

LAVAN Legal: Employment Update

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Disability discrimination: *Walker v The State of Victoria*

The recent Federal Court decision in *Walker v The State of Victoria* has again confirmed that a school is entitled to rely on a student's excessive bad behaviour as a reason to exclude a difficult but disabled student. This decision followed the line of reasoning set by the High Court in 2003 in *Purvis v State of New South Wales*.

Similar to the *Purvis* decision, the school in this matter had made a decision to exclude a student, who suffered from a number of disabilities including Asperger's syndrome (an autism spectrum disorder), dyslexia and attention deficit disorder, from school on the grounds of excessive bad behaviour which included amongst other things, physical violence towards teachers and other students.

The student alleged direct discrimination in the provision of educational services, in that the New South Wales Education Department (**Department**) had treated him less favourably than a person without a disability by:

- not permitting him to attend school during recess and lunch time;
- not permitting him to attend certain school excursions;
- preventing him from attending school at all times during the third term of 2007;
- preventing him from attending school full time; and
- preventing him from travelling on the school bus.

It was argued by the student that his behaviour was caused by his disabilities and was therefore effectively part of the disability. Thus, it was said the actions taken by the Department as a result of his behaviour were directly related to his disability and therefore a breach of the *Disability Discrimination Act*.

When considering the Department's treatment of the student, the Court considered whether the restrictions imposed upon the student would have been any different for a non disabled student in the same circumstances, behaving in the same way.

The Court considered each of the allegations separately and in each instance found that the reason for the imposition of restrictions upon the student was not related to his disability and therefore the student's claim of direct discrimination had not been made out.

The student also claimed that the Department had acted in breach of the *Disability Standards in Education 2005* (**Standards**) in that it had not:

- made reasonable adjustment for him;
- allowed him to participate in the education process at the same level as his peers;
- developed an accessible curriculum for him; and
- supported him adequately.

This is the first decision to consider the Standards and whilst each alleged breach of the Standards will have to be considered on its own facts, the Court did make the following general comment about the application of the Standards:

'The school is not bound, in making these decisions, by the opinions or wishes of professional advisers or parents. The school is also required to determine whether any reasonable adjustment is possible in order to further the prescribed aims. There may, therefore, be cases in which an adjustment is necessary but no reasonable adjustment is able to be identified which will ensure that the objectives contained in the relevant Disability Standards are achieved.'

This decision dealt with factors and incidents that occurred before the 2009 amendments to the *Disability Discrimination Act*, which introduced a positive duty upon schools to make reasonable adjustments in respect of disabled students. However, on its facts, even if those amendments had been in place at the time of the events relating to the student, the decision of the Court in this instance may well have been the same because it is apparent that substantial adjustments were made by the school in any event.

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