



GREENWAY CHAMBERS

General protections claims under Part 3-1 of the *Fair Work Act 2009* (Cth): common issues and recent authority

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Today's talk:

1. Common claims under Part 3-1 of the FW Act are that adverse action has been taken *because of*:
 - a. The exercise of a workplace right – sections 340 and 341(1)(c)(ii)
 - b. Specified 'discriminatory' grounds – section 351
2. What is, and what is not, 'adverse action'
3. 'Because of' and the rebuttable presumption – evidence required
4. Scope of compensation payable

Elements of the claim

1. Ensuring the application/pleading properly identifies:
 - a. Section 340/341 claims - a workplace right?
 - b. Section 351 claims - protected attribute?
 - c. Adverse action?
2. First – as a ‘precondition’ to trigger the rebuttable presumption in section 361, the applicant must:
 - a. Prove ‘objective facts’ to establish adverse action and workplace right/protected attribute; and
 - b. Show that the claim is ‘consistent with the hypothesis that the respondent was actuated by a proscribed purpose’: *Australian Red Cross v Qld Nurses' Union* (2019) 273 FCR 332 at [67]
3. Second – once triggered, the rebuttable presumption is that a ‘substantial and operative’ reason for the action was the prohibited reason: sections 360 and 361.

Exercise of workplace right – section 340

1. Person must not take adverse action because another person:
 - a. Has a workplace right
 - b. Exercises, or has not exercised, a workplace right
 - c. Proposes or proposes not to exercise a workplace right

Workplace right – section 341(1)(a) and (b)

1. Meaning of workplace right

a. Entitled to benefit of workplace law/instrument

Section 12 - any law regulating employment

Includes anti-discrimination, workers compensation, work safety legislation, FW Act: eg *ALAEA v Sunstate Airlines* (2012) 208 FCR 386 [24].

Not common law contracts

b. Able to initiate proceedings under workplace law/instrument

Workplace right – section 341(1)(c)

1. Complaint or enquiry under a workplace law/instrument OR in relation to employee's employment
 - a. Is there a 'complaint' that the employee is 'able to make'?
 - b. 'Complaint' means expression of grievance/fault: *Shea v TRUenergy (No 6)* (2014) 242 IR 1 [66]; *O'Kane v Freelancer* [2018] FCCA 933 [126]
 - c. BUT not a 'complaint' if merely complying with responsibility/obligation to report: *Environmental Group Limited v Bowd* (2019) 288 IR 396 [128]-[129]

Workplace right – section 341(1)(c)(ii)

1. Complaint or enquiry in relation to employee's employment
 - a. 'Able to make': if contract confers a right to raise a grievance/complaint, extends to a right to complain under the general law/based on statute: *PIA v King* (2020) 274 FCR 225 [18]-[20], [26]-[27] per majority; applied in *Flageul v WeDrive Pty Ltd* [2020] FCA 1666 at [273]-[274]
 - b. BUT in *Cummins South Pacific Pty Limited v Keenan* [2020] FCAFC 204 Bromberg J at [67], [19] (Mortimer J agreeing at [209]): 'had it been necessary' he would have found the majority in *PIA* 'wrong' and ability to complain does not have to be sourced in some identified right to complain.
 - c. *PIA* still the authority plus there is 'allied question' of whether complaint 'in relation to employment': *NTEIU v University of Sydney* [2020] FCA 1709 [181]-[191].

Discrimination – section 351

1. An employer must not take adverse action against a person who is an employee or prospective employee because of:
 - a. race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin
2. Meaning of 'because of' is the central question and linked to the rebuttable presumption.

Discrimination – section 351

1. Often used in preference to anti-discrimination legislation because:
 - a. Penalties – \$222 per penalty unit = up to \$66,600 for a corporation prima facie payable to applicant (*Sayed v CFMEU* (2016) 239 FCR 336 [101]-[102]): sections 539 and 546 of the FW Act;
 - b. Less complicated test, but see sections 351(2), (3)
 - c. Rebuttable presumption to be displaced by employer; and
 - d. Automatic liability for corporate employers: section 793. No need to establish ‘vicarious liability’ for instance under *Sex Discrimination Act 1984* (Cth).
2. BUT - difficulty for applicants under section 351(2) and (3), which ‘expressly pick up the detailed regimes’ of anti-discrimination statutes – *Sayed v CFMEU* (2015) 327 ALR 460 [161]

What is and what is not adverse action

1. Adverse action 'by an employer against an employee' (section 342) occurs where the employer:
 - a. dismisses the employee;
 - b. injures the employee in his/her employment;
 - c. alters position of the employee to employee's prejudice; or
 - d. discriminates between employees.
2. There are similar meanings of adverse action in respect of prospective employees, contractors and officers of industrial associations.

Adverse action – A. dismisses the employee

1. The term ‘dismissed’ takes the meaning given to it by sections 12 and 386: *Coles Supply Chain Pty Limited v Milford* [2020] FCAFC 152 at [15], [86] per Court; *FWO v Austrend International* (2018) 273 IR 439 [25]-[26]; *Morris v Allied Express Transport* [2016] FCCA 1589 [116]-[117]
2. ‘Dismissed’ under section 386(1) of the FW Act means:
 - a. Terminated at the employer’s initiative; or
 - b. Forced to resign because of employer’s conduct, or resigns where there is no reasonable choice (commonly called ‘constructive dismissal’)

Adverse action – A. dismisses a casual employee

1. BUT, no dismissal where there is no obligation to offer further work, ie, for casuals: *Thompson v Big Bert* (2007) 168 IR 309 at [61]; *Clarke v Premier Youthworks* [2020] FCCA 105 at [243]-[244] (both held no legal basis upon which to insist on offer of further work); cf *Kennewell v MG & CG Atkins* [2015] FCA 716 (employer conceded adverse action: [50], but damages only \$2,900.85 because entitled to terminate casual engagement with little/no notice: [89]-[91])
2. PLUS, under section 386(2) not dismissed if employed for a specified period of time/task/season.
3. Whether applicant “dismissed” must be determined as jurisdictional issue at stage application filed with FWC under s 365: *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152 [67].

Adverse action – A. constructive dismissal

1. 'Constructive dismissal' occurs where the employee was 'forced' to resign.
2. Requires an analysis of what actually occurred and whether the employer's conduct was the 'real and effective initiator of the termination': *FWO v Austrend International* (2018) 273 IR 439 [28].
3. It does not extend to the circumstance in which an employee 'is willing and content to resign on the terms which he [or she] has negotiated and which are satisfactory to him [or her]': *FWO v Austrend International* (2018) 273 IR 439 [30].

Adverse action – B. injury in employment

1. 'Injury in employment' includes:
 - a. Any injury of a compensable kind.
 - b. Deprivation of immediate practical incident(s) of employment.
 - c. Any substantially differential treatment to the normal treatment of the employee that is injurious; 'singling out'.
 - d. Narrower than 'altering the position of the employee to the employee's prejudice'.

Adverse action – C. altering position of employee

1. Altering position of employee prejudicially:

- a. Extremely broad; covers and extends beyond legal injury.
- b. Includes any adverse effect on, or deterioration in, previously enjoyed advantages and benefits of employee.
- c. Prejudicial alteration may occur without loss of legal right.
- d. *Milardovic v Vemco Services Pty Limited* [2016] FCA 19 at [54]:
 - includes any adverse effect on the advantages and benefits enjoyed by an employee, or any deterioration in such advantages and benefits;
 - may occur even though the employee suffers no loss or infringement of a legal right; and
 - will occur where the alteration is real and substantial rather than merely possible or hypothetical

Adverse action – C. altering position of employee

1. Altering position of employee prejudicially has included:
 - a. Allocation of less favourable shifts
 - b. Failing to re-employ even where there was no legal entitlement to re-employment BUT an ‘expectation of future work’: *Employment Advocate v NUW* (2000) 100 FCR 454 [73]-[77] (Adecco engaged casuals and supplied labour to David’s Distribution Pty Limited. NUW told David’s not to give shifts to non-union members. Held: NUW breached former s 298K(1) WR Act)
 - c. Conduct having the effect of rendering employment less secure, including investigating employee conduct or implementing a ‘spill and fill’ following a restructure
 - d. Issuing warnings under a disciplinary policy
 - e. Reducing access to employment benefits such as promotions

Adverse action – D. ‘discriminates between’

1. ‘Discriminates’ is not defined in the FW Act.
 - a. Not same meaning as under anti-discrimination legislation.
2. ‘Discriminates between’:
 - a. Means simply ‘treating people differently’ in similar or the same circumstances: *Sayed v CFMEU* (2015) 327 ALR 460 [160] (employee unsuccessfully claimed he was treated differently by being required to fly to Sydney for inquiry into his involvement with the Socialist Alliance: [162])
 - b. Incorporates the notion of indirect discrimination: *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 [95] (Klein unsuccessfully claimed that an enterprise agreement which required him to consult with UFU and which gave UFU a veto right indirectly discriminated against him because he was not a UFU member because his employer did not agree to or select those provisions because of their adverse impact on Klein)

‘Because of’ and rebuttable presumption

1. Proscribed reason need not be the sole (section 360) or dominant reason, but must comprise a ‘substantial and operative reason’: *Board of Bendigo Regional TAFE v Barclay* (2012) 243 CLR 500 at [104]; *CFMEU v BHP Coal* (2014) 253 CLR 243
2. Must be more than a temporal connection: *Milardovic v Vemco Services* [2016] FCA 19 at [55]; *Barclay* at [60]; *CFMEU v BHP Coal* (2014) 253 CLR 243 at [19]

Rebuttable presumption – onus and evidence

1. Direct evidence of the decision maker is generally required to rebut presumption: *Barclay* at [42]-[45], [101], [127], [146]; *Sayed v CFMEU* (2015) 327 ALR 460 at [179]; *Milardovic* at [57].
2. Express denial will not usually suffice, particularly where contradictory evidence/other facts proven: eg *Roohizadegan v TechnologyOne Limited (No 2)* [2020] FCA 1407 [967]-[1006].
3. Where direct evidence of decision-maker not given, or not given on the reasons for termination, presumption found not rebutted: eg *PIA Mortgage Services Pty Limited v King* (2020) 274 FCR 225 at [36], [148]-[156]; *Cigarette & Gift Warehouse Pty Limited v Whelan* (2019) 268 FCR 46 [29]-[31] (case ‘cried out’ for evidence of ‘relevant corporate actor’)

Rebuttable presumption – onus and evidence

1. Assessment of the state of mind of the decision maker: *Rumble v HWL Ebsworth* (2020) 294 IR 337 [33], [35] per majority; *Milardovic* at [57], but not ‘unconscious’ state of mind; *Barclay* [118], [124]-[126], [134], [145]-[147]
2. Court must ask ‘why’ the action was taken: *Barclay* [41]-[44]; *Rumble* [34] per majority; *Short v Ambulance Victoria* (2015) 249 IR 217 at [54]-[56]

Rebuttable presumption

1. Decision maker being *aware* of various facts or matters does not make those the *reasons* for the conduct: *Milardovic* at [59]-[60]; *CFMEU v Endeavour Coal* (2015) 231 FCR 150 at [91] (special leave refused).
2. Focus is not on the 'fairness' or otherwise of the employer's conduct: *Tsilibakis v Transfield Services (Australia) Pty Ltd* [2015] FCA 740 at [16]; *Celand v Skycity Adelaide Pty Ltd* (2017) 256 FCR 306 at [101]; *Taylor v Department of Health* [2020] FCA 1364 at [23]

Recent cases

1. *Rumble v The Partnership t/a HWL Ebsworth* (2020) 294 IR 337 – onus discharged

1. Applicant was engaged by firm to conduct review of client, Department of Defence. Applicant criticised Department of Defence in media, allegedly in breach of firm's media policy. Applicant was terminated allegedly on grounds of political opinion in breach of s351 of FW Act.
2. Majority upheld first instance decision, finding that motivation for termination was not applicant expressing a political opinion, but the employer's desire to 'eliminate insubordination' and 'the earning of fees' from Department of Defence.
3. The majority concluded at [50] that the applicant:
...could have modified his behaviour by adhering to the media policy and still would have been able to hold and express his political opinion using means other than the media, just as the unsuccessful employees could have acted differently in each of the trilogy of cases [*Barclay*, *BHP Coal* and *Endeavour Coal*] while exercising their respective workplace rights.

Recent cases

1. *PIA v King* (2020) 274 FCR 225 – onus not discharged
 - a. Applicant was engaged as CEO of finance company and made multiple internal complaints that the finance company engaged in fraud in issuing loans. Employer foreshadowed terminating the applicant, who said in an email and letter that doing so had or would breach the contract and ACL.
 - b. Majority upheld first instance decision, finding:

The email and letter were ‘complaints’ about breach of contract and ACL, which were complaints the applicant was ‘able to make’ under section 341(1)(c)(ii): [18]-[32].

Decision-maker (director) failed to give evidence on reasons for termination. Termination letter did not discharge onus: [36]. Termination letter stated reasons included ‘the making of demands’.

Employer entitled to terminate in manner most beneficial to itself: [50]-[51]. Compensation limited to \$100,000 ‘offer’ made by employer.

Recent cases

1. *Roohizadegan v TechnologyOne Limited (No 2)* [2020] FCA 1407

– onus not discharged; compensation and penalties

- a. Applicant made 7 allegations of bullying under workplace policy. Applicant dismissed. 'Gross income' was \$845,128.00 pa. Kerr J found:
 - Allegations were 'complaints' that the applicant was 'able to make' based on 'contractual entitlements', adopting the reasoning in *PIA*: [60]. Also conceded by employer: [53]-[54].
 - Implicitly that the policy was incorporated by reference into contract giving rise to 'contractual entitlement' to complain, applying *Shea (No 6)* at [640]: [57].
 - Onus not discharged: [1005]-[1006]. Executive chair accessorially liable.
- b. Compensation awarded in the sum of \$5,181,410 (\$2.825M future economic loss; \$1.59M breach of contract; \$756,410 share options; \$10,000 general damages) plus penalties of \$47,000.

Recent cases

1. *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152 – whether there has been a ‘dismissal’ goes to jurisdiction

- a. Applicant was engaged as casual employee in 2010, injured in October 2014 and Coles issued letter of termination on 13 June 2016. In June 2018 applicant brought general protections claim. Coles said application out of time and (later in proceedings) that Milford had not been dismissed because he was a casual.
- b. Overturned FWC Full Bench decision, finding:
 - Whether there has been a ‘dismissal’ under s 365 must be determined, if raised, at time application lodged with FWC, when it is ‘open to a respondent to assert that there has been no dismissal’: [67]. FWC can make rules under s 609 to deal with such applications: [68].
 - If FWC errs on question of ‘dismissal’, this is a jurisdictional error and either party can apply to the Federal Court for relief: [79].
 - NOW respondent employers may lodge a jurisdictional objection as to whether there was a ‘dismissal’ immediately after application filed under s 365 and FWC must determine it.

Compensation

1. Compensation and broad scope of s545 FW Act
 - a. *Kassis v Republic of Lebanon* [2014] FCCA 155 [62]-[64]
(up to age of retirement, 65 years)
 - b. *CFMEU v Hail Creek Coal* [2016] FCA 1032 (for life of project (\$1,296,735 plus interest))
 - c. *Roohizadegan v TechnologyOne Limited (No 2)* [2020] FCA 1407 (\$5,181,410 in compensation/damages plus penalties (approx. 4.5 years future economic loss in sum of \$2.825M after mitigation and contingencies at [1032], plus \$756,410 in foregone share options at [1023] and \$1.59M in respect of incentives said to be payable since November 2009 as percentage of profit before tax at [5] and [883]))

Compensation

1. BUT, in calculating damages:
 - a. employer entitled to terminate in earliest/most beneficial way: *PIA* at [50] applying *Dafallah v FWC* (2014) 225 FCR 559 at [161]
 - b. *Dafallah* can result in nominal compensation: *Kennewell v Atkins* [2015] FCA 716 [89]-[91] (\$2,900.85)
 - c. 'almost impossible' for casual to identify any loss because no 'regular' work: *Clarke v Premier Youthworks* [2020] FCCA 105 at [235]-[236]
 - d. *Dafallah* distinguished in *Roohizadegan* at [1037]-[1039]. Kerr J rejected argument that *Dafallah* means no entitlement to compensation if relationship had broken down and employer would have terminated in any event, also finding that any breakdown was due to bullying.
 - e. Causal connection between loss and contravention of FW Act needed: *IEU v AIAE* [2016] FCA 140; *RailPro Services v Flavel* (2015) 242 FCR 424 at [168] (for general damages, mere assertion of non-economic loss not enough)



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Questions?
