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Mr Peter Rozen QC
Reviewer
Independent Agent Review Service Delivery Reform,
Coordination and Workplace Safety
Department of Justice and Community Safety
Level 30, 121 Exhibition Street, Melbourne VIC 3000

By email: agentreview@justice.vic.gov.au

Dear Peter,

RE: VICTORIAN WORKERS' COMPENSATION SYSTEM - INDEPENDENT REVIEW

The Australian Education Union (AEU) has greatly valued consultation with respect to your review of the agent model in managing complex Workers' Compensation claims. We support the submission made by the Victorian Trades Hall Council (VTHC) and this letter makes three further observations regarding the characterisation of a complex claims and the emphasis that must be placed on the return to work process.

Complex Claims

The submission from VTHC outlines eight trademarks of a complex case. The AEU agrees with these, but we do believe that injuries that are of a psychiatric nature are inherently complex. Our members predominantly make claims for psychological injuries and our capacity to support injured workers would be unnecessarily burdened if a primary or secondary psychological injury was a determinative of a complex claim.

One area we would like to reiterate is how issues such as family violence can impinge on an injured worker's ability to meet their obligations. As such, injured workers who are also subject to family violence require their cases to be treated with sensitivity to ensure that their claims are not unfairly interrogated by insurers. Our members are reluctant to disclose any other personal circumstances with insurers due to a perceived fear of such information being used to close their claim. Injured workers should be comfortable discussing these matters with case managers and all agents should consider compassionate grounds respectfully.

The following areas of the *Workplace Injury Rehabilitation and Compensation Act 2013* (WIRC Act) can be areas of particular concern for these injured workers.

- Participate in planning for return to work [1]
- Use occupational rehabilitation services [2]
- Participate in assessments [3]
- Return to work [4]
- Participate in an interview [5]

We maintain our observations expressed in consultation with you on 27 August 2020 and endorse all other recommendations in the VTHC submission with respect to complex claims.

Integration of WorkCover obligations and obligations arising under the Equal Opportunity Act 2010 (Vic)

Employers are generally cognisant of their obligations to their employees under the WIRC Act. Return-to-work coordinators and occupational health and safety managers (and similar positions) are required to, and generally do, have a grasp of how injured employees should be engaged with under the WIRC Act.

What is missing, and it appears in our experience to be on a systemic basis, is an understanding by employers of their obligations under the Equal Opportunity Act 2010 (Vic) (**the EO Act**) to employees that posses a "disability" or are imputed with having that attribute.

Section 20 of the EO Act establishes the obligation for an employer to make "reasonable adjustments" for injured employees. This obligation is, of course, separate to those obligations arising under the WIRC Act, and importantly, are not limited to the 52-week period during which the employee's position is preserved. The practical effect of s 20 is that i\f an adjustment is reasonable, it ought to be made by the employer in as far as it is to meet the end of the employee performing "the genuine and reasonable requirements of the employment".

In *Dziurbas v Mondelez Australia Pty Ltd* [2015] VCAT 1432 (***Dziurbas***) this apparent lack of engagement by an employer with the EO Act was central to the proceeding. Whilst the injury was not an injury to which the WIRC Act applied, *Dziurbas* confirmed that employers must make reasonable adjustments to the workplace so that injured employees can perform their duties. For

[1] *Workplace Injury Rehabilitation and Compensation Act 2013,* s 111.
[2] Ibid, s 112.
[3] Ibid, s 113.
[4] Ibid, s 114.
[5] Ibid, s 115.

its failure to comply with the EO Act, the employer in *Dziurbas* was ordered to p[ay significant damages.[6]

Of course, employees having injuries that are assessed under the WIRC Act would be a significant source of injured employees to which a concurrent EO Act obligation would apply, and there is a natural overlap between the return-to-work process and the making of reasonable adjustments. There ought to be consistency and transparency in this field of concurrent regulation.

We make this part of our submission so that you may consider whether an educative or compliance function could be introduced into the practical operation of complex (and non-complex) claim processing so that all parties—both employers and employees—are aware of their rights and obligations under the EO Act in addition to the WIRC Act.

Conclusion

The AEU is sincerely optimistic about the independent review and the genuine interest you have shown in contemplating meaningful recommendations that will have tangible benefits for injured workers – such as expanding the 'employer obligation period'. We have truly valued the consultative process and the efforts made to engage all stakeholders during Victoria's Stage 4 lockdown.

Kind Regards,

Martel Menz

Martel Menz

Deputy Secretary

[6] *Dziurbas* at paragraphs 227 to 235, and note that the employer asserted that economic loss ought to have been calculated in the sum of $2,000 to $3,000.