



General Protections (Adverse Action) Claims - *Fair Work Act 2009*

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MEMBERSHIP LAWYERS

Background



- Since the introduction of the FWA, unfair dismissal and adverse action claims have increased by 35%.
- Claims for Adverse action can be made by:
 - Potential employees;
 - Current employees;
 - Previous employees.
 - Potential Contractors
 - Current contractors
- Fair Work Australia is a no cost jurisdiction
- Leave must be sought to be legally represented
- Most claims are settled in conciliation conferences.

Background



Difference from Unfair Dismissal:

- Longer time frame to apply;
- Claims are not limited by the high income threshold;
- Minimum qualifying period does not apply;
- Can result in compensation and penalties; and
- Compensation is not limited to 6 months of wages.

See *Hodkinson v The Commonwealth* [2011] FMCA 171

Policy Objects



S336

The objects of this Part are as follows:

- (a) to protect workplace rights;
- (b) to protect freedom of association by ensuring that persons are:
 - (i) free to become, or not become, members of industrial associations; and
 - (ii) free to be represented, or not represented, by industrial associations and
 - (iii) free to participate, or not participate, in lawful industrial activities;
- (c) to provide protection from workplace discrimination;
- (d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.

Adverse Action



- General Protection (Adverse Action) Claims are covered under **Part 3.1** of the FWA.
- Part 3.1 of the FWA protects 4 main categories:
 - Workplace Rights;
 - Industrial Activities;
 - Other protections such as discrimination and,
 - Sham Arrangements

Adverse Action



Common causes of adverse action claims include:

- Dismissal
- Refusal to employ
- Discrimination against a person
- Demotion or refusal to promote
- Reducing overtime or ordinary hours of work
- Altering terms and conditions of employment or contract

The Legislation



340 Protection

- (1) A person must not take adverse action against another person:
- (a) because the other person:
 - (i) has a workplace right; or
 - (ii) has, or has not, exercised a workplace right; or
 - (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
 - (b) to prevent the exercise of a workplace right by the other person.

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

- (2) A person must not take adverse action against another person (the **second person**) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

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

"civil remedy provision" : see ss 539(1) & (3).

"workplace right"



341 (1)

A person has a **workplace right** if the person:

- (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
- (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument;
- (c) or is able to make a complaint or inquiry:
 - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument;
 - (ii) or if the person is an employee - in relation to his or her employment.

Industrial Activity



- The right to take industrial action
- The right to belong to or not belong to a union or employer association
- Representing or advancing the views claims or interests of an industrial association

“Other protection”



- Freedom from Discrimination based on race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibility, pregnancy, religion, political opinion national extraction or social origin
(Defence if
(a) not unlawful under any anti –discrimination law in force in the place where the action is taken; or
(b) taken because of the inherent requirements of the particular position concerned; or
(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--taken:
(i) in good faith; and
(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.)
- Entitlement to take a temporary absence from work due to illness or injury

“Sham arrangements”



- Where the person's employment status is misrepresented as an independent contractor when they are really an employee
- Where a person dismisses or threatens to dismiss an employee in order to hire them as an independent contractor doing the same or substantially the same work

Adverse Action



S342 -Meaning of Adverse Action

1. An employer takes adverse action against an employee if the employer:

- (a) dismisses the employee; or
- (b) injures the employee in his or her employment; or
- (c) alters the position of the employee to the employee's prejudice; or
- (d) discriminates between the employee and other employees of the employer.

Prospective Employer



2. A Prospective employer takes adverse action against a prospective employee, if the prospective employer:

- (a) Refuses to employ the prospective employee; or
- (b) Discriminates against the prospective employee in the terms or conditions of which the prospective employers offers to employ the prospective employee.

Independent Contractors



3. Adverse Action is taken by a Principal who has entered into a contract for services and:

- Terminates a contract
- Injures the contractor in relation to the terms and conditions of the contract
- Alters the position of the contractor to their prejudice
- Refuses to use or make use of the contractor's services
- Refuses to supply goods or services to the contractor

Proposed Independent Contractors



4. Adverse Action is taken by a Principal who has proposes to enter into a contract for services and:

- Refuses to engage the contractor
- Discriminates against the contractor in the terms and conditions offered
- Refuses to use or make use of the contractor's offered services
- Refuses to supply goods or services to the contractor

Employees



5. An Employee takes adverse action against the Employer :

- Ceases work in the service of the employer
- Takes industrial action against the employer

Independent Contractors



6. An Independent Contract takes adverse action against the principal if they:

- Cease work in the service of the employer
- Takes industrial action against the Principal

Unions



7. An industrial association, it's officers or members take adverse action if they:

- a) organise or take industrial action against the person; or
- (b) Takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or
- (c) if the person is an independent contractor –takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or
- (d) if the person is a member of the association--imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member

Time Limits



S366

The Employee has **60 days** from the date of:

- The adverse action; or
- The termination of employment

to lodge a Claim

The **60 day** time limit can be extended at the discretion of Fair Work Australia

This acts as a secondary cause of action if the employee is out of time to lodge an unfair dismissal application.

Time Limits



S366(2)

Extension of time limit if FWA satisfied that there are exceptional circumstances, taking into account:

- (a) the reason for the delay; and
- (b) any action taken by the person to dispute the dismissal; and
- (c) prejudice to the employer (including prejudice caused by the delay); and
- (d) the merits of the application; and
- (e) fairness as between the person and other persons in a like position.

See : *Miss Melissa Kerr v Ballarat Truck Centre Pty Ltd* (C2011/3631); and

Mr Kiki Lwin v Manpower Services (Australia) Pty Limited T/A Manpower Professional (C2011/3189)



Bayford v MAXXIA Pty Ltd [2011] FMCA 202 (12 April 2011)

- Applicant dismissed for performance issues and constant lateness for work
- Alleged adverse action based on discrimination under Equal Opportunity Act (EOA) because of family responsibility of caring for young child before work made it difficult to be at work on time
- EOA found to be a workplace law-
- Found that Applicant had not raised family responsibilities before termination as reason for lateness for work
- Found that workplace was not inflexible as to start times
- Lateness for work was regular and for significant times
- Found no discrimination based on family responsibilities
- Application dismissed.



Onus of proof

Onus of proof

S361

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, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

- The Applicant must first allege and prove the act or omission constitutes adverse action in contravention of the FWA
- The onus is then on the Respondent to prove that the treatment was permitted at law.

Recent decisions



Barclay v The Board of Bendigo Regional Institute of Technical and Further Education

- Applicant was active in his union
- Sent e-mail to members in his union capacity saying he was aware of serious misconduct in his workplace by unnamed persons
- Did not notify management before sending e-mail
- Asked to show cause why should not be disciplined for failing to report misconduct
- Stood down on full pay and internet access suspended-(the alleged adverse action)
- Claimed the adverse action was because of his union activity(S.347)
- Full Court looked to the “real reason” for the action
- Objectively ,Barclay’s acts were in his capacity as a union officer and it followed that the action taken was because he was engaging in activity in that capacity

Recent decisions



Warnings from Barclay

Great caution should be exercised in any case in which taking action against an employee is contemplated in response to something that the employee has done or said in an arguable capacity of a union official or member, or which might be characterised as industrial activity.

An employers subjective intentions will be relevant –but not determinative.

The link will not be hard to establish.

Recent Decisions



STEPHENS v AUSTRALIAN POSTAL CORPORATION

- *Postal worker alleged adverse action taken because he exercised or was about to exercise rights under the Safety Rehabilitation and Compensation Act (Cth) "SRCA"*
- *Temporary absence from work*
- *Termination based on performance issues and inappropriate language in discussion with manager*
- *Total lack of contemporaneous documentation as to investigation and deliberations resulting in termination*
- *Lack of credibility of manager's evidence*
- *Pending compensation claim materially influenced decision to terminate employee*
- *SRCA was a "workplace law" giving rise to "workplace rights"*
- *A law "regulating the relationship between employees and employers"*
- *Reinstatement ordered*

Recent Decisions



ALAEA v Qantas Airways Ltd & Anor [2011]. In this case a Licensed Aircraft Maintenance Engineer (LAME) employed by Qantas (and a Brisbane-based member of the ALAEA) exercised workplace rights by making enquiries with his manager regarding certain shift allowances whilst on an overseas roster. The employee also complained about allegedly poor assistance provided by Qantas in relation to a health issue suffered whilst on duty overseas. Following this enquiry and complaint, the manager was said to have ordered the suspensions of all overseas rostering for Brisbane LAMEs until they confirmed in writing that they agreed with their existing shift allowances. The employee was also allegedly advised that "the guys who accept their conditions... are the ones who get asked to go away next time." It was held that the suspension of overseas rostering for the Brisbane LAMEs was a detrimental alteration of their employment terms and constituted discrimination between them and other Qantas engineers. It was also held that the comment constituted unlawful coercion and a threat against the exercise of the employee's workplace rights. Accordingly, Qantas has been ordered to pay a civil penalty under the Act.

Strategies –



1. Process –

- Listen to and consider complaints and grievances-treat them as alarm bells-as a claim waiting to happen.
- Avoid hasty/knee jerk reactions or decisions
- Think about it-is there any prohibited reason?
- Follow a process for making decisions which affect employee rights
- Consult with staff and foster acceptance, ownership and understanding of the process.

2. Documents -

- Have workplace policies and process in place
- Document everything – the importance of having every workplace decision properly documented is more important now more than ever.
- Scheduled review of processes
- Use processes effectively

How we can help



- Advise on potential claims before they turn into actual claims
- Identify risk in your workplace
- Help you to Minimise risk
- Documenting policy and process
- Defending claims
- Negotiating settlements

Contact Details



Brisbane

Level 10, 410 Queen Street
Brisbane QLD 4000
GPO Box 3246 Brisbane QLD 4001 Australia
T 61 7 3226 9099
F 61 7 3220 1300
E brisbane@workplacelaw.com.au

Gold Coast

9 Ouyan Street
Bundall QLD 4217
PO Box 9073 GCMC QLD 9726 Australia
T 61 7 5597 8888
F 61 7 5597 8899
E goldcoast@workplacelaw.com.au

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