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FOCUS

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Medical certificates – can employers require more?

Unhelpful medical certificates that simply state an employee is 'sick' or has an 'illness' have long frustrated employers, who feel they cannot ask for more information or challenge the certificate if the genuineness of the claim is in doubt. But a recent Australian Industrial Relations Commission decision shows that it is aware of this problem and is willing to address it, if given the right opportunity.[1] Senior Associate Suzanne Weingott reports.

Employer refuses certificate

In this case, the employer refused to accept a sick leave certificate from an employee, demanding that he also provide a statutory declaration supporting his application for paid sick leave. This was because the employee had made petrol purchases, used the e-tag and made several mobile phone calls while on leave, raising doubts in the employer's mind about the genuineness of his claim that he was sick. In the employer's opinion, if the employee was fit to drive, then he was fit for duty.

Award provision

The award provision that governed paid sick leave in this case was similar to that commonly found in awards and industrial relations legislation. It said that 'the employer may require that an application for sick leave is supported by the production of a medical certificate or other evidence satisfactory to the employer …'.

The Commission decided that this provision was unclear (it was not certain whether it was the employer or the employee who could choose the preferred means of proving the illness) and varied it.

The Commission came up with what it regarded as a workable solution, noting that:

> medical certificates are notorious for their lack of information or assistance. It is little wonder that employers would wish to have a document, which entitles payment for time not worked, to be

[1] *Finance Sector Union of Australia v Labour Union Insurance Pty Ltd* (AIRC, 27 March 2003)

more referable to the nature of the work carried out by the employee and a view that the employee is medically unfit to perform that work or other available work.

- As a general rule, the award provision should give primacy to the medical certificate.
- The general rule will not apply if the certificate fails to convey relevant information. The employer may require further evidence (such as a statutory declaration) if the medical certificate does not state:
  - the employee's duties; and
  - the impact of the medical condition upon the ability of the employee to perform those duties.

Medical certificates are notorious for their lack of information or assistance.

A step in the right direction

The decision won't be authoritative when interpreting other award or legislative sick leave provisions. But employers may see this case as a first step in the right direction and a useful guide when employers consider the reasonableness of pressure that might be applied to employees claiming sickness in suspicious circumstances.

Severance pay and in-sourcing functions

A recent Australian Industrial Relations Commission decision provides guidance on severance pay entitlements when employers in-source functions of their business. Lawyer Elly Gay reports.

Background

The West Australian Government Railway (***WAGR***) decided to terminate its contract with Chubb Security (***Chubb***) and move its security functions in-house. Employees of Chubb were notified of the contract termination but not told whether their employment would be terminated. There was a four-month transitional period between Chubb employees being told of the contract coming to an end and the termination date of their employment. Some employees were able to secure new employment with WAGR before the end of WAGR's contract with Chubb, while others resigned.

Severance not payable

A Full Bench held that severance was not payable to employees who resigned from Chubb and took up employment with WAGR during the transitional period because:

- an order for severance pay can be made only when the employees' employment is terminated at the employer's initiative; and
- as the employees in this case resigned, their employment was not terminated at the initiative of their employer.

In this instance, Chubb enjoyed a benefit from giving early warning of the termination.

In different circumstances...

Employers considering in-sourcing certain functions should be aware that, while the Commission may not be able to grant orders for severance pay where employees resign before the transfer date, severance obligations might be triggered in other situations. For example, employees who are not offered employment with the in-sourcing company may succeed in gaining orders for severance pay. In some circumstances, depending on the terms of the offer, transferring employees may also be awarded severance.

Preference clauses out

The Australian Industrial Relations Commission has confirmed that preference clauses will be removed from certified agreements, but encourage-ment clauses are legitimate, confirming employees' freedom of association. Law Graduate Leo Whiteley reports.

Background

The Employment Advocate applied to the Commission to have several objectionable provisions in four certified agreements removed.[2] The allegedly objectionable provisions all related to different aspects

[2] *Office of the Employment Advocate re Mechanical Maintenance Solutions (MMS) Maintenance, Fabrication Workshop and Site Certified Agreement 2000/2003 and Ors* – 3 April 2003

of union membership (specifically, membership of the Construction, Forestry Mining and Energy Union and the Australian Manufacturing Workers' Union).

The Act

The freedom of association provisions of the *Workplace Relations Act 1996* (the ***Act***) prohibit discrimination over membership or non-membership of a union, and render preference clauses void.[3] The Act imposes a duty on the Commission to remove preference clauses from awards.

So what is objectionable?

The Commission decided that the following clauses were objectionable, and removed them from the certified agreements before it:

- a clause imposing a duty on the employer to develop a single union employee representative unit comprised of members of a specific union; and
- a clause imposing a duty on the employer to consider membership of a union as a positive factor in any merit-based decisions to engage or continue to employ.

But the following clauses were not objectionable:

- a clause encouraging the membership of a union;
- a clause requiring that the employer not challenge a specific union's constitutional coverage of the employees; and
- a clause imposing a duty on the employer, when employing labour, to (where possible) contact suitably qualified unemployed members of a specific union first. The Commission said that the clause only required the employer to contact the unemployed union members first; it did not require the employer to employ those members.

The approach in this decision is consistent with that previously adopted by the Full Bench of the Commission[4], and the legal position in Queensland under the *Industrial Relations Act 1999* allowing a workplace agreement to require an employer to encourage employees to join or maintain membership of a union.

The difference between preference and encouragement is that preference entitles union members to a benefit because of membership and penalises non-members because of their status. As long as encouragement does not involve unfair pressure or coercion, employees retain the right to choose without benefits riding on it.

[3] Any conduct that contravenes Part XA of the *Workplace Relations Act 1996*

[4] In the case of *Australian Collieries Staff Association v Gordonstone Coal Management Pty Limited* (Print Q2167, 22 June 1998)

AWAs live on

The Australian Industrial Relations Commission recently refused to terminate a series of Australian Workplace Agreements because of uncertainty of default arrangements in the workplace, and the potential risk of industrial disputation. Articled Clerk Laura Colavizza reports.

Background

The Commission was asked to terminate Australian Workplace Agreements (***AWAs***) at a workplace. The application involved the employment conditions at the workplace, which included AWAs (some of which had expired) and a certified agreement (which had passed its nominal expiry date). The employer and union failed to settle on a new agreement; with the employer indicating it no longer wished to use a certified agreement and that it was considering having the certified agreement terminated. The employer proposed that its employees sign new AWAs, or face protected industrial action, including a lockout. In response to this proposal, ten employees brought the application to have their AWAs terminated.

Terminating an AWA

The AIRC can terminate an AWA if it considers that it is not contrary to the public interest to do so. The union argued on behalf of the employees that termination was justified because of a potential reduction of benefits under the agreement. The employer submitted that terminating the AWAs would only exacerbate the current state of industrial turmoil.

Refusal to terminate

In deciding that the AWAs should not be terminated, the Commission confirmed that public interest should focus on matters of community concern and not subjective, or relationship specific, matters.

The Commission held that termination of the AWAs was not in the public interest because of likely ongoing disputation over the form of industrial regulation, and

the potential to exacerbate disputation. In reaching this conclusion, it considered:

- the uncertainty of whether the existing certified agreement would apply to the employees once the AWAs terminated;
- if the certified agreement did apply, the uncertainty of whether the agreement would operate in the foreseeable future because of disputes over the relevance of the agreement and the employer's emphasis on individual employment arrangements;
- the nature of employment benefits and rights established by the AWAs, agreement and the underlying award. The Commission indicated that, although the AWA and agreement entitlements were broadly comparable, the award resulted in a significant reduction in rates, which was a disadvantage the parties had not considered; and
- the provisions of the agreement dealing with stand down and termination of employment to be inherently inconsistent, qualifying as a 'dispute waiting to happen'.

Implications

Termination of expired industrial instruments remains an area of broad discretion, even though the basic presumption is that agreements are made with a limited term in mind.

The Commission favours clarity and certainty, and any attempt to withdraw from an expired arrangement will fare better if there are clear and unambiguous arrangements likely to fill the vacuum.

Employee piercing off the agenda

An employer's grooming policy regulating body piercing and jewellery was recently upheld as reasonable by the Australian Industrial Relations Commission. Lawyer Jonathan Morley reports.

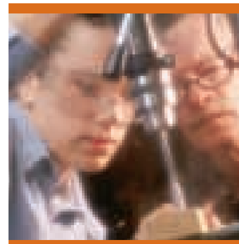
Background

Ms Fairburn was a dealer with Star City Casino in Sydney, where company policy dictates that visible body piercing is unacceptable.

Ms Fairburn started wearing a tongue stud and, despite being told by her supervisor that this breached the policy, Ms Fairburn refused to remove the stud. She produced a medical certificate stating that, to avoid the risk of infection, she should not remove the stud for any length of time. Despite this, Star City terminated Ms Fairburn's employment.

Application dismissed

The Commission accepted Star City's argument that termination of Ms Fairburn's employment was not harsh, unjust or unreasonable. The Commission concluded that the policy was reasonable to maintain the standards of appearance required in a competitive five-star business. In addition, the policy supported the job performance requirement of clear speech when communicating with customers, which could be adversely affected by the wearing of a tongue stud.



> ***Employers should ensure that their policies are carefully worded and reasonable and necessary for the conduct of their business. The decision provides some comfort to employers who have more prescriptive dress or grooming policies in place.***

Other relevant factors in the decision were:

- Ms Fairburn was aware of the policy and had agreed, by way of a signed letter, to comply with it;
- she was aware she would be dismissed if she refused to comply with the policy;
- Star City had taken a number of steps to accommodate her, including allowing her a three-month grace period when she was excused from complying with the policy to protect against the risk of infection; and
- Star City had applied the policy consistently.

Implications

Employers should ensure that their policies are carefully worded and reasonable and necessary for the conduct of their business. The decision provides some comfort to employers who have more prescriptive dress or grooming policies in place, although (as with all workplace policies) they should be careful to:

- make sure there is a rational basis for the policy;
- apply these policies consistently, and

- follow the necessary procedural fairness steps before taking action for non-compliance.

Choice of super funds

Employers should start planning ahead for 'choice of fund' changes to superannuation, which become effective on 1 July 2004. Lawyer Tracey Scott explains.

Background

Choice of fund proposals were first announced by the Federal Government in the 1997-98 Federal Budget. The Government has indicated an ongoing commitment to choice of fund, notwithstanding its defeat in the Senate in 1998, and introduced the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002 (***Choice of Fund Bill***) into Parliament in June 2002. While debate has been deferred to the forthcoming Spring 2003 sittings of Parliament, employers should be aware of the proposals and start positioning themselves now to reduce future compliance costs.

> ***Employers will face additional administrative burdens under a choice of fund regime.***

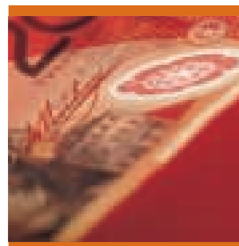
Key elements

Employers should note the key elements of the Choice of Fund Bill in its current form:

- Choice of fund will (if the Bill is passed) commence operation on 1 July 2004.
- Employers will need to offer employees an unlimited choice of funds, except employees covered by industrial agreements having a particular superannuation fund.
- A complex choice process is prescribed, requiring employers to follow detailed rules about the giving of forms and information to employees.
- Employees will be entitled to select any complying fund.
- Rules will apply for determining a default fund of an employer.
- If an employer fails to satisfy their choice of fund obligations, they may be guilty of an offence.

Senator Helen Coonan stated in a press release on 25 May 2003 that the Government will be amending its Choice of Fund Bill to address some concerns regarding the complexity of administration. However, Senator Coonan emphasised that the Government remains committed to implementing choice of fund.

> ***To avoid the risk of remitting contributions to a non-complying fund, employers will need to assure themselves that funds chosen by employees are complying funds.***



Obligations and costs

Employers will face additional administrative burdens under a choice of fund regime:

- to avoid the risk of remitting contributions to a non-complying fund, employers will need to assure themselves that funds chosen by employees are complying superannuation funds – a process exists to obtain prescribed certificates from fund trustees on which employers can rely;
- there will be cost and administrative inconvenience in remitting contributions to a (possibly large) number of different funds rather than to one or two;
- employers will need to satisfy potentially onerous obligations in supplying choice forms to employees, which will need to include information about the choice process and about the default fund;
- some in-house funds may no longer be viable if a large number of employees leave the fund for a fund of their choice;
- employers may face pressure from employees to provide guidance in respect of choice of fund decisions, notwithstanding that financial advice cannot be provided without the appropriate Australian Financial Services Licence; and
- some workplaces may be disrupted as fund operators seek to market their products to staff.

How employers can plan ahead

Employers should become familiar with the circumstances in which choice of superannuation fund need not be offered, and consider:

- if negotiating an AWA or a certified agreement, including a prescribed superannuation fund;
- if entering into negotiations regarding a state industrial award, seeking to have a prescribed superannuation fund included; and

- reviewing any relevant employment agreements that were in force under the *Employee Relations Act 1992* (Vic) and have continued in operation under the *Workplace Relations Act,* to determine whether these provide for a particular superannuation fund.

Safety screws tightened in Queensland

Lawyer Simon Dewberry looks at the recent amendments to the *Workplace Health and Safety Act 1995* (Qld).

The changes to the Act reflect the Queensland Government's attempts to reduce risks to health and safety at workplaces through broader and more onerous obligations on employers and others. Some of the new obligations will include:

- an obligation on persons conducting a business or undertaking (and not just an employer) to ensure the workplace health and safety of each person who performs work for the business or undertaking;
- a supplier of new plant must ensure the plant supplied is safe by either:
  - examining and testing the plant; or
  - ensuring the manufacturer of the plant has given an assurance that the plant has been examined and tested;
- designers of buildings used as workplaces have an obligation to ensure the building can be used, repaired and maintained in a safe manner; and
- workplace health and safety officers are required to conduct at least one workplace health and safety assessment each year.

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