FEDERAL COURT OF AUSTRALIA

Wroughton v Catholic Education Office Diocese of Parramatta [2015] FCA 1236

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| Citation: | Wroughton v Catholic Education Office Diocese of Parramatta [2015] FCA 1236 |
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| Parties: | **KAREN ALETHEA WROUGHTON v CATHOLIC EDUCATION OFFICE DIOCESE OF PARRAMATTA and THE TRUSTEES OF THE ROMAN CATHOLIC CHURCH FOR THE DIOCESE OF PARRAMATTA** |
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| File number: | NSD 211 of 2015 |
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| Judge: | **FLICK J** |
|  |  |
| Date of judgment: | 17 November 2015 |
|  |  |
| Catchwords: | **INDUSTRIAL LAW –** termination of employment – adverse action **–** reverse onus of proof – reasons for action taken did not include improper reasons**HUMAN RIGHTS –** discrimination –no jurisdiction of Court in absence of termination of complaint – no complaint made to Human Rights Commission |
|  |  |
| Legislation: | *Australian Human Rights Commission Act* *1986* (Cth), ss 3, 46PO(1)*Fair Work Act* *2009* (Cth), ss 12, 340, 340(1)(a), 341(1), 341(1)(c), 342, 342(1), 346, 351, 352, 361, 570, 570(2)*Industrial Relations Act* *1988*(Cth), s 170DF(1)*Sex Discrimination Act* *1984* (Cth), ss 28A, 28A(1), 28B, 28B(6), 28(B)(7)*Work Health and Safety Act* *2011* (Cth), ss 12(1), 20 *Work Health and Safety Act* *2011* (NSW), ss 20, 255*Workplace Relations Act* *1996* (Cth), s 170CK(2)(a)  |
|  |  |
| Cases cited: | *Australian Workers Union v Leighton Contractors Pty Ltd (No 2)* [2013] FCAFC 23*Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32, (2012) 248 CLR 500*Country Roads Board v Neale Ads Pty Ltd* (1930) 43CLR 126*Ermel v Duluxgroup (Aust) Pty Ltd (No 2)* [2015] FCA 17*General Motors-Holden’s Pty Ltd v Bowling* (1976) 51 ALJR 235*Kennewell v MG & CG Atkins (t/as Cardinia Waste & Recyclers)* [2015] FCA 716*Khiani v Australian Bureau of Statistics* [2011]FCAFC 109*Momcilovic v The Queen* [2011] HCA 34, (2011) 245 CLR 1*National Tertiary Education Union v Royal Melbourne Institute of Technology* [2013] FCA 451*RailPro Services Pty Ltd v Flavel* [2015] FCA 504*Sperandio v Lynch* [2006] FCA 1648*State of Victoria (Office of Public Prosecutions) v Grant* [2014] FCAFC 184*Tattsbet Ltd v Morrow* [2015] FCAFC 62, (2015) 321 ALR 305*Tsilibakis v Transfield Services (Australia) Pty Ltd* [2015] FCA 740  |
|  |  |
| Date of hearing: | 9 and 11 September 2015 |
|  |  |
| Date of last submissions: | 23 September 2015 |
|  |  |
| Place: |  |
|  |  |
| Division: | FAIR WORK DIVISION |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 108 |
|  |  |
| Counsel for the Applicant: | The Applicant appeared in person |
|  |  |
| Counsel for the Respondents: | Mr D O’Sullivan |
| Solicitor for the Respondents: | Makinson d’Apice Lawyers |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | NSD 211 of 2015 |

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| BETWEEN: | KAREN ALETHEA WROUGHTONApplicant |
| AND: | CATHOLIC EDUCATION OFFICE DIOCESE OF PARRAMATTAFirst RespondentTHE TRUSTEES OF THE ROMAN CATHOLIC CHURCH FOR THE DIOCESE OF PARRAMATTASecond Respondent |

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| JUDGE: | FLICK J |
| DATE OF ORDER: | 17 NOVEMBER 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The proceeding is dismissed.
2. There is no order as to costs.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | NSD 211 of 2015 |

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| BETWEEN: | KAREN ALETHEA WROUGHTONApplicant |
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| JUDGE: | FLICK J |
| DATE: | 17 NOVEMBER 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. On 11 March 2015 the Applicant, Ms Karen Wroughton, filed an *Originating Application* in this Court under the *Fair Work Act* *2009* (Cth) (the “*Fair Work Act*”). The claims sought to be raised by the Applicant arise out of her employment with the Catholic Education Office Diocese of Parramatta.
2. The Applicant claims contraventions of ss 340, 351 and 352 of the *Fair Work Act*. The form of the *Further Amended Originating Application* filed on 19 August 2015 “*asks the Court for Reinstatement and/or compensation*”. The Applicant further claims relief pursuant to the *Sex Discrimination Act* *1984* (Cth) (the “*Sex Discrimination Act*”) and the *Work Health and Safety Act* *2011* (Cth) (the “Commonwealth *Work Health and Safety Act*”).
3. But the correct identification of the proper Respondent to face those claims for relief posed difficulties. At the time of hearing, there were two Respondents: the First Respondent being the Catholic Education Office Diocese of Parramatta; the Second Respondent being The Trustees of the Roman Catholic Church for the Diocese of Parramatta. Counsel appearing for the Respondents maintained that the correct Respondent was the First Respondent only; Ms Wroughton maintained that the correct Respondent was the Second Respondent.
4. Whichever be the correct Respondent, all relief is to be refused and the proceeding is to be dismissed.

# THE *FAIR WORK ACT*

1. The section of the *Fair Work Act* which assumes primary importance in the present proceeding is s 340. It is that section which provides that a person must not take “*adverse action*” against another for the reasons there set forth. That section provides as follows:

**Protection**

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

(a) because the other person:

(i) has a workplace right; or

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

(2) A person must not take adverse action against another person (the ***second person***) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Section 341(1) gives content to the phrase a “*workplace right*” as follows:

*Meaning of* ***workplace right***

A person has a ***workplace right*** if the person:

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

(c) is able to make a complaint or inquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee – in relation to his or her employment.

The phrase “*a workplace law*” is defined in s 12, the *Dictionary* to the *Fair Work Act*, as follows:

“***workplace law***” means:

(a) this Act; or

(b) the Registered Organisations Act; or

(c) the *Independent Contractors Act 2006*; or

(d) any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters).

1. Section 342 sets out the “*meaning of adverse action*”. The *Table* set forth in s 342(1) provides in part as follows:

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| --- |
| **Meaning of *adverse action*** |
| **Item** | **Column 1*****Adverse action* is taken by …** | **Column 2****if …** |
| 1 | an employer against and employee | the employer:(a) dismisses the employee; or(b) injures the employee in his or her employment; or(c) alters the position of the employee to the employee’s prejudice; or(d) discriminates between the employee and other employees of the employer |

1. It must be recalled at the outset that the bringing of an application under s 340 of the *Fair Work Act* does not provide an opportunity for a person to “*raise whatever issues she wishes to about the validity of the steps taken before her dismissal*”: *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109. Gray, Cowdroy and Reeves JJ there observed:

[31] … A general protections application is not intended to provide an opportunity for the appellant to raise whatever issues she wishes to about the validity of the steps taken before her dismissal. The crucial issue in such an application is the causal relationship between adverse action and one or more of the factors mentioned in the various provisions of Pt 3–1. The issue is whether the person who has taken the adverse action has done so because the person against whom the adverse action has been taken has one or more of the relevant characteristics or has done one or more of the relevant acts. In the present case, the question is whether the respondent has taken adverse action against the appellant because she had a workplace right to be on sick leave, or because she had exercised that right.

[32] The first question to be addressed in such a case is whether adverse action was taken. …

“*A general protections proceeding is not a broad inquiry as to whether the applicant has been subjected to a procedurally or substantively unfair outcome*”: *Ermel v Duluxgroup (Aust) Pty Ltd (No 2)* [2015] FCA 17 at [48] per Bromberg J. The “*focus … must be on whether the employer has taken the adverse action for a proscribed reason*”: *Tsilibakis v Transfield Services (Australia) Pty Ltd* [2015] FCA 740 at [16] per White J.

1. If “*adverse action*” has been taken, attention must be focussed upon the reasons why that action was taken: the prohibition in s 340(1)(a) being upon the taking of adverse action “*because the other person … has a workplace right*…”. A contravention of s 340(1) is made out if “*a substantial and operative*” reason for a decision to terminate employment is that the employee has made inquiries and complaints about workplace entitlements: *General Motors-Holden’s Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241 per Mason J; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 at [103], (2012) 248 CLR 500 at 535 per Gummow and Hayne JJ; *Kennewell v MG & CG Atkins (t/as Cardinia Waste & Recyclers)* [2015] FCA 716 at [51] per Tracey J.
2. Other provisions of the *Fair Work Act* which should also be mentioned include ss 351, 352, 360 and 361.
3. Section 351 provides in part as follows:

**Discrimination**

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

…

(3) Each of the following is an ***anti-discrimination law***:

…

(ad) the *Sex Discrimination Act 1984*;

…

1. Section 352 provides as follows:

**Temporary absence–illness or injury**

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

Section 352 can be traced back to s 170DF(1) of the former *Industrial Relations Act* *1988*(Cth). That section, in turn, became s 170CK(2)(a) of the *Workplace Relations Act* *1996* (Cth). The reason for the dismissal which s 352 now proscribes is “*not merely the employee’s temporary absence but the temporary absence from work because of illness or injury*”: *Ermel* [2015] FCA 17 at [85]. Justice Bromberg there went on to cite with approval the following observations of Jessup J in *Sperandio v Lynch* [2006] FCA 1648:

[91] Turning to s 170CK(2)(a) of the Act, the “reason“ to which that provision refers is, I consider, the temporary absence from work. For an employer to act in breach of the provision, there must be an awareness that the absence was because of illness or injury, and the absence must be the reason for the termination. Or, to put it defensively, an employer will succeed in avoiding an adverse finding under the provision upon proving either that he or she did not know the reason for the absence or that he or she did not terminate the employment by reason of the absence. In the present case the respondents have not proved either: indeed, I find the contrary in each case.

1. Sections 360 and 361 should also be noted. Section 360 provides as follows:

**Multiple reasons for action**

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

Section 361 is the “*reverse onus of proof*” provision and is as follows:

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

(1) If:

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

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

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

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

1. When addressing s 346 of the *Fair Work Act* and the prohibition there contained against the taking of “*adverse action*” because (*inter alia*) a person was not a member of an industrial association, in *Board of Bendigo* [2012] HCA 32, (2012) 248 CLR 500 French CJ and Crennan J observed in respect to that provision and s 361:

[5] The task of a court in a proceeding alleging a contravention of s 346 is to determine, on the balance of probabilities, why the employer took adverse action against the employee, and to ask whether it was for a prohibited reason or reasons which included a prohibited reason …

Their Honours continued:

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

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

See also: *State of Victoria (Office of Public Prosecutions) v Grant* [2014] FCAFC 184 at [32] per Tracey and Buchanan JJ. Upon proof that an employee has exercised a “*workplace right*”, it is then presumed that that action was taken for the reason alleged unless the employer proves to the contrary: *Kennewell v MG & CG Atkins* [2015] FCA 716 at [52] per Tracey J; *Tsilibakis* [2015] FCA 740 at [14] to [15]. “*What the party seeking to rebut the presumption must do is to establish on the balance of probabilities that the alleged improper reason was not a reason for the taking of action*”: *National Tertiary Education Union v Royal Melbourne Institute of Technology* [2013] FCA 451 at [20], (2013) 234 IR 139 at 146 per Gray J. The rationale for s 361 casting the onus in this way is that the facts lie peculiarly within the knowledge of the employer: *Bowling* (1976) 51 ALJR at 241 per Mason J; *RailPro Services Pty Ltd v Flavel* [2015] FCA 504 at [23] per Perry J.

# THE EMPLOYMENT HISTORY - A BRIEF OVERVIEW

1. Ms Wroughton was employed on 16 January 2012 as a Team Leader, Level 3. She worked within the Employment Relations Team within the First Respondent’s Staff Services Directorate.
2. She progressed from that position to that of Team Leader, Level 4, in mid-2012.
3. Mr Gregory Whitby was the Executive Director of Schools of the First Respondent.
4. From about mid-2012 and throughout 2013 there began to emerge difficulties in the relationships between Ms Wroughton and those with whom she was working.
5. In late 2013 a new Director of Financial, Administrative and Staff Services was appointed, Mr Peter Ricketts. Ms Wroughton was to report directly to him.
6. Disharmony continued.
7. During a meeting between Mr Whitby and Bishop Anthony Fisher on 13 December 2013 it emerged that an anonymous complaint had been made to the Bishop. According to Mr Whitby, the Bishop had said to him words to the following effect:

I have been told that Karen Wroughton has only told two of the four employment relations officers in her team that they will need to reapply for their jobs.

Mr Whitby told Ms Wroughton not to “*do anything in relation to a restructure, that is something that would need to be organised at a higher level*”.

1. In late January 2014 Mr Whitby met with Father Chris de Souza, the Vicar for Education for the Diocese of Parramatta. Concerns were then expressed to Mr Whitby as to allegations made by the mother of an employee, Ms Jo Ongley, that Ms Wroughton had been “*bullying and harassing staff*”. Following that meeting, Mr Whitby had the opportunity to discuss the issues with Ms Ongley during an annual system leadership day held at the Novotel in Parramatta.
2. Ms Wroughton was admitted to a psychiatric facility in late January 2014. She then took a period of leave from late January to late February 2014.
3. In mid-February 2014 Mr Whitby retained the services of ProActive Resolutions, a conflict resolutions firm that offered the service of gathering all the parties to a workplace conflict in a room and talking through any problems being experienced. A conference was organised for 21 March 2014. Fourteen people attended.
4. During that conference when Ms Ongley and Ms Morin were talking about their feelings, Mr Whitby observed Ms Wroughton interrupting. Although Mr Whitby could not recall the entirety of what was said, he did recall Ms Wroughton saying to Ms Ongley:

If you’ve got a problem with me, lets step outside and sort it out.

Ms Morin and Ms Ongley were crying. Ms Wroughton then said words to the following effect:

I’ve had enough.

She got up and walked out of the conference and did not return.

1. On 21 March 2014 Mr Whitby wrote to Ms Wroughton directing her not to return to work until she was certified as fit.
2. Thereafter followed a series of e-mails and correspondence.
3. In one affidavit sworn on 6 July 2015 Ms Wroughton maintains that on or about 25 July 2014 “*the Roman Catholic Archbishop of Sydney (formerly Bishop of Parramatta) failed to meet with me and failed to return telephone calls when I lodged a complaint regarding Mr Greg Whitby as the employer of Mr Whitby*”. There was in the evidence no note of any such telephone calls. The meaning to be given to the “*complaint regarding Mr Greg Whitby*” remained elusive.
4. By August 2014 Mr Whitby had decided that an investigation should be conducted because many issues still remained unresolved. A firm of solicitors thereafter briefed Ms Sinclair of Ibsen Consulting. Ms Wroughton was advised of the appointment of Ms Sinclair to investigate allegations made by and against her. On 1 November 2014, Ms Sinclair issued a report. It was a lengthy report of 196 pages. In an *Executive Summary* provided at the outset, the report summarised its findings as follows:

1.4 In summary, Ms Morin’s allegations against Ms Wroughton which were investigated, and the findings in relation to these allegations are as follows:

a) **Allegation 1**: Ms Wroughton referred to Ms Morin as ‘*useless*’ to other members of staff on a number of occasions – **Substantiated**

b) **Allegations 2**: Ms Wroughton planned a restructure as a means of removing Ms Morin from the organisation – **Substantiated**

c) **Allegation 3**: Ms Wroughton deliberately withheld the information from Ms Morin that Ms Verity Lloyd was resigning – **Substantiated**

d) **Allegation 4**: Ms Wroughton behaved aggressively towards Ms Morin in a case management meeting of 17/12/13 – **Substantiated**

e) **Allegation 5**: Ms Wroughton changed the office seating arrangements with the intention of causing distress to Ms Morin on or around 18/12/13 – **Substantiated**

f) **Allegation 6**: Ms Wroughton failed to give Ms Morin access to the Child Protection Room when this was necessary for Ms Morin to fulfil her role requirements – **Not Substantiated**

g) **Allegation 7**: Ms Wroughton refused to meet with Ms Morin to discuss her potential redundancy during the period of 28/11 – 12/12 – **Substantiated**

h) **Allegation 8**: Ms Wroughton treated Ms Erin Morin unfairly by ‘targeting’ her and behaving aggressively towards her – **Substantiated**

1.5 In summary, Ms Ongley’s allegations against Ms Wroughton which were investigated, and the findings in relation to these allegations are as follows:

a) **Allegation 9**: Ms Wroughton referred to Ms Ongley as ‘*useless*’ to other members of staff on a number of occasions – **Substantiated**

b) **Allegation 10**: Ms Wroughton planned a restructure as a means of removing Ms Ongley from the organisation – **Substantiated**

c) **Allegation 11**: Ms Wroughton deliberately withheld the information from Ms Ongley that Ms Verity was resigning – **Substantiated**

d) **Allegation 12**: Ms Wroughton behaved aggressively towards Ms Ongley in a case management meeting on 17/12/13 – **Substantiated**

e) **Allegation 13**: Ms Wroughton changed the office seating arrangements with the intention of causing distress to Ms Ongley on or around 18/12/13 – **Substantiated**

f) **Allegation 14**: Ms Wroughton failed to give Ms Ongley access to the Child Protection Room when this was necessary for Ms Morin to fulfil her role requirements – **Not Substantiated**

g) **Allegation 15**: Ms Wroughton behaved in an intimidating way towards Ms Ongley in relation to employee files by raising her voice when addressing her – **Substantiated**

h) **Allegation 16**: Ms Wroughton spoke to Ms Ongley in a threatening manner during the meeting facilitated by Proactive Solutions on 21/3/14 – **Substantiated**

i) **Allegation 17**: Ms Wroughton treated Ms Ongley unfairly by ‘targeting’ her and behaving aggressively towards her – **Substantiated**

1.6 The combined impact of the behaviours substantiated in allegations 1-17 are considered by the writer to amount to a systematic campaign of ‘bullying’ as defined in Section 5.1 of this Report.

The *Conclusion* expressed on the last page of the report was as follows:

**11. Summary – Conclusion**

11.1 There was resounding evidence that Ms Wroughton did target Ms Ongley and Ms Morin and did behave aggressively towards them. Examples provided of humiliating others, using the silent treatment, unreasonably withholding information vital to effective work performance, isolating, taking action that makes competent employees appear incompetent in the hope they will resign are all examples of ‘bullying’.

11.2 Ms Wroughton’s behaviour led to a climate of intimidation and fear of retribution in her team.

11.3 Ms Wroughton’s conduct impacted on other teams within the organisation and impacted on workplace productivity. This long running dispute has been extremely costly for the organisation, with the disruption and ongoing gossip in the workplace a hidden but additional cost.

11.4 Nothing has been said of Ms Wroughton’s ability to be a warm and engaging presence in the workplace, which she clearly can be. However, this attribute does not mitigate the finding of bullying.

11.5 Ms Wroughton’s conduct throughout the Investigation was inconsistent. At times Ms Wroughton was constructive, candid and cooperative and at other times, as discussed, she was obstructive and showed no regard for the impact of her deliberate delays on her employer.

11.6 In the view of the writer, the combination of Ms Wroughton’s substantiated bullying behaviours, her demonstrable animosity towards Ms Morin and Ms Ongley (and others in the CEO workplace), the ongoing fear of her team and her complete lack of remorse equate to a breakdown of the employment relationship between Ms Wroughton and the CEO.

11.7 Prior to any consideration being given to the return of Ms Wroughton to the CEO workplace, the organisation should consider the WHS implications and their duty of care towards their employees to maintain a safe workplace.

1. On 11 November 2014 Mr Whitby wrote to Ms Wroughton inviting her to show cause why her employment should not be terminated. Ms Wroughton responded on 24 November 2014 and her responses were then considered by Mr Whitby. On 26 November 2014 Mr Whitby met with Ms Wroughton. During that meeting, Mr Whitby said to Ms Wroughton words to the following effect:

I have read your response to the show cause letter, and to me it demonstrates a lack of understanding of the seriousness of the findings concerning your bullying and harassment of Ms Ongley and Ms Morin and the serious misconduct you engaged in … I am particularly disappointed as you are employed in a senior role as a human resources and employment relations specialist.

Mr Whitby indicated that he would be prepared to discuss a mutually agreeable termination. He was met with the response: “*I’m not prepared to resign on any basis*”. Mr Whitby then gave Ms Wroughton a letter dated that day terminating her employment. It was Mr Whitby who signed that letter in his capacity as Executive Director.

1. The letter handed to Ms Wroughton detailed Mr Whitby’s response to the issues raised by Ms Wroughton and concluded:

On the basis of the findings of the investigation, the CEO considers that it would be difficult to have trust and confidence in you to perform your role as the Team Leader – Employment Relations in a manner which would ensure the health and safety of employees whom you supervise.

You have made a number of responses which, after our consideration, do not fully restore our trust and confidence in you to perform your role. In fact, a number of your responses confirm that you would remain a risk in the workplace – both to your own health and safety and to the health of fellow employees. Your comments about me, for example, demonstrate a lack of respect and do not bode well for re-establishing an effective working relationship.

While you have indicated that you are prepared to apologise to staff, you have not acknowledged that your conduct is not appropriate for a Team Leader and has created a hostile work environment. We do not consider that you would be able to rebuild the relationships you have destroyed in your team. The CEO would be remiss in its work health and safety duties to the Employment Relations Team to place you back in a direct supervisory role over them.

The decision has been made to terminate your employment, by two weeks’ notice, with payment in lieu. This means that your employment comes to an end with immediate effect.

As you have been on paid suspension, this means that you will be paid to today and the two weeks’ have weeks’ notice will be paid shortly, less any advance payment of remuneration that has been made to you.

You will also be paid for any accrued but unused annual leave.

The reference to the “*CEO*” is a reference to the “*Catholic Education Office – Parramatta*”.

# THE CORRECT RESPONDENT

1. Although the conclusion that all relief should be refused renders it unnecessary to resolve the competing submissions as to the correct identification of the Respondent, brief reference should nevertheless be made to this issue.
2. There has been considerable vacillation from the outset on the part of Ms Wroughton in the identification of the correct Respondent to the proceeding. The *Originating Application* identified the Respondent as:

Catholic Education Office Diocese of Parramatta.

The *Amended Originating Application* “*crossed-out*” that Respondent and identified the Respondent as:

The Trustees of the Roman Catholic Diocese of Parramatta Inc.

At the outset of the hearing which was initially to take place on 18 August 2015, and when questioned as to whether the correct Respondent was that as set forth in the *Amended Originating Application*, Ms Wroughton sought to identify the Respondent as:

The Trustees of the Roman Catholic Church for the Diocese of Parramatta.

1. There was some discussion at the time of amendment as to whether the proceeding as against the Trustees of the Roman Catholic Diocese of Parramatta Inc should be discontinued or dismissed. The only entity for which Counsel was then briefed to appear was the currently named First Respondent. Counsel initially had no instructions to appear for The Trustees of the Roman Catholic Church for the Diocese of Parramatta. Given some reservation as to whether the existing Respondent was indeed the correct Respondent and whether the course proposed by Ms Wroughton of simply “*substituting*” the existing Respondent for the proposed new Respondent, it was concluded that the safer course was to add the proposed new Respondent as an additional Respondent and to reserve any question as to whether an order for costs should be made. An adjournment was inevitable, given a question as to whether the proposed new Respondent had been properly served and did not appear.
2. Had it been necessary to resolve the question, it would have been concluded that the correct Respondent was at all times the First Respondent.

# ADVERSE ACTION – the exercise of A WORKPLACE RIGHT

1. Before a contravention of s 340 of the *Fair Work Act* may be made out, an employee must establish that:
* there has been “*adverse action*” taken against the employee;

and that that “*adverse action*” was taken (*inter alia*):

* “*because*” the employee had a “*workplace right*”, or sought to exercise that “*workplace right*”.

The dismissal of an employee falls within Item 1 of the *Table* in s 342(1).

1. The identification of the “*adverse action*” sought to be relied upon and the manner in which Ms Wroughton sought to bring her case within s 340 shifted, with respect, throughout the course of the hearing and submissions.
2. In her affidavit sworn on 16 June 2015 Ms Wroughton thus stated:

12. My employment was terminated by Mr Whitby on 26 November 2014. One reason given by Mr Whitby was the comments I had made about Mr Whitby and I understood that to mean that related to my complaints made about the leadership team of which Mr Whitby was a member, the complaint to Bishop Anthony Fisher, the statements to the investigator and the statements that Mr Whitby alleged were disrespectful and did not bode well to re-establishing a relationship.

This way of advancing her case departed from the following exposition in her *Further Outline of Submissions* which stated:

The Applicant alleges that her dismissal was for the proscribed reasons of:

i. Exercising her workplace right to complain about management including the Executive Director Mr Greg Whitby;

ii. Discrimination on the basis of her mental illness; and

iii. Being temporarily absent from the workplace due to illness.

But such shifting sands can perhaps be left to one side.

1. As the case was finally advanced for resolution, Ms Wroughton claimed that the “*adverse action*” she relied upon for the purposes of s 341(1) was either or both of:
* a demotion in February 2014 from her role as a “*team leader*” to a significantly different role; and/or
* the termination of her services in November 2014.

And it was further claimed that the “*workplace right*” she sought to invoke was either or both of:

* the right to make a “*complaint*” (s 341(1)(c)); and/or
* the “*benefit of … a workplace law*” (s 341(1)(a)), that law being either or both of the *Sex Discrimination Act* or the Commonwealth *Work Health and Safety Act*.

As a factual matter, Ms Wroughton contended that “*adverse action*” was taken against her because:

* she wished to make a complaint to the Bishop regarding the conduct of Mr Whitby, that complaint embracing a complaint Mr Whitby had engaged in conduct which constituted sexual harassment;
* she was suffering from a mental illness; and
* she was temporarily absent from work.

Each of these three different ways of advancing her claims for relief should be separately considered – even though they each ultimately face the same common difficulty.

1. However the claims of Ms Wroughton are considered, the facts do not fall within ss 340, 351 or 352 of the *Fair Work Act*.

# THE ABSENCE OF A COMPLAINT & DEMOTION

1. Although there are more substantive reasons for which Ms Wroughton’s claims should be dismissed, two preliminary aspects of the manner in which she sought to advance her claims should be noted at the outset.
2. First, on the facts, Ms Wroughton has failed to establish that she ever made a “*complaint*” – at least against Mr Whitby.
3. It may be accepted that there was some communication with the Bishop. Other than the oblique reference to the “*complaint to Bishop Anthony Fisher*” in her 16 June 2015 affidavit, and the reference to the telephone call in July 2014 when she“*lodged a complaint regarding Mr Greg Whitby*”, Ms Wroughton did not seek to expand upon what she actually said to the Bishop or what the terms of the complaint were. In addition to this statement by Ms Wroughton, Mr Whitby gave an account of a conversation with the Bishop during their meeting on 13 December 2013.
4. Such evidence, it is concluded, falls well short of establishing that a “*complaint*” was ever made as against Mr Whitby for the purposes of s 341(1)(c).
5. Second, Ms Wroughton has failed to establish that she was “*demoted*”.
6. This aspect of her claim had its origins in her contention that “*adverse action*” had been taken “*because*” she was suffering from a mental illness. Notwithstanding a potential tension between her contention that the “*adverse action*” sought to be relied upon was her “*dismissal*” – as opposed to the potentially re-framed claim that she had been “*demoted*”, the substance of this aspect of her claim focusses upon the fact that Ms Wroughton was admitted to a psychiatric facility on 23 January 2014. She was discharged from that facility on 14 February 2014 and sought to return to work a few days later.
7. Although Mr Whitby was uncertain as to the exact date upon which Mr Ricketts was appointed, it was in late 2013, “*towards* [*the*] *end of Christmas and then over the new year period*”. Whatever be the exact date, he was appointed prior to 23 January 2014. Upon her return to work, Ms Wroughton was to report to him. Ms Wroughton saw this as a “*demotion*”. Mr Whitby resisted that characterisation of her role. When this issue was pursued in the cross-examination by Ms Wroughton of Mr Whitby, the following exchange occurred between the witness and Ms Wroughton:

… So I returned to work, Dr Sharma had certified me fit for four days per week. February was a short month. Mr Ricketts was in the chair of director but he did change my role and you agree with that? How the work was being done was for Peter to work through. Your role was still as team leader. You’re a senior person and we had even agreed in recognition of the change of your circumstances that I had now found a person I deemed – and I made that appointment – to be appropriate. We continued paying you the 20,000 because I expected you, and we had the discussion, I expected that you would cooperate and collaborate with Peter to move things forward. Now, that’s the instruction they were working under.

But it wasn’t? Nobody took any authority away from you.

But it wasn’t business as usual, was it? Well, no it was not business as usual because I was now no longer the Director of Staff Services. There was a new person who was Director of Staff Services that fits in with our whole organisational structure. So that they – he reports to me and you now report to him. Which would have been the normal thing if we had of had a Director of Staff Services.

1. The introduction of Mr Ricketts unquestionably occasioned a change in the workplace. There was a deliberate attempt to re-distribute the workload.
2. But that change, it is concluded, was nothing other than an attempt to put in place a team of persons who worked together. Although Ms Wroughton saw herself as the only person in that team possessing expertise in the area of employment relations, this was not the case. She clearly resented the new arrangements put in place with the coming on board of Mr Ricketts. The following exchange thus occurred in the further cross-examination of Mr Whitby:

So that’s a change to my role. Yes? Well, look, Karen, we had had the discussion beforehand, now that you were going back we had a senior person you reported to. He was just reorganising the workload and, as I said there, I think it’s very positive we welcomed you back. The reason we didn’t want to do that is because I had the discussion with Mr Ricketts about how I wanted it done and how he saw it. This is the plan that we came out with, and we want to welcome you back and we’re looking forward to working cooperatively and positively together. Now, certainly there were going to be some changes as he, as director, sought to put in place. That’s the standard practice. Whoever the new director was, was going to always do that sort of thing.

And yet I was the? And we were just mapping out for you.

And yet I was the most competent ER. I was the only ER specialist in the team; is that correct? You were the most competent ER person in the team, yes.

But after I had been in Northside for three weeks, my role changed, didn’t it? Because we were building a team and we had always worked on building a team of complementarity, and that you had indicated, even before, that that’s the way we need to go so that we shared the expertise around. Peter Ricketts–

But it does not make sense that Peter Ricketts, who is an accountant, to take over my case load, does it? Peter Ricketts–

MR O’SULLIVAN: Your Honour.

THE WITNESS: is not an accountant. Peter Ricketts was not an accountant. He is – he has specialised in expertise in managing leading companies and a strong record in ER and HR. He was a very competent ER and HR specialist as well with a proven track record, I might add.

I put it to you he wasn’t, Greg – Mr Whitby.

HIS HONOUR: Please answer the question? He was.

Mr Whitby’s account is accepted. There had been no “*demotion*” of the services of Ms Wroughton. Her responsibilities, terms and conditions remained the same. There had been no alteration to “*the position of the employee to the employee’s prejudice*” within the meaning of the *Table* set forth in s 342(1).

1. Even had a contrary characterisation of the facts been reached, and even had it been concluded that the restructuring of responsibilities could accurately be characterised as a “*demotion*” – and, accordingly, “*adverse action*” – it would be difficult to reach a further conclusion that such action had been taken “*because*” of Ms Wroughton’s mental condition. The decision to appoint Mr Ricketts, it will be noted, occurred towards the end of 2013 and prior to the admission of Ms Wroughton to a psychiatric facility.
2. But such preliminary observations as to these two aspects of Ms Wroughton’s claims ultimately assume little importance. Her claims are to be dismissed upon more substantive bases.

# SEXUAL HARASSMENT

1. A further claim made by Ms Wroughton was that she had been the subject of sexual harassment.
2. That claim was advanced by her as against both Mr Whitby and Mr Ricketts.
3. But the manner in which she sought to advance such claims also seemed to shift during the course of the hearing and submissions.
4. It is understood that Ms Wroughton sought either to contend that:
* this Court has jurisdiction to entertain a claim as to sexual harassment by reason of the *Sex Discrimination Act*; and/or
* irrespective of such jurisdiction, the *Sex Discrimination Act* is a “*workplace law*” for the purposes of s 341(1) of the *Fair Work Act*.
1. The former argument is rejected because:
* in the absence of any complaint having been made to the Human Rights Commission, this Court does not have jurisdiction to entertain any claim for relief made pursuant to the *Sex Discrimination Act*;

and, albeit unnecessary to resolve:

* the complaint as to sexual harassment by Mr Whitby has not been made out.

In respect to the latter argument:

* it is unnecessary to resolve an argument advanced by the First Respondent that the *Sex Discrimination Act* is not a “*workplace law*” within the meaning of the definition of that phrase in s 12 of the *Fair Work Act* because it is not (so it was contended) a law “*that regulates the relationships between employers and employees.*”

But even if it be assumed that the *Sex Discrimination Act* is such a law, it is further concluded that:

* no “*adverse action*” has been taken by the First Respondent pursuant to s 340(1) of the *Fair Work Act* “*because*” Ms Wroughton had the benefit of such a law.

### The Sex Discrimination Act – the absence of jurisdiction

1. The *Further Amended Originating Application* claims that the Respondents “*breached the applicant’s workplace right to a workplace free of sexual harassment in accordance with section 28B(6) of the Sex Discrimination Act 1984*”. Reliance was also placed upon the definition of “*sexual harassment*” in s 28A of that Act.
2. Construed according to its terms, this allegation is most probably directed to a complaint of sexual harassment that founded a right to relief under the *Fair Work Act*.
3. But such clarity was obscured by the submissions advanced by Ms Wroughton.
4. Although it was perhaps unclear whether Ms Wroughton ultimately sought to contend that this Court had jurisdiction on the facts of the present case to grant relief under the *Sex Discrimination Act,* any such claim is to be rejected.
5. Section 28A(1) of the *Sex Discrimination Act* provides as follows:

For the purposes of this Division, a person sexually harasses another person (the ***person*** ***harassed***) if:

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

Section 28B(6) of that Act provides as follows:

It is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of either or both of those persons.

And s 28(B)(7) provides the following further definition:

“***workplace participant***” means any of the following:

(a) an employer or employee;

(b) a commission agent or contract worker;

(c) a partner in a partnership.

1. Section 46PO(1) of the *Australian Human Rights Commission Act* *1986* (Cth) provides as follows:

If :

(a) a complaint has been terminated by the President under section 46PE or 46PH; and

(b) the President has given a notice to any person under subsection 46PH(2) in relation to the termination;

any person who was an affected person in relation to the complaint may make an application to the Federal Court or the Federal Circuit Court, alleging unlawful discrimination by one or more of the respondents to the terminated complaint.

“*Unlawful discrimination*” is defined in s 3 of the 1986 Act as including “*any acts, omissions or practices that are unlawful under … Part II of the Sex Discrimination Act 1984…*”. Section 28B of the *Sex Discrimination Act* is within Part II of that Act.

1. On the facts of the present case, the statutory regime set forth in the *Sex Discrimination Act* need not be further pursued.
2. On the facts, there is no evidence of a complaint first being made to the Commission and no evidence of any such complaint having been terminated by the Commission.
3. The *Sex Discrimination Act*, in such circumstances, confers no jurisdiction upon this Court.

## *Sexual harassment – the facts*

1. Separate from any conclusion as to the absence of jurisdiction to grant any relief for sexual harassment pursuant to the *Sex Discrimination Act*, rather than relief pursuant to the *Fair Work Act*, there remains a far more persuasive reason to reject this aspect of Ms Wroughton’s claims for relief – at least in respect to the complaint directed against Mr Whitby.
2. The complaint by Ms Wroughton relating to “*sexual harassment*” was presumably founded upon s 28A(1)(b) of the *Sex Discrimination Act,* namely “*unwelcome conduct of a sexual nature*…”.
3. To bring the facts within that provision, Ms Wroughton sought to rely upon a number of events, namely:
* an interview in September 2011 with Mr Whitby which was initially conducted in the reception area of the Parmelia Hotel in Perth but transferred to Mr Whitby’s room;
* an incident in August 2012 when Mr Whitby told Ms Wroughton to “*do the pretty woman thing*” when addressing a number of men whom she had apparently upset by comments that she had made;
* an exchange at some time in 2012 when Mr Whitby said to Ms Wroughton that she was “*looking particularly fresh today*”; and
* a number of exchanges when Mr Whitby referred to Ms Wroughton as “*Maggie Thatcher*” and said: “*I bet you don’t have frilly lace around your bed*”.

In addition to these claims directed to Mr Whitby, there was a further instance relied upon by Ms Wroughton, namely:

* an incident in late December 2013 when Ms Wroughton maintains that Mr Peter Ricketts, the new Director of Financial, Administrative and Staff Services, “*leered*” at her breasts and said: “*I think we are going to get along just fine*”.

For the purposes of resolving a complaint made as to sexual discrimination, it is unnecessary to make findings of fact in respect to each of these instances. The principal complaint as to sexual harassment was that directed to the conduct of Mr Whitby; but the complaint as to sexual harassment by Mr Ricketts should not be ignored.

1. It should, however, be noted, that the facts as they unfolded during the hearing exposed a very different context to that sought to be presented by Ms Wroughton.
2. The September 2011 interview, for example, was moved from the hotel reception area to Mr Whitby’s room simply because there were two other persons participating in that interview (Mr Farley and Dr DeCourcy) by means of “*Skype*”. The background noise in the foyer was such that neither of those two other participants could hear what was being said. After moving to the hotel room, the “*Skype*” connection was recommenced and the interview continued. Ms Wroughton sought to put a different complexion upon the facts. In her cross-examination of Mr Whitby, the following exchange thus occurred:

… you said to me, “It is all right if we go up to have a meeting in a room upstairs”? No. What actually –

Yes? – happened, we met in the lobby.

Yes? We started a Skype –

No, we didn’t, Greg? We started a Skype and then, you know, it was too busy in that – it was a very small foyer from my memory. Then I did say to you, “Look, this is not working. Can we go upstairs?” And we went upstairs and we continued the Skype.

Well, I put it to you that’s not how it occurred. I met you at the lift? You were seated when I walked in.

Yes? Now, you were seated –

But we met at the lift? – ready to go –

Right outside the lift? – and I sat down beside you and after general introductions, “Can we do this?” And that’s how we started. You were seated. You weren’t near – the seats might be near the lift, but you were seated, ready to go. I was pressed for time because I was due in Adelaide and so that’s how we went. That’s my memory. I asked – I clearly asked you if we could carry this on upstairs, “Fine.” We had a bit of a laugh about it then we carried out the interview upstairs.

Yes, but not in your bedroom? It was in the room that I was – I mean, I said, “The only place I can think of is my room.” They didn’t have a business centre. I – so I said, “Are you comfortable?” And, “Let’s do this here,” knowing that we had people on the screen and it went for about half an hour and that was it.

I put to you, Greg, it did not happen like that? Well, I’m sorry. That’s my recollection.

It is concluded that Mr Whitby’s account is to be accepted.

1. The “*pretty woman*” incident, however, is less neutral. The suggestion advanced by Mr Whitby, it is concluded, could not accurately be described as “*unwelcome conduct of a sexual nature*”. Mr Whitby’s objective, it was understood, was to convey to Ms Wroughton that a less judgmental approach on her part when dealing with other persons may better achieve a desired outcome. Any analogy to modelling behaviour upon the conduct depicted in the movie of the same title, perhaps, is open to serious question. Whatever cinematographic merit the movie may have, conduct of an employer urging an employee to emulate the part played by a “*woman of the night*” may well – according to the factual circumstances – constitute sexual harassment. But the context in which Mr Whitby made the comment was not a context in which he was suggesting that Ms Wroughton was to conduct herself as “*the pretty woman*”; the context was rather that of suggesting to her a change in the manner in which she dealt with people. The reference to the movie, Mr Whitby explained, was not to the conduct of the female depicted – but, rather, was a reference to the conduct of the male character when securing the assistance of sales personnel by assuring them that he was prepared to spend an “*obscene amount of cash*”.
2. Mr Whitby gave evidence and denied any inappropriateness in his conduct. Mr Ricketts was not called to deny the allegation made against him.
3. It may be noted that none of the limited number of instances of sex discrimination now relied upon were raised by Ms Wroughton prior to the termination of her services. Although even isolated conduct which can properly be characterised as “*sexual harassment*” remains harassment irrespective of whether or not the conduct has previously been brought to the attention of others, the failure to raise any of these incidents with Mr Whitby at the time can potentially be relevant to an assessment as to the seriousness with which Ms Wroughton viewed such conduct at the time – as opposed to her assessment of such conduct at a point of time subsequent to termination – and relevant to a proper characterisation of the conduct.
4. Had it been necessary to resolve the factual aspect of this aspect of her claims, the complaints regarding the conduct of Mr Whitby would have been rejected. In the absence of Mr Ricketts being called as a witness to rebut the complaint made against him, that factual aspect of the claim would most likely have been accepted. The unreliability of Ms Wroughton’s account of the events directed against Mr Whitby does not necessarily have the consequence that her account of what Mr Ricketts is attributed as having said is equally unreliable.
5. But it is unnecessary to pursue this factual inquiry further.

### Sex discrimination and the Fair Work Act

1. If the *Further Amended Statement of Claim* is construed according to its terms to be an allegation that the sexual harassment of Ms Wroughton constituted a contravention of the *Fair Work Act*, and not the *Sex Discrimination Act*, Counsel for the Respondents further contended that that argument should also be rejected for either of two reasons, namely:
* that there was no contravention of s 340 of the *Fair Work Act* because the *Sex Discrimination Act* was not a “*workplace law*” within the definition of that phrase in s 12 of the *Fair Work Act*; and/or
* no adverse action had been taken against Ms Wroughton “*because*” she had a “*workplace right*”.

Although it is unnecessary to resolve the former argument, the substance of the argument should nevertheless be noted.

1. The substance of the argument was that the *Sex Discrimination Act* is not a “*workplace law*” as that term is defined by s 12 of the *Fair Work Act* because it is not a “*law of the Commonwealth … that regulates the relationships between employers and employees*”. No question arises as to whether the *Sex Discrimination Act* is a “*law of the Commonwealth*”: cf. *Momcilovic v The Queen* [2011] HCA 34 at [226] to [230], (2011) 245 CLR 1 at 106 to 107 per Gummow J. Clearly it is. But the Respondents did contend that it was not a law “*that regulates the relationships between employers and employees*”. The contention was that there was a distinction between a law that “*regulates*” conduct as opposed to a law that “*prohibits or prevents*” conduct: cf. *Country Roads Board v Neale Ads Pty Ltd* (1930) 43 CLR 126 at 133 per Knox CJ, Starke and Dixon JJ. See also: (1930) 43 CLR at 138 to 139 per Isaacs J (Gavan Duffy J agreeing). In the present case it was contended that the *Sex Discrimination Act* fell outside the definition in s 12 because it was properly to be characterised as a law that “*prohibits or prevents*” conduct. In *Tattsbet Ltd v Morrow* [2015] FCAFC 62 at [103], (2015) 321 ALR 305 at 330 it may be noted that Jessup J was of the view that the *Superannuation Guarantee Charge Act 1992* (Cth) conferred entitlements that extended the operations of that Act“*beyond the circumstances of employees strictly so called*”and that such provisions“*did not regulate the relationships between employers and employees*”*.* Chief Justice Allsop and White J agreed with Jessup J.
2. Although unnecessary to resolve the argument, it may be noted that s 351(1) of the *Fair Work Act* does not itself employ the term “*discrimination*”. Nor does s 351 contain any prohibition upon (in the present case) “*sex discrimination*”, including “*sexual harassment*”. The prohibition in s 351(1) is a prohibition upon an employer taking “*adverse action against a person…*”. And once that constraint upon the prohibition is recognised, attention is then directed back to ss 340 and 341. So much is (perhaps) to be expected in legislation whose objects are those set forth in s 3 of the Act rather than legislation whose specific focus of attention is “*discrimination*”.
3. Reservation is nevertheless expressed in respect to the merit of any argument seeking to draw a distinction between a law which “*regulates*” - as opposed to a law which “*prohibits*”- conduct. Care should be taken in too readily acceding to an argument that has the potential to emasculate the width of the prohibition in s 351.
4. Even if it be assumed in favour of Ms Wroughton that s 351 embraces a prohibition of sexual harassment and assuming that her complaint as to sexual harassment by Messrs Whitby and Ricketts is accepted, her claim for relief pursuant to the *Fair Work Act* fails because no “*adverse action*” has been taken against her “*because*” she was entitled to the “*benefit*” of a “*workplace law*” for the purposes of s 341(1)(a) of that Act.

# WORK HEALTH AND SAFETY

1. Comparable to Ms Wroughton’s reliance upon the *Sex Discrimination Act* is her reliance upon the Commonwealth *Work Health and Safety Act*. Only brief reference was made to the Commonwealth *Work Health and Safety Act*. But such submissions as were made should briefly be resolved.
2. The *Further Amended Originating Application* thus claims that the Respondents “*breached the Applicant’s workplace right to a safe place to work under section 20 of the* Work Health and Safety Act 2011 *No 10 and took adverse action against her when she fell ill due to the workplace not being safe and ultimately dismissed her because of her illness*”.
3. Reliance upon this Act had the potential to mislead – there is both State legislation titled the *Work Health and Safety Act* *2011* (NSW) (the “State Act”) and the Commonwealth legislation already referred to, the *Work Health and Safety Act 2011* (Cth).
4. Section 20 of the Commonwealth *Work Health and Safety Act* provides as follows:

**Duty of persons conducting businesses or undertakings involving management or control of workplaces**

(1) In this section, **person with management or control of a workplace** means a person conducting a business or undertaking to the extent that the business or undertaking involves the management or control, in whole or in part, of the workplace but does not include:

(a) the occupier of a residence, unless the residence is occupied for the purposes of, or as part of, the conduct of a business or undertaking; or

(b) a prescribed person.

(2) The person with management or control of a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person.

Section 20 of the State Act is in substantially similar terms.

1. The Applicant’s *Further Outline of Submissions* makes express reference to the State Act. But s 255 of the State Act provides that proceedings for an offence against the State Act are to be dealt with by the Local Court or the Industrial Court. This Court is, unsurprisingly, not entrusted with any jurisdiction to entertain any proceeding claiming a contravention of the StateAct.
2. Even if reliance is placed upon the Commonwealth *Work Health and Safety Act*, Ms Wroughton meets with no greater success.
3. Any reliance upon the Commonwealth *Work Health and Safety Act* fails for either of two reasons.
4. First, the Commonwealth Act does not apply to the Respondents. Section 12(1) of that Act thus provides as follows:

This Act applies in relation to each of the following:

(a) if the Commonwealth is conducting a business or undertaking:

(i) the Commonwealth; and

(ii) an officer of the Commonwealth;

(b) if a public authority is conducting a business or undertaking:

(i) the public authority; and

(ii) an officer of the public authority;

(c) to the extent that a person is a worker and carries out work in any capacity for a business or undertaking conducted by the Commonwealth or a public authority–that person;

(d) to the extent that a person is a worker and is taken to carry out work for a business or undertaking conducted by the Commonwealth or a public authority because of section 7–that person;

(e) if work is carried out by a worker at a place (as defined for the purposes of section 8) for a business or undertaking conducted by the Commonwealth or a public authority–that place;

(f) if work is taken to be carried out by a worker at a place (as defined for the purposes of section 8) for a business or undertaking conducted by the Commonwealth or a public authority because of section 7–that place.

Neither Respondent falls within any of these descriptions.

1. Second, if attention is focussed upon the conditions in Ms Wroughton’s “*workplace*”, there is no evidence to suggest that that “*workplace*” exposed persons to “*risks to … health and safety*…”. There is no evidence to suggest that prior to (for example) January 2014 the workplace environment was anything other than one which had due regard to “*health and safety*”. And, if the period of time be shifted to that time after November 2014, the only evidence is that steps were being taken to address as far as possible the difficulties being encountered by Ms Wroughton. Steps were attempted to be taken to bring her back within the “*workplace*” in a manner acceptable to all employees. But it was Ms Wroughton, for example, who shunned the steps being taken during the conference being conducted by ProActive Resolutions.
2. Whether it be the State or Commonwealth legislation which is invoked by Ms Wroughton, this part of her claim is also rejected.

# THE REASONS FOR TERMINATION – “*BECAUSE*”

1. No matter how individual aspects of her claims to relief may have been resolved, the principal basis upon which it has been concluded that Ms Wroughton’s claims should fail is because the decisions taken in respect to her employment were taken for reasons not including any exercise by Ms Wroughton of any “*workplace right*”.
2. For the purposes of ss 340, 341, 351 and 352 of the *Fair Work Act*, it is concluded that no action was taken against Ms Wroughton “*because*” she sought to exercise any “*workplace right*” or “*because*” she had a “*mental disability*” or “*because*” she was “*temporarily absent from work…*”.
3. Assuming that s 361 of the *Fair Work Act* applied to the facts of the present case, the Respondents have displaced the onus of proof imposed upon them by that section.
4. The reasons for the termination of the services of Ms Wroughton on 26 November 2014 are to be distilled from:
* the terms of the letter terminating her services handed to her at the conclusion of the meeting on 26 November 2014; and
* the oral evidence of Mr Whitby.
1. If reference is had to the terms of the letter, it is apparent that the substantive reason for the decision to terminate her services was the assessment made by Mr Whitby that she had lost his “*trust and confidence*” – her “*lack of respect*”, Mr Whitby concluded, was such that it did“*not bode well for re-establishing an effective working relationship*”. Viewed against even a brief chronology of events as they unfolded, there was no basis upon which to reject his assessment. None of the reasons provided by Mr Whitby in the letter handed to Ms Wroughton had anything to do with the exercise by Ms Wroughton of any “*workplace right*”, her “*mental illness*” or her absences from work.
2. If reference is had to the oral evidence of Mr Whitby, the factual finding that has been made becomes even more certain. There had been, according to Mr Whitby, a “*total breakdown in the* [*working*] *relationship…*”.
3. Ms Wroughton’s principal line of challenge to the reasons given by Mr Whitby in his letter of termination was the recurring suggestion that he had decided to terminate her services by reason of her mental illness. Mr Whitby resisted this suggestion and maintained that he made his decision without regard to her mental health issues and by reference to (*inter alia*) the August 2014 review which had been undertaken. One such exchange during his cross-examination by Ms Wroughton started with Mr Whitby’s statement in the letter of termination that Ms Wroughton’s “*lack of respect*” did not “*bode well for re-establishing an effective working relationship*” and continued (without alteration):

When did our relationship break down, Greg? Over the period of time in dealing with this I formed the opinion that I could not work with you in the – in relationship of your responsibility in that area. And as it says, on the basis of the findings of the investigation, I think it would be difficult for you to perform that role and I think it’s a total breakdown in the relationship, and your lack of understanding about what it requires to be a team leader in a Catholic organisation.

Because I was sick? That’s what I had to weigh up. And I had staff –

Because I was? – at significant risk of further harm.

Because I was sick? No. Because you were sick.

But during that period of time I was extremely ill? It had nothing to do with you being sick. This is about your behaviour –

Whilst I was? – when you were – while you were fit to be at work. It had nothing to do with you while you were off. This is about what you did and how you did it. And that’s what the report says. The report is very detailed and provides the – it provided the framework so I formed the opinion on the basis of that, that there is no longer a possibility that you could continue in working with us.

Which were behaviours which were symptomatic of mental illness being unmedicated? No.

Is that your medical opinion? I’m not a medical person. I’m dealing with the facts of the investigation that was carried out by a professional at arm’s length from the organisation.

And she gave no consideration to the fact that it might have been because I was ill? She was employed to do a job on – doing investigation in that context and it has nothing to do – she was not briefed or told it had anything to do about your health. It was about what actually happened while you were employed as a team leader in that area – what you actually did and engaged in.

And it wasn’t normal behaviour, was it? Well, I would think it’s not normal behaviour for an employee who works in the Catholic Education Office, and we expect better.

And I had had unblemished conduct with the Catholic Education Office in Western Australia, hadn’t I? To the best of my knowledge, yes.

So, when you say things like:

*You have made a number of responses which, after our consideration, do not fully restore our trust and confidence in you to perform your role. In fact, a number of your responses confirm that you would remain a risk in the workplace, both to your own health and safety and to the health of fellow employees* –

that’s all about my health, isn’t it? No, it’s about your behaviour. It’s shown right from the involvement of Peter Ricketts right through to the proactive and the attempts to mediation on a couple of occasions that it just would not work. So I couldn’t see that we could go much further.

Because I wasn’t well? No, because of your behaviour, and we had objective arm’s length advice on your behaviour in the workplace. Nobody took your health into consideration per se.

Thank you. That’s all.

On re-examination, Counsel for the Respondents and Mr Whitby had this exchange:

What role, if any, did the applicant’s diagnosed medical condition have to play in the termination of the applicant’s employment? None.

This evidence given by Mr Whitby, and his exposition of his reasons for terminating Ms Wroughton’s services, is accepted. His evidence, it is considered, was “*reliable*” and such as to discharge any onus upon the Respondents to establish the reasons for decisions taken in respect to Ms Wroughton: cf. *Board of Bendigo* [2012] HCA 32 at [45], (2012) 248 CLR at 517 per French CJ and Crennan J.

1. Even if the “*complaints*” sought to be relied upon by Ms Wroughton are extended to the complaints referred to in the report of Ms Sinclair of Ibsen Consulting, namely the complaints made about the conduct of two Employment Relations Officers (Ms Ongley and Ms Morin), no different conclusion is reached. No “*adverse action*” was taken against Ms Wroughton either “*because*” she made complaints or because others made complaints about her own conduct.
2. As to the final basis upon which Ms Wroughton claimed “*adverse action*”, there was no evidence that any action was taken against her by reason of her temporary absence from work.
3. Even had a different conclusion been reached in respect to any of these three limbs to her argument, it is further concluded that the reasons for the termination of the services of Ms Wroughton by Mr Whitby had nothing to do with any complaint that she may have made. Nor did the reasons for termination have anything to do with Ms Wroughton’s “*mental illness*” or her absences from work. The reasons for the decision to terminate her services are primarily to be found in the letter of termination. None of those reasons had anything to do with the exercise by Ms Wroughton of any “*workplace right*” and all reasons were directed to the absence of any “*trust or confidence*”on the part of Mr Whitby as to Ms Wroughton’s ability to“*perform* [*her*] *role as the Team Leader – Employment Relations in a manner which would ensure the health and safety of employees*”whom she supervised. Those reasons were sought to be challenged during Ms Wroughton’s cross-examination of Mr Whitby – but that challenge failed.

# COSTS – section 570

1. In the event that the claims advanced by Ms Wroughton failed, the Respondents sought an order for the payment of their costs.
2. Section 570 of the *Fair Work Act* provides for those circumstances in which an order for costs may be made, as follows:

**Costs only if proceedings instituted vexatiously etc.**

(1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.

(2) The party may be ordered to pay the costs only if:

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or

(c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before the FWC;

(ii) the matter arose from the same facts as the proceedings.

1. In *Australian Workers Union v Leighton Contractors Pty Ltd (No 2)* [2013] FCAFC 23 Dowsett, McKerracher and Katzmann JJ provided the following useful summary of principles relevant to s 570, namely:

[7] … In our view the authorities establish the following principles:

(1) The purpose or policy of the section is to free parties from the risk of having to pay their opponents’ costs in matters arising under the Act, while at the same time protecting those parties who are forced to defend proceedings that have been instituted vexatiously or without reasonable cause.

(2) It follows from the protection offered by s 570(2) that a person will rarely be ordered to pay the costs of a proceeding. But it is not necessary to prove that there are exceptional circumstances warranting the making of an order …

(3) The relevant question is whether the proceeding had reasonable prospects of success at the time it was instituted, not whether it ultimately failed: *R v Moore; Ex parte Federated Miscellaneous Workers’ Union of Australia* (1978) 140 CLR 470 at 473 per Gibbs J; Kangan at [60]. In *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257 at 264–5 (approved in Kangan) Wilcox J said

If success depends on the resolution in the applicant’s favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding, as being “without reasonable cause”. But where, on the applicant’s own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks a reasonable cause.

[8] We would emphasise, however, that these principles relate to the question of whether the jurisdiction to award costs is enlivened. Even if the court has jurisdiction to make a costs order, it retains the discretion to refrain from exercising it in an appropriate case.

1. Notwithstanding the conclusion that the principal basis upon which Ms Wroughton’s claims must fail was because she had failed to establish any “*improper*” reason in the action taken against her, it is not considered that the institution of her claims can properly be characterised as vexatious or without reasonable cause.
2. The present proceeding is not one in which the discretion conferred by s 570 is enlivened.

# *CONCLUSIONS*

1. The essential reason why the Applicant’s claims to relief fail is because the reasons for her dismissal were stated by Mr Whitby in his letter terminating her employment as handed to her on 26 November 2014. The reasons for her dismissal had nothing to do with any exercise by Ms Wroughton of a “*workplace right*”.
2. It is unnecessary, in such circumstances, to resolve Ms Wroughton’s application that there be a separate hearing in respect to the relief to be granted. She is entitled to no relief.
3. Although claims for relief under the *Sex Discrimination Act* and the Commonwealth *Work Health and Safety Act* have also been advanced, the claim essentially remains a claim brought under the *Fair Work Act*. Section 570(2) of the *Fair Work Act* provides for limited circumstances in which costs may be awarded against an unsuccessful applicant. The present proceeding does not fall within s 570(2).
4. The proceeding should be dismissed with no order as to costs.

# THE ORDERS OF THE COURT ARE:

1. The proceeding is dismissed.

2. There is no order as to costs.

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| I certify that the preceding one hundred and eight (108) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick. |

Associate:

Dated: 17 November 2015