



## HIGH COURT OF AUSTRALIA

7 September 2012

BOARD OF BENDIGO REGIONAL INSTITUTE OF TECHNICAL AND FURTHER  
EDUCATION v GREGORY PAUL BARCLAY & ANOR  
[2012] HCA 32

Today the High Court allowed an appeal by the Bendigo Regional Institute of Technical and Further Education ("BRIT") from a decision of the Full Court of the Federal Court of Australia. The High Court held that BRIT's Chief Executive Officer, Dr Louise Harvey, had not taken adverse action against the first respondent, Mr Gregory Barclay, for a reason prohibited by the *Fair Work Act 2009* (Cth) ("the Act").

Mr Barclay was an employee of BRIT and an officer of the second respondent, the Australian Education Union ("the AEU"). On 29 January 2010, Mr Barclay sent an email to all members of the AEU employed at BRIT. The email noted allegations of serious misconduct by unnamed persons at BRIT, who were said to have been involved in the production of false or fraudulent documents in connection with an upcoming audit. Mr Barclay did not report the allegations of misconduct to BRIT management when he became aware of them, and he did not provide details of the allegations to management when asked to do so. On 2 February 2010 Dr Harvey handed a letter to Mr Barclay requiring him to show cause why he should not be disciplined for this conduct. Dr Harvey suspended Mr Barclay on full pay pending a disciplinary investigation.

Section 346 of the Act prohibits 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". Adverse action includes dismissing an employee and altering the position of an employee to the employee's prejudice.

Mr Barclay and the AEU applied to the Federal Court for a declaration that BRIT had contravened s 346 of the Act. Dr Harvey gave evidence that she had not taken adverse action against Mr Barclay because of his industrial activities or affiliation, but because of the inappropriate way in which he had raised the allegations of serious misconduct. The trial judge accepted Dr Harvey's evidence that she had not taken the adverse action for a prohibited reason, and dismissed the application. Mr Barclay and the AEU appealed to the Full Court of the Federal Court which, by majority, allowed the appeal. By special leave, BRIT appealed to the High Court.

The High Court unanimously allowed the appeal. The Court held that Dr Harvey's evidence, which had been accepted by the trial judge and had not been challenged before the Full Court, established that the adverse action taken against Mr Barclay had not been for a prohibited reason.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*