# Federal Magistrates Court of Australia



## Bayford v MAXXIA Pty Ltd [2011] FMCA 202 (12 April 2011)

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Last Updated: 15 April 2011

**FEDERAL MAGISTRATES COURT OF AUSTRALIA**

*BAYFORD v MAXXIA PTY LTD* *[2011] FMCA 202*

INDUSTRIAL LAW – Fair Work – adverse action – discrimination – breach of contract.

*Equal Opportunity Act 1995* *(Vic)* ss.6, 9, 14, 14A
*Fair Work Act 2009* ss.12, 340, 342, 351, 360, 361

*Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 274 ALR 570; [2011] FCAFC 14
*Richold v State of Victoria* [2010] VCAT 433

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| Applicant: | JULIAN BAYFORD |
| First Respondent: | MAXXIA PTY LTD |
| File number: | MLG 574 of 2010 |

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| Judgment of: | Riley FM |
| Hearing dates: | 9 & 10 February 2011 |
| Date of last submission: | 2 March 2011 |
| Delivered at: | Melbourne |
| Delivered on: | 12 April 2011 |

REPRESENTATION

| | |
|---|---|
| Counsel for the Applicant: | Ms Kapitaniak |
| Solicitors for the Applicant: | Max Legal |
| Counsel for the Respondent: | Mr D'Abaco |
| Solicitors for the Respondent: | McPherson + Kelly |

ORDERS

(1) The application filed on 20 April 2010 is dismissed.

**FEDERAL MAGISTRATES**
**COURT OF AUSTRALIA**
**AT MELBOURNE**

**MLG 574 of 2010**

**JULIAN BAYFORD**

Applicant

And

**MAXXIA PTY LTD**

Respondent

## REASONS FOR JUDGMENT

### Background

1. This is an application arising from the respondent's dismissal of the applicant from his employment on 11 January 2010. The applicant said that he was dismissed because of his family responsibilities. The respondent said the applicant was dismissed because of his failure to meet quality requirements and because he was repeatedly late for work.

2. The respondent provides a service for other employers whereby they are able to outsource to the respondent the management of salary packaging and workplace benefits for their employees. The applicant began working with the respondent as a call centre operator on 30 July 2007. The calls the applicant took concerned the setting up of accounts for the employees of the respondent's clients.

3. The people in the applicant's team were rostered to work:
   a. from 8.30am to 5pm; or
   b. from 9am to 5.30pm; or
   c. from 9.30am to 6pm.

4. Initially, the applicant worked from 9am to 5.30pm. On 5 October 2008, the applicant's son, Noah, was born. At the start of 2009, the applicant's hours were changed, with his agreement, to 9.30am to 6pm.

5. At the end of July or in August 2009, Andrew Campbell became the applicant's immediate supervisor. On 14 October 2009, Mr Campbell and a human resources consultant, Alison Campbell, conducted a formal counselling session with the applicant. A record of the meeting indicates that Mr Campbell told the applicant that, in September 2009:
   i. he had achieved 89% accuracy, when the requirement was for 92% accuracy; and
   ii. he had been late for work on 10 specified dates by two, five, 22, five, 26, eight, three, two, 11 and four minutes respectively.

6. When asked if he had an explanation for being late, the record indicated that the applicant said:
   - *I suppose not any big reason. Noah's teething and I'm not getting much sleep. I suppose it's just a couple of minutes difference between catching the train and not.*

7. When asked if he had an explanation for his inaccuracy, the record indicated that the applicant said, among other things:
   i. he could not offer an explanation;
   ii. he had improved on quality in response to previous feedback and would try to improve his punctuality;
   c. he had not done anything disgraceful, like transferring money into his own account;
   d. he had received clear instructions previously about punctuality; and

e. "I hope it's understood that I have a wife and kid at home and they need me. Do I now have to be at work 15 minutes early every day just to make sure?"

8. Following the meeting on 14 October 2009, the respondent issued the applicant with a formal counselling letter dated 15 October 2009. The letter noted the applicant's poor performance and punctuality and set out an action plan for improvement. The applicant declined to sign the letter.

9. In October 2009, the applicant's accuracy had improved to 96%, well above the then required standard of 90%. However, records indicated that the applicant was late for work on six occasions in October 2009, by 17, 26, four, six, 16 and 15 minutes respectively. Records also indicated that the applicant was six minutes and 27 minutes late on two days in November 2009, although he was on leave from 6 to 20 November 2009.

10. On 24 November 2009, a second formal meeting was held with the applicant. The respondent was represented by Mr Campbell and a human resources consultant, Debbie Kaya-Galati. When asked why he had been late, the record of the meeting indicated that the applicant said he had been stuck on the train in the city loop and the public transport system was unreliable. When asked if there was anything Mr Campbell could do to help, the applicant is recorded as having said words to the effect of:

- *Improve the public transport system.*

11. Following the meeting of 24 November 2009, the respondent issued the applicant with a first written warning dated 25 November 2009. It cited a lack of punctuality.

12. On 8 December 2009, Mr Campbell and Ms Kaya-Galati had a third formal meeting with the applicant. The record of the meeting noted that the applicant had achieved a quality standard of 81%, when 90% was required, and that he had been late on three of the seven days that he had attended work since the last meeting.

13. Mr Campbell said in his affidavit sworn on 24 November 2010 that, when asked why he had been late, the applicant had said that he had telephoned on two occasions to say he would be late and on one occasion he had been late because the train had stopped at North Melbourne for no reason. The record of the meeting on December 2009 also noted that the applicant said that he had to change his baby's nappy because his wife was busy doing something.

14. Following the meeting of 8 December 2009, the respondent issued the applicant with a second and final written warning dated 9 December 2009. It cited poor quality work and a lack of punctuality.

15. On 16 December 2009 at 1pm, Mr Campbell sent his team an email indicating that the applicant and everyone else was rostered to work between 8.30am and 5pm on 24 and 31 December 2009.[1]

16. On 16 December 2009 at 4.59pm, Mr Campbell sent his team a further email stating each team member's rostered hours for 23, 24, 29, 30 and 31 December 2009 and 4 January 2010.[2] The applicant was rostered to work between 8.30am and 5pm on each of the days in December and between 9.30am and 6pm on 4 January 2010.

17. Records indicated that the applicant arrived for work on 24 December 2009 at 9.21am, 51 minutes after his start time as stated in the first and second emails, and

arrived at work on 29 December 2009 at 8.53am, or 23 minutes after his start time as stated in the second email.

18. On 6 January 2010, one of the respondent's operations managers, Robert Varhelyi, asked the applicant to attend a further meeting at 11am on that day. The applicant asked for two days to prepare. That request was granted. On 8 January 2010, the applicant asked for a further deferral of the meeting. It was decided to proceed with the meeting on the basis that the applicant could provide his response later. Ms Campbell, the human resources consultant, was also in attendance.

19. Mr Varhelyi noted that the applicant had achieved a quality standard of 59.67% for December 2009, when 90% was required, and had arrived 51 minutes late on 24 December 2009 and 23 minutes late on
29 December 2009. The applicant said that he would provide his response in writing.

20. A further meeting was convened on 11 January 2010 between the applicant, Mr Varhelyi and Ms Campbell. The applicant provided his written response at that meeting. The applicant said in his written response, among other things, that:

a. he had arrived at work at 9.21am on 24 December 2009 in reliance on the rosters in TotalView, the respondent's electronic roster system;
b. the email (meaning the first email) from Mr Campbell advised that those working on 24 and 31 December 2009 would start at 8.30am and finish at 5pm but went on to say that:
    - *The actual rosters shall be updated shortly by Kevin Grice and will be viewable in Totalview.*
c. TotalView had shown the applicant's start times on 24 and 29 December as 9.30am;
d. the quality assessment was based on a sample of between about 12% and 25% of cases, so skewed results could arise; and
e. finding poor quality performance enabled the respondent to avoid paying commissions to its employees.

21. The applicant concluded his lengthy written response, saying:
    - *... I have been late previously due to the pressures of being a father to a 15 month old son and relying on the Melbourne train system, which can sometimes be unreliable. Rather than receive understanding from my workplace, I have been caught up inside a machine that is about to spit me out.*

22. The record of the meeting on 11 January 2010 indicated that:

a. the applicant was asked why he had not relied on the emails about the start times over Christmas rather than TotalView;
b. the applicant said that TotalView was the definitive source;
c. the applicant was asked why he had not clarified the start times with his supervisor;
d. the applicant said it was up to the respondent to provide consistent information and Ms Bailey had said that TotalView was the definitive source;
e. the applicant said that he lessened the impact of being late by calling ahead to say he would be late;
f. the applicant said that the public transport system was beyond his control; and
g. the applicant said that the employer should have backstops to pick up errors and prevent them having an impact on customers.

23. Mr Varhelyi and Ms Campbell then took a break from the meeting with the applicant and met with Craig Logan, the respondent's National Operations Manager. It was decided that the applicant would be dismissed. That decision was verbally conveyed to the applicant by
Mr Varhelyi and Ms Campbell on 11 January 2010. Mr Logan signed a letter on 12 January 2010 which advised the applicant that he was dismissed. The letter cited the applicant's continued failure to meet quality and punctuality requirements.

**Application**

24. The applicant's claims, as they stood at the end of the hearing, were as follows:
a. the respondent contravened s.351 of the *Fair Work Act 2009* ("the FWA") by taking adverse action against the applicant, namely, dismissing him, because of his family responsibilities;
b. the respondent contravened s.340 of the FWA by taking adverse action against the applicant, namely, dismissing him, because he exercised his workplace right not to be discriminated against because of his family responsibilities, such workplace rights arising under:
i. s.9 and s.14A of the *Equal Opportunity Act 1995* (Vic); and
ii. the respondent's Equal Opportunity Policy, which was a term of the agreement between the parties or was a workplace instrument; and
vvvv. the respondent breached the employment agreement between the applicant and the respondent by dismissing the applicant because of his family responsibilities.

25. The applicant, in effect, withdrew paragraphs 10(b), (c) and (d), 15, 17, 22 and 25 of the points of claim filed on 16 July 2010, and paragraphs A, C, D, F, H and J of the prayer for relief set out in the points of claim.

**Claim A: adverse action: s.351**

Legislation

26. Subsection 351(1) of the FWA provides as follows:
- *(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 preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*
  - *Note: This subsection is a civil remedy provision (see Part 4-1).*

*(2) However, subsection (1) does not apply to action that is:*
- *(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or*
- *(b) taken because of the inherent requirements of the particular position concerned; or*

- *(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed - taken:*
    - *(i) in good faith; and*
    - *(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

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

- *(aa) the Age Discrimination Act 2004 ;*
- *(ab) the Disability Discrimination Act 1992 ;*
- *(ac) the Racial Discrimination Act 1975 ;*
- *(ad) the Sex Discrimination Act 1984 ;*
- *(a) the* Anti-Discrimination Act 1977 *of New South Wales;*
- *(b) the Equal Opportunity Act 1995 of Victoria;*
- *(c) the* Anti- *Discrimination Act 1991 of Queensland;*

*(d) the Equal Opportunity Act 1984 of Western Australia;*

*(e) the Equal Opportunity Act 1984 of South Australia;*
*(f) the* Anti-Discrimination Act 1998 *of Tasmania;*
*(g) the Discrimination Act 1991 of the Australian Capital Territory;*
*(h) the* Anti-*Discrimination Act of the Northern Territory.*

27. Section 342 of the FWA defines adverse action to include dismissal. The respondent accepted that its dismissal of the applicant constituted adverse action as defined.

28. Section 360 of the FWA provides that:

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

29. That is, where a relevant action is taken for multiple reasons, it will breach Part 3-1 of the FWA if only one of the various reasons for the action was a prohibited reason.

30. Subsection 361(1) of the FWA provides that:

    - *(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, in proceedings arising from the application, 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.*

31. That is, in the present case, the court must presume that the respondent dismissed the applicant because of his family responsibilities unless the respondent proves otherwise.

Barclay v Board of Bendigo Regional Institute of TAFE

32. The Full Court of the Federal Court recently considered the meaning of "because of" in the FWA in *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 274 ALR 570; [2011] FCAFC 14. That case concerned the protections given by the FWA to union officers. Gray and Bromberg JJ gave a joint judgment and Lander J dissented. Gray and Bromberg JJ said at [24] to [36]:

- *[24] In consolidating the provisions and adopting a generic approach for s 346, the draftsperson had to choose between the two competing prior approaches. The more modern style of using the conjunction "because" instead of "for the reason that" was adopted. The choice was stylistic, not substantive. The primary judge was correct to conclude that the word "because" in ss 340(1)(a) and 346 was intended to have the same meaning as "by reason of the circumstance that". The Macquarie Dictionary gives as the primary meaning for the word "because", when used as a conjunction, "for the reason that" and, when used as an adverb, "by reason". The expressions "because" and "by reason of", in the context of the relevant provisions of the Fair Work Act, are interchangeable. If that were not so, as the primary judge pointed out, the assistance provided to applicants by ss 360 and 361 would not be available.*
- *[25] To the extent that the AEU and Mr Barclay contended before the primary judge, and on the appeal, that the introduction of the word "because" had the effect of making irrelevant the state of mind of the person taking the adverse action, that contention must be rejected.*
- *[26] As Gummow, Hayne and Heydon JJ said in* Purvis v New South Wales (Department of Education and Training) *[2003] HCA 62 ; (2003) 217 CLR 92 at [236] of the use of "because" in a similar way to its use in s 346:*
  - *For present purposes, it is enough to say that we doubt that distinctions between motive, purpose or effect will greatly assist the resolution of any problem about whether treatment occurred or was proposed "because of" disability. Rather, the central question will always be — why was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it "because of", "by reason of", that person's disability? Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression "because of".*
- *[27] The central question under s 346 is why was the aggrieved person treated as he or she was? If the aggrieved person was subjected to adverse action, was it "because" the aggrieved person did or did not have the attributes, or had or had not engaged or proposed to engage in the industrial activities, specified by s 346 in conjunction with s 347?*
- *[28] The determination of those questions involves characterisation of the reason or reasons of the person who took the adverse action. The state of mind or subjective intention of that person will be centrally relevant, but it is not decisive. What is required is a determination of what Mason J in* Bowling *(at 617) called the "real reason" for the conduct. The real reason for a person's conduct is not necessarily the reason that the person asserts, even where the person genuinely*

*believes he or she was motivated by that reason. The search is for what actuated the conduct of the person, not for what the person thinks he or she was actuated by. In that regard, the real reason may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question.*

- *[29] So much is evident from the use of the word "because". It is also consonant with the objective and protective purposes of s 346. Further, it is consistent with the approach to construction taken in relation to provisions in anti-discrimination legislation where, in a similar context, the word "because" is utilised: see in particular* Purvis *at [142]–[166] per McHugh and Kirby JJ and at [234]–[236] per Gummow, Hayne and Heydon JJ; and* Toben v Jones *[2003] FCAFC 137 ; (2003) 129 FCR 515 at [31] per Carr J, [61]–[63] per Kiefel J and [151] per Allsop J.*
- *[30] Section 360 continues the long-standing position that, where adverse action is taken against a protected person, culpability will be established if the reasons for that conduct include a reason for conduct that is within the ambit of s 346. The reason must be an operative or immediate reason and need not be the sole or dominant reason (see the Explanatory Memorandum at para 1458). But the drawing of distinctions between proximate or immediate reasons for conduct (*Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union *[2001] FCA 349 ; (2001) 112 FCR 232 at [216]), or between the cause of conduct and the reason for conduct (*Greater Dandenong *at [164]), is not helpful. Those distinctions fail to give sufficient attention to whether or not the reason was operative, and they also draw distinctions between a reason and a factor in a reason. As Gray J (with whom Woodward and Jenkinson JJ agreed) said in* Lewis Construction Co Pty Ltd v Martin *(1986) 17 IR 122 at 125:*
  - *The Act and the authorities do not distinguish between a "reason" and a "factor"; indeed, in* Bowling, *these terms are used interchangeably.*
- *[31] Further, that no distinction is to be drawn between the cause of conduct and the reason for conduct is supported by our earlier conclusion at [24] as to the meaning of "because" and the interchangeable use by the relevant provisions (ss 340, 346 and 360, 361) of cause and reason.*
- *[32] The onus cast by s 361 on the person taking the adverse action means that, to succeed, that person has to establish that he or she was not actuated by the attributes or industrial activity which s 346 seeks to protect. As Mason J said in* Bowling *at 617, that objective will not be achieved unless the evidence establishes that the real reason for the adverse action lies outside the ambit of the provision — in this case s 346. The real reason or reasons for the taking of the adverse action must be shown to be "dissociated from the circumstances" that the aggrieved person has or had the s 346 attribute or has or had engaged in or proposes to engage in the s 346 industrial activity.*
- *[33] It is important, however, to appreciate that not all of the circumstances specified by s 346 (in conjunction with s 347) are circumstances specified for the purpose of identifying whether the causal link of an operative*

*reason exists. Objective facts, dependent on the determination of questions of mixed fact and law, have now been included in s 346 to a much greater extent than they were in the section's predecessors. Section 347 is replete with examples. For instance "lawful activity" in (b)(ii) and (iii) and "lawful request" in (b)(iv). Whether a person is or is not a member or officer of an industrial association is also a fact to be ascertained objectively by reference to a legal standard, usually the rules of the association.*

- *[34] It is for an applicant to prove the existence of objective facts of the kind we have identified: see* Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd *[2010] FCA 590 at [44] and the cases there cited. The specification in ss 346 and 347 of facts of this kind is designed to delineate the area of protection from adverse action afforded by s 346. For instance, an employee is not protected by s 346 (in conjunction with s 347(b)(ii)) where the activity promoted for or on behalf of an industrial association is not a lawful activity. However, it is not necessary that the subjective belief held by the person accused of the adverse action about such a fact should correlate with the legal conclusion as to the existence or non-existence of that fact. Thus a contravention of s 346 (in conjunction with s 347(b)(ii)) may occur where the activity promoted by the employee was lawful, but where the employer taking the adverse action held a subjective belief that it was not. In such a case, a failure by the employer to establish that the real reason for the taking of the adverse action was dissociated from the circumstance that the employee was promoting a lawful activity for or on behalf of an industrial association will result in a finding of contravention, irrespective of the employer's subjective belief that the activity was unlawful. The "connection" between the adverse action and the industrial activity will be sufficiently made out in those circumstances: see the Explanatory Memorandum at para 1400.*
- *[35] The central question in* Purvis *was whether a disabled child whose disability caused him to behave violently at school had been discriminated against, in contravention of s 5(1) of the Disability Discrimination Act 1992 (Cth), by being excluded from the school. The High Court held that the relevant comparison, for the purposes of determining whether such a contravention had occurred, was between the child concerned and another child without the disability, but who had behaved in a similarly violent way. See Gleeson CJ at [12], Gummow, Hayne and Heydon JJ at [221]–[225] and Callinan J at [273]. With the exception of para (d) of item 1 of the table in s 342, which extends the concept of adverse action by an employer against an employee to discrimination between that employee and other employees of the employer, the provisions of Divs 3 and 4 of Pt 3-1 of the Fair Work Act do not require that any comparison be undertaken between the treatment of the employee in question and any other employee or employees, actual or notional, who acted in the same way as the employee in question. The provisions focus on the protection of the person who has a particular attribute, or engages in particular activity, without regard to how others might be treated if they did not have the benefit of the protection afforded by the provisions. It is not to the point to say that any other employee who acted in the same way would have been subject to the same discipline.*

- *[36] In applying the provisions of ss 341 and 346 of the Fair Work Act, except when the adverse action alleged is confined to discrimination when compared with other employees of the employer, a comparative test of the kind dealt with by the High Court in* Purvis *is not appropriate.*

33. The parties in the present case filed additional written submissions on the effect of the Full Court's decision in *Barclay*. The applicant relied particularly on [28] where it was said that:

- *It is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question.*

34. The applicant argued that:

- *9. Applying this reasoning, it is not open to the respondent, using the words of the Full Court, to* **ignore the objective connection** *between the adverse action/the termination of the applicant's employment on the one hand, and the applicant's family responsibilities on the other. The objective connection in the instant case is the inextricable link between being late to work and the applicant's family responsibilities, as argued in closing submissions.*
- *10. It cannot be denied that the objective link between lateness and family responsibilities exists. The irresistible conclusion must then be that the* **real reason** *(or at the very least one of the reasons as per s.346) for the adverse action against the applicant was his family responsibilities.*

35. The respondent also focussed particularly on paragraphs 27 and 28 of the Full Court's decision in *Barclay*. However, the respondent also argued that the dissenting judgment of Lander J put forward the same test as Gray and Bromberg JJ, but added that the question of the alleged contravenor's intention will be based on a consideration of the evidence as a whole. Lander J said at [208] that:

- *If the decision maker's evidence having regard to "established facts" is accepted, the decision maker will have discharged the onus imposed upon the decision maker by s.361 of the Act."*

36. With respect, I am not sure that Lander J's dissenting judgment adds anything of significance to how evidence is to be assessed in a case such as this. I will consider the evidence in this case in what I understand to be the accepted way. That is, I will consider the evidence as a whole to determine the "real reason" for the applicant's dismissal, bearing in mind that a person's stated reason might not be his or her unconscious but nevertheless real reason.

The applicant's evidence

37. The applicant relied on affidavits affirmed by him on 20 October 2010 and 18 January 2011. In his first affidavit, the applicant said that he was employed by the respondent at $45,000 per year plus a sales commission that normally added $300 to $400 per month to his income.

38. The applicant said that he and his wife shared the care of their son, Noah. The applicant said that Noah usually woke between 7am and 7.30am, and it was the applicant's responsibility to change his nappy while the applicant's wife was preparing Noah's milk. The applicant said that he left home between 8am and 8.15am to drive to

Moonee Ponds Station to catch one of the trains scheduled between 8.39am and 8.57am. He said his normal start time was 9.30am.

39. The applicant said that, if he was running late for work, he would often telephone his team leader, Mr Campbell. On at least a couple of those occasions, the applicant said that he conveyed to Mr Campbell that he was late for family reasons by saying something like:

- *Sorry, I'm running late because we had a rough night with Noah.*

40. The applicant also said the respondent would have been aware of his family responsibilities because he sometimes talked about his family responsibilities and Noah with other people at work.

41. The applicant said that in July 2009 he was trialled in the role of team leader. However, he had bike accident during that time and had to take some time off work. He said when he returned, he was only able to work half days, for two days. The applicant said he was shocked when his manager, Lucinda Bailey, asked him how long "this" would go on for because she needed to plan around it.

42. The applicant said that, shortly after Mr Campbell became team leader, the applicant failed a quality assessment because of a recent unfair change in the rules.

43. The applicant said that in October 2009, a new commission plan was introduced that effectively halved the potential earnings of sales consultants such as himself. (I understand this to refer to a halving of the commission component of the applicant's pay, rather than the salary component.)

44. The applicant said that the respondent approved him having annual leave in October 2009 but the approval was rescinded because a new campaign would increase call volumes. However, that did not eventuate. The applicant said his leave being rescinded demonstrated that the respondent was not interested in the applicant's family responsibilities.

45. The applicant said that he often worked through his lunch break and stayed back late to make up for his late arrivals. He said that other team members could easily cover for him in the mornings.

46. The applicant exhibited the respondent's record of the meetings on 14 October 2009 and 8 December 2009, and said that they confirmed that he made reference to his family responsibilities in those meetings. The applicant said that the notes were not accurate in relation to his references to family responsibilities but he did not detail the alleged inaccuracies.

47. The notes of the 14 October 2009 meeting indicate that the applicant said:

- *I hope it's understood that I have a wife and kid at home and they need me. Do I now have to be at work 15 minutes early every day just to make sure?*

48. When asked if he had any reasonable explanation for his repeated failure to arrive at work on time, the notes indicate that the applicant said:

- *I suppose not any big reason. Noah's teething and I'm not getting much sleep. I suppose it's a couple of minutes difference between catching the train and not.*

49. The applicant was on leave for two weeks in November 2009.

50. The notes of the 8 December 2009 meeting indicate that the applicant, when asked if he had any reasonable explanation for his repeated failure to arrive at work on time, said that he had telephoned on the last two occasions to say he was running late,

and, on 8 December 2009, the train had stopped at North Melbourne station for a while. The applicant later mentioned that he had to change his baby's nappy before leaving for work because his wife was busy doing something.

51. The applicant said that, during the meeting on 8 December 2009, he was cut off by Ms Kaya-Galati while explaining his morning routine and appeared to not account for 40 minutes. He provided that account in his affidavit. The applicant said that:

- his normal getting up time was 7am to 7.15am;
- he would take 20 minutes to get himself ready[3];
- c. he would take 10 minutes to get himself ready[4];
- d. he would always change Noah's nappy;
- e. if Noah did not drink his milk straight away, the applicant would put on a DVD to entice Noah to have his first bottle; and
- f. if the applicant's wife had to leave early in the morning for any reason, the applicant would mind Noah while the applicant's wife got ready.

52. The applicant said Ms Kaye-Galati said that he should follow her example and arrive 15 to 30 minutes before he was due to start work. The applicant said he was not given the opportunity to explain to
Ms Kaye-Galati that he was not keen to give up any of the short time he had with Noah in the mornings and getting to work early was dependent on the trains.

53. The applicant said he was not offered the opportunity to use annual leave to make up for the time he was "seriously late". He said he was too stressed to propose it himself.

54. The applicant said that he was not late 40% of the time, as the respondent asserted, because that calculation was based on the applicant's log-in times at his desk, when he could have been sidetracked by a senior on his way to his desk. The applicant said that the respondent had told him in formal meetings that less than five minutes would not be considered late.

55. The applicant conceded that "on certain occasions" he was late for work. However, in his affidavit, he disputed that he was late on 24 and 29 December 2009. He said that he had been perfectly prepared, for the benefit of the team, to disrupt his normal family routine on those days and start early. However, he said he understood that he was in fact required at work at his usual time of 9.30am.

56. In relation to the note to the effect that the applicant answered the query about how the respondent could help him by saying, "Fix the public transport system", the applicant said it was a jest. Additionally, the applicant said that what he actually said was:

- *Other than ask you to fix the public transport system, I suppose be understanding is the only thing.*

57. The applicant disputed in his affidavit that his work performance had been unsatisfactory. However, the applicant in his cross examination of the respondent's witnesses and in his closing submissions did not maintain that his work had been of an adequate quality or that he had in fact been on time on 24 and 29 December 2009. The applicant's case was that he had been frequently late because of his family responsibilities and the respondent should have been more understanding. Consequently, I will not dwell on the issue of work quality.

58. In his second affidavit, which was affirmed on 18 January 2011, the applicant answered the affidavits of Mr Logan, Ms Bailey and Mr Campbell.

59. In his second affidavit, the applicant said that the impact on the respondent's business of the applicant being late had been exaggerated. The applicant said he was willing to answer calls during his lunch break to make up for his lateness. The applicant said that the respondent reduced the number of staff checking the quality of the work of call centre staff and the commission arrangements were changed to reduce the cost to the respondent.

60. In his second affidavit, the applicant disputed much of the evidence of Ms Bailey. He also said that, contrary to Mr Campbells' claims, his quality results were improving. The applicant accepted in his second affidavit that he had never asked for a change to his start times. However, he said that he considered Mr Campbell was being rhetorical when he said:

- *We already have you on the latest start time, what more can we do for you?*

61. The applicant noted Mr Campbells' statement that:

- *Julian did not say anything to me to indicate he had responsibilities that were any different to other employees with families.*

62. The applicant said this was contradicted by Mr Campbell admitting that:

- *he knew Noah was teething and that was disrupting my sleep.*

63. In cross examination, the applicant conceded that, contrary to his affidavit evidence, he did not "normally" receive commissions. He had, in fact, received commissions in only five out of the 12 months in each of 2008 and 2009.

64. The applicant said one member of his team started at 8.30am, two started at 9am and two started at 9.30am. The applicant conceded that his claim that he only spent 20 to 30 minutes with Noah in the morning was not accurate on the time frames he had provided. On those time frames, the applicant conceded that, if Noah woke at his earliest usual time, and the applicant left for work at his latest usual time, the applicant could spend 75 minutes with Noah.

65. The applicant said that he would normally leave home between 8am and 8.15am. He said it would take him between 15 and 30 minutes to travel to the Moonee Ponds railway station where he would take the train to Melbourne Central or Parliament. He agreed both of those stations were about five minutes walk from work. He agreed that, if the trains ran on time:

a. the 8.25am train would get him to Melbourne Central at 8.40am and to Parliament at 8.42am;
b. the 8.38am train would get him to Melbourne Central at 8.45am and to Parliament at 8.47am;
c. the 8.50am train would get him to Melbourne Central at 9.04am and to Parliament at 9.06am;
d. the 9am train would get him to Melbourne Central at 9.14am and to Parliament at 9.16am; and
e. the 9.11am train would get him to Melbourne Central at 9.25am and to Parliament at 9.27am.

66. The applicant conceded that, when he was late for work, he would not have caught a train before 9.11am.
67. The applicant conceded that his start time was 9.30am, in the sense that he was required to be at his desk, logged on to his computer and ready to receive or make calls at 9.30am.
68. The applicant conceded that he was late for work on 10 out of 22 working days between and including 10 September 2009 and 14 October 2009 by variously five, 22, five, 26, eight, three, four, 17 and 30 minutes.
69. On 14 October 2009, being the day of the first formal counselling session, the applicant was late by 30 minutes. The applicant conceded that he did not say at that meeting that his actual starting time was prior to his log in time.
70. The applicant conceded that he was late on seven days in his 13 working days between 15 October 2009 and 5 November 2009 by variously four, three, six, 16, three, 15 and six minutes. The applicant conceded that, on 3 December 2009, he was eight minutes late and on 8 December 2009 he was 13 minutes late. The applicant conceded that, if his start time on 24 and 29 December 2009 was 8.30am, as the respondent claims, then he was almost an hour late on 24 December and about 30 minutes late on 29 December. The applicant conceded that he was frequently late for work.[5]
71. The applicant conceded that he did not have an agreement with the respondent to the effect that he could make up time by staying back or working through lunch time. He said that he had no records of the times that he claimed to have worked out of his scheduled hours. He maintained, contrary to the respondent's evidence, that it was possible to make outgoing calls after logging off from the system.
72. The applicant conceded that, in his last six months with the respondent, he did not have any in depth discussion about his family responsibilities. He also conceded that neither Mr Campbell nor Ms Campbell questioned or criticised the applicant's family responsibilities.
73. The applicant conceded that:
    a. Mr Logan did not attend any of the disciplinary meetings;
    b. the applicant did not tell Mr Logan directly about his family responsibilities; and
    c. Mr Logan never criticised the applicant's family responsibilities.
74. The applicant conceded that, contrary to his earlier evidence, his two weeks of annual leave in October 2009 was not rescinded but was postponed.
75. The applicant conceded that his quality results were as follows, when the expected minimum was 92%, until October 2009, and then 90%:
    i. in June 2009, 74%, the lowest for the team;
    ii. in July 2009, 58%, the lowest for the team;
    c. in August 2009, 78%, the lowest for the team;
    d. in September 2009, 89%, the lowest for the team;
    e. in October 2009, 96%, the highest for the team;
    f. in November 2009, 81%, the lowest for the team; and
    g. in December 2009, 60%, the lowest for the team.
76. The applicant conceded that, from a quality perspective, he was the worst performing member of the team in six of the seven months before his dismissal.

77. The applicant conceded that, at the meeting on 14 October 2009, he apologised for being late for work. In relation to his statement at the meeting that, "Noah's teething, I'm not getting much sleep", the applicant conceded in cross examination that he had difficulty waking up because he had been up during the night. When he was asked whether he could set his alarm and still get up, even if he was tired, he said:

- *I suppose it's all about what kind of person you are.*

78. When asked whether, if he found it harder to get out of bed than others, that provided a reasonable explanation for being late for work, he said:

- *I think that is something that should be considered, yes.*

79. When asked whether an employer should accommodate a person who has difficulty in getting out of bed for any reason, the applicant said:

- *I suppose it's in relation to the family responsibilities. If they have family, and they are experiencing a bit of difficulty with a young child.[6]*

80. The applicant said that at the meeting on 24 November 2009, which resulted in the first written warning, he could not recall mentioning his family responsibilities. The applicant was asked repeatedly whether he considered that telephoning ahead to say he would be late excused the lateness. Eventually, the applicant conceded that telephoning ahead to say that he would be late still meant that he was late.

81. The applicant conceded that he did not mention his family responsibilities at the meeting on 8 December 2009, which resulted in the second written warning, other than to say he had to change his baby's nappy. The applicant conceded that he was seven minutes late for work on 3 December 2009 and 13 minutes late on 8 December 2009, even though he was doing his best to get to work on time.

82. The applicant conceded that, in his discussion with Ms Bailey on 24 December 2009, he did not mention his family responsibilities. The applicant conceded that he did not seek clarification from his employer about the start times on 24 and 29 December 2009. The applicant conceded that he did not mention family issues during the meeting on 8 January 2010.

83. The applicant conceded that, when he was verbally advised of his dismissal on 11 January 2010, Ms Campbell and Mr Varhelyi did not mention his family responsibilities.

84. In re-examination, the applicant said that he did not ask for a later start time than 9.30am because:

- *It was actually affirmed to me several times that that is the latest start time that you can actually do.*

85. The applicant said he was never asked if the respondent could help him to juggle his family and work responsibilities. He said there would have been a record of when he arrived at work as opposed to when he logged on to the telephone because he had to swipe a card to get into the office. He said that he was offered training to help with his quality targets, which was provided.

Ms Bailey's evidence

86. Lucinda Bailey, who was Mr Campbell's immediate supervisor, said in her affidavit sworn on 24 November 2010 that:

a. in June 2009, the former manager of the applicant's team had resigned;

b. each member of the team who wished to do so was given the opportunity to work as team manager for two weeks;

c. the applicant wished to do so;

d. however, he had a bike accident during his two week managerial period and was away for three days and worked half days for two days;

e. on the second of those two days, Ms Bailey asked the applicant when he would be able to work normal hours; he said he was not faking it; she said she accepted that but needed to plan around his absences; Ms Bailey authorised the applicant to leave early;

f. Ms Bailey had been copied in to Mr Campbell's email concerning start times on 24 and 29 December 2009;

g. she was told on 24 December 2009 that the applicant arrived 51 minutes late that day;

h. she asked the applicant why he had been late;

i. the applicant said that he had read the email with the new start times but that he had forgotten about it; and

j. she told the applicant that he would need to work to the revised roster over Christmas and he should print it out and stick it on his fridge.

87. In cross examination, Ms Bailey agreed that TotalView showed the applicant's start time as 9.30am on 24 and 29 December 2009.

Mr Campbell's evidence

88. Mr Campbell, the applicant's team manager, swore an affidavit on 24 November 2010. It contains much of the chronology set out in the background to these reasons. In addition, Mr Campbell gave a good deal of evidence about quality control, how quality was assessed and some informal meetings he had with the applicant about quality in August 2009. Mr Campbell said that he offered the applicant assistance with meeting quality targets and it was decided that the applicant would be provided with a buddy to help with set up processes.

89. Mr Campbell described the meeting on 14 October 2009. Mr Campbell said that, after the meeting, he and Ms Campbell decided to issue the applicant with a formal counselling letter. Mr Campbell said that he explained the disciplinary process to the applicant as involving a counselling session, a first written warning, a second and final written warning, and then, potentially, termination.

90. Mr Campbell described the meeting on 24 November 2009. Mr Campbell said that the quality of the applicant's work met the required standard in October 2009, but there were still problems with the applicant's punctuality. Mr Campbell said that, following the meeting on 24 November 2009, he and Ms Kaya-Galati decided to issue the applicant with a first written warning.

91. Mr Campbell then described the meeting on 8 December 2009 and said that the applicant was then given his second and final written warning.

92. Mr Campbell said that a business decision was made to finish early on 24 and 31 December 2009. He said he sent the team members a roster for the Christmas period. He said rosters were frequently altered for the applicant's team because it was small and it

was necessary to accommodate absences. He said the alterations were frequently done by email rather than by updating TotalView.

93. Mr Campbell said that he was on leave from 18 December 2009 until 8 January 2010. He said he was not involved in the termination of the applicant's employment.

94. Mr Campbell said that it was not possible to make up time after 6pm because the telephone system stopped working. In any event, Mr Campbell said that working late did not remedy the problem of putting undue pressure on other team members by being late in the morning.

95. Mr Campbell said that, at a meeting in July 2009, he had told the team that there would be some leniency with punctuality given people's personal lives, but anything more than two or three times a month would be unacceptable.

96. Mr Campbell said at paragraph 68 of his affidavit:

- *There were times when Julian would ring to tell me he was running late for work. On a couple of occasions he mentioned his child when he said he would be late. At no time did Julian say to me that he needed flexibility around his commencement times due to the nature of his family responsibilities.*

97. In relation to the applicant's leave in October 2009, Mr Campbell said:

- the applicant lodged a request for leave from 5 to 23 October 2009;
- the request was lodged on 1 October 2009, after Mr Campbell had left for the day;
- c. the applicant rang in sick the next day;
- d. Mr Campbell telephoned the applicant to say that he could only approve leave from 5 October 2009 until 12 October 2009; and
- e. after the applicant returned from leave, Mr Campbell discussed with him his concerns about the late notice for such a large amount of leave.

98. Mr Campbell said that he did not offer the applicant the opportunity to utilise annual leave when he was late for work because the unscheduled absences would place undue pressure on other members of the team. Mr Campbell conceded that he did tell the applicant that periods of lateness of under five minutes would be disregarded, but, given the applicant's continued lateness, the respondent also took into account periods of lateness of under five minutes.

99. Mr Campbell was cross-examined at some length about how the quality of employees' work was determined and how their punctuality was assessed. However, as there were no closing submissions to the effect that the applicant's work had actually been of an acceptable quality, or that the applicant had actually not been repeatedly late, I will not dwell on that evidence.

Ms Campbell's evidence

100. Ms Campbell, a human resources consultant, swore an affidavit on 24 November 2010. It contains much of the chronology set out in the background to these reasons and details the various meetings held with the applicant.

101. Ms Campbell gave some supplementary oral evidence-in-chief. She said that the decision to dismiss the applicant was ultimately taken by Mr Logan but all people present at the meeting with him on 11 January 2010 were able to put forward a view.

102. In cross-examination, Ms Campbell said that the applicant's family responsibilities were not discussed with Mr Logan on 11 January 2010. She said that punctuality and quality were discussed. Ms Campbell said that she had briefed Mr Logan before 11 January 2010 in relation to the applicant and Mr Logan had access to the notes of the previous meetings with the applicant. Ms Campbell said that she did not recall discussing with Mr Logan in the earlier briefing session anything about the applicant's family responsibilities.

103. Ms Campbell agreed that she did not draw a link between the applicant's lateness and his family responsibilities. She said that the reason the applicant emphasised for his lateness was public transport problems.

104. Ms Campbell said that she had never been asked to brief the respondent on flexible arrangements for the applicant to enable his family responsibilities to be met. She said that the applicant had never asked for such arrangements so the issue had never been pursued. She said that the respondent had flexible work arrangements for some employees, but she was not aware of any such arrangements in the applicant's team.

105. In re-examination, Ms Campbell said that the applicant had cited family responsibilities as the reason for his lateness for work on only two occasions. She said that, in relation to his lateness on 24 and
29 December 2009, the applicant had said he was late as a result of confusion with TotalView.

Mr Logan's evidence

106. Mr Logan, the respondent's National Operations Manager, swore an affidavit on 24 November 2010 and re-swore it on 4 February 2011. He said that the respondent has service targets under its contracts with its clients which require the respondent to answer a certain percentage of telephone calls within a certain time. Consequently, he said it was important for call centre staff to be logged on and ready to take calls at their rostered times. Mr Logan also said that, given the financial nature of the calls, it was important for call centre staff to have a high degree of accuracy. Mr Logan said that the respondent checks 17 to 20% of the new accounts set up each month for quality control purposes.

107. Mr Logan said that he had been briefed in relation to the performance management issues concerning the applicant. He said that he signed the first and second written warnings that were issued to the applicant.

108. Mr Logan said that he met with Mr Varhelyi, Ms Campbell and another human resources consultant, Suzanne Peddington, on 11 January 2010. He said that he was satisfied during that meeting that proper performance management processes had been followed in relation to the applicant and that the applicant had not provided a satisfactory response to issues of his continued poor performance and poor punctuality. Mr Logan said that they decided to dismiss the applicant. He said that he signed the letter of dismissal the next day.

109. Mr Logan said that the applicant was not dismissed because of family responsibilities but because of his continued and repeated poor work performance and his habitual lateness for work. Mr Logan said that his recollection was that the applicant mentioned his family responsibilities only briefly as an explanation for his lateness and instead attributed his lateness to trains being delayed.

110. Mr Logan gave some additional oral evidence in chief. He said that he made the ultimate decision to terminate the applicant's employment. He said that the issue of the applicant's family responsibilities was not raised at the meeting he had on 11 January 2010 with Mr Varhelyi and Ms Campbell.

111. Mr Logan was cross-examined. He said that he did not consult the respondent's equal opportunity policy in deciding to dismiss the applicant. He said that he understood the respondent's equal opportunity policy required the respondent to be flexible with employees who have issues with their families. He said that he did not recall the applicant's family responsibilities being discussed at the meeting he attended on 11 January 2010.

112. Mr Logan was also cross-examined about the measurement of quality. However, as it was not put to any of the respondent's witnesses or submitted in closing addresses that the applicant had in reality achieved adequate quality targets, I will not dwell on that evidence.

Consideration

113. Counsel for the applicant said in closing submissions that Mr Logan was not the only decision-maker in this case, and that the other people involved in the counselling process were also decision-makers.

114. I do not accept that submission. Counsel for the applicant said herself to Mr Logan:

- *... you accept that you were the final decision-maker on 11 January?*[7]

115. On the evidence in this case, I consider that Mr Logan was the ultimate decision-maker. The respondent is a corporation and has a hierarchical structure. It is clear on the evidence that the various supervisors and consultants who were involved in the process did not make the ultimate decision to dismiss the applicant. Mr Logan did. Consequently, it is Mr Logan's motivations that must be considered. But having said that, Mr Logan was briefed by others and consulted with others. Their understanding of the situation thus contributed to Mr Logan's decision.

116. The applicant also argued that the respondent had an inflexible rule that everyone had to be at their desk by 9.30am. However, the evidence was that the respondent had a rule that everyone had to be at their desk by their rostered start time, not that the rule was inflexible. Clearly, the respondent was late many, many times before he was eventually dismissed. Moreover, Mr Campbell's evidence was that he would have accepted lateness of up to five minutes two or three times a month. The applicant's lateness went well beyond that.

117. The applicant also submitted that:

- *So if you accept lateness on the one hand as being an issue, then you must, with that, accept family responsibilities was part and parcel of that .... If there was such an issue with lateness, we say that same gravity of importance must be placed on my client's family responsibilities. ...*
- *To say that the applicant was late, as I have said, is an implicit acknowledgement that the applicant had family responsibilities as he has raised it with his employer.*

118. In further written submissions, the applicant argued that there was an "objective connection" between the applicant's lateness and his family responsibilities and, therefore, the "irresistible conclusion must be" that the real reason for the applicant's dismissal was his family responsibilities.
119. It was not entirely clear, but the applicant seemed to be arguing that, if he was late for work, it must have been because of his family responsibilities. I do not accept that submission. The applicant admitted that he was frequently late for work but it does not follow logically that his lateness was connected with his family responsibilities. He said himself that he had difficulty getting out of bed in the morning.[8] Even if his difficulty in getting out of bed in the morning was the result of having his sleep disturbed by an unsettled child, it does not necessarily mean his family responsibilities made him late for work. It is a matter of common human experience that almost all parents of young children have disturbed sleep, but they generally manage to get to work on time. The applicant's counsel seems to have said as much in oral submissions.[9]
120. In any event, the applicant's description of his morning routine, including his family responsibilities, did not explain why he was late for work. He said he normally left for work by 8.15am and it normally took him no more than 30 minutes to drive to the station. Accordingly, he should have been able to get the 8.50am train, which was scheduled to reach Parliament station at 9.06am. Even if the train was
15 minutes late, it would have arrived at 9.21am, and the applicant would have been able to do the five minute walk to work and be at his desk by 9.30am.
121. The applicant did not give evidence before this court that he was late for work on any particular occasions because his family responsibilities did not allow him to comply with his usual routine. As I have said, the applicant's usual routine gave him ample time to get to work on time.
122. In any event, the applicant's reasons for being late for work are not the issue. The question for the court is the respondent's reasons for dismissing the applicant. The respondent's reasons for its actions are not necessarily the same as the applicant's reasons for his actions.
123. Mr Logan, the decision-maker, said on oath that he dismissed the applicant not because of his family responsibilities but because of his continued and repeated poor work performance and his habitual lateness for work.
124. The applicant did not squarely argue that his work performance should have been regarded as adequate. There was some evidence from the applicant to the effect that the way the respondent assessed the quality of the work of the call centre staff was not entirely fair and reasonable. However, there was no closing submission to that effect. The applicant touched in cross-examination on the issue of the manner of the assessment of the quality of the applicant's work. However, it was not squarely put to any of the respondent's witnesses that the assessment of the quality of the applicant's work was flawed and that his work was actually of an acceptable standard, except in the month of October 2009.
125. In all the circumstances, I proceed on the basis that, in January 2010, Mr Logan was justified in considering that the applicant had a history of repeated poor work performance.
126. The applicant did not squarely argue that he was not habitually late for work. Indeed, the applicant admitted in his first affidavit that he was sometimes late for work

and admitted in cross-examination that he was frequently late for work. The applicant's case seemed to be that, because he was frequently late for family reasons, he could not be dismissed lawfully because of his lateness.

127. The applicant did not make any closing submissions about the change in his rostered times on 24 and 29 December 2009 or about whether the hours specified on TotalView prevailed over the email instruction to start at 8.30am on those days. The applicant did not in cross-examination or final submissions question the respondent's motives for the change in the rostered times on 24 and 29 December 2009. Consequently, I proceed on the basis that there was nothing untoward in the applicant's hours being changed on 24 and 29 December 2009.

128. I consider, in all the circumstances of this case, that the email instructions prevailed over the roster in TotalView. Although the first email sent on 16 December 2009 said TotalView would be updated shortly to reflect the change, it obviously was not. The second email did not refer to TotalView at all. In the circumstances, it was incumbent on the applicant to follow the roster set out in the emails, or at least clarify his start times with his supervisors. He did not seek to do so.

129. I also proceed on the basis that the applicant was frequently late for work, as he admitted. The applicant accepted that he was late on the days and by the amounts listed by the respondent, subject to the question about TotalView on 24 and 29 December 2009. Because, in my view, the applicant should have complied with the email instructions or clarified the issue with his employer, but did not, I accept that the applicant was late on all of the days listed by the respondent and by the amounts listed by the respondent.

130. On the respondent's evidence, the applicant was late in some cases by less than five minutes. Mr Campbell had said early in the relevant period that the respondent would not be concerned about lateness of less than five minutes, but the respondent later included numerous of those occasions in his subsequent calculations of the applicant's lateness. In effect, the respondent retracted the concession it had previously made. However, even if the periods of less than five minutes were excluded, the evidence clearly shows that the applicant was still late for work many times. The applicant did not dispute that.

131. Consequently, the situation is that, when he was dismissed, the applicant had a history of poor quality work and a history of often being late for work. These issues were formally raised with the applicant in a disciplinary process that extended over a period of about three months. There was no closing submission to the effect that the disciplinary process was inadequate in any way. Based on the evidence and in view of the closing submissions that were put to the court, I consider that Mr Logan had sufficient reason on 12 January 2010 to dismiss the applicant because of his poor quality work and frequent lateness.

132. However, the question for the court is whether Mr Logan was actually motivated, perhaps subconsciously, to dismiss the applicant wholly or in part because of his family responsibilities. It is for the respondent to prove that it did not have any such motivation.

133. In all of the circumstances of this case, I am satisfied on the balance of probabilities that Mr Logan, on behalf of the respondent, did not dismiss the applicant, in whole or in part, consciously or subconsciously, because of his family responsibilities. Mr Logan denied having any such motivation. It was not put to Mr Logan in cross-examination that he had such a motivation, subconsciously or otherwise. The

respondent's witnesses all denied discussing the applicant's family responsibilities in the lead up to the decision to dismiss the applicant. They noted that the applicant when questioned about his lateness emphasised public transport difficulties. The applicant's poor work quality and repeated lateness were sufficient reasons to dismiss him. I am unable to infer in all of the circumstances of this case that the applicant's family responsibilities were a factor in the decision to dismiss him.

**Claim B: adverse action: s.340**

134. Subsection 340(1) of the FWA provides that:
    - *(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.*
        - *Note: This subsection is a civil remedy provision (see Part 4-1).*
    - *(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.*
        - *Note: This subsection is a civil remedy provision (see Part 4-1).*

135. Subsection 341(1)(a) of the FWA provides that:
    - *(1) 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... .*

136. "Workplace instrument" is defined in s.12 of the FWA to mean an instrument that:
    - *(a) is made under, or recognised by, a workplace law; and*
        - *(b) concerns the relationships between employers and employees.*

137. "Workplace law" is defined in s.12 of the FWA to mean:
    - *(a) this Act; or*
    - *(b) the Fair Work (Registered Organisations) Act 2009 ; 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).*

138. The applicant argued that the *Equal Opportunity Act 1995* (Vic) is a workplace law, as defined, and the respondent's equal opportunity policy is a workplace instrument, as defined.

139. The applicant relied particularly on s.9 and s.14A of the *Equal Opportunity Act 1995* (Vic). Section 14A of the *Equal Opportunity Act 1995* (Vic) provides that an

employer must not unreasonably refuse to accommodate an employee's responsibilities as a parent or carer. It provides as follows:

- *(1) An employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer.*
- *(2) In determining whether an employer unreasonably refuses to accommodate the responsibilities that an employee has as a parent or carer, all relevant facts and circumstances must be considered, including—*
  - *(a) the employee's circumstances, including the nature of his or her responsibilities as a parent or carer; and*
  - *(b) the nature of the employee's role; and*
  - *(c) the nature of the arrangements required to accommodate those responsibilities; and*
  - *(d) the financial circumstances of the employer; and*
  - *(e) the size and nature of the workplace and the employer's business; and*
  - *(f) the effect on the workplace and the employer's business of accommodating those responsibilities, including—*
    - *(i) the financial impact of doing so;*
    - *(ii) the number of persons who would benefit from or be disadvantaged by doing so;*
    - *(iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and*
  - *(g) the consequences for the employer of making such accommodation; and*
  - *(h) the consequences for the employee of not making such accommodation.*

140. The respondent argued that the *Equal Opportunity Act 1995* (Vic) is not a workplace law as defined. The respondent said that the objects of the Act made no reference to regulation of the workplace. The respondent said that, although the Act prohibited discrimination in the workplace, it was concerned to eliminate discrimination in society generally. Therefore, the respondent said, the Act was not a workplace law.

141. I do not accept that submission. "Workplace law" is defined in the FWA to include a State law that regulates the relationships between employers and employees. The fact that the *Equal Opportunity Act 1995* (Vic) regulates other relationships as well does not take it outside the definition of "workplace law".

142. In relation to s.14A of the *Equal Opportunity Act 1995* (Vic), the respondent submitted that it was implicit in that provision that a request had to be made for an employee's responsibilities to be accommodated in a particular way. That submission was based on the decision of Deputy President Macnamara in *Richold v State of Victoria* [2010] VCAT 433 at [38] and [40] where it was said that:

- *38. In the present case whilst it is true as Mr Swannie observes that a 'request' for accommodation on the part of Ms Richold is not according to the words of the statute a necessary requirement to establish a contravention by the employer, it is necessarily implicit. Whilst an employer might be expected to be generally aware of an employee's domestic arrangements, practical limits on*

*knowledge and the entitlement of employees to their own privacy mean that an employer cannot have full knowledge of the employee's domestic arrangements. Even if the employer did, rights of privacy and autonomy for the employee and the employee's family would render it inappropriate for an employer to reach a judgment as to what was an appropriate accommodation for a particular employee absent any consideration of the employee's views.*

...

- *40. In his submissions Mr Swannie at times appeared to contend that there was no express or implied obligation on an employee in the context of Section 14A to make known to the employer what would be an appropriate accommodation. For reasons given above I cannot accept that.*

143. *Richold* appears to be the only decision to date on s.14A of the *Equal Opportunity Act 1995* (Vic). The applicant did not contend that a request was not required to activate the employer's obligations under s.14A of the Act. However, the applicant did contend that such a request was implicit in the applicant's reference to his family responsibilities in the context of the disciplinary proceedings. The applicant conceded in cross examination that he did not expressly request a change to his working times to accommodate his family responsibilities.

144. I consider that Deputy President Macnamara was correct in holding that a request must be made under s.14A before the employer can be found to have contravened it. However, I do not accept the applicant's claim that he made an implicit request for his family responsibilities to be accommodated. To enable the request to be properly considered, any such request would have to include a specific proposal for alteration of the existing arrangements. Deputy President Macnamara alludes to this in [40], set out above. The applicant did not suggest any specific alteration to the existing arrangements before his dismissal.

145. I do not accept that the applicant requested the respondent to accommodate his family responsibilities. Consequently, I consider that s.14A of the *Equal Opportunity Act 1995* (Vic) does not arise in this proceeding.

146. Section 9 of the *Equal Opportunity Act 1995* (Vic), which the applicant also relied on, defines indirect discrimination and is as follows:

- *(1) Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice—*
  - *(a) that someone with an attribute does not or cannot comply with; and*
  - *(b) that a higher proportion of people without that attribute, or with a different attribute, do or can comply with; and*
  - *(c) that is not reasonable.*
- *(2) Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including—*
  - *(a) the consequences of failing to comply with the requirement, condition or practice;*
  - *(b) the cost of alternative requirements, conditions or practices;*
  - *(c) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice.*

- *(3) In determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination.*

147. Section 14 of the *Equal Opportunity Act 1995* (Vic) provides that:

- *An employer must not discriminate against an employee—*
  - *(a) by denying or limiting access by the employee to opportunities for promotion, transfer or training or to any other benefits connected with the employment;*
  - *(b) by dismissing the employee or otherwise terminating his or her employment;*
  - *(c) by denying the employee access to a guidance program, an apprenticeship training program or other occupational training or retraining program;*
- *(d) by subjecting the employee to any other detriment.*

148. Section 6 of the *Equal Opportunity Act 1995* (Vic) defines "attributes" to include "parental status or status as a carer".

149. The applicant argued that indirect discrimination occurred in this case because the employer imposed an unreasonable requirement (starting work at 9.30am) that any person with family responsibilities (such as the applicant) could not comply with, although a higher proportion of people without family responsibilities could start work by 9.30am.

150. I do not accept that claim. The reality is that the applicant did get to work on time about half the time. The normal departure times that the applicant described in his evidence gave him ample time to get to work by 9.30am, as discussed above.

151. Additionally, the applicant described his parental responsibilities in the morning as being:

- changing Noah's nappy;
- sometimes putting on a DVD to entice Noah to have his first bottle; and

c. if the applicant's wife had to leave early in the morning for any reason, minding Noah while she got ready.

152. The applicant did not raise the issue of needing to mind Noah while his wife got ready until he filed his first affidavit on 20 October 2010. In any event, the applicant did not explain how often his wife had to leave early or why. He did not say for how long he had to mind Noah on those occasions. In the absence of detailed evidence about the obligation to mind Noah when the applicant's wife had to leave early, I do not accept that this obligation significantly impinged on the applicant's ability to get to work by 9.30am.

153. The applicant submitted that it was unreasonable for the respondent to impose an inflexible requirement that the applicant always be at work by 9.30am. However, as discussed above, I do not accept that it was an inflexible requirement. It was a requirement that the applicant breached many times, by considerable amounts, before action was taken against him.

154. All in all, I do not accept that a person with the applicant's family responsibilities could not be at work by 9.30am. I do not accept that the applicant was discriminated against because of his family responsibilities.

155. In relation to the respondent's Equal Opportunity Policy[10], the respondent conceded that the policy was incorporated in the applicant's contract with the respondent (Exhibit 1). The respondent disputed that the contract was a workplace law or that it is a workplace instrument. The contract is clearly not a workplace law. The respondent

argued that the contract was not a workplace instrument because the contract was not made under a workplace law and was not recognised by a workplace law. The respondent said the applicant's contract was made under the common law not under the FWA or an industrial award or any other workplace law. I accept that argument.

156. Even if the contract were a workplace instrument, the respondent argued that the Equal Opportunity Policy did not create legal obligations but merely made aspirational statements. I do not accept that argument. The Equal Opportunity Policy is clearly intended to be a statement that the respondent will honour.

157. In any event, the respondent's Equal Opportunity Policy relevantly requires the respondent not to treat a person less favourably because of his or her family responsibilities. For the reasons previously stated, I do not accept that the applicant's family responsibilities were a factor in the respondent's dismissal of the applicant and nor do I accept that the respondent treated the applicant less favourably in any way because of his family responsibilities.

**Claim C: breach of contract**

158. I understand this claim is put on the same basis as the third point in claim B, namely, that the respondent breached the contract between the applicant and the respondent by failing to comply with the respondent's Equal Opportunity Policy. For the reasons already given, I reject that claim.

**Conclusion**

159. None of the grounds raised by the applicant has succeeded. The application must be dismissed.

**I certify that the preceding one hundred and fifty-nine (159) paragraphs are a true copy of the reasons for judgment of Riley FM**

Associate: Rose Hopkins

Date: 12 April 2011

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[1] Annexure 3 to the affidavit affirmed by the applicant on 20 October 2010.
[2] Exhibit ATJ-14 to the affidavit affirmed by Mr Campbell on 24 November 2010.
[3] Applicant's affidavit affirmed on 20 October 2010, paragraph 36, second sentence.
[4] Applicant's affidavit affirmed on 20 October 2010, paragraph 36, fourth sentence.
[5] Transcript 9 February 2011 page 31 line 36
[6] Transcript 9 February 2010 page 46 lines 15 to 37

[7] Transcript 10 February 2011 page 118 line 28.
[8] Transcript 9 February 2010 page 46 lines 15 to 37
[9] Transcript 10 February 2010 page 129 to 130 lines 43 to 47 and lines 1 to 45.
[10] Annexure 1 to the applicant's affidavit sworn on 20 October 2010

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