Workplace

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Mental Illness and Reasonable Adjustments

When assisting employees with mental illness, employers must engage with treating doctors and carefully consider how and if the requests of the employee regarding changes to work can be accommodated, balanced against business needs.

Mental Health and the Workplace

With mental health being an issue of critical importance within the legal profession, many employers take action to ensure that there are wellbeing and support programs accessible to employees within the workplace. While support from the employer is critical to maintaining wellbeing, it is also essential to ensure that employers offer reasonable adjustments in order to comply with the law if an employee does suffer from mental illness.

In a recent Federal Court case, the obligation for an employer to make 'reasonable adjustments' in such circumstances has been clarified.

An Employer Needs to Recognise Reasonable Adjustments Which Should be made for any Employee with a Mental Illness

The case is significant in its clear application of the law to the facts and the balanced view taken in the judgment between the competing needs of an employee suffering from depression and the business and other needs of the practice. The approach taken by the employer was also highlighted in the decision.

It was shown that the practice was engaged in communication with Mr Tropoulos and his treating practitioners and this was fundamental to the employer demonstrating that it had acted on valid information (and not assumptions about what Mr Tropoulos could and could not manage).

Tropoulos v Journey Lawyers Pty Ltd [2019] FCA 43 concerned a lawyer, Mr Tropoulos, at a small family law practice in Queensland. He could no longer work when his pre-existing depression worsened. Under the guidance of his treating practitioner, Mr Tropoulos made several brief attempts to return to work, which were ultimately unsuccessful. He took 6 months off and his claim of disability discrimination related to the terms on which the practice proposed to take him back on his return. After some discussion regarding his return to work and his employer being made aware of the extent of his illness, several adjustments were proposed and made for Mr Tropoulos which rejected by Mr Tropoulos who then brought a claim of disability discrimination.

Determining what a Reasonable Adjustment would look like for an Employee

In his brief attempts to return to work, the employee had experienced difficulties with decision-making, had felt intensely stressed and fatigued, and had doubted his abilities in keeping up with his previous standard of legal knowledge and practice. Taking this into account, the employer made a range of adjustments for Mr Tropoulos. As he sought a graduated return to work, the employer offered three full alternate days per week. Due to the part-time nature of the role, his expected earnings and salary were reduced along with his responsibilities associated with mentoring other lawyers, his office was reallocated, and he was assigned primarily to legal aid matters rather than private client work. Further, he had been provided with ample time to recover, and additional leave was offered to facilitate further recovery.

Mr Tropoulos considered that "reasonable adjustments" would have involved half-day working days, the return to his previous role and its corresponding salary, as well as the use of the office he had previously occupied. It is important to note, however, **that the treating practitioner failed to prescribe a return to work plan entailing Mr Tropoulos' necessary workplace adjustments.** Therefore, the adjustments that were made amounted to what the employer deemed to be necessary when considering the needs of the employee, balanced against the employer's requirements (and expectations of its clients).

Whilst the employer communicated frequently with both the employee and his treating practitioner, the adjustments that Mr Tropoulos sought were not considered to be feasible. Despite the already reduced hours, the employee was unable to meet the newly set expectations and was working at one tenth of his previous working capacity. Upon reflection, the Court considered that the treating practitioner had been overly optimistic and had misjudged the capacity of Mr Tropoulos to return to work.

Mr Tropoulos claimed that these and other actions amounted to unlawful disability discrimination under the Disability Discrimination Act 1992 (Cth) ('Act), as the employer had failed to provide "reasonable adjustments" as required by section 5(2) upon his return to work following a major depressive episode. **Under the Act, a "reasonable adjustment" is an adjustment to be made unless the adjustment would impose an unjustifiable hardship.**

The Court found the actions of the Practice were not unlawful and found that the actions of the practice were 'reasonable adjustments' and that the preferred position of Mr Tropoulos on the issues (such as working half days), would have imposed an unjustifiable hardship on the practice.

The Consideration of "Unjustifiable Hardship"

The Court provided an in-depth analysis on the extent of the hardship that the employer would have faced, whilst keeping in mind the needs of Mr Tropoulos, in order to establish that there was an "unjustifiable hardship" as defined in section 11 of the Act. It was determined that even if the adjustments were made, Mr Tropoulos would have been unable to carry out the inherent requirements of his previous role by applying a high level of legal knowledge and skills into practice.

In the time that Mr Tropoulos had been absent from the workplace, new processes had been developed so that his role was absorbed by other lawyers due to the time-pressured and litigious nature of family law practice. As the small firm had limited resources, the office was now in use by another full-time employee due to a shortage of space. Additionally, all of the files he had worked on prior to his time off had been completed or otherwise finalised. It would not have been possible to reinstate him to his previous role as new client files could not be opened and managed within the working capacity that he had demonstrated since his return.

Further, the Court accepted the employer's decision to reduce Mr Tropoulos' salary on the basis that the firm utilised a performance-based pay system. As his expectations had been reduced, his salary corresponded to reflect a decrease in productivity. This had been prior common practice in relation to Mr Tropoulos as well as other employees when their performance was reviewed in accordance with fluctuations in productivity throughout their careers. On the circumstances, the Court found that as Journey Lawyers was not a large firm, the financial strain caused by the suggested adjustments would cause significant hardship in respect of its overheads and salary to be paid in the course of Mr Tropoulos' adjusted employment, and would amount to an "unjustifiable hardship".

As it was found that the adjustments offered were in fact reasonable, the nature of "reasonable adjustments" and its origin in human rights law was discussed in some depth. The Court referred to the Explanatory Memorandum to the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008. This Bill indicates that the concept draws upon the term "reasonable accommodation" used within the Convention on the Rights of People with Disabilities, of which Australia is a party. In that, "reasonable accommodation" means **necessary and appropriate modification and adjustments without imposing a disproportionate burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.**

It was clear that in this instance, Mr Tropoulos had been afforded with reasonable adjustments as he had not been treated differently to any other employee who did not suffer a mental illness in factually similar circumstances. For instance, no other employees had previously been allowed to work half-days for the firm. Section 5(2) of the Act states that as long as a modification is "for" a person with a disability, an issue does not arise as to how specific the adjustment must be. With reference to this, although the employer was unable to fulfil Mr Tropoulos' request of half-days, the fact that he was provided with part-time adjustments as well as reduced responsibilities was sufficient in the view of the Court.

The smaller size of the employer here was also determinative of what could be provided and what would be unsustainable for the practice to accommodate. It was held that although a more structured and comprehensive return to work program could have been provided, the nature of the small firm meant there were limited resources to cope with the challenges that arose due to Mr Tropoulos' condition. Ultimately, the Court was satisfied that reasonable adjustments had been made and that the conduct had not amounted to a breach of the Disability Discrimination Act. A larger employer may have difficulties in making out that defence (of unjustifiable hardship).

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