IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M 128 OF 2011**

On appeal from
the Federal Court of Australia

BETWEEN:

THE BOARD OF BENDIGO REGIONAL INSTITUTE OF TECHNICAL AND FURTHER EDUCATION
Appellant

GREGORY PAUL BARCLAY
First Respondent

AUSTRALIAN EDUCATION UNION
Second Respondent

INTERVENER'S SUBMISSIONS

PART I FORM OF SUBMISSIONS

10 1. This submission is in a form suitable for publication on the internet.

PART II BASIS OF INTERVENTION

2. Section 569 of the *Fair Work Act 2009* (**the FW Act**) empowers the Minister for Tertiary Education, Skills, Jobs and Workplace Relations (**the Minister**) to intervene on behalf of the Commonwealth in proceedings before a court in relation to a matter arising under that Act if the Minister believes it is in the public interest to do so.

3. The Minister intervenes in this appeal in support of the Respondents.

PART III INTERVENTION

4. Not applicable.

PART IV LEGISLATIVE PROVISIONS

20 5. The Minister accepts the Appellant's statement of the applicable provisions.

Filed on behalf of the Intervener by:
Australian Government Solicitor
Level 21, 200 Queen Street, Melbourne, VIC 3000
DX5678 Canberra

Date of this document: 2 November 2011
Contact: Catherine Mann
File ref: 11010049
Telephone: 02 6253 7402
Facsimile: 02 6253 7381
E-mail: catherine.mann@ags.gov.au

PART V ISSUES PRESENTED BY THE APPEAL

SUMMARY

6. The Minister's submissions focus on grounds 2, 3 and 4. In summary, the Minister submits:

6.1. To ask whether s 346 poses an 'objective' or 'subjective' test is to pose a question that is apt to mislead. The operation of s 346 turns on whether adverse action has taken place 'because of' a proscribed reason.

6.2. In circumstances where a person is presumed (by reason of s 361(1)) to have taken 'adverse action' for one or more reasons proscribed by s 346, that person will not necessarily 'prove otherwise' by giving evidence at trial that the adverse action was taken for a reason or reasons believed not to be proscribed, even if that evidence is accepted as honest.

6.3. It is necessary to distinguish between what must be disproved to avoid a finding of contravention of s 346 (that adverse action was taken because of, or for reasons that included, a proscribed reason), and the evidence that will be sufficient to discharge that burden.

6.3.1. Evidence that a person did not believe that his or her actions were taken for proscribed reasons, if accepted as honest, is plainly of central relevance. But that evidence may not be sufficient to prove that action was not taken for reasons that included a proscribed reason, because the conscious reasons of the decision-maker will not be decisive if the decision-maker made a mistake of fact, or a mistake of law, or if the evidence given is not sufficient to exclude the existence of reasons additional to those advanced, or if a decision was based on a factor of which the decision-maker was not conscious.

6.3.2. In each of those circumstances, honest evidence about the reason or reasons for which particular action was taken may not be sufficient to discharge the burden of proving that adverse action was not taken for a proscribed reason.

6.4. The reasons given by Dr Harvey for taking adverse action against Mr Barclay revealed an objective connection between the action taken and a proscribed reason. While she did not characterise her own actions in a way that recognised that fact, her evidence raised the possibility that a proscribed reason was a 'substantial and operative'[1] reason for the adverse action taken

---

[1] *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 at 616, 619.

against Mr Barclay. In those circumstances, her evidence could not be accepted as determinative of the absence of a proscribed reason.

6.5. The majority was correct in concluding that, where the adverse action alleged is dismissal, injury in employment or prejudicial alteration (as opposed to discrimination), a comparative test of the kind dealt with in *Purvis v State of New South Wales (Department of Education and Training)*[2] is not required. The protection given by the FW Act in relation to these three types of adverse action depends upon the attributes of the protected persons, and therefore does not require the use of a comparator.

LEGISLATION

7. Part 3-1 of the FW Act confers a range of general protections, including protection from a variety of adverse actions taken for a variety of proscribed reasons (including reasons relating to freedom of association)[3]. The operation of some of those protections expressly depends on the intent of the person taking the adverse action (e.g. ss 343, 348, 355). But many of the protections simply rely on action that is taken for a particular reason (e.g. ss 340, 346, 351, 352 and 354).

8. Section 346 of the FW Act is a provision of that latter kind. It relevantly provides:

> **346 Protection**
>
> A person must not take adverse action against another person because the other person:
>
> (a) is or is not, or was or was not, an officer or member of an industrial association; or
>
> (b) engages, or has at any time engaged or proposed to engage, in industrial activity[4] within the meaning of paragraph 347(a) or (b) ...

9. Sections 360 and 361 of the FW Act provide:

> **360 Multiple reasons for action**
>
> For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.
>
> **361 Reason for action to be presumed unless proved otherwise**
>
> (1) If:
>
> (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

---

2 (2003) 217 CLR 92.

3 See FW Act s 336(b).

4 Defined in FW Act s 347(b) to include the encouragement of or participation in lawful activity organised or promoted by an industrial association.

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise. (emphasis added)

ADVERSE ACTION 'BECAUSE' OF A PROSCRIBED REASON

10. The Appellant accepts that it took 'adverse action'[5] against Mr Barclay in three respects.[6] The only issue is whether it did so 'because of' a reason proscribed by s 346.

11. In determining whether adverse action is taken 'because of' a proscribed reason, the observations of Gummow, Hayne and Heydon JJ in *Purvis v State of New South Wales (Department of Education and Training)* are relevant. After summarising an argument that sought to draw 'distinctions between objective and subjective criteria of operation',[7] and having noted a provision (equivalent to s 360 of the FW Act) that acknowledged the possibility of multiple reasons for proscribed action, their Honours said:[8]

> [W]e doubt that distinctions between motive, purpose or effect will greatly assist the resolution of any problem about whether treatment occurred or was proposed "because of" disability. Rather, the central question will always be — *why* was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it "because of", "by reason of", that person's disability? Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression "because of". (original emphasis)

12. While s 346 uses the word 'because', ss 360 and 361(1) refer to action being taken 'for' a reason or reasons. The majority in the Full Court was correct in concluding that those words are used interchangeably. Otherwise, s 361(1) would not assist in establishing a breach of s 346, and would therefore fail to serve its purpose. As the majority said:[9]

> In consolidating the provisions and adopting a generic approach for s 346, the draftsperson had to choose between the two competing prior approaches. The more modern style of using the conjunction "because" instead of "for the reason that" was adopted. The choice was stylistic, not substantive. The primary judge was correct to conclude that the word "because" in ss 340(1)(a) and 346 was intended to have the same meaning as "by reason of the circumstance that". The *Macquarie Dictionary* gives as the primary meaning for the word "because", when used as a conjunction, "for the reason that" and, when used as an adverb, "by reason". The expressions "because" and "by reason of", in the context of the relevant provisions of the *Fair*

---

5 FW Act s 342.

6 Appellant's submissions, paragraph 16.

7 (2003) 217 CLR 92 at 163 [234].

8 (2003) 217 CLR 92 at 163 [236]. In the same case, Kirby and McHugh JJ (dissenting) said, at 142-143 [160]: "Motive is ordinarily the reason for achieving an object. But one can have a reason for doing something without necessarily having any particular object in mind."

9 (2011) 191 FCR 212 at 220 [24] [AB#].

Work Act, are interchangeable. If that were not so, as the primary judge pointed out, the assistance provided to applicants by ss 360 and 361 would not be available.

13. Having regard to the two passages just quoted, the majority in the Full Court was correct to identify the central question as being:[10]

> [W]hy was the aggrieved person treated as he or she was? If the aggrieved person was subjected to 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, specified by s 346 in conjunction with s 347?

The 'real reason' formulation

14. The references in the authorities,[11] and in the judgment of the majority below,[12] to 'the real reason' for a decision should not be understood as suggesting that it is necessary to seek to identify a single 'real reason' for a decision.

15. As s 360 expressly acknowledges, a person may take adverse action against another person for a number of different reasons. If any one of those reasons is a proscribed reason then a breach of s 346 occurs, provided the proscribed reason is a 'substantial and operative factor'.[13]

16. The 'real reason' language is taken from Mason J's judgment in *General Motors Holden Pty Ltd v Bowling* (***Bowling***),[14] but in that judgment Mason J expressly rejected the proposition that it was necessary to identify 'the sole or predominant reason actuating the employer'.[15] His Honour expressly held that, where adverse action is taken for multiple reasons, if any one of the 'substantial and operative' reasons is a proscribed reason then that is sufficient. Given that express finding, his Honour's references to the 'real reason' for a decision are not properly understood as requiring an inquiry as to a single 'real', or 'true', reason for a decision.

17. The adjective 'real' serves not to deny the possibility of multiple reasons,[16] but to emphasise that a person may make a decision for reasons other than those that are claimed or to which a decision-maker is prepared to admit, and indeed for reasons that may not be revealed even by honest evidence (perhaps because the decision is made for reasons of which the decision-maker is not conscious).

---

10 (2011) 191 FCR 212 at 221 [27] [AB#].

11 E.g. *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 at 617.

12 (2011) 191 FCR 212 at 221 [28] [AB#].

13 *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 at 616. This is reflected in paragraph 1458 of the Explanatory Memorandum which notes that the "sole or dominant" reason test which applied to some protections in the *Workplace Relations Act 1996* does not apply in Part 3-1. See also *Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326 at 342 [54]-[55].

14 (1976) 12 ALR 605.

15 *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 at 616.9 and 619.8.

16 A possibility acknowledged by the majority many times: see for example (2011) 191 FCR 212 at 233 [74] [AB#], referring to "the real reason or reasons for the conduct taken against Mr Barclay".

18. The majority in the Full Court captured the correct approach, in observing:[17]

> 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 held a benevolent intent.

19. That passage reveals that it is not accurate to characterise the approach of the majority as simply rejecting a subjective inquiry in favour of an objective inquiry. Instead, their Honours postulated an inquiry into what actuated the adverse action by the decision-maker (i.e. the actual reasons of the decision-maker) but acknowledged that the evidence that is relevant to identifying the actual or real reasons is not restricted to evidence given by the decision-maker. The relevant evidence also includes objective evidence as to the surrounding circumstances that may demonstrate that a decision was made for proscribed reasons.[18]

20. On that approach, evidence from the decision-maker is 'centrally relevant'.[19] Without such evidence, a decision-maker would have little prospect of displacing the presumption under s 361(1),[20] which in effect compels decision-makers to give evidence to avoid a finding of contravention.[21] But while such evidence is centrally relevant, it is not determinative, even if it is accepted as honest.

21. It is an error to reduce the question to a binary choice between believing the evidence of the decision-maker or rejecting that evidence.[22] When evidence is adduced as to the reason or reasons for taking adverse action, at least the following five possibilities arise:

---

17 (2011) 191 FCR 212 at 221 [28] [AB#]. That approach is consistent with that adopted in *Pearce v WD Peacock & Co Ltd* (1917) 23 CLR 199 at 203-204 (Barton ACJ), which indeed gave less weight to evidence from the decision-maker. Barton ACJ said at 203, in the context of a predecessor provision: "No doubt, it is an inquiry in a large measure as to motive; and no doubt also, the motive is to be inferred from facts, and mere declarations as to the mental state that prompted the employer's action are entitled to little or no regard".

18 In that respect, the distinction between "reasons" and "intent" in s 361 may be significant: see Respondent's submissions, paragraph 13.

19 (2011) 191 FCR 212 at 221 [28] [AB#].

20 See *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* (2011) 193 FCR 526 at [372] (Barker J). The Explanatory Memorandum to the Fair Work Bill 2009 states at [1461], in relation to s 361 that it "recognises that, in the absence of such a clause, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason".

21 *Seymour v Saint-Gobain Abrasives Pty Ltd* (2006) 161 IR 9 at 14 [29]; *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34 at 68 [221], both of which were cited with approval in *Rojas v Esselte Australia Pty Ltd (No 2)* (2008) 177 IR 306 at 321-322 [48]-[49]. See also *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 at 617.6.

22 Cf Appellant's submissions, paragraph 37; (2011) 191 FCR 212 at 254 [198] (Lander J, dissenting) [AB#].

21.1. First, the evidence of a decision-maker may be rejected by the Court on the basis that the reasons advanced by the decision-maker are not the 'real reasons' for the adverse action, in the sense that the evidence concerning those reasons is inaccurate, incomplete, or untruthful;

21.2. Second, the evidence of a decision-maker may be accepted by the Court in the sense that the Court finds that the evidence is honest, but the Court nevertheless concludes that the decision-maker's evidence does not identify the 'real reasons' for the adverse action because other evidence demonstrates that adverse action was taken for reasons of which the decision-maker was not conscious;

21.3. Third, the evidence may be accepted by the Court in the sense that that the Court finds that the evidence is honest, but that evidence is insufficient to avoid a finding of contravention because it does not exclude the possibility that a proscribed reason was a substantial and operative reason for the adverse action and therefore is insufficient to discharge the reverse onus imposed by s 361(1);[23]

21.4. Fourth, the evidence may be accepted by the Court in the sense that that the Court finds that the evidence is an honest, accurate and comprehensive statement of the reasons for which adverse action was taken, but on analysis those reasons include one or more proscribed reasons (whether or not that is appreciated by the decision-maker);

21.5. Fifth, the evidence may be accepted by the Court in the sense that that the Court finds that the evidence is an honest, accurate and comprehensive statement of the reasons that adverse action was taken, and that evidence is sufficient to discharge the reverse onus imposed by s 361(1).

22. The first situation recognises that a decision-maker may give evidence of the reasons for which a decision was made that the Court does not accept. That is the sense in which the phrase 'the real reason' for a decision was first used in *Bowling*.

23. The second situation reflects the fact that decision-makers are not always aware of all of the reasons that influence their decisions. Unconscious discrimination is a concept recognised in psychology and discrimination law.[24] The concept is clear enough. If, for example, an employer of a large number of employees downgraded the performance ratings of most of its female employees, and did not downgrade the

---

23 See, e.g., *Heidt v Chrysler Australia Ltd* (1976) 13 ALR 365 at 374.

24 See, e.g., Jonathan Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 23 *Sydney Law Review* 535 at 537-538; Audrey J. Lee, 'Unconscious Bias Theory in Employment Discrimination Litigation' (2005) 40 *Harvard Civil Rights - Civil Liberties Law Review* 481. See also *Virgin Blue Airlines Pty Ltd v Hopper* [2007] QSC 075 at [30]-[34], in which the court dismissed an appeal from a decision of the Anti-Discrimination Tribunal which had found that the airline had unconsciously discriminated on the basis of age in a recruitment process for flight attendants; see also *Griggs v Duke Power Co* (1971) 401 US 424.

performance ratings of any of the male employees, then provided there are sufficient numbers in both groups, in the absence of evidence to explain the disparity it would be apparent that one of the reasons for decisions downgrading the performance ratings of female employees was their sex. That would not cease to be one of the reasons for such decisions simply because the decision-maker gave honest evidence that he was not taking account of the sex of employees in moderating their performance ratings. The evidence of the employer would not 'prove otherwise' for the purpose of a provision such as s 361(1), even if the decision-maker was found by the trial judge to be honest.

24. The third situation recognises that, while the evidence may be accepted so far as it goes, that evidence may not be inconsistent with the possibility that a proscribed reason influenced the decision to take adverse action because, for instance, the evidence of the reasons for a decision does not, in terms, deny the existence of any reasons additional to those that are expressly identified. In that situation, the evidence of the decision-maker will not be sufficient to discharge the reverse onus under s 361(1). For the reasons explained below, *Bowling* is a case of this kind.[25]

25. The fourth situation recognises that s 346 may be contravened even where a decision-maker has genuinely failed to see an objective connection between a decision to take adverse action and an attribute or activity that attracts the protection of s 346, or where the decision-maker has a genuinely held subjective belief that adverse action is permitted (e.g. a belief that industrial action is unlawful, when in fact it is not). It recognises that 'it is not necessary that the subjective belief held by the person accused of the adverse action about such a fact should correlate with the legal conclusion as to the existence or non-existence of that fact'.[26] For the reasons addressed below, this appeal concerns a case of this kind.

26. It is in the fifth of the above situations that the evidence of the decision-maker can truly be described as 'determinative'. Thus, when:

    26.1. the evidence given by a decision-maker is accepted as an honest, accurate and comprehensive statement of the reasons that adverse action was taken; and

    26.2. the reasons disclosed do not include a reason that is objectively characterised as a proscribed reason;

    the onus imposed by s 361(1) will be discharged and no contravention will be established. *Harrison v P & T Tube Mills Proprietary Limited*[27] is a case of this kind, because the apparent connection between adverse action and a proscribed reason was answered on the evidence.

---

25 It may also be a case of the fourth kind.

26 (2011) 191 FCR 212 at 222 [34] [AB#].

27 (2009) 188 IR 270 at 276 [31]-[33] [AB#].

General Motors Holden Pty Ltd v Bowling

27. *Bowling*[28] was a case of the first and the third kinds identified above (and perhaps also the fourth kind). The question was whether the Industrial Court had erred in holding that the appellant had failed to discharge the onus placed on it by the then equivalent to s 361(1).[29] The evidence that the appellant had relied upon to satisfy that onus, being evidence from the plant superintendent that the respondent was dismissed because of his poor work record and attitude to the job, was not accepted by the Industrial Court as the 'real reason' for the dismissal. That conclusion was based in part upon the Industrial Court's assessment of the credibility of the witnesses who were called. In that sense, the case was of the first kind identified above.

28. On appeal, the company contended that Woodward J, who was one of the judges in the Industrial Court, had been correct in his finding that the real reason for the dismissal was that 'the plant superintendent was influenced by a belief that Mr Bowling had deliberately disrupted production on several occasions ... and was thus setting a very bad example to others'.[30] The company contended that this was not a proscribed reason, meaning that no contravention had occurred.

29. On appeal, Mason J (with whom Stephen and Jacobs JJ agreed) accepted that the principal reason for Mr Bowling's dismissal was that the employer considered him to be 'a troublemaker, to have deliberately disrupted production and thereby to be setting a bad example to others' (at 617). However, his Honour held that 'this finding does not carry the appellant the whole distance'. Mason J explained (at 617):[31]

> It is to my mind a very considerable leap forward to say that this finding in itself is a comprehensive expression of the reasons for dismissal and that they were dissociated from the circumstance that the respondent was a shop steward. No doubt this is an advance which could be made if officers of the appellant had said in evidence: "We dismissed him because he was a troublemaker, because he was deliberately disrupting production and setting a bad example and we did so without regard at all to his position as a shop steward", and that evidence had been accepted. Yet this evidence was not given and, even if it had been given, there may have been a question as to its reliability. Once it is said that the appellant dismissed him because he was deliberately disrupting production and was setting a bad example it is not easy to say without more that this had nothing to do with his being a shop steward. Although the activities in question did not fall within his responsibilities as a shop steward his office gave him a status in the work force and a capacity to lead or influence other employees, a circumstance of which the appellant could not have been unaware. It would be mere surmise or speculation, unsupported by evidence, to suppose that the appellant's management ... divorced that consideration from the circumstance that he was a shop steward.

---

28 *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605.

29 *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 at 616-617.

30 *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 at 614.7.

31 *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 at 617-618 (emphasis added).

30. Thus, because Mr Bowling's status as a shop steward was objectively connected to his capacity to lead or influence and set an example to other employees, in order to discharge the reverse onus the company needed to lead evidence that that fact was not a significant and operative reason in the decision to dismiss him.[32] The question whether such evidence would have been accepted, had it been given, would have depended not just on the honesty of those who gave the evidence, but also on whether the evidence was reliable.

31. In *Bowling*, the two individuals who actually made the decision to dismiss Mr Bowling had not been called to give evidence. That 'left uncontroverted the possibility that the respondent's position as a shop steward was an influential, perhaps even a decisive, consideration in their minds.'[33] Accordingly, *Bowling* was a case of the third kind identified above, because the evidence led was not sufficient, in the circumstances, to exclude the possibility that at least one of the reasons that adverse action was taken was a proscribed reason.

32. The submissions of the Respondents,[34] and the reasons of the majority below,[35] give considerable emphasis to Mason J's references in *Bowling* to whether the reasons for adverse action can be 'dissociated' from the reasons proscribed by s 346. The Minister submits that the references in the authorities to 'dissociating' the reasons for a decision should not be permitted to distract attention from the statutory text. The question is, and at all times remains, whether a decision-maker can prove that adverse action was not taken 'because of' the proscribed reason alleged. Where the objective circumstances suggest a connection between the taking of adverse action and a proscribed reason, the task of proving that action was not taken for that proscribed reason may be particularly demanding.[36] That is the task that is referred to by the term 'dissociation'. It should not be regarded as a separate requirement or test.

33. Where evidence is given by a decision-maker that adverse action was taken for a reason that is apparently innocent (e.g. non-performance of duties at work), but further inquiry reveals that there was a 'connection' (to use a neutral term) between the facts that resulted in the adverse action and a proscribed reason, the questions of causation that arise may be particularly difficult. The consequences of that difficulty will generally fall upon a decision-maker, given the burden on the decision-maker to show that a proscribed reason was not a substantial and operative reason for the adverse action. Nevertheless, it is to be expected that if adverse action is taken by an employer in response, for example, to theft or workplace assault by one of their employees who is a union official, the employer would ordinarily be able to

---

32 *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 at 618.

33 *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 at 619.

34 See, e.g., Respondents' submissions, paragraphs 25, 27-28, 31-32.

35 See, e.g., (2011) 191 FCR 212 at 232-233 [72]-[74], 234 [78] [AB#].

36 It may be doubted that late arrival for work is an objective circumstance that suggests such a connection, by contrast with the facts in this case, where adverse action is taken by reason of an email sent to union members by a person in their capacity as a union official: cf Respondents' submissions, paragraph 28.

establish that no other reason was a substantial and operative reason for the adverse action, and thus to discharge the reverse onus.

This case

34. This appeal concerns the third and fourth situations identified above.

35. Dr Harvey gave reasons for taking adverse action against Mr Barclay that she believed were not proscribed reasons, and she expressly denied that she took adverse action because of Mr Barclay's membership of the Second Respondent or because he had engaged in industrial activity.[37] However, while Dr Harvey's evidence was accepted (in the sense that it was considered truthful), both the reasons given by Dr Harvey, and the circumstances in which adverse action were taken, revealed a strong objective connection between the adverse action taken and the proscribed reasons.

36. In particular, Dr Harvey expressly based her decision to suspend Mr Barclay in part on the language used by Mr Barclay in the email he sent on 29 January 2010.[38] That email was sent only to union members, and it was signed by Mr Barclay in his capacity as a union official.[39] In sending that email, there is no question that Mr Barclay was engaging in industrial activity, with the result that, on Dr Harvey's own account, she suspended Mr Barclay for reasons that included the fact that he had engaged in industrial activity.

37. Of course, Dr Harvey did not characterise her reasons in that way, but that is not decisive. The characterisation that she put on her own reasoning process did not, in the circumstances of that case, change the fact that the operative reasons for her decision included a proscribed reason. The way that a decision-maker characterises his or her own actions cannot determine the availability of the protections conferred by the legislature in s 346.

38. This case is in marked contrast to *Bowling* (which turned on the absence of evidence from the true decision-makers), because Dr Harvey's evidence tended to establish rather than deny the existence of a proscribed reason for the taking of adverse action. It did so because it revealed that at least one of the reasons for which she took adverse action against Mr Barclay was that he had sent an email, and the terms of that email established that, in sending the email, he was engaging in lawful industrial action.

39. Another way of putting the above submission is that Dr Harvey's evidence could not displace the presumption under s 361(1) that her actions were taken for a proscribed reason, because an objective assessment of Dr Harvey's evidence concerning her subjective reasons for suspending Mr Barclay revealed that she had

---

37 (2010) 193 IR 251 at 264 [52]-[53] (trial judge) [AB#].

38 (2010) 193 IR 251 at 264 [49] (trial judge) [AB#].

39 (2011) 191 FCR 212 at 230-231 [60]-[61], [64] [AB#].

suspended him in part because he had engaged in industrial activity (even though she did not appreciate that his actions had that legal character). The majority correctly observed:[40]

> The sending of the email, and the manner in which it was expressed, were part of the exercise by Mr Barclay of his functions as an officer of the AEU. They were also at the heart of his engagement in industrial activity, as was Mr Barclay's insistence upon retaining the confidences of the members who approached him. Accordingly, Dr Harvey's evidence, as well as the terms of the letter, made it clear that, on behalf of BRIT, Dr Harvey took adverse action against Mr Barclay in three respects, for reasons that included the fact that he was an officer of the AEU and the fact that he had engaged in industrial activity ... The fact that Dr Harvey may have chosen to characterise the conduct of an officer as the conduct of an employee and therefore did not regard herself as taking action because Mr Barclay was an officer, or because of any of his industrial activities, does not alter the fact that her real reasons included these factors. (emphasis added)

40. Having regard to that passage, it is clear that the Full Court did not purport to overrule the trial judge's finding that Dr Harvey's evidence should be accepted.[41] Instead, their Honours concluded that, on proper analysis, Dr Harvey's reasons did not rebut the presumption (and, indeed, tended to prove) that adverse action had been taken against Mr Barclay for reasons that included a proscribed reason.

41. The above interpretation of ss 346 and 361 is consistent with the purpose both of those provisions, and of the FW Act more generally. Part 3-1 of the FW Act protects basic human rights, and gives effect to Australia's international obligations. It should not be interpreted as denying a remedy for adverse action taken because of industrial activity merely because the perpetrator did not recognise the industrial activity for what it was. Any other interpretation would substantially compromise the protection of the right to freedom of association, as it would leave employees vulnerable to employers' honest mistakes of fact or of fact and law.[42] It would make ignorance of the law a complete defence to an adverse action claim. It would protect those who, as in the case of Dr Harvey, incorrectly, if honestly, characterised the industrial activities of a union official as if they were activities of a disloyal employee.

42. The Appellant asks 'How could BRIT have successfully defended the application based on the approach taken by the majority?'[43] The implication is that error is revealed in the majority's approach because that approach did not leave the Appellant with any way to escape liability. That implication is wrong. Given that Dr Harvey admitted that she took adverse action against Mr Barclay by reason of facts that she characterised as breaching the Code of Conduct, in circumstances

---

40 (2011) 191 FCR 212 at 234 [78] [AB#].

41 Cf Appellant's submissions, paragraph 62. Accordingly, no issue arises in relation to *Fox v Percy* (2003) 214 CLR 118 at 128-129 [28]-[31].

42 The FW Act does not create a defence to s 346 built around the genuine belief of the decision-maker, in contrast to the provisions prohibiting misrepresentations, which provide that a person will not have contravened the provision if he or she can prove a certain subjective state of knowledge (e.g. not knowing or being reckless as to the relevant matter): cf FW Act ss 345, 349, 357, 359.

43 Appellant's submissions, paragraph 48.

where the conduct that attracted the adverse action was in fact properly identified as industrial activity, there is no reason it should have been possible for Dr Harvey to give evidence at the trial that would allow the Appellant to escape liability. In other words, once Dr Harvey took adverse action against Mr Barclay for a proscribed reason, it is perfectly proper that the Appellant could not escape liability for the consequences of that action.

PURVIS AND THE USE OF COMPARATORS

43. The majority below was generally correct in taking the view that the general protections provisions in Division 3 and Division 4 of Part 3-1 of the FW Act do not *require* any comparator, with the exception of sub-item 1(d) of item 1 in the table in s 342 of the FW Act (and, we submit, sub-item 4(b) of that table).[44]

44. The legislation at issue in *Purvis v State of New South Wales (Department of Education and Training)*[45] expressly required a comparison between the treatment of a disabled person and the treatment that would be received by a person without the disability. This Court made it clear that the issues it addressed turned entirely on the construction of the Act.[46]

45. By contrast, the specific provisions concerning discrimination aside,[47] the general protections provisions in Part 3-1 of the FW Act operate simply on the basis of the taking of adverse action for a proscribed reason. The legislation does not demand a comparison between the treatment of protected employees and non-protected employees, or between employees engaging in protected activities and employees engaging in similar activities that are not protected. For that reason, the statement of the majority that it is 'not to the point to say that any other employee who acted in the same way would have been subject to the same discipline'[48] is correct.

46. If the outcome turned, in every case, on such comparison, employees would be robbed of the protection the provisions are designed to give them. For example, an employer cannot dismiss an employee who is absent for two weeks carrying out

---

44 (2011) 191 FCR 212 at 223 [35] [AB#]. Mason J's statement in *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 at 616.7 is concerned to demonstrate why it is necessary for a proscribed reason to be a substantial and operative reason for the taking of adverse action, not to require the use of a comparator.

45 (2003) 217 CLR 92. See, relevantly, *Disability Discrimination Act 1992* (Cth) s 5, set out at 217 CLR 92 at 149 [186].

46 (2003) 217 CLR 92 at 152 [194]. Further, the plurality majority judgment distinguished disability discrimination from sex and race discrimination, on the ground that the former necessarily focuses on criterion of admitted difference: at 153-154 [198]-[199]. Adverse treatment by reference to proscribed reasons under the FW Act has more in common with race and sex discrimination, as discrimination on any of these grounds occurs by reference to "a generally irrelevant consideration".

47 Even s 351 of the FW Act (the anti-discrimination provision) may not require any consideration of a comparator, but is "a straight-out prohibition on attribute-based treatment": see Rice and Roles, "'It's a Discrimination Law Julia, But Not As We Know It': Part 3-1 of the Fair Work Act" (2010) 21 *The Economic and Labour Relations Review* 13 at 18.

48 (2011) 191 FCR 212 at 223 [35] [AB#].

lawful protected industrial action. But (subject to the operation of any other protections) an employer may well be able to dismiss another employee who is absent for two weeks. In cases of that kind, the use of the comparator would lead to error.

Date of filing: 2 November 2011

Tom Howe QC
Telephone: 02 6253 7415
Facsimile: 02 6253 7380
Email: tom.howe@ags.gov.au

Stephen Donaghue
Telephone: 03 9225 7919
Facsimile: 03 9225 8668
Email: s.donaghue@vicbar.com.au

Counsel for the Intervener