

CASE NOTE

Communication in Learning and the Provision of Australian Sign Language (Auslan) Interpreters for a Student with a Hearing Impairment

Clarke v Catholic Education Office & Anor [2003] FCA 1085 (8 October 2003)

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Introduction

Speech, language and communication are essential conduits for all students to learn and socialise in a school setting. Access to the rich and interactive culture of learning in Australian schools for some students with a hearing impairment is achieved through the use of the Australian Sign Language System or Auslan. Members of the deaf community who use Auslan believe that it is a superior form of communication to any other because it involves signing and body gestures. They take pride in the fluency and quality of expression they are able to achieve through the use of Auslan and regard the Auslan expressions as an important foundation for deaf culture.

Communication is a two way process, however, and the school community shares the responsibility to facilitate communication between all school and community members, particularly those students with a hearing impairment. This raises a moral dilemma for schools. Should schools provide Auslan language ‘experiences for students with a hearing impairment so they may enjoy and share the richness of culture that is valued in the deaf community or should schools introduce instruction in the dominant culture of spoken English to improve access for students to everyday speech in the wider community? An ideal situation would involve a combination of communication strategies in which all members of the school community could communicate effectively. Factors that compound the dilemma for schools include: the expectation that spoken English should be the only language of instruction; a limited number of teacher aides trained and available to translate in Auslan; inadequate communication alternatives such as note taking; a lack of volition on the part of school authorities to recognise the importance of communication in all forms for all students; and complex communications with students and parents who use Auslan.

Clark v Catholic Education Office (2003) investigates the dilemmas described above and the legal interpretations of the Disability Discrimination Act (1992) when a student with a severe hearing impairment enrolls at a Catholic secondary college. The student depended on the Auslan signing system to understand language and communication and the learning support model proposed by the college did not include the services of an Auslan interpreter. The parents claimed this was indirect discrimination.

Background

Jacob is an intelligent fourteen year old who has been profoundly deaf since birth. He attended a Catholic primary school for seven years where he achieved well and made many friends. The primary school provided an Auslan interpreter and a note taker for Jacob to assist with his classroom instruction and many of his friends learned Auslan so they could communicate with him. Jacob's parents wanted him to attend the local Catholic secondary college where he could maintain his friendships and progress his academic achievement.

When Jacob's parents approached the local Catholic secondary college they were pleased to find the college had no philosophical objections to the use of sign language. The college claimed they welcomed students with disabilities and provided professional development for teachers to maximise learning experiences for all students. At an enrolment meeting to determine strategies to facilitate Jacob's transition from primary school to secondary school, both the school and the parents agreed that an educational goal for Jacob should be to function as an independent learner in all contexts, that is, both Auslan and spoken English. As such, the school developed a model of learning support that involved the use of note takers and not an Auslan interpreter.

The parents analysed the model and were concerned that the services of an Auslan interpreter were not provided. They presented the school with a document that outlined the inadequacies of the model and detailed their concerns about the impact the proposed model of learning support would have on the quality of Jacob's educational experience. The parents explained that:

- Note taking, for any student in secondary schooling and particularly for a student with a hearing impairment, was a slow and inadequate means of academic support.
- Note-taking was not able to substitute the rich exchange of information and communication that occurred between teachers and students in lessons.
- At best, note-taking provided supplementary information that the student was able to refer to, or review, after the lesson.
- Auslan was Jacob's primary mode of communication both in school and in social situations.
- Jacob had successfully completed primary school studies with the assistance of Auslan interpreters.

Further, the parents made a generous offer to provide the school with \$15,000.00 to relieve any financial restraints that may inhibit Jacob's opportunities at school. They suggested the grant may be used to provide support for a teacher or teacher aide to be trained in the use of Auslan, provide support for excursions or apply for Commonwealth grants.

The school rejected the parents' perspectives on the model of support because they believed the model was appropriate for Jacob's educational needs. The school also rejected the offer of financial support from the parents because the offer may be considered inequitable for other students in the school. The parents eventually withdrew Jacob's application for enrolment at the Catholic secondary college and enrolled him at the local high school.

Decision

It was agreed between the parties that Jacob was a person with a disability within the terms of section 54 of the DDA. Unlike previous disability discrimination cases, most notably the Purvis litigation, the definition of disability was not contested in this instance.

Section 6 of the DDA defines indirect disability discrimination as follows:

For the purposes of this Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

- a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and
- b) which is not reasonable having regard to the circumstances of the case; and
- c) with which the aggrieved person does not or is not able to comply

The complainant alleged unlawful discrimination in the area of education, specifically in respect of Jacob's enrolment (s22(1) DDA). The parents claimed the school had indirectly discriminated against Jacob when they established a rule or expectation with which Jacob was not able to comply. To attend the school, receive instruction and participate in the full quality of the educational experience, it was proposed in this case, that the school expected Jacob to understand spoken English. Jacob's reliance on Auslan for communication and social interactions meant he was not able to comply with the school's expectation.

To determine a case of indirect discrimination, Madgwick J. had to decide:

- whether a student with total hearing loss since birth was unable to comply with a requirement established by the school on enrolment that the student should be able to 'participate in and receive instruction without the assistance of an interpreter'; and
- that a substantial proportion of the students who do not have the disability were able to comply;
- that the requirement made by the school was not reasonable; and
- that Jacob was not able to comply.

The Catholic Education Office (CEO) proposed there were no grounds under the requirements of the Disability Discrimination Act (1992) to argue whether the provision of Auslan was preferable to, or better than, the model of support proposed by the school. Madgwick J. believed this presented a very narrow interpretation of the requirements of the DDA and that there was nothing inherently prohibitive about the provision of Auslan support for a student to access and participate in the educational experience. Jacob's positive experiences at primary school were testimony to the importance of Auslan and Madgwick J. questioned the integrity of the respondents in not calling the primary school principal for evidence.

To determine whether a substantially high proportion of students were able to participate in the learning experiences at the school without the assistance of the Auslan interpreter, the CEO argued that baseline comparisons should exist between students enrolled at the school or those students attending year seven at the college in that year. This defence was described as 'legally inappropriate' because none of the suggested baseline comparators would have to comply with the model of support proposed by the school.

The CEO then argued that Jacob's parents may eventually be convinced that the proposed model of support was the most appropriate if negotiations had continued. Contrary to the CEO opinion, Madgwick J. agreed there would have been substantial disadvantages for Jacob if the planned model of support had been implemented. In effect, Jacob would have experienced

distress, frustration and confusion instead of quality learning that should be experienced by all students at the college.

Justice Madgwick then had to consider whether the proposed model of support for Jacob was a reasonable accommodation of his educational needs. The parents argued the model was not reasonable because: Jacob was dependent of Auslan; note-taking had limited effectiveness; they had offered \$15,000.00 to any mitigate financial strain caused by Jacob's enrolment; and an important consideration involved Jacob attending a religious secondary school with his friends and colleagues. The CEO counter argued by claiming that: Jacob was a 'total communicator' and not Auslan dependent; the long term goal was to make him an independent learner; the model of support considered the wishes of the parents and was proposed by professionals in the field; the offer of a grant from the parents was not acceptable; and the model of support did not ultimately rule out the possibility of an Auslan interpreter.

While finding that the requirements, expectations or conditions established on enrolment were 'not reasonable' within the terms of the Act, Madgwick J. commended the open enrolment policy of the CEO as consistent with the intent of the disability discrimination legislation. He proposed the case involved individual mistakes made in good faith rather than systemic discrimination. He also found the CEO had underestimated the importance of Auslan for Jacob's communication and that, at least for the first few years of secondary school, Auslan would be an integral part of Jacob's learning and socialising. Madgwick J. also claimed the CEO had not made any determined effort to find or train an Auslan interpreter and therefore had no intention of including Auslan in the model of support at any stage. Further to these findings, the school had made this intention clear to the parents when they rejected the offer to assist in finding and training a teacher or teacher aide in Auslan or to find volunteers who may be able to assist Jacob.

Madgwick J. considered the college principal's inexperience in the area of the educational needs of a student with a severe hearing impairment and weighed this against the proven success of Jacob's educational experience in primary school in which Auslan signing and Auslan communications were supported by the general school community. He proposed that sufficient evidence existed to demonstrate the successful contribution Auslan made in Jacob's learning and that the college principal had understated its importance. He then turned to the professional witnesses to explain the role of Auslan in Jacob's learning and communication.

The Catholic Education Office special needs consultant suggested the Auslan interpreter was 'desirable but not necessary' while the expert witness for the parents explained how Auslan was essential for Jacob's learning and communication needs as it was his primary mode of communication. In weighing the conflicting evidence from the professional witnesses, Madgwick J. concluded that the witness for the applicants, Dr. Komesaroff, convincingly, described the limitations of note-taking as a comprehensive form of communication and demonstrated how Jacob depended on Auslan for all interactions within the learning environment.

On 8 October, 2003, Madgwick J. found that the CEO had indirectly discriminated against Jacob and ordered payment of \$20,000.00 in compensation with \$6,000.00 interest. Damages to Jacob included his perceptions of rejection and the frustration involved in changing schools and moving away from his friends and other Auslan speakers.

Implications for Schools

The Clark (2003) case revolves around the legal concept of indirect discrimination in which a condition, rule or expectation precludes access and participation in the educational experience

by the student with the disability and it was not reasonable when all the circumstances of the case were considered. A condition of enrolment was established by the college that Jacob and his parents accept a model of support that did not include Auslan. This requirement established the expectation that attendance at the school was dependent upon all students accessing and participating in spoken English as the primary mode of instruction. As Jacob was not able to comply with this requirement he was not able to access instruction, and consequently, was not able to attend the school.

Indirect discrimination is a difficult legal concept to understand and interpret in terms of administrative actions and decisions in schools. The approach of the Federal Court in this instance was highly sensitive to the human rights of the student and also sensitive to the endeavours of the school to provide an inclusive environment. The courts decision in favour of the complainant highlights the significant point that proof of unlawful discrimination does not require a subjective analysis of the motivations of the education authority. Instead, this case involved an analysis of differing views of appropriate educational support.

Resolution of situations in which the parents' expectations of the level or mode of support differ from the schools' expectations, is primarily based on the quality of communication and collaboration between the two. An understanding of the legal concept of reasonable adjustment may also be helpful. Reasonable adjustments may be considered to be part of a continuum of responsive strategies that range from administrative convenience to unjustifiable hardship. For example, a decision to support the educational needs of a student with a disability that is based on administrative convenience alone would constitute the lowest level of reasonable adjustment. The problematic nature of identifying the barriers to inclusion and reducing those barriers to the maximum extent possible means that schools do not always investigate the least intrusive option and, instead, propose options that are based on convenience. In *Clarke* (2003) the schools insistence on a model of support that was clearly inadequate and the inability of the CEO to negotiate more reasonable options with the parents were significant factors in the finding of indirect discrimination.

The process of collaboration, to determine reasonable adjustments, begins when the student, parents and school consider a range of possible options that reduce the barriers to access and participation for a student with a disability. The most effective adjustment is usually the least intrusive and is not necessarily the most expensive. Schools should base proposed reasonable adjustments on information provided from a professional assessment of the student's educational needs. An integral part of negotiating a reasonable adjustment involves listening to and respecting perspectives from the parents. Together, an educational assessment and listening to the knowledge, experience and expectations of the parents should have provided the Catholic college with enough information to propose and negotiate reasonable adjustments that reduced barriers to access and participation and supported Jacob's attendance at the school.

Finally, the importance of the role of communications in learning is highlighted in this case. Auslan is more than a tool for communication for students with a hearing disability. Auslan substantiates a place in a community that shares a rich culture of all aspects of the human experience including language, love, belonging, excitement, tragedy, loss and hope. To remove Auslan interpretation for some students is to deny them access to understanding life and living within the school context. These are vital experiences that can not be replaced by the services of a note-taker.

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