Adverse action and reasons for acting: National Tertiary Education Union v Royal Melbourne Institute of Technology

Jim McKenna *BARRISTER*

Overview and significance of NTEU v RMIT University

A recent Federal Court decision has again addressed the difficult issue of determining when adverse action will be taken "because of" a proscribed reason in a general protections claim under the Fair Work Act 2009 (Cth) (FW Act). *National Tertiary Education Union v Royal Melbourne Institute of Technology*[1] involved a decision by the Royal Melbourne Institute of Technology (RMIT) to make redundant Professor Bessant (the applicant), following her exercise of various workplace rights. In his final judgment before his retirement, Gray J accepted the claim by the applicant and her union that her dismissal was for reasons including her workplace rights. In so doing, his Honour noted[2] that:

> Employers must understand that making use of redundancy as a pretext for getting rid of an undesired employee is not an option, if the reasons for wishing to get rid of that employee would be proscribed by the [FW Act].

Ultimately the court ordered the applicant be reinstated to her former position, with back pay, and imposed a significant additional pecuniary penalty.

The judgment highlights two important issues for respondents seeking to discharge their statutory onus of proving that adverse action was not taken for a proscribed reason:

- The first issue arises where a decision maker gives evidence of the reasons for taking action, but fails to expressly identify that the proscribed reasons were not operative in his or her decision.
- The second issue arises where a number of people contribute to a decision-making process. Even if a single person is responsible for the ultimate decision, if the decisions of others play an essential part of the ultimate decision, their reasons may form part of the reasons for the ultimate decision.

In both situations, a failure by a respondent to adduce specific evidence from the decision makers as to what were, and what were not, their reasons may result in a respondent being unable to discharge their onus.

Finally, the judgment provides a useful case study of where a trial judge may refuse to accept as conclusive the evidence of a decision maker about their subjective intention. It also highlights the difficulty of a decision maker quarantining proscribed reasons from the ultimate decision.

Background to Pt 3-1 of the FW Act: general protections

Part 3-1 of the FW Act relates to general protections. This part prohibits an employer from taking adverse action against an employee because an employee has, has exercised, or proposes to exercise, a workplace right. By reason of s 361, once an allegation is made that an employer has taken action against an employee because the employee exercised a workplace right, the onus essentially shifts to the employer to "prove otherwise". Further, s 360 expressly recognises that action may be taken for more than one reason.

In 2012, the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*[3] provided some guidance as to when adverse action will be "because of" a proscribed reason and what will be required to discharge the statutory onus. The High Court in *Barclay* confirmed that the central question was one of fact — namely, "why was the adverse action taken?"[4]

Overturning a decision of a majority of the Full Federal Court, which included Gray J, the High Court held that this question was not to be answered by regard to a "subjective" or "objective" test.[5] The court also noted that it will generally be extremely difficult for a respondent to displace the reverse onus if no direct evidence is given by the decision maker and, further, that direct testimony from the decision maker is capable of discharging this burden.[6] However, beyond this the court did little to clarify when a respondent will discharge the statutory onus, or when the evidence of a

decision maker's subjective intention should be accepted or rejected by a trial judge as determinative of the reasons for action.

NTEU v RMIT — the facts

The case involved a complex factual scenario. At the relevant times, the applicant was the head of a team of Youth Work academics within RMIT. The applicant enjoyed a very poor personal relationship with the RMIT head of the school within which she worked. In late 2009 and early 2010, she made various complaints both externally to WorkSafe and within RMIT, claiming that she was subjected to bullying by the head of school and was not afforded a safe workplace.

Following this, the head of school provided a memorandum to the Vice-Chancellor, indicating that the applicant's position in his school was no longer viable for a mixture of interpersonal, organisational and financial reasons. In support of these "financial reasons", there was evidence that the Youth Work team was running at a significant loss — although the basis for this assessment was disputed. In this memorandum, the head of school went on to recommend that the applicant be made redundant.

This was followed by further complaints by the applicant, an independent investigation, and a dispute resolution process, which led to an agreement whereby RMIT relieved the applicant of her undergraduate teaching to allow her to focus on research for a period of three years. Immediately following this agreement, RMIT initiated a voluntary redundancy process for the Youth Work team. There were no volunteers. The head of school then prepared a memorandum seeking approval to make the applicant's position redundant. This memorandum was initially sent to a senior member of the academic staff and the Executive Director for Human Resources, who endorsed the memorandum and forwarded it to the Vice-Chancellor. The evidence was that if either of these representatives had not endorsed this decision, it would not have been forwarded to the Vice-Chancellor for consideration. The Vice-Chancellor then also approved this memorandum and the applicant was informed that her position had been identified as potentially redundant.

This was followed by a dispute resolution process within the Fair Work Commission and a review by the RMIT Redundancy Review Committee (RRC). The RRC found the redundancy to be unfair for procedural and substantive reasons. The applicant was given an opportunity to comment on various issues identified by the RRC. After receiving the applicant's response, the Vice-Chancellor affirmed her decision and the applicant was made redundant.

Before the court, RMIT accepted that the applicant's redundancy amounted to adverse action (being a dismissal). It further accepted that the applicant had exercised workplace rights. However, RMIT claimed that the redundancy was made in good faith and for reasons (namely financial) that did not include her workplace rights.

Absence of direct evidence on the alleged prohibited reasons

RMIT claimed that the decision to dismiss the applicant was made by the Vice-Chancellor alone. The Vice-Chancellor was called to give evidence for RMIT. Her evidence was essentially that her reasons for making the applicant's position redundant were financial or "primarily financial".[7] However, the Vice-Chancellor was not asked specifically whether the fact that the applicant had, had exercised, or proposed to exercise her workplace rights were among her reasons for the dismissal. Accordingly, she did not give direct evidence that the applicant's workplace rights were not part of her reasons for approving the redundancy.[8]

The court found that the Vice-Chancellor's evidence did not preclude the possibility that she was motivated by reasons other than purely financial ones.[9] This therefore contributed to a finding by the court that the respondent had not satisfied its onus of proving that the reasons for the applicant's dismissal did not include the proscribed reasons.[10]

In those circumstances, Gray J noted that even if the reasons advanced by the decision maker are accepted by the court, an absence of evidence that there were no additional reasons, or that the actual reasons did not include the proscribed reasons, will usually result in a failure to rebut the statutory onus.[11]

Identification of the decision makers: who made the decision about redundancy?

Also at issue in the proceeding was who made the decision to make the applicant's position redundant. As noted above, RMIT claimed the Vice-Chancellor to be the sole decision maker. By contrast, the applicant argued that the Vice-Chancellor merely rubber stamped the recommendations by the head of school. Alternatively, the respondent argued that the two senior members of RMIT management who endorsed the memorandum and forwarded it to the Vice-Chancellor were part of the decision-making process. Notably, those two senior members of RMIT management were not called by RMIT to give evidence.

In addressing this issue, Gray J set out various authorities relevant to the court's task in determining the reasons for a corporation's actions.[12] Justice Gray determined that the Vice-Chancellor had her own views about

the redundancy and acted on those views. His Honour did not accept that the Vice-Chancellor's decision was "tainted" by the opinions of the head of school.[13] However, Gray J did find that the two senior members of RMIT management who endorsed the memorandum were an essential part of the process leading to the ultimate decision to terminate the applicant.[14] Without the decision of these additional employees, the Vice-Chancellor would not have been called on to make a decision at all. The absence of evidence from these two senior members of RMIT management also contributed to the respondent's failure to demonstrate that their decision was not made for proscribed reasons.[15]

The failure of the Vice-Chancellor's evidence to discharge the statutory onus

The court stopped short of explicitly rejecting the Vice-Chancellor's evidence as false. Consideration of her evidence started from the premise that she did not give exhaustive evidence of her reasons for making the applicant redundant.[16] However, Gray J made clear that he had serious reservations about her reasoning process and that her actions indicated that she was committed to making the applicant redundant. There were a number of issues that contributed to this finding.

Absence of criteria for choosing position for redundancy

Justice Gray commented on the absence of any clear reasoning in linking the financial deficit in the Youth Work discipline with the choice to make the applicant redundant.[17] His Honour noted the absence of any criteria by which the applicant's position was chosen for redundancy.[18]

Absence of recording reasons for decision to dismiss

His Honour also noted the high priority given to recording reasons for a decision to dismiss a person from employment by the relevant provisions of Pt 3-1 of the FW Act. Indeed, his Honour went so far as to describe the absence of any contemporaneous account of the reasons of the Vice-Chancellor as one of the most disturbing aspects of the case.[19]

Partial reopening of process after finding of unfairness

Having regard to the process followed by the Vice-Chancellor, Gray J found that the Vice-Chancellor's actions in only partially re-opening the process after the findings of unfairness by the RRC suggested that she was committed to making the applicant redundant.[20]

Relevance of business case for redundancy

Finally, as noted above, the court accepted that the Vice-Chancellor acted for her own views about the redundancy. However, Gray J also found the Vice-Chancellor to have been well aware of the fact that the head of school wished to have the applicant dismissed for reasons that were entirely unrelated to financial reasons.[21] The court noted that the Vice-Chancellor might have been expected to take steps to ensure that the "business case" being made was not designed to conceal an ulterior notice. The fact that the Vice-Chancellor was not concerned with such a possibility indicated that her approach was not that of the impartial decision maker.[22]

Recent decision: AMWU v Visy Packaging Pty Ltd (No 3)

This reasoning is echoed by the even more recent decision of in *Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)*.[23] In that case, Murphy J considered in detail, and rejected, the proposition that a decision to impose adverse action was quarantined from proscribed reasons because a manager acted on the recommendation of an independent report.

Penalty and remedy

Contrition and deterrence in determining penalty

Ultimately, the court found that RMIT used its redundancy processes to rid itself of an employee who was considered troublesome.[24] In considering penalty, Gray J noted that there was no display of contrition on the part of RMIT and that the need for specific deterrence was quite high. His Honour assessed the appropriate penalty for the contravention to be $27,000,[25] being close to the statutory maximum of $33,000.

Reinstatement ordered

Considering the appropriate remedy, Gray J noted that there would be some difficulty involved in reinstating the applicant. On the alternative of compensation, Gray J noted that it was likely that the figure awarded would have been significantly in excess of $1,000,000.[26] Ultimately, his Honour found that reinstatement was the preferable alternative.

Conclusion

Despite *Barclay* clarifying the operation of general protections provisions somewhat, respondents must still grapple with the establishment of the negative proposition — that is, a respondent must establish that action is not taken for a proscribed reason or with a proscribed intent.

Further, the critical question remains "why was the adverse action taken". In some circumstances, evidence

from a person identified as the decision maker may adequately address both of these issues. However, as *NTEU v RMIT* makes clear, this will not always be the case.

Jim McKenna
Barrister, Victorian Bar
Melbourne Chambers
jim.mckenna@melbchambers.com.au

Footnotes

1. *National Tertiary Education Union v Royal Melbourne Institute of Technology* [2013] FCA 451; BC201302485 (*NTEU v RMIT*).
2. Above, n 1, at [144].
3. *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647; 86 ALJR 1044; [2012] HCA 32; BC201206652 (*Barclay*).
4. Above, n 3, at 657, [44]–[45] per French CJ and Crennan J.
5. Above, n 3, at 657, [44]–[45] per French CJ and Crennan J and at 676, [139] per Gummow and Hayne JJ.
6. Above, n 3, at 657, [45] per French CJ and Crennan J.
7. For a discussion of the Vice-Chancellor's evidence, see above, n 1, at [90]–[99].
8. Above, n 1, at [24] and [90].
9. Above, n 1, at [97].
10. Above, n 1, at [131].
11. Above, n 1, at [20].
12. Above, n 1, at [26]–[27]. This summary of the applicable law was expressly endorsed in *Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)* [2013] FCA 525; BC201302742 at [149] per Murphy J.
13. Above, n 1, at [125].
14. Above, n 1, at [128].
15. Above, n 1, at [131].
16. Above, n 1, at [99]–[100].
17. Above, n 1, at [104], [108] and [131].
18. Above, n 1, at [109].
19. Above, n 1, at [110].
20. Above, n 1, at [121]–[123].
21. Above, n 1, at [120].
22. Above, n 1, at [120].
23. Above, n 12.
24. Above, n 1, at [144].
25. Above, n 1, at [145]. The court also determined $17,000 to be the appropriate penalty for a separate breach of the applicable Enterprise Agreement and, applying the totality principle, imposed a total penalty for the two contraventions in the amount of $37,000.
26. Above, n 1, at [149].