

## **772 Employment not to be terminated on certain grounds**

- (1) An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:
- (a) temporary absence from work because of illness or injury of a kind prescribed by the regulations;
  - (b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;
  - (c) non-membership of a trade union;
  - (d) seeking office as, or acting or having acted in the capacity of, a representative of employees;
  - (e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
  - (f) race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
  - (g) absence from work during maternity leave or other parental leave;
  - (h) temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) However, subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating a person's employment if:
- (a) the reason is based on the inherent requirements of the particular position concerned; or
  - (b) if the person is a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—the employment is terminated:
    - (i) in good faith; and
    - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (3) To avoid doubt, if:
- (a) an employer terminates an employee's employment; and
  - (b) the reason, or a reason, for the termination is that the position held by the employee no longer exists, or will no longer exist; and
  - (c) the reason, or a reason, that the position held by the employee no longer exists, or will no longer exist, is the employee's absence, or proposed or probable absence, during maternity leave or other parental leave;

the employee's employment is taken, for the purposes of paragraph (1)(g), to have been terminated for the reason, or for reasons including the reason, of absence from work during maternity leave or other parental leave.

- (4) For the purposes of subsection (1), subsection 109(2) (which deals with the meaning of *voluntary emergency management activity*) has effect as if the word employee had its ordinary meaning.

(Fair Work Regulation 2009)

#### **6.04 Temporary absence—illness or injury**

- (1) For paragraph 772(1)(a) of the Act, this regulation prescribes kinds of illness or injury.

Note: Under section 772 of the Act, an employer must not terminate an employee's employment because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

- (2) A prescribed kind of illness or injury exists if the employee provides a medical certificate for the illness or injury, or a statutory declaration about the illness or injury, within:

- (a) 24 hours after the commencement of the absence; or
- (b) such longer period as is reasonable in the circumstances.

Note: The Act defines *medical certificate* in section 12.

- (3) A prescribed kind of illness or injury exists if the employee:

- (a) is required by the terms of a workplace instrument:
  - (i) to notify the employer of an absence from work; and
  - (ii) to substantiate the reason for the absence; and
- (b) complies with those terms.

- (4) An illness or injury is not a prescribed kind of illness or injury if:

- (a) either:
  - (i) the employee's absence extends for more than 3 months; or
  - (ii) the total absences of the employee, within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illnesses or injuries); and
- (b) the employee is not on paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act for the duration of the absence.

- (5) In this regulation, a period of paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act does not include a period when the employee is absent from work while receiving compensation under a law of the Commonwealth, a State or a Territory that is about workers' compensation.

(Fair Work Act 2009)

#### **352 Temporary absence—illness or injury**

An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

Note: This section is a civil remedy provision (see Part 4-1).

(Fair Work Regulation 2009)

### 3.01 Temporary absence—illness or injury

- (1) For section 352 of the Act, this regulation prescribes kinds of illness or injury.

Note: Under section 352 of the Act, an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

- (2) A prescribed kind of illness or injury exists if the employee provides a medical certificate for the illness or injury, or a statutory declaration about the illness or injury, within:

- (a) 24 hours after the commencement of the absence; or
- (b) such longer period as is reasonable in the circumstances.

Note: The Act defines *medical certificate* in section 12.

- (3) A prescribed kind of illness or injury exists if the employee:

- (a) is required by the terms of a workplace instrument:
  - (i) to notify the employer of an absence from work; and
  - (ii) to substantiate the reason for the absence; and
- (b) complies with those terms.

- (4) A prescribed kind of illness or injury exists if the employee has provided the employer with evidence, in accordance with paragraph 107(3)(a) of the Act, for taking paid personal/carer's leave for a personal illness or personal injury, as mentioned in paragraph 97(a) of the Act.

Note: Paragraph 97(a) of the Act provides that an employee may take paid personal/carer's leave if the leave is taken because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee.

- (5) An illness or injury is not a prescribed kind of illness or injury if:

- (a) either:
  - (i) the employee's absence extends for more than 3 months; or
  - (ii) the total absences of the employee, within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illnesses or injuries); and
- (b) the employee is not on paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act for the duration of the absence.

- (6) In this regulation, a period of paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act does not include a period when the employee is absent from work while receiving compensation under a law of the Commonwealth, a State or a Territory that is about workers' compensation.

(Fair Work Regulation 2009)

### 6.05 Application fees

- (1) For subsection 775(2) of the Act, this regulation sets out matters relating to a fee for making an application to the FWC under section 773 of the Act.

*Fee at commencement of Regulations*

- (2) If the application is made in the financial year starting on 1 July 2009, the fee is \$59.50.

*Method for indexing the fee*

- (3) If the application is made in a financial year starting on 1 July 2010, or 1 July in a later year (the **application year**), the amount of the fee is to be worked out as follows:
- (a) identify the amount of the fee for an application made in the previous financial year;
  - (b) multiply it by the indexation factor for the application year (see subregulation (4));
  - (c) round the result to the nearest multiple of 10 cents, rounding up if the result is 5 cents.

- (4) The indexation factor for the application year is worked out using the following formula, and then rounded under subregulation (5):

$$\frac{\text{Sum of index numbers for quarters in most recent March year}}{\text{Sum of index numbers for quarters in previous March year}}$$

where:

**index number**, for a quarter, means the All Groups Consumer Price Index Number (being the weighted average of the 8 capital cities) published by the Australian Statistician for that quarter.

**most recent March year** means the period of 12 months ending on 31 March in the financial year that occurred immediately before the application year.

**previous March year** means the period of 12 months immediately preceding the most recent March year.

**quarter** means a period of 3 months ending on 31 March, 30 June, 30 September or 31 December.

- (5) The result under subregulation (4) must be rounded up or down to 3 decimal places, rounding up if the result is 0.0005.
- (6) A calculation under subregulation (4):
- (a) is to be made using the index numbers published in terms of the most recently published reference base for the Consumer Price Index; and
  - (b) is to be made disregarding index numbers that are published in substitution for previously published index numbers (unless the substituted numbers are published to take account of changes in the reference base).

*No fee—hardship*

- (7) If the FWC is satisfied that the person making an application will suffer serious hardship if the person is required to pay the fee, no fee is payable for making the application.

*Refund of fee—discontinuing application*

- (8) The FWC must repay to the person an amount equal to the fee if:
- (a) the fee has been paid; and

	<ul style="list-style-type: none"><li>(b) the application is subsequently discontinued as mentioned in section 588 of the Act; and</li><li>(c) either:<ul style="list-style-type: none"><li>(i) at the time the application is discontinued, the application has not yet been listed for conducting a conference; or</li><li>(ii) if the application has, at or before that time, been listed for conducting a conference on a specified date or dates—the discontinuance occurs at least 2 days before that date or the earlier of those dates.</li></ul></li></ul>
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