BOARD OF BENDIGO REGIONAL INSTITUTE OF TECHNICAL AND FURTHER EDUCATION V BARCLAY

THE HONOURABLE JUSTICE SHANE MARSHALL* & AMANDA CAVANOUGH**

I INTRODUCTION

On 7 September 2012, the High Court of Australia unanimously allowed an appeal by the Bendigo Regional Institute of Technical and Further Education ('BRIT') from the Full Court of the Federal Court of Australia.[1] The High Court held that BRIT's Chief Executive Officer, Dr Louise Harvey did not take adverse action against Mr Greg Barclay for a reason prohibited by the *Fair Work Act 2009* (Cth) ('the Act'). At the relevant time, Mr Barclay was an employee of BRIT and also the Sub-Branch President of the Australian Education Union ('AEU') at BRIT.

The central issue, at first instance and on appeal, concerned the correct approach to a determination under s 346 of the Act, which prohibits an employer from taking adverse action against an employee because of the employee's union role or activities. From the outset of the litigation, BRIT conceded that it had taken 'adverse action' against Mr Barclay, but denied that such action was taken because of Mr Barclay's industrial activity or association with the AEU in contravention of the Act.

II THE FACTS

The material facts were mostly uncontroversial. Mr Barclay was employed as a senior teacher and was a delegate of the AEU at BRIT. On 29 January 2010, he sent an email to members of the AEU employed by BRIT. The subject line of the email read 'AEU – A note of caution'. It referred to an upcoming audit of BRIT, which was being held for the purpose of securing re-accreditation and funding for the organisation. In the body of the email, Mr Barclay said that he was aware of reports of serious misconduct by unnamed individuals in connection with the

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[1] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 ('*Bendigo*').

preparations for the audit. He did not advise management of such reports before sending the email, which read:

> …It has been reported by several members that they have witnessed or been asked to be part of producing false and fraudulent documents for the audit… It is stating the obvious but, **DO NOT AGREE TO BE PART OF ANY ATTEMPT TO CREATE FALSE/FRAUDULENT DOCUMENTATION OR PARTICIPATE IN THESE TYPES OF ACTIVITIES**…

A footnote to the email indicated that the message was 'for the named person's use only' and 'may contain confidential, proprietary or legally privileged information'. Despite this, some of the email recipients forwarded the email to management. On 1 February 2010, it was brought to the attention of Dr Harvey.

Dr Harvey considered the email indicated a *prima facie* contravention of the *Code of Conduct for Victorian Public Sector Employees*. She met with Mr Barclay the following day and gave him a letter which set out her proposed course of action and asked him to 'show cause' why he should not be subject to disciplinary action for serious misconduct. Mr Barclay was suspended from duty on full pay and required not to attend BRIT premises. His internet access was also suspended pending a full investigation. Mr Barclay and the AEU applied to the Federal Court for a declaration that BRIT contravened s 346 of the Act.

III THE DECISION AT FIRST INSTANCE

At the hearing before Tracey J, Dr Harvey denied having taken adverse action against Mr Barclay because of his membership of the AEU or associated activities. She claimed that she decided to suspend Mr Barclay 'because [she] was of the view that the allegations against him were serious and… [she] was concerned if Mr Barclay was not suspended he might cause further damage to the reputation of [BRIT] and [its] staff'[2] due to the way in which he raised the allegations of misconduct.

A *The Statutory Interpretation Issue*

Section 361 of the Act places the onus on the employer to prove on the balance of probabilities that the reason for adverse action was not one

[2] [2010] FCA 284, [52].

which is prohibited.[3] Mr Barclay and the AEU argued that, in determining whether or not action was taken 'because' of the aggrieved person's status or activities, the subjective intentions of the decision-maker are irrelevant and the test to be applied is purely objective. Alternatively, the applicants argued that BRIT had not established that it had not acted because of Mr Barclay's activities as an officer of the AEU.

Justice Tracey rejected the respondents' submission that the reasons given by a decision-maker were irrelevant as 'inconsistent with the legislative history, relevant principles of statutory construction and authority'.[4] Rather, his Honour said:

> The task of the court, in a proceeding such as the present is…to determine why the employer took the adverse action against the employee. Was it for a prohibited reason or reasons which included that reason? In answering this question, evidence from the decision-maker which explains why the adverse action was taken will be relevant. If it supports the view that the reason was innocent and that evidence is accepted the employer will have a good defence. If the evidence is not accepted the employer will have failed to displace the presumption that the adverse action was taken for a proscribed reason.[5]

Justice Tracey found Dr Harvey 'a somewhat tentative and nervous witness'[6] but nevertheless found her evidence as to her reasons for acting 'convincing and credible'.[7] His Honour was satisfied that Dr Harvey did not act for any prohibited reason, but for the reasons she gave and dismissed the application. The respondents appealed to the Full Court of the Federal Court.

VI THE FULL COURT

The Full Court, by majority, allowed the appeal. In a joint judgment, Gray and Bromberg JJ explained:

> The central question under s 346 is why was the aggrieved person treated as he or she was? If the aggrieved person was subjected to

[3] This reverse onus of proof was introduced into the statutory framework around 100 years ago (see *Conciliation and Arbitration Act (No 2) 1914* (Cth)).
[4] [2010] FCA 284, [24]; as to the legislative history, see *Elliott v Kodak Australasia Pty Ltd* [2001] FCA 807.
[5] [2010] FCA 284, [34].
[6] Ibid [54].
[7] Ibid.

> adverse action, was it "because" the aggrieved person did or did not have the attributes, or had or had not engaged or proposed to engage in the industrial activities… The determination of those questions involves characterisation of the reason or reasons of the person who took the adverse action. The state of mind or subjective intention of that person will be centrally relevant, but it is not decisive. What is required is a determination of what Mason J in *Bowling* (at 617) called the "real reason" for the conduct. The real reason for a person's conduct is not necessarily the reason that the person asserts, even where the person genuinely believes he or she was motivated by that reason. The search is for what *actuated* the conduct of the person, not for what the person *thinks* he or she was actuated by. In that regard, *the real reason may be conscious or unconscious and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator had a benevolent intent.* 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.[8] [emphases added]

Justices Gray and Bromberg explained this approach as being consistent with the objects of the Act, to protect the right of freedom of association and the right to union participation at work. Their Honours added, the 'real reason or reasons for the taking of adverse action must be shown to be "dissociated from the circumstances" that the aggrieved person [engaged in industrial activity]'.[9] It followed, from this reasoning, that their Honours found BRIT to have engaged in prohibited adverse action because 'all of the relevant conduct in issue… involved Mr Barclay in his union capacity'.[10]

In a dissenting judgment, Lander J agreed with the primary judge's approach. His Honour said:

> In my opinion, his Honour's approach was correct. The question is why was the adverse action taken? That question will be answered by reference to the subjective intention of the decision maker. Ordinarily the decision maker will have to give evidence as to the reason or reasons why the adverse action was taken. If the decision maker's evidence having regard to "established facts" is accepted, then the decision maker will have discharged the onus imposed upon the decision maker by s 361 of the Act.[11]

By special leave, BRIT appealed to the High Court.

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[8] (2011) 191 FCR 212, [27]-[28].
[9] Ibid [32].
[10] Ibid [73].
[11] Ibid [208].

V THE HIGH COURT

The High Court unanimously allowed the appeal, holding that Dr Harvey's evidence, which was accepted by the primary judge and not challenged on appeal, established that the adverse action taken against Mr Barclay had not been for a prohibited reason.

A *The Parties' Submissions*

In challenging the judgment of the Court below, BRIT argued that a contravention of s 346 required that the employer's subjective reason for taking action was because of the employee's position as a union officer or industrial activities. This construction was said to be supported by the text of s 346 and related provisions, the legislative history and weight of authority concerning predecessor provisions.

The competing submission put for Mr Barclay and the AEU was that contravention is to be determined objectively without reference to the state of mind of the decision maker. This liberal approach was said to be appropriate because the provisions concern human rights, so the fact that Mr Barclay was engaged in industrial activity at the time adverse action was taken was sufficient to bring him within the Act's protection.

B *The High Court's Approach*

In a joint judgment, French CJ and Crennan J rejected Mr Barclay and AEU's submission and endorsed the approach of Tracey J. Their Honours noted that the respondents' submission, if accepted, would 'destroy the balance between employers and employees'[12] central to civil penalty regime established under the Act. Their Honours added, in reference to the Full Court majority's reasoning, 'it is a misunderstanding of, and contrary to, [authority] to require that the… reason for adverse action must be entirely dissociated from an employee's union position or activities'.[13]

Gummow and Hayne JJ also approved the primary judge's approach in their joint judgment holding that 'it was the reasons of the decision-maker at the time the adverse action was taken which was the focus of the inquiry'.[14]

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[12] *Bendigo* [2012] HCA 32, [61].
[13] Ibid [62].
[14] Ibid [127].

In a separate judgment, Justice Heydon concurred in upholding the approach and decision of the primary judge. His Honour was critical of the Full Court majority's approach of differentiating between 'conscious' and 'unconscious' reasons, noting that such an approach would impose an 'impossible burden'[15] on employers facing accusations of prohibited adverse action.

VI COMMENT

This case has clarified an important provision of the Act, which is intended to balance the right of workers to participate in union activity at work with the right of employers to discipline employees for what employers regard as inappropriate behaviour, whatever the role or position of the relevant employee.

The approach of the primary judge, which was upheld by the High Court, suggests that the subjective intention of the decision-maker, if accepted by the primary judge in the context of relevant objective facts, will usually provide a good defence to an accusation of adverse action. This is not to say, however, that the mere assertion that a prohibited reason was not the reason for taking adverse action will always be accepted by a primary judge. Whether an employer took adverse action for a prohibited reason is a question of fact for a primary judge to determine on all the relevant evidence before the Court, bearing in mind the onus on the employer to show that it did not take adverse action for a prohibited reason.

Whether that onus is discharged in any particular case is a matter to be assessed by the primary judge on all the evidence pertinent to that issue. The primary judge will scrutinise the evidence given as to the asserted reason for adverse action and will rely on it only if it is credible and rationally acceptable when viewed in the context of the entire factual matrix in the proceeding. Although subject to an appeal, a useful example of where such an onus was not discharged is the case of *Fair Work Ombudsman v Maclean Bay*.[16] That case can be contrasted with the case of *Elliott v Kodak*[17] where the Court accepted the evidence of the employer that it did not target the employee for discriminatory treatment in the redundancy process because of his position as a union delegate.[18]

[15] Ibid [146].
[16] [2012] FCA 10, [121] - [123].
[17] [2001] FCA 807.
[18] Ibid [84].