Reasonable adjustment
The (dis)ability to discriminate lawfully: “inherent requirements” and unjustifiable adjustment

“Injuries outside of work — whose responsibility?”
If an employee is injured in the course of their employment, the path forward is relatively clear: workers’ compensation legislation enacted across the Commonwealth and all its States and Territories provide a mechanism for the employees to be compensated, and a statutory program to manage their rehabilitation and return to work.

The situation is different for an employee who becomes injured or acquires a disease in circumstances unrelated to their employment, and that injury or disease affects their ability to satisfactorily carry out their duties.

What then is the employer obligated to do; where lies the legal tipping point on the balance beam between mandated compassion, and permitted self-interest?

Putting the human element to one side, such circumstances present obvious practical difficulties for the employer — they will likely want to minimise the time, costs, and risks inherent in making “adjustments” for the injured employee, whilst ensuring they do not take any action that might open them up to an expensive lawsuit under the Disability Discrimination Act 1992 (Cth) (DDA).

Yet for the employee, the consequences are certainly graver. Not only do they have to deal with the physical and emotional burdens of the injury itself, but also with the risk that they may lose their livelihood because of it.

Even this fails to give due weight to the difficulties faced by the chronically ill or disabled, for whom the DDA was primarily created to protect. As the late Australian disability activist Stella Young said, “Many of us, particularly those of us with disabilities who have faced persistent discrimination throughout our lives, not least when trying to find employment in the first place, take enormous pride in our hard-fought jobs and careers.”

The DDA accordingly seeks to balance these conflicting interests of the employer and employee, by:

1. prohibiting discrimination in employment on the ground of disability; and
2. allowing an exception to that unlawfulness if either:
   a. despite any “reasonable adjustments”, the employee would be unable to carry out the position’s “inherent requirements”; or
   b. the “reasonable adjustments” would impose an “unjustifiable hardship” on the employer.

The scheme thereby creates an imperative on the employer, when faced with such a situation, to carefully examine what comprises the “inherent requirements” of a particular position, whilst keeping “open minded” (within certain bounds) about the myriad of ways to make adjustments for those whom fortune has not so favoured.

“Reasonable adjustment” in the DDA
Direct vs Indirect Discrimination
The DDA prohibits both “direct” and “indirect” discrimination on the ground of disability. The former refers to when a person with a disability is treated less favourably in the same circumstances than someone without it; the latter refers to when apparently neutral policies and practices include unreasonable requirements or conditions that cannot be complied with by those with a disability, so as to put them at a disadvantage.

Origins of “reasonable adjustment”
Although the DDA was enacted in 1992, it was only through the Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth) (the Amending Act), that the failure to make “reasonable adjustments” was expressly included in the DDAs respective definitions of “direct” and “indirect” discrimination, in order to implement the recommendations of the Productivity Commission from its ‘Review of the Disability Discrimination Act 1992’.

The explanatory memorandum of the Amending Act states that the concept of “reasonable adjustments” is drawn from that of “reasonable accommodation” found in the United Nations Convention on the Rights of Persons with Disabilities (the Convention), which was ratified by Australia on 17 July 2008, and entered into force on 16 August 2008.

Article 2 of the Convention defines “reasonable accommodation” as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities...”
In other words, an employer must make, or must consider making, all adjustments for the injured employee up to the point that any further adjustments would cause it unjustifiable hardship. That is, if, despite all reasonable adjustments, the employee would still be unable to carry out the inherent requirements of the position, then the employer’s ‘discriminatory’ action (for example, in terminating the employee) is lawful.

Construction of “reasonable adjustments”

Mortimer J also made the following observations in Watts on how the term “reasonable adjustments” should be construed.

He noted the wording of the statute requires the adjustment to be made for the person with the disability, not to their position, nor to the equipment they use — the adjustment is to be made for the person to enable them to do the work that they are employed to do.10

The term “adjustment” therefore has a broad and flexible meaning, adaptable to each person and their unique set of circumstances, and qualified only by the need for the adjustment to be sufficiently identifiable so that the employer can determine whether it will impose unjustifiable hardship.11

Of particular note, despite the presence of the word “reasonable” in the term “reasonable adjustments”, suggested adjustments are not actually to be assessed by reference to “reasonableness” — the word “reasonable” in “reasonable adjustments” is said not to serve any qualitative purpose, and therefore the only adjustment that will be “unreasonable” is one that involves unjustifiable hardship.12

‘Reasonable adjustment’ should be defined to exclude adjustments that would cause unjustifiable hardship. This safeguard is necessary to ensure that adjustments are likely to produce net benefits for the community, and do not impose undue financial hardships on the organisations required to make them.” [emphasis added]

How, then, does one determine or evidence “unjustifiable hardship”?

Somewhat helpfully, section 11 of the DDA provides:

1. For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the first person) would be an unjustifiable hardship, all relevant circumstances of the particular case must be taken into account, including the following:
   a. the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
   b. the effect of the disability of any person concerned;
   c. the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;
   d. the availability of financial and other assistance to the first person;
   e. any relevant action plans given to the Commission under section 64.

“Unjustifiable hardship” has not been pleaded in many cases, leaving us with no real commentary on how it is to be construed. Nevertheless, the express factors to be considered make it somewhat self-explanatory as to how it is used as a defence to claims for failure to make reasonable adjustments.

“Inherent requirements”

By contrast, the term “inherent requirements”, has been present in the DDA since its first enactment, and so has had time to attract judicial attention and develop a body of law around its meaning.

“Inherent requirements” are “characteristic or essential requirements of the employment, as opposed to those requirements that might be described as peripheral”,13 and are those of the particular employment, not the requirements of some different employment that has been modified to meet the needs of a disabled employee.
The rationale behind the “inherent requirements” defence was described by the Productivity Commission as follows: “From the employers’ perspective, inherent requirements provide an important safeguard that underpins the merit principle in employment decisions. For employees, inherent requirements mean that employers cannot discriminate against them by using failure to meet non-essential requirements as a reason.”

In considering whether an employee would be able to carry out the inherent requirements of the particular work, the DDA requires the following to be taken into account:16

1. the employee’s past training, qualifications and experience relevant to the particular work;
2. the employee’s performance in working for the employer; and
3. any other factor that is reasonable to take into account.

The following examples from the case law give good illustrations of the “inherent requirements” principles in action:

1. Tolerance to penicillin is an inherent requirement of working at a pharmaceutical plant that exposes its employees to penicillin;17
2. Where most countries prohibit pilots over 60 years of age from flying in their airspace, it is an inherent requirement for an international airline pilot to be younger than 60, even if they are physically capable of flying;18
3. A support officer in the Royal Australian Air Force with Type I diabetes does not meet the inherent requirements of a position for which they need to be medically fit for long term deployment to a base with limited facilities, so that they can work in support of a person performing combat duties;19 and
4. It is an inherent requirement for a soldier in the Australian Defence Force to be able to bleed safely in the field without risking infecting his fellow soldiers with HIV.20

A salient question arises regarding the interaction between inherent requirements and reasonable adjustments, where an employee in unable, because of an injury, to fulfil the inherent requirements of a position at a particular time, but with reasonable adjustments may be able to do so in at some point the future.

When read in context, the obligation to make “reasonable adjustments” is not subject to any temporal limit, nor the implied measure of a “reasonable time”. Rather, as Mortimer J stated in Watts, the DDA is:21 “… intended to facilitate, in a variety of circumstances, disabled people performing, or continuing to perform, work for which they are qualified and of which they are capable, whether by training, experience or both. In this sense, allowing time for an employee to adapt, and gradually return to full capacity, itself forms part of the “reasonable adjustments” made, subject in any given case to the unjustifiable hardship exception.”

Thus, depending on the circumstances, employers faced with non-work related injuries can, in effect, be required by the DDA to provide something that is a feature of the injury management process under statutory workers compensation schemes: graduated return to work, on reduced hours. That is, it may well be that the employer will not be able to say, “it is an inherent requirement of your employment that you be able to work 38 hours per week, you cannot work those hours because of your non-work related injury, you’re sacked”. Rather, certainly in some cases, it will be the case that allowing the employee to work reduced hours for a time in anticipation of returning to work full time is a “reasonable adjustment” that does not cause “unjustifiable hardship” to the employer.

Lessons for employers

The recent case of Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW),22 provides a powerful reminder to employers of the consequences of breaching their obligations under the DDA.

In that case, the employee suffered from Crohn’s Disease. Before terminating her employment on the basis that she could not fulfil her position’s inherent requirements, the employer failed to turn its mind to what those inherent requirements actually were, or what the reasonable adjustments that could be made to permit her to perform those inherent requirements.

The employee was ultimately successful in her claim of disability discrimination, and was awarded damages of $180,000 plus interest. The DDA thus seems effective in providing employers with sufficient incentive to look past the limitations of a person’s disability, and be open minded about what that person might have to offer if the appropriate adjustments are made.

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Endnotes

1 Disability Discrimination Act 2002 (Cth), s 15.
2 Ibid, s 21A.
3 Ibid, s 21B.
4 Ibid, as 5, 6.
9 Watts v Australian Postal Corporation [2014] FCA 370, [54].
10 Ibid, [23].
11 Ibid, [24]-[25].
12 Ibid, [27].
14 X v Commonwealth (1999) 200 CLR 177, [102].
16 Disability Discrimination Act 1992 (Cth), s 21A(2).
21 Watts v Australian Postal Corporation [2014] FCA 370, [57].