BREACH OF WORKPLACE RIGHTS AND ADVERSE ACTION 2013: Still a worker's paradise?

Rob Stevenson
LLB(Hons)(QUT), LLM(Environmental Resources Law) (QUT)
Accredited Specialist (Workplace Relations)
Principal, Australian Workplace Lawyers

A. INTRODUCTION

Taking effect from 1 July 2009, the ability for a claimant to bring a claim of breach of workplace rights (also known as an *adverse action* claim) under the general protections provisions of the *Fair Work Act 2009 ("**FW Act**")* represented a significant new weapon for people with workplace grievances.

Although the provisions have been in force for 3 years now, there has not been a flood of general protections claims, certainly in comparison to statutory unfair dismissal claims.[1] Likewise, the number of these claims resulting in judicial determination has been relatively small and it has taken some time for a body of principles to emerge. This paper seeks to break down the main breach of workplace rights provisions, collate guidance from the cases to date and provide some tips so readers can at least be aware of some of the warning signs of potential claims in this area.

B. BACKGROUND

The general protections provisions of the FW Act consolidate and expand on the historical protections for unlawful termination of employment, freedom of association and lawful industrial action. They include prohibitions on:

a. the taking of adverse action against a person or coercing them because of a *"workplace right"* they have;

b. an employer exerting undue influence or pressure on an employee to make various agreements or arrangements;

c. knowingly or recklessly making a false or misleading representation about another's workplace rights, or their exercise;

d. taking adverse action against a person because of their membership or non membership of an association, or their engagement or non-engagement in various industrial activities;

e. an employer discriminating against an employee or prospective employee because of their race, sex, age, disability etc;

f. dismissing an employee because of temporary absence from work through illness or injury;

[1] According to the Fair Work Commission's 2012-2013 Annual Report, 2984 general protections claims were lodged in the financial year, compared to 14,818 unfair dismissal claims.

g. various conduct relating to *"sham"* contracting arrangements.

There are several features which distinguish these provisions from the more pedestrian unfair dismissal laws and make them more attractive to the potential litigant:

- unlike the unfair dismissal provisions, legal action to address the workplace rights provisions can be taken by all employees – there are no remuneration thresholds or minimum employment periods to be served;
- they are not limited to termination of employment situations;
- there is a "reverse" onus of proof;
- there is no limit on the remedies that can be granted and no cap on the compensation that can be awarded;
- in addition to remedies such as reinstatement, injunctions and compensation, civil penalties of up to $51,000 per breach (for companies - $10,200 for individuals) can be imposed.

However, as we shall see, the provisions are also significantly more complex than the unfair dismissal laws.

C. ADVERSE ACTION AND BREACH OF WORKPLACE RIGHTS

In general terms, *"adverse action"* must not be taken in relation to:

- workplace rights (which can be broadly described as employment entitlements and the freedom to exercise and enforce those entitlements);[2] and
- industrial activities (which encompasses the freedom to be or not be a member or officer of an industrial association and to participate in lawful activities, including those of an industrial association).[3]

Put simply, a person must not take adverse action against another person because of anything to do with a person's workplace rights or industrial activities.

My consideration in this paper will focus on the breach of workplace rights provisions contained in Division 3 of Part 3-1 of the FW Act which are most likely to be the basis of any action against small – medium size employers.

The key point to remember is that there must be some causal link between the adverse action and the workplace right. To fall within the prohibitions, the adverse action must be taken either:

a. because the person has a workplace right;
b. because the person has or has not exercised the workplace right;
c. because the person proposes to exercise or not exercise the workplace right or has ever done so;
d. in order to prevent the exercise of the workplace right; or
e. because the person has had a workplace right exercised or proposed to be exercised for their benefit by another person.

[2] Chapter 3, Part 3-1, Division 3 FW Act
[3] Chapter 3, Part 3-1, Division 4 FW Act

1. So, what are workplace rights?

There are three aspects to the definition of a workplace right:

a. a person's entitlements, roles and responsibilities;[4]
b. the ability to take part in processes and proceedings under workplace laws and instruments;[5] and
c. the ability to make complaints or inquiries.[6]

In particular, a person is defined as having a workplace right if they:

- have a benefit, role or responsibility under a workplace law, instrument or order;
- can take part in a process or proceedings under a workplace law or instrument , including:
  - conferences held by the Fair Work Commission ("FWC");
  - court proceedings;
  - protected industrial action and ballots;
  - the making, variation or termination of an enterprise agreement or bargaining representative appointment;
  - making or terminating individual flexibility arrangements;
  - agreements to cash out paid annual leave or paid personal/carers leave;
  - flexible working arrangement requests;
  - dispute settlements;
- are able to make a complaint or inquiry:
  - to a body that has the power to seek compliance with a workplace law or instrument; or
  - if the person is an employee - in relation to their employment.[7]

Apart from the final broad right of complaint or inquiry in relation to employment, all of the other rights referred to involve the concepts of a *workplace law* or *workplace instrument* and they are considered further below.

In practice, many cases involve allegations of infringement of multiple rights such as the relationship between OHS duties and the ability to make complaints or discrimination due to pregnancy and breach of the workplace right to take parental leave.

The first two types of workplace rights provisions depend on the existence of a *workplace law* or *workplace instrument.* These terms are defined in the FW Act.

[4] S. 341(1)(a) FW Act
[5] S.341(1)(b) FW Act
[6] S.341(1)(c) FW Act
[7] S.341(1), (2) FW Act

What is a workplace law?

A workplace law is defined in the Act as being:

a. the *Fair Work Act 2009*;
b. the *Fair work (Registered Organisations) Act 2009*;
c. the *Independent Contractors Act 2006*; and
d. any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters).[8]

A law can be an Act of parliament or a regulation.[9] It is now clear that legislation does not have to exclusively regulate employment relationships to fall under (d). Cases have held the following legislation to fall under (d) above:

- Occupational health and safety legislation;
- Discrimination and equal opportunity legislation;[10]
- Workers compensation laws. It has been held that the *Safety Compensation and Rehabilitation Act (Cth)* regulates the relationship between employers and employee at the most basic, economic foundations of the relationship.[11]

Whilst the law does not have to exclusively regulate the employment relationship, the particular law must have an object of regulating the employment relationship and it is not enough for the employment relationship to arise merely as an incidental matter. So, civil aviation legislation, privacy legislation and the legislation governing professional engineers has been held not to fall within this description.[12]

Further, the provisions do not capture the general law of contract including the exercise of implied rights of an employer or employee.[13] In particular, the exercise of the common law right to refuse an employer's request for an employee to carry out any act that is either illegal or not reasonable in the circumstances does not, of itself, amount to the exercise of a workplace right.[14]

CASE ILLUSTRATION
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd *[2011] FCA 1001 (Judgment delivered 12 August 2011)*
This case concerned the actions of an AMWU delegate and health and safety representative under the Occupational Health and Safety Act 2004 (Vic) in stopping the operations of 2 forklifts whose reverse beepers did not work. The employer took disciplinary action against the employee for failing to use appropriate dispute resolution procedures to address the matter and suspended him. The union applied for urgent interlocutory relief.

The court held:

- *there was a serious question that the employee had a workplace right namely to act to maintain safety and avert danger pursuant to his duty under the OHS Act to take reasonable care for his own safety and of persons at the workplace, whether he was acting as a HSR or as an ordinary employee; and*
- *there was a serious question that adverse action had been taken by the company.*

[8] S.12 FW Act
[9] See *Australian Licenced Aircraft Engineers Association v Sunstate Airlines (Qld) Pty Ltd* [2012] FCA 1222
[10] *Bayford v MAXXIA Pty Ltd* [2011] FMCA 202
[11] *Stephens v Australian Postal Corporation* [2011] FMCA 448 Also see *CFMEU v Leighton Contractors Pty Ltd* [2012] FMCA 487regarding the *Workers Compensation and Rehabilitation Act 2003 (Qld)*
[12] In relation to the *Professional Engineers Act 2002 (Qld)*, see *Daw v Schneider Electric (Australia) Pty Ltd* [2013] FCCA 1341
[13] Ibid at [113].
[14] Ibid at [95], [104]

Australian Licenced Aircraft Engineers Association v Sunstate Airlines (Qld) Pty Ltd *[2012] FCA 1222 (Judgment delivered 6 November 2012)*
A number of Sunstate aircraft were temporarily grounded following inspections by engineers. Sunstate issued the employees with formal warnings and docked their pay for 4 hours wages. The employees claimed that Sunstate had taken adverse action because they were acting in accordance with their obligations under the Civil Aviation Regulations and Act.

The judge dismissed the claim and found the employees' actions were part of a "go slow" during a bargaining dispute. The judge was also not satisfied that the Civil Aviation legislation was a "workplace law". He held that:

1. *a regulation could be a workplace law;*
2. *to be a workplace law, the law must have the "object" of regulating the employment relationship;*
3. *a law that imposes an obligation as an incident of undertaking a particular task in the course of employment does not regulate the employment relationship;*
4. *provisions which do no more than use the status of employment as an "incidental touchstone" for the imposition of duties serving other ends do not fall within the definition.*

Austin v Honeywell Ltd *[2013] FCCA 662 (Judgment delivered 28 June 2013)*
Ms A claimed that, during a pre-employment screening process, Honeywell required her to provide, among other things, an electronic copy of her signature and a digital copy of her passport. She declined to provide those things because she was concerned about identity theft and the bona fides of the agent conducting the pre-employment screening.

Honeywell withdrew the offer of employment it had made to the applicant. Ms A said this constituted adverse action because she had exercised a workplace right that arose under a workplace law, namely, the Privacy Act 1988.

In rejecting the claim, the court held that, at most, the Privacy Act 1988 incidentally imposes duties on prospective employers that do not primarily concern the regulation of the relationship between employers and employees. The fact that employee records are exempted from the legislation was a relevant consideration.

What is a workplace instrument?

A workplace instrument is defined as being an instrument that:

a. is made under, or recognised, by a workplace law; and
b. concerns the relationships between employers and employees.[15]

The concept is intended to refer to instruments which are given particular legal effect by a statutory enactment (including, it appears, regulations).[16] So, industrial awards, enterprise agreements and individual flexibility arrangements clearly fall within this description. However, a common law contract of employment would most probably not be a workplace instrument.[17] Note that the instrument itself does not have to *"regulate"* the relationship but must only *"concern"* the relationship.

An application to a state court for monies owing under a contract of employment has been held to be a *"clear"* exercise of a workplace right.[18] However, it would seem this would only be the case if the application concerned monies owing under the Act, an award, enterprise agreement or some other statutory based instrument.

[15] S.12 FW Act
[16] See *Barnett v Territory Insurance Office [2011] FCA 968; Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526.
[17] *Barnett v Territory Insurance Office [2011] FCA 968* (Judgment delivered 24 August 2011). Also note *Bayford v MAXXIA Pty Ltd* [2011] FMCA 202
[18] *Moore v Slondia Nominees Pty Ltd* [2012] FMCA 273

The ability to make a complaint or inquiry, if the person is an employee, in relation to employment

It is important to note firstly that this broad right only applies to employees and not contractors. Persons other than employees do not have a general right to make a complaint or inquiry but must make their complaint or inquiry to a relevant authority.

Most cases until this year had assumed that an employee has a general right to make a complaint or inquiry in relation to their employment. The cases had not squarely considered whether the use of the term *"able to make a complaint/inquiry"* was more restricted in meaning and required some basis of authority for the complaint, such as an enterprise agreement or contract of employment.[19]

However, two decisions this year, one in the Federal Magistrates Court (now the Federal Circuit Court) and the other in the Federal Court, have adopted a broad, literal, interpretation of the term. In these cases, email inquiries about payment of wages and a statement that an employee intended to obtain legal advice about unpaid commissions were held to fall within the term.

Any communication from an employee to an employer that can fairly be characterised as a *complaint* or *inquiry* is likely to be included. Not everything will be a complaint though, so a mere raising of concerns or expression of unhappiness about a particular situation is unlikely to suffice.[20]

A similar broad interpretation of the term "*in relation to employment"* has also been taken. There is authority that the complaint does not have to be directly about the complainer's employment and that *"in relation to"* in effect means *"in the course of"*. For example, complaints about the unsafe work practices of others come within this description.[21]

CASE ILLUSTRATION

Devonshire v Magellan Powertronics Pty Ltd & Ors *[2013] FMCA 207 (Judgment delivered 11 April 2013*

Ms D was a Business Development Manager. She sent several emails to her employer during December 2011 indicating that she had been paid incorrectly and following up on payment of car allowance. She took leave over Christmas and upon her return in mid January, she was still not being paid correctly so she sent further emails to her employer. The company director then met with the employer where he said that he was not happy that Ms M had taken leave and was not worth her salary. The employer could not give a date for outstanding payments to be made to Ms M. Ms M went on sick leave later that day and sent an email to this effect to the employer. She later received an email advising that her employment had been terminated for refusing to wear the company uniform and lack of sales.

The court held that an employee making a complaint or inquiry direct to their employer can constitute a workplace right under the Fair Work Act.

Murrihy v Betezy.com.au Pty Ltd *[2013] FCA 908 (Judgment delivered 10 September 2013)*
Ms M complained to her CEO about the employer's failure to pay commissions alleged to be due to her under an agreement. She said that if the commissions were not paid, she would get legal advice. Ms M was told that if she took legal advice about her unpaid remuneration and commissions, she would be fired.

The judge held that Ms M's proposal to seek legal advice was a proposal by her to make an inquiry in relation to her employment under s.341(1)(c)(ii) of the Act. The employer's threat to fire Ms M was a contravention of the Act.
The court noted that:

[19] See *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 at [49].
[20] See *Richards v Le Cordon Bleu Australia Pty Ltd* [2013] FCCA 566
[21] *CFMEU v Pilbara Iron Company (Services) Pty Ltd (No 3) [2012] FCA 697*

- *perhaps more than ever before, . . .individual employees, without the benefit of union representation, will often need to seek their own advice and representation in relation to rights arising under federal industrial legislation; and*
- *an employee should be able to have recourse to his or her solicitor, without the fear of repercussions in the nature of "adverse action" taken by the employer.*

The judge subsequently ordered that the employer pay Ms M a total of almost $511,000 comprising more than $410,000 in compensation, damages and interest and $98,300 in penalties, plus costs.

2. What is adverse action?

Having dealt with the technicalities of whether a relevant workplace right exists, it is somewhat easier to deal with the concept of *adverse action*. The first point is that whether something is an adverse action in any particular case depends on the nature of the relationship between the relevant persons. So, the first requirement is that there must be a certain type of *"doer"* and a certain type of *"subject"* of the adverse action.

Who can take part in adverse action?

Who may be an instigator of adverse action and who may be the subject of adverse action is set out in Column 1 of s.342(1) of the FW Act, namely:

1. an employer against an employee;
2. a prospective employer against a prospective employee;
3. a principal against their current independent contractor, or a person employed or engaged by the independent contractor;[22]
4. a principal against their proposed independent contractor, or a person employed or engaged by the independent contractor;
5. an employee against his or her employer;
6. an independent contractor against their sub contractor;
7. an industrial association, or an officer or member of an industrial association, against a person.[23]

CASE ILLUSTRATION
Vij v Cordina Chicken Farms Pty Ltd *[2012] FMCA 483 (Judgment delivered 15 June 2012) Mr V worked in a chicken factory and alleged that his employment was terminated after he tried to educate other workers and management about workplace rights. He was employed by a services company which was contracted to provide C with labour hire workers on a temporary basis. It was common for workers to be directly employed by the company after a period of time.*

The court held that:

- *the term "prospective employee" refers to a person whom the prospective employer is considering for employment;*
- *it excludes persons who might yet apply for employment or be invited to consider employment but at the relevant time were not yet negotiating with the prospective employer;*

[22] See *United Motor Search Pty Ltd v Hanson Construction Materials Pty Ltd* [2013] FCA 1104 (24 October 2013)
[23] S.342(1) FW Act

- *here, although the inducement of permanent employment might have been held out there was no evidence of an offer of employment or invitation to apply;*
- *accordingly, Mr V was not a "prospective employee".*

The issue of whether Mr V was a person employed by a contractor of the principal and whether he was able to take action in that capacity was not considered in the case.

What can be adverse action?

What is adverse action is broadly defined by reference to various circumstances.[24] Put simply, it includes:

1. termination;
2. injury;
3. alteration of position;
4. certain types of discrimination;
5. refusal to employ or engage services;
6. the taking of industrial action and organising industrial action;
7. threatening to do any of the above.[25]

CASE ILLUSTRATION
Wilkie v National Storage Operations Pty Ltd *[2013] FCCA 1056 (Judgment delivered 9 August 2013)*
Ms W worked as a centre manager at the employer's Cockburn Centre in Perth from 20 December 2010 until 20 January 2012. In June 2011, she commenced taking one day sick leave each month on medical advice to reduce her stress levels. On 7 December 2011,Ms W notified her team leader that she would need to leave at 2.30 pm the following day in order to collect her son from school as arrangements to have someone else collect him had fallen through. The team leader informed Ms W by email that no one was available to cover for her, that the office could not be closed and she would need to make alternative arrangements for her son. Nonetheless W left the office at 2.30 pm. As a result she was issued with a first and final warning.

The court held that Ms W had a workplace right to take personal/carer's leave or unpaid carer's leave due to an unexpected emergency, namely the need to collect a primary school child from school. The employer was well aware of why Ms W sought to leave work early. The court was satisfied that the warning amounted to adverse action in that it made Ms W more vulnerable to dismissal.

Three days after receiving the warning Ms W was informed that she was being transferred to another centre as an assistant manager "given your current personal circumstances". Ms W did not wish to transfer. The employer admitted that the decision to transfer Ms W was motivated, at least in part, by her personal circumstances, including her use of personal leave for medical reasons and/or family responsibilities, which was not permissible. The court also found that while Ms W's salary was to be maintained, the transfer involved a change of role from centre manager to assistant manager, which was effectively a change of contract terms. The change altered Ms W's position to her prejudice as it reduced her status and level of responsibility. The court found that Ms W's demotion was a repudiation of her contract entitling her to treat the employment as having come to an end, and on that basis, a

[24] S.342 FW Act
[25] S.342(2) FW Act

termination at the initiative of the employer. The court awarded W $32,130.78 for lost remuneration.

So, a constructive dismissal can amount to an adverse action.[26]

The concepts of *injury* and *alteration of position* are broad terms. One judge has expressed the view that injury in this context refers to the deprivation of one of the more immediate practical incidents of employment, such as the forced removal of a worker from a worksite or the attempted transfer of an employee to a worksite and stand down.[27] However, another has put it more broadly, saying that it includes any circumstances where an employee is treated substantially differently to the manner in which they are normally treated and the treatment is injurious or prejudicial.[28] The High Court has held that *"injured"*, in employment circumstances, covers injury of any compensable kind.[29]

The High Court has also held that alteration of the position of the employee to their prejudice refers to an intentional act directed to an individual employee or prospective employee.[30] This appears to be, if anything, a broader concept which could cover any deterioration or adverse effect in the advantages enjoyed by the employee before the conduct in question.[31] This can include, for example, a disciplinary warning or discriminatory allocation of less congenial shifts or rosters.[32]

CASE ILLUSTRATION

QANTAS v Australian Licensed Aircraft Engineers Assocn *[2012] FCAFC 63 (Judgment delivered 4 May 2012)*

The employee was an engineer and union member. He was required to work overseas for short periods to relieve overseas posted engineers. He made a claim for additional payment for an overseas posting and additional time off on his return to Australia. QANTAS refused the claim which led to email correspondence and a heated phone exchange between the employee and his superior. The employee instigated the dispute resolution process in the relevant EBA. Shortly afterwards, the employer suspended all overseas postings for engineers out of Brisbane.

The employee claimed his superior had abused him and that QANTAS had denied him any future possible international postings because he had complained about shift penalties and had proposed to use the dispute resolution process in the EBA. He also claimed coercion.

The court found that adverse action had been taken and held that:

- *yelling at the employee was not an "injury" although it could have been a prejudicial alteration of position;*
- *suspending all overseas postings constituted the loss of a benefit and was an injury or alteration of position;*
- *the threat to prevent the applicant from going on future postings was an attempt to bring pressure to prevent him from further pursuing his claim and amounted to coercion.*

QANTAS was fined $13,200 for its adverse action and the relevant manager was fined $2,200 for the coercion.

---

[26] See *Daw v Schneider Electric (Australia) Pty Ltd* [2013] FCCA 1341 at [87].
[27] *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd & Anor* [2011] FMCA 58
[28] *Hodkinson v The Commonwealth* [2011] FMCA 171 referring to *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155
[29] *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia No 3* (1998) 195 CLR 1
[30] Ibid
[31] *Hodkinson v The Commonwealth* [2011] FMCA 171; see also *Evangeline v Department of Human Services* [2013] FCCA 807 at [23].
[32] See *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 at [51].

3. "Because" – the link between the workplace right and the adverse action

The High Court in the *Barclay case* has now clarified that whether a particular action or decision was taken because of a proscribed reason, or for reasons which included a proscribed reason, is a question of fact to be determined on the evidence. This will involve consideration of the decision maker's particular reason for taking adverse action. The High Court has held that it is not necessary to make an objective enquiry into a defendant employer's reason, including any unconscious reason, for taking adverse action, as had previously been considered necessary.

So, in order to defend a prima facie case of breach, an employer should normally rely in its defence on direct testimony of the decision-maker's reason/s for taking the adverse action. It will be difficult for an employer to satisfy the reverse onus if this is not done.

That is not to say that direct evidence of the reason why a decision-maker took adverse action will always be the end of the case. The decision maker's evidence may be unreliable because of other contradictory evidence. However, direct testimony from the decision-maker which is accepted as reliable will generally discharge the employer's burden.

But note also that the workplace right element only has to be one of the reasons for the adverse action for the provisions to be breached. It must be an operative or immediate reason but need not be the sole or dominant reason.[33]

CASE ILLUSTRATIONS

Barclay v The Board of Bendigo Regional Institute of Technical and Further Education *[2012] HCA 32*

Mr B worked for the Bendigo TAFE. In a work email to colleagues, and signing off as president of his union sub-branch, he said that some union members had reported serious misconduct on the part of other persons at the TAFE and in particular that some members had reported being asked to produce false/fraudulent documents for an upcoming audit. His employer called on him to show cause why he should not be disciplined for failing to report the misconduct and he was suspended.

Mr B alleged adverse action on the basis that he was a union officer, because of industrial activity (namely advancing the views or interests of the union) and participation in a process.

He lost at first instance but on appeal the Full Court of the Federal Court, in a 2/1 majority held that a broad and objective approach to the issue of the connection between the workplace right and the adverse action should be taken. The majority held that the real reason is not necessarily the reason the employer thinks it was and subjective intent is not always necessary. Viewed in this context, the actions taken by Mr B were part of his union role and there was a causal nexus between the action taken by the employer and his workplace rights.

This decision was overruled by the High Court.

George v Northern Health (No. 3) *[2011] FMCA 894 (Judgment delivered 28 November 2011)*

Ms G was employed as a Pharmacy Technician on a fixed term (maternity leave cover) basis to run from 28 June 2010 to 18 March 2011, subject to 6 months probation. Her employment was terminated on 6 September 2010 after an assessment that she was not performing satisfactorily. Ms G claimed that she had been terminated because she had made verbal and email complaints about the Pharmacist in Charge. The question was whether Ms G's employment was terminated because of the exercise of the workplace right to make a complaint or inquiry.

[33] See Explanatory Memorandum at para 1458.

The court was satisfied on all of the evidence that the making of a complaint/inquiry played no part in the decision to terminate. The court made the points that:

- *it was not necessary for the Court to determine whether the termination was fair;*
- *the fact of a temporal connection between the adverse action and the complaint did not automatically mean there was a causal connection;*
- *it was necessary to call evidence from the real and effective decision makers.*

***Stevenson v Airservices Australia** [2012] FMCA 55 (Judgment delivered 1 February 2012)*
Mr S was a workplace relations advisor. He made complaints that 2 other employees were bullying and harassing him. An external mediator was appointed but Mr S's employment was terminated by the CEO before the mediation took place. Enterprise agreement negotiations in which Mr S would have played a significant role, were looming. The reason for termination was that Mr S had failed to build and sustain key relationships with internal and external stakeholders, including the respondents to his complaints.

The court accepted that Mr S had exercised a workplace right by making complaints and also accepted that termination was an adverse action. The issue was whether the adverse action was taken because, or in part because, Mr S had exercised a workplace right. The court held that:

- *attention is on the decision maker's state of mind when making the decision, not the state of mind of other persons providing the decision maker with information upon which the decision might be based;*
- *here, it was the fact of Mr S's poor working relationships, not why they were poor, which motivated the CEO.*[34]

***Turnbull v Symantec (Australia) Pty Ltd** [2013] FCCA 1771 (Judgment delivered 1 November 2013)*
Ms T held the position of Senior Manager Finance with the employer. She notified her manager of her pregnancy on 15 December 2010 and later made an application for maternity leave commencing 20 June 2011 and ending 31 January 2012, which was approved. Whilst on parental leave, Ms T's duties were partly taken over by her manager and partly by her direct reports. In early January 2012, Ms T raised the possibility of returning to work part time but her manager said this could not be accommodated.

In the meantime, Ms T's manager had been given a cost saving target. He recommended that 2 of the 4 senior finance roles be eliminated, including the position of Ms T. He followed a template decision making document. Ms T's employment was terminated with effect from 2 March 2012.

Ms T claimed that her employment had been terminated because of her family or carer's responsibilities. The court was satisfied that the decision to end Ms T's employment was taken because her work had already been allocated to other employees and the manager had concluded the work could be performed without Ms T's position. The judge noted that had Ms T not taken parental leave, it may not have become apparent that her tasks could be re allocated. However, the court had to determine the actual reasons for the termination. Also, the judge considered it probable that, even had Ms T not taken parental leave, the manager would have arrived at the same conclusion. Ms T's claim failed.

BUT CONTRAST THESE CASES WITH

[34] This case also illustrates the practical importance of the court's perception of witnesses. In this regard, also see *Gofton v Queensland Newspapers Pty Ltd [2012] FMCA 64* (Judgment delivered 7 February 2012)

NTEU V Royal Melbourne Institute of Technology *[2013] FCA 451 (Judgment delivered 16 May 2013)*
Professor B's employment was terminated due to redundancy. She had made written complaints of bullying and intimidation by her head of school and met with the Vice Chancellor about the complaints. The head of school wrote to the VC advising that he did not consider Professor B's position in the faculty to be tenable and proposing several options, including redundancy.

The judge was not satisfied that RMIT had discharged its onus. This was based on the failure of the VC to give explicit evidence about her reasons and the absence of any clear connection between the financial deficit in the Youth Work discipline and the choice of Professor B as the one who should be made redundant. This included the absence of any criteria by reference to which the making of that choice occurred. The judge also took into account the VC's apparent determination to ignore her knowledge of the head of school's animosity towards Professor B. Reinstatement was ordered and RMIT was penalised a total of $37,000.

D. OTHER ISSUES

The reverse onus of proof

The onus of proving a case is usually on the applicant making the allegation. However, for breach of workplace rights claims, once the applicant has shown some prima facie evidence of the workplace right and the adverse action that has infringed it, there is then a presumption that the action was taken with intent until the employer proves otherwise. This is known as the reverse onus of proof. Put in legal terms, it is necessary for the respondent to establish on the balance of probabilities, that the alleged improper reason was not a reason for taking the action.

In practice, the effect of the cases has been that the applicant must prove the existence of objective facts which set out a basis for the contravention. Once this occurs, it is then up to the respondent under s.361 to prove on the civil standard that the adverse action was not taken because of the workplace right. It is not sufficient for an applicant to simply allege that they had a workplace right and than an adverse action has occurred.

CASE ILLUSTRATION
Schultz v Scanlan & Theodore Pty Ltd *[2013] FCCA 1096 (Judgment delivered 18 October 2013)*
Ms S was employed between November 2010 and July 2012 and held the role of merchandising manager. The employer was a women's fashion designer and retailer. In March 2012, Ms S advised the employer she was pregnant and in April she told the employer that she planned to take maternity leave later that year. After a couple of days sick leave in June, her employment was terminated due to redundancy.

The court rejected the adverse action claim. Ms S argued that her duties could not be performed by others, that the timing of the decision was illogical and the financial reasons of the company were not supported.

However, the judge accepted that a business downtown and a "diabololical" sales season were the reasons for the termination. He accepted the evidence of the business owner and general manager which was "unshaken, and confirmed by certain financial and other records produced". The court accepted that there was substantial and objective evidence in support of the company's position that the reason for termination was solely redundancy.

Accessorial liability

Section 550 of the FW Act provides that a person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision. To be involved, the person must have:

(a) aided, abetted, counselled or procured the contravention; or

(b) induced the contravention, whether by threats or promises or otherwise; or

(c) been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) conspired with others to effect the contravention.

The provisions are intended to ensure that persons involved in contravening conduct, often directors or very senior employees of corporations, are held liable for their conduct. Further, they also ensure that liability is able to be imposed on persons involved in the contravening conduct in circumstances where a company has, for example, become insolvent or been deregistered, and no penalty would otherwise be recoverable.[35]

CASE ILLUSTRATION

Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Ors *[2011] FMCA 459 (Judgment delivered 21 June 2011)*

The FWO prosecuted the employer, director and HR manager for breach of employment laws regarding non payment of wages and engaging in sham contracting arrangements. The HR Manager said that he had just been following the instructions of the employer.

The court accepted that the HR manager was overborne by the company director and exercised no independent judgment in his actions in implementing directions. Nevertheless, as human resources manager, he should have been aware of, and at least attempted to give advice on, Centennial's obligations. The HR Manager was ordered to pay a penalty of $3,750.00 (in addition to penalties imposed on the director).

Fair Work Ombudsman v AJR Nominees Pty Ltd *[2013] FCA 467 (Judgment delivered 17 May 2013)*

Mr B had been employed as a spraypainter for almost 10 years. He told his employer in December 2011 that he had been diagnosed with blood cancer and he had to take several days off sick in January. The employer's director sought to persuade Mr B to resign. During a meeting in early February about an application by Mr B for a disability pension, the director told him that he did not believe there was anything wrong with him and said "You're a f...ing smart little c..t and if you dont get out of her I'm going to throw you out.". The director then maintained that Mr B had resigned. Mr B continued to provide medical certificates which were ignored by the employer.

The court accepted the employer had terminated Mr B's employment because it did not want to pay for personal leave as well as employing a replacement. The company was ordered to pay Mr B's accumulated personal leave and 5 weeks notice. The company director was also found to have been personally involved in the company's contraventions. Penalties are yet to be set.

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3) *[2013] FCA 525 (Judgment delivered 29 May 2013)*

The court held that the employer and a manager took adverse action against an employee by instigating and conducting an investigation into his conduct on 5 August 2011, suspending

[35] See *Devonshire v Magellan Powertronics Pty Ltd & Ors* [2013] FMCA 207

him from employment on 8 August 2011, and issuing him with a final written warning on 18 August 2011, because he had exercised a workplace right.

The court was satisfied that the Operations Manager, Mr S was the decision maker for the purposes of two contraventions and was Visy's guiding mind for these acts. He had knowledge of his own motives and he carried out various actions in furtherance of the contravention. The court had no difficulty in finding that Mr S procured and was knowingly concerned in Visy's contraventions in suspending and investigating Mr Zwart. The court was satisfied on the balance of probabilities that in making these decisions Mr S was actuated, at least in part, by Mr Z's actions in tagging the forklifts and/or opposing the temporary measures proposed. A penalty was imposed on Mr S of $4,620.00 in addition to penalties imposed on the company.

Contraventions that involve dismissal and those that do not

There are two types of contravention dealt with in Division 8 of Part 3-1 – those involving dismissal and those that do not. If a person has been dismissed then application must be made to the Fair Work Commission ("**FWC**") within 21 days of the dismissal taking effect (subject to a power of extension in exceptional circumstances).[36] An applicant cannot also bring a standard statutory unfair dismissal claim.

The FWC must conduct a conference in private to deal with a dismissal related dispute.[37] If the matter cannot be resolved, the FWC must issue a certificate to this effect and the applicant then has 14 days to make a court application to either the Federal Circuit Court or the Federal Court.[38] From 1 January 2014, the FWC will also be able to arbitrate general protections dismissal disputes where the parties consent.

There is no set time limit for legal action for non dismissal contraventions. For non dismissal related disputes, the parties must agree before a conference can be held by the FWC.[39] Where the parties do not agree on a FWC conference, a party can directly make an application to the Federal Court or Federal Circuit Court for orders.

Legal process

Most claims that escalate from the FWC are practically commenced in the Federal Circuit Court. Proceedings in the Federal Circuit Court are, generally speaking, more formal than in the FWC but the court does try to deal with matters as informally and as quickly as possible. In the Federal Circuit Court, after the applicant files and serves the initiating application and claim, the court will generally convene a directions hearing and make directions for the filing of a response, the filing of written evidence by the parties and refer the matter to mediation. Disclosure of documents is subject to order of the court. If the matter is not resolved at mediation, it will generally then be set down for hearing. The process generally takes about 6 months from commencement to hearing.[40]

It is possible for applicants to make application to amend the grounds of their claim while still in the FWC conciliation phase.[41] It was initially thought that an applicant's stage 2 court claim was restricted to the grounds alleged in the initial FWC application. However, it now appears that applicants can introduce new grounds once proceedings are commenced in the Federal Circuit Court or Federal Court as long as the additional grounds still relate to the *"dispute"* the subject of the FWC application.[42]

---

[36] S.366a FW Act
[37] S.368 FW Act
[38] Ss.369, 371 FW Act
[39] S.374 FW Act
[40] Although there can be delays in the handing down of judgments.
[41] *Talbot v Connor Haulage (ACT) Pty Ltd T/A Connor Haulage* [2012] FWA 3969
[42] *Shea v TruEnergy Services Pty Ltd (No 1)* [2012] FCA 628 (15 June 2012), not following *EPU v Active Tree Services Pty Ltd[2011] FMCA 535*

Once a claim has been lodged, the FWC must hold a conference and has no power to dismiss an application on jurisdictional grounds.[43]

The general rule in these proceedings is that each party bears their own costs. Accordingly, it is necessary to consider the costs and benefits of engaging lawyers as part of this process. However, costs can be ordered where the proceedings were commenced vexatiously or without reasonable cause or where there has been an unreasonable act or omission of a party in the proceeding. Rejecting a reasonable settlement offer and causing the respondent to incur significant costs by calling unnecessary witnesses has resulted in costs being ordered against an applicant.[44]

The court (either the Federal Court or Federal Magistrates Court) can impose a penalty of up to 60 penalty units ($51,000 for companies) per breach, under these provisions.[45] The court can also make injunctions, award compensation and order reinstatement.[46] There is no cap on the amount of damages available to a successful applicant. In the event of prosecution by the FWO, there is also the public stigma associated with the prosecution to keep in mind.

F. THINGS TO KEEP IN MIND

Whilst the field of breach of workplace rights has arguably not turned out to be a *"workers' paradise"* employers and principals are advised to tread carefully when considering any detrimental step against a person that can be the subject of adverse action.

The potential list of trigger areas is lengthy, but it includes:

- actions by employees who hold a formal office or role such as a union delegate or WHS representative;
- actions in the course of enterprise bargaining or industrial action or under legislation such as OHS legislation given the broad duties that exist;
- actions involving any of the National Employment Standard matters or discrimination triggers;[47]
- the making of complaints/inquiries to outside authorities or, if the person is an employee, internally;
- the taking of extended sick leave and/or workers compensation claims.

The following tips will not eliminate the risk of legal action but will help to minimise those risks.

Identify potential issues early

Prevention is better than cure and the starting point for most of these matters is educating line managers about the need for an innate sense of substantive fairness and procedural fairness and ensuring that line managers are ready, able and willing to seek advice. This often involves difficult cultural issues inside an organisation and balancing these objectives against pure business outcomes. Even if this type of approach doesn't prevent all issues from arising, it will help in heading them off at the pass before they spin out of control.

Its all about the "vibe"

Decisions that contravene the workplace rights provisions will either be made intentionally or not intentionally. However, the starting point is that if a proposed decision feels controversial or "unreasonable", then further consideration should be given to the matter.

[43] See *Hewitt v Topero Nominees Pty Ltd T/A Michaels Camera Video Digital* [2013] FWCFB 6321
[44] *Cugura v Frankston City Council (No 2)* [2012] FMCA 530 (20 June 2012)
[45] Ss. 371, .539 FW Act
[46] S.545(2) FW Act
[47] S.351(1) FW Act

In a similar vein, managers should avoid the temptation to retaliate or "get even" with employees who have caused them some grief. Managers should be encouraged to consider the implications before making decisions which may adversely affect an employee. A sliding scale of consideration should apply. The greater the potential effect, the greater the consideration that should be given to the matter.

Training is important

All managers should receive training in decision making processes and their responsibilities to avoid unlawful discrimination and potential triggers for breach of workplace rights claims. This is particularly important in light of the possibility of personal liability of managers for involvement in contraventions.

The paper trail is important

The courts have shown that they are prepared to back up employers who can show substantive and procedural fairness to employees, even where there is a workplace right and adverse action. An important part of this is the employer's ability to set out its paper trail of reasonable steps and consideration. This is as basic as keeping notes of conversations and meetings and correspondence. Where termination is involved, a contemporaneous written note of the reasons is helpful. It is also important to ensure that the reasons are clearly stated.

The use of template documents and checklists alerting decision makers to unlawful factors and requiring the reasons for a particular action to be detailed is to be encouraged, although these are not a substitute for a properly considered decision. For instance, where a redundancy is proposed, a decision maker should be able to set out in writing why a particular's person's position has been chosen including, if relevant, by reference to skills and productivity or other criteria.

In conduct related matters, it is best to separate the decision maker from the investigator so that it is more difficult for an applicant to argue that the decision maker has been influenced by other factors.

Also, a decision maker should err on the side of caution and disqualify themselves from making a decision affecting a person if the potential claimant makes allegations against that decision maker, eg of bullying behaviour.

Treat complaints seriously

Employers should have a policy process for employees to raise general complaints with their manager or managers further up the chain of command, and where appropriate, with the HR department. Complaints are less likely to get lost in the system if this is the case and managers can gauge for themselves the seriousness of the matter and the appropriate action.

Make sure that policies are followed

Questions may arise about the decision maker's motivations if there is a departure from established policy and process, particularly in relation to bullying and harassment, discrimination and dispute resolution.

Good luck!
