FEDERAL COURT OF AUSTRALIA

Rumble v The Partnership Trading as HWL Ebsworth Lawyers [2020] FCAFC 37

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| Appeal from: | *Rumble v The Partnership Trading as HWL Ebsworth Lawyers* [2019] FCA 1409 |
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| File number: |  |
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| Judges: | **RARES, FLICK AND KATZMANN JJ** |
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| Date of judgment: | 13 March 2020 |
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| Catchwords: | **INDUSTRIAL LAW** – adverse action – where applicant employee of law firm, who made repeated criticisms in media about government clients of firm, dismissed for breaching firm’s media policy – where firm’s media policy prohibited employees criticising clients or potential clients in the media without permission – where primary judge found that managing partner did not take action against employee because of applicant’s political opinion – whether adverse action taken against applicant because he breached firm’s media policy necessarily taken because of his political opinion – whether managing partner of firm dismissed applicant because of his political opinion in contravention of s 351 of the *Fair Work Act 2009* (Cth) – whether not open to primary judge to find that applicant’s political opinion was not a substantial and operative factor in decision maker’s reasons – appeal dismissed |
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| Legislation: | *Fair Work Act 2009* (Cth) |
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| Cases cited: | *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500  *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  *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 327 ALR 460 |
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| Counsel for the Appellant: | Mr J C Sheahan QC with Ms R Francois and Mr J Widjaja |
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| Solicitor for the Appellant: | Mr R Ishak of William Roberts Lawyers |
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| Counsel for the Respondent: | Mr M J Kimber SC with Mr G Fredericks and Mr S McIntosh |
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| Solicitor for the Respondent: | Mr S Penning of HWL Ebsworth |

ORDERS

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|  | | NSD 1601 of 2019 |
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| BETWEEN: | GARY RUMBLE  Appellant | |
| AND: | THE PARTNERSHIP TRADING AS HWL EBSWORTH  Respondent | |

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| JUDGES: | RARES, FLICK AND KATZMANN JJ |
| DATE OF ORDER: | 13 MARCH 2020 |

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*.

REASONS FOR JUDGMENT

RARES AND KATZMANN JJ:

1. The issue in this appeal is whether an employer contravenes s 351(1) of the *Fair Work Act 2009* (Cth) by dismissing an employee because the employee repeatedly breaches the employer’s policy prohibiting its employees from criticising the Government (being a client of the employer) in the media when the employer reasoned that that conduct could affect its ability to continue to attract and earn income from fees from Government work. Section 351(1) provides:

351 **Discrimination**

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person’s race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Note:          This subsection is a civil remedy provision (see Part 4‑1).

1. On 20 February 2017, Juan **Martinez**, the managing partner of the respondent, The Partnership Trading as HWL Ebsworth Lawyers (the **firm**), wrote an email to **Dr** Gary **Rumble**, the appellant, giving him three months’ notice of the termination of his contract of employment as a consultant to the firm. Mr Martinez told Dr Rumble that he would be paid out the period of his notice.
2. The primary judge found that, consistently with his history of similar conduct, during November and December 2016, Dr Rumble had criticised the Commonwealth Government twice in *The* *Sydney Morning Herald*. His Honour found that the conduct breached the firm’s media policy that in its practical effect prohibited such criticism in the media. The primary judge found, as facts, that *first*, Mr Martinez dismissed Dr Rumble because he disobeyed instructions and a policy not to discuss the Firm’s clients in public without first getting permission and *secondly*, Mr Martinez did not terminate Dr Rumble’s employment for having, or expressing, a political opinion.
3. Dr Rumble contended, in substance, that because the media policy operated to prevent him from expressing his political opinion (ie, his criticism of the Government) he was dismissed because of his political opinion in the context in which Mr Martinez had made it clear that he would not waive the policy to give permission to Dr Rumble to express that opinion in the media.
4. Dr Rumble raised other grounds of appeal, but it is not necessary to resolve them. In the course of argument both parties accepted that, were Dr Rumble to succeed in overturning the primary judge’s finding that the firm had not contravened s 351(1), all issues of damages should be remitted to the primary judge.
5. Dr Rumble did not challenge any of the primary judge’s findings of fact on the issue under s 351(1) and those facts are in narrow compass. Rather, he challenged his Honour’s application of the law to those facts. The following background summarises the primary judge’s findings of fact on the issue under s 351(1).

# Background

1. Dr Rumble has had a career in the law, particularly public law, since he was admitted to practice in 1975. He holds a doctorate in constitutional law from the Australian National University and has been both an academic and a practitioner. He was a well-regarded public lawyer in Canberra with a specialty in constitutional law.
2. In April 2011, Dr Rumble was a partner in the law firm, DLA Phillips Fox, when the Secretary of the Department of Defence appointed that firm to conduct a review into allegations of sexual and other abuse in the military (**the 2011 Review**). The three lawyers with DLA Phillips Fox who conducted the review were Dr Rumble, Professor Dennis Pearce AO and another partner, Melanie McKean. The Minister announced that those three were to act as the members of the review. Under their appointment, the three reviewers were expected by all concerned (including DLA Phillips Fox, the Government and the firm) to report their independent views as individuals and not as persons acting for the firm of solicitors for which each worked. This position continued after each of Dr Rumble, Professor Pearce and Ms McKean took up positions with the firm after leaving DLA Phillips Fox during the period between 1 May 2011 and October 2011.
3. On 22 July 2011 Dr Rumble signed a contract under which he was to be a casual consultant to the firm. Thereafter, DLA Phillips Fox (which became known as DLA Piper) and the firm worked cooperatively together in supporting the three reviewers’ work on volume 1 of their report on the 2011 Review.
4. On 11 October 2011 the three reviewers delivered volume 1 of their report to the Minister. On 12 April 2012, Dr Rumble delivered volume 2 of the report from the 2011 Review to the Minister.
5. Dr Rumble formed the view that his and his two colleagues’ appointments entitled each of them to continue to criticise the Government of the day’s implementation of the recommendations of the 2011 Review. As events transpired, Dr Rumble engaged in such criticisms for over four years after work on volume 2 of the report from the 2011 Review had finished.
6. On 10 July 2012 the Minister publicly released volume 1 of the report from the 2011 Review.
7. Thereafter, Dr Rumble began expressing his concerns about the then Minister’s delay in responding to and, later, in implementing the recommendations from the 2011 Review. He wrote to the Minister and began engaging with the media about his concerns.
8. On 27 April 2014, Dr Rumble appeared on the Seven Network’s *Weekend Sunrise* program and during his interview by the well-known journalist, Laurie Oakes, he criticised the Departments of Veterans Affairs and Defence (which were both clients of the firm). The interview came to Mr Martinez’s attention who asked a Canberra partner in the firm, Michael **Will**, and Russell **Mailler**, the firm’s national marketing manager, to seek an undertaking from Dr Rumble that he would not speak to the media without first obtaining the firm’s permission.
9. The primary judge found:

As it happens, just as Mr Martinez was dealing with the implications of Dr Rumble’s interview with Mr Laurie Oakes on 27 April 201[4], the Firm implemented another media policy on 2 May 2014. It was drafted by Mr Mailler and approved by Mr Martinez and was produced at least in part in response to Dr Rumble’s activities. The relevant portion of this policy said:

Partners and members of staff are required to obtain the prior approval of Juan Martinez (Managing Partner) or Russell Mailler (National Marketing Manager) before proceeding with any media interview.

**A condition of such approval will be that the partner or staff member will not be permitted to make any negative or critical comments in relation to any existing clients, past clients, potential clients, government departments or entities, regulatory bodies, or any existing or proposed legislation or regulations.**

This policy applies to all material published or broadcast by the legal press, mainstream media, industry groups and associations. Television, radio, magazines, newspapers and the internet are all included in this policy.

In his email of 2 May 2014 to Dr Rumble, Mr Martinez summarised this new media policy and, as noted above, required Dr Rumble’s adherence to it.

Unbowed, Dr Rumble then gave evidence to a further Senate Committee inquiry.

(Emphasis added.)

1. As the primary judge noted, in June 2014, Dr Rumble began an active engagement with a Senate Committee. That engagement produced what his Honour described as “uncharacteristic passivity” from Mr Martinez and the firm, possibly because of a concern about the potential of committing a contempt of the Senate were Dr Rumble dismissed in connection with his submissions and evidence to the Senate Committee.
2. Subsequently, in 2015 and 2016, Dr Rumble continued to contact a range of politicians expressing his concerns that the Government was not doing enough about, or responding appropriately to, the 2011 Review. During this period, Mr Martinez requested a copy of Dr Rumble’s contract to enable discussion of his future. However, the Canberra office partners in the firm were divided on whether Dr Rumble’s employment should cease.
3. On 21 October 2016, Dr Rumble wrote to Mr Martinez (as well as the Canberra partners) asking permission to speak to the press about his concerns relating to the 2011 Review. Mr Martinez replied that no such approval would be given and that, if Dr Rumble wanted to do as he had asked, he should resign. Mr Martinez told Dr Rumble that the firm reserved the right to terminate his contract if he did speak to the media. Dr Rumble remained resolute in his position that he had a right to give voice to his concerns in the media.
4. On 12 November 2016, an article appeared in *The* *Sydney Morning Herald* that included statements attributed to Dr Rumble. Soon after, Mr Will contacted two persons from the Firm who were seconded to the Department of Defence, one of whom told Mr Will in response to this enquiry about how well Dr Rumble’s remarks had gone down with the Department, that it was “mightily pissed off”. On 8 December 2016 Dr Rumble informed the firm that *The Sydney Morning Herald* would publish the next day an article that he had written about his dissatisfaction with the way in which the Government was dealing with issues relating to the 2011 Review. The article was published online by *The Sydney Morning Herald* on 8 December 2016 and in print in *The Canberra Times* on 9 December 2016.
5. His Honour found that the 12 November 2016 and both December 2016 articles contravened the media policy.
6. Mr Martinez had planned to attend the firm’s Canberra office Christmas party that was also to occur on 9 December 2016. He was irritated by the publication of the article on that day and told Mr Will that if Dr Rumble attended the party then he (Mr Martinez) would not. Mr Will told Dr Rumble that his presence at the Christmas party would be uncomfortable in a way that his Honour found, conveyed, indirectly but effectively, that Dr Rumble should treat his invitation as cancelled. The primary judged summed up the interactions at a human level in the following passage:

In the event, Dr Rumble took the hint and did not attend. Mr Martinez denied that he had ever instructed that Dr Rumble not be invited but given Mr Martinez’ stature within the Firm he, like Henry II, can have been under no illusion about what his statement to Mr Will would mean or what the consequences for the turbulent Dr Rumble were likely to be. I do not think that Mr Martinez intended to suggest to Mr Will for one moment that there was there was a potentially acceptable outcome in which Mr Martinez did not come to the party and in which Dr Rumble did. It was Mr Martinez’s Firm and he was its managing partner. Mr Martinez knew this and so did Mr Will. Dr Rumble was not to come to the Christmas Party. How Mr Will saw to this outcome was his problem but Mr Martinez had spoken.

1. Dr Rumble was entitled under his contract to a 5% increase in his retainer and hourly rate on 1 May each year. On 21 June 2016, he had emailed the firm’s national human resources manager enquiring about whether the current year’s increase had occurred. Dr Rumble received no information on that topic and over the following months sent reminders about his query. That led, in November 2016, to an exchange of emails between him and Mr Martinez the upshot of which was that Mr Martinez told Dr Rumble he would consider the issue.
2. On 16 January 2017, Dr Rumble sent a follow up email to the human resources manager and, after receiving no response, on 6 February 2017 he forwarded the emails to a partner in the Canberra office and asked what he should do. His Honour found:

What happened next—perhaps unsurprising to those schooled in the ordinary course of human affairs—is that Mr Martinez fired Dr Rumble. This he did by means of the email dated 20 February 2017…

What was in Mr Martinez’s mind when he decided that Dr Rumble’s employment was to be terminated? Here one enters upon the field of human psychology. Mr Martinez says that he had two reasons in mind when he took this decision. The first was Dr Rumble’s continuing breach of the Firm’s media policy. **I accept Mr Martinez’s evidence to that effect and also his corresponding evidence that he did not make the decision because of Dr Rumble’s political opinion about the Government’s stance on the 2011 Defence Review. Mr Martinez did not appear to care about the politics of the situation** and in fact described Dr Rumble’s activities as a ‘worthy cause’ under cross-examination. This is not necessarily an answer to Dr Rumble’s case for it is still necessary to deal with this submission that one cannot separate the expression of his political opinion from the breach of the media policy. **But at the level of the facts I am abundantly persuaded that Mr Martinez’s concern was the media policy and Dr Rumble’s continued defiance of it.** Indeed, I rather suspect that the real driver was not so much what Dr Rumble was doing but rather that he was not doing what Mr Martinez was telling him to do. **Mr Martinez’s actions in this case and his evidence before me tended to suggest that he is a man accustomed to instinctive obedience. Dr Rumble to my observation lacks that instinct. Unsurprisingly, Dr Rumble’s attitude was quite unacceptable to a person such as Mr Martinez.**

The second reason that Mr Martinez put forward as being the basis of his decision was that he thought there was insufficient demand for Dr Rumble’s services. I accept that Mr Martinez thought this although I question the logic. If Dr Rumble had been an ordinary salaried employee this might have made sense. But the nature of his appointment as a consultant meant that he was not on the full-time pay roll and the usual necessity for an employee to earn fees did not apply. I have in mind particularly that the Firm only had to pay him $30,000 (subject to a 5% annual uplift) by way of retainer and this was expressly said to be not for billed work but promotional activities. So far as billable work was concerned, it made no difference to the Firm how much or how little he brought in except that the more he brought in the more profit it would make. But there was no corresponding downside. He was not costing the Firm anything as a result of his low billing profile.

I therefore do not consider that the purported low demand for Dr Rumble’s services was an independent reason for Dr Rumble’s termination. Rather, I think the two reasons put forward by Mr Martinez are inextricably linked, i.e. that **Mr Martinez did not consider Dr Rumble valuable enough to the Firm to justify the repeated disobedience of his orders.**

(Emphasis added.)

1. The primary judge found that Dr Rumble’s enquiry about his increase in remuneration to the Canberra partner on 6 February 2017 was not an actuating factor in Mr Martinez’s mind. Rather, his Honour found, the query brought Dr Rumble back to Mr Martinez’s attention and provided the occasion, but not the cause, for Dr Rumble’s dismissal. The primary judge held that Dr Rumble’s reminder had caused Mr Martinez “now to act on what he regarded as insubordinate behaviour by an employee who was not, to his understanding, profit enhancing”, finding:

I therefore conclude that Mr Martinez was actuated by three matters in reaching his decision to terminate Dr Rumble’s employment: Dr Rumble’s disobedience to the media policy (and the not-to-be-questioned authority of Mr Martinez), Mr Martinez’s perception that he was not making the Firm much in the way of fees and the fact that the Firm was entitled to end the relationship on three months’ notice without any reason.

1. The primary judge found as facts that Mr Martinez dismissed Dr Rumble not because he had, or had expressed, a political opinion, but “because he disobeyed instructions and a policy not to discuss the firm’s clients in public without first getting permission”.

# Dr Rumble’s submissions

1. Dr Rumble made two principal submissions as to why his Honour erred, namely:

* because Dr Rumble’s expression of his political opinion was part of the actuating motive or reason for Mr Martinez terminating his contract; and
* as the media policy operated to preclude Dr Rumble absolutely from expressing his political opinion, since it was critical of the Government, and Mr Martinez relied on Dr Rumble’s breach of the media policy in terminating his contract, the firm necessarily contravened s 351(1).

1. Dr Rumble argued that in each of the trilogy of cases concerning the ascertainment of a decision-maker’s reason for taking adverse action, being *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243 and *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150, the decision-maker had formed a view that the employee had acted in a way that was outside a range of acceptable conduct and that the employee could have modified that conduct but still exercised his workplace rights (as opposed to refraining from engaging in the conduct at all). Dr Rumble noted that in both *Barclay* 248 CLR 500 and *BHP Coal* 253 CLR 243 the decision‑maker acted on the basis that the employee’s language in exercising workplace rights or engaging in industrial activity was excessive in communicating with other employees and in breach of policies intended to ensure respect in the workplace. He also noted that in *Endeavour Coal* 231 FCR 150 the employer acted because the employee’s exercise of his workplace rights to take leave made him unreliable and disruptive of the legitimate requirements of the employer that it be able to set shifts on the basis that necessary employees would attend or provide proper and timeous explanations for their absences.
2. Dr Rumble submitted that in contrast, here, Mr Martinez had caused the media policy to be worded so as to preclude Dr Rumble, specifically, from continuing in the future to criticise the Government for not acting on the 2011 Review. He argued that, unlike the situation in the trilogy of cases about adverse action, he could not modify his conduct so as to comply with the media policy except by refraining entirely from expressing his political opinion. Dr Rumble contended, in effect, that this feature of the media policy and Mr Martinez’s reasons for dismissing him necessarily meant that Mr Martinez took the adverse action of terminating his contract because of his political opinion, and so contravened s 351(1).

# Construction of SS 351(1), 360 and 361

1. The guide to Pt 3.1 of the *Fair Work* *Act* in s 334 states that the Part provides general workplace protections and that, among others, “Division 3 protects workplace rights, and the exercise of those rights” and “Division 5 provides other protections, **including protection from discrimination**”. Relevantly, the prohibitions in Pt 3.1 against an employer taking adverse action against an employee in s 340 (in respect of workplace rights generally), and specifically in s 346 (in respect of industrial activity), s 351 (in respect of discrimination) and s 352 (in respect of dismissal for illness and injury) are enlivened if the employer takes the particular adverse action “because” a fact or circumstance obtains or has occurred.
2. Section 346, for example, which is in Div 4, relevantly proscribes an employer from taking adverse action, such as dismissal, against an employee “because” the employee is or was an official or member of an industrial association (s 346(a)) or engaged, is engaging or proposes to engage in industrial activity (s 346(b)). And s 351(1), which is in Div 5 and is headed “Discrimination”, relevantly proscribes an employer from taking adverse action against an employee or prospective employee “because” of the particular employee’s specific characteristics, including physical or mental ones, his or her sexuality, beliefs or political opinion.
3. Section 361(1) creates a presumption in an application under Pt 3-1 that, where an employee alleges that the employer took, or is taking, adverse action for a particular reason, and “taking that action for that reason or with that intent would constitute a contravention of this Part”, “the action was or is being taken for that reason or with that intent unless the person proves otherwise”. Importantly, s 360 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 *Barclay* 248 CLR 500, the High Court considered the operation of the adverse action provisions in the context of a claim under s 346 that an employer had taken adverse action against an employee “because” he was an officer of an industrial association and had engaged in industrial activity.
2. The High Court observed that the Parliament intended ss 360 and 361 to provide a balance between the parties to a workplace dispute by, *first*, establishing a presumption in favour of an employee who alleges that an employer had taken, or is taking, adverse action against him or her because of a particular circumstance or fact of the kind specified in any of ss 340, 346, 351 or 354 and, *secondly*, enabling the employer to rebut that presumption (*Barclay* 248 CLR at 523 [61] per French CJ and Crennan J, 535–536 [103]–[105], 542 [127]–[128] per Gummow and Hayne JJ). The presumption and onus that ss 360 and 361(1) create are necessary because the employee cannot know or prove what was in the decision-maker’s mind when he or she took the adverse action. The court must enquire into, and make findings about, the mental processes of the decision-maker for taking the adverse action complained of (at 517 [44]–[45], 523 [62], 534–535 [101], and per Heydon J at 544 [140]).
3. Accordingly, the employer or decision-maker acting on its behalf who took the alleged adverse action must prove, as a fact, that none of his or her reasons for that action included as a substantial and operative factor any reason or intent that the Act proscribed him or her from having: *Barclay* 248 CLR at 522–523 [56]–[59] per French CJ and Crennan J, 535 [104] per Gummow and Hayne JJ, 544 [140] per Heydon J. As French CJ and Crennan J held (*Barclay* 248 CLR at 516–519 [41]–[44]), the Court must determine the question of fact, namely “why was the adverse action taken?” French CJ and Crennan J explained (248 CLR at 523 [61], [62] and see too per Heydon J at 547 [148]):

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.** If accepted, such a position would destroy the balance between employers and employees central to the operation of s 361, a balance which Parliament has chosen to maintain irrespective of the fact that the protection in s 346(b) has a shorter history than the protection in s 346(a). That balance, once the reflex of criminal sanctions in the legislation, now reflects the serious nature of the civil penalty regime. Speaking more generally, that balance is a specific example of the balance of which Alfred Deakin spoke as being necessary for an effective conciliation and arbitration system.

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,** [*General Motors-Holden's Pty Ltd v* ***Bowling*** [(1976) 136 CLR 676] **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.**

(Emphasis added.)

1. Gummow and Hayne JJ (248 CLR at 540 [118], 541 [124]–[126], 543 [134]) and Heydon J (at 546 [145]–[147]) rejected the argument that, in answering the question “Why was the adverse action taken?” the court could take into account any “unconscious” state of mind of the decision-maker or employer.
2. In *BHP Coal* 253 CLR 243 at 252–253 [22] French CJ and Kiefel J rejected as erroneous the reasoning of the primary judge (Jessup J) who had posited that the employer (or decision-maker) has to establish, under s 361(1), that no part of his or her reasons included the employee’s engagement in industrial activity (and see also at 268–269 [90]–[93] per Gageler J). Their Honours said:

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.

1. In essence, in this passage, French CJ and Kiefel J applied the test that, even though Mr Doevendans’ conduct amounted to his engaging in industrial activity within the meaning of s 346(b) and that conduct was “a reason” for the decision-maker, Mr Brick, acting as he did, the conduct was not a substantial and operative reason in Mr Brick’s mind when he took the adverse action. That conclusion was consistent with the reasons in *Barclay* 248 CLR at 522–523 [56]–[59], [62] and especially 535 [104] and 544 [140], based on the trial judge’s unchallenged findings of fact.
2. In *Endeavour Coal* 231 FCR 150 at 160–161 [32] (and see too at 164–165 [47]), Jessup J (who, with Perram J constituted the majority) explained the principle established in *Barclay* 248 CLR 500 and *BHP Coal* 253 CLR 243 as follows:

The “connection” which was held not to be sufficient in *BHP Coal* was between the adverse action taken by the employer and the industrial activity in which the employee had engaged. It was not between two different characterisations of the conduct of the employee, in that case, as a contravention of the employer's conduct policy and as participation in industrial activity. As French CJ and Kiefel J made clear, if adverse action was taken because the conduct involved such a contravention, it did not become a breach of s 346 merely because the conduct was, at the same time, participation in industrial activity. The existence of such a “connection” was insufficient. **What was necessary was that the actual reason of the decision-maker, in his or her own mind, be the employee's participation in industrial activity**. To see their Honours' reasons in this way is, in my view, to recognise the consistency of those reasons with the statements of principle contained in the reasons of Gageler J in the same case. Those statements represent the law after *Barclay* and *BHP Coal* .

(Emphasis added.)

1. Perram J came to the same conclusion. He gave the example that, while a judge in giving reasons for his or her decision will have regard to the unsuccessful party’s submissions as an important part of arriving at that decision, those submissions will not be the reasons that are substantial and operative in why the judge made the decision: *Endeavour Coal* 231 FCR at 173 [91].

# Consideration

1. Dr Rumble’s arguments must be rejected. The *rationes decidendi* in each of *Barclay* 248 CLR 500, *BHP Coal* 253 CLR 243 and *Endeavour Coal* 231 FCR 150 required the primary judge to find as a fact why Mr Martinez decided to terminate Dr Rumble’s contract. His Honour found (at [139]):

**I therefore find as a fact that Dr Rumble was not terminated for having or expressing a political opinion.** Mr Martinez gave evidence to that effect and was extensively cross-examined on this issue. Although there were reasons to reject other parts of Mr Martinez’s evidence, I am satisfied that this aspect of his testimony was correct. **In truth, Mr Martinez did not care about Dr Rumble’s views on the Government’s implementation of his recommendations to which he was most likely indifferent. What he did care about was the earning of fees and the elimination of insubordination**.

(Emphasis added.)

1. Of course, Dr Rumble’s conduct in contravening the media policy was the event that led Mr Martinez to act to bring an end to Dr Rumble’s contract. Mr Martinez regarded that conduct as insubordinate and a threat to the firm’s interests in attracting and retaining clients, including from Government. Just as in each of the trilogy of cases that Dr Rumble sought to distinguish, this adverse action necessarily had a connection to a reason that the Act proscribed the decision-maker (here Mr Martinez) from acting on. But, as French CJ and Crennan J explained in *Barclay* 248 CLR at 523 [62], the Act did not require the decision-maker there to establish that his or her reason or reasons for adverse action “be entirely dissociated from an employee’s union position or activity”. Likewise here, the Act did not require Mr Martinez to establish that his decision had nothing to do with Dr Rumble’s political opinion. Rather, the proscription in s 351(1) is against Dr Rumble’s political opinion being a substantial and operative factor in Mr Martinez’s reason or reasons for his termination.
2. In essence, the primary judge found as a fact that Mr Martinez’s only substantial and operative reasons for terminating Dr Rumble’s contract were protection of the firm’s business interests and Dr Rumble’s repeated acts of insubordination.
3. There was no issue at trial or on appeal about whether s 351(1) extended to proscribe adverse action taken because of the employee’s expression of his or her political opinion. Like the primary judge, it is appropriate to deal with the issues on the appeal by assuming that s 351(1) operates to protect from adverse action not only the holding of a political opinion but also the expression of political opinion. Whether this assumption is correct (as Mortimer J found, in relation to a person’s membership of a political party, in *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 327 ALR 460 at 493–496 [166]–[177]) can be decided in a proceeding where that is in issue.
4. Nor did the fact that Mr Martinez had caused the media policy to be worded so as to preclude Dr Rumble from criticising the Government over his perceptions about its response to the recommendations of the 2011 Review mean that that the adverse action must have contravened s 351. If the only substantial and operative factors in Mr Martinez’s reasons for taking the action or making the relevant decisions were not proscribed by s 351(1), then the firm would not have contravened s 351(1), regardless of the terms of the media policy or the reasons for it.
5. It would be incongruous if Mr Martinez could have terminated Dr Rumble’s contract had Dr Rumble criticised a non-Government client in breach of the media policy, for example, because he disagreed with the client’s release of a new product, but not because the subject matter of Dr Rumble’s criticism in breach of the same policy involved, instead, his political opinion. That is the distinction that the primary judge was conscious of, and correctly acted on, when he found (at [131]):

But no one at the Firm cared about Dr Rumble’s political opinion about the adequacy of the Government’s response to the 2011 Defence Review. **What Mr Martinez** (and Mr Will) **very much cared about was Dr Rumble’s conduct in criticising the Firm’s clients which they obviously regarded as a threat to its business. He had been directed not to do this and he continued to do so.**

(Emphasis added.)

1. Indeed, as French CJ and Crennan J said in *Barclay* 248 CLR at 523 [60]:

First, it is erroneous to treat the onus imposed on an employer by s 361 as being made heavier (or rendered impossible to discharge) because an employee affected by adverse action happens to be an officer of an industrial association. Further, the history of the relevant legislative provisions reveals no reason why the onus must now be different if adverse action is taken while an employee engages in industrial activity – like a person who happens to be an officer of an industrial association, a person who happens to be engaged in industrial activity should not have an advantage not enjoyed by other workers.

1. There is no reason why s 351(1) should be construed so as to give Dr Rumble an advantage that other employees, consultants and partners of the firm did not enjoy if they wished to criticise non-Government actual or potential clients of the firm in the media.
2. Accordingly, it is not to the point that, unless Mr Martinez waived the media policy, Dr Rumble was not able to express his political opinion in the media because of that policy. The media policy operated so that no employee, partner or consultant of the firm could criticise the firm’s clients or potential clients in the media in breach of it, regardless of the subject matter of the actual or proposed criticism. Having seen and heard Mr Martinez and Dr Rumble, the primary judge found as a fact that the only substantial and operative reasons for the action taken against Dr Rumble were his insubordination and the threat he posed to the firm’s commercial interest in earning fees.
3. Moreover, contrary to Dr Rumble’s submission (and the primary judge’s observation at [134]) that the media policy operated to prohibit him absolutely from expressing his political opinion, that policy applied only to criticism in the media. Thus, Dr Rumble was free, without seeking permission from Mr Martinez or the firm, to hold his political opinion and express it to anyone, except through the media, including to stakeholders, Ministers, Parliamentary Committees, shadow Ministers, backbenchers, colleagues, friends, acquaintances and family members.
4. It follows that the distinctions Dr Rumble sought to draw between his circumstances on one hand and the facts in *Barclay* 248 CLR 500*, BHP Coal* 253 CLR 243 and *Endeavour Coal* 231 FCR 150on the other were not sustainable. He could have modified his behaviour by adhering to the media policy and still would have been able to hold and express his political opinion using means other than the media, just as the unsuccessful employees could have acted differently in each of the trilogy of cases while exercising their respective workplace rights. The primary judge did not misunderstand or wrongly apply the relevant law. Indeed, Dr Rumble has not established any basis on which this Court could or should interfere in the primary judge’s findings of fact concerning the substantial and operative reasons that Mr Martinez had for taking the adverse action in terminating Dr Rumble’s employment.

# Conclusion

1. For these reasons, the appeal must be dismissed.

|  |
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| I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Rares and Katzmann. |

Associate:

Dated: 13 March 2020

REASONS FOR JUDGMENT

FLICK J:

1. The Appellant in the present proceeding, Dr Gary Rumble, was at one point of time employed by the Respondent, a partnership known as HWL Ebsworth Lawyers (“HWL Ebsworth”).
2. Dr Rumble had been one of the authors of a review conducted into allegations of sexual and other abuse in the Australian Defence Force and the Department of Defence. Volume 1 of that review was delivered to the Minister in October 2011. A further volume was delivered in April 2012. Thereafter, Dr Rumble was critical of the time taken by the Government to respond to the issues raised in the review he and others had undertaken. He expressed his views in media releases and media interviews.
3. HWL Ebsworth expressed concerns from time to time as to the comments being made by Dr Rumble. At least one of its concerns was that the views being expressed by Dr Rumble were critical of the Department of Veterans’ Affairs and the Department of Defence – the Government and its Departments being a valuable source of revenue for the partnership.
4. On 20 February 2017 Dr Rumble’s employment was terminated by the Managing Partner of the firm, Mr Juan Martinez.
5. Dr Rumble commenced a proceeding in this Court claiming (*inter alia*) a contravention of s 351(1) of the *Fair Work Act* *2009* (Cth) (the “*Fair Work Act*”). In very summary form, he claimed that the termination of his services was “*adverse action*” and that there had been a contravention of s 351(1) of the *Fair Work Act* “*because of*” his having expressed a “*political opinion*”. Even though his contract of employment provided that his services could be terminated without reason upon the giving of three months’ notice, Dr Rumble claimed (*inter alia*) that he was entitled to compensation for the contravention of s 351(1).
6. The primary Judge rejected that claim: *Rumble v The Partnership trading as HWL Ebsworth Lawyers* [2019] FCA 1409, (2019) 289 IR 72.
7. Dr Rumble now appeals to this Court.
8. The appeal is to be dismissed.

### Section 351(1) – “because of”

1. Section 351(1) provides as follows:

**Discrimination**

An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person’s race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

…

1. It was common ground between the parties to the appeal that the termination of the services of Dr Rumble constituted “*adverse action*” (under s 342(1) of the *Fair Work Act*) and that the views being expressed publicly by Dr Rumble constituted the expression of a “*political opinion*”. It was further common ground that the onus rested upon HWL Ebsworth to displace the “*presumption*” that the dismissal of Dr Rumble was not “*because of*” the expression of his “*political opinion*” (s 361 of the *Fair Work Act*).
2. It was also common ground that the requirement imposed by s 351 of the *Fair Work Act,* that the taking of adverse action be “*because of*” the expression of that opinion, required a factual determination as to whether the expression of that opinion was “*a substantial and operative factor*” in the decision‑making process of Mr Martinez when dismissing Dr Rumble: cf. *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 at [57] per French CJ and Crennan J, at [85] and [88] per Gummow and Hayne JJ , (2012) 248 CLR 500 at 522 and 530-531. In commenting upon s 346 of the *Fair Work Act*, Gummow and Hayne JJ there concluded at 534-535:

[100] The application of s 346 turns on the term “because”. This term is not defined. The term is not unique to s 346. It appears in s 340 (regarding workplace rights), s 351 (regarding discrimination), s 352 (regarding temporary absence in relation to illness or injury) and s 354 (regarding coverage by particular instruments, including provisions of the National Employment Standards).

[101] The use in s 346(b) of the term “because” in the expression “because the other person engages ... in industrial activity”, invites attention to the reasons why the decision-maker so acted. Section 360 stipulates that, for the purposes of provisions including s 346, whilst there may be multiple reasons for a particular action “a person takes action for a particular reason if the reasons for the action include that reason”. These provisions presented an issue of fact for decision by the primary judge.

…

[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.

The inherently factual nature of the inquiry into the reasons for a particular decision had earlier been emphasised by French CJ and Crennan J as follows at 516-517:

[42] Determining why a defendant employer took adverse action against an employee involves consideration of the decision-maker's “particular reason” for taking adverse action (s 361(1)), and consideration of the employee's position as an officer or member of an industrial association and engagement in industrial activity (union position and activity) at the time the adverse action was taken (ss 342, 346(a), 346(b), 347 and 361(1)).

…

[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)

### The findings made by the primary Judge

1. On appeal, a central theme advanced on behalf of Dr Rumble in his written outline of submissions was that “*where a policy prohibits protected conduct, adverse action actuated by breach of the policy constituted by such protected conduct contravenes section 351(1)*”. The submission was that in such circumstances “*there is no relevant distinction between the subjective reason for the adverse action and a reason proscribed by section 351(1)*”. On behalf of HWL Ebsworth, the central theme to its submissions was that the findings of fact made by the primary Judge contained an acceptance of the evidence of Mr Martinez as to the reasons for the dismissal and there was a finding that those reasons did not include the expression of “*political opinion*” by Dr Rumble. Those findings of fact, it was emphasised on behalf of HWL Ebsworth, were not sought to be impugned on appeal and – in such circumstances – it was inevitable that the appeal should be dismissed.
2. The “*policy*” to which reference is made is a reference to the *Firm’s Media Policy*, a policy introduced (at least in part) in response to the activities of Dr Rumble. In relevant part it provided as follows:

Partners and members of staff are required to obtain the prior approval of Juan Martinez (Managing Partner) or Russell Mailler (National Marketing Manager) before proceeding with any media interview.

A condition of such approval will be that the partner or staff member will not be permitted to make any negative or critical comments in relation to any existing clients, past clients, potential clients, government departments or entities, regulatory bodies, or any existing or proposed legislation or regulations.

This policy applies to all material published or broadcast by the legal press, mainstream media, industry groups and associations. Television, radio, magazines, newspapers and the internet are all included in this policy.

…

1. The terms of this policy and the actual findings made by the primary Judge, not surprisingly, assumed considerable importance. Those findings should thus be set forth with perhaps greater detail than would otherwise be normally required.
2. When addressing what was in the mind of Mr Martinez when he made the decision to terminate the services of Dr Rumble, the primary Judge said:

[115] What was in Mr Martinez’s mind when he decided that Dr Rumble’s employment was to be terminated? Here one enters upon the field of human psychology. Mr Martinez says that he had two reasons in mind when he took this decision. The first was Dr Rumble’s continuing breach of the Firm’s media policy. I accept Mr Martinez’s evidence to that effect and also his corresponding evidence that he did not make the decision because of Dr Rumble’s political opinion about the Government’s stance on the 2011 Defence Review. Mr Martinez did not appear to care about the politics of the situation and in fact described Dr Rumble’s activities as a ‘worthy cause’ under cross-examination. This is not necessarily an answer to Dr Rumble’s case for it is still necessary to deal with this submission that one cannot separate the expression of his political opinion from the breach of the media policy. But at the level of the facts I am abundantly persuaded that Mr Martinez’s concern was the media policy and Dr Rumble’s continued defiance of it. Indeed, I rather suspect that the real driver was not so much what Dr Rumble was doing but rather that he was not doing what Mr Martinez was telling him to do. Mr Martinez’s actions in this case and his evidence before me tended to suggest that he is a man accustomed to instinctive obedience. Dr Rumble to my observation lacks that instinct. Unsurprisingly, Dr Rumble’s attitude was quite unacceptable to a person such as Mr Martinez.

[116] The second reason that Mr Martinez put forward as being the basis of his decision was that he thought there was insufficient demand for Dr Rumble’s services. I accept that Mr Martinez thought this although I question the logic. If Dr Rumble had been an ordinary salaried employee this might have made sense. But the nature of his appointment as a consultant meant that he was not on the full-time pay roll and the usual necessity for an employee to earn fees did not apply. I have in mind particularly that the Firm only had to pay him $30,000 (subject to a 5% annual uplift) by way of retainer and this was expressly said to be not for billed work but promotional activities. So far as billable work was concerned, it made no difference to the Firm how much or how little he brought in except that the more he brought in the more profit it would make. But there was no corresponding downside. He was not costing the Firm anything as a result of his low billing profile.

[117] I therefore do not consider that the purported low demand for Dr Rumble’s services was an independent reason for Dr Rumble’s termination. Rather, I think the two reasons put forward by Mr Martinez are inextricably linked, i.e. that Mr Martinez did not consider Dr Rumble valuable enough to the Firm to justify the repeated disobedience of his orders.

1. His Honour then recounted the events occasioned by Dr Rumble’s inquiries as to why he had not received an annual 5% “*uplift*” in his remuneration. His Honour continued:

[120] I therefore conclude that Dr Rumble’s inquiry about the 5% pay increase was at least the sine qua non for the timing of Mr Martinez’s decision. But does that mean Mr Martinez terminated his employment because of that request as a matter of substance? Not necessarily, for there are various ways the event can be viewed. One version of events would see Dr Rumble’s request as having the effect of reminding Mr Martinez to terminate Dr Rumble’s employment; another would see Mr Martinez provoked by the request into the termination. The former would not be a termination *because* of the request but the latter would be.

[121] Although the question is not necessarily an easy one, I have come to the conclusion that the former characterisation better fits the facts. Dr Rumble had been inquiring about the 5% uplift for the 2016 year for a long time by then and if it was an actuating motive in Mr Martinez’s mind it is difficult to understand why he did not act on it sooner. The fact that he did not suggests that it was not something which he thought was a reason for terminating his employment. Mr Martinez’s concerns were more pedestrian. He held a perception that Dr Rumble was not bringing in much in the way of profit and he was infuriated by Dr Rumble’s refusal to comply with the media policy. What occurred therefore is that Dr Rumble’s inquiry to Mr Holcombe of 6 February 2017 brought Dr Rumble back to Mr Martinez’s attention and caused him now to act on what he regarded as insubordinate behaviour by an employee who was not, to his understanding, profit enhancing. The termination would not have happened at the time that it did without Dr Rumble’s inquiry (although it would surely have happened very soon afterwards) but to say that is not to say that the inquiry was the cause of the termination. Rather, it was the occasion.

[122] I therefore conclude that Mr Martinez was actuated by three matters in reaching his decision to terminate Dr Rumble’s employment: Dr Rumble’s disobedience to the media policy (and the not-to-be-questioned authority of Mr Martinez), Mr Martinez’s perception that he was not making the Firm much in the way of fees and the fact that the Firm was entitled to end the relationship on three months’ notice without any reason.

1. His Honour thereafter turned his attention specifically to whether Dr Rumble had been dismissed unlawfully. After setting forth a number of provisions of the *Fair Work Act*, including s 351(1), his Honour continued:

[129] Dr Rumble was able to make an inquiry of Ms Miselowski in relation to his employment with respect to his contractual entitlement to an annual 5% uplift. Consequently, it follows that he had a workplace right under s 341(1). However, the Firm has discharged the onus of proving that Mr Martinez did not determine the relationship because Dr Rumble exercised that right as I have explained at [121] above.

[130] I also do not accept that Dr Rumble’s employment with the Firm was terminated because he expressed a political opinion…

[131] But no one at the Firm cared about Dr Rumble’s political opinion about the adequacy of the Government’s response to the 2011 Defence Review. What Mr Martinez (and Mr Will) very much cared about was Dr Rumble’s conduct in criticising the Firm’s clients which they obviously regarded as a threat to its business. He had been directed not to do this and he continued to do so. Whilst the Act proscribes dismissing a person because of their political opinion there may be some issues as to whether the Act thereby also proscribes dismissing an employee for *expressing* their political opinion. Mortimer J held in *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27… [at [166] to [177], (2015) 327 ALR 460 at 493–496] that it did. I would prefer to express no view about that issue until it is raised squarely for consideration. In this case, I will assume this issue in Dr Rumble’s favour.

[132] However, what that then gives rise to is a question of fact viz whether Mr Martinez terminated Dr Rumble because he was expressing his political opinion or because he was criticising the Firm’s clients in breach of the Firm’s media policy. No doubt the same actions on Dr Rumble’s part are involved in both cases because his breach of the Firm’s media policy was constituted by his expressions of political opinion. But so to observe runs the risk of drifting away from the statutory language. The question is not what Dr Rumble did but rather why Mr Martinez terminated his employment. Once Mr Martinez’s subjective mental state is identified as the correct focus of inquiry then it is necessarily follows that the fact that the Dr Rumble’s conduct is capable of multiple characterisations (expression of political opinion, breach of the media policy) merely then gives rise to a factual question about which of them was it that actuated Mr Martinez’s thinking.

[133] This orthodoxy of this analysis, although once controversial, is now well-established as *BHP Coal* demonstrates. In that case, the person responsible for terminating the employee’s employment gave evidence that his reason for dismissing the employee was because he had been waving an offensive sign (with the word ‘scab’ on it) and not because the employee was engaged in a lawful protest. The Court held that that that finding of fact was determinative and that the employee had not been terminated for exercising a workplace right. That is indistinguishable from the present situation. Mr Martinez could have decided to terminate Dr Rumble’s employment because he had expressed a political opinion but that is not, as a matter of fact, what Mr Martinez did. He dismissed Dr Rumble because he disobeyed instructions and a policy not to discuss the Firm’s clients in public without first getting permission.

…

[139] I therefore find as a fact that Dr Rumble was not terminated for having or expressing a political opinion. Mr Martinez gave evidence to that effect and was extensively cross-examined on this issue. Although there were reasons to reject other parts of Mr Martinez’s evidence, I am satisfied that this aspect of his testimony was correct. In truth, Mr Martinez did not care about Dr Rumble’s views on the Government’s implementation of his recommendations to which he was most likely indifferent. What he did care about was the earning of fees and the elimination of insubordination.

### The application of the media policy & the findings made

1. The case for Dr Rumble centred on the media policy.
2. Although the opening words of that policy provided for a process of seeking approval, what was of importance to Dr Rumble’s argument was that the immediately following provision imposed a condition that approval would “*not be permitted to make any negative or critical comments in relation to any existing clients*…”. The “*negative or critical comments*” of Dr Rumble were characterised as the expression of a “*political opinion*” for the purposes of s 351(1) of the *Fair Work Act*. In Dr Rumble’s submissions, the policy thus had the inevitable effect that, even had Dr Rumble sought approval, the condition operated to preclude him from expressing his “*political opinion*”. Unlike the facts in, for example, *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* [2015] FCAFC 76, (2015) 231 FCR 150 (“*Endeavour Coal*”), it was submitted that the policy permitted no “*room*” for Dr Rumble to express his views in a manner which complied with the condition imposed by the policy and at the same time fell outside of the protection afforded by s 351(1). The policy prohibited the very conduct that s 351(1) protected.
3. By way of contrast, in *Endeavour Coal*, an employee had taken personal leave to which he was entitled. The employer moved him from a weekend roster to a week roster. On the facts of that case Senior Counsel on behalf of Dr Rumble maintained that there was “*room*” for the employer to move the employee from one roster to another provided it did so not “*because of*” the exercise by the employee of an entitlement. Such was the finding of the Court.
4. Perhaps less clearly, Senior Counsel maintained there was similarly “*room*” for the employer to take action not “*because of*” the employee’s exercise of his right to participate in industrial action in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41, (2014) 253 CLR 243 (“*BHP Coal*”). The employee in that case (Mr Doevendans) had participated in a lawful activity, organised by an industrial association of which he was a member, and in the course of doing so waved a sign which read “*No principles SCABS No guts*”. His employment was terminated. In seeking to discharge the presumption that Mr Doevendans’ employment had been terminated “*because of*” the employee’s participation in lawful conduct, the employer there gave evidence that the decision-maker (Mr Bricks) had terminated the employment because he considered the use of the term “*SCABS*” was inappropriate, offensive, humiliating, harassing, intimidating and flagrantly in violation of the workplace conduct policy. On appeal to a Full Court of this Court it was concluded that there had been no contravention of s 346 of the *Fair Work Act.* The evidence and reasons of the employer were accepted. On appeal to the High Court, a majority affirmed the decision of the Full Court. On behalf of the employer, the submission advanced was expressed as follows (at 246-247):

… an employer can be exculpated even if its reasons for taking adverse action are not entirely dissociated from the industrial activities described in s 347(b)(iii) and (v) and that employees are not immune from adverse action merely because their industrial activities are inextricably entwined with the adverse action. An employer can lawfully take adverse action against an employee for misconduct committed in a circumstance with s 347(b)(iii). The employer will discharge its onus under s 361 if it proves that the fact that the activity in which the employee participated had been organised or promoted by an industrial association was not a substantial and operative reason for the adverse action. So, if two employees were guilty of the same misconduct, but only one happened to have committed the misconduct while participating in a lawful activity organised or promoted by an industrial association, that employee would not for that reason be immune from adverse action.

(footnotes omitted)

Part of the majority (French CJ and Kiefel J) rejected the proposition that “*it is a necessary inference … that, if the adverse action (the termination of employment) was connected to an industrial activity, it must be taken to be a reason for the adverse action*”: [2014] HCA 41 at [15], (2014) 253 CLR at 251. Their Honours went on to conclude (at 252-253):

[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.

The remaining member of the majority (Gageler J) concluded (at 269):

[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.

Hayne and Crennan JJ dissented.

1. Importantly for Senior Counsel on behalf of Dr Rumble, so the submission ran, there was “*room*” for Mr Doevendans to engage in his lawful industrial action but in a manner which was not offensive. There was no such “*room*”, so it was submitted, for Dr Rumble to express his political opinion – the *Firm’s Media Policy* imposed the very condition which fell foul of the protection from discrimination found in s 351(1) of the *Fair Work Act*.
2. The distinction sought to be drawn by Senior Counsel for Dr Rumble, with respect, is foreclosed by decisions such as *BHP Coal*.
3. On the facts of the present case there was unquestionably a “*connection*” between the expression of the “*political opinion*” of Dr Rumble, the *Firm’s Media Policy* and the decision of Mr Martinez to terminate Dr Rumble’s service. As found by the primary Judge, Dr Rumble’s “*breach of the Firm’s media policy was constituted by his expressions of political opinion*”: [2019] FCA 1409 at [132]. And, as also found by the primary Judge, one reason that “*was in Mr Martinez’s mind when he decided that Dr Rumble’s employment was to be terminated*” was “*Dr Rumble’s continuing breach of the Firm’s media policy*…”: [2019] FCA 1409 at [115]. Similarly, there was also a “*connection*” between the lawful pursuit by Mr Doevendans of his lawful industrial action and the termination of his services by Mr Bricks.
4. But the mere fact that conduct of an employee may be “*inextricably entwined*” (*BHP Coal* [2014] HCA 41, (2014) 253 CLR at 247) with the taking of adverse action is “*to say no more than that the adverse action had a connection … to the industry activity*” and that what is “*necessitated*” is consideration to the “*true motivations*” of the employer: *BHP Coal* [2014] HCA 41 at [22], (2014) 253 CLR at 253 per French CJ and Kiefel JJ. To escape liability, an employer must “*prove that the act or omission having the character of a protected industrial activity played no operative part in its decision*”: *BHP Coal* [2014] HCA 41 at [93], (2014) 253 CLR at 269 per Gageler J.
5. It is the findings of fact carefully made by the primary Judge, and findings of fact not sought to be impugned by Senior Counsel for Dr Rumble, which doom the appeal to failure. The primary Judge thus:

* found that the two reasons which were “*in the mind*” of Mr Martinez were “*inextricably linked, i.e. that Mr Martinez did not consider Dr Rumble valuable enough to the Firm to justify the repeated disobedience of his orders*” ([2019] FCA 1409 at [117]);
* found that “*Mr Martinez was actuated by three matters in reaching his decision to terminate Dr Rumble’s employment: Dr Rumble’s disobedience to the media policy (and the not-to-be-questioned authority of Mr Martinez), Mr Martinez’s perception that he was not making the Firm much in the way of fees and the fact that the Firm was entitled to end the relationship on three months’ notice without any reason*” ([2019] FCA 1409 at [122]);
* did “*not accept that Dr Rumble’s employment with the Firm was terminated because he expressed a political opinion*” ([2019] FCA 1409 at [130]) and found that “*no one at the Firm cared about Dr Rumble’s political opinion*” but “*very much cared about [his] conduct [being] a threat to its business*” ([2019] FCA 1409 at [131]). The “*concerns*” of Mr Martinez, his Honour had previously found, “*were more pedestrian*” in that he “*held a perception that Dr Rumble was not bringing in much in the way of profit and he was infuriated by Dr Rumble’s refusal to comply with the media policy”* and *“what he regarded as insubordinate behaviour by an employee who was not, to his understanding, profit enhancin*g” ([2019] FCA 1409 at [121]); and
* found that Dr Rumble had been dismissed “*because he disobeyed instructions and a policy not to discuss the Firm’s clients in public without first getting permission*” ([2019] FCA 1409 at [133]).

Given these findings, the conclusion of the primary Judge was inevitable. The primary Judge:

* found “*as a fact that Dr Rumble was not terminated for having or expressing a political opinion”* and found that *“[i]n truth, Mr Martinez did not care about Dr Rumble’s views on the Government’s implementation of his recommendations to which he was most likely indifferen*t” and that “*[w]hat he did care about was the earning of fees and the elimination of insubordination*” ([2019] FCA 1409 at [139]).

1. In the absence of any challenge to any of these findings, no appellable error is discernible in the reasons of the primary Judge. Indeed, given these findings, the conclusion of the primary Judge was clearly correct.
2. The remaining *Ground of Appeal* challenging the manner in which compensation was addressed by the primary Judge only arose for consideration in the event that the former *Ground* prevailed. It thus need not be resolved.
3. The appeal should be dismissed.
4. The distinction sought to be drawn by Senior Counsel on behalf of Dr Rumble is a distinction foreclosed, at least in this Court, by decisions such as *BHP Coal.*

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| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick. |

Associate:

Dated: 13 March 2020