

‘But Why?’ ‘Just Because!’: The Causal Link between Adverse Action and Prescribed Grounds under the Fair Work Act

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The adverse action provisions under the Fair Work Act have the potential to provide very broad protections to employees and others. Taking adverse action is not, by itself, unlawful – generally adverse action is only unlawful if it is taken ‘because’ of a prescribed ground (for example, union membership, sex, race, disability). A key issue to date has been interpreting and applying this link between the action and the prescribed ground. This issue is of central importance in assessing the scope and impact of the adverse action provisions. A recent (September 2012) High Court decision provides guidance on how courts will approach this link in the future, and suggests the protection offered by the adverse action provisions is not as broad as some initially hoped.

Introduction

The adverse action provisions in the *Fair Work Act 2009* (Cth) (‘FW Act’) came into effect in 2009, and have the potential to provide broad protections to employees and others. Generally speaking, these provisions prohibit the taking of adverse action ‘because’ of a prescribed ground. In the three years since the adverse action provisions came into effect, one key issue has been the meaning and scope of the causal link between the adverse action and the prescribed reason, and how this link is proven in practice. The interpretation and application of the causal link is of central importance in determining the scope and impact of the adverse action provisions.

This paper profiles the adverse action framework, with a particular focus on the causal link. It then considers the litigation of *Barclay v Board of Bendigo Regional Institute of Technical and Further Education*, which centred on the causal link and culminated in a High Court decision in September 2012. In that case, an employer successfully defeated an adverse action claim when the decision-maker gave evidence of the reasons for her decision (which did not include a prescribed reason), and her evidence was found to be credible by the trial judge. This was despite the existence of an objective connection between her reasons and the prescribed ground. The

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High Court decision provides guidance on how courts will approach the causal link in the future, and suggests that the protection offered by the adverse action provisions is not as broad as some initially hoped. The decision indicates important limits on the ability of an employee or other applicant to challenge the reasons for an employer's decision.

Adverse action under the Fair Work Act

The FW Act prohibits a person from taking adverse action against another person 'because of' various circumstances, grounds or attributes.

What is 'adverse action'?

The meaning of the term 'adverse action' depends on the relationship between the people involved. In respect of action taken by an employer against an employee, 'adverse action' means dismissing them, injuring them in their employment, altering their position to their prejudice, or discriminating between them and other employees (s 342(1), item 1). Adverse action can also be taken in situations outside an employment relationship, including by prospective employers against prospective employees, principals against independent contractors, and industrial associations against others (s 342(1), items 2, 3 and 7). For simplicity, this paper uses the language of adverse action taken by an employer against an employee, but the issues regarding the causal link have broader application to the other forms of adverse action.

What are the prescribed grounds?

The FW Act prohibits adverse action on a wide range of grounds or attributes. The grounds are grouped into three main categories: industrial activities, workplace rights, and discrimination. In relation to industrial activities, an employer must not take adverse action against an employee because the employee is or is not an officer or member of a union, or engages (or does not engage) in certain 'industrial activities' (including participating in lawful union activities and representing the views of a union) (ss 346-7). In relation to workplace rights, an employer must not take adverse action against an employee because the employee has a workplace right, has or has not exercised a workplace right, or proposes to exercise or not to exercise a workplace right (s 340(1)(a)), or to prevent an employee from exercising a workplace right (s 340(1)(b)). The term 'workplace right' is broadly defined and includes being entitled to the benefit of, or having a role or responsibility under, a workplace law or instrument (s 341). Finally, an employer must not take adverse action against an employee because of the employee's 'race, colour, sex, sexual

preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin' (s 351).

The large number and range of prescribed grounds, as well as the various types of adverse action, means the reach of the adverse action provisions is potentially very wide.

What is the causal link?

Adverse action is only prohibited if it is taken 'because' of a prescribed ground. This word 'because' defines the causal link between the ground and the adverse action that is necessary to create a breach. (One exception is s 340(1)(b), which does not use the word 'because' – it prohibits an employer taking adverse action against an employee 'to prevent the exercise of a workplace right'.)

The causal link is crucial to understanding the reach of the adverse action provisions. A clear example of the importance of this link is provided by one of the early decisions under the adverse action provisions. In *Hammond v Boutique Kitchens & Joinery Pty Ltd*, an employee was given a warning. She was very upset, and left work saying she was going on 'stress leave'. She visited her doctor and obtained a medical certificate. Later that day she was dismissed. She claimed her dismissal was a breach of s 352, which prohibits an employer from dismissing an employee 'because the employee is temporarily absent from work because of illness or injury' within the meaning of the regulations. However, the employee did not allege that she was dismissed *because* she was on sick leave – she believed that the dismissal *while* she was on sick leave was enough to constitute a breach. The Federal Magistrates' Court dismissed her claim, finding that without the causal link, there was no breach of s 352.

Hammond is a clear example of a claim failing because the causal link was not established. But, of course, most cases are not this simple. For example, what if a prescribed ground (such as union membership, or disability) was one of a number of factors the employer considered? What if the employee was dismissed because of particular conduct, which was related to his or her union membership? How far does the causal link go?

The FW Act itself includes some additional provisions which help to define this causal link. First, the FW Act deals with the possibility that an employer might have multiple reasons for taking adverse action against an employee. It provides 'a person takes action for a particular reason if the reasons for the action include that reason' (s 360). Second, the legislation includes a reverse onus in relation to the reasons for taking an action. This means that although the employee must still establish that they have a prescribed ground, and have suffered adverse action within the meaning of the legislation, once the employee alleges their employer took action for a particular reason, it is presumed that the employer's action *was* taken for that reason

unless the employer proves otherwise (s 361). The employee is relieved of the burden of proving the employer's reason for taking an action.

Some background to the causal link

The adverse action provisions draw together, and expand on, various aspects of previous legislation including union victimisation provisions. Union victimisation provisions have existed in federal industrial legislation for over 100 years, although the wording of the causal link has changed. In 1904 employers were prohibited from dismissing an employee 'by reason merely of the fact that' the employee was a union member or officer (*Conciliation and Arbitration Act 1904* (Cth) s 9(1)). In 1914 the causal link became 'by reason of the circumstance' (*Conciliation and Arbitration Act 1904* (Cth) s 9(1), later renumbered to s 5(1)). With the introduction of the *Industrial Relations Act 1988* (Cth), the causal link became 'because', and this word continued to be used in the *Workplace Relations Act 1996* (Cth) and the present provisions of the FW Act.

One of the early cases on the causal link was the 1917 High Court decision *Pearce v WD Peacock & Co Ltd*. An employee claimed that the reason for his dismissal was his union membership. The union had issued a log of claims, and the employer asked him to sign a document stating that he was satisfied with his wages and conditions. (As the employee was the only union member at the business, if he had signed the document there would have been no dispute between the employer and the union and, under the then-current legislation, the employer could not have been made a party to the award.) When he refused to sign the document, he was dismissed.

The employer gave evidence that the employee's union status did not influence the decision to dismiss him – rather, he dismissed the employee because the employee was dissatisfied with his wages and 'I would not keep a man in my employ who was dissatisfied' (202). The magistrate had no reason to doubt the employer's testimony, and accordingly found the employer had not breached the section.

On appeal, the majority of the High Court found there was no ground to overturn the magistrate's finding, and accepting the employer's evidence meant the employer had satisfied the reverse onus (Gavan Duffy and Rich JJ). Acting Chief Justice Barton found the magistrate had the benefit of hearing the witnesses and observing the cross-examination, and there was no sufficient basis to overturn his findings, although his Honour issued a note of caution that 'mere declarations as to the mental state that prompted the employer's actions are entitled to little or no regard' (203).

This case illustrates a straightforward approach to issues of causation and the reverse onus. The primary judge accepted the employer's evidence and this was a complete answer to the claim.

Justice Isaacs (in dissent) noted the purposes of the Act to facilitate and encourage the organisation of unions. In his Honour's view, the employee's dissatisfaction was 'bound up' with his union membership, and if the employer could not say 'one is independent of the other', the employer could not rely on the excuse that the dismissal was because the employee was dissatisfied. Justice Isaacs said '[s]uch an excuse seems to me to have about as much validity as an excuse by a person accused of stealing a horse, that he only intended to take the halter, and not the horse to which it was attached' (207). His Honour referred to other evidence given by the employer which suggested the union membership was a factor – that 'there was a "horse" attached to the "halter", and that he knew it' (208).

On its face, Isaacs J's decision is consistent with the straightforward approach described above – his Honour simply disagreed with the magistrate's finding about the employer's evidence, because other parts of the employer's own evidence contradicted it. However, the 'horse and the halter' analogy also suggests a more nuanced and complex approach to the issue of the causal link. Is it consistent with the purposes of the legislation for the entire question to fall on the way an employer defines and subdivides their reasons for acting? What if their stated reason for acting (the halter) is clearly closely related to a prescribed ground (the horse)?

The *Barclay* case

Mr Greg Barclay was employed by the Bendigo Regional Institute of Technical and Further Education ('BRIT'), and was the President of the BRIT sub-branch of the Australian Education Union ('AEU'). BRIT was preparing for an audit by the relevant statutory authority. In the months leading up to the audit, four AEU members raised concerns with Barclay (in his union capacity) regarding inaccurate information in the audit documents. Each wished to remain anonymous. Barclay did not tell his managers about these allegations. He sent an email from his BRIT email address to all AEU members at BRIT, stating that 'several members ... have witnessed or been asked to be part of producing false and fraudulent documents for the audit' and warning members not to become involved in these activities. He closed the email message with 'Greg Barclay President BRIT AEU Sub-Branch'.

BRIT's Chief Executive Officer, Dr Louise Harvey, formed the view that Barclay's email and his failure to tell his managers about the allegations or reveal the identity of the AEU members may have constituted misconduct and a breach of the relevant code of conduct. Harvey suspended Barclay on full pay, suspended his electronic access account, told him not to attend BRIT premises, and asked him to 'show cause' why he should not be subject to disciplinary action.

Barclay and the AEU brought a claim against BRIT, arguing that BRIT had taken adverse action against Barclay because he was an officer of the AEU and had engaged in industrial activity. BRIT conceded it had taken conduct constituting adverse action by suspending Barclay. Accordingly, the main issue at all stages of the litigation was whether BRIT's adverse action was taken for a prescribed reason – that is, whether the causal link was made out.

The case was initially heard in 2010 by Tracey J of the Federal Court. Justice Tracey determined that BRIT had not contravened the legislation. Barclay appealed to the Full Court of the Federal Court, which in 2011 found in Barclay's favour. BRIT appealed to the High Court which overturned the Full Court's decision.

Federal Court – Justice Tracey

Harvey denied that she suspended Barclay because of his union status or activities. She stated her reasons were that Barclay had made allegations of fraudulent conduct in his email without raising the allegations with management, that the email was distressing to staff, damaging to BRIT's reputation and undermined confidence in the audit, and that Barclay's position at BRIT caused him to be involved in the audit process itself (264).

Justice Tracey noted the history of the legislative provisions, and the different wording used in predecessors to the FW Act to define the causal link. His Honour found that under the *Conciliation and Arbitration Act 1904* (Cth) courts were required to determine the 'real reason' for the prejudicial action. In doing so courts had regard to the employer's evidence as to what 'motivated or actuated its decision to take prejudicial action against the employee' (258). Courts assessed the credibility of the decision-maker's evidence in the context of the surrounding circumstances, and '[i]f they were believed the onus was satisfied' (258).

Barclay argued that the introduction of the word 'because' instead of 'by reason of' was significant. He argued that the use of the word 'because' meant the decision-maker's subjective reasons for taking the action were irrelevant and the test was purely objective (258).

Justice Tracey rejected this argument. His Honour noted several cases decided since the introduction of the word 'because' where courts had treated 'evidence of the employer's subjective reasons' as relevant to the question of whether the employer had taken the action because of a prescribed ground (259). His Honour concluded that an employer's evidence will be relevant, and '[i]f it supports the view that the reason was innocent and that evidence is accepted the employer will have a good defence' (260-1). Accordingly, Harvey's evidence was central to the case.

Justice Tracey assessed Harvey's evidence as follows:

Dr Harvey was a somewhat tentative and nervous witness, especially at the commencement of her cross-examination. At times she was unnecessarily guarded and defensive. ... When, however, she was called on to explain her reasons for taking adverse action against Mr Barclay she provided convincing and credible explanations of why it was she took the steps that she did. ... She maintained her denials of having acted against Mr Barclay for any reason associated with his union membership, office or activities (264-5).

Ultimately, his Honour found her evidence credible, and held that this evidence was a complete answer to the claim.

Full Federal Court – Justices Gray, Bromberg and Lander

In the Full Federal Court, Gray and Bromberg JJ disagreed with Tracey J's decision. Their Honours noted the international law recognition of freedom of association, and the protective and facilitative objects of the provisions (218-20). They agreed with Tracey J's rejection of Barclay's argument that the introduction of the word 'because' made the decision-maker's state of mind irrelevant (220). However, their Honours found that although the decision-maker's state of mind is *relevant*, it is not *conclusive*. What is required is a determination of 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* (221, emphasis added).

In other words, it is not open to the decision-maker to choose to ignore the fact that the halter was attached to a horse.

Their Honours found that all of the matters Harvey was concerned about (the terms of the email and Barclay's insistence on maintaining the confidences of his union members) were part of Barclay's exercising of his union functions, and his engagement in industrial activities, and said:

The fact that Dr Harvey may have chosen to characterise the conduct of an officer as the conduct of an employee and therefore did not regard herself as taking action because Mr Barclay was an officer, or because of ... his industrial activities, does not alter the fact that her real reasons included these factors (234).

Justice Lander dissented, finding that '[t]he subjective intention of the alleged contravenor if accepted by the Court to be the actual intention will be determinative' (254). His Honour found that a breach will not be made out 'by simply establishing that adverse action was taken whilst the union official was engaged in industrial activity' – there will only be a breach 'if in fact that is the reason for the taking of the adverse action' (258).

Full High Court – Chief Justice French and Justices Gummow, Hayne, Heydon and Crennan

In a relatively short decision of 34 pages, all of the judges upheld the appeal and found in favour of BRIT. There were three separate judgments, each with slightly different reasoning.

Chief Justice French and Justice Crennan undertook a textual analysis of the provisions. Like Tracey J and the Full Federal Court majority, their Honours rejected Barclay's argument that the introduction of the word 'because' made the decision-maker's state of mind irrelevant. On the contrary, the existence of the reverse onus 'naturally and ordinarily mean[s] that direct evidence of a decision-maker as to state of mind, intent or purpose' will be relevant, although the 'central question remains "why was the adverse action taken?"' [44]. Their Honours noted that evidence from the decision-maker may not always be accepted (for example, if it is contradicted by proven objective facts or by other passages of the decision-maker's own evidence). 'However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer' [45]. Their Honours also considered the policy, purpose and history of the provisions. They found that the employer's onus is not 'made heavier (or rendered impossible to discharge) because an employee affected by adverse action happens to be an officer' or to have engaged in industrial activity [60]. Such an approach would 'destroy the balance between employers and employees central to the operation of s 361' [61].

Justices Gummow and Hayne were in 'general agreement' with the reasons of French CJ and Crennan J [71]. Their Honours cautioned against looking for 'objective' or 'subjective' reasons, saying this approach adopts 'an illusory frame of reference'. The issue is a question of fact, and the Full Federal Court majority made an error of law when it displaced Tracey J's factual findings [121] and reassessed the evidence [133]. Their Honours held:

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 ... which was the focus of the inquiry [127].

Justice Heydon was of the view that '[t]he word "because" requires an investigation of Dr Harvey's reason for the conduct' [140]. His Honour referred to the Explanatory Memorandum's reference to the reason being an 'operative or immediate reason for the action', and said '[e]xamining 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' [140]. It was not open to the Full Federal Court majority to depart from the trial judge's conclusions. His Honour was critical of the Full Federal Court majority's distinction between 'what actuated the conduct' and 'what the person thinks he or she was actuated by', describing the position as 'indefensible' [145].

Complex questions

Ultimately, the High Court took a straightforward approach to the issue of causation. If the decision-maker gives evidence that they did not take adverse action for a prescribed reason, and that evidence is accepted, there will not be a breach of the Act. This approach veils from view a number of complex issues which were not explored in the judgments.

Those issues were also not explored in the earlier Fair Work Act Review Panel report. The panel recommended that, if the High Court upheld the approach taken by the Full Federal Court majority, the provisions should be amended 'so that the central consideration about the reason for adverse action is the subjective intention of the person taking the alleged adverse action' (McCallum, Moore and Edwards 2012: 237). In this sense the review panel took a similar approach to that expressed by the later High Court decision, and like the High Court judgments difficult questions were passed over.

Clearly, the High Court's approach to the causal link relies almost entirely on the trial judge's assessment of the decision-maker's evidence and credibility. In this case, it is perhaps somewhat surprising that Tracey J's assessment of Harvey's evidence took only one paragraph of his Honour's judgment, and included some reservations (that she was a 'tentative and nervous witness' and at times 'unnecessarily guarded and defensive'). Leaving aside this particular case, such an approach of assessing the evidence of the decision-maker has the potential to allow (and perhaps even encourage) employers (whether deliberately or not) to characterise their reasons for acting in a way that suits their cause. In the *Barclay* case, as the majority Full Federal Court judges noted, '[a]ll of the relevant conduct in issue ... involved Mr Barclay in his union capacity' (233). However, because Harvey's evidence asserted that her only reason for acting was Barclay's conduct in his capacity as an employee, this link was not relevant.

Although *Barclay* concerned the specific prescribed grounds of being a union officer and being engaged in industrial activities, the interpretation of the causal link will be relevant to all claims of adverse action, including those relating to the more conventional discriminatory grounds of sex, race, disability and so on. For those familiar with the field of anti-discrimination law, such as the *Sex Discrimination Act 1984* (Cth), and State legislation such as the *Equal Opportunity Act 2010* (Vic), this method of interpreting the causal link may raise some concerns. It is possible

to prove a breach of anti-discrimination laws even where the decision-maker did not have any deliberate intent, much less admit to having that intent in evidence. For example, in one case an airline was found to have discriminated against job applicants on the basis of age. The application process involved an assessment of ‘flair’ and the ability to have fun. The assessors were under the age of 35 and it was determined that they tended to identify with people of their own age. There was no conscious decision by the assessors to choose only younger people, but the process had that effect, and was found to breach the *Anti-Discrimination Act 1991* (Qld) (*Virgin Blue Airlines Pty Ltd v Stewart*). Given the High Court’s decision in *Barclay*, it seems clear that an attempt to remedy this type of situation through an adverse action claim would not succeed.

A noticeable feature of the High Court judgments was a lack of engagement with the possibility of unconscious bias infecting a decision, and the approach of anti-discrimination law to this issue. Notably, on a previous occasion the High Court rejected the idea that a person is always aware of their own motives (*Purvis*, 2003, quoted by Gray and Bromberg JJ: 221). Literature on the role of unconscious motivations in anti-discrimination law suggests that people may act for reasons that they are unaware of or refuse to admit to themselves, such as unconscious prejudice (Lawrence, 1987, 2008; Krieger 1995). These matters were not addressed by the High Court.

For these reasons the protection offered by the adverse action provisions is not as broad as some initially hoped. In some cases it will come down to the credibility of the evidence given by the decision-maker as to their reasons for the decision, even where, as in *Barclay*, an objective connection existed between a prescribed ground and the adverse action.

Interestingly, the Workplace Relations Minister intervened in the *Barclay* case in support of Barclay and the AEU. This suggests the Government did not expect (or want) the provisions to be interpreted in the manner adopted by the High Court. In his submissions to the High Court, the Minister accepted that a decision-maker’s evidence, ‘if accepted as honest’, is of ‘central relevance’, but argued that such evidence may not be decisive [6.3.1]. In particular, the submissions recognise the possibility that the ‘evidence given [may not be] sufficient to exclude the existence of reasons additional to those advanced’ [6.3.1], or a decision may be ‘based on a factor of which the decision-maker was not conscious’ [6.3.1], [23]. The submissions also argue that there was an objective connection between the adverse action and the prescribed reason [35], and ‘[t]he way that a decision-maker characterises his or her own actions cannot determine the availability of the protections conferred by the legislature...’ [37].

The Minister’s spokesperson has indicated that the Minister will take advice on the judgment, noted the issues in *Barclay* were the subject of many submissions to the review panel, and stated the Government was consulting on the panel’s recommendations before finalising its response (Workplace Express, 2012). One commentator has argued that, in light of the Minister’s intervention, the Minister ‘would seem bound to seriously consider legislative changes that would safeguard the interests of union delegates when engaging in lawful industrial activities’ (Shaw, 2012). Both the High Court decision and the Review Panel’s recommendations have

avoided dealing with nuances and difficult issues that are likely to arise in future. It remains to be seen how the government will respond.

References

Chapman, A (2012) 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' *Adelaide Law Review* 33, p.p. 39-78

Krieger, LH (1995) 'The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity' *Stanford Law Review* 47, pp. 1161-248.

Lawrence, C (1987) 'The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism' *Stanford Law Review*, 39 pp. 317-388.

Lawrence, C (2008) 'Unconscious Racism Revisited: Reflections on the Impact and Origins of "the Id, the Ego, and Equal Protection"' (Symposium: Unconscious Discrimination Twenty Years Later: Application and Evolution) *Connecticut Law Review*, 40, pp. 931-977.

McCallum, R, Moore, M, and Edwards, J (2012) *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*.

Minister for Tertiary Education, Skills, Jobs and Workplace Relations (2011), Intervener's Submissions, No M 128 of 2011, *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*, 2 November.

Parliament of the Commonwealth of Australia, House of Representatives, *Fair Work Bill 2008, Explanatory Memorandum*.

Rice, S and Roles, C (2010) "'It's a Discrimination Law Julia, But Not as We Know It': Part 3-1 of the Fair Work Act' *The Economic and Labour Relations Review* 21, p.p. 20-37.

Shaw, D (2012) 'Case for Protection of Union Delegates', *Australian Financial Review*, 12 September, p. 49.

Smith, B (2010) 'Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law' *Australian Journal of Labour Law* 23, p.p.199-219

Workplace Express (2012) 'Barclay Ends Union Members' Protected Species Status, Say Employers; Delegates Still Have Rights, Says ACTU', 7 September.

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

Barclay v Board of Bendigo Regional Institute of Technical and Further Education (2011) 191 FCR 212 (Full Federal Court).

Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32 (7 September 2012) (High Court).

Hammond v Boutique Kitchens & Joinery Pty Ltd (2010) 198 IR 336.

Pearce v WD Peacock & Co Ltd (1917) 23 CLR 199.

Purvis v Department of Education and Training (NSW) (2003) 217 CLR 92.

Virgin Blue Airlines Pty Ltd v Stewart (2007) EOC 93-457.