



FEDERAL CIRCUIT
COURT OF AUSTRALIA

PRESENTATION TO CLUBS NSW
LITIGATION IN RELATION TO THE FAIR WORK ACT

JUDGE SAL VASTA
FEDERAL CIRCUIT COURT OF AUSTRALIA

TYPES OF LEGAL DISPUTES

1. Adverse action and unfair dismissal based claims
2. Wages, leave and other payment based claims

ADVERSE ACTION AND DISMISSAL CLAIMS

Fair Work Act 2009 (Cth)

- Section 340
- Section 342
- Section 361

Case law

- Klein v Australian Baseball League & Ors [2016] FCCA 1722
- Power v BOC Ltd and Ors [2017] FCCA 1868

S340 FWA - PROTECTION

- (1) A person must not take adverse action against another person:
 - (a) because the other person:
 - (i) has a workplace right; or
 - (ii) has, or has not, exercised a workplace right; or
 - (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
 - (b) to prevent the exercise of a workplace right by the other person.

Note: This subsection is a civil remedy provision (see Part 4-1).

S342 FWA – MEANING OF ADVERSE ACTION

(2) **Adverse action** includes:

- (a) threatening to take action covered by the table in subsection (1); and
- (b) organising such action.

(3) **Adverse action** does not include action that is authorised by or under:


- (a) this Act or any other law of the Commonwealth; or
- (b) a law of a State or Territory prescribed by the regulations.

(4) Without limiting subsection (3), **adverse action** does not include an employer standing down an employee who is:

- (a) engaged in protected industrial action; and
- (b) employed under a contract of employment that provides for the employer to stand down the employee in the circumstances.

S342 CONTINUED

Adverse action includes situations where an employer:-

- Dismisses the employee
 - Alters the position of the employee to the employee's prejudice
 - Discriminates between the employee and other employees of the employer
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S361 FWA - REASON FOR ACTION TO BE PRESUMED UNLESS PROVED OTHERWISE

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;


it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.



KLEIN V AUSTRALIAN BASEBALL LEAGUE & ORS

[2016] FCCA 1722

Facts

- The Applicant was an American citizen employed on a 12 Month contract as General Manager of the Brisbane Bandits baseball club
 - The contract was for 12 months but also stated, “*contract renewal may be reviewed at any time after 1 January 2014 but no later than 30 June 2014*”
 - By letter dated 22 August 2014 the First Respondent gave the Applicant one months notice that they were terminating his employment, however that month coincided with the end of his contract.
 - He was not required to work out the remaining month of his employment
 - Applicant sought declarations and pecuniary penalties pursuant to the FWA along with damages for breach of contract.
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KLEIN V ABL

FACTS

- By way on email dated 30 June 2014 the ABL advised the Applicant his current contract would not be renewed but “*during that time the ABL may offer an extension, renewal or alternate contractual arrangement.*”
- The Applicant alleged that the wording of the email implied that there would be ongoing employment in some capacity

The Applicant alleged that he was dismissed because of his constant complaining about the ABL and their administration


KLEIN V ABL

Issues

- Whether giving notice 1 month before contract expired and paying out that month constituted dismissal?
 - Section 386 FWA – Meaning of Dismissal
- Should the contract have been renewed, extended or an alternate contractual arrangement offered?
- Had there in fact been adverse action would the Second Respondent have discharged their onus pursuant to s361 FWA

KLEIN V ABL

How do you discharge onus?


- Identify the decision maker
 - Have the decision maker express what the reason for the decision actually were
 - High Court case of *Barclay*
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KLEIN V ABL

Result

- No dismissal had occurred
- Contract should not have been renewed
- The respondents acted appropriately in accordance with s361 FWA
- No additional payment of commissions was justified
- **ALL CLAIMS DISMISSED**

POWER V BOC LTD

- Applicant had worked for the company for 2 years
 - Applicant became pregnant
 - Applicant applied for maternity leave
 - Maternity leave granted
 - Internal restructuring occurred
 - Redundancies were to occur
 - 8 redundancies in Queensland, including the Applicant
 - Decision made that all redundancies occur on 12.11.15
 - Applicant was due to begin maternity leave on 6.11.15
 - Her redundancy was brought forward to 4.11.15
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POWER V BOC LTD

Applicant alleged adverse action

- She claimed she was dismissed because of pregnancy

Company had to prove that they did not dismiss her for that reason

- The decision maker explained the redundancy process
- Able to justify the redundancy

BUT

The decision maker said that he wanted all redundancies to occur on the same day – 12.11.15

He said that he did not want to bring back the Applicant from leave to make her redundant. He said he felt sorry for her and because she was pregnant, it would be best to bring her redundancy date forward so she knows before she would go on leave

POWER V BOC LTD

The decision maker did not:-

- Check with his HR department first
- Realise the effect of s84 of the Fair Work Act
- Could never have made the Applicant redundant after 6.11.15 until maternity leave had finished
- Understand that the decision to bring her redundancy forward (while keeping the other redundancies on 12.11.15) altered her position to her prejudice

Therefore the employee was the subject of adverse action

The employer admitted that the “adverse action” was taken because “she was pregnant”

WAGES, LEAVE AND OTHER PAYMENT BASED CLAIMS

Fair Work Act

- Section 45
- Section 44(1)
- Section 535(1)
- Section 536(1)
- Section 545(1)
- Section 546(1)

Case Law

- Fair Work Ombudsman v Song & Ors [2016] FCCA 2827

SECTION 45 FWA

45 Contravening a modern award

A person must not contravene a term of a modern award.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: A person does not contravene a term of a modern award unless the award applies to the person: see subsection 46(1).



SECTION 44 FWA

44 Contravening the National Employment Standards

- (1) An employer must not contravene a provision of the National Employment Standards.

Note: This subsection is a civil remedy provision (see Part 4-1).



SECTION 535 FWA

535 Employer obligations in relation to employee records

- (1) An employer must make, and keep for 7 years, employee records of the kind prescribed by the regulations in relation to each of its employees.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) The records must:

- (a) if a form is prescribed by the regulations—be in that form; and
- (b) include any information prescribed by the regulations.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (3) The regulations may provide for the inspection of those records.

SECTION 536 FWA

536 Employer obligations in relation to pay slips

- (1) An employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Section 80 of the *Paid Parental Leave Act 2010* requires an employer to give information to an employee to whom the employer pays an instalment under that Act.

- (2) The pay slip must:

- (a) if a form is prescribed by the regulations—be in that form; and
- (b) include any information prescribed by the regulations.


Note: This subsection is a civil remedy provision (see Part 4-1)



FAIR WORK OMBUDSMAN V SONG & ORS

[2016] FCCA 2827

Facts

- The First and Second Respondents (who were also the sole shareholders of the Third and Fourth Respondents) were Malaysians who came to Australia and established a number of food outlets including 'Teppanyaki Lovers' in the Myer Centre, 'Nigi Nigi Sushi' in Anzac Square and a restaurant names 'KU-O' in Sunnybank.
 - Across the outlets they employed 5 foreign workers
 - Through a complaint and subsequent investigation by the Fair Work Ombudsman it was established that there had been chronic underpayment of wages across all the outlets.
 - Effectively all staff were paid a base rate well below the modern award and no allowances were made for casual loading, penalty rates or overtime.
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FAIR WORK OMBUDSMAN V SONG & ORS

Facts continued

- Subsequent to the investigation the Respondents cooperated with the Fair Work Ombudsman
- The staff in question were repaid the \$148,710.55 in underpaid wages and received letters of apology
- The breaches were admitted and an agreed statement of facts tendered which allowed this matter to proceed as a penalty hearing alone
- A penalty hearing is limited to submissions as to the severity of the pecuniary penalties to be paid to the Commonwealth and the declarations to be made.

FAIR WORK OMBUDSMAN V SONG & ORS

Result

- It was declared the various Respondents had breached ss 45, 44(1), 535(1) and 536(1) of the FWA
- For their cooperation with the process the pecuniary penalties were reduced by 25%
- The Second Respondent received a further reduction of 20% for her lesser culpability
- The ultimate pecuniary penalties paid were as such:
 - 1st Respondent \$40,500
 - 2nd Respondent \$32,400
 - 3rd Respondent \$99,00
 - 4th Respondent \$29,250
- Section 545(1) FWA
- Section 546(1) FWA

QUESTIONS?

