

DISCRIMINATION

Hinton v Alpha Westmead Private Hospital [2016] FCAFC 107

Introduction

This case concerned an appeal heard by the Full Court of the Federal Court of a decision by the primary judge in the Federal Circuit Court to dismiss an application for associated discrimination under the *Disability Discrimination Act 1992* (Cth) (the **DD Act**) as an abuse of process on the basis that the Appellant had no reasonable prospect of success.

Background

Application in the Federal Circuit Court

Following the termination of a complaint against Alpha Westmead Private Hospital (**Alpha Westmead**) to the Australian Human Rights Commission in September 2015, Kate Joynton-Smith Hinton (**Mrs Hinton**) filed an application for unlawful discrimination as an associate of a person with a disability, in contravention of the DD Act, in the Federal Court under section 46PO of the *Australian Human Rights Commission Act 1986* (Cth).

Mrs Hinton had engaged the services of Alpha Westmead for the scheduled birth of her child at the hospital; however, Mrs Hinton alleged that Alpha Westmead had refused to provide sign language interpreting services to her husband, who was deaf, during the birth. Accordingly, Mrs Hinton gave birth in another hospital, which provided interpreter services.

At the first directions hearing on 11 February 2016 the primary judge set the matter down for a hearing later that day to determine whether the application should be dismissed on the basis that it had no reasonable prospect of success and was an abuse of process. In the primary judge's view, Mrs Hinton's husband was not the recipient of the services, and the complaint did not identify any conduct that contravened the DD Act. The primary judge expressed the view that the claim was 'patently inarguable' as it would mean that 'everywhere [Mrs Hinton] and her husband went, services in the nature of translation had to be provided'. Accordingly, the proceedings were summarily dismissed on the basis that there was no reasonable prospect of successfully prosecuting proceedings and the conduct complained of was a 'mere trifle', and therefore an abuse of process.

Mrs Hinton appealed this decision, which was heard by Collier, Jagot and Perry JJ in the Full Court of the Federal Court of Australia. On appeal, Mrs Hinton argued that:

- the primary judge erred in dismissing the application on the basis that it had no reasonable prospect of success;
- the circumstances of the hearing amounted to a denial of procedural fairness; and
- the primary judge had demonstrated apprehended bias and should be precluded from rehearing the application.

Issues

Did the application have no prospect of success?

In a unanimous judgement, the Full Court concluded that the primary judge erred in concluding that the application concerned a 'trifle', had no prospect of success and, as a result, was an abuse of process. In their view, the application clearly identified maternal and birthing services as those sought by Mrs Hinton, and these came within the inclusive definition of 'services' in section 4(1) of the DD Act. Relevantly, they considered that the

application and the written submissions contained an arguable case, regardless of whether it was for direct or indirect discrimination, on the basis that:

- it was clearly arguable that the maternal and birthing services sought included the provision of information to Mrs Hinton's husband to ensure that he was able to provide support, converse and contribute to the decision making process regarding treatment of Mrs Hinton and her child, and if Mrs Hinton lost capacity, provide consent; and
- even if this was not the case, it was also arguable that the associate discrimination provision in section 7 of the DD Act was engaged.

The Full Court commented that the application in question was 'fact dependant' and would not mean that 'for every service sought by Mrs Hinton, an interpreter would have to be provided to her husband'. Further, the primary judge had overlooked the application of sections 11 and 29A of the DD Act, which provide a defence to an unlawful discrimination claim where avoiding the conduct in question would 'impose an unjustifiable hardship on the discriminator'.

Relevantly, the Full Court emphasised that the mere fact that the woman had been able to give birth in another hospital that provided interpreter services did not, as the primary judge had considered, make the complaint 'a mere trifle'. In their view, regardless of whether Mrs Hinton's claim was for direct or indirect discrimination, the facts of the case clearly demonstrated an arguable case that was consistent with the objects of the DD Act.

Was the Appellant denied procedural fairness?

The Court considered that the factual and legal issues raised by the application were sufficiently complex to warrant more than five hours to prepare submissions. Accordingly, the Court concluded that Mrs Hinton was denied procedural fairness by the primary judge, which was not outweighed by the 'need to ensure quick, inexpensive and efficient justice'.

Conclusion

The Court remitted the application to the Federal Circuit Court for reconsideration by a different judge in light of their finding that the primary judge was disqualified from hearing the matter on the basis of apprehended bias.

Compliance Impact

While the case is not a final determination on the circumstances in which an organisation will be liable under the *Disability Discrimination Act 1992* (Cth) for failing to provide services to an associate of an individual, it is a reminder that section 7 of the DD Act expands the protections of the Act to people who have an associate with a disability.

Contact

For further information please contact:

Jeremy Smith
Compliance Officer

Direct: 03 9865 1342
Email: jeremy.smith@healthlegal.com.au



www.healthlegal.com.au



www.lawcompliance.com.au

Claudia Hirst
Legal Counsel

Direct: 03 9865 1340
Email: claudia.hirst@healthlegal.com.au



www.healthlegal.com.au



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