

TOPIC 9: ADVERSE ACTION

INTRO: WRITE: X may argue that there has been adverse action by the employer and the employer is prohibited from taking adverse action against an employee/prospective employee because of an employee's workplace rights (s340) There are 3 elements which must be made out for an adverse action claim to be successful.

Step 1: Element 1: Does X have a workplace right?

Step 1A: WRITE: X will be covered as a 'person' eligible to have a workplace right because he is an [insert from below]

- Employee (no maximum earnings threshold), job applicant, independent contractor
- Employer, principal, contractor, union, shop steward

Step 1B: Defining a 'workplace right' (s341 FW Act)

WRITE: X will argue that he has a workplace right under s341 because he is [insert from below]

- a. is entitled to the benefit of a workplace law/instrument (e.g. EA or award) ; or has a role or responsibility under a workplace law (e.g. the role of a bargaining representative), workplace instrument or order made by an industrial body
- b. Is able to initiate or participate in a process or proceedings under a workplace law/instrument;
 - X's ability to be able to initiate process/proceedings under a workplace law/instrument is evident as he can [insert action from s341(2) list below] and such an action is deemed to be a process/proceeding under a workplace law/instrument by s341(2)
 - See below
- c. I. Has the capacity under a workplace law to make a complaint or inquiry to see compliance with MA or FWA
 - E.g. if employee is covered by employment contract or HR policy and are able to make enquiry about procedural fairness in relation to performance review
 - See below
 - ii. Has the capacity to make a complaint or inquiry in relation to his/her employment
 - complaint or inquiry can arise from a statutory, regulatory *or contractual* provision to be in relation to a person's employment (includes the employment contract)
 - E.g. if employee is covered by employment contract or HR policy and are able to make enquiry about procedural fairness in relation to performance review

Note:

- Workplace law = a law that regulates the relationships between employers and employees- it is a statute law and does not generally include rights arising under contracts of employment
 - E.g. Equal Opportunity Act
- Workplace instrument = usually refers to an enterprise agreement or an award. Does not apply to the contract of employment itself.

Note: This protection also covers:

- Industrial activities (Div 4)
 - S346 - A person must not take adverse action against another person because the other person:
 - (a) joins or is a member of an industrial association (union)
 - (b) engages/proposes to engage in (lawful) industrial activities (see s347)
 - (c) does not engage in (lawful) industrial activities
- Discrimination (Div 5- esp 351)
 - This is a civil remedy provision- see s545

Examples of workplace rights:

- Being a member of union (*Barclay*, s346)
- Taking personal leave (this is a right under EA- entitlement in workplace law per s12 FWA; s341(1)(a)) (*CFMEU v Endeavour*)
- Request flexible working arrangements / taking parental leave (*Heraud*)
- Making a number of complaints about workplace practices (workplace bullying complaints) (*NTEU*)
- Taking industrial activity (*Barclay*)
- Taking personal/carer's leave (*CFMEU v Endeavour*)
- Discrimination (pregnancy) (*Sagona*)

s341(1)(b) Entitlement to initiate process/proceedings under a workplace law/instrument (s341(2))

2. Each of the following is a process or proceedings under a workplace law or instrument:
- a. a conference or hearing held by the Fair Work Commission (the Commission)
 - b. court proceedings under a workplace law or instrument
 - c. protected industrial action
 - If employer singles employee out for dismissal because they are taking protected industrial action
 - d. making, varying or terminating an enterprise agreement
 - e. appointing (or terminating the appointment of) a bargaining representative
 - f. making or terminating an individual flexibility arrangement under a modern award or enterprise agreement
 - g. agreeing to cash out paid annual leave or paid personal/carer's leave
 - h. making a request for flexible working arrangements
 - i. dispute settlement under a workplace law or instrument, or
 - j. any other process or proceedings under a workplace law or instrument
 - k. Any other process or proceedings under a workplace law or workplace instrument
 - this is very broad. Any type of HR process connected to the employment contract which incorporates the HR policies.

s341(1)(c) Has the capacity under a workplace law to make a complaint or inquiry

A person has workplace right if they are entitled to make complaint or inquiry under contract to seek compliance with their employment contract, MA or FWA

- E.g. might have a workplace right to make a complaint about sexual harassment (*Shea*)

WHAT IS A COMPLAINT?

- Must be a statement of a grievance
- More than a request for assistance
- May be implied but as so long complaint is clear, it will be sufficient (*Shea*)
- A claim must be genuinely held and be made in good faith for a proper purpose (no ulterior purpose) (*Shea*)

Step 2: Element 2: Was there adverse action (AA)?

WRITE: X may argue that he has been subject to adverse action because the employer has threatened to / organised to / taken action by [fill in from below] (Item 1 [a,b,c,d] s342)

- a. dismissing the employee
- b. injuring the employee in his or her employment
- c. altering the position of the employee to the employee's prejudice, or
 - E.g. getting less hours (e.g. taken off weekend shifts and onto weekday shifts- *Endeavour Coal*)
- d. discriminating between the employee and other employees of the employer.

- S351 Fw Act- An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's 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.
- Note: there is a statutory exception where discrimination is necessary due to the inherent requirements of the job (e.g. *X v the Commonwealth*- soldier being able to bleed safely was an inherent/essential requirement of employment)

See other notes for: prospective employee, independent contractor, proposed independent contractor, industrial associations

Step 3: Element 3: Causal link - Was the AA taken because of the workplace right?

Step 3A Write: X will argue that the AA of [insert act] was taken because [fill in from below]

- X exercised a workplace right (or proposes to); or
- To prevent the exercise of the workplace right by X

Step 3B: Write: Firstly, we have to consider why the adverse action was taken. There is a reverse onus (unlike normal civil cases) on the employer as the court/commission will presume that X's exercise of his workplace right [or whatever was filled in from Step 3A/alleged by X] was the actual reason behind the adverse action unless the employer can prove otherwise (s361 FW Act)

Step 3C: Write: As per s360 FW Act, an employer takes action for a particular reason if the reasons for the action include that reason. Therefore, X's case will succeed if simply one of the reasons is a prohibited reason. However, employer might argue that the prohibited reason was not the 'substantial and operative' reason (even if need not be the sole or dominant reason) (*Shea*)

- If employer is able to put forward direct testimony which offers a plausible alternative explanation as to X's allegation, then this is capable of rebutting the presumption (*Bendigo TAFE*)
 - The court is not required to search for unconscious elements of the employer's decision
 - Note: it can be difficult for an employee to succeed unless there is some written evidence of the reason for the decision (*CFMEU v Endeavour*)
- Whether the onus will be discharged is determined on the balance of probabilities in light of all the established evidence (*Bendigo TAFE*)
 - Mention Hayne and Crennan JJ (minority) in *CFMEU v BHP Coal* if relevant: they said that offensive language used during an industrial activity/action (workplace right) could not be dissociated from the context

Example

A pregnant employee applies for job. Is unsuccessful and alleges that pregnancy is reason.

Employer must prove, carrying reverse onus of proof, that pregnancy was not a substantial or operative reason for not employing the job applicant.

Employer is required to discharge the evidentiary onus by showing what he reasons were and that they are unrelated to pregnancy.

Case example: *Shea*- She argued that there was AA (redundancy- dismissed) because she had a right to make a complaint about sexual harassment and she then complained.

- The test for the employer is whether the complaint (her exercise of her workplace right) was a dominant or operative reason for the redundancy

Case example: *Collison*- the substantial and operative reasons for Collison's dismissal was the exercising of her workplace rights to paid sick leave, pursuing a workers' compensation claim and making inquiries about her employment.

Some Examples of AA claims:

- Performance Management or Discipline or Dismissal after Complaints (about underpayment, tax etc.)
- Performance Management, Discipline or Dismissal when entitled to the benefit of an award or enterprise agreement
- Redundancy following pregnancy or parental leave
- Discipline or Dismissal when engaging in Lawful Industrial Activity (or unlawful or unauthorised activities in connection)