

> Adverse Action

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The general protection provisions of the *Fair Work Act 2009 (Cth)* state that an employer must not take any "adverse action" against an employee because the employee has exercised or proposes to exercise a "workplace right".

Legal firms are reporting a rise in the number of applicants making claims under the general protection provisions of the *Fair Work Act 2009 (Cth)*. These claims may arise from everyday workplace matters such as performance management, missing out on promotion or other areas where an employee feels they have suffered some detriment.

Legislative Background

Chapter 3 of the *Fair Work Act 2009 (Cth)* sets out general protection provisions for the protection of workplace rights. The aim of these general protection provisions are to:

- protect workplace rights
- protect freedom of association
- provide protection from discrimination in the workplace
- provide remedies to people who have been victimised or discriminated against because of breaches to this part of the Act

These provisions apply at all stages of employment. They operate:

- prior to employment or engagement (e. g . to prospective employees)
- during the employment relationship; and
- upon termination of employment.

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Author	J. Bashiruddin
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Workers who are not eligible to pursue claims for unfair dismissal (due to the length of their service or their remuneration) may be eligible to make a claim for adverse action.

Who does this affect?

Adverse action may be taken by:

- an employer against an employee
- a prospective employer against a prospective employee
- a 'principal' who has entered into a contract with an independent contractor
- a principal proposing to enter into a contract with an independent contractor
- an employee against his or her employer
- an independent contractor against a person who has entered into a contract for services
- an industrial association against a person

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What is Adverse Action?

The most common form of adverse action is claims made by an employee against an employer if the employer:

- dismisses the employee.
- injures the employee in his or her employment.
- alters the position of the employer to the employee's prejudice.
- discriminates between the employee and other employees of the employer.

Further examples of claims that may arise due to adverse action include:

By a prospective employer against a prospective employee if the prospective employer:

- refuses to employ the prospective employee; or
- discriminates in the terms or conditions upon which employment is offered.

By an employer against his/her employee if the employee:

- ceases work in the service of the employer; or
- takes industrial action against the employer

The *Fair Work Act 2009 (Cth)* also sets out the circumstances where adverse action is taken by principals and independent contractors and by industrial associations and their officers.

Adverse action includes threatening to take any action or organising such action.

What are “workplace rights”?

Workplace rights are defined very broadly. Perhaps most broadly, a 'workplace right' includes a right to make a complaint or inquiry in relation to one's employment (this could feasibly include vexatious or trivial complaints). Workplace rights fall broadly under three categories:

- **Entitlements, roles and responsibilities**

The right to basic entitlements which may exist under the *Fair Work Act 2009 (Cth)*, a collective agreement or an industrial award. E.g. the right to annual leave, redundancy payments, wages, etc.

- **Processes and proceeding under workplace laws and instruments**

For example, the right to participate in a conference or hearing held in Fair Work Australia, engage in protected industrial action, make a required for flexible working arrangements, appoint a bargaining agent, etc.

- **Complaints or inquiries**

For example, the right to raise a grievance in relation to bullying, the right to raise a grievance in relation to internal company policies, guidelines and procedures, and the right to make a complaint to Fair Work Australia.

Examples of Workplace Rights

An employer *will* take adverse action against an employee if the employee is not given higher duties or given a promotion because the employee made an internal grievance against another employee (e.g. a claim of bullying).

An employer *may* be in the position of taking adverse action if an employee is unilaterally moved to a 'special projects role' because the employee requested flexible working conditions. It will be up to the employer to show this was not the reason for the taking the decision.

Case Note: *Barclay v The Board of Bendigo Regional Institute of TAFE*

In determining whether an adverse action was taken for a prohibited reason, the courts will consider the actual reason that the action was taken.

Mr Barclay was a TAFE teacher who was also an AEU sub-branch president. He sent emails to AEU members at the campus alleging that workers at the Bendigo Regional Institute of TAFE had been asked to produce "false and fraudulent documents" to help the university obtain re-accreditation. The TAFE suspended Mr. Barclay, refused him permission to enter the workplace and denied him internet access. Mr Barclay alleged the adverse actions breached the Fair Work Act, but last year, in its first substantive

decision on the provisions, the Federal Court rejected his claim. Mr Barclay appealed to the full bench. This appeal succeeded when two of three judges supported his view. The appeal decision points out that a union officer engaging in any industrial activity is protected by the Fair Work Act, even if the industrial action was not performed as well as it could have been. Moreover, Mr Barclay was acting in his capacity as a union officer and not an employee, therefore he should not have been disciplined as an employee. This decision confirms that the courts take into account the "state of mind" of the person taking the alleged adverse action when deciding whether the action was taken *because* the affected person has a workplace right or is engaging in industrial activity.

Adverse Action and Discrimination

In addition, an employer is prohibited from taking adverse action against an employee or a prospective employee because of a person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion or national or social origin. This applies not only in the case of a dismissal, but also during the course of the employment. The discrimination does not need to be the sole reason.

When is adverse action not taken against an employee?

Adverse action is not taken against an employee or a prospective employee when the action is:

- authorised under a State or Territory antidiscrimination law
- taken because of the inherent requirements of a particular position
- taken against certain persons in good faith to avoid injury to religious susceptibilities of adherents of a particular religion or creed.

Onus of proof

Adverse action claims have a **reverse onus of proof**.

Example:

- The Applicant (employee) must prove that they had a workplace right.
- The Applicant (employee) must prove that there was adverse action.
- The Respondent (employer) must prove that the adverse action was not because of the workplace right.

It should be noted that most State and Federal discrimination claims require the applicant to establish the discrimination.

The Consequences

The Applicant has 60 days to lodge a complaint and can either request the Fair Work Ombudsman to have the allegation of adverse action investigated, or request Fair Work Australia to resolve the matter through a compulsory conference.

If the matter cannot be resolved at conference, the Applicant, an industrial association or an inspector can make an application to the Federal Court or the Federal Magistrates Court to impose a civil penalty. The Federal Court or Federal Magistrates' Court can order a civil penalty up to a maximum of \$6,600 for an individual and \$33,000 for a company.

Both courts may also make such orders as they see fit which may include compensation and/or reinstatement. The compensation awarded for the loss that a person has suffered is at an uncapped amount.

The courts also have powers to make interlocutory orders such as injunctions. This may have the effect of restraining an employer, for example, from taking steps to review or manage an employee's performance.

Case Note: Jones v Queensland Tertiary Admissions Centre Ltd

The Federal Court's decision provides an insight into how an employee might use the adverse action provisions to restrain an employer in relation to taking disciplinary action.

Ms. Jones was the CEO of Queensland Tertiary Admissions Centre (QTAC). While she was involved in enterprise bargaining on behalf of QTAC with the Australian Services Union (ASU), a number of bullying and harassment complaints were made against her. QTAC began an investigation into the complaints and came to the conclusion that Ms Jones' behaviour did amount to bullying and harassment of employees. Ms Jones was concerned about the investigation process and the possibility that her employment would be terminated so she filed an application for interlocutory relief in the Federal Court to restrain QTAC from taking any disciplinary action against her, including terminating her employment.

The Court held:

- the commencement of an investigation into the complaints against Ms Jones could constitute adverse action, as could the threatened disciplinary action against and termination of Ms Jones' employment;
- Ms Jones' participation in the process of making an enterprise agreement or carrying out her purported role as bargaining representative could arguably constitute the exercise of a workplace right; and

- in order to avoid what the Court termed ‘additional impact on Ms Jones reputation and career’, they issued an injunction to restrain temporarily (pending a full trial) the QTAC from taking any action against her.

Lessons for Employers

To minimise exposure to adverse action claims, employers should:

- establish a recruitment process that is compliant with anti-discrimination laws as specified in both equal opportunity legislation and the Fair Work Act.
- ensure that staff involved in recruiting are educated about their statutory obligations and fully understand the various grounds upon which it is unlawful to discriminate.
- educate managers about employees’ rights before, during and upon termination of employment.
- implement and monitor compliance with policies and procedures regarding grievance and dispute resolution, discrimination, bullying and harassment and ensure consistency in administering a fair process.
- train managers to keep records of all employee concerns, requests and responses.
- document the reasons behind workplace decisions to substantiate any actions taken.

Further Information

Fair Work Australia: <http://www.fairwork.gov.au>

Catholic Church Insurances:

http://www.ccinsurances.com.au/rm/documents/rm_news_adverse_action_201012.pdf#search=%22adverse%20action%22

The Office for Employment Relations can provide you with assistance on this and other employment related matters. Please visit our website: www.employmentrelations.org.au or contact

Jane Bashiruddin at the Office for Employment Relations on 03 9934 3355

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