FEDERAL COURT OF AUSTRALIA

Milkins v Dioceses of Sale Catholic Education Limited (St Joseph’s Primary School Wonthaggi) [2019] FCA 1715

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| File number: |  |
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| Judge: | **O’CALLAGHAN J** |
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| Date of judgment: | 18 October 2019 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application to strike out pleading – application allowed  |
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| Legislation: | *Federal Court Rules 2011* (Cth), r 16.21(1)  |
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| Date of hearing: | On the papers |
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| Date of last submissions: | 11 September 2019 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 5 |
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| Solicitor for the Applicant: | M Qureshi of Starnet Legal Pty Ltd |
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| Counsel for the Respondent: | A G Manos |
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| Solicitor for the Respondent: | Wotton + Kearney |

ORDERS

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|  | VID 106 of 2019 |
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| BETWEEN: | JAELAH MILKINS (BY HER NEXT FRIEND MELINDA MILKINS)Applicant |
| AND: | DIOCESES OF SALE CATHOLIC EDUCATION LIMITED (ST JOSEPH’S PRIMARY SCHOOL WONTHAGGI)Respondent |

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| JUDGE: | O’CALLAGHAN J |
| DATE OF ORDER: | 18 October 2019 |

THE COURT ORDERS THAT:

1. The applicant’s statement of claim dated 6 May 2019 be struck out.
2. The applicant’s interlocutory application dated 12 August 2019 be dismissed.
3. The applicant has leave to file an amended statement of claim within 30 days of the date of this order.
4. The applicant pays the respondent’s costs of and incidental to the respondent’s interlocutory application dated 13 August 2019 and of the applicant’s interlocutory application for summary judgment dated 12 August 2019.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

O’CALLAGHAN:

1. This proceeding is related to VID 107 of 2019. Like that proceeding, it concerns alleged breaches of the *Disability Discrimination Act 1992* (Cth) by the respondent, a school (**St Joseph’s**). The applicant in this proceeding is also a former student at St Joseph’s.
2. As in VID 107 of 2019, the respondent seeks orders striking out a Statement of Claim (also dated 6 May 2019) (**SOC**) pursuant to r 16.21 of the *Federal Court Rules 2011* (Cth), by an interlocutory application dated 13 August 2019. The applicant also seeks summary judgment by an interlocutory application dated 12 August 2019 on the ground that the respondent has failed to file a defence.
3. These reasons should be read with the reasons in VID 107 of 2019, and will be published simultaneously.

## STATEMENT OF CLAIM

1. It is convenient to set out the SOC in full:

**A. Relationship between the Applicant and the Respondent**

1. The Applicant (“**Jaelah**”) was born on 20 July 2006, and is currently 12 years of age.

2. The Respondent is:

(a) an educational authority; and

(b) and an educational provider;

for the purposes of ss.4 and 22 of the *Disability Discrimination Act* 1992 (Cth) (“**the DDA**”).

3. Jaelah was enrolled at St Joseph’s Primary School (“**St Joseph’s**”) in January 2015, the period of this complaint being January 2014 to September 2018 (“the relevant period”).

4. The claim is brought under ss.5, 6, 22 and 32 of the DDA, as applied pursuant to s.12(8).

**B. Jaelah’s Disabilities**

5. Jaelah has the following disabilities within the meaning of Section 4 of the DDA:

(a) Severe Expressive and Receptive Language Disorder;

(b) Dyslexia;

(c) Generalised Anxiety Disorder;

(d) Autism Spectrum Disorder;

(e) Features of Specific Learning Disorder;

(f) Sensory Processing Disorder;

(g) Language Difficulties.

**C. Details of the Discrimination**

**Discrimination in Education – Section 22**

6. The Respondent has breached s.22 of the DDA, as set out below.

7. The Respondent has limited Jaelah’s access to a benefit provided by it, in breach of s.22(2)(a), namely access to the academic curriculum.

8. The Respondent limited Jaelah’s access to the academic curriculum during the period of the complaint, as set out in the First to Fifth Allegations inclusive herein.

9. The Respondent has subjected Jaelah to detriment, in breach of s.22(2)(c), namely exacerbation of her anxiety, as set out in First to Fifth Allegations inclusive herein.

10. The Respondent has subjected Jaelah to detriment, in breach of s.22(2)(c), namely subjecting her to serious disadvantage by preventing her from reaching her academic potential, as set out in the First to Fifth Allegations inclusive herein.

**D. Direct Discrimination: Section 5(1)**

**First Allegation: Less favourable treatment - suggestion to leave school**

11. On 23 November 2017, and in breach of s.5(1), it was suggested by Mr Ronan O’Mahony, Principal, that St Joseph’s was not suitable for Jaelah, and that she should seek to be enrolled in an alternative setting, in preference to the school providing her with the supports that had been requested by her parents (“the suggestion”)[.]

PARTICULARS

Mr O’Mahony made the suggestion in response to a discussion concerning meeting Jaelah’s needs as a student with a disability.

12. The suggestion constituted less favourable treatment within the meaning of Section 5, by reason of the following:

(a) the treatment was due to Jaelah’s needs as a student with multiple disabilities and intensive learning needs;

(b) the treatment did not accord with St Joseph’s policies, procedures and guidelines, as set out below in paragraphs 35.1, 35.2, 35.3, 35.4, 35.6, 35.7, 35.12, 35.15, 35.16, 35.17, 35.18, 35.19, 35.20 and 35.21 hereof.

13. In the premises, in making the suggestion, the Respondent treated Jaelah less favourably than it would treat a student:

(a) without Jaelah’s disabilities;

(b) without any disability;

(c) needing intensive assistance to effectively access the curriculum;

(d) experiencing anxiety due to her inability to access the curriculum;

(e) attending St Joseph’s;

being circumstances not materially different.

14. A student without a disability or without Jaelah’s disabilities would have been:

(a) embraced by the school as a valued student;

(b) provided with the assistance to access the curriculum on the same basis as others.

15. In the premises, the Respondent unlawfully discriminated against Jaelah by treating her less favourably in limiting her access to the benefit set out in paragraph 7 hereof, as she was subsequently withdrawn from the school as a consequence of the suggestion, such treatment being contrary to s.22(2)(a) of the DDA; and by subjecting her to the detriments set out in paragraphs 9 and 10 hereof, contrary to s.22(2)(c).

**Indirect Discrimination: Section 6(1)**

**Second Allegation: Requirement or Condition - evidence-based remedial literacy and numeracy programs**

16. In breach of s.6(1), the Respondent imposed a requirement or condition on its students that they access the curriculum and/or their education without evidence­ based remedial literacy and numeracy programs, implemented with fidelity (“the requirement or condition”).

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(a) “evidence-based” means based on the most recent scientific research;

(b) “fidelity” means application with accuracy/exactness.

17. Because of Jaelah’s disabilities set out in paragraph 5 hereof, she could not comply with the requirement or condition.

18. The requirement or condition had the effect of disadvantaging Jaelah, because:

(a) She was not able to reach her academic potential;

(b) She was required to miss school regularly to obtain tutoring to make up for her lack of effective education at school, thereby differentiating her from her peers;

(c) Her anxiety was exacerbated due to her inability to comply with the requirement or condition, thereby causing her to miss attending school due to mental health issues, and ultimately the necessity to leave school;

(d) She missed out on advantages such as family holidays by reason of her family having to fund assessments, speech therapy, private tutoring, workbooks, programs and readers in the absence of the school providing the support she required.

19. The requirement or condition was not reasonable, having regard to the circumstances of Jaelah’s learning disabilities.

20. In the premises, the Respondent unlawfully discriminated against Jaelah on the ground of her disabilities by imposing a requirement or condition upon her that she could not comply with, in breach of s.6(1), thereby limiting her access to the benefit set out in paragraph 7, contrary to s.22(2)(a), and subjecting her to the detriments set out in paragraphs 9 and 10, contrary to s.22(2)(c) of the DDA.

**Indirect Discrimination Section 6(1)**

**Third Allegation: Requirement or Condition – Comprehensive Educational Assessment/Individual Education Plan**

21. In breach of s.6(1), the Respondent imposed a requirement or condition upon students at St Joseph’s that they access the curriculum and/or their education without a Comprehensive Educational Assessment and Individual Education Plan containing measurable outcomes, such plan being formally monitored and evaluated to ensure the strategies in the plan were effective.

PARTICULARS

(a) A ‘Comprehensive Educational Assessment’ is an assessment that:

21.a.1 accurately benchmarks entry skills in each learning area;

21.a.2 identifies each barrier to learning through analysis of relevant reports;

21.a.3 formulates specific strategies to address the barriers.

22. Because of Jaelah’s disabilities set out in paragraph 5 hereof, she could not comply with the requirement or condition.

23. The requirement or condition had the effect of disadvantaging Jaelah, as:

(a) the Individual Education Plans applied to her learning were not effective in supporting her to reach her academic potential, and were not substantially altered by reason of a failure by the Respondent to subject them to formal monitoring or evaluation;

(b) She was required to miss school regularly to obtain tutoring to make up for her lack of effective education at school, differentiating her from her peers;

(c) Her anxiety was exacerbated due to her inability to comply with the requirement or condition, and the therefore missed attending school by reason of mental health issues, ultimately necessitating her leaving school;

(d) She missed out on advantages such as family holidays by reason of her family having to fund assessments, speech therapy, private tutoring, workbooks, programs and readers in the absence of the school providing the support she required.

24. The requirement or condition was not reasonable:

(a) having regard to the circumstances of Jaelah’s learning disabilities; and

(b) because formal measuring of outcomes and formal monitoring and evaluation, based upon evidence, are standard best practice educational approaches.

25. In the premises, the Respondent unlawfully discriminated against Jaelah on the ground of her disabilities by imposing a requirement or condition upon her that she could not comply with, in breach of s.6(1), thereby limiting her access to the benefit set out in paragraph 7, contrary to s.22(2)(a), and subjecting her to the detriments set out in paragraphs 9 and 10, contrary to s.22(2)(c) of the DDA.

**Indirect Discrimination Section 6(1)**

**Fourth Allegation: Requirement or Condition - Open Classrooms**

26. In breach of s.6(1), the Respondent imposed a requirement or condition on students at St Joseph’s that they learn in open classrooms, namely classrooms shared by two classes.

27. Because of Jaelah’s disabilities set out in paragraph 5, she could not comply with the requirement or condition.

28. The requirement or condition had the effect of disadvantaging Jaelah, as:

(a) her learning disabilities resulted in her accessing the classroom on the same basis as others, and thereby requiring significant concentration and effort;

(b) the open classrooms resulted in a substantial increase in noise and activity, affecting the calm and ordered learning environment required by Jaelah.

29. The requirement or condition was not reasonable having regard to the circumstances of Jaelah’s learning disabilities.

30. In the premises, the Respondent unlawfully discriminated against Jaelah on the ground of her disabilities by imposing a requirement or condition upon her that she could not comply with, in breach of s.6(1), thereby limiting her access to the benefit set out in paragraph 7, contrary to s.22(2)(a) the DDA, and subjecting her to the detriments set out in paragraphs 9 and 10, in breach of s.22(2)(c).

**Fifth Allegation: Breach of *Disability Standards* - Section 32**

31. The Respondent has breached s.5.2(1) and s.5.2.(2) of the Disability Standards for Education 2005, as follows:

(a) The Respondent failed to take reasonable steps to ensure that Jaelah could participate in her educational program on the same basis as students without a disability, and without experiencing discrimination, as a result of not properly undertaking its responsibilities as set out in s.5.2(2), such responsibilities interpreted through the Respondent’s obligations pursuant to the *Convention on the Rights of Persons with Disabilities;*

(b) The Applicant refers to and repeats the First to Fourth Allegations inclusive above, as if they were set out *seriatum* hereto.

(c) With the requirements and conditions imposed as set out in the Second to Fourth Allegations:

31.c.1 Jaelah was not able to access the curriculum on the same basis as others;

31.c.2 Jaelah’s anxiety required her to leave the school to remediate her mental health;

31.c.3 Jaelah did not participate in the educational program on the same basis as students without a disability, and without experiencing discrimination.

(d) The Respondent failed to meaningfully consult, pursuant to its obligations set out in General Comment 7 of the *Convention on the Rights of Persons with Disabilities*.

(e) The Applicant says that any attempts to consult her and/or her associates were merely tokenistic, and as such did not comply with the *Disability Standards for Education*, as applied through s.12(8) of the DDA.

**E. Sixth Allegation: Victimisation**

32. In breach of s.42(2)(f), Jaelah has been victimised as a result of her rights being asserted as a student with a disability, in that, after asserting such rights:

(a) St Joseph’s staff refused to provide evidence of documentation supporting the effectiveness of the educational strategies utilised for Jaelah.

(b) St Joseph’s staff, in the main, refused to answer most queries in writing about Jaelah’s education, and instead would only allow discussions in relation to her education to occur at meetings, which typically only lasted 30 minutes.

(c) Jaelah’s mother and associate, Ms Melinda Milkins, experienced intimidation and harassment at meetings, and meeting minutes failed to properly reflect what occurred in such meetings.

(d) The actions in paragraphs 32.1 to 32.3 inclusive hereof caused detriment to Jaelah, in the following ways:

32.d.1 regular school meetings failed to result in positive educational or psychological outcomes for Jaelah;

32.d.2 because St Joseph’s practice did not require evidence-based teaching methods, Jaelah’s parents wished to research any approaches suggested by the school to ensure that they were evidence-based prior to agreeing to them, however this was not possible without explicit explanation as to what such approaches were;

32.d.3 there was significant disagreement in relation to the manner in which Jaelah was being educated, and there was insufficient time at meetings to comprehensively discuss Jaelah’s educational plans, which were lengthy and verbose;

32.d.4 at meetings, Mrs Milkins’ suggestions were often dismissed, her requests for evidence of supports for Jaelah were ignored, and she was not provided with minutes, despite requesting same;

32.d.5 the hostile treatment of Mrs Milkins adversely affected the school/parent relationship, further impeding the negotiation of supports for Jaelah.

32.d.6 As a consequence of the matters the subparagraphs immediatelyabove, discussions in relation to Jaelah’s education could not properly occur, and educational planning could not be finalised.

**F. Associated Claim - Breaches of the *Competition and Consumer Act 2010***

33. The Respondent is a supplier of educational and other services within the meaning of the Australian Competition and Consumer Act 201O (“**the Consumer Act**”).

34. The Respondent received monies from the Applicant’s parents, who were consumers within the meaning of the Consumer Act, to provide educational services to the Applicant.

35. The Respondent made numerous false and misleading representations that its services were of a particular standard, quality, value or grade, in breach of s.29(1)(b) of the Consumer Act.

36. Alternatively, each of the representations constituted conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose, or the quantity of the services, in breach of s.34 of Schedule 2 of the Consumer Act. Such misleading claims included assertions that that the Respondent:

(a) works collaboratively with parents, students and other community members to ensure a safe school environment;

(b) personalises learning for each child based upon their developmental needs and interests;

(c) builds a positive learning community where students feel valued and respected;

(d) plans reasonable adjustments for the student to access the curriculum;

(e) monitors the progress of the student;

(f) holds the care, safety and wellbeing of children and young people as a central and fundamental responsibility of the school;

(g) acts in a partnership with parents where both parties seek to achieve a common goal;

(h) views the role parents play in their child’s schooling as vital to their school’s mission to educate each child;

(i) undertakes honest, open and regular communication with parents;

(j) is committed to nurturing respectful relationships and active partnerships with parents;

(k) communicates with parents regularly regarding their child’s learning, development and wellbeing;

(l) relates with and responds to parents in a respectful and professional manner;

(m) ensures a timely response to any concerns raised by parents;

(n) encourages parents to play an integral role in their children’s education;

(o) will always act to protect students from any kind of harm;

(p) seeks to achieve academic development as an important component for students;

(q) strive for resolutions and outcomes that are satisfactory to all parties;

(r) provides a learning environment that promotes independence;

(s) supports each child’s social, emotional and intellectual growth in a caring yet stimulating environment;

(t) provides an inclusive educational environment where every child feels important;

(u) strives for the implementation of a curriculum that is student centred and personalised.

37. By virtue of the matters aforesaid, including the First to Fifth Allegations hereof, the Respondent failed to render the services with due care and skill, in breach of s.60 of Schedule 2 of the Consumer Act, and the Applicant and/or her parents have thereby suffered loss and damage.

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Particulars of loss and damage will be provided prior to trial.

**G. Relief/Remedies sought by the Applicant**

38. Jaelah seeks:

(a) A declaration that the Respondent has committed unlawful discrimination and victimisation against her during the relevant period or parts thereof.

(b) Damages pursuant to Section 46PO(4)(d) of the *Australian Human Rights Commission Act 1986* (Cth).

(c) Any further or other Orders as the Court considers appropriate.

(d) Damages pursuant to s.236 of Schedule 2 to the Consumer and Competition Act 2010;

(e) Compensation and/or damages pursuant to Section s.267 of Schedule 2 to the *Consumer and Competition Act 2010*;

(f) Any further orders as the court considers appropriate.

(g) Costs.

1. The SOC in this proceeding suffers from the same manifest deficiencies as the SOC in the other related proceeding. It is sufficient to say that it must be struck out for the same reasons that I have given in VID 107 of 2019. Orders will therefore be made to similar effect.

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| I certify that the preceding five (5) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O’Callaghan. |

Associate:

Dated: 18 October 2019