MKA: Risk Mitigation

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MKA: Making Knowledge Accessible

It is has been another busy quarter for MKA Risk Mitigation. A presentation on the prevention of workplace bullying was made to the College of Organisational Psychologists. The panel consisted of Martha Knox Haly, Brian Williamson (Director of Workplace Law) and Mary Yaegar (OHS Officer, NSW Labour Council). A guest lecture was also given to the Masters of Forensic Psychology Program at UWS on the history of workplace cultural change in the NSW Police Force. Moreover, a presentation on support of employees with a mental health condition was made to the Hotels Safety Alliance Panel in the last quarter.

During these presentations, it became apparent that there was substantial confusion over how employees with mental health disorders could be supported and managed in the workplace. When someone is suffering from a mental health condition they may be vulnerable and unable to express themselves in the hurly burley of a workplace and they can be bullied. Alternatively, individuals with mental health conditions can act in a bullying and traumatising fashion.

It is important to remember that whenever there is bullying, an employer has obligation to speak to those about the unacceptability of such behaviour. It is also critical that employers continue to consult with their workforce. In this newsletter, we touch upon three cases which outline additional process requirements of employers trying to manage employees with a range of medical conditions in the workplace. However we will also look at practical behavioural strategies for managing relationships within the workplace, where one or more employees has a mental health condition.

Practical Strategies

The first step is for management to have confidence in their own ability to turn the situation around. Everyone can manage employees who have no performance problems. The really strong managers are those who can obtain effective performance from employees who have a psychiatric or physical health disorder. In addition to this, the most effective managers were the ones who proactively managed the relationship between mentally ill workers and their colleagues. These managers firmly kept the workplace on an even keel, and played an instrumental role in stabilising the mentally ill employee. It is not possible to succeed in every case, but I have seen enough situations which were well managed to know that it is worth trying!

The next step is to consult with the workforce, and be informed about what is happening with relationships at a shop floor level. Everyone in the workplace has an obligation to participate in safe work practices. This obligation also extends to those who have a mental health condition.

If there is a sense that any employee or manager (irrespective of health status) is behaving in a way that damages physical or psychological well being of others, then that problem needs to be directly addressed with that employee as a performance issue.

Some supervisors are scared of having these discussions for fear that they will be accused of discrimination or will hurt the employees' feelings. Reasonable performance management is not discrimination or harassment. The risk of emotional hurt is minimised if a manager or supervisor has taken the time to develop a strong working relationship with that employee (again this truism applies to every employee irrespective of health status). A positive relationship means that there is a greater possibility that the employee can accept the criticism, without assuming it is part of a personal vendetta against him or her.

Cosma v Qantas Airways [2002]

Silvano Cosma was dismissed in July 1997 from a shoulder injury he had sustained in 1991. Qantas relied on section 15 (4) of the Commonwealth Disabilities Discrimination Act 1992 which states that:

Discrimination on the grounds of disability is not unlawful if the employment takes into account past training, qualifications and experience relevant to the particular employment; and if the person is already employed by the employer, the person's performance as an employee and other relevant factors.

This section advises that "it is reasonable to take into account, the person because of his or her disability:

a) Would be unable to carry out the inherent requirements of the particular employment."

Qantas was praised by the Court for its sustained efforts to provide alternative employment for Mr Cosma, who was well regarded as an employee. The Qantas rehabilitation staff were described as conducting their duties in a conscientious and thorough manner. Qantas had to face the question of what were the inherent position requirements for jobs for which Mr Cosma was capable. Qantas was criticised for failing to conduct a systematic or comprehensive review of the tasks that needed to be done.

The issue of unjustifiable hardship was not addressed in this case because Mr Cosma did not specify services or facilities that he would require.

The take home points from this case are: (a) that the employers have to make a genuine and sustained effort to identify alternative positions; (b) that professionalism of rehabilitation staff is important; (c) that systematic and thorough job analysis and risk assessment procedures are essential.

Commonwealth of Australia v Williams (2002) FCAFC

Williams developed insulin dependent diabetes and was declared medically unfit for combat related duties. Williams had fluctuated in his ability to successfully manage his condition, and the employer provided detailed lists of core competencies, risk assessments, work activities and medical standards to support the Defence Force case. Again there needs to be substantial evidence that an employee is not able to perform his or her duties, before discrimination on the grounds of disability can be upheld. In other words an employer who engages in discriminatory activity without a substantial evidentiary base does so at his or her peril!

X v Commonwelath (1999) 193 CLR 177 High Court of Australia

The appellant was discharged from the army on the ground of an HIV positive status. It was alleged that the appellant was not able to carry out the inherent requirements of the particular employment. The lower courts held that X was able to carry out the inherent requirements of his employment, because he was extremely physically fit at the time of his discharge. This is a fascinating case, because it takes the meaning of inherent requirements of employment to be more than just "the tasks which are performed." The full court decided that the inherent requirements of a particular employment are not confined to the physical aspects or to the skills required for that employment.

The court referred to the requirement that an employee be able to work in a manner that did not pose a risk to the health or safety of fellow employees. The court took a broader view of inherent requirements than that stated in S 15(4). The bench stated that employee or applicant for employment must "*be able to perform the functions and tasks required, in the particular employment, without exposing co-workers and others to whom a duty of care is owed, to unreasonable loss or harm, before it can be said that the person is able to do the job (s. 31).*

Furthermore it is an implied warranty of every contract of employment that the employee possess reasonable skill and care in carrying out employment obligations. If for any reason, (mental, physical or emotional), the employee is unable to carry out these requirements, an otherwise unlawful discrimination may be protected by the provisions of Section 15 (4) of the Disabilities Discrimination Act (s 32)."

Future Topics

- Creating positive, performing, professional workplace cultures
- Positive Mental Health at Work
- A Drug Free Workplace
- Inspired Performance Management
- Adventurous workplaces without risk
- Goodbye Chronic Pain
- Mediation that Works
- Safety Culture Plus
- Real Team Building

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