



## WORKPLACE SAFETY AUSTRALIA PTY LTD

### **Safety Alert: 40 – 2005**

*A special 'unreasonable workers' issue – you need to read this Alert!*

#### **In this Alert**

- ["Reasonable" conflict management procedures for unreasonable workers](#)

#### **Note**

*This alert looks at a recent case applicable to all businesses across Australia – both in an OHS and a general industrial relations area. The case is important and sends a message for employers. You must take particular care when dealing with disciplinary matters with workers – especially with 'difficult' workers. One of the fastest growing types of OHS claim in Australia relates to workplace 'stress'.*

*The following case highlights, in our opinion, the sometimes almost unreasonable burden placed on employers in having to deal sensitively with (what the Industrial Commission conceded in this case was an) 'unreasonable worker'. But as we note at the end of the article – even though it may sometimes seem unfair – it is the law! And unfortunately, unless you comply with the law, there is more and more of a chance that it is going to cost you!*

*Kim Schekeloff*

*Director of Workplace Safety Australia Pty Ltd*

## Reasonable conflict management procedures

A recent South Australian case illustrates the importance of employers utilising reasonable conflict management procedures – even with ‘difficult’ staff – to avoid stress claims.

The claim that was the subject of this case arose from a notice of work related injury dated 11 June 2003 served by the worker Allen Rukavina on his employer Bridgestone Australia Ltd which alleged that he suffered from a general anxiety disorder.

The case was heard in South Australia, but similar laws are found in all Australian states.

The notice asserted that the injury happened at about 6.45 am on 6 June 2003 in the laboratory of the respondent, where the worker was employed as a Laboratory Technician (“technician”), and that as a result he stopped work due to the injury at 6.55 am that day. He alleged in his notice that he was engaged in laboratory testing at the relevant time, and that the matters which led to his injury comprised a barrage of insulting verbal abuse, and stress, and that the injury was caused by long term verbal abuse and an aggressive environment.

By the time of the trial the worker had not worked since 6 June 2003, and had been diagnosed to be suffering from a disorder of the mind being an adjustment disorder with depressed mood, with some panic disorder features, *“such that at all material times to the present and continuing the worker has been considered to be unfit for normal employment duties with the respondent or for any other work.”*

The employer dismissed the employee’s claim for compensation. The claim was rejected on the basis that the disability was wholly, or at the least predominantly, caused by:-

- A decision by the respondent, based on reasonable grounds, not to award or provide a benefit in connection with the worker’s employment.
- Reasonable action undertaken in a reasonable manner by the respondent to counsel the worker in connection with unsatisfactory work practices or other unsatisfactory aspects concerning the performance of his duties of employment.
- Reasonable administrative action undertaken in a reasonable manner by the respondent in connection with the worker’s employment.

The employee listed a long series of incidents and issues relating to the work environment, that he claimed had contributed to his stress. They are listed below in full, as an indication of the sorts of stress related incidents that employees in such situations refer to as the causes for their illnesses:

- The resignation of the laboratory supervisor and quality assurance manager in 2002 and the introduction of replacements without experience, with consequent

[Go back to ‘In this alert’](#)

loss of direction in the laboratory and a deterioration in safety, quality, workload and many other factors.

- Continual problems arising from the breakdown of equipment resulting in increased workload and an inability to keep up with testing of production samples.
- Long absences of three out of six technicians leaving remaining technicians to run the laboratory on 12 hour shifts.
- Unnecessary and unreasonable duress over the past six months whilst performing work.
- “Near miss” incidents involving malfunctioning machinery when the worker asserted his life was at risk and a subsequent attack by his supervisor on him and for blaming the supervisor for the malfunction with a consequent lack of trust and confidence developing between one another and advice from his manager that he had not followed procedures.
- Abuse directed to the worker as a result of conflicts over a contractor technician introduced to assist with workload.
- Allegedly inappropriate criticism from his supervisor of actions taken by the worker in relation to what he perceived to be faulty equipment with subsequent disciplinary process for alleged failure to follow instructions not to use the equipment.
- Conflict over interpretation of agreed procedures to be followed to address technician’s workloads and disputes arising as to laboratory testing work being left by the worker to be done by the next shift.
- Extreme and insulting abuse towards the worker from a fellow employee on the morning of 6 June 2003 which caused the worker to become frightened and to leave the workplace.

Generally, compensation for psychiatric injury is not available for all types of psychiatric injury. The South Australian Workers Rehabilitation and Compensation Act is typical of the restrictions placed upon psychiatric injury claims in all Australian states. Section 30A of that Act states;

*A disability consisting of an illness or disorder of the mind is compensable if and only if —*

*(a) the employment was a substantial cause of the disability; and*

*(b) the disability did not arise wholly or predominantly from —*

[Go back to ‘In this alert’](#)

- (i) *reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, counsel, retrench or dismiss the worker; or*
- (ii) *a decision of the employer, based on reasonable grounds, not to award or provide a promotion, transfer, or benefit in connection with the worker's employment; or*
- (iii) *reasonable administrative action taken in a reasonable manner by the employer in connection with the worker's employment; or*
- (iv) *reasonable action taken in a reasonable manner under this Act affecting the worker.*

In very general terms, therefore, a psychiatric injury is *not* compensable if it arose from a *reasonable* action of the employer in the above circumstances. In this case, the employer claimed any interactions with the employer *had* been reasonable: the employee contended otherwise.

The judge was not impressed with the employee's evidence. He stated:

The worker was an unimpressive witness. He presented as a person with a difficult and unusual personality who held and expressed dogmatic, rigid and uncompromising views. As his counsel noted, he tends to see things in "black and white". He was prone to react in an oversensitive manner to various events, and I find that his account of certain events in his written and oral evidence was greatly exaggerated, although many of these instances concerned peripheral events. Some of his evidence was evasive, lacking in credibility or disingenuous, particularly his denials or non acceptance of the fact that on certain occasions he had carried out tasks contrary to instructions or that he had received informal counselling with respect to his conduct, and his explanations for not following instructions where such was admitted. He was far too ready to accuse Mr Cicchiello of vindictiveness, harassment, malice and dishonesty with respect to actions Mr Cicchiello took or statements he made in evidence in relation to the worker. The worker lacked insight into his own behaviour, and was unable to accept that his conduct might on occasions have contributed to difficulties which developed in his relations with co-workers and his supervisor.

Even though the judge made this finding , he qualified it by adding that the employee's state of mind when giving evidence (his lack of credibility and his evasiveness and exaggeration etc) were partly the employer's fault!

I qualify the matters set out above by noting that there are likely to be a number of causes for the unsatisfactory presentation of the worker as a witness. The worker's personality had much to do with his problems at work. His perceived success in his employment in the initial stages and the positive recognition which flowed from that was of great importance to his sense of self worth and esteem. Until July 2002 at least, he appears to have carried out his work satisfactorily and without any undue conflict or

[Go back to 'In this alert'](#)

stress despite cost cutting pressures which had been adversely affecting the workload imposed on technicians for some time. The worker was clearly distressed by the turn which events took during the second half of 2002 and in 2003. My unfavourable impression of him as a witness must be considered in light of the loss of self worth and esteem which followed from his inability to cope with the various matters arising from his employment which led to his disability, and in light of the fact that during this time he became quite mentally unwell and remained so at the time of giving his evidence.

The result of this finding was, however, that much of the worker's evidence could not be taken as credible.

Because of these matters, there are a number of instances ... where I consider the worker's evidence ought not to be preferred to that of other witnesses, or where I consider that his inability to recall certain events indicates at best either a substantially impaired or suppressed memory or at worst a lack of credibility. This does not mean that I am unable to accept the worker's account of certain critical events.

The Industrial Commission found that when a new supervisor had been appointed to replace the employees old supervisor he seemed to have been informed that the worker had conflicts with previous supervisors, that he was not well liked, and that the worker was annoyed that he had missed out on getting the supervisor's job. This would become important later, when the Commission was to find that the expectation of management that the employee "was difficult" lead to them treating him unfairly in dealing with him.

The Commission looked at the evidence relating to each of the alleged incidents in detail to establish 'both sides of the story' in order to determine whether management interaction with the employee had been reasonable (the Commission's judgment – most of it looking discussing the evidence presented to it runs to over 50 pages).

Prior to making its findings, the Commission summarized the issues that had to be determined in order to make a finding in relation to the employee's claim:

- Whether the factors emanating from the employment which caused the disability resulted from stress arising from an inability to cope with the job itself and thus did not arise from any disqualifying actions of the respondent under s 30A(b) of the Act, or at least so outweighed any disqualifying factors such that the disability could not be said to have predominantly arisen from them - if so, the worker will succeed in his claim.
- If the worker is not able to establish that the actions within the employment were not either actions taken to discipline or counsel him, or administrative actions in connection with his employment, whether or not the disability for which the employment was a substantial cause arose wholly or predominantly from such actions.

[Go back to 'In this alert'](#)

- Even if there are causes other than those encompassed by action to discipline or counsel or from relevant administrative action, such that the disability does not arise wholly from those actions encompassed by the aspects of s 30A relevant to this matter, whether the worker has established that the disability did not arise predominantly from such actions.
- If the worker is still unable to establish that the disability did not arise wholly or predominantly from action to discipline or counsel him, or from relevant administrative action, whether the disability arose from reasonable action taken in a reasonable manner by the employer to discipline or counsel the worker, or reasonable administrative action taken in a reasonable manner in connection with his employment. If the worker is not able to establish this (should the inquiry get this far), the claim will fail.

### **What is reasonable?**

What is reasonable action by an employer will be viewed by a Court or commission by looking at the claim 'in all the circumstances'.

Reasonable must also be considered in the context of an individual history, his age, personality and legitimate expectations. In other words in deciding whether an act is prima face (sic) reasonable, the manner of how that act impacts upon an individual employee must be examined. It is not the collective 'worker' who is disabled – it is the individual who claims compensation.

### **The Commission's conclusion**

The Commission then looked at "all the circumstances" in the current case. As noted above, it dismissed some of the employee's claims as being exaggerated or self serving. In relation to some of the claims that the supervisor had harassed or victimized the employee it stated that "*the various actions of Mr Cicchiello [the supervisor] were not indicative of any singling out or harassment or victimisation of the worker as alleged.*"

However, in relation to one major incident it found that the employer had acted unreasonably. This incident was related to the sometime short staffing of the laboratory where the employee worked. At one stage the employer and the union had come to an agreement about how work was to be managed when there was short staffing. The employee in question and the employer differed (quite extremely, apparently) as to how this agreement was to be interpreted. The Commission summarized the situation in relation to this agreement as follows:

I consider that it was a major failing of the respondent's supervisors not to address this conflict over the manner in which the agreement should be implemented. The continuing difference as to the effect of the agreement was what underpinned much of the ongoing disputation between the parties.

[Go back to 'In this alert'](#)

I consider the negotiation of an agreement concerning workload with a view to implementation of the same in the workplace for the benefit of management and employees was reasonable administrative action. However, I cannot accept that such action was taken in a reasonable manner in circumstances where the worker vehemently maintained and persisted in acting upon an interpretation of the agreement which appeared to be at odds with the understanding of the respondent. Some action should have been taken in my view, to seek a resolution with respect to this ongoing difference. The failure of the respondent to take action to defuse the ongoing tension between the worker and the respondent in relation to the implementation of the agreement of 10 April 2003 was a failure by the respondent to take action of a nature which could give it the benefit of the disqualifying provisions of s 30A(b) of the Act.

Both Mr Cicchiello and his immediate superior, Mr Mullins, found the worker very difficult to deal with in relation to what they saw as a continuing deterioration in the worker's level of performance. I consider that the unsuccessful and frustrating attempt in December 2002 to engage in a formal counselling process with respect to a failure by the worker to follow instructions caused both Mr Cicchiello and Mr Mullins to be reluctant to embark on a similar process with respect to the conflicts over the period from April to June 2003. This is regrettable, as it allowed the stress resulting from continuing confrontations to spiral out of control, and to culminate in the altercation with Mr Botei.

Ironically for the employer, the Commission has basically found in this instance that the employer should have acted more decisively earlier on to 'correct' the behavior and interpretation of the employee rather than, in effect, letting him get away with his own approach to work for so long. The worker's (probably) erroneous interpretation of how he should be doing his job led to workplace conflict and led to the worker's stress. The Commission stated:

There was every reason for management to take action with respect to the worker's performance, and as observed above, such action should have been taken well before 5 June 2003. There was clearly a workload issue which had to be addressed. The application of the April agreement should have been clarified so that it was understood and acted upon in the same manner by all technicians.

Despite the fact that the worker was unreasonable, acted in an intemperate and unreasonable and insubordinate way to his employer's instructions and suggestions, because the employer had allowed the situation to deteriorate to such a stage with a worker who was clearly "difficult" meant that the psychiatric illness suffered by the worker was not the result of any 'reasonable' actions on the part of the employer – they were in fact 'unreasonable'.

The above case is one of many which show the very high burden placed upon employers in dealing with employees in the workplace. Employers who deal with 'unreasonable' employees (even those that are obstructive, difficult or trouble makers) must ensure they go out of their way to ensure that their dealings are as fair and careful as possible.

[Go back to 'In this alert'](#)

One cannot help in reading the facts in the above case to consider whether this is placing too high a burden on employers. But even if this is the case, the simple fact is that ***it is the law*** and no matter how *burdensome* or even *unreasonable* it may be, employers must attempt to comply or face the possible consequences.

*See Rukavina v Bridgestone Australia Ltd 52 Hannon DPJ [2005] SAWCT 79*

Yours Faithfully,

Workplace Safety Australia Pty Ltd.

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**Important Note**

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[Go back to 'In this alert'](#)