



## Long time No see

A recent Employment Court case *Dunn v. Waitemata District Health Board*, dealt with the circumstances of dismissal for long term absence. In this particular case, the situation was complicated by the employee's performance issues, and a personal grievance he raised prior to going on sick leave, his depressive illness, and a lack of communication with the employer during the protracted absence.

Dunn was employed by Waitemata District Health Board (WDHB) in 2002. The employment relationship encountered problems and in 2005 Mr Dunn received a verbal warning which eventually led to him raising a personal grievance. Attempts to resolve the employment issues were unsuccessful, with the WDHB offering alternative positions and Mr Dunn seeking a severance payment, which was unacceptable to the WDHB.

On 14 March 2008, Dunn went on sick leave, providing a medical certificate confirming he was medically unfit for work. Two mediations occurred in March and April 2008 but nothing was resolved.

On 5 May 2008, WDHB wrote to Mr Dunn setting out his sick leave entitlements, advising that his ongoing employment may need to be considered if he could not return to work in a timely manner, referring him for assessment and a return to work programme, seeking a medical report and indicating that a separate letter would be sent to him regarding the performance issues that would need to be addressed upon his return to work.

Mr Dunn did not initially respond to this letter nor to a subsequent follow up letter, nor to a further letter regarding the performance issues.

Finally, on 26 June 2008, Mr Dunn responded to the 5 May 2008 letter seeking a copy of WDHB's Return to Work and Rehabilitation Policy, but did not provide the requested medical report.

On 21 July WDHB received a response (that it had commissioned) from a specialist occupational physician, Dr Kenny, which was pessimistic about Mr Dunn's likelihood of a return to work. Dr Kenny considered that the outstanding employment issues made it unlikely that the employment relationship could be restored, and that the personal grievance was a major barrier to a return to work. Dr Kenny also ascertained from Mr Dunn that he did not wish to return to an alternative position and was seeking instead an exit package.

### 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
- Employment Relations Strategies
- Training
- Monthly newsletter



## Welcome Back to Work!

We trust you found time to relax and unwind over the festive season. We wish you all the best for a prosperous New Year in 2015 and look forward to providing you with assistance.

### Employment Law Update

#### Employment Relations Amendment Act 2014

First two sessions held in December 2014 sold out! We are now taking registrations for 12 February 2015.

Changes come into effect 6 March 2015 – be prepared!

Contact us for further details.

## 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 **Neil McPhail, Raewyn Gibson, or Peter Zwart**.

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On 19 August 2008 WDHB also sought clarification from Mr Dunn as to whether he wished to return to work in his current or another role, but he failed to respond. A further letter was sent on 9 September 2008, again asking whether he intended to return to work and advising that if no response was received WDHB would assume he did not intend to return and would terminate his employment.

Mr Dunn responded through his lawyer on 11 September 2008, indicating a return to work was possible if WDHB removed the 'barriers' set out in the Kenny report. WDHB queried what these were, but received no response. A further letter from WDHB stated clearly that if no response was received by 20 October 2008 it would proceed to terminate Dunn's employment. When no response was received, WDHB sent a letter terminating his employment on notice, indicating that if the requested information was provided during the notice period it would reconsider.

Further correspondence between the parties did not resolve the issues, and a Statement of Problem was filed 12 months later, with the matter finally reaching the Court almost five years later.

Mr Dunn's grievance was based on a claim that the WDHB knew of the barriers for a return to work but did nothing to facilitate his return; and that it failed to follow its own rehabilitation policy.

The Court, in considering these claims, restated the applicable law:

*"[25] It is well established that an employer is not required to keep a job open indefinitely where an employee is suffering from a prolonged illness. Much will depend on the circumstances, including the employer's needs and what can and cannot reasonably be accommodated, and the anticipated timeframe for any return. A fair process must be followed. The employee must be provided with an opportunity to provide relevant information and input. The interests of both parties must be balanced."*

and went on to say:

*"[26] There is no dispute that Mr Dunn was suffering from depression and was medically unfit for work during the period he was away from the workplace until his dismissal on 28 November 2008. That amounted to a period of around eight and a half months. It is also clear that, at the time the decision to dismiss was made, the prospects of a return to work in the foreseeable future were low. Indeed the evidence before the Court established that Mr Dunn remained incapacitated and unfit for work for a further year following his dismissal."*

The Court then examined WDHB's actions and found that its concerns about needing to replace Mr Dunn were genuine; that it took a number of steps to investigate a return to work for Mr Dunn; and that its actions complied with its own rehabilitation policy.

As to whether WDHB should have resolved the employment issues before considering termination, the Court said:

*"[39] It is clear that Mr Dunn perceived that the warning that he had received, and treatment by his manager and colleagues, was unfair and that this sense of grievance presented an impediment to a return to work. The WDHB was not obliged to resolve those issues to Mr Dunn's satisfaction before considering termination. That would impose an illogical burden on employers and potentially lead to years on sick leave without resolution."*

*[40] As the Court observed in McKean v Board of Trustees of Wakaaranga School:*

*"If an employee is unable to return to work or provide a positive prognosis for return, an employer cannot be expected to continue the employment relationship to enable other dissatisfactions to be dealt with on their merits at some indefinite future time."*

Finally, the Court was critical of Mr Dunn's lack of communication:

*"[43] Employment relationships involve a two-way street. Both parties have an obligation to be responsive and communicative and to deal with each other in good faith. It ill-behoves an employee to complain about a failure to adequately progress a rehabilitative process when they themselves fail to engage in constructive dialogue in a genuine attempt to resolve issues. Mr Dunn said that he was, to large measure, reliant on his then representative. However, the WDHB was entitled to assume that his representative was acting under instructions at all material times."*

The Court concluded that Mr Dunn was justifiably dismissed for medical incapacity.

While this case had a positive outcome for the employer, dismissals for long term absence are often fraught with difficulties. Clients considering such dismissals are well advised to seek advice.

