Special educational needs and discrimination

Turner v Department of Education and Training (2007) VCAT 873

By Greg Barns

Around Australia, there are thousands of children with special educational needs that state educational authorities are struggling to meet. Victorian student, Becky Turner, is one such student. Earlier this year, the Victorian Civil and Administrative Tribunal (VCAT) upheld in part her claim that she was being indirectly discriminated against on the basis of her disability because the Department of Education failed to provide her with a full-time teacher's aide.

In *Turner v Department of Education and Training*,[1] McKenzie DP held that s37(2) (a) of the *Equal Opportunity Act* 1984 (Vic) applied to Becky's circumstances.

Section 37(2) provides:

'(2) An educational authority must not discriminate against a student –

(a) by denying or limiting access to any benefit provided by the authority.'

Section 6 of the Act prohibits discrimination on the grounds of 'impairment', among other things. 'Impairment' is defined in s4 to mean 'total or partial loss of a bodily function' and 'malfunction of a part of the body including a mental or psychological disease or disorder', and 'a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder'.

Under the Victorian Equal Opportunity Act, discrimination includes indirect discrimination and, in determining whether a person has indirectly discriminated against another person, motive or intent are irrelevant. It does not matter whether the discriminating party was aware of the discrimination.

Under s9 of the Act, indirect discrimination occurs where the state imposes on individuals a requirement, condition or practice that, with their impairment, they do not or cannot comply with, which a higher proportion of people without that attribute do or can comply with, and which is not reasonable.

But whether a requirement, condition or practice is 'reasonable' depends on all the relevant circumstances of the case, including:

'(a) the consequences of failing to comply with the requirement, condition or practice;

(b) the cost of alternative requirements, conditions or practices; and

(c) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice.'[2]

The facts of Becky Turner's case are not particularly novel, which makes it potentially very significant for education authorities, parents and students in other Australian jurisdictions.

Becky is now 16 years old and has attended four state primary and secondary schools in Melbourne's eastern suburbs. McKenzie DP, after hearing from a number of medical and educational psychology experts, found that although 'Becky's medical picture is a complex and fluctuating one', she has – and has had since the beginning of the claim period in 1999 – a brain dysfunction. McKenzie DP also found that Becky had suffered from anxiety which, at different times, has been more or less severe, and that from at least 2000 onwards, Becky has had a severe learning disability. In addition, from at least 1999 onwards, Becky has had working memory and auditory processing deficits. From at least August 2005, there was a clear gap between Becky's verbal and non-verbal IQ, with her verbal IQ being lower.[3]

Having made those findings, McKenzie DP then determined that some of these various symptoms and conditions – manifestations of the brain disorder – were impairments within s4 of the Act.

'The language disorder, learning disability and double depressive disorder are all impairments within the meaning of s4 of that Act. They are either malfunctions of the brain, or a psychological disorder, or a condition or disorder as a result of which Becky learns more slowly than those without the condition or disorder.'[4]

Extensive evidence was given by Becky's teachers and educational experts about her educational progress from 1999-2006, and whether or not she should have had a full-time teacher's aide throughout that period. She had access to such help during this time, but not at other times. McKenzie DP concluded that

> 'there will always be a gap in educational achievement between Becky and her peers without severe language disorder. That gap is caused, not by inadequate assistance, but by the consequences of the severe language disorder itself. Adequate educational assistance can narrow the gap or prevent it from widening further. Inadequate educational assistance can cause it to widen further.'[5]

The Education Department argued that a full-time teacher's aide would be to Becky's detriment, because it would make her less independent. But McKenzie DP rejected that argument, noting that this

> 'must depend on what the particular aide does, his or her training, and the measures that the person who directs or supervises the aide puts in place. There is no reason why a teacher's aide could not, by the way in which he or she provides assistance to Becky, help Becky to develop compensatory mechanisms and learning skills. There is no reason why a teacher's aide could not, by allowing Becky to work independently when she has understood a task, help her to increase her learning independence, self-reliance and self-confidence.'[6]

McKenzie DP concluded that '[t]he bulk of the expert evidence is that Becky would have benefited more from her education if she had greater one-on-one teacher-aide assistance. I accept this evidence.'[7]

Given the nature of s9(2) of the Act, McKenzie DP considered whether or not it was reasonable for the state to impose on Becky a requirement or condition that she access education without a full-time teacher's aide. In doing so, McKenzie DP considered evidence about various Victorian government programs designed to deal with students who have special educational needs. She concluded that the programs in question had difficulties and shortcomings in eligibility criteria. One of them was still being implemented, and there were question marks about its effectiveness; therefore, it was not reasonable for the state to make Becky access education without a full-time aide.[8]

Although it was not an issue in this case, McKenzie DP made it clear that, when considering reasonableness, courts should have regard to the resources and budgetary capacity of states. 'If the evidence were that it would be impossible for the state to provide Becky with more assistance than I have found that she received, this might be a factor in favour of the reasonableness of the requirement,' she observed. And, further, if 'the evidence had been that the state did not have the resources to further assist Becky in her education, this might have been a factor indicating that the requirement or condition was reasonable'.[9]

At the time of writing, McKenzie DP had made no findings in relation to orders for compensation sought by Mrs Turner. She urged the parties to use mediation to seek a solution, given Becky's ongoing educational needs.

While each case will turn on its facts, as McKenzie DP pointed out, the importance of this case should not be underestimated. Many people are in a similar position to Becky Turner. And if the state can be held to have discriminated indirectly against an individual with special educational needs by making them access an education system without appropriate special assistance, could the principle apply to other areas of government, such as healthcare and transport? ■

Notes: **1** (2007) VCAT 873. The decision handed down in this case is subject to an appeal to the Supreme Court of Victoria. **2** *Equal Opportunity Act* 1984 (Vic) s9(2). **3** (2007) VCAT 873, [82-90]. **4** (2007) VCAT 873, [92]. **5** (2007) VCAT 873, [480]. **6** (2007) VCAT 873, [481]. **7** (2007) VCAT 873, [485]. **8** (2007) VCAT 873, [578]. **9** (2007) VCAT 873, [576-7].

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