



## Incapacity Reconsidered

### Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
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A recent determination of the Employment Court has examined an employer's obligations to employees who develop a medical incapacity which compromises their health and safety in the workplace. The facts before the Court in **Amcor Flexible (New Zealand) Limited v. Gillan** [2018] NZEmpC 147, concerned an employee who was dismissed due to a medical incapacity arising from his epilepsy and seizures at work. The Employment Relations Authority determined the employee had been unjustifiably dismissed and ordered Amcor to pay the employee lost wages and compensation. Amcor challenged the Authority determination to the Employment Court.

The facts concerned an employee who had been engaged by Amcor as a "highly skilled flexographic printer" and at the time of dismissal had been employed at Amcor for approximately 22 years. The role carried out by the employee was described as "a highly skilled shift-work job operating a fast moving and complex printing machine". The employee was responsible for ensuring the proper operation of the machine and this required him at times to work at height, from a ladder, when the machine was switched off to undertake cleaning and other work.

On 18 June 2015 the employee was found in a condition where he appeared to be unstable on his feet and having "incoherent speech". Amcor stood down the employee to allow an investigation to be undertaken as to what had occurred.

On 22 June 2015 the employee advised Amcor that he:

- had been diagnosed with epilepsy and that he had medication to help him control it.
- got advance warning of a seizure and was therefore able to take steps to remove himself from any potential harm in the workplace.
- that before the incident in June 2015, his last seizure had occurred in March 2015.

Amcor instructed a specialist in occupational and environmental medicine, to undertake an independent medical assessment of the employee to assist Amcor to create a return to work plan.

The specialist's first report took into account the following:

- The employee's advice that he normally got 10 – 15 minutes warning of a seizure.
- That after the employee had a seizure he would go home and rest and would be "fine" the following day.
- The worksite assessment which resulted in the specialists concluding that "*the printing machine where Mr Gillan worked had a greater degree of risk than office work, because the printer is large and has fast moving parts, not all of which can be completely guarded, and it required working at height. The possibility of an accident, by falling into the machine, she described as remote but not "zero".*"

The specialist developed a return to work plan which Amcor implemented. Follow-up reports were provided by the specialist on 4 September 2015 during which time there had been no further seizures or health and safety issues arising and again at the end of September 2015 at which time the specialist informed Amcor that the employee was able to work overtime with some limitations.

On 11 October 2015 there was a further incident. The specialist concluded the employee had suffered a seizure however the employee disputed that. Consequently, the employee was stood down on full pay. The specialist provided a further report and stated that a specialist neurological opinion was needed to draw conclusions about the employee's capacity for work.

## Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Raewyn Gibson, Peter Zwart** or **Dean Kilpatrick**.

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The specialist neurological advice was that it was not appropriate for the employee to be working with heavy machinery when, if he was to become unconscious, he could injure himself or someone else. However, as the employee received sufficient warning to remove himself from the workplace every time it would not be unreasonable for him to return to work in a modified role. In reliance on this advice the specialist advised Amcor in January 2016 that the employee must only work 3 consecutive eight hour days shifts as a printer followed by a least a 24 hour rest, that he was not to be left alone in the factory, and was not to climb stairs or work at heights.

Amcor also received advice from the employee's neurosurgeon (who had treated the employee in 2009) that the employee could return to work without restriction.

On 24 February 2016 Amcor wrote to the employee about the possibility of terminating his employment on the grounds of medical incapacity. Amcor said that the "medical information suggested he was able to safely undertake some types of work but that it would not be safe for him to resume his full duties and there was "no firm timeframe" within which he would make a return to those duties. This letter referred to Dr Obele's opinion that it would be unsafe for Mr Gillan to undertake key parts of his job including any "safety critical" work, referring particularly to working at height or reaching into machinery."

The letter stated:

*"Regrettably, things have now reached the stage where we need to consider the likelihood of you being able to make a return to the full duties of your role within a reasonable time, and in a way that is safe and sustainable. If we are not satisfied that you will be able to make such a return, your employment may be terminated on the grounds of medical incapacity."*

The parties met on 10 March 2016 to discuss this, during which the union acting on behalf of the employee submitted there was a low risk of seizure, the employee's ability to know when a seizure was coming reduced and/or eliminated the risk, the company's actions discriminated against those with epilepsy, he had worked for many years for the company with this condition, and that he should be given more time.

On 11 March 2016 Amcor wrote to the employee advising it had reached a decision to dismiss on the basis of the medical information before it which led Amcor to conclude:

- "(a) it would not be safe for him to undertake the full duties of his role in the company's work environment; and*
- (b) there was no firm timeframe within which he would make a return to full duties where there would be no increased risk of injury to himself or others."*

The Court referred to "the well-established principle that an employer is not bound to hold a job open indefinitely for an employee who is unable to return to work." The Court determined that when Amcor made the decision to dismiss it had given the employee a reasonable opportunity to take steps to manage his epilepsy so he could resume work in a "safety critical environment":

*"[58] . . . By that time about eight months had elapsed, since the seizure in June 2015, during which there had been a comprehensive review of his medical condition, which had progressively been identified as being more complex than it was originally thought to be. By March 2016 there was no clear medical management able to satisfy Amcor's health and safety concerns, nor was there an end in sight to these uncertainties. Information about Mr Gillan's epilepsy was evolving, but what remained a constant problem was that he was not able to return to safety sensitive work and there was no medical information available to say that he could do so within a reasonable time."*

The Court also concluded that Amcor's inquiry into the employee's ability to return to his usual work was fair and reasonable:

*"[62] . . . At all times it sought professional advice and, when it was received, passed on that information to Mr Gillan. He was kept informed by Amcor, even to the extent of being invited to comment about whether it should retain Dr Obele or, instead, appoint someone else. Amcor commissioned reports which comprehensively reviewed the medical condition as it was known as at June 2015 and January 2016."*

Ultimately the Court concluded that Amcor's actions and how it acted was what a fair and reasonable employer could have done and consequently the dismissal was justified:

*"[74] In Amcor's safety-sensitive workplace, even though the risk of harm might be low, it was not eliminated and could not be. Mr Gillan's medical condition added an unfortunate complexity to that risk."*

While this case illustrates the responsibilities of an employer when dealing with potential medical incapacity issues to ensure that they obtain and rely upon medical advice before making a decision to dismiss, the outcome clearly establishes an employer is not obliged to continue to employ individuals who develop a medical incapacity which means they cannot fulfil the responsibilities of the role without compromising their health and safety in the workplace.