BOARD OF BENDIGO REGIONAL INSTITUTE OF TECHNICAL AND FURTHER EDUCATION v BARCLAY & ANOR (M128/2011)

Court appealed from: Full Court of the Federal Court of Australia [2011] FCAFC 14

Date of judgment: 9 February 2011

Date special leave granted: 2 September 2011

The first respondent (Barclay) is a senior teacher employed by the appellant (BRIT). He is also the Sub-Branch President at BRIT of the second respondent (AEU). Barclay forwarded an email to AEU members employed at BRIT, regarding an upcoming re-accreditation audit, in which he said he was aware of reports of serious misconduct by unnamed persons in BRIT. Before sending the email he did not advise any of his line managers of the details of the alleged misconduct. The email was passed on to senior managers and subsequently, the Chief Executive Officer of BRIT (the CEO). She wrote to Barclay requiring him to show cause, why he should not be disciplined for failing to report the misconduct alleged in his email to senior managers. Barclay was suspended on full pay, had his internet access suspended and was not required to attend BRIT during the suspension period.

The respondents commenced proceedings, contending that BRIT had contravened provisions of the *Fair Work Act* 2009 (Cth) (the Act), designed to protect the right of union officials and members, so that the action taken by the CEO constituted adverse action within the meaning of s 342 of the Act. BRIT conceded that Barclay's suspensions and preclusion from BRIT did constitute adverse action. However BRIT submitted that the decision to require Barclay to show cause was not adverse action within the meaning of the Act. The respondents submitted that the test of the reason why the relevant action was taken was objective and not subjective. Tracey J found that the adverse action was taken by the CEO because she considered that his conduct could be a breach of BRIT's code of conduct and his obligations as a BRIT employee and not because of his union activity.

The respondents appealed to the Full Court (Gray, Lander & Bromberg JJ) on a number of grounds. The majority (Gray & Bromberg JJ, Lander J dissenting) concluded that the reasons for the CEO's actions were founded upon the sending of the email, which was part of the exercise of Barclay's functions as an AEU officer. While there may have been a number of reasons for the CEO's actions, one of the factors was Barclay's union activity and thus constituted adverse action within the meaning of the Act. The majority held that on the facts the objective factors outweighed the subjective evidence. Lander J considered that a person's reasons for taking action can only be ascertained subjectively. He agreed with the reasoning and conclusions of the trial judge.

The grounds of appeal include:

- The majority [of the Full Federal Court] erred in law in concluding that a decision-maker , who establishes by evidence at trial that they took adverse action for an innocent and non-proscribed reason, does not establish a good defence under the general protection provisions in Part 3-1 of the *Fair Work Act* 2009 (Cth);

- The majority [of the Full Federal Court] erred in law in finding:
  (a) whether a general protections contravention has occurred is determined by ascertaining whether there is a causal connection between the adverse action and the prescribed reason;
  (b) the requisite causal connection may be determined by an objective test;
  (c) an innocent state of mind of the decision-maker is not determinative as to whether there is a requisite causal connection.

The Minister for Tertiary Education, Skills, Jobs and Workplace Relations is intervening in this appeal, pursuant to s 569 of the *Fair Work Act* 2009 (Cth).