



CCI Lawyers Work Place Law is a boutique workplace relations practice. We provide advice to a wide range of employers, from small business to multinational employers across a full range of work place matters.

Mindful employment



CCI Lawyers
Level 3, 150 Collins Street
Melbourne VIC 3000

Tel: 03 8662 5210
Fax: 03 8662 5401
smillard@ccilawyers.com.au

Earlier this year we addressed the necessity for employers to consult with individual employees whose mental health issues are impacting their work performance. In this article we delve into what must be done to assist these employees either return or stay at work.

Adjustments for Employees working with mental health issues

What do you do if an employee who has been undertaking suitable duties pursuant to a WorkCover claim for work related stress, is still unable to return to pre illness duties after 12 months? If you were to simply terminate employment or withdraw suitable duties on the basis that the employee is unable to perform the inherent requirements of employment you might think you would have a good defence to any legal proceedings issued by the employee - wrong!

If you were able to establish on medical evidence that the employee was unlikely now or in the foreseeable future to be able to perform the inherent requirements of employment and that an appropriate level of consultation with the employee had taken place, then you would have reasonable prospects of defending an unfair dismissal claim or a general protection court application based on discrimination.

However successfully defending a claim under the Disability Discrimination Act or the Equal Opportunity Act is a different and more challenging matter. The employee may assert that the termination and/or a failure to provide employment with adjustments has constituted discrimination.

What adjustments might be made by an employer to assist a mentally ill employee?

The Disability Discrimination Act ("DD Act") prohibits discrimination in employment. Discrimination occurs where an employee is treated less favourably because of an illness than another employee in similar circumstances but without that attribute.

Following amendments to the DD Act in 2009, discrimination will also occur where an employer does not make or proposes not to make reasonable adjustments which has the result of an employee being treated less favourably than another without that mental illness but in similar circumstances.

There are the defences available to an employer where an adjustment would impose unjust hardship or there would be an inability to carry out inherent requirements of employment despite reasonable adjustments being made.

In *Watts v Australian Postal Corporation [2014]* the Federal Court considered the meaning of the amendments made in 2009 and the Court's comments provide useful guidance as to what employers should consider doing when managing an employee whose performance or conduct is impacted by a mental health issue.

The Court determined that "reasonable adjustment" in the DD Act requires that an adjustment be made unless making the adjustment would impose an unjustifiable hardship. "Adjustment" should be given a broad and flexible meaning. An adjustment should be directed to assisting a person carry out their employment. It is not to be confined to the position or duties carried out by that person. Where the disability is a mental illness it may include making alterations to working relationships, reporting lines, work load and the like unless to do so that would impose an unjustifiable hardship.

What might constitute an "unjustifiable hardship" requires consideration of the effect of the illness on the person, the financial impact and nature of a benefit or detriment that would result from the adjustment being made. The employer bears the onus of establishing that a hardship would be imposed on it if it was to make the adjustment. Watts returned to alternate duties after suffering a work related mental illness which necessitated a 6 month period off work. Her doctor and psychologist had said she was not fit to return to her original role without adjustments being made. Fifteen months after returning to work her Comcare claim was settled however her restrictions continued.

Subsequently Australia Post decided, wrongly, to treat Watts as if she was suffering a non work related illness and applied a Non work related injury policy. That was directed to having her return to her original position without any restrictions within 3 months. Failing that being achieved Australia Post would seek to redeploy her and if that was also unsuccessful then she would be retired on medical grounds.

In applying that policy, Watts was required to provide detailed medical information about her capacity and any proposed adjustments. Watts provided further information however Australia Post considered that it was inadequate.

During an extended period Watts refused a number of requests by Australia Post to attend a medical examination. She said that she had already provided sufficient evidence of her capacity, restrictions and suggested adjustments. She was directed to leave work in May 2010 on the basis that she was not fit to perform her original role and that no reasonable adjustments could be made. Watts was directed to use her accrued sick and personal leave. Later she was permitted to take unpaid leave.

Watts was ultimately directed to attend a medical examination by a doctor engaged by Australia Post for the purposes of determining whether she had capacity to carry out the inherent requirements of her original position and whether there were any reasonable adjustments that might be made to assist. That doctor then reported that Watts could return to her original position with adjustments being made to assist her.

Those adjustments to her original position were similar to that which had been previously suggested by her treating health practitioner and doctor. Consequently all doctors were basically of the view that Watts could return to her original position with adjustments of:

- reduced hours
- less complex work
- reduced work load
- greater supervision and support.
- not reporting to the employee who had been involved in decision making that had given rise to the original work related illness.

Watts then returned to her original role with the adjustments made – nearly 2 years after she was directed to leave work.

Ultimately the Court decided that between June 2010 and April 2011 Australia Post had failed to make reasonable adjustments that would have assisted Watts. By not making those adjustments at that time it had treated her less favourably than it would have treated someone on Comcare claim for a mental illness. It had been dilatory in obtaining detail from her and her doctors as to her capacity and adjustments. Watts had provided sufficient detail of possible adjustments to Australia Post which should then have been more proactive in its consideration of such adjustments. Further it could have directed Watts to attend an appointment with its doctor earlier than what it did. All it had done was to insist that Watts comply with its Non work related illness policy.

Consequently it had discriminated and caused her detriment as she was denied the benefits of employment including being required to leave work, use up her accrued leave and take leave without pay. It did not seek to rely upon the defence that the making of such adjustments would have imposed an unjustifiable hardship.

Further Australia Post failed to make out the defence that Watts was unable to carry out the inherent requirements of her position. The Court determined that the inherent requirements defence in the DD Act was not available where employment continues and the discrimination has taken the form of denying an employee benefits associated with employment or the employee is subjected to some other detriment.

There are similar but not identical protections and obligations in the Equal Opportunity Act of Victoria. Some commentators have suggested that this Act may be of more assistance to employees in such circumstances.

Lessons for business

1. Once an illness is known to exist or there are grounds for suspecting that an illness is impacting on performance or conduct, an employer must be proactive in ascertaining and discussing what adjustments might be made for an employee.
2. Consideration needs to be given as to whether adjustments might be made to the individual's employment circumstances i.e. reporting lines, work load, how work is carried out with others etc. and not just the pre illness position or duties. Adjustments need to be flexible and may need to be varied over time.
3. Under the DD Act adjustments must be made unless they will impose unjustifiable hardship. The onus of proving unjustifiable hardship will fall on the business. It would need to establish the impact on its operations and finances of making an adjustment would create an unjustifiable hardship.
4. If a business is wishing to terminate such an employee and have prospects of being able to rely upon the inherent requirement defence, it must be able to establish on medical grounds that the employee was not able to in the near future carry out the inherent requirements of their position even if adjustments were made.
5. However a business is not required to create new jobs for these employees.
6. Increasingly it is being reported that employers are recognising the presence of mental health issues in workplaces. A planned approach to raising awareness and addressing the issue in the workplace will assist maintain productivity and add to your business's reputation as a good employer. Employers should take the following actions:
 - Have the leadership group trained and committed to promoting good mental health practices;
 - Develop a mental health policy in conjunction with employees;
 - Educate and periodically remind the workforce and especially management of the purpose, goals and responsibilities set out in that policy;
 - Conduct focused surveys and act on issues relevant to preventing mental health issues from arising.
 - Always act early to address individual employee issues.