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LAWYERS

DISCUSSION PAPER

ADVERSE ACTION: An Overview

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1. WHAT IS ADVERSE ACTION?

- 1.1. Adverse action is defined in the *Fair Work Act 2009* ('FWA') as action taken by an employer, principal, employee or industrial association that is deemed unlawful under the General Protections provisions.¹ It includes dismissing or refusing to employ a person, discriminating against a person or otherwise injuring a person in their employment, and extends to action taken by a principal against a contractor or prospective contractor for services.²
- 1.2. There is a table in s. 342 of the FWA titled "Meaning of adverse action" that sets out all the circumstances in which a person will be taken to have engaged in adverse action against another person.
- 1.3. In simple terms a person must not take adverse action against another person because that person:
 - (a) has a workplace right;³
 - (b) has or has not exercised a workplace right; or
 - (c) proposes or has proposed at any time to exercise or not exercise a workplace right.

2. REVERSE ONUS

- 2.1. If a person establishes that they have a workplace right, any adverse action taken against that person will be presumed to have been taken because of that right. This then reverses the onus of proof and the respondent has to rebut that presumption with evidence that the action was taken for another, valid reason.⁴
- 2.2. For example, if a worker who is a union representative, has their employment terminated as a result of redundancy and the worker alleges he was singled out for redundancy only because he was a union representative, then that termination will be presumed to have occurred because they are a union representative. This is referred

¹ Part 3-1 of the FWA.

² s 342, FWA.

³ The term *workplace right* is defined in s. 341 of the FWA and includes: entitlements, roles and responsibilities.

⁴ s 361(1), FWA.



to as the prohibited reason. The respondent will then bear the onus to prove otherwise.

- 2.3. To discharge the onus, the respondent must persuade the Court that the prohibited reason was not a factor in the decision to take the action. Evidence from the decision maker is therefore critical and it will obviously assist if supported by contemporaneous documents.
- 2.4. Unhappily for the respondent, the prohibited reason (e.g. that the worker was a union representative) need only be one of the reasons why the action was taken in order for the worker's claim to succeed, not just the dominant reason.⁵

3. WHAT IS AN ACCESSORY?

- 3.1. If a respondent is alleged to have engaged in adverse action, a person associated with that respondent could also potentially be held liable as an accessory. This is called accessory liability and the elements that must be established are prescribed in s. 550(2) of the FWA.
- 3.2. Often there will be a claim of adverse action involving a company as a respondent, where a director or manager responsible for the day-to-day decision making of the company is added as an (accessory) respondent to the claim.

4. ESTIMATING ACCESSORY LIABILITY

- 4.1. Importantly the reverse onus of proof does not apply when it comes to establishing accessory liability.⁶
- 4.2. The onus is on the applicant to show that, on the balance of probabilities⁷, the alleged accessory actually knew of the facts giving rise to the contravention – that is, the adverse action – and participated in or furthered the contravention. It is not necessary to prove that the accessory also knew that the conduct amounted to a contravention.⁸

⁵ s. 360, FWA.

⁶ s. 550(2), FWA; and *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)* [2013] FCA 525 at para [241].

⁷ *Director of The Fair Work Building Industry Inspectorate v Baulderstone Pty Ltd & Ors* [2014] FCCA 721 at para [252].

⁸ *Fair Work Ombudsman v Quincolli Pty Ltd & Anor* [2011] FMCA 139 at 68.



- 4.3. An allegation of accessory liability is determined separately to the adverse action claim against the respondent employer, even in circumstances where the respondent is a company with a sole director, who is the 'guiding mind'.⁹

5. PENALTIES

- 5.1. In the event a respondent is found to have taken adverse action against the applicant in contravention of a workplace right, the penalties that can be ordered include: injunctive relief, award of compensation and pecuniary penalties.¹⁰
- 5.2. For individuals¹¹ the maximum fine for an adverse action contravention is 60 penalty units¹² which equates to \$10,200. For corporations¹³ the maximum penalty is five times that amount, which currently equates to \$51,000. While this is not an insignificant amount, in some circumstances, particularly for very large corporations, it may be considered far from prohibitive.
- 5.3. In determining the appropriate penalty in a particular case, the seriousness of the contravention will be rated against a well-established set of criteria¹⁴ and be assessed as a percentage of the maximum penalty.¹⁵ The maximum is only ever imposed for the most blatant conduct.¹⁶ Proportionality and the reasonableness of the total penalty are also considered when finalising orders against a respondent.¹⁷ For compensation to be awarded, the applicant must prove that actual loss has been suffered. The final award must not be obviously excessive or inadequate.

6. CONCLUSION

- 6.1. The FWA is an example of protective legislation that is protective of workers.

⁹ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Beynon* [2013] FCA 390.

¹⁰ s. 545 and s. 546, FWA.

¹¹ s. 539 [see Table: items 11 & 12]; and s. 546(2)(a), FWA.

¹² As at the date of this paper, one penalty unit equates to \$170; see: s 4AA, *Crimes Act 1914*.

¹³ s. 539 and 546(2)(b), FWA.

¹⁴ *Fair Work Ombudsman v EA Fuller & Sons Pty Ltd & Anor* [2013] FCCA 5.

¹⁵ *Fair Work Ombudsman v EA Fuller & Sons Pty Ltd & Anor* [2013] FCCA 5.

¹⁶ An example of this is seen in *Transport Workers' Union of Australia, NSW Branch v No Fuss Liquid Waste Pty Ltd* [2011] FCA 982.

¹⁷ *Fair Work Ombudsman v EA Fuller & Sons Pty Ltd & Anor* [2013] FCCA 5.



- 6.2. Employers are obliged to ensure that if they wish to terminate an employee or otherwise alter their terms or conditions of employment that they have a genuine and permissible reason.
- 6.3. Employers will be presumed to have acted against an employee's rights unless they can prove otherwise.
- 6.4. Directors and managers who actively and knowingly participate in adverse action are potentially liable to a penalty as an accessory.

For further information in relation to the issues discussed in this paper, please contact either Joe Brown or John Kirkwood.

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