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MANAGING DISABILITIES IN THE WORKPLACE

Managing injured or ill employees can pose difficulties for employers at the best of times. When a business is under pressure, these difficulties can be exacerbated. Employers may feel reluctant to “carry” sick or injured workers. Setting performance targets to boost business may have a discriminatory effect on some staff. Stress claims can proliferate. And when it comes to selecting employees for redundancy, it may be tempting for employers to look first to those who are absent or under-performing.

In this edition of Employment Alert, we provide an overview of the law relating to disability discrimination, and discuss some ways to manage staff disability issues without venturing over the boundary into unlawful discrimination.

Unlawful disability discrimination

Discrimination on the grounds of disability or impairment is prohibited by federal legislation - the *Disability Discrimination Act 1992* ('the DDA') and the *Workplace Relations Act 1996* ('the WR Act'). It is also prohibited by the Victorian *Equal Opportunity Act 1995* ('the EO Act') as well as legislation in other States. These Acts all deal with disability discrimination slightly differently. However, the following features generally apply in disability discrimination cases:

- The concept of 'disability' or 'impairment' includes a broad range of conditions, including physical injury and illness, mental illness, learning disorders and disfigurement.
- **Direct** disability discrimination in the workplace occurs when an employer treats an employee with a disability **less favourably** than it would treat a person without the disability: for example, failing to offer the same training opportunities to an employee with vision impairment as are available to other employees in a similar position.
- **Indirect** disability discrimination in the workplace occurs when an employer imposes an **unreasonable requirement or condition** with which the disabled employee cannot comply (and with which a substantially higher proportion of people without the disability can comply): for example, requiring all employees to attend a meeting in an upstairs room may have a discriminatory effect on an employee with limited mobility.
- Discrimination is prohibited in relation to job applicants, contractors and business partners, as well as employees.
- If the disability is one of a number of reasons for an employer's conduct, this may still be unlawful discrimination – it is not necessary for the disability to be the sole or dominant reason.
- Employers may discriminate in limited circumstances where an exception applies – such as where an employee is unable to perform the inherent requirements of the job due to his or her disability, or where the provision of special services or facilities for the disabled employee would impose unjustifiable hardship on the employer.

Managing performance of employees with disabilities, illnesses or injuries

If an employee is underperforming, the employer should try to find out why this is the case, including whether there are any impairments affecting the employee's performance, and what job modifications could be made to assist the employee.

Setting performance targets across the board can result in indirect discrimination against an employee with a disability.

These points are illustrated by the 2006 case of *Deckert v Department of Primary Industry*. In that case, an employee suffering from arthritis of the fingers, and who had needed time off due to migraines, was placed under pressure to improve her work performance. The final straw came when general work output targets were announced in a meeting, in such a way that the employee feared that she would lose her job if she failed to meet the targets within a short timeframe.

The tribunal found that the employer had discriminated against the employee on the ground of impairment. The employer had been unaware of the employee's arthritis but had failed to take adequate steps to determine why the employee was underperforming.

Of course, not every case of underperformance can be excused by reason of a disability. In some cases, it is

reasonable for an employer to insist on minimum standards of performance, or the employee's underperformance may be unrelated to the disability. In the case of *Penwill v National Jet Systems Pty Ltd*, the court found that the employer had acted lawfully in dismissing a flight attendant for persistent lateness and absenteeism, despite the employee's claims that she suffered problems with breathing, headaches, nausea and sore eyes caused by aircraft fumes.

Redundancy and disabled, injured or ill employees

Employers should disregard employees' injury or illness status when offering voluntary redundancies and selecting employees for retrenchment. While an employee's injury or illness may be relevant to their capacity to perform the inherent requirements of the job, this is a separate issue from whether the employee's position is redundant.

In one recent case, an employer was found to have discriminated against an injured worker in not offering him the option of voluntary redundancy. In another case, an employer who had retrenched a number of employees on WorkCover was found to have unlawfully terminated their employment.

In the case of *Brunsch v Venture Mould and Engineering Australia Pty Ltd*, the Victorian Civil and Administrative Tribunal found that the employer had indirectly discriminated against the employee, because it had set a requirement that employees be 100% fit and working in order to qualify for voluntary redundancy. The Tribunal ordered the employer to give the employee a choice of transfer to the company's new site, or a redundancy package.

In *Smith v Moore Paragon Australia Ltd*, the Australian Industrial Relations Commission upheld the claims of seven employees who claimed their employment had been unlawfully terminated on the grounds of their WorkCover injury status. The Commission found that Moore Paragon had taken into account the workers' injury status and workers' compensation history when they were selected for involuntary redundancy. The employees were awarded compensation.

Guidelines for managing performance and redundancy

In order to place themselves in a good position to manage disability, illness and injury issues that arise, employers should ensure that their employment agreements cover issues such as:

- pre-employment medical testing, where relevant;
- agreement to undergo medical tests, as reasonably required;
- agreement to disclose pre-existing injuries and illnesses that may be affected by the proposed role.

When performance issues arise, employers should:

- consider whether these may be related to an impairment or medical condition;
- give the employee an opportunity to provide reasons for their poor performance;
- request or require the employee to undergo a medical examination where the employee's medical work capacity is in doubt.

In determining redundancy issues, employers should:

- not use an employee's injury or illness status as part of the redundancy selection criteria;
- not assume that a job is not required because it is temporarily vacant due to illness or injury;
- not impose a requirement of 100% work capacity as a condition of voluntary redundancy;
- deal separately with issues relating to an employee's ability to perform the inherent requirements of the job – this may lead to termination, but should not be confused with redundancy.

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations contact the Workplace Relations team at Moores Legal.

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