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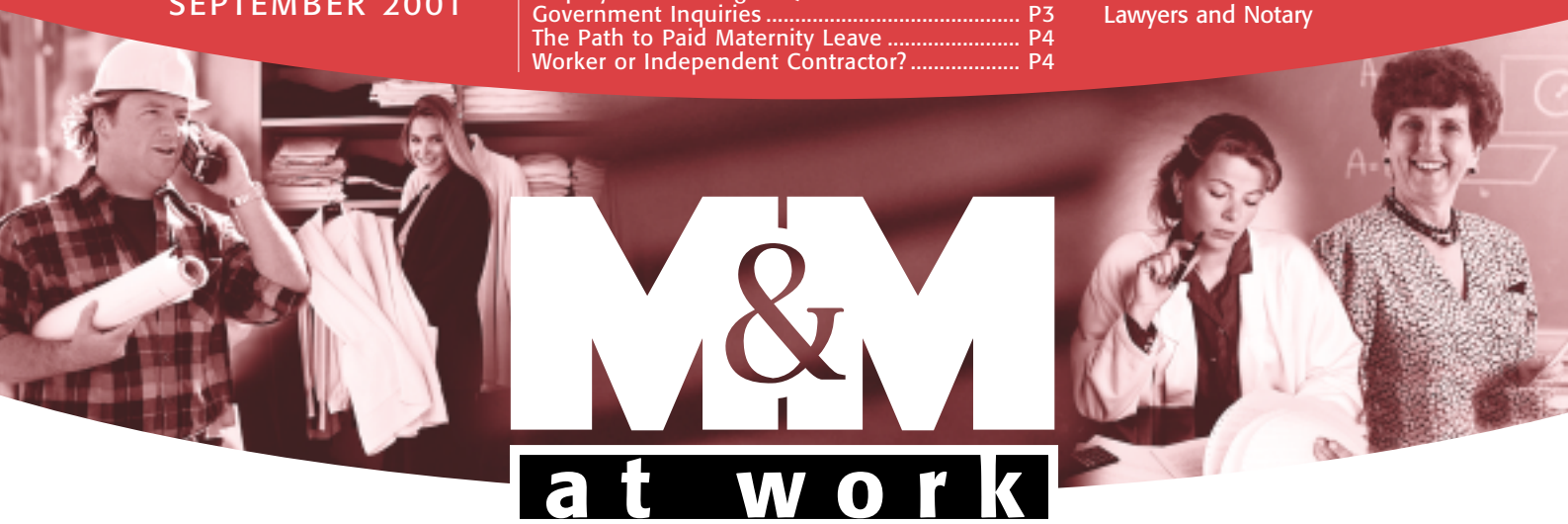

M&M at work

Risky Business -

Impairment Discrimination Vs Occupational Health and Safety

by Sam Kane

It is now widely understood that it is unlawful to discriminate against an individual on the basis of a disability either at work or in offering employment. Likewise, employers are aware that they have a duty to protect the health and safety of employees. Difficulties occur however when workplace health and safety concerns arise as a result of an impairment. An employer is faced with competing requirements: compliance with anti-discrimination laws or workplace health and safety laws. The issue can have wide ranging implications and be a source of confusion for employers and employees alike.

Whilst it is impossible to canvas all of these issues, this article attempts to outline some legal principles and important considerations to be taken into account in determining the future employment of an impaired worker or job applicant.

The Anti-Discrimination Act 1991 (Qld) (ADAQ)

In Queensland the ADAQ prohibits discrimination on the basis of "impairment". The definition of impairment is quite broad and includes most illnesses (mental or physical), injuries or medical conditions.

The Act prohibits discrimination in the "pre-work" area (eg. failing to offer work) and in the "work" area (eg. denying access to promotion, dismissal, or treating the employee in any way unfavourably). Put simply, any less favourable treatment of a worker or prospective worker on the basis of a medical condition suffered by them is discrimination on the basis of impairment. The question then arises as to whether the exemptions from discrimination provided under the Act apply. These exemptions include:

- An employer may impose "genuine occupational requirements" for a position;
- if the circumstances of the impairment would impose "unjustifiable hardship" on the employer (this depends on all the relevant circumstances of the case, including the nature of the impairment, the nature of the work and the resources of the employer);
- An employer may do an act that is reasonably necessary to protect the health and safety of people at a place of work.

Whilst the responsibility is on an applicant to prove that the employer has discriminated, it is for the employer to raise an exemption and to prove that it applies. The decision of the Anti-Discrimination Tribunal Queensland of *Cambey v Adam, Hadwen & Queensland Rail* (27 June 2000) provides a useful illustration of the considerations which apply.

Queensland Rail Decision

In 1997 Queensland Rail (QR) advertised vacancies for the position of ticket inspector. Mr Cambey was short-listed and required to attend QR for a medical assessment. Mr Cambey suffered from a condition to his knee. He was examined by an occupational health nurse employed by QR and referred to a Railway Medical Officer, Dr H. After examining Mr Cambey and his hospital medical records, Dr H discussed Mr Cambey's condition with QR's Chief Medical Officer, Dr A. Both doctors shared the opinion that Mr Cambey was unfit for the duties of ticket inspector. Dr H wrote to QR advising that in his opinion Mr Cambey was unfit for the duties of ticket inspector and that, "*...the risk of injury to his knees when restraining individuals or when jumping from carriages and running over unstable, uneven ground (rail lines and ballast) would be unacceptable.*"

QR accepted Dr H's assessment of Mr Cambey's unfitness for the position, and he was consequently unsuccessful in his application.

Mr Cambey lodged a complaint against QR alleging discrimination on the basis of impairment.

At the hearing before the Tribunal, considerable evidence was tendered by QR relating to the duties of ticket inspectors, the hazards of those duties and the risk of personal injury occurring to ticket inspectors, co-workers or members of the public. The evidence included:

- photographs and video tapes depicting a platform and track environment;
- evidence from the Manager responsible for ticket inspectors relating to the duties commonly carried out by ticket inspectors, including running over uneven tracks and down train carriages to catch fare evaders, jumping off platforms onto tracks and using force to remove persons from the railway;
- material from the manager of Workplace Health and Safety within QR detailing the injuries to ticket inspectors at QR over a four year period, including knee and ankle injuries;
- QR documents setting out the work environment, tasks, physical demands and other relevant matters to the performance of ticket inspector duties, prepared by an occupational therapist; and
- A report by an occupational therapist outlining her personal observations of ticket inspectors over several weeks.

Medical evidence was also lead as to whether, on the basis of the physical demands of the position, Mr Cambey was medically fit to perform the duties of the position. All medical witnesses shared

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Risky Business
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the opinion that there was a very high likelihood that Mr Cambey would have further injuries to his knees should he take on the position.

The Tribunal found that QR failed to proceed any further with Mr Cambey's application for employment as a result of the opinions received from the doctors and because of his knee condition and that QR had therefore discriminated against him.

The Tribunal then considered whether any of the exemptions applied including whether a "genuine occupational requirement" had been imposed. The Tribunal commented that the evidence produced by QR showed that ticket inspectors were frequently required to work in hazardous situations in which the risk of personal injury is always present and that, before employing Mr Cambey, QR was bound to ensure that he was physically fit to perform the physical activity required of the position without an unacceptable risk of personal injury to himself or others present at the workplace.

The Tribunal accepted the medical evidence and found that Mr Cambey was not fit to perform the necessary physical activities inherent in the duties of ticket inspector and that QR had therefore imposed a genuine occupational requirement for the position.

Whilst this case involved a physical condition or injury, similar considerations will apply in cases concerning mental illness (including stress related medical conditions). Further the recent decision of *Marsden v Coffs Harbour & District Ex-Servicemen & Women's Memorial Club* (15 November 2000), decided under the *Federal Disability Discrimination Act 1992*, found that drug or alcohol addiction could constitute a disability within the meaning of the act.

Conclusion

Whilst it is prudent and necessary that an employer takes all reasonable steps to protect the health and safety of those at work, these decisions send a clear message that, before an employer may be justified in refusing to employ or terminating employment on the basis of a person's impairment, it must be certain that it:

- has obtained medical evidence clarifying the nature and existence of the medical condition; and
- is able to show that it has acted reasonably in considering the duties of the position and whether that person is reasonably capable of performing the genuine occupational requirements of the position, whether with or without special services or facilities.

An employer who acts without following such a process may face significant difficulties in successfully arguing that an exemption under the ADAQ applies.

References - don't gil

By Patrick Mullins

Employers need to be wary of providing references for staff or former staff. In the past such references were given, without the slightest concern that there might be any consequences. The potential for serious consequences is now very real.

In staff selection, reference checking is now crucial. Much reliance is placed on written references, but it is now standard (or it should be) for referees to be personally contacted and for oral comments to be sought out to confirm the contents of written references.

Prospective employers clearly rely on the written and oral comments of referees, and there is the potential for legal redress against referees where they negligently or fraudulently provide glowing references which are demonstrably incorrect.

Those providing references should therefore be careful to include only statements which can be backed up by documented evidence. Where there are records of performance appraisals it may be useful to refer to these and what they demonstrate about the staff member's competence or performance. Where a weakness or area for improvement is highlighted in those records, it may be prudent to refer to that issue in a written reference.

A comment in a reference that the referee is willing to provide further comment on request is not only helpful, but a sign of bona fides. The absence of such a written comment should ordinarily be a cause for suspicion or concern. The refusal to further discuss a written reference should set alarm bells well and truly ringing.

In some cases of dismissal from employment, the supply of a written reference can be a negotiated term of "departure". Often, the term of the written reference can be the subject of protracted negotiations. On other occasions, the terms of "departure" may include a provision that the former employer will not "denigrate" the former employee. Further, the terms of "departure" can on occasions provide specifics as to how enquiries from a prospective employer are to be handled and what may and may not be said.

For these reasons a prospective employer would be highly suspicious of a refusal of a referee to provide oral back up comments or a written reference. Where answers are given to follow up questions in a stilted way, in a manner that appears uncommunicative or if answers are delivered in a "parrot" fashion, a

Employee Screening in

By Sam Kane

The requirement to screen paid employees in "child related employment" in Queensland commenced on 1 May 2001 with the introduction of the *Commission for Children and Young People Act 2000 (Qld)*. The requirement to screen certain volunteers will commence on 1 May 2002. Compliance with the screening requirements are of particular importance for schools and sporting clubs. Whilst the legislative requirements are quite detailed and have been outlined in previous articles, we have set out below some practical guidelines for employers in child related employment to ensure compliance with the Act:

1. Consider all existing employees (and from 1 May 2002 volunteers).

- is there knowledge of or a reasonable suspicion of a criminal history which would make them unsuitable for child related employment?
- if no - there is no need or basis for screening check.
- if yes - the employer must complete the relevant form (Commission for Children and Young People Form ES 002) (note - the employee's consent is not required on this form) and lodge together with filing fee ($40 for paid employees; volunteers free) with:

Employment Screening Services
Commission for Children and Young People
Level 6
15 Adelaide Street
Brisbane Qld 4000

2. Consider potential new employees (and after 1 May 2002 volunteers) before they commence employment.

- the employer must enquire as to whether the new employee already possesses a "suitability notice", ie either a "suitable notice" or a "not suitable notice" for child related employment.
- if they possess a "suitable notice" the employer may proceed to employ (NB a "suitable notice" is current for a period of 2 years from the date of issue and is transferrable across other child

d the lily or sink the boot

prospective employer needs to be on his or her guard.

Another area of exposure for employers in giving references is the potential for proceedings for defamation by a former employee. A former employee may have a cause of action in defamation if defamatory material is published by a former employer to a prospective employer or to an employment agency, and where that matter cannot be shown to be true and in the public benefit.

This would more usually apply when an oral reference is given, which means that when an employer fields a telephone enquiry from a prospective employer or from an employment agency, care must be given about the answers provided.

A prudent employer should have a policy or set of procedures by which these enquiries are handled. It may be that a designated person within management should deal with all enquiries of this nature. For larger organisations the HR Manager would be the appropriate person but for a smaller organisation it may be that a senior management person should be designated to handle all such enquiries. It may be preferable to ask for questions to be put in writing so that responses likewise can be reduced to writing and carefully checked before they are provided. The provision of a written response allows the employer to choose not to answer certain questions which might lead to some exposure.

Defamation actions are costly and relatively unusual in this context, but it is appropriate to take careful steps to avoid being exposed to such an action. Taking the above steps in developing a reference policy, as well as keeping records so that you can support any comments made about the performance of a particular former employee, such as performance appraisals or documented records of discussions and issues, is invaluable.

Employers certainly value candid comments made by former employers but in giving such references employers need to be extremely careful to ensure that statements are accurate, and that the lily is not gilded, nor the boot sunk.

Qld: Guidelines for Employers

related employment).

- if they possess a "not suitable notice" the employer must not employ. Penalties will apply to both the employer and employee.
- if the potential employee does not possess either a "suitable notice" or "not suitable notice" the employer must arrange for the employer and employee to complete the necessary application form (Commission for Children and Young People Form ES 001) in order to obtain a suitability notice. This form requires the potential employee's written consent.
- if the potential employee does not consent or withdraws consent, the employer must not proceed to employ the candidate.
- the employer must then lodge the application form, together with the filing fee with the Commission for Children and Young People (see details above).
- if a "suitable notice" is issued by the Commission, the employer may proceed to employ (note the suitability notice is current for a period of 2 years).
- if a "not suitable notice" is issued the employer must not proceed to employ the candidate.

3. The employer should monitor and review all "suitable notices" before the date of expiry to arrange for renewal.

It is important to note that, whilst the above guidelines will apply to non-teaching staff employed within schools, they do not apply to employment of teachers. When employing teaching staff a check with the Board of Teacher Registration is essential. Legislation requires the reporting to the Board by the employing authority where a teacher has been dismissed for any sexual impropriety or where a teacher has resigned in such circumstances.

The reporting requirement extends to a teacher who leaves employment within 6 months after the investigation of an allegation of sexual impropriety.

These requirements have been developed for the protection of children in Queensland. It is vital that, for the protection of children and employers, they are strictly complied with.

Government Inquiries

by Elizabeth Sheehan

Workplace Bullying Taskforce

Workplace bullying is a pattern of abuse of workers or co-workers which can range from subtle actions such as being assigned meaningless tasks to more obvious conduct such as yelling, screaming and abuse by employers or fellow employees.

The Queensland Government has appointed Australia's first taskforce to examine and develop strategies to help prevent bullying in the Workplace. The taskforce comprises employer, community and union representatives.

The terms of reference for the taskforce include to:

- examine the extent and characteristics of bullying;
- identify workers at risk of bullying;
- develop strategies to increase awareness; and
- investigate possible methods of protecting employees under current and/or new legislation.

The taskforce is required to report back to the Minister for Industrial Relations by the end of the year.

Pay Equity Inquiry Findings

In our March issue, we discussed the Pay Equity Inquiry which was being undertaken by the Queensland Industrial Relations Commission.

The Inquiry considered the extent of pay inequity in Queensland, the adequacy of the current Queensland legislation for achieving pay equity and was also required to draft a pay equity principle which might be adopted in Queensland. The findings were released on 30 March 2001.

The Inquiry concluded that pay inequity for women exists and persists in Queensland, including:

- lack of career path;
- lack of or inadequate recognition of qualifications; and
- a large proportion of casual employees.

A draft "Equal Remuneration Principle" was developed. If approved, it must be applied when the Commission makes or amends awards, makes orders under the Equal Remuneration part of the Act, arbitrates industrial disputes about equal remuneration or values or assesses the work of employees in "female" occupations.

The draft principle requires the Commission, in assessing the value of work, to examine the nature of work, skill and responsibility required and conditions under which the work is performed, as well as other relevant work factors.

Baby Steps: The path to paid Maternity leave

by Elizabeth Sheehan and Sam Kane

Much controversy has been created by the recent landmark decision of the Australian Catholic University agreement to offer staff 12 months paid maternity leave. This will consist of 12 weeks leave with full pay with the balance of the 12 months paid at 60% of normal salary. Interestingly, the offer by the University was at its own instigation rather than a claim made by employees or the union.

The minimum maternity leave standard of the International Labour Organisation (ILO) is 14 weeks paid maternity leave.

The current legal minimum requirements provided for in industrial instruments and legislation across Australia, provide for 12 months unpaid maternity leave, although some employees, particularly in the public sector, have negotiated short periods of paid maternity leave in addition to their unpaid leave entitlements.

Currently, Australia remains one of the only three industrialised countries (including New Zealand and the USA) not to provide paid maternity leave.

There has for some time been concerns raised by unions to bring Australia in line with the minimum ILO standards of 14 weeks paid maternity leave. Whilst the decision of the Australian Catholic University is not a binding decision of any court and is only an agreement reached by negotiation between the University and its staff, the agreement

reached has renewed efforts by trade unions and the ACTU to push for Australia to implement paid maternity leave.

Whilst unions and the Human Rights and Equal Opportunity commission have praised the decision, employer groups are concerned that the agreement has set an unachievable precedent which other employers, particularly those in small business will not be able to follow. However, the fact that minimum ILO standards for paid maternity leave are currently not being met in Australia, is an indicator that some form of paid maternity leave is likely to be introduced in the future within Australia.

Worker or Independent Contractor?

by Cameron Seymour and Alexandria Meyers

A high court decision on 9 August put to the test the definition of a 'worker' as opposed to an 'independent contractor'.

In *Hollis v Vabu*, the court ruled in favour of a pedestrian knocked over by a Sydney bicycle courier, ordering the courier firm to pay damages of more than $176,000.

The Court found Vabu, trading as Crisis Couriers, was vicariously liable for the negligent actions of its couriers. Vabu had argued unsuccessfully that its couriers were independent contractors, and they were therefore not responsible for their actions.

In deciding that the courier was a worker and not an independent contractor, the court applied the "control test".

The control test determines whether a person is a worker by the extent the employer has the right to control and direct the individual who performs the work. That is, can the employer not only control what work will be performed by its worker, but how it will be performed?

It does not matter whether the employer actually exercises that power. What is important, is whether the employer has the right to do so.

A person is not likely to be considered a worker if the person carrying out the work agrees to produce a certain result, but does not agree to the employer exercising control over how the result is to be produced.

In the case of *Hollis v Vabu*, the High Court held that the bicycle courier was a worker having regard to the following facts:

- the bicycle courier was not providing skilled labour which required special qualifications;
- the bicycle courier was instructed to wear a uniform as a representative of the company;
- the employer had knowledge of the dangers to pedestrians presented by bicycle couriers and was responsible for the deterrence of that danger;
- the bicycle courier received a fixed rate of remuneration (although there were no entitlements for annual leave or sick leave and the cost of insurance was deducted from take home pay);
- the bicycle courier had limited scope for the pursuit of any real business enterprise;
- the bicycle courier had little control over the manner of performing the work; and
- there was considerable scope for the employer to exercise control.

While the bicycle courier was responsible for providing his bicycle and meeting the costs of repairs and maintenance, the court found the ownership and provision of the bicycle did not exclude the courier from being a "worker".

Editorial

By Patrick Mullins

Increasingly legislation is impacting on the employment relationship as it is impacting on more areas of Australian life. We deal in this issue with legislative developments that impact on the employment relationship, in particular the screening provisions contained in the *Commission for Children and Young People Act 2000* which in respect of child related employment commenced on 1 May 2001. Samantha Kane deals with the difficult collision of statutes in relation to impairment discrimination with the requirements of the *Anti-Discrimination Act 1991* on the one hand and of the *Work Place Health and Safety Act 1995* on the other.

It would seem that the pattern for the future is clear. More and more legislation will impact upon the employment relationship. This must be of concern to all of us because an employment contract is a special type of contract. It is very much a personal style of contract.

Traditionally the Courts would never intervene in the employment relationship by way of an injunction or specific performance which might have the effect of forcing unwilling parties to work with each other. That reluctance was a very common sense reluctance. The employment relationship only works when the parties are willing and where there is the appropriate level of trust and confidence on both sides. That trust and confidence cannot be engendered by legislative sanction. The more legislation imposes conditions, restrictions and requirements upon the basic bargain between an employer and an employee, the more fragile and artificial that relationship becomes. Trust and confidence cannot be built on relationships that are fragile and artificial.

Mullins & Mullins
LAWYERS AND NOTARY

Level 22 Central Plaza One
GPO Box 2026, Brisbane Q 4001
345 Queen Street, Brisbane Q 4000
Phone: (07) 3229 2955
Fax: (07) 3229 8075
Email: skane@mullins-mullins.com.au