

Tackling suspected fake 'sickies'

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If you are an employer or a manager, you have probably questioned from time to time the genuineness of an employee taking sick leave. Of course, employees are entitled to sick leave, and the vast majority of sick leave is genuine. However, if an employee is too regularly doing this for what appear to be minor illnesses or is providing semi-believable excuses, there are some tools available to you.

Suspicious 'sickies' – making enquiries

Every instance of sick leave should not be treated with suspicion. Employers are required to act in good faith, and should only launch into investigation mode when it is warranted. For example, enquiries are generally warranted if an employee presents a pattern of absences, such as calling in sick every Monday, or using an excessive amount of sick leave, and the injury or illness is unclear or transient. It may similarly be warranted if you have evidence of dishonesty, such as seeing an employee at a social or sporting occasion when they claim to be home with a sick child.

Under the Holidays Act 2003, an employer can require proof of sickness or injury from an employee. Proof can be requested at any time, but the cost of obtaining that proof must be borne by the employer if the period of sick leave is less than three calendar days. If, following a request, the employee does not furnish proof that they are (or a spouse or dependant is) sick or injured, the employer may refuse to pay the employee for that day.

Beyond that, the first step is to communicate with your employee. This can be helpful if a medical certificate has been supplied with little to no information (which is usually the case). While privacy and discretion are undoubtedly important, employers are entitled to ask questions about the reasons for taking sick leave where this impacts on their operations and puts other employees under pressure. The employee's employment agreement or the employer's policies may even provide for this. This could include nominating who to supply the proof, such as a specialist, or requesting further information as to the diagnosis or prognosis. The employer should be precise about the information required and who it will be shared with, and for what purpose. In doing so, such requests will be reasonable and consistent with the obligation of good faith.

However, remember that employees have a right to refuse medical treatment and/or to refuse to share the results with their employer. In that case, an employer may be able to draw inferences from the information available to it at the time.

Assessing the evidence

If the employee fails to provide the proof requested, this does not automatically suggest dishonesty, as there may be genuine reasons for this. Regardless of any explanation, the threshold for disciplinary action is unlikely to be met simply because the employee was unable to provide proof. However, an employer may be entitled to refuse payment, which may act as a deterrent for future 'sickies'.

Disciplinary action is more likely to be warranted where an employee's activities during sick leave appear inconsistent with their condition. But the assessment must be fair and reasonable, and they do not have to be chained to their sick bed. For example, if you see an employee walking down the street while they are on sick leave, they may be on their way to a doctor or a physio. On the other hand, if an employee is updating their Facebook story with pictures in Bali while they claim to be in bed with the flu, your suspicions will likely be well-founded.

Potential disciplinary action

If you have sufficient evidence to show an employee is taking fake 'sickies', this may amount to dishonesty and/or misuse of sick leave, which could amount to serious misconduct and justify disciplinary action (including dismissal). However, before launching into disciplinary action, a fair and reasonable process will need to be followed, including providing the employee with a fair opportunity to respond to the allegations against them and providing them with all relevant information. The employee is also entitled to obtain support or representation. The decision-maker should be impartial and only make the decision after hearing from the employee and undertaking any follow-up investigations. Of course, the employer's decision must be what a fair and reasonable employer could have done in all the circumstances.

In essence, there are a number of factors which need to be weighed up before taking disciplinary action against an employee, and employers should be alive to the sensitivities surrounding sick leave – particularly where mental health or domestic violence may be concerned. We are experienced in advising on a variety of these complex matters, so feel free to get in contact with us.

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