



Managers on notice about the potential personal costs of unlawful disciplinary decisions

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The ongoing high profile legal dispute between the former Managing Director of the ABC, Michelle Guthrie, and the national broadcaster is merely the latest example of the reputational and financial cost to employers that can arise where the process leading up to a dismissal is not carefully managed and documented.

Executives and members of senior management involved in a decision-making process that may result in a dismissal are learning that any decision they take can carry potentially severe financial penalties against them personally, where a court finds them liable as an accessory for their part in the dismissal. This year, a further warning has been sent to senior executives by the recent decision of the UK Court of Appeal, which could have flow on effects to Australia.

Dismissed whistleblower entitled to recover millions in damages from executive decision-makers

In *Timis & Anor v Osipov & Anor*¹ (*Timis*), two directors of an oil exploration company, Mr Timis and Mr Sage, were found personally liable to pay damages to a former employee, Mr Osipov.

Mr Osipov had been the CEO of the company operating in Niger in June 2014. Within days of joining the company, Mr Osipov discovered serious wrongdoing by senior employees and made a number of complaints to an external authority about corporate governance and compliance with local law.

Mr Osipov was subsequently dismissed by two of the company's non-executive directors, Mr Timis (the largest individual shareholder) and Mr Sage (the Chairman).

The Employment Tribunal ruled that Mr Timis and Mr Sage caused a "detriment" to Mr Osipov by making the decision to summarily dismiss Mr Osipov because he'd made the protected disclosures. The Tribunal concluded that the executives were personally liable, along with the employing entity, International Petroleum Ltd (IPL), to compensate Mr Osipov for the losses he suffered as a result of the dismissal, which the Tribunal initially calculated at £1,744,575.56.

When an initial appeal against the order for damages before the Employment Appeals Tribunal was unsuccessful, the executives brought the Court of Appeal proceedings. After a careful consideration of the terms and effect of the relevant UK legislation, the Court determined that Mr Timis and Mr Sage could be ordered to pay damages to Mr Osipov in their personal capacity. Ultimately, the damages payable by the executives were increased to £2,003,972.35, which equates to almost AUD\$3.5 million².

Potential for similar orders to be made against decision-makers under the *Fair Work Act 2009* (Cth)

Had the circumstances surrounding the dismissal in *Timis* taken place in Australia, it would have been open to

¹ [2018] EWCA Civ 2321.

² Calculated using exchange rate as at 5 December 2018.

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Mr Osipov to pursue a general protections application against each of IPL, Mr Timis and Mr Sage.

Under Part 3-1 of the *Fair Work Act 2009* (Cth) (**FW Act**), it is prohibited for an employer to take “adverse action”, such as a termination of employment, against an employee for reasons that include the exercise of a “workplace right”, such as the employee having made a complaint or inquiry about their employment. The general protections provisions under the FW Act are civil remedy provisions.

Significantly, section 550 of the FW Act provides that an individual who is “involved in” the employer’s contravention of a civil remedy provision is also taken to have personally contravened that provision. This is more commonly known as “accessorial liability.” An individual will be “involved in” the employer’s contravention of the general protections provisions if the individual was knowingly concerned in the employer’s contravention.

To use the ABC dispute as an example, Ms Guthrie has alleged that she was dismissed from her employment with the ABC for reasons that included her making complaints to the Board of Directors of the ABC alleging that ABC Chairman Justin Milne was attempting to interfere in the editorial independence of the national broadcaster.

Although it is unclear at this stage whether Ms Guthrie has named Mr Milne as an individual respondent to her general protections dispute application, it would be open for her to allege that as Chairman of the Board of Directors, Mr Milne was knowingly involved in a decision to dismiss Ms Guthrie for reasons that included her making a complaint about Mr Milne’s conduct. In those circumstances and if she succeeds, Mr Milne can be personally liable to Ms Guthrie for her losses.

As Ms Guthrie was reportedly employed for a five year term on a salary worth \$900,000 per annum, and there is no cap imposed on the compensation payable to a successful applicant in a general protections dispute, it is possible that a similar damages order to that made in *Timis* could be awarded against the ABC and Mr Milne, should the dispute be resolved by a court.

Limiting exposure to accessorial liability

Employers should implement the following measures to reduce exposure for executives and senior managers with decision-making responsibilities in disciplinary proceedings to a possible accessorial liability claim under the FW Act:

- Ensure senior staff are adequately trained in the lawful conduct of disciplinary processes, with a

strong understanding of what constitutes a “workplace right” and “adverse action”.

- To the extent practically possible, limit the number of individuals involved in making the ultimate decision whether to take disciplinary action against an employee, in order that the company and individuals involved the decision making can best defend themselves should the matter be litigated.
- Ensure the decision-maker creates a contemporaneous written record of the legitimate and defensible reasons for their decision to take disciplinary action.

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