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Article Information

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When can an employer manage employee conduct which is related to a disability without doing so "because of" the disability (and without breaching anti-discrimination laws)?

Employees affected by a psychological disability are as capable as any other employee of engaging in poor workplace conduct that needs to be managed by the employer. The issue of whether the poor conduct is a feature of the disability can often lead to reluctance to deal with it, out of a concern that doing so amounts to unlawful discrimination, especially when the employee makes exactly that assertion when faced with the prospect of performance management or discipline.

A recent appeal decision of the Federal Court has reinforced that not every consequence of a psychological disability will be immune from employer scrutiny under anti-discrimination laws, and that an employer will not be prohibited from taking action to deal with behaviour which is affected by (but not part of) a disability.

Western Union Business Solutions (Australia) Pty Ltd v Robinson [2019] FCA 1913 dealt with the circumstances of a senior employee who was dismissed after a seven-month absence, said in medical certificates submitted by him to be due to "significant work related stress and depression" and "a major depressive disorder associated with significant anxiety".

Some five months after the absence commenced, and on the basis of the assertions that the absence was linked to a psychological condition, Western Union directed the employee to attend an independent medical examination (IME) for provision of a report that would address a timeframe for a return to work (and therefore, his capacity to work). That direction was given on the basis that an employee is required to comply with lawful and reasonable directions of the employer, the direction was reasonable, in the circumstances of the extended absence and uncertainty as to return.

The employee did not comply with the direction to attend an IME, or any follow up directions to do so, and was notified that the employer may treat continued refusals as a disciplinary issue. Still the employee did not comply, and in May 2017 his employment was terminated.

The employee claimed the termination was unlawful disability discrimination, under section 351 of the *Fair Work Act 2009* which is:

> "An employer must not take adverse action [including termination of employment] against a person who is an employee…of the employer ***because of the person's…physical or mental disability***…"

Like other anti-discrimination regimes, discrimination that occurs "because of the inherent requirements of the particular position concerned" is not unlawful, but is a high bar to meet. The need to rely on this exemption only arises if the termination was "because of the disability". The main focus in this case was on the reason for termination and whether that was something that is included in the concept of a disability, rather than whether the inherent requirements of the role could not be met as a result of the disability.

The termination decision was taken by an HR professional who was unaware of any more detailed evidence of the claimed disability, despite having sought to obtain further medical information (which had been stymied by the employee's refusal to attend an IME). Her reasons for the termination were that there was a real doubt that the employee would return to work in the foreseeable future and had refused multiple opportunities to submit himself to an independent medical

assessment that might have assisted to clarify that capacity. She also said (and the Court accepted) that she did not know whether the employee had capacity for work, and did not believe (or at least did not accept) that he had a disability.

The critical issue became whether either or both of these features was sufficiently within the scope of a "disability" under the legislation so as to be a prohibited reason.

At first instance, the Court had said that the lack of capacity to return to work "was but a 'manifestation' of his claimed mental disability, and a 'manifestation' that could not be 'severed' from that disability".

In the appeal decision, the Full Court overturned that initial decision, making the distinction between a disability and its consequences:

> "The question is what the disability is, which does not necessarily equate to what the disability causes…the fact that the collection of attributes which comprise the disability result in incapacity for work would not necessarily compel the conclusion that the incapacity for work was part of the disability as opposed to being a consequence of having the disability".

It is important to keep in mind that other cases (acknowledged by the Full Court) can lead to a different result based on the knowledge and reasoning of a decision maker. In one earlier case, *Shizas*, the decision-maker had unlawfully refused to engage a particular employee, because of a specific and direct manifestation of the employee's disability. However, in the *Western Union* case, the decision-maker did not know or believe that the employee had a disability when she decided to terminate his employment.

Furthermore, Western Union's decision to dismiss the employee was made due to specific reasons (unreasonable failure to cooperate, and concern about his capacity which arose in the context of his failure to cooperate). These might be *consequences* of the disability, but they are not (without more) *manifestations* of the disability.

The Full Court also supported the view that even if the termination had amounted to unlawful disability discrimination, the exemption would in any case have applied that the termination was otherwise because of the inherent requirements of the position. On this point,the Full Court decision included:

> "[the HR professional's] indecision lay in not being sure about why [the employee] was not performing his work, not in whether he could or would perform the work. She took the view that, if it was because he was genuinely unwell, then he could not perform the work and was unlikely ever to be able to perform the work in light of the broadly unchanging nature of the medical certificates. She also took the view that, if he was not genuinely unwell, then he was simply not performing work he could perform and that position was unlikely to change."

Long term absences associated with undefined "stress" and claimed psychological disabilities do not need to be put in the "too hard" basket. With careful management and a sound process exploring the circumstances of the absence (and even in the face of employee refusals to co-operate with obtaining further information), a defensible resolution can be reached. Case-by-case management is critical to getting through those situations intact.

Lessons for employers

- Exercising management discretion to deal with an incapacity for work or poor workplace behaviour that is only consequentially connected to a disability (and not a feature of the disability) does not by itself lead to a conclusion that management action was unlawfully taken "because of" the disability.
- HR professionals should ask first what are the features of the disability and, having excluded those, only take necessary action on remainder consequences.
- Care must be taken to avoid mere semantic distinctions – an employer cannot dismiss an employee because he "lacked control over his legs", but say that because it did not explicitly think this was because of paraplegia, and did not enquire about that obvious possibility, it is not discriminatory.
- The interaction of workers compensation scheme employment protections (where a work-related injury is accepted) did not arise in this case, but must be kept in mind.