



WORKPLACE LAW UPDATE

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EMPLOYERS ARE SUCCESSFULLY DEFENDING CLAIMS OF ADVERSE ACTION UNDER THE FAIR WORK ACT

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Fair Work Australia has recently reported on the steady number of applications being made by disgruntled employees under the Adverse Action provisions of the *Fair Work Act 2009*.

Encouragingly, applications that have proceeded to the Federal Courts have resulted in decisions demonstrating the careful attention being given to the reasons for termination in order to determine whether the termination was due to the existence of a workplace right.

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In a recent Federal Magistrate's Court decision, an employer successfully defended a claim brought by an employee after she was not employed after the completion of her probation period.

About CCI Lawyers

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The employee had taken sick leave during the probation period for non-related work medical conditions. Upon her return, the employer placed her on a return-to-work program. At the same time, the employee was also placed on a Work Improvement Plan (WIP) due to her poor performance in failing to meet productivity targets.

Near the end of the completion of the WIP, the employee requested an extension of the WIP, on the basis that her absence due to the medical conditions should be taken into account and an adjustment made to allow her to try and meet those productivity targets. That request was denied. The employer proceeded to terminate her employment on the basis of poor performance during the probation period. The employee had raised the issue that she was unable to meet the productivity targets because of her medical condition and due to her involvement in the WIP.

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The employee alleged that the employer had taken adverse action because she had exercised or proposed to exercise a workplace right in that she had sought to complain about the management of her probation period and specifically the WIP.

The employer successfully argued that its decision to dismiss was due to its dissatisfaction with her performance during the probation period. Its decision was unrelated to any attempts to exercise her right to complain that she had been discriminated against during her probation period. In fact, the employee had not raised the issue of her medical condition until the employer had indicated that it was unlikely to employ her after the probation period.

The Court was of the view that the employer had supported the employee throughout the probation period and afforded her every opportunity to improve. The Court was not satisfied that the employee had produced any evidence that she had been discriminated against in terms of being treated less favorably than others due to her medical condition during the probation period.

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The employee had sought to rely on provisions of the *Disability Discrimination Act*, including a provision requiring an employer to accommodate impairment. The Court determined that the *Disability Discrimination Act* was not relevant to section 351 of the *Fair Work Act*.

The lesson for employers is that a decision to terminate solely based on performance will have a much greater prospect of success in defeating adverse action claims. It is critical in such circumstances to ensure that a decision to terminate is not because of a person's disability or because they have sought to make a complaint about management of a probation period.

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