



## Précis Paper

### Medical issues and sick leave

Sick leave is sometimes viewed as an employee's entitlement. In fact, sick leave is a contingent benefit. That is, a benefit that arises if you are unwell and unfit to attend work. The taking of sick leave, an employee's return to work, and the statutory frameworks which govern this area of law has been considered by a number of authorities.

#### Discussion Includes

- Medical issues and sick leave
- Receiving a medical certificate
- The contractual relationship between employee and employer
- What is the obligation on an employee?
- An employer's safety obligations
- The limitations of what an employer can ask
- What adjustments an employer can make

# Précis Paper

## Medical issues and sick leave

1. In this edition of BenchTV, James Mattson (Partner, Bartier Perry, Sydney) and Nick Leon (Senior Associate, Bartier Perry, Sydney) discuss an employer's right to ask questions when supplied with a medical certificate and also their obligations to make reasonable adjustments to manage an illness or injury for their employee if required.

### Medical issues and sick leave

2. Often, you have employees and the union holding the belief that if they give a medical certificate to their employer that says they are unfit for work or that they have a medical illness, that it is their right to take sick leave. Employers have the right to manage sick leave and ask questions. Businesses need to make sure that services are delivered, resources and staff are managed, and any legal obligations such as WHS or discrimination are discharged.

### Receiving a medical certificate

3. The validity of medical certificates can be questioned where there is suspected forgery, dishonesty or misuse of sick leave. A medical certificate might be inconsistent with an earlier one. For example in the cases of *Sulis v Woolworths Ltd* [2009] AIRC 791 and *Bluzer v Monash University* [2017] FWC 2536 which are discussed below. Medical certificates can also be misused for example, the filing of a medical certificate for one employer and undertaking employment for someone else.
4. In *Anderson v Crown Melbourne Ltd* [2008] FMCA 152, the Applicant attended an interstate football match, between Essendon and West Coast. The applicant submitted a medical certificate to cover the period of absence. The Applicant's Employer then dismissed the Applicant as a result. Social media makes it easier for an employer to find out if someone is not ill.
5. In *Shakir v Department of Family and Community Services* [2017] NSWIRComm 1040, the worker had an argument at work and went off on stress leave and she then (at [7]) "presented WorkCover NSW certificates of incapacity to the respondent from her general practitioner stating that she was totally incapacitated for work". At [9]:  
Four days after presenting a WorkCover certificate to the respondent stating that she was suffering a work-related injury and had no current capacity for any employment, Ms Shakir made a handwritten application for employment to (another employer).
6. The Industrial Commission held at [67]:  
..because the relationship of employer and employee is one importing implied duties of honesty and trust, this conduct, which was active deceit, struck at the heart of the employment relationship.

The misconduct was serious, and the respondent could not be expected to have the necessary trust and confidence in Ms Shakir going forward to maintain an employment relationship.

7. An employee may be unfit for work but be fit to engage in other things. In *Marshall v Commonwealth of Australia (represented by Bureau of Meteorology)* [2012] FMCA 1052, the applicant was unfit for work due to situational anxiety. His treating doctor said he would be fit to attend other workplaces without aggravating his condition and that he was also fit to participate in a reality TV show. The Court held at [92] "I accept Dr Thomson's evidence that he did not believe that participating in 'Beauty and the Geek' would be likely to trigger the adjustment disorder symptoms which had their origin in the Applicant's workplace"

#### The contractual relationship between employee and employer

8. Underlying these relationships is a contract. One person's solemn word to another that in turn for remuneration - I will turn up to work when I have been contracted to, and I will work to the best of my ability in the best interests of my employer. Accordingly, the employee needs to discharge the contractual undertaking it has given their employer. If you start from this frame work: it informs what sick leave is. Sick leave is viewed as an entitlement, which is wrong. Sick leave is a contingent benefit: a benefit that arises if you are unwell and unfit to attend work.

#### What is the obligation on an employee?

9. What sort of evidence do you need to demonstrate that you were unfit for work in order to access that contingent benefit? Awards and enterprise agreements may have different evidence requirements.
10. Section 107 of the *Fair Work Act 2009* (Cth) provides:

...

(3) An employee who has given his or her employer notice of the taking of leave under this Division must, if required by the employer, give the employer evidence that would satisfy a reasonable person that:

- (a) if it is paid personal/carer's leave--the leave is taken for a reason specified in section 97; or
- (b) if it is unpaid carer's leave--the leave is taken for a permissible occasion in circumstances specified in subsection 103(1); or
- (c) if it is compassionate leave--the leave is taken for a permissible occasion in circumstances specified in subsection 105(1).

#### Compliance

(4) An employee is not entitled to take leave under this Division unless the employee complies with this section.

Modern awards and enterprise agreements may include evidence requirements

(5) A modern award or enterprise agreement may include terms relating to the kind of evidence that an employee must provide in order to be entitled to paid personal/carer's leave, unpaid carer's leave or compassionate leave.

11. Would a medical certificate that says the employee is "unfit for work" from an employee's GP satisfy a reasonable person? This would be a question of fact in all the circumstances. The medical certificate should identify the period in which the person will be away; when

they will return; the likelihood of them returning to work at the end of the period; and whether it will be in the same capacity. If an employee is taking lengthy or frequent periods of sick leave, there would be an obligation to satisfy a reasonable person "a bit more".

#### An employer's safety obligations

12. In *Leonila Pilli and DG NSW Dept. of Health SESIAHS* [2010] NSWIRComm 1050, frequent, unexplained absences were putting pressure on the staff and meeting service needs. The applicant was absent on unscheduled leave there was no one else available to undertake her duties.
13. An employer has an interest and positive duty in managing the well-being of the employee, but they also have an obligation to manage the interests of their organization. The employer needs to be properly informed in order to discharge this obligation. This may involve questioning the medical certificate, and length and time of absences.
14. These are critical factors in understanding what is actually causing the problem in managing the person's WHS and others impacted.
15. In *Grant v BHP Coal Pty Ltd* [2017] FCAFC 42, after rehabilitation for a shoulder injury, the applicant's doctor certified him as fit for work but BHP wanted him to be assessed by their assessor. Employers need to participate in the process. Just because you have a period of unfitness it does not mean that you are then automatically fit again for work: employers with a legitimate concern about whether they are fit, they are entitled to take steps to establish whether you are. This may also relate to the risk of further issue later on.
16. The common law implies that as a term of the employee's employment contract that the employer, where necessary, can require a person to furnish them with information that allows them to make decisions or direct the employee to attend a medical assessment.
17. In *Blackadder v Ramsey Butchering Services Pty Ltd* [2005] HCA 22, the HCA considered Section 28 of the *Work Health and Safety Act 2011* (Cth) which provides:  
28 DUTIES OF WORKERS  
While at work, a worker must:  
(a) take reasonable care for his or her own health and safety, and  
(b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons, and  
(c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act, and  
(d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.
18. Section 28 puts a positive statutory duty on workers to cooperate with matters dealing with WHS.
19. In *Australian and International Pilots Association v Qantas Airways Ltd* (includes Corrigendum dated 10 February 2014) [2014] FCA 32, a fleet manager requested a report from the employed pilot to at [40]:  
determine whether he would be considering returning to work in a full time or part-time capacity and what, if any, adjustments Qantas might be required to make in its business and rostering

arrangements to assist that....This was an extremely important consideration for him in managing the Boeing 747 fleet roster on a day-to-day operational basis. This was particularly so if Mr Kiernan would require some flexibility in his working arrangements that would necessitate extensive reorganisation or management of the fleet roster. He also said that the requested report would allow him to understand the likelihood of Mr Kiernan's return to work, time frame and when that might occur.

20. The FCA at [63] held that, in a contract of employment, as in most other contracts, ordinarily, each party agrees to do all such things as are necessary on his, her or its part to be done to enable the other party to have the benefit of the contract. Qantas had the right to ask for up to date, informative material.

#### The limitations of what an employer can ask

21. The limitations of what an employer can ask will be what is reasonable in the circumstances. If it is a genuine illness or injury that has been substantiated by a clear medical certificate, it would rarely be appropriate to ask what caused it.
22. Employers need to approach mental health issues with compassion but need information to manage the situation appropriately and reasonably accommodate the situation. Employers need to be mindful about confidentiality.

#### What adjustments an employer can make

23. Employers have an obligation to make reasonable adjustments to manage an illness or injury: *Disability Discrimination Act 1992* (Cth). Any adjustment will be reasonable unless that adjustment poses unjustifiable hardship on the employer, which is a high test.
24. Making adjustments requires a sharing of information in order for it to occur. The information leads to a capacity and an understanding of what an employer can reasonably accommodate and what steps it can take to reasonably accommodate in making a reasonable adjustment and whether or not that adjustment would amount to unjustifiable hardship. The calculus requires information.
25. In *Watts v Australian Postal Corp* [2014] FCA 370, on return to work from a non-work related psychological injury, the worker's employer formed the opinion that she needed to be fit for the inherent requirements of her role and was therefore not able to attend work until she could produce a medical certificate that said she was fit for all aspects of her role. By not making reasonable adjustments, she was discriminated against by Australia Post. Australia Post could not demonstrate that there was unjustifiable hardship caused by the adjustments because they had not considered it not work related.
26. Disability laws apply regardless of whether someone is on workers compensation. Employers need to make reasonable adjustments that do not impose an unjustified hardship on the employer. When mental illness is involved that might mean exploring less hours or days at work and less demands while someone works their way back up.
27. In *Watts*, the FCA held at [229]:

In my opinion, matters such as limited working hours which gradually increased, alterations to supervision arrangements, modifications to face to face meeting requirements, amelioration of deadlines being too tight, changes in the kind of work being performed, minimising conflict situations, avoiding the need to lead teams, where all those matters are envisaged as necessary for a limited period of time of approximately 3 months, are adjustments which could have been made for Ms Watts without imposing unjustifiable hardship on Australia Post.

28. The court identified a range of things that the employer could have done in a graded fashion in a return to work. There should be timelines and they should be managed but you cant start out with the end in mind and not take steps to achieve it. Employers frequently fall into the trap of not engaging with the employee and not managing their absence. They need to take steps along the way to understand the illness or injury to figure out if they can make reasonable adjustments. You've got to get in there and get in early and regularly. Don't harass or go over the top but stay in touch with the worker. Talk to the worker about their illness/injury and their fitness.
29. Maintain a line of communication with them and their doctor: what is their condition, what treatment are they getting, their prognosis, and what as an employer you should avoid to prevent a set back or aggravation of their condition.
30. A timely, functional, safe return to work so that the can fulfill their role and their employer can pay them for fulfilling their role. Managing absentees is difficult because you've got to have difficult conversations. However, the difficult conversations give the employee confidence about what the employer is doing. It takes the personal nature out of it and makes the decision-making objective.
31. There are some statutory time frames in terms of terminating someone's employment. Section 772 of the *Fair Work Act 2009* (Cth) provides:  
Employment not to be terminated on certain grounds  
(1) An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:  
(a) temporary absence from work because of illness or injury of a kind prescribed by the regulations...
32. A temporary absence is anything less than three months unpaid in a 12 month period.

## **BIOGRAPHY**

### James Mattson

Partner, Bartier Perry, Sydney

James draws on over 20 years of employment and industrial law experience to provide advice and guidance that's grounded in the real world. James helps management and HR apply holistic and lasting solutions to workplace issues. This includes advising them on navigating industrial disputes, dealing with complaints and grievances, managing difficult employees and resolving complex claims involving awards, agreements, and employment contracts. He also often represents clients in court as an advocate in unfair dismissal, adverse action, and discrimination claims.

### Nick Leon

Senior Associate, Bartier Perry, Sydney

Nick began his workplace relations career at Linfox Australia Pty Ltd, Australia's largest privately held logistics company. After over 5 years in senior workplace relations roles, Nick transitioned into an in-house employment lawyer position before moving into private legal practice. His depth of experience, both industrial and legal, provides his clients with the confidence that he is assisting them in achieving the best possible outcome for the businesses. Nick retains an interest in the logistics industry and works with a number of transport and logistics companies.

## **BIBLIOGRAPHY**

### Cases

*Sulis v Woolworths Ltd* [2009] AIRC 791 and *Bluzer v Monash University* [2017] FWC 2536

*Anderson v Crown Melbourne Ltd* [2008] FMCA 152

*Shakir v Department of Family and Community Services* [2017] NSWIRComm 1040

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*Leonila Pilli and DG NSW Dept. of Health SESIAHS* [2010] NSWIRComm 1050

*Grant v BHP Coal Pty Ltd* [2017] FCAFC 42

*Blackadder v Ramsey Butchering Services Pty Ltd* [2005] HCA 22

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*Watts v Australian Postal Corp* [2014] FCA 370

### Legislation

*Fair Work Act 2009* (Cth)

*Work Health and Safety Act 2011* (Cth)

*Disability Discrimination Act 1992* (Cth)

