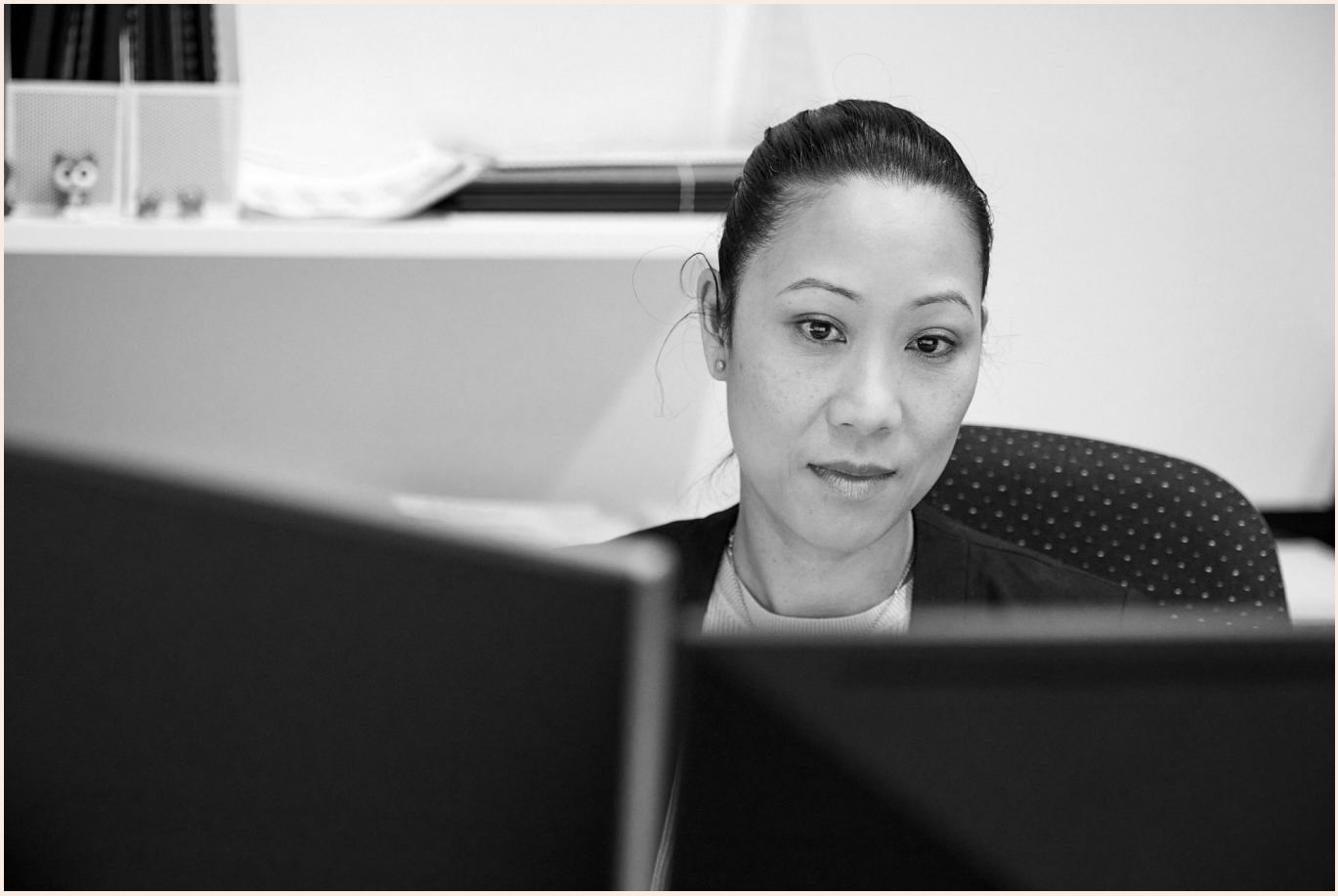

Run out of sick leave but you’re still sick?

A large part of our work at Andersons involves assisting clients who have been injured while at work. To protect their income and medical expenses, they are able to **claim workers compensation** either through Return to Work (the South Australian system) or Comcare (the Federal system).

But what happens if you have been injured outside of work and cannot attend to your normal duties either in the short or longer term?

How is sick leave calculated?

The **National Employment Standards** in the *Fair Work Act 2009* ("**the Act**") provide that permanent workers are entitled to 10 days per year paid personal leave, which includes carers and sick leave (or the pro-rata equivalent for permanent part time employees). This entitlement can accrue from year to year and any leave not used in one year can be "rolled over" to the next year. It is NOT a case of "use it or lose it".

If a worker requires more time off work than they have accrued in personal leave, they can access any other accrued paid leave, such as annual or long service leave, to cover absences due to illness or injury. If all paid entitlements have been exhausted a worker can seek unpaid leave.

Can a worker be dismissed for taking more than months off work?

The Act provides protection to workers who are temporarily absent from work due to illness or injury. The Act provides that an employer cannot terminate a worker due to a "temporary absence from work" which is defined as a period of three months or less in any twelve month period (which can be one single period of three months or less, or made up of a number of shorter periods amounting to three months or less).

> *"The Act provides that an employer cannot terminate a worker due to a temporary absence from work"*

Some employers have interpreted these provisions to mean that it is lawful to dismiss a worker who has taken more than three months leave in any twelve month period. That is NOT the case.

In the decision of the Federal Circuit Court in *McGarva v Enghouse Australia Pty Ltd [2014] FCCA 1552*, the worker had been on unpaid leave for ten months due to illness or injury. When he felt well enough to contemplate returning to work he contacted

his employer to discuss his return. His employer then terminated his employment, asserting that it had 'no choice' but to do so, due to his extended leave of absence. The employer stated that, as the worker's absence from work was greater than three months, he was not entitled to the protection provided by the Act.

The worker applied to the Federal Circuit Court for relief and the Judge held that the definition of a "temporary absence" as being three months or less did NOT mean that an employer was automatically entitled to dismiss a worker if they were absent from work for more than three months in a twelve month period.

> *"An employer would need to consider all relevant circumstances if considering dismissing a worker as a result of their absence from work due to illness or injury."*

An employer would need to consider all relevant circumstances if considering dismissing a worker as a result of their absence from work due to illness or injury. Relevant factors could include:

- whether the worker will be fit to return to work and if so, when;
- whether the worker will be fit to return to their normal duties or will require alternative duties or some modification to their normal duties in order to be able to undertake them;
- the length of the worker's employment with the organisation; and
- the size of the employer and its ability to accommodate a lengthy absence from work.

By way of example, consider Josephine, who worked for XYZ Pty Ltd for 20 years. Josephine was diagnosed with cancer and her doctors advised her that she required a six month course of chemotherapy to treat her illness and she would not be able to work during this treatment period. After those six months were up, Josephine's doctors said that she would be able to return to work, but would require a transitional period, where she worked half time hours for a short period, after which she could return to full time work and her normal duties.

In these circumstances, in our view it would be unlawful for Josephine's employer to dismiss her on the basis that she was absent from work.

On the other hand, if after the chemotherapy treatment had ended, Josephine's doctors advised her that she needed a further course of chemotherapy and were unable to give any indication of whether or when she could return to work, Josephine's employer might be lawfully entitled to terminate Josephine's employment.

Even then however, the lawfulness of any such dismissal could depend upon factors such as the size of XYZ Pty Ltd and their ability to keep Josephine's job open indefinitely without causing detriment to the company.

Are workers covered by disability discrimination laws?

In addition to the protections available under the Act, workers with non-work related illnesses or injuries have certain rights under disability discrimination legislation. Such workers have the same rights as anyone else to be able to work and the law imposes a positive obligation upon employers to make reasonable accommodations to enable the worker to continue to work, as long as it is safe to do so.

In *R v Aurizon [2014] FWC 22*, the Fair Work Commission held that a dismissal was considered 'fair' on the basis that the worker in question had been ill for more than one year and had no reasonable prospects of returning to his old position safety. Although the worker argued that the company should have accommodated his injury due to his long service, and because he was a loyal employee, the Commission disagreed, saying that the employer had no duty to find the worker an alternative position when it was unlikely he would be medically fit to perform it.

Can the employer send a worker for a medical examination?

Employers are entitled, in appropriate circumstances, to require a worker to undergo

a medical examination with a doctor of the employer's choice or to provide more information about their illness or injury.

> *"Employers are entitled, in appropriate circumstances, to require a worker to undergo a medical examination with a doctor of the employer's choice"*

In *Australian and International Pilots Association v Qantas Airways Ltd [2014] FCA 32* the Court held that the employer was entitled to require a worker who was on long term sick leave to provide more than a basic medical certificate.

In other cases, the Fair Work Commission has rejected unfair dismissal claims by workers who were dismissed after being off work for sustained periods of time and who refused the employer's request to attend appointments with medical specialists. Courts and Tribunals have recognised that employers have a right to medical information in certain circumstances, to enable them to comply with laws relating to work health and safety, workers compensation, disability (and other) discrimination, and the employment relationship.

If you require advice or assistance in relation to anything raised in this blog or your employment generally, Andersons' **workers compensation** and **employment law** team can assist you.

> What happens if you have been injured outside of work and can't attend work either in the short or longer term?