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ADVERSE ACTION:

THE HIGH COURT TO

RECONSIDER THE REAL REASON

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Adverse Action Update: High Court to Reconsider the Real Reason

In September, the High Court will hear an appeal by the Construction, Forestry, Mining and Energy Union (**CFMEU**) against the majority ruling of Dowsett and Flick JJ in *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 132.

On 16 May, Crennan and Gageler JJ granted the CFMEU's special leave application which will next month see the High Court clarifying the test articulated in *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 (***Bowling***) and approved in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 (***Barclay***).

As Crennan J stated when hearing the special leave application:[1]

…it raises the whole debate that has informed both *Bowling's Case* and *Barclay's Case* – about whether one is confined to looking at subjective statements of intention…for taking the action, or whether one adopts an approach which attempts to assess whether objectively what the substantial reason is, which was explained I think by Chief Justice Mason in *Bowling's Case*.

At trial, Jessup J found that Mr Doevendans, a machinery operator employed by BHP at a Queensland mine, was dismissed for reasons including that he held up and waved at passing motorists an anti-scab sign at a roadside protest during a seven day protected strike.

Jessup J accepted BHP's evidence that its reason for dismissing Mr Doevendans was because his conduct in holding up and waving the anti-scab sign was in breach of its Workplace Conduct Policy and Charter Values and not because of any of the unlawful reasons alleged.

Despite these findings of fact, His Honour went on to hold that BHP terminated Mr Doevendans' employment in breach of s 346 of the *Fair Work Act 2009* (**FW Act**) because he participated in a lawful activity organised by an industrial association and because, in holding up and waving the anti-scab sign, he represented or advanced the views and interests of such association.

On appeal to the Full Federal Court, BHP argued that the error committed by the primary Judge was in concluding that it necessarily followed that an employee is "immune" from dismissal once it is found that an employee's conduct falls within s 347 of the FW Act. That is:[2]

…employees are immunised from discipline for any misconduct, no matter how serious, if that misconduct is part of an activity organised or promoted by an industrial association, or represents or advances the views or interests of an industrial association.

Upholding the appeal, Flick J, with Dowsett J concurring, held that the error made by Jessup J was to:[3]

[1] Construction Forrestry, Mining and Energy Union v BHP Coal Pty Ltd [2014] HCA Trans105, 3.
[2] BHP Coal Pty Ltd v Construction, Forrestry, Mining and Energy Union [2013] FCAFC at [105] per Flick J.
[3] Ibid at [108].

• conclude that there had been a contravention of s 346(b) in circumstances where the evidence that had been accepted and the findings of fact made by His Honour excluded any prospect that the decision to dismiss Mr Doevendans was taken "because" he had engaged in "industrial activity". The onus imposed by s 361, it should have been concluded, had been discharged.

Kenny J, in dissent, found that it was open to Jessup J to conclude that BHP had not discharged its onus in establishing that it had not dismissed Mr Doevendans because he represented or advanced the views or interests of the CFMEU.

Kenny J stated:[4]

In any event, it seems to me some care must be taken in considering alleged breaches of an employer's good conduct policies. Without re-introducing the chain of reasoning rejected in *Barclay* and *Bowling*, it seems to me that, in taking adverse action against an employee, an employer can sometimes, but not always, rely on a contravention of a good conduct policy (and like workplace charters and protocols) as a non-prohibited reason to take adverse action.

[4] Ibid at [68] per Kenny J.