
UNTANGLING ADVERSE ACTION - CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION V BHP COAL PTY LTD

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I INTRODUCTION

In *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd*¹ ('*BHP Coal*'), the High Court (by majority) found that the respondent employer ('*BHP Coal*') did not act unlawfully by dismissing an employee for his conduct during a protest organised by the appellant CFMEU ('*Union*'). In determining the case, the High Court referred heavily to its decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* ('*Barclay*').² In *Barclay*, the Court clarified the principles that Australian courts must apply in relation to claims of prohibited adverse action under the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'). Importantly, the Court emphasised that an employer does not need to show that its reasons for taking action were 'entirely dissociated' from the employee's union position or activity.³ Rather, the question is whether that was a 'substantial and operative factor'⁴ in the decision. In other words, an employee who engages in misconduct while coincidentally being engaged in industrial activity is not thereby immune from discipline, which any other employee would face.

In *Barclay*, the employee, Mr Barclay, sent an email in his capacity as a delegate of the Australian Education Union to union members at the Bendigo Regional Institute of Technical and Further Education (the '*Institute*') containing serious allegations of fraud against unnamed individuals in relation to an upcoming audit upon which the Institute's ongoing accreditation and funding depended. The trial judge accepted the evidence of the Institute's CEO, Dr Harvey, who testified that her reasons for taking adverse action did not include the fact that Mr

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¹ (2014) 253 CLR 243.

² *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500.

³ *Ibid* 523 [62] and 542 [127]; see also *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 especially 241.

⁴ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 522 [57], 542 [127].

Barclay was a union delegate or had participated in union activity. Rather, he was disciplined for the manner in which he raised the allegations (by way of a broadly distributed email) and his failure to report his concerns to management to enable them to be investigated.⁵ The High Court unanimously upheld the approach taken by the trial judge at first instance, after his Honour's decision dismissing Mr Barclay's application was overturned on appeal to the Full Court.⁶ By contrast, in *BHP Coal*, judicial opinion as to the appropriate outcome was split by a majority of three to two. This difference can largely be explained by the fact that in *BHP Coal*, the alleged misconduct was harder to distinguish from the protected industrial activity in question. The relevant facts are discussed below.

II BACKGROUND

BHP Coal operated a mine in Queensland. The employee in question, Mr Doevendans, had been employed there for some 24 years. He was a longstanding member and officer of the Union. In his role as a union officer he was responsible for overseeing industrial disputes, recruiting new members, meeting with management and investigating complaints about occupational health and safety issues.

During 2011 and 2012, BHP Coal and the Union were negotiating for a new enterprise agreement to apply at the mine. Protected industrial action was taken in support of the union's demands. Relevantly, the Union organised a week-long work stoppage and a protest outside the entrance to the mine site. The protesters carried signs bearing various slogans which they would hold up whenever a car passed along the mine entrance road. One of the signs read, 'No principles SCABS No guts' with the word 'scabs' printed in large and bold red font. Mr Doevendans was alleged to have been holding and waving the 'scabs' sign on numerous occasions.

After an investigation into his conduct, he was given a letter setting out BHP Coal's allegations that his actions breached its workplace policies. Mr Doevendans was also asked to attend a meeting with the general manager of the mine, Mr Brick. At this meeting, Mr Doevendans accepted that he probably did hold up the sign but, according to Mr Brick, said that BHP Coal's rules and policies did not apply to him

⁵ See further, Justice Shane Marshall and Amanda Cavanough, 'Case note: Board of Bendigo Regional Institute of Technical and Further Education v Barclay' (2012) 16 *University of Western Sydney Law Review* 155.

⁶ *Ibid.*

while he was 'on the picket line.'⁷ After considering the allegations and his responses Mr Brick decided to dismiss Mr Doevendans.

III THE CASE AT TRIAL

The case was tried in the Federal Court before Justice Jessup. The Union alleged that Mr Doevendans was dismissed for a reason prohibited under section 346 of the *Fair Work Act*: either because he was a member or officer of the Union; or because he participated in lawful activity organised by the Union; or because he represented or advanced the views, claims or interests of the Union.⁸ An important feature of adverse action cases is the reverse onus of proof.⁹ It is presumed that adverse action was taken for the prohibited reason alleged, unless the employer proves otherwise.¹⁰ The central question in this context is: 'why was the adverse action taken?'¹¹ The focus of the court is on the state of mind of the decision-maker and his or her particular reasons for acting. Direct testimony from the relevant decision-maker as to his or her 'true' reasons will usually be essential to discharge the evidentiary burden, but direct evidence may be contradicted by other evidence or objective facts presented.¹²

Mr Brick gave evidence of his reasons for terminating Mr Doevendans' employment on behalf of BHP Coal. He said that he considered that the sign was offensive, humiliating, intimidating and harassing; that Mr Doevendans had deliberately held and waved the sign numerous times knowing it was inappropriate; that he had shown arrogance and a lack of contrition when confronted about his actions; and that Mr Brick thought his behaviour was antagonistic to the culture he was seeking to establish at the mine and a flagrant breach of workplace policies.¹³ There was further evidence that the word 'scab' is a

⁷ *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [No 3]* (2012) 228 IR 195, [20].

⁸ *Ibid* [33] - [35]. The meaning of engaging in 'industrial activity' is set out in s 347 of the *Fair Work Act*.

⁹ Section 361 of the *Fair Work Act*. The reverse onus has been a feature of industrial legislation since 1904, see Anna Chapman, Kathleen Love and Beth Gaze, 'The Reverse Onus of Proof Then and Now: The Barclay Case and the History of the Fair Work Act's Union Victimisation and Freedom of Association' (2014) 37(2) *University of New South Wales Law Journal* 471.

¹⁰ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 517 [44] - [45] per French CJ and Crennan J; *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235, 241 per Mason J.

¹¹ *Ibid* 517 [44].

¹² *Ibid* 517 [45].

¹³ *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [No 3]* (2012) 228 IR 195, [28]-[31].

notorious insult in industries such as mining, denoting contempt for those who continue to work despite a collective decision to take action in support of an industrial objective.¹⁴ In addition, some other employees had complained that they felt intimidated by the signs.

Justice Jessup accepted that Mr Brick's evidence as to the reasons for his decision represented his 'true' reasons in light of the objective facts.¹⁵ However, his Honour found that, since a reason for the dismissal was that Mr Doevendans had held and waved the sign, it followed that one reason for his dismissal was his participation in the protest activity organised by the Union¹⁶ and another was that he was representing or advancing the interests of the Union.¹⁷ In reaching this conclusion, his Honour noted that section 346 is a beneficial protective provision of the *Fair Work Act* that should not be narrowly or pedantically construed.¹⁸ The Court ordered Mr Doevendans be reinstated to his former position. BHP Coal appealed.

IV APPEAL TO THE FULL COURT OF THE FEDERAL COURT

The Full Court (by majority)¹⁹ allowed the appeal, finding that the trial judge had erred in concluding that the dismissal was contrary to the *Fair Work Act*. The majority emphasised that it is an error to treat a person's union position, membership or activities as having to be entirely dissociated with the adverse action. Justice Dowsett said of the decision below:

His Honour's reasons are both careful and comprehensive but, with all respect, I find it impossible to reconcile his findings and conclusions with the High Court's decision in *Barclay*.... Clearly, holding and waving the sign comprised part of the reason for the adverse action as did, in *Barclay*, the sending of the relevant email. Although Mr Barclay's conduct was in discharge of his union duties, and may have involved his representing or advancing the views, claims or interests of the union, such characterisation did not mean that the adverse action was because of his engagement in union activity. Rather, it was the content of the email, the circumstances in which it was sent and the likely effects on the Institute's operations which caused the adverse action. In other words, an employee may act in a way which falls within

¹⁴ *Ibid* [92].

¹⁵ *Ibid* [36], [41].

¹⁶ *Ibid* [115].

¹⁷ *Ibid* [123]-[124]. NB Jessup J held that Mr Doevendans was not dismissed because he was a member or officer of the union.

¹⁸ *Ibid* [122].

¹⁹ *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 219 FCR 245.

s 346 and/or s 347 but may do so in a way, or in circumstances which cause the employer to act adversely, not because of the employee's engagement in industrial activity, but because of other concerns...

In my view, the primary Judge's finding that the employee's engagement in industrial action or activity played no part in the employer's decision-making process disposed of the matter.²⁰

Similarly, Justice Flick observed that Mr Brick's reasons, accepted by the primary judge as true, went beyond the mere fact that he held and waved the 'scabs' sign and the *Fair Work Act* does not give union members or officials license to act in a way which would not be tolerated in the case of any other employee. In his Honour's view, the trial judge erred by seizing one aspect of the employee's conduct and 'placing to one side the reasoning process of Mr Brick.'²¹ The result, in his Honour's opinion, was that the primary judge did not make an ultimate finding of fact as to what was a 'substantial and operative' reason for the dismissal.²²

Justice Kenny, in dissent, said that by holding and waving the sign Mr Doevendans had been representing or advancing the union's interests in bargaining negotiations with BHP Coal and there was no error in the trial judge's finding that the employee was dismissed for this reason. Her Honour found that it was open to find that BHP Coal had not discharged the onus of proof on this point, considering Mr Brick's reasons against other evidence presented at trial.²³ Her Honour added that it did not matter whether the union's view (that employees who continued to work during the industrial action were 'scabs') was reasonable or not because there is no requirement under the *Fair Work Act* for the union's views and interests to be reasonable, as long as they are lawful.²⁴ However, her Honour agreed with the majority that the primary judge had erred in concluding that Mr Doevendans was dismissed because he participated in the protest.²⁵

²⁰ Ibid 250-251 [12]-[13] (emphasis added).

²¹ Ibid 276 [108].

²² Ibid.

²³ Ibid 265 [64].

²⁴ Ibid 267 [69].

²⁵ Ibid 263-264 [57]-[59].

V THE HIGH COURT'S DECISION

A The Majority

Chief Justice French and Kiefel J concluded that it was not possible to find that the employer had contravened the *Fair Work Act* since none of the reasons stated by Mr Brick as actuating the dismissal (and accepted by the trial judge as true) were prohibited under the *Fair Work Act*. Their Honours observed that in *Barclay*, French CJ and Crennan J said that:

it is incorrect to conclude that, because the employee's union position and activities were inextricably entwined with the adverse action, the employee was therefore immune and protected from the adverse action. Such an approach would destroy the balance between employers and employees which the Act seeks to attain and which is central to s 361 [of the *Fair Work Act*].²⁶

In their Honours' view, the trial judge, by accepting Mr Brick's reasons but nonetheless finding a breach seemingly added 'a further requirement to [the onus of proof], namely that the employer dissociate its adverse action completely from any industrial activity.'²⁷ Their Honours observed that Mr Brick's reasons had to do with the content of Mr Doevendans' communications with his fellow employees rather than the fact of participating in the protest or representing union views. Their Honours considered that it was not the mere fact that he attended the protest and held and waved the sign, but the content of the sign and other concerns about Mr Doevendans' behaviour as an employee which caused Mr Brick to dismiss him.²⁸

In a separate judgment, Justice Gageler concurred with French CJ and Kiefel J that the appeal should be dismissed. His Honour noted the CFMEU's submission that the majority view potentially undermined the protective provisions of the *Fair Work Act* by allowing an employer to apply its own description to otherwise protected industrial action. However, his Honour was not persuaded by that argument and said, in effect, that an employer would not be able to escape liability so easily. The employer would need to show that the employee's industrial activity, membership or status was not an operative reason for the adverse action.²⁹ That condition was satisfied in this case because the trial judge did not accept that an inference was available

²⁶ (2014) 253 CLR 243, 252 [20].

²⁷ Ibid 253 [22].

²⁸ Ibid 249 [10].

²⁹ Ibid 269 [91] - [92].

on the facts to contradict the reasons given by Mr Brick (which were accepted as his true motivations).³⁰

B *The Minority*

In his dissenting judgment, Hayne J said that the use of the word 'scabs' on the sign cannot be divorced from the circumstances in which it was used. In his Honour's view, it was not possible to distinguish between the employee's participation in the protest and the manner in which he protested. Therefore, it was not relevant for Mr Brick to consider whether the expression of that protest might be offensive to others; it was enough that it was lawful.³¹ In dismissing Mr Doevendans for protesting in an offensive matter, his Honour found that Mr Brick acted for a prohibited reason.

Justice Crennan agreed with the reasons of Hayne J. Interestingly, her Honour was a member of the High Court which heard *Barclay* and said that *Barclay* did not impede a court from drawing inferences from all of the circumstances to contradict honest reasons given by a decision-maker.³² In her Honour's view, notwithstanding that Mr Brick's evidence was accepted as true by the primary judge, 'the circumstances and conduct for which Mr Doevendans was dismissed were inconsistent with, and rendered unreliable, Mr Brick's assertion that Mr Doevendans' engagement with industrial action or activity had nothing to do with his decision.'³³

VI CONCLUSION

As explained above, the members of the High Court (and the Federal Court below) took different approaches to determining this case while all emphasising that their task involved a factual enquiry into the state of mind of the decision-maker viewed in light of the surrounding facts and circumstances. Clearly, the application of settled principles is less likely to produce uniform decisions where adverse action is taken against an employee for misconduct which is closely entwined with the employee's participation in industrial activity. Some suggest that the 'strict' application of *Barclay* which prevailed in the High Court may undermine the protective provisions of the *Fair Work Act*.³⁴ However,

³⁰ Ibid 268 [90]; see further (2012) 28 IR 195, [38]- [41].

³¹ Ibid 258 [47].

³² Ibid 263 [68].

³³ Ibid 263 [67].

³⁴ 'High Court 'scab' ruling not the end: Stewart', *Workplace Express*, 16 October 2014. This echoes Justice Jessup's concern that section 346 of the *Fair Work Act* is a beneficial

each case turns on its own facts. Employers cannot escape liability under the *Fair Work Act* simply by labelling protected industrial activity as something else, such as disloyalty. Employees and unions will continue to challenge employer decisions in this area and it is for employers to demonstrate, in light of all of the evidence, that they did not act for the prohibited reason alleged.³⁵

protective provision and should be beneficially construed. See further *CFMEU v Endeavour Coal Pty Ltd* [2015] FCAFC 76 at [185] per Bromberg J.

³⁵ See for example, *Sayed v CFMEU* [2015] FCA 27 per Mortimer J especially at [189] and following.