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Employment Alert

Go to the doctor! - Directing an employee to attend a medical assessment

Schoeman v Director-General, Department of Attorney-General and Justice [2013] NSWIRComm 1018 (26 September 2013)

WHAT YOU NEED TO KNOW

- An employer has a common law right to give a lawful and reasonable direction to an employee. This includes the right to direct an employee to attend a medical assessment. Such a right may also be reflected in an employment contract, a workplace agreement, a company policy, or, in some circumstances, such as the public sector, legislation.
- Irrespective of the source of the power, it is important for an employer to be able to demonstrate that any direction is lawful and reasonable. Disciplinary action, including termination of employment, for failing to comply with a direction to attend a medical assessment will only be enforceable if the direction is found to be lawful and reasonable in the circumstances.
- A direction to attend a medical assessment must relate to an employee's fitness for work, usually in the context of a current medical condition. On its face, a direction to attend a psychiatric assessment is likely to be found to be unreasonable and so not lawful if the employee is providing medical certificates as part of a return to work plan for a physical, not a psychiatric, injury.

WHAT YOU NEED TO DO

- When considering directing an employee to attend a medical examination, you should identify the source of your power to do so and ensure you act in accordance with that power.
- You should review your workplace agreements, employment contracts and company policies to determine if you have, or want to add, an express right to direct an employee to attend a medical assessment. In doing so, you should carefully consider the scope and application of any such express right.
- Carefully consider and manage each employee in the context of the individual's personal circumstances. There is no 'one size fits all' approach to managing ill and injured employees.
- Be mindful of the myriad of legal risks to employers in this area, which include claims for unfair dismissal, discrimination, adverse action, worker's compensation and breach of contract or a workplace agreement.

Imagine that you have directed an employee to attend a medical assessment, not once, but three times, and the employee has refused to attend each time. How would you manage the situation?

These are the circumstances which faced an employer in a recent decision of the Industrial Relations Commission of NSW, *Schoeman v Director-General, Department of Attorney-General and Justice* [2013] NSWIRComm 1018. The decision highlights the challenges many employers face when assessing the fitness of ill and injured employees. In particular, the decision emphasises the need for employers to ensure that each direction to an employee is lawful and reasonable.

In *Schoeman*, Commissioner Newall found that the employer had acted beyond its power and had unreasonably directed an employee to undergo a psychiatric assessment. The employee's subsequent

dismissal for refusing to follow the direction was therefore overturned.

Psychological or physical injury?

Fiona Schoeman commenced permanent employment as a typist with the NSW Department of Attorney-General and Justice in October 1994.

In July 2007, Ms Schoeman commenced a period of absence from the workplace. This was due to interpersonal difficulties between Ms Schoeman and certain Department officers in the Crime Prevention Division against whom Ms Schoeman had made allegations of bullying and corrupt conduct. Ms Schoeman's allegations were investigated but found to have no substance.

Ms Schoeman made a worker's compensation claim which was declined. The medical certificates from her doctor stated that the reason for Ms Schoeman's absence was a psychological injury. The employer accommodated Ms Schoeman's requests not to work in the Crime Prevention Division or in that building.

In August 2009, Ms Schoeman's injury was again assessed at the instigation of her employer. The assessing physician said that Ms Schoeman was "fully fit to carry on working productively" but that due to "unresolved interpersonal/human resources issues" she could not work in the Crime Prevention Division, as that would result in an exacerbation of her psychological injury. The employer continued to accept this limitation, placing Ms Schoeman in other locations.

Subsequent wrist injury

In June 2010 Ms Schoeman's pre-existing tendonitis in her wrist worsened and she was assessed as fit only for suitable duties, and at times unfit for duties at all.

In March 2011, Ms Schoeman returned to work under a return-to-work program to accommodate her wrist injury.

In late 2011, the employer advised Ms Schoeman that she was required to attend a psychiatric assessment, framing the requirement to attend as a desire to "better assist with identifying suitable duties and provide support to you in the workplace".

At the hearing, the employer did not provide any evidence or explain why this view had been reached.

On 29 December 2011, the employer wrote to Ms Schoeman advising that an appointment was being arranged with a psychiatrist "to obtain advice on your fitness for duty with the department".

Ms Schoeman responded that she would not be attending because it was not a medical condition, but rather it was unresolved human resources issues, which prevented her from working within the Crime Prevention Division.

Directions to attend a medical assessment

The employer then directed Ms Schoeman for a second time to attend a psychiatrist for a psychiatric assessment.

Commissioner Newall found that this direction was problematic because:

- it was made under a public sector regulation which had been repealed more than two years earlier; and

- the regulation (both the repealed regulation and the one which had replaced it) contained a precondition that the Directory-General, before issuing a direction to attend a medical examination, must first form a view that the employee concerned was not fit for work. This had not happened, and in the Commissioner's view, could not have happened.

Ms Schoeman wrote to her employer restating her refusal to attend.

In May 2012, the employer wrote to Ms Schoeman directing her for a third time to attend a psychiatrist for a psychiatric assessment. Ms Schoeman again refused to comply with this direction.

Disciplinary investigation

As a result of Ms Schoeman's repeated refusals to attend a psychiatric assessment, the employer undertook a disciplinary investigation. Ms Schoeman refused to take part in the investigation.

The investigation report recommended that a finding of misconduct be made against Ms Schoeman for refusing to comply with the directions.

On 10 January 2013, Ms Schoeman's employment was terminated for misconduct on the basis that she had refused to comply with her employer's directions to attend a psychiatric assessment.

Validity of the direction

The common law permits an employer to direct an employee to attend a medical assessment provided that the direction is reasonable. The question of whether a direction is reasonable will always be a question of fact, as will the question of what are reasonable terms for the undertaking of the medical assessment. Commissioner Newall found that it was unreasonable to require an employee to attend a psychiatric assessment for a wrist injury.

Reinstatement ordered

Commissioner Newall found there was no basis for the allegation of misconduct made against Ms Schoeman because he found the directions to attend a psychiatric assessment were not "lawful and reasonable". So, there could be no misconduct in failing to obey the directions. As there was no misconduct, Commissioner Newall held no punishment was warranted and so the employer's decision to dismiss Ms Schoeman was set aside.

Ms Schoeman was reinstated with back pay and continuity of service.

Implications for assessing an employee's fitness for work

While the *Schoeman* decision deals specifically with public sector employment, it reinforces some key principles for all employers when looking to assess an employee's fitness for work:

- the common law gives an employer the right to direct an employee to attend a medical assessment, however, the direction must be lawful and reasonable;
- employers may have other sources of power to direct an employee to attend a medical assessment, such as an express term in an employment contract, workplace agreement, company policy, and, in some circumstances, legislation;
- an employer should consider the reasonableness of any request and be able to demonstrate the link between the request and the employee's medical condition; and
- an employee can always consent to a medical assessment.

Employers should carefully review their workplace agreements, employment contracts and company policies to determine if they have, or want to add, an express right to direct an employee to attend a medical assessment. In doing so employers should carefully consider the scope and application of any such express right.

Assessing fitness for work can be a complicated and fraught process, given the myriad of legal risks which an employer is exposed to. These risks include claims for unfair dismissal, discrimination, adverse action, worker's compensation and breach of contract or a workplace agreement.

There is no one size fits all approach and each step in the management of each ill or injured employee must be carefully considered in light of the individual's circumstances.

MAKING THE CASE: Insights from Geoff Giudice

A number of the issues which arose in *Schoeman* relate to employment in the public service, and by the State of New South Wales in particular, and so are not relevant to private sector employment. But the case is still important for private employers. While the decision reinforces the principle that an employer has a common law right to direct an employee to undergo a medical assessment provided the direction is reasonable, there are two points to note in particular:

- the right to give a direction is not absolute and may be modified by legislation or the terms of the contract of employment; and
- in deciding whether a direction is reasonable, relevant circumstances will include the terms of the direction, the connection between the employee's state of health and the type of medical assessment required and anything in the contract of employment or company policies which deals with health and safety. Although not expressly mentioned in *Schoeman*, it is likely that general considerations of fairness will also be taken into account.

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