

Employment Workplace Relations and Safety

Update: FEDERAL COURT SHEDS LIGHT ON ADVERSE ACTION PROVISIONS

In our Update in July 2009, we examined the new concept of “adverse action” under the Fair Work Act 2009 (FW Act) and the possibility of it giving rise to novel claims against employers. We foreshadowed that prospective, current and dismissed employees, may commence legal action pursuant to these provisions. ([link to article](#)). On 25 March 2010, in the Federal Court’s first detailed analysis of these new provisions, Justice Tracey shed light on their practical application in relation to claims by *current* employees.

FEDERAL COURT SHEDS LIGHT ON ADVERSE ACTION PROVISIONS

In our Update in July 2009, we examined the new concept of “adverse action” under the Fair Work Act 2009 (FW Act) and the possibility of it giving rise to novel claims against employers. We foreshadowed that prospective, current and dismissed employees, may commence legal action pursuant to these provisions. ([link to article](#)). On 25 March 2010, in the Federal Court’s first detailed analysis of these new provisions, Justice Tracey shed light on their practical application in relation to claims by *current* employees.

The decision of *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education [2010] FCA 284*, clarifies that the adverse action provisions do not prevent employers from justifiably instigating disciplinary procedures against employees merely because they are union members or delegates. Disciplinary inquiries and actions will only be considered adverse action for the purposes of the FW Act, if they occurred because of the employee’s union membership.

THE FACTS

The applicant was a senior teacher and Sub-Branch President of the Australian Education Union (AEU) at Bendigo Regional Institute of TAFE (BRIT). In his union capacity, the employee sent an email to members of the AEU stating that he was aware of reports of serious misconduct by BRIT employees

with respect to witnessing or being asked to participate in the production of false and fraudulent documents prepared for BRIT’s reaccreditation audit.

Upon senior management becoming aware of the email, the CEO of BRIT asked the employee to show cause why he should not be disciplined because of the method he chose to raise his concern (namely, a widely distributed email), his failure to report the alleged misconduct to his manager and his refusal to provide further information about the allegations contained in his email. The employee was suspended from his employment, denied internet access and denied access to BRIT’s premises so that he could formally respond to the charges of serious misconduct. The suspension was lifted after 10 days, following an interlocutory hearing in the Federal Court.

The employee commenced proceedings alleging that the employer’s disciplinary conduct constituted adverse action under the FW Act as it had occurred because the employee was: an officer of the AEU, engaged in industrial activity (by advancing views, and encouraging or participating in claims) and exercising workplace rights (pursuant to a workplace agreement).

THE DECISION

The Federal Court dismissed the application and determined that the employer’s conduct did not constitute adverse action for the purposes of the

FW Act. The central issues clarified by this decision are as follows:

1. The fact that an employee is a union member or delegate does not mean that he/she is automatically immune from disciplinary action. Justice Tracey stated:

“It has never been the case that an employer was prevented, by federal industrial legislation, from taking prejudicial action against an employee who happened to be a union member or a union official...An employer could not, however, act to the detriment of an employee ‘by reason of’ or ‘because’ of the employee’s union membership or associated activities.”

2. The subjective intention of the employer or other party taking adverse action is relevant. Therefore, the employer must provide evidence as to whether the action in question arose because of a proscribed reason (e.g. union membership) or reasons which included a proscribed reason. Accordingly, the person who made the decision must explain why the action was taken. If the evidence as to why the conduct occurred is not accepted by the Court, the employer’s defence will fail as it will not be able to displace the presumption in the FW Act that the adverse action was taken for a proscribed reason.
3. Disciplinary action (such as suspension or the initiation of a disciplinary inquiry) is adverse action but does not automatically fall within provisions of the FW Act. Justice Tracey commented that whether action constitutes adverse action within the meaning of the FW Act:

“...[it] will depend on the particular circumstances of a given case. The variables may include the rules under which the action is taken by the employer, the practical impact of the taking of the administrative action on the employee and the bona fides of the employer in instigating the administrative processes. The greater the impact on the employee the more likely it is that the employer’s action will be treated as ‘adverse action’ for the purposes of the Act.”

On the basis of the CEO’s comprehensive evidence as to why she decided to act as she did, the Court determined that BRIT did not act for any proscribed reason and that it was justified in initiating disciplinary action requiring the employee to show cause why he should not be disciplined for circulating the email. Justice Tracey further commented that the employee also failed to establish that he had suffered any loss as a result of the suspension to be entitled to any monetary compensation, even if it were found that BRIT did breach the FW Act.

IMPLICATIONS FOR EMPLOYERS

This decision concerns a current employee seeking to use the adverse action provisions in the FW Act to protect himself from the disciplinary process. Justice Tracey’s judgment emphasises that the mere fact that an employee is a union member does not provide them with a blanket immunity from disciplinary action. However, if there is evidence that union membership even partially influences whether disciplinary action is commenced, this may be considered adverse action within the meaning of the FW Act.

As adverse action claims invoke a reverse onus of proof for employers to establish that a decision was not taken for a proscribed reason, it is crucial that employers produce evidence to support why a particular decision was taken. Employers should ensure that all disciplinary policies are comprehensively drafted and diligently complied with. All documentation relating to the disciplinary process (e.g. emails, file notes, warnings) must have sufficient detail and be stored safely to enable the documentation to be reproduced as evidence in support of an employer’s decision if a claim for adverse action is made. An inability to produce such documentary evidence may leave it open for a Court to infer that the action had been taken for a proscribed reason.

This is the first decision of what is likely to be many more decisions in the future regarding adverse action. The full extent to which these provisions will be used still remains to be seen. Employers should continue to ensure that systems are in place to properly defend adverse action claims by prospective, current and dismissed employees.

This article was produced by Herbert Geer.
It is intended to provide general information in summary form on legal issues.
The contents do not constitute legal advice and should not be relied upon as such.

For further enquiries contact:

Melbourne

Chris Hartigan
Partner

chartigan@herbertgeer.com.au
Phone: (03) 9641 8745

Louise Russell
Partner

lrussell@herbertgeer.com.au
Phone: (03) 9641 8657

Luci Mummé
Partner

lmumme@herbertgeer.com.au
Phone: (03) 9641 8661

Sydney

Malcolm Davis
Partner

mdavis@herbertgeer.com.au
Phone: (02) 9239 4525

Gary Punch
Special Counsel

gpunch@herbertgeer.com.au
Phone: (02) 9239 4570

Paul Ludeke
Special Counsel

pludeke@herbertgeer.com.au
Phone: (02) 9239 4565

Richard Lund
Special Counsel

rlund@herbertgeer.com.au
Phone: (02) 9239 4501

Brisbane

Andrew Cardell-Ree
Special Counsel

acardell-ree@herbertgeer.com.au
Phone: (07) 3853 8822