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High Court decision clarifies adverse action provisions in the *Fair Work Act 2009*

On 7 September 2012 in *Board of Bendigo Regional Institute of Technical and Further Education and Advancement v Barclay* [2012] HCA 32 the High Court allowed an appeal which clarifies the scope for agencies to take action in relation to employees without infringing the adverse action provisions in Pt 3-1 of the *Fair Work Act 2009*.

Background

Greg Barclay was an employee of the Bendigo Regional Institute of Technical and Further Education (BRIT). He was also the President of the BRIT Sub-Branch of the Australian Education Union (the AEU). Mr Barclay sent an email to all AEU members employed by BRIT in which he said that several AEU members had reported that they had witnessed or been asked to take part in producing false and fraudulent documents as part of a forthcoming audit.

A senior manager at BRIT asked Mr Barclay to provide him with the names of the members referred to in the email as having witnessed or been asked to be part of producing false and fraudulent documents. Mr Barclay declined to do so. The Chief Executive Officer of BRIT, Dr Harvey, suspended Mr Barclay from duty on full pay and requested him to show cause why he should not be subject to disciplinary action.

Before the Federal Court

Mr Barclay and the AEU applied to the Federal Court under s 539 of the *Fair Work Act 2009* (FW Act) for a declaration that BRIT had contravened s 346 by impermissibly taking adverse action against Mr Barclay because he was an officer of the AEU, and because he had engaged in particular kinds of industrial activity. Orders were also sought for civil penalties, compensation and interlocutory relief.

Where it is alleged that a person took adverse action for a particular reason that is contrary to the adverse action provisions, s 361 of the FW Act provides that it is presumed that the action was taken for that reason or with that intent unless the person taking the action proves otherwise. Accordingly, BRIT was required to prove that Dr Harvey's reasons for acting against Mr Barclay did not include any reason that was prohibited by s 346 of the FW Act.

Dr Harvey gave evidence that she considered an investigation into Mr Barclay's actions was necessary because it appeared that he had failed to notify management of very serious allegations of fraudulent conduct in the workplace and instead had cast aspersions and innuendo upon his colleagues by way of a widely circulated email, which she regarded as a breach of BRIT's Code of Conduct and of Mr Barclay's obligations as a BRIT employee. She said she did not object to Mr Barclay raising the issue of fraud with AEU members and that

she had taken action against Mr Barclay because he had not raised such a serious issue with senior management. She said she would have taken the same action in similar circumstances against a person who was neither a member nor an officer of the AEU.

At first instance Tracey J dismissed the application. His Honour accepted the evidence given by Dr Harvey about her reasons for suspending Mr Barclay and was satisfied that she had acted for the reasons that she gave and had not acted for any reason prohibited by the FW Act.

Before the Full Federal Court

A majority of the Full Court of the Federal Court (Gray and Bromberg JJ; Lander J dissenting) upheld the respondents' appeal from the primary judge's decision. BRIT sought, and obtained, special leave to appeal to the High Court from the judgment of the Full Federal Court.

In the High Court

The High Court (French CJ, Gummow, Hayne, Heydon and Crennan JJ) unanimously upheld an appeal from the decision of the Full Federal Court and dismissed the appeal to that Court from the decision of Tracey J at first instance, effectively reinstating his Honour's decision.

Key points emerging from the High Court decision

Three separate judgments were delivered by the members of the High Court.

French CJ and Crennan J held that the onus of proving that an employee's union position and activity was not an operative factor in taking adverse action is to be determined in the light of all the available evidence. The fact that the employee holds a union position or is engaging in union activity at the time the adverse action is taken does not give the employee immunity from adverse action if the position or activity is not an operative factor in taking the adverse action. An employee who happens to hold a union position or is engaging in industrial activity should not have an advantage over other workers. Dr Harvey's evidence established that Mr Barclay's union position and activities were not operative factors in the decision to take the adverse action ([44]–[45]; [60]–[62]).

Gummow and Hayne JJ held that there will be a contravention of s 346 of the FW Act only where the industrial activity is a substantial and operative reason for the adverse action. This is a question of fact to be determined on the basis of all the evidence. In the absence of a challenge to Dr Harvey's evidence that she did not take the adverse action for a proscribed reason, a contravention of s 346 could not be made out in this case ([101]; [127]–[128]).

Heydon J held that the reason for adverse action is the actual reason of the person who took the action. He held that the reason cannot include any 'unconscious' reason for the action and cannot be imputed from the fact that the person against whom action is taken is engaged in activity on behalf of a union ([146]–[149]).

Evidence of the decision maker

Clearly the High Court accepted that direct evidence from the decision maker which is accepted as reliable is capable of discharging the reverse onus even though, at the time of the adverse action, the employee may hold a union position or be engaging in industrial activity: French CJ and Crennan J at [45]; Gummow and Hayne JJ at [127]–[128]. It may be appropriate for a decision maker to give positive evidence comparing the position of the

employee affected by the adverse action with that of an employee who has had no union involvement: French CJ and Crennan J at [63]; Gummow and Hayne JJ at [89]–[91].

However, it is also clear that the High Court accepted that positive evidence of the decision maker that the action was not taken for a prohibited reason may be unreliable because of other contradictory evidence given by the decision maker or because other evidence contradicts the decision maker's evidence: French CJ and Crennan J at [45]; Gummow and Hayne JJ at [127]; Heydon J at [140]–[141]. For example, if in this case there was evidence that Dr Harvey had not taken similar disciplinary action against another employee who was not associated with the union but who had also been aware of the fraud allegations and had not reported them, the reverse onus may not have been discharged despite her evidence of her reasons.

The test is neither 'subjective' nor 'objective'

It was argued that the correct test for determining the reason for adverse action involves both 'subjective' reasons (the actual state of mind of the decision maker) and 'objective' reasons derived from the context in which the action was taken. The Full Federal Court had effectively taken this view: (2011) 191 FCR 212 at [28].

The High Court rejected this argument: French CJ and Crennan J at [44]–[45]; Gummow and Hayne JJ at [121]; Heydon J at [149]. Gummow and Hayne JJ said that describing the test in 'objective' and 'subjective' terms creates an 'illusory frame of reference': at [121]. As indicated above, the Court held that the correct test is whether, as a matter of fact, the reason is an operative reason for the decision to take the adverse action.

Unconscious reasons not relevant

It was argued that the test for determining the reason for adverse action includes the 'unconscious' reasons of the decision maker. The Full Federal Court had held that the real reason for conduct is not necessarily the reason the person genuinely believes was their reason and that 'it is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question': (2011) 191 FCR 212 at [28].

The High Court rejected this proposition: French CJ and Crennan J at [44]–[45]; Gummow and Hayne JJ at [134], read with [118], [128]–[133]; Heydon J at [146].

French CJ and Crennan and Heydon JJ clearly considered that it was the state of mind of the decision maker that was relevant.

The conclusion of Gummow and Hayne JJ may have been confined to the circumstances of this case. They considered that, in circumstances in which the decision maker had given evidence that excluded the existence of any prohibited reason in her decision, where that evidence had been accepted by the trial judge as a correct statement of her reasons, and where that finding of the trial judge had not been challenged by Mr Barclay in the appeal, there was no scope for the Full Federal Court to make findings with respect to the 'unconscious' state of mind of BRIT. It appears that their Honours considered that there was no scope for 'unconscious' reasons to be found to have played a part in an employer's decision, at least where the court has accepted evidence from the decision maker that has denied that possibility.

Implications of the decision

The decision clarifies some of the uncertainty for agencies about the extent to which Pt 3-1 of the FW Act will prevent them from making employment decisions that adversely affect an employee in their agency.

The decision of the majority of the Full Federal Court effectively prevented agencies from taking adverse action against employees where the decision related to conduct in the employee's capacity as a union member or official or in the course of lawful industrial activity.

Any suggestion that employees who are union members or union officials, or who are engaging in union activity, are in every case immune from adverse action by their employer has been resoundingly rejected by the High Court. Where an agency has genuinely permissible reasons, and not proscribed reasons, for taking adverse action, the High Court's decision means that the agency should have no special difficulty in resisting a claim of breach of the provisions, especially where the reasons for decision are well documented.

However, the High Court's decision should not be taken as sweeping away the protections in the FW Act for union members and union officials and for employees engaging in industrial activity. It does not do that.

So agencies should still take care when considering taking adverse action in respect of an employee if the employee's industrial activity, or membership of an industrial association, is part of the context in which the adverse action is being taken. It appears that there may remain difficult questions in particular factual circumstances as to whether an employee's position as a union member or official or an employee's lawful industrial activity may be accepted as involving conduct which is so intrinsic to the position or activity that the employee's situation would not be analogous with the position or activities of other employees and that taking adverse action in relation to the conduct would necessarily involve taking the adverse action by reason of the employee's position or activity.

AGS acted for the Minister for Employment and Workplace Relations, who intervened in the hearing before the High Court.

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