

# Article

## WORKERS COMPENSATION & SELF INSURANCE

### Dealing With Injured Employees

When does an employer have the right to terminate the employment relationship?

By Patrick Walsh

In a decision which could be an indication as to how Section 18 of the *Return to Work Act 2014 (SA)* will operate, the Full Bench of the Fair Work Commission has considered the dismissal of an injured employee, who suffered an exacerbation at work, and was dismissed as he was no longer able to meet the inherent requirements of the position.

The majority of the Full Bench decision in *Sipple v Cole & Allied Mining Services Pty Limited* [2015] FWCFB 5728 applied the earlier Full Bench decision in *J Boag & Son Brewing Pty Ltd v Button* [2010] FWA 4022 and has reiterated that:

1. employers are not required to create new positions if an employee cannot perform the inherent requirements of his, or her, position; and
2. employers must also establish that continued employment would have imposed an unreasonable burden on their business.

In *Sipple v Cole & Allied Mining Services Pty Limited*, the employee made an application for unfair dismissal remedy pursuant to Section 394 of the *Fair Work Act 2009 (Cth)* after his employment was terminated due to the inability to perform the inherent requirements of his position. The employee's position in the company was multi skilled

and required the employee to be able to perform duties as a haul truck driver as well as operate equipment such as dozers, graders, frontend loaders, scrapers, excavators and service carts.

Independent medical evidence established that the employee did not have capacity to perform these duties at the time of the dismissal. Furthermore, there was no prospect of him being able to perform the duties in the future. The Commissioner adjudicating at first instance therefore found that there was a valid reason for the employee's dismissal, and ultimately dismissed the employee's application for an unfair dismissal remedy.

The Commissioner's decision was then appealed to the Full Bench of the Fair Work Commission on the basis that he failed to consider other relevant matters including that:

- the employee was 57 years old;
- the employee had been employed by Cole & Allied Mining Services Pty Limited ('**CAMS**') for 27 years;
- the employee was fit to drive a service cart;
- the employee had driven a service cart since 2003;

- a service cart is always in operation at the mine;
- CAMS was responsible for the exacerbation of the employee's injury;
- the employee would find it difficult to find alternative employment due to his injury;
- the employee had a low level of literacy; and
- the employee had family commitments.

The majority of the Full Bench allowed the appeal as there was an arguable case of error for failing to consider these matters.

When determining whether a dismissal is harsh, unjust or unreasonable, the Commission must take into account all relevant factors and weigh them in the balance, depending on the particular circumstances of the case.

In respect of whether his continued employment would have placed an unreasonable burden on the business of the employer, the worker argued that he could continue operating the service cart and, although he was unable to perform the other tasks involved with his role, he could still perform meaningful work for the employer.

However, the employer successfully argued that allowing the worker to simply use the service cart would result in operational inefficiency.

Interestingly, the majority of the Full Bench also commented on the employee's work injury and noted:

"We do not consider that the apparently temporary exacerbation of the appellant's non work injury during the various return to work plans in 2012 should be seen as contributing to the unfairness of the dismissal. In the circumstances, it was reasonable for the respondent to see if the appellant could eventually perform the full range of duties involved in the Pit Services Operator role. **The very object of a rehabilitation and return to work program is that modified duties are a temporary measure in order to assist in the return of an injured employee to unrestricted duties.**"

#### Considerations for Employers

It is important to remember that, in respect of an injured employee, each situation is unique and decision makers will need to take into account **all** of the factors surrounding an employee's employment when making a decision in relation to an injured employee. This judgement shows that any decision must include a consideration of whether:

- there are any reasonable modifications that can be made by the employer to accommodate the worker's restrictions/disability. In this regard it is important to consider the impact of the applicable disability discrimination law;
  - it can be established that continued employment will place an unreasonable burden on the employer's business; and
  - there are any other factors which might render the employee's dismissal unfair, unjust or unreasonable.
- there is any contemporaneous medical evidence that establishes an employee is not only not able to perform the inherent requirements of their position, but also whether they will not be able to do so for the foreseeable future;



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