Mental health and fitness to work: Learnings from recent decisions of the Employment Relations Authority

Two recent decisions out of the Employment Relations Authority provide practical insight into how employers should navigate scenarios relating to an employee's mental health and their fitness to work.

McKenzie v Tranzurban [2023] NZERA 303

involved an employee who had been off work for several months. Unhappy with how their employer had managed their absence, they reached out to their employer to let them know they were seriously struggling mentally. Within days, the employee contacted their employer again and said they wanted to return to work. Given the quick change of tune, the employer had concerns about the employee's ability to work, but struggled to get the employee to agree to an independent medical assessment to allay those concerns.

The decision is interesting in that the Authority agreed the employer's concerns were reasonable, but found the employer's suspension and dismissal of the employee was unjustified.

The facts:

John McKenzie began working as a bus driver for Tranzurban in June 2019. When the COVID pandemic struck, Mr McKenzie was unable to work as a result of several underlying health conditions. By September 2021, Mr McKenzie had been off work for four months.

It is unclear from the decision what occurred during those four months, but on 16 September 2021, Mr McKenzie emailed Tranzurban to say he had experienced a serious asthma attack and migraines, which had *"been brought on by excess stress anxiety and panic attacks from poor communication from Tranzurban and no individual solutions for support and lack of empathy*." Three days later, Mr McKenzie sent a further email to Tranzurban telling them not to contact him under any circumstances.

However, several days later, Mr McKenzie's union representative contacted Tranzurban to let them know Mr McKenzie wanted to return to work.

Tranzurban responded, saying it was *"concerned as to John's ability to return to work due to the stress and anxiety he has raised in his email".* Tranzurban added that, as a bus driver, Mr McKenzie's role involved safety sensitive work that required him to be *"in the right frame of mind"* when at work. Accordingly, Tranzurban relied on the medical assessment clause in Mr McKenzie's employment agreement, and requested that Mr McKenzie participate in a medical assessment based on a task analysis provided by Tranzurban's Health and Safety Manager.

Mr McKenzie declined to participate in the assessment, and said he would provide a "driving medical certificate" instead. When Tranzurban repeated its request, Mr McKenzie again declined on the basis that the assessment was wide ranging and unreasonable. He then told Tranzurban he had now received the COVID vaccination and could return to work without participating in a medical assessment.

Still concerned as to Mr McKenzie's mental health, Tranzurban did not accept that he was fit to return to work, and asked him to complete a "Drivers Medical Assessment", known as "DL9". Included in the assessment would be an evaluation of any mental disorder that may impair Mr McKenzie's ability to drive safely. Tranzurban further advised it was considering suspending Mr McKenzie for failing to comply with the medical assessment clause of his employment agreement. Mr McKenzie was invited to a suspension meeting to comment on the proposed suspension, and at that meeting it was agreed Mr McKenzie would participate in the DL9 assessment.

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Mr McKenzie passed the assessment, but only sent pages one and four of the four-page assessment to Tranzurban. This raised alarm bells because the missing pages contained the detail about mental disorders, which was the information most important to Tranzurban in determining Mr McKenzie's fitness to work.

As a result, Tranzurban contacted the doctor about the missing pages, but the doctor did not provide them. The doctor said Tranzurban did not need the page on mental disorders, as all that was relevant to them as the employer was whether the assessment found Mr McKenzie fit to drive commercially, which it did.

Still unsatisfied, Tranzurban suspended Mr McKenzie and relied on his employment agreement to request that he attend a second medical assessment with an Occupational Physician. Mr McKenzie attended the assessment, and the report found he had no underlying health condition that might affect his ability to do his job. However, the report also noted that Mr McKenzie refused to answer any questions about feelings of stress or anxiety as raised with Tranzurban, which again was the information Tranzurban felt it needed to determine Mr McKenzie's fitness to work.

At this point, Tranzurban "gave up" and dismissed Mr McKenzie under the medical assessment clause for being unable to satisfy whether he could safely return to work. Mr McKenzie then raised a personal grievance, claiming his suspension and dismissal were unjustified.

Employment Relations Authority:

The Authority found that while Tranzurban's had *"valid concerns that Mr McKenzie posed a potential safety threat to himself, Tranzurban's clientele and road using public generally"*, its process for addressing those concerns was *"misguided"* and became unjustified once Mr McKenzie informed Tranzurban he had passed the DL9 assessment. While it was frustrating that Mr McKenzie did not provide all four pages of the report, the fact remained that the parties had agreed Mr McKenzie could return to work if he passed the DL9 assessment.

Takeaway: The Authority's decision in this case suggests that even if an employer continues to hold reasonable concerns about an employee's mental wellbeing, and consequently the safety of others, the employer must accept the findings of the independent medical assessment regardless. In terms of what the employer can do with those findings will depend on what the employer and employee agree on prior to the medical assessment, and/or what the employment agreement says.

VXO v Northland District Health Board [2023] NZERA 97

[2023] NZERA 97 involved a tricky situation that employers sometime face in the context of a disciplinary process. The employer proposed to dismiss an employee for serious misconduct following an investigation, but the disciplinary process had to be adjourned because the employee claimed they were no longer fit to participate.

The Authority's decision is helpful in that it demonstrates how a preliminary decision to dismiss for serious misconduct can turn into a justified dismissal for medical incapacity.

The facts:

VXO was a Senior Medical Officer in a paediatric hospital unit. In April 2020, one of VXO's trainees made allegations of sexual harassment against him, and an investigation found that those allegations were substantiated. The Northland District Health Board (**NDHB**) informed VXO of its preliminary decision to dismiss him, and VXO was invited to provide his response.

However, three days later, VXO advised the DHB he'd been admitted to hospital due to stress induced cardiomyopathy. The disciplinary process was adjourned as a result and VXO was placed on sick leave.

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Several months passed before the NDHB asked VXO to participate in an independent medical assessment. VXO agreed, and was examined by a cardiologist and psychiatrist. The psychiatrists report found that VXO had developed symptoms of a Major Depressive Episode, and that VXO would unlikely be fit to return to work *"if his name is not cleared through the process of resolving the complaints".*

At this stage, what had been a preliminary decision to dismiss on serious misconduct grounds turned into a preliminary decision to dismiss for medical incapacity. Not only was it clear that VXO would not return to work unless the disciplinary process went his way, but also VXO's extended absence was having a harmful effect on service delivery in the paediatric unit, and the cost of paying for expensive locums on top of VXO's sick leave was growing excessive.

As a result, the NDHB advised VXO of its preliminary decision to dismiss him on medical incapacity grounds. VXO provided his feedback via his lawyer, which reiterated the findings of the medical report. The NDHB upheld its preliminary decision and VXO was dismissed.

VXO then raised personal grievance for unjustified dismissal.

Employment Relations Authority:

In the Authority, VXO's main argument was that the DHB should have carried out further enquiries as to VXO's expected date to return to work.

The Authority rejected this argument, and agreed with the DHB's rationale that it fairly switched to a dismissal for medical incapacity once it became clear VXO would not return to work to complete the disciplinary process without the DHB reversing its investigation finding. The key requirements for dismissing on incapacity grounds were met, and VXO's view on how the disciplinary process should conclude was unrealistic. Therefore, the DHB's decision to dismiss was a reasonable one.

Takeaway: The decision shows that an employer can pivot during a process where an employee becomes incapacitated, and in some cases that incapacity in those circumstances will warrant dismissal.

Want to know more?

If you have any questions about managing mental health in the workplace, please contact our specialist Employment Team.