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# Federal Court holds dismissal of an ill employee breached the *Fair Work Act 2009*

**In *Robinson v Western Union Business Solutions (Australia) Pty Ltd* [2018] FCA 1913, the Federal Court held that dismissal of an employee who had been away from work for 7 months with a mental illness was discrimination in breach of the *Fair Work Act 2009* (FW Act).**

## Summary

Agencies need to exercise caution in cases where an employee has a medical condition or other disability that contributes to performance or conduct problems. In particular, agencies need to be careful to ensure that their actions do not breach anti-discrimination protections in the FW Act or in other Commonwealth legislation and that any termination of employment is not harsh, unjust or unreasonable.

A particularly difficult aspect is whether employer action by reference to manifestations of the disability, rather than by reference to the disability itself, is proscribed. Where a person's disability or illness causes performance or conduct problems, agencies should consider seeking legal advice as to their options to address these problems.

## Factual background

Mr Robinson worked with Western Union Business Solutions (Australia) Pty Ltd as a sales executive. In September 2016, Mr Robinson went on sick leave alleging a medical disability, and provided a series of medical and Work Cover certificates over a period of 7 months.

In correspondence in January and February 2017, representatives of Western Union requested Mr Robinson attend a doctor nominated by the company 'to assist the business in gaining a clear understanding of a possible return to work date'. Mr Robinson refused, and on 27 February 2017, representatives of Western Union sent Mr Robinson another letter directing him to attend a nominated doctor, and stated that:

> … if you continue to refuse this direction … then Western Union will treat this refusal as a breach of your contract of employment and may terminate your employment without further notice.

On 8 March 2017, Mr Robinson sent an email indicating his preparedness to follow the direction. Representatives of Western Union on 13 March 2017 indicated an intention to arrange a medical appointment but did not do so.

There was then a break in correspondence until 8 May 2017, when Western Union sent a letter to Mr Robinson stating that his employment was terminated. The reasons given in the letter were that:

> … you cannot give any indication as to when you will return to work, your unreasonable failure to cooperate with the Company's attempts to obtain up-to-date, specialist medical advice and … the Company's serious concerns about your capacity to work.

## Legal issues

Section 351 of the FW Act provides, relevantly:

> **Discrimination**
>
> (1) An employer must not take adverse action against a person who is an employee … of the employer because of the person's … physical or mental disability …
>
> (2) However, subsection (1) does not apply to action that is:
>
> …
>
> (b) taken because of the inherent requirements of the particular position concerned.

The central issue in this case was whether Western Union had taken action 'because' of Mr Robinson's mental disability – a depressive illness.

## Determination

Justice Flick held that the dismissal was because of his mental disability. In this regard, his Honour said that a disability in s 351 includes the manifestations of the disability and that 'no distinction can be drawn, with respect, between his 'capacity' to return to work and his mental disability': at [26] and [39]. His Honour continued at [41]:

> To employ the language of Katzmann J in [*Shizas v Commissioner of Police* [2017] FCA 61], and on the particular facts of the present case, any lack of '*capacity'* of Mr Robinson to return to work was but a '*manifestation*' of his claimed mental disability and a '*manifestation*' that could not be severed from that disability … Concurrence is expressed with the '*difficulty*' expressed by Katzmann J 'with the notion that "disability" can ever exclude the manifestations of a condition' …

## What the case means for public sector agencies

The case is a timely reminder of 3 matters about the FW Act test: (a) the FW Act test generally does not distinguish between the disability and manifestations of that disability, (b) employers have the onus of proof in demonstrating that the firing was not 'because' of the person's disability, and (c) the Court will consider objective and subjective factors in determining whether disability discrimination has occurred.

**The FW Act test may be satisfied even where adverse action is taken because of manifestations of the person's disability.**

In *Purvis v New South Wales* (2003) 217 CLR 92, the High Court held (under a different statute, the *Disability Discrimination Act 1982*) that it was not unlawful disability discrimination for a school to expel a student whose violent behaviour was a manifestation of his disability. That result flowed because the High Court said the legislation in question required a comparison between the particular student and a student without a disability who was similarly violent.

By contrast, the FW Act test only requires that the 'adverse action' be 'because' of the person's mental disability, and there is no requirement of a comparison between a person with a disability and a person without a disability. In this regard, Flick J stated that he accepted that Western Union's HR manager genuinely believed that she had dismissed Mr Robinson because of his incapacity to attend work, not his disability. Nevertheless, the Court held there was disability discrimination because Mr Robinson's performance issues were a manifestation of his disability and could not be separated from them.

Further, s 360 of the FW Act provides that 'because of' will be satisfied even if the unlawful reason for the dismissal is only one reason among many. The result is that the FW Act test is

relatively stringent, and may apply even where the employer considers that the real issue is the person's performance or conduct, not their disability.

**In some situations action can be taken against an employee who is suffering an illness or other disability.**

Where the employee has a medical condition but is fit for duties, APS agencies can rely on the employee's non-performance or unsatisfactory performance of duties as grounds for demotion or termination of employment (as provided for in s 24 and s 29 of the *Public Service Act 1999*).

In *Hamden v Commonwealth of Australia* [2010] FCA 924, the Federal Court on appeal held that, in the circumstances of that case, a termination of employment on the ground of non-performance of duties following an unauthorised absence from work did not involve unlawful disability discrimination under the *Disability Discrimination Act 1982*. Although the employee was suffering medical conditions, the employer had an expert medical assessment that the employee was fit for duties.

It is usually appropriate in the first instance to make reasonable attempts to accommodate an employee's disability. For example, if the employee's performance remains unsatisfactory despite reasonable accommodations, agencies can then potentially rely on the unsatisfactory performance ground. *De Sousa v Department of Education, Employment and Workplace Relations* [2013] FWC 10155 is an example of a case where the Fair Work Commission held that a termination of employment on the unsatisfactory performance ground was not harsh, unjust or unreasonable, even though the employee was suffering a medical condition that had some impact on their capacity to perform modified duties.

Where a Commonwealth agency has concerns about the conduct of an ill employee it should be cautious about taking disciplinary action, particularly if there is medical evidence that links the conduct to the employee's illness or other disability. *State of Victoria (Office of Public Prosecutions) v Grant* (2014) 246 IR 441; [2014] FCAFC 184 is an example of a case where a court found that the employer did not contravene s 351 of the FW Act in taking disciplinary action against an employee who was known to be suffering from depression and other ailments at the time at which the misconduct occurred. In that case medical evidence did not expressly or impliedly link the misconduct and the illness, the decision-maker considered there was no link and the decision to take disciplinary action was genuinely actuated by a concern with the employee's misconduct. The Full Federal Court observed at [57] (Tracey and Bromberg JJ, White J agreeing) that: 'It is, therefore, possible, depending on the evidence, for what the primary judge called "disaggregation" to occur when ss 360 and 361 of the Act are being applied. As these authorities demonstrate it is possible for there to be a close association between the proscribed reason and the conduct which gives rise to adverse action and for the decision-maker to satisfy the court that no proscribed reason actuated the adverse action.'

*Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150; [2015] FCAFC 76 is an example of 'disaggregation' of very closely related matters. The Court accepted that in taking adverse action the employer decision-maker was actuated by the employee's variable attendance record, rather than a proscribed reason referrable to the employee taking permissible leave for illness: see Jessup J at [32–34] and Perram J at [77].

**Where appropriate, employer agencies should get medical evidence.**

If a Commonwealth agency has concerns about an employee's capacity to work or their conduct where the employee has an illness or other disability, the agency should carefully assess the medical evidence and get its own evidence where appropriate.

An employer can generally direct an employee to attend a medical examination where it is reasonable to do so. APS agencies can require an employee to undergo a fitness-for-duty assessment in accordance with reg 3.2 of the *Public Service Regulations 1999*.

**The onus of proof is on employers.**

A further reason for caution is that s 361 of the FW Act provides that where an action is taken for contravention of disability discrimination protections, it is presumed that the adverse action was for the discriminatory reason alleged, unless the employer proves otherwise.

**While the test is not wholly objective, Courts will rely on contemporaneous documents.**

Justice Flick's approach in *Western Union* demonstrates that correspondence with the person will be important evidence in establishing that the adverse action was taken for a permissible reason. This is a further reason to seek legal advice promptly – it will ensure that correspondence does not cause problems in litigation later down the track.

While the Court will consider objective and subjective factors in considering whether adverse action is 'because of' the disability, in this case, the objective factors (ie the letter) were more persuasive than subjective beliefs of Western Union's HR manager. Although her belief that Mr Robinson was dismissed for reasons unrelated to his disability was genuinely held, this view failed to take into account the fact that dismissing a person because of manifestations of a person's disability is covered by the test in the FW Act.

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