

# ALERT

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## Employer in breach of adverse action provisions for taking prejudicial action against 'unionised' employee

A Federal Court full court majority has overturned last year's controversial decision regarding adverse action. To read our coverage of last year's decision, please click [here](#).

### The case

A senior teacher at Bendigo TAFE, who was also the Australian Education Union (AEU) sub-branch president, emailed a number of AEU members alleging that several colleagues had informed him they had been witness to or had been asked to be part of producing 'false and fraudulent documents' for an audit being conducted for the TAFE's re-accreditation.

Mr Barclay was suspended, following what Bendigo TAFE described as serious misconduct.

### The case history leading up to the appeal

As we previously reported, this was the first case to examine the new adverse action provisions under the *Fair Work Act 2009* (Cth) (**Act**).

Mr Barclay alleged that Bendigo TAFE had suspended him unlawfully, because its decision to take action against him was based on his association with (and membership of) the union, a prohibited reason under the Act.

At first instance, the court found that Bendigo TAFE had not acted, by disciplining and suspending Mr Barclay, for any prohibited reason, but that it had acted to address serious allegations raised by the teacher and to prevent further damage to their reputation and staff.

### Findings on appeal

On appeal, the court ultimately found that the employer had breached the adverse action provisions when it disciplined Mr Barclay over the email.

Justices Peter Gray and Mordy Bromberg said the central question under s346 (the general protections provision) was *why the aggrieved person was treated the way that he or she was* – and, in determining this, it was not only the employer's intent that mattered. Although the state of mind or subjective intention of that person would be centrally relevant, what is required is a determination of the 'real reason' for the conduct.

Their Honours went on to comment that the real reason is not necessarily the reason that the person asserts, even if that person genuinely believes he or she was motivated by that reason. The real reason could be conscious or unconscious, and where it was unconscious and not appreciated or understood, adverse action would not be excused simply because the employer had no malicious intent.



Importantly, their Honours held that all of the relevant conduct in issue in this case involved Mr Barclay in his union capacity and none of it involved him in his capacity as an employee of Bendigo TAFE. That is, Mr Barclay's interaction with other AEU members – in receiving information, maintaining the confidence of the information received and communicating with AEU members through his email – was done *for and on behalf of* the AEU.

Justices Gray and Bromberg said that if an employer has a basis for complaint, or a legal claim arising out of such conduct, the complaint or claim ought to be addressed to the union, because the source of such complaint or claim is the conduct of the union. Furthermore, if employers were able to punish those of its employees who are union members or officers for the conduct of their union, the protection to those persons afforded by the Act would be illusory.

The case was remitted to the primary judge to determine penalties.

## What does this mean for employers?

This decision means that an employee who is performing the functions of a union cannot be subject to discipline for any conduct which is 'union conduct'. The reasoning of the court suggests it would not seem to matter that an employee sends an email that was inaccurate or unsubstantiated and resulted in actual damage to the employer. Such claims or complaints ought to be addressed to the union concerned.

Employers should take heed of this decision and note that it will be all but impossible to take action against a unionised employee if his or her conduct is in some way related to the activities of the union.

Employers should seek advice before taking **any** disciplinary step against an employee where the conduct complained of relates to their activity as a union member.

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