



EMPLOYEE PAID \$1.3M FOR ADVERSE ACTION

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A recent adverse action case has demonstrated how day to day employment decisions can be a high stakes contest.

Justice John Reeves of the Federal Court has found that a central Queensland mine took unlawful adverse action against a drill rig operator (Mr Haylett) in standing him down just four days after he was awarded damages for a back injury in November 2013.

In one of the largest adverse action payouts seen to date, the employer was ordered to pay Mr Haylett \$1,272,109 for past and future loss of wages, plus \$24,626 in interest. The employer was also ordered to pay a penalty of \$50,000 to the CFMEU.

BACKGROUND

Mr Haylett sustained a back injury in mid 2009 and took time off work. Upon returning to work he was unable to complete his normal duties and was trained as a drill operator.

Mr Haylett pursued the employer for damages arising from his back injury. On 15 November 2013, Mr Haylett was awarded \$637,000 in compensation for the injury.

On 18 November 2013, Mr Haylett undertook a prearranged 5 yearly medical assessment under the provisions of the *Coal Mining Safety and Health Act 1999* (“**CMSH Act**”). It was determined by Dr Parker that

Mr Haylett was unfit to undertake his current duties. Mr Haylett was stood down from performing duties with effect from 19 November 2013.

The decision to stand Mr Haylett down was made by the employer’s mine manager. The manager was made aware of Dr Parker’s opinion through a third party some time after 4:33pm on 19 November 2013.

During the course of 2014, Mr Haylett and the employer were involved in litigation over the validity of the CMSH Act medical assessment.

Mr Haylett remained stood down without pay during this period. Ultimately, Mr Haylett was successful when the Queensland Court of Appeal approved the CMSH Act medical assessment.

However, despite Mr Haylett being successful in the Queensland Court of Appeal, the employer maintained its decision to stand Mr Haylett down.

In these Federal Court proceedings, Mr Haylett claimed that a reason for his stand down included because he pursued the employer for damages arising from his back injury (and this was a “workplace right” has was entitled to pursue).

Because of the “reverse onus of proof” in adverse action proceedings, the employer had to prove that the reason or reasons Mr Haylett was stood down did not include because he pursued compensation for his injury.

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The employer maintained that the “primary and only” reason the mine manager stood Mr Haylett down was the need to comply with the CMSH Regulations.

FINDINGS

The Court was not satisfied that the employer had discharged the onus of proof to show that the workplace rights Mr Haylett exercised was not a reason for its decision to stand him down on 19 November 2013.

The mine manager gave evidence that the “primary and only reason” for his decision to stand Mr Haylett down was the need for the employer to comply with the CMSH Regulations. However, Justice Reeves found the manager to be generally unsatisfactory as a witness. His Honour specifically found:

1. the mine manager had been advised that as a result of Mr Haylett’s compensation for the back injury, the employer’s insurance premiums would rise;
2. the decision to stand Mr Haylett down was made in haste – the manager received Dr Parker’s assessment after Mr Haylett was placed on sick leave;
3. the purpose of the CMSH Act and Regulations is to protect the safety and health of employees working in the coal mining industry; it is not directed to the operational requirements of coal mining employers;
4. the manager said in evidence that he did not know Mr Haylett and he did not know the type of work he was performing at the mine. Notwithstanding this, he did not ask anyone about Mr Haylett’s work activities before making his decision to stand him down, purportedly for safety reasons;
5. the manager did not speak to anyone about the content of the email from Dr Parker or seek any advice from the Human Resources Department about any requirements under the CMSH Regulations; and
6. the manager could not point out any provision in the CMSH Regulations that required him to act in the manner he did.

Because the employer could not prove that Mr Haylett’s compensation claim was excluded from the reasons for standing Mr Haylett down, the Court found that Mr Haylett’s stand down was unlawful adverse action.

There is no “cap” on compensation that can be awarded for unlawful adverse action. Mr Haylett was awarded:

1. compensation for past and future loss of wages, plus interest (\$1,296,735); and
2. a penalty (paid to his union, the CFMEU, of \$50,000).

CONSIDERATIONS FOR EMPLOYERS

This serves as a reminder to employers that:

- Evidence of a decision maker’s reasons will be critical for the employer to “prove their innocence”, and usually managers will have to give evidence.
- Uninformed and ill advised decision making may lead to contraventions.
- Care must be taken when making decisions to an employee’s detriment, even where the decision is well intended, to ensure the decision does not breach any enterprise agreement, modern award or the *Fair Work Act 2009*.
- Having a clear decision making process and documenting appropriate reasons can be key to discharging the reverse onus.

With the impending replication of the adverse action jurisdiction to the government sector in Queensland, it has never been more important for all workplace decision makers to be able to justify adverse treatment of employees.

For more advice about dealing with adverse action risk in management decision making, or to consider training for front line managers, please contact our office.

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