

COURT CLARIFIES ADVERSE ACTION RIGHTS

Adverse Action

A recent decision of the Federal Court Full Bench in *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (9 February 2011) has clarified the scope of the protections available to employees under the “adverse actions” provisions of the Fair Work Act 2009 Act (“Act”). The decision is the first Full Court decision to deal with the adverse action provisions and the views expressed by the Court majority (Justice Lander dissented) provide important guidance for employers when dealing with such claims.

Section 340 of the Act states that a person must not take adverse action against another person:

- (a) because the other person:
 - (i) has a workplace right;
 - (ii) has, or has not, exercised a workplace right; or
 - (iii) proposes or proposes not to, or has at any time proposed not to, exercise a workplace right, or
- (b) to prevent the exercise of the workplace right by another person.

Section 341 contains an extensive definition of a “workplace right” and includes circumstances where:

- (a) a person is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument (such as a modern award) 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 in relation to his or her employment.

The concept of a “workplace right” is extremely broad and would include circumstances such as where an employee has an entitlement under an award or a right to invoke a grievance procedure in a policy or

employment contract. Importantly, the Act contains a deeming provision the effect of which is that once an employee can show the existence of a workplace right and alleged adverse action, the employer is presumed to have taken the action for a prohibited reason unless the employer can “prove otherwise”. The decision of the Court majority in Bendigo indicates that employers will have real and practical difficulties in rebutting this deemed contravention of the Act. The decision also makes it clear that Employers need to be very careful when taking disciplinary action against employees who are also union members.

The applicant, Gregory Barclay, was employed as a teacher at the Bendigo TAFE and was also an AEU delegate. Mr Barclay sent an email to other AEU employee members in which he alleged that some TAFE employees had been asked to produce false and fraudulent documents for an audit linked to ongoing funding. The TAFE’s management became aware of the email and commenced disciplinary action against Mr Barclay which included suspension on full pay and removal of his computer access rights.

The AEU lodged an adverse action claim with Fair Work Australia which, in part, alleged that the Institute had taken the disciplinary action because Mr Barclay was an AEU delegate engaged in union activities. At the initial hearing, the TAFE’s CEO gave evidence that the actual reason for the disciplinary action was because Mr Barclay’s conduct was in breach of the applicable Public Sector Employee Code of Conduct, he had failed to report the alleged fraud to management, his conduct had threatened the reputation and probity of the TAFE and also had the potential to cause distress to other employees.

The CEO of the TAFE denied that her actions were motivated by the fact that Mr Barclay was a union delegate. The primary Judge accepted this evidence and dismissed the case. On appeal, the Court majority held that in assessing whether “an aggrieved person was subjected to adverse action” the:

“state of mind or subjective intention of (the person who took the action) will be centrally relevant, but it is not decisive. What is required is a determination of...the “real reason” for the conduct. The real reason is not necessarily the reason the person asserts even when the person genuinely believes he or she was actuated by. In the regard, the real reason may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the

decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question". and:

"the search required by s 346 is a search for what actuated the conduct of the person who took the adverse action, not for what that person thinks he or she was actuated by".

Based on the Bendigo decision, the Court is now required to look beyond the subjective evidence of a witness and must also consider the "unconscious" or "not understood" motivations of the employer. How this approach will work in practice remains to be seen.

A further aspect of the Bendigo decision which employers need to be aware of is the finding of the Court majority that when Mr Barclay sent the contentious email he did so in his capacity as a union delegate and not as an employee. It followed that the employee's alleged failings were the union's failings and the TAFE was required to deal directly with the AEU and not the employee in relation to the email. This failure also constituted adverse action.

One positive aspect of the decision in Bendigo is that the Court refused to make an award of compensation because the employee had failed to show that he suffered any loss such as loss of salary as a result of the adverse action.

PRACTICAL TIPS

- Employers need to be aware of the factors that constitute a "workplace right" and "adverse action" under the Act.
- Employers need to ensure that any action which is taken is not taken for the prohibited reasons set out in the Act.
- Employers must ensure that they maintain a comprehensive document trail which sets out the actual reasons as to why actions have been implemented including in respect of any disciplinary action.

- Employers must exercise caution when dealing with complaints from union representatives and, based on the Bendigo decision, must deal directly with the union involved and not the employee union member.
- Employers should note that adverse action claims can be brought by a prospective employee, an independent contractor or an industrial association.
- Employers should obtain legal advice before implementing any action which could affect an employee's workplace rights or employment benefits.

If you would like more information about how Meridian Lawyers can assist you in relation to adverse action claims or general employment law matters please contact Russ Baldwin or Peter Frazer.

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