

HR&IR Update

18 March 2009

When is a resignation not a resignation?

If it follows a period of performance management, or an employee has a mental illness or other debilitating condition at the time, it's a question you should probably be asking.

While the recent Australian Industrial Relations Commission (**AIRC**) decision in *Lenora Ann Peary v Australian Hearing* (Thatcher C, 18 February 2009) does not break new legal ground, it's a cautionary tale for businesses confronted by these kinds of day to day issues and a handy reminder of things to watch.

Overview

Ms Peary made an unfair dismissal claim against Australian Hearing (**AH**) which AH sought to have struck out on the basis that Ms Peary had, in fact, resigned. After a close look at the events leading up to the resignation, and the circumstances in which it was given, the AIRC decided that Ms Peary had not resigned voluntarily, but was forced to do so because of AH's conduct.

The matter has now been referred to conciliation.

Facts

Briefly, the critical facts are:

- Ms Peary was employed as Office Manager at AH's Lismore office. She had a history of depression
- Ms Peary's supervisor raised performance concerns about her to the Regional Manager. He referred the issues to HR without raising them with Ms Peary. AH received a further complaint from one of its employees alleging Ms Peary had (among other things) spoken to the employee in an intimidating, rude and humiliating manner
- Ms Peary was invited to respond in writing to the second complaint under the disciplinary procedures in AH's enterprise agreement

Implications for employers

Employers should:

- be careful requiring a response to misconduct allegations or resuming a performance management process immediately on an employee's return from sick leave
- not assume an employee has resigned if they say they cannot return to work (eg due to medical reasons) – particularly if they are not in the right frame of mind at the time. The employee may need to be given time to properly consider their position
- provide a copy of any report (eg medical, OH&S consultant or psychologist) relied on in making decisions affecting an employee (unless there are exceptional circumstances) and seek the employee's response
- ensure temporary arrangements are just that – temporary. If they are designed to address workplace conflict or other performance issues, put steps in place to address the underlying concerns

- the Regional Manager found the complaint proven and wrote to Ms Peary giving her the option of moving to AH's Ballina or Tweed Heads office for 3 months. In doing so, the Regional Manager relied, in part, on recommendations in a report from AH's EAP Psychologist. Ms Peary was not given a copy of, or a chance to respond to, the Psychologist's report
- Ms Peary took sick leave, and lodged a workers' compensation claim, before returning to work – reluctantly – at the Ballina office (32 kilometres from the Lismore office) under a return to work (RTW) plan. The RTW plan provided for her ultimate reintegration into the Lismore office
- in October 2008, Ms Peary sent an email to a colleague in the Lismore office which included comments about the employee who had made the second complaint
- HR considered Ms Peary's email to be disrespectful, warranting a further disciplinary enquiry under AH's enterprise agreement. Ms Peary was asked to respond in writing. Before responding, she again went on sick leave
- whilst on sick leave, AH sent Ms Peary an email reminding her that she would need to respond in writing on her first day back from sick leave. Ms Peary replied by email that she would not be returning to work as per an attached medical certificate which stated she was *'unable to return to her current workplace'*. Her supervisor asked by email if this meant she was resigning, to which Ms Peary answered 'yes'

Findings

Having regard to her medical condition and other relevant factors, the AIRC decided that that Ms Peary had no real or effective choice but to resign. The AIRC considered it particularly significant that:

- AH failed to return Ms Peary to her Office Manager role in Lismore at the end of the 'temporary' 3 month period – despite medical evidence that she could return
- the temporary arrangements at the Ballina Office were less than satisfactory – she had less responsibility and incurred additional travel time
- AH had indicated it would provide Ms Peary with training and mentoring to assist her reintegration into the Lismore office – but none was provided nor planned
- insisting Ms Peary respond in writing to the allegations immediately on return to work would create unnecessary stress given her sick leave and medical condition
- AH relied on medical reports without keeping Ms Peary adequately informed or giving her an opportunity to challenge the basis on which AH's decisions were made

In relation to her resignation, the AIRC noted that:

- Ms Peary's supervisor initiated the discussion of resignation, while aware that Ms Peary was on a month's sick leave
- a supervisor's suggestion that a subordinate consider resigning would not usually mean it was not voluntary. However, the AIRC considered that in this case, weight had to be given to Ms Peary's diminished capacity – at the time, Ms Peary was (at best) very vulnerable and (at worst) a person of special disadvantage
- in these circumstances, an employee considering resigning should be given time to determine their rights and how their future may be affected by the resignation (eg superannuation entitlements)

Other situations

Although not relevant in this case, there may be other situations where a resignation is challenged – for example, if an employee:

- is given a choice to resign or be dismissed
- is threatened with a particular course of action if they do not resign (eg, referring a matter to the police)
- resigns in the 'heat of the moment' and the resignation is immediately accepted without the employee having an opportunity to reconsider

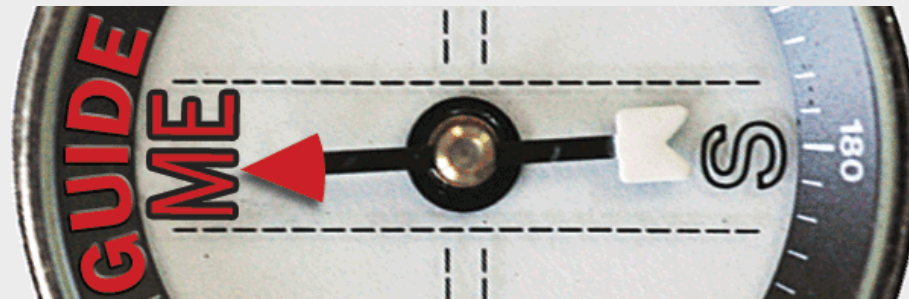
Injunctions and the Fair Work Bill

Watch out for performance / disciplinary procedures in enterprise agreements

In this case, the AIRC noted that if Ms Peary's performance was considered unsatisfactory, AH should have followed the performance procedures in AH's enterprise agreement.

Employers with disciplinary or performance management procedures in their enterprise agreements should take heed. Under the Fair Work Bill, from 1 July 2009 an employee or union could seek a court order preventing an employer from taking certain action (eg dismissing an employee) until the process is followed.

This new 'injunctive relief' means employers should carefully consider whether it is appropriate to include disciplinary or performance management provisions in their enterprise agreements. The transitional bill, due to be introduced tomorrow, should clarify whether this injunction power will apply to agreements made before 1 July 2009.



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