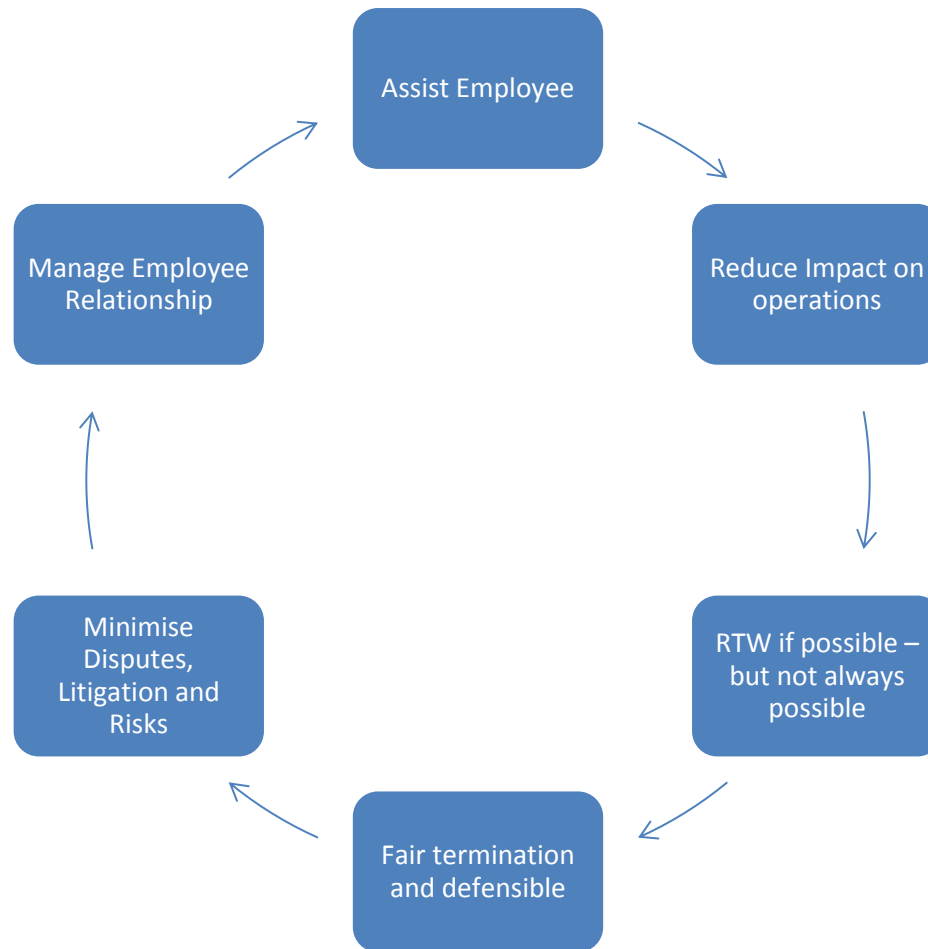

Managing, Disciplining and Terminating Ill and Injured Workers

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Overview



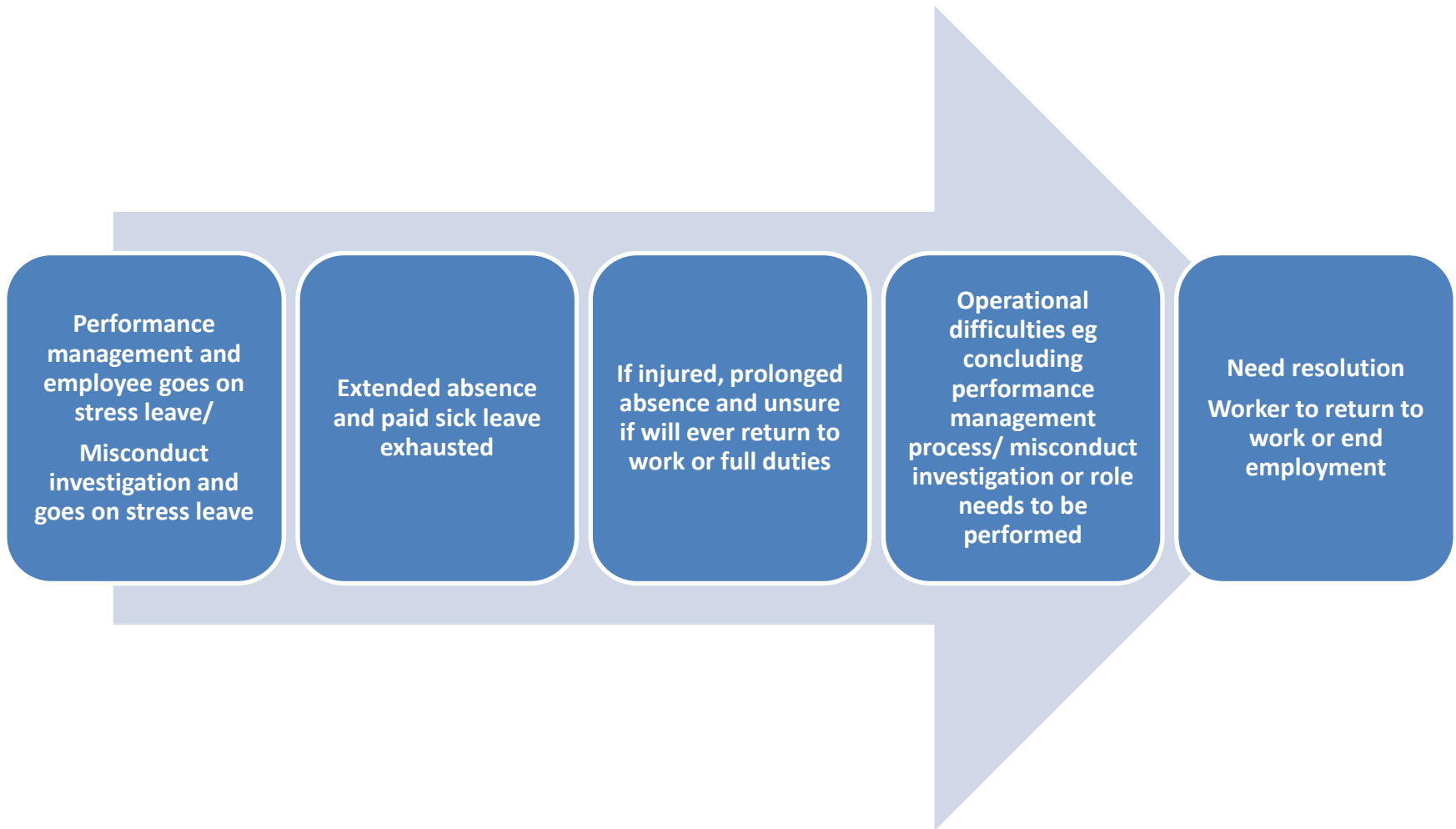
Outline

- ❑ Areas to be covered
 - ❑ Personal leave entitlements, when they run out
 - ❑ Evidence of illness, how, when and why to request
 - ❑ Legal Risks
 - Adverse Action
 - Unfair Dismissal
 - Unlawful Termination
 - Discrimination
 - Protection from dismissal under workers compensation legislation

Outline cont...

- Bullying complaints
- Dealing with issues of performance and conduct when worker absent due to illness or injury
- Dealing with the worker's grievance whilst they are absent due to illness or injury
- Suggestions and tips for dealing with these situations

Common scenarios



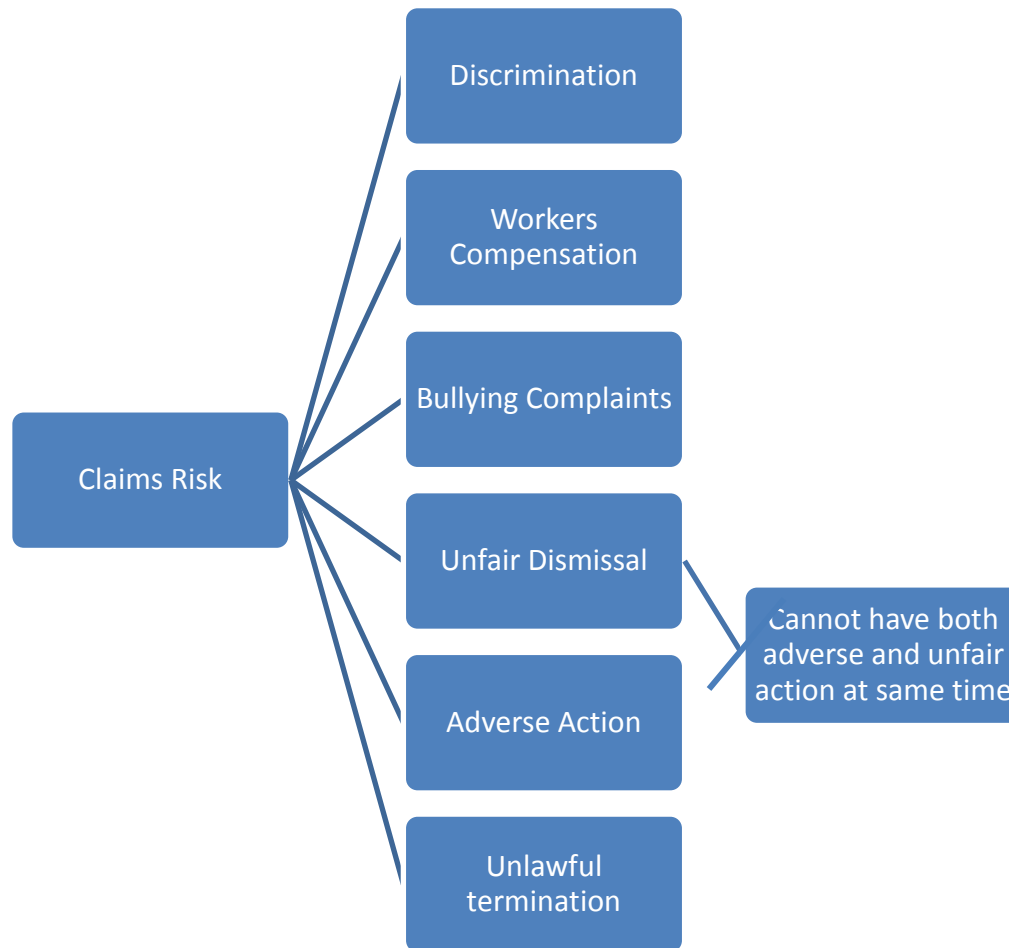
Summary of statutory obligations

- ❑ Must not discriminate on grounds of disability
- ❑ Must put in place injury management plan (with insurer) for work related injuries
- ❑ Must not terminate within 6 months of work related injury (in NSW)
- ❑ Right to request suitable duties from employer within 6 months of injury (in ACT)
- ❑ Must not terminate on grounds of disability

Summary of stat obligations cont...

- ❑ Must not terminate due to temporary absence due to illness or injury
- ❑ Termination must not be harsh, unjust, or unreasonable
- ❑ Termination must not be in breach of general protections

Claims that may be brought



Key issues

- ❑ Discrimination – how far does the inherent requirement exception extend?
- ❑ Six months' prohibition – can you terminate for other reasons and is this advisable?
- ❑ Discrimination/termination – what constitutes inherent requirements?

The key issues cont...

- ❑ Termination – what is a temporary absence?
- ❑ Termination – how to minimise the risk of a finding of harsh, unjust or unreasonable or an adverse action claim

Personal (Sick) Leave

- ❑ NES entitlement is 10 days paid leave per annum which accumulates ongoing
 - Can be used if not fit because of illness or injury
 - Can be used to care for family/ household member
- ❑ Check contract, policy, award or EA in case for any more beneficial entitlements
- ❑ Check for any leave without pay/ extended leave entitlements
- ❑ Must not terminate due to temporary absence due to illness or injury

Temporary Absence under FWA

- ❑ What is a temporary absence?
 - ❑ Regulation 3.01 requirements for purposes of Section 352:
 - Medical certificate within 24 hours or reasonable period; or
 - Compliance with terms of industrial instrument to notify employer and substantiate absence; or
 - Provision of required document i.e. medical certificate or, if not reasonably practicable, statutory declaration.

Temporary Absence cont...

- ❑ what is a temporary absence? (cont'd)
 - ❑ Regulation 3.01 exceptions:
 - Absence extends for more than 3 months, unless on paid sick leave for duration of absence; or
 - Total absences, within 12 months' period, whether single or separate illnesses or injuries, extend for more than 3 months, unless on paid sick leave for duration of absences.

Temporary Absence cont

- ❑ Termination – what is a temporary absence?
(cont'd)
 - *Sperandio v Lynch* [2006] SCA 1648 (1 December 2006)
 - *Crowley v Parker Hannifin (Australia) Pty Ltd* [2006] FCA 901 (13 July 2006)
 - *Lee v Hills Before & After School Care Pty Limited* [2007] FMCA 4 (15 January 2007)
 - *McGarva v Enghouse Australia Pty Ltd* [2014] FCCA 1522 (15 July 2014)

Discrimination

- ❑ Discrimination on the basis of disability (medical condition) may be unlawful (under DDA and/or State laws)
- ❑ Unless it would cause unreasonable hardship the employer must make reasonable adjustments eg change to work processes or changes to physical set up or practices
- ❑ Standard defence – is that the worker cannot perform inherent requirements even if reasonable adjustments made.

Inherent Requirements Test

- ❑ If you cannot satisfy the inherent requirements of the position threshold, defence will fail
- ❑ This test is applied to unfair dismissal claims as well
- ❑ If the test is met and that is reason for termination then unlikely to be adverse action, unlawful or workers comp if in addition
 - 3 month rule is met and all leave exhausted (NB 12 month period for , and
 - Workers comp protection period has passed

Evidence to pass the test

- ❑ Evidence needs to show that it is unlikely in the foreseeable future that the employee will be able to perform the essential elements of the role in light of any reasonable adjustments

Discrimination – Inherent Requirements

- ❑ Discrimination/termination – what constitutes inherent requirements? (cont'd)
 - ❑ Must be close relationship between inherent requirements and otherwise unlawful reason for dismissal – *Cth v HREOC*
 - ❑ Ability to uphold APS values and code of conduct: *Gardiner v Toohey* [2007] FCA 1292 (21 August 2007)

Discrimination – Inherent Requirements

- ❑ Ability to work as a member of a gang performing duties as a ramp services operator: *Cosma v Qantas Airways* [2012] FCAFC 425 (20 December 2012)
- ❑ Ability to drive a motor vehicle including for substantial distances: *Gordon v Commonwealth* [2008] FCA 603 (6 May 2008)
- ❑ Need for reasonably harmonious interaction with other employees: *Razumic v Bright Industries* [2008] FCA 985 (30 June 2008)

Discrimination – inherent requirements

- ❑ Compliance with monitoring and treatment requirements (diabetes): *Construction, Forestry, Mining and Energy Union v Peabody Energy Australia Coal Pty Ltd* [2014] FCA 394 (10 April 2014)
- ❑ Employer must be proactive in identifying reasonable adjustments, but employee must cooperate eg by providing medical evidence suffice to allow employer to consider reasonable adjustments: *Watts v Aust Postal Corp* [2014] FCA 370

Unfair Dismissal - Inherent requirements)

□ How does it apply?

- Worker advised to avoid heavy lifting due to medical condition
- Worker given modified duties after worksite assessment
- After second assessment worker found to be unable to perform inherent requirements and dismissed
- Held, on appeal, that not unfair – inherent requirements were of original job, not modified duties

J Boag and Son Brewing v Button [2010] FWAFB 4022

Requesting evidence

- When is it lawful and reasonable to request?
 - On safety grounds and after extended absence if worker refuses to provide details of diagnosis/prognosis etc employer can direct:
 - Further information
 - Attendance at employee nominated doctor
 - If worker refuses – can discipline, dismiss (provided no ulterior motive eg poor performing employee, response to bullying complaints etc.)
 - Direction to attend doctor must be soundly based and not based on assumption about condition

Adverse Action

- ❑ Disability/ medical condition or exercise of workplace right (to take sick leave) grounds for adverse action claims.
- ❑ Reverse onus on employer to prove the prohibited reason was not the operative reason to dismiss.
- ❑ Inherent requirements defence available
- ❑ Focus on honest and genuine belief of the decision maker
- ❑ Cannot be dismissed for temp absence

Adverse Action cont...

- Worker sought to appear on TV show whilst on sick leave for anxiety due to adjustment disorder
- Worker's doctor certified unfit for work but fit to participate in show.
- Employer relied on medical assessment by Aust Gov Medical Officer that worker fit for work and did not accept worker's doctor
- Court accepted worker's doctor and ordered reinstatement, back pay and accepted explanation of well enough to appear on TV (the condition was **situational anxiety** that **only arose at work**).

Marshall v BOM [2012] FMCA 1052

Termination and Temp Absence

- Worker absent for 10 months due to stomach and liver cancer
- Worker wanted to come back to work, employer terminated worker due to extended leave of absence
- Employer claimed compliance with s 352 and Reg 3.01 as defence to adverse action.
- Court held “dismissal may be authorised due to period of absence but may still constitute an unlawful dismissal under FWA or discrimination laws

McGarva v Enghouse [2014] FCCA 1522

Workers Comp

- ❑ Six month prohibition – can you terminate for other reasons and is this advisable?
 - ❑ Short answer is yes but caution should be exercised
 - ❑ The prosecution needs to establish that the injury was a substantial and operative cause of the dismissal (not the sole reason)

Workers comp cont...

- ❑ Any decision to dismiss for another reason or reasons would need to be supported by very clear evidence
- ❑ It is a defence if an employee refuses a medical examination, or the employer believed on reasonable grounds that the injury was not work related
- ❑ Reinstatement requests can be made within 2 years of date of dismissal in NSW

Management issues...

- What if the misconduct (reason for termination) is behaviour that may be caused by a psychological condition?
 - If sole reason for the decision maker was misconduct then not adverse action *State of Victoria (Office of Public Prosecutions) v Grant* [2014] FCAFC 184
 - If medical certificate unclear, you can require a worker to allow direct communication with the worker's doctor to meet duty of care to employee – *Columbine v the GEO Group* [2014] FWC 6604

Management issues cont...

- ❑ If in the course of misconduct or other conduct management and employee is goes off on stress leave?
 - If medical certificate unclear, you can require a worker to allow direct communication with the worker's doctor to meet duty of care to employee – *Columbine v the GEO Group* [2014] FWC 6604. This could include asking the doctor what assistance the employee requires to respond to the allegations.

Management issues cont...

- ❑ If employee grievance is in process of being dealt with, is employer required to progress if employee goes on stress leave?
- ❑ No if employer suspends process because of legitimate concern over employee's fragile mental state – *Christos v Curtin University of Technology* [No2] [2015] WASC 72

Suggestions and tips

- ❑ Review statutory, contractual and award requirements and obligations
- ❑ Does your EB have a clause permitting requirement to attend a medical to determine fitness?
- ❑ Obtain/prepare detailed duty statement of position in which employee was originally employed (job dictionary)
- ❑ Work with the employee to review progress of fitness for work and advise, and advise of intended course and possible outcomes

Suggestions and tips (cont'd)

- ❑ Is there conflicting medical evidence, have you resolved that as best you can without need to get additional medical evidence?
- ❑ Yes you can question med certificates if there is a reasonable basis to do so.
- ❑ Require medical examination from doctor with understanding of history, workplace and which provides guidance re rehabilitation and prognosis (*see Thompson v IGT*)

Suggestions and tips (cont'd)

- ❑ Obtain employee's consent to communicate with treating doctor, if possible
- ❑ If no consent, you still have the right to reasonably direct the employee (*Grant v BHP Coal Pty Ltd* (C2014/3771) (18 June 2014))
- ❑ Take care in draft such directions to require more detailed medical evidence, link to concerns about the employee's health & safety, safety of others and capacity to safely return to work.

Suggestions and tips (cont'd)

- ❑ For work related injuries, liaise with Insurer on rehabilitation plan
- ❑ Consider utility/benefit of functional assessment and retraining
- ❑ Be conscious of workers' compensation claims or potential claims (especially stress related)

Suggestions and tips (cont'd)

- ❑ Consider inherent requirements of position.
Can modifications be accommodated?
Unjustifiable hardship?
- ❑ Consider alternative positions (you are not obliged to create a special position)
- ❑ Keep track of sick leave entitlements
- ❑ Ensure accurate records of all discussions

Suggestions and tips (cont'd)

- ❑ Keep employee informed of status of employment and allow opportunity to discuss
- ❑ Before considering termination, undertake thorough review from all angles and seek advice, don't rush.
- ❑ Termination of employment should be last resort

Questions

