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Article Information

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Are requests for medical information bullying? Commission says no to "self-serving" applicant

If an employee cannot perform the "inherent requirements" of the job they are employed to do, and is unable to safely work, that can eventually be a ground for termination of employment – there is no entitlement to unending personal leave.

However, if the true problem is an unreasonably unsafe workplace, then it stands to reason the employer could have facilitated a return to work and a termination of employment may be challenged. How does the Fair Work Commission identify whether it is the workplace or the employee's inherent capacity that is preventing a return to work, especially when the issue is workplace stress?

An employee commences personal leave and is absent from the workplace for a period of close to 13 months. The employee's certificates of capacity identify that her incapacity is as a result of "*depression and anxiety secondary to workplace harassment*". Subsequent to her termination for being unable to fulfil the inherent requirements of her pre-injury role, the employee makes an unfair dismissal application in the Commission claiming that her employer did not provide a safe work environment. This scenario was the matter which came before Deputy President Hamilton in *Linda Duckham v The Royal Children's Hospital T/A The Royal Children's Hospital Melbourne* [2019] FWC 1612.

Background

The Applicant, Linda Duckham, was employed as a part time employee. In late July 2017, Ms Duckham commenced a 13 month period of personal leave. The basis of that personal leave was said by Ms Duckham to be related to depression and anxiety as a result of workplace harassment.

This is not a case about when an employer can require an employee to provide medical opinion or attend an independent medical examination to identify how a return to full duties can safely be managed, but the dispute started off with that issue. In September 2017, two months after her personal leave commenced, Ms Duckham was directed by her employer to provide medical information obtained from her treating medical practitioner. On advice from her union representative, Ms Duckham declined to provide the information to her employer.

The absence of medical information resulted in Ms Duckham's employer directing her in October 2017 to attend an independent medical examination. Ms Duckham was put on notice that a failure to attend could result in disciplinary action. Again, Ms Duckham refused to comply on advice from her union representative.

A dispute in the Fair Work Commission under the employer's enterprise agreement dispute procedure was lodged by the employer in an attempt to resolve the impasse. Arising out of that dispute, in February 2018, Ms Duckham agreed to provide a medical report from her treating practitioner. It appears that a brief medical report was provided which did not satisfy the employer that it had enough information.

In May 2018, Ms Duckham was invited to provide any additional medical information to her employer for the purposes of determining whether Ms Duckham could continue her employment. No further information was received and two months later, Ms Duckham's employment was terminated on the basis that she could no longer perform the inherent requirements of her pre-injury role.

Employee says 'it's your unsafe workplace, not my capacity to work safely'

Ms Duckham argued that if she had been provided a safe workplace, she could have performed the requirements of her

role. The issue was not whether she was affected by workplace stress and unable to attend for work (that was accepted). The issue was whether the stress was the result of an unsafe workplace, or was simply a medical condition arising from reasonable workplace practices to which Ms Duckham took exception.

The Commission took a view that for it to be satisfied that the workplace was unsafe, evidence was required to illustrate that that was the case. Ms Duckham sought to establish that communications from her employer in relation to ascertaining her medical conduction were bullying and harassment and relied on various other general assertions of making complaints. The Commission disagreed, holding:

"it is well-established that the act of disciplining an employee does not constitute an acceptable reason for abusive or defiant or otherwise inappropriate conduct. Similarly, a reasonably employer attempt to obtain information about the health of an employee is not unreasonable because the employee has an emotional reaction to it"

"Even if Ms Duckham became upset, it does not mean that the [employer] acted inappropriately in sending the letter [requesting her medical information]. The … letter was written in a temperate and reasonable fashion".

Further, the Commission held that in the interests of maintaining a safe workplace, employers were not only entitled to, but "*obliged*" to ascertain the fitness for work of employees. Confirming the fears that many employers have in similar circumstances, the Commission identified that if employers did not ascertain the fitness of their employees, "*many would be quick to blame the employer … if it allowed an employee to work in circumstances where this was injurious to their health"*. The Commission held that in the circumstances of this case, it was lawful and reasonable for the employer to direct Ms Duckham to attend an independent medical examination which she had declined to do on advice from her union.

Assessment of medical capacity to perform role

Following on from recent Commission authorities, the Commission was tasked with considering the medical evidence as to whether an employee is able to perform the inherent requirements of their role. On the evidence available, which identified that Ms Duckham's period of recovery was unknown and where her capacity had not changed over a period of close to 13 months, it was clear that Ms Duckham did not have the capacity to perform her pre-injury role.

Impact of other recent decisions on Duckham reasoning

The employer was successful in showing that the termination was not unfair, including because it had accessed (after a spirited dispute with the employee and her union) sufficient medical opinion to satisfy it and (more importantly) the Commission that her capacity was genuinely affected. Without adequate medical evidence of that kind, a Commission Full Bench has recently confirmed, an employer will not have positively established it had grounds to terminate for capacity reasons – it is no longer enough for there to be an absence of positive evidence of capacity after inviting the employee to demonstrate they are fit for work (*CSL Limited v. Papaioannou* [2018] FWCFB 1005)

However, a separate Commission Full Bench has also found that the *Privacy Act 1988* applies to some private-sector employers to regulate requests for sensitive personal information of employees (until and unless that information has been documented when it becomes an exempt "employee record") (*Lee v. Superior Wood* [2019] FWCFB 2946). That would, conceivably, enable an employee to refuse to consent to collection of a medical opinion, even for the purpose of assessing the employee's capacity to safely work. Without that opinion, according to the *CSL Limited* case, a reliable decision to termination employment for legitimate capacity reasons cannot be made.

Quite how the Commission will reconcile this seemingly-impossible Catch-22 remains to be seen.

If you are unsure of the process in managing long-term ill or injured employees including the reasonableness of your communications, or if you are considering requiring an employee to participate in an independent medical examination or to provide capacity-related medical information, contact a member of Piper Alderman's Employment Relations team for assistance.

Key Takeaways:

- Employers can require employees to provide medical opinions (or attend independent medical examinations) about capacity to perform their duties when extended and on-going absences affect genuine operational requirements.
- Medical opinions may well cite reported workplace stress as a reason for continuing absence, but will rarely provide a sufficient factual basis to say exactly what steps are needed to relieve that stress so as to allow an employee to return to work, or whether those steps are a reasonable adjustment.
- In this case, once medical opinion became available which indicated 'workplace stress' without much more, the employer did not identify any obvious reasonable changes to reduce the stress and terminated the employment on "inherent requirements" grounds.

- The employee asserted but was unable to make out what changes she said could or should reasonably have made to allow her to return to work, and failed in her claim that the dismissal was unfair.
- Managing long-term ill or injured employees towards return to work or (if necessary) termination of employment is a case-by-case proposition, but adopting a reasonable and objective assessment of what the employee or medical opinion identifies as an obstacle to a return to work is the foundation of a sound decision either way.