

# Critical developments in managing ill & injured workers: effective case management

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# OVERVIEW



# OVERVIEW (CONTD.)

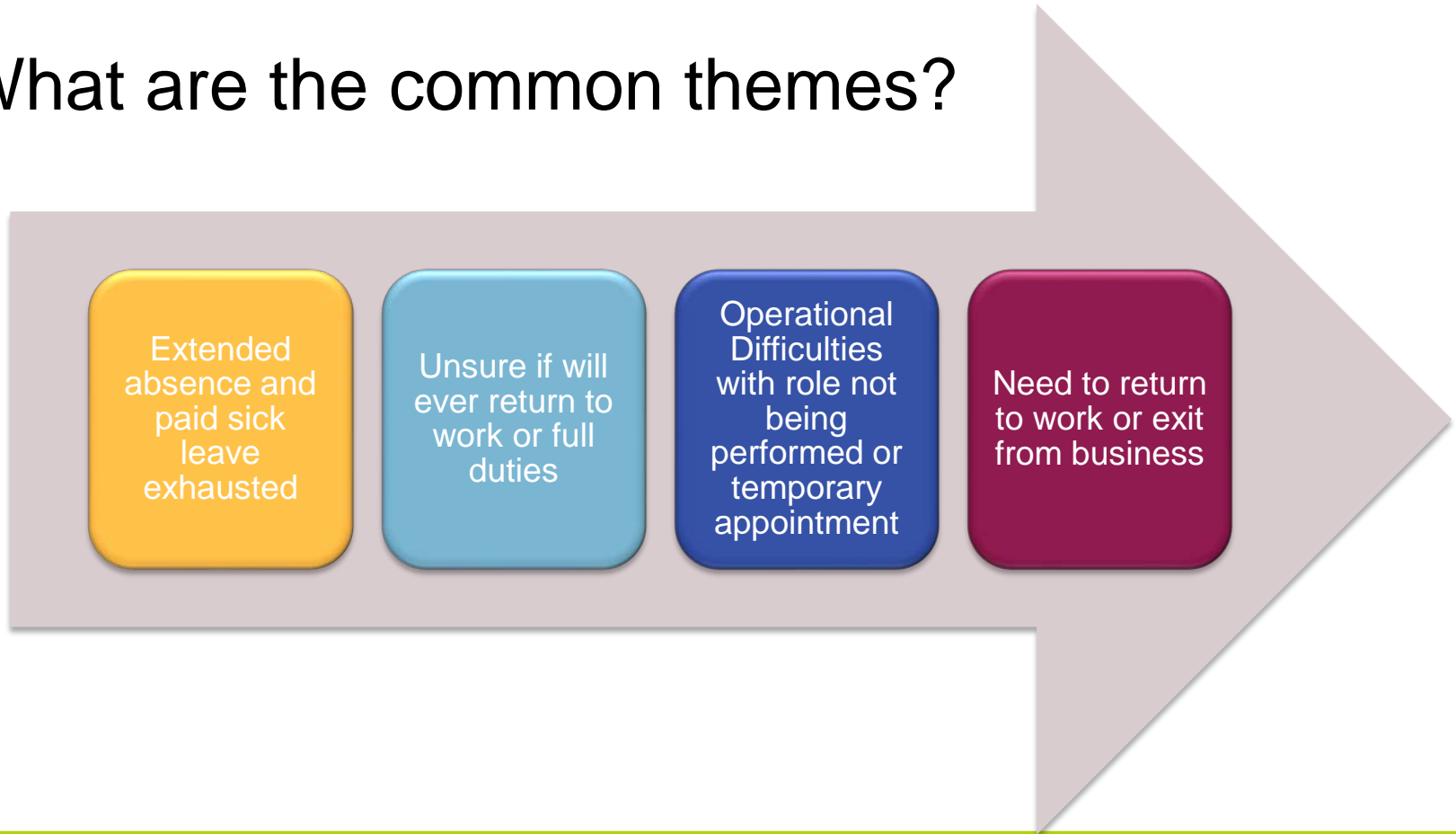
## What are we going to cover?

- ▶ The entitlement to personal/carer's leave: how to manage when the leave runs out
- ▶ Requesting evidence of illness: when, how and why
- ▶ Legal risks you need to navigate:
  - » Discrimination
  - » Unfair dismissal
  - » Adverse Action
  - » Unlawful termination under workers' compensation legislation
- ▶ Dealing with employee grievance while employee is absent due to illness or injury
- ▶ The inherent requirements defence
- ▶ Practical steps checklist



# COMMON THEMES

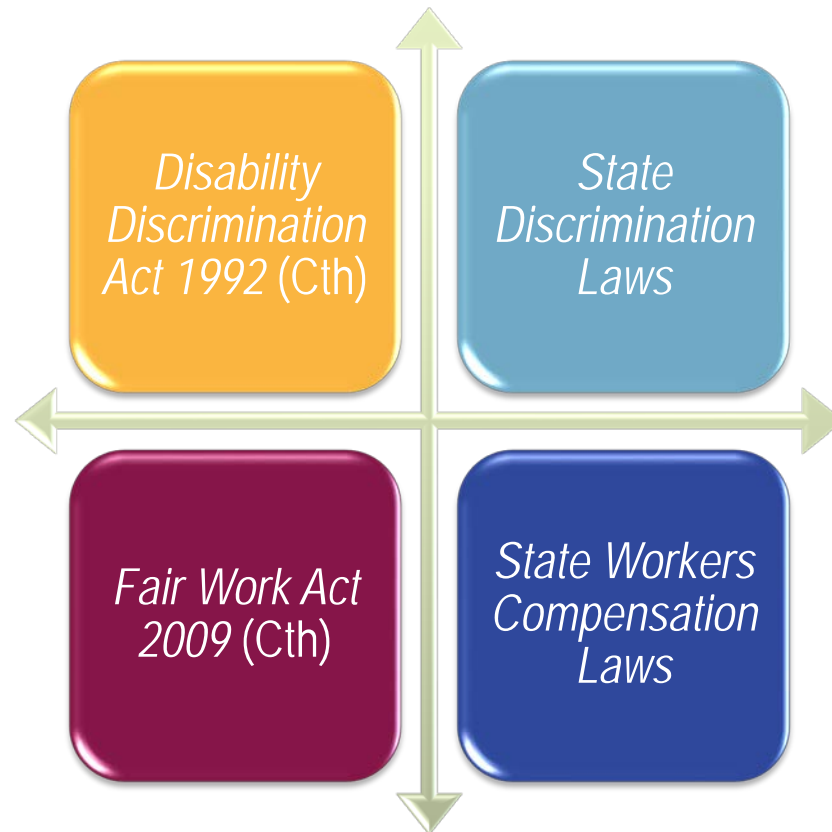
What are the common themes?



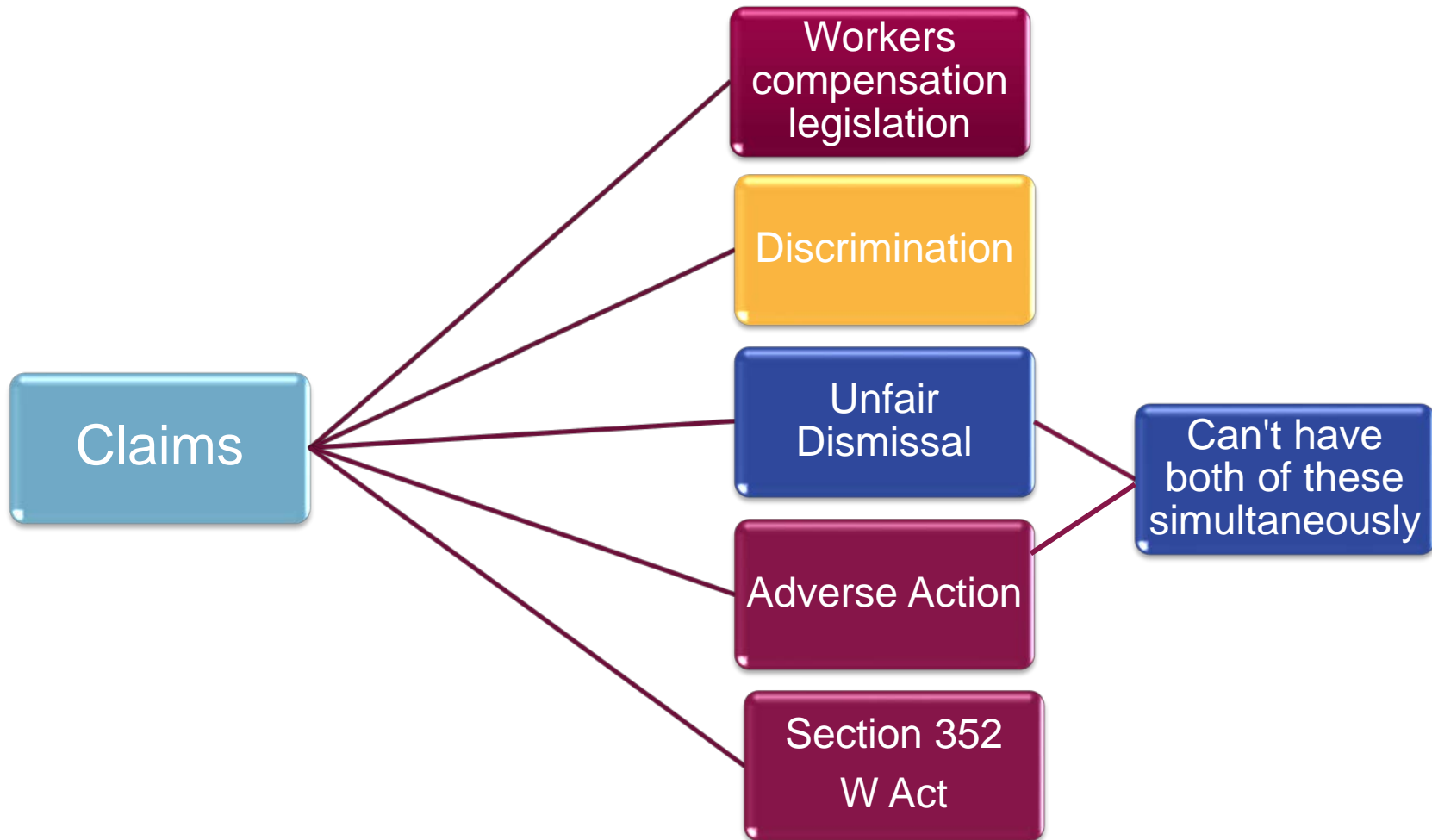
# PERSONAL/CARER'S LEAVE

- ▶ The starting point is when the leave runs out
- ▶ National Employment Standards under the *Fair Work Act 2009* - 10 days paid personal/carer's leave per annum (accumulating on ongoing basis)
  - » used if not fit for work because of illness/injury
  - » used to care for family/household member
- ▶ May be supplemented by contract of employment, policy, Award or Enterprise Agreement
- ▶ Entitlement to compensation and extended "leave" from work if illness/injury is work related under workers compensation laws (usually 12 months unless redundant)
- ▶ The 3 months rule (section 352 *Fair Work Act* and Regulation 3.01 (later))

# STATUTORY FRAMEWORK



# POTENTIAL CLAIMS AGAINST EMPLOYERS



# GETTING THROUGH THE EYE OF A NEEDLE

- ▶ Start with disability discrimination because if you can't satisfy the inherent requirements of position threshold, you will fail
- ▶ Inherent requirements test is applied to unfair dismissal as well as disability discrimination
- ▶ If inherent requirements test is met, and that is why you terminate then unlikely to be adverse action or breach of FW Act or Workers Compensation laws if, in addition:
  - » The 3 months Reg is met and all leave exhausted, and
  - » 12 months has passed if on workers compensation



# HOW TO GET EVIDENCE THAT THE EMPLOYEE CANNOT PERFORM INHERENT REQUIREMENTS OF THE POSITION

- ▶ What evidence is sufficient (the evidence needs to show that it is unlikely in the foreseeable future that the employee will be able to perform the essential elements of the position)?
- ▶ What medical evidence can you ask for (e.g. evidence of fitness to return to work)?
- ▶ Can you require an employee to allow you to talk to their doctor?
- ▶ When can you direct employee to attend independent medical assessments
- ▶ Can you discipline or dismiss employee if refuse direction?
- ▶ Conflicting medical evidence

Will return to these vital questions

# DISCRIMINATION

- ▶ Discrimination on the basis of disability (medical condition) may be unlawful (under DDA and/or State discrimination laws)
- ▶ Unless it would cause unreasonable hardship the employer make reasonable adjustments e.g. changes to work process or changes to physical set up or practices
- ▶ Standard defence is that employee cannot perform the inherent requirements of the position even if reasonable adjustments are made
- ▶ In Victoria the test is whether the employee cannot adequately perform the genuine and reasonable requirements of the position even after adjustments are made

# DISCRIMINATION (CONTD.)

- ▶ *Flavel v Railpro Services Pty Ltd* [2013] FCCA 1189
  - » Applicant employed as a train driver, having 37 years' experience
  - » Applicant was involved in a train crash, for which he received a final warning, but also suffered chronic post-traumatic stress disorder
  - » Applicant was then asked to undergo a competency assessment, which he refused to do without use of some technical notes - which was not allowed, citing stress and anxiety
  - » Employee dismissed and claimed reasonable adjustments (training about how to drive a train without his notes) had not been made by the employer
  - » Awarded \$100,000 compensation

# DISCRIMINATION (CONTD.)

- ▶ *Flavel v Railpro Services Pty Ltd* [2013] FCCA 1189
  - » Held, that Applicant's employment was terminated for reasons including that he suffered from an illness, in contravention of the Disability Discrimination Act 1992 (Cth) and the adverse action provisions of the FW Act.
  - » Simpson J said (at [83] and [84]):

*"Mr McNaught gave evidence that in making up his mind to dismiss Mr Flavel, he did not consider anything other than Mr Flavel's competence. I do not accept this evidence as the whole truth. If competence as a driver were the decisive factor in Mr McNaught's mind in deciding whether or not to dismiss, it seems strange that Mr McNaught did not get to the bottom of why this man, who had been a train driver for some 37 years, was now indicating that he would (or could) not drive with or without his notes. I would have expected the respondent to have taken steps to teach Mr Flavel to be able to drive without his notes."*

# FURTHER REFERENCES ON INHERENT REQUIREMENTS UNDER DISCRIMINATION LAW

- ▶ *Watts v Australian Postal Corporation* [2014] FCA 370
  - » (Employer must be proactive in identifying reasonable adjustments, but employee must co-operate e.g. by providing medical evidence sufficient to allow employer to consider reasonable adjustments)
- ▶ *Mueller v Toll Transport (No 2)* [2014] VCAT472
  - » (There is onus on an employee to tell an employer their needs arising from the disability and what adjustments they expect, based on the medical evidence)
- ▶ *J Jones and P Ellerson "Legislated Compromise?"* (2015)  
Employment Law Bulletin Vol 21 pp 19-25
- ▶ *Alcock v TNT Australia* [2014] FWC 9120 (Commissioner Wilson)
  - » contains excellent guidance and analysis in unfair dismissal context

# UNFAIR DISMISSAL

- ▶ Employer must have valid reason based on capacity of employee
  - » inherent requirements now and foreseeable future?
  - » reasonable modifications that could be made?
  - » other jobs available that the employee could perform?
- ▶ Employer must give procedural fairness
- ▶ Focus on medical evidence

# DISCRIMINATION - INHERENT REQUIREMENTS: HOW DOES IT APPLY TO UNFAIR DISMISSAL

## *J Boag and Son Brewing v Button* [2010] FWAFFB 4022

- ▶ Employee advised to avoid heavy lifting due to medical condition.
- ▶ Employee given modified duties after worksite assessment.
- ▶ After second assessment employee found to be unable to perform inherent requirements and dismissed.
- ▶ Held, on appeal, that not unfair - inherent requirements were of the original job, not the modified duties



# REQUESTING EVIDENCE

- ▶ When is it lawful and reasonable to request?
  - » *Australian and International Pilots Association v Qantas Airways Ltd* [2014] FCA 32
  - » *Grant v BHP Coal Pty Ltd* [2014] FWC 1712; [2014] FWCFB 3027 (Full Bench) - now on appeal to Federal Court (*Grant v BHP Coal Pty Ltd* [2015] FCA 329)

**Queensland**  
Workers' compensation medical certificate

CLAIM ENQUIRIES  
WorkCover Queensland 1300 362 128  
Self insurance or other enquiries 1300 361 235

For general information about workers' compensation visit [www.qcomp.com.au](http://www.qcomp.com.au)

B.E.R. VERSION 1

PARTS A AND E OF THIS MEDICAL CERTIFICATE COMPRISE AN APPROVED FORM UNDER THE WORKERS' COMPENSATION AND REHABILITATION ACT 2003

Tick  if applicable, and fill in the information as requested.

New claim

Claim number: \_\_\_\_\_

**PART A - Worker's details**  
I certify that on \_\_\_\_/\_\_\_\_/\_\_\_\_ I attended to (given names) \_\_\_\_\_  
(surname) \_\_\_\_\_ (DOB) \_\_\_\_/\_\_\_\_/\_\_\_\_  
Worker's daytime contact phone number \_\_\_\_\_  
Worker's employer name \_\_\_\_\_  
The worker is/was suffering from (list all medical/dental diagnoses relevant to the claim):  
Diagnosis: \_\_\_\_\_  
 This is a provisional diagnosis (if provisional complete Part B)  
Worker was first seen at this practice/hospital for this injury/disease on \_\_\_\_/\_\_\_\_/\_\_\_\_  
Worker stated date of injury (if not \_\_\_\_/\_\_\_\_/\_\_\_\_) \_\_\_\_\_  
Worker's stated cause of injury (if not \_\_\_\_/\_\_\_\_/\_\_\_\_) \_\_\_\_\_  
Injury/disease is consistent with work \_\_\_\_\_ (Yes  No  Unsure   
Detail any pre-injury factors or conditions \_\_\_\_\_ (if not \_\_\_\_/\_\_\_\_/\_\_\_\_) \_\_\_\_\_  
What is the nature of the injury/disease? (list only pre-injury work) \_\_\_\_\_  
Please describe the "limits of work" when certifying the worker's capacity \_\_\_\_\_  
For suitable duties for \_\_\_\_\_ to \_\_\_\_/\_\_\_\_/\_\_\_\_ (complete Part C)  
No capacity for type of work \_\_\_\_\_ to \_\_\_\_/\_\_\_\_/\_\_\_\_ (complete Part C)  
Estimated time to return to some form of work duties: \_\_\_\_\_ days  weeks  unsure

**Medical management**  
 Worker will require treatment from \_\_\_\_/\_\_\_\_/\_\_\_\_ to \_\_\_\_/\_\_\_\_/\_\_\_\_ (complete Part C)  
 Worker will be reviewed again on \_\_\_\_/\_\_\_\_/\_\_\_\_  No further review required

**PART B - Diagnostic plan**  
I have ordered:  Diagnostic imaging  Pathology  Other investigations  
Details: \_\_\_\_\_

**PART C - Medical management plan**  
Treatment: \_\_\_\_\_  
Medication prescribed: \_\_\_\_\_  
Referred to specialist (specialty/name): \_\_\_\_\_  
Referred to allied health professional (discipline/name): \_\_\_\_\_  
Detail (specify): \_\_\_\_\_  
I would like the insurer to arrange a case conference with \_\_\_\_\_ (more than one )  
 Treating practitioner  Treating Health  Other  
 Employer has been contacted  Health  Other  
 I would like the insurer to \_\_\_\_\_  
Further information: \_\_\_\_\_

**Return to work plan**  
 Approve \_\_\_\_\_ for a suitable duties program with the following guidelines

	No	Occasional	Frequent	Comments
Lifting weight (kg)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Bending/lifting/squatting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Standing/lifting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Use of injured hand/arm	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Pushing/pulling	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Operating machinery/heavy vehicle	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Driving a car	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

Keep wound clean and dry  
Other considerations (specify): \_\_\_\_\_  
Restricted hours/days (specify): \_\_\_\_\_  
 I require a suitable duties program to be provided to me for approval

**PART E - Medical/Dental practitioner details** (please print clearly or use practice or hospital stamp)  
Doctor's name: \_\_\_\_\_ Practice/hospital name: \_\_\_\_\_  
Postal address: \_\_\_\_\_  
Preferred method of contact:  Ph: \_\_\_\_\_ day(s)/time(s)  
 Fax: \_\_\_\_\_  Email: \_\_\_\_\_  
Signature: \_\_\_\_\_ Date: \_\_\_\_/\_\_\_\_/\_\_\_\_  
Practice/hospital stamp here

This form was approved by the Chief Executive Officer of WorkCover Queensland, the Workers' Compensation Regulatory Authority, on 4 June 2011, pursuant to section 388 of the Workers' Compensation and Rehabilitation Act 2003. PRACTICE STAMPS must be used by the Worker's Compensation and Rehabilitation Act 2003 and other Queensland workers' compensation agencies. No other circumstances should be referred to other than the Worker's Compensation and Rehabilitation Act 2003 and other Queensland workers' compensation agencies. Some of the information contained in this form may be disclosed to the claimant's employer, another health professional or other health professional or any other relevant compensation authority as required.

Fit for work?



# REQUESTING EVIDENCE (CONTD.)

## *AIPA v Qantas* [2014] FCA 32

- ▶ Qantas required pilot (who had been absence 149 days) to provide further medical information beyond medical certificate and threatened disciplinary action. Context was the need to plan 10 week rosters and to comply with WHS obligations
- ▶ AIPA alleged threat of adverse action due to exercise of workplace right - providing a medical certificate to obtain sick leave
- ▶ AIPA said no right to require more detailed medical information
- ▶ Held, that there was an implied contractual right for Qantas to require (adverse action case but wider lessons) medical information from the pilot's doctor about diagnosis, prognosis, capacity to return to pre-injury duties and expected date of return
- ▶ Refusal to comply would permit disciplinary action

# REQUESTING EVIDENCE (CONTD.)

Key passages from judgment of Rares J in Qantas at paras [62] - [65]

Citing Blackadder (118 FCR 411), he said "*the terms of the agreement were not exhaustive of the contractual rights of Qantas and its employees in respect of when or why Qantas could require an employee to undergo a medical examination or provide it with further information in relation to his or her medical condition*".

"The necessity to imply a contractual right of Qantas to require its pilots to provide medical evidence of the kind it sought from [the pilot] and for them to attend a meeting to discuss matters concerning their condition arises from the obligations imposed on Qantas by both the [enterprise] agreement itself and the Work Health and Safety Act," he said.

# REQUESTING EVIDENCE (CONTD.)

*"An employee's statutory, certified agreement or analogous industrial award based entitlement to take sick leave does not displace the contractual relationship in which, at some point, the employer is entitled to make its own business arrangements to adjust for the impact that the leave caused by the sickness of the employment will have on it and to address its obligations under the Work Health and Safety Act and its analogues."*

*Justice Rares said an employer "must be able to obtain appropriate medical information to ascertain, first, whether its work place or some matter for which it is legally responsible under such legislation has not been a cause of the employee's condition and, secondly, if it has, how to remedy that situation as soon as practicable."*

*That [the pilot] could not "simply turn up to work one day and expect or demand that Qantas make arrangements to facilitate his immediate return to flying in circumstances where, as here, he had provided his employer with medical certificates that were substantively uninformative about any of the matters Qantas needed to know for its own operational purposes".*

# IMPLICATIONS OF QANTAS CASE IN HIGHER EDUCATION

- ▶ Planning lengthy rosters in advance (and therefore need for detail information about prognosis/return to work dates) analogous to planning/allocating teaching on a semester basis
- ▶ WHS considerations/duty of care also applies in Higher Education
- ▶ So likely the Qantas approach can be used to Higher Education to require provision of detailed medical information/attendance at independent medical assessment (query how the standard "*Termination of Employment on Grounds of Ill-Health-Academic Staff*" clause in EBs affects this? Exclusive code? Delete the clause?)

# UNFAIR DISMISSAL: REQUESTING EVIDENCE

## Grant v BHP Coal

- ▶ Unfair dismissal case
- ▶ Boilermaker at mine absent on extended sick leave (shoulder injury)
- ▶ Advised BHP returning to work and fit for duties (general medical certificate by treating GP)
- ▶ BHP issued direction to attend medical examination by BHP doctor (occupational physician) with expertise in mine safety to perform functional assessment. Employee said he would attend other doctor chosen by him for functional assessments
- ▶ Employee (on advice of CFMEU) refused
- ▶ BHP dismissed employee for misconduct (refusal to comply with lawful and reasonable direction)
- ▶ Full Bench found direction was lawful and reasonable (under implied contractual term or to comply with safety regulations) on valid reason to dismiss
- ▶ Dismissal not unfair

## Implications of *Qantas and Grant v BHP Coal*

- ▶ On safety grounds and after extended absence if employee refuses to provide details of diagnosis/prognosis etc., employer can direct:
  - » further information
  - » attendance at employee nominated doctor
- ▶ If employee refuses - can discipline dismiss (provided no ulterior motive e.g. poor performing employee, response to bullying complaints etc.)
- ▶ Direction to attend doctor must be soundly based (*Schoeman v D-G* [2013] NSWIR Comm 1018 - direction was to see psychiatrist when no evidence of psychiatric illness - but see also *Thompson v IGT* [2008] FCA 994 where inadequacy of employees response justified direction to attend psychiatrist)

# ADVERSE ACTION / GENERAL PROTECTIONS

- ▶ Disability/medical condition or exercise of workplace right (to take sick leave) grounds for adverse action claims
- ▶ Reverse onus to prove the prohibited reason was not an operative reason
- ▶ Inherent requirements defence available to employer
- ▶ Focus on honest and genuine belief of decision maker
- ▶ Cannot be dismissed for temporary absence due to illness or injury
  - » more than three months in a twelve month period
  - » paid sick leave has been exhausted

# ADVERSE ACTION / GENERAL PROTECTIONS

## Marshall v BoM [2012] FMCA 1052

- ▶ Employee sought to appear on TV show while on sick leave for anxiety and traumatic stress caused by adjustment disorder
- ▶ Employee's doctor certified that employee was unfit for work but able to participate in the show
- ▶ BoM relied on medical assessment by Australian Government medical officer that the employee was fit for work. BoM did not accept the validity of the employee's doctor's medical certificate/information
- ▶ Court accepted the evidence of Marshall's treating doctor (detailed medical explanations in the certificates) ordered reinstatement and backpay and accepted rationale for being well enough to appear on the TV show (the medical condition was "*situational anxiety*" that only arose at work!)



# SECTION 352

## ▶ Section 352, *Fair Work Act 2009* (Cth):

"An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations."

## ▶ Regulation 3.01, *Fair Work Regulations 2009* (Cth):

*"(2) A prescribed kind of illness or injury exists if the employee provides a medical certificate for the illness or injury, or a statutory declaration about the illness or injury, within:*

*(a) 24 hours after the commencement of the absence; or*

*(b) such longer period as is reasonable in the circumstances...*

*(5) An illness or injury is not a prescribed kind of illness or injury if:*

*(a) either:*

*(i) the employee's absence extends for more than **3 months**; or*

*(ii) the total absences of the employee, **within a 12 month period, have been more than 3 months** (whether based on a single illness or injury or separate illnesses or injuries); and*

*(b) **the employee is not on paid personal/carer's leave** (however described) for a purpose mentioned in paragraph 97(a) of the Act for the duration of the absence."*

# SECTION 352

## McGarva v Enghouse [2014] FCCA 1522

- ▶ Employee was absent for 10 months due to both stomach and liver cancer
- ▶ Upon expressing a desire to return to work, the employer advised the employee that his employment was terminated due to his extended leave of absence
- ▶ Employee claimed that compliance with section 352 FW Act and Regulation 3.01 was a complete defence to adverse action (i.e. 351 discrimination)
- ▶ Court held that "*a dismissal may be authorised due to the period of absence but it may still constitute an unlawful dismissal under Commonwealth or state anti-discrimination legislation*"

# OTHER TRAPS AND ISSUES

- ▶ What if the misconduct (for which you want to dismiss) is behaviour that may be caused by a psychological or physiological condition? (e.g. bi-polar condition sets of unacceptably aggressive behaviour)?
- ▶ *State of Victoria (Office of Public Prosecutions) v Grant* [2014] FCAFC 184, Full Federal Court found if sole reason for the decision maker was the misconduct then not adverse action
- ▶ If medical certificate unclear, can you require employee to allow direct communication with employee's doctor? Yes, to meet duty of care to employee - in *Columbine v the GEO Group* [2014] FWC 6604 at para 30

# OTHER TRAPS AND ISSUES (CONTD.)

- ▶ If employee grievance is process of being dealt with, is employer required to progress if employee goes on stress leave?
- ▶ *Christos v Curtin University of Technology* [No 2] [2015] WASC 72
  - » No - if employer suspends process because of legitimate concern over employees fragile mental state
  - » But in some cases this might apply in reverse!

# OTHER TRAPS AND ISSUES (CONTD.)

- ▶ Do the principles in *Qantas and Grant V BHP* allow an employer to require an "*at risk*" group of employees to participate in functional capacity health assessments?
- ▶ *TWU v Cement Australia* [2015] FWC 158 (same Commissioner as in *Grant v BHP* - Commissioner Spencer)
- ▶ Said no - there was only a general concern that the group of long distance drivers were more prone to musculoskeletal injuries and no "*genuine need*" for requiring the assessments was established. Direction was not lawful and reasonable
- ▶ Not necessarily the end of the story because the Commissioner had concerns about details of the assessment program

# WORKERS' COMPENSATION

- ▶ *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* (similar Legislation in other States and Territories) allows an employee to claim compensation for work related physical or mental injury.
- ▶ To the extent that it is reasonable to do so an employer must provide to a worker:
  - » Suitable employment if the employee has a current work capacity; or
  - » Pre-injury employment if the employee no longer has an incapacity for work.

# WORKERS' COMPENSATION (CONTD.)

- ▶ The obligation continues for a period of 52 weeks from the date on which the employer:
  - » receives a medical certificate;
  - » receives a claim for compensation; or
  - » is notified by WorkCover that an employee has made a claim for compensation.
- ▶ Exception may be if employee is redundant (uncertain)
- ▶ \$132,849 maximum penalty for breach for a body corporate

# PRACTICAL STEPS CHECKLIST

- ▶ If considering dismissal, has the employee been absent for more than 3 months over a 12 month period and exhausted paid sick leave?
- ▶ Is there up to date medical evidence that the employee cannot perform the inherent requirements of the role and will not be able to do so in the foreseeable future? What are the gaps in the evidence?
- ▶ Have you considered what reasonable adjustments/accommodations could be made to the role?
- ▶ Have you considered what alternative roles (that the employee could perform) may be available for the employee?



# CHECKLIST

- ▶ Have you given the employee an opportunity to respond?
- ▶ Have you tried to obtain the employee's consent to speak to their doctor?
- ▶ If there is conflicting medical evidence have you resolved that conflict as best you can without the need to require additional medical evidence?
- ▶ Feel free to question the medical certificates if there is a reasonable basis to do so
- ▶ Take care in drafting any direction to require more detailed medical evidence, link to concerns about the employee's health and safety, safety of others and capacity to safely return to work
- ▶ Termination of employment should be a last resort!

# CHECKLIST

- ▶ Include a clause like University of South Australia EB clause 57  
*"The Vice-Chancellor (or nominee) may require staff members to undergo a medical examination to determine their fitness to carry out their duties. Such examination shall be made by a qualified medical practitioner and its cost shall be borne by the University. Nothing in this clause shall preclude a staff member's right to furnish a second medical opinion. Pre-employment medicals shall not normally be required."*
- ▶ Don't rush - fair process is paramount!

# QUESTIONS?



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