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Employers can direct employees to undertake psychiatric assessment

A Federal Court decision has confirmed that an employer may lawfully direct an employee to undertake a medical assessment where reasonable in all the circumstances.

In *Thompson v IGT (Australia) Pty Ltd* [2008] FCA 994, Goldberg J dismissed an interlocutory application by an employee with a back injury who claimed that his employer's direction to undertake a psychiatric assessment subjected him to a detriment on the grounds of his medical disability, in contravention of s 15(2)(d) of the *Disability Discrimination Act 1992* (Cth) ('the Act'). His Honour held that the direction was not a detriment but was 'reasonable and probably necessary' because of the employee's history of frequent and unexplained absences from work.

Background

IGT first raised concerns with the employee about his frequent absences and his fitness for work in September 2007. The employee subsequently agreed to attend an appointment with a general surgeon but refused to comply with IGT's direction to attend a psychiatric assessment.

The surgeon's report indicated that the employee's absences to date were attributable to treatment for his back injury but that he was now fit to work. Despite this prognosis, between December 2007 and May 2008 the employee continued to take significant amounts of leave, much of which was either unexplained or attributed to an unspecified 'medical condition'.

In May 2008, after further correspondence with the employee had not clarified the details of his medical condition, IGT again directed the employee to attend a psychiatric assessment. IGT said it was concerned about the frequency of the employee's leave and his failure to comply with previous directions to attend the psychiatric examination and provide specific details in his medical certificates.

The employee's claim

The employee filed an application alleging that the May 2008 direction breached s 15(2)(d) of the Act, which makes it unlawful for an employer to discriminate against an employee on the grounds of the employee's disability by subjecting the employee to a detriment. Discrimination occurs when the employer treats the employee less favourably than it would a person without the disability (s 5(1) of the Act).

The employee sought interlocutory orders that IGT withdraw the direction and not make any further requests or take disciplinary action against him. To obtain interlocutory relief the employee had to satisfy the court that it was reasonably arguable:

— that the direction constituted a detriment within the meaning of s 15(2)(d) of the Act

— that IGT made the direction because of the employee's disability (the causation issue)

— that IGT would not have made the same direction to a comparable employee with no disability (the comparator issue).

Was the employee subjected to a detriment?

Whether the direction subjected the employee to a detriment depended on whether IGT was entitled to direct the employee to undertake psychiatric assessment.

Obligation to obey lawful and reasonable directions

In determining whether IGT was entitled to make the direction, Goldberg J relied on the principle Finn J described as 'the accepted view in [the Federal] Court' that an employee has a common law obligation to obey the lawful and reasonable directions of the employer: *McManus v Scott-Charlton* (1996) 70 FCR 16 at 21 per Finn J (referring to *Australian Telecommunications Commission v Hart* (1982) 65 ALR 41, *Bayley v Osborne* (1984) 4 FCR 141 and *R v Darling Island Stevedoring & Lighterage Co Ltd*; *ex parte Halliday* (1938) 60 CLR 601 at 621–22 per Dixon J).

Goldberg J referred to the decision of *Blackadder v Ramsay Butchering Services Pty Ltd* (2002) 118 FCR 395 (upheld by the High Court in (2005) 221 CLR 539) as authority for the principle that a direction to undertake medical assessment was a reasonable direction. In that case Madgwick J found that an employer's obligations under occupational health and safety legislation made it reasonable to require an employee to provide medical information and to attend a medical examination to determine whether the employee was fit to perform duties safely.

What about when the employee has a disability?

Goldberg J noted that in circumstances where the employee had a disability, an employer's obligation under the *Occupational Health and Safety Act 2004* (Vic) may require the employer to assess the extent to which the disability might affect the employee's work.

His Honour also noted that an employer can lawfully dismiss an employee whose disability prevents the employee from carrying out the inherent requirements of the employee's work (s 15(4)(a) of the Act). These matters made it appropriate for an employer to obtain medical information that might be relevant to an employee's work.

According to His Honour it followed that 'there are circumstances in which a requirement to provide medical information to one's employer, provided it is made on reasonable terms and is shown to be reasonably necessary, does not constitute a detriment in employment but is … a necessary part or an incident of the employment'.

In this case the circumstances that meant the requirement was not a detriment but was 'reasonable, and probably necessary' were:

— the employee's history of absences related to his medical condition

— the inconsistencies in the information available to IGT about the employee's health

— the number of absences for which the employee gave insufficient or no details.

The causation and comparator issues

Even if the employee had been subjected to a detriment, he would still have had to satisfy the court that it was reasonably arguable that IGT made the direction because of his disability (the causation issue) and that IGT would not have made the same direction to a comparable employee with no disability (the comparator issue).

Goldberg J held that there was no serious issue to be tried with respect to either of these issues. With regard to the causation issue, His Honour held that the requests were made not because of a disability but to address the employee's continued absences from work, to enable IGT to comply with its occupational health and safety obligations, and to assess whether the employee could continue to perform the inherent requirements of his work. As to the comparator issue, His Honour found that IGT would have required an employee without a disability who had taken large amounts of unexplained leave to provide an explanation and evidence to exclude a medical condition.

Goldberg J ordered the employee to pay IGT's costs.

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