

MILLION DOLLAR DISMISSAL CLAIMS

No longer just a problem for the top end of town



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Traditionally, multi-million dollar payouts in employment litigation were typically only awarded to executives of large corporates and high-profile public figures. Now, with the evolution of the General Protections provisions in the *Fair Work Act 1999*, “average workers” are regularly seeking – and winning – high levels of compensation and damages through adverse action claims.

The dollar difference

Adverse action claims are appealing to ex-employees because – unlike unfair dismissal claims – there’s no cap on compensation, probationary and high-income earning employees are not excluded, and successful employees can be awarded interest, general damages and penalty payments. Directors, managers and HR professionals can also be joined personally to the action under the accessorial liability provisions of the Act.

With payouts exceeding \$1 million, aggrieved ex-employees are increasingly making adverse action claims rather than unfair dismissal claims as the Fair Work Commission (FWC) has significant limits on the amounts it can award.

The forerunner case

The first case involving a high employment litigation payout for an “average worker” involved Mr Haylett, a drill rigger at the Hail Creek Coal mine who was stood down after suffering a back injury. In 2014, his union successfully brought Federal Court proceedings claiming that the reason for Mr Haylett’s dismissal was because he pursued the mine for damages for his back injury, which, the union asserted, was his workplace right. With no statutory cap, the Federal Court of Australia awarded Mr Haylett be compensated \$1,296,730. His union also fared well, receiving a \$50,000 penalty from the employer.

The new normal

FWC statistics show that 6,064 General Protections claims were filed against employers last financial year. Coupled with the 13,928 unfair dismissal claims, there were almost 20,000 claims involving dismissals filed in the FWC in FY19 financial year.

The high number of claims likely reflects the success of many recent cases. For example, in 2019, Peter Ridd succeeded in his adverse action claim against James Cook University. After it found that Mr Ridd was unlawfully dismissed from his position as a

professor, the Federal Circuit Court awarded him more than \$1.2 million for lost income, lost future income and pecuniary penalties.

In another 2019 case, which notably included a scathing judgment about the employer’s HR practices, Andrew Keenan both won back his job with Cummins Engineering and received \$1.1 million compensation for lost wages and interest, \$20,000 for pain and suffering and a \$45,000 penalty.

SME exposure

Large adverse action payouts are not limited to big business employers. For example, in *Sagona v. R & C Piccoli Investments Pty Ltd & Ors* [2014] FCCA 875, a small family business was ordered to pay \$174,079 compensation for economic loss and distress and \$61,000 in pecuniary penalties.

For small businesses without EPL insurance, employment litigation can be financially catastrophic. They are exposed to both increasingly high levels of compensation and damages and the costs of defending an adverse action claim, which can occupy up to 15 hearing days in the Federal Courts. For example, in *Chen v. Monash University*, the employer spent more than \$1 million in legal fees in its successful defence of a discrimination claim.

“Employment litigation can be financially catastrophic for SMEs. With payouts exceeding \$1 million, aggrieved ex-employees are increasingly making adverse action claims rather than unfair dismissal claims as the FWC has significant limits on the amounts it can award.”

The risks are getting bigger

The risk of an unfair dismissal claim can loom large with any termination of employment. For all employers, and particularly for SMEs, risk assessments should also consider the risk of an adverse action claim. Given the million dollar plus payouts in recent cases, combined with media coverage claims of high profile people like Israel Folau and Michelle Guthrie, it’s reasonable to predict adverse action claims are a risk on the rise.