

RECENT DECISIONS

Reinstatement of injured workers

Hibbard v Lithgow City Council [2019] NSWIRComm 1020 per Commissioner Sloan

Summary

A recent case in the Industrial Relations Commission of NSW explains the law regarding an employer's obligation to reinstate injured workers who have been dismissed because of a work-related injury, and the matters to be taken into account when deciding whether or not an injured worker has satisfied the requirements for reinstatement.

Background

Mr Hibbard was employed by Lithgow City Council. An industrial dispute arose in the workplace, and Mr Hibbard was accused of intimidating other workers to support a petition to the employer about alleged bullying by a supervisor. Upon receiving the petition, the Council informed the workers that an investigation would be undertaken, and during that process the allegations were to be kept confidential until a decision was made regarding action, if any, that was to be taken.

Contrary to the direction to maintain confidentiality, Mr Hibbard had approached other workers encouraging them to maintain their support for the allegations against the supervisor, and in some cases intimidating those workers not to withdraw their support. The Council's General Manager cautioned the worker about breaching confidentiality regarding the complaint against the supervisor and intimidating other workers.

In October 2017, Mr Hibbard alleged that he had developed a psychiatric injury as a result of bullying by the supervisor and the General Manager. His claim was disputed.

In December 2017, Mr Hibbard was dismissed from his employment with the Council because of his misconduct in relation to the industrial issues at work.

In March 2018, Mr Hibbard commenced proceedings in the Workers Compensation Commission which were resolved

on a compromise basis. After finalisation of the Workers Compensation Commission action, Mr Hibbard, through his solicitor, made an application for reinstatement relying on sections 240 to 244 of the *Workers Compensation Act 1987*. The Council refused to reinstate Mr Hibbard because he had been dismissed because of his misconduct, not because of his injury.

Mr Hibbard then commenced proceedings in the Industrial Relations Commission for an order that he be reinstated to his previous position. The application was unsuccessful.

Decision

In the Commission decision, the following observations were made:

In *Glenn Robson and GWA Group Limited* [2015] NSWIRComm 9 Walton J held as follows:

The jurisdiction of the Commission under Pt 8 of the WC Act is enlivened in the event that each element of the jurisdictional criteria outlined in ss 241(1), 241(3) and 242(1) of that Act is satisfied.

First, an injured worker must have been dismissed because he or she was not fit for employment as a result of the injury received: s 241(1) of the WC Act. (An injured worker is defined, for present purposes, as a worker who receives an injury for which they are entitled to receive compensation under the WC Act or the Workers' Compensation (Dust Diseases) Act 1942: s 240(2) of WC Act. Correspondingly, a person is the employer of an injured worker only if the subject injury arose (either wholly or in part) out of or in the course of employment with that person.)

Secondly, that worker must have made an application to the relevant employer for reinstatement to 'employment of a kind specified in the application' (see s 241(1) of the WC Act) and produced 'a certificate given by a medical practitioner to the effect that the worker is fit for employment of the

kind for which the worker applies for reinstatement' in support of the same (see s 241(3) of that Act). Whilst the requirement to produce a medical certificate attesting to the requisite fitness constitutes what has been described as the 'gateway' to the Commission's jurisdiction under Pt 8 of the WC Act, the certificate given by a medical practitioner for the purposes of s 241(3) is by no means conclusive of the application brought and, in particular, the resolution of whether the injured worker is fit for the purposes of s 243(2) and (3)

Finally, the jurisdiction of the Commission is activated when the employer does not immediately reinstate the worker 'to employment of the kind for which the worker has so applied for reinstatement (or to any other kind of employment that is no less advantageous to the worker)': s 242(1) of the WC Act."...

In *Bindaree Beef Pty Ltd v Riley* [2013] NSWCA 305; 239 IR 52 Bathurst CJ ...made the following observations:

The presumption in s 244(1) has the effect of placing the onus on the employer to demonstrate that the reason for dismissal was not because of unfitness for employment as a result of the injury received. ... The question in effect is why the employer dismissed the worker. That can only be considered in the context of the actual reasons for doing so. ... The question of whether the injury was a substantial and operative cause of the worker's dismissal is a question of fact to be decided by reference to all the circumstances including the employer's evidence as to such cause. ... This inquiry inevitably involves consideration of the reasons of the decision-maker [i.e. the employer's representative].

After considering the evidence presented by Mr Hibbard and the Council, the Commissioner Sloan concluded:

I am satisfied that any injury suffered by Mr Hibbard was not a substantial and operative cause of his dismissal, and so I find that the Council has discharged its onus under s 244(2).

The evidence certainly does not support a finding that either Mr Faulkner or anyone else at the Council acted deliberately or maliciously to cause Mr Hibbard harm.

I find that Mr Hibbard was not dismissed because he was not fit for employment as a result of the injury.

The Commissioner added that the initial application made by Mr Hibbard to the Council was also defective in that:

The letter [seeking reinstatement] did not specify the employment to which Mr Hibbard sought to be reinstated. Rather, it was unclear on the point. It opened by seeking that Mr Hibbard be "reinstated and provided with employment" before going on to make reference to Mr Hibbard's alleged entitlement to be provided with "suitable duties" pursuant to s 49(1) Workplace Injury Management and Workers Compensation Act. It is not possible to discern from the letter whether Mr Hibbard was applying for reinstatement to his pre-dismissal position, for "suitable duties" or for some other employment. No "kind" of employment is specified.

**For more information,
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