Article Information

Author: Ben Motro
Service: Employment & Labour

Employer's failure to make "reasonable adjustments" to accommodate employee with disability leaves it liable to pay over $13,000 in damages

In the recent Victorian case of Butterworth v Independence Australia Services (Human Rights) [2015] VCAT 2056, a not-for-profit disability service provider was ordered to pay more than $13,000 to a former employee who suffered a workplace injury, for failing to provide reasonable adjustments

In the recent Victorian case of Butterworth v Independence Australia Services (Human Rights) [2015] VCAT 2056, a not-for-profit disability service provider was ordered to pay more than $13,000 to a former employee who suffered a workplace injury, for failing to provide reasonable adjustments. This case highlights the risks associated with managing injured employees and the importance of employers being across all relevant legislative duties and responsibilities. ***Ben Motro, Senior Associate,*** *and* ***Shauna Roeger, Law Clerk*** *explain the case and, most importantly, the lessons employers can learn from it.*

The Facts

Ms Butterworth was employed in a call centre as a Customer Service Officer (**CSO**) by Independence Australia Services (**IAS**), a not for profit organisation that provides community-based services to people with disabilities.

In November 2011, Ms Butterworth sustained a form of soft tissue injury to her neck and shoulders, which caused her to experience extreme pain from the long hours she was required to sit at her desk and take telephone calls. Ms Butterworth lodged a workers compensation claim, which was subsequently approved in February 2012. It was accepted that working in the call centre had likely caused the injury, at least in part.
Ms Butterworth worked with modified duties under a series of return to work plans for the next 12 months. The modified duties included reduced hours and shorter blocks of time answering telephone calls, and greater administrative duties.

When IAS' employment obligations under the *Accident Compensation Act 1985* (Vic) came to an end, IAS reviewed Ms Butterworth's capacity to return to her pre-injury duties. Based on the available medical evidence, IAS concluded she could not return to performance of her pre-injury duties, indefinitely. After a series of meetings, in April 2013, IAS terminated Ms Butterworth's employment on the basis of her ongoing and indefinite inability to perform the inherent requirements of the role, and paid her five weeks in lieu of notice.

Ms Butterworth subsequently brought a claim against IAS, alleging that it directly discriminated against her by failing to make "reasonable adjustments" to accommodate her disability, and by terminating her employment.

IAS denied that it discriminated against Ms Butterworth. IAS further asserted that even if its conduct was discriminatory, it was necessary to comply with its OHS obligations, as returning Ms Butterworth to her pre-injury duties carried the risk that her injury would be exacerbated.
In the same action, Ms Butterworth also alleged that IAS discriminated against her by making unreasonable requests for medical information, requiring her to accept new duties, and subjecting her to bullying and harassment, however these claims were rejected by the Tribunal.

The Legislative Framework

The *Equal Opportunity Act 2010* (Vic) (**EO Act**) sets out certain obligations for Victorian employers when managing employees with a disability.
Importantly, an employer must make "reasonable adjustments" for an employee with a disability, unless the employee cannot adequately perform the genuine or reasonable requirements of the employment even after the adjustments are made.

Section 20(3) of the EO Act sets out several facts and circumstances which are relevant to determining whether an adjustment is reasonable, namely:

- the employee's circumstances, including the nature of his or her disability;
- the nature of the employee's role;
- the nature of the adjustment required to accommodate the disability;
- the financial circumstances of the employer;
- the size and nature of the workplace and the employer's business;
- the effect on the workplace and the employer's business or making the adjustment, including;
    - the financial impact of doing so
    - the number of persons who would benefit from or be disadvantaged by doing so
    - the impact on efficiency and productivity and, if applicable, on customer service of doing so
- the consequences for the employer of making the adjustment
- the consequences for the employee of not making the adjustment
- any relevant action plan made under the Commonwealth disability discrimination legislation.

Further, an employer must not discriminate against an employee by dismissing the employee or subjecting the employee to any detriment, due to a prescribed attribute. An exemption applies if the discrimination is necessary to comply with other legislative obligations, for example occupational health and safety legislation.

It is worth noting that similar, though not identical, obligations are prescribed by the federal anti-discrimination legislation, the *Disability Discrimination Act 1992* (Cth), as well as State and territory legislation.

The Tribunal's Decision

The Tribunal held in favour of Ms Butterworth, deciding that IAS had discriminated against her by failing to make reasonable adjustments for the workplace injury, and by terminating her employment because of her workplace injury.

The Tribunal acknowledged that the obligation to make reasonable adjustments does not require employers to create a "perfect working environment" and does not require an employer to create another job for the employee or to keep the employee in work. Nonetheless, employers must consider what reasonable adjustments can be made within the employment, and in determining whether an adjustment is "reasonable" it should turn its mind to the s 20(3) factors.

The Tribunal noted that it was "uncontentious" that IAS could move CSOs within the three divisions of the Customer Service Centre for operational reasons. While Ms Butterworth was unable to return to her pre-injury role in the call centre, she could still have performed the work of a CSO in other divisions, such as accounts and enquiries. Redeploying Ms Butterworth to another division involving more non-telephone work would have had no financial impact on IAS and would have caused no detriment to Ms Butterworth. The redeployment would have been unlikely to affect customer service, efficiency or productivity, as Ms Butterworth had previously performed the role in accounts, and little or no re-training would be required.

The Tribunal did not accept that terminating Ms Butterworth's employment was necessary to comply with its occupational health and safety obligations. If the CSO roles involved only answering incoming calls, IAS may have been able to raise this exception, but given that there were reasonable adjustments that could have been made, termination of her employment was not necessary for IAS to comply with its obligations.

The Tribunal emphasised that just because IAS had complied with its return to work obligations for the 52 week period prescribed by the *Accident Compensation Act 1985*, this did not mean it could then simply determine whether Ms Butterworth was fit to return to pre-injury roles and, if not, terminate her employment. It was incumbent on IAS to have regard to its other obligations, such as those under the EO Act.

The Tribunal awarded Ms Butterworth $3,325.25 for economic loss and $10,000 for distress, hurt and humiliation.

Lessons for Employers

When managing employees with a workplace injury or other disability, employers must ensure their actions are not in contravention of State or federal anti-discrimination laws. At the same time, employers have a duty to provide a safe

working environment for employees under work health and safety legislation. Navigating a complex legal landscape which creates many concurrent duties and responsibilities can be challenging.

This case in particular highlights the importance of genuinely and thoroughly considering whether any “reasonable adjustments” can be made to accommodate an employee’s disability, prior to making any decision that is detrimental to the employee, such as to terminate their employment. What is considered a “reasonable” adjustment depends on a myriad of facts and circumstances, and thus each individual case must be examined on its own merits.

In this case, the former employee’s economic loss was moderated by the fact that she obtained new employment less than two months after the termination of her employment with IAS. Had she been unable to secure a new job so quickly, IAS could have been liable for a much larger sum for its contraventions.