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About CCI Lawyers

CCI Lawyers is a boutique workplace relations practice.

CCI Lawyers operates as an independently managed legal practice, providing legal services that are charged at competitive rates to employers across Australia.

CCI Lawyers is associated with the Victorian Employers' Chamber of Commerce and Industry (VECCI). Your business does not need to be a VECCI member to engage our services.

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ADVERSE ACTION LEADING TO REINSTATEMENT OF AN INJURED WORKER

Summary Points

The Federal Magistrates Court has reinstated a dismissed employee after finding the employer took adverse action against him because he had a right to access Comcare compensation and because of his physical disability arising from a workplace injury.

The Facts

Mr Stephens was initially employed by Australia Post as a part-time driver/sorter on a fixed term contract from 11 May 2009 until 28 October 2009. Shortly before the expiry of the first contract, a second term contract was offered to Stephens on a fixed term employment basis. Stephens sustained a work injury on 3 December 2009. His employment was terminated on 7 January 2010.

In the letter of termination, Australia Post had set out the following reasons for the termination:

1. missing a scheduled pick-up
2. swearing at supervisor

Stephens alleged that the termination of his employment with Australia Post in January 2010 was in contravention of s.340(1) of the *Fair Work Act* (the Act) due to 'adverse action', which was taken because he had 'workplace rights' under the *Safety, Rehabilitation and Compensation Act* (SRC) arising from the work injury. Stephens also alleged that his termination was in contravention of s.351 of the Act, since the termination was taken because of a physical disability suffered in the work injury.

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The Law

Under s.361(1) of the Act, if an employee brings an adverse action claim and establishes they have a ‘workplace right’, then the onus of proof shifts to the employer to prove the adverse action was not taken because of that ‘workplace right’. That is, under the Act it is presumed that an employer took adverse action for a particular reason unless the employer proves otherwise.

The High Court decision in *Barclay v Bendigo TAFE* will in due course clarify whether an employer’s real reasons for taking a particular action are to be determined by a subjective as opposed to an objective assessment of the surrounding facts and circumstances.

The Decision

Australia Post attempted to defend its actions on two main grounds. The first was that Stephens could not rely on s.340 (1) of the Act because the SRC Act did not fall under the definitions of a ‘workplace right’. Secondly, the reasons for the termination as set out in the letter of termination were legitimate performance issues which warranted Stephens’ summary dismissal.

The Court found that the SRC Act being Commonwealth legislation regulated the relationship between employer and employee. It imposed financial and other obligations on the employer to meet the compensation needs of its injured employee. On that basis, the SRC Act fell within the definition of a ‘workplace law’ as required by the Act.

The Court also determined that Stephens had an “excellent excuse” for missing the scheduled pick-up and did not accept Australia Post’s evidence as to its asserted reasons for the dismissal because:

- there was almost a total lack of contemporaneous documents;
- employer’s main witness had poor memory and was not convincing as a witness of fact;
- the unfairness of procedure applied was not addressed;
- the decision to dismiss was disproportionate to the conduct/performance in question; and
- the failure to call significant witnesses.

Objectively viewed, the Court considered that the surrounding facts and circumstances revealed that the termination was because of the relevant manager’s knowledge of Stephens’ pending workers’ compensation claim.

The Court ultimately found Australia Post had contravened s.340(1) and s.351 of the Act by terminating the employment in respect of Stephens' workplace rights arising from his right to make a claim for workers' compensation and his physical disability arising from the injury. Consequently, it ordered Australia Post to reinstate the worker.

Lessons for Employers

For employers, the above case is significant because it confirms that 'workplace rights' are not confined to rights arising under the *Fair Work Act* itself. They also include rights from other Commonwealth legislation regulating the employment relationship such as the SRC Act.

It is imperative for employers to assess, before taking disciplinary action, the reasons for termination. It is important to be able to prove that the sole reason is due to poor performance or misconduct. Failure to do so will expose employers to risk of an adverse action complaint. Detailed contemporaneous notes and supporting documentation will be of significant assistance in defending such claims.

To minimise risks, employers should adopt a proactive approach in ensuring all decision makers are trained and well informed in relation to what constitutes an adverse action under the general protection provisions of the *Fair Work Act*.

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