




Adverse Action and Workplace Rights

Heinz Lepahe
Partner

2

Today's agenda


- Protection of workplace rights under the *Fair Work Act 2009* (Cth) (FW Act)
- What are workplace rights?
- What constitutes "adverse action"?
- Prohibition of coercion, undue influence or pressure, or misrepresentations in negotiating arrangements
- Who can bring an action?
- What legal remedies are available?



3

Overview


- The new 'adverse action' provisions in the FW Act apply to all national system employees and employers
- Commenced 1 July 2009
- Prohibits a person from taking "adverse action" against another person because the person has or exercises or proposes to exercise a "workplace right"



4

Protection of workplace rights


- Can not take adverse action against another person because the person:
 - has a workplace right
 - does/does not exercise the workplace right
 - has/has not proposed to exercise the workplace right
- Can not take adverse action against a person to prevent them from exercising a workplace right
- Can not take adverse action against a person where another person has exercised a workplace right for the benefit of that person



5

When does a person have a workplace right?


1. A person is entitled to a benefit of, or has a role or responsibility under:
 - A workplace law
 - FW Act, Fair Work (Registered Organisations) Act, Independent Contractors Act, any other law of the Commonwealth, State or Territory that regulates the relationships between employers and employees (including OHS)
 - A workplace instrument
 - made under, or recognised by a workplace law and concerns the relationship between employers and employees
 - An order made by an industrial body



6

When does a person have a workplace right? cont.

2. A person is able to initiate or participate in a process or proceeding under a workplace law or workplace instrument including:
 - a conference hearing conducted by FWA
 - court proceedings
 - protected industrial action
 - protected action ballot
 - making, varying or terminating an enterprise agreement
 - appointing or terminating a bargaining representative
 - making or terminating an individual flexibility arrangement under a modern award or enterprise agreement
 - agreeing to cash out paid annual leave or paid personal/carer's leave
 - making a requests for flexible working arrangements
 - dispute settlement
 - any other process or proceedings



When does a person have a workplace right? cont.

3. A person is able to make a complaint or inquiry
 - to a person or body having the capacity under a workplace law or workplace instrument to seek compliance with that law or instrument
 - if they are an employee – in relation to their employment

What can constitute adverse action

An employer takes adverse action against an employee if:

- the employer dismisses the employee
- the employer injures the employee in his or her employment
- the employer alters the position of the employee to the employee's prejudice
 - Examples
 - Denial of pay increase or training opportunities
 - Issues written warnings
 - Providing inferior financial and legal entitlements
 - Adversely affecting promotional, advancement and transfer opportunities

Case example

Byrne v Australian Ophthalmic Supplies Pty Ltd

- An employee made a complaint to Wageline and the Office of Workplace Services
- Employee's employment was suspended on pay
- Employee was transferred from a workplace near her home to one several hours from her home
- Court held this amounted to an "injury in employment" and "an alteration of her position to her prejudice"
 - Employer ordered to pay compensation of \$ 6688.97 to cover the outstanding wages
 - Employer ordered to pay a penalty of \$60,000
- The court stated the employee "had a right to be paid the correct pay rate and the right to raise the issues with an appropriate authority without fearing humiliating retaliatory conduct by the employers"

What constitutes "adverse action"?

A employee takes adverse action against an employer if:

- the employee ceases to work for the employer
- the employee takes industrial action against the employer

What constitutes "adverse action"? cont.

A prospective employer takes adverse action against a prospective employee if:

- the prospective employer refuses to employ the prospective employee
- the prospective employer discriminates against the prospective employee in terms or conditions offered

What constitutes "adverse action"? cont.

A principal takes adverse action against the independent contractor person if:

- the principal terminates the contract
- the principal injures the independent contractor
- the principal alters the position of the independent contractor to the independent contractor's prejudice
- the principal refuses to make use of services offered by the independent contractor
- the principal refuses to supply goods or services to the independent contractor

What constitutes “adverse action”? cont.

13

An independent contractor takes adverse action against the principal if:

- the independent contractor ceases work under the contract
- the independent contractor takes industrial action against the principal

What constitutes “adverse action”? cont.

14

An industrial association takes adverse action against a person if it:

- Organises or takes industrial action against the person
- takes action that prejudices the person in the person's employment or prospective employment
- the industrial association takes action that prejudices the independent contractor in relation to a contract for services

What constitutes “adverse action”? cont.

15

An industrial association takes adverse action against a member of the association if it:

- 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

Threatening or organising adverse action

16

- Adverse action includes threatening or organising to take adverse action

Must not coerce

17

- A person must not take or threaten to organise any action against another person with intent to coerce the other person to
 - exercise or not exercise, a workplace right
 - exercise a workplace right in a particular way

Must not exert undue influence or pressure

18

- An employer must not use undue influence or undue pressure on any employee in relation to a decision by the employee to:
 - make an agreement or arrangement under the NES
 - make an agreement or arrangement under a term of a modern award or enterprise agreement
 - agree to, or terminate, an individual flexibility arrangement
 - accept a guarantee of annual earnings
 - agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work

Must not misrepresent

19

- A person must not knowingly or recklessly make a false or misleading representation about:
 - another person's workplace rights; or
 - the exercise of or the effect of exercising a workplace right

Onus of proof

20

- If an applicant alleges that the respondent took an action for a particular reason in contravention of adverse action - it is presumed that the action was taken for that reason
 - The onus will be on the respondent to establish that its conduct was not unlawful
- This presumption does not apply to in interim injunction

Who can make an application?

21

- A person affected by the contravention
 - National system employee
 - National system employer
- An industrial association
- An inspector
- No statutory salary cap applies to employees making a claim
 - unlike unfair dismissal claims which have a \$108,300 cap
- There is no "small business" employers exception

Where an employee is dismissed

22

- Employee (or an association may apply to FWA)
- Application should be made within 60 days after the dismissal took effect
 - late applications can be heard in certain circumstances
- FWA conducts a conference
 - if all reasonable attempts to resolve the dispute have been or are unlikely to be unsuccessful – FWA may issue a certificate
 - employee then has to be made to the courts within 14 days

Where a dispute does not relate to dismissal

23

- The person (or an association) may:
 - apply to FWA for the dispute to be addressed
 - an application to FWA can only be led to conciliation or mediation where both parties agree
 - or
 - make an application directly to the Federal Court or Federal Magistrates Court
- Time limit for an application is six years after the contravention occurred

Legal remedies

24

- The court can make the following orders:
 - a maximum penalty of \$6,000 (individual) or \$33,000 (body corporate)
 - Pecuniary penalty or part of the penalty may be paid to the Commonwealth, a particular organisation or a particular person (such as the employee)
 - grant an injunction or interim injunction to prevent or remedy a contravention
 - award compensation for damages for loss suffered
 - no cap on compensation that may be ordered
 - re-instatement of an employee

Recent Federal Court decision

25

- *Jones v. Queensland Tertiary Admissions Centre Ltd* [2009] FCA 1382

The Facts:

- Ms Jones was involved in the enterprise bargaining negotiations on behalf of QTAC with the ASU
- Ms Jones was the subject of a number of complaints by ASU and other employees
- QTAC conducted an improper investigation into Ms Jones' action
 - investigation finds Ms Jones' actions amounted to "bullying or harassment of employees"
- Ms Jones sought interlocutory injunction to prevent QTAC taking adverse action by terminating her employment

Recent Federal Court decision cont.

26

The Decision:

- Federal Court allowed the interlocutory injunction on the following grounds:
 - there was a serious question to be tried whether employer had taken adverse action against Ms Jones because of her workplace right
 - Ms Jones' participation in the process of making an enterprise agreement could arguably constitute the exercise of a workplace right
 - there was a strong prima facie case
 - there was a probability that Ms Jones would be entitled to relief
 - the injury Ms Jones was likely to suffer if the interim injunction was not granted outweighed the injury to Ms Jones
 - damages would not be an adequate remedy
 - conduct could potentially harm Ms Jones' reputation and seriously impact her future career prospects
 - Therefore, it was appropriate to preserve the status quo

Lessons for employers

27

- Employers can also bring an adverse action claim to protect their workplace right
- Employers should:
 - take care when making decisions about employees who are exercising a workplace right
 - should document any actions that may bring about an adverse action claim



Thank You

Heinz Lepahe
T 61 7 3231 2559
E heinz.lepahe@cgw.com.au

Annie Smeaton
T 61 7 3231 2946
E annie.smeaton@cgw.com.au