Disputing a sickie

Recent cases illustrate the potential headaches for employers who challenge medical certificates.

By Alex Manos and Nick Ruskin

The maze that appears to surround the circumstances in which an employer can discipline an employee who has taken sick leave can be difficult to manoeuvre.

As a general rule, an employer is bound to accept a medical certificate (or statutory declaration) at face value. In most cases this will not be a problem. However, there may be times when an employer is sceptical of an employee's absence and doubts the genuineness of the claimed illness or injury.

How can an employer lawfully act on these doubts? Recent cases in courts and tribunals have shed some light on this area and provided guidance on when an employer can look beyond the medical certificate.
The Workplace Relations Act 1996 protects a dismissed employee in circumstances where the dismissal is harsh, unjust or unreasonable; or for a reason that includes temporary absence from work because of illness or injury; or for a reason that includes a person's physical or mental disability.

The Federal Magistrates Court case of Anderson v Crown Melbourne Ltd made headlines this year because it involved a fanatical football fan who opted not to attend work so he could attend an important game. In the weeks leading up to the game, after the event and at the hearing, the fan was at all times upfront with his employer and the court about the reason for his absence. He told his employer he wanted to attend the game, but he was unable to obtain leave.
His employer told him in advance that he faced serious repercussions if he chose not to attend work.
On the day in question, he called in sick and flew from Melbourne to Perth for the game. On returning to work the next day, he gave his employer a medical certificate attesting to his incapacity. The employer dismissed the man, who pursued an unlawful dismissal claim in court.

The court held that a qualified medical practitioner's medical certificate, issued within the practitioner's area of expertise, is prima facie to be accepted. However, it qualified this statement when it said an employer was not always bound to accept a medical certificate, and it may be disregarded in "unusual and exceptional circumstances".

The court found that the uncontested evidence in this case constituted such exceptional circumstances. The employee had admitted that he was in excellent physical health, the medical certificate was dated several days in advance of the actual day it was issued, and the employee had insisted on attending the game no matter what.

Also, the treating doctor had admitted that the most that could be said was that if the employee had attended work was that his judgment might have been impaired and he might not have performed to the best of his ability.

The issue, the court decided, was essentially whether the employee was dismissed because of an absence which, despite certainly being temporary, was caused by illness or injury. The court concluded that it was not. Rather, it was the employee's misconduct in wilfully not attending work. The claim was dismissed.

It is notable that the medical practitioner gave evidence at the hearing, and the court found that the facts on which he had based his expert opinion that the employee was going to be incapacitated on the day in question were severely undermined.

In the case of Kaur v DHL Exel Supply Chain (Aust) Pty Ltd, before the Australian Industrial Relations Commission, an employee had sought four weeks of annual leave to visit her dying mother in India. The employer, for operational reasons, granted one week. In spite of this, the employee booked flights allowing for four weeks in India.
While in India, and prior to the date her employer expected her to return to work, the employee became ill. She obtained a medical certificate attesting to her incapacity and sent it to her employer. She was dismissed for not returning to work when her authorised leave had concluded and was told that the employer did not accept medical certificates from overseas.

The commission held that the employee's application for leave was not unreasonable and DHL had no pressing needs which justified its decision to deny her application for annual leave (of which she had accrued eight weeks) for operational reasons. While the commission could see why the employer was suspicious of her failure to return to work due to ill-health, which coincided with the time she had sought off as annual leave, it did not justify the decision to ignore the medical certificate. The certificate was issued by an Indian doctor whose credentials were not in question, and there was no objectively sound reason to reject it. The commission found that the employee ad been unfairly dismissed.

Paid sick leave is one of the indispensable minimum entitlements in the Australian Fair Pay and Conditions Standard. Details of the rate of accrual, the notice that an employee is required to give an employer, and the documentary evidence the employee must provide attesting to incapacity are all contained in Division 5 of Part 7 of the standard, in the Workplace Relations Act 1996.

Generally speaking, the standard provides a minimum entitlement and it will not apply to all employees. The test to determine whether it applies to an employee depends on the source of their current entitlement. If the source is a contract or workplace agreement, the standard will apply if it provides a more favourable outcome in each particular respect than the entitlement under the contract or workplace agreement. If the source is an award, then the award will apply if it is more generous than the standard.

As a minimum, a full-time employee is entitled to a total of 10 days paid sick leave a year, which is cumulative from year to year. The leave accrues at least every four weeks of continuous service at the rate of 1/26th of the number of nominal hours worked during the previous four-week period and must be credited to the employee at least monthly.
To access the leave, the employee must give notice as soon as is reasonably practicable that they are, will be or have been absent from their employment during the period because of a personal illness or injury.

The employer is entitled to require the employee to supply, as soon as is reasonably practicable, supporting documentary evidence in the form of a medical certificate from a registered health practitioner, if reasonably practicable; or, if providing a medical certificate is not reasonably practicable, a statutory declaration by the employee. An employee is not entitled to be paid sick leave if they have not complied

with the notice and/or documentary provisions of the Act. However, the documentary provisions do not apply if an employee is unable to comply due to circumstances beyond their control.

The Act's definition of 'registered health practitioner' is very broad. It includes any health practitioner who is registered or licensed as such by a state law. Conceivably, this includes registered physiotherapists, acupuncturists, chiropractors and the like.

In summary, the key points for employers:

They should ascertain whether their employees are entitled to the statutory sick leave entitlements in the Workplace Relations Act 1996 by applying the correct test. If so, the entitlement for a full-time employee will usually be 10 days paid leave a year, to accrue every four weeks and be credited monthly.

Employers can refuse to pay sick leave to an employee who has not complied with the notice and/or documentary provisions in the Act. However, this is difficult in practice because an employee is not obliged to provide a certificate if it is not reasonably practicable or if the failure to provide it is due to circumstances beyond their control.

Medical certificates should be accepted at face value and can be safely ignored only in exceptional cases. Usually an employer will need objectively compelling evidence to look behind the certificate. One way to achieve this is to effectively discredit a doctor's reasons for granting the certificate.

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