

Managing medical incapacity

Sherridan Cook

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Medical incapacity issues with employees can be notoriously challenging to manage. Helpfully, the Employment Court recently provided some useful guidance in *Amcor Flexibles (New Zealand) Ltd v Gillan*.

Mr Gillan was a long-serving employee, responsible for the operation of a complex printing machine. At times, he worked from a height and occasionally had to reach into the machine. His employer (Amcor) became aware that Mr Gillan had a form of epilepsy when one of his co-workers found him unsteady on his feet and speaking incoherently.

Over the following eight months, Amcor took steps to assess the health and safety risk created by Mr Gillan's condition and to accommodate him in the workplace. Mr Gillan was assessed by several medical professionals, including an occupational and environmental medical specialist (OEMS). While at first, it appeared that Mr Gillan could return to work, he subsequently suffered a different type of seizure, which would be more difficult to manage. The final recommendation of the OEMS was that Mr Gillan could return to work, but with a number of limitations, including restricted shifts, periods of rest and not working from a height. Amcor did not consider that Mr Gillan could safely fulfil his duties, and given the uncertainty surrounding recovery, Amcor decided to dismiss Mr Gillan on the grounds of medical incapacity.

In assessing whether the decision was one a fair and reasonable employer could make in the circumstances, the Court reaffirmed the principles in *Lal v The Warehouse Ltd*. It confirmed that an employer is not bound to hold an employee's job open indefinitely and may dismiss for a long-term absence where the dismissal is substantively and procedurally justified. As the Court held in *Lal*, procedural fairness requires the employer to:

- Give the employee a reasonable opportunity to recover
- Have regard to the terms of the employee's employment agreement and the employer's policies
- Undertake a fair and reasonable inquiry into the prognosis for a return to work, by engaging with the employee, seeking and considering relevant medical information
- Consider the employee's position, the length of his or her employment, and other relevant factors
- Inform the employee of the reason for the inquiry, the possible outcome (ie termination) and give the employee an opportunity for input
- Fairly consider the employee's feedback before making a decision to terminate.

The Court considered that Amcor's decision met the requisite threshold and the dismissal was justified. It found that Amcor had gone to 'strenuous' efforts to consider whether Mr Gillan's condition could be accommodated in the workplace.

This case serves as a useful example of what is required to lawfully dismiss an employee on the grounds of medical incapacity. However, it remains to be seen whether *Amcor* 'sets the bar', or whether a lesser standard would have sufficed.

Auckland

188 Quay Street
Auckland 1010

PO Box 1433
Auckland 1140
New Zealand

P: +64 9 358 2555
F: +64 9 358 2055

Wellington

Aon Centre
1 Willis Street
Wellington 6011

PO Box 2694
Wellington 6140
New Zealand

P: +64 4 499 4242
F: +64 4 499 4141

Christchurch

83 Victoria Street
Christchurch 8013

PO Box 322
Christchurch 8140
New Zealand

P: +64 3 379 1747
F: +64 3 379 5659

