



## Challenging Alleged Misuse of Sick Leave

*Commentary by Tony McKone, Director McKone Consultancy Ltd, 23 June 2014*

In this blog, I talk about what you should do when you doubt whether or not your employees are genuinely using their sick leave entitlement.

In the employment relationship, an employee's employment contract (whether a collective agreement or an individual agreement) will most likely set out the sick leave entitlements that are available to an employee. The sick leave that is provided for by an employer must be no less than what is provided for in the Holiday Act 2003. Under the Holidays Act 2003 an employee's entitlement to sick leave arises after six months of employment. The minimum sick leave entitlement is five days' sick leave for each 12 month period after the employee becomes entitled to that sick leave. An employer may enhance the Act by applying sick leave from the date of employment and by providing a greater number of days' entitlement.

Some points to keep in mind:

When dealing with sick leave issues, an employer must treat each situation on its own merits. Each person responds to illness or injury in a different way, so it is important not to treat each person or situation the same as another without considering the circumstances of the person who is sick or injured.

- An employee may use their entitlement when they are personally sick or injured; or when their spouse or partner is sick or injured; or when a person who depends on them for care is sick or injured.
- An employer may request proof of sickness or injury. Where the employer requests this proof within three consecutive days of sickness or injury the employer must make this request of the employee as early as possible and agree to pay the employee's reasonable expenses in obtaining the proof. Where the request of proof is for a period of three or more consecutive calendar days, the cost of the proof rests with the employee. Note there are other rules around the request of proof of sickness or injury. These are set out in the Holidays Act 2003.

### **Challenging sick leave:**

Employers have the right to request an employee to produce proof of their absence due to sickness or injury. However to do so, it is recommended that you are very clear, direct and specific with your employee(s) when you request them to provide that proof and also be clear that if the employee is not able to allay your concerns, that disciplinary action may follow.

If you believe an employee is not genuinely using their sick leave, then you need to challenge them as soon as your concern arises and carry out an appropriate investigation. You must put your concern to the employee and provide them an opportunity to respond to your concern. In investigating that concern it is recommended that you request a medical certificate from a medical practitioner. Considering whether a person's absence was or wasn't due to illness or injury will require the input of an appropriate medical practitioner. It is not for the employer to play doctor and rely on their own view of what is wrong (or not wrong) with the employee's health.

The Holidays Act 2003 does not provide an employer with a right to send the employee to a medical practitioner of their choosing. This means that unless the employee agrees to go to a medical practitioner of your choosing, you will need to require the employee to obtain that medical certification from their own medical practitioner.

Before you can receive information from the employee's medical practitioner, you will need to get the employee's consent to release the information about their health to you. This is to protect the doctor / patient confidentiality and ensures the released information remains subject to the Privacy Act and confidentiality.

When asking for medical information, I recommend providing specific information, in lay terms, about the work the employee does for you. Supply a position description, but do not rely on the medical practitioner being able to understand what that means the job is really about. I also recommend commenting on your concerns and asking for specific feedback about the employee's current health and what that means in terms of the employee being able to perform their duties.

In an earlier blog I provided information from the medical council about their [guidelines to medical practitioners](#). I recommend asking your questions of the medical practitioner such that you get the information you may need to help you decide the legitimacy of the illness and what, if any, impact the illness has on the employee being able to perform their job. It is important to keep your enquiries relevant to the employee's current health and not go seeking information not relevant to the current situation. I also recommend that when requesting information from the medical practitioner that a copy of that request is made in writing and a copy given to the employee. Your request should also ask the practitioner to provide both you and the employee with a copy of their response. This is so both you and the employee then have the same information available to you when you meet to discuss that report.

In a situation where you doubt whether a person's use of sick leave is genuine, a medical certificate that merely states an employee is "unfit for work" without any details will not, in my view, be sufficient to allay those concerns. Where a medical practitioner provides such a notice, I would strongly recommend going back and querying for more details as per the medical councils guidelines.

Depending on what is in your employees employment agreement (collective or individual), where an employee declines to give consent to seek the medical information you require, you may be able to withhold payment for the sick leave until such time as the employee provides that consent. It will pay to seek appropriate advice prior to withholding payment for sick leave where a request is declined by your employee.

Once you have the medical report and have discussed this with the employee, you need to determine what that means next. If the medical report supports the employee being ill or injured, then the employee is entitled to use their sick leave entitlement to cover their absence. Where the report does not support the employee being ill or injured, then this leaves it open for you to determine what, if any, disciplinary action you may wish to take.

**In summary:**

- Be aware of the employee's employment agreement provisions, if any, around use of sick leave;

- If you doubt sick leave is being genuinely used, you need to challenge it straight away;
- Advise the employee that if they are not able to allay your concerns that their use of sick leave is not genuine that disciplinary action may be taken;
- Seek the input of a medical practitioner to determine what, if any, health issues the employee may have;
- Provide a lay description of the work your employee undertakes and seek specific information on what the employee may or may not be able to do due to their condition;
- Disciplinary action may be taken, subject to following an appropriate investigation into alleged abuse of sick leave, where those allegations are upheld;
- When considering disciplinary action, seek appropriate advice and support.

Contact [McKone Consultancy Ltd](#) if you need any assistance dealing with employment relations issues around alleged issues of inappropriate use of sick leave.