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Précis Paper

Adverse Action

Barrister Glenn Fredericks discusses adverse action claims – where an employee claims to have been treated adversely because of the exercise of a workplace right. He discusses the issues that commonly arise in such claims and what evidence is usually required as to the reason for the employer's action.

Discussion Includes

- What is the prohibition in the *Fair Work Act* regarding adverse action?
- What can constitute adverse action?
- How does one bring an adverse action claim?
- What evidence should employers lead to discharge their reverse onus of proof?
- Why have interlocutory adverse action proceedings become less common?

Précis Paper

Adverse Action

1. In this edition of BenchTV, Glenn Fredericks (Barrister) and Ian Benson (Solicitor) discuss adverse actions in employment law in light of Mr Fredericks' article in the February edition of the *Law Society Journal* entitled 'Adverse action: In the mind of the beholder?'.

2. Mr Fredericks is an experienced corporate and employment counsel having previously been a senior in-house lawyer for the Commonwealth Bank of Australia and partner of Freehills (now Herbert Smith Freehills).

The Employment Law Legislative Framework

3. The *Fair Work Act 2009* (Cth) is the main legislation governing work place relations. It deals with awards, enterprise agreements, industrial action, unfair dismissals, and general protections (also known as adverse action). In addition, most States have legislation dealing with work place relations including unfair discrimination and legislation dealing with health and safety.

4. Part 3-1 of the *Fair Work Act* sets out general protections provisions that protect employees, employers and independent contractors from being victimized because they are exercising a work place right e.g. prevents an adverse action against an employee because the employee chooses to belong to a union or chooses to not belong to a union.

5. Section 340 of the *Fair Work Act* sets out the prohibition on adverse actions in relation to another person who has, has exercised, or proposes to exercise a workplace right:

SECTION 340:

Protection

(1) A person must not take adverse action against another person:

(a) because the other person:

i. has a workplace right; or

ii. has, or has not, exercised a workplace right; or

iii. proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

(2) A person must not take adverse action against another person (the second person) because a third person has exercised, or proposes or has at any time proposed to

exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

6. A "workplace right" is defined in s 341:

SECTION 341:

Meaning of workplace right

(1) A person has a workplace right if the person:

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

(c) is able to make a complaint or inquiry:

i. to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

ii. if the person is an employee--in relation to his or her employment.

7. Mr Fredericks takes the view that awards and enterprise agreements are relevantly "workplace instruments". However, he also argues that employment contracts are probably not "workplace instruments" within the meaning of the Act.

8. Mr Fredericks notes there has been some disagreement as to the sort of complaints that fall within the language of s 341(1)(c). In some cases a very narrow interpretation was applied such that only complaints relating to entitlements under a workplace law or instrument could be protected from adverse actions. Other cases suggest that a 'genuine' complaint that is grounded in an instrument or contract of employment could be sufficient. Beyond those, there remains dispute as to whether complaints about how other employees are treated or complaints about systemic issues in the workplace are within the meaning of the provision. Mr Fredericks argues that as long as the complaint is genuinely grounded in an instrument or contract, and not frivolously or vexatiously initiated, and relates to an actual entitlement, then that will probably be enough to come within the definition of a "workplace right".

9. A list of "adverse actions" are defined in s 342 of the *Fair Work Act*. For example:

SECTION 342:

Meaning of adverse action

Item 1: Adverse action is taken by an employer against an employee if the employer:

(a) dismisses the employee; or

(b) injures the employee in his or her employment; or

(c) alters the position of the employee to the employee's prejudice; or

(d) discriminates between the employee and other employees of the employer.

……

10. An example of an adverse action would include changing an employee's hours such that they no longer receive a particular shift penalty or not rostering a casual on for shifts. The courts have taken a very broad view of what can constitute adverse action and generally ask the question of whether you are disadvantaging the employee in their employment.

11. It is important to remember that an adverse action of itself is not unlawful per the Act e.g. an employer is well within their rights to dismiss their employee in a range of circumstances and it is only precluded where an adverse action is done for reasons including the fact that the employee is entitled to a workplace right or instrument etc.

The Consequences of an Adverse Action Claim and the Appropriate Forum

12. The remedies for an adverse action taken in the circumstances described are quite broad. The court can put the employee back in the situation they were in had the adverse action not occurred and the employer can be the subject of penalties which the court can order is paid to the employee or a union etc.

13. How an employee brings a claim will depend on whether the adverse action has been their termination. If there is a dismissal involved, a claim must initially be made to the Fair Work Commission. However, the Commission cannot resolve the dispute and simply determines whether the matter can be conciliated at conference. If the matter is not settled at conciliation, the employee can then bring a claim in the Federal Circuit Court or the Federal Court. If there is no dismissal involved, you can go bring the matter straight to the Federal Circuit Court.

The Elements of Adverse Action and the Burden of Proof

14. Returning to s 340, the relevant elements to prove a breach of that provision are as follows. The employee must prove that an adverse action was taken, which is usually straightforward. For example, it is not difficult to prove you have been dismissed. However, sometimes there can be a dispute as to whether disciplinary action is necessarily "adverse action" within the meaning of the Act.

15. The onus then shifts to the employer, who must prove that they took that adverse action for an appropriate reason and not for a prohibited reason. For example, an employee might have been made redundant and the employee alleges that the employer took this action because

the employer had previously questioned a pay slip. The employer would need to provide evidence such as a downturn in business meaning that they did not require that position going forward. This element is often referred to as the causal nexus between the employer's intention in the adverse action and the employee's workplace right and relates the word "because" in s 340.

16. In *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, the High Court emphasised that it is important for the actual decision-maker to provide evidence as the reason behind the adverse action rather than the employer more generally. Furthermore, the employer will have a higher likelihood of success if they can provide extrinsic evidence to validate the evidence of the decision-maker, particularly if that is evidence of board meetings or reports that occurred prior to the date the employee made the complaint.

17. The reason for the shifting onus in relation to the second element is because s 361 of the Act provides:

SECTION 361:

Reason for action to be presumed unless proved otherwise

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.

18. Furthermore, the High Court in *Barclay* interpreted this provision to mean that even if the prohibited reason is one of many reasons and is "substantial and operative" then the employer will still have contravened s 340. Accordingly, the prohibited reason need only be one of many reasons, as long as it is not trivial, for the adverse action, in order for a contravention to be established.

Example 1: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500

19. In *Barclay* (2012), the employee in question was a union sub-branch president who sent an email to fellow employees encouraging them not to agree to create fraudulent

documentation to help the employer pass an accreditation audit. The employer then took disciplinary action against the employee.

20. The Full Court of the Federal Court considered that while the subjective intent of the decision-maker was relevant, the correct approach was to look beyond it and find the unconscious 'real reason', The Majority found that employer had breached s 340 by looking to the "objective connection between the decision he or she is making and the attribute or activity in question" (see [2011] FCAFC 14 at [28]).

21. In contrast, the High Court found that the proper approach was to look at the actual reasons of the decision-maker (at [65] per French CJ & Crennan J; at [129] per Gummow & Hayne JJ). Mr Fredericks emphasises that the High Court's approach focused on the word "because" in the provision, and the employer was found to have taken the adverse action *because* of the allegations of fraud and *not because* the employee was a union official.

22. In light of the High Court's decision in *Barclay*, the presenters note that the test to be applied for the second limb of the s 340 prohibition is essentially subjective. However, Mr Fredericks notes that the alleged subjective reason for the action must nevertheless be credible to be believed by the court. He suggests that a decision-maker will often have to give evidence that they would have made the same decision in relation to any employee, irrespective of whether they were a union official.

Example 2: *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243

23. In *BHP Coal Pty Ltd* (2014), an employee held up a sign which said: "No principles, Scabs, No guts". The employee was dismissed and the union brought an adverse action claim on behalf of the employee. The High Court took a similar approach to that which they took in *Barclay* (2012) and found that the employer was not taking disciplinary action *because* the employee was taking part in industrial action but *because* of the nature of the comments on the sign, which were a breach of BHP's policy in relation to how employees should treat each other. It was significant in this case that the employer did not take any action against other employees in the picket line. This evidence made their asserted subjective reason for taking the adverse action more believable.

24. So in both *Barclay* (2012) and *BHP Coal* (2014), there were employees who had rights as a union official and an employee taking industrial action. However, the High Court explained that not everything you do in such positions will be protected by the general protections provisions.

Example 3: *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150

25. In *Endeavour Coal* (2015), an employee who had a particular qualification required for work to proceed had taken a number of days off for illness. The days were taken off within the employee's entitlements. Nevertheless, the employer formed the view that they needed to reliably have someone with the employee's qualifications on shift and they removed the employee from the Saturday shift, causing the employee to suffer a reduction in earnings. The Full Court again took a similar approach to the High Court in *Barclay* and *BHP*. They noted that the source of the employee's right was sick leave. However, they emphasised that the employer had not taken the adverse action *because* of that right but *because* of his inconsistent attendance, and they would have taken that action regardless of the source of that right.

Example 4: *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* (2015) 238 FCR 273

26. In *Anglo Coal* (2015), an employee wanted to take annual leave either side of a long weekend and the employer said they could not. The employee then told then employer words to the effect of 'well, I'm going to be sick then' and took the days off. The employer formed the view that the employee was taking sick leave without being sick and dismissed the employee. However, the employee had been legitimately sick on those days and had a medical certificate. The employer was acting on a mistaken belief.

27. A majority of the Federal Court found that it was enough for the employer to discharge their onus that they subjectively considered that the employee was taking sick leave without being sick, notwithstanding they were not.

28. In the course of their decision, the majority noted that an unfair dismissal claim remained open to the employee although no action was subsequently taken. Mr Fredericks argues that decisions such as *Anglo Coal* emphasise that employees need to think carefully about the precise claim they bring against employers and that adverse action claims may be difficult for employees in light of the subjective approach taken to the second limb by the courts in *Barclay, BHP, Endeavour* and *Anglo Coal*.

BIOGRAPHY

Glenn Fredericks

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Glenn Fredericks was admitted as a lawyer in 1991 before being called to the Bar in 2015. He is an experienced corporate and employment lawyer. Previously, he worked as a senior in-house lawyer with the Commonwealth Bank of Australia and had previously been a partner of Freehills (now Herbert Smith Freehills). As well as writing about legal issues, Glenn also presents for CLE seminars on various aspects of employment law.

Ian Benson

Ian Benson is Special Counsel at AR Conolly and Company and holds a First Class Honours degree in law.

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Legislation

Fair Work Act 2009 (Cth)