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Client Update

Shaping the future of insurance law

Big compensation for the "difficult" employee and landmark decision on 'permanent casuals'

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AT A GLANCE

- A damages award of $614,000 in a recent Federal Circuit Court case has highlighted the significant risk associated with taking an adverse action against an employee who has made complaints.
- In *Tran v. Macquarie University* [2020] FCCA 1010, the Court found Ms Tran had been selected for the redundancy because she had been identified as a "difficult individual".
- The Tran decision is the latest in a number of cases that highlight the often hidden risk of taking an adverse action.
- In another recent development, the Full Federal Court handed down its much anticipated decision in *Workpac v Rossato*. The *Workpac* decision is a landmark judgment that will have serious implications for employers who use casual labour on a regular and systematic basis.
- For EPL insurers, the *Workpac* decision is likely to complicate some settlements and lead to new risks for insureds.

COMPLAINTS CASE HIGHLIGHTS HIDDEN RISK

An employee, who was described in an internal email as being a "difficult individual" and "poisonous to the team environment", has recently been awarded $614,000 by the Federal Circuit Court of Australia (*Tran v. Macquarie University* [2020] FCCA 1010).

The case, like others before it, highlights the significant – but commonly unseen – risk associated with taking an adverse action against an employee because they make a 'complaint'.

Ms Tran was an accountant who had made a number of complaints regarding her workload, changes to her work hours, feeling bullied by a co-worker and doing her own work in addition to that of another employee.

The employer had a need to restructure its operations, which included making several employees redundant. Ms Tran alleged that she had been selected for the redundancy because she had been identified as being a difficult individual. The Court agreed.

The Court accepted that the employer was motivated by the desire to remove Ms Tran from the workplace because of her previous complaints.

That meant that it had contravened the prohibition in the *Fair Work Act 2009* (Cth) by taking adverse action against the employee for making a complaint regarding their employment. Ms Tran was awarded significant damages of $614,000.

The complaint issue is not new

The complaint issue was also a factor in *Fatouros v Broadreach Services Pty Ltd* [2018] FCCA 769. In that matter, Mr Fatouros sent an email to another employee stating:

> *"I am really disappointed how you've handled this situation". On the same day he wrote another email to senior managers saying: "Gentleman, I really need your help…sadly I don't believe Marie is acting in the highest and best interest under business".*

Mr Fatouros was dismissed and one of the reasons given for his dismissal was the email sent to the two senior managers. However, the Court deemed that email to be a "complaint" for the purposes of the Act and, accordingly, found the employer had taken adverse action. Mr Fatouros was awarded $144,570.48 and the employer was ordered to pay a pecuniary penalty of $12,500.

Employees on probation cannot bring unfair dismissal claims, but they are entitled to bring adverse action claims. In *Pacheco-Hernandez v Duty Free Stores Gold Coast Qld* [2018] FCCA 3734, a probationary employee who was dismissed because "they [did] not fit within the team" and did not "display adequate respect to management" was found to be dismissed because she had made complaints regarding bullying. She was awarded $20,000 compensation for the termination, despite not having successfully completed a probationary period.

The issues for EPL insurers with complaint cases

These cases show how easy it can be for an employer to be exposed to an adverse action claim. Employees who are seen as uncooperative, complaining or not fitting-in with the culture of an organisation can often find themselves on the receiving end of disciplinary action or termination. Their employers are often not even aware of the risk they are taking in moving against the 'difficult employee'.

The Courts have given a very broad interpretation to the meaning of "complaint" in the adverse action provisions of the *Fair Work Act*. The *Tran* case demonstrates that an employer is likely to contravene the adverse action provisions of the Act if the employee's history of complaining forms part of the reason for termination – even when an employer is acting for legitimate reasons, like a restructure.

The *Tran* case also highlights how the compensation associated with successful adverse action claims can dwarf what might be available through an unfair dismissal claim in the Fair Work Commission.

LANDMARK DECISION CREATES 'PERMANENT CASUALS'

In May, the Full Federal Court handed down its much anticipated decision in *Workpac v Rossato*. In that case an employee, who was engaged on a casual basis, was found to be a permanent employee with the same entitlements as a full-time employee (e.g. annual leave). The Court also held that the employer was not entitled to offset the casual loading of 25% against the claim for unpaid entitlements.

The *Workpac* decision is a landmark judgment that will have serious implications for employers who use casual labour on a regular and systematic basis.

Traditionally, the Fair Work Commission has taken the approach that employees engaged as casual workers who are paid the 25% casual loading are deemed to be a 'casual' for all purposes, regardless of their working pattern.

With this decision, the Full Federal Court of Australia overturned that approach. In doing so, it stated that there was a need to look at the relationship as a whole and that a Court was not confined to the terms of any contract of employment between the parties. The Court held that any employee who had a "firm" or "advance commitment" for work was likely to be permanent and not casual.

THE IMPLICATIONS FOR EPL INSURERS

While claims for unpaid entitlements are excluded by EPL policies, the *Workpac* decision will still have consequences for EPL insurers.

There has already been a sharp rise in long-term or regular casual employees filing dismissal claims, together with claims for unpaid wages based on

allegations that they should have been treated as a permanent employee. While the claims for unpaid wages are not covered by the EPL policy, the additional claim for backpay can make it difficult to settle the insured claim for termination of employment.

This rise in concurrent claims may also see terminated casual employees preferring to run adverse claims instead of unfair dismissal claims, as they can bring both the unpaid wages and adverse action claims in the Federal Circuit Court of Australia. As with adverse action claims, employers found to have done the wrong thing with employer's entitlements are exposed to pecuniary penalties. These penalties can be significant and are usually paid to a successful applicant.

As an extension of the complaint issues discussed earlier in this article, casuals who complain that they should be treated as permanent staff while they are still employed will also benefit from the protection of the adverse action provisions.

The *Workpac* decision is likely to go on appeal to the High Court of Australia. However, as two unanimous Full Federal Court Australia benches have now delivered judgments, the decision will remain the law of the land unless overturned by the High Court of Australia or legislative intervention. Until that happens, businesses that rely on a regular or long-term casual workforce will be exposed to a new and significant risks.

Need to know more?

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