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Workplace View

June 2012

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Adverse Action, Turbulence and Hot Air

A recent decision of the Full Federal Court illustrates the expansive reach of the adverse action provisions in the *Fair Work Act 2009* (Cth) (**FW Act**) and warns that knee-jerk reactions can leave a costly legacy.

Background

Mr Murray, an aircraft engineer employed by Qantas, undertook a six week posting in Japan, and, upon his return to Australia, made a complaint about the rate he was paid while overseas.

During a heated phone conversation, Murray's manager intimated that future postings would only be allocated to engineers who accept the conditions as they stand. The next day, Qantas suspended indefinitely all overseas postings of Brisbane-based engineers (only to lift the suspension a month later).

The employee's union commenced legal action against Qantas and was successful in arguing that:

- the suspension of overseas postings breached the adverse action provisions in the FW Act; and
- in pressuring Murray to drop his complaint, the manager's conduct constituted coercion under the FW Act.

Issues on appeal

Qantas appealed the decision and asserted:

- the temporary suspension of overseas postings had no impact on Murray because he was not eligible for an overseas post during the suspension period;
- Murray's complaint played no part in the decision to suspend overseas postings; and
- the court reformulated the engineer's coercion claim and did not allow Qantas an adequate opportunity to respond.

Decision on appeal

Other than clarifying the declarations made at first instance, the Full Bench dismissed the appeal and found there was no substance to Qantas' arguments.

The court held the suspension of overseas postings constituted a prejudicial alteration of Murray's employment conditions because there was no temporal limit on the suspension when it was imposed. Murray was denied a future benefit and this constituted sufficient detriment to enliven the adverse action provisions.

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The court reiterated that adverse action claims impose a heavy burden on the employer. Due to the reverse onus of proof, Qantas had to prove that it did not suspend the overseas posting for a reason which **included** the reason that Murray had made a complaint. The Court found Qantas failed to discharge this burden, making 'no attempts' to establish the first instance decision was 'glaringly improbable or contrary to compelling inferences'.

On the issue of coercion, the court rejected the argument that Qantas had been denied any procedural fairness, stating the trial judge was entitled to accept the substance of Mr Murray's version of the conversation.

How does it affect you?

This decision highlights the broad concept of 'detriment' in the context of adverse action claims. Employers should appreciate that an employee may incur a detriment even if he or she suffers no actual loss or infringement of a legal right. However, the disadvantage must be real and substantial, not merely possible or hypothetical.

Great caution should be exercised by employers when responding to claims and complaints made by employees. Given that snap decisions and thoughtless comments can initiate protracted legal disputes, it is important that managers avoid 'heat of the moment' reactions and ensure their responses are measured and considered.

Furthermore, the reverse onus of proof means that an organisation must be extremely careful if it is contemplating taking action against an employee who has recently exercised a workplace right. The proposed action should only proceed if there is compelling evidence that the reason for taking the action is unrelated to the exercise of the employee's workplace right.

'Continuous service' – what does it mean?

A recent decision of Fair Work Australia (**FWA**) has clarified the meaning of 'continuous service' under the FW Act, ruling that workers compensation absences count towards the six month qualifying period for protection from the unfair dismissal jurisdiction.

In reaching its decision, the Full Bench of FWA rejected the employer group's argument that an absent injured worker should not be able to access the unfair dismissal jurisdiction because they do not meet the continuous service requirements under the FW Act.

Under the FW Act, an employee is protected by the unfair dismissal jurisdiction if they have completed a 'period of employment' of at least the 'minimum employment period', being six months of 'continuous service'.

Continuous service is defined in the FW Act to be a period of service by an employee with his or her employer during which the employee is employed by the employer, but **does not include** any period that does not count as service (an 'excluded period'). Excluded periods that do not count as service include:

- any period of unauthorised absence; or
- any period of unpaid leave or unpaid authorised absence other than those prescribed by the FW Act or the Fair Work Regulations 2009 (Cth).

In this case, the question that was essentially before the Full Bench was whether an employee's absence on workers compensation is an ‘excluded period’ because such an absence is an 'unpaid authorised absence'.

The Full Bench held that an absence on workers compensation was not an 'unpaid authorised absence', and therefore not excluded. The Full Bench stated that the critical consideration in reaching its decision was that an injured worker would be receiving workers compensation payments 'pursuant to a legal obligation upon the employer', in other words, the injured worker was not taking an 'unpaid authorised absence' and, accordingly, the employment would be continuous.

In coming to that conclusion, the Full Bench also rejected the employer group's argument that employers would be unable to assess the capacity and conduct of a new employee if their period of absence counted as continuous service for the purpose of the unfair dismissal qualifying period.

The Full Bench stated that authorised employee absences such as jury service or community service activities (both absences that count towards the minimum employment period) do not allow the employer to assess the capacity and conduct of the employee. FWA was of the view that workers compensation absences are no different.

How does it affect you?

The meaning of 'continuous service' is important when it comes to determining whether an employee is afforded protection under the unfair dismissal jurisdiction under the FW Act.

It is now well established that the following absences count towards the minimum employment period:

- annual leave;
- personal leave;
- absences while on workers compensation;
- jury service; and
- community service activities.

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Did you know?

Australian employment law extends to companies based and operating overseas

In a decision that may unnerve offshore employers, an internet gaming company based in New York has been found liable under Australian unfair dismissal legislation.

Mr Argy was employed by the American company as a game designer and worked remotely from his home in Australia. After an unfavorable performance review, the company terminated Mr Argy's employment in writing, stating he had 'refused to agree' to 'changes in duties and scope of work'.

Mr Argy filed a claim with FWA claiming the dismissal was harsh, unjust and unreasonable, and without notice.

The employer failed to file a response to the claim, and refused to attend the proceedings, its lawyers informing FWA the company 'does not submit to the jurisdiction of Australia'. Distinctly unimpressed with the company's game of bluff, FWA noted this 'unfortunate and disrespectful conduct appears consistent with the regrettable circumstances of the applicant's dismissal'.

Based on the uncontested evidence of Mr Argy, FWA found the dismissal was harsh, unreasonable and unjust and ordered the employer pay $46,425 in compensation.

Given the growing trend toward decentralised and global work practices, this decision serves as a timely reminder of the risks involved in trans-jurisdictional employment arrangements.

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