

# AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL WEBINAR SERIES 2020

**Professional Development and Networking for  
the In-House Legal Community**

***Managing ill and injured employees in the workplace***

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# Two key issues

- Two key issues for the successful management of ill and injured employees:
  - Reasonable adjustments
  - Inherent requirements exception
- These two concepts are inherent in:
  - Unfair dismissal laws
  - General protections laws
  - Disability discrimination laws

# Reasonable adjustments

- Reasonable adjustments are:
  - Adjustments made for the employee
  - That do not impose unjustifiable hardship on the employer
- The failure to make reasonable adjustments may be:
  - Lawful
  - Unlawful

# Reasonable adjustments

Continued

- The failure to make a reasonable will be unlawful if:
  - the discriminator does not make reasonable adjustments for the person; and
  - because of the disability, the failure to make the reasonable adjustments has the effect that the person is treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

# Reasonable adjustments

*Watts v Australian Postal Corporation* [2014] FCA 370

- The Background facts:
  - Employee was unsuccessful for a promotion and, as a result, suffered a mental health condition
  - Under a graduated return to work place, the employee almost made it back to full hours
  - A new HR manager questioned why AP was paying for rehabilitation and directed employee home until she could provide medical clearance
  - The employee saw their own doctor, who provided a list of temporary restrictions to assist the employee return to work
  - AP disputed the measures prescribed by the doctor

# Reasonable adjustments

## *Watts v Australian Postal Corporation (cont)*

- The temporary restrictions:
  - Tasks and roles allocated to be less complex than AO6 Bid Consultant position
  - Avoid tight deadlines
  - Avoid tasks assigned simultaneously
  - Avoid one on one meetings with middle management (AO6 – AO8)
  - Avoid supervisory tasks and leading teams
  - Avoid tasks or situations where conflict would arise
  - Avoid working on the same floor as Ms Marshall and avoid communication or interaction with Ms Marshall (at least until mediation)
  - Duties to be performed at usual work location: 111 Bourke St Melbourne.

# Reasonable adjustments

*Watts v Australian Postal Corporation (cont)*

- The Federal Court held:
  - AP discriminated against employee by not implementing the temporary restrictions.
  - Reasonable adjustments that must be made are those:
    - Made for the person
    - That allow the person participate in work (ie substantive equality)
  - Reasonable adjustments may include temporary measures designed to return an employee to their pre-injury duties

# Overcoming obstacles

- Key considerations:
  - What exactly is the employee asking for?
  - Is it related to the medical condition (despite what the employee says)?
  - Do you have a legal obligation to satisfy the request?
  - The more conditions an employee places on their return to work, the less likely the prospect of return

# Overcoming obstacles

*Phillips v Integrated Medical Solutions Group Pty Ltd* [2019] FWC 6225

- The background facts:
  - Manager was accused of disclosing confidential information to employees, and was suspended
  - She attended her GP and a psychologist the following day, and started seeing them regularly
  - The manager then sought adjustments, namely:
    - an independent review into the investigation
    - a plan to restore her reputation
    - a plan to create a psychologically safe workplace with no risk of reprisal
    - an apology for the damage to her welfare, livelihood and health
  - Manager submitted a medical certificate stating that she was not fit for work with the employer
  - The employer dismissed her

# Overcoming obstacles

*Phillips v Integrated Medical Solutions Group Pty Ltd (cont)*

- The FWC held:
  - The manager was dismissed because she could not perform the inherent requirements of her position
  - Investigating workplace complaints did not warrant an apology
  - No evidence as to:
    - Reputation damage
    - Why the workplace was not psychologically safe
  - There were no reasonable adjustments that could be made
  - The adjustments sought were more “outcomes”, not adjustments that were required to be made

# Workers compensation

- Commonwealth workers compensation claims (Comcare claims) can highlight some of the risks inherent in managing ill and injured employees.
- Significant risk of psychological injury – usually some kind of Adjustment Disorder – when expectations do not match reality, especially in circumstances where there is a pre-existing psychological vulnerability.
- Two recent decisions in the Tribunal are instructive: *Samy v Comcare* and *Bailey v Comcare*.

# Managing pain

*Samy and Comcare (Compensation)* [2020] AATA 3850 (2 October 2020)

- IT worker with neck and shoulder pain.
- Pain caused by nerve root impingement and not compensable.
- Report from a rehab specialist said fit for full-time work, but with restrictions.
- Process to implement the specialist report was flawed, and employee developed an Adjustment Disorder as a result.
- Employee required to come back to work when still experiencing pain and taking strong medication – both affected performance.

# Managing pain

*Samy and Comcare (Compensation)* [2020] AATA 3850 (2 October 2020)

- Tribunal found that the administrative action taken to return the employee to work and then to performance manage him was unreasonable.
- Lessons:
  - Read specialist reports very carefully and ensure that there are no ‘creeping assumptions.’
  - Abide by opportunities given to employees to provide further evidence.
  - Make sure to understand employees’ limitations and the affect that treatment has on them (even if the treatment and condition are non-compensable).

# Managing vulnerabilities

*Bailey v Comcare (Compensation)* [2020] AATA 1244 (8 May 2020)

- Team leader reviewing objections relating to child support payments.
- Fragile health – previous psychological claim, risk of being ‘triggered,’ treatment for cancer.
- Meetings to discuss working hours – employee has been starting at 7am, asked to start at 8am.
- Rehabilitation meetings traversed the employees psychological history – including events she thought of as traumatic.

# Managing vulnerabilities

*Bailey v Comcare (Compensation)* [2020] AATA 1244 (8 May 2020)

- Tribunal found the meetings were reasonable administrative action, but not taken in a reasonable manner.
- Lessons:
  - If you know about psychological vulnerabilities, then avoid confrontation and avoid unnecessary meetings.
  - Attend meetings well-prepared and anticipate questions that might reasonably be raised.

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