

ACTUS WORKPLACE LAWYERS

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Sickness can be a ‘disability’

The Federal Circuit and Family Court has decided that an employee’s sickness can be a ‘disability’ for the purposes of the general protections in the Fair Work Act. The decision has important implications for the rights of an employer to terminate an employee after a lengthy absence due to personal illness.

The case involved a casual employee of Brown Cow Café in Sunbury who was absent from work for one day due to a chest infection. The employee was dismissed and the employer was held by the Court to have breached:

- Section 351 of the Act which prohibits adverse action being taken against an employee because of the employee’s physical or mental disability, and
- Section 352 of the Act which prohibits the dismissal of an employee because of a temporary absence due to illness or injury of a kind prescribed by the Regulations (i.e. an absence due to personal illness or personal injury of more than 3 months, or total absences in a 12 month period of more than 3 months).

With regard to section 351, in the [Court’s judgment](#) Deputy Chief Judge Mercuri stated:

It is also submitted for the applicant that the term ‘disability’ in section 351 ought to be given its ordinary meaning and include temporary illnesses or injuries. As noted by Judge Jarrett, as he then was, in Pavolvich v Atlantic Contractors Pty Ltd [2012] FMCA 1080 at paragraph [26]:

... The applicant points out ... that a physical or mental disability is not confined to permanent disability. I accept that argument. There seems to be no particular reason why one ought to read down the otherwise remedial provisions of s 351 of the Fair Work Act 2009 in such a way. A physical disability can, of course, be temporary or permanent. In the case of sickness, the disability may only last as long as the sickness lasts. ...

I agree with this reasoning.

The judgment highlights that an employer cannot assume that an employee can be dismissed after a temporary absence due to personal illness or personal injury of more than three months, without any risks. In such circumstances, even though section 352 of the Act would not be breached, the dismissal could be held to be in breach of section 351 on the basis that the employee’s illness is a “physical or mental disability”.

For further advice or assistance about any termination of employment issues, please contact **Stephen Smith**, Principal of Actus Workplace Lawyers on 0418 461 183 or Email: stephen.smith@actuslawyers.com.au.