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## Educational Institutions and the prohibition on disability discrimination

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# EDUCATIONAL INSTITUTIONS AND THE PROHIBITION ON DISABILITY DISCRIMINATION

By Greg Walsh



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A claim of discrimination by a medical student with disabilities was considered by the Administrative and Equal Opportunity Division of the NSW Civil and Administrative Tribunal in *BKY v The University of Newcastle* [2014] NSWCATAD 39. The Tribunal held that the university's decision to reject the student's application for an extension on the maximum enrolment period permitted under university regulations so she could complete her medical degree constituted discrimination under the *Anti-Discrimination Act 1977* (NSW). The case emphasises the importance of educational institutions taking into account the intellectual, emotional and social challenges persons with disabilities may have with their academic work, and would be of particular interest to anti-discrimination and employment law solicitors and solicitors advising clients in the educational sector.

## Facts

In 2004, the applicant commenced a five-year Bachelor of Medicine degree at the University of Newcastle. Eight years after admission the applicant had completed the equivalent of three and a half years of the degree due to a combination of failing, withdrawing from courses and suspending her enrolment. Under university regulations, if a student did not complete a medical degree within eight years they were required to seek an extension of time from the Dean of Medicine to remain in the course. The applicant submitted an application for an extension, but it was declined by the Dean. The applicant lodged a complaint with the Anti-Discrimination Board of NSW claiming the university had discriminated against her on the grounds of disability as, during the period of her enrolment, she was being treated for Bipolar II Disorder, Borderline Personality Disorder, and severe psychosocial stressors, and that she had symptoms of these conditions during the course of her study. As the complaint could not be resolved at a conciliation session, it was referred to the former Administrative Decisions Tribunal for determination.

## Snapshot

- *BKY v The University of Newcastle* [2014] NSWCATAD 39 considered a claim of direct discrimination under s 49B(1) of the *Anti-Discrimination Act*
- The Tribunal (NCAT) determined that the applicant (student) was treated less favourably by the university on the ground of her psychiatric disability. The Tribunal emphasised it was not its role to determine the applicant's fitness to practise medicine if she were to complete her degree, nor was it the role of the university.
- The case emphasises the importance of educational institutions taking into account the intellectual, emotional and social challenges persons with disabilities may have with their academic work

## Evidence

The Dean gave evidence to the tribunal in support of his decision, explaining that he did not consider the applicant would be able to complete the medical degree if an extension were granted. He had concerns about her high levels of anxiety and considered that her continued enrolment could be detrimental to her health. The Dean also relied on the applicant's poor academic history, the currency of her medical knowledge due to the length of her enrolment, and general concerns about her ability to practise safely as a doctor.

The Tribunal also heard evidence from the applicant's treating psychiatrist who informed the Tribunal that the applicant's disorder manifested itself in anxiety, especially performance anxiety about examinations, and that this interfered with her ability to study and caused her to miss examinations. The psychiatrist gave evidence that with continued medical treatment the applicant was capable of completing the medical degree if an

extension of 18 months was granted. The psychiatrist considered that the applicant's medical condition would not prevent her from working effectively as a medical practitioner, and also emphasised that the Medical Council is the relevant expert body to assess her requisite fitness to practise. On the concerns about currency of medical knowledge, the psychiatrist, relying on her experience working on the Medical Council, advised that this could be addressed through remedial teaching and supervision.

## Direct discrimination

The Tribunal held that the applicant's psychiatric conditions satisfied one of the statutory definitions of disability under s 4(1)(e) of the *Anti-Discrimination Act 1977* (the Act) being "a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour". The applicant claimed that the university's conduct amounted to direct discrimination under s 49B(1)(a) as she was treated less favourably than a person without her disability would have been treated by the university in circumstances that were not materially different. Relying on *Purvis v New South Wales* (2003) 217 CLR 92, the Tribunal stated that the issues of whether the applicant received differential treatment compared with someone without a disability, and whether the differential treatment was on the ground of disability, needed to be considered separately.

The applicant provided evidence to the Tribunal of another medical student who had failed courses and had requested a 12 month extension to complete the degree. The university decided that his academic performance was due to poor study habits, the difficulty of adjusting to living away from home, and a need to care for his father who had health problems and granted the student an extension. As there was no evidence that this student had a disability, he was considered to be an appropriate comparator as his circumstances were not materially different from the applicant's.

The Tribunal concluded that, in comparison to this student, the applicant was treated less favourably.

The Tribunal emphasised that its role was to determine if the applicant was treated less favourably on the ground of her disability, and that it was not its role to determine if the applicant would be fit to practise as a medical practitioner if she were to complete her degree. The Tribunal reviewed the Dean's evidence on why he had made the decision to reject the extension application, noting he was concerned about the applicant's ability to practise due to her psychiatric conditions, that she would not be able to complete the degree within a reasonable time, and that continuing in the degree might be detrimental to her health. On the basis of the concerns expressed by the Dean, the tribunal held there was a probable connection between the decision to reject the extension application and the applicant's disability. The Dean was found to have failed to comply with s 49B(1)(a) and that under s 53 the university was vicariously liable for the Dean's conduct.

As the university had engaged in direct discrimination, the tribunal considered there was no need to consider whether

the university had indirectly discriminated against the applicant by requiring her to comply with a requirement that a substantially higher proportion of persons who did not have her disability were able to comply.

#### Order

The Tribunal ordered the Dean to grant the applicant an 18 month extension to provide her with an opportunity to complete her medical degree. The orders originally sought by the applicant were aimed at requiring the university to grant this extension and did not include a request for compensation. At the conclusion of the evidence the applicant filed her submissions, which included an application for compensation at the discretion of the Tribunal. The university claimed it was not in a position to file submissions in relation to a purported amendment of a claim after the hearing had concluded and sought to have the matter relisted for directions. Before the matter returned to the Tribunal, the applicant indicated that she would not be pressing the matter. As a result, the Tribunal did not consider the appropriateness of awarding damages to the applicant. **LSJ**

**The applicant claimed that the university's conduct amounted to direct discrimination under s 49B(1)(a) as she was treated less favourably than a person without her disability would have been treated by the university in circumstances that were not materially different.**



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