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EMPLOYMENT LAW FOCUS

This Issue: Misleading Medical Certificates: The Saga Continues...

This article looks at the ongoing problems facing employers in New Zealand in relation to inadequate medical certificates causing delays in disciplinary proceedings.

The Problem

I recently wrote an article which looked at delay tactics often used by employee advocates to derail an employer's attempt to conduct a fair disciplinary procedure (see article on my LinkedIn profile entitled 'Disciplinaries from Hell' or previous July/August 2015 newsletter). One of those tactics, known as "go-sick-and-delay", is for the employee, upon receiving an invitation to a disciplinary meeting, to proffer a medical certificate stating they are medically unfit. This is often followed by successive medical certificates with the employee claiming they are under stress (which they may very well be), that they are medically unfit to attend a disciplinary meeting and which effectively prevents the disciplinary process moving forward.

This leaves employers in a very difficult position. On the one hand, you want to treat an employee fairly and recognise that disciplinary proceedings can cause stress. On the other hand, as the days stretch into weeks and potentially months, the employer is left with the serious problem of how to be fair yet still progress matters (see the 'Practical Tips' section at the end of this article on how to deal with this).

The Law

Unless there is a clause in their employment agreement providing enhanced sick leave entitlements, sections 65 and 66 of the Holidays Act 2003 entitle an employee to

five days' sick leave for every 12 months of employment, with the ability to carry over up to 15 days' sick leave to a maximum of 20 days' current entitlement in any year. Therefore, there is no legal obligation on an employer to continue paying an employee once their sick leave entitlements have been exhausted (although an employer may continue paying if they wish).

Many individual employment agreements ('IEAs') contain clauses which specify what the parties agree to do if an employee is medically incapacitated for any lengthy period of time. The very thorough IEAs will also contain a clause that states the employee agrees to attend a medical examination with a treatment provider of the employer's choice (and at the employer's expense) AND that the employee will provide signed authorisation, when requested, to permit the employer to discuss the employee's condition and prognosis with their treatment provider. The latter clause is very important as without such authority, neither a doctor nor an employer have a legal right to discuss an employee's private medical information.

Medical Certificate Requirements

In September 2013, amid increasing dissatisfaction from employers over the lack of information GPs were providing on employee medical certificates, the Medical Council of New Zealand ('MCNZ') issued new standards specifying the information that should be contained in a medical certificate. The standards include the following:

- The information disclosed should be accurate and based upon clinical observation, with patient comment clearly distinguished from clinical observation.

- Certificates should provide the necessary information required by the receiving agency and consented to by the patient. [Emphasis added]

- The receiving agency may seek information to guide their planning and may believe they will have a better idea of timeframes and restrictions if they have all the medical information. However, the only information they are entitled to is your clinical opinion on safe activities/ restrictions and timeframes.

- The certificate should not include private or irrelevant information.

- A diagnosis does not have to be disclosed unless it has direct implications for the receiving agency. However, where the diagnosis relates to a workplace injury or illness, or where the illness or injury may have an impact on co-workers and the public, and the medical certificate is to be received by the patient's employer you should seek the patient's permission and include on the certificate both a diagnosis and the workplace factors which may have contributed. [Emphasis added]

- Any comments on fitness for work should refer specifically to your clinical opinion, outlining those activities that are safe for the patient to undertake and appropriate restrictions, or unsafe activities that the patient should not undertake.

- If the patient is fit for some activities, this should be recorded in the certificate. Any duties that should not be attempted should also be clearly stated.

- A certificate should clearly identify the examination date and the time period of treatment (if any). Retrospective certificates should be clearly identified as such.

- A receiving agency may seek clarification from you about the patient's health status. As noted above, you should usually have had a conversation with the patient about the information you are permitted to disclose. In general, you should limit any additional comments to your assessment of the patient's capacity and timeframes. [Emphasis added]

Medical Information and the Privacy Act 1993

So why are employers continuing to receive medical certificates with almost no information ('Jennifer is medically unfit for 4 weeks') or with patient comment included as if it were the doctor's clinical observation ('It appears that inappropriate workplace interactions have increased David's stress')? The emphasised clauses in the section above provide the answer.

Doctors are bound by the Health Information Privacy Code 1994 ('Code') which was amended in 2008. The Code sets specific rules for agencies in the health sector. It covers health information collected, used, held and disclosed by health agencies and takes the place of the information privacy

principles in the Privacy Act 1993 for the health sector.

In general (and as can be seen littered throughout the MCNZ standards) the disclosure of a patient's medical information still requires the consent of the patient, and if an employee is not going to provide consent, there is very little a treatment provider can do about it.

The inclusion of inappropriate or non-clinical observations implies that the GP concerned is either unaware of the MCNZ standards or is unable to distinguish clinical observation from patient comment.

Case Law

In *Dunn v Waitemata District Health Board* [2014] NZEmpC 201 Judge Inglis has given some helpful guidance on the obligations an employer is under when facing lengthy medical incapacity of an employee who refuses to return to work because of disciplinary issues.

In 2007, Mr Dunn ('D') raised a personal grievance in relation to a verbal warning he had received. The WDHB and D met in early 2008 to try and resolve matters. On 14 March 2008 D commenced sick leave and remained away from work, much of it unpaid, until his employment was terminated on 28 November 2008.

In June 2008, WDHB sent a letter to D noting that although he was on sick leave, there were some performance issues they needed to discuss with him. There appeared to be no pressure on D to respond immediately to these issues.

Throughout the eight and half months of his medical incapacity, WDHB tried numerous times to engage with D (including two mediations) and initiate a return to work programme. In July 2008 WDHB sought a report from an occupational physician, Dr

Kenny (the Kenny report). The report stated that D was suffering from depressive illness and that the ongoing employment issues presented a "barrier" to D's return to work. The report also opined that it seemed unlikely that the employment relationship could be sufficiently repaired for him to ever return to his position.

By October 2008, D was informed that his employment was being terminated on notice due to medical incapacity. He was invited to discuss matters further during the notice period and his comments would be considered and potentially the notice of termination would be withdrawn. Apart from a request for specific details of the reasons for his termination (which was provided) no further correspondence was received from D and his employment was terminated.

The Court held that the dismissal was justified. Specifically, where there are medical incapacity issues combined with disciplinary matters the Court stated:

> *[39] It is clear that Mr Dunn perceived that the warning that he had received, and treatment by his manager and colleagues, was unfair and that this sense of grievance presented an impediment to a return to work. The WDHB was not obliged to resolve those issues to Mr Dunn's satisfaction before considering termination. That would impose an illogical burden on employers and potentially lead to years on sick leave without resolution.*
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> *[40] As the Court observed in McKean v Board of Trustees of Wakaaranga School: "If an employee is unable to return to work or provide a positive prognosis for return, an employer cannot be expected to continue the employment relationship to enable other dissatisfactions to be dealt with on their merits at some indefinite future time."*
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> *…*
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> *[43] Employment relationships involve a two-way street. Both parties have an obligation to be responsive and communicative and to deal with each other in good faith. It ill-behoves an employee to complain about a failure to adequately progress a rehabilitative process when they themselves fail to engage in constructive dialogue in a genuine attempt to resolve issues…*

Practical Tips

- Even where sick leave during a disciplinary looks dubious, proceed with caution. Ask the employee's advocate, in writing, to provide more detailed information as to the nature and cause of the illness.

- Ask the employee (through their advocate) to sign an authorisation permitting the employer to communicate with their treatment provider for the purpose of ascertaining the prognosis and

whether the employee would be able to attend a disciplinary meeting.

- Ask the employee to provide a medical clearance before returning to work and inform them that the disciplinary meeting will be rescheduled as soon as they are cleared fit for work.

- If the employee continues to be unable to attend, inform the employee's advocate that you are happy to receive their comments and explanations in writing, if that makes it easier for the employee, given their current health issues.

- Take preventative measures to avoid the situation by strengthening your IEAs. Parties can agree to any terms and conditions in an IEA provided they are not contrary to law. Include a clause that specifies that where an employee goes on extended sick leave, including during disciplinary proceedings, the employee agrees to provide the employer with authorisation to discuss matters with their treatment provider. Expressly state that failure to provide the authorisation when requested may comprise a breach of the employee's IEA and that a decision regarding ongoing employment may be made based on the information the employer holds at the time the decision is made.

Need More Information?

- If you have further questions on this topic or any other employment law issue, please contact Erin Burke: erin@practicalegal.co.nz
- Visit Practica Legal's website: www.practicalegal.co.nz and click on "Publications";
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