WHEN MEDICAL OPINIONS COLLIDE

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Determining whether an employee is fit to return to work is a common challenge faced by employers. Employers are required to rely on the opinions of medical professionals in determining whether an employee can perform the inherent requirements of the job within the foreseeable future. But what happens when medical opinions collide?

In the recent decision of *CSL Limited t/a BSL Behring v Papaioannou* [2018] FWCFB 1005 (CSL), the Full Bench of the Fair Work Commission has clarified that in a dismissal case when there is a clash of medical opinions, it is the Commission that must decide which opinion is to be preferred. This puts to rest the divergent line of Full Bench authority, in which the Commission chose not to look behind the employer's assessment of medical evidence.

The implication for employers is that the Commission will not simply accept their assessment of medical evidence on face value. Employers must therefore be sure that they have sufficiently considered and assessed the relative weight of conflicting medical evidence.

At law, it is permissible to end an employment relationship where the employee can no longer carry out the essential or inherent requirements of his or her job within the foreseeable future. In order to make this determination, an employee will typically undergo an assessment with a medical practitioner in order to obtain an expert opinion as to the employee's capacity.

However, issues can arise where different doctors offer up conflicting opinions as to the prognosis of a particular employee. This issue has been canvassed in a range of different decisions before the Fair Work Commission. Until recently there were conflicting decisions on the issues.

According to the approach articulated in *Jetstar Airways Pty Ltd v Neeteson-Lemkes* [2013] FWCFB 9075 (**Jetstar**) in determining whether a valid reason for dismissal exists, it was for the Commission to consider and make findings as to whether, at the time of dismissal, the employee suffered from the alleged incapacity based on the relevant medical and other evidence before it.

By way of contrast the decision of the Full Bench in *Lion Dairy & Drinks Milk Ltd v Norman* [2016] FWCFB 4218 (**Lion Dairy**) found that it was not for the Commission to make an expert medical assessment. Rather, in establishing a valid reason for dismissal, an employer was entitled to rely on the medical report prepared by a professional medical practitioner and this would constitute an entirely defensible position. In the event of a conflict between medical opinions, it was incumbent on the employer to resolve that conflict.

THE CSL DECISION

The Full Bench in the recent CSL decision has resolved the tension between the Jetstar and Lion Diary by

adopting the approach in Jetstar. In its decision, the Full Bench has expertly and in some detail eviscerated the decision in Lion Dairy, describing it as "plainly wrong".

The Full Bench noted that the object of establishing a balanced framework and providing a 'fair go all round' seemed antithetical to the notion that any conflict in the medical assessment of an employee's capacity should be resolved by the employer.

In determining whether there is a valid reason for dismissal on the basis of incapacity, the Commission must consider and make findings as to whether the applicant suffered from the alleged incapacity. That finding is to be based on relevant medical and other evidence that is produced before the Commission. No preference is given to the opinion of the employer as to the preferred evidence, rather this assessment is to be made by the Commission, acting reasonably.

THE IMPLICATIONS

Unsurprisingly, medical assessments involve an element of subjectivity which can result in conflicting outcomes. An employee's medical team may say that the employee will improve in time whereas independent medical evidence obtained by the employer might say that the prospects of the employee returning to perform the job are poor and unlikely to occur within a reasonable period of time.

Employers must carefully weigh up conflicting medical material and make an assessment as to which opinion should be preferred. The CSL decision does not provide guidance as to the approach to adopt when weighing up competing evidence, however factors that employers should consider include:

- whether the medical practitioner is a treating practitioner or an independent medical examiner. Typically, the opinion of a treating medical professional is likely to carry more weight
- the relative qualification of each medical practitioner, for example whether they are a specialist or a general practitioner. Typically, the opinion of a relevant specialist is likely to carry more weight
- the relevance of the qualifications of the particular medical practitioner to the incapacity of the employee.

Ultimately, the judgement is entirely in the hands of the Commission to determine which reasoning makes more sense and is to be preferred. This can in fact come down to which medical practitioner performs better in the witness box and is able to persuade a Commission that their opinion carries sway. A similar issue arises in a discrimination or general protections claim before a Court.

Accordingly, if an employer wishes to terminate the employment on the basis of incapacity, it can only do so when the medical evidence supports the opinion that the prospects of the employee being able to perform the key requirements of the job are low. To be in the best position to defend any such claim it is recommended that employers:

- ensure that the employee is no longer temporarily absent because of illness or injury within the meaning of the Fair Work Act
- engage an expert medical specialist to examine the employee. If there is a clash of opinion, the employer should ensure that the conclusions reached in the independent report are sound and defensible

- invite an employee's medical practitioner to comment on the external report
- assess whether the medical specialists who produced the report will be able to substantiate it in any court/tribunal
- act swiftly upon receipt of a medical opinion so that a decision to end employment is reasonably proximate with the date of the medical report. This should help to resist any argument that the circumstances of an employee have changed.

There are no certainties in employment cases but instinctively the medical opinion that appears soundly based and seems reasonable and determinative should win the day.

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