

Equality & Justice

for people with disabilities



November 2023

THE ADVOCATE

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ACCESS – if you need this in an alternative format, please let us know

Disclaimer: The materials provided in this Newsletter have been supplied by the Disability Discrimination Legal Service Inc (DDLS). The DDLS provides general information to the public with the intention of making disability discrimination law accessible to people with disabilities, their carers, and friends. However, the information on this site should not be regarded as legal advice. Readers who are seeking advice regarding actions or decisions relating to disability discrimination matters should contact the DDLS directly.

Four years after the Disability Royal Commission into Violence Abuse Neglect and Exploitation of people with disabilities began, over 200 recommendations have been made with a view to improving the lives disabilities and protecting them from harm.

The recommendations were a “mixed bag” which the community continues to digest. The fact that Commissioners could not agree on the important matter of the segregation of people with disabilities, has not assist of the public. DDLS supports the inclusion of people with disabilities in every facet of our society.

The recommendations included improvements to the much maligned *Disability Discrimination Act*. In addition, the Commission recommended a “disability rights act”, implying that its view was that current legislation was not offering sufficient protection for Australians with disabilities.

We urge all interested people to begin lobbying State and Federal government to ensure that the recommendations of the Commission are regarded as a priority.

Julie Phillips
CEO
Disability Discrimination
Legal Service

SEXUAL HARASSMENT SERVICE

A reminder that DDLS has a new sexual harassment/discrimination service for women in the workplace.

If we can provide you with an education session on sexual harassment/discrimination or you wish to make an appointment to speak to our lawyer, either call 9654-8644 or email info@ddls.org.au.

VICTORIA POLICE ACCESSIBILITY ACTION PLAN

Victoria Police are seeking feedback on their accessibility action plan. If you are a person with a disability this is an opportunity to provide input.

<https://engage.vic.gov.au/project/accessibility-action-plan-aap-20242026/participate>

DDLS CHRISTMAS HOURS

DDLS will be closed Monday, 25 December 2023 and reopening on 8 January 2024.

Survey of people with disabilities to understand their experience of elections and voting.

<https://new.parliament.vic.gov.au/get-involved/committees/electoral-matters-committee?fbclid=IwAR0zVdw3-9mJ3x6grO2I193zaYkbQBZHWW2J0ly7htbajWqqjFNis3pHv98>

RECOMMENDATIONS TO IMPROVE THE DISABILITY DISCRIMINATION ACT

DDLS was pleased to see the Disability Royal Commission take up some of its recommendations provided via submission in relation to the improvement of the *Disability Discrimination Act*.

Recommendations include the following.

- ✚ Changing the direct discrimination section to make the test “unfavourable treatment” instead of “less favourable treatment”. This will take away the “comparator” test.
- ✚ Requiring the alleged discriminator to prove that the person with a disability was not treated unfavourably because of the disability.
- ✚ Removing the word “reasonable” to describe “adjustments”, thereby broadening the term “adjustments”.
- ✚ Including a positive duty to eliminate disability discrimination by all duty holders.
- ✚ Inserting new sections on “offensive behaviour” and vilification on the basis of disability.
- ✚ Reviewing the *Migration Act 1958* insofar as it authorises discrimination against migrants with disabilities.
- ✚ Amending the law to expressly include services provided by police officers in the definition of “services”.

Now the hard work begins with all of us doing our bit to ensure that these recommendations are accepted by the Commonwealth.

BROWN V HANNAN (HUMAN RIGHTS) [2023] VCAT 482

Orders

- Under section 75 of the *Victorian Civil and Administrative Tribunal Act 1998 (VCAT Act)*, this proceeding was struck out as ‘misconceived and as an abuse of process’.

Background

- In October 2022, Rohan Brown (**Brown**) made an application to the Victorian Civil Administrative Tribunal (**VCAT**) under the *Equal Opportunity Act 2010 (Vic) (EOA)* arguing that Judge Lisa Hannan (**Hannan, J**) discriminated against him due to his political beliefs in the area of goods and services.
- Brown had been remanded in custody for a significant time with charges issued but not served. He claims he has been falsely imprisoned and that his prosecution was discontinued.
- Brown stated that Hannan, J prevented him from defending himself in this matter. An example to this claim was when which Hannan, J denied Brown access to court recordings.
- On the application form, Brown was seeking orders for justice and compensation for false imprisonment. In addition, he wanted Hannan, J to be stopped from interfering in his defence and for her to be sent to prison for life.
- A hearing was set but postponed so the Judge could be informed.
- A hearing was set on 23 February 2023, however no one appeared for the judge.
- On 23 February 2023, Brown filed a further document stating that Hannan, J was ordering registry staff to refuse his access to court.
- After hearing from Brown on 23 February 2023, the Tribunal struck out the proceeding as misconceived and as an abuse of process.

Principles for Applying Section 75 of the VCAT Act

- VCAT has the authority to strike out or dismiss a claim under section 75 of the VCAT Act if the claim is misconceived or an abuse of process.
- The Tribunal should only strike out or dismiss a hearing when it is clear that the proceeding will not be successful or is an abuse of process for other reasons.
- This is a high threshold; therefore it must be clear that the proceeding is ‘absolutely hopeless’ that it cannot be successful.
- The Tribunal struck out the claim on the ground that it has no power to review the decisions of a judicial officer. However, the proceeding was not dismissed because the EOA may apply to some part of Brown’s complaint, although not necessarily against Hannan, J.

The EOA and ‘Services’

- Discrimination on the basis of a protected attribute, including political belief or activity, in some areas of public life is unlawful under the EOA.

- Brown claimed that the alleged discrimination occurred in the provision of goods or services. Section 44 of the EOA does not allow discrimination in the provision of goods or services.
- The Tribunal stated that 'it is not clear which activities, if any, of a magistrate or judge fall within the definition of services' included in section 4 of the EOA.
- The Tribunal held that a judicial officer when acting as a judicial officer, is not performing a service to anyone before them. There are ways judicial officers' actions can be reviewed but not through the EOA.
- In relation to a court proceeding, it is misconceived and may be an abuse of process to want a decision of a judicial officer reviewed because of discrimination against a party.
- It is not a proper use of the Tribunal's power to investigate the decisions of a judicial officer.
- Section 14 of the *Magistrates Court Act 1989 (Vic)* provides the same protection and immunity that judges have to magistrates in the performance of their duties. While it was not necessary to examine immunity in this case, immunity prevents magistrates from being personally sued and personally liable for their actions as a magistrate.
- It was decided that because there is no power under the EOA to grant Brown's orders, they are outside the Tribunal's jurisdiction.

Whether the Entire Complaint is Outside the Tribunal's Jurisdiction

- Brown stated that Hannan, J was not carrying out her duties in her capacity as a judge, rather her actions he complained of were exercised in her 'personal capacity'.
- As providing court recordings is an administrative action exercised by a registry in a court or tribunal, it may be defined as a service in the EOA in some circumstances.
- Brown said that he was banned from contacting Members of Parliament, his prosecution was withdrawn, and judges ignored the evidence that he was falsely imprisoned. From this information, the Tribunal decided that it was less likely that the complaint was about an administrative decision which could be regarded as a service, and rather about decisions made by Hannan, J as a judge.
- The Tribunal struck out Brown's claim rather than dismissing it completely, because the question of whether the EOA can apply to the area of court recordings was not determined by this decision. Therefore, there remains power for the Tribunal to determine whether a service was denied by someone not exercising judicial power.

Conclusion

- Based on Brown's application, the Tribunal decided that this claim should not proceed.
- It was recommended that Brown should not 'attempt to amend the application in this proceeding and have it reinstated'.
- The tribunal decided that Brown should make a new application detailing the events that amounted to discrimination against him, if he wishes to pursue the matter.

MAKSACHEFF V COMMISSIONER OF POLICE (WA) [2023] FCA 406

Applicants: Daniel and Agnieszka Maksacheff

Respondent: Western Australian Commissioner of Police

Background:

In June 2021 the applicants disembarked a domestic flight at Perth airport where it is claimed a police officer demanded that they wear a face mask. The applicants say this involved disability discrimination because they allegedly had medical conditions that prevented them safely wearing a face mask. When the police officer asked for a medical exemption, the applicants claimed they did not lawfully need to carry one with them. The applicants say they put on face masks 'under duress' to be allowed to exit the airport.

The applicants made a complaint to the AHRC on May 2022 for unlawful discrimination which was terminated because it was misconceived and lacking in substance.

The applicants did not provide evidence for the nature of the disabilities. The applicants claimed that they suffered anxiety and depression as a result of the allegedly unlawful conduct, and seek general and aggravated damages.

Case History:

The applicants relied on s 24 of the DDA in their complaints, which makes it unlawful for a person who provides services to discriminate in certain ways. The delegate was therefore satisfied that the applicants' complaints were misconceived, as they were based on an incorrect understanding of how the law applies. The delegate could not see how the applicants could claim they were treated less favourably because of their disabilities compared to any other person, with or without a disability. It appeared to the delegate that the applicants were approached because they were not wearing a face mask, not because of any disability. Any traveler without a disability who was not wearing a face mask would have been treated in the same way. The nature of the disability had not been disclosed to the AHRC. The delegate was therefore satisfied that the complaint was lacking in substance.

Reasons for Decision:

The Court found that the applicants had not put any reasonably arguable case of unlawful discrimination. Judge Jackson stated: (Emphasis added)

I made the point at the outset that there is a complete absence of any evidence to the effect that any of the things which are said to have happened actually did happen. The application therefore fails to put a factual basis to establish that the applicants' claim is reasonably arguable. There is no rational factual substratum for the allegations. **It would be contrary to the interests of the administration of justice to allow a claim to advance on the basis of speculation that witness evidence and other evidence might be adduced at some point might support the case.** This by itself is sufficient ground to dismiss the application for leave.

No evidence provided for the disability:

But it is even worse than that. I have also made the point that, not only is there no evidence of the alleged events, the nature of the asserted disability or disabilities is not specified. The closest the applicants get is to say in the statement of claim that they are members of a group that suffers from conditions that make it unsafe for them to wear a face mask, which include 'asthma, lung complaints, breathing disorders, psychological trauma and illnesses, heart conditions and skin conditions'. It is not said from which of these various conditions they suffer. Since this list is expressly without limitation, they may allegedly suffer from different conditions again. It is not known whether the applicants are said to suffer from the same disability or different ones.

Disability must be disclosed a case like this:

The existence and nature of an alleged disability are obviously fundamental to any claim for disability discrimination. Under s 5(1) of the DDA, direct discrimination only occurs if less favourable treatment is because of the disability. Under s 6(1)(b), there is only indirect discrimination if, because of the disability, the applicant does not or would not comply, or is not able or would not be able to comply, with the relevant requirement or condition. **To make an application alleging unlawful disability discrimination without saying what the disability is, much less providing evidence of it, is frivolous and vexatious.**

Refusal to disclose disability is deliberate. Failure to disclose is sufficient reason to dismiss.

It appears from the complaints to the AHRC that this omission is a deliberate choice by the applicants. Each of the complaints say that the 'complainant is not required by law (Australian Privacy Principles) to provide evidence' to support their contention that they suffer from a medical condition that prevents them from safely wearing a face mask. But where the applicants seek leave to put a claim of disability discrimination in this Court, they must state what their alleged disabilities were, and must provide at least some evidence of the disabilities, in order to satisfy the Court that it would be appropriate to permit their claims to proceed. They have not done so. This too is sufficient basis to dismiss the application for leave.

No evidence there was discrimination based on the disability:

If a further circumstance is posited as the same - that the applicants and the comparator were in Perth Airport without face masks during the time in which the Face Mask Direction was being enforced and they each asserted that they suffered from medical conditions that made it unsuitable to wear face masks - **there is still no basis for thinking that the police officer(s) would have treated the comparator differently.** In such a circumstance, there is no reason to think that the police officer(s) would have required the applicants, but not the comparator, to produce a medical exemption.

It is reasonable for an officer to investigate the mask exemption:

The submissions say that the police officers 'were not permitted to demand the production of the Applicants' private medical information under the provisions of any WA state legislation' and that there was 'no reasonable ground on which the officers could presume that the Applicants were committing an offence'. **The submissions assert that once the applicants told the officers that they suffered from medical conditions that made it unsafe to wear a face mask, 'any reasonable suspicion ended'. This amounts to an assertion that where a person who may be committing an offence tells a police officer that they have a lawful excuse, the police officer must take the person at their word, and it is not reasonable for the officer to inquire further or require verification of the excuse.** That only needs to be stated to be seen to be false.

Conclusion:

The proposed application is manifestly deficient. To purport to bring it in this Court without putting on any evidence capable of establishing it, and while refusing to particularise the key requirement of a disability, was to abuse the process of the Court by, at least, bringing proceedings that were manifestly groundless... That abuse persisted when the applicants pursued the necessary leave to proceed. Leave will be refused.

Orders:

1. Leave under s 46PO(3A)(a) of the Australian Human Rights Commission Act 1986 (Cth) to bring the application filed on 15 July 2022 is refused.
2. The interlocutory application filed on 30 August 2022 is dismissed.
3. On or before 17 May 2023 the respondent may apply for any special costs order by filing and serving an outline of written submissions of no more than five pages in length.
4. **The proceeding is otherwise dismissed.**

Give Now

Donate to the Disability Discrimination Legal Service

Despite living in a wealthy developed country, Australians with disabilities experience extremely high rates of discrimination, abuse and neglect. This is why the Disability Discrimination Legal Service provides free legal services to those experiencing harm. We also work to improve conditions for all people with disabilities through community legal education and law and policy reform.

In the face of limited government funding, we need your support to expand our work, especially in the key areas of education and employment. Despite numerous parliamentary inquiries and government bodies uncovering widespread abuse and neglect, not enough has been done to improve matters. But we know that continual advocacy and litigation creates pressure for better protections. Every dollar you donate helps us to achieve this goal.

DDLS is an independent, non-profit community organisation. Many people with disabilities, volunteers and students contribute their efforts to our work

<https://www.givenow.com.au/DDLS>

Our Organisation

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