FEDERAL COURT OF AUSTRALIA

Robinson v Western Union Business Solutions (Australia) Pty Ltd  
[2018] FCA 1913

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| File number: | NSD 1333 of 2017 |
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| Judge: | **FLICK J** |
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| Date of judgment: | 30 November 2018 |
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| Catchwords: | **INDUSTRIAL LAW** – adverse action – where Applicant dismissed – where action taken for reasons which included the incapacity of the Applicant – whether adverse action taken because of the Applicant’s mental disability – consideration of the meaning of “*disability*” – whether action taken because of the inherent requirements of the particular position– calculation of compensation – quantification of penalty  **COMPETITION** – where employer dismissed employee – whether unconscionable conduct in trade or commerce – whether dismissal of employee “*in trade or commerce*” – whether dismissal of employee “*unconscionable*” |
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| Legislation: | *Competition and Consumer Act* *2010* (Cth) Sch 2 ss 20, 21  *Disability Discrimination Act 1992* (Cth) s 15  *Fair Work Act* *2009* (Cth) ss 342, 346, 351, 360, 361, 545, 546  *Trade Practices Act 1974* (Cth) ss 51AA, 51AC, 52  *Fair Trading Act* *1990* (Tas) |
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| Cases cited: | *Australian Building and Construction Commissioner v Ingham (No 2) (The Enoggera Barracks Case)* [2018] FCA 263  *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* [2003] HCA 18, (2003) 214 CLR 51  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54, (2013) 250 CLR 640  *Barto v GPR Management Services Pty Ltd* (1991) 33 FCR 389  *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32, (2012) 248 CLR 500  *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447  *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, (2015) 258 CLR 482  *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594  *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213  *Downe v Sydney West Area Health Service (No 2)* [2008] NSWSC 159, (2008) 71 NSWLR 633  *Kelly v Fitzpatrick* [2007] FCA 1080, (2007) 166 IR 14  *Macdonald v Australian Wool Innovation Ltd* [2005] FCA 105  *Martin v Tasmania Development and Resources* [1999] FCA 593, (1999) 163 ALR 79  *Mulcahy v Hydro-Electric Commission* (1998) 85 FCR 170  *Parker v Switchee Pty Ltd* [2018] FCA 479  *Qantas Airways Ltd v Christie* [1998] HCA 18, (1998) 193 CLR 280  *RailPro Services Pty Ltd v Flavel* [2015] FCA 504, (2015) 242 FCR 424  *Shizas v Commissioner of Police* [2017] FCA 61, (2017) 268 IR 71  *X v Commonwealth* [1999] HCA 63, (1999) 200 CLR 177 |
|  |  |
| Date of hearing: | 5, 6 and 7 June 2018 |
|  |  |
| Registry: | New South Wales |
|  |  |
| Division: | Fair Work Division |
|  |  |
| National Practice Area: | Employment & Industrial Relations |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 119 |
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ORDERS

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|  | | NSD 1333 of 2017 |
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| BETWEEN: | DAVID ROBINSON  Applicant | |
| AND: | WESTERN UNION BUSINESS SOLUTIONS (AUSTRALIA) PTY LTD  Respondent | |

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| JUDGE: | FLICK J |
| DATE OF ORDER: | 30 NOVEMBER 2018 |

THE COURT ORDERS THAT:

1. The parties are to bring in *Short Minutes of Orders* to give effect to these reasons within fourteen days.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

1. On 23 January 2013, the Applicant in the present proceeding, Mr David Robinson, signed an employment contract with the Respondent, Western Union Business Solutions (Australia) Pty Ltd (“Western Union”). He commenced work on 11 February 2013. He was dismissed on 8 May 2017.
2. On 7 August 2017, he filed in this Court an *Originating Application* under the *Fair Work Act* *2009* (Cth) and a *Statement of Claim*. On 6 September 2017, he filed an *Amended Statement of Claim*. In very summary form, Mr Robinson claims that Western Union has:

* contravened s 351 of the *Fair Work Act*:and
* engaged in “*unconscionable conduct*” in contravention of ss 20 or 21 of Sch 2 of the *Competition and Consumer Act* *2010* (Cth) (the “*Competition Act*”).

He seeks (*inter alia*) compensation, damages and an order for the imposition of a penalty. Western Union denies liability.

1. It is concluded that there has been a contravention of the *Fair Work Act* and that Western Union should pay Mr Robinson compensation and should also pay a penalty.
2. That conclusion requires:

* a brief overview of Mr Robinson’s employment with Western Union and the requests made of him to attend a medical examination sought to be organised by Western Union;
* a brief reference to the provisions of the *Fair Work Act*, the application of those provisions to the facts and (in particular) whether the reasons for Mr Robinson’s dismissal “*included*” a consideration of his “*disability*”; and
* a brief reference to the provisions of the *Competition Act* and, in particular, whether the dismissal of Mr Robinson was an act done in “*trade or commerce*” within the meaning of ss 20 or 21 of that Act.

## THE EMPLOYMENT HISTORY & REQUESTS MADE – AN OVERVIEW

1. Mr Robinson commenced work on 11 February 2013 as a “*Client Executive*”.
2. His employment history need not be set forth at any greater length than is necessary to understand the reasons that ultimately led to his dismissal some four years later.
3. In July 2015, he approached Ms Victoria Pickles, who at the time was the Human Resources Director for Western Union. He then made a complaint about his manager, Mr Hayden Scown. A mediation took place in August 2015. The mediation took place over a 1½ to 2 hour period. Ms Pickles thought that “*good progress*” had been made.
4. In late 2015, a separate dispute arose concerning Mr Robinson’s entitlement to a commission payment.
5. In September 2016, Mr Robinson went on sick leave alleging a mental disability. A series of medical certificates were obtained by Mr Robinson and submitted to Western Union. These medical certificates, the periods of time covered by the certificates and the reasons provided by Mr Robinson’s medical practitioner were as follows:

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| --- | --- | --- |
| ***Date of certificate*** | ***Period covered*** | ***Reason*** |
| 16 September 2016 | 16 to 24 September 2016 | “*suffering from a medical condition*” |
| 23 September 2016 | 23 September to 7 October 2016 | “*very significant work related stress and depression*” |
| 5 October 2016 | 7 to 13 October 2016 | “*very significant work related stress and depression*” |
| 12 October 2016 | 13 to 18 October 2016 | “*significant work related stress*” |
| 4 January 2017 | 4 January to 8 February 2017 | “*a major deressive* [*sic*] *disorder associated with significant anxiety*” |

1. It was in about October 2016 that Mr Robinson commenced a claim for worker’s compensation. That claim was investigated by Ms Kathy Lynskey. Statements were obtained by her from both Mr Robinson and Ms Pickles. The claim was denied by QBE in December 2016.
2. A series of *Work Cover Certificates* were also provided certifying (*inter alia*) whether Mr Robinson had “*current work capacity*”. These *Certificates* were each signed by Mr Robinson’s “*Nominated Treating Doctor or treating Specialist*”, who certified that the information contained in the *Certificates* was “*to the best of* [*their*] *knowledge, true and correct*”. Mr Robinson also signed each *Certificate*, declaring that the details he had given were “*true and correct*”. Each of those *Certificates* provided that Mr Robinson had “*no current work capacity for any employment*” for a specified period. A summary of these *Certificates* is as follows:

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| --- | --- |
| ***Date of Certificate*** | ***Period of incapacity*** |
| 12 October 2016 | 19 October to 4 November 2016 |
| 4 November 2016 (but provided by email on 8 November 2016) | 5 November to 5 December 2016 |
| 4 November 2016 (but provided by email on 16 November 2016)  This was an amended version of the certificate provided on 8 November. | 5 November to 5 December 2016 |
| 30 November 2016 | 6 December 2016 to 6 January 2017 |
| 4 January 2017 | 6 January 2017 to 15 February 2017 |
| 15 March 2017 | 17 March 2017 to 17 April 2017 |
| 18 April 2017 | 17 April 2017 to 16 May 2017 |

1. During this period, inquiries were made of Mr Robinson as to his return to work. These inquiries and his responses were as follows:

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| --- | --- | --- |
| ***Date of inquiry*** | ***Inquiry made*** | ***Response*** |
| 20 October 2016 | “*Are you able to please provide me with an update on where you are at with returning to work?*” |  |
| 8 November 2016 | “*Just wanted to reach out to you regarding your anticipated return to work … If you could please confirm your return to work date or if you can please provide a medical certificate to confirm any further time you will be taking.*” | Response on 8 November: “*Please find attached my doctors certificate*”. |
| 4 January 2017 | “*As the last Workcover certificate we have from you has an end date of 6 January 2017, could you please confirm whether you will be returning to work after the date, or if you have further documentation could you please send this through to me as soon as possible*.” | Response on 5 January: “*I am still unwell, please find attached the required documentation*”. |

1. Later in January 2017, further inquiries were made as to when Mr Robinson was intending to return to work and requests made for him to attend for a medical examination to be conducted by a doctor nominated by the employer in order to obtain “*an independent evaluation”*. These requests were made by Ms Chantal Chidiac on behalf of Western Union. Ms Chidiac had taken over as Mr Robinson’s “*HR contact*” and occupied the position of Senior Generalist, Human Resources (and later Human Resources Business Partner, Australia and New Zealand). Ms Chidiac worked under Ms Pickles.
2. The first of these requests was made in a letter sent by email on 13 January 2017. That letter stated in part as follows:

Dear David,

Thank you for your communication with us regarding your continued absence from work. Following on from your doctor’s certificate dated 4 January 2017 and the Workcover certificate citing no current work capacity from 6 January 2017 – 15 February 2017, at this stage we remain unclear as to your possible return to work date.

You have now been absent from work on sick leave since 16 September 2016. The role you were performing is one that continues to be required. To be able to manage your team, we really need to know when you are likely to be able to return to work.

To assist the business in gaining a clear understanding of a possible return to work date, we are requesting that you visit a doctor of our nomination to give an independent evaluation of your medical condition and to provide a recommendation for the timeframe of your return to the organisation. This information would help the company to facilitate your return to work and best support you in the process of rehabilitation.

We need to ensure we can clarify that upon your return to work, you will be able to return to full capacity in your role with the relevant return to work plan in place. We advise that until such point that we can ascertain the possibility of your return to work, effective from 1 February 2017, you will be placed on unpaid leave.

We require your confirmation that you will be attending an appointment with our nominated practitioner, Dr Istvan Schreiner, and provide the following options as per below.

* Wednesday 18 January at 10:00am
* Monday 30 January at 10:00am

Dr Istvan Schreiner

Suite 2A, 201 New South Head Rd

Edgecliff NSW 2027

Could I please ask for your confirmation within 5 working days of this letter, of your availability to attend one of the appointment options as per the above and the booking will be arranged for you.

There was no response provided by Mr Robinson to this letter. Ms Chidiac then sent a follow-up email on 27 January 2017. That email provided (in part) as follows:

Following our previous correspondence and to assist us in ensuring your successful return to work, could I please ask you to confirm your attendance with our nominated practitioner as per the attached letter which you received on 13 January. This will assist us in tailoring your return to work plan, with up to date medical information. If you could please confirm your attendance via return email, as soon as possible.

If we do not hear from you by 30 January 2017, please be aware that we will need to make an assessment on your potential return to work without up to date medical information.

1. In response, Mr Robinson on 30 January 2017 sent an email to Ms Chidiac which provided in part as follows (without alteration):

Can you please contact my general practitioner Dr Sheena Wilmot at Benchmark Medical Centre (ph [redacted]) in relation to my return to work and a return to work plan. Dr Walmot is my treating general practitioner. She has been involved in the care and on-going management of my condition and is best placed to assist with a return to work plan.

1. Ms Chidiac responded on 2 February 2017. That response was relevantly as follows:

Thank you for your email and we appreciate that your current Doctor has been involved in your ongoing treatment thus far.

However, to ensure that we have a balanced return to work plan in place for you, we also request that you attend an independent assessment with the company’s nominated practitioner. We endeavour to use the assessment from your current treating GP Dr Walmot, as well as the assessment from the company’s approved practitioner, to objectively address all requirements for your return to work plan, as created and put in place by WUBS.

If you could please confirm your attendance and I will reschedule a time for you to attend an appointment with Dr Schreiner as well.

1. On 8 February 2017, Ms Chidiac sent another email to Mr Robinson seeking confirmation that he received her previous email “*requesting your attendance at an appointment with the company’s nominated practitioner*”. Mr Robinson responded on the same day querying whether Ms Chidiac was “*suggesting that Dr Wilmot is not objective and you want to get another assessment?*”
2. A further request was made by Ms Chidiac by way of email on 14 February 2017. That email requested Mr Robinson to attend a consultation with an expert in occupational health, Dr Schreiner, “*as soon as possible*”. Three dates and times were specified, being 20, 23 and 27 February 2017. Mr Robinson responded on 22 February 2017 stating in part that his understanding was that Dr Schreiner was a psychologist and that if Western Union required an opinion from a psychologist, he was “*already seeing a psychologist and psychiatrist in relation to my psychological condition*”. Western Union were “*encouraged*” to contact Mr Robinson’s existing general practitioner, Dr Wilmot.
3. A further request was made in a letter dated 27 February 2017. That letter stated in part as follows:

Thank you for your email. I note your comments regarding Dr Wilmot’s management of your condition to date. Dr Wilmot is your general practitioner and you should obviously continue to see her. We are concerned to obtain an independent opinion from a specialist, that is, one who has not been engaged in your treatment to date and who has the expertise to advise on occupational health and cases of long-term sick leave such as yours, so as to determine your fitness for work.

We have written to you on several occasions regarding this reasonable direction and have provided a range of available dates and times. We have contacted Dr Schreiner’s office again and they can offer the following dates and times for an appointment:

Thursday 2nd March 10am

Monday 6th March 10am

Wednesday 8th March 10am

Dr Istvan Schreiner

Suite 2A, 201 New South Head Rd

Edgecliff NSW 2027

Please let me know as soon as possible which of the above is most suitable for you to attend and I will then arrange with Dr Schreiner’s office to book the appointment.

Please note that if you continue to refuse this direction and do not attend an assessment with Dr Schreiner before 8th March 2017, then Western Union will treat this refusal as a breach of your contract of employment and may terminate your employment without further notice.

The email to which this letter refers would appear to be that sent on 22 February 2017.

1. On 8 March 2017, Mr Robinson sent to Ms Chidiac an email which stated in part as follows (without alteration):

I have been providing Western Union medical certificates during the time I have been absent that contains medical information about my condition and my fitness for work. My absences from work have been explained. I also note that there are no inconsistencies in medical evidence.

However, I understand that you may want clarity about my fitness for work. In relation to this, I have made a simple request that you contact the general practitioner, who has been coordinating my treatment, in the first instance in relation to any questions you have. If it is specialist opinion that you need about my fitness for work, I advised you in my email dated 16 February 2017 that I have been consulting a psychologist and a specialist psychiatrist. I can sign an authority agreeing for you to contact them also. If it would assist, I can obtain medial reports from the general practitioner, the psychologist and/or the psychiatrist regarding my condition, prognosis and likely return to work. If you have specific questions, I can put these to them also.

So that there is no confusion, I am more than happy to attend any medial appointment that Western Union requires. I do have a few questions, however. Can you kindly advise:

1. the grounds on which Western Union believes it is entitled to direct me to attend a medical examination by Dr Schreiner in the circumstances that I am prepared to obtain reports from my treating medical practitioners (or consent to Western Union contacting the doctors);
2. why the general practitioner and the treating specialist are not qualified to provide an opinion in respect of my condition, prognosis and return to work;
3. the questions that will be asked of Dr Schreiner;
4. what documents, information and copies of the documents will be provided to Dr Schreiner;
5. what will Dr Schreiner’s examination entail, and
6. the position against which I will be assessed.

You have threatened termination of my employment for breach of my employment contract. Can you advise which section of the contract have I allegedly breached (and the details).

As you know, I am suffering a psychiatric condition and a threat to terminating my employment without further notice is not helpful. At no stage have I declined to obtain a medical report regarding my condition, prognosis and likely return to work. In fact, I have encouraged you to correspond with the treating general practitioner which you continue to refuse to do.

I recently lodged a workers compensation claim in respect of workplace bullying, intimidation and harassment - issues in connection with my employment with Western Union dating back for many years. It appears that any decision to terminate my employment is not based on legitimate reasons (in light of the above) but instigated by my recent decision to make a claim against Western Union.

I look forward to hearing from you.

1. Ms Chidiac responded to this email on 13 March 2017 relevantly as follows:

In response to your email of 8 March 2017, it is an implied term of your contract of employment that you comply with the Company’s lawful and reasonable directions. It is clearly a lawful and reasonable direction that you attend a medical examination by a specialist appointed by the Company in order to advise the Company whether you are fit to return to work.

It is not a question as to whether your current treating practitioners are or are not qualified to provide an opinion. The Company is perfectly entitled to require you to attend for examination by a doctor who is independent from your current treating practitioners.

Dr Schreiner will be asked to form a view and advise as to whether you are fit to return to your role as Key Account Manager - Enterprises. In connection with this examination, Dr Schreiner will be provided with details of your job description.

The Company denies the allegations contained in the penultimate paragraph of your email. These allegations are clearly incorrect.

We are obtaining dates and times of Dr Schreiner’s availability. We will then advise you and ask that you nominate a suitable time. We will then confirm the appointment with you and Dr Schreiner.

Notwithstanding the statement in the last paragraph of this email, no further “*dates and times*” were obtained from Dr Schreiner and Mr Robinson was not (accordingly) further advised of any future available times for an examination.

1. On 8 May 2017, Ms Pickles caused Ms Chidiac to send a letter to Mr Robinson terminating his employment. That letter stated in part as follows:

**TERMINATION OF EMPLOYMENT**

I refer to your last email from 18 April 2017, with attached medical and Workcover certificates indicating that you are not fit to return to work.

You have not attended work for a period of 7 months, with 3 of these months constituting unpaid leave. In that time, you have refused multiple, reasonable attempts by Western Union Business Solutions (Australia) (the Company) to attend an independent assessment by Dr Istvan Schreiner, the company’s nominated practitioner.

Given 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 in light of the Company’s serious concerns about your capacity to return to work, the company has decided to terminate your employment. This termination will take effect on 8 May, and you will be paid two months’ pay in lieu of notice plus accrued but untaken leave entitlements.

## THE *FAIR WORK ACT*

1. The provisions of the *Fair Work Act* of primary importance to the resolution of the present dispute are ss 351, 360 and 361, which all appear in Pt 3-1 of the Act.
2. Section 351 provides in relevant part as follows:

**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; or …

There are at least three aspects of s 351 which presently assume relevance – the requirement that action be taken “*because*”of a person’s disability; the meaning of the term “*disability*”; and the meaning of the phrase “*the inherent requirements of the particular position*”.

1. As to the first aspect, the requirement that action be taken “*because*”of a person’s disability invites attention to the reasons why action has been taken: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32, (2012) 248 CLR 500 (“*Barclay*”). When addressing s 346 of the *Fair Work Act* and the prohibition there contained against the taking of adverse action “*because*” (*inter alia*) a person is a member of an industrial association, French CJ and Crennan J observed in respect to that provision and s 361 (at 506):

[5] The task of a court in a proceeding alleging a contravention of s 346 is to determine, on the balance of probabilities, why the employer took adverse action against the employee, and to ask whether it was for a prohibited reason or reasons which included a prohibited reason.

Their Honours continued (at 517):

[44] There is no warrant to be derived from the text of the relevant provisions of the *Fair Work Act* for treating the statutory expression “because” in s 346, or the statutory presumption in s 361, as requiring only an objective enquiry into a defendant employer’s reason, including any unconscious reason, for taking adverse action. The imposition of the statutory presumption in s 361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains “why was the adverse action taken?”.

[45] This question is one of fact, which must be answered in the light of all the facts established in the proceeding. Generally, it will be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer. Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker’s evidence. However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer even though an employee may be an officer or member of an industrial association and engage in industrial activity.

(Footnotes omitted.)

Justices Gummow and Hayne also relevantly observed (at 534 to 535):

[101] The use in s 346(b) of the term “because” in the expression “because the other person engages … in industrial activity”, invites attention to the reasons why the decision-maker so acted. Section 360 stipulates that, for the purposes of provisions including s 346, whilst there may be multiple reasons for a particular action “a person takes action for a particular reason if the reasons for the action include that reason”. These provisions presented an issue of fact for decision by the primary judge.

1. The term “*disability*” employed in s 351(1) includes the “*manifestations*” of that disability: *Shizas v Commissioner of Police* [2017] FCA 61, (2017) 268 IR 71 (“*Shizas*”). In the context of considering a “*physical disability*”, Katzmann J there concluded (at 95 to 96):

[119] But the question here is not whether a condition and its manifestations may be disaggregated; it is whether a particular disability can be severed from its manifestations. With the greatest respect, absent a statutory definition to that effect, which is missing from the [*Fair Work Act*], I have real difficulty with the notion that “disability” can ever exclude the manifestations of a condition. In the absence of a statutory definition, one must look to the ordinary meaning of the word. In its ordinary meaning “disability” denotes both the condition and its manifestations. …

[121] In any event, it would be “difficult, if not artificial” to draw a distinction between ankylosing spondylitis and its manifestations. To say that a person has ankylosing spondylitis is to say that he or she has, or may be susceptible to, problems of a particular kind with his or her spine and related joints. 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. Ankylosing spondylitis is “a chronic inflammatory rheumatic disorder”, primarily affecting the spine. Its hallmark is sacroiliitis (inflammation of the sacrum) accompanied by inflammation of the entheses (the points of union between tendon, ligament, or capsule and bone) and formation of syndesmophytes (bony growths originating inside a spinal ligament), which in the later stages of the disease lead to spinal ankylosis (or fusion).

Her Honour continued a little later as follows (at 97):

[128] The Commissioner rightly accepted that the burden is on the employer to prove that adverse action was taken because of the inherent requirements of “the particular position concerned”. Although the exception in s 351(2)(b) does not come within the terms of the reverse onus provision in s 361, it is highly unlikely that Parliament intended the onus to lie with the employee to prove the negative, particularly in relation to a matter such as this that would be peculiarly within the knowledge of the employer.

[129] In determining whether the Commissioner has discharged his onus of proof it is first necessary to identify “the particular position concerned”, and then to determine whether each of the two decisions was made because of the inherent requirements of that position.

See also: *RailPro Services Pty Ltd v Flavel* [2015] FCA 504 at [124], (2015) 242 FCR 424 at 459 per Perry J.

1. As to the last aspect of s 351, namely s 351(2)(b) and the reference to “*the inherent requirements of the particular position*”. It may be accepted that “*the inherent requirements of the particular position*” is not a reference to every requirement of that position: cf. *X v Commonwealth* [1999] HCA 63, (1999) 200 CLR 177. There in issue, amongst other things, was a provision which provided that discrimination was not unlawful if an employee was “*unable to carry out the inherent requirements of the particular employment*”. McHugh J observed (at 187 to 188) in respect to this provision found in s 15(4) of the *Disability Discrimination Act* *1992* (Cth):

*The inherent requirements of the particular employment*

[31] Whether something is an “inherent requirement” of a particular employment for the purposes of the Act depends on whether it was an “essential element” of the particular employment. However, the inherent requirements of employment embrace much more than the physical ability to carry out the physical tasks encompassed by the particular employment. Thus, implied in every contract of employment are obligations of fidelity and good faith on the part of the employee with the result that an employee breaches those requirements or obligations when he or she discloses confidential information or reveals secret processes. Furthermore, it is an implied warranty of every contract of employment that the employee possesses and will exercise reasonable care and skill in carrying out the employment. These obligations and warranties are inherent requirements of every employment. If for any reason – mental, physical or emotional – the employee is unable to carry them out, an otherwise unlawful discrimination may be protected by the provisions of s 15(4).

[32] Similarly, carrying out the employment without endangering the safety of other employees is an inherent requirement of any employment. It is not merely “so obvious that it goes without saying” – which is one of the tests for implying a term in a contract to give effect to the supposed intention of the parties. The term is one which, subject to agreement to the contrary, the law implies in every contract of employment. It is but a particular application of the implied warranty that the employee is able to and will exercise reasonable care and skill in carrying out his or her duties.

[33] It would be extremely artificial to draw a distinction between a physical capability to perform a task and the safety factors relevant to that task in determining the inherent requirements of any particular employment. That is because employment is not a mere physical activity in which the employee participates as an automaton. It takes place in a social, legal and economic context. Unstated, but legitimate, employment requirements may stem from this context. It is therefore always permissible to have regard to this context when determining the inherent requirements of a particular employment.

(Footnotes omitted.)

Jutices Gummow and Hayne observed in respect to s 15(4) as follows (at 208):

[101] Section 15(4)(a) contains a number of elements that must be taken into account in seeking to apply it. First, the inquiry is whether “*because* of [the person’s] disability” he or she would be unable to carry out the inherent requirements of the particular employment. That is, the search is for a causal relationship between disability and being unable to carry out the inherent requirements of that employment. Secondly, the provision applies only if the person would be *unable* to carry out those requirements. No doubt inability must be assessed in a practical way but it is inability, not difficulty, that must be demonstrated. Thirdly, the requirements to which reference must be made are the “*inherent* requirements of the *particular* employment”.

[102] The reference to “inherent” requirements invites attention to what are the characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral. Further, the reference to “inherent” requirements would deal with at least some, and probably all, cases in which a discriminatory employer seeks to contrive the result that the disabled are excluded from a job. But the requirements that are to be considered are the requirements of the *particular* employment, not the requirements of employment of some identified type or some different employment modified to meet the needs of a disabled employee or applicant for work.

[103] It follows from both the reference to inherent requirements and the reference to particular employment that, in considering the application of s 15(4)(a), it is necessary to identify not only the terms and conditions which stipulate what the employee is to do or be trained for, but also those terms and conditions which identify the circumstances in which the particular employment will be carried on. Those circumstances will often include the place or places at which the employment is to be performed and may also encompass other considerations. For example, it may be necessary to consider whether the employee is to work with others in some particular way. It may also be necessary to consider the dangers to which the employee may be exposed and the dangers to which the employee may expose others.

(Footnote omitted, emphasis in original.)

1. Section 360 of the *Fair Work Act* provides as follows:

**Multiple reasons for action**

For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

1. Section 361 should also be noted. It provides as follows:

**Reason for action to be presumed unless proved otherwise**

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.

# The reasons for the dismissal

1. The reasons for the decision to terminate the employment of Mr Robinson are to be found in both a letter dated 8 May 2017 terminating his employment and the affidavit of Ms Pickles.
2. The letter sent to Mr Robinson which was dated 8 May 2017 and signed by Ms Pickles stated in part as follows:

**TERMINATION OF EMPLOYMENT**

I refer to your last email from 18 April 2017, with attached medical and Workcover certificates indicating that you are not fit to return to work.

You have not attended work for a period of 7 months, with 3 of these months constituting unpaid leave. In that time, you have refused multiple, reasonable attempts by Western Union Business Solutions (Australia) (the Company) to attend an independent assessment by Dr Istvan Schreiner, the company’s nominated practitioner.

Given 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 in light of the Company’s serious concerns about your capacity to return to work, the company has decided to terminate your employment. This termination will take effect on 8 May, and you will be paid two months’ pay in lieu of notice plus accrued but untaken leave entitlements.

1. The reasons as set forth in the affidavit of Ms Pickles were somewhat differently expressed. The reasons as set forth in the affidavit were as follows:

81. I formed the belief that the Applicant was unreasonably failing to cooperate with the Respondent’s attempts to obtain up-to-date specialist medical advice about his condition. The Applicant failed to provide the confirmation requested for three sets of potential appointments, which I took as a refusal to attend, given he also queried the need for the appointments. I believed that it was likely that he was working elsewhere.

82. I formed the view that, alternatively, if the Applicant was being genuine in his claims that he was unable to return to work, then that state of affairs would continue for the indefinite future, particularly given his unchanging and brief medical certificates. There had never been any indication, in any document from a medical professional, that the Applicant would shortly be able to return to work, or that he was making progress over his almost eight months of leave. There was no indication of what we could do to assist him to return to work or to make reasonable adjustments to assist him. The reference in some of the workcover certificates to contacting a rehabilitation provider (referred to in paragraphs [100] and [105] of the Applicant’s affidavit) was directed at the workers compensation insurer and this suggestion was not followed up by the Applicant or his doctor with me or Ms Chidiac.

83. I did not terminate the Applicant’s employment because he suffered a mental disability. I find this allegation insulting. I am very aware of the requirement to support people suffering from mental disability and am currently supporting a number of employees with this issue.

84. I did not believe that the Applicant was genuinely unwell and likely to improve in the foreseeable future.

1. Although inelegantly expressed in both the letter and at para [84] of the affidavit, Ms Pickles made clear in her oral evidence that reference was being made to her conclusion that Mr Robinson had unreasonably failed to attend for an independent medical examination and her concern or uncertainty as to Mr Robinson’s capacity to return to work. Ms Pickles also confirmed that the reasons for the termination were, in their entirety, set out in the 8 May 2017 letter.
2. Given the repeated requests that had been made of Mr Robinson to attend an independent examination, it is respectfully concluded that Ms Pickles as at March 2017 – when Mr Robinson was again directed to attend an assessment and was also told of the possibility of his employment being terminated if he did not – could reasonably come to the conclusion that Mr Robinson had unreasonably failed to co-operate with the attempts made by Western Union to organise such an examination. It is further concluded that, as at March 2017, Ms Pickles could also have genuine “*concern*s” as to his capacity to return to work. Notwithstanding the absence of any follow up request made of Mr Robinson after March 2017 with further dates and times to attend an assessment, it is further concluded that both conclusions remained reasonably available to Ms Pickles as at May 2017.

### The taking of adverse action – because of

1. It is nevertheless concluded that the dismissal of Mr Robinson on 8 May 2017 was the taking of adverse action in contravention of s 351(1) of the *Fair Work Act*.
2. The letter of termination and the affidavit evidence of Ms Pickles sets forth two reasons for the action taken by Western Union, namely:

* the “*unreasonable failure to cooperate with the Company’s attempts to obtain up-to-date, specialist medical advice*”;

and, however it be characterised or qualified:

* “*concerns*” as to Mr Robinson’s “*capacity to return to work*”.

The dismissal of Mr Robinson was unquestionably “*adverse action*”: *Fair Work Act* s 342(1) (Item (1)).

1. The more difficult question is whether his dismissal was “*because of*” his “*mental disability*”: s 351(1). But for the evidence of Ms Pickles that she “*did not terminate the Applicant’s employment because he suffered a mental disability*” and her evidence that she found such an allegation “*insulting*”, little difficulty would have been experienced in concluding that the facts fell within s 351(1) of the *Fair Work Act*.
2. Notwithstanding that evidence, however, it has ultimately been concluded that Mr Robinson has made out his claim that the termination of his employment was both the taking of “*adverse action*” and the taking of such action “*because of*” his mental disability.
3. The conclusion as to the reason for his dismissal is reached because no distinction can be drawn, with respect, between his “*capacity*” to return to work and his mental disability: cf. *Shizas* [2017] FCA 61, (2017) 268 IR 71.
4. The letter of termination and – in particular – the reference in that letter to “*concerns about* [*Mr Robinson’s*] *capacity to return to work*” – has (of course) to be understood in the factual context in which it was written. Part of that factual context, as expressed in the letter, was the past history of Mr Robinson’s responses to the requests made of him to attend medical examinations. Part of that factual context also included the content of the claims being made by Mr Robinson, namely his repeated claims that he was “*unwell*” and claims that he was “*suffering a psychiatric condition*”. In the absence of any other reason going to the “*capacity*” of Mr Robinson to return to work, the reference in the 8 May letter to “*capacity*” can be nothing other than a concern occasioned (at least in part) by the claimed “*psychiatric condition*”. Other than more generally expressed claims as to his feeling “*unwell*”, Mr Robinson was advancing no other basis upon which he would be lacking in capacity to resume his employment. His claimed “*psychiatric condition*” formed part of the decision-making processes of 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.
5. To employ the language of Katzmann J in *Shizas*, 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: cf. [2017] FCA 61 at [119], (2017) 268 IR at 95. Concurrence is expressed with the “*difficulty*” expressed by Katzmann J “*with the notion that ‘disability’ can ever exclude the manifestations of a condition*”: [2017] FCA 61 at [119], (2017) 268 IR at 95.
6. “*Adverse action*” was, accordingly, taken against Mr Robinson because of, or at least for a reason which included, a “*manifestation*” of his claimed mental disability and hence for reasons which included his mental disability: *Fair Work Act* s 360. Part of the reasoning process which led to the taking of that action included “*concerns*” as to Mr Robinson’s “*capacity to return to work*”. It matters not, with respect, whether the reasoning process is perhaps better expressed in Ms Pickle’s affidavit than in her letter and whether the “*concerns*” as to his “*capacity* *to return to work*” was but an “*alternative*” or even a separate and “*fall-back*” reason for the action taken. Part of the reasoning process included a consideration given to his “*capacity*” to return to work: *Fair Work Act* s 360; cf. *Barclay* [2012] HCA 32 at [101], (2012) 248 CLR 500 at 534 to 535 per Gummow and Hayne JJ.
7. That was sufficient to make out a contravention of s 351(1) of the *Fair Work Act*.
8. Rejected are the submissions advanced on behalf of Western Union that:

* “*concerns*” as to a “*capacity to return to work*” was to be distinguished from the taking of action because of “*concerns*” that a person had a “*mental disability*” – the asserted difference being between concerns as to a person’s inability to work and taking action because of concerns that a person had a “*disability*”; and
* the taking of action by reference to “*concerns*” expressed was not the taking of action “*because of*” a disability in circumstances where, so it was said, Ms Pickles did not know one way or another whether Mr Robinson was in fact suffering from a disability.

1. Also rejected is a separate but related submission that the action taken fell outside s 351(1) because the action was “*taken* *because of the inherent requirements of the particular position concerned*” and hence fell within the exception in s 351(2)(b). If, contrary to its primary submission that “*concerns*” as to an incapacity to return to work was not sufficient to fall within s 351(1), the fall-back submission was, in effect, that if “*concerns*” as to incapacity was sufficient to fall within s 351(1) it was also sufficient to satisfy s 351(2)(b). The effect of such an argument was that the moment a medical certificate was provided which stated that an employee was unfit to return to work in the foreseeable future, it necessarily followed that the employee could not satisfy the “*inherent requirements*” of his employment – namely his capacity to undertake any work at all.
2. If that submission prevailed, the broader the reach of s 351(2)(b), the more reduced would become the protection afforded by s 351(1). Some difficulty would have been expressed in respect to such a construction of ss 351(1) and (2)(b). A more confined operation of s 351(2)(b) may well have been more consistent with permitting s 351(1) a broader scope of operation.
3. An identification of the “*inherent requirements*” of a position are not necessarily to be determined by reference to the express terms of the contract of employment: cf. *Qantas Airways Ltd v Christie* [1998] HCA 18, (1998) 193 CLR 280. In the context of considering a contract of employment of a pilot who had attained the age of sixty years, Brennan CJ there observed (at 284):

[1] … I agree that a stipulation in a contract of employment is not necessarily conclusive to show whether a requirement is inherent in an employee’s position. The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer’s undertaking and, except where the employer’s undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation. In so saying, I should wish to guard against too final a definition of the means by which the inherent nature of a requirement is determined. The experience of the courts of this country in applying anti-discrimination legislation must be built case by case. A firm jurisprudence will be developed over time; its development should not be confined by too early a definition of its principles.

Justice Gummow in that case likewise ascribed to the phrase “*inherent requirements*” a meaning which “*suggests an essential element of that spoken of rather than something inessential or accidental*”: [1998] HCA 18 at [114], (1998) 193 CLR at 318.

1. Wherever the line may otherwise have been drawn, however, an employer who takes action because an employee is unable by reason of a mental disability to carry out the terms of his employment may well fall within the protection afforded by s 351(2)(b): cf. *X v Commonwealth* [1999] HCA 63 at [31], (1999) 200 CLR at 187 to 188 per McHugh J.
2. There nevertheless remain difficulties with defining precisely the outer limits of what constitute the “*inherent requirements*” of a position.
3. But those difficulties need not be resolved in the present proceeding.
4. Those difficulties need not be resolved in the present case because no decision had been taken by Ms Pickles as to the actual capacity that Mr Robinson could bring to his employment and whether he had the capacity to undertake the “*inherent requirements*” of his position. Although the taking of adverse action to terminate the employment of Mr Robinson included as part of the reasoning process “*concerns*” about his “*capacity to return to work*” – and hence fell within s 351(1) – no decision had been taken as to the extent of his incapacity or (indeed) whether or not he was in fact incapacitated for work. To fall within the reach of s 351(2)(b) a decision, it is considered, must be taken as to whether an employee can or cannot satisfy “*the inherent requirements of the particular position*”. It is only when such a decision has been taken that it can be concluded that s 351(1) “*does not apply*” to the action taken “*because of*” those inherent requirements.
5. The position of Ms Pickles at the stage in the decision-making process when Mr Robinson’s employment was terminated was correctly stated in her 8 May 2017 letter – the letter correctly stating that she had as at that date no more than “*concerns*” as to the capacity of Mr Robinson to return to work. The position at that stage in her decision-making process was only reinforced by her evidence in cross-examination that she was in no position to form a view that Mr Robinson could not satisfy the inherent requirements of the position without more information including the independent assessment that Western Union had long been seeking.
6. Given this conclusion, it is unnecessary to resolve the further but related submission advanced on behalf of Mr Robinson that any decision – if reached – would have to be the result of a “*rational assessment*” and that no such rational assessment was undertaken in this case.

### The taking of adverse action – the reverse onus of proof

1. The conclusion reached in respect to the correct construction and application to the facts of s 351 self-evidently depends upon the reasoning in *Shizas* that the term “*disability*” cannot exclude the “*manifestations*” of that “*disability*”: [2017] FCA 61 at [119], (2017) 268 IR at 95. It is respectfully concluded that the reasoning of Katzmann J in *Shizas* is correct and should be followed and applied to the facts of the present case.
2. But that reasoning inevitably confronts the evidence of Ms Pickles that she “*did not terminate the Applicant’s employment because he suffered a mental disability*” and her further evidence that she found such an allegation “*insulting*”. The reasoning pursued in the present case, as it was in *Shizas*, involves construing the evidence of Ms Pickles as not relying upon the “*mental disability*” of Mr Robinson but impermissibly taking adverse action because of a “*manifestation*” of that disability.
3. The genuineness of the views held by Ms Pickles is accepted. She presented as a witness who genuinely found offensive the notion that she would take action by reference to a person’s mental disability. But the conclusion that has been reached is that – no matter how genuinely Ms Pickles believed that action should not be taken because of a disability – she nevertheless fell foul of s 351(1) by taking action motivated in part by a “*manifestation*” of Mr Robinson’s disability, namely a concern as to his “*capacity*”.
4. In case this construction of her evidence be erroneous, it has been considered prudent to go on and express some tentative views as to whether her evidence would otherwise have been sufficient to discharge the “*reverse onus of proof*” imposed by s 361. Had that question arisen, it would have been concluded that the challenges mounted to her evidence on the basis of her credibility would have been rejected.
5. There were a number of different lines pursued in her cross-examination. Two of these lines included:

* a challenge to her independence, be it expressed in terms of independence or in terms of departing from a position of a more neutral buffer between (in this case) the interests of an employee and those of the employer; and
* the contention that nothing much had changed as between March and May 2017 and that the failure to follow up the 13 March 2017 email of Ms Chidiac could not be accurately characterised as simply a “*misstep*”.

1. The first of these lines of challenge to the evidence of Ms Pickles started with her acceptance of the proposition that, as a human resources professional, her role was to act “*as a kind of neutral intermediary*” and that it was of importance “*to maintain a measure of independence or neutrality*”. Having established that as the starting point, Counsel for Mr Robinson sought to establish that she departed from that position of “*neutrality*”. One instance seized upon was the statement she gave to Ms Lynskey when Mr Robinson’s worker’s compensation claim was being investigated.
2. The second of these lines of challenge involved a challenge to the failure to follow up the 13 March 2017 email, which was sought to be described by Ms Pickles as a “*misstep*”.
3. It was unquestioningly a serious shortcoming in the decision-making process not to follow up the 13 March 2017 email by obtaining further possible dates from Dr Schreiner upon which Mr Robinson could potentially attend for an examination. But whether or not Ms Pickles proceeded upon an erroneous assumption as to a matter of fact, her reasons for dismissing Mr Robinson remained as stated in the 8 May 2017 letter. And that part of the reasoning process which relied upon a failure to co-operate by not attending an examination by Dr Schreiner remained amply supported by the history of appointments suggested and the failure on the part of Mr Robinson to attend any.
4. The suggestion that a decision had been taken in March 2017 to terminate the employment of Mr Robinson but not notified until May 2017 – the inference being that the notification of the decision was deliberately deferred until May 2017 – was rejected by Ms Pickles.
5. Part of Ms Pickles’ evidence in cross-examination followed her being taken through the sequence of emails between Mr Robinson and Ms Chidiac. The following exchange then took place:

So at 13 March, this is the state of play, isn’t it: the first thing is, you don’t know whether David is fit to come back to work?—That’s true.

To determine whether he is fit you needed the opinion of an independent expert in occupational medicine experienced in cases of long-term absences?—That was our request.

And as at 13 March, David had offered to give you whatever information you needed from his condition, including by giving you an authority to contact those who had been treating him to that date?—He did invite us to do that.

And in terms of the medical examination, he had said he’s more than happy to attend…?—He did.

… asked some questions, Chantal answers the questions and says – and I’m paraphrasing, of course – that she will get some dates and get back to David?—She did.

All right. Can you just go – sorry to do this. Go back to the 8 March email. Why didn’t you sack David on 8 March?—Page? We were asking David to participate in an independent assessment.

Why didn’t you sack David on 8 March?—Because we were making an attempt to return him to the workplace by asking him to go through an independent evaluation.

Should you have sacked him on 8 March?—I don’t believe so.

Do you think there was a basis to dismiss him on 8 March?—I don’t believe there was.

Do you think there was a basis to dismiss him for lack of cooperation as at 8 March?—I believe we were heading in that direction.

So at 8 March, do you say there was a basis to dismiss David for lack of cooperation?—I believe we were moving in that direction. We didn’t make the decision to do it that day because we were still in conference with him, giving him opportunities and available appointments.

Is the answer, “Yes” or “No”?—The answer is that we didn’t.

There was no basis to dismiss David as of 8 March for lack of cooperation?—He wasn’t being cooperative at that point.

Ms Pickles, I’ve asked the question four times and you won’t give me a “Yes” or “No” answer. Can you do it this time, please. As at 8 March, do you say there was a basis to dismiss David for lack of cooperation?—I believe he was being uncooperative at that time and, yes.

Your answer is now “Yes”, is it?—My answer is yes.

Why didn’t you do it?—Because we wanted to return him to the workplace.

Look, whatever lack of cooperation troubled you had already occurred by 8 March; correct?—He was being uncooperative until 8 March.

And if you thought he should have been sacked for lack of cooperation you would have sacked him on 8 March?—We were attempting to return him to the workplace by asking him to go through an independent evaluation.

Whatever you were doing, in your own mind, there was no basis to sack him for lack of cooperation as at 8 March?—There was, because he was being uncooperative.

Why didn’t you do it?—Because we were trying to return him to the workplace.

Ms Pickles, you’ve just told a lie. When you said there was a basis, in your mind, to sack him as at 8 March, you weren’t telling the truth?—That’s not true. I believed him to be uncooperative at that time. I believe that we had made several attempts to have him see a doctor – an independent doctor – and that he was making – that he didn’t respond to some – to some emails and did respond to others, and never went to one of the appointments that we had made for him.

That had all happened before 8 March, hadn’t it?—It had.

There was then a short break in the cross-examination. The cross-examiner returned to his theme of what had happened between March and May 2017 and the email sent by Ms Chidiac on 13 March 2017. The cross-examination continued:

You didn’t see any other email from Chantel saying, “Here are the dates.”?—I didn’t.

You had no basis whatsoever to form a view that Chantel had contacted David and that he had refused to attend?—I believe she had.

There is no rational basis whatsoever for you to come to that view?—I disagree.

Well, can you identify any fact which would lead you to the view that Chantel had contacted David and that he had refused to attend?—It was my belief that she had. It was my belief that she had followed through, as was the practice the several other times before, and offered up those appointment times.

Let me try this again. You knew all the contact was by email; correct?—Yes.

You didn’t see any further email from Chantel after 13 March?—She didn’t because she didn’t send it.

You knew if Chantel was going to contact David, it was only going to be by email?—Yes.

You hadn’t seen any such email?—I hadn’t.

There was no rational basis for you to form the view that David had failed to attend an appointment?—Well, rational or not, I had formed that view.

Are you able to give his Honour any reason why you would have come to that view?—I came to the view because Chantel is a good worker and does what is required of her on almost all occasions and on this occasion she failed to follow through on something she herself thought she had. She has a number of things going on, 230 employees in her sights. She failed to follow through. I believe she had.

Is there any other basis for the opinion that you say you held about his lack of cooperation after 8 March?—Judging from the previous behaviour, it seemed normal.

Okay. When did you form the view that David had failed to cooperate post 8 March?—In early May.

What happened in early May?—As what happens in each period of payroll and discussions and decisions around employees. In that period of time we took some discussion. I took discussion with Chantel and some internal guidance. And the decision was made to terminate based on not hearing back yet again.

Spoke to Chantel about David?—Yes.

In May?—Yes.

Chantel ever told you any lies?—Chantel is not in the habit of telling me lies.

Has Chantel ever told you any lies?—I can’t answer that, counsel. How do I know that?

Okay. Chantel lie to you and say, “Look, I did reach out to David and he refused to cooperate.”?—She never lied.

Did she say that to you?—She admitted her error immediately as it was – as she became aware of it.

When?—After.

Okay. I’m asking you about the conversation you say you had with her in early May?—We had a conversation that led me to believe that he had not come back on the appointment times. At that time I believe she thought that she had. Having had that action and called the doctor and called for multiple appointment times many times previously, she was in a position of thinking she had done that.

You have a conversation. You decide to sack this guy as a result, do you, as a result of this conversation?—It was a result of many months of attempting contact and attempting to have him see a doctor.

You make the decision in early May; is that right?—We made the decision in May.

And following a conversation you had with Chantel, the person who had been dealing with him?—We had a conversation in May. I had the conversation with Chantel and we made a decision to proceed with the termination.

You’re seriously suggesting that you just didn’t bother to check whether Chantel had actually contact this fellow?—I believe that she had. She thought she had.

Based on what?—On her previous good performance and on his previous denials to do so.

References to “*Chantel*” are understood to be references to Ms Chidiac.

1. The answers given by Ms Pickles are accepted.
2. It is concluded that as at March 2017, Ms Pickles had suspicions as to Mr Robinson’s fitness (or willingness) to return to work but made no decision to terminate his employment until May 2017.
3. It should finally be noted that Ms Pickles denied that the decision to terminate Mr Robinson’s employment was influenced by an impediment to taking any such action during what was characterised as a three month period during which an employee on unpaid leave could not be dismissed. Her evidence in that respect was as follows:

Now, what is the significance of the date of 8 May?—The significance, from my perspective, is that it’s before payroll. Payroll runs in our business on 15 May. We make decisions as to what needs to be changed by the 10th.

Well, why did you sack him on 8 May and not 8 April?—We were giving him a chance to respond.

To…?—To the appointments that I believed had been set for him.

Okay. You say it’s purely a coincidence that the 8 May is three months virtually to the day after he went on unpaid leave?—I’m aware of the relevance. I don’t know if I would say it’s a coincidence. It’s how the case was being managed.

When you say you’re aware of the relevance, what do you mean by that?—The three-month period of time after which somebody is being paid and not being paid until – and what action we can take with that employee. Those things were not in my mind, and they’re not in my mind now.

Okay. So you’re aware that – it’s your view, your understanding, that when you go onto unpaid leave, for the first three months you can’t be sacked for temporary absence because of illness, but once that period expires, you can be?—That’s the law.

And you say that was not a factor in your thinking; it just so happened?—I see the – I see the relationship, but 8 May is the date at which we made the decision to terminate.

You waited until the three months ended and then you sacked him?—Well, we didn’t wait. We waited until there was ample time for David to come back to us and attend the appointments that we thought we had set for him.

That just happened to be three months and two days?—8 May is the date that termination occurred.

And it just happened, you say, to be three months and two days after going on unpaid leave?—Well, if that’s the calculation then it happens to be three months and two days.

Can I suggest to you that what happened was you waited until that period expired and then you pulled the trigger?

There was then an objection and the cross-examination on this topic thereafter continued:

Ms Pickles, the proposition that I’m putting to you is that it wasn’t a coincidence that David was sacked three months almost to the day after he went on unpaid leave?—It wasn’t a coincidence is what you’re saying.

Yes?—Well, I believe it was.

1. Again, that evidence of Ms Pickles is accepted. Her decision was not influenced by any consideration of whether Mr Robinson prior to around 8 May 2017 could not be dismissed because any time before then was within a 3 month period in which such action could not be taken.
2. Although the evidence of Ms Pickles has been accepted, it may be observed that she was defensive and cautious as a witness. But it is not considered that she was doing anything other than giving a truthful and accurate account of her reasons for terminating the employment of Mr Robinson.
3. A suggestion in Mr Robinson’s email sent on 8 March 2017 that the “*threaten*[*ed*] *termination*” was “*instigated by* [*his*] *recent decision to make a claim against Western Union*” was not pursued by Counsel for Mr Robinson. That suggestion can thus be discarded from further consideration.
4. In summary form, and confined to the questions as to when a decision had been taken to terminate the services of Mr Robinson, it is concluded that:

* Ms Pickles had “*suspicions*” in early March 2017 as to the medical condition of Mr Robinson but retained an open mind as to what decision should be made and a mind which awaited the provision of further input from Dr Schreiner (assuming Mr Robinson attended an examination) and an input as to what (if any) return to work program was to be considered; and
* the decision to terminate the services of Mr Robinson was taken in May 2017 and taken by reference to the “*payroll runs*” within Western Union and the need to make a decision prior to the 10th day of each month.

The fact that there was a serious “*misstep*” in not following up with further dates for Mr Robinson to attend an appointment with Dr Schreiner, as expressly mentioned in the 13 March 2017 email, does not occasion reason to depart from any of these findings.

## THE *COMPETITION & CONSUMER ACT*

1. Schedule 2 of the *Competition Act* is the *Australian Consumer Law*.
2. Within Sch 2, s 20 provides as follows:

**Unconscionable conduct within the meaning of the unwritten law**

(1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.

(2) This section does not apply to conduct that is prohibited by section 21.

As at the time of Mr Robinson’s dismissal, Section 21 provided in part as follows:

**Unconscionable conduct in connection with goods or services**

(1) A person must not, in trade or commerce, in connection with:

* + - 1. the supply or possible supply of goods or services to a person (other than a listed public company); or
      2. the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

…

(4) It is the intention of Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court’s consideration of the contract may include consideration of :

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

1. It is concluded that the reliance placed upon ss 20 or 21 of the *Australian Consumer Law* is misplaced and that the claim fails. The pleadings, it may be noted, contain some inconsistency. The *Originating Application* seeks a declaration of contravention of s 21. However, the *Amended Statement of Claim* pleads a contravention of s 20. But it matters not which provision is relied on.
2. The primary reason for concluding that reliance on either s 20 or s 21 is misplaced is that as a matter of general principle neither:

* the termination of an employee’s contract of employment generally; nor
* the termination of a contract of employment contrary to what was loosely described in cross-examination as “*procedural fairness*”,

could be properly characterised as an act of a corporate employer engaged in “*trade or commerce*”.

### The unconscionable conduct as pleaded

1. The starting point for resolving the claim founded upon s 20 of the *Australian Consumer Law* is, self-evidently, the pleadings.
2. The *Amended Statement of Claim* relevantly pleads as follows:

Unconscionable conduct

31. On 13 March 2017 Western Union represented to Mr Robinson that it:

(a) was uncertain of his fitness for work;

(b) would take steps to arrange a medical assessment in order to determine his fitness for work; and

(c) would contact him once its chosen doctor’s availability was known.

32. Western Union did not subsequently:

(a) contact Mr Robinson with Dr Schreiner’s availability;

(b) arrange a medical assessment;

(c) take steps to assess Mr Robinson’s fitness for work;

(d) advise Mr Robinson that it no longer wished to assess his fitness for work;

(e) advise Mr Robinson that it proposed to dismiss him;

(f) give Mr Robinson an opportunity to demonstrate his fitness for work;

(g) give Mr Robinson an opportunity to be heard in relation to its decision to dismiss him; or

(h) communicate at all with Mr Robinson.

33. Instead Western Union waited until the Protected Period ended and then dismissed Mr Robinson.

34. The Contract restrains Mr Robinson from being employed by or interested in any firm which provides services similar to or competitive with Western Union or any related body corporate of Western Union.

35. As a result, Mr Robinson is unable to obtain other employment in the field of financial services before 8 November 2017.

36. Mr Robinson was at a special disadvantage in dealing with Western Union, including because he was:

(a) ill;

(b) physically absent from work due to illness; and

(c) required to follow any lawful and reasonable direction by Western Union.

37. Western Union’s conduct in dismissing Mr Robinson in the circumstances identified at paragraphs [31]–[33] above was conduct which was:

(a) in trade and commerce; and

(b) in all the circumstances, unconscionable conduct within the meaning of s20 of the Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

38. Mr Robinson suffered loss and damage as a result of Western Union’s unconscionable conduct, including:

(a) loss of wages;

(b) exacerbation of his mental illness; and

(c) hurt, distress and humiliation.

### Trade or commerce

1. The words “*trade*”and “*commerce*” have been said to have about them a “*chameleon-like hue*”: *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 603 per Mason CJ, Deane, Dawson and Gaudron JJ (“*Concrete Constructions*”). That conduct which falls within the phrase “*trade or commerce*” and that which falls outside the phrase has been productive of some uncertainty. But that which is certain is that not all conduct engaged in by a corporation which is involved in trading or commercial activities is necessarily conduct “*in trade or commerce*”.
2. When addressing s 52 of the former *Trade Practices Act 1974* (Cth), Mason CJ, Deane, Dawson and Gaudron JJ in *Concrete Constructions* (1990) 169 CLR 594 at 602 to 604 set forth some general guidelines as follows:

The phrase “in trade or commerce” in s. 52 has a restrictive operation. It qualifies the prohibition against engaging in conduct of the specified kind. As a matter of language, a prohibition against engaging in conduct “in trade or commerce” can be construed as encompassing conduct in the course of the myriad of activities which are not, of their nature, of a trading or commercial character but which are undertaken in the course of, or as incidental to, the carrying on of an overall trading or commercial business. If the words “in trade or commerce” in s. 52 are construed in that sense, the provisions of the section would extend, for example, to a case where the misleading or deceptive conduct was a failure by a driver to give the correct handsignal when driving a truck in the course of a corporation’s haulage business. It would also extend to a case, such as the present, where the alleged misleading or deceptive conduct consisted of the giving of inaccurate information by one employee to another in the course of carrying on the building activities of a commercial builder. Alternatively, the reference to conduct “in trade or commerce” in s. 52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. So construed, to borrow and adapt words used by Dixon J. in a different context in *Bank of N.S.W. v The Commonwealth* [(1948) 76 CLR 1 at 381], the words “in trade or commerce” refer to “the central conception” of trade or commerce and not to the “immense field of activities” in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business.

As a matter of mere language, the arguments favouring and militating against these alternative constructions of s. 52 are fairly evenly balanced. The scope of the prohibition imposed by s. 52 is, however, governed not only by “the terms in which it is created” but by “the context in which it is found” … In that regard, it is of particular significance that the words “trade” and “commerce” have “about them a chameleon-like hue, readily adapting themselves to their surroundings” (*O’Brien v Smolonogov* [(1983) 53 ALR 107 at 113], quoting *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* [(1982) 150 CLR 355 at 378 to 379]). Section 52(2) precludes limiting the scope of s. 52(1) by implication drawn from the contents of other provisions of Pt V. Nonetheless, when the section is read in the context provided by other features of the Act, which is “An Act relating to certain Trade Practices”, the narrower (i.e. the second) of the alternative constructions of the requirement “in trade or commerce” is the preferable one. Indeed, in the context of Pt V of the Act with its heading “Consumer Protection”, it is plain that s. 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business. Put differently, the section was not intended to impose, by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities. What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public. In some areas, the dividing line between what is and what is not conduct “in trade or commerce” may be less clear and may require the identification of what imports a trading or commercial character to an activity which is not, without more, of that character. The point can be illustrated by reference to the examples mentioned above. The driving of a truck for the delivery of goods to a consumer and the construction of a building for another pursuant to a building contract are, no doubt, trade or commerce in so far as the relationship between supplier and actual or potential customer or between builder and building owner is concerned. That being so, to drive a truck with a competitor’s name upon it in order to mislead the customer or to conceal a defect in a building for the purpose of deceiving the building owner may well constitute misleading or deceptive conduct “in trade or commerce” for the purposes of s. 52. On the other hand, the mere driving of a truck or construction of a building is not, without more, trade or commerce and to engage in conduct in the course of those activities which is divorced from any relevant actual or potential trading or commercial relationship or dealing will not, of itself, constitute conduct “in trade or commerce” for the purposes of that section. That being so, the giving of a misleading handsignal by the driver of one of its trucks is not, in the relevant sense, conduct by a corporation “in trade or commerce”. Nor, without more, is a misleading statement by one of a building company’s own employees to another employee in the course of their ordinary activities. The position might well be different if the misleading statement was made in the course of, or for the purposes of, some trading or commercial dealing between the corporation and the particular employee.

1. For present purposes, it is concluded that a decision to terminate the services of an employee upon the bases expressed by Ms Pickles is not conduct “*in trade or commerce*” within the meaning of ss 20 or 21 of the *Australian Consumer Law*.
2. The authorities, however, do not all speak with one voice.
3. The preferable line of authority, it is respectfully considered, may conveniently start with *Mulcahy v Hydro-Electric Commission* (1998) 85 FCR 170. Former employees of the Commission had there commenced a proceeding in which reliance was placed (*inter alia*) upon the *Trade Practices Act* and the *Fair Trading Act* *1990* (Tas). Heerey J concluded that “*the relationship between the Hydro and each of the applicants was that of employer and employee*”: (1998) 85 FCR at 213. However, in rejecting the misleading and deceptive conduct claim, his Honour also concluded that there “*were no trade or commercial dealings between them in the relevant sense*”: (1998) 85 FCR at 213.
4. His Honour reached a similar conclusion in *Martin v Tasmania Development and Resources* [1999] FCA 593, (1999) 163 ALR 79. An employee’s services had there been terminated. Reliance upon s 52 of the *Trade Practices Act* was rejected. In so concluding, Heerey J referred to *Concrete Constructions* and continued as follows:

[77] … The majority in that case clearly rejected the wider construction of “in trade or commerce”, which would extend to virtually any activity of a corporation. It is true that a building company could not earn income unless it had workers who received instructions from foremen. But that was not enough to bring the alleged misrepresentation within the concept of “trade or commerce”. Similarly, [Tasmania Development and Resources] could not carry out its activities of promoting Tasmanian trade and development (which activities themselves I assume for present purposes to be in trade or commerce) unless it engaged staff. Nevertheless such engagements and the necessary associated incidental negotiations, however necessary, are not in themselves of a trading or commercial nature. They are internal affairs of [Tasmania Development and Resources].

1. After citing *Concrete Constructions*, Rothman J in *Downe v Sydney West Area Health Service (No 2)* [2008] NSWSC 159, (2008) 71 NSWLR 633 at 649 similarly concluded as follows in respect to a claim raised by Dr Downe as to a contravention of s 51AA of the *Trade Practices Act*:

[232] While it is arguable that the removal of the Director of a Unit, providing services to the public, which Director was providing those services, may be an act in trade or commerce, on current authority, the act in trade or commerce is the impact upon the public, not the treatment of the employee. In the present situation, the relationship between the Health Service and Dr Downe was that of employer and employee. Dr Downe has failed to prove that there were trade or commercial dealings, as explained in *Concrete Constructions v Nelson*, between her and the Health Service in any relevant sense. Section 51AA of the *Trade Practices Act* (Cth) does not apply to the conduct of the Health Service in relation to Dr Downe.

Although unnecessary to do so, his Honour further expressed the following conclusion in respect to that claim (at 647):

[237] In the current proceedings, Dr Downe does not point to any special disability that prevented her from exercising her own mind and making a judgement as to her own best interests. It is unnecessary, despite the request so to do, in those circumstances, and because of the earlier conclusion as to the applicability of the *Trade Practices Act* (Cth), to discuss whether s 51AA of the *Trade Practices Act* (Cth) is confined to the equitable remedy for unconscionable conduct or provides a broader remedy, provided by the *Trade Practices Act* (Cth), where unconscionable conduct exists and in which equity would grant some relief, eg estoppel: see *GPG (Australia Trading) Pty Ltd v GIO Australia* *Holdings Ltd*  (2001) 117 FCR 23 at [113]–[126], per Gyles J and the cases therein cited.

1. In respect to what was characterised as an “*alternative claim*” under the former s 51AC of the *Trade Practices Act*, in *Macdonald v Australian Wool Innovation Ltd* [2005] FCA 105 (“*Macdonald*”) Weinberg J concluded:

[279] The applicants also failed to make good their other alternative claim under s 51AC. There was nothing to suggest that they laboured under any special disability, or were placed in some special situation of disadvantage. They were both intelligent and experienced men, professional and highly educated, perfectly well able to look after their own interests. In hindsight, they acted with perhaps less prudence than they might have done. That is a far cry from making good a claim of unconscionability.

[280] It goes without saying that Mr Dorber’s opinion that AWI had acted unconscionably towards the applicants by failing to discharge its obligations under the contract has no particular legal significance. Any promise that is deliberately broken could easily be characterised as “unconscionable”. That is not the sense in which the term is used in s 51AC.

[281] It follows that had the applicants relied solely upon their claim of unconscionability, they would have failed.

1. The contrary view, and the view relied upon by Counsel on behalf of Mr Robinson, was that of Wilcox J in *Barto v GPR Management Services Pty Ltd* (1991) 33 FCR 389. His Honour there also referred to the observations expressed by the majority in *Concrete Constructions* and continued (at 393):

I admit to some difficulty in discerning precisely what activities the majority would regard as being “in trade or commerce” and what activities it would not. It is clear enough, on the one extreme, that conduct which is not inherently a commercial activity, such as driving a truck or giving information about the safety of a building site, is not conduct “in trade or commerce” simply because, in the particular case, it is performed in the course of a larger activity for commercial gain. It seems equally clear, on the other extreme, that conduct which would plainly be conduct “in trade or commerce” if carried out vis-à-vis a stranger does not lose that characteristic simply because the party with whom the corporation is dealing happens to be an employee. To take an example mentioned in argument in this case: if a company which carried on business as a car dealer sold a motor car to an employee, that would be conduct “in trade or commerce”, so the company could be make liable under s 52 in respect of any loss-causing misrepresentations. It is true that, in one sense, the transaction is an “internal” one. But the *Concrete Constructions* majority expressly left open the position “if the misleading statement was made in the course of, or for the purposes of, some trading or commercial dealing between the corporation and the particular employee”.

1. In the absence of any binding decision of this Court it is concluded that the views of Heerey and Rothman JJ should prevail. Those views, it is respectfully considered, are more in accordance with the observations of the majority in *Concrete Constructions* and the generally expressed principle that all activities of a corporation otherwise engaged in trading or commercial activities are not for that reason alone “*in trade or commerce*”. Some activities of a corporation remain “*internal*” to the corporation and fall outside the rubric of “*trade or commerce*” and remain properly characterised as personal to the relationship of employer and employee.

### Unconscionable conduct

1. The remaining limb to the argument advanced on behalf of Mr Robinson, namely that the conduct in terminating his services was “*unconscionable*”, need not be resolved.
2. Had it arisen for decision, some reservation is expressed as to whether it would in any event have been resolved in his favour notwithstanding the fact that s 20 is expressed in terms of conduct that is “*unconscionable, within the meaning of the unwritten law*” and the fact that s 21(4)(a) expressly provides that s 21 “*is not limited by the unwritten law relating to unconscionable conduct*”.
3. Unconscionability refers (*inter alia*) to an unconscientious use of a superior position or bargaining power: *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461 (“*Amadio*”). Mason J there explained that:

relief on the ground of “unconscionable conduct” is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage, e.g., a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink.

1. In *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* [2003] HCA 18, (2003) 214 CLR 51 at 72 to 73 (“*Berbatis*”), Gummow and Hayne JJ, when considering the former s 51AA of the *Trade Practices Act*, observed:

*The term “unconscionable”*

[42] The term “unconscionable” is used as a description of various grounds of equitable intervention to refuse enforcement of or to set aside transactions which offend equity and good conscience. The term is used across a broad range of the equity jurisdiction. Thus, a trustee of a settlement who misapplies the trust fund and the fiduciary agent who makes and withholds an unauthorised profit may properly be said to engage in unconscionable conduct. The relief given by equity against the imposition of monetary penalties and the forfeiture of proprietary interests has been said to reflect the attitude of equity to overreaching and unconscionable dealing, as well as to accident, mistake and surprise. The remedy of rescission may reflect the characterisation as unconscionable of the conduct of the party seeking to hold the plaintiff to a contract entered into under the influence of innocent misrepresentation or unilateral mistake. Again, the various doctrines and remedies in the field of estoppel, at a general level, may be said to overcome the unconscionable conduct involved in resiling from the representation or expectation induced by the party estopped.

[43] It will be unconscientious for a party to refuse to accept the position which is required by the doctrines of equity. But those doctrines may represent, as the above examples indicate, the outcome of an interplay between various themes and values of concern to equity. The present editor of *Snell* has noted the use of the terms “unconscionable” and “unconscientious” “in areas as diverse as the nature of trusteeship and the doctrine of laches”; he rightly observed that “this may have masked rather than illuminated the underlying principles at stake”.

(Footnotes omitted.)

Their Honours continued (at 74):

[46] It is unnecessary to resolve these questions concerning the reach of s 51AA because, as remarked earlier in these reasons, and consistently with what had been said in the Explanatory Memorandum, the litigation was conducted on the footing that the facts fell within that well-established area of equitable principle concerned with the setting aside of transactions where unconscientious advantage has been taken by one party of the disabling condition or circumstances of the other. In such situations, and as will be further discussed below, equity intervenes not necessarily because the complainant has been deprived of an independent judgment and voluntary will, but because that party has been unable to make a worthwhile judgment as to what was in the best interests of that party.

1. Unconscionability “*involves a higher moral standard than unfairness or unjustness*”: *Parker v Switchee Pty Ltd* [2018] FCA 479 at [77] (“*Switchee*”).

### Unconscionability & Mr Robinson

1. Although unnecessary to decide, difficulty would also have been experienced in reaching a conclusion that the conduct as pleaded could be characterised as “*unconscionable*”.
2. It may for present purposes be accepted that, as pleaded in para [36] of the *Amended Statement of Claim*, Mr Robinson was:

* ill;
* physically absent from work due to illness; and
* required to follow any lawful and reasonable direction by Western Union.

The *Amended Defence* denies para [36], but that denial can presently be placed to one side.

1. The difficulty that would have been experienced in concluding that the conduct of Western Union, as pleaded, was “*unconscionable*” would essentially derive from the fact that prior to 8 May 2017 Mr Robinson had:

* been invited to advise Western Union as to when he was anticipating returning to work and on at least two occasions had not responded to that inquiry;
* not attended any of the examinations which Western Union had requested that he attend;
* had explained to him the reasons why Western Union was requesting that he attend an examination; and
* responded to requests that he attend an examination by a specialist nominated by Western Union by either offering something which was not what had been requested by Western Union (namely, access to his own medical practitioners) or (on a view most favourable to him) requested Western Union provide him with answers to the “*few questions*” posed in his email on 8 March 2017.

Although each of these matters preceded 8 May 2017, any argument founded upon a generally expressed failure to afford “*procedural fairness*” strikes hollow. Mr Robinson had over a period of time extending from January through to March 2017 been given every opportunity to accede to the requests made of him by Western Union. The accepted “*misstep*” in not following up the 13 March 2017 email can properly be characterised as just that, a “*misstep*”. It certainly of itself is not sufficient to found any conclusion of “*unconscionability*”.

1. Even though the concept of unconscionability may not for the purposes of s 21 be confined to the equitable concept, and even though the concept of unconscionability for the purposes of s 21 may extend to a procedural irregularity of the kind that occurred in the present case because the concept is “*wider*” and not confined to the equitable concept (cf. *Switchee* [2018] FCA 479 at [77] to [78] per Gleeson J), the concept nevertheless retains the need for the conduct to expose some “*special situation of disadvantage*” (cf. *Amadio* (1983) 151 CLR 447 at 461 per Mason J) or some “*unconscientious advantage*” being taken which deprives a person of the ability to make some “*worthwhile judgment*” (cf. *Berbatis* [2003] HCA 18 at [46], (2003) 214 CLR 51 at 74). That is what is lacking in the present case.
2. It was not at all apparent that Mr Robinson “*laboured under any special disability*” with respect to the matters relied upon in the pleadings to establish “*unconscionability*”: cf. *Macdonald* [2005] FCA 105 at [279] per Weinberg J. There was no “*unconscientious use*” by Western Union of its superior position: *Amadio* (1983) 151 CLR 447 at 461 per Mason J. Western Union was at all times, at least prior to 13 March 2017, taking all reasonable steps to advise Mr Robinson of the reasons why it was seeking an independent medical examination and taking all reasonable steps to facilitate the making of an appointment to allow that to happen. Difficulty would have been experienced in concluding that the failure to follow up the 13 March 2017 email rendered unconscionable that which hitherto had been reasonable conduct devoid of any unconscientious use by Western Union of its position as an employer of an employee suffering a medical condition.

## THE RELIEF TO BE GRANTED

1. The conclusion that Western Union took adverse action against Mr Robinson contrary to s 351 gives rise to the necessity to consider the quantification of both:

* the compensation to be paid to Mr Robinson; and
* the penalty (if any) to be imposed.

### Compensation

1. It was common ground that the Court could order the payment of compensation to Mr Robinson for past and future economic loss and could make an award of general damages. Such compensation can be ordered pursuant to s 545 of the *Fair Work Act*.
2. That which divided the parties was the quantification of the amounts (if any) to be ordered.
3. Mr Robinson’s calculation was as follows:

|  |  |  |
| --- | --- | --- |
| **Amount** | **Category** | **Calculation** |
| $221,552 | Past economic loss as at 8 June 2018 | Earnings if still employed by WUBS: 56 x $4,492 = $276,752  Earnings at the gym since July 2017: 46 x $1,150 = $55,200 |
| $98,592 | Future economic loss for six months from 8 June 2018 | 26 weeks x $3,792 |
| $25,000 | General damages | N/A |
| $25,000 | Penalty | N/A |
| **Total** | **$370,144** | |

1. The difficulty with these calculations is some uncertainty as to whether Mr Robinson would have:

* in fact returned to work at Western Union and (if so) when,

and even had he returned to work, whether he would have continued to receive the same rate of remuneration in respect to:

* the past period; and
* the future period of six months.

It is considered that there was no such certainty. Notwithstanding the assertions by Mr Robinson of his desire to return to his former responsibilities, some uncertainty is generated both by the history recorded in his medical certificates and some reservation as to the manner in which he gave evidence. An assessment, necessarily subjective, of the manner in which he gave his oral evidence during cross-examination was that he was a witness very alert to the giving of evidence that supported his claims. Uncertainty is also generated in respect to the remuneration he would receive if he returned to work by reason of the fact that the client base upon which he had previously earned his commissions had changed and because there had been changes within Western Union since Mr Robinson went on leave. It is difficult to assess the extent to which such changes may have impacted upon the calculations advanced on behalf of Mr Robinson, but some accommodation for those uncertainties needs to be taken into account.

1. The submissions advanced on behalf of Western Union considered three scenarios – one being a nil probability of Mr Robinson returning to work; a 10% probability; and a 25% probability. Assuming that there was a 25% probability, and excluding any quantification of any penalty to be ordered, the calculation on behalf of Western Union was as follows:

|  |  |
| --- | --- |
| *Category of payment* |  |
| Economic loss – base salary | $25,000 |
| Economic loss – commissions | $18,375 |
| General damages | $10,000 |
| **Total** | **$53,375** |

1. The approach of Western Union in separately quantifying Mr Robinson’s base salary and the quantum of remuneration derived from commission permits of a limited degree of greater certainty when attempting to quantify the quantum of compensation.
2. If any question of penalty be presently left to one side, the difference is stark: Mr Robinson’s calculation is approximately $345,000; Western Union’s calculation is approximately $53,000.
3. Given the uncertainties involved, any calculation is necessarily an exercise in subjective assessment. Some uncertainty is removed if it be assumed, as it should be, that Mr Robinson’s medical condition was improving and accepting his professed desire to return to his former position.
4. Although imprecise, it is respectfully considered that it was just as likely that Mr Robinson would not return to work as it was that he would return. It is also further considered that Mr Robinson’s calculations do not adequately take into account the fact that his base salary was $100,000 and do not adequately take into account the absence of any contractual entitlement to the payment of commissions. There were, moreover, changes to what were referred to as Western Union’s “*commission structure*”. Taking these factors into account it is considered that compensation (excluding any question of penalty) should be calculated as follows:

|  |  |  |
| --- | --- | --- |
| ***Category of payment*** | ***Past payments (financial year ending June 2015)*** | ***Amount ordered*** |
| Base salary | $100,000 | $ 50,000 |
| Commissions | $147,000 | $ 75,000 |
| General damages |  | $ 15,000 |
| **Total** | | **$140,000** |

1. In assessing general damages, regard has been had to the effect that the dismissal had upon Mr Robinson. In describing this effect, Mr Robinson said the following during cross-examination by Counsel for Western Union:

The termination of my employment took me by surprise. It was deeply hurtful and really knocked me for six, if I can put it that way. I found I spiralled back into my worst of my depression, wasn’t sleeping well. I wasn’t able to concentrate. I kept ruminating all the things that had happened at work. Yes. Things weren’t going well for me.

Notwithstanding the reservation expressed in respect to Mr Robinson’s evidence, this evidence is accepted. Regard has also been had to (*inter alia*) the earlier medical certificates attributing Mr Robinson’s medical condition to his work and to the absence of (*inter alia*) any evidence of (for example) vilification of Mr Robinson.

1. The calculation of any penalty to be imposed for the contravention of s 351(1) of the *Fair Work Act* and the question of to whom any penalty should be paid is best addressed separately.

### Penalty

1. The present proceeding occasions no necessity to re-canvas the principles and authorities of relevance to the purpose served by an order for the payment of a penalty or the matters to be taken into account when quantifying the penalty to be imposed.
2. It is nevertheless prudent to recall that a primary purpose served by an order for the imposition of a penalty is that of deterrence.
3. In *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, (2015) 258 CLR 482 at 506, French CJ, Kiefel, Bell, Nettle and Gordon JJ there relevantly concluded:

[55] No less importantly, whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd* [[1991] ATPR 41-076 at 52,152], is primarily if not wholly protective in promoting the public interest in compliance:

“Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the *Trade Practices Act*] … The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.”

1. “*General and specific deterrence*”, French CJ, Crennan, Bell and Keane JJ had earlier observed in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54 at [65], (2013) 250 CLR 640 at 659, “*must play a primary role in assessing the appropriate penalty in cases of calculated contravention of legislation where commercial profit is the driver of the contravening conduct*”.
2. The identification of some of the considerations of relevance when assessing the quantum of any penalty to be imposed has been conveniently set forth by Tracey J in *Kelly v Fitzpatrick* [2007] FCA 1080 at [14], (2007) 166 IR 14 at 18 to 19. His Honour there adopted as a “*non-exhaustive range of considerations*” to be taken into account the following:

* the nature and extent of the conduct which led to the breaches;
* the circumstances in which that conduct took place;
* the nature and extent of any loss or damage sustained as a result of the breaches;
* whether there had been similar previous conduct by the respondent;
* whether the breaches were properly distinct or arose out of the one course of conduct;
* the size of the business enterprise involved;
* whether or not the breaches were deliberate;
* whether senior management was involved in the breaches;
* whether the party committing the breach had exhibited contrition;
* whether the party committing the breach had taken corrective action;
* whether the party committing the breach had cooperated with the enforcement authorities;
* the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
* the need for specific and general deterrence.

As his Honour has subsequently pointed out, “[*e*]*ach of these considerations has the potential to have both an ameliorative and aggravating impact in the course of the instinctive synthesis process*”: *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213 at [16]. See also: *Australian Building and Construction Commissioner v Ingham (No 2) (The Enoggera Barracks Case)* [2018] FCA 263 at [59] to [66] per Rangiah J.

1. In the circumstances of the present case it is considered that only a modest penalty need be imposed. Contrary to the submission advanced on behalf of Mr Robinson, the conduct pursued by Western Union in terminating the employment of Mr Robinson cannot be characterised as a “*cynical mistreatment*” of an employee. It was a *bona fide* decision taken for well-founded – albeit flawed – reasons.
2. Other than recognising the seriousness of any breach of the *Fair Work Act*, it is not considered that specific deterrence assumes any real significance. Nor is it concluded that the contravention of s 351(1) of the *Fair Work Act* was deliberate; indeed, it is concluded that there was an absence of any intent to contravene the *Fair Work Act* and rather a desire on the part of Western Union to treat Mr Robinson fairly and certainly not in disregard of any of his rights and entitlements. Counsel for Western Union submitted that there has been no history of prior contraventions. The maximum penalty prescribed as at the time of contravention was $54,000. A penalty of $20,000 should nevertheless be imposed pursuant to s 546(1) of the *Fair Work Act*. Pursuant to s 546(3), that penalty should be paid to Mr Robinson.

## CONCLUSIONS

1. A contravention of s 351(1) of the *Fair Work Act* has been made out.
2. Compensation has been assessed in the sum of $140,000. In addition, Western Union should pay a penalty to Mr Robinson in the sum of $20,000.
3. The Court was invited to, and acceded to, a request to defer making any order as to costs until after judgment. If the question of costs remains in dispute, it is considered that the issue can be resolved by the filing of short written submissions supplemented, if necessary, by a short oral hearing.
4. The parties should bring in *Short Minutes of Orders* to give effect to these reasons within fourteen days.

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| I certify that the preceding one hundred and nineteen (119) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick. |

Associate:

Dated: 30 November 2018