Article Information

Authors: Erin McCarthy, Tim Capelin, Tim Lange
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Webinar Q&As: Employment relations national seminar series – Managing mental health in the workplace

Piper Alderman provides the Answers in response to the Questions received during our Employment Relations National Seminar Series – Managing Mental Health in the Workplace webinar on 22 April 2020

Q1: We have an employee with a mental health condition, it has prevented them working for 3 months, we have just granted the employee another 3 months unpaid leave to assist them to address the condition, but we are concerned the next request will be for part-time work. Does the request have to be granted?

A1: No is often the answer. Assuming this is not a workers compensation situation, the issue is whether part-time work is a reasonable accommodation. A reasonable accommodation is one that enables the employee to undertake the inherent requirements of their role, in many instances only working part-time does not meet that test. However, it does depend upon the specific circumstances of the workplace and the role. In addition you would also need to ensure that any request for part time work that is based on a medical condition is handled in accordance with the flexible work request provisions of the National Employment Standards (NES) as set out in the *Fair Work Act 2009 (Cth*).

Q2: How do flexibility requests under s65 and reasonable adjustments under discrimination law interact?

A2: A flexibility request can be rejected on reasonable business grounds and unless the employer has given greater rights in a contract or enterprise agreement, the request under the NES is not reviewable so long as the proper procedural requirements are met (eg responses provided in writing and within the legislated time frame).

Reasonable adjustments, or reasonable accommodations, under discrimination law is a reviewable standard. You cannot dismiss someone for their inability to undertake the inherent requirements of their role, if with reasonable adjustments the employee could undertake the inherent requirements of their role. An alleged breach by an employer may be pursued through discrimination laws or through the general protections provisions of the Fair Work Act.

Further, a flexibility request can amount to a request to undertake the inherent requirements of the role in a different way, which might be similar to reasonable adjustments/accommodations, but it also might be a request to undertake lesser duties which may make it a request beyond what would be required in determining whether there are reasonable adjustments/ accommodations.

So while a decision not to grant a flexible work request may not be reviewable under the NES, if the subject matter could also give rise to a claim of breach of the general protections or of discrimination law, an employee could separately challenge the decision in one of those other forums.

Q3: When can you ask for an IME or a report beyond that from the employee's GP?

A3: In the absence of an express right to do so under a contract of employment or an enterprise agreement, the general rule is that the request must be a lawful and reasonable direction. Whether this is the case will depend on the individual facts including how long the employee has been absent, the seriousness of the condition and any special risks inherent in the workplace that are relevant to the condition.

An employer can ask its employee to provide authorisation to speak to their GP when the GP is providing a certificate/report going to the employee's fitness for work. In most instances that will be a reasonable direction to the employee. If the GP's report is unclear or raises reasonable questions (eg. after a long period of major issues preventing the employee from being fit for work, suddenly the GP clears the employee) it is appropriate to first seek clarity from the GP. You may next wish to seek access to the treating specialist (if there is one) and usually only when those avenues continue to leave you with reasonable questions, would it be appropriate to direct the employee to participate in an IME.

Q4: If an employee is not disclosing a mental condition, but their behaviours suggest they have such a condition, can you require them to obtain a medical clearance? Do you need to do this before addressing the behaviour at face value?

A4: As so often is the case, the answer depends on facts that are not disclosed.

In many instances, where the employee's behaviour currently is posing a risk to the safety of themselves or others, this would be a reasonable direction. That would also be the case if the risk is not immediate, but the behaviour seems to be trending that way.

If you just believe it might be an explanation for misconduct, but the employee is not putting a medical condition forward as an explanation for the misconduct then an employer does not have the obligation to investigate.

Q5: Is there a difference between "reasonable management action" and "reasonable administrative action"?

A5: These are terms used in workers compensation legislation as an exclusion to a work related mental health injury/illness being compensable. As Erin noted in her presentation, the issue is dealt with slightly differently under each jurisdiction's legislation. In general the terms are used inter-changeably, but the precise use of the term under a particular workers compensation statue requires specific advice.

Q6: Can a mentally ill employee still be acting unreasonably (even taking the illness into account) and be able to be managed accordingly?

A6: Yes, and the short answer is it is a minefield – go into it with a legal mine detector but don't avoid the issue.

The slightly longer answer is that like other underlying health conditions the condition might not be materially affecting performance or behaviour. Alternatively, the condition might be affecting behaviour, but not outside the reasonable range of behaviour. Another alternative is that the behaviour may be outside of the reasonable range, but with knowledge of the condition, reasonable accommodations may be able to be provided to bring the behaviours back into the reasonable range.

There is often a tendency with employees who (as a result of a mental health condition, but not necessarily) are considered difficult and therefore are managed by avoidance. That rarely is a good medium to long term strategy.

Q7: Given the circumstances around COVID-19 continue to change with no end date, how does an employer adequately monitor an employee's mental health given it may have been ok one week and not the next? For example, the employee may have coped with the first transition stage to Working From Home, but now with home schooling on top of that their mental health is an issue. From a practical point of view, how often should a manager be checking in with staff and should they be documenting every call with their staff (from mental health perspective)?

A7: If working from home is new for the team (or the quantity is increased) the manager should be checking in at least daily and in most instances in as close to the regularity when the employee was in the office.

It will often be difficult for a manager to pick up signs of mental health concerns, so it is best to be open about the potential before signs are identified and guide employees to the services available (whether they be the organisation's EAP service or those publicly available).

Q8: When can you terminate for the inability to undertake the inherent requirements of the role? For instance, if a Dr mentions employee won't recover for 12 months can this be seen as an unjustifiable hardship?

A8: The answer depends upon whether it is a work related illness or injury that is compensable under workers compensation laws, or non-work related.

Assuming:

- you are outside of the prohibition period under the Fair Work Act;
- you are outside of the prohibition period under the relevant workers compensation statute;
- "recovery" means being able to undertake the inherent requirements of the role; and
- apart from waiting 12 months, there are no other reasonable accommodations,

then dismissal should be defendable.

One issue to watch though is that for long serving employees with significant sick leave accruals you should seek advice to ensure that you are taking into account the general protections. This needs to be considered both from the perspective of whether it could be a "temporary illness" and/or the employee's "workplace right" to take their accrued leave.

Q9: Would you recommend that a GP has the specialist knowledge to determine fitness for work when a mental illness is present, or is there an ability for the employer to ask for an assessment to be completed by a psychologist?

A9: Please refer to the answer to question 3.

Q10: What about the scenario where an employee does not think there is a mental health issue, but from the employee's behaviour, the employer thinks this may be a possibility? Is an Independent Medical Examination appropriate in this instance?

A10: Please refer to the answer to question 4.

Q11: Do you need independent medical evidence to prove there is no link between mental health condition and behaviour/conduct?

A11: Please refer to the answer to question 4.

Q12: I'm not sure that we can ever mitigate Workers comp claims. Regardless of meeting all criteria and 100% correct in all processes onus still on the employer. Question: should we be put into a position of changing the individual's job and therefore other people's tasks where the employee is not mentally fit to be able to do the original job they were employed, but can undertake a modified version.

A12: This question assumes the issue arises in relation to a compensable injury/illness. Often you have an obligation under workers compensation laws to offer modified duties, if the modified version of the role can be reasonably offered, it should be offered, but this is usually not required where others would also need their roles modified.

Q13: What if an employee has been on unpaid leave due to a non-work related injury for 3 months, and there is no certainty when they may return to the work place, as they keep providing a medical certificate each fortnight. We have been able to obtain a medical assessment from his doctor, who indicates they will return in 1 month however the employee said this was estimated. This employee is also within the minimum employment period. How should we manage this?

A13: Starting with the minimum employment period, if you usually make an assessment at a point prior to the end of the period, you may undertake that assessment. If on what you have seen in the limited period the employee has been at work, their employment would not ordinarily be continued, you can make that assessment. This doesn't mean the employee

won’t seek to challenge any dismissal (through a discrimination claim or a general protections claim) and specific advice should be sought before dismissing, but you are not necessarily blocked from proceeding in your usual manner.

Dismissal also may be possible, for an inability to undertake the inherent requirements of the role. The doctor’s assessment, even if precise, may not be sufficient to require you to keep the role open for a further month. You are not caught by the temporary illness prohibition in the Fair Work Act, but if you are contemplating dismissing and you do not already have the employee’s authority to speak to the doctor, you can direct the employee to provide the authority, so that you can clarify the doctor’s assessment and determine whether there are reasonable accommodations.

Q14: Can you please provide links to the various documents referenced in the webinar?

Comcare: Looking after your Mental Health – Supporting Others In Times Of Uncertainty

Comcare: Looking after your Mental Health – Responding to Uncertainty

Safework Australia: Work-related psychological health and safety: A systematic approach to meeting your duties