HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

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

AND

GREGORY PAUL BARCLAY & ANOR RESPONDENTS

Board of Bendigo Regional Institute of Technical and Further Education v Barclay
[2012] HCA 32
7 September 2012
M128/2011

ORDER

1. *Appeal allowed.*

2. *Orders 1, 2 and 3 of the orders of the Full Court of the Federal Court of Australia, made on 9 February 2011, be set aside, and in their place, order that the appeal to that Court be dismissed.*

3. *Any question of the costs of the appeal be dealt with by consent order or by this Court on the papers as indicated in the reasons for judgment.*

On appeal from the Federal Court of Australia

Representation

J L Bourke SC with P M O'Grady for the appellant (instructed by Lander & Rogers Lawyers)

R C Kenzie QC with M A Irving for the first and second respondents (instructed by Holding Redlich)

T M Howe QC with S P Donaghue SC and L E Young intervening on behalf of the Minister for Tertiary Education, Skills, Jobs and Workplace Relations (instructed by Australian Government Solicitor)

CATCHWORDS

Board of Bendigo Regional Institute of Technical and Further Education v Barclay

Industrial law (Cth) – General protections – Adverse action – Section 346 of *Fair Work Act* 2009 (Cth) prohibits employer from taking adverse action against employee because employee "is ... an officer or member of an industrial association" or "engages ... in industrial activity" – Section 361 creates presumption that adverse action taken for prohibited reason unless employer proves otherwise – First respondent was employee of appellant and officer of second respondent – Second respondent was industrial association – First respondent engaged in industrial activity – Chief Executive Officer of appellant took adverse action against first respondent – Chief Executive Officer gave evidence at trial that adverse action taken for innocent reasons and not for prohibited reasons – Trial judge accepted that evidence – Whether adverse action taken for prohibited reason.

Words and phrases – "because", "substantial and operative factor".

Fair Work Act 2009 (Cth), ss 342, 346, 360, 361.

1 FRENCH CJ AND CRENNAN J. Section 346 of the *Fair Work Act* 2009 (Cth) ("the Fair Work Act") prohibits an employer from taking adverse action against an employee because that employee is an officer or member of an industrial association, or because that employee engages or proposes to engage in particular kinds of industrial activity. Under s 361 of the Fair Work Act, adverse action taken against an employee will be presumed to be action taken for a prohibited reason unless the employer responsible for taking the adverse action proves otherwise. Similar protections have existed in federal industrial relations legislation in Australia since the enactment of the *Conciliation and Arbitration Act* 1904 (Cth)[1].

2 The issue in the present appeal arises from a decision by the Chief Executive Officer of the Bendigo Regional Institute of Technical and Further Education ("BRIT"), Dr Louise Harvey, to suspend the first respondent, Mr Greg Barclay, from duty on full pay and to request him to show cause why he should not be subject to disciplinary action. The appellant is the statutory authority responsible for the operation of BRIT. Mr Barclay is an employee of BRIT, and is also the President of the BRIT Sub-Branch of the second respondent, the Australian Education Union ("the AEU"). The AEU is registered as an industrial association under the *Fair Work (Registered Organisations) Act* 2009 (Cth).

3 Following Mr Barclay's suspension, the respondents applied to the Federal Court under s 539 of the Fair Work Act for a declaration that BRIT had contravened s 346 by impermissibly taking adverse action against Mr Barclay because, among other things, he was an officer of the AEU, and he had engaged in particular kinds of industrial activity. Orders were also sought for civil penalties[2], compensation[3] and interlocutory relief.

4 In the Federal Court, the primary judge (Tracey J) dismissed the respondents' application[4]. His Honour accepted evidence given by Dr Harvey as to her reasons for suspending Mr Barclay, and was satisfied that she had acted for the reasons which she gave and had not acted for any reason prohibited by the

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1 Originally the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth), renamed the *Conciliation and Arbitration Act* 1904 (Cth) by the *Conciliation and Arbitration Act* 1950 (Cth), s 3.

2 Fair Work Act, s 546.

3 Fair Work Act, s 545(2)(b).

4 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251.

Fair Work Act[5]. 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 and remitted the matter to the primary judge for further consideration[6]. By special leave, the appellant now appeals to this Court to challenge the interpretation, and application, of the relevant provisions favoured by the majority in the Full Court. The Minister for Tertiary Education, Skills, Jobs and Workplace Relations intervened, by leave, in support of the respondents.

5 The task of a court in a proceeding alleging a contravention of s 346 is to determine, on the balance of probabilities, why the employer took adverse action against the employee, and to ask whether it was for a prohibited reason or reasons which included a prohibited reason. This appeal was concerned with identifying the correct approach to that task.

6 The respondents argued that the relevant provisions of the Fair Work Act require that such a proceeding should not be resolved in favour of a defendant employer unless the evidence in the proceeding objectively establishes that the employer's reason for taking adverse action was dissociated from any reason prohibited by s 346. For the reasons which follow, the respondents' interpretation of the relevant provisions must be rejected and the appeal upheld.

Factual background

7 The basic facts are not in contest. In January 2010, staff of BRIT were preparing for a re-accreditation audit to be conducted by the Victorian Registration and Qualifications Authority ("the VRQA"), the statutory authority responsible for the accreditation of providers of vocational education and training in Victoria. BRIT requires accreditation in relation to each of its courses in order to continue to offer those courses and confer relevant qualifications, and to receive funding for that purpose. Auditors from the VRQA were due to attend at BRIT on 16 and 17 February 2010, and staff of BRIT had been preparing documentation for the re-accreditation audit since mid-2009.

8 Mr Barclay's present role as an employee of BRIT is "Team Leader – Teaching Excellence". As part of this role, Mr Barclay is part of a team responsible for ensuring that the courses provided by BRIT are accredited and retain accreditation. Mr Barclay reports to the "Manager – Teaching, Learning

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5 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at 264-265 [54].

6 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212.

and Quality", Mr Jamie Eckett. Mr Barclay is also the President of the BRIT Sub-Branch of the AEU. The BRIT Sub-Branch of the AEU consists of all AEU members employed by BRIT. The AEU does not reveal the names of its members to BRIT, although some BRIT employees do publicly identify themselves as AEU members. As part of his role as President of the BRIT Sub-Branch, Mr Barclay is responsible for advising, assisting and representing AEU members employed by BRIT to resolve concerns, issues and disputes through both formal and informal avenues.

9 On four separate occasions between late 2009 and mid-January 2010, members of the AEU employed by BRIT approached Mr Barclay to raise concerns about inaccurate information being included in documentation prepared for the re-accreditation audit. On each occasion, Mr Barclay discussed these concerns with the member outside of his BRIT office. Each of the members indicated to Mr Barclay that they did not want him to take any formal action in relation to their concerns, and did not want him to disclose their name or detailed information about their concerns to BRIT.

10 In early January 2010, Mr Barclay was present during a telephone conversation between Mr Eckett and another BRIT employee which included a discussion of the issue of inaccurate information being included in documentation prepared for the re-accreditation audit. Following this telephone conversation, Mr Barclay and Mr Eckett continued to discuss this issue, and examples of such inaccurate information. At about the same time, in the course of his duties as Team Leader, Mr Barclay became aware of other inaccurate information contained in documentation prepared for the re-accreditation audit.

11 On 29 January 2010, in his capacity as President of the BRIT Sub-Branch of the AEU, Mr Barclay sent the following email to all AEU members employed by BRIT:

> "**Subject:** AEU – A note of caution
>
> Hi all,
>
> The flurry of activity across the Institute to prepare for the upcoming reaccreditation audit is getting to the pointy end with the material having been sent off for the auditors to look through prior to the visit in February.
>
> 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/ FRADULENT** [sic] **DOCUMENTATION OR PARTICIPATE IN THESE TYPES OF ACTIVITIES**. If you have felt pressured to participate in this kind of

activity please (as have several members to date) contact the AEU and seek their support and advice.

Greg Barclay
President
BRIT AEU Sub-Branch"

12 Copies of this email were seen by senior managers at BRIT, including Mr Eckett. On 1 February 2010, Mr Eckett forwarded a copy of the email to Dr Harvey, accompanied by comments from other managers to the effect that the email had the potential to cause serious damage to BRIT's reputation. Mr Eckett told Dr Harvey that he had discussed the email with Mr Barclay earlier on 1 February 2010, and that Mr Barclay had declined 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. Dr Harvey considered the email and the comments overnight and formed the view that Mr Barclay had contravened certain clauses of the Code of Conduct for Victorian Public Sector Employees.

13 On 2 February 2010, Dr Harvey invited Mr Barclay to meet with her. Mr Barclay was accompanied at this meeting by an AEU representative. At the meeting, Dr Harvey handed Mr Barclay a letter in the following terms which asked him to show cause why he should not be subject to disciplinary action:

"**Re: Possible Serious Misconduct**

I refer to an email sent by you to many Bendigo TAFE staff on Friday, 29th January 2010 in which you alleged that serious inappropriate behaviour has occurred in that several staff members have been 'asked to be part of producing false and fraudulent documents for the audit' for Bendigo TAFE's re-accreditation.

Your allegation raises the possibility that improper conduct has occurred which will require a full and thorough independent investigation. I am in the process of arranging for this to occur. You will be required to be interviewed by the investigator appointed. I will supply more information to you about that in the near future.

However, the purpose of this letter is to ask that you show cause why you should not be subject to disciplinary action for serious misconduct in your role as Team Leader – Teaching Excellence. It appears to me that such disciplinary action may be warranted because of:

- the manner in which you have raised the allegation, via a broadly distributed email;

- your actions in not reporting the instances of alleged improper conduct directly to your manager or me to enable us to take appropriate action; and

- your refusal or failure to provide particulars of the allegations when asked to do so by your manager.

In my preliminary view, this conduct is inconsistent with the behaviour expected of a public sector employee, a BRIT employee and a Team Leader in the Teaching, Learning & Quality Unit of this organisation. Additionally, I am of the view that because your accusation is vague and general, it doesn't demonstrate proper respect for your fellow employees and places the individuals concerned in the re-accreditation process under the shadow of suspicion with no right of reply or defence.

I believe you have breached Clause 3.6, 3.9 and 6.1 of the Code of Conduct for Victorian Public Sector Employees. Clause 3.6 refers to public sector employees reporting to an appropriate authority any unethical behaviour. You did not report to your supervisor your knowledge of possible unethical behaviour and as yet have not provided proof of your allegation to your manager when asked to do so. Clause 3.9 refers to public sector employees behaving in a manner that does not bring themselves or the public sector into disrepute. The manner in which you have disseminated your allegations (whether or not they are well-founded) clearly threatens the reputation and probity of Bendigo TAFE. Finally, Clause 6.1 refers to public sector employees being fair, objective and courteous in their dealings with other public sector employees. By making generalised allegations, that could apply to anyone in the Institute involved in the re-accreditation process, you have cast a slur on your colleagues against which they cannot defend themselves.

In line with Clause 3 of the BRIT Staff Discipline procedure, it is my decision to suspend you from duty on full pay until Friday, 19th February 2010. This period of time will provide you with the opportunity to formally respond to the charge of serious misconduct as outlined above. You should provide your response to the charges by no later than 12 noon on 17 February 2010. Until 19 February you are not to attend any of the Bendigo TAFE campuses and your electronic access account will be suspended."

14 Mr Barclay was suspended on full pay, denied internet access through the BRIT computer system and prohibited from entering the BRIT premises until it was agreed between the parties at an interlocutory hearing before the primary judge on 12 February 2010 that Mr Barclay should return to work on a normal basis. Mr Barclay remains subject to the disciplinary proceedings referred to in

the letter, which have been suspended pending the outcome of Mr Barclay's legal proceedings.

Relevant provisions of the Fair Work Act

15 Part 3-1 of the Fair Work Act provides for general protections in the workplace for industrial associations and their representatives. Division 4 of Pt 3-1 contains various provisions which protect the rights of officers and members of industrial associations to associate freely in the workplace and to be involved in lawful industrial activities.

16 Section 336, in Div 1 of Pt 3-1, provides that the objects of Pt 3-1 include protecting "freedom of association".

17 Section 342, in Div 3 of Pt 3-1, defines "adverse action" in considerable detail. It is not presently disputed that BRIT took "adverse action" against Mr Barclay within the meaning of s 342[7].

18 Section 346, in Div 4 of Pt 3-1, relevantly protects the rights claimed in the respondents' application:

> "A person must not take adverse action against another person because the other person:
>
> (a) is ... an officer ... of an industrial association; or
>
> (b) engages, or has at any time engaged ... in industrial activity within the meaning of paragraph 347(a) or (b); or ..."

19 Section 347(b), also in Div 4, relevantly provides that a person "engages in industrial activity" if the person:

> "(iii) encourage[s], or participate[s] in, a lawful activity organised or promoted by an industrial association; or
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> ...
>
> (v) represent[s] or advance[s] the views, claims or interests of an industrial association; or ..."

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7 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at 263 [46].

20 The terms "lawful activity" and "unlawful activity" are not defined in the Fair Work Act.

21 Sections 360 and 361, in Div 7 of Pt 3-1, make it easier than it otherwise would be for an employee to establish a contravention of the protective provisions in Pt 3-1, including s 346. Section 360 provides that, for the purposes of Pt 3-1, "a person takes action for a particular reason if the reasons for the action include that reason." Section 361(1), which casts a burden of proof on an employer to show that it did not take action for a prohibited reason, relevantly provides:

> "If:
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> (a) in an application in relation to a contravention of this Part, it is alleged that a person took ... action for a particular reason ... ; and
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> (b) taking that action for that reason ... would constitute a contravention of this Part;
>
> it is presumed, in proceedings arising from the application, that the action was ... taken for that reason or with that intent, unless the person proves otherwise."

22 Part 4-1 provides for civil remedies in respect of a contravention of s 346.

The proceedings

23 Before the primary judge, the case that s 346 had been contravened was founded on the close relationship between the reasons for Mr Barclay's dismissal and his role as an AEU officer: Mr Barclay had become aware of the AEU members' concerns in his capacity as an AEU officer; he had sent the email on 29 January 2010 in his capacity as an AEU officer; and he had only sent the email to AEU members.

24 BRIT denied that it had taken adverse action against Mr Barclay for any impermissible reason and the decision-maker, Dr Harvey, gave sworn evidence to that effect.

25 In her affidavit, Dr Harvey first explained the significance of the re-accreditation audit as follows: "A satisfactory Audit result is crucial for [BRIT] because failure to comply with VRQA's requirements could ultimately lead to [BRIT] losing its accreditation and hence its right to deliver education and training. Accordingly, the Audit is taken very seriously by [BRIT]."

26 Dr Harvey then described her concerns after considering the contents of Mr Barclay's email:

"I had a number of very serious concerns about the Email and Mr Barclay's related conduct. My concerns were that:

(a) the allegations of fraudulent conduct were made without any complaint or report of conduct of that kind being raised with me or any other member of senior management;

(b) the language used in the Email was bound to cause distress to members of staff, bring the reputation of [BRIT] into question and undermine staff confidence in the Audit process; and

(c) I was also concerned that Mr Barclay was employed in the Unit responsible for overseeing the preparation for the Audit process."

27 Dr Harvey also gave evidence in her affidavit of her reasons for taking adverse action against Mr Barclay:

"I considered the investigation into Mr Barclay's actions necessary because it appeared to me that he had failed to notify either me or his direct manager of very serious allegations, being allegations of fraudulent conduct in the workplace, which were material to the Audit process. Instead, he proceeded to cast aspersions and innuendo upon his colleagues by way of a widely circulated email. I regarded this as *prima facie* evidence of a breach of the Code of Conduct and his obligations as a [BRIT] employee.

I made the decision to investigate Mr Barclay's conduct in sending the Email on the basis that he is an employee of [BRIT] who is required to adhere to policy and procedures that govern his employment, not because of his membership of or role in the AEU ...

I made the decision to suspend Mr Barclay because I was of the view that the allegations against him were serious and I was concerned that if Mr Barclay was not suspended he might cause further damage to the reputation of [BRIT] and of the staff [of BRIT]."

28 Dr Harvey stated that she would have taken the same action in similar circumstances against a person who was neither a member nor an officer of the AEU.

29 Dr Harvey was cross-examined on her affidavit. In her oral evidence, Dr Harvey made it plain that she did not object to Mr Barclay raising the issue of fraud with AEU members, and that she had taken the adverse action against Mr Barclay because he had not raised such a serious issue with senior management. Dr Harvey agreed in her oral evidence that it was a legitimate

activity for Mr Barclay to advise members of the AEU and to encourage AEU members to obtain advice from the AEU.

30 It was not disputed before the primary judge that the AEU is an "industrial association" or that Mr Barclay is an "officer" of the AEU within the meaning of those terms in s 12 of the Fair Work Act. It was also common ground before the primary judge that Mr Barclay "had the right (and probably the duty) to discuss workplace issues of concern to members with those members and to advise them" and that Mr Barclay was "bound to respect confidences"[8].

31 The primary judge said[9]:

> "The task of the court, in a proceeding such as the present is, then, 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.
>
> If an employer, who is alleged to have contravened one of the provisions of Part 3-1 in which the word 'because' is to be found, adduces evidence which persuades the court that it acted solely for a reason other than one or more of the impermissible reasons identified in a particular protective provision, it will have made good its defence. Because of the reverse onus provision the employer will normally need to call evidence from the decision-maker to explain what actuated him or her to act to the employee's detriment ... That evidence can be tested in the light of established facts. The credibility of the decision-maker will be assessed by the court."

32 The primary judge stated his reasons for accepting Dr Harvey's evidence[10]:

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8 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at 262 [42].

9 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at 260-261 [34]-[35].

10 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at 264-265 [54].

> "When ... [Dr Harvey] was called on to explain her reasons for taking adverse action against Mr Barclay she provided convincing and credible explanations of why it was that she took the steps that she did. Dr Harvey said that she had been extremely concerned by the statement that false and fraudulent documentation had been prepared for the purposes of the audit. She wished to establish whether or not this had occurred and immediately instituted an inquiry to establish whether there was any foundation for the allegation. She adhered to her explanation ... for calling on Mr Barclay to show cause why he should not be disciplined for circulating the e-mail. She said that she had determined to exclude him from BRIT campuses and suspend his e-mail access because she did not want Mr Barclay on the premises while the auditors were there and because she did not want any other 'loose allegations' made inappropriately during the audit to the detriment of BRIT. She maintained her denials of having acted against Mr Barclay for any reason associated with his union membership, office or activities ... I accept her evidence. I am satisfied that she did not act for any proscribed reason. Rather, she acted for the reasons which she gave."

33 The primary judge concluded that Dr Harvey had not taken adverse action against Mr Barclay for any reason associated with his position as an officer of the AEU or with his engagement in industrial activity, and that BRIT therefore had not contravened s 346 of the Fair Work Act[11].

34 In upholding an appeal from the decision of the primary judge, the majority in the Full Court said[12]:

> "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 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?
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> 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* [(1976) 51 ALJR 235 at 241; 12 ALR 605 at 617] ... called the 'real reason' for the conduct. The real reason for a person's conduct is not

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11 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at 265 [54], [59].

12 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 221 [27]-[28].

> 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. 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."

35 Their Honours later said[13]:

> "All of the relevant conduct in issue in this case involved Mr Barclay in his union capacity. None of it involved him in his capacity as an employee of BRIT."

36 Their Honours held that Mr Barclay had engaged in industrial activity within the meaning of ss 347(b)(iii) (encouraging or participating in a lawful activity organised or promoted by an industrial association) and (v) (representing or advancing the views, claims or interests of an industrial association) of the Fair Work Act by: sending the email on 29 January 2010; encouraging members of the AEU to contact the AEU and seek support and advice; and retaining the confidences of AEU members who had approached him in his capacity as an officer of the AEU[14].

37 Their Honours treated Dr Harvey's sworn evidence about her reasons for taking adverse action as leaving uncontroverted the possibility that Dr Harvey had taken action for an unconscious reason or a reason which was not appreciated or understood by her which was prohibited. In essence, their Honours reasoned that, because the sending of the email on 29 January 2010 amounted to engagement in industrial activity, and because Dr Harvey's reasons for taking adverse action against Mr Barclay were "founded upon" the sending of the email, the reasons why Dr Harvey had taken adverse action against Mr Barclay "included the fact that he was an officer of the AEU and the fact that

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13 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 233 [73].

14 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 231 [63]-[64].

he had engaged in industrial activity."[15] On this basis, their Honours held that BRIT had contravened both s 346(a) and s 346(b) of the Fair Work Act.

38 In dissent, Lander J agreed with the reasoning of the primary judge. His Honour said that the word "because" in s 346 directs an investigation into the reason actuating the person who took the adverse action and that contravention of s 346(b) is not made out "by simply establishing that adverse action was taken whilst the union official was engaged in industrial activity."[16]

Submissions

39 In challenging the decision of the majority below, the appellant contended that a contravention of s 346 requires a mental element – a contravention will be established if the subjective reason why the employer took the adverse action was because of the employee's position as an officer or member of an industrial association or because the employee was engaged in industrial activity. That construction was said to be supported by the text of s 346 construed by reference to ss 360 and 361, considerations of legislative history and various authorities concerning legislative predecessors to the current provisions.

40 The competing view advanced by the respondents was that a contravention of s 346 is to be determined objectively – if adverse action is taken when an employee is an officer or member of an industrial association engaged in industrial activity covered by s 347, a contravention of s 346 is established if a reasonable observer would conclude that the employer had not demonstrated that the real reason for the adverse action was dissociated from the reasons prohibited by s 346. The respondents recognised that this involved "a large and liberal" interpretation of ss 346 and 347 which, it was said, was appropriate because those provisions are concerned with human rights and give effect to Australia's obligations under particular international instruments[17]. It was contended that the circumstance of Mr Barclay being an officer of an industrial association engaged

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15 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 234 [78].

16 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 257 [218], 258 [227].

17 Freedom of Association and Protection of the Right to Organise Convention (1948), Arts 2, 11; Right to Organise and Collective Bargaining Convention (1949), Art 1; Worker's Representatives Convention (1971), Art 1; International Covenant on Economic, Social and Cultural Rights (1966), Art 8; International Covenant on Civil and Political Rights (1966), Art 22.

in lawful industrial activity at the time the adverse action was taken was sufficient to bring Mr Barclay within the protective provisions.

The correct approach

41 The question of why an employer took adverse action against an employee is a question of fact arising from the operation of interdependent provisions of the Fair Work Act. These provisions must be construed together in accordance with the principles of statutory construction established by this Court, which must begin with a consideration of the text of the relevant provisions and may require consideration of the context including the general purpose and policy of the provisions[18].

Text

42 Determining why a defendant employer took adverse action against an employee involves consideration of the decision-maker's "particular reason" for taking adverse action (s 361(1)), and consideration of the employee's position as an officer or member of an industrial association and engagement in industrial activity ("union position and activity") at the time the adverse action was taken (ss 342, 346(a), 346(b), 347 and 361(1)).

43 Clearly a defendant employer interested in rebutting the statutory presumption in s 361 can be expected to rely in its defence on direct testimony of the decision-maker's reason for taking the adverse action. The majority in the Full Court correctly rejected an argument put by the respondents that the introduction of the statutory expression "because" into a legislative predecessor

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18 As to which, see *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41. See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

to s 346[19], in place of the previous statutory expression "by reason of"[20], rendered irrelevant the state of mind of the decision-maker[21].

44 There is no warrant to be derived from the text of the relevant provisions of the Fair Work Act for treating the statutory expression "because" in s 346, or the statutory presumption in s 361, as requiring only an objective enquiry into a defendant employer's reason, including any unconscious reason, for taking adverse action. The imposition of the statutory presumption in s 361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains "why was the adverse action taken?"[22].

45 This question is one of fact, which must be answered in the light of all the facts established in the proceeding. Generally, it will be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer[23]. Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker[24] or because other objective facts are proven which contradict the decision-maker's evidence. However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer even though an employee

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19 *Industrial Relations Act* 1988 (Cth) (as enacted), s 334.

20 The expression "by reason of" last appeared in the *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration Amendment Act* 1984 (Cth)), s 5(1).

21 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 220 [25].

22 *Purvis v New South Wales* (2003) 217 CLR 92 at 163 [236] per Gummow, Hayne and Heydon JJ; [2003] HCA 62.

23 See, for example, *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241 per Mason J; 12 ALR 605 at 617.

24 See, for example, *Pearce v W D Peacock & Co Ltd* (1917) 23 CLR 199 at 208 per Isaacs J, 211 per Higgins J; [1917] HCA 28.

may be an officer or member of an industrial association and engage in industrial activity[25].

Policy and purpose

46 The provisions of the Fair Work Act containing the general protections for officers and members of industrial associations commenced operation on 1 July 2009. However, provisions analogous to s 346(a), prohibiting an employer from taking adverse action against an employee because he or she is an officer or member of an industrial association, have existed in federal industrial relations legislation in Australia since the enactment of the *Conciliation and Arbitration Act* 1904 (Cth).

47 That Act, which initiated a federal system of conciliation and arbitration, was preceded by social and legislative developments in Australia and New Zealand[26], Britain[27], and Europe and North America[28], which all reflected a

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25 See, for example, *Harrison v P & T Tube Mills Pty Ltd* (2009) 188 IR 270 at 276 [31]-[33].

26 See Davison, Hirst and Macintyre, *The Oxford Companion to Australian History*, (1998) at 647-649; Mitchell, "State systems of conciliation and arbitration: the legal origins of the Australasian model", in Macintyre and Mitchell (eds), *Foundations of Arbitration*, (1989) 74 at 82-97; Australia, Committee of Review into Australian Industrial Relations, *Australian Industrial Relations Law and Systems*, (1985), vol 2 at 18-20; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 March 1904 at 762-791; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 July 1903 at 2858-2883.

In 1890, Charles Kingston (acknowledged by Alfred Deakin as a major architect of the federal legislation) unsuccessfully introduced a Bill for an "Act to Encourage the Formation of Industrial Unions and Associations, and to Facilitate the Settlement of Industrial Disputes" into the South Australian Parliament. This was the earliest proposal for a compulsory system of conciliation and arbitration in Australia, the conceptual framework of which included the idea of incorporating trade unions into the process through a system of registration and regulation. Its form and content can be detected in subsequent legislation: the *Industrial Conciliation and Arbitration Act* 1894 (NZ), the *Industrial Conciliation and Arbitration Act* 1900 (WA), the *Industrial Arbitration Act* 1901 (NSW) and, to a lesser extent, in modified form in the *Conciliation Act* 1894 (SA). The marginal notes to the Conciliation and Arbitration Bill 1904 (Cth) record the derivation of various clauses of the Bill from sections of those four Acts, including the derivation of cl 9 (the predecessor to ss 346(a) and 361 of the Fair Work Act) from s 35 of the *Industrial Arbitration Act* 1901 (NSW).

growing appreciation that, in industrialised countries, stable industrial relations and the settlement of industrial disputes were best secured through a system of collective bargaining between employees and employers. In his second reading speech in the House of Representatives on the Conciliation and Arbitration Bill 1904 (Cth), Alfred Deakin referred to experiences in Great Britain and the United States as a prelude to his explanation that an effective system of compulsory conciliation and arbitration, which the Bill was designed to achieve, necessitated a balance in the powers of the parties involved[29].

48 As originally enacted, s 9(1) of the *Conciliation and Arbitration Act* 1904 (Cth) made it a criminal offence for an employer to dismiss an employee from his employment "by reason merely of the fact that the employee [was] an officer or member of an organization or [was] entitled to the benefit of an industrial agreement or award." Reflecting an increase in the categories of conduct protected by legislation, prohibited reasons for taking adverse action have been expanded over the years as substantive provisions have been amended or reproduced in substitute legislation[30]. In particular, provisions analogous to

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27 See Great Britain, Royal Commission on Labour, *Fifth Report* (1892); *Conciliation Act* 1896 (UK). The *Conciliation Act* 1896 (UK) was enacted following a recommendation made in Royal Commission's report. See further Brodie, *A History of British Labour Law 1867-1945*, (2003) at 1-62; Mitchell, "State systems of conciliation and arbitration: the legal origins of the Australasian model", in Macintyre and Mitchell (eds), *Foundations of Arbitration*, (1989) 74 at 76-80.

28 See Mitchell, "State systems of conciliation and arbitration: the legal origins of the Australasian model", in Macintyre and Mitchell (eds), *Foundations of Arbitration*, (1989) 74 at 80-82.

29 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 March 1904 at 763-765. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 July 1903 at 2864, 2870.

30 See *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act* 1909 (Cth)), s 9(1); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act (No 2)* 1914 (Cth)), ss 9(1)(a), (b) and (c); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act* 1920 (Cth)), s 9(1)(d); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act* 1947 (Cth)), s 9(1)(e) (at this stage, s 26 of the *Commonwealth Conciliation and Arbitration Act* 1947 (Cth) renumbered s 9 of the *Conciliation and Arbitration Act* 1904 (Cth) to s 5); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration Act* 1973 (Cth)), s 5(1)(f); *Conciliation and Arbitration Act* 1904

(Footnote continues on next page)

s 346(b) (read with ss 347(b)(iii) and (v)), prohibiting an employer from taking adverse action against an employee in respect of lawful industrial activity, have existed since 1973[31].

49 A statutory presumption and correlative onus of the kind now found in s 361 of the Fair Work Act can also be found in earlier provisions[32]. In his second reading speech on the Commonwealth Conciliation and Arbitration Bill (No 2) 1914 (Cth), the Attorney-General, Billy Hughes, identified the rationale for the statutory presumption in favour of the employee, and the placing of an onus on the employer, as being the need to remedy the ease with which an employer might avoid liability[33].

(Cth) (as amended by the *Conciliation and Arbitration Act* 1977 (Cth)), s 5(1)(aa); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration Amendment Act* 1981 (Cth)), ss 5(1)(ab) and (ac); *Industrial Relations Act* 1988 (Cth) (as enacted), s 334(1); *Workplace Relations Act* 1996 (Cth) (as enacted), ss 298K(1) and 298L(1); *Workplace Relations Act* 1996 (Cth) (as amended by the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth)), ss 792(1) and 793(1).

31 See *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration Act* 1973 (Cth)), s 5(1)(f); *Industrial Relations Act* 1988 (Cth) (as enacted), s 334(1)(j); *Workplace Relations Act* 1996 (Cth) (as enacted), ss 298K(1) and 298L(1)(n); *Workplace Relations Act* 1996 (Cth) (as amended by the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth)), ss 792(1) and 793(1)(o).

32 See *Conciliation and Arbitration Act* 1904 (Cth) (as enacted), s 9(3); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act* 1909 (Cth)), s 9(3); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act (No 2)* 1914 (Cth)), s 9(4); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act* 1947 (Cth)), s 5(4); *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration Act* 1977 (Cth)), s 5(4); *Industrial Relations Act* 1988 (Cth) (as enacted), s 334(6); *Workplace Relations Act* 1996 (Cth) (as enacted), s 298V; *Workplace Relations Act* 1996 (Cth) (as amended by the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth)), s 809.

33 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 November 1914 at 659:

> "Under the Act as it stands, in order to secure a conviction it is necessary to prove that an employé has been dismissed merely because he is a unionist.

(Footnote continues on next page)

50 The following description of a legislative predecessor to s 361[34] given by Mason J in *General Motors-Holden's Pty Ltd v Bowling*[35] remains pertinent[36]:

> "the plain purpose of the provision [is to throw] on to the defendant the onus of proving that which lies peculiarly within his own knowledge."

51 Observations about the rationale for including s 361 in the Fair Work Act are consistent with the abovementioned descriptions of the evident purpose of its legislative predecessors[37].

52 Since the enactment of the *Workplace Relations Act* 1996 (Cth), the general protections have been enforced through a civil penalty regime, which replaced the criminal offence regime that had been in place since 1904.

> It is a fact, and one of the most cheering evidences of the innate goodness of mankind, that convictions have been secured for this offence under the existing law. But for every one offender caught, ninety-nine go free. It is obvious that if a man wishes to dismiss an employé because he is a unionist, he may easily do so. An employer may discharge a man because he is a unionist, and say that he has dismissed him because he does not like his appearance. We are amending the principal Act so that the onus will rest on the employer, and that is quite compatible with the policy of the Act."

As repealed and substituted by the *Conciliation and Arbitration Act (No 2)* 1914 (Cth), the onus in s 9(4) required a defendant employer "to prove that he was not actuated by the reason alleged in the charge."

34 *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration (Organizations) Act* 1974 (Cth)), s 5(4).

35 (1976) 51 ALJR 235; 12 ALR 605 ("*Bowling*").

36 (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617 per Mason J.

37 Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 234 [1461]:

> "in the absence of such a [section], it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason."

Relevant authorities

53 The decisions of this Court in *Pearce v W D Peacock & Co Ltd*[38] and *Bowling* dealt with different legislative predecessors to ss 346 and 361 of the Fair Work Act[39].

54 In *Pearce*, an employee who was a member of an organisation registered under the *Conciliation and Arbitration Act* 1904 (Cth) was dismissed from his employment. A director of the defendant employer gave evidence that the employee was not dismissed "because of being in a union", but rather because he was dissatisfied with his wages and conditions[40]. A question arose as to whether the director's evidence was sufficient to satisfy the onus cast upon the employer. In deciding that the director's evidence was sufficient, the majority in *Pearce* recognised that mere declarations of an innocent reason or intent in taking adverse action may not satisfy the onus on an employer if contrary inferences are available on the facts[41]. In the minority, Isaacs and Higgins JJ decided that the director's evidence of his reasons for dismissing the employee did not satisfy the onus because other evidence given by the director had contradicted it. In considering this issue, Isaacs J recognised that it is not possible to "peer into [an employer's] mind"[42]. Equally, it is not possible in a curial process to plumb the depths of "[an employer's] unconscious"[43].

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38 (1917) 23 CLR 199 ("*Pearce*").

39 *Pearce* concerned ss 9(1) and (4) of the *Conciliation and Arbitration Act* 1904 (Cth) which, at that stage, had last been amended by the *Commonwealth Conciliation and Arbitration Act (No 2)* 1914 (Cth). *Bowling* concerned the renumbered ss 5(1) and (4) of the *Conciliation and Arbitration Act* 1904 (Cth) which, at that stage, had last been amended by the *Conciliation and Arbitration Act* 1973 (Cth).

40 *Pearce* (1917) 23 CLR 199 at 202.

41 *Pearce* (1917) 23 CLR 199 at 203 per Barton ACJ (with whom Gavan Duffy and Rich JJ agreed). See, subsequently, *Heidt v Chrysler Australia Ltd* (1976) 13 ALR 365; *Lewis v Qantas Airways Ltd* (1981) 54 FLR 101.

42 *Pearce* (1917) 23 CLR 199 at 206.

43 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 221 [28] per Gray and Bromberg JJ.

55 More generally, in *Pearce*, Isaacs J said of s 9(4) of the *Conciliation and Arbitration Act* 1904 (Cth) (the then applicable legislative predecessor to s 361)[44]:

> "The provision casting the onus on the defendant employer means that the fact that the dismissed employee was a member of an organization must not enter in any way into the reason of the defendant, if he desires exculpation."

56 That interpretation was rejected in *Bowling*. In *Bowling*, an employee who was a shop steward was dismissed from his employment. The decision-makers, two directors of the employer, did not give evidence. In a short judgment concurring with Mason J, Gibbs J said[45]:

> "The onus of proving that the fact that the employee held the position was not a substantial and operative factor in the dismissal is to be discharged according to the balance of probabilities and is not to be made heavier by any presumption that if an employee who is dismissed for disruptive activities happens to be a shop steward the latter circumstance must have had something to do with his dismissal. If in the present case evidence had been given by the directors responsible that the employee was dismissed because he was guilty of misconduct or because his work was unsatisfactory, and that in dismissing him they were not influenced by the fact that he was a shop steward or indeed that he was dismissed in spite of the fact, and that evidence had been accepted, the onus would have been discharged."

57 Mason J, with whom Stephen and Jacobs JJ also agreed, said of the interpretation adopted by Isaacs J in *Pearce*[46]:

> "The protection of trade unions and their representatives from discrimination and victimization by employers does not require an interpretation as extreme as that favoured by Isaacs J. It would unduly and unfairly inhibit the dismissal of a union representative in circumstances where other employees would be dismissed and thereby confer on the union representative an advantage not enjoyed by other workers, to penalize a dismissal merely because the prohibited factor

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44 *Pearce* (1917) 23 CLR 199 at 205.

45 *Bowling* (1976) 51 ALJR 235 at 239; 12 ALR 605 at 612.

46 *Bowling* (1976) 51 ALJR 235 at 241; 12 ALR 605 at 616.

> entered into the employer's reasons for dismissal though it was not a substantial and operative factor in those reasons."

58 His Honour went on to say that the decision-makers in *Bowling* who failed to give direct evidence could hypothetically have said in evidence[47]:

> "'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'."

Because no such evidence was given, his Honour found that the evidence in the case[48]:

> "left uncontroverted the possibility that the respondent's position as a shop steward was an influential, perhaps even a decisive, consideration in [the decision-makers'] minds."

59 Despite the change to a civil penalty regime effected in 1996, s 361 does not differ in relevant respects from its legislative predecessors and *Bowling* remains authoritative in relation to a number of the arguments raised on the appeal.

60 First, it is erroneous to treat the onus imposed on an employer by s 361 as being made heavier (or rendered impossible to discharge) because an employee affected by adverse action happens to be an officer of an industrial association. Further, the history of the relevant legislative provisions reveals no reason why the onus must now be different if adverse action is taken while an employee engages in industrial activity – like a person who happens to be an officer of an industrial association, a person who happens to be engaged in industrial activity should not have an advantage not enjoyed by other workers.

61 Central to the respondents' argument on this appeal was the contrary and incorrect view that Mr Barclay's status as an officer of an industrial association engaged in lawful industrial activity at the time that Dr Harvey took adverse action against him meant that Mr Barclay's union position and activities were inextricably entwined with the adverse action, and that Mr Barclay was therefore immune, and protected, from the adverse action. If accepted, such a position would destroy the balance between employers and employees central to the operation of s 361, a balance which Parliament has chosen to maintain irrespective of the fact that the protection in s 346(b) has a shorter history than

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47 *Bowling* (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617.

48 *Bowling* (1976) 51 ALJR 235 at 242; 12 ALR 605 at 619.

the protection in s 346(a). That balance, once the reflex of criminal sanctions in the legislation, now reflects the serious nature of the civil penalty regime. Speaking more generally, that balance is a specific example of the balance of which Alfred Deakin spoke as being necessary for an effective conciliation and arbitration system.

62 Secondly, it is a related error to treat an employee's union position and activity as necessarily being a factor which must have something to do with adverse action, or which can never be dissociated from adverse action. It is a misunderstanding of, and contrary to, *Bowling* to require that the establishment of the reason for adverse action must be entirely dissociated from an employee's union position or activities. Such reasoning effectively institutes an interpretation of the relevant provisions indistinguishable from that of Isaacs J in *Pearce*, which was rejected in *Bowling*. The onus of proving that an employee's union position and activity was not an operative factor in taking adverse action is to be discharged on the balance of probabilities in the light of all the established evidence.

63 Thirdly, it is 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 no union involvement.

64 Finally, the international instruments referred to in passing by the respondents are consistent with the approach to the relevant provisions identified above.

Conclusions

65 In this case the primary judge adopted the correct approach to the relevant provisions. Dr Harvey gave evidence of her reason for taking adverse action against Mr Barclay and also gave positive evidence that this was not for a prohibited reason and that she would have taken the same action against a person circulating a similar email who was not an officer of the AEU. That evidence was accepted by the primary judge and his findings in that regard were not challenged before the Full Court[49]. The appellant discharged the burden cast upon it to show that the reason for the adverse action was not a prohibited reason, and that Mr Barclay's union position and activities were not operative factors in him being required to show cause. The appeal must be upheld and consequential orders made.

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49 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 258 [226] per Lander J.

Orders

66 The orders of the Court should be:

1. Appeal allowed.

2. Orders 1, 2 and 3 of the orders of the Full Court of the Federal Court of Australia made on 9 February 2011 be set aside and, in their place, order that the appeal to that Court be dismissed.

3. Any question of the costs of the appeal be dealt with by consent order or by this Court on the papers as indicated in the reasons for judgment of Gummow and Hayne JJ.

67 GUMMOW AND HAYNE JJ. The first respondent, Mr Barclay, is a senior teacher at the Bendigo Regional Institute of Technology and Further Education ("BRIT"), the Board of which is the appellant. Mr Barclay is also President of the BRIT Sub-Branch of the second respondent, the Australian Education Union ("the AEU"). The AEU is an organisation registered pursuant to legislative provisions now found in Ch 2 of the *Fair Work (Registered Organisations) Act* 2009 (Cth).

68 On 2 February 2010, BRIT suspended Mr Barclay on full pay from his employment, suspended his internet access, excluded him from the BRIT premises and commenced disciplinary proceedings against him. (It later was agreed that Mr Barclay return to work on a normal basis, but he remains subject to pending disciplinary proceedings.) The action on 2 February 2010 followed an e-mail sent by Mr Barclay four days previously. The e-mail was headed "A note of caution" and warned employees of BRIT who were members of the AEU that they should "not agree to be part of any attempt to create false[/fraudulent] documentation" in preparation for an audit of BRIT to be conducted by the Victorian Registration and Qualifications Authority.

69 In proceedings in the Federal Court, Mr Barclay and the AEU sought declaratory relief that the action by BRIT contravened s 346 of the *Fair Work Act* 2009 (Cth) ("the Act"). This provided that a person should not take adverse action against another "because" that other person: (a) was or was not an officer or member of an industrial association, or (b) engaged or proposed to engage in "industrial activity". They also sought orders for compensation under s 545(2)(b) of the Act and orders pursuant to s 546 for the imposition and recovery of penalties. Tracey J dismissed the application[50].

70 However, the Full Court (Gray and Bromberg JJ, Lander J dissenting)[51] allowed an appeal by Mr Barclay and the AEU. The matter was remitted to the primary judge to determine the appropriate penalties to be imposed on BRIT for its contraventions of the Act.

71 For the reasons which follow, in addition to those in the other joint reasons, with which we are in general agreement, the appeal by BRIT to this Court should be allowed and consequential orders made.

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50 *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251.

51 *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212.

72 The provisions in s 346 of the Act, contraventions of which were alleged against BRIT, have a lengthy provenance in industrial law in Australia. An appreciation of the issues which arise in the present appeal is assisted by some reference to that legislative history, including several decisions upon the earlier legislation which informed the submissions on the appeal.

Legislative history

73 Section 346 of the Act derived from s 9 of the *Commonwealth Conciliation and Arbitration* Act 1904 (Cth) ("the 1904 Act"). As first enacted, s 9 of the 1904 Act provided:

> "(1) No employer shall dismiss any employee from his employment by reason merely of the fact that the employee is an officer or member of an organization or is entitled to the benefit of an industrial agreement or award.
>
> Penalty: Twenty pounds.
>
> (2) No proceeding for any contravention of this section shall be instituted without the leave of the President or the Registrar.
>
> (3) In any proceeding for any contravention of this section, it shall lie upon the employer to show that any employee, proved to have been dismissed whilst an officer or member of an organization or entitled as aforesaid, was dismissed for some reason other than those mentioned in this section."

Section 9 in this form was omitted by the *Commonwealth Conciliation and Arbitration Act* 1909 (Cth) and a substituted s 9 provided:

> "(1) No employer shall dismiss any employee from his employment *or injure him in his employment* by reason merely of the fact that the employee is an officer or member of an organization, or of an association that has applied to be registered as an organization or is entitled to the benefit of an industrial agreement or award.
>
> Penalty: Twenty pounds
>
> (2) No proceeding for any contravention of this section shall be instituted without the leave of the President or the Registrar.
>
> (3) In any proceeding for any contravention of this section, it shall lie upon the employer to show that any employee, proved to have been dismissed *or injured in his employment* whilst an officer or member of an organization or such an association or whilst entitled as aforesaid, was

> dismissed or injured in his employment for some reason other than that mentioned in this section." (emphasis added)

Whilst s 9 of the 1904 Act was the first federal provision of its kind, it was drawn from New South Wales legislation.

74 In his second reading speech in the House of Representatives on the Bill for what became the 1904 Act, Alfred Deakin described the *Industrial Arbitration Act* 1901 (NSW) ("the New South Wales Act") as[52]: "the most advanced and complete piece of legislation of this kind which has yet found its way upon a statute-book". He went on to indicate that the Bill had been drafted with the provisions of the New South Wales Act in mind.

75 This is apparent from the terms of s 35 of the New South Wales Act:

> "If an employer dismisses from his employment any employee by reason merely of the fact that the employee is a member of an industrial union, or is entitled to the benefit of an award, order, or agreement, such employer shall be liable to a penalty not exceeding twenty pounds for each employee so dismissed.
>
> In every case it shall lie on the employer to satisfy the court that such employee was so dismissed by reason of some facts other than those above mentioned in this section: Provided that no proceedings shall be begun under this section except by leave of the court."

76 In his second reading speech in the Legislative Council on the Bill, for what became the New South Wales Act, the Attorney-General[53], The Hon Bernhard Wise KC, made extended reference to industrial strife in the United States, adding:

> "We know that there is a black list in the United States, and one of the most potent instruments of the capitalists in the United States is that black list. A man who makes himself conspicuous as an advocate of the rights of the workmen is debarred from employment; though he may disguise himself, and change his name as he will, he is debarred from employment from one end of the Union to the other."

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52 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 July 1903 at 2866.

53 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 2 October 1901 at 1841.

Of the clause which became s 35 of the New South Wales Act, the Attorney-General said:

> "The clause would not operate harshly upon an employer who honestly dismisses a man for a genuine reason; but if the clause is to exist at all in the bill, it is absolutely useless, unless the burden of showing that the man was dismissed for some other reason than that of belonging to the union is cast upon the only man who knows the real reason, that is, the employer."

77 The protections provided for by the Act in contemporary times serve purposes not dissimilar to its antecedents. In argument on this appeal reference was made to *Pearce v W D Peacock & Co Ltd*[54]. *Pearce* involved an unsuccessful appeal direct to this Court from the dismissal of the prosecution, in a Tasmanian Court of Petty Sessions, of an employer for an offence under s 9 of the 1904 Act[55]. The information had been laid by Mr Pearce, the general secretary of the union of which Mr Batchelor was a member. It alleged that the respondent employer had dismissed Mr Batchelor by reason of the circumstance that he was a member of the union which was an organisation registered under the 1904 Act. Mr Batchelor had been the only employee who was a member of the union. The employer had been served with a log of claims in Arbitration Court proceedings. Mr Batchelor refused to sign a paper proffered by the employer in which he would indicate his satisfaction with his working conditions and remuneration. If he had signed as requested, the result would have been to deprive the Arbitration Court of jurisdiction to include the employer in the award[56]. Mr Batchelor was dismissed after he refused to sign the paper. The employer argued that the dismissal had occurred because Mr Batchelor had expressed dissatisfaction with his job, and not for any reason connected to his union involvement.

78 By majority (Barton ACJ, Gavan Duffy and Rich JJ, Isaacs and Higgins JJ dissenting), this Court held that there was evidence to support the view that the employer had not been actuated by the reason alleged in the information, and that it had been open to the Court of Petty Sessions to dismiss the union's information.

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54 (1917) 23 CLR 199; [1917] HCA 28.

55 The legislation considered in *Pearce* was the *Commonwealth Conciliation and Arbitration Act* 1904-1915 (Cth); s 9 had remained unaffected by the subsequent legislative amendments.

56 As Isaacs J emphasised: (1917) 23 CLR 199 at 208-209.

79 With respect to the operation of s 9, Barton ACJ said[57]:

> "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."

80 Isaacs J was in dissent on the issue of whether, on appeal, the High Court had the power or duty to form its own reasons and conclusions on the evidence before the Magistrate. His Honour also went further regarding the interpretation of s 9 and concluded[58]:

> "[A]s I read that section, it is designed, among other things, to preserve organizations, so that the method selected by Parliament for settling disputes shall not be thwarted. The provision casting the onus on the defendant employer means that the fact that the dismissed employee was a member of an organization *must not enter in any way* into the reason of the defendant, if he desires exculpation. Otherwise he might add any other reason whatever to the membership of a union, and break down the whole structure of the Act, so far as he is concerned, as the defendant has, in fact, done in this case." (emphasis added)

81 When read with s 10 of the 1904 Act, the protection applied both to employees and employers. Isaacs J continued[59]:

> "It is very material to remember that the Statute must be construed as a whole. It applies equally both to employers and employees. An employee's dissatisfaction is no more and no less independent of the industrial dispute in which it is expressed, where it is relied on to justify an employer in dismissing an employee, than where it is relied on to justify an employee for striking because of his dissatisfaction with existing conditions. Neither position is, in my opinion, justifiable in law, and both are to be condemned. When we consider the Act as speaking with equal force to both parties to a dispute, then a Court must, in arriving at its view of the meaning of the law, take into account the consideration that whatever is a legal justification in the one case is equally a legal justification in the other. To hold what is relied on here as a legal justification to be so in either case, and consequently in both cases, to my

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57 (1917) 23 CLR 199 at 203.

58 (1917) 23 CLR 199 at 205.

59 (1917) 23 CLR 199 at 206.

> mind would mean reducing the law in all cases to a dead letter, and defeating the objects of the Act to the injury of the general community, which ought to be protected against both employers and employees taking the law into their own hands in disregard of the general welfare."

82 By 1976, the 1904 Act had undergone substantial amendment. Relevantly, through a process of renumbering, s 9 had become s 5 of the *Conciliation and Arbitration Act* 1904-1976 (Cth) ("the 1976 Act")[60]. Section 5(1) was in the following terms:

> "An employer shall not dismiss an employee, or injure him in his employment, or alter his position to his prejudice, by reason of the circumstance that the employee –
>
> (a) is or has been, or proposes, or has at any time proposed, to become an officer, delegate or member of an organization, or of an association that has applied to be registered as an organization; or
>
> ...
>
> (f) being an officer, delegate or member of an organization, has done, or proposes to do, an act or thing which is lawful for the purposes of furthering or protecting the industrial interests of the organization or its members, being an act or thing done within the limits of authority expressly conferred on him by the organization in accordance with the rules of the organization.
>
> Penalty: Four hundred dollars."

83 Under the 1976 Act, the onus remained with the defendant employer to prove it was "not actuated" by the reason alleged in the charge[61].

84 Section 5 of the 1976 Act was considered by this Court in *General Motors Holden Pty Ltd v Bowling*[62]. By majority (Gibbs, Stephen, Mason and Jacobs JJ, Barwick CJ dissenting), the Court dismissed an appeal from the Industrial Court of Australia. The Industrial Court had convicted the appellant company of contravening s 5(1) in dismissing Mr Bowling.

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60 *Commonwealth Conciliation and Arbitration Act* 1947 (Cth), s 26, and made in accordance with Sch 2.

61 *Conciliation and Arbitration Act* 1904-1976 (Cth), s 5(4).

62 (1976) 51 ALJR 235; 12 ALR 605.

85 Mason J, with whom Stephen and Jacobs JJ agreed, began his analysis of s 5 by remarking that the section had "a legislative history which extends back to the turn of the century when the trade union was a more fragile institution than it is today and when it stood in need of a large measure of protection from employers"[63]. His Honour went on to say that[64]:

> "The protection of trade unions and their representatives from discrimination and victimization by employers does not require an interpretation as extreme as that favoured by Isaacs J [in *Pearce*]. It would unduly and unfairly inhibit the dismissal of a union representative in circumstances where other employees would be dismissed and thereby confer on the union representative an advantage not enjoyed by other workers, to penalize a dismissal merely because the prohibited factor entered into the employer's reasons for dismissal though it was not a substantial and operative factor in those reasons."

Mason J preferred the construction that[65]:

> "[Section] 5(1) does not proscribe the circumstances which it lists as the sole or predominant reasons for dismissal. It is sufficient if the circumstance is *a substantial and operative factor*. And it does not cease to be such a factor because it is coupled with other circumstances or because regard is had to it in association with other circumstances not mentioned in the section." (emphasis added)

86 With respect to the onus borne by the employer, Mason J stated[66]:

> "Section 5(4) imposed the onus on the [employer] of establishing affirmatively that it was not actuated by the reason alleged in the charge. The consequence was that the [employee], in order to succeed, was not bound to adduce evidence that the [employer] was actuated by that reason, a matter peculiarly within the knowledge of the [employer]. The [employee] was entitled to succeed if the evidence was consistent with the hypothesis that the [employer] was so actuated and that hypothesis was not displaced by the [employer]. To hold that, despite the subsection, there is some requirement that the prosecutor brings evidence of this fact

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63 (1976) 51 ALJR 235 at 240; 12 ALR 605 at 616.

64 (1976) 51 ALJR 235 at 241; 12 ALR 605 at 616.

65 (1976) 51 ALJR 235 at 242; 12 ALR 605 at 619.

66 (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617.

> is to make an implication which, in my view, is unwarranted and which is at variance with the plain purpose of the provision in throwing on to the [employer] the onus of proving that which lies peculiarly within his own knowledge."

87 Turning to the facts of the case, Mason J held[67]:

> "Once it is said that the appellant dismissed [the respondent] 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, if concerned as to the bad example he was setting, divorced that consideration from the circumstance that he was a shop steward."

88 Gibbs J accepted the "substantial and operative factor" criterion adopted by Mason J, and added[68]:

> "The onus of proving that the fact that the employee held the position was not a substantial and operative factor in the dismissal is to be discharged according to the balance of probabilities and is not to be made heavier by any presumption that if an employee who is dismissed for disruptive activities happens to be a shop steward the latter circumstance must have had something to do with his dismissal. *If in the present case evidence had been given by the directors responsible that the employee was dismissed because he was guilty of misconduct or because his work was unsatisfactory*, and that in dismissing him they were not influenced by the fact that he was a shop steward or indeed that he was dismissed in spite of that fact, and *that evidence had been accepted, the onus would have been discharged*." (emphasis added)

89 The construction of the legislation accepted in *Bowling* was subsequently applied by Morling J in *Lewis v Qantas Airways Ltd*[69]. This case concerned the dismissal of an employee, Mr Lewis, around the time of an industrial dispute

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67 (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617-618.

68 (1976) 51 ALJR 235 at 239; 12 ALR 605 at 612.

69 (1981) 54 FLR 101.

which resulted in a twelve-day strike[70]. Mr Lewis was a delegate of the Transport Workers' Union of Australia. Another employee, Mr Macfarlane, was dismissed at the same time. The central question for determination was whether the fact that Mr Lewis was a union delegate constituted a "substantial and operative factor" which actuated his dismissal[71]. The case presented by Qantas was that the dismissal of Mr Lewis (and Mr Macfarlane) had been prompted by timekeeping mispractice with respect to the bundy card system utilised by Qantas to record time spent by employees at work.

90 In holding that Qantas had not contravened s 5 of the 1976 Act in dismissing Mr Lewis, Morling J assessed the reliability and weight of the evidence adduced by both parties. His Honour made findings that Mr McLean, the dismissing officer, "bore no ill-will to the prosecutor", and that[72]:

> "It is significant that McLean did not single out the prosecutor for treatment different from that meted out to Macfarlane, who was not a union delegate and who had not taken any special part in the quarantine dispute. ... I am satisfied that neither Macfarlane nor the prosecutor was unfairly treated. If facts favourable to the prosecutor did not emerge at the interview, that failure was due entirely to his own refusal to say anything in his own defence."

91 Morling J concluded that the evidence was sufficient to draw a reasonable inference that Mr Lewis had directly or indirectly requested Mr Macfarlane to "clock" his bundy card[73]. His Honour agreed with the statement by Northrop J in *Hyde v Chrysler (Australia) Ltd*[74], that being a member, delegate or officer of a union organisation[75]:

> "'does not confer on that employee an immunity from dismissal by reason of the circumstance that he is a delegate of an organization'. ... The timekeeping offence for which the prosecutor was dismissed had no relation to his position as a union delegate or to the part which he had

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70 (1981) 54 FLR 101 at 105.

71 (1981) 54 FLR 101 at 107.

72 (1981) 54 FLR 101 at 109.

73 (1981) 54 FLR 101 at 108-109.

74 (1977) 30 FLR 318 at 332.

75 (1981) 54 FLR 101 at 113.

played in the industrial disputation with the company. His position as delegate gave him no immunity from dismissal for the offence."

The *Fair Work Act* 2009

92 In 1988, s 5 of the 1976 Act was embodied in s 334 of the *Industrial Relations Act* 1988 (Cth) ("the IR Act"). This provision was then encapsulated first in ss 298K and 298L of the *Workplace Relations Act* 1996 (Cth) ("the WR Act") and then in ss 792 and 793 of the WR Act, as amended in 2006. The WR Act was repealed in 2009 and replaced by the Act.

93 The critical provision, s 346, is contained in Ch 3, Pt 3-1, Div 4 of the Act under the chapeau "Industrial activities". Part 3-1 (ss 334-378) is headed "General Protections".

94 The objectives of Pt 3-1 include protecting the freedom to elect to become a member of, be represented by and participate in the lawful industrial activities of industrial associations (s 336(b)). Division 3 of Pt 3-1 (ss 340-346) concerns the protection of "Workplace rights", Div 5 (ss 351-355) provides for "Other protections" and Div 7 (ss 360-364) provides "Ancillary rules". As will be seen, the interpretation of any of the provisions contained within Pt 3-1 requires an appreciation of the Part as a whole.

95 Section 346 is in the following terms:

"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 within the meaning of paragraph 347(a) or (b)*; or

(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

Note: this section is a civil remedy provision (see Part 4-1)." (emphasis added)

The Note refers to Pt 4-1 of Ch 4, which includes orders for compensation (s 545(2)(b)), and pecuniary penalty orders (s 546).

96 A person "engages in industrial activity" under s 347 if the person:

> "(b) does, or does not:
>
> ...
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> (ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or
>
> (iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or
>
> ...
>
> (v) represent or advance the views, claims or interests of an industrial association".

97 The term "industrial association" is used by the Act to replace the term "organizations" found in the earlier legislation. The term is defined in s 12 of the Act as:

> "(a) an association of employees or independent contractors, or both, or an association of employers, that is registered or recognised as such an association (however described) under a workplace law; or
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> (b) an association of employees, or independent contractors, or both (whether formed formally or informally), a purpose of which is the protection and promotion of their interests in matters concerning their employment, or their interests as independent contractors (as the case may be); or
>
> (c) an association of employers a principal purpose of which is the protection and promotion of their interests in matters concerning employment and/or independent contractors;
>
> and includes:
>
> (d) *a branch of such an association*; and
>
> (e) an organisation; and
>
> (f) a branch of an organisation."
>
> (emphasis added)

98 The taking of "adverse action" is defined in s 342(1). Amongst other actions, adverse action is taken by an employer against an employee if the employer[76]:

> "(c) alters the position of the employee to the employee's prejudice; or
>
> (d) discriminates between the employee and other employees of the employer."

99 Finally, the term "officer" of an industrial association is defined in s 12 as:

> "(a) an official of the association; or
>
> (b) a delegate or other representative of the association."

Section 12 defines "official" as meaning:

> " a person who holds an office in, or is an employee of, the [industrial] association."

The appellant concedes that the AEU is an "industrial association" and that Mr Barclay, as President of the BRIT AEU Sub-Branch, is an "officer" for the purposes of these proceedings.

100 The application of s 346 turns on the term "because". This term is not defined. The term is not unique to s 346. It appears in s 340 (regarding workplace rights), s 351 (regarding discrimination), s 352 (regarding temporary absence in relation to illness or injury) and s 354 (regarding coverage by particular instruments, including provisions of the National Employment Standards).

101 The use in s 346(b) of the term "because" in the expression "because the other person engages ... in industrial activity", invites attention to the reasons why the decision-maker so acted. Section 360 stipulates that, for the purposes of provisions including s 346, whilst there may be multiple reasons for a particular action "a person takes action for a particular reason if the reasons for the action include that reason". These provisions presented an issue of fact for decision by the primary judge.

102 Reference was made in argument to *Purvis v New South Wales*[77]. That litigation concerned the application of the *Disability Discrimination Act* 1992

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76 *Fair Work Act* 2009 (Cth), s 342, It 1.

77 (2003) 217 CLR 92; [2003] HCA 62.

(Cth) to the suspension and expulsion of a disabled student from a State school. Section 5(1) used the expression "because of the disability". Gummow, Hayne and Heydon JJ emphasised that s 10 of the statute stated that if an act is done for two or more reasons, one of which is the disability of a person, even if it not be the dominant or a substantial reason for doing the act, the act is taken to be done for that reason[78]. This provision may be compared with s 360 of the Act just described.

103 With respect to what became s 346 of the Act, paragraph 1458 of the Explanatory Memorandum to the Fair Work Bill 2008 stated:

> "Clause 360 provides that for the purposes of Part 3-1, a person takes action for a particular reason if the reasons for the action include that reason. The formulation of this clause embodies the language in existing section 792 which appears in Part 16 of the WR Act (Freedom of Association) and *includes the related jurisprudence*. This phrase has been interpreted to mean that the reason must be an *operative or immediate reason for the action* (see *Maritime Union of Australia v CSL Australia Pty Limited*[79]). The 'sole or dominant' reason test which applied to some protections in the WR Act does not apply in Part 3-1." (emphasis added)

The phrase "operative or immediate reason" used in *CSL* is relevantly indistinguishable from the phrase "a substantial and operative factor" used by Mason J in *Bowling*.

104 In light of the legislative history of s 346 and the intention of Parliament outlined above, the reasoning of Mason J in *Bowling* is to be applied to s 346. An employer contravenes s 346 if it can be said that engagement by the employee in an industrial activity comprised "a substantial and operative" reason, or reasons including the reason, for the employer's action and that this action constitutes an "adverse action" within the meaning of s 342.

105 With respect to the onus of proof, the Act adopts the same position as that under the 1904 Act. Section 361 establishes the onus of proof under the chapeau "Reasons for action to be presumed unless proved otherwise". The provision is in the following terms:

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78 (2003) 217 CLR 92 at 144-145 [169].

79 (2002) 113 IR 326 at 342 [54]-[55].

"(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

(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.

(2) Subsection (1) does not apply in relation to orders for an interim injunction."

106 Consistent with the statement of Gibbs J in *Bowling*[80], the Explanatory Memorandum to the Fair Work Bill 2008 states[81]:

> "subclause 361(1) provides that once a complainant has alleged that a person's actual or threatened action is motivated by a reason or intent that would contravene the relevant provision(s) of Part 3-1, that person [in this case, the employer] has to establish, on the balance of probabilities, that the conduct was not carried out unlawfully. This has been a long-standing feature of the freedom of association and unlawful termination protections and 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."

There is no issue of onus raised in these proceedings.

At trial

107 The respondents, then the applicants, submitted that in determining whether or not prejudicial action has been taken "because" of the status or activities of the victim, the subjective reason of the actor for taking the prejudicial action is wholly irrelevant. Rather the test was said to be "purely objective". This disjunction between "subjective" and "objective" reasons was to be productive of error in the Full Court. Alternatively, the respondents submitted

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80 (1976) 51 ALJR 235 at 239; 12 ALR 605 at 612.

81 Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 234 [1461].

at trial that BRIT had not established that, on the balance of probabilities, it had not acted for a proscribed reason[82].

108 With respect to the operation of s 346, Tracey J held[83]:

> "It has never been the case that an employer was prevented, by federal industrial legislation, from taking prejudicial action against an employee who happened to be a union member or a union official: see for example *Cuevas v Freeman Motors Ltd*[84]. An employer could not, however, act to the detriment of an employee 'by reason of' or 'because' of the employee's union membership or associated activities. Over the past century the legislature has expanded progressively the number of prejudicial acts which are denied to an employer and the number of proscribed reasons which might actuate the taking of such prejudicial action. The central issue in this case is concerned with the provisions of the Act which determine whether a causal nexus exists between an employee's union membership and activities and any prejudicial action about which complaint is made."

109 His Honour continued[85], after considering what was decided in *Bowling*:

> "In all of the cases to which I was referred ... and others which I have examined, the court proceeded on the basis that evidence of the employer's subjective reasons for taking the impugned action was relevant in deciding whether the employer had taken the action because of the existence of one or more of the circumstances in which such action was impermissible."

110 Dr Harvey, the Chief Executive Officer of BRIT, was the person responsible for the action taken against Mr Barclay. She gave evidence and was cross-examined at length. His Honour made the following findings regarding her evidence[86]:

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82 (2010) 193 IR 251 at 258 [23].

83 (2010) 193 IR 251 at 257 [19].

84 (1975) 25 FLR 67 at 78-79.

85 (2010) 193 IR 251 at 259 [28].

86 (2010) 193 IR 251 at 264-265 [54].

> "When, however, [Dr Harvey] was called on to explain her reasons for taking adverse action against Mr Barclay she provided convincing and credible explanations of why it was that she took the steps that she did. ... She said that she had determined to exclude him from BRIT campuses and suspend his e-mail access because she did not want Mr Barclay on the premises while the auditors were there and because she did not want any other 'loose allegations' made inappropriately during the audit to the detriment of BRIT. She maintained her denials of having acted against Mr Barclay for any reason associated with his union membership, office or activities. ... I accept her evidence. I am satisfied that she did not act for any proscribed reason."

111 The application was dismissed.

The Full Court

112 In dealing with the operation of the word "because" in s 346 on appeal to the Full Court of the Federal Court, the majority (Gray and Bromberg JJ) said[87]:

> "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 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?
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> ...
>
> So much is evident from the use of the word 'because'. It is also consonant with the *objective* and *protective* purposes of s 346." (emphasis added)

Their Honours continued[88]:

> "Objective facts, dependent on the determination of questions of mixed fact and law, have now been included in s 346 to a much greater extent than they were in the section's predecessors. Section 347 is replete with examples. For instance 'lawful activity' in (b)(ii) and (iii) and 'lawful request' in (b)(iv). Whether a person is or is not a member or officer of an industrial association is also a fact to be ascertained objectively by reference to a legal standard, usually the rules of the association."

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87 (2011) 191 FCR 212 at 221 [27], [29].

88 (2011) 191 FCR 212 at 222 [33].

113 Whilst accepting the view of the primary judge that the words "because" and "by reason of" are used interchangeably by the Act, Gray and Bromberg JJ took issue with the assessment of the employer's subjective state of mind in ascertaining the reasons relevant to the adverse action[89]:

> "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*[90] 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 held 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." (emphasis added)

114 Gray and Bromberg JJ concluded the primary judge erred by failing to require BRIT to establish the "real reason" for the treatment of Mr Barclay, rather than that by which Dr Harvey had thought she had been actuated[91]. Their Honours linked this notion of the "real reason" to what had been said in the passage set out above by reiterating that "the search required by s 346 is a search for what actuated the conduct of the person who took adverse action, not for what that person thinks he or she was actuated by"[92]. Further, the e-mail was sent by Mr Barclay in his capacity as an officer of the AEU and, even if it were to be accepted that the content of the e-mail may have been overstated, his failure was that of a union officer and not of an employee[93]. The dismissal therefore occurred for a proscribed reason in contravention of s 346.

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89 (2011) 191 FCR 212 at 221 [28].

90 (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617.

91 (2011) 191 FCR 212 at 233 [73]-[74].

92 (2011) 191 FCR 212 at 233 [74].

93 (2011) 191 FCR 212 at 234 [78].

115 In his dissenting reasons, Lander J preferred the approach of the primary judge, namely, that when looking to identify the reasons "because" a decision was made, the question is to be answered "by reference to the subjective intention of the decision-maker"[94]. In this regard, whilst Mr Barclay may have been acting on behalf of the AEU when sending the e-mail, the adverse action taken by BRIT was not for this reason. The action was taken because "[Dr Harvey] was of the view that the allegation against [Mr Barclay] was serious, and [she] was concerned if Mr Barclay was not suspended he might cause further damage to the reputation of the (BRIT) and of the staff in the BRIT", as found by the primary judge[95]. These findings of fact had not been challenged before the Full Court[96].

The appeal to this Court

116 Before this Court the appellant accepts that it took "adverse action" against the first respondent under s 342 of the Act. On the footing that s 346 applies, the primary issue for determination is whether or not the adverse action was made "because" of a reason proscribed by s 346. No party to the appeal seeks to agitate the findings of fact made by the primary judge.

117 The Minister for Tertiary Education, Skills, Jobs and Workplace Relations ("the Minister") sought, and was granted, leave to intervene. The Minister largely supported the position taken by Mr Barclay and the AEU.

118 The appellant submits that there are four questions to be dealt with in this appeal; and it is convenient to proceed in this fashion. The questions may be formulated as follows:

1. Is the question of whether a person has taken adverse action because of a proscribed reason for the purpose of s 346 of the Act to be answered by an "objective" or "subjective" test?

2. If a primary judge accepts evidence of an employer that a decision has been made for an innocent and non-proscribed reason, and such findings and the reasons for such findings are not challenged, is this a good answer to an alleged breach of s 346?

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94 (2011) 191 FCR 212 at 256 [208].

95 (2011) 191 FCR 212 at 258 [226].

96 (2011) 191 FCR 212 at 257 [221].

3. If the answer to Question 1 is an "objective" test, did the majority of the Full Court nonetheless erroneously apply the test impermissibly narrowly?

4. Did the findings of the primary judge only go toward the "conscious" state of mind of the decision-maker, leaving open to the Full Court the making of findings with respect to the "unconscious" state of mind of the decision-maker?

Question 1

119 The appellant submits, in support of the approach taken by the primary judge, that in applying s 346 the court should favour the application of a "subjective" test, which is based on the history of the legislation and the intention of Parliament. It contends that, while "objective" considerations are relevant, they are not decisive in testing the reliability and weight of the evidence.

120 The respondents submit, with support from the Minister, that (a) questions of subjectivity as opposed to objectivity serve only to misdirect the correct interpretation of s 346; rather, the relevant inquiry concerns that which the employer must establish to avoid a finding of contravention, and that (b) the ultimate issue becomes "whether the employer has discharged the onus of dissociating all the real reasons from each of the reasons proscribed by s 346". Submission (a) should be accepted. But while submission (b) correctly emphasises the importance of the onus placed upon the employer, it does not give proper effect to *Bowling*.

121 With respect to submission (a), to engage upon an inquiry contrasting "objective" and "subjective" reasons is to adopt an illusory frame of reference. Such an inquiry into the "objective" reasons risks the substitution by the court of its view of the matter for the finding it must make upon an issue of fact. Here, that finding was made by Tracey J and it was an error of law to displace it in the way seen in the reasons of the Full Court majority.

122 However, some attention should be paid here to a passage in the reasons of Lord Nicholls of Birkenhead in *Chief Constable of West Yorkshire Police v Khan*[97], which was repeated by Baroness Hale of Richmond in *Derbyshire v St Helens Metropolitan Borough Council*[98]. Section 2(1) of the *Race Relations Act* 1976 (UK) defined "discrimination by victimisation" in terms which posited treatment of the person victimised "by reason that" this person had acted in any of the ways then set out in pars (a)-(d).

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97 [2001] 1 WLR 1947 at 1954; [2001] 4 All ER 834 at 841.

98 [2007] 3 All ER 81 at 96.

123 Lord Nicholls denied that the expression "by reason that" attracted notions of causation as understood when attaching a legal conclusion to a particular state of affairs[99]. Rather, as his Lordship said, "[t]he reason why a person acted as he did is a question of fact"; he also remarked that "[u]nlike causation, this is a subjective test"[100].

124 The particular difficulty is that Lord Nicholls spoke as he did in response to a question he framed as follows: "What, *consciously or unconsciously*, was his reason?" (emphasis added). The reference to unconscious reasoning presents a paradox apparent in the passage in the majority reasons in the Full Court set out above[101]. This reference is apt to confuse and mislead the finder of fact.

125 It may be noted that in *Derbyshire*, Lord Bingham of Cornhill summarised Lord Nicholl's proposition in *Khan* as "[w]hat matters is the discriminator's subjective intention: what was he seeking to achieve by treating the alleged victim as he did?"[102] This formulation has no reference to the unconscious.

126 The relevant frame of reference in this case is a statutory provision in which neither the words "objective" nor "subjective" appear. There is an inherent risk of misguidance when seeking to imply tests or requirements in the application of a statutory provision absent some persuasive basis to do so. Nothing was put in argument, nor are there any decisions of this Court, to provide such a basis. Indeed, no direct challenge was made to what had been said by Mason J in *Bowling*.

127 In determining an application under s 346 the Federal Court was to assess whether the engagement of an employee in an industrial activity was a "substantial and operative factor" as to constitute a "reason", potentially amongst many reasons, for adverse action to be taken against that employee. In assessing the evidence led to discharge the onus upon the employer under s 361(1), the reliability and weight of such evidence was to be balanced against evidence adduced by the employee and the overall facts and circumstances of each case; but it was the reasons of the decision-maker at the time the adverse action was taken which was the focus of the inquiry.

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99 So also was Lord Scott of Foscote: [2001] 1 WLR 1947 at 1964; [2001] 4 All ER 834 at 850-851.

100 [2001] 1 WLR 1947 at 1954; [2001] 4 All ER 834 at 841.

101 At [114].

102 [2007] 3 All ER 81 at 86.

128 Whilst it is true to say, as do the respondents, that there is a distinction between discharging the onus of proof and establishing that the reason for taking adverse action was not a proscribed reason, there is nothing to suggest that the conclusions drawn by the primary judge, and the findings and reasons upon which these were based, did not take this into consideration. As Lander J concluded, if the reasons for the conclusions and the facts for which they were formulated are not challenged, then the contravention of s 346 cannot be made out[103]. This proposition should be accepted. To hold otherwise would be to endorse the view that the imposition of an onus of proof on the employer under s 361(1) creates an irrebuttable presumption at law in favour of the employee.

129 Question 1 is to be answered: "Neither. The test is whether adverse action has been taken because of a proscribed reason."

Question 2

130 In the joint reasons in *Fox v Percy*[104], in a passage which has been applied since[105], Gleeson CJ, Gummow and Kirby JJ said:

> "[An appellate court] must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record[106]. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court reading the transcript, cannot always fully share[107]."

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103 (2011) 191 FCR 212 at 258 [226].

104 (2003) 214 CLR 118 at 125-126 [23]; [2003] HCA 22.

105 *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at 548 [130]; 286 ALR 501 at 534-535; [2012] HCA 17; *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at 381 [76]; [2010] HCA 31.

106 *Dearman v Dearman* (1908) 7 CLR 549 at 561; [1908] HCA 84. See also *Scott v Pauly* (1917) 24 CLR 74 at 278-281; [1917] HCA 60.

107 *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 at 637; [1985] 1 All ER 635 at 637, per Lord Scarman, with reference to *Joyce v Yeomans* [1981] 1 WLR 549 at 556; [1981] 2 All ER 21 at 26. See also *Chambers v Jobling* (1986) 7 NSWLR 1 at 25.

131 Further, absent any challenge to the findings of fact or reasons for the conclusions drawn by the primary judge, the decision that an employer has not acted for a proscribed reason in taking adverse action against an employee must stand. The findings by Tracey J in relation to the evidence of Dr Harvey established that the reasons for adverse action were not proscribed by s 346.

132 Question 2 is to be answered "yes".

Question 3

133 Applying what has been said with respect to Question 1, the Full Court erred in reassessing the reliability and weight of the evidence in this case. Such a course was not open to it.

Question 4

134 Given the answers to the above three questions, there was no scope for the Full Court to make findings with respect to the "unconscious" state of mind of BRIT.

Conclusion

135 The appeal should be allowed and consequential orders made as proposed by the Chief Justice and Crennan J.

136 These orders do not include a costs order with respect to the appeal to this Court. Section 26 of the *Judiciary Act* 1903 (Cth) states that this Court has jurisdiction to award costs in all matters brought before it. This appeal is a matter brought before the Court under s 73(ii) of the Constitution. On that basis the appeal would attract a costs order.

137 However, s 570 of the Act provides that in "proceedings (including an appeal) in a court (including a court of a State or Territory) exercising jurisdiction under this Act", a party may be ordered by the court to pay costs incurred by another party to the proceedings only in certain circumstances, none of which is presently applicable. If it can be said that the right or duty in issue on the appeal to this Court from the Full Court of the Federal Court owes its existence not to s 73(ii) of the Constitution but to the Act, in which s 570 appears, then s 570 would appear to be engaged[108].

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108 See *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* (2001) 203 CLR 645 at 660 [41]-[44]; [2001] HCA 16.

138 If the appellant seeks against the first and second respondents a costs order in respect of this appeal, and this is not resisted by those parties then a consent order may be filed.

139 If the first and second respondents resist that course then:

(a) the appellant is to file written submissions on or before 10 September 2012,

(b) the first and second respondents are to file written submissions on or before 12 September 2012, and

(c) any submissions by the appellant in reply are to be filed on or before 14 September 2012.

The costs issue then will be determined by the Court on the papers.

HEYDON J.

The trial

140 Dr Louise Harvey was the appellant's Chief Executive Officer. Mr Greg Barclay, the first respondent, was an employee of the appellant. He was also an officer of the second respondent, a trade union. She suspended him from duty and took other measures against him. The question was whether she did this "because" he had engaged in industrial activity within the meaning of s 346 of the *Fair Work Act* 2009 (Cth) ("the Act"). The word "because" requires an investigation of Dr Harvey's reasons for her conduct. Section 360 provided that "a person takes action for a particular reason if the reasons for the action include that reason." The Explanatory Memorandum makes it clear that to satisfy s 360 the particular reason must be an "operative or immediate reason for the action"[109]. Under s 361 of the Act, it is presumed that action was taken for a prohibited reason, unless the employer proves otherwise. Examining whether a particular reason was an operative or immediate reason for an action calls for an inquiry into the mental processes of the person responsible for that action.

141 Dr Harvey gave an account of her mental processes in an affidavit. The respondents' searching cross-examination of her is recorded over 70 pages of the trial transcript. The record of her re-examination extends over three pages of that transcript. The assessment of a witness's mental processes is an assessment of that witness's state of mind. It is pre-eminently a matter in which a trial judge has a considerable advantage over an appellate court. In the course of his great speech in *Nocton v Lord Ashburton*, Viscount Haldane LC said[110]:

> "it is only in exceptional circumstances that judges of appeal, who have not seen the witness in the box, ought to differ from the finding of fact of the judge who tried the case as to the state of mind of the witness."

The trial judge possesses great learning in the present field. He has considerable experience of oral hearings. He said that Dr Harvey "provided convincing and credible explanations of why it was that she took the steps she did." He said that she "maintained her denials of having acted against Mr Barclay for any reason associated with his union membership, office or activities." He concluded: "I accept her evidence. I am satisfied that she did not act for any proscribed reason. Rather, she acted for the reasons which she gave."[111] Of course, "mere

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109 Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 234 [1458].

110 [1914] AC 932 at 957. See also at 945 and 949. And see *Clark Boyce v Mouat* [1994] 1 AC 428 at 436-437.

111 (2010) 193 IR 251 at 257-258 [54].

declarations" by a witness as to his or her "mental state" may not be sufficient to discharge the appellant's burden of proof under s 361[112]. External circumstances could put into question the reliability or credibility of those declarations. But Dr Harvey's evidence did not consist only of "mere declarations". There was nothing to suggest that her evidence was incorrect.

No challenge pressed to the trial judge's factual reasoning

142 In the Full Court, the respondents did not attempt to demonstrate any error vitiating the trial judge's fact-finding process[113]. In this Court, the respondents filed a notice of contention asserting that the trial judge "failed to appreciate the weight or bearing of established circumstances, namely that the first respondent was acting as an officer and engaging in industrial activities". However, at the end of their counsel's address, that notice of contention was almost silently abandoned. In that way, the respondents also jettisoned a number of unsupported and pejorative remarks in their written submissions about the trial judge, for example, that his conclusion "beggars belief". Had the respondents seriously attempted to demonstrate any error vitiating the trial judge's fact-finding process, they would inevitably have failed.

The Full Court majority's approach

143 Why, then, did the majority in the Full Federal Court depart from the trial judge's conclusions? The majority gave two main reasons.

144 *"Conscious" and "unconscious" reasons.* Their Honours drew a distinction between the "real reason for a person's conduct" and "the reason that the person asserts, even where the person genuinely believes he or she was motivated by that reason."[114] Their Honours said that the "real reason" could be "unconscious"[115]. They said that "what actuated the conduct of the person who

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112 *Pearce v W D Peacock & Co Ltd* (1917) 23 CLR 199 at 203 per Barton ACJ; [1917] HCA 28.

113 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 257 [221] and 258 [224] and [226].

114 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 221 [28].

115 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 221 [28].

took adverse action" could be different from "what that person thinks he or she was actuated by."[116]

145 In this Court, the respondents did not refer to this approach in their written submissions. This was despite the fact that the appellant had criticised it in its written submissions. The respondents referred to it in oral argument. But they did not long persist in any attempt to defend it. It is indefensible. Counsel for the respondents courteously, but scarcely enthusiastically, said of the Full Court majority's approach:

> "It might be said that that might be interesting, but it would be a little difficult to turn into a practical set of propositions in resolving a case. It might be so, but it might not be very helpful."

The respondents made no attempt to turn the Full Court majority's approach into a practical set of propositions enabling them to gain victory in this case.

146 To search for the "reason" for a voluntary action is to search for the reasoning actually employed by the person who acted. Nothing in the Act expressly suggests that the courts are to search for "unconscious" elements in the impugned reasoning of persons in Dr Harvey's position. No requirement for such search can be implied. This is so if only because it would create an impossible burden on employers accused of contravening s 346 of the Act to search the minds of the employees whose conduct is said to have caused the contravention. How could an employer ever prove that there was no unconscious reason of a prohibited kind? An employer's inquiries of the relevant employees would provoke, at best, nothing but hilarity. The employees might retort that while they could say what reasons they were conscious of, they could say nothing about those they were not conscious of.

147 Even if the Act did suggest that a search for "unconscious" elements was a proper one, the respondents did not demonstrate that there was any "unconscious" element in Dr Harvey's reasoning. Understandably, it did not occur to counsel for the respondents at trial to put any such proposition to Dr Harvey in cross-examination. It is true that the burden of proof was on the appellant at the trial. But at this appellate stage it is incumbent on critics of the trial judge's conclusion to point to an error underlying it. This the respondents did not convincingly do. There is no evidence whatever that supports the proposition that Dr Harvey "unconsciously" employed prohibited reasoning in taking action against Mr Barclay.

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116 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 233 [74].

148 *A "logical" consequence of Mr Barclay's representative role.* The second theme in the Full Court majority's reasoning was that the appellant had not met its onus of proof because all the conduct of Mr Barclay which led Dr Harvey to act "was … done for and on behalf of" the second respondent[117]. The respondents submitted that from this fact it "logically" followed that the appellant must fail. Contrary to that submission, that circumstance did not prevent the appellant meeting its onus of proof. Dr Harvey's mental state did not turn on whom Mr Barclay was acting for, but on what he did.

The respondents' stance in this Court

149 In this Court, the respondents contended that s 346 of the Act "is not confined to the subjective intent of the decision-maker". They argued:

> "The 'real reason' for the adverse action may comprise a multiplicity of reasons, some of them 'subjective' in the sense that they refer to an intention, belief or other state of mind of the actor and others of which are objective in the sense that they refer to extrinsically ascertainable facts which comprise the context in which the action was taken. However, the enquiry to ascertain the real reason or reasons is objective. The decision maker may or may not be in a position to give dispositive evidence of the real reasons for the adverse action".

The respondent did not make it plain what precise meaning the words "objective enquiry" would have in this context. The language of the Act does not support the respondents' submission. The international instruments to which Australia is party and on which the respondents relied do not support it either. Nor do the authorities to which the respondents referred. One of those authorities, for example, was Mason J's judgment in *General Motors-Holden's Pty Ltd v Bowling*, with which Stephen and Jacobs JJ concurred. In that case, his Honour was considering the purpose of an earlier version of the Act. His Honour held that its purpose was to place on the defendant the onus of proving "that which lies peculiarly within his own *knowledge*" (emphasis added)[118].

Orders

150 The appeal should be allowed and the orders proposed by other members of the Court should be made.

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117 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 233 [73].

118 (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617.