

## Article Information

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# Lifting the veil: When can the Commission look beyond an external authority's decision as to psychological suitability?

**Many industries require staff to hold certain “authorities” before they can undertake work. If that authority, given by an external agency, is withdrawn, the outcome is often termination of employment. If an employee challenges that termination, saying there was no valid reason for termination, is the Fair Work Commission able to go behind that withdrawal of authority and assess whether that decision was reasonable? In the case of *DA v Baptist Care SA* [2019] FWC 7358, the Fair Work Commission was required to consider the extent to which the reasoning behind a psychological assessment could be put to the test.**

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In response to the Child Protection Systems Royal Commission, South Australia saw the introduction of the *Children and Young People (Safety) Act 2017* (**the Act**). Under the Act, a Psychological Suitability Assessment (**PSA**) is now a mandatory test for all employees providing residential care for children under the guardianship of the SA Department of Child Protection (**the Department**).

D.A worked in a residential care facility, meaning that he needed to pass a PSA to continue in his employment.

The organisation appointed by the Department to conduct PSAs is PsychCheck. The PsychCheck assessment protocol involves a psychometric evaluation, one-on-one interviews with the relevant person and a risk mitigation relevance model. A determination that the person is ‘unsuitable’ requires agreement between three psychologists, including the primary assessing psychologist.

### D.A.’s Assessment

D.A. was required to undertake a PSA conducted by PsychCheck and was ultimately assessed as being “Currently Psychologically Unsuitable”. The notification of the assessment provided no further information as to how PsychCheck came to that view.

In light of this assessment, Baptist Care informed D.A. that because he was no longer able to fulfil an inherent requirement of the job, his employment would necessarily cease.

D.A. lodged an unfair dismissal claim in the Fair Work Commission and sought production by PsychCheck of all documents in relation to the PSA. It was established that PsychCheck was in possession of at least three relevant documents. These were:

- Handwritten notes made during interview with D.A.;
- Psychometric test data concerning D.A.; and
- The PSA Report concerning D.A.

D.A. was of the view that all of these documents should be provided as a matter of procedural fairness and to allow him to challenge the finding that he is “Currently Psychologically Unsuitable”. D.A. argued that without production he would be unable to assess the basis for being deemed unsuitable for his job and that the documents were highly relevant to whether the dismissal was unfair.

In opposing production of the documents, PsychCheck submitted that the PSA Report would contain irrelevant information

that was only ever intended for internal use by qualified psychologists, the information presented a risk of causing harm to D.A. and would be inconsistent with meeting its duty of care and that there was a risk that D.A. would misinterpret the notes and their significance.

Finally, PsychCheck argued that the release of the test data would risk its methods becoming public and might put the integrity of future tests, and the safety of children in care, at risk.

### **Production ordered**

Deputy President Anderson ultimately concluded that it was appropriate to require PsychCheck to produce the documents sought by D.A.

The Deputy President found that all of the documents sought had apparent, if not direct, relevance. He considered that, in order to determine if there was a “valid reason” for dismissal, the reason for the determination made by PsychCheck was relevant and should be open to critique by D.A.

The Deputy President stated that:

*“Litigation is not conducted on the basis that a decision-maker or litigant is expected to trust what a party says about their oral or documentary evidence. Integral to litigation and making findings of fact is the testing of evidence.”*

While taking into account PsychCheck’s submission that the documents might not be meaningful or that their value may be compromised without explanation, the Commission concluded that simply because a relevant document is confusing, technical or open to misinterpretation, that will not be a ground for refusing production.

Deputy President Anderson found that D.A. would suffer potential prejudice in his unfair dismissal claim if production was refused and that without the documents he could be unable to consider or take advice on matters of central importance to the contentions he was making.

Production was ordered, but due to the PSA dealing with a subject matter of great personal and professional sensitivity, the potential prejudice to PsychCheck, and the potential to put the safety of children at risk, it was ordered that the documents could only be provided to D.A. via a psychologist. A confidentiality order was also made to prevent PsychCheck’s internal processes from being revealed more widely.

### **Reliance on the assessment may not be sufficient**

While no decision has been made by the Fair Work Commission on whether or not D.A. was unfairly dismissed, the decision highlights that simply relying on a third party assessment as to an employee’s suitability for the role, even where this is a legislated requirement, may be insufficient to establish that there was a valid reason for the dismissal.

As more and more industries are required by legislation to ensure that staff have, and maintain, specific registrations or authorities to keep vulnerable people safe, such as working with children checks, the likelihood of similar unfair dismissal applications being made would seem set to increase.

If a final decision is reached in this matter, it will be interesting to see how the Commission deals with the fact that the employer was not in a position to influence the outcome of the PSA. The Commission’s assessment of how the employer should have dealt with the ‘unsuitable’ determination may provide guidance to other businesses in similar circumstances.

Should you have any questions concerning how this decision may affect your business, please contact a member of Piper Alderman’s Employment Relations team.