Article Information

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Unreasonable Adjustments – How far must an employer go to enable an employee to return to work?

A recent decision[1] in the Fair Work Commission provides guidance for employers when dismissing an employee with a disability. The Commission found that the only way the Applicant could have returned to work was if substantial modifications were made to her pre-injury role. The employer's decision to terminate the employment on the basis that the employee could not meet the inherent requirements of her role was found not to be unfair, and was also found to not contravene the Disability Discrimination Act.

Background

Mrs Sarah Davis (the **Applicant**) was dismissed from her employment with Aldi Stores (the **Respondent**) in February 2022 on the basis that she could not fulfil the inherent requirements of her job as Store Manager.

In November 2019 the Applicant suffered a family tragedy resulting in the death of her husband, while she was pregnant with their third child. She developed PTSD as a result of the tragedy and remained away from work until February 2021.

In April 2021 a man collapsed in the store while the Applicant was working. This incident triggered the Applicant's PTSD, and she provided a medical certificate indicating that she would be unfit for work until 9 May 2021. The Applicant did not return to work after this incident.

On 27 September 2021 the Director of Store Operations and the Area Manager of the Respondent met with the Applicant to discuss a requirement for her to undergo a Psychological Assessment of Capacity. This report was conducted by Mr Paul Marsh, an Occupational Therapist. Following this report, the Respondent also sought reports from the Applicant's General Practitioner, Dr Nayna Purchase, and her Psychologist, Ms Christiane Jaeger.

The reports reached a consensus that the Applicant would not be able to perform her pre-injury duties as Store Manager in the foreseeable future. They agreed that she "*would be at significant risk of aggravating or accelerating her mental health condition*" should she attempt to return to work, and that the work environment was a "*trigger*" for her condition. Ms Jaeger went so far as to recommend that the Applicant not return to work at ALDI stores in any role. Dr Purchase suggested that the Applicant may have capacity to return to work, conditional on a gradual return and with changes in the work environment.

The Respondent invited the Applicant to put any suggestions she may have in relation to adjustments that could be made that would enable her to remain employed by ALDI "*in any role*" by 30 December 2021. The Applicant proposed on 2 January 2022:

- that she receive greater support, with one, or possibly two, assistant managers, and at least two store manager trainees;
- that she return to work 2/3 days to perform specific tasks, with a review after 3 months;
- that she undertake recruitment for the Mildura or Berri stores (a task that appeared to not form part of her original role); and
- that she be able to directly contact Area Managers if she felt there were issues that were not being resolved

The Respondent met with the Applicant to discuss its response to her proposals, and ultimately decided to terminate her employment effective 31 January 2022.

The Respondent wrote to the Applicant to explain that her employment was terminated because she was not capable of safely performing the inherent requirements of her role; there was a significant risk of aggravating or accelerating her psychological condition should she attempt to return to work; and there were no alternative roles that she could safely perform without compromising her health sand safety.

Was there a valid reason for dismissal?

The Applicant was dismissed because a decision was made, based on the three medical reports, that she could no longer safely perform the inherent requirements of her role, even with reasonable adjustments in place to assist her.

The Applicant gave evidence that the Respondent could have assisted her through sufficient staffing, regular check-ins, and open communication, and also through reduced hours and undertaking the **alterative work** she had suggested on 2 January.

However, the Commission, in citing a number of previous cases, stated that the question to be determined was whether the Applicant could fulfil the inherent requirements of her role as Store Manager at the time she was dismissed, rather than a modified or adjusted role.[2] It was decided that, although there were some discrepancies in the reports, all three agreed on the point that the Applicant **could not return to her role as Store Manager**.

Dr Purchase, who had the most positive view of the Applicant's ability to return to work, stated that her return could only occur through modification or "*additional levels of support*." The Applicant's own evidence was that she could not return without modifications to her hours and duties, and engaging additional staff. The Commission was therefore satisfied that the Applicant could not fulfil the inherent requirements of her job as Store Manager.

Could reasonable adjustments be made?

The Applicant submitted that the Respondent was in breach of the *Disability Discrimination Act 1992* (Cth) (**DDA**) by not making adjustments for her, as a person with a disability. The Commission noted the exception that it is not unlawful to discriminate against a person on the grounds of their disability "*if avoiding the discrimination would impose an unjustifiable hardship on the discriminator*." This exception includes hardship brought about by any requested adjustments.

The Commission identified the issues to be addressed as:

1. whether the adjustments sought by the Applicant were reasonable; and
2. if they were, then whether, with these adjustments, the Applicant could have fulfilled the inherent requirements of her job.

The Commission was satisfied that Respondent carefully and fully considered the adjustments put forward by the Applicant, in the context of the medical evidence they received, and that the evidence indicated that the Applicant's mental health may be adversely affected by a return to work. The Respondent also investigated redeployment opportunities for the Applicant but no suitable roles were identified.

The Commission noted the Respondent took steps to fill vacant positions in the store, but that the resignation of employees was beyond the Respondent's control. Further, at the time of dismissal there were three managers in the store, but the Applicant did not accept this number as being adequate. The Commission acknowledged that even if vacancies were "*filled to meet the requirements of the Applicant, the respondent could not guarantee that this position would be maintained at all times*."

The Commission also considered that although some of the adjustments sought by the Applicant related to tasks she could perform, others were more intangible like what the Applicant believed to be adequate staffing levels, or a more supportive work environment. Even still, many of the tangible proposed adjustments fundamentally altered the Applicant's role.

The Commission was satisfied that the Respondent considered, but could not accommodate, adjustments to the Applicant's role as she proposed, and the dismissal was not unfair.

Lessons for Employers

Managing a situation where an employee is unfit for work on a more permanent basis can be very difficult, particularly when considering what adjustments are "reasonable" to enable the employee to continue to work.

This decision helps to clarify the extent of an employer's obligations in this space, by explaining that:

- employers must ensure that they have meaningfully considered adjustments that can be made for an employee to

assist an employee in performing their pre-injury role;

- any decisions made regarding these matters, including a decision to dismiss, should be based on sufficient medical evidence and advice;
- when an employer relies on an employee's incapacity to perform the inherent requirements of their role, it is the substantive role of the employee that must be considered and not modified or restricted duties, or a temporary alternative position; and
- if the only way the employee can return to the workplace is through fundamentally altering the pre-injury role, such adjustments will not be "reasonable" for the employer to make.

Each situation will be different, and employers should seek specific advice when undertaking a process to determine whether an employee can perform the inherent requirements of their role, or if any proposed adjustments are reasonable.

[1] *Mrs Sarah Davis v Aldi Stores (A Limited Partnership)* [2022] FWC 2387

[2] *J Boag and Son Brewing Pty Ltd v Allan Button* [2010] FWAFB 4022; (2010) 195 IR 292; *X v Commonwealth* (1999) 200 CLR 177*; Qantas Airways Ltd v Christie* [1998] HCA 18*; CSL Pty Ltd (t/as CSL Behring) v Papaioannou* [2018] FWCFB 1005; (2018) 273 IR 168.