FEDERAL COURT OF AUSTRALIA

State of Victoria (Office of Public Prosecutions) v Grant [2014] FCAFC 184

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| Citation: | State of Victoria (Office of Public Prosecutions) v Grant [2014] FCAFC 184 |
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| Appeal from: | *Grant v State of Victoria (The Office of Public Prosecutions)* [2014] FCCA 17*Grant v State of Victoria (The Office of Public Prosecutions)* [2014] FCCA 991 |
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| Parties: | **STATE OF VICTORIA (THE OFFICE OF PUBLIC PROSECUTIONS) v ANTHONY GRANT** |
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| File number: | VID 322 of 2014 |
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| Judges: | **TRACEY, BUCHANAN AND WHITE JJ** |
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| Date of judgment: | 23 December 2014 |
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| Catchwords: | **INDUSTRIAL LAW** – appeal from Federal Circuit Court – whether trial judge erred in finding employee’s mental disability was the reason for the termination of his employment – whether employee’s conduct was interwoven with his medical condition – consideration of the principles enunciated in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41  |
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| Legislation: | *Disability Discrimination Act 1992* (Cth) ss 5, 22*Fair Work Act 2009* (Cth) ss 346, 351, 360, 361, 546*Public Administration Act 2004* (Vic)  |
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| Cases cited: | *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 – considered *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41 – considered *Grant v State of Victoria* [2014] FCCA 17 – cited *Grant v State of Victoria (No 2)* [2014] FCCA 991 – cited *Purvis v New South Wales* (2003) 217 CLR 92 – considered  |
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| Date of hearing: | 27 November 2014 |
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| Place: | Melbourne |
|  |  |
| Division: | FAIR WORK DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 86  |
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| Counsel for the Appellant: | Ms R Doyle SC and Ms E Holt |
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| Solicitor for the Appellant: | Herbert Smith Freehills |
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| Counsel for the Respondent: | Mr W Friend QC |
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| Solicitor for the Respondent: | Maddison & Associates |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | VID 322 of 2014 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | STATE OF VICTORIA (THE OFFICE OF PUBLIC PROSECUTIONS)Appellant |
| AND: | ANTHONY GRANTRespondent |

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| JUDGES: | TRACEY, BUCHANAN AND WHITE JJ |
| DATE OF ORDER: | 23 DECEMBER 2014 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by the Federal Circuit Court on 22 May 2014 be set aside.
3. In lieu thereof it be ordered that the application 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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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | STATE OF VICTORIA (THE OFFICE OF PUBLIC PROSECUTIONS)Appellant |
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| JUDGES: | TRACEY, BUCHANAN AND WHITE JJ |
| DATE: | 23 DECEMBER 2014 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

**TRACEY & BUCHANAN JJ**

1. Mr Anthony Grant was employed by the State of Victoria in the Office of Public Prosecutions in 2007. From then until March 2012 he worked there as a solicitor. In March 2012 he was stood down pending an investigation into his conduct. The investigation found that, on four occasions, he had been guilty of misconduct which, it was common ground, warranted disciplinary action under the relevant industrial instrument and the *Public Administration Act 2004* (Vic). Having considered the investigator’s report the Solicitor for Public Prosecutions, Mr Craig Hyland, terminated Mr Grant’s employment.
2. Mr Grant then commenced a proceeding in the Federal Circuit Court of Australia (“the Federal Circuit Court”) on the ground, amongst others, that the State of Victoria had contravened s 351(1) of the *Fair Work Act 2009* (Cth) (“the *Fair Work Act*”) by taking adverse action against him because of his mental disability.
3. This claim was upheld by the Federal Circuit Court: see *Grant v State of Victoria* [2014] FCCA 17. The Court made orders that Mr Grant be reinstated in his former position or in an equivalent position and be paid wages forgone following his termination. The Court also imposed a pecuniary penalty of $10,000 on the State of Victoria pursuant to s 546 of the *Fair Work Act*: see *Grant v State of Victoria (No 2)* [2014] FCCA 991.
4. On 2 June 2014 the primary judge made orders by consent staying the operation of his orders pending the hearing and determination of this appeal.
5. The State of Victoria has appealed against these orders. Its principal contention is that the primary judge erred in finding that Mr Grant’s mental disability was a reason for the termination of his employment.

# THE BACKGROUND FACTS

1. For the first three years of his employment Mr Grant performed his duties at or above the standard required by his supervisors. Towards the end of 2010, however, his performance began to deteriorate.
2. In September 2010 he broke his leg. He required medical treatment over some months to deal with the original injury and some complications which ensued. During this period Mr Grant’s attendance at work was sporadic. His absences continued throughout 2011 and into the early part of 2012. He advised his supervisors that his regular absences were because of his medical condition and the need for him to attend medical facilities for treatment and assessment.
3. Mr Grant’s absences gave rise to a number of difficulties relating to the preparation of cases for which Mr Grant was responsible.
4. By late January 2012 these shortcomings had become a matter of significant concern to Mr Grant’s supervisor Mr Bird. He arranged a meeting with Mr Grant to discuss Mr Grant’s work performance. Mr Grant told Mr Bird that he was unwell. Mr Bird requested that Mr Grant advise him of the nature of his ongoing health problems. Mr Grant said that he would consult his doctor. He did so and, on 6 February 2012, his general practitioner, Dr Frean, provided him with a medical certificate which said that he was unable to work until 12 February 2012. On that day Mr Grant again consulted Dr Frean who told Mr Grant that he should tell his supervisors that he was suffering from depression. Mr Grant took that advice and shortly afterwards advised a number of managers, including Mr Bird, of his condition.
5. On 24 February 2012 Mr Hyland wrote to Mr Grant about what he said was Mr Grant’s “unsatisfactory work performance and the action that will be taken to address [it].” The letter continued:

“I am advised by your Directorate Manager*,* Mr Stephen Bird that your commencement times and general attendance continue to be unacceptable despite repeated discussions in relation to these issues. Further, your performance at work is well below that expected of a Grade 3 OPP Solicitor and the standard of your prosecution files continues to be unsatisfactory despite repeated efforts to assist you in addressing these concerns.

I understand through discussions with Mr Bird and Mr Sam Kenny, Human Resources Manager that you have disclosed to them a medical condition which you maintain is impacting on your ability to perform your role and maintain regular working hours. I understand that to date the Office has not been provided with any detailed medical evidence in relation to your medical condition.

Irrespective of the cause, it is clear that you are presently incapable of performing your role as a Solicitor with the OPP.”

Mr Hyland directed Mr Grant to take leave with pay and to provide the office with a detailed medical report on his condition and the impact of it on his ability to perform his duties. The report was also to outline any work restrictions or modifications that might be needed to assist Mr Grant with his recovery.

1. In response, Mr Grant provided a copy of a report from Dr Frean dated 29 February 2012. The report said that Mr Grant had a long term anxiety condition which had been complicated by excessive consumption of alcohol and bouts of depression. Dr Frean concluded that Mr Grant:

“… has recently lapsed into a depressive bout for which he sought treatment and is starting to respond to treatment. He has reduced his alcohol consumption and is insightful into the process required to regain his health. I suspect his prognosis is excellent.”

1. On 26 March 2012 Mr Hyland wrote to Mr Grant advising him that he [Mr Hyland] had authorised an investigation into a number of allegations of misconduct which had been made against Mr Grant. Four of the allegations related to alleged disobedience of lawful directions. It was alleged that:
* On 31 January 2012 Mr Bird had directed Mr Grant that he was to attend work on time or provide timely and accurate notification of [his] attendance (by 9.30 am if not in court; before 9:00 am if in court) …”. Particulars were given of 13 instances, between 1 February and 24 February 2012, of Mr Grant failing to comply with the direction. (“Allegation 2”). On some days there had been no notification at all of Mr Grant’s failure to attend or that he was to arrive late. On some of the days on which he had contacted the office (albeit late) he attributed his absence to ill health. On three days (20-22 February 2012) his absences were attributed (again belatedly) by him to the need to care for a friend who had been in hospital and then required care at home.
* On 8 February 2012 Mr Grant had been advised by one of his superiors that the indictment and opening for a forthcoming trial for which Mr Grant was responsible were due to be filed on 23 February 2012. He was asked to get the matter ready for trial and to brief counsel as soon as possible. He was advised that, should he encounter any problems in completing these tasks in a timely way, he should forewarn the senior officer. It was alleged that, in breach of this direction, Mr Grant failed to brief counsel or file the necessary documentation by the due date. (“Allegation 3”).
* On 20 February 2012 Mr Grant was required to attend the arraignment of an accused and to instruct counsel during the hearing. The hearing was to commence at 10:30 am. At 10:20 am Mr Grant telephoned Mr Bird and advised that a friend had been taken to hospital. Mr Grant sought permission to visit the hospital. Mr Bird had given that permission on condition that Mr Grant first attend the arraignment. It was alleged that, in breach of that direction, Mr Grant failed to attend the arraignment or instruct counsel at the hearing. He had spoken to counsel before the hearing commenced and then left. (“Allegation 4”).
* On 22 February 2012 Mr Bird had given Mr Grant a written direction that he was not to attend court for the sentencing hearing of a particular accused the following day. Mr Grant was to remain in the office and be available to deal with any telephone queries. In breach of the direction it was alleged that Mr Grant had attended the sentencing hearing on 23 February 2012. (“Allegation 5”).
1. Mr Grant was given an opportunity to provide written responses to these allegations. He availed himself of this opportunity.
2. In response to Allegation 2 Mr Grant said that he did not recall Mr Bird giving him the direction on 31 January 2012. He was under the impression that he had some flexibility in relation to the hours that he worked each week. He did not dispute that he had failed to provide any or any timely notification of his absences on the days particularised in the allegation.
3. Mr Grant did not dispute Allegation 3 but said that he did not brief counsel because his attendance at work had been limited between 8 February and 23 February 2012 due to his health problems and he simply did not have time to brief counsel.
4. Mr Grant denied Allegation 4. He said that he had attended court and spoken to counsel and provided him with the necessary documentation. He had then gone to the hospital “with a clear belief I had undertaken all tasks required in relation to the matter.”
5. In relation to Allegation 5, Mr Grant confirmed that he saw Mr Bird’s written direction on the morning of 23 February 2012. He had asked another officer for permission to attend the hearing. Despite not being given permission he had gone to court because he considered that the matter was complex and he was concerned about the possibility of a sentencing error occurring. Mr Grant asserted that his “actions in relation to this matter were done in good faith and in the interests of justice and the best interests of the OPP.”
6. Having considered the allegations and Mr Grant’s responses, Mr Hyland found each of the allegations to have been substantiated. He so advised Mr Grant and notified him of his intention to terminate his employment. He afforded Mr Grant the opportunity of making submissions by way of mitigation before a final decision was made. Mr Grant responded but did not supply any new material. Mr Hyland then terminated his employment.

# THE LEGISLATION

1. Section 351(1) of the *Fair Work act* provides that an employer must not take adverse action against an employee because of the employee’s mental disability.
2. Section 360 provides that “a person takes action for a particular reason if the reasons for the action include that reason.”
3. Section 361 contains a reverse onus provision pursuant to which, if an applicant alleges that there has been a contravention of provisions, including s 351(1), because an employer took action for a particular reason and, if the employer had done so for that reason there would have been a contravention of the provision, “it is presumed that the action was … taken for that reason … unless the person proves otherwise.”
4. There was no dispute that, at relevant times, Mr Grant suffered from a “mental disability” within the meaning of the *Fair Work Act* or that his dismissal from employment constituted “adverse action”. It was also accepted that the decision to terminate Mr Grant’s employment had been made by Mr Hyland and that the outcome of the case depended upon a determination of the reason or reasons which had motivated him in making the decision.

# THE TERMINATION DECISION

1. Mr Hyland gave evidence at trial in which he maintained that the only reason that he had terminated Mr Grant’s employment was that Mr Grant had engaged in misconduct. Mr Hyland expressly denied that Mr Grant’s mental disability had played any part in the making of the decision. He had first become aware that Mr Grant was suffering from depression on 21 or 22 February 2012. Although he had read Dr Frean’s reports they did not explain any link between Mr Grant’s medical condition and the misconduct.
2. The enquiry into Mr Grant’s conduct had been instituted by Mr Hyland in mid-March 2012 after he had received an e-mail from Mr Bird outlining the alleged misconduct. It was purely coincidental that these allegations had been made shortly after Mr Hyland had become aware of Mr Grant’s medical condition.

# THE TRIAL JUDGE’S REASONS

1. Mr Hyland did not make a good impression on the trial judge when he gave evidence. His Honour thought that Mr Hyland had been “almost openly contemptuous” in giving answers under cross-examination and formed the impression that Mr Hyland’s “entire demeanour suggested a certain disdain for the proceeding as a whole.” He also detected “a particularly peremptory way” about Mr Hyland.
2. The primary judge nonetheless found that Mr Hyland’s evidence had been “given honestly”. Despite this he also found that Mr Hyland’s evidence about his reason for terminating Mr Grant’s employment was “unreliable” and that Mr Grant’s mental disability was a reason for the decision.
3. The primary judge summarised his reasons for so concluding on alternative bases. He said (at [326]-[327]) that:

“326. Clearly the evidence of Mr Hyland is of very considerable significance. As I have made I hope clear I am not for an instant suggesting that Mr Hyland has been untruthful in a witting way in his evidence. Nonetheless there are two things to be said. First, as I hope I have also made clear, I think there is a measure of unconscious reconstruction in his position. It is obvious from the circumstances I have described the applicant’s ill health played a part in the decision-making process.

327. Even if I am held to be wrong in that regard and the matter did not intrude upon Mr Hyland’s consciousness as he says, the fact is that what Mr Grant did was completely interwoven with his medical condition and it is what he did that led to his dismissal. In my view as a matter of cause and effect Mr Grant’s illness was quite clearly a part of the reason why he was dismissed. It was his illness on any view that led him to do the things that he did that caused his dismissal, and Mr Hyland well knew of the illness. In the circumstances as I have found them, these two matters cannot be disaggregated as the respondent seeks, for the reasons given earlier. It therefore follows that the respondent has not discharged the burden of proof placed upon it by s.361 of the FW Act.”

1. The circumstances which made it “obvious” to the trial judge that Mr Grant’s ill health played a part in Mr Hyland’s decision-making process and the finding that Mr Grant’s misconduct was “completely interwoven with his medical condition” can be traced to his Honour’s assessment of Dr Frean’s report and Mr Hyland’s treatment of it.
2. The trial judge considered that Dr Frean’s report was “clear” and would have told “any reasonable observer exactly why Mr Grant was behaving as he did.” He rejected what he said was Mr Hyland’s evidence that the report had “told him nothing.” He said that Mr Hyland claimed that he [Mr Hyland] had no understanding whatsoever about what depression was and the effects it may have on those who suffer from it. He nonetheless attributed to Mr Hyland “at least some generalised appreciation of what depression was.” He considered that Mr Hyland had “disaggregated” Mr Grant’s ill health and conduct:

“It is quite clear that Mr Grant’s ill health was known to Mr Hyland who was both seeking further information about it and drawing his own conclusions contrary to the medical advice received. It must have been entirely clear to a man as intelligent as Mr Hyland that the applicant’s conduct arose from or at the very least in part caused by this condition. Whether he was aware of it at the time or not or whether it is a matter of subconscious reconstruction, I do not accept Mr Hyland’s evidence that his state of mind at the time of his decision to terminate the applicant’s employment wholly excluded Mr Grant’s ill health. I think it was quite clear that it was part of the reason he was dismissed.”: at [309].

1. His Honour went on to observe that Mr Hyland’s knowledge of Mr Grant’s medical condition at the time at which he decided to terminate Mr Grant’s employment, in some unstated way, made Mr Hyland’s evidence “unreliable.”
2. The alternative basis for the ultimate finding was also referred to earlier in the trial judge’s reasons when he said that “the fact is that [Mr Grant’s] ill health was what caused him to do the things for which he was dismissed” and that “in truth [Mr Grant’s] conduct arose wholly out of his medical condition and the respondent well knew of the medical condition.” (at [311]).

# CONSIDERATION

1. As the trial judge recognised the leading authority on the operation of ss 360 and 361 of the *Fair Work Act* in the context of Part 3-1 of that Act (which includes s 351) is *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500. The principles which informed this decision were recently reaffirmed by a majority of the High Court in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41. Relevantly, these authorities establish that:
* The central question to be determined is one of fact. It is: “Why was the adverse action taken?”
* That question is to be answered having regard to all the facts established in the proceeding.
* The Court is concerned to determine the actual reason or reasons which motivated the decision-maker. The Court is not required to determine whether some proscribed reason had subconsciously influenced the decision-maker. Nor should such an enquiry be made.
* 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.”
* Even if the decision-maker gives evidence that he or she acted solely for non‑proscribed reasons other evidence (including contradictory evidence given by the decision-maker) may render such assertions unreliable.
* If, however, the decision-maker’s testimony is accepted as reliable it will be capable of discharging the burden imposed on the employer by s 361.

*Barclay* at 517 (French CJ and Crennan J); 542 (Gummow and Hayne JJ); 545-6 (Heydon J) and *CFMEU* at [19]-[22] (French CJ and Kiefel J); [85]-[89] (Gageler J).

1. A significant tension exists between the trial judge’s assessment of Mr Hyland as an honest witness and his finding that Mr Hyland’s evidence about his reasons for dismissing Mr Grant was “unreliable.” The tension is all the more acute if, as appears likely, his Honour was using the word “unreliable” in the same sense that French CJ and Crennan J used it in *Barclay* at 517 (see also per Gummow and Hayne JJ at 542). Their Honours there used “unreliable” as synonymous with “not to be believed or accepted”.
2. It is difficult to comprehend how Mr Hyland’s evidence that he had acted because of Mr Grant’s misconduct and for no other reason could be both honest and yet unreliable in this sense.
3. One possible explanation is that the trial judge attributed to Mr Hyland some unconscious desire to be rid of an employee who was suffering from a disability and was causing problems in his office. There are suggestions of such an approach in the trial judge’s use of phrases such as “unconscious reconstruction”, the matter “not intrud[ing] upon Mr Hyland’s consciousness” and “a matter of subconscious reconstruction”.
4. Even if his Honour’s reasons are benignly construed to mean that Mr Hyland gave honest evidence in respect of all matters other than the central question, substantial difficulties remain.
5. In the first place the trial judge founded his conclusions in part on some material misconstructions of Mr Hyland’s evidence. At no point in his evidence did Mr Hyland say that Dr Frean’s reports had “told him nothing.” What he did say was that:

“Those two medical reports relayed a treating history of Mr Grant of some 20/25 years, an indication of anxiety which led to depression, alcohol abuse, a number of factors but, aside from a comment about poor decision-making there was nothing in those reports which to me – or that, either of those reports which, to me, linked the behaviour that we were seeing with a medical opinion.”

1. Later he had said that the reports had not helped him with deciding what the next step should be in managing Mr Grant within the office.
2. At no point in his evidence did Mr Hyland claim to have no understanding about the nature of depressive illness and the effects it can have on those who suffer from it. His Honour was, with respect, wrong to attribute such an assertion to Mr Hyland.
3. Although the trial judge thought otherwise, Mr Hyland’s appreciation of Dr Frean’s report is, on a fair reading of it, understandable. The report does, indeed, recount a long history of anxiety and abuse of alcohol interspersed with bouts of depression. In February and March 2012 Mr Grant was, according to Dr Frean, in the process of recovery from a depressive episode. While, at a general level, it may have been appreciated that this condition would have some adverse impact on Mr Grant’s work performance, there was nothing in the report which attributed the four acts of misconduct, on which Mr Hyland relied in dismissing Mr Grant, to the mental illness suffered by Mr Grant. Mr Grant had the opportunity, at both the show cause and mitigation stages of the discipline process to have furnished supplementary medical evidence forging the link. He did not do so.
4. Allegation 2 involved a failure by Mr Grant to comply with a direction to give timely notice of his inability to attend for work at the prescribed time. On some days late notice was given and the absence was explained on health grounds. On these occasions the lateness of the notice was not, however, also attributed to illness. On three of the days Mr Grant was avowedly absent for the purpose of looking after a sick friend. On these days neither the lateness nor absence of notice was attributed to illness.
5. Allegation 3 was that Mr Grant had failed to brief counsel and file documentation relating to a forthcoming trial by the due date. That date was 23 February 2012. Mr Grant claimed that his failure to comply with this directive occurred because of the limited time he spent in the office between the direction being given on 8 February and 23 February 2012. He said that his absences in this period were caused by ill health. He was, however, in the office for part of the period and he did not advise his senior officer (despite being advised to do so) that he was having difficulty meeting the prescribed time limits. It is also to be borne in mind that his absences on 20, 21 and 22 February occurred because he was looking after a sick friend, not because of any personal illness. On 23 February 2012 he had left the office and attended court despite a clear written instruction not to do so.
6. Mr Grant’s failure to attend court during the arraignment of an accused on 20 February 2012 despite an instruction to do so (Allegation 4) occurred because of Mr Grant’s wish to visit his friend in hospital.
7. Allegation 5 was that Mr Grant had disobeyed a direct written order to remain in the office and not go to court on 23 February 2012. Mr Grant responded to this allegation by asserting that he had gone to court in what he perceived to be the interests of justice and the best interests of the OPP. He said nothing about his judgment being impaired by depression or other cause.
8. In these circumstances it is hardly obvious that the conduct which gave rise to the disciplinary action was caused by Mr Grant’s medical condition or that the connection must have been obvious to Mr Hyland. Indeed, to so conclude would have required the trial judge to disbelieve Mr Grant’s own evidence about why he had acted as he did.
9. Mr Grant sought to support the primary judge’s decision on the basis that the finding that Mr Hyland’s evidence about his reason for terminating Mr Grant’s employment was unreliable meant that the onus which fell on the respondent under s 361 of the Act had not been discharged. Mr Grant placed particular reliance on the observations of Crennan J in *CFMEU* at [56] that:

“This does not mean that an assertion by a credible decision-maker that adverse action was not taken because of any prohibited reason will always discharge the statutory onus on an employer to prove that the reasons for taking adverse action did not include a prohibited reason. It is open to a trier of fact to accept as honest and credible a decision-maker’s explanation of his or her decision for taking adverse action, then to weigh all the evidence (including an assertion that the decision-maker did not act for any prohibited reason) but not be satisfied that an employer has discharged a statutory onus of proving that the reasons did not include any prohibited reason.”

1. He contended that, although her Honour was in dissent in *CFMEU*, her statements of principle were consistent with the reasoning of the majority and with the Court’s earlier decision in *Barclay*.
2. A reading of the relevant passages in the joint judgments of French CJ and Kiefel J in *CFMEU* and of French CJ and Crennan J in *Barclay* does not support this contention. What was said in those judgments was that it will normally be necessary for direct evidence to be called from the decision-maker if an employer is to satisfy the onus imposed by s 361 of the *Fair Work Act*. If that evidence is called and it is accepted the onus will have been discharged. The Court is not, however, bound to accept the evidence and may consider it to 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”: *Barclay* at [45]; cf *CFMEU* at [8].
3. In contrast, Crennan J, in *CFMEU*, contemplates circumstances in which the decision-maker has given an “honest and credible” exculpatory explanation for making the decision. Despite this the Court, after weighing all the evidence, for some reason, may remain unsatisfied that the employer had discharged the statutory onus. It is, with respect, difficult to conceive of circumstances in which the decision-maker is believed when he or she denies having acted for a prohibited reason and yet that evidence is somehow undermined by other evidence to the point where it will not be acted upon. That other evidence would, presumably, have to have called the decision-maker’s credibility into question or have led, contrary to the unanimous view in *Barclay*, to the conclusion that the decision-maker had subconsciously taken into account a proscribed reason.
4. In the present proceeding the trial judge did not point to any material internal conflict in Mr Hyland’s evidence relating to his reasons for taking adverse action against Mr Grant. There was, for example, no documentary evidence which was at odds with Mr Hyland’s stated reasons. There was no suggestion of any prior dealings between Mr Hyland and Mr Grant which might have influenced Mr Hyland’s decision. Mr Hyland’s denial that Mr Grant’s medical condition played any part in his decision was not accepted by the primary judge for the sole reason that it must have been “entirely clear” to Mr Hyland that Mr Grant’s “conduct arose from or at the very least [was] in part caused by” Mr Grant’s ill health. Mr Grant’s ill health was known to Mr Hyland and, as an intelligent man, Mr Hyland must, according to his Honour, have appreciated the link between the medical condition and the misconduct.
5. For the reasons which we have given the evidence does not support his Honour’s reasoning. Nor was there any evidence to support his Honour’s unqualified finding that Mr Grant’s “conduct arose *wholly* out of his medical condition …”. (Emphasis added).
6. We would add that we do not accept his Honour’s conclusion that Mr Grant’s misconduct “was completely interwoven with his medical condition” and the related finding that the misconduct and the ill health could not “be disaggregated” as Mr Hyland was said to have done.
7. Such a finding was not open either on the evidence or consistently with the High Court’s reasoning in *Barclay* and *CFMEU*.
8. In *Barclay* the complainant was a union official employed by the Bendigo Institute. He was suspended after he had circulated an e-mail to other union members alleging that some of the Institute’s officers had acted fraudulently in preparing documentation for a forthcoming audit. The employee alleged that he had been suspended for a number of proscribed reasons. They were that he was an officer of the union and that he had engaged in industrial activity. The High Court rejected this argument. French CJ and Crennan J said (at 523) that:

“Central to the [employee’s] argument on this appeal was the contrary and incorrect view that [the employee’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 [the employee’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 …”.

See also *CFMEU* at [20] (French CJ and Kiefel J).

1. In *CFMEU* the complainant was a member of a union picket line which had been formed in the course of an industrial dispute. He held up a placard which had emblazoned on it pejorative comments directed to other workers who were passing through the picket line and going to work. Despite the fact that he was engaged in industrial action at the time his employer was found not to have contravened the *Fair Work Act* because the decision-maker was believed when he gave evidence that he had terminated the complainant’s employment because the employee had breached the company’s workplace conduct policy by failing to accord courtesy and respect to fellow employees and for no other reason.
2. In *Purvis v New South Wales* (2003) 217 CLR 92 a student who had intellectual and other disabilities had been suspended and excluded from a State school after he had acted violently towards staff and other students. Section 22(2) of the *Disability Discrimination Act 1992* (Cth) (“the *DDA*”) rendered it unlawful for an educational authority to discriminate against a student on the ground of the student’s disability, inter alia, by expelling the student. By s 5(1) of that Act it was provided that a person discriminated against an aggrieved person on the grounds of disability if, because of the disability, the discriminator treated the disabled person less favourably than the discriminator treated or would treat a person without a disability in circumstances that were the same or not materially different. The student claimed that the State had contravened s 22(2). The High Court, by majority, rejected this claim. It accepted that it was possible for a decision-maker to suspend or exclude a student because of a perceived need to protect students and teachers from violent conduct without offence to the *DDA* notwithstanding that the conduct was a manifestation of a medical condition. Gummow, Hayne and Heydon JJ (at 163) counselled against the drawing of distinctions between motive, purpose and effect when deciding whether the impugned conduct had occurred “because of” disability. “Rather”, their Honour’s held, “the central question will always be – *why* was the aggrieved person treated as he or she was?” (Emphasis in original). This formulation was adapted in *Barclay* by French CJ and Crennan J (at 517) when they held that the central question, for the purposes of applying ss 346 and 361 of the *Fair Work Act*, was “why was the adverse action taken?”
3. It is, therefore, possible, depending on the evidence, for what the primary judge called “disaggregation” to occur when ss 360 and 361 of the Act are being applied. As these authorities demonstrate it is possible for there to be a close association between the proscribed reason and the conduct which gives rise to adverse action and for the decision‑maker to satisfy the Court that no proscribed reason actuated the adverse action.
4. Mr Hyland was aware when he made his decision that Mr Grant had been suffering from depression and other ailments at the time at which the misconduct occurred. The medical evidence did not expressly or impliedly link the misconduct and the illness. It was never put to Mr Hyland at trial that Dr Frean’s reports contained anything which was inconsistent with Mr Hyland’s assertion that he had not acted for any proscribed reason. It was, therefore, not open to the primary judge to conclude that the misconduct and the illness were inextricably linked, particularly when he had accepted Mr Hyland’s exculpatory and other evidence as being “honest”. There was no evidentiary foundation for the conclusion that “[i]t was [Mr Grant’s] illness on any view that led him to do the things that he did that caused his dismissal …”.

# DISPOSITION

1. The appeal should be allowed.

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| I certify that the preceding fifty-nine (59) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey and Buchanan. |

Associate:

Dated: 23 December 2014

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 322 of 2014 |

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| BETWEEN: | STATE OF VICTORIA (THE OFFICE OF PUBLIC PROSECUTIONS)Appellant |
| AND: | ANTHONY EDWARD GRANTRespondent |

|  |  |
| --- | --- |
| JUDGE: | tracey, buchanan and wHITE J |
| DATE: | ## DECEMBER 2014 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

**WHITE J**

1. I agree that the appeal should be allowed and, subject to the reasons which follow, agree generally with the joint reasons.
2. The facts and circumstances giving rise to this appeal, the statutory provisions and the applicable legal principles are set out in the joint reasons. It is not necessary to repeat them.
3. The decision at first instance was *Grant v State of Victoria (The Office of Public Prosecutions)* [2014] FCCA 17. The Judge said in two separate passages (at [309] and [326]) that he accepted that Mr Hyland, the decision-maker, gave his evidence honestly. Nevertheless, the Judge rejected Mr Hyland’s evidence that he had made the decision to dismiss by reason of Mr Grant’s misconduct alone and that Mr Grant’s ill health had played no part in the decision. The Judge’s reasons for that conclusion appear in two separate sections of his reasons.
4. The first is in a section entitled “Findings on the Facts”. The Circuit Court Judge summarised at [308] evidence indicating that Mr Hyland was aware of Mr Grant’s depression and that Mr Hyland had some generalised appreciation of the nature of depression. He then continued:

[309] Where I am afraid I am unable to accept the evidence of Mr Hyland, *which I should make it clear I accept was given honestly*, is that I do not accept the disaggregation of the applicant’s ill health and his conduct. It is quite clear that Mr Grant’s ill health was known to Mr Hyland who was both seeking further information about it and drawing his own conclusions contrary to the medical advice received. It must have been entirely clear to a man as intelligent as Mr Hyland that the applicant’s conduct arose from or at the very least in part caused by this condition. Whether he was aware of it at the time or not or whether it is a matter of subconscious reconstruction, I do not accept Mr Hyland’s evidence that his state of mind at the time of his decision to terminate the applicant’s employment wholly excluded Mr Grant’s ill health. I think it was quite clear that it was part of the reason he was dismissed. I have seen and heard the evidence and that is my conclusion as to what occurred. As French CJ and Crennan J said in Barclay at [45]:

Direct evidence of the reason why the decision-maker took adverse action, which may include positive evidence that the action was not taken for the prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because of other objective facts are proven which contradict the decision-makers evidence.

[310] Here, in my view, the evidence given by Mr Hyland about his state of knowledge of the applicant’s medical condition at the time of decision to terminate in my view, when seen in context, makes Mr Hyland’s evidence about his reason to terminate unreliable.

[311] Furthermore, and even if I am wrong in the above finding, the fact is that the applicant’s ill health was what caused him to do the things for which he was dismissed. The respondent knew of his ill health. The question is why the applicant was dismissed and while superficially it would be put, as the respondent does, that it was the applicant’s misconduct, in truth the applicant’s conduct arose wholly out of his medical condition and the respondent well knew of the medical condition.

(Emphasis added)

1. The second section in which the Circuit Court Judge gave his reasons for not accepting Mr Hyland’s evidence is entitled “The Application of the Law to the Facts as Found”. The Judge said:

[326] Clearly the evidence of Mr Hyland is of very considerable significance. As I have made I hope clear *I am not for an instant suggesting that Mr Hyland has been untruthful in a witting way in his evidence*. Nonetheless there are two things to be said. First, as I hope I have also made clear, I think there is a measure of unconscious reconstruction in his position. It is obvious from the circumstances I have described the applicant’s ill health played a part in the decision-making process.

[327] Even if I am held to be wrong in that regard and the matter did not intrude upon Mr Hyland’s consciousness as he says, the fact is that what Mr Grant did was completely interwoven with his medical condition and it is what he did that led to his dismissal. In my view as a matter of cause and effect Mr Grant’s illness was quite clearly a part of the reason why he was dismissed. It was his illness on any view that led him to do the things that he did that caused his dismissal, and Mr Hyland well knew of the illness. In the circumstances as I have found them, these two matters cannot be disaggregated as the respondent seeks, for the reasons given earlier. It therefore follows that the respondent has not discharged the burden of proof placed upon it by s 361 of the FW Act.

(Emphasis added)

1. The Judge’s assessment of Mr Hyland as an honest witness is seen in the emphasised passages in [309] and in [326]. Those passages indicate that the Judge regarded Mr Hyland’s evidence as truthful, in the sense that he was conveying to the Court truthfully his knowledge of Mr Grant’s circumstances at the time he made the termination decision as well as the reasoning which he believed he had adopted in relation to that decision. Putting it negatively, it is a finding that Mr Hyland was not knowingly giving false or incomplete evidence.
2. The finding that Mr Hyland’s evidence was honest was not of course conclusive of the question of whether the appellant had discharged the onus of proof under s 361. Honest witnesses may be mistaken. In particular, the evidence of witnesses describing their own mental state or reasoning process at a time in the past may, although honest, be affected by a process of retrospective rationalisation in their own interest. It is commonplace in criminal trials for juries to be reminded of these matters.
3. In a context like the present, the passage from the reasons of French CJ and Crennan J in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; (2012) 248 CLR 500 at [45], quoted by the Circuit Court Judge in [309] of his reasons, indicates that the apparently honest evidence of a decision-maker may nevertheless be rejected as unreliable. Matters justifying such a rejection may be other contradictory evidence from the decision-maker or other objective evidence in the trial.
4. Similarly, in *CFMEU v BHP Coal Pty Ltd* [2014] HCA 41; (2014) 314 ALR 1, Crennan J (in dissent) said at [56]:

[56] In *Barclay,* the primary judge was satisfied that the decision-maker acted for the reasons she gave. His Honour also accepted her denials that she acted for any reason prohibited under the Act, particularly under s 346(a). Neither party challenged those findings of fact by the primary judge. In this Court it was acknowledged that direct testimony of a decision-maker which is accepted as reliable is capable of discharging the burden of proof cast upon an employer. This does not mean that an assertion by a credible decision-maker that adverse action was not taken because of any prohibited reason will always discharge the statutory onus on an employer to prove that the reasons for taking adverse action did not include a prohibited reason. It is open to a trier of fact to accept as honest and credible a decision-maker’s explanation of his or her decision for taking adverse action, then to weigh all the evidence (including an assertion that the decision-maker did not act for any prohibited reason) but not be satisfied that an employer has discharged the statutory onus of proving that the reasons did not include any prohibited reason.

(Citations omitted)

1. Both counsel referred to these passages. On my understanding, Crennan J did not use the word “credible” in the quoted passage as a synonym of “reliable”, but rather in the sense of “believable”. Her Honour was indicating that honest and apparently believable evidence from a decision-maker may nevertheless be assessed as unreliable, or at least as not discharging the onus of proof that a decision-maker’s reasons did not include any prohibited reason.
2. Nevertheless, the finding by the Circuit Court Judge that Mr Hyland’s evidence was honestly given was important to his consideration of whether the appellant had discharged the onus cast upon it by s 361. It meant that the focus in the Judge’s decision had then to turn to the reliability of Mr Hyland’s evidence.
3. The Judge’s reasons for finding Mr Hyland’s evidence unreliable are seen in the paragraphs from his judgment quoted above. One can discern in those paragraphs several strands of reasoning:
	* 1. Mr Grant’s ill health was known to Mr Hyland, at [309];
		2. Mr Hyland’s evidence about his knowledge at the time, at [310];
		3. It must have been clear to Mr Hyland that the applicant’s conduct “arose from”, or was at least in part “caused by”, his mental condition, at [309], [311];
		4. Mr Hyland may, or may not, have been aware at the time he made his decision that he was taking into account Mr Grant’s ill health, at [309];
		5. Alternatively, Mr Hyland had engaged in a process of “subconscious reconstruction”, at [309], and there was “a measure of unconscious reconstruction in his position”, at [326];
		6. The applicant’s misconduct “arose wholly out of” and was “completely interwoven with” his medical condition and Mr Hyland well knew of that condition, at [311], [327]. There was therefore a relationship of “cause and effect” between the condition and the termination, at [327]. These matters “could not be disaggregated”, at [327].
4. Counsel for the appellant impugned each of these elements. In my opinion, there is a good deal of force in Counsel’s criticisms.
5. As to strand (i), the circumstance that Mr Hyland knew of the appellant’s health condition did not, by itself, mean that his evidence as to the reasons for the termination was unreliable. It is commonly the case that a decision-maker knows of a circumstance which, if relied upon, would constitute action for a prohibited reason. The question is whether, in addition to knowing of the circumstance, the decision-maker has taken the action in question because of it. I observe that in each of *Barclay* and *CFMEU v BHP Coal*, the relevant decision-maker knew of the role of the dismissed employee in his union and knew that there was a relationship between that role and the activity which the decision-maker considered constituted misconduct. The circumstance that the decision-makers had that knowledge was not, by itself, sufficient to prevent the s 361 onus being discharged. Accordingly, a decision‑maker’s knowledge of a circumstance or condition referred to in s 351(1) is a necessary, but not a sufficient, condition for a finding that action was taken for a prohibited reason.
6. As to strand (ii), the Judge’s reasons do not indicate whether it was Mr Hyland’s acknowledgment that he knew about Mr Grant’s health condition, or some aspect of his evidence about that knowledge, which was relied upon. If the former, then, for the reasons already given, that did not by itself make Mr Hyland’s evidence unreliable. If it was the latter, then the following points are pertinent.
7. First, the Circuit Court Judge seems to have been influenced by his assessment of Mr Hyland’s personality style. It is evident that the Judge did not find that style attractive. However, the particular features which the Judge found unattractive were not such as, by themselves, to make Mr Hyland’s evidence unreliable.
8. Secondly, in making his findings of fact, the Judge had been critical of Mr Hyland’s evidence in two respects, as seen in the following paragraph of his reasons:

[302] I regret to say that I am unable to accept the evidence of Mr Hyland that Dr Frean’s report told him nothing. It told him nothing because he did not want to believe it. As I clarified with Mr Hyland, depression is a matter with which officers of the respondent deal on a routine basis. He himself did so, during his period in court until 10–15 years ago. I do not accept the assertions made by Mr Hyland, and to a lesser extent, Mr Bird and Mr Sabljak, that they simply had no understanding whatsoever of what depression is and what effects it may have on people. It is inconsistent with their professional experience and education. It also ignores the plain language of Dr Frean’s report.

It seems that the Judge’s reference in [310] quoted earlier to the evidence given by Mr Hyland about his state of knowledge of Mr Grant’s mental condition is a reference back to these findings in [302]. It is not easy to identify any other passage in the reasons to which the Judge could have been making reference. However, the Judge’s reliance on his conclusions in [302] was unsound because those conclusions were themselves unsound. Mr Hyland had not given evidence that the report of Dr Frean “told him nothing” and had not said that he had “no understanding whatsoever of what depression is and what effects it may have on people”. The Judge was therefore critical of Mr Hyland because of statements which the Judge had wrongly attributed to him. Counsel for Mr Grant acknowledged these matters and submitted that the Judge had probably exaggerated Mr Hyland’s evidence. That may be so, but it remains the fact that it is unsound to find a witness’ evidence to be unreliable by reference to evidence imputed to the witness, but which the witness did not give.

1. As to strands (iii) and (vi), accepting for the moment that there was a causal relationship between Mr Grant’s conduct and his health condition, or that the two were “completely interwoven”, it did not mean that Mr Hyland’s evidence that it was the effect, and not the cause, which was the reason for the dismissal could not be accepted, nor did it mean that Mr Hyland must necessarily have made his decision for a prohibited reason. Again, reference to the circumstances considered in *Barclay* and in *CFMEU v BHP Coal* is instructive. It was claimed in each of those cases that the dismissed employee engaged in the impugned activity because of his role in his Union and as part of industrial activity and that the two could not be separated. This argument was rejected by French CJ and Crennan J in *Barclay*:

[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. 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.

[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.

This reasoning was confirmed in *CFMEU v BHP Coal*, by French and Kiefel JJ at [20] and by Gageler J at [88], [90]-[92].

1. Accordingly, the existence of a close relationship between the adverse action and a prohibited reason does not mean that the two cannot be disaggregated. The Circuit Court Judge does not appear to have considered this circumstance.
2. Another difficulty in this strand of the Judge’s reasoning is that the evidence linking Mr Grant’s misconduct with his mental health state was, at the least, incomplete. Perhaps it could be inferred that his failure to provide timely and accurate notification on some of the occasions when he was going to be late to work or be absent all together and his failure to prepare appropriately for a forthcoming criminal trial were attributable in part to his mental state. However, that was not the case in relation to Mr Grant’s disobedience to explicit directions on 20 and 22 February 2012 (referred to as Allegations 4 and 5 in the joint reasons) as the applicant’s own evidence for not complying with those directions did not make any reference at all to his mental health. Nor did the applicant’s general practitioner, Dr Frean, opine that his conduct on these days could be attributed to his mental health. Further still, when Mr Hyland made his decision, he did not have any evidence to the effect that Mr Grant’s disobedience was to be attributed to his mental health, and nor was there evidence to that effect at the trial.
3. There may perhaps be some medical conditions in which the condition and its manifestations are indistinguishable, or in which the affected person’s conduct may to a degree be involuntary. This may make disaggregation of the condition and the manifestation a difficult, if not artificial, exercise. But the Judge did not have evidence indicating that Mr Grant’s mental condition was of this kind. As is noted in the joint reasons, there was no evidence in the Circuit Court that Mr Grant’s conduct arose “wholly” out of his medical condition.
4. The reasoning in strand (iv) appears to raise the prospect that Mr Hyland acted for a reason of which he was not conscious at the time. This kind of analysis was expressly disapproved by the High Court in *Barclay*. That disapproval was confirmed in *CFMEU v BHP Coal*.
5. The reasoning in strand (v) refers to Mr Hyland’s mental processes since making the decision to terminate. It is in effect a finding that Mr Hyland had retrospectively rationalised his reasoning process with the effect that he gave honest, but mistaken, evidence. This is a conclusion rather than a step in a reasoning process. A statement that a witness has engaged in a form of retrospective rationalisation is usually a means of explaining how evidence can be regarded as honestly given and yet not accepted. It explains a decision arrived at for other reasons. Those other reasons should be identified. For example, a judge may prefer conflicting evidence or consider that the manner in which a witness gave evidence, or its very content, suggested reconstruction.
6. In this case the Judge did not have conflicting evidence and did not point to any feature of Mr Hyland’s evidence which was suggestive of reconstruction. Nor did the Judge point to any other feature of the evidence indicating that Mr Hyland may have engaged in the process of retrospective rationalisation or, to use the Judge’s expression, unconscious reconstruction.
7. The result of this review of the Judge’s reasons is that I consider the reasoning which led the Judge to find Mr Hyland’s evidence to be unreliable is unsound. The Judge has, in part, relied on matters which do not of themselves make Mr Hyland’s evidence unreliable and has in part engaged in forms of reasoning prohibited by, or disapproved in, *Barclay* and *CFMEU v BHP Coal*. In fairness to the Circuit Court Judge, I note that he delivered his decision before the High Court delivered its decision in *CFMEU v BHP Coal*.
8. There is a question as to how effect should be given to this conclusion. Plainly, the appeal should be allowed and the orders made in the Federal Circuit Court set aside. However, in my opinion, it is not possible for this Court to substitute its decision as to the reliability of Mr Hyland’s evidence for that of the Circuit Court Judge. All this Court can say is that the shortcomings identified in the Judge’s reasons mean that the conclusion he reached is unsound. Accordingly, a rehearing is required.
9. It would be inappropriate to remit the matter to the same Circuit Court Judge for him to consider the matter further. Accordingly, I see no alternative but to allow the appeal, to set aside the Circuit Court Judge’s orders and to remit the matter to the Circuit Court for retrial before another Judge.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White. |

Associate:

Dated: 23 December 2014