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Adverse Action: where to after Barclay's case?

The High Court has now given judgment in the first adverse action case to travel all the way up the appeal hierarchy.... and has reinstated the decision of the trial judge.

Background to the case

In this particular case, Bendigo TAFE had suspended Mr Barclay (a union representative) because of some inflammatory comments he made about the TAFE allegedly fostering the preparation of false documents in the lead up to a quality audit. Mr Barclay filed a claim against the TAFE stating that it had taken adverse action against him because of his status as a union representative.

The trial judge in the Federal Court found that the TAFE had not taken action because of Mr Barclay's role as a union representative, and accepted Bendigo TAFE's argument that it had taken action because it perceived Mr Barclay had breached his obligations as an employee.

On first appeal, the Full Court of the Federal Court found in favour of Mr Barclay. It held that it could not rely only on what the managers at Bendigo TAFE said their intentions were, because when viewed "objectively", the action related to Mr Barclay's conduct (albeit excessive conduct) as a union representative and therefore it was impossible to divorce the action taken against him from his union role.

The High Court decision

The High Court overruled this reasoning and reaffirmed the importance of the evidence given by the employer about the reasons for taking the action in question.

The managers' evidence was that, in their minds, Mr Barclay was suspended because his comments alleging serious misconduct were inflammatory, and because he refused to give details to the college so that it could investigate the alleged misconduct - NOT because of his union role.

The High Court held that these two things could be distinguished: credible evidence given by the managers about their subjective reasons could not be overridden by the mere fact of his union role, unless there was some evidence that the union role did in fact play some part in the decision.

What must employers do?

This case emphasises the fact that in adverse action claims, generally speaking, the critical issue is the decision-maker's evidence about his or her reasons for taking the action, and the credibility of that evidence.

Obviously this evidence is strengthened if there is a contemporary written record of the decision and the factors taken into account, and nothing in the circumstances which suggests an illegitimate reason for the decision.

Whenever you make a decision that adversely affects an employee, especially if there are risk factors present (such as possible grounds for alleging discrimination, or union involvement, or the employee having asserted a workplace right), you need to act with some caution and be aware of the matters that will need to be proved if the decision is challenged.

If the decision is challenged, as an employer you will need to prove that the suggested illegitimate reason for taking adverse action was not in fact the reason, or even one of the reasons, why the action was taken.

If you need advice on handling potential adverse action situations, please contact Anna Ford on aford@colemangreig.com.au, or phone 02 9895 9233.

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Work Health and Safety Update

Harmonisation? Dis-harmonisation?

Twelve months into our 'sort-of-harmonised' national WHS system things are, in many ways, settling down without having the dire consequences predicted in some quarters. However, things are not all neat and tidy just yet!

Who's in and who's out?

As things stand, QLD, NSW and the Territories have the system in place, and Tasmania and South Australia will join from 2013. Victoria and Western Australia are still considering their positions.

Life as we know it continues

There has been much debate as to whether compliance with the harmonised legislation is a big deal, or whether WHS life will continue as we know it with a few variations.

The general view now is that, for businesses that were substantially compliant prior to harmonisation, the changes are relatively small. The loudest cries of angst are coming from businesses that were probably not compliant before and have suddenly realised the size of their compliance gap. In actual fact, it is the same sized compliance gap as before the new legislation, but the publicity about harmonisation is making it top of mind!

Discordant harmony?

One of the areas of confusion predicted in relation to the harmonised system, since it depends on adoption of the model by individual state governments, is the temptation for a state government to 'fiddle' with the legislation, thereby derogating (or deviating) from national uniformity.

What was predicted seems to be coming to pass: the new state government in Queensland is considering amending the legislation to remove contractors and sub-contractors from the definition of "worker", to alter union right of entry provisions, and to decline to adopt a number of the model codes of practice. Whether this will happen, or is more a matter of demonstrating political difference from the preceding state government remains to be seen.

However, whatever the merits of any particular point, changes of this nature will substantially frustrate the goal of having the same rules applying everywhere, so that businesses operating beyond the bounds of one state don't need to take different rules into account.

WHS Codes of Practice

One particular confusion is about the status of the Codes of Practice being released progressively by Safe Work Australia (see link below) and whether these are mandatory, or simply guidelines. They are in fact guidelines as to what may be "reasonably practicable" - but if they are not "reasonably practicable" in particular circumstances, then failure to follow the code would not, of itself, be an infringement of the legislation.

On the other hand, the codes of practice provide lots of useful guidance on what businesses may consider doing in their own efforts to provide a safe workplace. Many of the detailed guidelines will not be practicable in small businesses, or inapplicable where they are not relevant to a business' areas of work. However, it is definitely good practice to be aware of Codes, implement them where applicable, and otherwise consider alternative ways of managing risks if the Codes' guidelines are not the most appropriate or practicable way to go about it for your business. The Codes are actually there to help as a guide to best practice, without each business having to reinvent the wheel for itself.

Bullying Code of Practice

The most controversial code has been the draft Code concerning bullying, which, when released in 2011, was the subject of furious disagreement and was withdrawn for redrafting. It has not yet re-appeared. Areas of controversy included whether bullying involves repeated unreasonable behaviour, or whether it could be constituted by one incident, and also whether the examples of conduct which could constitute bullying were legitimate (eg both giving someone too much work, or not enough work).

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Work Health and Safety Update cont.

It remains to be seen how Safe Work Australia will deal with these issues, but in a colourful example recently proposed by the Opposition IR spokesman Senator Abetz, "eye-rolling responses" might diminish a person's dignity and therefore constitute bullying, but at least if repeated conduct is required, one example of eye-rolling would not be bullying! The difficulty that this demonstrates is, of course, that bullying is notoriously hard to define and whether particular conduct is bullying or not depends very much on particular circumstances.

The issue of concern to employers should be that a very broad definition of bullying could potentially result in allegations of bullying based on a selective use of the Code, when in fact overall circumstances would not support a conclusion that bullying occurred.

We will keep you updated on this issue and advise when the revised draft Code on bullying is released.

For further information, visit the Safe Work Australia website, to view the Model Codes of Practice *click here*.

If you need assistance with WHS issues, call one of our experienced employment lawyers, Anna Ford (9895 9233), Amanda Harvey (9895 9222) or Enza Iannella (9895 9207) and we will be pleased to help.

Paid Parental Leave Update: "Dad and Partner Pay"

Fathers and partners have had a right to unpaid "short" parental leave immediately after the birth or adoption of their child for many years. The entitlement is for three weeks of unpaid leave (though of course paid annual leave can be used instead, if accrued).

Now, as a further development of the Paid Parental Leave scheme, fathers and partners can apply to the Family Assistance Office to be paid the minimum wage for two weeks out of the three, IF they meet the same eligibility criteria that a mother needs to meet for paid parental leave. That means, they need to have earnings of less than $150,000 per annum, and have worked for at least 330 hours in 10 of the 13 months prior to the birth or adoption.

Unlike the broader PPL scheme, dad and partner's pay will be paid directly by the Family Assistance Office and not channelled through the employer's payroll.

The scheme commenced from 1 January 2013. If you require further information about Paid Parental Leave or Dad and Partner Pay, please contact Enza Iannella on eianella@colemangreig.com.au or 02 9895 9207.

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