

Adverse Action Claims under the Fair Work Act

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Section 3 – Objects of *the Fair Work Act*

- ▶ The FW Act seeks to promote seven objects including;
- ▶ Taking into account Australia's international labour obligations significantly Conventions 87 and 98;
- ▶ Recognising freedom of association and the right to be represented, protecting against unfair treatment and discrimination;

Application of the Act

- ▶ Part 1– 3 Deals with the extent of the application of the FW Act.
- ▶ Section 26 – Exclusion of State and Territory Laws (in WA context over-rides *Industrial Relations Act 1979*);
- ▶ Section 27 State and Territory Laws Not Excluded – examples State Laws on Occupational Health and Safety & Discrimination

Rights and Responsibilities

- ▶ General Protections “Adverse Action Provisions” are contained in Part 3 of the Fair Work Act;
- ▶ This part of the Act provides for the imposition of Civil Penalty Provisions for contraventions including for breaches of;
- ▶ Section 340 (where adverse action is taken for exercising Workplace Rights)
- ▶ Section 346 (adverse action is taken for participating in Industrial Activities).

Part 3 of the FW Act

- ▶ Part of the Act giving effect to the Object under Section 4 of promoting Freedom of Association and the Right to Organise;
- ▶ Statutory protections against discrimination;
- ▶ Unfair Dismissal Claims.
- ▶ Part of the FW Act to which most industrial / employment lawyers will be exposed.

What is Adverse Action?

- ▶ Must involve some injury or detriment;
- ▶ Gift vouchers for non striking workers – *CFMEU v Corinthian Industries Australia (Australia) Pty Ltd* [2014] FCA 239
- ▶ *CFMEU v Mammoet Australia Pty Ltd* [2013] HCA 36 – removal of accomodation during period of protected industrial action.

Reverse Onus of Proof

- ▶ An important part of this Chapter of the Act is Section 361 which relevantly provides for a “*reverse onus of proof*” in applications for breaches of general protections provisions.
- ▶ The reverse onus applies equally to employers and unions alike.
- ▶ The inclusion of the reverse onus is recognition of the inherent difficulty in proving discrimination.

Complaints in Relation to Employment

- ▶ *Shea v TRU Energy Services Pty Ltd* (No 6) [2014] FCA 271
- ▶ Section 341(1)(c) of the FW Act – “*a complaint is a communication which, whether expressly or implicitly, as a matter of substance, irrespective of the words used conveys a grievance a finding of fault or accusation*”.
- ▶ Must be genuinely held or considered valid by the complainant

Other features of Complaints

- ▶ Must be made in good faith and for a proper purpose;
- ▶ Not limited to complaints made to an external authority (for example to Worksafe or the Fair Work Ombudsman)
- ▶ Must be founded on a source of entitlement for example non compliance with an award or safety legislation.
- ▶ The employer has to be aware of the existence of the complaint.

Important Cases on the Reverse Onus of Proof

- ▶ *Board of Bendigo Regional Institute of TAFE v Barclay* [2012] HCA 32
- ▶ *CFMEU v BHP Coal Pty Ltd* [2014] HCA 41
(which confirms the High Court's approach to the adverse action provisions "*the real and operative reason*")
- ▶ *General Motors– Holden's Pty Ltd v Bowling*
(1976) 51 ALJR 235

Multiple Reasons for Action – Section 360

- ▶ Adverse Action that includes action (for example a dismissal) for a group reasons that includes a prohibited reason will be taken to be action for the prohibited reason.
- ▶ Example – Dismissing an employee for performance reasons and because she / he raised complaints about a workplace safety issue.

Limit to the Reverse Onus of Proof

- ▶ Section 361(2)
- ▶ The reverse onus does not apply in applications for interim injunctions;
- ▶ “*The Patricks Payback*” – legislative amendment which followed the successful use of the former “Freedom of Association Provisions” under *the Workplace Relations Act 1996*.

Chapter 3 Division 8 Compliance

- ▶ This is a very important part of the Act for legal practitioners;
- ▶ Section 366 – 21 Time Limit following a dismissal to make a claim
- ▶ Section 366 (2) Capacity to extend time but by and large the Commission exercises this discretion very sparingly

Section 368 Certificates

- ▶ You cannot proceed to the Federal Court in an Adverse Application case where the alleged conduct involves a dismissal without first;
- ▶ Making an application to the Fair Work Commission within the 21 day prescribed time limit;
- ▶ The Commission issuing a Certificate under Section 369 of the FW Act.

Section 368 Certificates

- ▶ Once a Certificate issues under Section 368 of the FW Act you only have 14 days in which to commence your application to the Federal Court or Federal Circuit Court.
- ▶ Diarise and do not delay action until the last day.
- ▶ Multiple Respondents – Certificate Required for all respondents or just the employer?

Accessorial Liability Provisions

- ▶ Multiple Respondents – See Section 550 of the FW Act – Accessorial Liability Provisions.
- ▶ *“A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.”*

Accessorial Liability

- ▶ Under Section 550(2); involved in a contravention of civil remedy provision means;
- ▶ Aiding, abetting, counselling or procuring the contravention;
- ▶ Inducing the contravention whether by threats or promises or otherwise;

Accessorial Liability

- ▶ Has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- ▶ Has conspired with others to effect the contravention.
- ▶ Recent high profile example;
- ▶ [Fair Work Ombudsman v Offshore Marine Services Pty Ltd \(No 2\) \[2013\] FCA 943](#) (on accessorial liability)
- ▶ [Maritime Union of Australia v Fair Work Ombudsman \[2015\] FCAFC 120](#) (on damages awarded to persons affected by the contraventions)

Claims that do not involve dismissals

- ▶ If the Adverse Action does not involve a dismissal (See Section 342 – Meaning of Adverse Action);
- ▶ You do not need a Section 368 Certificate; and you may proceed straight to the Federal Circuit Court.
- ▶ The time limit to commence proceedings is six(6) years from the date of the contravention (See Section 544 of the FW Act).

Conduct on Picket Lines

- ▶ Significance of Industrial Action being Protected – Section 415
- ▶ No action lies under any law (whether written or unwritten) in a State or Territory.
- ▶ Exceptions include if the industrial action involves– personal injury, wilful or reckless destruction of or damage to property.
- ▶ *CFMEU v BHP Coal* – Dismissals for Scab Posters & Placards will not be for a prohibited reason.

Questions and Discussion

