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ONE SIZE PLASTER CAST DOES NOT FIT ALL: NAVIGATING THE PITFALLS OF DISMISSING AN INJURED OR INCAPACITATED WORKER

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Legal Briefings – By **Anthony Longland**, **Anna Creegan** and **Giacomo Giorgi**

IN BRIEF

- Many employers will, at some point, be faced with the difficult task of terminating the employment of an employee who has been absent from work for some time and is no longer able to perform their job due to illness or injury. This can be a tricky issue to manage and negotiate.
- The Full Bench of the Fair Work Commission (**FWC**) in *Lion Dairy and Drinks Milk Limited v Norman* [2016] FWCFB 4218[1] (**Lion Dairy**) has provided some important guidance on the principles which will be applied when an employee who has been dismissed for their incapacity brings a claim for unfair dismissal.
- This decision emphasises that there is no one-size-fits-all approach – it is important that employers consider each case individually and, in particular, seek and rely upon clear and considered medical advice before determining that an employee can no longer perform the inherent requirements of their role.

KEY TAKEAWAYS FOR DISMISSING ILL OR INJURED EMPLOYEES

1. **Appropriate medical evidence will generally provide a 'valid reason':**
   A decision to dismiss which is based on a clear medical opinion that the employee cannot perform the inherent requirements of their role will generally be accepted by the FWC as being based on a 'valid reason'. Similarly, the absence of such a medical opinion will likely suggest that there is no valid reason for the dismissal.[2]

2. **Make sure you get your medical evidence right:**
   The FWC will apply a different test in relation to a dismissal for incapacity compared with a dismissal for misconduct – in incapacity cases, primacy will be given to the medical evidence, as the FWC is not in a position to make their own independent medical assessment.[3]
   However, importantly, the medical professional must have been asked the right question; that is, they must have been asked to specifically assess the employee's overall capacity to perform the inherent requirements of their job, and whether that capacity is likely to improve in the near future, rather than, for example, merely commenting on the employee's recovery process generally.[4]
   This highlights the importance of careful planning from the moment an employer becomes aware that an employee has been injured. It also means that tailoring the request to the independent medical practitioner is crucial. Employers should carefully consider and set out the inherent requirements of the employee's job and ask the medical professional to assess the employee against those requirements. If appropriate, employers should seek assistance with this task.

3. **What are the 'inherent requirements of the role'?**
   The inherent requirements of the role are the particular work or tasks which are so essential or defining that the job would not be the same without them.[5] This is a practical and objective question that will be determined based on a common sense consideration of the actual work performed by the employee.[6]
   Given that these essential characteristics are likely to vary widely between employees performing different roles, there really is no one-size-fits-all approach – each job needs to be considered separately.

4. **How long do you wait before sending an employee to be assessed?**
   This is a difficult question which will, again, depend on the specific facts of the case. This issue was not discussed in any detail in Lion Dairy, likely given that the employer had waited around a year before asking the employee to undertake an independent assessment. However, we are not suggesting that this is an indication of how long employers should wait.
   Instead, we recommend that ill or injured employees should be asked to undertake an independent assessment as soon as reasonably practicable. Importantly, no decision should be made while the condition of the employee remains fluid. That is, it is only after

the medical professional is able to make a judgment about the employee's prospects of improvement over the short-to-medium term (say, 2-3 months) that a decision should be made.

5. **You should attempt to resolve inconsistencies between conflicting medical evidence:**
   In a situation where there are alternative, conflicting medical opinions, the employer is expected to make reasonable efforts to resolve the inconsistencies.[7]
   These steps may include requesting a reassessment of the employee based on the evidence provided by the employee's treating physician, asking the physicians to consider each other's medical reports, or asking to speak directly to the employee's treating physician. In cases of significant and persistent inconsistencies, this may extend to seeking a third medical opinion to review the employee. However, again, there is no template approach which completely mitigates against unfair dismissal risks and a bespoke approach will likely need to be tailored depending on the particular circumstances of the case.

6. **What 'adjustments' have to be made?**
   If there is a medical opinion that the employee is not able to perform the inherent requirements of their job, that is not the end of the matter – employers should also consider whether 'reasonable adjustments' could be made to accommodate the employee's current or future incapacity.[8]
   While this needs to be a genuine consideration, we do not consider that this extends to considering whether there are any redeployment opportunities (in contrast to the situation where an employee has been made redundant) or whether the role could be drastically changed to suit the employee's capacity. In most circumstances, it would be appropriate to ask the independent physician to make a determination on what adjustments would be necessary, and then to consider whether those adjustments are reasonable in the context of the employee's job overall.

ENDNOTES

1. *Lion Dairy and Drinks Milk Limited v Norman* [2016] FWCFB 4218.
2. *Ibid* [25].
3. *Ibid* [34].
4. *Ibid* [30].
5. *Ibid* [20], citing *J Boag & Son Brewing Pty Ltd v Button* [2010] FWAFB 4022 at [22]-[29].
6. *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at [82].

7. *Lion Dairy and Drinks Milk Limited v Norman* [2016] FWCFB 4218 at [34].

8. *Ibid* [25].

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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