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Employment Alert

What's up, Doc? How to obtain and use an employee medical report

Australian and International Pilots Association v Qantas Airways Ltd [2014] FCA 32 and *Grant v State of Victoria (The Office of Public Prosecutions)* [2014] FCCA 17

WHAT YOU NEED TO KNOW

- There are circumstances where an employer can successfully challenge a vague medical certificate.
- Employers can require medical information from their employees where they have an express right to do so, for example under statute, or in an award, enterprise agreement or contract.
- Courts will look beyond the express terms of industrial instruments in appropriate cases.
- Where it is necessary to meet their OHS obligations, employers have an implied right to require an employee to provide medical evidence to confirm the employee's fitness for work, and to require an employee to attend a medical examination, on reasonable terms, to confirm the employee's fitness.
- Circumstances where the employee's absence affects the employer's ability to manage its business may also make a direction to provide medical information lawful and reasonable.
- Employers need to take care about the medical advice they receive. The definition of 'disability' under the *Disability Discrimination Act* 1992 (Cth) includes behaviour which is a symptom or manifestation of the disability. This aspect of the definition is also being applied in some unfair dismissal and adverse action decisions.
- An employee's misconduct or poor performance may be a symptom or manifestation of a medical condition. If so, discrimination or adverse action against the employee because of the misconduct or poor performance will be unlawful unless an exception under discrimination or adverse action laws applies.

WHAT YOU NEED TO DO

- Consider what information you need from long term ill and injured employees in order to manage your business.
- Do not be quick to disregard a medical opinion, without making further investigations.
- Seriously consider medical information provided to you by an employee – particularly where the employee's condition could be linked to his or her misconduct.
- Review whether you need to make any adjustments (and if so what is reasonable), and whether the employee is still able to carry out the inherent requirements of the work before making any decision to dismiss an employee.

How many employees have you had off work sick in the last year? Do you struggle to manage these absences? Would more detailed medical information about each employee's condition help you?

Two recent cases provide useful guidance for employers in obtaining, and using employee medical reports.

Medical reports: How to get them

An employer can be entitled to make its own business arrangements to manage the impact of an employee's absence on sick leave.

In *AIPA v Qantas Airways Limited*, when the employer asked its employee (who had been absent for over 149 days) to provide more information about his medical condition beyond the one-line medical

certificates that he had already provided, the employee refused.

The Australian and International Pilots' Association argued that the one-line medical certificate was all that the employee was required to provide under the terms of the relevant industrial instrument.

Implied term of employment contract

The Court rejected AIPA's argument. It found that there was an implied contractual right for the employer to require the employee to provide medical evidence, and to attend a meeting to discuss matters concerning his fitness for work.

This implied term was not displaced by the employee's other rights to take sick leave, including rights arising from statute or an industrial instrument.

Intersection of work health and safety obligations

The Court held that an employer may require medical information from an employee to address its obligations under safety legislation. For example, to determine whether the workplace was a contributing factor in the employee's condition, and if so, how to remedy that contribution.

The Court noted that an employee also has obligations under safety legislation to comply with reasonable instructions issued by his or her employer to allow the employer to comply with its obligations under safety legislation.

The *AIPA* decision highlights some important opportunities for employers:

- There are circumstances where an employer can successfully challenge a vague medical certificate
- Courts will look beyond the express terms of industrial instruments in appropriate cases; and
- There is an implied contractual right for an employer to require an employee to provide medical evidence to meet the employer's OHS obligations to confirm the employee's fitness for work.

What (not) to do with a medical report

Unlike the employee in *AIPA* who refused to provide medical information, the employee in *Grant v State of Victoria (The Office of Public Prosecutions)* provided his employer with a detailed medical report. The *Grant* decision concerned the employer's lack of regard to the information in that report, and a subsequent doctor's certificate.

Following a string of erratic behaviour in connection with work, the employee in *Grant* was required to (and did) provide a medical report detailing his condition (anxiety and depression), and his prognosis (excellent). On the basis of this report the employer advised the employee that his condition rendered him unfit to perform his role as a solicitor. The employer directed the employee not to return to work until he had medical clearance to do so.

The employee then provided a medical certificate which included a return to work date. However, the employer directed the employee not to return to work until further notice.

The Court criticised the employer's decision to ignore, without any further investigation, the medical advice provided to it by the employee's treating doctor.

Misconduct linked to medical condition

When the employee was subsequently dismissed for serious misconduct, he alleged (and the Court agreed) that his employment was in fact terminated because of his medical condition.

The Court found that the misconduct for which the employee had been dismissed was a clear manifestation of the employee's depressive illness, which his employer knew about. The misconduct concerned:

- Not attending court to instruct in a matter before visiting a friend in hospital
- Two days later attending court on another matter (which Mr Grant had failed to list in a database) when instructed not to do so
- Other performance issues, including lateness for work.

The Court did not accept the employer's evidence that it did not take the employee's illness into account in making the decision to terminate his employment. The employer's evidence was contradicted by the fact that the misconduct complained of arose because of the employee's depressive illness, and so the illness was unavoidably a reason for the dismissal.

When discrimination or adverse action may be lawful

Employers faced with situations where an employee's performance or conduct is directly linked to the employee's medical condition need to take great care to avoid unlawful discrimination or adverse action. The definition of 'disability' under the *Disability Discrimination Act* 1992 (Cth) includes behaviour which is a symptom or manifestation of the disability.

This aspect of the definition is also being applied in some unfair dismissal and adverse action decisions.

Important considerations for employers include:

- Understanding any link between the medical condition and the employee's behaviour. Employers will generally need medical advice to assist them in identifying a connection (if any).
- Making reasonable adjustments to accommodate an employee's condition; and
- Not terminating employment unless the employee cannot perform the inherent requirements of the work.

MAKING THE CASE: Insights from Geoff Giudice

Proper management of employees who are ill or disabled can involve difficult decisions about the health and safety of the employee concerned, as well as the interests of other employees and sometimes the interests of customers. It may be difficult to manage these issues effectively without becoming exposed to the adverse action provisions of the *Fair Work Act* 2009.

The decision in *AIPA v Qantas* should give employers some encouragement because it acknowledges that an employer has an entitlement to reasonable information from an employee on sick leave as to his or her illness, prognosis and likelihood and timing of any return to work. It is important to bear in mind, however, that this entitlement might be limited in some way by the terms of an industrial instrument covering the employee.

By contrast, the decision in *Grant* may be of concern to employers as they may find it difficult to disentangle an employee's inappropriate behaviour from any underlying medical condition.

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