# THE PLAINTIFF'S NEW BLACK: Adverse Action

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## A. INTRODUCTION

Taking effect from 1 July 2009, the workplace rights, or *"adverse action"* provisions of the *Fair Work Act 2009* represent a significant new weapon for people with workplace grievances. Together with the reduction in the employee numbers threshold for unfair dismissal claims, they constitute a significant expansion of previously existing legal rights. This is reflected in the number of these types of claims. According to FWA's quarterly report for the first 3 months of 2012, 706 general protection applications were lodged with FWA. This compares with 566 in the same quarter of 2011. [1]

This increased potential for, particularly, disgruntled employees to bring claims has come at the same time as the government's policeman, the Fair Work Ombudsman, has been taking a higher profile approach to recovery of wage entitlements and prosecuting employers for breaches of NES and award requirements, record keeping requirements and in some instances, discrimination and adverse action.

Although the provisions have been in force for 3 years now, the number of 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 adverse action provisions in practical terms, collate important guidance from the cases to date and provide tips so readers can at least be aware of some of the warning signs of potential claims in this area.

## B. BACKGROUND

Apart from the unfair dismissal regime and basic entitlements, historically, workplace relations legislation has provided remedies to address:

1. Unlawful termination of employment;
2. Freedom of association; and
3. Protection of industrial action.

The workplace rights provisions of the *Fair Work Act* constitute a significant expansion of these provisions.

[1] Although to put it into context, there were 3574 unfair dismissal applications over the first 3 months of 2012, up from 3219 for the same quarter of 2011.

They are not specifically mentioned in the objects of the Act:

> ***"3 Object of this Act***
>
> *The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*
>
> *(b) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented,* ***protecting against unfair treatment and discrimination*** **(my emphasis)***, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and. . .."*[2]

The only real reference to the expanded provisions is contained in the explanatory notes to the *Fair Work Bill* which state that the consolidated protections are intended to rationalise but not diminish existing protections, and that in some cases the provision of general, more rationalised protections has expanded their scope.[3]

Turning then to Part 3-1 of the Act which deals with *"general protections"*, the objects are said to be:

(a) to protect workplace rights;
(b) to protect freedom of association;
(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.

The general protections provisions in the Act 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;

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

[2] S.3 *Fair Work Act 2009 (Cth)* All following references are to this Act, unless indicated otherwise.
[3] Fair Work Bill 2008 Explanatory Memorandum clause 1336

There are several features which distinguish these provisions from the more pedestrian unfair dismissal laws:

- 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;

- there is a longer period in which to commence claims – 60 days for termination related claims and 6 years for all other claims;

- the provisions extend rights to prospective employees and contractors;

- 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 $33,000 per breach (for companies - $6,600 for individuals) can be imposed.

## C. THE ADVERSE ACTION PROVISIONS AND WORKPLACE RIGHTS

My consideration will focus on the workplace rights provisions contained in Division 3 and Division 4 of Part 3-1 of the Act and in particular, the adverse action provisions which represent the greatest area of expansion. 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);[4] 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).[5]

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.

The key point is that there must be some 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.

[4] Chapter 3, Part 3-1, Division 3
[5] Chapter 3, Part 3-1, Division 4

## 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;[6]
b. the ability to take part in processes and proceedings under workplace laws and instruments;[7] and
c. the ability to make complaints or inquiries.[8]

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 Fair Work Australia ("FWA");
  - 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.[9]

Apart from the final broad right of complaint or inquiry in relation to employment, all of the other rights referred to involve a workplace law or instrument and that is 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.

[6] S. 341(1)(a)
[7] S.341(1)(b)
[8] S.341(1)(c)
[9] S.341(1), (2)

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

It is important to note that the final broad right only applies to employees and not contractors.

The cases to date have seemed to assume that an employee has a general right to make a complaint or inquiry in relation to their employment. The cases have not squarely considered whether the use of the term *"able to make a complaint/inquiry"* is more restricted in meaning and requires some basis of authority for the complaint. There is obiter dictum in a FWA Full Bench decision which suggests the ability must come from some statute or instrument such as an enterprise agreement or contract of employment but this does not seem to have been taken up by the courts to date.[10]

Whilst it does not appear there needs to be any particular legal foundation for the ability to make a complaint, it would seem that not everything will be a complaint though, so a mere expression of unhappiness about a particular situation will not suffice.

But 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.[11]

*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).[12]

It appears that legislation does not have to exclusively regulate employment relationships to fall under (d). Cases have held that the following legislation falls under (d) above:

- Occupational health and safety legislation;
- Discrimination and equal opportunity legislation;[13]
- 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.[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.*

[10] See *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 at [49]. The issue is also the subject of a current case in the Federal Magistrates Court – *Harrison v In Control Pty Ltd*
[11] *CFMEU v Pilbara Iron Company (Services) Pty Ltd (No 3) [2012] FCA 697*
[12] S.12
[13] *Bayford v MAXXIA Pty Ltd* [2011] FMCA 202
[14] *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)*

*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.*

*The company undertook to the court to complete its investigation within a week and gave the applicant the opportunity to seek further interlocutory relief before implementing any decision.*

*The application to injunct the employer was unsuccessful on this basis but the employee had some success. Had the employee been vulnerable to immediate dismissal without further notice, been subject to a disciplinary investigation of long or indefinite duration or been suspended without pay, the result likely would have been different, according to the judge.*

***Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 2)*** *[2011] FCA 953 (Judgment delivered 31 August 2011)*
*The matter was revisited after Visy completed its investigation and issued the employee with a final written warning over the tagging. Visy accepted the warning constituted "adverse action". The judge held there was a real prospect the employee could be dismissed if he committed some misconduct before the final hearing even if it would not justify dismissal in itself. Accordingly, an injunction was issued preventing Visy from relying on the warning pending the final hearing of the matter.*

Apart from demonstrating that OHS legislation will generally be a workplace law, the case illustrates the power of interim injunctive relief and the willingness of courts to give relief to maintain the status quo pending a full hearing.

*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]

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

For instance, 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.[17] 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.

## 2. What is adverse action?

What is 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 giver and a certain type of receiver of the adverse action.

[15] S.12
[16] *Barnett v Territory Insurance Office [2011] FCA 968* (Judgment delivered 24 August 2011). Also note *Bayford v MAXXIA Pty Ltd* [2011] FMCA 202
[17] *Moore v Slondia Nominees Pty Ltd* [2012] FMCA 273

*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 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;
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.[18]

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;*
- *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 was not considered in the case.

*What can be adverse action?*

What is adverse action is broadly defined by reference to various circumstances.[19] Put simply, it includes:

1. termination;
2. injury;
3. alteration of position;
4. certain types of discrimination;
5. refusal to employ or engage services;

[18] S.342(1)
[19] S.342

6. the taking of industrial action and organising industrial action;

7. threatening to do any of the above.[20]

CASE ILLUSTRATION
***Jones v Queensland Tertiary Admissions Centre Ltd (No 2)*** *[2010] FCA 399 (Judgment delivered 29 April 2010)*
*Ms J was the employer's CEO and appointed bargaining representative in EBA negotiations (or alternatively, so the court held, if she was not formally appointed, she had the right to participate in the bargaining process). Complaints were made against Ms J by the ASU and individual employees. The complaints coincided with the bargaining process. She claimed that the relevant union had orchestrated a campaign against her because of her bargaining negotiations and that QTAC was bowing to pressure from the union in taking action against her. The court held that:*

- *commencing a disciplinary investigation can in certain circumstances be adverse action;*
- *a show cause notice as to why Ms J should not be subject to disciplinary action, including termination, could be an adverse action.*

*The court accepted the existence of a workplace right and these matters could be an adverse action either as injury or alteration of position. However, despite having earlier granted an interlocutory injunction, at trial, the court found that there was no evidence of a link between the workplace right and the adverse action in this case. Her Honour found that the only reasons motivating the key directors of QTAC were a concern that Ms J had been mistreating staff, a belief that action should be undertaken to investigate those allegations and that the investigation should be undertaken in accordance with established procedures.*

The area of most potential controversy involves the concepts of injury and alteration of position which are broad terms.

One Federal Magistrate 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, the attempted transfer of an employee to a worksite and stand down.[21] 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.[22]

Alteration of position appears to cover any deterioration in the advantages enjoyed by the employee before the conduct in question.[23]

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

The effect of the cases is that the subjective intention of the person taking the adverse action is not determinative of whether the adverse action was taken *"because"* of the workplace right element. Rather, the exercise involves looking at all the circumstances and considering the *"real"* reason for the action to see if the relevant causal nexus exists. In short, state of mind is relevant but not decisive.[24]

[20] S.342(2)
[21] *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd & Anor* [2011] FMCA 58
[22] *Hodkinson v The Commonwealth* [2011] FMCA 171 referring to *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155
[23] *Hodkinson v The Commonwealth* [2011] FMCA 171
[24] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 (Full Court, Federal Court)

CASE ILLUSTRATIONS

***Barclay v The Board of Bendigo Regional Institute of Technical and Further Education*** *[2011] FCAFC 14 (Judgment delivered 9 February 2011)*

*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. 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.*

It should be noted that the Full Court's decision is subject to a reserved decision of hte 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.*

*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.*

***Winter v Ostwald Bros Civil Pty Ltd*** *[2012] FMCA 51 (Judgment delivered 27 January 2012)*

*Mr W was a concreter employed by an earthmoving business who claimed he had been terminated because he had a physical disability or because he had made a workers compensation claim. There had been internal discussion of the possible redundancy of Mr W's position due to a lack of work before he suffered his injury. The court accepted that:*

- *the employer did not want to terminate whilst Mr W was not fit to return to full duties and that the employer was trying to secure more work, but this did not eventuate; and*
- *the real reasons for the termination were sound operational reasons.*

***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, even if, that may have to be determined objectively, 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.*[25]

But note 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.[26]

## D. INDUSTRIAL ACTIVITIES

The industrial activities protection is separate to the workplace rights protection. Here, the protection provided is from adverse action being taken by a person against another person because the person:

- is or isn't, was or wasn't an officer or member of an industrial association;
- engages or has engaged or proposed to engage in industrial activity;
- doesn't engage or hasn't engaged or has proposed to not engage in industrial activity.[27]

Industrial activity is basically defined to mean any action taken in relation to an industrial association (including membership, non membership, organising, encouraging or participating in lawful activities promoted by the industrial association, advancing the views, claims or interests of the industrial association and even organising unlawful activities for the industrial association.)[28]

CASE ILLUSTRATIONS

***AMACSU v Shire of Mundaring & Anor*** *[2011] FMCA 731 (judgment delivered 23 September 2011)*

*Certain council employees who were union members letterboxed a flyer about enterprise bargaining with the Shire during local government elections. The CEO wrote to the employees advising he would consider it a breach of the Shire's code of conduct for the employees to distribute the flyer and would "be required to take appropriate action". The court held that distribution of the flyer may amount to industrial activity and an implicit warning of some kind of unspecified future harm may constitute adverse action. An injunction was granted preventing the employer from threatening to or taking adverse action against any employee who electioneered.*

***CFMEU v Pilbara Iron Company (Services) Pty Ltd (No 3)*** *[2012] FCA 697 (Judgment delivered 29 June 2012)*[29]

*The employee was a trainee on a fixed term 12 month contract. Unlike most other trainees, he was not offered permanent employment at the end of that period. It was also alleged that the employer marked him down in his mid year performance review and failed to accept his nomination for a position on its health and safety committee. It was alleged the reasons were*

[25] 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)
[26] See Explanatory Memorandum at para 1458.
[27] S.346
[28] S.347
[29] Also see *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2012] FCA 563 (Judgment delivered 25 May 2012)

*that the employee was a CFMEU member, had engaged in industrial activity by advancing the union's views and that he had exercised his workplace right to make complaints and/or inquiries in relation to his employment when he took up various issues including WHS matters, with his supervisors. The employer maintained that it acted because the employee had "a poor attitude" and behaved in an aggressive and confrontational way.*

*The court:*

- *said that complaints about others were sufficient to amount to complaints/inquiries "in relation" to the employee's employment;*
- *was not satisfied that the employer had excluded the fact of the complaints/inquiries as an operative reason for its decision; and*
- *ordered that the employee be offered permanent employment.*

## E. OTHER PROTECTIONS

In addition to the protection against adverse action, there are provisions prohibiting:

- coercion of a person in relation to a workplace right;
- undue influence or pressure on a person to make an agreement under the National Employment Standards, an award or Enterprise Agreement;
- the making of misrepresentations about a person's workplace rights.[30]
- taking adverse action of a discriminatory nature;[31] There is no distinction between direct and indirect discrimination and the requirement for a comparator which exists under anti discrimination legislation does not exist. There is a defence based on the inherent requirements of a particular position.
- dismissing an employee because of temporary absence due to illness or injury;[32]
- discrimination against an employer because employees are covered or not covered by particular instruments;[33]
- coercion of a person to employ or not employ a particular person, engage or not engage a particular contractor or in the allocation of duties to a particular employee/contractor;[34]
- objectionable terms in workplace instruments or agreements that permit or require the breach of a workplace right are of no force.[35]

[30] Ss.343, 344, 345
[31] S.351
[32] S.352
[33] S.354
[34] S.355
[35] S.356

## F. THE LEGAL PROCESS

*The reverse onus of proof*

The onus of proving a case is usually on the applicant making the allegation. However, for adverse action 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.

In practice, the effect of the cases has been that the applicant must prove the existence of objective facts which suggest the contravention, BUT does not have to prove the reason for the adverse action. Once the existence of the workplace right and the adverse action is shown, 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.

*Multiple reasons*

It is not necessary that the prohibited reason be the only, main or dominant reason for the adverse action in order to be a breach. It is sufficient if the reasons include that reason. But it is necessary that it be a real, or operative reason and not merely incidental.

*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 Fair Work Australia within 60 days of the dismissal taking effect (subject to a power of extension in exceptional circumstances).[36]

FWA must conduct a conference in private to deal with a dismissal related dispute.[37] If the matter cannot be resolved, FWA must issue a certificate to this effect and the applicant then has 14 days to make a court application to either the Federal Magistrates Court or the Federal Court.[38]

Legal action for non dismissal contraventions must be taken within 6 years. For non dismissal related disputes, the parties must agree before a conference can be held by FWA.[39] Where the parties do not agree on a FWA conference, a party can still make an application to the Federal Court or Federal Magistrates Court for orders.

*Legal process*

Most claims that escalate from FWA are practically commenced in the Federal Magistrates Court. Proceedings in the Federal Magistrates Court are, generally speaking, more formal than in FWA but the Federal Magistrates Court does try to deal with matters as informally and as quickly as possible. In the FMC, 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.

It is possible for applicants to make application to amend the grounds of their claim while still in the FWA conciliation phase.[40] It was initially thought that an applicant's stage 2 court claim was restricted to the grounds alleged in the initial FWA application. However, it now appears

[36] S.366
[37] S.368
[38] Ss.369, 371
[39] S.374
[40] *Talbot v Connor Haulage (ACT) Pty Ltd T/A Connor Haulage* [2012] FWA 3969

that applicants can introduce new grounds once proceedings are commenced in the Federal Magistrates Court or Federal Court as long as the additional grounds still relate to the *"dispute"* the subject of the FWA application.[41]

As is the case in most Fair Work Australia proceedings, the general rule 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.[42]

The court (either the Federal Court or Federal Magistrates Court) can impose a penalty of up to 60 penalty units ($33,000) per breach, under these provisions.[43] The court can also make injunctions, award compensation and order reinstatement.[44] 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

The potential list of trigger areas where the need to tread carefully should be kept in mind, 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 NES matters or discrimination triggers;[45]
- 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.

*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.

*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.

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[41] *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*
[42] *Cugura v Frankston City Council (No 2)* [2012] FMCA 530 (20 June 2012)
[43] Ss. 371, .539
[44] S.545(2)
[45] S.351(1)

*Avoid hasty or knee jerk reactions even where there is provocation*

Put another way, 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 should apply. The greater the potential effect, the greater the consideration that should be given to the matter.

*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.

Other things to keep in mind are:

- Courts have shown they are prepared to grant interlocutory injunctions where there is a serious question to be tried and are keen to retain the status quo until final hearing where there is a risk of damage to the applicant;

- Be conscious of the concept of temporal proximity. The mere fact that an adverse action was taken close to the time of the exercise of a workplace right will generally be enough to suggest the contravention and trigger the reverse onus. Whilst a number of employers have been able to satisfy this onus, this has largely been due to the quality of their evidence;

- The accessorial liability provisions of the *Fair Work Act* mean that it is possible for persons *"knowingly involved"* in the contraventions to also be penalised and this may include HR managers in appropriate cases;[46]

- Beware the motivated, self represented applicant for they are the most dangerous form of adversary.

CASE ILLUSTRATIONS

***Hodkinson v The Commonwealth*** *[2011] FMCA 171 (Judgment delivered 31 March 2011)*
*Ms H was dismissed during a probationary period because of failure to meet productivity targets. She had taken time off work due to medical difficulties, had a gradual back to work program in place and had also been placed on a Work Improvement Plan for failure to meet productivity targets. Ms H claimed the dismissal was because she exercised a workplace right to use the Child Support Agency's internal review mechanisms and/or was because of a disability and temporary absence from work.*

*The court accepted on the evidence that complaints/inquiries by the applicant played no part in the decision to terminate. The court said it was necessary to differentiate between the effect of a disability, eg the inability to attend work, and the actual disability itself. A practical consequence such as an absence from work, is not a disability whilst a physical or mental limitation itself is. Here, the applicant was unable to establish precisely what her disability was.*

***Bayford v MAXXIA Pty Ltd*** *[2011] FMCA 202 (Judgment delivered 12 April 2011)*
*Mr B's employment as a call centre operator was terminated after counselling and 2 warnings about being late by up to 51 minutes and inaccuracy in his work. Mr B blamed public transport delays and the pressures of being a father to a 15 month old son, including having to change his baby's nappy in the morning. He claimed that adverse action had been taken because of his family responsibilities and because he exercised his workplace right not to be*

[46] See *Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Ors [2010] FMCA 863*

*discriminated against because of his family responsibilities. The evidence was that the applicant was frequently late for work for reasons unrelated to his family responsibilities and had not made a specific request of the employer for accommodation of his parental/carer responsibilities under the EEO Act.*

*The court accepted that the termination constituted adverse action and that the Equal Opportunity Act 1995 (Vic) was a workplace law. However, the court did not accept that a person with Mr B's family responsibilities could not be at work by 9.30am and accepted that the employee was terminated for the reasons given by the employer.*

***Stephens v Australian Postal Corporation*** *[2011] FMCA 448 (Judgment delivered 8 July 2011)*
*Mr S was injured in the course of fixed term employment, which was subject to extension, on 3 December 2009. He had completed a claim which was provided to the employer's compensation section on the day before his employment was summarily terminated for swearing. The court held:*

- *Mr S had a bundle of workplace rights under the Safety Rehabilitation and Compensation Act including the right to determination of his claim and entitlement to payments;*
- *APC had not satisfied the reverse onus taking into account:*
    - *the lack of contemporaneous documentation as to investigations and deliberations leading to the decision to terminate;*
    - *the unexplained unfairness of the termination procedure;*
    - *the disproportionality of the decision to terminate;*
    - *the lack of candour of the employer's primary witness;*
    - *the employer's failure to call a significant witness from the HR Dept who had advised the decision maker;*
- *that Mr S should be reinstated and ordered a penalty of $25,000.*

***Khiani v Australian Bureau of Statistics*** *[2011] FCAFC 109 (Full Court judgment delivered 24 August 2011)*
*Ms K was a long term employee of the ABS. The ABS Certified Agreement required a 2 stage process for performance management. Ms K was found to have under performed in the first stage review. The ABS made several attempts to implement the second stage but Ms K did not cooperate in attending meetings and took significant sick leave. On termination, she made a claim of adverse action on the basis she had exercised the workplace right to take sick leave.*

*The court held that the general protections process was not intended to provide an opportunity for the applicant to raise issues about the validity of steps taken before her dismissal. Rather, the crucial issue was the causal relationship between the adverse action and the relevant workplace protections. The fact of a temporal connection between the adverse action and the taking of leave did not mean there was a causal connection.*

*Here, the termination was the culmination of a long process of attempting to review the appellant's performance when she failed to achieve a satisfactory level and frustrated the management process. The court was satisfied the employer had not taken the fact of the sick leave into account when terminating the employee.*

***Ucchino v Acorp Pty Ltd*** *[2012] FMCA 9 (Judgment delivered 27 January 2012)*
*Ms U was employed as a director of a child care centre. She alleged that adverse action was taken in attempting to change her employment from full time to casual because she became pregnant and informed Acorp and she needed time away from work to care for her other children over a Christmas school holiday period. In question was whether the action taken by the employer was for the reasons asserted by Acorp, namely dissatisfaction with Ms U's work and her general unreliability.*

*The key feature for the Federal Magistrate was that none of the employer's allegations of poor performance were ever taken up with Ms U in a "meaningful" way. He held that, whilst not an unfair dismissal case, the fact that significant matters were not taken up with Ms U tended to impact negatively on the respondent's case. The court was also satisfied that none of the matters raised by the employer were instrumental in its decision to terminate Ms A's position as director and move her from full time to casual employment.*

*The FM did not award general damages as the type of distress suffered was the type that "accompanies most terminations". He imposed a penalty of 50 penalty units ($5,500) and awarded economic loss of $8,956.61.*

***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.*

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**ATTACHMENTS:**

1. Extracts from *Fair Work Act 2009*
2. Extracts from Explanatory Memorandum
3. Practical scenarios

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