Case Note

COPING, COMPLYING AND INDIRECT DISCRIMINATION: *HURST v STATE OF QUEENSLAND*

Elizabeth Dickson[†]
Queensland University of Technology, Brisbane, Australia

The Full Federal Court, in Hurst v State of Queensland,[1] has upheld the appeal of a student challenging the Federal Court's interpretation of the indirect discrimination provisions of the Disability Discrimination Act 1992 (Cth) (DDA). Tiahna Hurst, and her co-complainant Ben Devlin, both deaf since birth, had claimed that the decision of Education Queensland not to supply them with instruction in their first language, Auslan,[2] amounted to indirect discrimination. Although Lander J, of the Federal Court, found that Ben had been the victim of discrimination and awarded him $64 000 in damages, he was of the view that Tiahna had not been discriminated against because, as she could 'cope' with receiving her classes in English, she could 'comply' with a requirement or condition that she do so.[3] Upon appeal, The Full Federal Court held that the relevant test for proof of indirect discrimination was not whether Tiahna could not 'cope' with this method of instruction, but whether she would 'suffer serious disadvantage in complying with' this method of instruction. The Court held, further, that 'inability to achieve his or her full potential, in educational terms, can amount to serious disadvantage'.[4] The facts established, in Tiahna's case, that she would be compromised in her ability to reach her full potential should she be required to receive her education in English, including signed English, rather than in Auslan.

I The Facts

Tiahna Hurst was 7 years old at the time of trial. She was born severely to profoundly deaf into an extended family whose first language was Auslan. Between June 2001 and February 2002, Tiahna was a student at a pre-school operated by Education Queensland, the Noosaville Special Education Unit (SEU). She left the State system in February 2002, returning in August 2003, to attend the Coolum State Pre-School. From January 2004 she attended the Coolum State School. In 2001 the respondent had refused to provide an education to Tiahna in Auslan, prompting, in 2003, a complaint by Ms Gail Smith, Tiahna's mother, under the *DDA*. Although the complaint related back to alleged deficiencies in the pre-school education Tiahna was provided at Noosaville, it is clearly to be inferred from the facts that the Hurst family wished to establish an entitlement to education in Auslan for the duration of Tiahna's formal education. At the time of Tiahna's complaint, and until July 2006, Education Queensland delivered an education to students with hearing impairments in accordance with its 'Total Communication Policy'.[5] The policy aimed to

[†]*Address for correspondence*: Elizabeth Dickson, Law School, Queensland University of Technology, Gardens Point Campus, GPO Box 2434, Brisbane QLD 4001, Australia. Email: e.dickson@qut.edu.au

1327-7634 Vol 10, No 2, 2005 & Vol 11, No 1, 2006 pp. 103–108
Australia & New Zealand Journal of Law & Education

'ensure … that deaf/hearing impaired children across the state have equal access to an appropriate educational program and a consistent communication approach'[6] and the preferred method of instruction was signed English. Although not spelled out clearly in the judgment at first instance, Ms Smith's claim on behalf of her daughter appeared to be that, because the State did not provide an appropriate education for Tiahna, her family was forced to provide for her needs, through private schooling and therapy, at their own expense.[7] Further there was evidence that Tiahna's educational potential was limited by the requirement that she receive instruction in a language other than her first language. The Respondent's case was that Tiahna, a bright student with good oral communication ability, was not at any disadvantage compared with her hearing peers. Tiahna's academic progress was good and there was evidence that she could communicate effectively with others.

II The Law

The *DDA* prohibits discrimination on the ground of disability in the area of education. Disability is defined broadly, as follows:

> (a) total or partial loss of the person's bodily or mental functions; or
> (b) total or partial loss of a part of the body; or
> (c) the presence in the body of organisms causing disease or illness; or
> (d) the presence in the body of organisms capable of causing disease or illness; or
> (e) the malfunction, malformation or disfigurement of a part of the person's body; or
> (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
> (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour[8]

The *DDA* contemplates a variety of 'detriments' as amounting to discrimination in education including the denial of access to school or to any 'benefit' provided by a school.[9]

Under the *DDA*, indirect discrimination occurs if a 'discriminator' requires a person with a disability 'to comply with a requirement or condition', and the complainant is not able to comply but a 'substantially higher proportion of persons without the disability' are able to comply. Further, the term must be 'not reasonable'.[10] Typically, discriminatory requirements or conditions are not 'written' but inferred from the circumstances of the treatment of a complainant. This reflects the fact that discriminatory terms are frequently imbedded in the culture of an institution rather than consciously constructed to discriminate. The application of the indirect discrimination provisions may be illustrated through the classic example of indirect discrimination—the building accessible only by steps. The unwritten 'requirement' to be inferred from this situation is that 'a person must be able to use steps' to enter the building. Many people with mobility impairments cannot use steps and cannot comply with the requirement while a substantially higher proportion of people without mobility disabilities can use steps and can comply with the requirement. In many circumstances, the requirement that a person must be able to use steps will not be 'reasonable'.[11]

III Application of the Law to the Facts at First Instance

At trial, it was uncontroversial that Tiahna's hearing impairment amounted to a disability within the meaning of the *DDA*.[12] It was also accepted that a refusal to supply instruction in Auslan would potentially amount to a restriction on Tiahna's access to the educational benefits

supplied to her by Education Queensland and as such to a 'detriment' within the meaning of the Act.[13]

Lander J found that a requirement or condition had been imposed on Tiahna that she 'undergo… education in English and without the assistance of an Auslan teacher or an Auslan interpreter'. He found that a substantially higher proportion of people without Tiahna's disability could comply with this requirement. He was critical of the implementation of the Total Communication Policy by Education Queensland[14] and this, no doubt, informed his further finding that the requirement imposed on Tiahna that she receive her instruction in Signed English was 'not reasonable'. [15]

Despite concluding that it was 'obvious' that Tiahna would have been 'better taught in Auslan',[16] however, Lander J found that she could comply with the requirement that she receive instruction in Signed English: 'There is no evidence, or no evidence which I am prepared to accept, to support a finding that Tiahna cannot be educated in English, including Signed English'.[17] Lander J relied on expert evidence that Tiahna could 'cope' with the arrangements put in place by Education Queensland. [18]

It seems the unfortunate but inevitable conclusion that Tiahna's case failed because her family compensated for the lack of Auslan assistance at school by tutoring her at home and by arranging private therapy, both of which helped her to maintain her educational standard at school. Lander J conceded that 'It might be that … [Tiahna] has not fallen behind her hearing peers because of the attention which she receives from her mother and the instruction which she no doubt receives from her mother in Auslan'.[19]

IV Issues upon Appeal

The issue to be decided upon appeal was whether Lander J, at first instance, had approached correctly the issue of whether Tiahna was 'able to comply' with the requirement that she receive her instruction in English. The argument for Tiahna was that Lander J had found that she could comply because she could 'cope' without Auslan.

The Full Court of the Federal court held that the decision of Lander J on the point was affected by his belief that Tiahna could 'cope'. The Court highlighted his reliance on expert evidence that Tiahna was sufficiently academically advanced that she could manage in a regular class room without Auslan assistance. The Full Court held, however, that the relevant test in respect of the ability to comply was not whether the complainant could 'cope' but whether the complainant would suffer 'serious disadvantage' if required to comply.[20] The Court held, further, that it was clear from a 'substantial body of evidence' that Tiahna had suffered and would continue to suffer 'serious disadvantage'[21] in that, if denied Auslan assistance, 'she could not reach her full educational potential'.[22]

While acknowledging that Lander J had been 'distracted by the somewhat unsatisfactory manner in which Tiahna's case was presented below', the Full Court pointed out that he had not considered the relevance of the earlier Auslan case *Catholic Education Office v Clarke*[23] on the compliance point. The Full Court considered that the 'issues raised in *Clarke* were essentially the same as those raised by Tiahna'[24] yet the complainant in *Clarke* had won at trial and Tiahna had lost. Madgwick J in *Clarke*, at first instance, found that Jacob Clarke could not 'meaningfully participate' in class without Auslan assistance despite evidence suggesting that he, like Tiahna, could, theoretically, 'cope':

> … compliance must not be at the cost of being thereby put in any substantial disadvantage in relation to the comparable base group. In my opinion, it is not realistic to say that Jacob could have complied with the model. In purportedly doing so, he would have faced serious disadvantages that his hearing classmates would not. These include: contemporaneous incomprehension of the teacher's words; substantially impaired ability to grasp the context of, or to appreciate the ambience within which, the teacher's remarks are made; learning in a written language without the additional richness which, for hearers, spoken and "body" language provides and which, for the deaf, Auslan (and for all I know, other sign languages) can provide, and the likely frustration of knowing, from his past experience in primary school, that there is a better and easier way of understanding the lesson, which is not being used. In substance, Jacob could not meaningfully "participate" in classroom instruction without Auslan interpreting support. He would have "received" confusion and frustration along with some handwritten notes. That is not meaningfully to receive classroom education.[25]

While the decision in *Clarke* was appealed, The Full Federal Court did not interfere with the reasoning of Madgwick J on this point or, indeed, on any other. In *Hurst*, the Full Court considered that reasoning of Lander J at first instance could not be reconciled with the reasoning in *Clarke*.[26]

Although the Full Court conceded that the denial of Auslan assistance in her early years of formal education would, 'implicitly', have long-term ramifications in terms of her educational achievement,[27] there was no award of damages to Tiahna. Her remedy was a declaration that Education Queensland had contravened the indirect discrimination provisions of the *DDA* by failing to provide Tiahna with Auslan assistance.[28] Upon appeal, Tiahna had not challenged the decision of Lander J that, even had she been able to prove discrimination, she had suffered no compensable loss.[29] This seems unfortunate in view of the suggestion of the Full court of the Federal Court that she 'would be further disadvantaged in years to come, as a result of having been denied that assistance during the claim period'.[30]

V Conclusion

While Tiahna has ultimately been successful in her challenge to Education Queensland policy it has, perhaps, come too late for her to enjoy an education in Queensland. After losing at trial, Tiahna and her family moved to Western Australia where Tiahna could access Auslan assistance.[31] It is interesting to note that, since Tiahna and her family left Queensland, Education Queensland has revamped its policies on the education of students with disabilities.[32] It is also interesting to note, however, that it has recently alarmed one Brisbane Deaf community by proposing cut backs to an experimental Auslan program at Toowong Primary School.[33]

At trial, Lander J remonstrated against what he saw as the politicisation of the complaint process by those intent on changing 'educational institutions' to reflect their 'educational theory':[34] 'In my opinion, it is a misconception to think that legal proceedings of this kind are the appropriate vehicle to introduce changes into the education system and, in particular, into that part of the education system which impacts upon persons with disabilities'.[35] Upon appeal, the Full Court echoed his sentiments stressing that '[t]he resolution of this case is not assisted by the involvement of various interest groups, each with its own agenda, which seek to politicise what is, at bottom, a legal issue'.[36] The Full Court stressed, further, that Tiahna's case is not to be seen as a 'test' case: 'The judgment of this Court does not establish that educational authorities must make provision for Auslan teaching or interpreting for any deaf child who desires it. It does not

establish that Auslan is better than signed English as a method of teaching deaf children. It does not determine that an educational authority necessarily acts unreasonably if it declines to provide Auslan assistance'.[37] Despite these cautions by the courts, however, the strong inference to be drawn from litigation such as that involving Tiahna Hurst, Ben Devlin and Jacob Clarke is that the entrenched attitudes of some educators within some educational institutions will only yield to the influence of different pedagogies when compelled to do so by court order. To this extent, complaints under anti-discrimination legislation have a valuable role to play in the improvement of educational opportunities for people with disabilities.

Endnotes

1. *Hurst v State of Queensland* [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006) ('*Hurst*').
2. Auslan is a language constructed from hand movements, body language and facial expression. Unlike other methods of communication used by people with hearing impairments, it does not simply 'translate' English – it is a discrete language with its own grammatical structures and rules. Further, it exists only in its 'signed' form and cannot be recorded in writing or 'spoken'. Auslan has been recognised by the Commonwealth as an indigenous Australian language and 'the principal means of communication within the Australian Deaf Community': Department of Employment, Education and Training, *Australia's Language: The Language and Literacy Policy* (1991) 20.
3. *Hurst and Devlin v Education Queensland* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) ('*Hurst and Devlin*'). For analysis of the judgment at first instance see Elizabeth Dickson, 'The Instruction of Students with Hearing Impairments in Auslan: Hurst and Devlin v Education Queensland' (2005) 10(1) *Australia and New Zealand Journal of Law and Education* 95.
4. *Hurst* [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006) [134].
5. See Education Queensland, *CS-11: Total Communication for Deaf/Hearing Impaired* (version approved January 2005) <http://education.qld.gov.au/corporate/doem/curristu/cs-11000/cs-11000.html> at 15 December 2005. This policy has been replaced by Education Queensland, *CRP-PR-009: Inclusive Education* <http://education.qld.gov.au/strategic/eppr/curriculum/crppr009/> at 22 August 2006.
6. Education Queensland, *CS-11: Total Communication for Deaf/Hearing Impaired* (version approved January 2005) <http://education.qld.gov.au/corporate/doem/curristu/cs-11000/cs-11000.html> at 15 December 2005.
7. *Hurst and Devlin v Education Queensland* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) [380]-[381].
8. *DDA* s 4.
9. *DDA* s 22.
10. *DDA* s 6.
11. See, for example, *Cocks v State of Queensland* (1994) 1 QADR 43; *Kinsela v Queensland University of Technology* [1997] HREOC No H97/4 (Unreported, Commissioner Atkinson, 27 February 1997).
12. *Hurst and Devlin* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) [5]; *DDA* s 4 paragraphs (a), (e) and (f) of the definition of disability.
13. *Hurst and Devlin* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) [797].
14. Ibid [749], [757], [796].
15. Ibid [797].
16. Ibid [798].
17. Ibid [817].
18. Ibid.
19. Ibid [819].
20. *Hurst* [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006) [134].
21. *Hurst* [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006) [108].

22. Ibid [113].
23. *Catholic Education Office v Clarke* [2004] 138 FCR 121.
24. *Hurst* [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006) [117].
25. *Clarke v Catholic Education Office & Anor* [2003] 202 ALR 340 [49].
26. *Hurst* [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006) [125].
27. Ibid [130].
28. Ibid [136].
29. *Hurst and Devlin* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) [825]-[827].
30. Ibid [130].
31. See Australian Association of the Deaf Inc, 'Auslan in the Queensland Education System' (2005) 14(4) *Outlook* 2.
32. See Education Queensland, *CRP-PR-009: Inclusive Education* <http://education.qld.gov.au/strategic/eppr/curriculum/crppr009/> at 22 August 2006.
33. ABC Television, 'Toowong School', *Stateline (Qld)*, 4 August 2006 <http://www.abc.net.au/stateline/qld/content/2006/s1706789.htm> at 22 August 2006.
34. *Hurst and Devlin* [2005] FCA 405 (Unreported, Lander J, 15 April 2005) [431].
35. Ibid [424].
36. *Hurst* [2006] FCAFC 100 (Unreported, Ryan, Finn and Weinberg JJ, 28 July 2006) [133].
37. Ibid [131].
