

# Equality & Justice

for people with disabilities



Winter 2017

## THE ADVOCATE



Villamanta Disability Rights Legal Service Inc.

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### Editorial

Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service welcomed the release of the University of Melbourne Report “Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities”.

The Report addresses the significant disadvantages that people with Cognitive disabilities are faced with when being deemed unfit to plead. High profile cases of indefinite detention in Australia, due to the problems surrounding such decision-making, have been embarrassing.

The trial project of utilising trained support workers (“The Disability Justice Support Program”) has encouraging results that we hope will provide a platform for supportive measures that should be widely adopted in all Australian states.

Given the many and regular reports on the barriers in accessing justice people with disabilities have, we hope for enthusiastic judicial responses to the report.

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# King and National Disability Insurance Agency [2017] AATA 643

Date of Judgement: 4 May 2017

Applicant: Jessica King

Respondent: National Disability Insurance Agency (NDIA)

Facts:

The applicant has cerebral palsy, a mild intellectual disability and mild vision and hearing impairments. The applicant receives the disability support pension and her mother receives a carer's payment. The NDIA entered into a plan with the applicant under s 33 of the National Disability Support Scheme Act (Cth) (the Act).

The applicant sought review by the NDIA of the statement of participant supports in the Plan, so as to include 20 hours of physiotherapy and a gym membership. The NDIA exercised its discretion under s 33(2) of the Act and decided not to approve these additions in the plan as they were not 'reasonable or necessary' under s 34 of the Act. The original decision not to approve the additional supports was upheld.

The applicant then applied to the Administrative Appeals Tribunal for review of this decision, represented by Victoria Legal Aid and the Rights, Information and Advocacy Centre.

## Legislation

Section 34(1) of the Act lists the factors that the CEO must be satisfied of before specifying the supports in a statement of participant supports.

Section 35 of the Act allows for NDIS rules to be prescribed for the method by which supports to be provided are assessed.

## Issues:

- whether the NDIA should fund the total cost of the applicant's gym membership (\$570) or only \$500 of this amount
- whether the NDIA should fund an additional 20 physiotherapy sessions or only the 9 extra sessions that the NDIA has agreed to

## Evidence

### *(1) Regarding the gym membership*

Although it appeared from NDIA's letter dated 21 April 2017 that the applicant was seeking \$500 for the membership, the tribunal decided that the cost of the membership was actually \$570. This decision was based on a letter sent by the applicant's representative to the NDIA and lodged with the Tribunal prior to the hearing. The Tribunal also considered the recent decision of *McGarrigle v NDIA* [2017] FCA 308 to reach this conclusion regarding the full \$570.

### *(2) Regarding the physiotherapy sessions*

#### *i. Evidence provided by the applicant*

- the specialist physiotherapy that the applicant seeks is unique as it made her happy and allowed her to walk around rather than being in her wheelchair
- without this treatment, the applicant is now in extreme pain, confined to her wheelchair and ‘feels different to everyone else’

*ii. Evidence provided by the applicant's mother*

- it was getting more difficult to assist her daughter with her mobility
- access to gym and the specialist physiotherapy was essential to achieve the applicant's goal of continuing to work for as long as possible
- since finishing the last physiotherapy session, the applicant had considerably declined and has resorted to crawling at home

*iii. Evidence provided by the applicant's treating physiotherapist*

- the specialist physiotherapy allows the applicant to continue to walk safely and be more independent
- the specialist physiotherapy needs to be ongoing so as to manage the applicants' complex neurological condition
- trained carers are required during the applicant's gym sessions so that the exercise program complements the specialist physiotherapy
- when the applicant stopped the specialist physiotherapy, it was noticeable

Decision

The Tribunal decided that these alterations, as recommended by the applicant's physiotherapist, are reasonable and necessary supports under s 34 of the Act because:

- as can be seen from the previous results, it would assist the applicant in achieving her goals of improving her mobility
- it would allow the applicant to continue working and participate in the community both socially and in the workplace
- the costs of the supports required are reasonable and cost effective when considering their benefits and the costs of alternative options
- the specialist physiotherapy is reputable and will be effective for the applicants' condition
- the applicant has a limited income and the applicants' carer is at an age where she will become less able to physically assist the applicant
- the NDIS is an appropriate service provider to fund the treatment

Outcome

The AAT set aside the original decision and substituted a decision that the applicant's NDIS plan be altered to include:

- an annual gym membership- \$570
- fortnightly physiotherapy sessions throughout the plan- \$175 per hour
- 5 physiotherapy sessions to be taken at any time:
  - 3 sessions to train the applicant's carers in how to assist her at the gym to ensure she is performing the exercises according to the physiotherapists' recommendations
  - 2 sessions at the applicant's home

## **Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82**

### **The case**

The case of *Richardson* is primarily significant due to the damages awarded to the claimant. Rebecca Richardson, a victim of sexual harassment in employment, brought one claim against a co-worker at Oracle for sexual harassment, and a further claim against her employer Oracle for vicarious liability. These claims arose from the claimant's allegations that her co-worker had made sexual advances and several humiliating remarks towards her. The Full Court of the Federal Court of Australia awarded the claimant \$100,000 in general damages to compensate for pain, suffering and loss of enjoyment of life, as well as for the detriment the harassment caused to the claimant's relationship with her partner. This award of damages is significantly higher than the trial judge's initial award of \$18,000, which was deemed to be 'manifestly inadequate' by the Full Court. The notably large sum of compensation is likely to set a new standard for damages in this area of law. It demonstrates the court's willingness to award damages in accordance with current day community standards regarding discrimination. It is clearly a welcomed decision that is relevant for disability discrimination law as it could have the effect of increasing damages for future claimants.

### **Implications for disability discrimination law**

In light of *Richardson*, disability discrimination claimants and their lawyers are urged to consider this case and other jurisdictions to determine the extent to which this more generous approach to damages may be applied or drawn upon. It is especially relevant because the pain and suffering experienced by victims of sexual harassment is often analogous to the pain and suffering experienced by those who have experienced disability discrimination. The psychological effects of disability discrimination are particularly similar in prolonged matters whereby claimants have experienced systematic and ongoing discrimination that seriously affects their emotional and psychological wellbeing. Accordingly, future claimants in the area of disability discrimination law may seek to be compensated in the same vein as sexual harassment victims where appropriate, and should consider *Richardson* in order to do so.

## Summary of Fair Work Commission Decision- [2017] FWCFB 3541

The Fair Work Commission recently carried out a 4 yearly review of modern awards, which included a review of the Social, Community, Home Care and Disability Services Industry Award 2010 (SCHCDSI). The purpose of the review is to determine whether the award meets the modern awards objective, and if not, to vary it accordingly so that it only includes terms that are 'necessary to achieve the modern awards objective'. This requirement is pursuant to s 138 of the Fair Work Act 2009, which states that a modern award 'must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective'. The modern awards objective is outlined in s 134(1).

### **Applications**

#### *Re: Variation of part-time employment provision*

In relation to the SCHCDSI, three employer organisations made applications to change the current part-time employment provision to enable greater flexibility when designating the hours of work for part-time employees. The intended purpose behind this application was to update the award so that it is in line with the development of the **National Disability Insurance Scheme (NDIS)**, which is significantly altering the nature of the provision of disability services. In particular, the claimants asserted that the NDIS gives a lot more agency and autonomy to persons with a disability and their carers regarding their access to disability services. As a result, disability services should be afforded more flexibility in terms of the hours for part-time employees so that they can adequately meet the increased needs and expectations of clients that have arisen from the NDIS. The claimants were concerned that without this greater flexibility, employees in this area will be casualised to properly respond to the more comprehensive and particular needs of people accessing the services.

#### *Re: Variation of rostering provisions*

One employer also made an application to alter the rostering provisions in the SCHCDSI.

### **Decision**

#### *Re: Variation of part-time employment provision*

The Commission took into consideration the factors in s 134(1) and decided that the proposed alterations to the part-time employment provision are not necessary to achieve the modern awards objective. The reasons behind this decision are listed below:

#### i) High prevalence of part-time employment

The Commission denied that part-time employment for NDIS services is being phased out or at the risk of being overtaken by casual employment. It maintained that more than a third of disability support workers were working part-time, and that this form of employment was still integral to the provision of disability services. Whilst the Commission conceded that casual employment was becoming more common, it

considered it too early in the process of delivering the NDIS to be certain that this would continue and that part-time employment would be phased out.

ii) Flexibility of the current part-time provision

The Commission highlighted many features of the current part-time provision to conclude that it is already sufficiently flexible and therefore does not need to be varied. For example, the Commission reiterated that the written agreement regarding an employee's pattern of work hours can be altered to respond to short term or enduring changes in the demand for services that may arise. Moreover, the Commission emphasised that the current provisions enable part-time workers to work certain amounts of extra hours without a requirement for overtime pay. This is another way in which the current provisions can be seen to be flexible and able to meet the greater demand for disability services that are likely to arise from the NDIS. Finally, the Commission relied on the fact that the current provision does not specify a minimum number of work hours per day or week. This allows for situations where only a brief use of a service is required- situations which are likely to become more common when the NDIS is fully implemented.

iii) Roster changes unnecessary

The application for alteration of the provision to allow for employers to make roster changes at short notice was rejected. The Commission did not accept that the introduction of the NDIS would cause any greater need or tendency for short notice cancellations or alterations to appointments. In fact it asserted that the NDIS enables more predictable, consistent and controlled provision of services whereby roster changes at short notice would not be required. For example, the Commission pointed to the fact that service agreements in the NDIS discourage cancellations and encourage frequent communication between the service provider and the participant. Whilst the Commission acknowledged that some services that are inconsistent or infrequently accessed may require such roster changes, this can be addressed by employing casual staff or part-time staff working extra hours.

iv) Unrealistic expectations regarding the NDIS

The Commission questioned the degree of discretion and choice that participants of the NDIS will be given which would warrant the greater flexibility being sought in the application. In order to meet participants' expectations of having high quality service providers who are consistent and suited to their needs, the provision of services will not always be able to be ad hoc and flexible. In order for the NDIS to operate effectively and efficiently, there will have to be a certain level of consistency and predictability. In addition, in order to engage part-time workers in the sector, the working hours will have to be stable and predictable to a certain degree.

*Re: Variation of rostering provisions*

The Commission agreed to vary the rostering provisions by clarifying that electronic means of communication can be used for 'rostering arrangement and changes to rosters'.

*Re: Agreed part-time work arrangements*

The Commission clarified that the part-time provision allows for flexible part-time work arrangements. The ability to have such arrangements better meets the modern awards objective, as it provides for agreements between employer and employee whereby the amount of hours agreed upon per week can be different. This means

that whilst the hours are pre-determined, the employee can work more hours one week than another. This is beneficial for the employee who can rely on a stable and pre-determined amount of hours that suits their needs. These arrangements are also beneficial for the effective provision of services, as it involves part-time employment that can more adequately respond to the demands of the NDIS.

### **Implications**

It seems that the Commission is not fully recognising the considerable changes that the NDIS is intended to initiate in the disability services sector. The Commission is not willing to make changes based on assumptions or predictions about the way the NDIS will operate in the future.

Nevertheless, the Commission recognised in its decision that the conclusions are based on its current view on the NDIS and how it will operate. The Commission acknowledged that another review may be required once the NDIS is fully in force, as different requirements or demands may arise. Such a review may be necessary if the expectations of increased providers and participants prove to be true.

## **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, non-profit community organisation. Many people with disabilities, volunteers and students contribute their efforts to our work

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

## Our organisations

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