

# ALERT

7 SEPTEMBER 2012

## Barclay worse than its bite: High Court overturns contentious adverse action case

The High Court has overturned a decision of the Full Federal Court of Australia that inflated the application of the adverse action provisions of the *Fair Work Act 2009* (**Act**) and exposed employers to greater liability as a result.

The High Court's decision in *Board of Bendigo Regional Institute of Technical and Further Education v Gregory Paul Barclay & Anor* [2012] HCA 32, handed down today, has restored the provisions' operation and the relevant burden of proof to a more moderate level.

### Case history

On 29 January 2010, an employee of the Bendigo Regional Institute of Technical and Further Education (**BRIT**), Mr Barclay, emailed members of the Australian Education Union (**AEU**) alleging serious misconduct by unnamed BRIT employees involving the production of fraudulent documents for audit-purposes. Mr Barclay was an officer of the AEU and identified himself as such in the email. Mr Barclay had not reported the allegations to BRIT management, nor had he given details of the allegations when asked to do so.

BRIT's CEO, Dr Harvey, subsequently suspended Dr Barclay on full pay pending a disciplinary investigation and sought reasons from him as to why disciplinary action should not be taken against him. Dr Barclay instituted proceedings alleging that Dr Harvey's conduct amounted to adverse action, in contravention of section 346 of the Act.

Click to see our previous alerts:

- *Employer beware: the need to justify action against union-associated employees* (16 April 2010)
- *Legal update: employer in breach of adverse action provisions for taking prejudicial action against 'unionised' employee* (25 February 2011)

### The legislation

Section 346 of the Act prohibits persons (in this case, an employer) from taking adverse action against an employee because the employee 'is...an officer or member of an industrial association' or 'engages...in industrial activity'.



Section 342 of the Act defines adverse action as including, but not being limited to, dismissal of an employee or alteration of his or her position to his or her prejudice.

## The High Court decision

Despite the Full Federal Court's finding that, regardless of a decision-maker's subjective intention, an objective connection between the decision to take action and the attribute or activity in question could support a finding of adverse action, the High Court accepted Dr Harvey's evidence that she had taken the action because of the unsuitable manner in which Dr Barclay had raised the allegations and to prevent further damage to BRIT's reputation – not because of Dr Barclay's affiliation with the AEU.

## Comment

It is important to note that, while this case has removed the possibility that any disciplinary action against a 'unionised' employee could attract liability under the adverse action provisions of the Act, the onus is still on an employer to positively establish that any adverse action taken against the employee was for a reason other than any of those prohibited in the Act.

Accordingly, employers are encouraged to seek advice before taking disciplinary steps against an employee where the conduct relates to their activity as a union member. This may be particularly necessary where the line between employee activities and union activities blurs.

Furthermore, keeping an accurate record of the decision-making process and relevant deliberations will serve as important evidence should an employer be faced with an adverse action claim.

Authored by: **Ora-Tali Korbl**, Cornwall Stodart

## Want to republish any of this article?

If you would like to republish any part of this article in your staff newsletter or elsewhere please contact our Marketing team on **+61 3 9608 2168**

## Disclaimer

This article is intended to provide general information on legal issues and should not be relied upon as a substitute for specific legal or other professional advice.



## For further information please contact:

**Louise Houlihan**, Partner  
Phone (direct) **+61 3 9608 2273**  
Mobile **+61 409 835 809**  
Email [l.houlihan@cornwalls.com.au](mailto:l.houlihan@cornwalls.com.au)