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Legal Insights

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The critical role of decision makers in adverse action claims

17 DECEMBER 2019

AT A GLANCE

- In adverse action claims the employer's defence often depends on the acceptance of the subjective intent of the "decision maker" because of the reverse onus of proof.
- This can cause problems for employers when there are many decision makers because it can take years for cases to be heard.
- Given the importance of decision maker evidence, insureds need to actively manage their risks in this space.

Why defences often depend on decision makers

Adverse action claims under the *Fair Work Act 2009 (Cth)* require a very different defence approach to that used in "normal" commercial litigation. This is because there is a reverse onus of proof, pecuniary penalties are usually paid to the employee, and the employer's defence often depends on the acceptance of the subjective intent of the "decision maker".

While each of these jurisdiction-specific nuisances has a fundamental impact on the way a business should handle a claim from the moment an allegation is made, it is often the decision maker issue that causes defences to fail.

The recent Full Federal Court of Australia decision, *Australian Red Cross Society v Queensland Nursing Union of Employees* [2019] FCAFC215, serves as a timely reminder of the importance of the evidence of the "decision maker". In that case, the Court reminded us that a "decision maker" can "range from one person to a committee or group, and from a person or body starting from scratch to person or body rubber stamping the recommendation of others."

Identifying who the decision makers are early is critical for employers because of the impact of the reverse onus of proof. This was highlighted in the case of *National Tertiary Education Union v Royal Melbourne Institute of Technology* (2013) FCA 451 (RMIT decision), in which the Court rejected the employer's argument that there was only one decision maker who was responsible for the termination of the worker's employment.

As the Court identified that there were more decision makers involved, and that those people were not called to give evidence, it made it impossible for the employer to rebut the reverse onus of proof. As happened in the RMIT decision, if the Court makes that assessment, the employer will automatically lose the case.

The impact of delay

Most adverse action claims start their life in the Fair Work Commission before proceeding through the Federal Circuit Court of Australia, which is an extremely overworked jurisdiction.

The practical reality is that it may take years for an adverse action matter to be set down for trial. For employers, that creates significant defence hurdles if representatives of the business involved in the original decision-making leave the organisation, are no longer cooperative, or cannot be found.

This issue was seen in a matter involving a small community organisation that was run by a volunteer Board of 12 people. The Board made the decision to terminate an employee and that person later brought an adverse action claim. Given the RMIT decision it was necessary to call all 12 members of the Board. Unfortunately, many of those people no longer served on the Board, some had relocated to different states, and some had no recollection of the events in question. Because of the reverse onus of proof, it was not enough to rely on the Board's minutes that showed that the Board had acted for legitimate reasons. This made the claim, which was set down for trial two years after the dismissal, virtually impossible to defend.

Protection through process

The breadth of decision makers the Court recognises is often not reflected in organisational risk management practices. For example, a large ASX-listed company had a practice where the CEO would sign letters of termination without any real knowledge about why the employee was being terminated. By signing the letters he automatically became a decision maker under the law, which meant he had to be called to give evidence when the company faced an adverse action claim.

Apart from the fact that the CEO was less than impressed about having to spend so much time in Court on a matter he knew nothing about, the union that represented the employee was able to cross-examine him on several matters relating to the operation of the business in a way that was designed to embarrass the CEO.

Offsetting the risks

Unlike "normal" commercial litigation, someone giving evidence about the "corporations knowledge or intent" will not help defend employers facing adverse action claims. It is the individual decision makers who are the key to the success or otherwise of any defence.

Given the importance of decision maker evidence, before any decision about terminating employment is taken employers should consider who is going to be the "decision maker" and make sure the right processes are in place to support that outcome. Having "many hands" involved in the process may not be in the best interest of the business if there's any potential for an adverse action claim.

It will also be prudent for employers to obtain some form of statement from the decision makers as soon as possible after a claim is received. This will help offset the risk of not having that evidence available in several years' time when the matter goes before the Court.

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