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EMPLOYMENT LAW

Navigating the Workplace in 2015

Recent Court Decisions and Lessons for Employers

By Thea Birss | April 2015

Recent developments in workplace law indicate employers should review risk management measures in the areas of adverse action, sexual harassment/ discrimination and consultation with employees.

Adverse action

Adverse action by an employer includes dismissing an employee, altering an employee's position to their detriment, and discriminating between one employee and other employees.

The High Court's decision in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* last October that BHP did not take unlawful adverse action against an employee for holding a 'SCAB' sign during industrial action will not be the last word in adverse action claims.

Just before Christmas a Full Federal Court overturned a decision that Victoria's Office of Public Prosecutions had taken unlawful adverse action in sacking a solicitor due to misconduct which was 'completely interwoven with his medical condition' of depression. The Full Court determined that a close relationship between the adverse action and a prohibited reason (dismissal for misconduct that could have been due to disability) does not mean the two cannot be disaggregated. The medical evidence, upon review, did not link the employee's misconduct and his illness so the termination was lawful.

Current law suggests that prohibited grounds for adverse action, such as union membership, disability, carer's responsibilities and workplace rights do not offer an employee a licence to behave as they please so long as their actions relate to a protected status or activity. However, BHP won in the High Court only by decision of a majority and Federal Court judges are equally undecided about where to draw the line: employee protections should not be undermined by clever employers reframing protected actions as misconduct, but neither should Federal legislation allow errant employees to hide behind a protected status or activity in order to damage their employer's business.

The lesson for employers is to take advice before adversely affecting any employee who is entitled to the general protections provisions of the *Fair Work Act*.

Sexual harassment/discrimination

The 2013-14 Annual Report of the Fair Work Ombudsman details the prevalence of discrimination in relation to pregnancy at work and return to work after parental leave. A total of 202 workplace discrimination complaints were received by the Ombudsman, with 95 of those complaints surrounding pregnancy.

Under the *Fair Work Act* it is unlawful for an employer to take adverse action against an employee or prospective employee for such attributes as sex, physical or mental disability, family or carer's responsibilities and pregnancy.

Many acts of discrimination are blatant, as when a McLaren Vale Italian restaurant advertised last year for a chef who was "max 30 years old". However, the Federal Court decision in *Fair Work Ombudsman v A Dalley Holdings Pty Ltd* demonstrates that employers can also fall foul of the adverse action provisions by unwittingly discriminating against pregnant workers.

In this case the owner-managers of a Victorian aged care facility were penalised over $30,000 for discriminating against a care worker on the grounds of pregnancy, family and carer responsibilities when she attempted to return to her pre-parental leave position upon completion of her maternity leave.

Prior to going on maternity leave, the employee worked six afternoon shifts and one sleepover shift per fortnight. Upon returning to work, she was only offered two sleepover shifts per fortnight. The employee stated she was unable to do sleepover shifts due to family and carer responsibilities. Her employer advised that refusing these shifts would be taken as her resignation, resulting in her constructive dismissal.

What did the employer do wrong? Firstly, the employer failed to consult with the employee while on maternity leave about decisions that may affect her job and did not allow her to resume her previous position, or a mutually agreed position.

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Secondly, the employer took adverse action against the employee because she exercised her workplace right of maternity leave. Thirdly, the employer took adverse action against the employee due to her family or carer responsibilities by requiring her to perform sleepover shifts.

Many employers are lagging behind developments in the law regarding flexible work arrangements for people with family responsibilities. Failure to genuinely consider accommodations requested by workers can be costly.

We have seen penalties in this area of the law steadily increase over recent years but now it's official; in *Richardson v Oracle Corporation* a Full Federal Court noted a growing appreciation within the community of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct.

The Full Court substituted an award of $18,000 general damages with an award of $100,000 for Ms Richardson's pain and suffering, which is comparable to the value of similar claims for psychological injury resulting from other wrongs such as workplace bullying or misleading and deceptive conduct.

Just as sexual harassment has become more expensive, The Full Federal Court confirmed in August the Court's decision in *Ewin v Vergara* (calculating the victim's loss at $476,000) which included the following findings:

1. The 'workplace' can include the local pub, and the corridor outside the office.
2. Employers can be held vicariously liable for sexual harassment conducted by somebody else's employee.
3. A victim of sexual harassment can sue their employer, the harasser and the harasser's employer (the harasser was ordered to pay the victim $210,000 plus costs).

The lesson for employers is to regulate where and how work takes place, and the behaviour of all your workers (regardless of their legal status). Let your workers know that by sexually harassing colleagues they could lose the family home.

Consultation

Unions and employees are getting technical in their complaints that employers have not complied with consultation obligations in awards and enterprise agreements prior to effecting redundancies. This can result in penalties for breach of awards and agreements, or access to the unfair dismissal jurisdiction because lack of consultation denies an employer the 'genuine redundancy' exemption.

The Federal Circuit Court decision of *Ingersole v Castle Hill Country Club* usefully clarified last March that the obligation to consult found in many modern awards requires employers to discuss the effects of a redundancy decision, rather than to review the decision (though suggestions made by the employee in such discussions must still be acted upon swiftly).

However, Ms Ingersole was only verbally advised of her redundancy, effective immediately. Written notice was not provided until 6 days later. This amounted to a breach of section 117 of the *Fair Work Act* which is (via section 44) a civil remedy provision. Ms Ingersole was compensated an additional 6 days' pay. Fortunately, the Court did not award a penalty against the employer in this instance but employees will use technical breaches to bargain for more attractive settlement outcomes; better not to hand them this opportunity.

Section 117 requires employers:

1. to provide written notice of termination; and
2. not to terminate employment prior to the expiry of the notice period or the payment of an amount in lieu of notice has been made.

Employers are being fined around $7,000 per offence for non-compliance with these obligations.

The lesson for employers is to review dismissal processes to ensure written notices of termination and payments in lieu are organised in advance to ensure they are given on the day of termination (in respect of all dismissals). Personal service is preferable but if serving notice by post, allow 4 working days from the date of postal for receipt. Review the terms of applicable industrial instruments regarding consultancy obligations to ensure redundancy processes are compliant.

The year ahead

All the best with your business operations for 2015.

For further information or for assistance with the implementation of appropriate measures to mitigate your risk and maximise your HR opportunities, please contact a member of DW Fox Tucker's Employment Law team.

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