FEDERAL COURT OF AUSTRALIA

Barnes v Hatch Associates Pty Ltd [2017] FCA 434

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| Appeal from: | *Barnes v Hatch Associates Pty Ltd* [2015] FCCA 3375  |
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| File numbers: | QUD 60 of 2016QUD 180 of 2016 |
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| Judge: | **LOGAN J** |
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| Date of judgment: | 28 April 2017 |
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| Catchwords: | **INDUSTRIAL LAW** – *Fair Work Act 2009* (Cth) – workplace rights and responsibilities – general protections – adverse action – whether adverse action taken for prohibited reason – prejudicial alteration of position – whether *Jones v Dunkel* (1959) 101 CLR 298 inference could be drawn in relation to alleged failure of respondent to call certain evidence – relevant decision-makers called by employer – *Jones v Dunkel* inapplicable**APPEAL AND NEW TRIAL** – appeal from Federal Circuit Court of Australia – rehearing – trial judge’s assessment of credibility of witnesses – applicable principles in respect of exercise of appellate jurisdiction in relation to credibility assessment **COSTS** – procedural fairness – departure by court from understanding engendered in parties by representation of judge’s associate – resultant denial of procedural fairness  |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 340, 342, 361, 570*Federal Court of Australia Act 1976* (Cth) s 24*Federal Circuit Court of Australia Act 1999* (Cth) s 76 *Veterans’ Entitlements Act 1986* (Cth)  |
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| Cases cited: | *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38*Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500*British Aircraft Corporation Ltd v Austin* [1978] IRLR 332*Construction, Forestry, Mining and Energy Union v Clarke* (2008) 170 FCR 574*Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169*Fox v Percy* (2003) 214 CLR 118*International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319*Jones v Australian Competition and Consumer Commission* (2010) 189 FCR 390*Jones v Dunkel* (1959) 101 CLR 298*Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20*Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507*Shrestha v Migration Review Tribunal* (2015) 229 FCR 301*SZRPT v Minister for Immigration and Border Protection* [2014] FCA 24*Warren v Coombes* (1979) 142 CLR 531*Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666  |
|  |  |
| Date of hearing: | 1 - 3 August 2016 |
|  |  |
| Date of last submissions: | 6 September 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 142 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Counsel for the Respondent: | Mr LM Copley |
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| Solicitor for the Respondent: | Milner Lawyers |

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| **Table of Corrections** |  |
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| 28 April 2017 | In the Appearance on the cover page Counsel for the Respondent has been amended from Mr M Copley to Mr LM Copley |

ORDERS

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|  | QUD 60 of 2016 |
|   |
| BETWEEN: | ANTHONY JOSEPH BARNESAppellant |
| AND: | HATCH ASSOCIATES PTY LTD ACN 008 630 500Respondent |

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| JUDGE: | LOGAN J |
| DATE OF ORDER: | 28 APRIL 2017 |

THE COURT ORDERS THAT:

1. The appeal against the order of 18 December 2015 dismissing the appellant’s application filed on 27 November 2012 be dismissed.

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

ORDERS

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|  | QUD 180 of 2016 |
|   |
| BETWEEN: | ANTHONY JOSEPH BARNESAppellant |
| AND: | HATCH ASSOCIATES PTY LTD ACN 008 630 500Respondent |

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| JUDGE: | LOGAN J |
| DATE OF ORDER: | 28 APRIL 2017 |

THE COURT ORDERS THAT:

1. The appeal against the order made on 5 February 2016 in respect of costs be allowed and the order made that day be set aside.
2. The question as to what order as to costs, if any, be made in respect of the respondent’s application for costs be remitted to the Federal Circuit Court for hearing according to law and in accordance with such interlocutory directions as that court may make.

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

REASONS FOR JUDGMENT

LOGAN J:

1. Anthony Joseph Barnes’ employment with the engineering and project and construction management consultancy, Hatch Associates Pty Ltd (Hatch) was terminated on 20 August 2012. Hatch is part of a global such consultancy, the latter conveniently termed the Hatch Group so as to distinguish it from the respondent company. The Hatch Group is headquartered in Canada.
2. As a sequel to that termination, Mr Barnes instituted proceedings in the Federal Circuit Court of Australia (Federal Circuit Court) claiming that, in terminating his employment, Hatch had contravened either or each of s 340(1)(a)(ii), s 340(1)(a)(iii) or s 340(1)(b) of the *Fair Work Act 2009* (Cth) (FW Act). In those proceedings he further claimed that a prior decision by Hatch, made on or about 3 August 2012, to accede to a request which he had made to be transferred from a particular project team and his consequential transfer also constituted a contravention of one or more of these same provisions of the FW Act. Mr Barnes claimed compensation in respect of these alleged contraventions.
3. After a trial conducted episodically over 11 days between 13 July 2015 and 3 December 2015, the Federal Circuit Court dismissed Mr Barnes’ application on 18 December 2015.
4. Mr Barnes came to allege thirteen instances of complaint made by him during his employment with Hatch, each of which was said to constitute the exercise of a workplace right. These are detailed in the reasons for judgment of the primary judge. His Honour found that, at the very least, the seventh and twelfth of these constituted the exercise of a workplace right. In one way or another, the complaints related to the conduct and competency of Mr Barnes’ superior, Ms Vanessa Visman and to her allegedly having “side lined”, “disrespected” or harassed him.
5. The primary judge found that no adverse action had been taken against Mr Barnes by virtue of his having exercised a workplace right. His Honour found that his termination was the result of a genuine redundancy, occasioned by a downturn in Hatch’s available and prospective work. His Honour also found that there was no prejudice to Mr Barnes in his prior transfer, at his request, away from the particular project to which he had hitherto been deployed. Here, too, his Honour found an absence of adverse action.
6. Mr Barnes has appealed against the dismissal of his application (QUD 60 of 2016).
7. In dismissing Mr Barnes’ application, the primary judge reserved for later consideration the question as to what order for costs, if any, ought consequentially, be made. On 5 February 2016, the following costs order was made:

The Applicant pay the costs of the Respondent for the 1st, 2nd and 3rd of December 2015 as agreed or if not agreed to be taxed as per Schedule One of the Federal Circuit Rules 2001 and in addition, the Applicant pay the sum of $26,984.59 being the costs of Senior Counsel, Junior Counsel and the Solicitors for the hearing on the 13 July 2015.

This order, also, is the subject of an appeal (QUD 180 of 2016).

1. To do justice in these appeals requires two things.
2. Firstly and for the reasons which follow, it requires that Mr Barnes’ appeal against the order of 18 December 2015 dismissing his substantive application be dismissed but that his appeal against the costs order of 5 February 2016 be allowed and the matter remitted for hearing afresh on the question of costs.
3. Secondly, and no less necessarily, it requires a public acknowledgement that Mr Barnes has, in his time, rendered praiseworthy service to Australia and her interests, suffered for that service and attempted, determinedly, to overcome the effects of that service on his health and well-being. The wounds which warfare inflicts on members of the armed forces are not confined to the physical. This has always been the case but that is at least much better understood now than in earlier times. It is my sincere hope that the outcome of these appeals assists in closing rather than aggravating Mr Barnes’ wounds.
4. The second of these two requirements might seem completely incongruent with the first, even odd in what is, apparently, an industrial appeal heard in the court’s Fair Work Division. That is until the nature and extent of Mr Barnes’ military service and its impact upon him, as revealed on the evidence, is known. Prior to the events which gave rise to the proceeding before the Federal Circuit Court, Mr Barnes undertook periods of operational service in Iraq and Afghanistan, on each occasion as a military intelligence officer. He also rendered service overseas on other occasions but it is, on the evidence, the sequel to his health and well-being arising from his operational service which is particularly pertinent. I elaborate on this below. For the present, it is enough to record that the reasons for judgment of the learned Federal Circuit Court judge describe, not just permissibly but convincingly, why that sequel looms large in his conclusions of fact, especially those based on assessments of the relative credibility of witnesses.
5. Mr Barnes appeared on his own behalf on the hearing of the appeals. He was represented at trial by counsel highly experienced in industrial law and solicitors.
6. Mr Barnes’ grounds of appeal are prolix. They raise a number of issues of law, the resolution of some of which depends on a favourable outcome to challenges to findings of fact which he makes. Other grounds of appeal discretely challenge findings of fact alone. In these circumstances, it is as well to commence by setting out some relevant principles in relation to a challenge on appeal to findings of fact made at trial. Appropriately, these and their ramifications featured in the submissions made on behalf of Hatch.
7. An appeal to this court from the Federal Circuit Court under s 24(1)(d) of the *Federal Court of Australia Act 1976* (Cth), no less than an appeal under s 24(1)(a) of that Act from a single judge exercising the original jurisdiction of this court to a Full Court, is an appeal by way of rehearing: *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [75] per Gleeson CJ and Gummow J (Hayne J, at [176] agreeing in this regard) and at [128] per Kirby J; *SZRPT v Minister for Immigration and Border Protection* [2014] FCA 24 at [21]. That means that the principles applicable to reviewing the findings of fact made by the primary judge are those stated in *Warren v Coombes (*1979) 142 CLR 531 (*Warren v Coombes*).
8. In *Warren v Coombes*, at p 551, Gibbs ACJ, Jacobs and Murphy JJ stated the applicable principles in this way:

Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it.

1. Where, as here, particular factual findings of a trial judge have been influenced by an assessment of the relative credibility of witnesses, those findings are not incontrovertible on an appeal by way of rehearing but an appeal court must approach any challenge to such findings in the way described by Gleeson CJ, Gummow J and Kirby J in *Fox v Percy* (2003) 214 CLR 118 at 127 [26]-[27] (*Fox v Percy*):

More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact. [See *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842; 62 ALR 53; *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; *Abalos v Australian Postal Commission* (1990) 171 CLR 167.] If the trial judge’s finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge “has failed to use or has palpably misused his advantage” [*SS Hontestroom v SS Sagaporack* [1927] AC 37 at p 47] or has acted on evidence which was “inconsistent with facts incontrovertibly established by the evidence” or which was “glaringly improbable”. [*Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at p 844; 62 ALR 53 at p 57]

1. It is for Mr Barnes to demonstrate an error in the findings of fact made by the primary judge.
2. I consider first Mr Barnes’ substantive appeal, leaving for later consideration the appeal which he makes against the order for costs.
3. As to the substantive appeal and as set out in his amended notice of appeal, the grounds of appeal are these:

*The Applicant’s Complaints*

a. The primary judged failed to give reasons or the judgement is otherwise deficient, in that the primary judge failed to specify, at paragraph [79] which of the Applicant’s 13 complaints he did not consider constituted the exercise of a workplace right.

*Injures the Employee in their Employment*

b. The primary judge failed to give reasons or the judgement is otherwise is deficient, in that the primary judge failed to make any findings with respect to whether the Respondent “injured” the Applicant in his employment, within the meaning of Item 1 of s 342(1) of the Fair Work Act 2009 (“The FW Act”).

c. The primary judge erred by failing to conclude or otherwise find on the relevant evidence before him, that Ms Els injured the Applicant in his employment, collectively or in part by;

i. Isolating or by passing the Applicant in his role as the TSM project manager, without informing him of such;

ii. Seeking advice from Ms Visman , Mr Brown and / or Mr Eutick, the very subjects of the Applicant’s complaints, about what to do in relation to the Applicant;

iii. Removing the Applicant not just from his role as the TSM Project Manager, but from the Operational Readiness Team altogether; and / or

iv. Making unfounded pejorative remarks about the Applicant to Mr Loxton, of which the Applicant was not informed and to which the Applicant was given no opportunity to respond. Ms Els doing so, in the full knowledge that such remarks would or may ultimately induce the termination of his employment.

*Alters the position of the employee to their prejudice*

d. The primary judge erred at paragraph [140] by taking an impermissibly narrow view of the “factors” or “aspects” he ought to consider, in the proper statutory interpretation, construction and / or application of the term “prejudice”, within the meaning of Item 1 of s 342(1) of the FW Act,

e. The primary judge erred at paragraphs [115] and [144] by failing to find that movement of an employee to a less “secure” position, did meet the statutory definition of “prejudice” within the meaning of Item 1 of s 342(1) of the FW Act, in and of itself.

f. The primary judge erred between paragraphs [124] and [125] by implying in his statement “is there further prejudice?” that more than one instance of “prejudice” was necessary to meet the statutory definition of “prejudice” within the meaning of Item 1 of s 342(1) of the FW Act.

g. The judge erred at paragraphs [138], [140], [144] and [221] by failing expressly to take into account relevant considerations he was bound to take, including, but not limited to;

i. The inefficacy of the Applicant’s complaints, which were the catalyst for and / or were substantially underpinning motivation or reason for his request;

ii. The broader functions being performed by the Applicant within the Operational Readiness Team beyond the TSM Project (his “full position”);

iii. The prejudicial or injurious nature of Ms Els seeking advice from Ms Visman, Mr Brown and / or Mr Eutick, the very subjects of the Applicant’s complaints, about what to do in relation to the Applicant.

iv. The social humiliation, stigma or embarrassment suffered by the Applicant in being removed from the TSM Project, and

v. The Respondent's failure to appropriately communicate to the Operational Readiness Portfolio, the TSM Project Team or BHP, the true reasons or nature for the Applicant’s removal from the TSM Project, and the office rumour, gossip and / or damage to the Applicant’s professional reputation that this foreseeably created or caused.

*Intent or Reasons For Action*

h. The primary judge’s conclusions at paragraphs [126], [127], [160] and [179], with respect to the “reason” which actuated Ms Els’ actions, was induced or otherwise affected by fraud on behalf of the Respondent.

i. The primary judge erred in reaching his conclusion at paragraphs [126]. [127], [160] and [179], by failing to make relevant inquiries at trial, as to the reason for the Respondent's failure to produce any evidence to support of Ms Els’ pejorative remarks about the Applicant and / or the quality of his work. In so doing, the primary judge failed to understand the potential significance of that evidence, or rather the lack there of, despite its central relevance to his determinations on the “reason/s” or “intent” which underpinned Ms Els actions and the Respondent's reverse onus liability under s 361 of the FW Act.

j. The primary judge’s conclusions at paragraph [160] with respect to the “reason” which actuated Ms Els’ actions are illogical, incongruent or otherwise inconsistent with his earlier findings at paragraph [156].

k. The primary judge failed to give reasons or the judgement is otherwise is deficient, in that the primary judge failed to make any findings with respect to the “intent” which underpinned Ms Els’ actions.

I. The primary judge’s conclusion at paragraph [160], that the “sole reason” for Ms Els acceding to the Applicant’s request to be removed as the Project Manger [sic] of the TSM project, was because of his lack of competence , is so manifestly unreasonable , that no reasonable person, having proper regard and consideration for the established facts, and the principals [sic] outlined the *Board of Bendigo Regional Institute of Technical Further Education v Barclay* (2012) 248 CLR 500, could, on the balance of probabilities could arrive at the same conclusion.

*Reverse Onus of Proof*

m. The primary judge’s conclusions at paragraphs [161] that the Respondent had successfully rebutted the reverse onus of proof provisions , within the meaning of, or in accordance with s 361 of the FW Act, was so manifestly unreasonable that no reasonable person, having proper regard and consideration for the established facts and the principals [sic] outlined the *Board of Bendigo Regional Institute of Technical Further Education v Barclay* (2012) 248 CLR 500, could, on the balance of probabilities, could arrived at the same conclusion.

*Compensation*

n. The primary judge erred in his calculation of the compensation payable to Applicant under s 545(2)(b) of the FW Act and as sought in paragraphs 157(c)(i) and 157(c)(ii) of the Second Further Further Amended Statement of Claim (“the Statement of Claim”).

o. The primary judge failed to give reasons or the judgement is otherwise deficient in that the primary judge failed to find any interest payable on the amounts of compensation ordered or in the alternative, a declaration that such a payment be included in any lump sum payment in lieu of interest, pursuant to s 76 of the *Federal Circuit Court Act 2009*, and as sought by the Applicant at paragraph 157(d) of the Statement of Claim.

p. The primary judge failed to give reasons or the judgement is otherwise deficient, in that the primary judge failed, pursuant to 545(b) of the FW Act, to make findings with respect to all of the aspects of compensation sought in paragraphs 157(c)(i) of the Statement of Claim, namely the loss particularised at paragraph 156G of the same.

q. The primary judge erred at paragraphs [186], [187] and [223] by arbitrarily, capriciously and / or unreasonably reducing the quantum of future economic loss payable to the Applicant because of his “attitude”. The primary judge did so without adequate explanation and / or evidentiary support.

r. The primary judge erred at paragraphs [216 - 223] by failing expressly to take into account relevant considerations he was bound to take, namely but not limited to;

i. The Respondent's duty of care;

ii. The Respondent's failure take action in relation to the Applicant’s complaints; and

iii. The foreseeability of the injury, based on the Respondent's intimate knowledge of Ms Visman previous inappropriate behaviour towards other colleagues and clients;

*Assessments of Credit*

s. The primary judge erred by departing from implied or otherwise express undertakings and / or indications made at trial, with respect to the manner in which he would view the questionable and disputed absence of evidence to support allegations made against the Applicant by Ms Els. The primary judge did so, without reason and/or without notice of his intentions to deviate and / or affording the Applicant the opportunity to be heard on the matter.

t. The primary judged erred by failing to find the Respondent guilty of deliberately misleading the Court and / or for failing to make any adverse findings against the Respondent for failing to produce evidence, which they claimed existed and would be produced, but which did not appear in any affidavit of documents and which they subsequently and silently abandoned.

u. The primary judge erred by failing to find the Respondent guilty of deliberately misleading the Court and / or for failing to make any adverse findings against the Respondent for advancing knowingly false assertions about when or how they became aware of the Applicant’s qualifications.

v. The primary judge erred by failing to warn Ms Els, Ms Turner and / or Mr Eutick for perjury and / or failing to make adverse findings against them, after advancing obviously fraudulent, false or otherwise misleading testimony under cross-examination or in their affidavits.

w. The primary judge erred by failing to make adverse findings against Ms Visman , for advancing fraudulent and/or misleading testimony under cross-examination or in her affidavit.

x. The primary judge erred at paragraph [168] by asserting that the Applicant never provided the Respondent with a copy of his qualifications and / or that the Respondent never checked his qualifications, without any evidence of the facts alleged or otherwise inferred.

*Bias*

y. Numerous aspects of the primary judge’s decision and /or conduct at trial would raise an apprehension of bias, in the fair-minded observer.

1. Of these grounds, Mr Barnes came to abandon grounds b, c, u, v and y. As to the remaining grounds, Mr Barnes adopted particular groupings of them in his submissions. It is convenient to adopt those same groupings in considering their merits. Before so doing, it is necessary to give an account of some background facts which were not controversial and to identify the persons mentioned in the grounds of appeal and some others.
2. Mr Barnes is a graduate of the Australian Defence Force Academy (ADFA) and, in turn, the Royal Military College, Duntroon (RMC). He was commissioned from the RMC into the Australian Intelligence Corps in the Australian Army in January 2004. He was then aged 22. Following specialist training, he undertook periods of duty overseas over a four year period. He served in Indonesia, Papua New Guinea, Iraq, Kuwait, East Timor and Afghanistan. His duty in Iraq and Afghanistan entailed operational service in warlike operations. In this duty encountering death and distress was “par for the course”.
3. In December 2009, having by then attained the rank of Captain, Mr Barnes resigned from the Army. His discharge took formal effect in March 2010.
4. It is appropriate to interrupt this chronology of Mr Barnes’ career so as to refer in more detail to evidence which the primary judge had before him concerning Mr Barnes’ military service and its impact upon him and the relevance this came to have in his Honour’s credibility assessments.
5. At trial, a number of reports concerning Mr Barnes’ performance in the Army and medical treatment and diagnoses during his military service and thereafter were tendered. Based on these, the primary judge made a number of findings of fact, none of which is disputed. They were certainly open on the evidence tendered at trial. What follows is drawn from those findings.
6. Mr Barnes was a “model soldier and a true asset to the Australian Defence Force from the time he began at ADFA until 2008” (reasons for judgment, [193]). On 26 June 2008, one Colonel Platt (in Exhibit 46) noted of the then Captain Barnes:

... I have counselled him on the need for consistency of performance and judgement, and the reality that all officers are expected at some time to do jobs they don’t want to do. He is intolerant of those he perceives to be unprofessional or incompetent; in this respect he needs to develop his interpersonal relations. To his credit, in the latter part of the reporting period he has taken feedback on his performance well and has modified his actions promptly when required.

1. The service medical record material in evidence disclosed that, on and from 2008, Mr Barnes suffered from psychological distress and symptoms of depression.
2. Considered in conjunction with the other medical evidence which he had before him, notably the evidence of two civilian psychiatrists, Dr Joseph Mathew and Dr Gary Larder, the primary judge observed (reasons for judgment, [195]) of Colonel Platt’s report, “A lot of what Col Platt observes is apposite when considering the behaviour of the applicant in his relationships with other employees of the respondent, especially Ms Visman.” Ms Visman was a person with whom Mr Barnes came to work at Hatch.
3. Having, for the purposes of this appeal, separately reviewed the evidence led at trial, my conclusion is that this observation was, to say the least, reasonably open to the primary judge.
4. This observation formed part of why the primary judge came not to prefer Mr Barnes’ evidence where it differed from that of others. Other bases were Mr Barnes’ failure to disclose to Hatch at the time of his engagement his prior treatment and counselling for a depressive condition, his claim on the *curriculum vitae* which he submitted to Hatch for the purpose of securing employment that he had Master’s Degree in Project Management when he had no such degree (as opposed to pursuing studies for an award of the same) and his failure to discover material relating to his medical treatment and counselling arising from his military service or to disclose the same to Dr Mathew, the psychiatrist whose expert evidence he tendered. This material emerged only late in the course of the trial.
5. The primary judge also had before him in evidence an Army report concerning a highly emotionally charged email which Mr Barnes had written to his former Army superior, the Officer Commanding, 1st Intelligence Company, some six months after his discharge, concerning that officer’s alleged treatment of him while under that officer’s command. Also in evidence was an email, the text of which was similar in tone, which Mr Barnes had sent to Human Resources Manager of Hatch in October 2012 as an immediate sequel to proceedings in the Fair Work Commission (industrial commission) that month relating to the termination of his employment with that company.
6. The primary judge also had the advantage, which I have not had, of observing each of the witnesses in the course of their oral evidence. I do not consider that he has misused that advantage. Giving due weight to that advantage but based on my separate assessment of the evidence, I find his Honour’s reasons for his conclusions as to the relative credibility of the various witnesses to be compelling.
7. From late December 2009 to about February 2011 Mr Barnes worked for Aegis, a private contractor to the American military, in Iraq. His work entailed frequent, “on the ground” project assessments and that he carry a firearm.
8. After the cessation of his contract with Aegis, Mr Barnes took time off for a period. He visited a friend who was doing “military type” work in Southeast Asia and then backpacked around that region. Thereafter, until February 2012, he worked for Anglo-American preparing operational schedules.
9. Mr Barnes left Anglo-American so as to take up the appointment with Hatch. He signed a contract of employment with Hatch on 24 January 2012 but did not take up his appointment until the following month. Mr Barnes’ appointment was to a project manager position in Hatch’s Project Delivery Group (PDG), based in its Brisbane office. The PDG comprised a pool of specialist staff who were deployed by Hatch as occasion required to particular projects being undertaken by it for a client. When so deployed, a PDG project manager came under the supervision of whichever more senior employee(s) of Hatch had responsibility for that particular project. Upon completion of a given project a PDG project manager then became available for redeployment, assuming that Hatch had sufficient other project work on its books. Mr Barnes’ position in the PDG was always a “pool” position.
10. Soon after he commenced employment with Hatch and certainly by March 2012, Mr Barnes was deployed as a project manager on a project known as the Thick Seam Mining Project (“TSM project”) in relation to which, at the time, Hatch was in negations with BHP Billiton.
11. BHP Billiton was an important client of Hatch. Ms Visman was Hatch’s technical manager for operation readiness projects being undertaken for, or negotiated with, BHP Billiton or for that company and one of its joint venturers, eg BMA. The TSM project was one such project. Ms Visman’s responsibilities extended to other BMA projects. At the time, she had responsibility for at least five other such projects.
12. Ms Visman held a more senior position in Hatch than Mr Barnes. While deployed to the TSM project, he reported to her on an almost daily basis. The purpose of the TSM project was to assist BHP Billiton in the setting up of a “wall” of support machinery for an underground mining project.
13. For the whole of the period when Mr Barnes was involved with the TSM project, Hatch was in negotiations with BHP Billiton about that project. Plans were prepared and submitted but BHP Billiton had not signed a purchase order. Unless and until it did that, no agreement existed between BHP Billiton and Hatch as to exactly what work Hatch would undertake and how much it would be paid for that work. I infer from this that, at the time, Hatch was engaged in a process of persuading BHP Billiton that its services would be of value in this particular aspect of the underground mining project.
14. Not unreasonably, the primary judge (reasons for judgment, [20]) considered that Hatch’s then circumstances in relation to the TSM project were important in understanding not only the behaviour of Mr Barnes but also that of others within Hatch who were involved with that project.
15. While deployed to the TSM project, Mr Barnes also reported within Hatch to a Mr Peter Brown and a Mr David Eutick.
16. There were others within Hatch of importance in the proceeding.
17. Throughout 2012, Hatch’s Managing Director, North East Australia was a Ms Jeanne Els, a qualified engineer. In that position, Ms Els was the regional senior representative in Queensland of the Hatch Group’s leadership. She also had oversight of the Hatch Group’s operations in China and Indonesia. Her duties included an overarching responsibility for all work which Hatch performed for BHP Billiton and its joint venture partners. Ms Visman was one of her subordinates.
18. Also throughout 2012, a Mr John Loxton was employed by Hatch as its Project Delivery Group Director for North East Australia. In that role he was responsible for maintaining the required level of expertise in the company’s engineering and project delivery and construction management related disciplines. He was also accountable for the delivery of these services in projects that were undertaken by Hatch. Mr Loxton’s responsibilities extended to client services in Australasia, covering Australia, New Caledonia, Indonesia, India and China. It was Mr Loxton who, on advice from Mr Eutick, made the offer of employment within Hatch’s PDG group to Mr Barnes. It was also Mr Loxton who, after advice from Mr Eutick, made the decision that Mr Barnes’ position was redundant that, that consequentially, his employment should be terminated.
19. In making that decision, Mr Loxton consulted with Hatch’s Human Resources (HR) “lead” (his term – senior responsible officer, I infer) for North East Australia, Ms Helen Turner. One of Ms Turner’s roles was to provide HR support in relation to the PDG group. Another staff member within Hatch’s HR group was Ms Cassandra (“Cassy”) Gardner.
20. On the evidence, Ms Visman, Mr Brown and Mr Eutick were each subordinates of Mr Loxton, as, of course, was Mr Barnes.
21. The persons within BHP Billiton with whom Mr Barnes dealt in relation to the TSM project were Mr Ian Glazebrook and his assistant Ms Natalie Crone.
22. I turn then to Mr Barnes’ grouped and remaining grounds of appeal.

## “Ground 1” – a consolidation of grounds i, s and t

1. As to ground 1, Mr Barnes alleges an error in the primary judge’s credibility preference for the evidence of Ms Els where it differed from his own. He submits that the primary judge “failed to consider the applicability of the rule in *Jones v Dunkel*”. This error, he submits affected the factual conclusions in [118] and [127] of the judgment below.
2. It is necessary to set out these paragraphs in the context in which they appear in the judgment below:

**The events leading up to the request for transfer**

116. The events leading up to the request of the applicant are also very instructive. ...

117. Without going into great detail, the TSM project needed to have a proper resource schedule and an estimate for the project submitted to BHP by 3 August 2012. By 1 August 2012, the working relationship between the applicant and Ms Visman had become dysfunctional.

118. Ms Els, in her supervisory role, was to meet with the TSM team to review the proposal as it was at a point where a decision by BHP would have to be made. Ms Els met with the applicant earlier on 1 August 2012. Both Ms Els and the applicant have given evidence about the content of that meeting. I accept the evidence of Ms Els about the content of this meeting where it conflicts with the evidence of the applicant. This is because of the lack of credibility of the applicant which I will address later in these reasons.

119. The applicant presented Ms Els with his resource schedule and estimate for the project. It became quickly evident to Ms Els that these documents were not workable. After talking to the applicant for over ninety minutes, Ms Els also was of the view that the applicant was not equipped to handle the job as project manager.

120. Ms Els made a decision to “bypass” the applicant and ensure that what needed to be done for the project was going to be done on time. She was of the view that if the applicant was involved in this process, a suitable proposal would not have been made to BHP. That decision was hers and hers alone.

121. By 2 August 2012, Ms Els had formed the view that the applicant should not continue in the role of project manager for the TSM project. Having made that decision, she did not get the opportunity to put that decision into action.

122. At 3:06 PM that day, the applicant wrote the email to Ms Els requesting that he be removed from the position of project manager of TSM. Ms Els did not immediately reply to the applicant, notwithstanding her decision that she had not yet implemented.

123. Instead, she waited till she could consult with Mr Brown. Mr Brown told her that his view was that if the applicant “had asked to be removed, we shouldn’t force him to stay in the position as it might cause more problems”.

124. At 8:46 AM on 3 August 2012, Ms Els wrote to the applicant acceding to his request.

**Is there further prejudice?**

125. The second limb to what the applicant says is the prejudice to his altered position, is that he submits that he had lost the further opportunity to impress the respondent and to demonstrate how well he could work with BHP. Given the history I have just related, it seems difficult to accept such a submission.

126. The applicant had demonstrated to Ms Els that he was simply not suitable for the position as a project manager of TSM. Given the tight deadlines of the project, the applicant would never have been able to demonstrate how well he could work with BHP.

127. I accept the evidence of Ms Els that the work presented to her by the applicant was of a poor standard. If such work had been submitted to BHP, there would be very little to salvage of that relationship. Whilst the applicant submits that the good relationship had saved his position once, I cannot see how it would be able to have been saved a second time.

1. The reference to “*Jones v Dunkel*” is a reference to the High Court case, *Jones v Dunkel* (1959) 101 CLR 298 (*Jones v Dunkel*), in which the inferences which might be drawn based on an unexplained failure to call a witness were discussed. The effect of that discussion was summarised by a Full Court of this court in *Jones v Australian Competition and Consumer Commission* (2010) 189 FCR 390, at [20]:

The decision of the High Court in *Jones v Dunkel* is authority for the proposition that an unexplained refusal by a party to give evidence or to call witnesses or to lead other evidence may, in appropriate circumstances, entitle the tribunal of fact to draw an inference that the uncalled evidence would not have assisted that party’s case.

1. The witness Mr Barnes identifies as the one whose evidence ought not to have been preferred over his, having regard to *Jones v Dunkel*, is Ms Els. He submits that TSM estimate and schedule documents said to have been prepared by him and given to Ms Els at a meeting which he had with her on 1 August 2012 ought to have been exhibited to an affidavit of her evidence in chief made and filed in April 2014. Because they were not exhibited, he submits that her evidence as to what transpired at the meeting ought not to have been preferred over his.
2. In considering the contents of Ms Els’ affidavit it is necessary to highlight that an allegation that contraventions occurred when Hatch accepted Mr Barnes’ request to be transferred from the TSM Project was not made until an amendment of the statement of claim in May 2015, at the commencement of the scheduled trial, over a year after her affidavit had been filed. Ms Els was a relevant decision-maker in relation to the transfer and the events preceding it but, unsurprisingly, her affidavit addressed the allegations in the statement of claim and the contents of Mr Barnes’ filed evidence in chief as at the time when it was made.
3. There is nothing in this “*Jones v Dunkel*” error contention.
4. It was Mr Barnes’ evidence that he prepared particular TSM estimate and schedule documents and presented those documents and others to Ms Els in a meeting on 1 August 2012. Ms Els did not deny that she and Mr Barnes had met on 1 August 2012. In her affidavit she gave her version as to what had occurred at that meeting. She admitted that she was presented with a schedule and an estimate by Mr Barnes. She expressly denied that documents as described by him in his affidavit of evidence were provided to her at that meeting. Mr Barnes had alleged that he presented two estimates. In the course of her cross examination, the documents which Mr Barnes had stated were given to her on 1 August 2012 were put to her. Ms Els denied that, as put to her, these were the documents given on 1 August 2012 or was unable to say that they were. Mr Barnes did not give evidence that he left any documents with Ms Els at the conclusion of the meeting on 1 August 2012. In her affidavit Ms Els stated that she had “no way of knowing” whether the estimate attached to Mr Barnes’ affidavit of evidence is the one he had given to her. She explained in cross examination that it is the responsibility of the person who gives a document to her to save it to Hatch’s document management system. Hatch did not give discovery of the documents in the form Mr Barnes claimed they were given to Ms Els. Ms Barnes sees this as inadequate, even sinister, but that conclusion turns on issues of credit.
5. Ms Els was a witness whose absence from the witness box might well have permitted the drawing of an inference, based on *Jones v Dunkel*, that her evidence would not have assisted Hatch’s case. But she was called. She gave evidence in chief by affidavit. She attended for cross-examination. She was extensively cross-examined. There is no foundation for any error based on *Jones v Dunkel*.
6. The primary judge came to prefer Ms Els’ version of events, including especially the meeting of 1 August 2012, where hers differed from that of Mr Barnes. For reasons which I have already explained, this he was entitled to do. It would do violence to what was stated in *Fox v Percy*, in the excerpt quoted above, to disturb his Honour’s credibility preference.

## “Ground 3” - a consolidation of grounds j, l and m (there is no “ground 2”)

1. This ground focuses upon the conclusions reached by the primary judge at [140] and [143] in relation to his transfer from the TSM project. To give context, [140] to [143] inclusive from the judgment below should be set out:

140. The term “employee’s prejudice” must be looked at holistically. It must cover not just the aspects of remuneration or position but must also include the well-being, both mentally and physically, of the employee and personal considerations of that employee, including the wishes of that employee.

141. If it were otherwise, an employer who, at the request of the employee, moves that employee to a position that entailed less work and the less remuneration, so as to fit in with the lifestyle of that employee, would commit an adverse action and be liable to penalties under the FW Act.

142. In such a case, the employee would be exercising a workplace right because they are, in effect, complaining about the conditions of their employment. The employer has altered the position to one that has less remuneration. Therefore, under the hypothesis proffered by the Applicant in this case, the altered position is to the employee’s prejudice. The hypothesis would then lead to a conclusion that there had been a breach of the FW Act. Such a hypothesis is absurd.

143. In this case, the employer transferred the employee to another position. That position was more vulnerable to redundancy action. The employee, knowing this, requested the transfer. By doing this, the employee relieved himself of major stressors that affected his mental health.

1. Mr Barnes submitted that the “proper nexus of inquiry in the first instance, is not what the employee knew would or could be the consequence of their request, but what it was that actuated the request”. In particular, he submitted that, “this should include consideration and analysis of the freedom, fairness or legitimacy of that choice”.
2. Mr Barnes’ evidence was that he felt forced to remove himself from the TSM project. On his evidence, it was Ms Visman whose competency and professionalism in dealing with BHP Billiton and him were inadequate, leading to an impossible situation for him in relation to his continuance of work on the TSM project. On his version, Hatch left him with no other choice than to make the request, thereby putting himself in a more vulnerable position in relation to redundancy and termination than would otherwise have been the case. He drew an analogy between his circumstance and that of the employee in *British Aircraft Corporation Ltd v Austin* [1978] IRLR 332 (*British Aircraft v Austin*), who had made a workplace health and safety complaint relative to her personal circumstances, which was unactioned, leaving her with no choice other than to resign. That resignation was regarded, in the circumstances, as a constructive dismissal.
3. *British Aircraft v Austin* is one of a line of English authorities, of which, notably, *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666 (in which the former case is referred to with approval) is another, which culminated in the House of Lords in *Malik v Bank of Credit and Commerce International SA (In liquidation)* [1998] AC 20 (*Malik*). In *Malik* it was held that there was to be implied into a contract of employment a term that the employers would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. This is not the position in Australia, where it has been held by the High Court, to the contrary of *Malik*, that no such term was implied by law: *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169. To this extent, Mr Barnes’ reliance on *British Aircraft v Austin* is misconceived. Further, it is to be remembered that the elements of the cause of action which he invoked were wholly defined by the FW Act. Even so, I do accept that, within the confines of that statutory cause of action, a conclusion of “adverse action” as defined by s 342 of the FW Act, constituted by a dismissal, an injury or an alternation of an employee’s position to the prejudice of an employee, is not precluded by a finding that the employee resigned or, as the case may be, requested the action which proved injurious in that employment or requested the alteration which proved prejudicial. In other words and for example, what was in form a resignation might, on particular facts be found in substance to have been a dismissal.
4. It was common ground on the evidence that there were interpersonal difficulties between Mr Barnes and Ms Visman. It was also common ground that Mr Barnes had made complaint about her, notably in a meeting which he had with Ms Els on 1 August 2012.
5. What was not common ground was that Ms Visman’s performance was substandard and Mr Barnes’ was not. By the time Ms Els and Mr Barnes met on 1 August 2012 a critical deadline date, 3 August 2012, had emerged by which Hatch had to submit plans concerning the TSM project to BHP Billiton. Ms Els’ evidence, which the primary judge was entitled to accept, was that, as a result of the meeting she had with Mr Barnes and a review of his work, she formed a personal view that he did not have the skills to assist Hatch to meet this deadline. She had also expressly told Mr Barnes that she would look into the complaint which he made about Ms Visman. That complaint was not ignored. Later on 1 August 2012, Ms Els met with Mr Eutick and told him that he needed to resolve working relationship issues as between Ms Visman and Mr Barnes. Thereafter, Mr Barnes continued to insist to Ms Els, contrary to her professional judgement, that his particular plan was workable. She told him this again on the morning of 2 August 2012 in person in her office, although Mr Barnes insisted that it was workable. Ms Els then told him that Ms Visman and a Mr Mario Blasi would be amending the resourcing plan to make it workable for BHP Billiton. Ms Els formed the view that Mr Barnes ought to be removed from the TSM project and reverted to the PDG group pool but that she ought not to action this before speaking with Mr Brown about this action. In the result, mid-afternoon on 2 August, Mr Barnes requested to be removed from the TSM project. That was before Ms Els had made a final decision on that subject, much less communicated that to him. Even then, she did not immediately accede to this request. Rather, as the primary judge found, again as he was entitled:

123. Instead, she waited till she could consult with Mr Brown. Mr Brown told her that his view was that if [Mr Barnes] “*had asked to be removed, we shouldn’t force him to stay in the position as it might cause more problems*”.

124. At 8:46 AM on 3 August 2012, Ms Els wrote to [Mr Barnes] acceding to his request.

[emphasis added]

1. Ms Els’ evidence was also that, via the efforts of Ms Visman and Mr Blasi, a workable plan had been submitted to BHP Billiton by the deadline.
2. In accepting Ms Els’ evidence, the primary judge accepted that Mr Barnes’ work was substandard and that the decision to accept his transfer request was hers and hers alone (reasons for judgment, [120] and [127]).
3. The findings which the primary judge made as to this aspect of the case, which were based on relative credibility as between Mr Barnes and, in particular, Ms Els, did not admit of a conclusion that the actions of Hatch had placed him in a position where he was forced to request a transfer because of unactioned complaints. He had a view as to the adequacy of his standard of work which was not shared by Ms Els. Later in his reasons for judgment, referring to Colonel Platt’s observation of the then Captain Barnes (quoted above), the primary judge expressed his view that:

195. A lot of what Col Platt observes is apposite when considering the behaviour of the Applicant in his relationships with other employees of the respondent, especially Ms Visman.

1. In requesting the transfer, Mr Barnes merely precipitated an event that was going in any event to occur on competency grounds and those alone. The parallel drawn by the primary judge in relation to his earlier behaviour was open on the evidence. Be this as it may, Mr Barnes was not forced into a position in which he had no choice other than to request the transfer.
2. Even so, it is possible to regard the acceptance of his request as an “alteration” of his position. Hatch submitted to the contrary, because his was always a “pool” position in the PDG. This is true but he did have a particular deployment from that pool and that deployment was altered by the acceptance of his transfer request. It is implicit in the conclusions reached by the primary judge that his Honour accepted this. His conclusion was that the transfer was not consequentially prejudicial.
3. The primary judge expressed the view (reasons for judgment, [141]) that the mere acceptance of a request by an employee for a transfer to a position that entailed less work and less remuneration did not constitute adverse action. He accepted that Mr Barnes’ reversion to the unassigned PDG pool made him more vulnerable to redundancy. Earlier in his reasons for judgment ([114] and [115]), the primary judge found:

114. To my mind, the applicant was still vulnerable to being terminated on the basis of redundancy even if he had stayed at the TSM project. However, it would seem to me, based on the evidence before me that such redundancy at the TSM project, would not have occurred before there was a decision by BHP as to whether they would proceed with the project.

115. In this way, it may be said that the position as TSM project manager was more “secure” than returning to the PDG group. As to whether this fact automatically means that the Applicant was prejudiced is not clear.

1. Accepting a pool employee’s request for a transfer from a deployed task back to an assignment pool with the consequence that the employee is rendered more vulnerable to redundancy is, in my view, capable of being regarded as both an alteration of that employee’s position and one to his or her prejudice. By definition (s 342), this constitutes “adverse action”. The FW Act does not absolutely prohibit the taking of adverse action by an employer against an employee. Instead and materially for the present case, the protection is specified by s 340 in this way:

**Protection**

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) …

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

1. What is prohibited is the taking of adverse action for a particular reason nominated in the FW Act, materially one or the other or each of those in ss 340(1)(a)(ii), 340(1)(a)(iii) or 340(1)(b) of that Act. The question is always one of why the action was taken: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 (*Board of Bendigo Regional Institute of Technical and Further Education v Barclay*). That question is one of fact and looks to the subjective intention of the relevant employer decision-maker(s).
2. Thus, where an employee voluntarily requests a transfer to a lesser paid position or one more vulnerable to redundancy and the employer accedes to this, this does constitute the taking of adverse action. But if the reason for this is nothing more than honouring the employee’s voluntary request, there is no transgression of any statutory protection.
3. In the present case, the primary judge posed himself the further question that, even if he were incorrect about there having been no adverse action constituted by the acceptance of the transfer request and consequential transfer, why had that occurred? The answer which he gave to this, based on his permissible assessment of Ms Els’ credibility, was that she had accepted the request for no reason other than a genuine assessment of Mr Barnes’ competency and the urgent need to submit a workable plan to BHP Billiton. Ms Els was the relevant decision-maker. That being so, the statutory presumption (s 361) was displaced, because Hatch had discharged the correlative onus. Acceptance of her evidence necessarily meant that the transfer was not occasioned by any of Mr Barnes’ asserted workplace rights. Contrary to Mr Barnes’ contentions, there is no deficiency in his Honour’s expression of why he preferred her evidence over his.
4. The same consequences flow in relation to the termination of Mr Barnes’ employment, having regard to the acceptance by the primary judge, again as he was entitled, of the evidence of Mr Loxton. Mr Loxton was the relevant decision-maker. His evidence was that the promising economic conditions for Hatch at the start of 2012 had, by mid-2012, very much changed for the worse. Hatch could no longer retain a PDG pool of its then size, which led to redundancies, including that of Mr Barnes. That did not constitute a reason for dismissal prohibited by the FW Act. I did not understand Mr Barnes to challenge his Honour’s acceptance of Mr Loxton’s evidence and its consequence. In any event, his reasons for preferring Mr Loxton’s evidence, including where it differed from that of Mr Barnes are sound. None of the reasons mentioned in *Fox v Percy* for disturbing a credibility influenced conclusion are made out.

## “Ground 4” – apparently a grouping of grounds i, l and m

1. In respect of what he termed:

“Ground 4”, Mr Barnes submitted that the primary judge “erred in law, applied the wrong test, the wrong principal [sic] or considered the wrong question when determining the Respondent’s reasons and the rebutted the presumption set out in [section 361 of the *Fair Work Act 2009*].

He did not expressly relate this to particular paragraphs in his notice of appeal but it appears to me that it at least relates to grounds i, l and m.

1. I have already expressed the view, which differs from that of the primary judge, that the acceptance of a request for transfer the effect of which was to revert an employee to an assignment pool in circumstances which made the employee more vulnerable to redundancy could constitute adverse action. However, the reasons for judgment of the primary judge did not stop at this point. Both as to the transfer and the termination his Honour correctly posed for himself why this had occurred. He had before him the evidence of the relevant decision-makers, Ms Els and Mr Loxton. He accepted their evidence. Acceptance of their evidence necessarily meant none of the adverse action taken in respect of Mr Barnes had been for a prohibited reason. This entailed an application on the facts of the construction of s 361 of the FW Act mandated by *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*. Hatch submitted as much. There is no merit in “ground 4”.

# “Ground 5” – “the appellant’s mental health”

1. Mr Barnes did not expressly in his submissions associate what he termed “ground 5” with any particular ground in his notice of appeal. Mr Barnes submitted, accurately, that at [132], [143], [221] and [222] of his reasons for judgment, the primary judge had found that he was in a “better position mentally by the cessation of the working relationship” between him and Ms Visman and that “removal of the [Appellant] from the TSM project was to the benefit of the [Appellant] rather than his prejudice” and that the primary judge had concluded that he “could not attribute any contribution to [Mr Barnes’] mental state by the removal from the TSM Project”. One of these paragraphs, [221], is cited in ground g in the notice of appeal but the tenor of Mr Barnes submissions under “ground 5” is directed to an alleged absence of evidentiary foundation for not awarding compensation based on the transfer, as opposed to the termination.
2. It must first be said that the assessment of damages made by the primary judge was made on the footing that his conclusion that Mr Barnes had failed to establish the statutory cause of action pleaded was wrong. I do not consider that Mr Barnes has established that this conclusion as to an absence of liability was erroneous.
3. The challenged findings in relation to the transfer from the TSM project do nothing more than reflect the expert medical opinion and lay evidence. Dr Mathew had originally regarded this transfer as a contributor to Mr Barnes’ mental illness. This opinion was expressed without the benefit of the prior history of Mr Barnes’ earlier diagnosis, treatment and counselling, because Mr Barnes had withheld that from him. That information came to Dr Mathew late in the proceedings on the initiative of Hatch. That occasioned a change in his opinion, which particularly included not attributing any contribution to the transfer itself. The primary judge offered what is a fair summary of Dr Mathew’s original evidence and that change in his reasons for judgment:

202. Dr Mathew originally provided a report that opined that the applicant’s experiences with the Respondent were wholly responsible for the psychiatric injury that prevents him from currently working. In that first report he sought to assign weightings to particular features of the employment.

203. Dr Mathew originally estimated that the relationship the applicant had with Ms Visman, the relationship the applicant had with management and the reaction of removal from the TSM project equally contributed to 50% of his mental condition (that is, 16.7% each). The other 50% contribution was from the reaction to the end of his employment with the respondent.

204. At the time of this report, Dr Mathew had not been provided with the collateral material I have just detailed. On 27 November 2015, Dr Mathew was provided with all of the collateral material. On 1 December 2015, Dr Mathew was asked to provide a further report. He provided that report and gave evidence later that same day.

205. Dr Mathew changed his opinion quite markedly once he had been given that collateral material. He is now of the opinion that the applicant had a depressive illness when he started with the respondent. He said that there were three factors that worsened the illness.

206. The first factor was the cumulative effect of the four aspects spoken of in paragraph 203 above.

207. The second factor was the criminal proceedings of October 2013 that followed the sending of the email spoken of in paragraph 200 above.

208. The third factor is the unresolved issues that the applicant has with the army.

209. Dr Mathew cannot give a percentage contribution as he could at the time of his first report as he now says that the whole picture of the applicant is not fully known.

1. The email referred to in the passage quoted (the reference to [200]) is the email sent by Mr Barnes as a sequel to the industrial commission proceeding mentioned above.
2. The primary judge also offered an accurate summary of the effect of the opinions of Dr Larder, the other psychiatrist who gave evidence:

211. Dr Larder is of the opinion that the applicant has understated his difficulties and stresses with the military. He said that the applicant has fixated upon what Ms Visman did to him and what the respondent didn’t do in response.

212. He says that the applicant didn’t display symptoms of his illness during the time that he was working for the respondent because he was able to “mask and cover up his illness, put his best foot forward and just get on with it”. However, the applicant was not getting the treatment that he needed.

213. Dr Larder is of the opinion that the termination of employment “tipped him (the applicant) over the edge”. He said that the illness may have been held back by the proverbial “dam wall” that starts to crack until it finally breaks. Dr Larder said that the applicant can become extremely enraged when slighted.

214. Dr Larder says that the applicant has become fixated with the idea that it was what occurred to him during his employment with the respondent that is the cause of his current illness. The applicant has excluded any other possibilities for his illness.

215. Dr Larder says that the applicant has not displayed insight into the fact that he is very sick and has been for a long time. He also says that the applicant needs to embrace recommendations for his treatment. Dr Larder is of the opinion until these matters are resolved, the Applicant will not get better.

1. As Dr Mathew came to revise his opinion, it was accurate for the primary judge to hold that his opinion and that of Dr Larder concerning Mr Barnes were “very similar”. Neither attributed any contribution to Mr Barnes’ depressive condition to his removal from the TSM project. Read in context, all that his Honour meant by his reference (notably in [221]), “in hindsight, I am of the view that the removal of the applicant from the TSM project was to the benefit of the applicant rather than his prejudice” is that this removed a stressor in the form of an association with Ms Visman that was dysfunctional. That was a conclusion open on the lay and medical evidence. As Hatch correctly submitted, “a fair reading of the evidence of [Mr Barnes], Mr Brown, Mr Eutick, Dr Mathew and Dr Larder all confirm that the working relationship between [Mr Barnes] and Ms Visman caused [him] difficulties”.
2. In any event, even if, in the hypothetical situation in which compensation fell for assessment, one regards the termination for a prohibited reason as a sequel to a transfer for a prohibited reason found in a failure to act on a complaint as to Ms Visman or in the making of a complaint concerning her, there was no evidence of a contribution separate from the effect of the termination itself. Whatever contribution it may have made had there been no termination was subsumed by the termination.
3. There is no merit in “ground 5”.

# “Ground 6(i) - The appellant’s complaints”

1. Though not expressly stated by Mr Barnes, ground 6(i) is apparently related to ground a in his notice of appeal. Under this heading, Mr Barnes submitted that the primary judge had not adequately specified his reasons or reached a conclusion on all of the complaints to Hatch which he alleged he had made. As to this, it might first be said that it was not the task of the primary judge in a claim for compensation like the present to investigate and reach a conclusion on the merits of any of the complaints. His task was to decide whether a complaint constituted the exercise of a workplace right, whether adverse action had been taken against Mr Barnes by reason of the exercise of that right and, if so, to assess compensation.
2. Hatch conceded that three of the alleged complaints were made and constituted the exercise of a workplace right (complaints numbered 5, 10 and 11). The primary judge accepted that two others, numbers 7 and 12 constituted the exercise of a workplace right. Though he had reservations about Mr Barnes’ genuineness and whether each of the thirteen alleged complaints constituted the exercise of a workplace right, his Honour set each of them out in detail. He did this (reasons for judgment, [76]), “so as to put into a proper context the manner in which he exercised that workplace right”. His Honour further accepted (reasons for judgment, [79]) that Mr Barnes “genuinely believed that he was being ‘side lined’ and ‘disrespected’ by Ms Visman and he believed that this was something that [Hatch] ought to have, at the very least, properly investigated”. This was the essence of Mr Barnes’ complaints.
3. Mr Barnes alleged that the primary judge ought to have reached a conclusion about his second, fourth, sixth, eighth and ninth complaints. He did. He set the complaints out in detail. As to their circumstances, it was only where in some respect Mr Barnes’ evidence differed from that of others that he rejected Mr Barnes’ evidence. He did not reach a conclusion as to whether each and every complaint had merit. He was not required to do this. His Honour did consider why the transfer and the termination occurred. He was required to do this. He found that this was not because of any complaint. He did this after, relevantly, Ms Els and Mr Loxton were cross-examined as to why they had made their respective decisions. Mr Barnes has failed to establish a basis for impeaching his Honour’s resultant conclusions.
4. There is no merit in ground 6(i).

# “Ground 6(ii) & 6(iii)” – “The effectiveness of ECT / Attitude”

1. Though not expressly stated by Mr Barnes, these facts of his “ground 6” are apparently a reference to ground g in the notice of appeal. His submissions under this heading took as their starting point [184] to [187] of the reasons for judgment of the primary judge:

184. It is well known, within psychiatric circles, that ECT is an effective treatment against depressive illnesses. It is not known exactly why this treatment is so effective, but its use is not uncommon.

185. It later emerged in evidence, that the treating team of the applicant had raised the question of ECT with the Applicant in 2014. The applicant chose not to undertake this treatment. In evidence before me, the applicant said that he was worried about the procedure occurring under a general anaesthetic and that there may be some subsequent memory loss.

186. The applicant is not getting better. However, it seems to me that, with the change of attitude, there could be some progress in the mental health of the Applicant.

187. For that reason, I am of the view that I ought limit the future economic loss to loss that will occur up until December 2018. Though it is not an orthodox approach, I will look at the period of future economic loss as commencing at the expiration of the period I have allowed for past economic loss.

1. Both in Mr Barnes’ submissions and in the reasons for judgment below, the abbreviation, “ECT” is a reference to electro-convulsive therapy.
2. Mr Barnes submitted that the findings in these paragraphs of the reasons for judgment were arbitrary and insufficiently reasoned.
3. The evidence at trial included the clinical notes of “Healthscope” (Exhibit 63) in relation to treatment of Mr Barnes in 2014. These record that the option of his undertaking ECT was raised with him and that he was adamant that he did not wish to undertake this.
4. In an apparent reference to the raising of this treatment option, Dr Larder opined in his report (p 15):

If I was treating [The Appellant] I would have strongly recommended he had a course of ECT in April 2014 when he was an inpatient in the Melbourne Clinic [as did the treating team at the time].

His presentation with a severe depressive illness has deteriorated since that time. I think that [The Appellant] needs a course of ECT now.

1. There was ample evidence before the primary judge that Mr Barnes was, “Not getting any better”. The evidence from Healthscope and Dr Larder provided a foundation for the primary judge’s finding that the option of ECT had been raised with him. It also provided a foundation for a finding that ECT was regarded as an appropriate treatment by psychiatrists for his particular condition. Even if not expressly stated, it also admitted of the inference that the treatment was considered appropriate because it was regarded by psychiatrists as effective. The evidence did not go so far as to warrant the statement that this was “well known within psychiatric circles” (this, with respect, appears to me to have been based on his Honour’s experience of evidence in other cases, not that in the present). Even so, the evidence at trial did admit of a conclusion that the advocacy of such treatment was not idiosyncratic to Dr Larder.
2. The Healthscope evidence and Mr Barnes’ evidence, in combination also admitted of the finding that Mr Barnes had chosen not to undertake ECT, because “he was worried about the procedure occurring under a general anaesthetic and that there may be some subsequent memory loss”. His Honour did not explore, and there was no evidence, that this was an unreasonable choice. Dr Larder’s evidence was that he would have “strongly recommended” such treatment. That it was raised more than once during the course of Mr Barnes’ treatment by Healthscope is consistent with such a strength of recommendation but not that its refusal was unreasonable.
3. The fixing of a limit until December 2018 in the assessment of compensation was based on his Honour’s view that, with a change in Mr Barnes’ attitude to ECT, his condition would improve by then. With respect, he had no evidence that his attitude would change. Nor did he address whether the refusal to date was reasonable. That appears to be a reflection of the evidence not addressing this. The position really was one of an entrenched depressive illness which had persisted for years and was likely to continue into the indefinite future without ECT.
4. The primary judge accepted Dr Larder’s opinion that Mr Barnes’ experience of redundancy and related termination was a breach in a “dam wall” in which cracks were, prior to employment with Hatch, evident. To this extent (contrary to Mr Barnes’ “ground 7”), he did act on what Mr Barnes (and his Honour) termed an “egg shell skull” principle. He also though accepted Dr Mathew’s revised opinion, which held that the reasons for Mr Barnes’ present, severe depressive illness were multi-factorial, with the termination by Hatch being but one with discrete contributory percentages not being able to be given. In the result, his Honour fixed 20% as the contribution which the termination had made to Mr Barnes’ loss of future earning capacity.
5. Subject to what follows, there was no exploration in evidence or in the judgment below as to the circumstance in which Mr Barnes would have found himself in the period to judgment or into the future in terms of earning capacity, had he not been terminated by Hatch. It was not explored as to whether, given that he did have a depressive illness before that employment, it was likely that any demanding, stressful employment involving working to others with tight deadlines would have worsened his condition. There were certainly indications on the evidence, dating as far back as his period of military duty in 2008, that this was at least a possibility, if not more so but it was not expressly explored.
6. The primary judge separately assessed past economic loss only to December 2012. He assessed this figure to be $55,000.00. This was based on the proposition, open on the evidence, that, given the diminished consultancy work available to Hatch and in prospect, Mr Barnes would in any event have been made redundant by December 2012. His Honour did not then proceed to consider what Mr Barnes’ position might have been to judgment. There was no consideration, because there was no evidence led, as to whether prevailing economic conditions thereafter would have made it difficult to secure continuous employment at all or at a particular level after 2012. Instead, the primary judge amalgamated the period from December 2012 to judgment with his consideration of loss of future earning capacity.

# “Ground 6(iv)” – “Academic Sponsorship”

1. This ground also seemingly relates to the ground in the notice of appeal as to adequacy of reasons. Mr Barnes correctly submitted that his compensation claim included a claim in respect of the loss of sponsorship by Hatch of his study towards a “Masters of Systems Engineering” [sic]. There was evidence of such sponsorship but not of its value. Mr Barnes submitted that this had not been addressed by the primary judge in his reasons for judgment. This is true but then again his Honour had no evidence upon which to assess compensation under this head. In these circumstances, it is an error of omission without consequence.

## “Ground 6(v)” – “Penalty Interest”

1. It emerges from his submissions that what Mr Barnes terms “penalty interest” is interest up to judgment. The court had power to award such interest (s 76, *Federal Circuit Court of Australia Act 1999* (Cth)) and it had been claimed. There was no reason not to allow interest at least on the figure of $55,000.00. That may not have been the full measure of economic loss to the date of judgment. Mr Barnes was entitled to interest on that full measure.
2. In short, though Mr Barnes’ criticisms are not wholly warranted, the assessment of compensation did miscarry in relation to loss of earning capacity, past and future. Were it necessary, and it is not, I would remit the matter to the Federal Circuit Court for a re-trial, limited to an assessment of compensation.

## “Ground 8” - “Fraud”

1. In her affidavit evidence in chief ([34]), Ms Els stated that Mr Barnes had incorrectly budgeted for a full time project manager in the TSM Estimate presented to her on 1 August 2012. Her evidence was that a part time manager only was needed and that the project could not afford a full time manager. Mr Barnes submitted that I ought to conclude that this was a lie and, moreover, a lie to which Hatch’s counsel and solicitors were parties.
2. There is no substance in this submission. It proceeds from a false premise. The nature of that is evident, as Hatch correctly submitted, in an exchange which occurred during the course of Ms Els’ cross-examination (transcript of 22 September 2015, p. 44):

MR WATSON: Would you turn to paragraph 34 of your affidavit? Now, in that paragraph you’re saying that [the Appellant] presented to you a resource schedule and an estimate for the project?---Yes.

Can the witness be shown exhibit 5?

HIS HONOUR: 5?

MR WATSON: 5.

HIS HONOUR: Yes, 5 or 3 because that’s – Ms Ells [sic], you will see 5 is three actual matters. They’re 5A, 5B and 5C okay and there’s differences in each of them. Were they – were – anyway I will let Mr - - -

MR WATSON: Thank you, your Honour. Would you have a look at those documents, please, Ms Ells, and tell the court, if you’re able, whether or not you’ve seen those documents before?---I can’t definitively say these are the documents that I’ve seen before.

Well, have you seen any of them before?---[The Appellant] presented an estimate sheet to me - - -

Yes?--- - - - in the meeting. **I cannot definitively say whether any of these were the sheet that he presented.**

[Emphasis added]

1. The point is that, as the portion emphasised reveals, Ms Els was not able to state that the documents shown to her was the one to which she referred in her affidavit (at [34]). In the absence of a concession by her, it was necessary for Mr Barnes’ evidence about these documents to be accepted. It was not. For reasons to which I have already referred, the primary judge did not accept Mr Barnes as a credible witness where his evidence differed from that of others.
2. An objection was taken about the documents which were being put to Ms Els. In response, Mr Barnes’ counsel stated that if he could be shown these then he may come back to it. There matters rested at the trial.
3. By the time of Ms Els’ cross-examination, the solicitors acting for Mr Barnes had already received (on 26 July 2015) from the solicitors for Hatch an email from Mr Barnes to Ms Visman sent on 1 August 2012 at 11.19am. An attachment to this email was an estimate showing full time project management hours for the 6 month TSM Project. It provided for a total of 955 hours for project management at the time when the project was required to be completed by February 2013 (a six month period). Yet there was other evidence that the TSM project was one expected to be completed by December 2012. What, if anything, was to be made of this email and its attachment, including in cross-examination of Ms Els, were matters for Mr Barnes and more particularly those acting for him. His counsel did not respond to Ms Els or to the objection that he was putting to documents attached to the email disclosed on 26 July 2015. I have already referred to Mr Els’ evidence that it was for Mr Barnes to save particular documents to Hatch’s document management system. The absence in discovery of the version of the document Mr Barnes claimed to have put is explicable by it not having been saved in that form.
4. Mr Barnes’ submissions proceed from the understandable but wholly subjective premise that he was a witness of truth and that the primary judge was obliged to accept this. However, he has not demonstrated why, in the exercise of appellate jurisdiction, I am entitled to disturb a credibility based finding in relation to Ms Els’ evidence compared with his own.
5. For these reasons, there is no merit in Mr Barnes’ challenge to the dismissal of his claim.

# Costs

1. On 18 December 2015, the primary judge reserved until 5 February 2016 at 10.00 am the hearing of any application in respect of costs. An application by Hatch for an order for costs was heard and determined that day.
2. The background to that hearing was the subject of agreement between the parties. The following is taken from those agreed facts.
3. On 23 December 2015, the then solicitors for Mr Barnes sent correspondence to the Associate to the primary judge, requesting the matter be listed for a directions hearing in the week commencing 11 January 2016 and advising amongst other things, that Mr Barnes would require a reasonable period of time to respond to any application for costs brought by Hatch. Hatch's solicitors were copied into this correspondence.
4. On 11 January 2015, the Associate sent correspondence to Mr Barnes’ solicitors and the solicitors for Hatch, advising that his Honour was unavailable to hear the parties before 5 February 2016 and further stating that “As such any directions for costs applications will have to be made on 5 February 2016 unless the parties are able to agree on directions prior to this date”. I interpolate this, this latter observation was contrary to the order of 18 December 2015, which did not envisage that all that would occur on 5 February 2016 was a directions hearing, as opposed to the substantive hearing of any costs application. Nonetheless, it did create a procedural expectation.
5. On each of 23 December 2015, 14 and 29 January 2016, Mr Barnes’ solicitors sent correspondence to Hatch’s solicitors advising that Mr Barnes would require a reasonable period of time to respond to any application for costs bought by Hatch.
6. On 14 January 2016 at 10.25 am, Mr Barnes’ solicitors sent further correspondence to Hatch’s solicitors. Among other things, this correspondence proposed the following timetable with respect to any application for costs that Hatch might make:

(a) Filing of application by Hatch by 12 February 2016;

(b) Filing of any affidavit material in support of the application and outline of submissions by 26 February 2016;

(c) Filing of any affidavit material in opposition and an outline of submissions by 11 March 2016;

(d) Listing for hearing of the application for the first available date after 18 March 2016.

1. On 1 February 2016, Hatch’s solicitors filed an application with respect to costs. An unsealed copy of this was served via email on Mr Barnes’ solicitors for the Appellant at 3.53 pm the same day.
2. On 2 February 2016, Hatch’s solicitors filed an affidavit of Ms Elizabeth Anne Milner in support of its application for costs. On 2 February 2016, at 11.13 am, Hatch’s solicitors served, via email, an unsealed copy of this affidavit on Mr Barnes’ solicitors.
3. On 2 February 2016 at 5.38 pm, Hatch’s solicitors sent an email to Mr Barnes’ solicitors proposing a timetable of directions for the resolution of the costs application to the following effect:

(a) Mr Barnes file and serve any material to be relied upon in response to Hatch’s application for costs by 9 February 2016;

(b) The parties file and serve any submissions with respect to the costs issues by 16 February 2016;

(c) The matter be listed for any oral argument at a time suitable to the Court.

1. On 4 February 2016 at 3.18 pm, the parties reached agreement as to the appropriate timetable for the progression of the hearing on costs. The effect of that agreement was that:

(a) Mr Barnes was to file and serve any material to be relied upon in response to Hatch’s Application by 4:00pm on 19 February 2016;

(b) Hatch was to file and serve written submissions in support of its Application by 4:00pm on 26 February 2016;

(c) Mr Barnes was to file and serve written submissions in response by 4:00 pm on 4 March 2016; and

(d) The matter was to be listed for oral argument at a time suitable to the court.

1. On 4 February 2016 at 4.15 pm, Mr Barnes’ solicitors sent an e-mail to the Associate, advising that the parties had reached consent on proposed orders. Hatch's solicitors were copied into this correspondence.
2. On 4 February 2016 at 4.49 pm, Mr Barnes’ solicitors sent an e-mail to the Associate enclosing the draft consent order agreed by the parties. Hatch's solicitors were copied into this correspondence.
3. On 5 February 2016 at 8.01 am, the Associate sent an e-mail to the solicitors for both parties, advising that the court required a signed consent order before His Honour could consider making such orders.
4. On 5 February 2016 at 8.17 am Hatch’s solicitors emailed a signed consent order to Mr Barnes’ solicitors.
5. On 5 February 2016 at 8.57 am, Mr Barnes’ solicitors sent an e-mail to the Associate enclosing signed consent orders in the terms already outlined.
6. On 5 February 2016 at 9.06 am, the Associate sent an e-mail to the solicitors for both parties, advising that the parties were required to appear at the hearing listed for 10:00 am that morning.
7. At 10.00 am on 5 February 2016, the primary judge commenced a hearing of Hatch’s costs application. At 10.09 am, this hearing was temporarily adjourned. It recommenced at 11.38 am that day.
8. At the hearing on 5 February 2016, both parties requested the primary judge to make directions in accordance with the signed consent order that had been emailed to the court.
9. Mr Barnes did not attend the hearing on 5 February 2016 in person. He and his then solicitors intended to prepare affidavits of reply with respect to costs, as provided for in the proposed directions agreed by the parties. Mr Barnes’ solicitors were unable to obtain a sworn affidavit from him for the hearing on 5 February 2016. They provided only a draft of an affidavit by him to the court.
10. Hatch accepted that Mr Barnes and his then solicitors were taken by surprise when the primary judge proceeded to hear the costs application on 5 February 2016. Nonetheless, they submitted that the order made was one reasonably open to his Honour.
11. The Federal Circuit Court’s power to make an order for costs in respect of Mr Barnes’ application was not unqualified. Materially, the effect of s 570(1) and s 570(2)(b) of the FW Act was that an order for costs could be made only if the court were satisfied that Mr Barnes’ unreasonable act or omission caused Hatch to incur the costs sought. If the court were so satisfied, it fell to the court to exercise a discretion as to whether to award costs and, if so, the amount of those costs. The relevant principle, as the parties put to the primary judge and as his Honour accepted remained that stated by the Full Court in *Construction, Forestry, Mining and Energy Union v Clarke* (2008) 170 FCR 574 at [28] in respect of the analogue of these provisions in a predecessor to the FW Act.
12. It is not necessary to set out that principle, much less is it desirable to explore whether the particular application of it by his Honour was reasonably open. That is because, in the circumstances which had transpired after 18 December 2015, as set out above, to proceed to hear the application substantively on 5 February 2016 entailed, with all due respect to the primary judge, a denial of procedural fairness to Mr Barnes (or, which is no different, a breach of the rules of natural justice). His submission to this effect ought to be upheld.
13. In respect of the application for costs no less than in respect of the substantive, alleged breach of statutory protection compensation application, the Federal Circuit Court was obliged to afford each of the parties a reasonable opportunity to be heard. The precise content of that obligation was not fixed but one inherently related to the circumstances of the particular case. In the circumstances of the present case, the parties, through no fault of their own but commencing with an error made by the Associate to the primary judge had each come to a consensual position as to how Hatch’s costs application ought to proceed. It was that position which was jointly promoted to the primary judge. In that the parties were following the expectation as to procedure already mentioned. This expectation and their agreement governed their respective states of preparation. The primary judge was, as his reasons for judgment of 5 February 2016 reveal, aware of the error which his Associate had made.
14. *Shrestha v Migration Review Tribunal* (2015) 229 FCR 301 also concerned an appeal from orders made by a Federal Circuit Court judge who had proceeded to a hearing on an issue of his own motion contrary to a consensual position of the parties put to him. In that case and by reference to prior pertinent authority, the Full Court summarised the procedural fairness obligation which attends an exercise of judicial power. The court stated:

37. It is axiomatic that the primary judge was obliged to accord procedural fairness to the appellant: *Taylor v Taylor* (1979) 143 CLR 1; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350 per Mason J; *Allesch v Maunz* (2000) 203 CLR 172 at 184-185 per Kirby J

....

38. It is equally axiomatic that the requirements of procedural fairness include the provision of a reasonable opportunity for the appellant to present evidence and to make submissions: *Cameron v Cole* (1944) 68 CLR 571 at 589 per Rich J; *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396 per Dixon and Webb JJ.

1. In reserving 5 February 2016 as the date for the hearing of any costs application, the primary judge had not made any consequential directions as to by when any such application had to be filed or related, consequential evidence and submissions for each of the parties were to be filed. After 18 December 2015, an attempt was made to obtain such orders but the parties were left with the impression by the Associate that this could not be done until 5 February 2016 but that they might by agreement secure directions which would see a later hearing. In other words, they were left with the impression that 5 February 2016 could alternatively be a date for interlocutory directions, not a substantive costs hearing. It is obvious that they conducted themselves accordingly.
2. As mentioned, Hatch conceded that when his Honour did not make the agreed directions but instead proceeded with a substantive costs hearing this took Mr Barnes and his then solicitors by surprise. Hatch failed to appreciate in its submissions the procedural fairness ramification of this concession in the agreed circumstances of what had transpired between 18 December 2015 and 5 February 2016 and on the latter day.
3. The error made by his Associate and the subsequent position reached by the parties may well have been vexing to the primary judge but, with respect, judicial vexation is no warrant for a denial of procedural fairness. In these circumstances, which notably included a consensual appreciation by each of the parties that each ought to have an opportunity to put on evidence relevant to whether there was occasion under s 570 of the FW Act to make a costs order, it was, with respect, no answer for his Honour to record (reasons for judgment, [5]), “if I had given the adjournment [I sincerely doubt] that the submissions that they made before me today could have been any better or more fulsome”. Those submissions were made in denial of a mutually apprehended need for costs submissions to be made after such factual supplementation by affidavit as each might be advised. Moreover, those submissions on the costs question which were made were made at very short notice and on a day when neither party was expecting to have to make them. Events had overtaken the case management order made on 18 December 2015 and it was necessary for the court to yield to the procedural fairness consequence of those events. That was so even though it may readily be accepted that it was desirable that any costs application be heard and determined as soon as possible to the date on which the judgment of 18 December 2015 was delivered.
4. In *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [54] French CJ, stated:

Procedural fairness or natural justice lies at the heart of the judicial function. In the federal constitutional context, it is an incident of the judicial power exercised pursuant to Ch III of the *Constitution*. It requires that a court be and appear to be impartial, and provide each party to proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it. According to the circumstances, the content of the requirements of procedural fairness may vary.

In the circumstances of the present case, Mr Barnes was denied an opportunity to answer, by evidence and argument, the case put against him in respect of costs. There may well have been reasons, not limited to the entrenchment of his depressive illness, why his case was conducted the way it was.

1. As Gageler J observed in *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [186]:

Unfairness in the procedure of a court saps confidence in the judicial process and undermines the integrity of the court as an institution that exists for the administration of justice.

1. It does not necessarily follow from the foregoing that the question as to costs must be heard by a different judge. As the trial judge and before then latterly the docket judge, the primary judge was best placed to appreciate the issues bearing on costs. The views reached by his Honour were reached upon a misconception that it was appropriate to proceed to hear the costs application. It does not follow that this error having been corrected, he will not bring an independent mind to bear upon such submissions as the parties make upon such evidence as they choose to adduce.
2. The appeal against the costs order of 5 February should be allowed and the orders made that day set aside. The question as to costs ought to be remitted to the Federal Circuit Court for rehearing in accordance with such further interlocutory directions as to that court may make.
3. I conclude with these observations, based on my review of the evidence and my experience in hearing the appeal.
4. The primary judge was entitled to characterise Mr Barnes’ falsehood on the pre-employment CV he submitted to Hatch as tantamount to fraud (reasons for judgment, [168]). Equally, when one looks through the whole of the evidence concerning his military service and the medical evidence, it is possible to explain that act as a manifestation of a man attempting to retain by employment his self-respect and to overcome the insidious effects of a depressive condition to which his military service was at least a contributor. A feature of those insidious effects is a lack of insight into his condition. The email which he sent to his former Officer Commanding and that sent following the industrial commission proceeding could equally be viewed, on the medical evidence, as manifestations of his condition.
5. In the course of Mr Barnes’ oral submissions on the appeal, it proved necessary at one stage for the case to be stood down so as to allow him to compose himself. His behaviour was never intentionally discourteous, quite the reverse, but it was consistent with the severity of the condition mentioned by Dr Mathew and by Dr Lander. The nature of judicial power is that it is necessarily responsive to cases in which a court’s jurisdiction is invoked and limited to the remedies available in respect of that invocation. Executive power, which includes the administration of the *Veterans’ Entitlements Act 1986* (Cth), is different. Mr Barnes is entitled to respect in relation to operational service which he has undertaken. It is because of that respect that I respectfully urge him to place his circumstances before the Repatriation Commission via the Department of Veterans’ Affairs and to be guided by the advice of treating medical practitioners. The time has surely come for him not to try to soldier on alone.

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| I certify that the preceding one hundred and forty-two (142) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 28 April 2017