

### **“adverse action – (s342)**

*An employer is prohibited from taking adverse action against an employee (or prospective employee) **because of** an employee's workplace right.*

*Action includes:*

- *Dismissing an employee*
- *Injuring an employee in their employment*
- *Altering an employee's position to their prejudice*
- *Discriminating between the employee and other employees*

### **“protection of workplace rights” – (s340)**

*A person must not take AA against another person:*

- ***Because*** that other person has a workplace right
- ***Because*** that other person has or has not exercised a workplace right (or proposes to/not to)
- ***To prevent*** the exercise of a workplace right by the other person.

### **Proving REASON and INTENT:**

In ascertaining whether AA was taken ‘**because of**’ a right/activity/status, central question to **CONSIDER: Why was the adverse action taken?**

Enquiry is on reasons of **relevant decision-maker in taking the action.**

- Not fully subjective nor objective
- ‘Knowingly concerned’

### **Element ONE: Substantial or operative reason within multiple reasons (s360)**

*A person takes action for a particular reason if the reasons for the action include that reason*

- There may be multiple reasons for the action. The Applicant's case will succeed if simply one of the reasons is a prohibited reason.
- Prohibited reason must, however, be a ‘substantial and operative’ reason, even if it need not be the sole or dominant reason

### **Areas of Claims to Date, where applicant employees have alleged AA by:**

- Performance Management or Discipline or Dismissal after Complaints
- Performance Management, Discipline or Dismissal when entitled to the benefit of an award or enterprise agreement
- Outsourcing to a contractor when entitled to the benefit of an award or enterprise agreement
- Redundancy following union activity
- Redundancy following pregnancy or parental leave
- Discipline or Dismissal when engaging in Lawful Industrial Activity (or unlawful or unauthorised activities in connection)

## Element TWO: Reverse Onus (s361)

If:

In an application in relation to a contravention of the General Protections Part, it is alleged that a person took, or is taking, action **(alleged AA)** for **a particular reason or with a particular intent**; **AND** 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 person proves otherwise.**

Reverse Onus is intended to address the difficulty of proving the requisite intention to victimise, or why the action was taken.

<b>General Motors-Holden v Bowling</b>
<b>PRINCIPLE:</b> Reliable, direct testimony of the decision-maker is required.
<b>WHAT TRANSPIRED:</b> Two of them did not attend the court hearing. Without their evidence, <b>employer was not able to discharge the onus</b> to show that there was not an action taken for prohibited reason, because the worker, Bowling, had a workplace right.
<b>FINDING:</b> <b>Without evidence of the decision-maker</b> , the employer was not able to avoid the conclusion that the reason was unlawful.

**Direct testimony of the decision-maker is required.** If accepted as reliable, it is capable of rebutting the presumption. Whether the onus is discharged is determined **on the balance for probabilities** in light of all the established evidence presented to the court (**Bendigo TAFE v Barclay**).

- Where the employer puts forward all its reasons for the action
- Showing all the reasons, and that it was **unrelated to the pregnancy**
- Appears to be difficult for employer to deal with, but if they can provide the reasons etc, then it will rebut the presumption.

<b>Bendigo TAFE v Barclay</b>
<b>FACTS</b> <ul style="list-style-type: none"><li>- Barclay sent <u>email alleging corrupt behaviour by TAFE management</u> in false documents prepared for audit</li><li>- TAFE CEO initiated <b>disciplinary action; excluding him from campus and computer systems during audit</b></li><li>- He says that CEO of TAFE taken the action because he had been involved in industrial action in sending the email (which was allowed), treated adversely</li><li>- CEO said - only took the action as <b>breaching employment obligations by not first reporting to his supervisors</b>, before sending the email</li></ul>
<b>ISSUE:</b> Relevance of direct decision-maker's testimony – <i>subjective? Objective?</i>
<b>HELD</b> <ul style="list-style-type: none"><li>- Full Federal COURT: <i>objective test and TAFE breached, but overturned by HCA (below)</i></li><li>- <b>No contravention</b> by TAFE CEO, <b>no valid claim for AA breach</b></li><li>- <b>Direct testimony from decision maker can discharge the presumption</b><ul style="list-style-type: none"><li>o Rejected Barclay's argument that the employer's onus was to entirely disassociate with an employee's union activities</li><li>o <b>Onus can be discharged, on balance of possibilities</b>, by a possible, alternative explanation put forth by the decision-maker</li><li>o Court focused on decision-making of CEO, revealed <u>no contravention</u></li></ul></li></ul>

**CFMEU v Endeavour Coal Pty Ltd** Full Federal Court [2015]

**FACTS**

- Employee had workplace right to take personal leave.
- Adverse action alleged: Employee was removed from the weekend roster (with higher penalties) and placed on weekday (Mon-Fri) roster

**Employee argued: Exercise of workplace right led to** being 'deemed unreliable and unpredictable', which resulted in the removal from the weekend roster

- *Workplace right to take personal leave – 30 days of personal/carer's leave over 3 years*

**Employer argued:** reason for removing the employee was due to unpredictable and unreliable attendance at work, which impacted on operations at the mine; **not** because of personal/carer's leave taken

- **Had taken 29 days of personal/carer's leave over 18-months**

**HELD**

- Jessup J: characterisations put upon the employer's actions is a purely factual enquiry which the trial judge can resolve.
- **CFMEU WON.** Removal **did not constitute a breach** of the general protections provisions of the FW Act
  - Found that CFMEU's decision was taken because it was unpredictable and unreliable, not because of taking personal/carer's leave

**CFMEU v BHP Coal [2016] HCA**

**FACTS**

- Employee engaged in an industrial activity, during a union-organised protests, waves a sign 'No principles SCABS, no guts'; **then, dismissed by GM**
- The allegation by **GM**: Employee's sign was offensive, breached company's workplace conduct policy; and when presented with these allegations, employee displayed arrogance when challenged

**FOCUS: TESTIMONY BY THE GM IN DISPROVING THE ALLEGATIONS (UNDER REVERSE ONUS)**

**HELD**

**HCA Majority: GM won**

"Reasons given by manager for dismissals were NOT prohibited."

**Minority (Hayne and Crennan JJ)**

- The offensive language/sign could not be disassociated from the context
- No distinction can be drawn between fact of participation in the protest, and the manner of participation in the protest (industrial activity)
  - **Workplace right:** probably extends to protesting! **But how far?**
    - Employer could take AA if that was the substantial operating reason, because sign was found to be outside the protest boundaries

**Collison v Brighton Rd Enterprise Pty Ltd [2016] FCCA – sick leave**

**FACTS**

Collison **took sick leave after being reprimanded** by the director for booking a large function in the lead up to the AFL Grand Final – *director said "I cant do my effing job and yours as well"*

Despite Collison's repeated requests for further training, she claimed director had told her to rethink her career path.

Collison left **distressed, attended GP for advice** on managing anxiety; **got one week's sick leave**

- Upon telling the director of the leave, informing a relation to anxiety and stress as a result of working, he responded "*sorry to hear of this development, as recent as it is; particularly given **there were no signs of this when you left work***".
- Clearly did not believe her illness (although **doctor's words are FINAL in employment**); felt both sick leaves were as 'revenge'

## HELD

### FCC – Judge Jones found: Ms. Collison won.

- Substantial and operative reasons for dismissal were **exercising of her workplace rights to paid sick leave, pursuing a workers' compensation claim and making inquiries about her employment**
- Understood that employer wanted certainty about Collison's return, however he was **going too far** when requesting to speak with the GP – and a failure to permit this (revealing confidential information by Dr to employer) would jeopardise Collison's employment
- Company ordered to pay Collison \$35k, director, personally, \$7k.

## NTEU v RMIT [2013] FCA 451

### FACTS

Professor Bessant and the NTEU **successfully brought** an AA claim against RMIT.

Bessant reported to Professor Haywood

- **Conflict arose between B and H** regarding the Restructure, resulting in **Bessant making complaints** to RMIT about H's management practices (workplace bullying complaints)
  - o Complaints subject to formal external investigation, RMIT appointed B to a research role for a three-year term pursuant to the terms of a deed of release

**ALLEGED AA:** After B signed, H sought to make B's (now previous) position **redundant**, so she could not return to it – **proposal approved by two managers above H, and subsequently the Vice-Chancellor**

- B brought an AA claim after informed of the proposed redundancy

During conciliation, B notified by RMIT that her **employment would be terminated for redundancy**

### HELD

RMIT had taken AA against B in terminating her employment **because she had exercised workplace rights**

- FCC did not accept that Vice-Chancellor was the sole decision maker, and considered the **two other managers to also be key decision makers** in the proposed redundancy
- RMIT did not call them to give evidence in this case; **no contemporaneous records of those decisions makers' reasons**
  - Court was **not satisfied that RMIT had discharged the reverse onus of proof**

**CONCLUDED:** **Redundancy was a sham**; RMIT made use of its redundancy process to dismiss her because she was a **"troublesome employee"**, at least in part, because she had **exercised her workplace rights** by making Complaints.

### REMEDY

**Reinstatement** of B; indicated that if not reinstated, entitled to **\$2m in compensation**

- Also ordered RMIT to pay a civil penalty of \$37,000 for two contraventions of the FW Act as warning to employers of the risks of using **"sham" redundancies** as a means for dismissing difficult employees

**Lessons:** **if making someone redundant, must have some elements of WHY.** Why that role is not needed? Why choose to make redundant? Without those records and reasons, more difficult to discharge the **reverse onus of proof**

- Also, decide **WHO the Court would hold as the decision-maker**
- **Requires objective criteria for restructure; critically assess reasons, exercise precautions**

## CLAIM FOR REMEDY UNDER FW ACT – Court or Commission (FWC)?

A claim is made under FW Act to FWC for remedy for **adverse action**.

- For **alleged contraventions involving dismissal** – **involvement of FWC is MANDATORY.**
- For **alleged contraventions during employment** – **FWC's involvement is OPTIONAL.** (*for decision of party/parties*)

## **FWC Procedures for dismissal related applications** (*non-dismissal see below*)

### **Ss365-375A**

- **Application** – lodge application within 21 days after dismissal
- **Conciliation** – Usually telephone conference in FWC using staff conciliators
- **Certificate** – if dispute not likely to be resolved despite all reasonable attempts, issue certificate (Must advise parties if the claim has 'no reasonable prospect of success')
- **Arbitration** – in the **FWC**, *preferable, less formal, saves time and costs* (if both parties agree and request lodged within 14 days of certificate); **OR**
  - **Court** – Federal Court or FCC – *NOT Preferable for employee, less likely for re-instatement because of time taken, costs, time*
    - *Once certificate given (for dismissal-related matters), Court application can add other general protections claims*
      - *Note: Anti- double dipping/anti-multiple remedies provision*
        - *Cannot go for Equal Opportunity and AA, choose between the two*
        - *Can go for CL and AA, but applications would be similar*

## **COSTS (by FWC)**

### **FW Act, ss 375B, 376, 377, 611**

Permits an order for costs against a party whose **unreasonable act or omission** has caused another party to **incur costs in connection with the conduct, or continuation of the dispute**

Permits costs orders against lawyers or paid agents (who **encourage a party to start, continue**: applicant's solicitor; or **respond: respondent's solicitor**) where it should have been **reasonably apparent that the person has no reasonable prospect of success in the dispute**

- Inducing parties to enter the dispute, despite lacking a good basis right from the start (poor odds of winning etc.)

## **REMEDIES (Court or FWC) – dismissal-related applications:**

- Reinstatement
- Orders relating to continuity or lost remuneration
- **Compensation (uncapped), unlike unfair dismissal**
- (Civil penalty can be given by Court, not in FWC)