

Article Information

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Employment Relations Podcast #35 - The Governance of Decision Making in the Post-Qantas Environment

The recent High Court decision in *Qantas v TWU* [2023] HCA 27 focussed on the question of how the general protections in the *Fair Work Act 2009* (Cth) work in circumstances where employees did not presently have particular workplace rights (in that case the right to take industrial action), but would have those rights in the future if not for the adverse action being taken.

While that analysis has rightly been the subject of a lot of interest, the outcome in that case turned on the other key concept in general protections claims – the “reverse onus” where employers need to prove that an unlawful reason did not form a substantive part of their reason for taking the action. In *Qantas*, it was apparent that there were clear and appropriate commercial reasons for taking the action that occurred. The question for the Court at first instance was whether Qantas was able to discharge its burden.

In this episode of the Podcast, Emily Haar and Erin McCarthy discuss *how* legally-defensible decisions are best made, whether by a Board, the Executive, or others down the “decision-making chain”, drawing on a number of recent (and not so recent) cases in the general protections space, including [Barclay](#), [BHP Coal](#), [Kodak](#), [Claremont Coal](#), [Australian Red Cross](#), [Wong v NAB](#), and [Serpanos](#). Being intentional about the process, as well as what is considered, and what is documented, in making a decision will best protect employers in the case of a legal claim.

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