

AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

CITATION: FERGUSON AND MCPHAIL [2007] ACTDT 7 (11 SEPTEMBER 2007)

DT07/12

Catchwords: Discrimination on the grounds of disability – advice by medical practitioner that complainant undergo driver assessment.

Discrimination Act 1991, s 20
Human Rights Commission Act 2005

Tribunal: Mr M H Peedom, Deputy President

Date: 11 September 2007

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT07/12

RE: **KAREN FERGUSON**
Complainant

AND: **MARIA MCPHAIL**
Respondent

ORDER

Tribunal : Mr M H Peedom, Deputy President

Date : 11 September 2007

Order :

The Tribunal is satisfied, after a hearing, that the complainant's complaint lacks substance.

THE TRIBUNAL ORDERS, pursuant to section 99(2) of the Discrimination Act 1991, that the complaint be dismissed.

.....
Deputy President

AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL) NO: DT07/12

RE: **KAREN FERGUSON**
Complainant

AND: **MARIA MCPHAIL**
Respondent

EX TEMPORE REASONS FOR DECISION

11 September 2007

Mr M H Peedom, Deputy President

The complainant in this case has alleged that she was discriminated against by the respondent in the area of the provision of services on the ground of a disability from which she suffers.

2. The kind of conduct of which she complains is made unlawful by section 20 of the Discrimination Act 1991 (“the **Discrimination Act**”). It provides:

20 Goods, services and facilities

*It is unlawful for a person (the **provider**) who (whether for payment or not) provides goods or services, or makes facilities available, to discriminate against another person—*

- (a) by refusing to provide those goods or services or make those facilities available to the other person; or*
- (b) in the terms or conditions on which the provider provides those goods or services or makes those facilities available to the other person; or*
- (c) in the way in which the provider provides those goods or services or makes those facilities available to the other person.*

3. The complainant suffers from cerebral palsy. So much is not disputed by the respondent. What is not accepted by the respondent is that her treatment of the complainant was unfavourable or that the complainant’s disability was the reason for the treatment of her by the respondent and of which the complainant complains.

4. In order to substantiate her complaint it is necessary for the complainant to prove, on the balance of probabilities, that she was treated unfavourably by the respondent in one of the ways described in section 20 of the Discrimination Act.

5. The complainant, who represented herself at the hearing of the complaint by the Tribunal, relied upon the documents submitted to and created by the Discrimination Commissioner in the course of considering the complaint pursuant to the provisions of the Human Rights Commission Act 2005 and a short report prepared by her which was received by the Tribunal on 24 August 2007. The respondent, who represented herself, did not provide any evidence to the Tribunal. The documents forwarded to the Tribunal by the Discrimination

Commissioner did, however, include a letter provided by the respondent to the Discrimination Commissioner in response to the complaint made against her.

6. The material relied upon by the complainant does not make the facts of the case clear. Doing the best that I can with that material, the circumstances that surround the complaint are as follows.

7. The complainant was seriously injured in an accident when she was a young child. This resulted in cerebral palsy. Despite her disability, she has demonstrated remarkable courage and determination to overcome it. She has competed successfully in a number of sporting disciplines at State, national and international levels, principally as a swimmer and cyclist. She has held a licence to drive a motor vehicle although the evidence before me does not say when it was first issued.

8. She was treated for her disability by a number of doctors including Dr C Andrews, a consultant neurologist. He reported in August 1992 that she had a left hemiparesis plus other problems. She had seen him about obtaining a driver's licence. He said that there was a general lack of concentration and apart from her motor difficulties, as far as he could gather, she was "fairly unsafe to drive". He said that his approval of her driving was conditional upon a satisfactory driving report. She had told him that she thought she was being discriminated against and was going back to driving school. He said that he did not like her chances and he considered that she should be actively discouraged from driving.

9. The complainant underwent a practical driving assessment on 21 October 1992. She was assessed as passing the test despite it being recorded that she had failed to "turn into correct lane", lacked anticipation and lacked observation. The report recorded that she was to be issued with an automatic driver's licence; that power steering was to be fitted and that she was not to convert to a higher class.

10. The complainant referred in documents provided by her to the Discrimination Commissioner to her involvement in a motor vehicle accident in New Zealand following which she did not drive for a period of four years. She had later hurt her neck whilst reversing a car. This had caused her to lose her confidence in driving. The time of these events was not specified. In September 2006 her general practitioner had suggested she have some driving lessons before driving again. She had driven for ten years, at some stage, with a driving school as she did not have a car to get confidence because everyone had told her she should drive with someone.

11. The specific complaint made by the complainant appears to be that, following a consultation with the respondent in October 2006, the respondent had recommended to the Road Transport Authority ("RTA") that the complainant's driving ability should be assessed. It is this alleged conduct of the respondent which the complainant contends constitutes discrimination under section 20 of the Discrimination Act.

12. Documents provided by the complainant to the RTA show that it received a recommendation from the respondent that the complainant be referred to the Assessment and Rehabilitation Service. It appears that in consequence of that recommendation the complainant was required by the RTA to undergo tests or assessment of her driving ability or knowledge of safe driving practices or road law. She was referred to the Driver Assessment and Rehabilitation Service at Canberra Hospital for assessment. She was told that she would

be advised when an appointment had been made. In response to the complainant's request for internal review by the RTA of the decision that she undertake the assessment, she was informed that the respondent had indicated that the complainant had a left-sided weakness and tremor and that she considered it appropriate that the complainant be assessed by an occupational therapist.

13. In a letter to the Discrimination Commissioner responding to the complaint, the respondent said that the complainant had been a patient of hers since 19 December 2002 and she had seen her on many occasions since that time. She had seen the complainant in October 2006 about a knee injury. The complainant had asked her to fill in a taxi voucher form. The respondent had declined because she considered that the complainant did not meet the criterion. The complainant had said that she would just drive. The respondent enquired whether the complainant had a driver's licence. The complainant stated that she had but that she had not driven for a few years. The respondent said that because the complainant had some trouble with her movements and had a spastic paresis of the left side with a mild weakness, she advised the complainant that a driving assessment might be useful and that the occupational therapists at Canberra Hospital, who did many driving assessments, would be the place to go. They could assess her to see if any modifications to a car would help with her driving and she (the respondent) would talk to them to set it up. When the respondent had spoken to them, they had asked her to send a driver licence medical form so they could set up an evaluation and she had done that.

14. The respondent also said that the complainant's neurologist had advised her in October 2006 that he felt that an occupational therapy assessment of the complainant would be useful and if she could pass the test with the occupational therapist she would be fit to drive.

15. The respondent stated that the reason she requested a driving assessment for the complainant was to help her and to ensure her safety. The test would have been to ascertain if the complainant needed aids or modifications to her car to help her drive at first and then, after further discussion with her, to assess her driving ability to ensure that she was not at risk of injury.

16. There is no suggestion that the respondent refused to provide a service which, in the circumstances of this case, is a medical service so as to give rise to consideration of whether section 20(a) of the Discrimination Act might apply. Nor is there a suggestion that section 20(b) is relevant.

17. The question to be resolved by the Tribunal is whether the respondent treated the complainant unfavourably in the way in which she provided a medical service to her because of her disability, contrary to section 20(c) of the Discrimination Act.

18. The evidence does not make it clear that the conduct of the respondent of which the complainant complains involved the provision of a medical service. It is unnecessary, however, for me to resolve that issue for reasons which follow.

19. Although the respondent's letter to the Discrimination Commissioner sets out the explanation of the course she proposed to take in arranging a driver assessment for the complainant, it does not, in terms, state whether the complainant agreed to her taking that course. Should the complainant have not agreed to that course there could arguably be a basis for finding that the complainant was treated unfavourably.

20. The inference to be drawn from the letter, however, is that there was no opposition by the complainant to the course proposed by the respondent and I note that no disagreement to the respondent's explanation has been expressed by the complainant in any material before the Tribunal since she was provided with a copy of that explanation by the Discrimination Commissioner in March 2007.

21. In a later document sent by the complainant to the Discrimination Commissioner she makes the further complaint that the respondent telephoned the motor registry. That allegation was not the subject of the complaint to the Discrimination Commissioner which has been referred to the Tribunal and, in any event, no evidence was provided in support of it. I do not need to comment on it further.

22. On the material before me there is no basis for a conclusion that the complainant has proved that, on the balance of probabilities, she was treated unfavourably. The material that she provided to the Discrimination Commissioner does not support a conclusion that there was no issue to be addressed in relation to her driving, nor does it support a conclusion that the course of action advised and taken by the respondent was inappropriate. On the contrary, the evidence of the concerns of doctors and other persons about the complainant's ability to drive safely suggests that the action taken may well have been beneficial to the complainant by exploring the means of enabling her to continue driving, and thereby maintain her independence, without the risk of injury to herself and members of the public.

23. I therefore conclude that it has not been established that the complainant was treated unfavourably.

24. Further, there is no basis for the Tribunal to conclude otherwise than that the reason for the respondent's treatment of the complainant was that given by her, that is, that what she did was done to assist the complainant drive safely. Accordingly, I do not find that any treatment of the complainant by the respondent was because of the complainant's disability.

25. The complaint should therefore be dismissed as not substantiated.

**AUSTRALIAN CAPITAL TERRITORY
DISCRIMINATION TRIBUNAL****APPEARANCE DETAILS**

To be completed by Member's Staff

FILE NO: DT07/12**COMPLAINANT:** KAREN FERGUSON
RESPONDENT: MARIA MCPHAIL**COUNSEL APPEARING:** **COMPLAINANT:**
RESPONDENT:**SOLICITORS:** **COMPLAINANT:**
RESPONDENT:**OTHER:** **COMPLAINANT:** SELF
RESPONDENT: SELF**TRIBUNAL MEMBER:** MR M H PEEDOM, DEPUTY PRESIDENT**DATE OF HEARING:** 11 SEPTEMBER 2007 **PLACE:** CANBERRA**DATE OF DECISION:** 11 SEPTEMBER 2007 **PLACE:** CANBERRA**COMMENT:** ORAL DECISION GIVEN
