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LAWYERS

Employment Law Update

September 2016

Chucking a sickie, and major sporting events

"Any boss who sacks anyone for not turning up to work today is a bum!" (Bob Hawke, 1983)

Have you ever thrown a sickie for a grand final? You're far from alone. With the average Australian's passion for sport, major sporting events (the Olympics, the World Cup, Wimbledon, le Tour de France, the Ashes, Origin – the list is endless) can provide employees with significant temptation to "chuck a sickie." Indeed, a recent Robert Half global survey found Aussies (and Kiwis) get the gold medal for sports event-related sickies (or at least, HR managers perceive that they do)

Despite Bob Hawke's famous comment on the morning Australia won the America's Cup , an employer's expectation that employees will turn up for work is not to be disregarded entirely.

Of course, in many cases, employees will let their employer know that they intend to stay up late to watch a big game, and they'll make acceptable arrangements in a tolerant and mutually respectful way.

However, the employee who doesn't forewarn their employer, and just calls in sick (or worse, the employee who asks and is refused but is defiantly determined to do as they please, so calls in sick) presents problems for getting work done when required, and of trust.

So how do you manage this? Here are a few pointers:

- Does your sick leave policy require a medical certificate for one-day absences? If so, enforce it
- If there is scuttlebutt that employees will be "otherwise occupied," remind them about your expectations: what needs to be done the morning after, and the expectations
- If there is plain defiance, and significant issues at stake for you as the employer, you could consider disciplinary action, but be careful to keep things in proportion and calibrate consequences to the situation and the past record of the employee - manage things so you are not the Grinch who stole Christmas
- If the issue concerns a number of employees, the circumstances may justify the same treatment for all – or not: reflect on possible differences in their situations or conduct
- If there's questionable behaviour but no more than a vibe to support it, consider what Facebook may show, if this is readily accessible.

However, all these options have a certain killjoy tone (as Bob Hawke's exuberant aphorism suggests). Is there a more positive way, apart from letting employees get away with it?

Chucking a sickie, and major sporting events cont.

Positive engagement benefits might arise if you work the event into the work day. Events on early in the morning or late in the afternoon, might become a work social event (much as the Melbourne Cup traditionally is) which can fit in with the work day, minimise the risk of absenteeism and serve as a bonding experience. This Smart Company article suggests uncovering and embracing employee's sporting passions may be an effective way to boost employee engagement and show the boss in a good light. It may be harder to apply that to an long event or an event occurring in the small hours (the Olympics, a test match, the Tour de France, the World Cup) than to a one-off occurring in or close to work time, but then again, there could be scope for a bigger buzz from working in a bigger event.

Now, what about the people who don't have an interest in sport, working away at their desks and feeling they don't get a benefit that their sporting fan colleagues do?

Enjoy whatever sports event comes next in your calendar.

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10 things you need to know about discrimination in the workplace

Discrimination in the workplace is one of the most common areas that people lodge formal discrimination complaints about. In Australia, there are prohibitions in relation to discrimination on the grounds of attributes such as age, race, sex, sexual orientation and disability. These prohibitions are contained in various pieces of Commonwealth legislation, including the Fair Work Act, as well as in state legislation such as the Anti-Discrimination Act. Given the complexity and volume of laws that govern discrimination in Australia, as an HR Manager or the person responsible for HR in your workplace - what are the top 10 things you should know in relation to discrimination in the employment context?

1. Discrimination can be *direct or indirect*. Direct discrimination occurs when an employer discriminates against an employee because of a protected attribute such as their age, race, sex or disability. Indirect discrimination occurs when an employer imposes a condition or requirement that, on the face of it, appears to treat and affect everybody equally, but has the actual effect of disadvantaging a particular group because of a protected attribute. Therefore, you should consider whether any of your policies might be indirectly discriminatory.

2. Employers can be held to be *liable* for the discriminatory conduct of one employee (such as a supervisor or manager) against another. Prevention is better than cure so seek legal advice and make sure that you put policies in place and provide training to ensure employees understand what discriminatory conduct is.

3. Discrimination complaints can also be brought by potential employees who may have grounds to believe that they weren't offered employment because of something that was raised in the interview process, in relation to their race, age, ethnicity, religion or sex. For example, they may allege that they were not offered the role because they were told they "too old" or they were asked if they had "plans for kids." It is therefore important to ensure that potentially discriminatory questions are not included as part of the interview process.

4. Discrimination *does not need to be intended* by the alleged perpetrator of the discriminatory conduct for there to be a breach of the relevant anti-discrimination legislation. Often unconscious discriminatory biases play out in the employment arena, and so long as the impact of the conduct is discriminatory, there can be found to be a breach, even if the alleged perpetrator honestly believed they weren't acting in a discriminatory manner.

5. Discrimination complaints can be brought as *stand-alone complaints* before the Australian Human Rights Commission or the NSW Anti-Discrimination Board, or can form part of a general protections or adverse action claim before the Fair Work Commission. However, there are laws in place to prevent "double dipping" which occurs when a complainant lodges a claim in more than one jurisdiction, for the same complaint.

6. The *definitions in anti-discrimination legislation are general and wide*, in order to capture a variety of potentially discriminatory acts. For example, the Sex Discrimination Act protects against - amongst other things - sexual harassment, sexual identity or gender, family responsibilities, and pregnancy or potential pregnancy. The definition of "disability" under the *Disability Discrimination Act* can include psychological as well as physical disabilities, in addition to previous or potential disabilities. If you're not sure whether something would be caught by the anti-discrimination laws, you should talk to your solicitor.

7. Some types of discrimination such as "positive discrimination" or "affirmative action" or "special measures" could constitute a defence or exception to discrimination. There are also a variety of defences specific to certain types of discrimination. For example, it is a defence for disability discrimination if you can prove that providing reasonable adjustments for that particular disabled employee, would cause the employer unjustifiable hardship.

10 things you need to know about discrimination in the workplace cont.

8. If you want to impose a condition or requirement that may be discriminatory, you can ask the Australian Human Rights Commission for an exemption from the laws. Exemptions can be granted if certain requirements are met.

9. Rude or offensive comments in the workplace aimed at a particular person or group of people and made on the basis of someone's race, age, ethnicity, religion, etc, can also be actionable under the vilification provisions in the anti-discrimination legislation. These types of rude or offensive comments, if repeated, could also potentially form part of a bullying claim. Again, you should ensure that you have policies in place that clearly establish what is acceptable behaviour in the workplace, and what is not.

10. If the employer is a provider of goods and services, or an educational institution, prohibitions in relation to discrimination extend past your employees, and can also extend to users of your goods or services such as clients and customers, and in the case of education institutions, to students as well.

It's important to ensure that all employees and employers are aware of the different types of discrimination that can occur in the workplace. If you need advice in relation to discrimination laws, contact our Employment and Business Migration Team.

Lisa is currently a casual lecturer at Western Sydney University; teaching Anti-Discrimination Law.

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Employment Law Update

An injured employee…conflicting medical reports on capacity…can you terminate employment?

The Full Bench of the Fair Work Commission recently dealt with this situation in the case of *Lion Dairy and Drinks Milk Ltd v Peter Norman.*

The Facts

Mr Norman was employed by Lion Diary as a Maintenance Fitter. He had had a skydiving accident which resulted in significant injuries, after which Lion Dairy engaged Dr Graham, a Specialist Occupational Physician, to provide a medical assessment of Mr Norman and recommendations as to his ongoing capacity to perform the inherent requirements of his position. Dr Graham concluded that it was unlikely that Mr Norman would be able to perform these requirements in the near future however, Mr Norman's treating Orthopaedic Surgeon, Professor Jaarsma, provided him with a clearance to return to work.

Lion Dairy provided Professor Jaarsma's clearance to Dr Graham - who advised his opinion remained unchanged, l*eaving Lion Diary with two conflicting medical opinions.*

Lion Dairy opted to rely on the opinion of Dr Graham, and terminated Mr Norman's employment on the grounds that he was no longer able to perform the inherent requirements of his role.

Initial Outcome

Deputy President Bartel held that Lion Dairy's decision to terminate Mr Norman's employment was unfair and that he should be reinstated and paid remuneration he'd lost as a result of his dismissal.

Lion Diary appealed Deputy President Bartel's decision to the Full Bench to make a determination.

The Appeal

The Full Bench highlighted the following general principles:

- In capacity cases the employer is usually required to take on board an expert opinion or opinions - they shouldn't make an independent assessment of what is essentially a medical question
- The existence of a valid reason for termination based on capacity depends on whether the reason was sound, defensible and well-founded - not capricious, fanciful, spiteful or prejudiced;
- It's appropriate to consider medical assessments that relate to the capacity of the employee to perform the full duties of the position
- It's also appropriate to take into account whether reasonable adjustments may be made to a person's role in order to accommodate any current or future incapacity but, this relates to capacity to perform the substantive position, not a modified or restricted role to accommodate the employee's injury
- The absence of a clear finding by an appropriate medical practitioner that the employee can't perform the inherent requirements of the job will suggest that there is not a valid reason for termination based on capacity
- A decision based on the existence of a medical opinion that an employee can't perform the inherent requirements of a job suggests a valid reason because such a decision is sound, defensible and well-founded.

An injured employee…conflicting medical reports on capacity…can you terminate employment? cont.

Specific to the facts of this case, the Full Bench made the following observations:

- *"Professor Jaarsma was Mr Norman's treating surgeon. His advice related to Mr Norman's recovery from the injury he sustained and the surgery performed. He is not an occupational physician. He made no occupational assessment of Mr Norman. He was not given a copy of the job description and paid no regard to the job requirements_"*
- *"Dr Graham, an independent occupational physician was provided with details of the job. He was asked whether, in his assessment, Mr Norman could perform the inherent requirement of the role"*
- *Further, "After Norman produced a medical certificate from Professor Jaarsma_ Lion Diary requested that Dr Graham review his opinion. Dr Graham confirmed his view and assumed that the medical certificate related to recovery from the injury, not the different question of ability to perform the inherent requirements of the job"*
- *"An employer is entitled, and expected, to rely on expert assessments. If there is some apparent conflict in medical opinions it will usually be incumbent on the employer to resolve that conflict. In this case the employer asked the occupational physician, Dr Graham, to conduct a reassessment with the benefit of Professor Jaarsma's medical certificate. Dr Graham confirmed his view that Mr Norman is unlikely to be able to perform the inherent requirements of the role in the near future"*

Outcome of the Appeal

The decision to terminate was in fact fair.

Lion Diary had a valid reason to terminate Mr Norman's employment - that is, its decision was based on medical advice and therefore the reason relied upon by Lion Dairy was sound, defensible and well-founded.

These situations are always tricky to deal with - so ideally gather all information available, and preferably seek legal advice before making a final decision and taking any action. If you need assistance dealing with this sort of situation or something similar, please do not hesitate to contact our Employment Law specialists in Parramatta and Norwest, Baulkham Hills:

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