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Employment Law Update

April 2019

Have you got what it takes to manage an ill or injured worker?

Many business owners, as well as those responsible for the management of employees, shudder at the very thought that they may one day have to terminate the employment of someone on grounds that they are no longer able to fulfil the requirements of their position. This fear is completely understandable, given the complexities involved and the significant legal liability that employers can be exposed to if they get it wrong.

Employers managing ill or injured employees have many legal obligations imposed on them, ranging from those under the work health and safety, anti-discrimination and equal opportunity legislation, as well the Fair Work Act 2009 (Cth).

When it goes wrong, an aggrieved employee has many legal avenues to pursue their claim. Depending on the avenue taken, the compensation and/or damages that can be awarded to such an employee if successful, is significant.

The recent case of Elaina Tito v Pilbara Iron Company (Services) Pty Ltd [2018] FWC 7469 highlights the considerable lengths that employers have gone to prior to terminating an employee on grounds of incapacity. In this particular case, the employer was able to successfully defend an unfair dismissal claim that was made in response to its decision.

The facts of the case

Ms Elaina Tito ('Ms Tito') was employed by Pilbara Iron Company (Services) Pty Ltd ('Rio') as a full-time mobile plant operator (her "substantive role"). Ms Tito worked 12-hour days, on a fly-in, fly-out roster. In September 2013, Ms Tito sustained a neck injury whilst operating a piece of mobile plant equipment. Approximately six months after the injury, Ms Tito returned to full fitness and recommenced her driving duties.

Unfortunately, Ms Tito sustained another neck injury in July 2016 which required surgery. Initially, Ms Tito returned to her substantive role on restricted duties (one hour of driving followed by one-hour of rest, for the duration of her normal work day, for one week) in accordance with her doctor's advice, and as a "trial" arrangement. However, one and a half hours into her first shift, it was apparent that Ms Tito was unable to perform even her restricted driving duties, due to a significant level of pain and discomfort that she was experiencing.

Although unable to perform her substantive role, Ms Tito was certified as fit to perform alternative duties in administration, which she subsequently performed up until August of 2018.

Following Ms Tito's surgery, she was regularly reviewed by specialists and general practitioners. Based on the significant evidence provided by these medical professionals over a two-year period, Rio determined that it was unsafe for Ms Tito to operate mobile plant equipment moving forward. Accordingly, Rio initiated an extensive redeployment process to move Ms Tito into a suitable alternative role. As part of the redeployment process, Ms Tito participated in regular meetings with management and HR, was provided with assistance and feedback on job applications and was given weekly "open role" reports.

Have you got what it takes to manage an ill or injured worker? cont.

In mid-August 2018, Rio offered Ms Tito a full-time administration position, however she declined the offer based on her parental responsibilities.

Ms Tito's employment with Rio was subsequently terminated on 27 August 2018 on the basis that she was unable to fulfil the inherent requirements of her role as a mobile plant operator.

Shortly after her termination, Ms Tito lodged an unfair dismissal claim against Rio alleging that she was dismissed:

- Without a valid reason, as no medical evidence was tendered to indicate that she could not fulfil the inherent requirements of her job as a mobile plant operator, at the time of dismissal; and
- that the medical evidence Rio had relied upon did not indicate that she was unable to perform the job of mobile plant operator in the future.

Findings of the Commission

It was apparent that Rio considered Ms Tito's health, safety and wellbeing to be of paramount importance and that it had gone to considerable lengths to facilitate her return to work. Rio also diligently considered the extensive medical evidence and opinions provided by the specialist medical practitioners had who treated Ms Tito over the years. In addition, Rio had consulted with Ms Tito and other key stakeholders throughout the entirety of the return to work process.

When the redeployment position was declined, Ms Tito was given a further opportunity to provide reasons as to why her employment should not be terminated. All reasonable steps were taken by the employer.

Deputy President Beaumont found that Rio did have a valid reason to terminate Ms Tito's employment, with this having been based on sound medical opinions - and that the dismissal was therefore not harsh, unjust or unreasonable. Accordingly, no compensation was awarded to Ms Tito.

Key take away

The dismissing of an employee on the grounds of incapacitation needs to be handled delicately, with care, and to be underpinned by sound legal advice in consideration of the specific facts and circumstances of the case. No one injury or illness is the same, so a "one size fits all" approach is unlikely to reap a successful outcome for either party.

Below are some things to consider:

1. Having a Return to Work policy or program is vital: All employers in New South Wales should have a Return to Work (RTW) policy which outlines how it will manage an employee's workplace illness and injury, and the steps that it will take to get them back into the workplace as soon as possible.

   A RTW policy will need to be applied consistently across the business. Accordingly, it is important that a business strictly complies with its RTW policy in the event of an injured or ill worker, as there may be consequences for non-compliance. When drafting a RTW policy, consideration must be put towards any relevant work, health and safety legislation applicable in the State or Territory within which a business operates.

Have you got what it takes to manage an ill or injured worker? cont.

2. Open communication: As always, open and candid communication is the key to success.

   Keeping the dialogue open between employer and employee is integral in ensuring that the employment relationship does not erode to a point of irreparable damage.

   On a practical note, if an employer has an Employee Assistance Program, it may be wise to encourage the employee to utilise such a service as a means of additional support throughout the RTW process.

3. Consultation: All parties, including the employer, employee, employee representative (if applicable), human resources (or RTW co-ordinators), medical/health professionals and insurers should be kept regularly updated on how the employee is progressing, and whether any adjustments (large or small) need to be made to the RTW plan.

   Having all participants involved will ensure that issues are both addressed and rectified promptly.

If your organisation is facing the difficult task of managing an ill or injured employee, or you have a question relating to anything in this article, please do not hesitate to get in touch with Coleman Greig's Employment Law team.

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Immigration and the NSW Election – what it means for business

The recent state election has brought with it an increased focus on immigration. While immigration is usually an area regulated by the Federal government, NSW Premier Gladys Berejiklian has made it a state issue by bringing to the forefront the impact that immigration could potentially have on NSW public infrastructure and housing prices.

The Premier has claimed that NSW is playing catch-up in attempting to build infrastructure to keep up with population growth. The Premier has commissioned a three-member expert panel to present a policy to the Federal government which will aim to reduce the intake of migrants into NSW. As part of her campaign, the Premier has called for a return to Howard era migrant intake levels, which will require halving current intake levels for NSW to 45,000 a year.

Current immigration levels and the six-point plan

Permanent immigration in Australia has been capped at 190,000 a year. There have been recent cuts in both skilled and family visas, resulting in last year's migrant intake dropping to 162,000. Despite this drop, as most migrants (85%) live in the larger cities rather than regional areas, there is still significant pressure on states to accommodate for rising population growth.

To combat this pressure, Gladys Berejiklian announced a six-point plan in December of last year, which could make it more difficult for skilled migrants to migrate to NSW, and similarly make it more difficult for current skilled migrants to remain.

The plan draws on Canada's current immigration system, and will involve greater input from states and territories in determining what type of skilled visas a state requires. The system, as it currently stands, dictates that it is the Minister for Home Affairs who determines which occupations are available for sponsorship through a skilled visa (including employer sponsored visas). As such, states have very little say in which occupations should make that list.

In comparing Australia's immigration system to that of its Canadian counterpart, Canadian provinces have had the ability to nominate their own migrant intake levels, and in the case of the Canadian province of Quebec, have been able to go so far so to create their own criteria for selecting immigrants.

If the proposed changes are implemented, it would mean that each state is able to have a greater say with regard to which skills are lacking, and in turn, which skilled migrants should be able (and encouraged) to apply for a skilled visa. Whilst there are clear benefits to ensuring that the visa program for a state meets the skill shortage of that particular state, this could also make it much more difficult, if not impossible, for other skilled migrants, who don't meet the cut, to migrate to the state of their choice.

This change, if implemented, has the potential to affect business - particularly in NSW - as it may become far more difficult for employers to sponsor workers in roles that the state government does not consider to be addressing the skill shortage within that state.

There is also potential for this to become problematic for smaller businesses, who may have their needs for skilled employees overshadowed by the needs of larger businesses, at least within the context of deciding where each state falls short with regard to skilled workers.

Many businesses are already frustrated at the changes made to the now obsolete "457" working visa in April 2017, as these led to many occupations no longer being available for employer sponsored visas. Further changes to the requirements for an employer sponsored skilled working visa, together with plans to reduce migrant levels to NSW by half, could lead to more difficulties being faced by NSW businesses looking to retain skilled staff.

Immigration and the NSW Election – what it means for business cont.

Skill Shortages in Australia's regional areas

Another strategy to ease migrant levels in Australia's capital cities is to encourage immigration to regional areas. A $19.4 million plan has been pledged by the Minister for Immigration, Citizenship and Multicultural Affairs David Coleman, to encourage regional migration. Strategies to increase regional migration include less stringent visa requirements, as well as faster visa processing times.

The Minister has also negotiated a series of Designated Area Migration Agreements (DAMAs) for areas such as the Norther Territory and Warrnambool on Victoria's Great South Coast, which would see visa requirements tailored to the needs of the specific designated area.

Currently, there are significant concessions in place for regional skilled migration, including a wider list of occupations available for sponsorship. It appears that skilled workers migrating to Australia, as well as those on student visas, are attracted to the hustle and bustle of the capital cities and would prefer to attempt to obtain a visa to those capital cities over regional cities, even if their chances of obtaining that visa are lower. However, unless there is something done to alter the allure of the larger cities, it is doubtful whether a $19.4 million plan to increase regional migration will indeed be enough to entice migration away from the larger cities.

If you have a query relating to any of the information in this piece, or you require assistance with regard to employer sponsored migration, please don't hesitate to get in touch with our Employment Lawyer and Registered Migration Agent.

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Employment Law Update

Key legal considerations to be aware of if you are thinking of making a position redundant

Elements of a "genuine redundancy"

The term "redundancy" in an employment context refers to a situation when an employer no longer requires the role that the relevant employee(s) has/have been performing to be performed. The focus is the job, or the removal of the particular position from the company personnel structure, so it is important to keep in mind that it is quite possible for a redundancy to arise even in circumstances where the duties of a particular position are reallocated to other existing or remaining employees.

One key point for employers and employees alike to note is that an unfair dismissal application will not succeed if the dismissal qualifies as a "genuine redundancy".

The term "genuine redundancy" refers to situations where:

- the employer no longer requires the job that the relevant employee is performing to be performed due to changes in the operational requirements of its business; and
- the employer has complied with their obligation(s) under any applicable award or enterprise agreement to "consult" with regard to the redundancy; and
- there was no reasonable opportunity for the employee to be redeployed within the employer's business, or the business of an associated entity.

"Consultation"

Employers are required to consult with employees about a proposed restructure as soon as possible in the decision-making process, or more specifically, as soon as a decision to consider a restructure and the possibility of redundancies has been made.

The purpose of consultation is to assist management by giving it access to ideas or options that they may not have otherwise considered, as well as to provide the potentially impacted employees with an opportunity to reduce the impact of any negative effects likely to come about as the result of a proposed restructure.

The typical steps include:

1. Explain the situation that has made the restructure necessary (i.e. the reason behind the restructure and redundancies being considered in the first place) - what is the business hoping to achieve?;
2. Provide an outline or framework of the proposed restructure (e.g. explain the company structure now and compare it to the proposed company structure if the redundancy/redundancies is implemented);
3. Ask for input from the potentially impacted employee(s), carefully considering any responses/suggestions put forward;
4. Make a final decision; and
5. Implement the decision.

The information in steps 1 and 2 must be given in writing, ideally following a face to face meeting at which the information is initially conveyed.

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Key legal considerations to be aware of if you are thinking of making a position redundant cont.

Redeployment

A person's dismissal will not qualify as a "genuine redundancy" if it would have been reasonable to redeploy the employee, i.e. place the employee in another role within the employer's business, or the business of an associated entity of the employer.

In determining whether or not there is a reasonable redeployment opportunity - the following factors must be considered:

- Is there actually a position available?
- What skills, qualifications and experience are required for the position being offered?
- Does the relevant employee have the skills, qualifications and experience required for the position being offered?
- What is the location and the remuneration of the job being offered?
- How do the location and remuneration of the job being offered compare to the location and remuneration of the employee's current role?

Essentially, the employee should have the relevant skills, experience and qualifications required to perform the role either immediately, or within a reasonable period of associated training.

If you as an employer have positions available that the employee has the skills to perform, you should not assume that the employee will refuse the position - even if it is at a lower level.

Redundancy Pay

Once it has been established that the role is no longer required, and both the consultation and redeployment steps have been addressed, attention must be turned to the calculation of the redundancy package - which consists of the following:

1. Notice;
2. Redundancy pay; and
3. Accrued leave.

Typically, employers will need to refer to the National Employment Standards in order to calculate the amount of notice and redundancy pay required - although this may not be the case if the relevant employment contracts or workplace polices provide for a greater, or specific amount to be paid. The relevant amount of accrued leave will ordinarily include accrued annual leave, and for your longer serving employees, the possibility of accrued long service leave.

Another crucial point for both employers and employees to note is that employers with less than 15 employees are exempt from having to pay the "redundancy pay" component.

Key legal considerations to be aware of if you are thinking of making a position redundant cont.

Variation of Redundancy Pay - obtaining "other acceptable employment"

If you are able to obtain or secure "other acceptable employment" for an employee who would otherwise be entitled to redundancy pay due to the fact that you no longer require their job to be performed, you can apply to the Fair Work Commission for a determination that the amount of redundancy pay under the Fair Work Act be reduced to a specified amount, which may be nil.

The Fair Work Commission applies an 'objective' test when determining whether alternative employment is "acceptable", that is, the Commission looks at the particular circumstances of the role on offer as compared to the role that was made redundant - paying particular attention to the following (among other things):

- Rate of pay;
- Hours of work;
- Location of job;
- Seniority;
- Fringe benefits;
- Workload;
- Job security;
- Continuity of service;
- Accrual of benefits;
- Probationary periods;
- Carers responsibilities; and
- Family circumstances.

A case study

Whether or not an alternate position qualifies as "other acceptable employment" was an issue considered by the Fair Work Commission in the case of Australian Footwear T/A Diana Ferrari [2018] FWC 7864 - which involved footwear retailer, Diana Ferrari.

To summarise this matter, Diana Ferrari applied to the Commission to vary the redundancy amount payable to a particular employee, Ms Tzortzis. Specifically, Diana Ferrari had sought to have Ms Tzortzis' redundancy pay reduced to nil. Ms Tzortzis opposed the application and sought the full amount of statutory redundancy pay.

The position made redundant was at the Diana Ferrari Store located at Birkenhead Point at Drummoyne ("the Birkenhead Store"), and the position offered by Diana Ferrari as "other acceptable employment" was at the Williams store located at Macquarie Centre at North Ryde ("Macquarie Centre Store").

Key legal considerations to be aware of if you are thinking of making a position redundant cont.

The Commission held that the new position at the Macquarie Centre Store offered the same part-time hours, rate of pay and seniority that Ms Tzortzis had been receiving at the Birkenhead Point Store, so the determining issue was Ms Tzortzis' commute to work. The Commission was satisfied that the commuting time for Ms Tzortzis had not increased significantly, however, it then focussed on Ms Tzortzis' capacity to park her car at or near the Macquarie Centre Store.

Free street parking was available to Ms Tzortzis at Birkenhead Point Store, however parking at the Macquarie Centre Store cost $10 a day, or $50 a week. The Commission took that additional expense into account in reaching its decision, as well as the fact that Ms Tzortzis was earning an award rate of pay, and concluded that given the additional expense for parking, Ms Tzortzis has not been offered "other acceptable employment" and refused to reduce the redundancy pay to which she was entitled.

If you have a query relating to any of the information in this article, or you would like to speak with a lawyer in Coleman Greig's Employment Law team with regard to your own redundancy matter, please don't hesitate to get in touch:

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