

Employment Alert

Yours Sincerely ... was making that complaint a "workplace right"?

WHAT YOU NEED TO KNOW

- The Full Court of the Federal Court of Australia has advised taking "considerable care" in restricting an employee's ability to freely exercise the right to make a complaint under the general protections provisions in the *Fair Work Act 2009* (Cth) by requiring that a complaint be "genuine".
- This decision is important, as it throws into doubt the reasoning in the decision at first instance, *Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271. In that case, the Court held that for a complaint to fall within the scope of the general protections provisions, it must be "genuinely held" and not made "without good faith or for an ulterior purpose".
- The Full Federal Court ultimately found it unnecessary to conclusively determine the question. However, the decision warrants caution by employers seeking to take disciplinary action against employees who make workplace complaints that may lack "bona fides" or may be vexatious.
- This decision, and other recent decisions, illustrate the broad approach that courts are tending to take in general protections applications on the issue of when an employee's ability to make a complaint or inquiry in relation to the employee's employment will be a "workplace right".

WHAT YOU NEED TO DO

- Employers should treat employee complaints seriously and impartially, regardless of:
 - the employer's views as to the merits of those complaints;
 - the manner in which the employee raises the complaint or brings the complaint to the employer's attention; and
 - the subject matter of the complaint, which may extend beyond employee entitlements sourced in statute or contract, to other issues directly (or indirectly) related to the employee's employment.
- Employers should exercise caution when taking disciplinary action against an employee because the employee has made a complaint that is not "bona fides" or is vexatious.
- Where an employee makes a malicious or dishonest complaint it may be open to an employer to take disciplinary action because of the dishonesty. However, employers should be mindful of the risks associated with this. If the employee initiates proceedings there can be practical difficulties in demonstrating that the fact that the employee made the complaint was not part of the reason for taking the action.
- Employers should review their policies that deal with making complaints with a view to addressing the potential risks that may arise from taking disciplinary action in relation to complaints that are not "bona fides" or are vexatious.

Background

The employer employed Kate Shea as Director of Corporate and Government Affairs. In February 2010, Ms Shea made a complaint to the HR Director of her employer alleging sexual harassment by the

company's CEO. She repeated this complaint to the CEO in April 2011. The employer commenced an independent investigation, which ultimately found her allegation to be unsubstantiated. Ms Shea subsequently complained about the way her employer dealt with her concerns, alleging that the company

fostered a workplace culture in which sexual harassment was prevalent and condoned, and alleging that the CEO had also engaged in sexual misconduct.

The employer made Ms Shea redundant in February 2012. She commenced an adverse action claim against her employer, claiming the company had terminated her employment because of her complaints, the making of which, she argued, was a protected 'workplace right' under the *Fair Work Act*.

The decision at first instance

In dismissing Ms Shea's application, Dodds-Streeton J found (among other things) that:

- **(genuine)** to fall within the scope of the general protections provisions, a complaint must be "genuinely held" and made "in good faith and for a proper purpose". However, Dodds-Streeton J accepted that establishing the absence of a genuine belief may be "difficult, albeit not impossible" for an employer; and
- **(substance over form)** a complaint can be any communication which, expressly or implicitly, conveys a grievance, finding of fault or accusation.

Ultimately, these findings were not determinative because Dodds-Streeton J found that the employer had discharged the onus of proving that the decision to dismiss Ms Shea was not based on the complaints made by her – genuinely held or otherwise – but rather, was due to her position becoming redundant.

Decision of the Full Federal Court

On appeal, the Full Federal Court cautioned against "implying into section 341 any constraint that would inhibit an employee's ability to freely exercise" his or her workplace right to make a complaint. To imply a requirement that the complaint be "genuine" would risk discouraging employees, who may have mixed motives, from raising concerns.

Despite these remarks, the Court concluded that the questions about the construction and application of sections 340 and 341 did not need to be resolved because the Court agreed with the primary Judge's finding that Ms Shea was not, in fact, dismissed *because of* the complaints.

The Court also accepted the primary Judge's findings on the substance of complaints taking precedence over their form, finding that "[t]he expression or drafting of a 'complaint' should not require the sophistication or knowledge of an experienced industrial lawyer or legal advice regarding whether it should in fact be made".

Implications of the Full Federal Court decision

Whilst the Full Federal Court's remarks about the genuineness of complaints are not binding, employers should be wary about prejudging the genuineness of, or motives underlying, employee complaints, even those raised informally. Employers who fail to investigate and respond properly to such a complaint – even where the employer's initial view is that the complaint is unfounded or has been made for an ulterior purpose – are exposed to a general protections claim.

In light of these developments, it is especially important for employers to document investigations thoroughly and avoid making (or acting on) premature judgments. A prudent course would be to approach every complaint with the mindset that the complainant has made the complaint genuinely and in good faith.

If, after conducting an appropriate investigation into the complaint, the employer is satisfied that the complaint is not genuine and has been made in bad faith (eg the employee has been deceitful or falsely accused another employee), then to minimise the risk of a successful adverse action claim the employer should be cautious in its approach to taking any disciplinary action.

Importantly, before taking any disciplinary action against an employee in connection with a complaint, the employer should:

- establish by an appropriately thorough and impartial investigation that the complaint is unsubstantiated, and the complainant did not hold a genuine belief in the complaint;
- identify why the employee's conduct in not holding a genuine belief is improper (eg the employee has been lying);
- clearly state that the reason for taking the disciplinary action is due to the employee's improper conduct, and not because of making the complaint itself; and
- ensure that any disciplinary action the employer takes is in accordance with company policy.

While it may be open to an employer to take disciplinary action because of dishonesty, employers should be mindful of the risks associated with this. If the employee initiates proceedings there can be practical difficulties in demonstrating that the fact that the employee made the complaint was not part of the reason for taking the action.

Employers should review their policies that deal with making complaints with a view to addressing the potential risks that may arise from taking disciplinary action in relation to complaints that are not "bona fides" or are vexatious.

Expanding scope of workplace rights

The Full Federal Court decision in *Shea* illustrates the broad approach that courts are tending to take in general protections applications on the issue of an employee's ability to make a complaint or inquiry in relation to the employee's employment.

In the recent Federal Circuit Court case *Evans v Trilab Pty Ltd* [2014] FCCA 2464 (30 October 2014), Lucev J also took a broad approach to meaning of the workplace right "to make a complaint or inquiry" in relation to the employee's employment (section 341(1)(c) of the FW Act). Lucev J found it was "arguable" that the applicant had a workplace right to make a complaint, even where there was no statutory, regulatory or contractual entitlement to do so.

In rejecting an employer's application for summary dismissal of the proceeding, Lucev J outlined the marked divergence in the approaches of courts as to whether protected complaints must be underpinned by

a statutory, regulatory or contractual right. His Honour criticised the narrow approach taken in a number of cases, including the decision at first instance in *Shea*.

His Honour found that the use of the words "in relation to" in s 341(c)(ii) of the Act, protected complaints that:

- did not necessarily arise from a statutory, regulatory or contractual provision; and
- may only have an indirect nexus with a person's terms or conditions of employment (for example, by way of a complaint relating to another person in the workplace, or a workplace process, which affects the complainant's employment).

Although this was not a final decision and related only to an application for summary dismissal, it demonstrates the tendency of courts, in recent times, to adopt a liberal interpretation of the protections provided to employees under the 'workplace rights' provisions of the FW Act.

MAKING THE CASE: Insights from Geoff Giudice

It is a breach of the Fair Work Act for an employer to take adverse action against an employee:

- because the employee has a workplace right;
- because the employee has exercised or proposes to exercise such a right; or
- to prevent the employee exercising a workplace right.

One of the workplace rights identified in the FW Act is "the ability to make a complaint or inquiry in relation to employment". There have been a number of cases which have examined the meaning of these words. It is clear that they include cases in which the employee has a specific legal right to make a complaint or inquiry which arises from a contractual, award or statutory provision, but it is unclear whether the words have any more general application.

If, as occurred in *Shea*, the employee alleges that the employer took adverse action because the employee *had exercised* the right to make a complaint in relation to employment, questions may arise about the nature of the complaint the employee made. It is a requirement that the complaint must relate to employment in some meaningful way. But if, for example, the complaint was clearly without merit, would it come within the term: "a complaint in relation to employment"? All that can be said after the Full Court's decision in *Shea* is that for the time being at least it should be assumed that the Court will not look too closely at the genuineness of the complaint. It will be sufficient if the employee had the right to make the complaint and actually did so.

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