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Adverse Action: The decision in *CFMEU v Bengalla Mining Pty Ltd*[1]

Introduction

The Federal Court recently revisited the requirements for a general protections claim for adverse action - one of the first matters determined post the High Court's decision in Barclay.[2]

Facts

On three occasions during 2012, an employee, who was also a union member and office holder, made applications for unpaid leave in order to attend union meetings. The employer had a leave policy which provided that unpaid leave was only available if an employee had first exhausted all accrued leave. On each occasion the employer refused to approve the unpaid leave request on the basis that he had not exhausted his accrued leave.

The employee, without approval for leave, attended a union management meeting. As a result he was issued with a written warning stating that any further unauthorised absence from work could result in the termination of his employment.

The union filed an originating application contending that the warning letter had been given for a prohibited reason - because of the employee's affiliation with the union, and that this constituted unlawful adverse action under the *Fair Work Act 2009*.

Submissions of the parties

At hearing, the employer denied that the decision to issue the written warning was influenced in any way by the employee's union affiliation, his attendance at a union meeting, or that he was otherwise engaging or proposing to engage in industrial activity. The employer lead evidence that at the time of making their decision, management had only considered:

- the terms of the unpaid leave policy;
- the fact that the employee had breached the policy;
- the employee could have applied for annual leave (having been told by the employer that such leave would be approved); and
- the employee had failed to notify his supervisors on the day of his absence.

The union submitted that the employer's evidence should be rejected on the basis that the denials of being motivated by a prohibited reason should be weighed against the evidence showing that the purpose of the employee's absence was to attend a union meeting. The union argued that these denials were not credible and were not sufficient to discharge the reverse onus of proof resting with the employer because:

- when the decision to send the warning letter was made, the witnesses were well aware that the employee was a union member and officer and that his absence related to a union management meeting;
- the reason for the absence could not be separated from the reason for the disciplinary action;
- the investigation process was "tainted" or flawed in that only one interview was conducted, relevant documents were not collected, the person carrying out the interview was involved in the decision to refuse leave, and relevant material was not taken into consideration or investigated; and
- relevant management of the employer knew it would be unlawful to take the employee's union affiliation and activities into consideration.

Decision of the Court

The Federal Court was not persuaded by the union's submissions, stating that:

- there was no reason to doubt the reliability of the employer's witness evidence;
- there was no evidence to suggest that any witnesses bore any antipathy towards the union or had any objection to the employee's involvement with the union;
- there was no evidence that the unpaid leave policy had been applied in a partisan or discriminatory way;
- any argument concerning the fairness of the investigation or the policy itself was irrelevant; and
- it was "*scarcely a point*" that relevant managerial staff of the employer knew it would be wrong to take to disciplinary action for a prohibited reason.

Accordingly, the Federal Court accepted the employer's evidence that the employee's union membership, his position as an officer of the union and the fact he was absent from work to attend a union management meeting had nothing to do with its decision to take disciplinary action against the employee. As such, the employer was found to have discharged its onus of proof that the warning letter had not been issued for a prohibited reason.

Importantly, the Federal Court observed that if the union's arguments had been correct, no employer who took disciplinary action against an employee knowing them to be a union member or officer, or knowing the employee was engaging or intending to engage in industrial activity, could ever discharge the reverse onus. In this sense, the union's argument was observed to not be materially different to the argument rejected by the High Court in the Barclay matter.

Lessons for employers

This decision of the Federal Court reinforces the fact that in the absence of a court finding that a witness giving evidence as to their decision making considerations has been untruthful, the mere inference that the decision could have involved prohibited reasons is not enough to overcome direct evidence to the contrary.

Employers should however diligently continue to ensure that their policies, practices and procedures remain consistent with legislative requirements and are consistently applied. Departures from policy or the inconsistent application of those policies may give applicants stronger evidence to challenge the credibility and veracity of witnesses called by the employer to establish that a person has not been treated adversely.

1 *Construction, Forestry, Mining and Energy Union v Bengalla Mining Company Pty Limited* [2013] FCA 267.

2 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32

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Special Counsel joins Corporate team

Carter Newell is pleased to welcome **Matt Couper** to the firm as Special Counsel in the Corporate team.

Matt joins Corporate Partner Tony Stumm and brings almost 10 years experience advising public and private companies and government entities in relation to mergers and acquisitions, strategic investments, joint ventures, structuring, due diligence and general corporate and business issues.

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