

Adverse Actions

Sebastian McIntosh

In 2009 the *Fair Work Act 2009* (Cth) introduced a new concept to Australian law – adverse action. It is an expansive creature, born from statute, which perhaps goes further than the legislators intended.

Fundamentally, the action provides a cheap and readily accessible forum in which employees can complain about actions taken against them in their employment. Each prohibition is drafted in a similar fashion:

‘A person must not take an adverse action against another person because [of a prohibited reason]’

As such, the adverse action provisions may be understood by breaking the prohibition into three distinct concepts:

1. What is an adverse action?
2. What are the prohibited reasons?
3. When is an adverse action taken because of a prohibited reason?

What is an adverse action?

In broad terms an adverse action are actions done by one person that detriment another person. The legislation provides a list of circumstances deemed to be adverse actions. The list is divided into various categories based on the relationship between the two “persons”.

An employer, for example, takes an adverse action against an employee where the employer does any of the following acts:

1. Dismisses the employee;
2. Injures the employee in his or her employment;
3. Alters the position of the employee to the employee’s prejudice; or

4. Discriminates between an employee and other employees of the employer.

Whereas, a prospective employer takes an 'adverse action' against a prospective employee where they:

1. Refuse to employ the prospective employee; or
2. Discriminate against (in the employment terms and conditions) a prospective employee.

Importantly the statute also deems that a person commits an adverse action where they threaten and/or organise to commit an adverse action.

It is relevant to note that the phrase "alters the position of the employee to the employee's prejudice" is potentially open to creative interpretation. It appears that an employer may commit an adverse action even where there the employee has not suffered an identifiable legal injury.

What are the prohibited reasons?

A person cannot take an adverse action in the following circumstances:

1. An adverse action cannot be taken because a person has, exercises or proposes to exercise a workplace right;
2. An adverse action cannot be taken because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibility, pregnancy, religion, political opinion, national extraction or social origin; and
3. An adverse action cannot be taken because the person is associated with an industrial association or engages in industrial activity.

What, therefore, is a workplace right? To paraphrase, a person has a workplace right if under some form of workplace law, instrument or contract that person:

1. Is entitled to a benefit;
2. Can initiate or participate in proceedings; or
3. Can make a complaint or inquiry.

In addition, a person has a workplace right if the person is able to make a complaint or inquiry if the person is an employee – in relation to his or her employment. This definition of workplace right is unique. There is no reference to a workplace law, instrument or contract. Whether, therefore, this means that a person has a workplace right by virtue of being sentient (and therefore having the ability to make compliant) is yet to be conclusively determined by the courts.

When is an adverse action taken because of a prohibited reason?

The adverse actions provisions operate such that a person is only liable for a breach of the provisions where the adverse action has been taken because of a prohibited reason. Thus, if a person takes an adverse action for a non prohibited reason, the person will not breach the adverse action provision. The aim of the adverse action provisions is not to prevent employers from genuinely managing staff in relation to performance or conduct.

Whether an ‘adverse action’ is taken ‘because of’ a prohibited reason involves:

1. Identifying the ‘real reason’ that an action was taken; and
2. Demonstrating that the relevant prohibited reason is dissociated from the ‘real reason’.

The ‘real reason’ an action is taken is an objective assessment. The subjective intention of a person will be relevant but not determinative. Therefore, a court may conclude that due to the relevant facts, the perpetrator of an adverse action took that action for a prohibited reason, even where the perpetrator was unconscious of that reason.

The adverse action provisions are now drafted such that it is initially incumbent upon the accused to demonstrate that the taking of an adverse action is not for a prohibited reason. In the recent single magistrate decision of *Hodkinson v Cth*, Cameron FM of the Federal

Magistrates Court also held that in order for a reason to be dissociated from the 'real reason', the prohibited reason can play 'no part' in the decision. These requirements, when read in conjunction with one another, may prove to be particularly burdensome on employers.

Conclusion

Unlike unfair dismissal actions, there is no exclusion on high income earners seeking remedy for a breach of the adverse action provisions. Thus, employers should be mindful of the potential impact of the adverse action provisions. People are now protected from before employment begins until after the termination of an employee's position. In developing policies to minimise exposure to these provisions, employers should maintain a focus on ensuring that actions are taken for *bonna fide* and legitimate managerial reasons wherever there is the potential that an action may be considered adverse to another person's interest. It is also important to keep detailed records of such decisions, in order to objectively demonstrate that an adverse action has not been taken because of a prohibited reason.