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WORKPLACE VIEW

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When the Doctor's "Sick Note" Won't Cut It

The management of long term sickness absence cases can be difficult for employers. This is particularly relevant if an employee is reluctant to provide information about their condition and prognosis.

This is often amplified by the fact that many medical certificates, in keeping with the Australian Medical Association guidelines, often only state that the employee is unfit to work for a given period. When subsequent medical certificates are provided in the same form it becomes very difficult for an employer to deduce anything regarding the expected duration of the absence and if the employee will ever be able to safely return to work. So can an employer demand further medical information?

In *Australian and International Pilots Association (AIPA) v Qantas Airways Limited* (2014) FCA 32 the Federal Court recently ruled that employers may have an implied right to require employees to provide more detailed medical reports.

The AIPA pursued an adverse action claim against Qantas on behalf of a pilot who had been absent for work for over six months. During his absence, the pilot submitted medical certificates to Qantas indicating that he was suffering from clinical depression and initially stating that he would be unfit for work for three months. This was subsequently extended. In response, Qantas requested that the pilot provide a written medical report regarding:

- his medical prognosis;
- the expected duration of his absence; and
- the likelihood of him being able to return to work and perform the inherent requirements of his role.

The AIPA objected to the request, claiming that the pilot had complied with the requirements under the Enterprise Agreement by producing a medical certificate as evidence of unfitness for duty. The AIPA asserted that there was no lawful basis for Qantas to request further evidence.

In response, Qantas advised the pilot that if he failed to provide the information requested he could face disciplinary action.

The AIPA claimed that, in doing so, Qantas had taken adverse action against the pilot for exercising a workplace right to provide a medical certificate evidencing his unfitness for duty and take sick leave under the Enterprise Agreement.

The Federal Court disagreed and found that Qantas' request for further information had not interfered with the pilot's rights under the Enterprise Agreement – Qantas had never challenged his entitlement to take sick leave. The Court considered that it would be 'quite unrealistic' to expect Qantas to have no right or ability to require a sick employee to provide it with the sort of information it had requested.

The information provided to Qantas in the medical certificate told Qantas nothing about how it should plan for the pilot's absence or his return to work beyond the period stated in the medical certificates, which could be extended. The information requested was necessary to allow Qantas to comply with its obligations under the Enterprise Agreement regarding rostering requirements, and also to allow it to conform with its statutory obligations to ensure the health and safety of the pilot and his colleagues (both on his return to work and during his absence). It was therefore necessary to imply a right within the employment contract for Qantas to require the employee to provide further medical information.

Author: Jillian Howard, Senior Associate, Perth.

Lessons from the Case

- √ Employers can protect their position by ensuring contracts of employment or enterprise agreements include an express right to require an employee to provide medical information or attend medical examinations.
- √ In the absence of an express provision, a right may be implied into the contract if the information is required for health and safety purposes.
- √ The impact of the employee's absence on the employer's ability to effectively manage its business may provide a valid basis for such a request.

Did You Know?

Employers are obliged to make minimum superannuation contributions for independent contractors who are engaged as "individuals". Under the *Superannuation Industry (Supervision) Act* 1993 (Cth) the meaning of "employee" is expanded to include a "person who works under a contract that is wholly or principally for the labour of the person" which can include an independent contractor who is not engaged through an interposed entity (such as a company or trust).

While it is possible to engage independent contractors as individuals, it is strongly recommended that independent contractors are engaged via an interposed entity, as this is a key indicia (amongst others) in assessing whether a relationship is one of employment or is a true independent contractor arrangement and whether tax withholding and superannuation obligations are applicable.

Employer Reminder

Two recent cases are good reminders for employers to always engage in consultation before carrying out redundancies and to ensure the concept of 'suitable alternative employment' is well understood.

In the case of *Smith v Onesteel Limited and Commonwealth Steel Company Pty Ltd* [2013] NSWDC 18, Mr Smith had been working as a furnace operator for 20 years when, due to lack of work, he was moved to a role painting wheels on a finishing line. Humiliated and stressed by the perceived demotion, and physically unable to do the role, he tendered his resignation and claimed termination payments, including redundancy pay. The court was critical of the way the employer had directed him to perform the painting role rather than consulting with him about its suitability, and awarded him just over AU$150,000 in redundancy entitlements.

In the *Iryna Margolina v Jenny Craig Weight Loss Centres Pty. Ltd.* [2011] FWA 5215, Ms Margolina's managerial role was made redundant when a new role was created combining the elements of two senior roles. There was no consultation with Ms Margolina at all. She was simply called into a meeting, advised her job was redundant and dismissed.

FWA, on hearing Ms Margolina's claim for unfair dismissal on grounds there was no genuine redundancy, was critical of the Jenny Craig's failure to offer alternative employment. Jenny Craig's evidence was that there were alternative positions available, but they were for lower pay and of lower status. Accordingly, the positions had not been offered to Ms Margolina even though she had the necessary skills to perform the roles. Jenny Craig had not wanted to insult her. Ms Margolina gave evidence that she would have accepted a lower paid position including an entry level position or a part-time job.

FWA found that it would have been reasonable in all the circumstances for Ms Margolina to be redeployed. It was noted that in many cases involving a demotion, an employer's presumption that the employee will not want to accept redeployment may be found by a court to be correct, but the employer proceeds at its own risk if it does not even ask the employee's opinion.

Lessons for employers

- √ Discuss all alternative roles which the employee is capable of performing with the employee, even if the roles might appear to be a demotion.
- √ Do not make assumptions about which roles an employee may or may not accept.
- √ Ensure proper consultation and active dialogue with an employee during a redundancy situation and meaningfully consider any proposals suggested by the employee. (Consultation is a legal requirement when an employee is covered by a modern award or enterprise agreement).

WORKPLACE VIEW

Client Quiz

On 1 July 2013 changes to the family friendly provisions in the *Fair Work Act* 2009 (Cth) came into force. Assuming the employee has met the service criteria, which category of employee does not have a legal right to request flexible working?

A. An employee who has a disability;

B. An employee who is 50 years or older; or

C. An employee who is experiencing violence from a member of the employee's family.

The first correct entry emailed to isla.rollason@squiresanders.com will win a West Australian Good Food Guide (delivery within Australia only)

Events Update

On 1 April 2014 Senior Associate Dominique Hartfield will be presenting "How to respond to complaints of workplace bullying, discrimination and sexual harassment – A guide for HR" at the New IR Law for HR Managers Conference. The conference is run by IES Conferences Australia and is being held at the Amora Jamison Hotel, Sydney.

To register, please contact 02 9425 7600 or admin.manager@iesconferences.com

Legislation update

Legislative Instrument	Stage of Legislation	Proposed Changes
Workforce Reform Bill 2013	Referred to Standing Committee on Legislation 11/12/2013	To amend the following Acts – • *Industrial Relations Act* 1979; • *Public Sector Management Act* 1994; • *Salaries and Allowances Act* 1975. Amendments will: • provide the capacity to implement enhanced and more flexible redeployment arrangements that may ultimately end with the involuntary severance of employees who are surplus to an agency's requirements or whose post, office or position has been abolished and cannot effectively be redeployed; and • ensure that decisions made by the Western Australian Industrial Relations Commission and the Salaries and Allowances Tribunal have appropriate regard to the Public Sector Wages Policy Statement, the State's financial position and fiscal strategy, and in relation to the WAIRC, the financial position of the relevant public sector agency.

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