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Employment & Safety Alert

Adverse action - High Court restores balance

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Some balance was restored to the complex area of 'adverse action' under the *Fair Work Act 2009* (Cth) (**FW Act**) with the release of a unanimous decision of the High Court of Australia on Friday, 7 September 2012.

In the matter of *Bendigo Regional Institute of TAFE* (**BRIT**) v *Barclay* (**Barclay decision**), the High Court overturned a decision of the Full Court of the Federal Court and provided clear direction on the interpretation of the 'adverse action' provisions of the FW Act.

The legacy of the Full Court decision in 2011 had been a great deal of uncertainty for employers seeking to implement disciplinary processes.

The High Court has now provided some comfort to businesses so that the adverse action protections remain workable and employers can justify their actions without delving into an artificial search into the 'subconscious' thinking behind management decisions.

Background

The Barclay decision arose out of disciplinary action involving the standing down of a BRIT employee, Greg Barclay. Mr Barclay was a teacher and union representative. In January 2010, Mr Barclay sent an email to a broad distribution group alleging certain fraudulent practices by BRIT management in the preparation of materials for an audit review.

BRIT management took exception to the email and disciplined Mr Barclay pursuant to its code of conduct and other internal policies. This included standing Mr Barclay down on full pay pending an investigation into his conduct.

The union representing Mr Barclay claimed that this disciplinary action constituted 'adverse action' taken against Mr Barclay for the prohibited reason that he was a union official engaging in 'industrial activity'. BRIT responded that it was carrying out a genuine disciplinary process and that Mr Barclay's union status or activity had nothing to do with its actions.

Mr Barclay lost his initial legal claim at a trial before Justice Tracey of the Federal Court. Tracey J accepted the evidence of BRIT's key decision-maker, the CEO, who confirmed that her motive for the disciplinary action was Mr Barclay's position as an employee rather than his union role.

However Mr Barclay won an appeal to the Full Court of the Federal Court in February 2011. On the appeal, a two to one majority reinterpreted the decision making process that lead to the disciplinary action. The majority applied an 'objective' test in assessing BRIT's conduct and concluded that the actions against Mr Barclay arose out of his union membership and industrial activity.

BRIT's appeal to the High Court was successful, with five judges allowing the appeal and quashing the previous decision of the Full Court.

The High Court decision

The High Court made a series of robust and forceful observations:

- The question of whether adverse action has been taken for a prohibited reason is a question of fact.

- There is no basis for courts to apply an 'objective' or 'subjective' test to assess the reasoning applied by an employer in taking action against an employee. Undertaking such an inquiry would produce a risk that courts would substitute their own views in cases rather than assess matters on the evidence.
- Evidence from an employer's key decision-makers is critical for an employer to succeed in defending an adverse action claim.
- There is no immunity or blanket protection from adverse action simply because a person is a union official or engaged in industrial activity.
- Attempting to assess distinctions between a person's 'conscious' or 'unconscious' reasons for a person's conduct was 'indefensible'. Such an approach would create an 'impossible' burden on employers to search the minds of their employees.

Issues for employers

The Barclay decision helps to clarify the operation of the adverse action provisions of the FW Act.

Employers still need to ensure that management and employees are fully instructed and understand the implications of the adverse action provisions and indeed, the broader 'general protections' provided under the FW Act.

It is critically important that employers are aware that even though there may be many reasons leading to a decision to discipline or terminate an employee, there is still a risk of legal action and of being found to have breached the adverse action provisions, if the employer is motivated by even one prohibited reason.

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