

What this fact sheet is about

This fact sheet is about the rights and responsibilities of workers and employers when a person's ability to perform the job is affected by physical or mental ill-health.

What the law says

In Queensland it is unlawful to treat a worker less favourably because of a physical or mental illness or condition, or to make a requirement that is more difficult for the person because of an illness or condition.

This also applies in the recruitment process and deciding who should be offered a job.

In working out what to do when incapacity affects the job, it is necessary to observe and comply with the *Anti-Discrimination Act 1991*.

Managing incapacity

Clear and open communication is essential.

When a person is having trouble doing the job because of an illness, injury or condition it is often sensible to have a suitable medical report to help both the person and the employer work out what to do. It can help to identify the extent to which an illness, injury or condition impacts on the person's ability to do the job.

For some occupations there are specific laws that allow an employer or regulator to require the worker to be examined by a doctor to assess their ability to perform the job. These occupations include public servants [1], lawyers [2], and health practitioners [3].

In other cases, it is preferable for the worker and employer to agree on a medical report, otherwise imposing a requirement to undergo a medical assessment might be unlawful discrimination.

Any pre-employment medical assessment must relate specifically to the essential requirements of the job.

Generic medical examinations are usually not appropriate at either pre-employment or during employment.



Employers must be careful to avoid unfair treatment of workers with any physical or mental ill-health.

Reasonable adjustment

Consider whether any adjustment or changes can be made to help the worker do the job. This might include:

- physical aids or adjustments to the work environment that can help the worker;
- changes to the hours of work or number of hours worked;
- incorporating breaks;
- changes to the duties to be performed.

Adjustments should be made to accommodate the incapacity unless it would amount to an unjustifiable hardship on the employer.

It is unlawful to treat a worker less favourably because of a physical or mental illness

Unjustifiable hardship

Whether there is unjustifiable hardship depends on the circumstances of the particular case. What might be unjustifiable hardship for one person might not necessarily be unjustifiable hardship for another. Some of the things to consider include:

- the nature of the special services or facilities required to accommodate the incapacity;
- the cost of supplying any special services or facilities, and the number of people who would benefit or be disadvantaged;
- the financial circumstances of the employer;
- any disruption that making the adjustment might cause;
- the nature of any benefit or detriment to all of the people in the particular case.

Genuine occupational requirement

An important part of managing incapacity and determining whether reasonable adjustments can be made is to consider what are the genuine occupational requirements of the position.

A genuine occupational requirement, or inherent requirement, is an aspect that is essential to the position.

The issue of what is an occupational requirement and whether it is genuine is a wholly factual question.

To determine whether a requirement is essential to the position, it is necessary to look at the factual circumstances and consider whether or not the position would be effectively the same without the requirement. It is not enough to simply 'label' aspects of the job as genuine occupational requirements or inherent requirements. Take care in differentiating between the requirement and the means of performing the task (e.g. imposing an eye sight standard when the task can be safely performed using glasses or contact lenses).

Special terms for a job

If a worker has a restricted capacity to do work genuinely and reasonably required for the position, or requires special conditions in order to be able to do the work, the employer may fix reasonable terms for that worker.

For example, the employer might restrict the duties the worker can perform or limit the number of hours to be worked. Any special terms must be reasonable, taking into consideration the nature of the incapacity and the work that the position entails.

Work Health & Safety

An employer has a responsibility to safeguard its employees from unreasonable risks. It is permissible to do an act that is reasonably necessary to protect the health and safety of people at a place of work.

For this exemption to apply there must be an unacceptable risk and the action must relate to that risk. The act must be something a reasonable person would do to protect the health and safety of people at a place of work.

An employer needs to investigate whether there are any risks, and assess the level of any risks. Any action taken must be reasonable in relation to the risk. It is not enough to simply follow an organisation's policy such as a health assessment guideline or standards.

Public servants

In Queensland, the *Public Service Act 2008* provides for the administration of the Queensland public service and the management of its public service employees. The Public Service Act is not the only law that applies to the public service, and it is now settled that the Anti-Discrimination Act also applies. [4]

Under the Public Service Act, the chief executive has power to appoint a doctor and require an employee to attend a medical examination, and after receipt of the report, to transfer, redeploy or

retire the employee. These powers can only be exercised if the employee is absent from work or performing unsatisfactorily, and the chief executive reasonably suspects the cause is mental or physical illness or disability.

In deciding what, if any, action the chief executive might take after receipt of the medical report, the chief executive must comply with the obligations under the Anti-Discrimination Act, which are briefly described above.

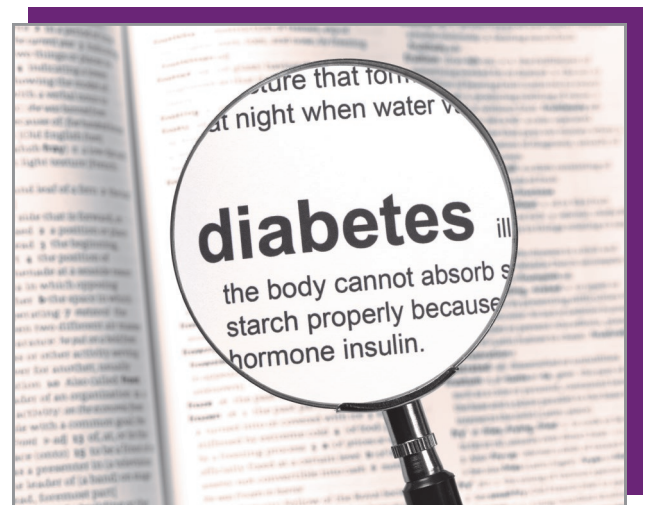
See also the Public Service Commission guideline on mental and physical incapacity, available at <http://www.psc.qld.gov.au/publications/guidelines.aspx>

Case examples:

These examples are from decided cases and other published information. It is important to remember that each case must be dealt with on its own facts.

- Requiring a pilot who was on a disability support pension to provide a fresh medical certificate before renewing a license was not unlawful discrimination. [5]
- It was unlawful discrimination to withdraw an offer of employment based on a history of back pain disclosed in a pre-employment general medical assessment, when the applicant could safely perform the duties of an occupational nurse at mine site. [6]
- Physical work was not an inherent part of a Business Development Manager job with a building materials company, and the company unlawfully discriminated against an applicant by withdrawing the job offer when a long-term shoulder injury was disclosed. Minor adjustments could have been made to avoid the applicant having to perform physically demanding work. [7]

- Behaving to a professional standard and following reasonable directions were inherent requirements of the job of an Australian Federal Police officer. Providing constant and intensive supervision would cause undue hardship, and it was not unlawful to terminate an officer who had developed a personality disorder causing behavioural problems after suffering a head injury. [8]
- Being able to see colours was an inherent requirement of a fire-fighter. [9] However a train driver who could not see the colour red could safely drive a train because the safety issue also involved the position of warning signals. [10]
- A worker was not discriminated against when he was dismissed for repeatedly ignoring medical restrictions on lifting due to his back injury. [11]
- Where it was not possible to organise the work of an animal refuge to ensure a pregnant worker did not come into contact with cats or cat faeces and the whole of the refuge was a high risk for toxoplasmosis infection, work at the refuge would pose an unacceptable health hazard for the pregnant worker and her unborn child. [12]



- It was not a genuine occupational requirement that each and every police officer be able to drive a motor vehicle at all times. In the particular case where epilepsy was well managed, the risk of seizure was low and the likely consequence of a seizure is that officer would have physical warning beforehand and he would not jeopardise the safety of others. [13].

For information on managing mental illness, see *Workers with Mental Illness: a Practical Guide for Managers* available from the Australian Human Rights Commission at :
<http://www.humanrights.gov.au/publications/2010-workers-mental-illness-practical-guide-managers>

Endnotes

1. *Public Service Act 2008*, section 175
2. *Legal Profession Act 2007*, section 87
3. *Health Practitioners (Professional Standards) Act 1999*, sections 107 & 288
4. *State of Queensland v Attrill* [2012] QCA 299
5. *Atieh v CASA* [2012] FCA 1027
6. *Gehrig v McArthur River Mining Pty Ltd* [1996] NTADComm 4
7. Enforceable undertaking given by James Hardie Australia Pty Ltd to the Fair Work Ombudsman on 17 May 2012
8. *Gibbons v Commonwealth of Australia* [2010] FMCA 115
9. *van der Kooij v Fire & Emergency Services of WA* [2009] WASAT 221
10. *MacDonald & Ors v Queensland Rail* [1998] QADT 8
11. *Zhang v Blinds Pty Ltd* [2010] NSWADT 91
12. *Parker v North Queensland Animal Refuge* [1998] QADT 4
13. *Stevens v Queensland Police Service* [1998] QADT 6

Need more information?

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