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Practice Group(s):

*Labour, Employment
and Workplace Safety*

Hit and Miss? Australian Cricket Coach Takes Swing at Adverse Action Claim

By Peter Lupson and Martin Alden

The coach of the Australian cricket team, Mickey Arthur, was dismissed a fortnight before the 2013 Ashes series commenced in England. Arthur had been appointed to the position in November 2011 for a term that was set to expire at the end of the cricket World Cup in 2015. In response to the dismissal, Arthur lodged an adverse action claim against Cricket Australia with the Fair Work Commission. On 31 July 2013, the parties reached a confidential settlement agreement to resolve the matter before it proceeded to hearing. The claim serves as a reminder to employers of the need to be alert to any circumstances which may give rise to an adverse action claim when contemplating dismissal.

Background

Originally from South Africa, Arthur was the first foreign national to coach the Australian cricket side. At the press conference held to announce Arthur's dismissal, the Chief Executive Officer of Cricket Australia, James Sutherland, is quoted as saying that "the performance of the Australian cricket team has not been up to standard" and "consistency of behaviour, accountability, and discipline of behaviour, were reasons [for his dismissal]". Details of the adverse action claim lodged by Arthur have not been made public, however, it has been reported that the claim was based on a number of grounds, including alleged racial discrimination. Specifically, Arthur claimed that he was discriminated against because of his South African background and because of a perception that he didn't understand the "Australian way". It was also reported that Arthur was seeking reinstatement or AUD4 million in compensation from Cricket Australia.

What are the Adverse Action Provisions?

The adverse action provisions of the *Fair Work Act 2009 (Cth)* came into effect on 1 July 2009. In summary, the provisions prohibit an employer taking adverse action (which includes dismissal) against an employee for a prohibited reason. The prohibited reasons include, but are not limited to, an employee's race, national extraction, age, disability, pregnancy, union membership, industrial activity, and making a complaint or inquiry in relation to their employment.

Unlike the unfair dismissal regime, there is no minimum employment period or monetary threshold to lodge an adverse action claim. Further, there is a reverse onus of proof for such claims. This means that it is presumed that the adverse action was taken for the prohibited reason unless the employer can show otherwise. This can be an onerous burden to discharge.

In addition, to make out a contravention, it is sufficient if the prohibited reason is just one of the reasons for the dismissal. It need not be the only reason or the main reason. So, for example, if an employee's race was just one of the factors taken into account by an employer in deciding to dismiss the employee, the claim will succeed.

An employer that has breached the adverse action provisions may be liable to a range of sanctions, including a civil penalty of up to AUD51,000 per breach, an order awarding compensation for any

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loss or damage suffered as a result of the action (uncapped), reinstatement of employment, and an injunction to stop or prevent any threatened or continuing action.

Implications for Employers

Whilst adverse action claims are not limited to termination of employment, employers need to be alert to any complaints, enquiries or other circumstances which may give rise to such a claim when contemplating dismissing an employee. If such a claim is lodged and proceeds to hearing, the employer will need to demonstrate that the prohibited reason/s had nothing whatsoever to do with the decision to dismiss the employee in order to successfully defend the claim. The employer will need to show that the decision was made purely for lawful reasons, such as the employee's performance or redundancy. In this respect, documentary evidence will be crucial.

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