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## Mental health

### when both employee and employer are between a rock and a hard place



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Effectively managing a mentally ill employee whose performance or conduct is not at an acceptable level will challenge the most experienced and skilled manager. For these employees just getting to work some days can be tough.

It would be convenient if a standardised approach could be developed and applied in order to promptly manage these employees. However therein the dilemma lies – a “one size fits all” approach will not work. Each ill employee will present a unique set of circumstances that will potentially call into play an array of legal rights and obligations.

The management approach must anticipate the interplay of the various legal rights, allow for flexibility in responding to an individual's circumstances and encourage on going, comprehensive consultation with the employee before any decisions are made concerning their employment.

#### **Why is management of mentally ill employees a challenge?**

Firstly there has been a significant increase in the community of those suffering mental illness. The Department of Health in its National Mental Health Report 2013 reported that 20% of the population currently suffer varying degrees of mental illness. Today both employer and workforce are much more aware of the issue.

Employers are required to address the issue in so far as an employee's illness manifests itself in the workplace by:

- inappropriate conduct;
- frequent absences;
- continued fluctuations in mood, thinking and their interactions with others;
- behaviour that puts the health and safety of the employee and others at risk.

A failure to address issues such as workplace bullying, the definition of roles and performance expectations will only accentuate the vulnerabilities of mentally ill employees.

Secondly, employers will be conscious of the myriad relevant legal obligations which can overlap and leave an employer uncertain as to what action can be taken. For instance establishing an inability to carry out the inherent requirements of employment may provide a valid reason for termination and a defence to unfair dismissal proceedings. Yet such proof may be insufficient to successfully defend a discrimination claim where there has been no attempt to accommodate the employee's illness in order to assist them carry out their employment. Alternatively an unfair dismissal claim may be defensible however will the employer be able to successfully defend an adverse action claim brought by the employee?

Thirdly, work related mental illness that results in a WorkCover claim may demand a different response to a non work related mental illness which precludes an employee from working. Returning an employee to work as part of a WorkCover claim requires both parties to meet their respective return to work obligations imposed by the WorkCover legislation. It also requires the employer to try and ensure that the WorkCover agent is fulfilling its role in ensuring that an employee is cooperating with rehabilitation attempts. The primary focus of the WorkCover legislation being to compensate employees injured at work and to assist their return.

In contrast where an employee is not fulfilling the inherent requirements of their employment due to non-work related illness the focus is more on not discriminating against such employees in making any decisions about their employment including termination. Discrimination can include failing to make reasonable accommodation that might assist such an employee carry out their employment.

#### **Comprehensive medical opinion is critical.**

Before any decisions are made with respect to the employment of mentally ill employees, it is critical to obtain detailed medical opinion and to involve the employee in discussions about that opinion. This will occur to an extent during the planning and implementation of WorkCover RTW arrangements when an occupational rehabilitation provider will discuss an employee's capacity with the employee, treating doctor and employer. While WorkCover agents may provide summaries of the findings from an independent medical examinations to employers, they typically refuse to provide copies of full medical reports due to the nature of mental illness and its relevance to the work related illness. One needs to keep in mind that medical information provided as part of a WorkCover claim can only be used for the purpose of the claim. An employer should consider gathering its own medical opinion separate from the WorkCover process. An employee may have reasonable grounds, especially during the first 12 months of a claim, to decline a direction from an employer to attend a doctor appointed by the employer. However such a direction still should be considered subject to the circumstances.

In contrast where a worker is precluded from carrying out the inherent requirements of their role due to non work related illness the employer should be requesting that the employee provide consent for the employer to obtain a detailed report from the treating doctor. That opinion will assist determine what might be done to accommodate the employee's circumstances and the potential for a return to their normal duties in the not too distant future. Subject to the adequacy of that report an employer will also need to consider directing the employee to attend for an examination by an employer appointed doctor.

Medical opinion need not only explain the nature of the mental illness but also address whether there is current capacity and future capacity to carry out the inherent requirements of employment.

#### **Directions to attend medical appointments.**

Decisions of both the High Court of Australia, lower courts and tribunals have recognised that an employer is entitled to give lawful directions to an employee. Such directions are to be obeyed provided that they relate to employment, involve no illegality and are reasonable in the circumstances. What is reasonable may include consideration of industry specific Awards, enterprise agreements and legislation.

Directions may include that an ill employee attend a medical appointment. This often becomes necessary where the employee, after an extended period of being off work, indicates that they are ready to return to their duties however the employer has reservations about their capacity to do so.

The lawfulness of a direction given to an employee to attend a medical appointment organised by an employer will be dependent upon whether the direction is reasonable in the circumstances. Further any subsequent disciplinary action i.e. termination for failing to comply with a direction will only be justified if the direction was lawful and reasonable in the first place.

The factors that may weigh in favour of it being reasonable to give an employee a direction to attend an appointment include:

- where the employee's return to a workplace may expose the employee to an environment that may aggravate the illness or may put the health and safety of fellow workers at risk. Some work environments are inherently dangerous places i.e. mines, railways, airlines etc. Industry specific legislation can impose obligations on employers with respect to ensuring that a workplace is safe.
- a lack of information from a treating doctor about the specific nature of the mental health condition and current and future capacity. For instance where medical certificates only state that an employee is unable to attend work due to illness or has capacity to return to work;
- where there is conflicting medical opinion. For instance a diagnoses of adjustment disorder with mixed anxiety in contrast to a personality disorder;
- medical opinion indicates that it is unlikely that an employee will return to their original role and the WorkCover agent is seeking to find new employment;
- lack of expertise of a treating doctor in contrast to a specialist health professional or a physician with familiarity with workplace and industry;

Factors that may weigh against a direction being considered reasonable include:

- where investigation of bullying allegations is yet to be finalised and before any disciplinary action is taken;
- where a WorkCover claim has been accepted and weekly payments are being paid during the first 12 months or so;

Time needs to be extended to allow an employee to obtain treatment, to recover and participate in the management process. Time is also required in order to gather comprehensive medical opinion. While the employee needs to cooperate and give their best efforts to returning to work, disciplined and empathetic management will assist an employee return to their normal duties and reduce the risk of successful legal claims being made against an employer.

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