Adverse action, disability and inherent requirements in s 351 of the Fair Work Act: Western Union v Robinson

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Section 351 of the Fair Work Act 2009 (Cth) (FW Act), the protection against adverse action being taken against an employee or prospective employee on the grounds of a list of protected attributes, is one of the more novel protections introduced by Pt 3-1 of the FW Act.[1] The section has spawned a proliferation of cases, most notably in relation to the attribute of physical or mental disability.[2] However, there has been limited superior court appellate consideration of the operation of s 351.[3] The case law was augmented in October 2019, with the Full Federal Court decision in *Western Union Business Solutions (Australia) Pty Ltd v Robinson*[4] (*Robinson 2*). In *Robinson 2*, an appeal from a first instance decision of his Honour Flick J (*Robinson v Western Union Business Solutions (Australia) Pty Ltd*[5] (*Robinson 1*)), their Honours Kerr, O'Callaghan and Thawley JJ considered in particular the questions of what constitutes a disability for the purposes of Pt 3-1 and the operation of the inherent requirements exemption at s 351(2)(b).

Background: legal context

It is well-known that a contravention of s 351(1) will occur where an employer's substantial and operative reason[6] for taking particular adverse action (such as termination of employment) in relation to the employee is that the employee has a protected attribute. Relevantly for present purposes, one of those protected attributes is "physical or mental disability". There are some prescribed exceptions to this general rule. Importantly for current purposes, one of those exceptions is s 351(2)(b), which authorises adverse action that would otherwise contravene s 351(1) in a situation where the action is taken "because of the inherent requirements" of the particular job.[7]

At a very high level, prior to *Robinson 2*, the following principles emerged from key s 351 cases involving allegations of adverse action in relation to physical or mental disability:

- Broadly, the meaning of "disability" for s 351 purposes was held not to be established by reference to the definition of disability in the Disability Discrimination Act 1992 (Cth) (DD Act).[8]
- While early cases suggested otherwise,[9] the more recent decisions are to the effect that a "disability", for s 351 purposes, includes the attribute itself and its manifestations.[10] A key decision on this issue is *Shizas v Commissioner of Police (Obh of Commonwealth)*[11] (*Shizas*). There, Mr Shizas alleged adverse action was taken because he had a spinal condition, ankylosing spondylitis. Katzmann J observed:[12]

  > The relationship of a disability to its manifestations is not one of cause and effect; it is between a label and the things to which the label refers …
  > It would be entirely artificial to say that Assistant Commissioner Connelly's opinion was formed because of Mr Shizas's spinal infirmities (or at least the Assistant Commissioner's perception of them) and not because of Mr Shizas's ankylosing spondylitis. It would be as artificial as saying that a person was refused employment not because he was a paraplegic, but because he had no control over his legs.[13]

- It is possible to disaggregate a disability from its alleged "manifestations". In *Victoria (Office of Public Prosecutions) v Grant*,[14] for example, Mr Grant suffered from depression. His employment was terminated as a result of misconduct. At first instance, the misconduct was found to be a manifestation of the depression.[15] However, on appeal, in circumstances where there was no medical evidence that the misconduct was a result of the depression, there was found to be no contravention of s 351(1).[16]
- If a disability is genuinely not known to the decision-maker, an employer is likely to be able to defend the claim on the basis that without that knowledge, the employer could not in practice have been motivated by either the disability or a manifestation of it.[17]

Where an allegation of a s 351 contravention is made, s 361 of the FW Act mandates that once the employee has first established possession of the attribute and that adverse action was taken, it is up to the employer to disprove the allegation of a causal link between the two. A well-developed body of case law confirms that this can be achieved where the employer provides sufficient credible evidence that the person who made the decision to take the adverse action was motivated by reasons other than the protected attribute.[18]

Background: the facts of Robinson 2

Mr Robinson was employed as a Client Executive by Western Union Business Solutions (Australia) Pty Ltd (Western Union). In September 2016, Mr Robinson commenced absence on personal leave continuously supported by medical certificates. The certificates broadly stated that Mr Robinson suffered depression and anxiety. In October 2016, Mr Robinson ignored a request by Western Union for clarity as to when he would return to work. In November 2016 and January 2017, Mr Robinson responded to similar requests by providing medical certificates. On 13 January 2017, Western Union requested that Mr Robinson attend an independent medical examination (IME). Mr Robinson did not respond. On 27 January 2017, Western Union again requested that Mr Robinson attend an IME and advised that if he failed to confirm attendance at an IME appointment by 30 January 2017, assessment of the time frame for his return to work would be made without up-to-date medical information. Mr Robinson requested that Western Union contact his general practitioner. Between February and April 2017, Mr Robinson and Western Union continued to correspond regarding his attendance at an IME, but no appointment took place.

On 8 May 2017, Ms Pickles, Western Union's Head of Human Resources for Australia and New Zealand, wrote to Mr Robinson terminating his employment. The reasons given were that Mr Robinson had not advised of a return to work date, had unreasonably failed to cooperate in relation to medical assessment and because of "serious concerns about your capacity to return to work".[19]

Mr Robinson commenced proceedings, alleging contravention of s 351 of the FW Act and that Western Union had engaged in unconscionable conduct for the purposes of ss 20 and 21 of Sch 2 to the Competition and Consumer Act 2010 (Cth). The latter claim was not accepted at trial.[20] This finding was not appealed and is not considered further here.

Judgment at first instance: Robinson 1

Robinson 1 is a decision of his Honour Flick J. His Honour accepted Ms Pickles's evidence that she considered that Mr Robinson had refused to attend an appointment and believed it was likely that Mr Robinson was not genuinely unwell and was working elsewhere. Further, if Mr Robinson was genuinely unable to return to work, then Ms Pickles considered that this was likely to continue for the indefinite future. His Honour also accepted that Ms Pickles expressly disavowed terminating Mr Robinson's employment because he had a mental disability.[21]

Flick J concluded that it was open to Ms Pickles to take the view that Mr Robinson had unreasonably refused to cooperate with respect to the IME and for her to have concerns about Mr Robinson's work capacity.[22] However, despite this, and despite accepting Ms Pickles's evidence that she had not taken action because of Mr Robinson's disability, his Honour went on to conclude that there was a contravention of s 351.[23] This was because, for Flick J, Mr Robinson's lack of capacity to return to work was a manifestation of his mental disability.[24] In Flick J's view:

> [Mr Robinson's] claimed "psychiatric condition" formed part of the decision-making processes of [the decision-maker] Ms Pickles when she expressed her "concerns" as to Mr Robinson's "capacity to return to work", and any question of Mr Robinson's capacity could not be severed from the disability itself.[25]

Flick J further concluded that Western Union could not rely on s 351(2)(b). In Flick J's view, no decision had actually been taken as to whether Mr Robinson was incapacitated for work. Ms Pickles had merely stated that she had "concerns" about his capacity for work. Unless and until a decision as to whether Mr Robinson could in fact perform the inherent requirements of the role was made, it could not be concluded that s 351(2)(b) applied.[26]

Flick J awarded Mr Robinson $125,000 in compensation for economic loss and $15,000 in general damages, as well as a civil penalty of $20,000.[27]

Western Union appealed on five grounds, later abandoning one. Mr Robinson cross-appealed, seeking an increase in damages.[28]

Judgment on appeal

On appeal, the matter was heard by a Full Court comprising their Honours Kerr, O'Callaghan and Thawley JJ.

Grounds of appeal

Western Union's remaining grounds of appeal were as follows:[29]

1. Flick J erred in finding contravention of s 351 by way of Western Union taking adverse action against Mr Robinson because of his mental disability, when it dismissed him for reasons including concerns about his capacity for work.

2. (Not pursued)
3. Flick J erred by holding that the manifestation of Mr Robinson's disability could be severed from the disability itself, in circumstances where the decision-maker did not know, as a matter of fact, whether Mr Robinson actually had a mental disability.
4. Flick J erred by rejecting the alternative argument that if Western Union's concerns about Mr Robinson's capacity was sufficient to fall within the scope of s 351(1), it was also sufficient to satisfy s 351(2)(b).
5. In the alternative to Ground 4, compensation had been incorrectly assessed.

The judgments

In two judgments (one of Kerr J and one of O'Callaghan and Thawley JJ), their Honours found in favour of Western Union as to Grounds 1, 3 and 4.

The main point of difference in the judgments was in relation to Ground 5, which Kerr J would have rejected and which the majority would have allowed if Grounds 1, 3 and 4 had been dismissed.[30] All judges dismissed the cross-appeal.[31]

The discussion below is focused on the observations made by their Honours in relation to Grounds 1, 3 and 4.

The DD Act definition of "disability" should be taken into account in relation to s 351

In a more positive endorsement of the link between s 351 of the FW Act and s 4 of the DD Act than has appeared in most other cases, the majority concluded that the definition of "disability" in s 4 of the DD Act is relevant to construing the term in s 351. The majority observed that while s 4:

> … does not apply to the [FW Act] … [i]t is clear that the intention was for s 351(1) to operate harmoniously with the various anti-discrimination laws set out in s 351(3). The phrase "physical or mental disability" and the word "disability" in the Fair Work Act should be read having regard to this context.[32]

This conclusion did not, however, have an enormous impact on the outcome in *Robinson 2*.

What is a "manifestation" of a disability?

Their Honours unanimously accepted, consistently with *Shizas*, that a disability for s 351 purposes includes its manifestations.[33] Having now received endorsement of a Full Federal Court, unless and until the High Court finds otherwise, this conclusion appears unassailable.

However, their Honours went on to delineate between the manifestation of a disability and a consequence of that disability,[34] concluding that Mr Robinson's claimed inability to return to work was not a manifestation of his disability, but was a consequence of it.[35] Kerr J explained the distinction as follows:

> A manifestation of a disability includes, for example, symptoms such as lethargy or fatigue. A consequential inability to attend work because of lethargy or fatigue is a result of the manifestation. It is not a manifestation of the disability itself.[36]

The majority further commented on this issue that:

> … it is not every consequence of a disability which is to be regarded as a "manifestation" of the disability such that the consequence is to be regarded as comprising a part of the disability. The question is what the disability is, which does not necessarily equate to what the disability causes. The name given to a medical condition merely identifies the condition and not the collection of physiological or behavioural or other changes or symptoms which comprise the condition. For example, behaviours associated with a particular mental illness might be shown to be a "manifestation" of the illness (harmoniously with the definition of "disability" in the [DD Act]). However, 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. In many contexts, for example workers' compensation, there is a distinction between incapacity and the causes of that incapacity, namely the underlying medical condition. The question in that context would more likely be whether the disability caused incapacity, rather than whether the incapacity was part of the disability.[37]

This distinction was critical to their Honours' decision to accept the appeal in relation to Grounds 1 and 3.

How did the distinction between a manifestation and a consequence affect the outcome in Robinson 2?

Ms Pickles was adamant that she did not decide to terminate Mr Robinson's employment because of his disability. Her evidence was that she was concerned that Mr Robinson had failed to cooperate with the IME and she believed that Mr Robinson was working elsewhere. Ms Pickles did not believe Mr Robinson was unwell. Further, she had no medical evidence to confirm that he in fact was ill.[38] Ms Pickles did not actually know whether Mr Robinson was genuinely unwell and whether his absence from work was explained by his underlying condition. However, either he was not genuinely unwell and was therefore able but unwilling to return to work, or, if he was genuinely unwell, then he had been so for 7 months and Western Union was concerned that he could not fulfil the requirements of his position for the reasonably foreseeable future.[39] In short, what Ms Pickles was ultimately motivated by was concern about Mr Robinson's capacity for work.

For the appeal judges, even if Mr Robinson's incapacity for work was the result of his claimed disability,

that incapacity was a consequence, not a manifestation, of that disability.[40] Flick J had accepted Ms Pickles's evidence at trial that her decision was made not because of Mr Robinson's mental disability but because of her concern about Mr Robinson's capacity, or willingness, to return to work. In those circumstances, the appeal judges concluded that it was *not* open to Flick J to conclude that Mr Robinson was dismissed *because of* his mental disability.[41] For the appeal judges, Ms Pickles's concern about Mr Robinson's capacity or willingness for work did not involve the element that the incapacity stemmed from, or was connected in any way with, any mental disability from which Mr Robinson suffered.[42] It was in this context that Ms Pickles had formed the view that Mr Robinson would not in the future be capable of fulfilling the inherent requirements of his employment, being attendance at work.[43]

Disaggregation of a disability and its manifestation

Even if the effect of Mr Robinson's mental disability on his work capacity could be construed as a manifestation of it, the majority pointed out that the two could be disaggregated.[44] Here, the majority referred to the decision in *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd*[45] (*Endeavor Coal*). In that case, the employee's attendance was unreliable, as he frequently took statutory paid personal leave. The decision-maker's evidence was that he was motivated by the unreliable attendance, not by the employee's exercise of his right to take personal leave. This was accepted and it was held by the majority that the adverse action was not unlawful.[46] In the present case, the majority drew on the reasoning in *Endeavour Coal*[47] to emphasise that in a situation where Flick J had accepted Ms Pickles's evidence that she genuinely believed adverse action should not be taken because of a disability and had not done so, his Honour should further have accepted that Ms Pickles was concerned about Mr Robinson's capacity for work, not the underlying cause of his incapacity.[48]

How did s 351(2)(b) apply in this context?

The majority observed that s 351(1) does not apply in a situation where the relevant action falls within the scope of s 351(2). Section 351(2)(b) is an exception to the s 351 rule which also revolves around the state of mind of the employer.[49]

In the present case, where there was no contravention of s 351(1), there was effectively no room for the s 351(2)(b) exception to operate.[50]

In his Honour's judgment, Kerr J did not take the question any further. However, the majority concluded that if Mr Robinson's capacity for work *had* been a manifestation of the disability, the s 351(2)(b) exception would have applied.[51] As the majority observed, Ms Pickles's views, as set out above, necessarily included her taking the view that Mr Robinson could not perform the inherent requirements of the position. If Mr Robinson was genuinely unwell, then the medical certificates suggested he could not perform the work and was not likely ever to be able to do so. On the other hand, if Mr Robinson was not genuinely unwell, then he was simply not performing work he could perform and that position was unlikely to change.[52] Accordingly, if Mr Robinson's incapacity *was* a manifestation of his claimed disability, then it must be accepted that Ms Pickles considered that Mr Robinson could not perform the inherent requirements of the position and the action was justified by s 351(2)(b).[53]

Following *Shizas*, the majority further held that an honest but mistaken belief that an employee cannot perform the inherent requirements of a position will engage s 351(2)(b).[54] Their Honours then took this a step further, concluding that s 351(2)(b) will also be engaged where a decision-maker holds an honest but mistaken belief that an employee is *unwilling* to perform the inherent requirements of a position.[55] That is, s 351(2)(b) does not apply only when an employee is *unable* to carry out the inherent requirements of particular employment.[56] Here, Ms Pickles took action because her view was that Mr Robinson was either unable or unwilling to perform his duties. Both were capable of enlivening s 351(2)(b).

Issues arising from Robinson 2

On one level, *Robinson 2* can be read as a cogent reminder and further illustration of the importance of the principles established in earlier case law on s 361, and in particular the consideration and treatment of a decision-maker's evidence.

However, *Robinson 2* offers some interesting developments in relation to s 351:

- The express acceptance that while the definition in s 4 of the DD Act will not simply be read as being imported into the FW Act; it should be taken into account when considering a s 351 physical or mental disability claim, may be an important consideration in future cases.
- All three judges were very clear in their view that while a manifestation of a disability is part of a physical or mental disability for s 351 purposes, it is possible to differentiate between the "manifestations" and the "consequences" of such a disability. It is submitted that the distinction between a

"manifestation" of a disability and a "consequence" of a disability may not always be straightforward. Accordingly, it will be interesting to see how this distinction is applied in future cases.

- The majority took the view that s 351(2)(b) will be engaged where a decision-maker holds an honest but mistaken belief that an employee not only is *unable* to perform the inherent requirements of a role, but also where there is *unwillingness* to do so. In the author's view, there remains scope for further exploration of the boundaries of what constitutes an honest but mistaken belief and also of what will be sufficient to establish sufficient *unwillingness* to perform for s 351(2)(b) purposes.

Robinson 2 focuses on only some aspects of s 351. Many others remain unclear and open to further elucidation.[57] In addition, on the matters it does cover, in some respects *Robinson 2* provokes many questions. Nevertheless, the decision also provides some useful clarity for those interested in the construction of s 351.

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The views expressed in this article are those of the author and not necessarily of MinterEllison.

Footnotes

1. Section 351 does have antecedents, but had not appeared in its present form prior to the advent of the FW Act. See further the discussion of predecessors to s 351 in chapter 6 of T Donaghey and E Goodwin, *General Protections under the Fair Work Act*, LexisNexis 2019, pp 332–9 [6.3]–[6.10].
2. See the discussion in chapter 6 of Donaghey and Goodwin, above n 1, pp 352–6 [6.31]–[6.35].
3. See, for example, *Victoria (Office of Public Prosecutions) v Grant* (2014) 246 IR 441; [2014] FCAFC 184; BC201411037.
4. *Western Union Business Solutions (Australia) Pty Ltd v Robinson* [2019] FCAFC 181; BC201909609.
5. *Robinson v Western Union Business Solutions (Australia) Pty Ltd* (2018) 284 IR 414; [2018] FCA 1913; BC201811538.
6. See *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500; 290 ALR 647; [2012] HCA 32; BC201206652 at [56]–[57] per French CJ and Crennan J; [85]–[89], [103]–[104] per Gummow and Hayne JJ. See also *Shizas v Commissioner of Police (Obh of Commonwealth)* (2017) 268 IR 71; [2017] FCA 61; BC201700507 at [151], [165], [184] (*Shizas*).
7. This type of exception is well-known in dedicated anti-discrimination law. See, for example, the discussion in N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law*, 3rd edn, Federation Press, 2018.
8. See, for example, *RailPro Services Pty Ltd v Flavel* (2015) 242 FCR 424; [2015] FCA 504; BC201504344 at [112]; and *Hodkinson v Commonwealth* (2011) 248 FLR 409; 207 IR 129; [2011] FMCA 171; BC201101612 (but see also *Zahra v Pharmacy Management Avoca Beach Pty Ltd* [2015] FCCA 1511; BC201504835).
9. *Hodkinson v Commonwealth*, above n 8; *Cugura v Frankston City Council* [2012] FMCA 340; BC201202532 at [128].
10. *Shizas*, above n 6; *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 149 ALD 88; 327 ALR 460; [2015] FCA 27; BC201500376 at [194]–[195]; *Robinson v Western Union Business Solutions (Australia) Pty Ltd*, above n 5, at [26], [54]; see also *Construction, Forestry, Mining and Energy Union (CFMEU) v Peabody Energy Australia Coal Pty Ltd* [2014] FCA 394; BC201402680 at [9].
11. *Shizas*, above n 6.
12. *Shizas*, above n 6, at [119]–[125].
13. *Shizas*, above n 6, at [121]–[122].
14. Above n 3.
15. *Grant v Victoria (Office of Public Prosecutions)* [2014] FCCA 17; BC201400181.
16. Above n 3, at [34]–[53], [58] per Tracey and Buchanan JJ; [80] per White J.
17. See *RailPro Services Pty Ltd v Flavel*, above n 8, reversing *Flavel v RailPro Services Pty Ltd* [2013] FCCA 1189; BC201312437.
18. See in particular *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500; 290 ALR 647; [2012] HCA 32; BC201206652; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243; 314 ALR 1; [2014] HCA 41; BC201408607; *Victoria (Office of Public Prosecutions) v Grant*, above n 3.
19. Above n 4, at [10].
20. Above n 5, at [73].
21. Above n 5, at [32].
22. Above n 5, at [34].
23. Above n 5, at [35]–[38], [56].
24. Above n 5, at [36].
25. Above n 5, at [40].
26. Above n 5, at [51]–[53].
27. Above n 5, at [117].
28. Above n 4, at [18]–[20].
29. Above n 4, at [18]–[20].
30. Above n 4, at [95] per Kerr J; [104] per O'Callaghan and Thawley JJ.
31. Above n 4, at [95]–[101] inclusive per O'Callaghan and Thawley JJ. Note the contrary observation in the early decision of *Hodkinson v Commonwealth*, above n 8, at [142].
32. Above n 4, at [113] per O'Callaghan and Thawley JJ.
33. Above n 4, at [48], [60] per Kerr J; [129]–[138] per O'Callaghan and Thawley JJ.

34. Above n 4, at [48] per Kerr J; [137]–[139] per O'Callaghan and Thawley JJ.
35. Above n 4, at [48] per Kerr J; [136]–[149] per O'Callaghan and Thawley JJ.
36. Above n 4, at [48] per Kerr J.
37. Above n 4, at [137] per O'Callaghan and Thawley JJ.
38. Above n 4, at [49], [52] per Kerr J; [124]–[126] per O'Callaghan and Thawley JJ.
39. Above n 4, at [62] per Kerr J; [141] per O'Callaghan and Thawley JJ.
40. Above n 4, at [48]–[63] per Kerr J; [132]–[142] per O'Callaghan and Thawley JJ.
41. Above n 4, at [64]–[66] per Kerr J; [142] per O'Callaghan and Thawley JJ.
42. Above n 4, at [62]–[63] per Kerr J; [142] per O'Callaghan and Thawley JJ.
43. Above n 4, at [62] per Kerr J; [127] per O'Callaghan and Thawley JJ.
44. Above n 4, at [143] per O'Callaghan and Thawley JJ.
45. *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150; 250 IR 422; [2015] FCAFC 76; BC201504767.
46. Bromberg J handed down a dissenting judgment: *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd*, above n 45.
47. Above n 4, at [144]–[151] per O'Callaghan and Thawley JJ.
48. Above n 4, at [153] per O'Callaghan and Thawley JJ.
49. Above n 4, at [119] per O'Callaghan and Thawley JJ.
50. Above n 4, at [80] per Kerr J; and see [155] per O'Callaghan and Thawley JJ.
51. Above n 4, at [155]–[156] per O'Callaghan and Thawley JJ.
52. Above n 4, at [164] per O'Callaghan and Thawley JJ.
53. Above n 4, at [167] per O'Callaghan and Thawley JJ.
54. Above n 4, at [165] per O'Callaghan and Thawley JJ.
55. Above n 4, at [165] per O'Callaghan and Thawley JJ.
56. Above n 4, at [166] per O'Callaghan and Thawley JJ.
57. See, for example, the discussion of whether s 351 covers both direct and indirect discrimination in Ch 6 of Donaghey and Goodwin, pp 345–7 [6.23]–[6.25].