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Employer Beware: the Need to Justify Action against Union-associated Employees

Introduction

A recent case in the Federal Court has shed some light on the new adverse action provisions of the *Fair Work Act 2009 (Act)*, which essentially prohibit an employer from taking prejudicial action against an employee for a prohibited reason (the **protective provisions**).

In *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2010] FCA 284, a senior teacher claimed that a decision to suspend him made by his employer, Bendigo TAFE, was unlawful because it was based on his union delegate activities. Mr Barclay was suspended, following what Bendigo TAFE described as serious misconduct, for sending an email to union member employees of Bendigo TAFE alleging improper conduct by Bendigo TAFE. The case is the first to examine adverse action under the Act since the commencement of the protective provisions on 1 July 2009.

Adverse action

In its decision, the court considered the scope of the protective provisions under the Act, noting the term 'adverse action' expands the type of action previously covered under the *Workplace Relations Act 1996*. Under s342 of the Act, an employer takes adverse action against an employee if it:

- (a) dismisses the employee;
- (b) injures the employee in his or her employment;
- (c) alters the position of the employee to the employee's prejudice; or
- (d) discriminates between the employee and other employees of the employer.

Bendigo TAFE conceded that, in suspending Mr Barclay, it took adverse



action against him. Hence the court did not explore the precise definition of the term, specifically whether instituting an inquiry, issuing a show cause notice or laying disciplinary charges falls within that definition. It did however note that although the particular circumstances of each case must be considered, the greater the impact on the employee, the more likely it is that the employer's conduct will be treated as 'adverse action'.

Prohibited reasons and presumption against employer

Mr Barclay alleged Bendigo TAFE had suspended him unlawfully, because its decision to take action against him was based on his association with (and membership of) the union, a prohibited reason under the Act. Other prohibited reasons under the Act include taking adverse action because the employee:

- engages in industrial activity;
- has a workplace right;
- is entitled to a benefit under workplace law and/or participates in proceedings under workplace law; or
- is of a particular race, colour, sex, sexual preference, age, marital status, religion, political opinion, national extraction or social origin, has a physical or mental disability or family or carer's responsibilities or is pregnant.

Where the court finds a nexus between the prohibited reason and the adverse action, the employer's actions will be unlawful. The evidence of the decision maker will be relevant to the court's determination.

Ultimately, in this case the court found that Bendigo TAFE, in disciplining and suspending Mr Barclay, had not acted for any prohibited reason,

but rather it had acted to address the serious allegations raised by Mr Barclay and prevent further damage to the reputation of Bendigo TAFE and its staff.

Comment

Importantly, under the protective provisions there is a **presumption** that the employer has acted for a prohibited reason. This is significant because the onus lies on the employer to prove that the proscribed issue (in this case, Mr Barclay's status with the union and his responsibilities and activities as the union delegate) was not a reason for its decision to take disciplinary action.

While confirming that an employer is not prevented from taking prejudicial action against a 'unionised' employee, the case serves as an important reminder that if adverse action is taken, employers must explain why it was taken and show it was not motivated by a prohibited reason.

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