

K vs CSPL

An employment minefield

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Outline of talk

- ◆ Overview of story
- ◆ Relevant legislation and case law
- ◆ Details of the complaint
- ◆ Relevant issues for each party
- ◆ Result of the complaint



Overview

- ◆ Complaint about CSPL and labour hire company (LHC) to ADB
 - ◆ Discrimination in employment on the basis of disability (LHC)
 - ◆ Aiding and abetting a discriminatory act (CSPL)
 - ◆ Took 2 ½ years to mediate a settlement
 - ADB – ADT; 4 mediation conferences
 - ◆ Win-win for CSPL, LHC and K (complainant)



The Story

- K employed from 1985 to 1997 by one mine
- Left industry in 1997; re-entry in 2000
- Pre-employment screening at CSPL
 - ◆ Unfit/unsafe by virtue of hearing loss
- LHC did not employ K
- Oct 2000; K lodged complaint with ADB



Applicable Law – Legislation

- ◆ Coal Industry Act 1946 (C'th), Coal Industry Act 1946 (NSW) and 2001 (NSW)
- ◆ Occupational Health and Safety Act 2000 (NSW)
- ◆ Anti Discrimination Act 1977 (NSW)



Coal Industry Acts

◆ 1946 Acts

- CSPL (then JCB) has power to
 - ◆ “provide occupational health and rehabilitation services for workers engaged in the coal industry including providing preventive medical services, monitoring workers’ health...”

◆ 2000 Act

- ◆ Essentially identical provision



OHS Act 2000 (NSW)

- ◆ Absolute duty of care owed to employees contained in S8
 - “An employer must ensure the health, safety and welfare at work of all the employees of the employer”



Anti Discrimination Act (NSW)

◆ Outlaws discrimination on the basis of disability,

■ S49

◆ “It is unlawful for an employer to discriminate... on the grounds of disability ...in determining who should be offered employment”

■ S52

◆ Makes it unlawful for a person to aid and abet a discriminatory act by another person



Anti Discrimination Act ctd

◆ Defence against discriminatory act

■ S54

- ◆ “Nothing in this Act renders unlawful anything done by a person if it was necessary for the person to do it in order to comply with a requirement of any other Act”



Applicable Law – Case Law

◆ OHS Act – Inherent Requirement

- X vs Commonwealth [1999] HCA 63 2nd December 1999
 - ◆ Appeal from HREOC and Fed Court
 - ◆ Defence forces
 - ◆ HIV-AIDS
 - ◆ Commonwealth discriminated



Applicable Law – Case Law

◆ OHS Act

- French v Sydney Turf Club
 - ◆ Bar attendant
 - ◆ Back injury
 - ◆ STC lawfully discriminated



Applicable Law – Case Law ctd

◆ AD Act

- Sloey vs State Transit Authority 1998
NSWEOT 153 of 1996
 - ◆ Bus driver
 - ◆ Returning to duty following bypass surgery
 - ◆ STA unlawfully discriminated



K

◆ K's hearing loss

- In 1985 aged 36, had 10.4% binaural loss
- Over twelve years, hearing fell to 35.2%
- In 2000, hearing loss was 41.2%
- K's hearing loss is congenital; therefore likely to continue to deteriorate



K

◆ Employer arrangements

- During 1985 – 1997, constantly employed by same mine
- In 2000, sought employment with LHC
 - ◆ LHC would place K wherever it had a job
 - ◆ LHC sent K to CSPL for a fitness assessment



The Medical

◆ Pre-employment

- Fitness for duty
- Inherent requirements of job
 - ◆ Includes ability to operate safely

◆ Different to health surveillance



Issues

◆ K

- K could physically do the job
 - ◆ Analogous to X
- Reasonable modification
 - ◆ LHC had no control over duties of K and no ability to enforce mine changes to accommodate K



Issues ctd

◆ Labour Hire Co

- Ability to select based on safety
- Reliance on expert opinion



Issues ctd

◆ CSPL

- Ability to pass opinion
- Core business of CS Health under threat
- Impact upon CMI



Result

◆ Innovative

- ◆ In exchange for dropping his complaint, K was invited to become involved in research into practical hearing tests.

◆ Useful

- All parties benefited
 - ◆ K – fee for consultancy
 - ◆ LHC & CSPL – no precedent; no legals
 - ◆ Industry – new procedure for hearing tests



More Information

- Paper is on <http://www.coalservices.com.au>
- If you want to see transcripts of the quoted cases or other similar ones, look on <http://www.austlii.edu.au> or <http://caselaw.lawlink.nsw.gov.au>
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