SQUIRE SANDERS

WORKPLACE VIEW

November 2013

Taking the Adversity out of Adverse Action

Kylie Groves, Of Counsel

With the number of adverse action claims continuing to rise, employers should be alert to the risks associated with these claims and ensure they are in a good position to defend any claims that arise.

The *Fair Work Act 2009* (Cth) prohibits adverse action for prohibited reasons and enables a person the subject of such action to bring an adverse action claim. Adverse action claims are not limited to termination situations or to the employment relationship and therefore have a much broader application than unfair dismissal claims. They can present significant risks to employers in a variety of contexts.

What is Adverse Action?

Adverse action is any action (including a threat to take action) that is or could be adverse or detrimental to a person. It includes dismissal, demotion, issuing a warning, removing a benefit or treating someone differently.

What is an Adverse Action Claim?

An adverse action claim can be made by a person who alleges adverse action has been taken against them for a prohibited reason.

What are the Prohibited Reasons?

A reason is a prohibited reason if it is because of any of the following:

- the exercise or non-exercise of a workplace right
- industrial activities
- discriminatory reasons (such as age, sex, pregnancy, physical or mental disability)
- illness or injury leading to a temporary absence from work
- sham contracting where an employee's status has been misrepresented as an independent contractor

What is a Workplace Right?

A person has a workplace right if:

- they have an entitlement, role or responsibility under a workplace law, workplace instrument or order made by an industrial body
- they can initiate or participate in a process or proceedings under a workplace law or workplace instrument
- they can make a complaint or inquiry to seek compliance with a workplace law or workplace instrument or, if they are an employee, in relation to their employment.

Reverse Onus

One of the most contentious aspects of the adverse action claim lies in the burden of proving the claim. Once a claim has been made the burden of proof switches to the respondent (usually the employer). The respondent must then prove that the adverse action was not taken for a prohibited reason but for some other reason.

The reverse onus means adverse action claims are easy to make by employees but difficult to defend by employers who need to demonstrate there was an alternative non-prohibited reason for the adverse action.

The Barclay Decision

Prior to the High Court of Australia's decision in *Bendigo Regional Institute of TAFE v Barclay* [2012] HCA 32 (**Barclay Case**), it had been extremely difficult for respondents in certain circumstances to rebut a claim that the adverse action was for a prohibited reason.

However the Barclay Case made it clear that a prohibited reason must be a substantial and operative factor in taking the adverse action and that direct reliable evidence from the decision maker that they did not take the adverse action for a prohibited reason can be sufficient for an employer to resist a claim.

Developments from Other Cases

Since Barclay there have been a number of other cases that have continued to provide further clarity on the scope of the claim. From decisions relating to these cases we now know:

- the refusal by an employee to follow what he claims was an unlawful direction given by his employer was not the exercise of a workplace right: *Daw v Schneider Electric (Australia) Pty Ltd* [2013] FCCA 1341;
- issuing an employee with a written warning after she took carer's leave due to an 'unexpected emergency' being the need to collect a primary school child from school was adverse action: *Wilkie v National Storage Operations* [2013] FCCA 1056;
- an employee who refused to drive a train while he was mentally and/or physically ill was exercising a workplace right under section 21 of the *Occupational, Health, Safety and Welfare Act 1986* (SA) to take reasonable care to protect his own health and safety at work and the health and safety of other persons: *Flavel v Railpro Services Pty Ltd [2013] FCCA 1189*;
- a betting agency employee's ability to seek legal advice about unpaid commissions was a workplace right and a threat by her employer to sack her when she said she was going to obtain such advice was adverse action: *Murrihy v Betezy.com.au Pty Ltd* [2013] FCA 908;
- a prospective employee who refused to provide information sought as a part of a pre-employment background check on the basis it was a breach of the *Privacy Act 1988* (Cth) was not exercising a workplace right as the Privacy Act is not a workplace law: *Austin v Honeywell Ltd* [2013] FCCA 662; and
- disciplining an employee for taking unauthorised leave to attend a union meeting is not adverse action: *CFMEU v Bengalla Mining Company Pty Ltd* [2013] FCA 267.

Lessons from the Cases

Our top tips to reduce the risks of adverse action claims are:

- be risk aware and remember claims can also come from prospective employees and contractors
- educate and train those members of staff who are decision makers on how adverse action claims can arise
- ensure employment related decisions are based on lawful reasons and don't include prohibited reasons
- ensure all decisions relating to employment matters are well documented and evidence is available to rebut an adverse action claim

Legislation Update

Legislative instrument	Stage of legislation	Key proposed changes
Privacy Act 1988 (Cth)	Commencement date is 12 March 2014 (passed both houses of Parliament in December 2012)	The creation of new Australian Privacy Principles (**APPs**) which will replace the old Information Privacy Principles, for government, and the National Privacy Principles, for business. It will be a requirement that all businesses must have a privacy policy. The privacy policy will need to cover how the business deals with its customers' information and other key information. The policy does not have to cover how the business uses internal employee information, but can do if desired. Businesses will need to educate their employees about the new principles and ensuring compliance with the policy. New civil penalty provisions for non-compliance with the Privacy Act include fines of up to AU$1.1 million for businesses and AU$120,000 for individuals. There is no change to the employee records exemption.

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Events

Squire Sanders Sydney 2013 Australian Labour and Employment Breakfast Series

26 November 2013 Anna Elliott and Caitlin Cook are presenting a "*Redundancy Refresher*"

Level 10, 1 Macquarie Place, Sydney

To register for the Squire Sanders Labour and Employment Breakfast Series, please contact RSVP perth.rsvp@squiresanders.com or speak to Vanessa Farris (02) 8248 7801

Legalwise Seminar on School Law

20 November 2013 Kylie Groves is presenting "*Obligations of Schools under Anti-Discrimination Laws*"

Parmelia Hilton Perth, 14 Mill Street, Perth

To register for the Legalwise seminar on School Law, please contact 02 9387 8133 or info@legalwiseseminars.com.au

Did You Know?

Caitlin Cook, Associate

Pregnancy does not necessarily preclude an employee from being made redundant.

The Federal Circuit Court recently ruled that an employer did not take adverse action against a pregnant employee in making her role redundant. The employer, a high-end women's fashion designer and retailer, terminated the employee for redundancy three months after she announced to her employer that she was pregnant and planned to take maternity leave.

The Court found the General Manager gave evidence that was the "direct evidence of a decision maker as to the state of mind, intent or purpose" which was the threshold referred to in the High Court case of *Board of Bendigo Regional Institute of TAFE v Barclay* [2012] HC 32, and that there was substantial and objective evidence to support the employer's position that the reason for the decision to terminate the employee's employment was because it no longer required the role to be performed.

Whilst this is an important decision in relation to redundancy situations, employers still need to exercise a degree of caution in making pregnant women, employees on parental leave, or employees with family responsibilities redundant, and ensure the reason(s) for making that employee redundant, do not include a discriminatory reason such as pregnancy or family responsibilities.

Employee Reminder

From 1 January 2014, the new bullying laws will be operative as a result of the *Fair Work Amendment Act 2013* (Cth) (see Worldview October 2013 article). Employers should continue to prepare for these changes by ensuring policies, processes and any training reflect the new laws as well as monitoring any further changes as a result of the new Coalition Government, which has currently proposed the following modifications:

- requiring workers to first seek preliminary help, advice or assistance from an independent regulator before applying for an order from the Fair Work Commission to stop the bullying
- including union officials and their conduct towards managers, employers and workers in the new laws

Worldview October 2013 article

Client Quiz

The first correct entry emailed to jayne.chance@squiresanders.com will win a West Australian Good Food Guide (delivery within Australia only).

The time limit for bringing an unfair dismissal claim or an adverse action claim (relating to a dismissal) is within 21 days of the dismissal taking effect - True or false?

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