FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd [2015] FCAFC 157

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| Citation: | Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd [2015] FCAFC 157 |
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| Appeal from: | Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd (No 2) [2015] FCA 265 |
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| Parties: | **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION and STEPHEN BYRNE v ANGLO COAL (DAWSON SERVICES) PTY LTD** |
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| File number: | QUD 185 of 2015 |
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| Judges: | **JESSUP, BUCHANAN AND RANGIAH JJ** |
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| Date of judgment: | 5 November 2015 |
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| Catchwords: | **INDUSTRIAL LAW** – Adverse action – Dismissal of employee – Reasons for dismissal – Onus of disproof of existence of proscribed reasons cast upon employer – Whether discharged – Direct evidence of decision‑maker – Significance of employer’s failure to call some persons who conferred with decision‑maker – Whether this meant that onus had not been discharged – Finding at trial that onus had been discharged – Decision‑maker’s evidence as to his reasons accepted – Whether primary Judge’s findings glaringly improbable.**INDUSTRIAL LAW** – Summary dismissal of employee for dishonestly claiming to be unwell during absence from work – Finding at trial that employee was unwell – Onus of proof to justify facts warranting summary dismissal – Whether facts to be assessed objectively or by reference to perception of employer at time of dismissal – Remedy for wrongful dismissal – Whether specific performance available – Whether exceptional circumstances present – Whether constituted by period of satisfactory post‑dismissal service under command of interlocutory order.**INDUSTRIAL LAW** – Adverse action – Dismissal of employee – Reason for dismissal – Whether because employee exercised right under industrial instrument to be absent from work on account of illness – Employee had previously sought and was refused annual leave on days concerned – Employee announced intention to produce medical certificate – Employee did absent himself from work and later produced medical certificate – Employee was unwell on days concerned but employer believed otherwise and did not accept medical opinion – Employer regarded employee’s conduct as dishonest – Reason for employer’s decision to dismiss – Relevance of employer’s actual but erroneous belief that employee not unwell.  |
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| Legislation: | *Conciliation and Arbitration Act 1904* (Cth)*Fair Work Act 2009* (Cth) ss 117, 340, 341, 346, 352, 360, 361, 394, 725, 727 and 729  |
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| Cases cited: | *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500*Byrne v Australian Airlines Ltd* (1995) 185 CLR 410*Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243*Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150*Fox v Percy* (2003) 214 CLR 118*General Motors-Holden’s Pty Ltd v Bowling* (1976) 136 CLR 676*House v The King* (1936) 55 CLR 499*Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326*Musgrove v Murrayland Fruit Juices Pty Ltd* (1980) 47 FLR 156*State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588*Tattsbet Limited v Morrow* [2015] FCAFC 62; 321 ALR 305  |
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| Date of hearing: | 24 August 2015 |
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| Place: | Brisbane |
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| Division: | FAIR WORK DIVISION |
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| Category: | Catchwords  |
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| Number of paragraphs: | 137 |
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| Counsel for the Appellants: | E White |
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| Solicitor for the Appellants: | Hall Payne Lawyers |
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| Counsel for the Respondent: | I Neil SC with A Duffy |
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| Solicitor for the Respondent: | Ashurst Australia |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | QUD 185 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNIONFirst AppellantSTEPHEN BYRNESecond Appellant |
| AND: | ANGLO COAL (DAWSON SERVICES) PTY LTDRespondent |

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| JUDGES: | JESSUP, BUCHANAN AND RANGIAH JJ |
| DATE OF ORDER: | 5 NOVEMBER 2015 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The appeal be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| DATE: | 5 NOVEMBER 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

# Jessup J

1. This is an appeal from a judgment of a single Judge of the court delivered on 26 March 2015, in which her Honour dismissed an application by the appellants, the Construction, Forestry, Mining and Energy Union (“the union”) and Stephen Byrne challenging the legality of the termination of Mr Byrne’s employment by the respondent, Anglo Coal (Dawson Services) Pty Ltd. It was alleged that the termination was in contravention of certain provisions of Pt 3-1 of the *Fair Work Act 2009* (Cth) (“the FW Act”) and amounted to a breach of Mr Byrne’s contract of employment with the respondent.
2. The statutory element in the appellants’ case was that adverse action had been taken by the respondent when it dismissed Mr Byrne, and that this action was taken because he exercised the “workplace right” involved in his entitlement to personal/carer’s leave under the relevant industrial instrument (s 340(1)(a)(ii) and s 341(1)(a) of the FW Act) and because he was temporarily absent from work because of illness (s 352 of the FW Act). The primary Judge treated these as two different statutory articulations of what was, in effect, the same allegation, and it is convenient to do so again on appeal.
3. The contractual element in the appellants’ case was that Mr Byrne had not conducted himself in a way that justified the summary termination of his employment. This was a conventional wrongful dismissal case (save that, as will be mentioned further below, Mr Byrne abandoned his claim to damages), and the primary Judge rejected it. Mr Byrne contends on appeal that her Honour was in error to have done so.
4. Mr Byrne was employed by the respondent at the Dawson Mine (“the mine”) at Moura in central Queensland as a Mine Employee Level 2. He was rostered to work day shifts on 21 and 22 April 2014, and night shifts on 24 and 25 April 2014. On 21 April 2014, he applied for two days of annual leave, which he wished to take on 24 and 25 April 2014. On 22 April 2014, that application came to the attention of the mine superintendent, Andrew Lawn, and was rejected by him. Later on the same day, Mr Byrne went to Mr Lawn’s office and was told that his leave application had been declined “due to overall crew numbers”. There followed an exchange between the two, in which Mr Byrne insisted that, under the relevant enterprise agreement, the leave application could not be declined for that reason, and in which Mr Lawn adhered to his decision not to approve the leave for which Mr Byrne had applied.
5. According to Mr Lawn’s evidence, which the primary Judge accepted, the conversation then proceeded in substance as follows:

Mr Byrne: Fine, I’m going to be sick anyway.

Mr Lawn: Mate, you have asked for annual leave, it is not within the time period, it’s not approved.

Mr Byrne: I will get a medical certificate. You will find that very hard to challenge.

Mr Lawn: If you get a certificate from a medical practitioner, that is fine but you have already told me that you are going to be sick. If you take sick leave, we will have to have a completely separate discussion based on the discipline policy.

The primary Judge also accepted Mr Lawn’s evidence that, during this conversation, Mr Byrne, while “agitated”, did not exhibit signs of being unwell.

1. Before the primary Judge, there was some controversy as to whether Mr Byrne was exhibiting signs of sickness at other stages, and in the presence of other people, on 22 April 2014. Her Honour did not accept evidence called on his behalf that he was. On the findings which her Honour made, the position seems to have been that Mr Byrne did not exhibit any such signs on that day.
2. On 23 April 2014, Mr Byrne consulted his doctor, Dr Vahid Farahmand. Dr Farahmand advised Mr Byrne not to attend work on the nights of 24 and 25 April 2014, prescribed him antibiotics, and issued a medical certificate certifying that he would be unfit for duty on those dates. Dr Farahmand gave evidence before the primary Judge. He said that he knew Mr Byrne, and that, on 23 April 2014, Mr Byrne was exhibiting symptoms which were compatible with asthma exacerbation and a lower respiratory tract infection. Her Honour accepted that evidence.
3. Having seen Dr Farahmand, Mr Byrne telephoned his supervisor, and informed him that he was unwell and would not be attending work for the night shifts on 24 and 25 April 2014. He also sent a text message to the respondent’s Human Resources Manager, Amanda Baker, informing her of the terms of the medical certificate which had been issued by Dr Farahmand.
4. The primary Judge found that Mr Byrne was ill on 24 and 25 April 2014. That finding is not challenged by the respondent.
5. Mr Byrne did not return to work until 30 April 2014. In the afternoon of that day, he was required to attend a meeting with Mr Lawn. At the meeting, Mr Byrne was accompanied by Heath Timmins, and also present were the respondent’s Human Resources Manager, Kaitlyn Britton and a human resources superintendent, Stephanie Elliott. They questioned him as to why, if he was absent from work on account of sickness, he had originally applied for annual leave. Mr Lawn thought that Mr Byrne had been dishonest in this respect. In the course of the meeting, Mr Timmins said that, by asking for annual leave, Mr Byrne had been trying to help the respondent by improving the leave statistics and figures.
6. On 1 May 2014, on Mr Lawn’s initiative, Mr Byrne was given a letter, signed by the then Mine Manager, which invited him to show cause why disciplinary action should not be taken against him. At the same time, he was stood down from work pending the later meeting at which he would show cause.
7. On 5 May 2014, Tony Power took over as Mine Manager (having previously held that position from 28 March 2011 to 19 August 2012). In the days which followed, he was told by Mr Lawn that, when he informed Mr Byrne that his application for annual leave had been declined, Mr Byrne had said that it did not matter because he was not going to come to work, and would obtain a medical certificate which would mean that his absence from work could not be challenged. Mr Power formed the view that Mr Byrne’s attitude was a serious one, because it demonstrated an attitude of, “I will do what I like and when I like it”.
8. At a meeting on Friday 9 May 2014 with Mr Power, Ms Baker and Ms Britton, Mr Byrne (again accompanied by Mr Timmins) provided a written response to the show cause letter. In that response, and in the conversation which followed, Mr Byrne stated that he had been unwell on 22 April 2014, and that the only reason that he had applied for annual leave was to avoid a further deterioration in his crew’s, and the respondent’s, statistics in respect of unplanned absenteeism. At the end of the meeting, Mr Byrne was told that he would be informed of the respondent’s decision on the following Monday.
9. On Monday 12 May 2014, Mr Byrne’s employment was terminated by a letter over the hand of Mr Power which, omitting formal and presently irrelevant parts, was in the following terms:

You attended a meeting with Dawson Mine Management (“the Company”) representatives on 9 May 2014 to show cause why your employment with the Company should not be terminated in relation to your misconduct.

We have now taken into consideration your response. It is the Company’s position that your behaviour is unacceptable. Steve, you made it clear that regardless of the Company’s rejection of your leave application, you would not be in attendance for your rostered shifts and you then did not subsequently attend your rostered shifts.

The Company considers that your conduct is in breach of your terms and conditions of employment and has irreparably damaged and undermined the employment relationship.

Given the seriousness of your misconduct, the Company has decided to terminate your employment at Dawson Mine effective immediately. You will be paid one week in lieu of notice and all entitlements owing. Your termination pay will be transferred within seven (7) business working days.

1. In evidence which the primary Judge accepted, Mr Power stated his reasons for terminating Mr Byrne’s employment. Factually, he accepted what Mr Lawn had told him about his conversation with Mr Byrne on 22 April 2014. He formed the view that Mr Byrne had, in effect, threatened Mr Lawn with a medical certificate, and had indicated to Mr Lawn that he would use the certificate to get what he wanted, thereby putting himself above reproach by Mr Lawn or his employer. He thought that Mr Byrne had expected that his request for annual leave would be approved and, when it was not, decided to take the leave in any event, without regard for the impact of his conduct on his colleagues or his employer. As it appeared to Mr Power, Mr Byrne had no regard for the need for annual leave to be managed carefully because of its impact on productivity and operations and the pressure it placed on other employees when too many people were away at any given time. He considered that Mr Byrne had conducted himself in a manner which showed that he intended to be dishonest with his actions and to take sick leave when he was not in fact sick. Mr Power believed that Mr Byrne had not been unfit to work on 24 and 25 April 2014, and that he had obtained a medical certificate because it was an easy way to circumvent the refusal of his annual leave request. He said that, in his experience, it was easy for an employee to get a medical certificate, even if he or she were not unwell, because of the reliance which doctors placed on their patients self-reporting their symptoms. He did not attach any significance to the fact that Mr Byrne had obtained a medical certificate.
2. Mr Power also considered the fact that, at the show cause meeting on 9 May 2014, Mr Byrne did not show any remorse for his conduct or otherwise accept that his conduct was not appropriate. Indeed, according to Mr Power, the attitude then exhibited by Mr Byrne showed contempt and disdain for his employer and its processes. That attitude led Mr Power to believe that Mr Byrne thought that his behaviour was acceptable, and did not understand why it was problematic.
3. The primary Judge also accepted Mr Power’s evidence that, if the conversation between Mr Byrne and Mr Lawn (on 22 April 2014) had not occurred, there would not have been any issue with the fact that Mr Byrne had taken sick leave.
4. The appellants’ challenge to the correctness of the primary Judge’s conclusions under the FW Act are concerned with the application to the facts of the case of ss 340 and 352. Relevantly, s 340(1) provides:

A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right ….

Under s 341(1)(a), a person has a workplace right if he or she is entitled to the benefit of a workplace instrument. By cl 3.2.3(a) of the applicable workplace instrument, the Dawson Mines Collective Enterprise Agreement 2014, an employee was entitled to take personal/carer’s leave where the leave was taken “because the employee is not fit for work because of a personal illness or injury affecting the employee”.

1. Section 352 provides:

An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

1. Whether by the operation of ss 340 and 341 in conjunction with the enterprise agreement or by the direct operation of s 352, the questions which arose were whether Mr Byrne had been absent from work on 24 and 25 April 2014 because of illness or injury and, if so, whether he was dismissed from his employment because of that circumstance. The primary Judge answered those questions in the affirmative and the negative respectively. There is no challenge to the first answer. It is with the second answer that the present appeal is concerned.
2. Her Honour found that the decision to dismiss Mr Byrne had been made by Mr Power, and that it was his reason or reasons for making that decision that fell to be considered.
3. As to Mr Power’s reasons, the primary Judge said:

[T]he facts support a finding that Mr Byrne himself created a situation where, notwithstanding that I now find that he was actually ill on 24 and 25 April 2014, his employers had strong reason to believe that he simply wanted time off work over the Anzac Day holiday in 2014, and that he was prepared to acquire a medical certificate to overcome the respondent’s refusal to grant him that time off work as annual leave.

Her Honour also concluded that “it was open to Mr Power to form the view, as he evidently did, that Mr Byrne had adopted the attitude that he would take leave on those days irrespective of the views of the respondent, and justify it by the artifice of a medical certificate.”

1. Her Honour accepted Mr Power’s evidence that he did not believe that Mr Byrne was ill on the basis of the medical certificate issued by Dr Farahmand.
2. Her Honour held that “Mr Power did not terminate Mr Byrne’s employment for any reason associated with his temporary absence from work because of illness or injury, [or] Mr Byrne’s exercise or proposed exercise of the workplace right of taking sick leave ….” Putting the matter positively, her Honour held that Mr Byrne had been dismissed because Mr Power believed that Mr Byrne had conducted himself in a dishonest manner by planning to take sick leave when he was not sick, by threatening to use a medical certificate as a justification for taking annual leave which had been refused him, by obtaining that medical certificate to circumvent the respondent’s refusal of his annual leave request, by persuading Dr Farahmand to issue a medical certificate in reliance on a description of symptoms, and by disingenuously claiming that his original application for annual leave had been to assist the respondent in relation to maintenance of low absentee statistics and/or had been pursuant to a practice in respect of taking annual leave when sick rather than sick leave. That final aspect was a reference to evidence given by Mr Byrne to the effect that there was a practice at the mine of employees, at least sometimes, opting to take annual leave when they were unwell because leave of that kind, unlike sick leave, could not be “cashed out” if not taken. Her Honour did not accept that evidence.
3. In their submissions, the appellants contend that the primary Judge’s conclusion about Mr Power’s reasons involved errors in two ways, namely:
* in finding that the Respondent had discharged the onus imposed by s. 361 of the FW Act in circumstances where the decision maker (Mr Power) took advice from human resource personnel and where, either human resource personnel were not called or, where called gave no evidence regarding the content of meetings with Mr Power, and in circumstances where Mr Power could not recall the details of the meetings; and
* in finding that the Respondent had discharged the onus imposed by s. 361 of the FW Act in circumstances where Mr Power's evidence should not have been accepted because of incontrovertible facts indicating reasons such that the onus on the Respondent was not or could not be satisfied and in circumstances where the real strength of the evidence indicated that the Respondent could not have discharged the onus.
1. With respect to the first ground, the starting point is s 361(1) of the FW Act upon which the appellants rely. It provides as follows:

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

1. In the context of a provision such as ss 340 and 352, the effect of s 361 is to reverse the legal onus in relation to the reason or reasons for which the adverse action was taken. That is to say, at the end of the trial of fact, the question will be whether the respondent has established, on the civil standard, that the action taken was not taken for a reason, or for reasons which included a reason, proscribed by the legislation. That question is to be answered by reference to all of the evidence which bears upon it. Section 361 does not impose upon the respondent concerned the onus of calling any and every piece of evidence that might arguably influence the answer to the question of reasons or intent. The section is not, in other words, concerned to impose upon the respondent a continuing, unchanging, evidentiary onus with respect to that question.
2. In *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 516 [41], French CJ and Crennan J said that “the question of why an employer took adverse action against an employee is a question of fact arising from the operation of interdependent provisions of the [FW] Act.” Their Honours continued (248 CLR at 517 [45]):

This question is one of fact, which must be answered in the light of all the facts established in the proceeding. Generally, it will be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer. [See, eg, *General Motors-Holden’s Pty Ltd v Bowling* (1976) 136 CLR 676 (note) …] Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker [See, eg, *Pearce v WD Peacock & Co Ltd* (1917) 23 CLR 199 at 208 per Isaacs J; at 211 per Higgins J.] or because other objective facts are proven which contradict the decision-maker’s evidence. However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer even though an employee may be an officer or member of an industrial association and engage in industrial activity. [See, eg, *Harrison v P & T Tube Mills Pty Ltd* (2009) 188 IR 270 at 276 [31]-[33].]

In other words, whether the onus arising under s 361 has been discharged in a particular case will depend upon the assessment of all of the facts by the trier of fact, including, most importantly in the conventional case, his or her assessment of the evidence given by the decision‑maker acting on behalf of the employer.

1. In the present case, the appellants relied upon the respondent’s omission to call three members of its staff with human resources roles, Ms Britton, Leah Brosnan and Ms Elliott. Ms Britton was present at the meeting between Mr Lawn and Mr Byrne on 30 April 2014, she drafted the letter to Mr Byrne of 1 May 2014, she was present at a meeting with Mr Power and Ms Baker on 8 May 2014, and she was present at a meeting, after the show cause meeting, with Mr Power, Ms Baker and Ms Brosnan on 9 May 2014. At least so far as appears, the latter meeting was Ms Brosnan’s only involvement. Likewise, so far as appears, Ms Elliott’s only involvement was by way of her presence at the meeting on 30 April 2014 referred to in para 10 above.
2. Although it seems to have been put to the primary Judge that Mr Power was not the sole decision‑maker in the facts of this case, on appeal it was accepted that he was. The submission now made by the appellants is the more limited one that her Honour was in error not to have held that the respondent did not discharge the onus of proof when it had not called these human resources personnel who had advised Mr Power on the matter which fell to him to decide. On this point, the primary Judge said:

That Mr Power would seek advice from human resources staff as to appropriate procedures including the show cause meeting, and meet with the human resources staff after the show cause meeting to discuss ongoing procedures, is neither surprising nor inappropriate in an organisation like the respondent particularly when Mr Power was so new to his position at the time. Ms Baker and Ms Taumalolo were called to give evidence at the hearing, and did so. Mr Puna [the previous Mine Manager], Mr Lawn and Mr Hutchings also gave evidence. They all supported Mr Power’s evidence that the decision to dismiss Mr Byrne was his alone. I see nothing sinister about the failure of the respondent to call the other human resources staff who were present at the same meetings as Ms Baker and Ms Taumalolo. In written submissions the respondent said that, in respect of the cross-examination of Mr Power at the hearing:

It was not put to him that someone other than him had made the decision, or that someone else had told him what to do. That is perhaps not surprising because there is no evidence of any such thing.

In my view this submission is correct.

1. With respect, for the primary Judge to have observed that it was “neither surprising nor inappropriate” for Mr Power to seek advice from human resources staff as to appropriate procedures did not meet the appellants’ point. Mr Power was not being criticised for doing something surprising or inappropriate. Rather, the question was whether, when it was, apparently, uncontroversial that he had received some advice from these human resources personnel, his evidence, and that of others who were called, was sufficient to discharge the legal onus which arose under s 361.
2. Notwithstanding that relatively minor reservation, I am unpersuaded by the appellants’ case on appeal that her Honour’s conclusion as to Mr Power’s reasons was attended by error. While a party’s failure to lead particular evidence may tip the scales in favour of drawing an inference adverse to that party, the inference must still be fairly open on the evidence which has been called. In the present controversy, the questions presumptively in play were, first, whether the uncalled witnesses had advised Mr Power to dismiss Mr Byrne, and secondly, whether he followed that advice. At the first level, her Honour’s observation that the advice given by the three human resources staff members who did not give evidence related to matters of procedure has not been challenged. At the second level, Mr Power gave evidence, was tested on his reasons, and was believed by the trier of fact.
3. Although not specifically adverted to as a factor by the primary Judge, I think the circumstance that the participation of each of the three uncalled human resources staff members was limited to attendance at meetings at which others were present, either without or additionally to Mr Power, was also relevant to her Honour’s conclusion that no adverse inference should be drawn from the respondent’s omission to call them. Put the other way round, there was never an occasion when one or more of those staff members met with Mr Power in the absence of some who *was* called to give evidence. In respect of every occasion when Mr Power’s thinking was potentially exposed to the influence of others, at least one of those others was called as a witness.
4. Once the notion that, by the operation of s 361 of the FW Act, the respondent was under an obligation to call every person who *might* have influenced Mr Power in some way is rejected, there was nothing about the evidence, or the case generally, to justify the conclusion that the respondent ought to have called these three human resource staff members as an indispensable component of its evidentiary case. There was, correspondingly, no error in the primary Judge deciding the case by reference to the evidence which *was* called.
5. With respect to the appellants’ second ground of appeal, in the written outline filed on their behalves, the argument was expressed as follows:

The finding that the Respondent had discharged the onus was wrong in circumstances where the reasons asserted by Mr Power in his affidavit … were not either investigated or put to Mr Byrne in the show cause meeting.

The finding that the Respondent had discharged the onus was wrong in circumstances where Mr Power was unable to recall adequately, if at all, matters to which he deposed only some weeks earlier.

It was submitted that the primary Judge’s conclusion about Mr Power’s reason for dismissing Mr Byrne was “glaringly improbable” or “contrary to compelling inferences” (*Fox v Percy* (2003) 214 CLR 118, 128 [28]-[29]), and amounted to a failure to consider properly the real strength of the evidence (*State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588, 607, [63]-[64] and 588-622 [93]-[94]).

1. The circumstances referred to by the appellants in their outline might well have been the stuff of the cross-examination of a decision‑maker in a case such as the present, and they may well have contributed to an outcome adverse to him or her. In the present case, however, they did not. It was for her Honour to weigh those circumstances in the balance against the evidence which favoured the conclusion for which the respondent contended. A crucial finding by her Honour, in my view, was that Mr Power did not believe that Mr Byrne was sick at all. To the extent that inferential reasoning might have had any part to play in her Honour’s path to the making of that finding, it could only have supported it. The conversation which Mr Byrne had with Mr Lawn on 22 April 2014 was foundational. It provided the plainest of justifications for the belief to which Mr Power swore. There was no circumstantial evidence to which our attention was drawn on appeal that would undermine her Honour’s finding in that regard. By definition, neither Dr Farahmand’s certificate nor her Honour’s own finding that Mr Byrne had been sick would do so. The simple fact was that Mr Power said that he believed neither Mr Byrne nor Dr Farahmand, and her Honour accepted that he was telling the truth in this regard. Once that bar was crossed, the conclusion that Mr Byrne’s absence on account of illness was not a reason why he was dismissed by Mr Power followed almost as a matter of course. It was not “glaringly improbable” or “contrary to compelling inferences”: if anything, the contrary.
2. Although not the subject of a ground of appeal as such, there was some debate at the hearing of the appeal on the question whether it ought to have been found that Mr Byrne was dismissed because of his absence from work on account of illness because, objectively, he was absent for that reason and that absence was a factor in Mr Power’s reasons for his decision to dismiss. Counsel for the appellant, correctly in my view, considered that it was not open to him to argue along these lines in the light of *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243. For my own part, I consider that the present case was more straightforward than those, such as *BHP Coal* and *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150, which involve questions of characterisation, and was, rather, analogous to cases in which the result depended on the employer’s knowledge of the entitlement arising under the industrial instrument, such as *Musgrove v Murrayland Fruit Juices Pty Ltd* (1980) 47 FLR 156. It is true that the present case turned on the decision‑maker’s belief in the existence of facts which would have given rise to the entitlement, rather than on his knowledge of the existence of the entitlement as such, but, in my view, the principle – that the case must be decided by reference to the actual reason or reasons of the decision‑maker – is essentially the same in each situation.
3. Turning to Mr Byrne’s claim under his contract of employment, the appellants’ grounds of appeal propose that the primary Judge’s reasons involved errors in the following respects:
* in that, having found that Mr Byrne was ill so as to be unable to work, and in circumstances where the reason for his termination was a failure to attend rostered shifts, the Learned Trial Judge should have found that the summary termination of Mr Byrne's employment was unjustified; and
* [in] failing to order specific performance in the alternative to an order for reinstatement consequent upon a breach of the FW Act.
1. Corresponding with these grounds, there were two questions before the primary Judge on the contractual issue. The first was whether the termination of Mr Byrne’s employment amounted to a breach of that contract. If that question were to be answered in the affirmative, the second question arose, namely, whether the court should make an order requiring the respondent specifically to perform the contract by taking Mr Byrne back into its employment. As mentioned above, Mr Byrne abandoned his claim for damages for breach of contract.
2. As to the first of these questions, the primary Judge said:

First, I am not prepared to find that Mr Byrne did not engage in serious and wilful misconduct sufficient for termination of employment. While the Court has the benefit of both hindsight and evidence to make a determination of such facts as whether Mr Byrne was, in fact, developing a medical condition on 22 April 2014, the respondent was not so advantaged.

I accept that, in considering the appropriate outcome of the investigation into the matter, Mr Power applied the respondent’s Consequences Model such that he was satisfied that termination of Mr Byrne’s employment was a proper decision. I am satisfied that Mr Power’s application of the Consequences Model was fair. There is no evidence before me that the respondent’s Consequences Model is unfair or should not be followed. Considerably more material would need to be before me in the circumstances of this case to persuade me that the respondent acted unfairly in dismissing Mr Byrne.

1. The first sentence in the first of these paragraphs from the primary Judge’s reasons implies that, absent her Honour being persuaded that Mr Byrne had not engaged in serious and wilful misconduct, the respondent’s decision to dismiss him could not be disturbed. This was, with respect, to reverse the proper order of things. Mr Byrne was dismissed without notice (although there is a rather confusing reference in the evidence to the payment of a week’s pay in lieu of notice, a payment which, we were assured, was never made). Absent a contractual term to the contrary – and we were referred to none – an employee who has not given his or her employer cause for summary termination cannot be dismissed unless notice, either as provided in the contract or such as is reasonable in the circumstances, is provided. If the employer seeks to uphold a dismissal which was done without the provision of notice, the grounds necessary to justify summary termination are the employer’s to establish. In the present case, Mr Byrne did not have the onus of proof, or the onus of persuasion, in this regard.
2. The second sentence implies that the question whether there had been conduct sufficient to justify the summary termination of Mr Byrne’s employment was to be addressed not with the benefit of hindsight and evidence, but against the facts as they appeared to the respondent at the time of its decision to dismiss him. Once again, with respect, this reasoning is problematic. Whether an employee’s conduct justified summary dismissal is an objective question to be answered by reference to the facts as they existed, that is, to the facts as they are ultimately found by the court concerned, with all the benefits that hindsight, the examination and cross-examination of witnesses, and other conventionally available forensic processes provide.
3. The only justifications for the summary termination of Mr Byrne’s employment advanced on behalf of the respondent were that he had been absent from work when not entitled to be absent, and that he had been dishonest with his employer in concocting a false reason for that absence. But, because of his sickness as certificated by Dr Farahmand, and as found by the primary Judge, Mr Byrne was entitled to be absent from work, and had not been dishonest in that regard. There was, therefore, no valid justification for the summary termination of his employment. He was wrongfully dismissed.
4. As to the second of the questions, the primary Judge referred to what had been said by Brennan CJ, Dawson and Toohey JJ in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 428:

Moreover, a court will not, save in exceptional circumstances, order specific performance of a contract of personal service. The possible continuation of the contract of employment after a wrongful dismissal will, therefore, ordinarily be of no real significance as it will for all practical purposes be at an end.

Having referred to two earlier authorities, her Honour continued:

In this case exceptional circumstances to reinstate the contract of employment between Mr Byrne and the respondent have not been demonstrated. The only circumstance put to me by the applicants is that Mr Byrne appears to be functioning adequately in the working environment of the respondent since he was reinstated last year pending this decision. However putting to one side that this is a bare assertion of the applicants unsupported by evidence, in my view this circumstance is not “exceptional”. It certainly can be given no more weight than the bare assertion of the respondent, through its Counsel, that the fact that both parties have complied with the interlocutory order temporarily reinstating Mr Byrne does not change the position of the respondent that it dismissed Mr Byrne for dishonesty and it has not changed that view.

1. On appeal, counsel for the appellants did not submit that the principle was anything other than as set out above in the passage from *Byrne*. Rather, he submitted that exceptional circumstances existed in the present case because it had been demonstrated, during the period when Mr Byrne had been at the workplace pursuant to the interlocutory order which he obtained at the outset of the proceeding, that he was able to work to the satisfaction of the respondent. That was the argument referred to in the paragraph from her Honour’s reasons set out above. However, save to reiterate the argument, no real attack was made on those reasons. In my view, the basis upon which her Honour rejected the argument is unassailable. More importantly, it is free of error of the kind that would warrant the disturbance of the exercise of a discretionary judgment: see *House v The King* (1936) 55 CLR 499.
2. Moreover, for my own part I would not generally regard it as a circumstance warranting the exceptional remedy of an order for the specific performance of a contract of employment that, as required by an interlocutory injunction, the employer concerned had continued to tolerate the presence at the workplace of someone whom it had dismissed. If this came to be recognised as such a circumstance, the discretionary, and intensely pragmatic, process of considering how best to maintain the status quo at the outset of a proceeding, before the rights and wrongs of the matter had been investigated, would be significantly complicated.
3. For the reasons given above, I would dismiss the appeal.

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| --- |
| I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup . |

Associate:

Dated: 5 November 2015

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | QUD 185 of 2015 |

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| --- |
| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| --- | --- |
| BETWEEN: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNIONFirst AppellantSTEPHEN BYRNESecond Appellant |
| AND: | ANGLO COAL (DAWSON SERVICES) PTY LTDRespondent |

|  |  |
| --- | --- |
| JUDGES: | JESSUP, BUCHANAN AND RANGIAH JJ |
| DATE: | 5 NOVEMBER 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

# Buchanan J

## Introduction

1. The second appellant, Mr Stephen Byrne was employed by the respondent from 1 August 2011 until he was summarily dismissed on 12 May 2014.
2. I have come to the view that Mr Byrne was dismissed because he had exercised a workplace right (i.e. had taken sick leave) within the meaning of s 340(1)(a)(ii) of the *Fair Work Act 2009* (Cth) (“the FW Act”) and because he was temporarily absent from work because of illness within the meaning of s 352 of the FW Act.
3. My conclusion that Mr Byrne was dismissed *because* he exercised a workplace right and *because* he was temporarily absent from work because of illness is based upon the factual findings of the primary Judge, but I differ from her Honour about the legal significance of those factual findings.

## The facts as found

1. A statement of the factual position may be found in the judgment of the primary Judge (*Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd (No 2)* [2015] FCA 265) and in the reasons for judgment of Jessup J. What appears below is a summary or skeleton of those findings as an introduction to the discussion of the legal issues later in this judgment.
2. Mr Byrne, as I said earlier, was employed by the respondent from 1 August 2011. He was employed as a Mine Employee Level 2. He was a member of the first appellant and, in November 2012, was elected to the position of Lodge President at the mine operated by the respondent – the Dawson Mine at Moura in Central Queensland.
3. On 21 April 2014, Mr Byrne applied for two days annual leave for Thursday 24 and Friday 25 April 2014. The respondent normally required at least 28 days notice of an annual leave request. Mr Byrne’s request was declined shortly after it was made.
4. Evidence was given by the mining superintendent, which the primary Judge accepted, that Mr Byrne was put out by the decision and announced that he was “going to be sick anyway” and would obtain a medical certificate. Mr Byrne was then advised that if he did not attend for work the discipline policy would be invoked.
5. Mr Byrne did not attend for work on his rostered shifts on 24 and 25 April 2014. He did produce a non-specific and unilluminating medical certificate. The discipline process was commenced.
6. On 30 April 2014, Mr Byrne attended a meeting with the mining superintendent and a human resources officer. He was challenged about his earlier remarks and his desire to take annual leave. The mining superintendent did not accept his explanation (that it would assist the respondent to have lower absenteeism figures) and also concluded that Mr Byrne had dishonestly claimed to be sick on 24 and 25 April 2014.
7. On 1 May 2014 Mr Byrne attended a meeting at which the respondent gave him a letter providing him the opportunity to show cause why he should not be dealt with for serious misconduct. The letter said (in part):

**Serious Misconduct – Show Cause**

As you are aware, we have been investigating:

(a) Your conduct on 22 April 2014 (DS), at which time you requested annual leave and advised the Company that if your annual leave request was not approved for 24 and 25 April 2014 (NS) you would take sick leave; and

(b) Your subsequent absence from work on 24 and 25 April 2014 (NS) – you notified your supervisor that you were taking sick leave.

As part of our investigation, we have spoken to both you and other persons involved in the incident.

The Company has now finalised its investigation of the matter and based on the information available to the Company, the Company has determined that you have engaged in serious misconduct by wilfully absenting yourself from your work on 24 and 25 April 2014 (NS). This conduct occurred in circumstances where you had requested annual leave to be absent on those dates and had been advised on 22 April 2014 that:

* your annual leave was not approved; and
* if you absented yourself on those dates, you would likely be subject to disciplinary action.

…

1. A further meeting was then held on 9 May 2014. Present at that meeting was Mr Tony Power who had taken up the position of Mine Manager on 5 May 2014. Mr Power had not met, or dealt with, Mr Byrne before the meeting. Mr Power deposed, and the primary Judge accepted, that it was Mr Power who determined to dismiss Mr Byrne. Mr Power’s reasons for that decision are therefore critical. The primary Judge accepted that Mr Power’s reasons were as he stated them, and that his reasons were reflected in a letter of termination dated 12 May 2014. It is convenient to set out part of that letter first:

**Termination of Employment**

You attended a meeting with Dawson Mine Management (‘the Company’) representatives on 9 May 2014 to show cause why your employment with the Company should not be terminated in relation to your misconduct.

We have now taken into consideration your response. It is the Company’s position that your behaviour is unacceptable. Steve, you made it clear that regardless of the Company’s rejection of your leave application, you would not be in attendance for your rostered shifts and you then did not subsequently attend your rostered shifts.

The Company considers that your conduct is in breach of your terms and conditions of employment and has irreparably damaged and undermined the employment relationship.

Given the seriousness of your misconduct, the Company has decided to terminate your employment at Dawson Mine effective immediately. …

1. At this point, it is necessary to supplement the detailed findings of the primary Judge with some specific references to Mr Power’s affidavit evidence. It is not necessary to refer to his oral evidence.
2. It is clear that the primary Judge accepted Mr Power as a witness of truth, although her Honour observed that he was not a “compelling witness” due to his “hazy memory” about some matters. Nevertheless, it is quite apparent that her Honour had no real difficulty in concluding (as her Honour found at [100]) that “Mr Power was the sole decision-maker in respect of the dismissal of Mr Byrne”, (at [121]) that Mr Power “did not believe that Mr Byrne was ill on the basis of the medical certificate issued” and that (at [138]) “Mr Power believed that Mr Byrne had conducted himself in a dishonest manner”.
3. Mr Power’s affidavit evidence included the following:

**ALLEGATIONS ABOUT MR BYRNE’S CONDUCT**

15. During the week commencing 5 May 2014, I became aware that an incident had occurred as follows:

(a) Mr Stephen Byrne had requested annual leave for 24 and 25 April 2014;

(b) Mr Byrne’s request had been declined by Andrew Lawn, Production Superintendent, as there were already too many people rostered to take annual leave;

(c) Mr Byrne then said to Mr Lawn that he would not be at work on those days even though his annual leave application had not been approved and that he was going to go and get a sick certificate; and

(d) Mr Byrne subsequently failed to attend for his rostered shifts at the Mine on 24 and 25 April 2014,

(the **Incident**).

…

19. During my discussion with Mr Lawn, he said to me:

*I had a couple of conversations with Stephen Byrne. He had applied for annual leave and wanted to know where his application was. Later on in the day, I told him that the leave was declined because we were at numbers and then he told me that it didn’t matter whether the annual leave was granted or not because he was not going to come to work and he would go and get a medical certificate, which would mean his absence from work could not be challenged.*

…

**DECISION TO TERMINATE MR BYRNE’S EMPLOYMENT**

…

54. Having given consideration to all the information I had available to me, I came to the conclusion that the allegations against Mr Byrne were substantiated, namely that, in my view, Mr Byrne had wilfully absented himself from work on 24 and 25 April 2104 [sic: 2014], after his request for annual leave had already been declined, and after he had said that he would not be coming to work even though his annual leave request had been declined.

55. I came to this conclusion for the following reasons, and no other reasons:

…

(f) I judged that it was likely that Mr Byrne had just expected that his request for annual leave on 24 and 25 April would be approved and then, when it was not, decided that he was going to do what he wanted anyway, and take the leave in any event, without any regard for the impact of his conduct on his colleagues or his employer. In particular, he appeared to me to have had no regard for the fact that it is important for annual leave to be managed carefully at the Mine because it has an impact on productivity and operations at the Mine and it puts pressure on other employees when too many people are away at any given time.

(g) In my view, as at 22 April 2014, when Mr Byrne’s annual leave request was refused, he conducted himself in a manner which showed that he intended to be dishonest with his actions and take sick leave when he was not in fact sick.

(h) I believed that Mr Byrne had not actually been unfit to come to work and perform work on each of 24 and 25 April 2014.

(i) I believed that Mr Byrne had obtained a medical certificate for those [sic] 24 and 25 April only because his request for annual leave had been declined and that, in my view, Mr Byrne got a sick certificate as he thought that was an easy way to circumvent the refusal of his annual leave request.

(j) In my experience, it is very easy for an employee to go to a doctor and get a medical certificate even if they are in fact not unfit to work, and that many medical practitioners do not necessarily impose any rigor around the process involved in giving a person a medical certificate. Again in my experience, this is because doctors usually rely to a great degree upon what people tell them about their symptoms in order to issue medical certificates. For that reason I did not attach any significance to the fact that Mr Byrne had obtained a medical certificate, and I did not consider that the fact that he had done so was a reason not to hold the belief described in (h).

…

56. My ultimate conclusion was that, to my mind, if the conversation between Mr Byrne and Mr Lawn had not occurred, then there would not have been any issue with the fact that Mr Byrne had taken sick leave.

…

(Emphasis in original.)

1. In my view, it is clear from this evidence that Mr Power concluded that Mr Byrne set out from the beginning to take the two days off, that his claim to have been ill was false, that the medical certificate had been procured upon request from an obliging medical practitioner and that the medical certificate was not entitled to any weight in its own right.
2. Mr Power’s view was, inescapably from this evidence and on the findings of the primary Judge, that Mr Byrne did not have a relevant workplace right (i.e. a right to take sick leave) to exercise on 24 and 25 April 2014, and that he was not temporarily absent from work on those days on account of illness.
3. However, on the findings made by the primary Judge, which are not challenged on the appeal, Mr Power was mistaken about those matters.
4. The primary Judge took evidence from Mr Byrne, Mr Byrne’s wife and the medical practitioner who had issued the medical certificate. The primary Judge concluded, on the basis of that evidence, that Mr Byrne was in fact unwell on 24 and 25 April 2014 and that his medical practitioner was satisfied that he was unwell and had intended to so certify. Those conclusions may be seen in the following findings:

**Was Mr Byrne ill on 24 and 25 April 2014?**

…

73 In my view there are a number of fundamental flaws in the respondent’s arguments concerning the medical condition of Mr Byrne on 24 and 25 April 2014.

74 First, in my view Dr Farahmand was a credible witness, and in particular was credible in relation to his belief that Mr Byrne was unwell at the time Mr Byrne attended the surgery on 23 April 2014. I also note that the evidence of Dr Farahmand is uncontested, in the sense that there is no medical evidence before me to rebut it.

75 The respondent seeks to make much of the fact that Dr Farahmand’s diagnosis was, to some extent, based on the information provided to him by Mr Byrne as to how Mr Byrne was feeling at the relevant time. I do not see this as undermining the value of Dr Farahmand’s evidence. Inevitably the view of a medical practitioner must, to some extent, be guided by the symptoms described by the patient. In any event however it cannot be said that, in forming his opinion concerning Mr Byrne’s state of health, Dr Farahmand relied exclusively on information supplied to him by Mr Byrne. As was clear from his evidence Dr Farahmand was aware from Mr Byrne’s medical history that Mr Byrne was “very susceptible” to respiratory tract infections and that Mr Byrne had been “coping with asthma” for a number of years. Dr Farahmand examined Mr Byrne on both 23 April 2014 and 29 April 2014. On 23 April 2014 Dr Farahmand formed the view that Mr Byrne had, *inter alia*, a “wheezy chest” and prescribed him medication. In response to questions from Mr Neil SC, Dr Farahmand explained:

… I ask him to stay home for the rest of the week which means that the Thursday and Friday and come back after actually – after … actually week day, first of all to check his chest if he is … start his job, I issue actually a certificate to actually come back to the work, otherwise definitely I have to do some further investigation and maybe blood tests, chest x-ray and maybe a specialist referral.

(Transcript 30 July 2014 p 19 ll 13-19.)

76 Dr Farahmand also rejected the proposition that his assessment of Mr Byrne as sick depended on what Mr Byrne had told him, rather than his own observations of Mr Byrne (transcript 30 July 2014 p 23 ll 8-10).

77 Further, while I note that this Court is not obliged to accept without reservation a medical certificate provided by a medical practitioner excusing conduct of this nature, I note the uncontested evidence of Dr Farahmand that he is:

… very strict, very strict about issuing the medical certificate.

(Transcript 30 July 2014 p 22 l 18.)

78 I am satisfied that on 23 April 2014 Dr Farahmand formed the view that Mr Byrne was ill, that Mr Byrne should take time off work to rest, and that it was for that reason that Dr Farahmand provided the relevant certificate.

…

80 Second, I found Mr Byrne a credible witness in relation to his evidence that he was developing a chest cold on 22 April 2014 and was sick on 24 and 25 April 2014. It is not in dispute that Mr Byrne is an asthmatic, and that he suffered a serious attack of asthma in April 2013. He was responsive to the questions put to him by Mr Neil SC at the hearing, and to the extent that his memory was faulty he made appropriate concessions (for example at p 81 of the transcript of 31 July 2014 in relation to the attendance of Mr Spencer at the union meeting). I accept Mr Byrne’s evidence that, in light of his previous experiences with asthma:

* he was concerned that he was developing a chest cold, and that he would be required to work at night for the next few days because working in a cold temperature could exacerbate his asthma;
* he preferred to see his own doctor; and
* it would have been a waste of time for him to see the nurse at the mine because she would have been unable to prescribe him any medication.

81 Third, I found Ms Byrne a credible witness. Her evidence concerning Mr Byrne’s illness on 23 April 2014 and events of the following two days was firm and unshaken under cross-examination.

…

84 On the evidence before me I am satisfied that Mr Byrne was ill on 24 and 25 April 2014.

…

## The conclusions of the primary Judge

1. The conclusions of the primary Judge, upon this part of the case before her Honour, are stated in the following paragraphs:

**Claims under the FW Act – conclusion**

…

138 In conclusion, while the evidence before me supports a finding that Mr Byrne actually did have or was developing a medical condition on 22 April 2014, and that he was ill on 24 and 25 April 2014, I am satisfied that the respondent has discharged its onus under s 361 of the FW Act. I accept the evidence of Mr Power, and am satisfied that the real reasons of Mr Power in deciding to terminate Mr Byrne’s employment did not include as a substantial or operative factor any of the proscribed reasons identified in ss 340, 346 or 352 of the FW Act. More precisely, I am satisfied that, for the reasons I have set out, adverse action was taken by the respondent against Mr Byrne, for the reason that Mr Power believed that Mr Byrne had conducted himself in a dishonest manner by:

* planning to take sick leave when he was not sick;
* threatening to use a medical certificate as a justification for taking annual leave which had been refused him;
* obtaining that medical certificate to circumvent the respondent’s refusal of his annual leave request, by persuading Dr Farahmand to issue a medical certificate in reliance on description of symptoms; and
* disingenuously claiming that his original application for annual leave had been to assist the respondent in relation to maintenance of low absentee statistics and/or had been pursuant to a practice in respect of taking annual leave when sick rather than sick leave.

139 These reasons are not prohibited under the FW Act, and termination of employment in reliance on that belief is similarly not prohibited (cf *Barclay* and *CFMEU v BHP*, as well as comments of Burchardt FM (as he then was) in *Anderson* at [101]). Mr Power did not terminate Mr Byrne’s employment for any reason associated with his temporary absence from work because of illness or injury, Mr Byrne’s exercise or proposed exercise of the workplace right of taking sick leave, Mr Byrne’s engagement in industrial activity, or Mr Byrne’s position in the union.

1. In my respectful view, the summary offered at [138] is not a complete one because it does not include the earlier findings that Mr Power was significantly, indeed critically, influenced in his decision by his conclusion that the absences on 24 and 25 April 2014 were not on account of illness and, it must follow, his view that Mr Byrne was not entitled to be absent under the relevant enterprise agreement.
2. The enterprise agreement (the *Dawson Mines Collective Enterprise Agreement 2014*) provided, by cl 3.2, as follows:

**3.2 Personal/Carer’s Leave**

…

3.2.3 Employees may take personal/carer’s leave if the leave is taken:

(a) because the employee is not fit for work because of a personal illness or injury affecting the employee; or

…

3.2.4 Employees will be paid their Normal Annual Salary rate for the period of personal/carer’s leave.

3.2.5 Employees must notify Dawson of their inability to attend for a reason outlined in clause 3.2.3 prior to the commencement of work or otherwise as soon as is practicable. When notifying Dawson, the employee must also inform Dawson of the estimated length of the absence.

1. On the findings made by the primary Judge, Mr Byrne was entitled to sick leave on 24 and 25 April 2014 and was entitled to be temporarily absent from work on those days. Mr Power’s belief to the contrary was misplaced.
2. Nevertheless, it was found by the primary Judge to be sufficient that Mr Power believed Mr Byrne to have been dishonest when he dismissed him. Belief in that matter not being a “prohibited reason”, there was no breach of s 340 or s 352 of the FW Act. (It is not necessary to give separate attention to, or pursue, the claim of breach of s 346 of the FW Act).

## A brief explanation for my view

1. It will be necessary to refer to authority in the High Court, and in this Court, which I do hereunder. However, it is now possible to venture a view of the facts, and their relation with ss 340 and 352 of the FW Act, uninstructed by authority. It is relevant to bear in mind that s 361 of the FW Act provides:

**361 Reason for action to be presumed unless proved otherwise**

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.

1. In my view, it is not incorrect to say that Mr Byrne was dismissed because he exercised a workplace right (i.e. took sick leave to which he was entitled) and because he was temporarily absent from work on account of illness. It may also be true to say that Mr Power’s immediate, or conscious, motivation did not extend so far – i.e. his subjective reasons did not. However, in an appropriate context, objective circumstances may also provide reasons (I do *not*, in the present case, suggest subconscious ones) which give context and meaning to what is done and which cannot realistically be separated, divorced or disconnected from the action under examination.
2. Section 360 of the FW Act provides:

**360 Multiple reasons for action**

For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

1. In my respectful view, it is clear from Mr Power’s evidence which I extracted earlier that there were two fundamental and equally important reasons for his decision: Mr Byrne’s conduct on 24 and 25 April 2014 in absenting himself from work; and Mr Power’s attribution of dishonesty to that conduct. Absent either feature there would have been no dismissal. In particular, Mr Byrne was not dismissed because he said he would be absent; he was dismissed because he was, in fact, absent. He was dismissed because he exercised a workplace right which he did, in fact, have.
2. However, the matter cannot remain unaffected by a consideration of the authorities, and it is those to which I turn.

## The authorities

1. The first point to make is that, in a case where s 361 of the FW Act is relied upon, where it is alleged that “a person took … action for a particular reason”, it needs first to be established not only that adverse action was taken but also that a relevant workplace right exists “as an objective fact”. I agree, with respect, with what Jessup J (with whom Allsop CJ and White J agreed) said to that effect in *Tattsbet Limited v Morrow* [2015] FCAFC 62; 321 ALR 305 at [119], where his Honour referred also to numerous authorities in this Court to similar effect.
2. The relevant workplace rights (e.g. a right to sick leave and actually taking sick leave) were established as objective facts in the present case on the unchallenged findings of the primary Judge. That engaged the potential operation of s 361 of the FW Act, although that is only the starting point.
3. Next, it is necessary to refer to a case drawn to the attention of counsel at the hearing of the present appeal by Jessup J: the judgment of Smithers J in *Musgrove v Murrayland Fruit Juices Pty Ltd* (1980) 47 FLR 156.
4. In that case the prosecutor (a former employee) charged the defendant (his former employer) with breach of s 5(1)(a) and (b) of the *Conciliation and Arbitration Act 1904* (Cth). The charge was a criminal charge, commenced by laying an information. Section 5(1)(a) needs no further attention. Section 5(1)(b) raised for consideration whether the prosecutor was dismissed because he was entitled to a benefit under an award. The prosecutor (who was in dispute with his employer about various matters) unilaterally took a lunch break without waiting to be replaced, turning off machinery as he did so. He was dismissed, effectively, for insubordination, but he did have an award right to take his lunch at exactly that time.
5. Smithers J said (at 159):

I do not find it necessary to decide whether or not on this particular day the prosecutor was entitled pursuant to cl. 19 (a) to defy the request of his employer that he continue to work, because I am satisfied that even if that be so the facts of this case are such that I am satisfied that the defendant, in particular Mr. Carazza, did not dismiss the employee by reason either of the fact that he was a member of the union or that he was entitled to the benefit of cl. 19 (a) or of any other provision of the award. The critical question is whether the defendant dismissed the prosecutor by reason of the circumstance that he was entitled to the benefit of the award. I may say at the outset that I am thoroughly satisfied that there was no question of him being dismissed by reason of the fact he was a member of the union. So the critical question is whether the circumstance that the prosecutor was entitled to some particular benefit of the award and, of course, cl. 19 (a) is relied upon, was an operable and substantial reason in the mind of the factory, in the mind of the defendant, which influenced the defendant to dismiss the prosecutor when it did. The defendant by its managers knew that the award was operative and that the prosecutor was entitled to certain benefits thereunder. The defendant did not know what some of those benefits were but the defendant had no objection to the prosecutor having those benefits whatever they were.

As to these benefits that they did not know of, and did not know the nature and extent of, they were not influenced by those factors to take action against the prosecutor. The situation was that having become unfavourably inclined to the informant on various indefinite grounds, almost all of a personality incompatibility, the smouldering hostility flared into flame when the prosecutor took his meal break and for that purpose switched off the extractors. It so happened that the prosecutor was entitled to his meal break at the time at which he took it. There is no evidence he knew that, but that is, I think, irrelevant. Certainly the defendant did not know it. It may be said that the prosecutor [sic] ought to have known and that ignorance of the law is no excuse, but the question is as to the reason which actuated the defendant in taking the action that it did and that involved not what the defendant ought to have known or what ought to have been in its manager’s mind but what actually was in their minds. What circumstances were in their minds when they dismissed him? They could not act by circumstances of which they had no knowledge.

1. In my view, this reasoning is distinguishable from the present case. Smithers J found, on the facts, that the decision to dismiss was unrelated to the award entitlement. The decision was the result of “smouldering hostility”. He had earlier found that the factory manager had felt humiliated in front of other employees (at 158):

This conduct [including leaving the premises] upset Mr. Goonan a great deal. He felt he had been humiliated in the face of other employees and he regarded it as the last straw in the long process of incidents, more or less serious, which had irritated him in relation to Mr. Musgrove’s conduct over the last few months. He told Mr. Carazza that he regarded it as so serious that Mr. Musgrove would have to be dismissed, and indeed, said it was either he or Mr. Musgrove who would have to leave.

1. Those circumstances do not adequately reflect the present case. Indeed, Mr Power had no prior relationship with Mr Byrne. In the present case the absences on 24 and 25 April 2014 were not mere incidents which were not central to the decision to dismiss. The absences, themselves, were the subject of Mr Power’s consideration. The added element of perceived dishonesty may not, I accept, be dismissed as unimportant but a proscribed reason for adverse action need be only part of the reason; it need not represent all the reasons.
2. More recent cases in this Court have been heavily influenced by the decisions of the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 (“*Barclay*”) and *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243 (“*BHP Coal*”).
3. In *Barclay* the High Court dealt with an argument that an employer’s reasons for taking adverse action might be discerned from objective circumstances in preference to the subjective reasons asserted by a decision-maker. French CJ and Crennan J stated (at [41]):

41 The question of why an employer took adverse action against an employee is a question of fact arising from the operation of interdependent provisions of the *Fair Work Act*. …

and (at [44]-[45]):

44 There is no warrant to be derived from the text of the relevant provisions of the *Fair Work Act* for treating the statutory expression “because” in s 346, or the statutory presumption in s 361, as requiring only an objective inquiry into a defendant employer’s reason, including any unconscious reason, for taking adverse action. The imposition of the statutory presumption in s 361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains “why was the adverse action taken?”.

45 This question is one of fact, which must be answered in the light of all the facts established in the proceeding. Generally, it will be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer. Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision‑maker or because other objective facts are proven which contradict the decision-maker’s evidence. However, direct testimony from the decision‑maker which is accepted as reliable is capable of discharging the burden upon an employer even though an employee may be an officer or member of an industrial association and engage in industrial activity.

(Footnotes omitted.)

1. Their Honours dispelled the notion of any automatic association between an objective circumstance (such as in fact being an officer of a union) and adverse action for that reason, saying (at [61] and [62]):

61 Central to the respondents’ argument on this appeal was the contrary and incorrect view that Mr Barclay’s status as an officer of an industrial association engaged in lawful industrial activity at the time that Dr Harvey took adverse action against him meant that Mr Barclay’s union position and activities were inextricably entwined with the adverse action, and that Mr Barclay was therefore immune, and protected, from the adverse action. …

62 Secondly, it is a related error to treat an employee’s union position and activity as necessarily being a factor which must have something to do with adverse action, or which can never be dissociated from adverse action. It is a misunderstanding of, and contrary to, *Bowling* to require that the establishment of the reason for adverse action must be entirely dissociated from an employee’s union position or activities. Such reasoning effectively institutes an interpretation of the relevant provisions indistinguishable from that of Isaacs J in *Pearce*, which was rejected in *Bowling*. The onus of proving that an employee’s union position and activity was not an operative factor in taking adverse action is to be discharged on the balance of probabilities in the light of all the established evidence.

before concluding (at [65]):

65 In this case the primary judge adopted the correct approach to the relevant provisions. Dr Harvey gave evidence of her reason for taking adverse action against Mr Barclay and also gave positive evidence that this was not for a prohibited reason and that she would have taken the same action against a person circulating a similar email who was not an officer of the AEU. That evidence was accepted by the primary judge and his findings in that regard were not challenged before the Full Court. The appellant discharged the burden cast upon it to show that the reason for the adverse action was not a prohibited reason, and that Mr Barclay’s union position and activities were not operative factors in him being required to show cause. The appeal must be upheld and consequential orders made.

(Footnote omitted.)

1. In my view, Mr Byrne’s absences and the reason for the absences (i.e. sick leave) were indispensable factors in the overall circumstances, even if the entitlement to be absent was not recognised or accepted by Mr Power. Mr Byrne was only dismissed because he was absent. He was dismissed because he exercised a workplace right; not independently of it.
2. Gummow and Hayne JJ, at [121] and [126] deprecated a suggested contrast between “objective” and “subjective” reasons, but their Honours’ criticism appears to me to relate to any attempt to ascribe unconscious or subconscious reasoning to a decision-maker. No such consideration arises in the present case.
3. Heydon J said (at [146]):

146 To search for the “reason” for a voluntary action is to search for the reasoning actually employed by the person who acted. …

1. In my respectful view, it was an important part of Mr Power’s disclosed reasoning that Mr Byrne had absented himself, even though he misunderstood the factual and legal significance of that circumstance, according to the findings of the primary Judge. In my view, a misunderstanding of that kind does not break the causal connection otherwise present, nor serve to illustrate that the workplace right (which was in fact exercised) was an irrelevant consideration.
2. In *BHP Coal*, a worker was dismissed for carrying an offensive sign during a lawful union-sponsored protest. The person who dismissed the worker said he did so for breach of a company workplace policy and not because the conduct occurred during industrial action, as it did. The primary Judge found the FW Act had been breached. In the High Court, French CJ and Kiefel J referred to the primary Judge’s findings as follows (at [4]):

4 His Honour did not find that the mere fact that Mr Doevendans had held and waved the sign was one of Mr Brick’s reasons for terminating the employment. Mr Brick’s reasons had to do with the nature of Mr Doevendans’ conduct. His Honour accepted Mr Brick’s evidence that the fact that Mr Doevendans occupied certain positions within the CFMEU, and had engaged in industrial activity, did not play any part in Mr Brick’s decision.

(Footnote omitted.)

1. Their Honours said (at [7] and [10]):

7 The focus of the inquiry as to whether s 346(b) has been contravened is upon the reasons for Mr Brick taking the adverse action. This is evident from the word “because” in s 346, and from the terms of s 361. The inquiry involves a search for the reasoning actually employed by Mr Brick. The determination to be made by the court is one of fact, taking account of all the facts and circumstances of the case and available inferences.

(Footnotes omitted.)

…

10 None of the reasons given by Mr Brick, and accepted by the primary judge as true in fact, was a reason prohibited by s 346(b). Mr Brick did not dismiss Mr Doevendans because he participated in the lawful activity of a protest organised by the CFMEU (s 347(b)(iii)), nor did he dismiss Mr Doevendans because, in carrying and waving the sign, Mr Doevendans was representing or advancing the views or interests of the CFMEU (s 347(b)(v)), as the CFMEU alleged. Mr Brick’s reasons related to the content of Mr Doevendans’ communications with his fellow employees, the way in which he made those communications and what that conveyed about him as an employee. Mr Brick’s reasons included his concern that Mr Doevendans could not or would not comply with the standards of behaviour which Mr Brick was attempting to instil in employees at the mine.

1. Then their Honours said (at [19]-[22]):

19 Section 346 does not direct a court to inquire whether the adverse action can be characterised as connected with the industrial activities which are protected by the Act. It requires a determination of fact as to the reasons which motivated the person who took the adverse action.

20 In *Bendigo*, French CJ and Crennan J pointed out that it is erroneous to treat the onus imposed on the employer by s 361 as being heavier, or different, if adverse action is taken while an employee happens to be engaged in industrial activity. Their Honours said that it is incorrect to conclude that, because the employee’s union position and activities were inextricably entwined with the adverse action, the employee was therefore immune, and protected, from the adverse action. Such an approach would destroy the balance between employers and employees which the Act seeks to attain and which is central to s 361.

21 In the present case, the reasons found by the primary judge to actuate Mr Brick’s decision did not include Mr Doevendans’ participation in industrial activity, or his representing the views of the CFMEU. To the contrary, his Honour found that Mr Brick had not been motivated by such considerations. This was consistent with the reasons given by Mr Brick in evidence accepted by his Honour, which related to the nature of Mr Doevendans’ conduct and what it represented to Mr Brick about Mr Doevendans as an employee.

22 The primary judge then went on to consider whether Mr Doevendans’ conduct constituted an industrial activity in the relevant respects. The only inference which can be drawn from this additional reasoning is that, because the adverse action was based upon the sign which Mr Doevendans held and waved, this activity must be taken as one of the reasons for the action. That is to say no more than that the adverse action had a connection, in fact, to the industrial activity. That connection may necessitate some consideration as to the true motivations of Mr Brick, but it cannot itself provide the reason why Mr Brick took the action he did. That inquiry was concluded by his Honour’s earlier findings. His Honour, in effect, wrongly added a further requirement to s 361, namely that the employer dissociate its adverse action completely from any industrial activity.

(Footnote omitted.)

1. In my view, the present case is a different one from that considered by their Honours. In the present case, the absences were an integral factor explaining the decision. It may be accepted that Mr Power attributed a character and significance to the absences which did not recognise that they gave effect to a workplace right, but in my respectful view the search for the true or actual reasons of a decision-maker does not mean that the decision can be immunised by misunderstanding or incorrect characterisation of the underlying facts, if those facts are part of the explanation for the decision itself. In the present case, Mr Power’s decision actively denied the exercise by Mr Byrne of his workplace right by visiting upon him a consequence which would have unarguably breached the FW Act if done directly.
2. In my view, the decision cannot be protected upon such a basis where, upon the findings made by the primary Judge, mistake and misconception served as immunity against otherwise illegal conduct.
3. The other member of the majority in *BHP Coal*, Gageler J said (at [85], [91]-[93]):

85 Analysis in the appeal to this Court must begin, as analysis began at each stage of the proceedings in the Federal Court, with consideration of this Court’s decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]*. The unanimous holding in that case was that, read in the context of ss 360 and 361 of the Act and of its legislative history, the word “because” in s 346 of the Act connotes the existence of a particular reason as an operative and immediate reason for taking adverse action. Where the adverse action taken is in consequence of a decision made by a responsible individual within a corporation, the existence or non-existence of a particular reason as an operative and immediate reason for taking that adverse action turns on an inquiry into the mental processes of that individual.

(Footnotes omitted.)

…

91 The CFMEU argues that the consequence of allowing the decision of the Full Court in the present case to stand will be to undermine the statutory protection afforded to protected industrial activity by allowing an employer to escape culpability by choosing to apply its own characterisation to otherwise protected industrial activity.

92 Part of the answer to that argument lies in recognition of the nature of the protection that is afforded to protected industrial activity through the operation of s 346(b). The protection afforded by s 346(b) is not protection against adverse action being taken by reason of engaging in an act or omission that has the character of a protected industrial activity. It is protection against adverse action being taken by reason of that act or omission having the character of a protected industrial activity.

93 Another part of the answer lies in recognition of the significance of the combined operation of ss 360 and 361. An employer could not escape the proscription in s 346(b) merely by proving that the employer applied its own characterisation to an act or omission having the character of a protected industrial activity. The employer would need, in addition, to prove that the act or omission having the character of a protected industrial activity played no operative part in its decision.

1. I accept that Gageler J’s remarks convey a view (especially at [92] and [93]) that seems to leave open to an employer a defence of an honest (even if mistaken) belief that any workplace right was irrelevant to the decision. However, that approach does not extend, in my respectful view, to permit an employer to proceed with impunity on a mistaken view of the employer’s legal obligations and of the facts. That was not the issue being addressed in *BHP Coal*.
2. In the present case, to repeat what has already been said, the absences were integral to Mr Power’s reasoning. At the very least, they were a part of the reason for dismissal. Mr Byrne expressly claimed the benefit of the workplace right. The absences were in fact (and by law) protected. In my respectful view, those matters should not in the analysis be so completely merged with Mr Power’s misunderstanding about the legal rights involved so as to become indistinguishable from his (separate) conclusion that Mr Byrne was acting dishonestly or deceitfully.
3. Had Mr Power understood that Mr Byrne was sick, he would not have been dismissed. The present is not a case, for example, where having the status or role of a union official was shown to be irrelevant to an assessment of conduct (*Barclay*) or where a response to conduct was shown to be not responsive to protected industrial action occurring at the same time (*BHP Coal*). In the present case, on one view, Mr Byrne was dismissed for his perceived conduct (being absent without entitlement and dishonestly claiming to be ill). On the better view, he was dismissed for being absent, while at the same time the decision-maker believed him to have no right to be absent – i.e. that he was not protected from dismissal. In my respectful view, misunderstanding or a mistaken belief about the second aspect cannot protect the first and the High Court has not instructed that it does.
4. Since *Barclay* and *BHP Coal* another Full Court of this Court has dealt with a similar issue in *Construction Forestry Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150 (“*Endeavour Coal*”).
5. A maintenance fitter, accustomed to working on weekends (with additional pay as a result) was moved to Monday to Friday shifts with a consequent reduction in earnings. That was “adverse action”. The move to weekday work resulted from a series of systematic absences on personal leave (sick leave, carer’s leave or parental leave) on 15 occasions totalling almost 30 days in a little under three years. The employer’s evidence, accepted in the Federal Circuit Court, was that it was the fitter’s “lack of predictability” in his attendances which was the real reason for the adverse action, not the fact that he previously exercised his right to personal leave.
6. Again, it seems to me with respect that the present is a different case. In the present case, the absences in question provided the very occasion for the decision to terminate and were, in my view, as I have already discussed, at least partly explanatory of it.
7. In *Endeavour Coal*, Jessup J felt bound by *BHP Coal* to conclude that liability had not been established. There were other matters also discussed which approach less closely the present case, which I do not need to address.
8. The other member of the majority in *Endeavour Coal*, Perram J, also took the view that *BHP Coal* disposed of the contention of adverse action for a proscribed reason. There is one observation by his Honour to which I should draw specific attention. It is at [91] where his Honour said:

91 … The inquiry thrown up by s 340 is not one concerned with causation but, rather, the subjective reasons for action of the decision-maker. …

1. I would not, with respect, draw a distinction in quite that way. There may be cases, and in my view the present is one such case, where an indisputable causal relationship may be so integral to a decision, and the reason for it, that it cannot be put to one side in order to focus only on subjective reasons. The reasons of a decision-maker must be evaluated by reference to context and bearing in mind all the relevant circumstances.
2. I would regard myself as bound by considerations of comity to apply the majority reasoning in *Endeavour Coal*, despite any reservations of my own, if the *ratio decidendi* of the case was directly applicable but, as I have attempted to explain, the case is not a sufficient analogue with the present, and the reasons of the members of the majority are not sufficiently unified, to require that.

## Conclusion on adverse action

1. Ground 3 of the grounds stated in the notice of appeal asserted:

3. The learned primary Judge erred in finding that the Respondent had discharged the onus imposed by s. 361 of the *Fair Work Act* 2009 (Cth) (the “Act”).

1. On a broad reading of that ground, my analysis of the issues discussed to this point might be regarded as referable to Ground 3. However, my analysis of the issues discussed to this point does not, it must be said, reflect submissions put by the appellants in support of the appeal. The matters emphasised in support of the appeal are those which Jessup J has addressed in detail.
2. The issues with which I have dealt were, however, squarely ventilated at the hearing of the appeal and Mr Neil SC very properly and candidly eschewed any claim to be prejudiced by the issues being broadened beyond the apparent bounds of the appellants’ oral and written submissions.
3. In my view, the matters I have sought to explain provide a sufficient reason why Mr Byrne, in particular, is entitled to relief. He was dismissed on the basis of an error (on the findings of the primary Judge) when, if that error had been appreciated his job would have been safe, despite his absences.
4. I have concluded that, in the circumstances of the case, the appellants are entitled to a finding, reflecting Ground 3 of the notice of appeal, that on the facts found by the primary Judge the respondent did not discharge its onus under s 361 of the FW Act.
5. For that reason, I would uphold the appeal.
6. As to remedy, reinstatement is inevitable. Mr Byrne was entitled to take his sick leave. He should not have been dismissed. He would not have been dismissed if the true legal and factual position had been appreciated.

## Other matters

1. Subject to the above, I share the view expressed by Jessup J that the respondent was not obliged to call further witnesses. I agree with his Honour’s reasons.
2. I agree with Jessup J that, on the facts found by the primary Judge, this was not a case justifying summary dismissal. However, the statutory (and contractual) consequence would be an entitlement to additional pay in lieu of notice (either two or three weeks – an uncertainty which was not resolved on the appeal). The application did not attempt to press any cause of action related to such matters under either the FW Act (s 117) or for damages for breach of contract and further attention need not be given to that aspect.
3. As to the claim for specific performance, I agree that the case is not one of those “exceptional circumstances” where that form of relief may have been available (see *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 428, cited by the primary Judge at [145]). No error was shown in the conclusion of the primary Judge that this was not a case for specific performance.

## Orders

1. I would order that the appeal be upheld, that the order of the primary Judge be set aside and that, in lieu thereof, it be ordered that Mr Byrne be reinstated to his former position with no loss of pay or continuity of service.

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| I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan. |

Associate:

Dated: 5 November 2015

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | QUD 185 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNIONFirst AppellantSTEPHEN BYRNESecond Appellant |
| AND: | ANGLO COAL (DAWSON SERVICES) PTY LTDRespondent |

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| --- | --- |
| JUDGES: | JESSUP, BUCHANAN AND RANGIAH JJ |
| DATE: | 5 november 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

**RANGIAH J**

1. I have had the advantage of reading the reasons for judgment of Jessup J and Buchanan J in draft. Their Honours’ reasons depart on the question of whether the primary judge’s findings of fact require the conclusion that the respondent contravened s 340(1) and s 352 of the *Fair Work Act 2009* (Cth) (“the FWA”). For the reasons that follow, I respectfully agree with Jessup J that those provisions were not contravened and that the appeal should be dismissed.
2. Stephen Byrne was employed at the Dawson Mine at Moura. On 21 April 2014, he applied for two days annual leave, which he wanted to take on 24 and 25 April 2014. The application was rejected by the mine superintendent, Andrew Lawn, on 22 April 2014. The primary judge accepted Mr Lawn’s evidence that Mr Byrne then said, “Fine, I’m going to be sick anyway.” Mr Byrne also said, “I will get a medical certificate. You will find that very hard to challenge”.
3. Mr Byrne saw his doctor on 23 April 2014 and obtained a medical certificate which indicated that he was unfit for work for the next two days. The doctor gave evidence that he had observed symptoms of asthma exacerbation and a lower respiratory tract infection. Mr Byrne was then absent from work on sick leave on 24 and 25 April 2014.
4. Mr Lawn informed the mine manager, Tony Power, of what Mr Byrne had said to him on 22 April 2014. Mr Power made a decision on 12 May 2014 to dismiss Mr Byrne from his employment.
5. Before the primary judge, the appellants alleged (relevantly for present purposes) that the respondent had dismissed Mr Byrne because he had exercised a workplace right, or because he was temporarily absent from work because of illness.
6. Section 340(1)(a)(ii) provides:

A person must not take adverse action against another person…because the other person…has…exercised a workplace right…

1. Section 352 of the FWA provides:

An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

1. The first issue for the primary judge was whether Mr Byrne was genuinely sick, or whether he had pretended to be sick so that he could take the two days off work on sick leave. If he was not sick, he was not exercising a workplace right within s 340(1), and he was not temporarily absent from work because of illness for the purposes of s 352. Her Honour decided that issue in favour of Mr Byrne, holding that he was genuinely sick on 24 and 25 April 2014.
2. The second issue for the primary judge was whether the respondent dismissed Mr Byrne *because* he was temporarily absent from work because of illness. In the circumstances of the case, the issue was essentially the same under s 340(1) and s 352.
3. The primary judge decided the second issue against Mr Byrne. Her Honour held that Mr Byrne was dismissed because Mr Power believed that Mr Byrne had conducted himself in a dishonest manner. Although the reasons for judgment do not say so clearly, I understand her Honour to have concluded that one aspect of the dishonesty imputed to Mr Byrne was that he took sick leave when he was not in fact sick. The essence of Mr Power’s evidence appeared in the following passages of his affidavit:

In my view, as at 22 April 2014, when Mr Byrne’s annual leave request was refused, he conducted himself in a manner which showed that he intended to be dishonest with his actions and take sick leave when he was not in fact sick.

I believed that Mr Byrne had not actually been unfit to come to work and perform work on each of 24 and 25 April 2014.

1. The primary judge accepted Mr Power’s evidence. Her Honour held that Mr Power’s reasons for his decision to dismiss Mr Byrne did not include, as a substantial or operative factor, any proscribed reason identified in s 340(1) and s 352 of the FWA. In so holding, her Honour distinguished between:
2. dismissal because Mr Power believed that Mr Byrne was acting dishonestly by taking sick leave when he was not sick; and
3. dismissal because Mr Byrne had taken sick leave.
4. The issue is whether that distinction is a valid one in circumstances where it is evident that but for Mr Byrne taking sick leave, he would not have been dismissed.
5. In *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243, French CJ and Kiefel J said at [7]:

The focus of the enquiry as to whether s 346(b) has been contravened is upon the reasons for [the employer] taking the adverse action. This is evident from the word “because” in s 346, and from the terms of s 361. The enquiry involves a search for the reasoning actually employed by [the employer]. The determination to be made by the court is one of fact, taking account of all the facts and circumstances of the case and available inferences.

(Citations omitted.)

1. More particularly, in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, Gummow and Hayne JJ noted that the enquiry is whether a proscribed reason was a “substantial and operative” or “operative or immediate” reason for the adverse action. Their Honours said:

[103] …The phrase “operative or immediate reason” used in [*Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326] is relevantly indistinguishable from the phrase “a substantial and operative factor” used by Mason J in [*General Motors-Holden’s Pty Ltd v Bowling* (1976) 136 CLR 676].

[104] …An employer contravenes s 346 if it can be said that engagement by the employee in an industrial activity comprised “a substantial and operative” reason, or reasons including the reason, for the employer’s action and that this action constitutes an “adverse action” within the meaning of s 342.

1. In *BHP Coal*, Gageler J drew together the threads of *Barclay*. His Honour described the enquiry as being directed to “the operative and immediate reason” for the adverse action. His Honour said:

[85] Analysis in the appeal to this Court must begin, as analysis began at each stage of the proceedings in the Federal Court, with consideration of this Court's decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1].* The unanimous holding in that case was that, read in the context of ss 360 and 361 of the Act and of its legislative history, the word “because” in s 346 of the Act connotes the existence of a particular reason as an operative and immediate reason for taking adverse action. Where the adverse action taken is in consequence of a decision made by a responsible individual within a corporation, the existence or non-existence of a particular reason as an operative and immediate reason for taking that adverse action turns on an inquiry into the mental processes of that individual.

(Citations omitted.)

1. In the present case, Mr Byrne’s dismissal was certainly connected with his taking sick leave. There was a causal nexus. If Mr Byrne had not taken sick leave, then he would not have been dismissed. However, that does not necessarily mean that Mr Byrne was dismissed *because* he took sick leave. The word “because” in s 340(1) and s 352 requires an enquiry as to the operative and immediate reason or reasons for his dismissal.
2. The primary judge accepted that the reason why the respondent dismissed Mr Byrne was that Mr Power believed that Mr Byrne had acted dishonestly by taking sick leave when he was not sick. Her Honour accepted Mr Power’s evidence that if Mr Byrne had not given the employer reason to think that he was acting dishonestly, there would have been no problem with Mr Byrne taking sick leave. In my opinion, the taking of sick leave cannot itself be described as an operative reason for the dismissal. Nor can it be described as an immediate reason for his dismissal. On the findings of fact made by the primary judge, the only operative and immediate reason for the dismissal was Mr Power’s belief that Mr Byrne had acted dishonestly.
3. As it turned out, Mr Power’s belief that Mr Byrne had acted dishonestly by taking sick leave was wrong. The primary judge found that Mr Byrne was genuinely sick. However, the question of what the employer’s reasons for dismissing Mr Byrne were must be considered on the basis of what the employer knew or believed at the time of the dismissal. The primary judge found that the decision-maker genuinely, although wrongly, believed that Mr Byrne had acted dishonestly. That belief was brought about by Mr Byrne’s conduct. The fact that it was demonstrated at the trial that Mr Byrne was in fact genuinely sick and entitled to take sick leave could not be determinative of the employer’s reasons for dismissing him at an earlier time.
4. On the facts found by the primary judge, her Honour was right to conclude that Mr Byrne was not dismissed because he had exercised a workplace entitlement or because he was temporarily absent from work because of illness. I respectfully agree that the respondent did not contravene s 340(1) or s 352 of the FWA.
5. I have had some concern about whether this outcome is unjust. After all, Mr Byrne was genuinely sick and was entitled to take sick leave; and his dismissal came about through Mr Power’s mistaken, although honest, belief that Mr Byrne was not sick. However, Mr Byrne could have applied to the Fair Work Commission under s 394 of the FWA for a remedy for unfair dismissal. Under s 385, a person is unfairly dismissed if the Fair Work Commission is satisfied, relevantly, that the dismissal was harsh, unjust or unreasonable. Sections 725, 727 and 729 required Mr Byrne to elect whether to proceed under the general protections provisions or the unfair dismissal provisions of the FWA. The appellants made a tactical decision to proceed under s 340(1) and s 352, presumably because of a perceived advantage in attracting the reversal of onus of proof under s 361, and because the employer would be exposed to a pecuniary penalty for contravention of civil remedy provisions. The disadvantage of that course was that it allowed the respondent the opportunity to discharge its onus of proof by proving that the dismissal was not because of a proscribed reason. If Mr Byrne had applied under s 394 and the Fair Work Commission had made the same findings of fact as those made by the primary judge, it seems inevitable that his dismissal would have been regarded as harsh, unfair or unjust, and that he would have been reinstated. In addition, while Mr Byrne alleged that the respondent had breached the contract of employment before the primary judge, he abandoned his claim for damages. In these circumstances, the absence of any remedy is a consequence of the tactical decisions made by the appellants.
6. I respectfully agree with the other aspects of Jessup J’s reasons. I agree that the appeal should be dismissed.

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| I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 5 November 2015