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GREG REIFFEL CONSULTING
HUMAN RESOURCES & INDUSTRIAL RELATIONS

Employee Relations Newsletter

Edition 82 **14 January 2019**

Happy New Year! Enter 2019…

"My business grows by referrals. I would appreciate it if you would let me know if you have any colleagues, clients or associates who could benefit from my skill-set."

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Quote:

"I attribute my success to this: I never gave or took any excuse." – Florence Nightingale.

In this Edition

Ms Bastoni ("the applicant in this matter) was a call-centre employee with eight year's casual service. It was noted that she was a NUW union delegate. Cutting to the chase, the applicant was dismissed for inferring that her supervisor (which the DP chose to be identified as the "complainant" due to the "personal and sensitive nature of the events") did not feel the cold due to her "extra padding". Her employer found that this amounted to bulling, in breach of its policies, and the applicant was subsequently dismissed.

There is a growing tactic by (usually) no-win, no-fee lawyers to prosecute employers through the "Protected/adverse action" provisions of the FWA. This is usually a ploy to circumvent the requirements of the other sections of the Act – including unfair dismissals. It also places the onus on the employer, with the options being to settle the claim by paying money to the applicant, voluntary arbitration (why would you?) or (as in this case) progression to the Federal Court or Federal Circuit Court.

To put this in to perspective, there were **13,595 unfair dismissal claims** lodged with the FWC in 2017/2018. Add to this **4,117 "adverse action" claims** in the same period.

It is an unfortunate fact, that to get to this point was extraordinarily time consuming and costly for Telstra. This why most businesses "settle" at the conciliation phase, to put an end to the matter. This in turn is what the no-win-no-fee lawyers rely upon as their business model.

It is my view that the Protected Action provisions of the FWA be rescinded, as there a numerous other pieces of legation that protect workers from "harm".

Average pay increases for EBA's

According to a recent report published by the Department of Jobs & Small Business, about 1/3 of businesses are covered by an EBA. The following is the average pay increases afforded in the EBA's is 2.7% (up from 2.5%) across all industries. The report also provides for increases by industry sector…

"Fat-shaming" is a valid reason for dismissal

Julia Bastoni v ORC International Pty Ltd. (U2018/6390) [2019] FWC 38. Clancy, DP. 4 January 2019.

Ms Bastoni ("the applicant in this matter) was a call-centre employee with eight year's casual service. It was noted that she was a NUW union delegate. Cutting to the chase, the applicant was dismissed for inferring that her supervisor (which the DP chose to be to be identified as the "Complainant" due to the "personal and sensitive nature of the events") did not feel the cold due to her "extra padding". Her employer found that this amounted to bulling, in breach of its policies, and the applicant was subsequently dismissed.

Whilst not diminishing the hurt the "complainant" may have felt, should someone lose their livelihood over a one-off comment? Sensitivity training – but dismissal? Just asking…

Once upon a time on a cold Melbourne morning, a union representative on behalf of her constituents requested of the supervisor (aka "the Complainant") that the heater be turned on. Said supervisor stated that she did not feel cold. The applicant responded that this was because the supervisor having "natural extra padding" so she did not feel the cold.

As to why she had made such comments, Ms Bastoni said:

- She was trying to make an argument to get the heater turned on;
- The Complainant had more padding than she and the others in the room at the time;
- It is a scientific fact that people with more body fat do not feel the cold as much as skinnier people and that is perhaps why the Complainant would not have felt the cold like the applicant and the other colleagues were feeling it;
- Her conception of someone having "more body fat" was that they have more body fat than is healthy;
- The comments were not personal, and she did not intend to hurt the Complainant's feelings;
- She meant padding in terms of insulation and she did not mean to be derogatory;
- She did not think the Complainant would be so offended or take the comment so seriously given the context of their relationship; and
- She felt the Complainant would see the humour in her comments and did not intend to shame her.

On the other hand, the Supervisor stated that she was anxious, upset and humiliated by the applicant's comments referring to her having "extra padding" and "natural extra padding" as she was concerned that other people nearby had heard the exchange.

The DP in this matter, held a contrary view deeming the employer took the appropriate action in dismissing the employee (of eight years' service), stating:

> *"I regard [the applicant's] behaviour as being completely disrespectable and unacceptable. I am satisfied her dismissal was not a disproportionate outcome in response to cruel, insulting and demeaning comments".*

Oh, in case you were wondering – the heater was turned on.

Note: As we all know by now, it is a requirement to allow a support person to attend (eg) disciplinary meetings. The Deputy President stating in this matter:

> *"There is no positive obligation on an employer to offer an employee the opportunity to have a support person:*
>
> > *"This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."* [Explanatory Memorandum, Fair Work Bill 2008].

Federal Court rejects "perceived" Adverse Action claim

Dutta v Telstra Corporation Limited [2018] FCA 1994, Rangiah,J. 13 December 2018

There is a growing tactic by (usually) no-win, no-fee lawyers to prosecute employers through the "Protected/adverse action" provisions of the FWA. This is usually a ploy to circumvent the requirements of the other sections of the Act – including unfair dismissals. It also places the onus on the employer, with the options being to settle the claim by paying money to the applicant, voluntary arbitration (why would you?) or (as in this case progression to the Federal Court or Federal Circuit Court).

This is a matter where a very persistent employee would not take "no" for an answer. Telstra (being a large corporate) could afford to stick its guns. Why not? It's processes and selection criteria for choosing who was to be made redundant was solid, with the applicant arriving at several misconceptions – and out to prove his point.

It is an unfortunate fact, that to get to this point was extraordinarily time consuming and costly for Telstra. This why most businesses "settle" at the conciliation phase, to put an end to the matter. This in turn is what the no-win-no-fee lawyers rely upon as their business model.

It is my view that the Protected Action provisions of the FWA be rescinded, as there a numerous other pieces of legation that protect workers from "harm".

The Judge in the matter described such claims as follows:

> *"Mr Dutta's case…requires him to demonstrate, firstly, that Telstra took "adverse action" against him and, secondly, that he "exercised a workplace right". If he is able to do so, it is presumed…that the adverse action was taken because Mr Dutta exercised the workplace right. Telstra will then be required to prove that it took the adverse action for reasons that do not include that Mr Dutta exercised such workplace rights. Telstra must prove that any such exercise of workplace rights was not an "operative or immediate" or "substantial and operative" reason for the adverse action".*

This means that the FWA's so-called reverse onus of proof does not exonerate the applicant from making their case.

In this case, the applicant was chosen for redundancy through an extremely lengthy and thorough process, mandated by an EBA and a written policy. The applicant fought every inch of the way through internal appeals and complaints but was ultimately made redundant.

In his application to the FWC and ultimately the FCA, the applicant accused Telstra of:

> *"I have been dismissed from Telstra as revenge attack by my Superior Bruce Gessey. My crime was to rise up and complain about him last year for sufferings, isolation and Bullying after one incident in Dec 2015. His Dictatorship Management style was further supported by Telstra HR while dismissing me on False Assessment done in Jul 17. I was given lowest rating by my superiors to make me forcibly redundant…"*

Asserting:

> *"In 2014, Mr Dutta commenced working for Mr Bruce Gessey, an Executive at Telstra. During this period working for Mr Gessey, Mr Dutta suffered a mental and physical breakdown due to bullying, isolation and discrimination. After two and a half years working for Mr Gessey, Mr Gessey approved Mr Dutta being forcibly made redundant."*

The Judge "translated" this to means that, Telstra, through Mr Gessey and other managers, took adverse action against Mr Dutta by:

- selecting him for redundancy;
- blocking his redeployment to another position within Telstra;
- dismissing him from his employment;
- discriminating between him and another employee by telling him the wrong process for a task, but telling the other employee the correct process;
- bullying, harassing, targeting and isolating him, resulting in injury to his mental state.

The adverse action was taken because Mr Dutta exercised his workplace rights to make complaints and initiate a process under the Act by:

- making a complaint against Mr Gessey;
- making a complaint in a Telstra employee internet forum;
- making a complaint about his immediate manger, Stanko Zivcic;
- requesting flexible working arrangements.

The Judge's found the applicant to have "some particular and distinctive personality traits" which affected his perception of the events and incidents he complains of at Telstra:

> *"First, he seems convinced that he must be right and seems unwilling to consider that any different point of view may be available. Second, he is a stickler for rules and processes and seems quite disturbed by any suggestion that he might be asked to act outside what he perceives to be the rules or the appropriate process. Third, he has a very literal understanding of what he perceives to be the rules, processes and instructions. Fourth, he requires clear, precise and detailed instructions and is disturbed by the idea that he might have to improvise, investigate or work out for himself the processes that should be used. Fifth, and associated with the first, is that where a manager corrects him, disagrees with him or instructs him to do something that he disagrees with, Mr Dutta tends to consider that the manager's action must be done dishonestly and with an intention to injure him.*
>
> *"Mr Dutta's allegations of dishonesty, fraud and collusion are very serious and must undoubtedly be distressing to those who are the subject of the allegations. In case I have not already made it clear, I wish to emphasise that I reject those allegations…Perhaps all that might be said to excuse Mr Dutta's conduct in making such allegations is that he seems to be suffering from a psychiatric illness, and that may be influencing his perceptions and his conduct.*

Whilst the Judge found that Telstra had taken adverse action against the applicant, the question to be answered was that has Telstra "overcome the presumption that it took that adverse action because Mr Dutta exercised such workplace rights".

Following many pages of consideration, the Judge dismissed the application.

Average pay increases for EBA's

See: https://docs.jobs.gov.au/documents/trends-federal-enterprise-bargaining-report-march-2018

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Industry	AAWI % in Agreement
Construction	5.5%
Education	2.5%
Electricity, Gas, Water and Waste Services	3.1%

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Health and Community Services	2.4%
Manufacturing	2.5%
Mining	2.5%
Retail	3.0%
Transport, Postal and Warehousing	2.2%

Until next time…

Greg Reiffel
Principal Consultant