FEDERAL CIRCUIT COURT OF AUSTRALIA

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION v HUNTER VALLEY ENERGY COAL PTY LTD *[2017] FCCA 1559*

Catchwords:
INDUSTRIAL LAW – Adverse action claim – statutory and contractual interpretation – where worker employed on the Respondent's mine site – whether the worker was employed by the company retained by the Respondent as its labour hire service provider or whether worker in fact employed by another entity – whether implications of this in terms of s.342 Fair Work Act – whether such a worker, being a person employed by the independent contractor, falls within Column 2 of s.342(1) item 3(d) – whether adverse action in fact taken.

Legislation:
Fair Work Act 2009, ss.336, 340, 341, 342, 360, 361, 545,546.

Cases cited:
Askaro v Leading Synthetics Pty Ltd [2014] FCCA 2081
Australian Mear Industry Employees Union v Belandra Pty Ltd [2003] FCA 910
Autoclenz Ltd v Belcher [2011] UKSC 41
Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ld (No.2) 2013 FCA 446
Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] FCAFC 37
Leigh Valley Coal Co v Yensavage 218 Fed. 547 (2d. Cir.1914)
National Tertiary Education Union v Royal Melbourne Institute of Technology [2013] FCA 451
Port Kembla Coal Terminal Ltd v CFMEU [2016] FCAFC 99; 263 IR 344
State of Victoria v Construction, Forestry, Mining and Energy Union [2013] FCAFC 160
State of Victoria (Office of Public Prosecutions) v Grant [2014] FCAFC 184
Tattsbet Limited v Morrow [2015] FCAFC 62

Applicant:	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
Respondent:	HUNTER VALLEY ENERGY COAL PTY LTD

File Number:	SYG 2513 of 2015
Judgment of:	Judge Altobelli
Hearing date:	13, 14 and 15 February 2017
Date of Last Submission:	15 February 2017
Delivered at:	Sydney
Delivered on:	18 July 2017

REPRESENTATION

Counsel for the Applicant:	Mr Slevin
Solicitors for the Applicant:	Construction, Forestry, Mining and Energy Union (CFMEU) - Ms Short
Counsel for the Respondent:	Mr Follett
Solicitors for the Respondent:	Herbert Smith Freehills

ORDERS

(1) The Applicant's Statement of Claim and Application (as amended) filed 4 December 2015 be dismissed.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 2513 of 2015

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
Applicant

And

HUNTER VALLEY ENERGY COAL PTY LTD
Respondent

REASONS FOR JUDGMENT

Introduction and Background

1. By way of an Application (as amended) dated 4 December 2015 supported by a Statement of Claim dated 23 December 2015 (SOC), the Applicant seeks various orders pursuant to ss.545 and 546 of the *Fair Work Act 2009* (Cth) (FW Act), as a consequence of an alleged contravention of s.340(1) of the FW Act in relation to one of its members, Ms Lisa Zoppellaro (the worker).

2. The worker performed work at the Mt Arthur coal mine located in the Hunter Valley, New South Wales (the mine), during the period from 5 January 2015 to 8 February 2015. At all relevant times, the Respondent was the Mine Holder and had appointed Mt Arthur Coal Pty Ltd to operate the Mine.

3. In relation to some of the labour requirements at the mine, the Respondent had, pursuant to a contract for services, acquired the provision of labour hire services from Chandler Macleod Group Ltd (CMG). Pursuant to that contract, CMG sourced and provided to the Respondent for its use at the mine certain qualified labour.

4. One such person ultimately provided to the Respondent pursuant to that contract, was Ms Zoppellaro. Ms Zoppellaro's first shift at the Mine was on 5 January 2015, with her last shift being on 8 February 2015.

5. The Applicant alleges that during the course of her work at the Mine, Ms Zoppellaro made numerous complaints or inquiries in relation to her employment, including to persons with capacity under a workplace law to seek compliance with that law. It is alleged that in so doing, Ms Zoppellaro exercised one or more workplace rights. Some of these allegations are admitted, whereas some are denied.

6. On 8 February 2015, the Respondent informed CMG that it no longer wanted Ms Zoppellaro to perform work at the mine and asked CMG to replace her with another operator. This decision was formally communicated to CMG on 10 February 2015.

7. The Applicant alleges that by taking steps to have Ms Zoppellaro not perform any further work at the mine on or after 10 February 2015, the Respondent took adverse action against Ms Zoppellaro, within the meaning of item 3(d) of s.342(1) of the FW Act. This allegation is denied.

8. The applicant further alleges that the respondent took the alleged adverse action against Ms Zoppellaro for reasons which included the reason that she had exercised workplace rights as alleged, in contravention of s.340(1) of the FW Act. This allegation is also denied.

9. The worker primarily drove heavy trucks at the mine. This required considerable skill because of the conditions at the mine, which operated around the clock. When loaded the trucks weighed about 700tons, were 10m wide, 18.7m long, had 4m tyres and the drivers cabin sat 4.5m above the ground. One of the witnesses explained that a loaded truck was the equivalent of a 2 storey house on wheels which could travel at 60kph when fully loaded.

10. For environmental reasons (to reduce dust) the various haul roads at the mine were watered by watering carts. A properly watered road compacts the dirt, thus reducing the amount of dust generated by vehicles travelling on the road, as well as aiding traction.

11. Shortly after starting at the mine the worker experienced difficulties with the quantity of water on the haul roads. She claimed that the roads were overwatered such that they became slippery and caused the truck she was driving to lose traction and slide from time to time between 3 and 7 February 2015. The worker commented on or complained about what she perceived to be overwatering not just to the water cart operators but to her direct supervisor, Mr Bevan Moir. In so doing it was conceded that she was exercising workplace rights under s.342(1)(c) of the FW Act.

12. On 10 February 2015 the worker was informed by CMG that the Respondent (through Mr Andrew Hamson) had decided that she should not return to the mine to perform any further work. This decision was first communicated on 8 February 2015, and then confirmed on 10 February 2015. These Reasons for Judgment consider and adjudicate on the legal consequences of the above.

The Evidence

13. The Applicant relied on the following material:

    a) Affidavit of Shane Thompson, sworn 21 April 2016;

    b) Affidavit of Lisa Zoppellaro, sworn 22 April 2016;

    c) Affidavit in reply of Lisa Zoppellaro, sworn 8 July 2016;

    d) Affidavit of Keith Shaw, sworn 12 October 2016; and

    e) Affidavit of Owen John Carter, sworn 7 December 2016.

14. The Respondent relied on the following material:

    a) Affidavit of Andrew John Hamson, sworn 20 May 2016;

    b) Affidavit of Bevan Frank Moir, affirmed 20 May 2016;

    c) Affidavit of Joanne Patricia Crix, sworn 24 May 2016; and

    d) Affidavit of Daniel Jordan Redman, affirmed 20 May 2016.

15. The following material was tendered:

Exhibit No.	*Description of Exhibit/MFI*
R1	Employment Application dated 16/12/14
R2	Induction Questionnaire dated 16/12/14
A1	USB containing recordings
R3	Email dated 1/4/15
R4	Email dated 2/3/15
R5	Transcript of 9/11/15
A2	Un-redacted transcript of 9/11/15

16. The following witnesses were cross-examined at the final hearing:

    a) Ms Lisa Zoppellaro;

    b) Mr Owen Carter;

    c) Mr Bevan Moir; and

    d) Mr Andrew Hamson.

Overview of Issues

17. The facts of this case raise difficult issues of both contractual and statutory interpretation.

18. The worker entered into a contract to provide her services at the Respondent's mine. There is no doubt that she worked at the mine and was subject to the directions of the Respondent. One of the issues in this case is the precise contractual relationship that the worker entered into. The Court finds that the worker believed she had entered into a contract with CMG. In fact however she entered into a contract with Ready WorkForce (A Division of Chandler Mcleod) Pty Ltd (hereinafter referred to as 'Ready Workforce'). The Respondent had a contract with CMG to provide temporary labour according to the Respondent's requirements. Based on the evidence before the Court, it did not have a similar contract with Ready Workforce. Thus when the worker performed work at the site, she was not in fact employed by CMG but was employed by Ready Workforce.

19. The Applicant contends that the Respondent took adverse action against the worker, based on s342(1) Item 3(d) of the FW Act i.e. that

the Respondent as the principal, who had engaged the services of CMG as independent contractor, had refused to use the services of the worker (as a person employed by the independent contractor). The Respondent contends that if the worker was, in fact, employed by Ready Workforce, she was not an employee of CMG, and thus no adverse action could have been taken pursuant to s.342. The **first issue** the Court will need to decide, therefore, is whether the actual contractual relationship between the worker was in substance with CMG as the Applicant contends, or with Ready Workforce as the Respondent contends.

20. If the Court finds that the worker was in fact employed by CMG the **second issue** – one of statutory interpretation – is whether the Respondent took adverse action in accordance with s.342(1) Item 3(d) given that this refers to the refusal by the principal to make use of "services offered by the independent contractor", but does not refer to "a person employed or engaged by the independent contractor" in the way that Column 1 of s.342(1) Item 3(d) does. There is no dispute that the Respondent did not refuse to make use of the services offered by CMG. The Respondent contends that refusing to use the services of the worker is not, in the circumstances, adverse action as defined in s.342. The Court will need to decide, as a matter of statutory interpretation, whether this is correct.

21. If the Court finds that the Respondent did in fact take adverse action pursuant to s.342 against the worker, the **third issue** for the Court is whether the facts in fact establish that adverse action was taken against the worker because she exercised a workplace right. This involves a consideration of the facts, and the application of ss.340, 341, 342, 360 and 361 of the Act.

The Contract of Employment: the first issue

22. The Applicant's case is, in effect, that even though the worker entered into a contract with Ready Workforce, her employer was in fact CMG. The Applicant's case about who employed the worker focuses on substance rather than form.

23. The starting point is, of course, the written contract that was signed by the worker. This document became Exhibit "R1". It consists of the following:

a) A title: Employment Application: Industrial

b) A rectangular box the contents of which commence with the words "PLEASE NOTE", and paragraph (b)(ii) of which clearly refers to employment with Ready Workforce and which then explains that this company will be described in the document as Chandler Mcleod or the company.

c) Part A: Application form

d) Part B Privacy Collection Notice

e) Part D: Terms and Conditions of Employment

f) Fair Work Information Statement.

24. The Court notes that there is no Part C in the document tendered to it. The entirety of the document is paginated in the centre of the bottom of each page, and is numbered 1-10 consecutively. *Prima facie* it does not appear that a page is missing.

25. Part A is a form that is printed but then completed by the writer. The worker ticked the box that confirms that the worker had previously worked for "Chandler Mcleod or any other company in the Chandler Mcleod Group". The worker signed the last page of Part A which was entitled at the top 'Agreement, Consent and Understanding'.

26. Part B is unremarkable.

27. Part D, the Terms and Conditions of Employment, is significant because, consistent with the rectangular box at the top of the page on which Part A commences, it defines the parties as Ready Workforce and the worker. On the fourth page of Part D, being numbered page 9 of the document, the worker has signed, as has an authorised representative of ready Workforce.

28. But for the fact that the contract was an employment contract, the issue of who in fact employed the worker would have been determined

solely by the written agreement that became Exhibit "R1". In the present case the situation is more complex.

29. In *Tattsbet Limited v Morrow* [2015] FCAFC 62 Allsop CJ at [5] made some general but nonetheless important and relevant comments about employment contracts:

> *"The statutory and factual context will always be critical in a multifactorial process of characterisation of a legal and human relationship: employment."*

30. The context was, of course, different. The principle nonetheless applies beyond the specific context in which it was articulated. This can be gleaned by the Chief Justices's reference to *Leigh Valley Coal Co v Yensavage* 218 Fed. 547 (2d. Cir.1914). The extract from the majority judgment in that case emphasises the relevance of statutory context. There the Second Circuit Court majority (Coxe and Learned Hand JJ) stated at 553:

> *"Such statutes are partial; they upset the freedom of contract, and for ulterior purposes put the two contesting sides at unequal advantage; they should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them."*

31. Counsel for the Applicant emphasised the statutory object of Chapter 3 of the FW Act – to protect workplace rights: s.336(1)(a). That the protection of workplace rights is intended to protect persons is stated in s.336(2) – the protection of workplace rights be provided to a person whether an employee, an employer or otherwise. From this the Court concludes that the general protections promulgated by Chapter 3 were intended by the legislature to embrace categories of persons who were not necessarily employees. Indeed this is self-evident in s.342(1) Item 3 Column 1 which refers not just to independent contractors, but a person employed "or engaged" by the independent contractor. Implicit in this is the legislature's intention to cast the general protections widely, to apply its protections beneficially, and not necessarily to be bound by artificially created constructs of employment relationships entered into in circumstances where one party is able to dictate both the form and substance of such relationships.

32. The relationship between workers, and those for whom they perform work, was considered at length in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37 by North and Bromberg JJ, with Barker J agreeing in substance. What the present Court is looking for is principles by which to determine the actual relationship between a worker and those for whom they perform work, irrespective of the form chosen by them. *Quest South Perth* dealt with whether a worker was an employee or an independent contractor. That is not the issue in the present case. The principles propounded, however, are apposite, and are discussed at [132] – [150]. Their Honours discuss what they refer to as "the prevalence of disguised employments…" at [133]. They note at [135] that:

> *Triangular contracting arrangements are also used to provide labour to end-users. These arrangements involve a third person intermediary.*

33. At [137] their Honours state:

> *The many and varied ways in which the labour of an individual may be provided to an end-user have facilitated the provision of labour through arrangements which do not create an employment relationship between the provider and the end-user. The use of such arrangements may be real or artificial. Where artificial, the external form, appearance or presentation of the relations between the parties may cloak or conceal either an underlying employment relationship or the identity of the true employer. This is what is commonly referred to as a disguised employment.*

34. For present purposes the focus is on the principle i.e. that arrangements in relation to the provision of labour may be real or artificial. At [142] they observe that the current state of the law looks to substance and not form:

> *The prevalence of disguised employments may serve to explain why appellate courts in Australia and the United Kingdom have been particularly alert, when determining whether a relationship is one of employment, to ensure that form and presentation do not distract the court from identifying the substance of what has been truly agreed. It has been repeatedly emphasised that courts should focus on the real substance, practical reality or true nature of the relationship in question: R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Limited[1952] HCA 10; (1952) 85 CLR 138, at 151 and 155 (Dixon, Fullagar*

and Kitto JJ); Hollis v Vabu Pty Ltd [2001] HCA 44; (2001) 207 CLR 21, at [24], [47], [57], [58] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); ACT Visiting Medical Officers Association v Australian Industrial Relations Commission (2006) 232 ALR 69 at [25] and [31] (Wilcox, Conti and Stone JJ); Damevski at [77]–[78] (Marshall J, with whom Wilcox J agreed) and [144], [172] (Merkel J); Dalgety Farmers Ltd t/as Grazcos v Bruce (1995) 12 NSWCCR 36 at 46–48 (Kirby ACJ, with whom Clarke and Cole JJA agreed); Autoclenz Ltd v Belcher [2011] UKSC 41; [2011] 4 All ER 745 at [22], [25]–[26], [29]–[32] (Lord Clarke SCJ, with whom Lord Hope DP, Lord Walker, Lord Collins and Lord Wilson SCJJ agreed).

35. At [143] their Honours make this observation, pertinent to the present case:

> *In looking to the reality of the situation and in determining what it is that has truly been agreed, it is necessary to ensure that the conclusion reached coheres with applicable principles of contract law.*

36. For the Applicant to succeed, the Court would need to satisfy itself that the worker in fact contracted with CMG rather than Ready Workforce, despite the express terms of the contract.

37. But it is clear from the context of [143] and the following paragraphs that their Honours were not suggesting that the beginning and end of the enquiry about the reality of the situation was with the written contract, for that would defeat the purpose of the exercise. At [144-145] they refer to sham contracts. It was not part of the Applicant's case that the worker's contract with Ready Workforce was a sham – indeed it could not be on the evidence – but what was submitted was that in reality and substance the contract was with CMG.

38. At [145-146] their Honours refer to the development of what they describe as a "broader doctrine of pretence in which a common intention to deceive, is not required in order for a false arrangement to be disregarded" [145]. Their Honours continued at [146] – [147]:

> *146. The doctrine of pretence developed from the landlord and tenant cases as a mechanism for avoiding attempts by landlords to contract out of statutory protections afforded to tenants. The doctrine has now been applied to employment contracts by the United Kingdom's Supreme Court in Autoclenz at [21]–[35],*

(Lord Clarke SCJ, with whom Lord Hope DP, Lord Walker, Lord Collins and Lord Wilson SCJJ agreed); see Davies (2009), referred to with approval in Autoclenz at [28]; and see Raftland at [47] (Gleeson CJ, Gummow and Crennan JJ) where, by reference to one of the landlord and tenant cases, the majority observed that "a part of an instrument may be a pretence," and at [119] (Kirby J); see further Irving M, The Contract of Employment (LexisNexis Butterworths, 2012) at [2.27][2.28]; and Roles and Stewart (2012).

147.In Autoclenz at [35], Lord Clarke SCJ, speaking for the Court, observed that:

...the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem."

39. A number of the terms of the agreement considered in *Autoclenz Ltd v Belcher* [2011] UKSC 41 were regarded as ineffectual because they did not "reflect the true agreement between the parties" (at [38]). The terms disregarded provided for rights or imposed obligations of a kind which served to indirectly disclaim the existence of an employment relationship.

40. At [148] their Honours go even further and consider a situation where there is neither sham nor pretence:

Even in the absence of a sham or pretence, the parties' characterisation of their relationship, whether direct (by the application of a label) or indirect (as in Autoclenz) may not be given effect according to its terms, because that characterisation contradicts the nature of the relationship the parties have actually created: Curtis v The Perth and Freemantle Bottle Exchange Co Limited [1914] HCA 21; (1914) 18 CLR 17 at 25 (Isaacs J); Garnac Grain Company Incorporated v HMF Faure & Fairclough Ltd [1968] AC 1130 at 1137 (Lord Pearson); Australian Mutual Provident Society v Chaplin [1978] UKPC 7; (1978) 18 ALR 385 at 389 (the Court) (AMP Society), citing Lord Denning MR in Massey v Crown Life Insurance Co [1977] EWCA Civ 12; [1978] 2 All ER 576 at 579; Hollis at [58] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). In that situation, the character of the relationship created by the

contract will be revealed by all the terms of the contract (AMP Society at 388–389), examined in the light of the circumstances surrounding the making of it: Narich Pty Ltd v Commissioner of Pay-roll Tax [1983] 2 NSWLR 597 at 601 and 606 (Lord Keith of Kinkel, Lord Elwyn-Jones, Lord Roskill, Lord Brandon of Oakbrook and Lord Templeman); ACT Visiting Medical Officers Association at [24] (the Court).

41. At [149] they consider that parties might, by their conduct, have impliedly varied their contract. There is no suggestion of this in the present case.

42. Their Honours conclude at [150]:

> *Ultimately, the search for the reality or truth of what has been agreed, is a search for the common intention of the parties. That common intention is to be determined by what a reasonable person would have understood the parties to mean and, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction: Toll (FGCT) Pty Limited v Alphapharm Pty Limited (2004) 219 CLR 165 at [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). Whilst well known contractual principles are to be applied, an overly technical approach to contractual analysis is to be avoided. As McHugh JA (with whom Hope and Mahoney JJA agreed) said in an often cited passage from Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd (1988) 5 BPR 11,110 at 11,117–118:*
>
> > *It is often difficult to fit a commercial arrangement into the common lawyers' analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of "offer", "acceptance", "consideration" and "intention to create a legal relationship" which are the benchmarks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship ...*
>
> *Moreover, in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled. Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties'*

> *subsequent conduct become sufficiently specific to give rise to legal rights and duties. In any dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship was first formed.*

43. The reference to the United Kingdom Supreme Court decision in *Autoclenz Ltd v Belcher* [2011] UKSC41 also provides principles that are relevant to the characterisation of the employment relationships in this case. Their Lordships considered the classic description of a contract of employment at [18], some further uncontentious propositions at [19], and then the position under the ordinary law of contract at [20]. Their Lordships make clear at [21] that those principles applied to ordinary contracts and in particular commercial contracts, and they did not intend to alter those principles. They go on to say, however at [21]:

> *Nothing in this judgment is intended in any way to alter those principles, which apply to ordinary contracts and, in particular, to commercial contracts. There is, however, a body of case law in the context of employment contracts in which a different approach has been taken. Again, Aikens LJ put it correctly in the remainder of para 89 as follows:*
>
> *"But in cases of contracts concerning work and services, where one party alleges that the written contract terms do not accurately reflect the true agreement of the parties, rectification principles are not in point, because it is not generally alleged that there was a mistake in setting out the contract terms as they were. There may be several reasons why the written terms do not accurately reflect what the parties actually agreed. But in each case the question the court has to answer is: what contractual terms did the parties actually agree?*

44. In other words their Lordships recognised that a different approach is to be adopted in relation to employment contracts when, for example, a test that focuses on the reality of the situation should apply – even if the written documentation does not reflect that reality. Paragraphs [34] and [35] and informative.

45. How do these principles apply on the facts of this case? There is no dispute on the facts that the worker in fact worked on the Respondent's

mine-site. There is nothing on the evidence to suggest that this actuality was facilitated by Ready Workforce. Indeed there is no evidence to suggest that there is or at any relevant time was a contractual relationship between Ready Workforce and the Respondent. The only evidence before the Court of a contract between the Respondent and a provider of labour was the Short Form Services Contract between the Respondent and CMG annexed to the affidavit of Joanne Crix filed 24 May 2016, who provided her affidavit in the Respondent's case. On its face this contract relates to the provision of labour to the Respondent at the Mt Arthur Coal Mine in Muswellbrook where the worker in fact worked. The definition of Contractors Personnel at page 10 of the Contract includes all personnel engaged by CMG including sub-contractors and employees and employees of sub-contractors (in many ways consistent with s.342(1) Column 1 Item 3 as interpreted in the cases). At 20.1 the contractor is prevented from assigning, transferring or sub-contracting its rights or obligations under the contract without the company's prior written consent. There is no evidence before the Court that CMG assigned, transferred or sub-contracted its contractual obligations to provide labour to the Respondent to Ready Workforce. But, the Respondent contends, Ready Workforce employed the worker who worked on its mine site.

46. As there is no evidence of contractual relationship between Ready Workforce and the Respondent in this case, what was the worker doing working at the Respondent's mine, at the Respondent's direction and with its full knowledge? If the worker was not engaged pursuant to the contract between the Respondent and CMG, on what basis was she working at the mine site?

47. The Court believes that the only possible way to reconcile what the Respondent, the worker, CMG and Ready Workforce actually did, and to give effect to what must have reasonably been their intention, is to characterise the worker's employment contract as being with CMG and not Ready Workforce. That is the only logical way, on the evidence before the Court, that the worker could have actually worked on the mine site. That is the only way to make sense of the contract between CMG and the Respondent.

48. It might be argued that the substitution of one party for another in an employment contract (rather than to vary a contractual term) goes too far, and is not contemplated by the principles enunciated in the cases discussed above. In some cases that might be so. Not in this case. The contract the worker signed with Ready Workforce makes it plain that it is a division of CMG, thus signalling the relationship between the corporate entities. The worker's evidence about the circumstances in which she entered into the contract, which the Court accepts, make it entirely plausible that she thought she was working for CMG. If that is not what CMG intended, in the circumstances of an unequal contract they should have been much clearer. It is no answer for the Respondent to contend, as it did, that the worker signed a contract with Ready Workforce and should be bound by the consequences of not reading it and thus ascertaining she was not employed by CMG. That literal approach may well apply to other contracts, but it does not apply to this employment contract.

49. A close examination of the contract between CMG and the Respondent demonstrates that her employment by CMG is entirely consistent with that contract. The conduct of the parties after the contract is also consistent with the actual contract being between the worker and CMG. Pay-slips, letterheads, PAYG summaries were all in the name of CMG.

50. This is a case where the reality of the situation is not reflected in the written documentation. It is unlikely that the contract between CMG and the worker was a sham. It is possible that it was a pretence but even if it was not, the proper characterisation of the relationship between the worker, the Respondent, CMG and Ready Workforce is that she was employed by CMG. This is the only way to make sense of the relationships the parties have actually created. The Court therefore rejects the Respondent's contention on this issue.

Was the refusal to use the services of the worker adverse action within s.342 of the Act: the second issue

51. In his closing submissions Counsel for the Respondent described the relationship between the worker, the Respondent, and CMG as similar to a tripartite relationship. If his contention about the worker not being an employee of CMG was not accepted by the Court, the worker would be employed by CMG. CMG of course entered into a contract to

provide labour services to the Respondent. Thus, for the purposes of s.342(1), Counsel contended that in Item 3, Column 1 the Respondent was the principal, CMG was the independent contractor, and the worker was a person employed by the independent contractor. The Court accepts this broad analysis of the situation.

52. Turning to Column 2 of Item 3, however, Counsel contended that no adverse action was taken against the worker because, in effect, Column 2 does not refer to the worker. Column 2 does not refer to "a person employed or engaged by" the independent contractor. Thus there could be no adverse action because the Respondent did not refuse the services of CMG.

53. Counsel for the Respondent relied on a decision of Judge Jones in *Askaro v Leading Synthetics Pty Ltd* [2014] FCCA 2081. The tripartite relationship in that case is indeed similar to this case. One difference, however, is that in *Askaro* the Applicant alleged that adverse action was taken under Item 3, column 2 (c) whereas in this case it is column 2(d). In order to understand the Respondent's argument, and indeed its implications, it is necessary to set out [45] – [53]:

> *45.It is settled that the references to an "independent contractor" in s.342(1) apply both to an individual who offers labour directly to a principal and to a corporate independent contractor who offers labour through its employees: see State of Victoria v Construction, Forestry, Mining and Energy Union [2013] FCAFC 160, [118] – [120]. I am satisfied that the first respondent is the principal, the second respondent is a independent contractor and the applicant an employee of the independent contractor within the meaning of column 1 of Item 3.*
>
> *46.The real issue is whether the action by the first respondent (the principal) in transferring the applicant from night to day shift falls within the conduct described in column 2 of Item 3.*
>
> *47.The applicant relies on the conduct described in (c) of column 2, Item 3. He submits that whilst the conduct described "does not refer specifically to conduct that alters the position of an employee of an independent contractor (as opposed to the position of the independent contractor itself) to his/her prejudice, it should be understood to include such conduct."*
>
> *48.The applicant relies on the approach adopted by his honour Justice Bromberg in Construction, Forestry, Mining and Energy*

Union v McCorkell Constructions Pty Ltd (No.2) [2013] FCA 446 ("McCorkell"). In McCorkell his Honour was required to determine whether the reference to "independent contractor" in items 3 and 4 of s.342(1) extended beyond an individual contractor to encompass a corporate independent contractor. His Honour found that it did. In the course of reaching his decision his honour considered the history of predecessor statutory provisions relating to independent contractors and stated as follows at [125]:

……. Items 3 and 4 of s 342(1) go much further in guarding against the conduct of a principal which has an adverse effect on the workplace rights and industrial activities rights of employees of a contractor. It seems to me that this extended protection involves a recognition that contracting arrangements are a fertile area in which workplace rights and other protected activities are at risk of adverse action taken by a third party principal. It is likely that Items 3 and 4 were substantially directed at that mischief.

49.The applicant submits that the adoption of a narrow approach to Item 3, column 2 (c) "would have the consequence that a principal would only take adverse action against an independent contractor and its employees where it prejudicially altered the position of the independent contractor (but not where, as here, it altered the position of the employee of an independent contractor). Put another way, a principal could prejudicially alter the position of an employee with impunity, so long as in doing so it did not alter the position of the independent contract."

50.The applicant's submission as to the construction of Item 3, column 2(c) is not supported on a plain reading of the text contained in that column. The applicant's proposed construction would require the Court to read into the text contained in Item 3, column 2(c), the words "or person employed by the independent contractor" after each reference to the phrase "independent contractor." I cannot accept that the intention of Parliament was to include action by a principal which altered the position of a person employed by the independent contract to that person's prejudice. If Parliament had sought to extend the scope of the protections under Item 3, column 2 (c) to action by the principal which altered the position of the independent contractors employee to that employees prejudice, it could have done so expressly.

51.Justice Bromberg's observation in McCorkell at [125] was directed to the mischief created by "contracting arrangements."

> *52.I find that the action referred to in Item 3, column 2(c) is action taken by the principal against the independent contractor only which may have the consequence of adversely affecting the position of the independent contractor's employees. I concur with the applicant's submissions that this construction of Item 3, column 2(c) does operate to exclude action taken by a principal which alters only the position of an employee of an independent contractor (such as a labour hire company) to his or her prejudice. However, this is a matter for Parliament and not the Court.*
>
> *53.Consequently, I find that the first respondent did not engage in an adverse action within the meaning of s.342 of the Act. The applicant's claim that the first respondent contravened s.340 of the Act is, therefore, dismissed.*

54. The Court does not accept the Respondent's submissions and respectfully disagrees with the interpretation adopted by Judge Jones. In *Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ld* (No.2) 2013 FCA 446 Bromberg J at [88] observed that only a person with a workplace right specified by s.341(1) and is the second person referred to in s.342(1), will fall within the protective scope of s.340. Accordingly, on the Respondent's interpretation of s.342(1) the workplace right belongs to CMG, even though it is a company the sole purpose of which is to provide labour to the Respondent through a contract to do so. But what is the workplace right belonging to CMG that is protected in this case? Moreover, on the Respondent's contended interpretation of s.342(1), the Respondent would be taking adverse action against the worker (i.e. the person employed by CMG in Item 3, Column 1) by doing any of the matters listed in column 2. With respect, that is an unlikely interpretation of s.342(1), and it is highly unlikely that parliament intended a result whereby an independent contractor's employee could be deemed to have adverse action taken against her by the principal terminating its contract with the contractor. Section 342 is ultimately about protecting workplace rights, rights the employee clearly has, but rights which CMG does not appear to have in this case.

55. The Court respectfully adopts the approach to statutory interpretation undertaken by Bromberg J in *McCorkell* at [75] – [130]. On appeal, *State of Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160, the Full Court at [118] – [121] did not demur from

the approach adopted by Bromberg J. A number of paragraphs from His Honour's judgment bear repeating here:

> *The objects of Pt 3-1 reveal that the FW Act seeks to protect the rights conferred by the Part and to provide to persons on whom those rights are conferred effective relief from being discriminated against, victimised or otherwise adversely affected by reason of the holding or exercising of those rights. The rights protected under Pt 3-1 are:*
>
> > *the workplace rights conferred by Div 3 (the "workplace rights");*
> >
> > *the rights of association and participation in the industrial activities conferred by Div 4 (the "industrial activities rights"); and*
> >
> > *anti-discrimination rights and other protections conferred by Divs 5 and 6.*
>
> *In interpreting a legislative provision, the Court is required to prefer a construction that "would best achieve the purpose or object of the Act" (whether or not that purpose or object is expressly stated in the Act): s 15AA of the Acts Interpretation Act 1901 (Cth).*
>
> *Provisions of the kind contained in Pt 3-1, and in particular those in Div 3 and Div 4, have long been regarded as remedial and beneficial in nature despite their penal aspect: Barclay v Board of Bendigo Regional Institute of Technical and Further Education (2011) 191 FCR 212 at [14]-[17] (Gray and Bromberg JJ); Kelly v Construction, Forestry, Mining and Energy Union (No.3) (1995) 63 IR 119 at 130 (Moore J); Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong City Council (2000) 101 IR 143 ("Australian Municipal, Administrative, Clerical and Services Union") at [75] (Madgwick J); National Union of Workers v Qenos Pty Ltd (2001) 108 FCR 90 at [48] (Weinberg J); Construction, Forestry, Mining and Energy Union v Pilbara Iron Co (Services) Pty Ltd (No 3) [2012] FCA 697 at [35] (Katzmann J); and see Waugh v Kippen (1986) 160 CLR 156 at 164–5 (Gibbs CJ, Mason, Wilson and Dawson JJ).*
>
> *Accordingly, the terms of the legislative provisions in question should be given "a fair and liberal interpretation in order that they achieve the Act's beneficial purposes": AB v Western Australia at [38] (the Court). The approach that should be taken*

to the construction questions is one that gives effect to the evident purpose of the legislation and is consistent with its terms:AB v Western Australia at [23] (the Court).

56. That approach to statutory interpretation is adopted in this case. His Honour undertook an extensive survey of legislative history. At [121] – [126] Bromberg J concludes:

> *121.The legislative survey just undertaken satisfies me that at least until the WR Act was enacted, the term "independent contractor" was consistently used in its confined sense, to mean a self-employed individual personally providing work under a contract. Perhaps the term "individual contractor" or "self-employed contractor" would have been a better descriptor for the kind of person that Parliament had in mind. A wider conception of what was meant by independent contractor for some purposes, first appeared in the WR Act, where corporatised independent contractors employing employees were contemplated as falling within the description.*
>
> *What is notable about the change made in 1996 to the WR Act with the inclusion of s 298L(1)(c)(i), is that for the first time, the provisions addressed what must have been perceived to be a need to protect against action taken by a third party directed at employees of an independent contractor. In that case, the concern was limited to adverse action taken because the employees of the independent contractor were not or did not propose to become members of a union. What I think is telling about the current provisions, is that the concern about action taken by a principal against employees of an independent contractor has been significantly expanded. Not only is non-membership of a union covered, but each and every workplace right and each of the industrial activities protections, now operate in respect of persons employed (or engaged) by an independent contractor. That result is consistent with the observations made in the Explanatory Memorandum to the Bill which became the FW Act at [1336] as follows:*
>
> *The consolidated protections in Part 3-1 are intended to rationalise, but not diminish existing protections. In some cases, providing general, more rationalised protections has expanded their scope.*
>
> *There is a discernable rationale for the expansion of the protections afforded to employees of independent contractors from action taken by a principal who engages the contractor. It is*

well known that the trend to self-employment was accompanied by a growing practice by enterprises to contract out or outsource to contractors many of the functions which had formerly been performed internally by a part of an enterprise's direct workforce. As Owens and Riley point out, throughout the 1980's and 1990's the organisational model utilised by business underwent transformation. Many companies resolved to focus on their "core business" and to carve out or outsource non-core functions to separate enterprises that could provide services under contract: Owens R and Riley J, The Law of Work (Oxford University Press, 2007) p 145. The carving out or outsourcing of cleaning, security or maintenance services provide common examples. As a result, there has been a proliferation of employees of contractors working in the workplaces of enterprises involved in outsourcing.

In that context, enterprises that engage contractors have a heightened interest in the industrial rights, practices and arrangements made between the contractor and its employees. That is primarily because the employees of contractors commonly work in the same workplace as the direct employees of the principal or with employees of other contractors also engaged by the principal. Additionally, the labour costs of a contractor will often be of significant relevance to the ultimate price paid by the principal. In many situations, those costs may be directly passed on to the principal. As a result, the interests of a principal in the workplace relations arrangements of a contractor may extend to the selection of employees, their terms and conditions of employment and the nature and extent of their union activities. Any or all of those matters have a capacity not only to affect the price paid by the principal, but also the relations between the principal and those of its own employees employed in the same workplace as that in which the independent contractor's employees work.

The terms of the former s 298L(1)(c)(i) of the WR Act show that the mischief sought to be addressed by that provision, was directed against a principal requiring a contractor to have its employees join a union. Items 3 and 4 of s 342(1) go much further in guarding against the conduct of a principal which has an adverse effect on the workplace rights and industrial activities rights of employees of a contractor. It seems to me that this extended protection involves a recognition that contracting arrangements are a fertile area in which workplace rights and other protected activities are at risk of adverse action taken by a third party principal. It is likely that Items 3 and 4 were substantially directed at that mischief.

> *The only mischief that the State identifies to explain why adverse action by a principal against the employees of an independent contractor has been prohibited, if independent contractor is to be given its confined meaning, is the protection of the workplace rights of the owner/operator who is employed by his or her own company from adverse action by a principal. It is possible to conceive of a situation such as that. For instance where adverse action might be taken by a principal against the owner/operator employed by his or her own company because he or she has decided to join a union. However, the possibility of protection is so narrow and the occasion for its use likely to be so rare, that it is difficult to imagine that Items 3 and 4 were enacted for such an inconsequential purpose. It is far more likely that the very significant expansion of protection provided by Items 3 and 4 has been undertaken to guard against the unique power and interest in industrial matters, of principals who engage contractors. With that objective in mind, it is unlikely that "independent contractor" when used in Items 3 and 4 was intended to have a confined meaning.*

57. The same principles apply to this case. The same rationale justifies interpreting independent contractor in s.342(1) Item 3 Column 2(d) as including a person employed or engaged by the independent contractor, just as it is in Column 1. This interpretation does not stretch the meaning of s.342(1) beyond its reasonable boundaries as contemplated by the legislature.

58. The Court acknowledges, however, that an alternative to the interpretation postulated would be to interpret the word 'services' in Column 2(d) as including the services of persons employed or engaged by the independent contractor. The effect would be the same, and that is to give effect to what parliament must have reasonably intended.

59. The refusal by the Respondent to use the services of the worker on the facts of this case *did* fall within s.342(1). That does not necessarily mean that the Applicant is successful in its claim on behalf of the worker.

Was Adverse Action taken against the worker: the third issue

60. The Respondent contends that no adverse action was taken against the worker because the decision made to instruct CMG not to allow her to

return to the mine had nothing to do with complaints or inquiries to persons to enforce laws or in relation to her employment. The Respondent contends that the evidence adduced by the relevant decision-maker, Mr Hamson, should be accepted on the balance of probabilities and thus the onus on the Respondent under s.361(1) of the Act is discharged. The Court accepts the Respondent's contention, and the reasons that follow explain why, accordingly, the Applicant's claim must fail.

61. Section 361 of the Act states:

> *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.*

62. A reverse onus on the issue of the reasons for conduct makes good sense because the reason for conduct is a matter peculiarly within the knowledge of the Respondent: *Australian Mear Industry Employees Union v Belandra Pty Ltd* (2003) 126IR165; [2003] FCA 910 per North J at [50]. Thus the Respondent must satisfy the Court that an alleged improper reason was not a reason for the taking of action. The focus is on the mind of the decision-maker, and the actual reasons for the decision which do not include the alleged proscribed reasons: *National Tertiary Education Union v Royal Melbourne Institute of Technology* [2013] FCA 451 per Gray J at [20].

63. Section 360 of the Act states:

> *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.

64. The focus of the present case is very much on the reasons for the decision. The principles to be applied were considered and helpfully summarised in *State of Victoria (Office of Public Prosecutions) v Grant* [2014] FCAFC 184 per Tracey and Buchanan JJ at [32]:

> *As the trial judge recognised the leading authority on the operation of ss 360 and 361 of the Fair Work Act in the context of Part 3-1 of that Act (which includes s 351) is Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 248 CLR 500. The principles which informed this decision were recently reaffirmed by a majority of the High Court in Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2014] HCA 41. Relevantly, these authorities establish that:*
>
> · *The central question to be determined is one of fact. It is: "Why was the adverse action taken?"*
>
> · *That question is to be answered having regard to all the facts established in the proceeding.*
>
> · *The Court is concerned to determine the actual reason or reasons which motivated the decision-maker. The Court is not required to determine whether some proscribed reason had subconsciously influenced the decision-maker. Nor should such an enquiry be made.*
>
> · *It will be "extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer."*
>
> · *Even if the decision-maker gives evidence that he or she acted solely for non-proscribed reasons other evidence (including contradictory evidence given by the decision-maker) may render such assertions unreliable.*
>
> · *If, however, the decision-maker's testimony is accepted as reliable it will be capable of discharging the burden imposed on the employer by s 361.*
>
> *Barclay at 517 (French CJ and Crennan J); 542 (Gummow and Hayne JJ); 545-6 (Heydon J) and CFMEU at [19]-[22] (French CJ and Kiefel J); [85]-[89] (Gageler J).*

65. The reality is in many cases that evidence of reasons for making a decision may be contradictory, at least in part. The Court must carefully examine all of the evidence. In *Port Kembla Coal Terminal Ltd v CFMEU* [2016] FCAFC 99; 263 IR 344 (Jessup, Rangiah and White JJ) Jessup J said at [266]:

> *In a case such as the present where allegations are made under s 340 or s 346 of the FW Act as to the reason why a party took adverse action, the actual reasons of the party concerned are themselves the subject of the relevant inquiry: Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 248 CLR 500. In that case, French CJ and Crennan J said (248 CLR at 517 [45]):*
>
> *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. [See, eg,General Motors-Holden's Pty Ltd v Bowling (1976) ... 2 ALR 605 at 617 per Mason J] 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 [see, eg, Pearce v WD Peacock and Co Ltd (1917) 23 CLR 199 at 208 per Isaacs J; at 211 per Higgins J] 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, eg, Harrison v P&T Tube Mills Pty Ltd (2009) 188 IR 270 at 276 [31]-[33]]*

66. The Respondent relies principally on the evidence of Andrew John Hamson in his affidavit sworn 20 May 2016. The evidence that he gives about his decision regarding the worker is found at [36] – [43]. He acknowledged that he received reports from Mr Hamilton and Mr Carter, two trainers employed by the Respondent. It is also clear that he received a report from Bevan Frank Moir, the supervisor to whom the worker reported. The Court is satisfied from all the evidence that Mr Hamson was the relevant decision-maker.

67. Ms Hamson's evidence was that he directed CMG to remove the worker from the mine site because she was not suitable from a performance (driving) perspective. He formed the view that she, in

effect, struggled to drive with the nature of the watering procedures at the mine site and the level of watering which the Respondent deemed as appropriate and normal at the site. His evidence was, in effect, that the worker did not enjoy his confidence that she could perform her tasks without risks to others at the site. The Court finds that Mr Hamson was also concerned about how the worker's unsuitability would affect production at the mine. These are the positive reasons for causing the worker not to be engaged at the mine site.

68. Mr Hamson also deposed that certain factors formed no part of his reasons for making the decision. At [41] he deposed that the fact that the worker made enquiries or complaints about her employment in relation to the level of watering on ramps was, in effect, irrelevant to his decision. At [42] he further deposes to matters that formed no part of his reasons.

69. Unsurprisingly, Mr Hamson's evidence was the subject of detailed forensic scrutiny in cross-examination, and then in closing submissions. Counsel for the Applicant strongly submitted that Mr Hamson's evidence should not be accepted. The Court does not agree.

70. Counsel for the Applicant's Aide Memoire produced in closing submissions takes the Applicant's case about the inconsistencies in the evidence to its highest. The Court accepts this evidence. Specifically, it accepts that:

a) There are inconsistencies in the versions of certain events given by Mr Hamson in his trial affidavit, in cross-examination and in an interview he gave on 9 November 2016;

b) There are inconsistencies in the versions of certain events given by Bevan Moir in his trial affidavit and in cross-examination;

c) There are examples of contradictory evidence as between Mr Hamson and Mr Moir; and

d) There are examples of contradictory evidence as between Mr Hamson and Owen Carter.

71. However, the Court does not accept that these inconsistencies and contradictions lead it to conclude that Mr Hamson's evidence, where

relevant to the issue before the Court, should not be accepted. For example, many of the inconsistencies are irrelevant to the issue of the reasons for Mr Hamson's decision, and are generally inconsequential. Many inconsistencies are easily understood by reference to the passage of time between events and the giving of relevant statements or the making of affidavits. It is unsurprising that Messrs Hamson, Moir and Carter would recall events that occurred in February 2015 in different ways. These men were miners. The context of their evidence must be considered by the Court. Mr Hamson was not sitting in the context of a potentially rarefied environment of a HR Department, he was a Production Supervisor at an open cut mine supervising many workers in a potentially dangerous environment. Moreover, there was absolutely nothing about the manner in which he gave his evidence that indicated to the Court that it should hesitate on, let alone be wary of, accepting his evidence.

72. The Court accepts the actual reason Mr Hamson gave for making the decision. The statutory presumption in s.361 is displaced. The application must therefore fail.

I certify that the preceding seventy-two (72) paragraphs are a true copy of the reasons for judgment of Judge Altobelli

Date: 9 August 2017

CORRECTIONS:

1. Representation: Page 2, 8 line delete “Slater and Gordon Lawyers” and insert “Construction, Forestry, Mining and Energy Union (CFMEU) Ms Short”.