IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M 128 of 2011

BETWEEN:

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

and

GREGORY PAUL BARCLAY First Respondent

and

AUSTRALIAN EDUCATION UNION Second Respondent

APPELLANT'S SUBMISSIONS IN REPLY[1]

PART I – The Respondents' Submission

1. The Respondents make a number of attempts to formulate the test which is to be applied to determine the question of whether a person has taken adverse action for a reason proscribed by the general protection provisions.

2. The Respondents' Submission variously advocates:

   (a) an objective test, determined by the cause of the adverse action (Respondents' Submission [25], AB#);

   (b) a test which requires the decision maker to satisfy the reverse onus both objectively and subjectively (Respondents' Submission [36], AB#); and

   (c) a two-step analysis which seeks to "*trace*" the proscribed reason to the decision to take adverse action (Respondents' Submission [29], AB#).

3. None of these formulations is supported by the statutory provisions or by authority. Further, they are inconsistent with majority below, who applied an objective test, taking into account the evidence of the decision maker.

4. The legislative history, the authorities and the extrinsic Parliamentary materials proffer a subjective test.[2]

[1] This Reply submission adopts the terms as defined in the Appellant's Submission dated 30 September 2011. It is in a form suitable for publication on the internet.

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5. The Respondents recast the onus in s.361 to one which determines a causal link between the proscribed reason and the adverse action. This is apparent from the submissions that:

(a) it "*beggars belief*" that, in taking adverse action against Mr Barclay because he disseminated the email, Dr Harvey dissociated that consideration from the circumstance that he was an officer communicating by email with AEU members (Respondents' Submission [22], AB#);

(b) the Appellant's failure to exclude the tracing of the adverse action back to the proscribed reason meant that it did not discharge the reverse onus (Respondents' Submission [29], AB#);

(c) the trial judge wrongly failed to ask the "*second question*" - why did Mr Barclay send the email? (Respondents' Submission [30], AB#);

(d) the identification of the "*real cause*" has to take account of the terms of the email, the context in which it was sent and what made it offensive (Respondents' Submission [35], AB#); and

(e) what was required was evidence that Dr Harvey was unaware of Mr Barclay's status as an officer and that he sent the email on the AEU's behalf (Respondents' Submission [40], AB#).

6. It is also apparent from the Respondents' shift of focus from "*reason*" to "*cause*", most notably in the analysis at paragraphs [28] to [35] of the Respondents' Submission (AB#), which culminates in the submission that the court should determine what was the "*real cause*" of the adverse action.

7. The Respondents' analysis:

(a) avoids the application of the word "because" in s.346:[3]

(b) fails to explain the role of the reverse onus in s.361; and

(c) fails to identify, or justify, any such Parliamentary intent to set such a low threshold.

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[2] Appellant's Submission [31]-[44], AB#.

[3] The trial Judge (reasons at trial at [29], AB#) and the Full Court (majority reasons at [24]-[25], AB#, Lander J in dissent at [191]-[193], AB#) were unanimous in the view that "*because*" equated with "*by reason of*".

8. The deficiencies in the Respondents' analysis are laid bare by the example of the union official arriving late to work because he has been occupied on union business (Respondents' Submission [28], AB#). The Respondents submit that the decision-maker would have to give evidence to exclude tracing the lateness back to what the person was doing.

9. This cannot be right. If so, it would even fail an objective test based on the application of *Purvis*. In *Purvis*, the less favourable treatment was because of the behaviours, not the disability, even though the behaviours could be traced back to the disability. Evidence of the decision-maker that the disciplinary action which follows was because the person was late to work, not because the person was a union officer, or engaging in union activities, if accepted by the court, discharges the reverse onus.

10. The Respondents' analysis ignores the impact that the engagement in union activities has on the person's conduct as an employee (being late to work). The decision-maker may give evidence that he or she was of the view that the employee should have organised his or her affairs in such a way as to not be late for work. If accepted by the court, evidence of such an innocent, and non-proscribed, reason for taking adverse action, would discharge the reverse onus.

11. The Respondents' analysis:

(a) avoids the unchallenged findings of the trial judge as to the reasons for the adverse action (identified in detail in the Appellant's Submission at [17], AB#); and

(b) draws upon the inferences drawn by the majority (Respondents' Submission [5], AB#) in circumstances where the majority did not purport to disturb any factual findings of the trial judge.

12. The trial judge recognised and had regard to the circumstances in which the email was sent (reasons at trial [38] to [42], AB#). The trial judge adopted the conventional approach of taking the matters which were the subject of the inferences drawn by the majority into account and using them to test the evidence of the decision-maker. The Respondents cannot now submit that the inferences drawn by the majority validly overturn the findings of the trial

judge. On appeal there was no challenge to the findings of the trial judge as to Dr Harvey's reasons for taking the adverse action (Appellant's Submission at [17], AB#).[4]

13. If the Respondents' analysis is correct, Mr Barclay would succeed even if Dr Harvey did not know that Mr Barclay was an officer, or was engaging in union activities. It was enough that the email was sent. That is tantamount to a strict liability provision. If so, there is no role for the reverse onus in s.361.

14. The reasons for the adverse action (Appellants' Submission [17], AB#), which were accepted by the trial judge, and were not challenged on appeal below, concern the need to protect the business and the reputation of BRIT, not the fact that Mr Barclay was an officer or was engaged in union activities.

15. The Respondents' Submission[5] fails to address the Appellant's submission in relation to the comparator. The submission is that, in circumstances where the court is of the view that it may assist, it is wrong of the majority to say that a court cannot have regard to a comparator.

PART II – The Minister's Submission

16. The Minister introduces five possible "*situations*" in which the court may be called upon to determine whether adverse action was taken because of a prohibited reason (Minister's Submission [21]). The first and fifth situations are uncontroversial. Authority does not support the Minister's characterisation of the remaining situations.

17. The Minister's analysis of *Bowling* (Minister's Submission [27]-[33]) cannot be accepted. *Bowling* is not within the third situation. In *Bowling*, the gap in the evidence arose from the failure to call the decision maker. *Bowling* was determined not by the existence of an "*objective connection*" between the status and the conduct, but by the failure of GMH to call the decision maker to explain why they engaged in the conduct in question, namely, the dismissal of a union delegate. The court focussed on matters "*peculiarly within the mind*" of the decision maker (*Bowling* at 617.5, Mason J). Further, the Minister fails to address the passage at 616.7 (Mason J) which states:

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[4] A proposed challenge was abandoned on appeal as was observed by Lander J in dissent at [226], AB#.
[5] As does the Minister's Submission [43]-[46].

"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."

18. The fourth situation postulated by the Minister suffers the same deficiencies as those raised in paragraphs 5 to 10 above. It advocates a wholly objective test which confers immunity upon union officials contrary to the passage in *Bowling* cited above, failing to recognise that the conduct of a person, whilst engaged in as a union official, can have consequences for them as an employee. Consequently, the Minister's analysis of the matter in this appeal (Minister's Submission [34]-[42]) does not withstand scrutiny. Further, it fails to deal with the express denial, which was accepted by the court along with "*convincing and credible*" explanations of the reasons for the action (reasons at trial [54]).

PART III – The Respondents' Proposed Notice of Contention

19. The Appellant objects to the Notice of Contention.[6] The notice appears to be directed to overturning the central findings of fact of the trial Judge, when this was not a ground pressed on appeal below.[7] It should not be permitted now. Otherwise the Appellant repeats paragraphs 11 and 12 above.

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[6] The proposed Notice of Contention was served on 27 October 2011. It was due to be filed and served by 23 September 2011.
[7] Transcript of proceedings before the Full Court (2 August 2010) at page 98, line 40 and page 99, line 34.