

Medical Incapacity and Sickness at Work

It is not uncommon for employers to be faced with a situation where an employee requests an extended period of time off work for medical reasons. Sometimes the medical reasons are work related, sometimes they are not. Often the period of leave will start off being for a short period but may be extended repeatedly to the point where the employer considers dismissal as an option. Employers may also ask themselves what options they have if they suspect an employee has been using sick days fraudulently. This article examines and comments on an employee's sick leave entitlement and dismissal for medical incapacity.

What are an Employee's Sick Leave Entitlements?

It is important for employers to understand the basic rules about sick leave under the Holidays Act 2003. Once employees have been employed continuously for 6 months, they become entitled to 5 days of sick leave per year. Employees can carry over 15 days, meaning that they can have a maximum of 20 days sick leave accrued at a time. Employees are entitled to take their sick days for their own sickness or injury, or if their partner, child or dependent is sick or injured.

Non-Genuine Use of Sick Leave Entitlement

Under section 68(1) of the Holidays Act 2003, if an employee takes three or more consecutive calendar days of sick leave, their employer can require the employee to produce proof of his or her sickness, such as a medical certificate. Section 68(1A) provides that an employer can require proof of sickness within three consecutive calendar days if the employer informs the employee as early as possible of this requirement, and agrees to meet the employee's reasonable expenses in obtaining the proof.

The requirement to produce a medical certificate is a useful tool for employers when it is suspected that an employee may be fraudulently using sick leave. An employer does not need to suspect non-genuine sick leave is being taken to ask for a medical certificate. However, an employer must be certain that its suspicions have a factual basis before making a decision to terminate or otherwise discipline the employee. This will involve conducting a proper investigation into whether the employee took sick leave fraudulently, and giving the employee a chance to respond to the employer's suspicions or allegations before any decision is made. Failing to do so may lead to a personal grievance being raised by the employee. We next examine a case which provides guidance on this issue.

Taiapa v Te Runanga O Turanganui A Kiwa Trust [2013] NZEmpC 38

In this case the Employment Court had to decide whether an employer who dismissed an employee for dishonestly claiming sick leave was justified in its decision to dismiss.

The employee, Mr Taiapa, took sick leave for a calf injury. He stated that his doctor believed he needed two days off work, which prompted his employer to ask for a medical certificate to be provided to confirm this upon his return to work.

A medical certificate was provided, however it was “bland and uninformative”. When asked for further information to clarify the details of his absence, he said it was “none of the employer’s business”. The employer discovered through a photo posted on Facebook that Mr Taiapa had been at the Waka Ama sports competition in another city with a team of students he coached recreationally, during part of the period when he said he had been on sick leave. Mr Taiapa was told that the employer was concerned he had committed serious misconduct and that “summary dismissal was a possible consequence”. Two meetings were held, and Mr Taiapa gave his side of the story. During the investigation meetings, Mr Taiapa gave different and contradicting stories explaining where he was during his absence. The investigation resulted in Mr Taiapa’s summary dismissal.

The Employment Court found that the employer had acted as a fair and reasonable employer could. The Court stated that once discrepancies arose in Mr Taiapa’s story, the employer was entitled to be suspicious. The lack of detail in the medical certificate was one such cause for suspicion. The employer was then entitled to undertake an investigation into Mr Taiapa’s conduct. During this investigation it used all the information it had available to make a fully informed decision that Mr Taiapa had fraudulently used his sick leave. What he did on his sick leave was not consistent with recuperation from his injury, and the dismissal was found to be justified.

Medical Incapacity

Many employers face situations where an employee is declared unfit to work by a doctor. This period of medical unfitness will either last for a specified time, or will continue indefinitely until the doctor clears the employee to work again. In these situations the employer has to consider how to deal with the employee while on sick leave and when or whether they will be able to return to work.

Communication is important when an employee is off work for an extended period of time. The employer should ensure that they stay in contact with the employee during their absence, and make efforts to ask the employee about the nature of their sickness or injury and their prospects of returning to work. Employers should ensure that they do not make decisions without involving the employee simply because the employee is not at work. Employers should work with the employee to come up with a plan for his or her return to work, with the assistance of medical professionals.

If an employee is off work for an extended period and it appears he or she may not be able to return to work, the employer may instigate an investigation process to ascertain the employee’s fitness for work. During the process, the employer should consider such factors as:

- How long the employee has been employed
- How long the employee’s employment is likely to last if they weren’t sick
- The nature of the employee’s role, does it require abilities which are severely hindered by the sickness or injury?
- The prospects of the employee’s recovery
- Whether it is a work related injury or illness

It is only after a fair process and careful consideration of the employee’s ability to perform his or her job that an employer may consider dismissal.

Judea Tavern Ltd v Jesson [2017] NZEmpC 82

This recent case illustrates what not to do as an employer when faced with an employee who needs time off work for injury. Ms Jesson was employed by Judea Tavern, and after 4 months of employment she broke her leg at her brother's funeral. As a result of this injury, she was "medically certified as being unfit for work" for a week. At the end of this week, this medical certification was extended for a further 5 weeks, and then again for another 14 days. She was certified as being able to return to "alternative work" at the end of this period. Her total period spent off work with medical certification spanned from 1 September to 26 October. During this period, Ms Jesson communicated the details of her condition and recovery progress to her employer. However on 20 October her employer dismissed her, giving 8 days' notice of termination.

Ms Jesson brought a personal grievance for unjustified dismissal which was successful. The Employment Court found that the employer's actions "fell woefully short of meeting the minimum procedural standards". The employer failed to adequately engage with Ms Jesson and discuss a plan for return to work, despite Ms Jesson staying in constant communication and being medically cleared to return to work in some capacity by a specified date. Ms Jesson was awarded \$5000 as compensation for hurt and humiliation, loss of dignity and injury to feelings, as well as \$5985 in lost wages resulting from the unjustified dismissal.

This case emphasises the importance of staying in contact with the incapacitated employee and taking steps to implement and plan for their return to work, particularly if they have medical clearance to return.

Conclusion

An employee's right to take sick leave is important in allowing them to recuperate from sickness or injury without being disadvantaged by losing their pay or their job. However, there is always a possibility that employees will use sick leave for non-genuine reasons. If an employer suspects this is the case, the employer will need to conduct a proper investigation, giving the employee a chance to respond to the employer's concerns. The employee can only be dismissed once the employer is satisfied that serious misconduct has been committed.

If an employee is away from work on sick leave, the most important thing an employer can do is to stay in communication with the employee and work with the employee to create a plan for the employee's return to work. Dismissal will be a last resort and only justifiable where the employee lacks the ability to fulfil their role on a long term basis.

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