Equality & Justice
for people with disabilities

Disability Discrimination Legal Service Inc

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THE ADVOCATE

Villamanta Disability Rights Legal Service Inc.

In this edition

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Editorial

Our organisations were thrilled when just over a week ago, Leader of the Opposition Bill Shorten announced the ALP's support of a Royal Commission into the Abuse of People with Disabilities.

The discrimination and mistreatment of people with disabilities comes in many forms. We are as frustrated as people with disabilities themselves when they contact us to report violence, abuse, neglect or exploitation and we are unable to assist them due to such treatment being authorised by government or protected by law/regulation.

It has been disappointing to see the enthusiasm with which government often approaches violence against other sectors of society, while people with disabilities are swept to one side.

We urge everyone who can to write to Prime Minister Malcolm Turnbull and ask them to support a Royal Commission.

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Gray v State of Victoria (Department of Education and Early Childhood Development) [2017] FCA 353

Facts:
Jason Gray has a number of disabilities within the *Disability Discrimination Act 1992* ("the DDA") including Autism Spectrum Disorder, ADHD, oppositional defiant disorder and language, memory, processing and fine motor skill impairments. His mother and litigation representative, Sharlene Gray, sought Court approval of the settlement of a proceeding brought against the State of Victoria, through the Victorian Department of Education and Training (the Department). Murphy J approved this settlement on 1 December 2016. In this case he granted a confidentiality order over the terms of settlement and provided his reasons for doing so.

The proceeding alleged that the Department discriminated against Mr Gray in accessing educational services at various state schools. This included locking him in rooms, physically assaulting him and refusing enrollment. The Department failed to manage his behavior through, among other things, a lack of a positive behaviour plan and failure to make 'reasonable adjustments' for his condition as required under the DDA.

The Department denied these allegations however agreed to settle the proceeding at mediation. Per rule 9.71 of the *Federal Court Rules 2011,* the application must be accompanied by an affidavit including an opinion of an independent lawyer that the agreement is in the best interests of the person under a legal incapacity. This independent lawyer may also offer an opinion on the merits of settlement as an independent officer of the Court and not in furtherance of their duty to a party.

Murphy J was satisfied that the settlement was in the best interests of Mr Gray. Settlement avoids the risk of a less advantageous outcome, of incurring significant legal costs, of being required to meet an adverse costs order, and avoids the stress of a trial.

Murphy J believed the settlement was in Mr Gray's best interest because the settlement amount was reasonable and that further litigation would place emotional and psychological strain on Mr Gray and his family.

The Confidentiality orders sought

During settlement, the parties bound themselves to keep the terms confidential and to take all necessary steps to obtain Court approval of the settlement on a confidential basis. Murphy J noted that there is an 'important public interest in open justice' and before a confidentiality order is made, the Court must be satisfied there are proper grounds for doing so per s37AE of the *Federal Court of Australia Act 1976* (Cth).

According to s37AG the Court may make a suppression order or non-publication order on the following grounds:

- It is necessary to prevent prejudice to the proper administration of justice (a)
- It is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security (b)
- It is necessary to protect the safety of any person (c)
- It is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (d)

Murphy J noted the term 'necessary' indicates a reasonably strict test. The concept of administration of justice is multi-faceted to include the public interest in:

- the preservation of confidentiality of the mediation process and the process of negotiation of the settlement of litigation
- keeping people to their freely-entered bargain
- the settlement of proceedings prior to trial

During the hearing Murphy J expressed doubt that prejudice to the proper administration of justice would occur as a result of revealing the terms of settlement of a claim brought by a student alleging the Department did not make reasonable adjustments under the DDA.

The Department conceded that it had a practice of requiring a confidentiality agreement when settling DDA cases. It submitted that DDA cases are largely unmeritorious. It argued that allegations in proceedings are cut and pasted from earlier pleadings and that it only chooses to settle the proceedings because they are expensive to conduct, the compensation paid is less than the costs of conducting the case, and the Department would usually be unable to recover its costs if successful.

Murphy J believed this to be untrue; some cases may lack merit but not all. He stated that where parents have well-founded concerns that their child has suffered disability discrimination in accessing or using state educational services there can be 'no public interest in keeping them in the dark as to the practical availability of compensation under the DDA.' He stated that in his view this case did not lack merit.

Reasoning

However for the following reasons Murphy J made confidentiality orders:

1. The case was not a 'good vehicle for resolving any issue in relation to the Department's policy of requiring confidentiality.' The only submissions Murphy J received were those of the Department which contended a refusal of a confidentiality order was contrary to the interests of justice. However Murphy J believed 'if there is any suggestion that the proposed confidentiality regime is not freely-agreed the independent lawyer should deal with that question.' He held that an agreement by the litigation representative to protect settlement confidentiality could not inhibit the independent lawyer from informing the Court whether confidentiality was in the applicant's best interests.

2. Murphy J accepted the Department's contention that it had a legitimate interest in reducing the number of cases brought against it as matters are often complex, lengthy and may involve expensive trials. A 'multitude of factors may influence its decision to settle' and may affect the settlement sum including the costs of a trial, that costs may exceed damages payable of the claim proceeds and there may be no way to recover costs of the claim fails.

3. There were no submissions challenging the Department's contention that if it is not able to obtain its confidentiality orders it will have a 'serious chilling effect on its preparedness to settle such cases.' The removal of confidentiality over the settlement amount could prejudice the proper administration of justice as there may be fewer settlements and a higher number of complex, expensive trials.

4. The confidentiality of the terms was a matter of key importance to the settlement. Those associated with the proceeding gave an undertaking to preserve confidentiality in respect of the terms of settlement and the parties agreed to keep the terms confidential which assisted them in reaching their agreement. Murphy J believes there is a 'public interest in keeping parties to their freely-held bargains'. He held that where 'confidentiality is critical to achieving resolution of a case it is open to see the refusal of a freely agreed confidentiality regime as giving rise to some prejudice in the proper administration of justice.' Although Murphy J had some doubts in describing the confidentiality regime as freely agreed, he had no evidence in this regard.

He therefore made orders for confidentiality of the affidavits and annexures filed in support of settlement approval, which includes the Settlement Deed.

McGarrigle v National Disability Insurance Agency [2017] FCA 308

Date of judgement: 28 March 2017
Applicant: Liam McGarrigle (counsel: Mr C Horen with Ms L Martin)
First respondent: National Disability Insurance Agency (counsel: Ms J Davidson)
Second respondent: Administrative Appeals

Facts:
Mr Liam McGarrigle is a 21 year old male with Autism Spectrum Disorder and an intellectual disability. His mother is his primary carer who coordinates his supports and is on-call to assist him. Mr McGarrigle has had three "participant's plans" with the NDIS since Oct 2013. This includes general supports needed that will be funded by the NDIS (s 33(2) *NDIS Act*).

Mr McGarrigle receives funding of $11850 by the NDIA (Agency) to cover transport expenses for his travel to work at Karingal Kommercial (2 days a week) and a group program at Encompass Community Services (3 days a week), both located in Geelong (funding is approx. 75% of annual cost of $15,850 required). Mr McGarrigle lives with his parents and younger sister in Moriac (approximately 25 km from Geelong).

Mr McGarrigle uses NDIS for taxis to and from work. He holds a card entitling him to 50% subsidy on taxi fares. Two afternoons a week a support worker funded by NDIS takes Mr McGarrigle to the gym and then home.

The first two 'Participant plans' were not disputed and included funding for taxi fares, transport to and from the gym. The first "Participant's Plan" commenced 2 December 2013 and provided $8872 taxi return travel to Karingal Kommercial and $5445 provided per kilometre basis for support staff for transport to and from gym, going out for respite, and for in home support. This full allotment of funding was not provided, the agency said due to use of school bus which is not NDIS funded.

The second "Participant's Plan" commenced 2 December 2014, and was reviewed 1 December 2015. $10521.75 was provided for taxis to and from Encompass and Karingal Kommercial. This provided for support staff to and from the gym. 99% of this allotment was used.

There was no dispute in terms of the first two Participant Plans.

The third "Participant's Plan" commenced 21 December 2015 and was reviewed on 20 November, 2016. $8000 funding for travel assistance was provided however no separate indication for an amount per km allowance for support staff. The two amounts were grouped together.

Mr McGarrigle's mother asked the Agency to conduct an internal review for funding of $8,000 – and found only 50.8% of estimated costs were covered. The Agency increased this to $11,850. This left $4000 worth of transparent costs as an "onerous expectation", which was acknowledged by an Agency letter.

Issues:

Whether partial funding is indeed permissible under NDIS Act 2013 (Cth). Further, the meaning of "reasonable and necessary supports" contained within s 34(1) NDIS. The Applicant sought to have the meaning of "reasonable and necessary supports" identified and once defined, to be fully funded by the agency.

Judgement (Mortimer J)

Found the Tribunal erred on the approach it took to s 34(1) NDIS – thus judgement was favourable to the Applicant and the matter was then remitted back to the Tribuna. No direction was given to the Tribunal regarding this remittance.

Tribunal's Decision

The Tribunal provided the following reasons for not giving full funding:
1. Section 34(1)(e): what is reasonable to expect from the families, carers etc.- "contemplates that funding or provision of a support may be reduced, or may not be funded or provided at all."

2. The Tribunal stated that it is not incompatible with the objects of the Act to fund less than the full cost of support.

3. Drafted National Insurance Scheme Documents purported policy to cap travel payments, providing that "funding should never equate to the total funding required for transport – it is only ever a contribution".

Applicant's Relevant Argument

The Tribunal misconstrued or misapplied section 34(1) by finding it could fund a proportion of the cost of support which was found to be "reasonable and necessary".

Resolution

What is support?

The Tribunal had correctly defined the "support" as transport and rejected "contribution to funding" could be support for purposes of NDIS. Section 33 –' two components are necessary and connected for the participant's plan and 'support' must be given a broad construction in this context.

What is "reasonable and necessary"?

"Reasonable" is directed at factors such as those set out in s34(1)(c) and (f), however, the meaning of the word is not exhausted by these factors, rather these are illustrative. "Reasonable" focuses on the specific proportion of funding being subject to provision or funding by the Agency. "Necessary" focuses on the sense of whether it is a support that cannot be provided otherwise.

Scheme Contemplates full funding of reasonable and necessary supports

Once a decision is made that the support, as identified and described, is reasonable and necessary … subject to other requirements, that support "will" be funded. Once through the "gateway" of "reasonable and necessary" the NDIS Act 2013 intends this to mean support will be fully funded.

There is no reference … to "contributions" from the participant or the participant's family or carers. It is not intended for the decision maker to have to assess whether any of those persons/community in s31(1)(e) are capable or willing to make a financial contribution towards the support.

The decision maker will look at each support plan on a case-by-case basis and decide whether they are "reasonable and necessary" for the individual. It is not necessary that the supports are grouped as one and decided "all or nothing" .

It is for the decision maker to decide whether a support is necessary and reasonable (e.g. 5 days a week of taxi costs), however it is not for them to decide proportions of the support that is to be funded (e.g. 75% of the cost). Such an approach could lead to a support not being provided at all.

Decisions on proportion by the CEO or delegate would restrict the choice for a person with disability. To determine whether less support is "reasonable and necessary" (e.g. 3 taxi fares per week instead of 5) would require a detailed assessment of the participant's needs, and benefits received from the support. The Tribunal would have to confront this issue on the basis of a merits assessment.

Undecided Questions

Mortimer J did not find the applicant's appeal to have merit as to the question of whether the Tribunal erred by treating the need to ensure the financial sustainability of the NDIS as a qualification on the statutory criteria in s 34(1), such a question though was regarded to be an "important issue that should await determination in an appropriate case".

Whether NDIA policies were inconsistent with s 34(1) – the Tribunal did not apply the policy in question, thus were not deemed relevant by the Court.

Whether the Tribunal failed to respond to the applicant's claims that this weekday transport was reasonable and necessary support to be provided in full, question 1, succeeded therefore this question does not arise.

The NDIS is currently appealing this decision.

NDIS Code of Conduct

The NDIS is looking for submissions regarding the content of its Code of Conduct and feedback regarding its discussion paper. The final Code of Conduct will set legally binding expectations on service providers and workers as well as providing methods of enforcing consequences for breaches of the Code, including the imposition of sanctions. Providing feedback and submissions is important to develop an effective Code of Conduct, and the NDIS encourages people to either complete a quick survey or upload a submission to contribute more detailed feedback. The Code of Conduct is expected to come into effect once the NDIS is in full operation.

Give Now

Despite living in a wealthy developed country, Australians with disabilities experience extremely high rates of discrimination, abuse and neglect. That's 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, nonprofit community organisation Many people with disabilities, volunteers and students contribute their efforts to our work

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

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