

**IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY**

No. M 128 of 2011

BETWEEN:

**THE BOARD OF BENDIGO REGIONAL INSTITUTE OF  
TECHNICAL AND FURTHER EDUCATION**

Appellant

and

**GREGORY PAUL BARCLAY**  
and  
**AUSTRALIAN EDUCATION UNION**

First Respondent

Second Respondent

**APPELLANT'S CHRONOLOGY**

**PART I:**

The Appellant certifies that this chronology is in a form suitable for publication on the internet.

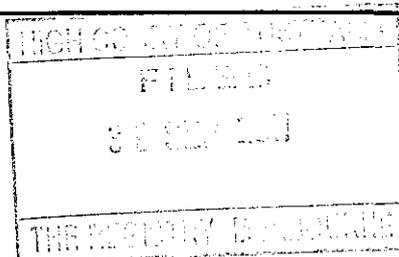
**PART II:**

Date	Event	Primary Source Ref	AB Ref
At all material times	(a) The First Respondent ( <b>Barclay</b> ) was: (i) a senior Teacher; (ii) employed as Team Leader – Teaching Excellence in the unit responsible for overseeing the preparation of an audit process, the unit being known as the “ <i>Teaching, Learning &amp; Quality Unit</i> ”; and (iii) Sub-Branch President of the Second Respondent ( <b>AEU</b> ) at the Bendigo Regional Institute of TAFE ( <b>BRIT</b> ).  (b) Dr Louise Harvey ( <b>Harvey</b> ) was the Chief Executive Officer of BRIT.	[1] <sup>1</sup> [49]  [1]  [1]	

<sup>1</sup> A reference to a paragraph, unless otherwise indicated, is a reference to a paragraph in the Judgment at first instance.

Date: 30 September 2011

Filed on behalf of the Appellant  
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Date	Event	Primary Source Ref	AB Ref
Late 2009 to mid-January 2010	<p>(a) Four members of the AEU spoke to Barclay about the preparation of audit documentation. They told him that they had become aware that incorrect information had been included in documents being prepared for audit purposes.</p> <p>(b) None of these persons told Barclay that they considered that the person responsible for making the entries had deliberately inserted details which they knew to be incorrect in an attempt to mislead the auditors.</p> <p>(c) At no time does Barclay bring these allegations to the attention of Harvey or any other members of senior management.</p>	<p>[43]</p> <p>Barclay Affidavit, 19/2/10, [40]-[47] and [52]</p> <p>XXN Barclay, T37.17-.40, T38.35-.40, T40.30-T41.10</p>	
29 January 2010	<p>Barclay forwards an email to all members of the AEU employed by BRIT (<b>the Barclay email</b>), the email being signed by him as "<i>President BRIT AEU Sub-Branch</i>", the email stating as follows:</p> <p><i>"The flurry of activity across the Institute to prepare for the upcoming reaccreditation audit is getting to the pointy end with the material having been sent off for the auditors to look through prior to the visit in February.</i></p> <p><i>It has been reported by several members that they have witnessed or been asked to be part of producing false and fraudulent documents for the audit.</i></p> <p><i>It is stating the obvious but, <b>DO NOT AGREE TO BE PART OF ANY ATTEMPT TO CREATE FALSE/FRADULENT</b> (sic) <b>DOCUMENTATION OR PARTICIPATE IN THESE TYPES OF ACTIVITIES</b>. If you have felt pressured to participate in this kind of activity please (as have several members to date) contact the AEU and seek their support and advice."</i> (emphasis in original)</p>	[4]	
29 January 2010	Some recipients of the Barclay email forward copies to senior managers of BRIT.	[6]	
1 February 2010	<p>(a) Harvey is advised of the existence of the Barclay email and later that day is provided with a copy by one of her managers.</p> <p>(b) One of Harvey's managers, Jamie Eckett (<b>Eckett</b>), who was Manager of the Teaching, Learning &amp; Quality Unit, and to whom Barclay reported, tells Harvey that he had discussed the contents of the Barclay email</p>	[7]	

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	<p>with Barclay earlier that day.</p> <p>(c) Eckett tells Harvey that Barclay had declined to provide Eckett with the names of his informants because they were union members and he did not wish the fact of their membership to become known to management.</p> <p>(d) Harvey says that Eckett also told her that Barclay would not provide details of the allegations made by these informants (Barclay disputed this).</p>	Harvey Affidavit, 22/2/10, [4]	
1 February 2010	<p>(a) Harvey forms the view that Barclay had, prima facie, contravened certain clauses of the Code of Conduct for Victorian Public Sector Employees.</p> <p>(b) Harvey is also concerned that the allegations of fraudulent conduct were made by Barclay without any complaint or report of conduct of that kind being raised by him with Harvey or any other member of senior management of BRIT.<sup>2</sup></p> <p>(c) Harvey is further concerned that these matters had not been raised despite Barclay being employed as Team Leader in the unit responsible for overseeing the preparation of the audit process.</p> <p>(d) Harvey is also concerned that the language used by Barclay in the Barclay email was bound to cause distress to members of staff, and bring the reputation of BRIT into question and undermine staff confidence in the audit process.</p> <p>(e) Harvey determines to issue a “show cause” letter to Barclay, requiring him to provide reasons why BRIT should not institute disciplinary proceedings against him.</p>	<p>[51]</p> <p>[49]</p> <p>[49]</p> <p>[49]</p> <p>Harvey Affidavit, 22/2/10, [9], [12]-[17], [19], [23]</p>	
2 February 2010	<p>At a meeting between Harvey, Barclay and an AEU representative, Barclay is provided with a letter entitled “Possible Serious Misconduct” and which in part states:</p> <p><i>“Your allegation [of staff members being asked to produce false and fraudulent documents for the audit] raises the possibility that improper conduct has occurred which will require a full and thorough independent investigation. I am in the process of arranging this to occur. You will be required to be interviewed</i></p>	[8]	

<sup>2</sup> Barclay accepted in cross-examination that if employees were being asked to or pressured to participate in the production of false and fraudulent documentation, that would be a matter of very grave concern for BRIT and a matter that should properly be brought to the attention of BRIT management (XXN Barclay, T42.15-43.5).

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	<p>by the investigator appointed.</p> <p>...</p> <p>"However, the purpose of this letter is to ask that you show cause why you should not be subject to disciplinary action for serious misconduct in your role as Team Leader – Teaching Excellence. It appears to me that such disciplinary action may be warranted because of:</p> <ul style="list-style-type: none"> <li>• the manner in which you have raised the allegation, via a broadly distributed email;</li> <li>• your actions in not reporting the instances of alleged improper conduct directly to your manager or me to enable us to take appropriate action; and</li> <li>• your refusal or failure to provide particulars of the allegations when asked to do so by your manager.</li> </ul> <p>In my preliminary view, this conduct is inconsistent with the behaviour expected of a public sector employee, a BRIT employee and a Team Leader in the Teaching, Learning &amp; Quality Unit of this organisation. Additionally, I am of the view that because your accusation is vague and general, it doesn't demonstrate proper respect for your fellow employees and places the individuals concerned in the re-accreditation process under the shadow of suspicion with no right of reply or defence.</p> <p>I believe you have breached Clause 3.6, 3.9 and 6.1 of the Code of Conduct for Victorian Public Sector Employees. Clause 3.6 refers to public sector employees reporting to an appropriate authority any unethical behaviour. You did not report to your supervisor your knowledge of possible unethical behaviour and as yet have not provided proof of your allegation to your manager when asked to do so. Clause 3.9 refers to public sector employees behaving in a manner that does not bring themselves or the public sector into disrepute. The manner in which you have disseminated your allegations (whether or not they are well-founded) clearly threatens the reputation and probity of Bendigo TAFE. Finally, Clause 6.1 refers to public sector employees being fair, objective and courteous in their dealings with other public sector employees. By making generalised allegations, that could apply to anyone in the Institute involved in the re-accreditation process, you have cast a slur on your colleagues against which they cannot defend themselves.</p> <p>In line with Clause 3 of the BRIT Staff Discipline procedure, it is my decision to suspend you from duty on full pay until Friday, 19<sup>th</sup> February 2010. This period of time will provide you with the opportunity to formally respond to the charge of serious misconduct as outlined above. You should provide your response to the charges by no later than 12 noon on 17 February 2010. Until 19 February you are not to attend any of the Bendigo TAFE campuses and your electronic access account will be suspended."</p>		
At all material	(a) Harvey did not engage in any alleged adverse action	[53]	

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times from 1 February 2010	<p>because of Barclay's membership of the AEU or because of any role he had within that organisation or because he had engaged in industrial activity.</p> <p>(b) Harvey decided to <b>suspend</b> Barclay on full pay because the allegations against him were serious and she was concerned that, if Barclay was not suspended, he might cause further damage to the reputation of BRIT and of the staff of BRIT at a critical stage in the audit process.</p> <p>(c) Harvey determined to <b>exclude Barclay from BRIT campuses</b> and <b>suspend his email access</b> because she did not want Barclay on the premises while the auditors were there and because she did not want any other "<i>loose allegations</i>" being made inappropriately during the audit to the detriment of BRIT.</p> <p>(d) Harvey determined to institute <b>an investigation</b> into Barclay's actions because it appeared to her that Barclay had failed to bring serious allegations to the attention of senior managers and proceeded to cast aspersions and innuendo upon his colleagues by way of a widely circulated email.<sup>3</sup></p>	<p>[52] and [58]</p> <p>[54]</p> <p>[51]</p> <p>Harvey Affidavit, 22/2/10, [9], [12]-[17], [19], [23]</p>	
3 February 2010	Harvey appoints an independent investigator to conduct an investigation into allegations that BRIT staff had been directed to produce fraudulent documentation.	Harvey Affidavit, 22/2/10, [18]	
5 February 2010	Harvey appoints Nadine Parry, Human Resources Co-ordinator to investigate potential serious misconduct allegations against Barclay.	Harvey Affidavit, 22/2/10, [17]	
10 February 2010	<p>Barclay and the AEU file an application against BRIT for an interlocutory injunction alleging that BRIT had taken adverse action against Barclay because he:</p> <p>(a) was an officer of the AEU (s.346(a) of the <i>Fair Work Act 2009</i> (Cth) (<b>FW Act</b>));</p> <p>(b) engaged in industrial activity, namely, representing or advancing the views, claims or interest of the AEU (s.346(b) and s.346(b)(v));</p>	[10]	

<sup>3</sup> The trial judge found that "Dr Harvey was entitled 'if not bound' to investigate the allegations" (Judgment at [45]).

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	<p>(c) engaged in industrial action, namely, engaging or participating in a lawful activity organised or promoted by the AEU (s.346(b) and s.347(b)(iii));</p> <p>(d) exercised a workplace right, namely, the role of responsibility granted by clause 10 of the <i>Victorian TAFE Teaching Staff Multi-Business Agreement 2009 (the Agreement)</i> (s.341(a)(ii) and s.341(1)(a)); and</p> <p>(e) exercised a workplace right, namely, the ability to participate in a process or proceeding under a workplace instrument, being the dispute settlement procedure under clause 10 of the Agreement (s.341(a)(ii), s.341(1)(b) and s.341(2)(j)).</p>		
12 February 2010	<p>(a) The return of the AEU and Barclay's interlocutory application.</p> <p>(b) The proceeding, by consent, is fixed for a speedy trial commencing 24 February 2010.</p> <p>(c) Pending the hearing and determination of the proceeding, BRIT agrees to lift the:</p> <ul style="list-style-type: none"> <li>(i) suspension on full pay;</li> <li>(ii) suspension on Barclay's internet access;</li> <li>(iii) suspension on Barclay's access to BRIT's premises; and</li> </ul> <p>suspend BRIT's disciplinary investigation into Barclay's conduct.</p>	[9]	
16-17 February 2010	<p>(a) The period when the Victorian Registration and Qualifications Authority was to conduct an on-site audit of BRIT.</p> <p>(b) The audit was to be conducted to establish whether or not BRIT had complied with various requirements upon which its continuing accreditation and funding depended.</p>	[6]	
24-26 February and 4 March 2010	Dates of the trial of the proceeding.		
25 March 2010	Judgment at first instance wherein the application by Barclay and the AEU was dismissed.		
9 February 2011	Judgment on appeal wherein the appeal was allowed (Gray and Bromberg JJ in the majority, Lander J in dissent) and		

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	the matter remitted to the primary judge for the making of further orders in accordance with the majority judgment.		

**JUSTIN L BOURKE SC**  
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Aickin Chambers  
Melbourne

**DATED:** 30 September 2011

*Lander & Rogers*

.....  
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