

Case Note

Integration in the Spotlight: *Demmery v Department of School Education*. Unreported Equal Opportunity Tribunal of New South Wales, 26 November, 1997

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In recent years a steady stream of complaints of discrimination on the ground of disability in education have been made by students and their parents in a number of Australian jurisdictions.ⁱ The complaints have arisen in the mainⁱⁱ from attempts at the implementation of integration/ 'normalisation' policies of state education authoritiesⁱⁱⁱ in respect of students with disabilities.^{iv} The determination of the New South Wales Equal Opportunity Tribunal in the *Demmery* complaint provides further guidance, particularly in relation to the framing and argument of complaints of *indirect* discrimination on the ground of disability in education, and illustrates the practical difficulties associated with the preparation of evidence in support of such complaints. It further highlights the role of expert evidence in elucidating the special education context within which decisions about the education of students with disabilities are framed.

The facts as reported in the Tribunal determination reveal once again a pattern of ineffectual communication between parents and school authorities and their agents, which is arguably the root cause of the detriment complained of. The anxiety, unhappiness and emotional distress which were clearly suffered by the young pupil the subject of the case, were an undesired but regrettable outcome. This fact must invoke a critical questioning of the quality and form of Australia's existing human rights protection, especially in respect of the most vulnerable. It is ironic in view of the ongoing development of international norms and standards for human rights protection, especially for children,^v that the domestic safeguards against unlawful discrimination often meet with disapprobation in the courts.^{vi} There are then persisting questions to be asked about the degree to which the right^{vii} of young people to pursue optimal educational opportunities free from discrimination is capable of realisation in the current policy and legal environment.

Facts

The complaints of direct and indirect discrimination on the ground of disability in education were initiated by the parents of Luke Demmery in respect of his experience as a student at the Kendall Central School in New South Wales during 1995. It was undisputed in the case that Luke (the complainant) was a person with a 'disability' within the meaning of section 4(1) New South Wales *Anti-Discrimination Act* 1977. It was also accepted that the New South Wales Department of School Education was an 'educational authority' to which the provisions of the Act applied.

The complainant had been profoundly deaf from birth. From the age of three years he had used the auditory/verbal mode of communication chosen by his parents to promote Luke's independence. Luke's parents also chose mainstream schooling as the most appropriate to promote his independence and potential. The complainant was first enrolled at Kendall Central School in 1992 in the Kindergarten class. During 1992 the complainant was fitted with a cochlear implant. He was a student in the year one class in 1993 and attended year two in 1994. During this time the complainant received assistance in the form of the development and implementation of an individual education programme from a specialist Itinerant Support Teacher (ISTH) and also teacher aide time. Regular six monthly review meetings were held between school representatives and parents to discuss and monitor Luke's progress. This period of schooling was not the subject of the complaints of unlawful discrimination.

Luke's parents sought an alternative school placement for him at the end of May 1995 as the result of a perceived pattern of discrimination against the complainant during the first half of 1995. The nature of the alleged discrimination included acts of 'exclusion' from sport and class activities, inappropriate discipline by the class teacher, and the succession of six class teachers for the composite year 2/3 class during the second term of 1995. There seems to be little doubt that Luke suffered emotional distress and anxiety during the period covered by the complaints. However, the task for the Tribunal was to establish a causal nexus between these facts and the actions of the school authority and its agents in terms of the legislative formulae adopted by the *Anti-Discrimination Act*.

There are a number of further factors which emerge from the evidence accepted by the Tribunal, including that of special education experts, which shed light on the emotional well-being of the complainant at this time. It was accepted that the transition from year 2 to year 3 was significant for all pupils, and especially significant for a pupil with the complainant's disabilities. It was also noted that the birth of a sibling in August 1994 may have influenced Luke's emotional state. Evidence was also provided of a comprehensive progress report by the Children's Cochlear Implant Centre, which supervised Luke's medical treatment, indicating that Luke had made little progress in language and speech skills during 1994. In April 1995 Luke was fitted with a new speech processor which was designed to screen out background noise and produce less harsh speech sound. This required a period of adjustment for Luke to the new mode of processing speech sound. The complaints of direct discrimination (less favourable treatment on the ground of his disability) encompassed actions alleged to have occurred during May 1995, soon after the

fitting of the new Spectra 22 speech processor on 18 April. The complaints of indirect discrimination cover the 1995 school year during which Luke was required (together with the other students in the year 2/3 class) to adjust to a succession of six class teachers during a short period of time. It was argued that such adjustment was considerably more difficult for a young child with a profound hearing disability and a cochlear implant than for hearing pupils, that Luke had been unable to adjust effectively, and that the requirement was not reasonable in the circumstances.

Legal Determination

In reaching a determination in the Demmery complaint, the Equal Opportunity Tribunal was not required to calculate the 'adequacy' of the Department of School Education's integration policy per se, and the Tribunal directly eschewed this role. The Tribunal's function involves neither a qualitative assessment of special education or other policy, nor any direct appraisal of the parent's choices about the type of education to be undertaken by a child. By contrast, the role of the Tribunal is circumscribed by statute (ss 94, 96, 113 *Anti-Discrimination Act 1977* (NSW)) to determining whether a complaint has been substantiated by reference to the legislative prohibitions and definitions (ss 49B, 49L *Anti-Discrimination Act 1977* (NSW)).

Direct Discrimination

In respect of the three allegations of direct discrimination, the task for the Tribunal was to determine whether the complainant had suffered less favourable treatment, in circumstances which were the same or not materially different from the treatment of pupils without the complainant's disability (s 49B(1)(a)). In order to establish unlawful direct discrimination it is necessary to show a causal nexus between the Act complained of and the prohibited ground (in this case, disability): *Haines v Leves* (1987) 8 NSWLR 467 per Kirby J. The legal question then becomes whether Luke was treated in a particular way because he was profoundly deaf, and did the treatment result in detriment to him which is compensable under the statute. The difficulty of proof of direct discrimination in *Demmery* seems to have arisen not so much from the legal elements of proof per se, but from the more practical difficulty of introducing sufficient evidence to discharge the burden of proof. In respect of all three complaints of direct discrimination the Tribunal found a problem with the quantity and weight of evidence adduced to support the complaint.

In determining whether the complainant had been excluded from a class performance activity at the school assembly on 19 May as an act of direct discrimination, the Tribunal considered the conflicting testimony of the complainant's parents and the class teacher, Mrs McNally. It was uncontested that Luke Demmery did not take part in the singing and clapping associated with the performance, but there was no unanimity as to the reason for the action. The second complaint concerned the alleged exclusion of Luke from a year 3 sports activity on 19 May 1995. Once again, the evidence that the complainant did not take part in the games on the volleyball court was not really in dispute, but the reasons are not clear. The affidavit evidence of

Mr Demmery and Mrs McNally does not present a complete picture. Thirdly, the complaint that Mrs Pope, one of Luke's class teachers, 'yelled' at him and treated him unfavourably because of his deafness was supported by a mosaic of hearsay from Mrs Demmery and various teachers.

Significantly there is no indication in the Tribunal's decision that Luke was asked to provide direct evidence of his version of events at Kendall Central School during 1995. The evidence which was deemed insufficient to substantiate complaints of direct discrimination was provided by Luke's parents, Luke's teachers, and the mother of one of his classmates. This fact alone raises a serious issue about the extent to which the rights of young people with disabilities to freedom of expression and the right to be heard in proceedings directly affecting them are being recognised and respected.^{viii} This is not just a utilitarian issue of a failure to provide sufficient evidence in support of a complaint of unlawful discrimination. It also involves an obvious infringement of human rights, in denying to a child with a disability a chance to tell his own story. In this case, Luke's own 'voice' is missing. Why did no one ask him to explain why he was standing at the edge of the volleyball court, crying and wringing his hands in his pullover?^{ix}

Indirect Discrimination

Indirect discrimination provisions are directed to making unlawful policies and practices which are on their face neutral but in practice have disproportionate and detrimental effects on particular groups, and are policies and practices which are held to be unreasonable. A complainant in respect of indirect discrimination is required to show that the school authority imposed a requirement or condition upon the complainant with which a substantially higher proportion of hearing students could comply, with which the complainant could not comply, and that such requirement was not reasonable in the circumstances of the case (s49B(1)(b) *Anti-Discrimination Act 1977* (NSW)). In the complaints of indirect discrimination associated with the implementation of Luke's integration programme at Kendall Central School in 1995, the complainant posited eight requirements, including, 'that Luke be capable of unaided hearing', 'that Luke not have a cochlear implant', 'that Luke be able to cope well with unexpected changes' and 'that Luke be confident and self-reliant'. The Tribunal criticised this approach to the framing of requirements and conditions, which it described as 'curious'. The Tribunal stated that it

... does not accept that this is the correct approach, particularly in this case where the resultant requirements and conditions, in a number of instances, are unrealistic and contrary to the evidence. A more objective approach should be taken, in the light of the evidence, to support the reality of the imposition of a requirement or condition such that it will support the establishment of a claim of indirect discrimination.

The Tribunal did consider that the complainant's requirement number 5 'that Luke be able to cope well with unexpected changes in routine' was 'the most capable of being sustained'. They referred to the expert evidence provided on the importance of consistency in the effective integration of

students with disabilities. The Tribunal found that in 1995 the ‘management of the school had adopted a riskier approach to the resourcing of Luke’s class than in the earlier years of his education’. Further in doing so, the school exhibited an expectation that Luke would be able to cope with changes in routine during the school year which amounted to a requirement or condition. In view of the abundant evidence of the complainant’s emotional distress at school during 1995, it is clear that he failed to comply with the requirement in practice. However, the tribunal was also called upon to consider the reasonableness of the requirement.

The Tribunal drew on previous jurisprudence in determining the question of reasonableness in the circumstances, which required the application of a range of principles, including a liberal construction of the statute, that the meaning of ‘reasonableness’ should be informed by the objects and purposes of the legislation, that a nexus between the requirement and the activity must be found, and that all relevant factors must be weighed including factors favouring the Respondent (*Finance Sector Union v Commonwealth Bank of Australia* (1997) EOC 92-889). In applying the principles, the Tribunal paid particular attention to the question of whether the Respondent’s actions in relation to Luke were ‘logical and understandable’. In reaching its conclusion in the indirect discrimination complaint, the Tribunal indicated that the evidence presented concerning management choices available to the school in allocation of teaching staff in 1995 was inconclusive. However, it was able to determine on the basis of the evidence, and in view of the type and location of the school in ‘a more isolated community’ that

the circumstances that faced the management of the school in January 1995 is (sic) not extraordinary. Schools must be expected to have to make last minute arrangements to meet sudden and unexpected loss of teaching personnel, A disabled child, such as Luke, as part of the normalisation process of integration, may reasonably have to expect to be in a situation where a temporary teacher has to take over his class pending the appointment of a permanent teacher.

The complaint was dismissed by reason of a failure to substantiate the complaints of discrimination.

Expert Evidence

It is also clear from the determination that the Tribunal did place weight upon the affidavit testimony of the two expert witnesses, Dr Loretta Giorcelli and Dr Gregory Leigh. The experts were asked to comment upon a number of significant aspects of the factual background, including the implementation of integration policy in respect of the complainant, Luke Demmery. In addition the testimony provided an informed assessment of the extent to which a student with the complainant’s disability might be affected by the large number of teachers in one year. Further, the expert testimony was able to highlight the strengths and limitations of the implementation of ‘normalisation’ principles in respect of Luke at Kendall Central School in order to provide a context within which the Tribunal might make its legal determination. The case illustrates that the

availability of specialist expert testimony may be critical to informed and effective Tribunal decision-making, especially in the area of disability discrimination in education.

Conclusion

This case raises more questions than it solves. In legal terms it breaks little new ground, which is perhaps disappointing. However, the facts in *Demmery* do point to key limitations in the present formulation of anti-discrimination legislation, especially for children. Equality of opportunity has inherent confines.^x The urgent need for more thorough-going human rights protection in Australia is shown graphically here. The inquiry conducted and the evidence presented before the Tribunal confirm the complexities of integration policies in education, but also the artificiality of compartmentalising the experience of education of a profoundly deaf student for the purpose of anti-discrimination law. Luke Demmery suffered emotional trauma, distress and unhappiness in 1995. He was unhappy at school and he was also unhappy at other times and in other places. In terms of the legislative requirements of direct and indirect discrimination, his unhappiness was not a compensable loss. This is the ultimate disappointment.

References

- Flynn, C. (1997) *Disability Discrimination in Schools: Students and Parents Speak Out*, Sydney: National Children's and Youth Law Centre, 1997.
- Van Bueren, G. (1995) *The International Law on the Rights of the Child*, Dordrecht: Martinus Nijhoff, 1995.

Endnotes

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- i See *Australia's Report under the Convention on the Rights of the Child*, December 1995, 37.
- ii *Hashish v Minister for Education* (1996) EOC 92-777 is a key example which does not arise from this fact scenario. This unsuccessful age discrimination complaint by a student with multiple disabilities arose from plans to terminate his attendance at a school established to provide special programmes for students with hearing impairments.
- iii For example, NSW Department of School Education *Special Education Policy* 1993.
- iv *L v Minister for Education* (1996) EOC 92-787 and *P v Minister for Education* (1996) EOC 92-795 are representative of this type which have come for determination before Equal Opportunity Tribunals. However, not all complaints reach the determination stage, as some may be withdrawn, abandoned or settled before a Tribunal hearing.
- v See G Van Bueren (1995), Chapters 1 and 9.
- vi For example, see *IW v City of Perth* (1997) 71 ALJR 943, at 947, 949, 963.
- vii See Article 26(1) *Universal Declaration of Human Rights* 1948; Articles 2, 26 *International Covenant on Civil and Political Rights* 1966; Articles 13, 14 *International Covenant on Economic, Social and Cultural Rights* and Articles 2, 3, 23, 28 *Convention on the Rights of the Child* 1989.
- viii Articles 12 and 13 *Convention on the Rights of the Child* 1989. It is also of significance that in

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- respect of the third complaint of direct discrimination, Luke's former classmate was not called to give direct evidence of the disciplining of the complainant by the class teacher. It is hardly surprising that the hearsay evidence of the classmate's mother was described by the Tribunal as 'tenuous'.
- ix This approach does not appear to be unusual. For example, students acting alone made up only 20% of the participants in the most recent research study on disability discrimination in education, whilst parents comprised 65% of participants. See Christine Flynn (1997), 13.
- x See *IW v City of Perth* (1997) 71 ALJR 943, at 970ff.