# FEDERAL CIRCUIT COURT OF AUSTRALIA

*INGERSOLE v CASTLE HILL COUNTRY CLUB LIMITED* *[2014] FCCA 450*

*Catchwords:*
INDUSTRIAL LAW – Where Applicant's employment terminated on grounds of redundancy – whether adverse action for a proscribed reason relating to workplace rights within s.340 of the Fair Work Act 2009 – when a definite decision was made by the Respondent activating notification and consultation provisions in an Award – identification of decision-makers for corporate respondent – whether Respondent met reverse onus – whether employer breached applicable Award – whether employer contravened s.117 of the Fair Work Act in relation to requirement of written notice – consideration of when written notice is 'given' to an employee for the purposes of s.117 of the Act.

*Legislation:*
*Evidence Act 1995* (Cth), ss.140, 160
*Fair Work Act 2009* (Cth), ss. 44, 45, 61, 117, 340, 342, 346, 360, 361 539, 545
*Acts Interpretation Act 1901* (Cth), ss. 13, 28A, 29
*Workplace Relations Act 1996* (Cth), s.298K

*Cases cited:*
*Amcor Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241; (2005) 214 ALR 56; (2005) 79 ALJR 703; [2005] HCA 10
*Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333
*Australian Licenced Aircraft Engineers Association v Qantas Airways Limited* [2013] FCCA 592
*Australian Workers' Union v BHP Iron Ore Pty Ltd* (2000) 106 FCR 482; [2000] FCA 39
*Begley v Austin Health* [2013] FMCA 68
*Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647; [2012] HCA 32
*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Ltd* (2010) 198 IR 382; [2010] FCA 591
*Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697
*Electrical Trades Union of Australia v Sims Products Pty Ltd* (1988) 42 IR 250
*Finance Sector Union of Australia v Commonwealth Bank of Australia* (2005) 224 ALR 467; [2005] FCA 1847
*General Motors-Holden's Pty Ltd v Bowling* (1976) 136 CLR 676; (1976) 51

ALJR 235
*Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216; (1992) 42 IR 255
*Jones v Queensland Tertiary Admissions Centre Ltd (No.2)* (2010) 186 FCR 22; [2010] FCA 399
*Kucks v CSR Limited* (1996) 66 IR 182
*Liquor, Hospitality and Miscellaneous Union v Arnotts Biscuit Ltd* (2010) 188 FCR 221; [2010] FCA 770
*Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326; [2002] FCA 513
*McIlwain v Ramsey Food Packaging Pty Ltd* (2006) 154 IR 111; [2006] FCA 828
*Minister for Immigration v Singh* [2000] FCA 377
*Municipal Officers Association of Australia v City of Bayswater* (1988) 30 AJLR 15; (1987) 22 IR 45
*National Tertiary Education Industry Union v Central Queensland University* [2008] FCA 481
*National Tertiary Education Union v Royal Melbourne Institute of Technology* [2013] FCA 451
*Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 641; [1998] HCA 31
*Qantas Airways Limited v Australian Licensed Aircraft Engineers Association* (2012) 202 FCR 244; [2012] FCAFC 63
*QR Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150
*Ramos v Good Samaritan Industries* [2013] FCA 30
*Siagian v Sanel Pty Ltd* (1994) 122 ALR 333
*Wacando v Commonwealth* (1981) 148 CLR 1; [1981] HCA 60
*Wolfe v Australia and New Zealand Banking Group Ltd* [2013] FMCA 65

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| Applicant: | ELIZABETH INGERSOLE |
| Respondent: | CASTLE HILL COUNTRY CLUB LIMITED |
| File Number: | SYG1478 of 2012 |
| Judgment of: | Judge Barnes |
| Hearing dates: | 9,10, 11, 12 and 25 July and 2 August 2013 |
| Delivered at: | Sydney |
| Delivered on: | 11 March 2014 |

**REPRESENTATION**

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| Counsel for the Applicant: | M Perry |
| Solicitors for the Applicant: | Sullivan Fernan |
| Counsel for the Respondent: | SEJ Prince |
| Solicitors for the Respondent: | HWL Ebsworth |

**DECLARATIONS**

(1) That the Respondent contravened s.117(1) of the *Fair Work Act 2009* (Cth) in terminating the Applicant's employment on 1 March 2012 prior to the date on which written notice of the day of the termination was given to the Applicant and is thus in contravention of s.44 of the Fair Work Act.

**ORDERS**

(1) Within 14 days of today's date the parties are to bring in Short Minutes of Order or, in the absence of agreement, are to file written submissions in relation to quantification of compensation to be paid to the Applicant in respect of the contravention of s.44 of the Fair Work Act.

(2) The matter be listed for a hearing on penalty in relation to the contravention of s.44 on a date to be fixed.

(3) The application is otherwise dismissed.

# FEDERAL CIRCUIT COURT
# OF AUSTRALIA
# AT SYDNEY

## SYG1478 of 2012

**ELIZABETH INGERSOLE**
Applicant

And

**CASTLE HILL COUNTRY CLUB LIMITED**
Respondent

## REASONS FOR JUDGMENT

### These proceedings

1. The Applicant, Elizabeth Ingersole, alleges that the Respondent, Castle Hill Country Club Limited (the Club), took adverse action against her in contravention of s.340 of the *Fair Work Act 2009* (Cth) (the Act), breached s.45 of the Act by contravening a term of the Registered and Licensed Clubs Award 2010 (the Award) and breached s.44 of the Act by failing to comply with s.117(1) of the Act. Her complaints relate to the circumstances and manner in which her employment was terminated by the Club on or about 1 March 2012.

2. Ms Ingersole was employed by the Club as administration manager. It is not in dispute that her employment was subject to the Award. As discussed further below, on 29 February 2012 a majority of the Board of Directors of the Club voted in favour of a resolution making two positions, including the position occupied by Ms Ingersole, redundant (the redundancy resolution). On 1 March 2012 she was informed that

her position had been made redundant. She commenced these proceedings on 5 July 2012.

3. Ms Ingersole asserted that there was a contravention of s.340 of the Act. She claimed that she had workplace rights to be notified and consulted about major workplace changes likely to have significant effects on her employment and to participate in discussions regarding any such definite decision under cl.8 of the Award and to participate in a dispute resolution process as provided for in cl.9 of the Award, as well as a more general right to make a complaint or inquiry in relation to her employment.

4. Ms Ingersole claimed that the Club took adverse action against her on 1 March 2012 in dismissing her from her employment on the grounds of redundancy; by dismissing her without any notice or warning; by refusing or failing to consult with her about any decision in accordance with cl.8 of the Award; by dismissing her without allowing her to participate in a dispute resolution process in accordance with the Award and by dismissing her in a way that was said to be "*peremptory including arranging for her to be immediately escorted from the Respondent's premises with directions that she not be allowed to speak to any other employee or board member...before leaving the premises*".

5. It is alleged that the Club took such adverse action to prevent the exercise by Ms Ingersole of her workplace rights and/or because she had workplace rights and/or proposed to exercise such rights or because she had exercised or proposed to exercise such rights in the past. The basis for such contention is pleaded in the Amended Statement of Claim.

6. Ms Ingersole also claimed that insofar as the Club failed to comply with the provisions of cll.8 and 9 of the Award in relation to notification, consultation and discussion regarding major workplace change and participation in a dispute resolution process this constituted a contravention of a Modern Award and hence a breach of s.45 of the Act.

7. Counsel for the Applicant encapsulated these aspects of Ms Ingersole's claims as a claim that she was deprived of her workplace rights of consultation, discussion and complaint because the Club made a

decision to introduce workplace change which it concealed from her (see the observation by Merkel J at first instance in *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2005) 224 ALR 467; [2005] FCA 1847 at [126]).

8. Further, Ms Ingersole alleged that in breach of s.44 of the Act the Club failed to comply with the written notice requirements in s.117 of the Act in that she was dismissed on 1 March 2012, but not given written notice of her dismissal until on or after 6 March 2012.

9. In the Form 2 accompanying her initiating application Ms Ingersole claimed compensation for loss of income following the termination of her employment. In the Form 2 and her Amended Statement of Claim Ms Ingersole also sought unparticularised civil remedies under s.539 of the Act and civil penalties to be paid to her, as well as interest and costs. In the Amended Statement of Claim she further sought any other order pursuant to s.545 of the Act that the Court considered appropriate.

10. The Club disputed liability on all bases alleged. In particular, it denied that Ms Ingersole's workplace rights were as extensive as was alleged, denied that it took adverse action or breached the Award as alleged, asserted that it terminated the employment of the Applicant on the grounds of genuine redundancy and claimed that it met any onus placed on it by s.361 of the Act in relation to its motivation. It asserted that there was no failure to comply with the Award and that written notice of the day of termination of employment was given to Ms Ingersole in accordance with s.117 of the Act.

11. The hearing proceeded as a hearing on liability only.

## The Evidence

12. Ms Ingersole relied on affidavits affirmed by her on 4 February 2013 and 12 April 2013, an affidavit of Roger Allsop and an affidavit of Bill Muter. Each of these witnesses was cross-examined. The Respondent did not take general issue with the credit of Mr Allsop, Mr Muter or, indeed, with that of Ms Ingersole.

13. Mr Allsop is a retired operations director and long-term member of the Club who has been a member of the Board of directors for a number of years and served as Vice-President and President. In particular, he was President of the Club from October 2003 to October 2009 and from October 2010 to October 2011. Mr Allsop was not a member of the Board for the year commencing October 2011. Ms Ingersole's employment was terminated on 1 March 2012. Mr Muter, a retired assistant general manager, was a director of the Club for 14 of the 16 years preceding October 2011. He was not on the Board for the year commencing October 2011.

14. Mr Allsop and Mr Muter generally impressed as witnesses of truth. However the weight to be given to their evidence relevant to the reason for any adverse action by the Club is considered in context. While there are some inconsistencies or differences in perception between the evidence of Ms Ingersole and other witnesses they are not such as to render her a generally unreliable witness. Relevant issues are discussed below.

15. The Club relied on affidavit evidence of Sandra Anne Turner, Duncan Leeton Walker, John Stephen Dakin, Celestine Michel, Philip Evan Moore and David Alan Geraghty. Ms Turner, an employee of the Club was not required for cross-examination. She gave evidence about posting and delivery of notice of redundancy letters to Ms Ingersole. Mr Walker is the operations manager for the Club. From mid-January 2012 to early May 2012 he acted as a conduit between the staff and the Board during the absence of the CEO, Mr Fraser on sick leave. No issue was taken with his general credibility.

16. Ms Michel, Mr Moore, Mr Dakin and Mr Geraghty (the Board members) were all on the Board of the Club in the year commencing October 2011. At a Board Meeting held on 29 February 2012 each of them voted in favour of the resolution to make the positions of administration manager and event coordinator (sometimes referred to as events manager) redundant.

17. Mr Geraghty, a chartered accountant and general manager, was a Board Member from October 2002 to October 2010 and from October 2011. He was Vice President from October 2005 to October 2009 and President of the Club between October 2009 and October 2010 and

again from October 2011 on. Mr Moore, a retired company director and businessman, was President of the Club for three years from October 2000 and Vice-President from October 2011 to October 2012. Mr Dakin, an accountant and chief operating officer, was Vice-Captain of the Club for the year commencing October 2011. Ms Michel, a managing director, was a Director of the Club for 12 months from October 2011.

18. Counsel for the Applicant took issue with various aspects of the evidence of the Board Members in relation to whether their evidence about their stated reasons for the asserted adverse action should be accepted as reliable. As discussed further below, the Applicant submitted that this "*concealment*" of the redundancy proposal and the "*unsatisfactory nature*" of the Board members' evidence, in particular that of Mr Geraghty, went to show that the decision or proposal to make Ms Ingersole redundant was kept confidential because of the concern that she would have made some complaints or inquiries and that was for the purpose of trying to obviate or avoid opposition or the initiation of a dispute resolution process by Ms Ingersole which might have jeopardised the proposal to make her job redundant. The Applicant submitted that the Court should be satisfied that these witnesses were involved in and aware of the proposed redundancy of Ms Ingersole before the Board meeting of 29 February 2012, but were prepared to keep it concealed from Ms Ingersole so that she could not exercise her workplace rights. In essence, it was contended that the manner in which the Club terminated Ms Ingersole's employment was to stop her making some complaint or inquiry.

19. In the alternative it was submitted that the evidence of the Board members supported the proposition that Mr Geraghty was for all practical purposes the mind of the Respondent, at least in relation to the effects of the major workplace change on Ms Ingersole. These contentions are discussed below in relation to the adverse action claim and the s.361 issues.

20. The Applicant appeared to submit generally that Ms Michel was not a reliable witness, based on what were said to be answers of "*concern*" and inconsistencies in her evidence. Accordingly I consider that issue at this stage.

21. Ms Michel is managing director of a business consultancy practice which provides assistance to organisations in areas of strategic and business planning, organisational management and project management. The Applicant took issue with Ms Michel's evidence in cross-examination about whether the project management and strategic business planning and organisational matters in which she had professional experience involved or gave her experience of redundancies. I am not persuaded that her evidence in this respect was evasive. She explained that her role was to facilitate the project management process. She acknowledged that the organisations she assisted may choose to make people redundant as part of the restructuring process. She made it clear that it was not part of her professional role to deal with redundancies of her client's employees.

22. The Applicant also contended that the "*concern*" Ms Michel expressed in her affidavit about the absence of the Club CEO from work on sick leave in early 2012 in circumstances of ill health was inconsistent with the views she expressed at a Board meeting on 29 February 2012 that the administration manager's (and the Event Coordinator's) duties could be shared with existing staff. This inconsistency was said to be such as to raise concerns about the reliability of Ms Michel's evidence about her reasons for adverse action.

23. This contention is not supported by the evidence. Counsel for the Applicant put to Ms Michel that "*getting rid*" of the administration manager while the CEO was away may worsen the position. However Ms Michel explained her view. She responded that the redundancy saved costs. She subsequently explained that in her view there were no other "*long term beneficial options*" or other cost savings options apart from those that would have reduced services to members. Such explanation was consistent with Ms Michel's affidavit evidence that after she attended the Club Finance Committee meeting on 22 February 2012 it was evident to her that the Board had to take remedial action with respect to the financial position of the Club, that she had considered a number of cost saving options based on her experience with multiple clients over the years and that, regrettably, the most obvious option for a "*long term*" beneficial effect was a restructure of staff with a view to making positions redundant within the Club.

24. Further, contrary to the Applicant's contention, Ms Michel's evidence about why she rejected other cost saving options (because they could have reduced services to members) does not go to show that she was not a reliable witness. She explained that she regarded the redundancy of the positions of the administration manager and event coordinator as being about reducing costs and that these were the areas that appeared to have the most potential for cost reduction with minimal service reduction to members. Her subsequent evidence that alternative cost savings options would be to let the maintenance area go, cease to run the restaurant or close the Club is to be seen in light of this earlier explanation. This evidence does not establish that Ms Michel was not a reliable witness.

25. Insofar as criticism is made of the reliability of Ms Michel's evidence on the basis of her failure to recall particular matters in cross-examination, having regard to all of her evidence I am satisfied that the occasions on which she indicated that she could not recall matters are not indicative of evasiveness, but rather of an honest recognition of an inability to recall specific events from some 18 months prior to the time at which she gave evidence. On the other hand, to criticise her for remembering, without prompting, the precise date that Mr Fraser took ill, overlooks her explanation that it was a most disturbing event and that it occurred on Friday the 13th. I am satisfied that Ms Michel was a witness of truth.

26. Insofar as the Applicant raised other issues in relation to whether the evidence of Ms Michel about events preceding the Board meeting of 29 February 2012 and the reason she voted in support of the redundancy resolution should be accepted, these matters are discussed below in the context of consideration of s.361 of the Act.

27. The Applicant also took issue with aspects of the evidence of the other Board members. Insofar as these submissions related to the general credibility of the other witnesses for the Club, as discussed in more detail below, I am not persuaded that any of these witnesses was lying or deliberately set out to mislead the court or that there were other concerns such as to render the whole of their evidence unreliable.

28. The issues raised about whether Mr Dakin's reasons and explanations for any adverse action should be accepted are discussed below.

However I note that the evidence in relation to the Board meeting on 29 February 2012 outlined below is not supportive of the Applicant's contention that Mr Dakin was being "*less than honest*" in his evidence that before that meeting he was not aware of the details of Mr Geraghty's motion that Ms Ingersole's position be made redundant.

29. It was not suggested that the concerns the Applicant expressed about Mr Moore's evidence, in particular in relation to Mr Moore's explanation for keeping the possibility of making Ms Ingersole's job redundant confidential prior to the redundancy resolution, were such as to render him an unreliable witness generally.

30. Counsel for the Applicant did take issue with the reliability of a number of specific aspects of Mr Geraghty's evidence in relation to his motivation and whether he planned Ms Ingersole's redundancy in concert with other Board members. These concerns are considered where relevant, particularly in relation to whether the Club has met the reverse onus in s.361 of the Act.

31. A general concern was raised about the reliability of Mr Geraghty's evidence, having regard to his evidence about not speaking to other Board members about certain matters prior to the Board meeting on 29 February 2012. Some differences of recollection did emerge in cross-examination. Mr Geraghty's evidence was that information before him after the Club's Finance Committee meeting of 22 February 2012 led him to review position descriptions, including that of the administration manager, but that he did not speak to anybody else about this and, in particular, did not speak to any of the other Board members about this until the Board meeting on 29 February 2012.

32. Mr Geraghty did not initially recall any discussion with Ms Michel prior to putting the redundancy resolution to the meeting of 29 February 2012. In contrast, Ms Michel's evidence was that one or two days before the 29 February 2012 Board meeting (after the Finance Committee meeting both she and Mr Geraghty attended) she spoke to Mr Geraghty over the telephone to voice her concerns about the costs of the administration, suggested that they needed to save money and that she thought they needed to restructure, to which Mr Geraghty responded with words to the effect, "*It's an option we have to look at.*" She recalled that it was a very brief discussion and could not recall who

had telephoned whom. Mr Geraghty subsequently recalled that after the Finance Committee meeting he had had a discussion with Ms Michel about the Club's finances.

33. I accept that Ms Michel had a conversation with Mr Geraghty in the brief and general terms she recalled. However Ms Michel did not claim that she had any conversation with Mr Geraghty about the specific issue of making Ms Ingersole's position redundant. I accept her evidence in this respect. Any "*inconsistency*" in the evidence in this respect is to be seen in light of the time that has passed and the nature of the conversation which was between Board and Finance Committee members. The fact that Mr Geraghty did not initially recall a brief general discussion with Ms Michel of some 18 months earlier or that she raised the possible need to "*restructure*" the Club is not such, either alone or in combination with the other concerns raised by the Applicant, as to establish that Mr Geraghty was a generally unreliable witness. The relevance of this difference in recollection to Mr Geraghty's reasons for adverse action is discussed further below.

34. The Applicant also expressed concern about the fact that while Mr Geraghty's evidence was that he had kept the redundancy proposal from Mr Moore prior to the Board Meeting of 29 February 2012 and that he did not recollect speaking to any of the other Board members about the proposal to suggest redundancies prior to the meeting of 29 February 2012, Mr Moore's subsequent evidence in cross-examination was that he had a conversation with Mr Geraghty before the Board meeting on 29 February 2012 in which he gave the benefit of his experience to Mr Geraghty. The discussion included possibly making one or two positions, including the administration manager's position, redundant. Mr Moore's recollection was that he initiated discussion about such possible redundancy.

35. This conversation is also discussed further below, but for present purposes I accept the evidence of Mr Moore that a conversation with Mr Geraghty occurred on 29 February 2012, although Mr Moore stated in cross-examination that he had no specific recollection of what was said. Mr Geraghty's failure to recollect (when the issue of prior discussions was canvassed) that on the day of the Board meeting he had some discussion with Mr Moore (the Club Vice-President) about

the need to restructure and the possibility of making one or two positions vacant, including that of the administration manager, is to be contrasted with Mr Moore's acknowledgement that he understood that it was likely that Ms Ingersole's position would be made redundant. However, as discussed further below, it is clear that in Mr Moore's view this would depend on the vote of the Board and that no redundancy would occur unless the Board voted for it. Moreover it is not Mr Moore's evidence that Mr Geraghty told him that he proposed to put a redundancy motion to the Board meeting or that there was any secretive plan or agreement with Mr Geraghty in relation to making Ms Ingersole redundant.

36. The relevance of this evidence in relation to the time at which the Respondent made a definite decision and as to whether the Respondent has met the reverse onus in s.361 of the Act is discussed below.

37. For present purposes, while Mr Geraghty's failure to recall any relevant pre-Board meeting conversations, in particular with Mr Moore, raises a concern about his recollection of past events, it is not such as to render him an unreliable witness in all respects. The witnesses were endeavouring to recall events of some 18 months earlier. Mr Moore's evidence was not inconsistent with Mr Geraghty's assertion that he did not inform other Board members that he intended to put the redundancy motion that he proposed at the Board Meeting of 29 February 2012. I am not persuaded that Mr Geraghty gave false testimony in this respect.

38. However I have borne these issues in mind, particularly where there is a difference in recollection between Mr Geraghty and other witnesses about past events. In such instances I prefer the evidence of such other witnesses. Other concerns raised by the Applicant about aspects of Mr Geraghty's evidence, including about his pre-2012 attitude to Ms Ingersole, are considered where relevant below.

39. Mr Fraser, who was the CEO of the Club at all relevant times, did not give evidence in these proceedings. Nor did any of the three members of the Board who did not vote for the redundancy resolution of 29 February 2012.

## The Club

40. The Club is a company which provides golfing and related facilities for members and guests. The Constitution of the Club makes provision for election and powers of a Board of directors (the Board) of seven persons who are to be elected annually (from October each year) at an annual general meeting. The Board is responsible for the management of the business and affairs of the Club. In addition to its general powers the Board has specific powers under cl.43 of the Constitution including, relevantly, to delegate any of its powers to committees (cl.43(a)); to make regulations (cl.43(b)); to appoint, discharge and arrange the duties and powers of the CEO and to determine remuneration and terms of employment and to specify and define the duties of the CEO (cl.43(g)(i)). Relevantly, the Board also has the power from time to time:

> *... to engage, appoint, control, remove, discharge, suspend and dismiss Chief Executive Officers, representatives, agents and servants or other employees in respect to permanent, temporary or special services as it may from time to time think fit and to determine the duties, pay, salary, emoluments or other remuneration and to determine with or without compensation any contract for service or otherwise.* (Cl.43(g)(ii)).

41. The Board is to meet at least once a month for the dispatch of business. Meetings are to be presided over by the President of the Club (cl.46). Clause 48 of the Constitution provides that:

> *Subject to the Constitution, questions arising at any meeting of the Board shall be decided by a majority of votes and a determination by a majority of the Members of the Board shall for all purposes be deemed a determination of the Board. In case of an equality of votes the Chairman of the Meeting shall have a second or casting vote.*

42. Clause 75 of the Club's Constitution is as follows:

> *At any time there shall only be one Secretary of the Club who shall be appointed by the Board. The appointment may be terminated by the Board at any time. The Secretary may be referred to as the Chief Executive Officer if so determined by the Board.*

43. Clause 77 of the Club's Constitution provides that "*The Secretary shall keep minutes of all resolutions of the Board and the names of the Board Members present.*"

44. Clause 84 deals with duties of Sub-Committees. The Finance Committee is to:

> *(a) Deal with all matters pertaining to the Club's finances and shall report and recommend thereon to the Board.*
>
> *(b) Keep the Board fully informed from month to month of the income and expenditure of the Club and its relationship to estimates.*
>
> *(c) Prepare a budget of income and expenditure for the finance year.*
>
> *(d) Ensure that all claims upon the Club and cash disbursements have been properly authorised, and certified to by a responsible officer or officers and after examination make appropriate recommendations to the Board as to confirmation of and/or passing for payment thereof.*
>
> *(e) Consider and make recommendations of reference made to it by other Sub-Committees in the matter or ordinary or extraordinary expenditure.*

45. The Club President is ex-officio a member of all sub committees which remain subject to the control of the Board (cl.83(b) and (c)).

46. The Regulations of the Club provide that complaints on all matters connected with the management or services of the Club or the conduct of any employee are to be made to the CEO. If the CEO is unable to satisfy the complainant he (sic) is to submit the matter to the President or Sub-Committee concerned.

47. Under the heading "*Staff*" the Regulations state:

> *No employee of the Club shall be directly reprimanded or given any directions or instructions regarding the matter of work or terms of employment by an individual or committee man"*

## The Factual Background

48. The claims made by Ms Ingersole are such that it is necessary to have regard not only to events of early 2012 leading up to and culminating in her termination and what occurred immediately thereafter, but also to earlier events during the time that Ms Ingersole worked for the Club. I was assisted by a Joint Chronology prepared by the Respondent's legal representatives and annotated by the Applicant's legal representatives, but have had regard to all the evidence.

49. It is not in dispute that Ms Ingersole was employed by the Club from October 2002 to 1 March 2012, that from 1 January 2010 her employment was covered by the Award and that the Act and Award applied to the Club at all material times in 2012.

50. Ms Ingersole commenced employment with the Club in October 2002 as a temporary office administration clerk. In January 2003 she was appointed assistant to the CEO. She became administration manager in about 2006. According to a 2010 position description, this position had overall responsibility for the successful operation of the administration, office and reception functions and for maintenance and management of all information technology requirements of the Club, and included provision of assistance with human resource requirements and ensuring the ongoing functionality of the Club Occupational Health and Safety Committee. As administration manager Ms Ingersole reported to the CEO.

51. Mr Stuart Fraser was appointed CEO and hence Secretary of the Club in or about 2004. Mr Allsop became President of the Club in October 2004. Ms Ingersole began to attend Board meetings from some time in or about 2004 to take minutes of the meeting.

## The Two Tee Issue

52. In or about April 2009 the Board included, relevantly, Mr Allsop as President, Mr Geraghty as Vice-President and Mr Muter. At or about that time the Board resolved to change Sunday golf tee times from a two tee start to a one tee start. This decision was made at a time when Ms Ingersole attended Board meetings and, on her own evidence took notes and minutes on behalf of Mr Fraser. In cross-examination she

agreed that she described her role as implementing policy and direction and providing advice to achieve Club goals in her applications for other jobs.

53. After the one tee start was implemented, Mr Geraghty told Ms Ingersole that the Board members wanted the Sunday fields to be changed back to two tee starts because they had had numerous complaints from members. She said she could not make such changes. She was of the view that she could not do so without authorisation from the CEO. Mr Fraser and the then President Mr Allsop were absent from the Club at that time.

54. On 1 May 2009 Ms Ingersole sent Mr Geraghty an email advising him that the Match Committee would meet the next Saturday to discuss the issue. In his response (copied in to all other members of the Board and the CEO) Mr Geraghty stated that he had discussed the issue with the CEO and had obtained agreement of all available Board members to revert to the two tee start. He expressed concern about member responses if the issue was deferred. He explained that he was "*not having a go at*" Ms Ingersole, but that the Board would look indecisive if the decision was further delayed. Ms Ingersole responded that she was not sure when Mr Geraghty had spoken to the CEO "*but at the end of my discussion with him, that is what I was requested to do. I have no further information than that*".

55. Ms Ingersole's evidence is that at the next Board Meeting a "*heated*" discussion about the "*incident*" took place between Mr Allsop and Mr Geraghty in which Mr Geraghty was effectively reprimanded. She claimed that in the following months she perceived a change in Mr Geraghty's attitude towards her, in that he was "*less friendly*".

56. In cross-examination Ms Ingersole maintained that Mr Geraghty was hostile to her, despite the fact that she was subsequently invited to sit on Sub-Committees while he was President, invited by him to represent the Club at a function and despite subsequent email exchanges with him that she acknowledged were cordial and polite. Insofar as she claimed Mr Geraghty was critical of her in emails sent to others, there is no evidence of such emails.

57. According to Mr Allsop, whose evidence in this respect I accept, he spoke to Ms Ingersole after his return. She was apparently upset at being put in this position as it was not for her to change the tee times without the authority of the Board and a direction from Mr Fraser. However there is no evidence that Ms Ingersole made a complaint or inquiry in relation to her employment with respect to these events. Mr Allsop did not given evidence about what occurred at the next Board meeting. Mr Muter's evidence, which I accept, is that the Board advised Mr Geraghty that the way he had dealt with the problem was inappropriate and that Ms Ingersole's approach was correct.

58. Mr Muter claimed that thereafter he observed a change of attitude by Mr Geraghty to Ms Ingersole to one of "*coolness*" and criticism of her work performance. By way of example, he claimed that he observed that when they had charity days Mr Geraghty did not praise Ms Ingersole's work and if he walked past her he did not acknowledge her. Mr Allsop also observed that thereafter Mr Geraghty's attitude towards Ms Ingersole changed and that Mr Geraghty would sometimes ignore her presence and would sometimes speak to her in a way that Mr Allsop felt caused unnecessary tension.

59. Mr Geraghty claimed that he was not agitated with Ms Ingersole and that this issue did not bear on his decision to support the resolution of 29 February 2012 to make two positions redundant. In cross-examination Mr Geraghty claimed there was "*no deliberate ignoring*" of Ms Ingersole, that if he needed to speak to her he did so, that he never changed his attitude to her and that it was "*not a matter of shooting the messenger*".

60. I accept that from the perspective of Ms Ingersole, Mr Allsop and Mr Muter an observable "*coolness*" in personal interactions between Mr Geraghty and Ms Ingersole was apparent. However it has not been established that Mr Geraghty's attitude amounted to hostility to Ms Ingersole. The evidence of her subsequent involvement in committees and attendance at functions and the email communications with Mr Geraghty are to the contrary. The absence of praise for her involvement in charity days is to be seen in light of the evidence about the 2010 auction discussed below. Insofar as Ms Ingersole now appears to contend that Mr Geraghty's reasons for her 2012 dismissal

and the manner in which it occurred relate back to the two tee incident, there is no allegation that the Club took adverse action against Ms Ingersole in 2012 for reasons that included any exercise of workplace rights by her in May 2009. The Applicant's contention that this event otherwise informed Mr Geraghty's attitude to her and his action in 2012 is considered below.

## October 2009 Changes

61. Mr Allsop did not stand for re-election to the Board of the Club in October 2009. Mr Muter remained a director. Mr Geraghty became President of the Club. At his first Board meeting as President, Mr Geraghty advised he had instructed the CEO that Ms Ingersole was no longer to attend Board meetings. I accept Mr Muter's evidence that Mr Geraghty also stated that he had formed the view that Ms Ingersole was an influence on members of the Board. Mr Muter indicated his disagreement. Mr Geraghty instructed the CEO to take minutes in the future and to complete draft minutes for distribution. Mr Muter did not regard it as efficient or appropriate for the CEO to perform this task. However cl.77 of the Club's Constitution requires the Secretary (that is, the CEO) to keep Board minutes. Insofar as the Applicant may have intended to assert that Mr Geraghty's attitude to her in 2012 was apparent in this action, this is also discussed below. Again, there is no evidence of any relevant exercise of workplace rights by Ms Ingersole at this time.

62. In December 2009 Mr Geraghty, as President of the Club, met with the CEO, Mr Fraser, to discuss job descriptions and key performance indicators and expressed a need to look at roles and responsibilities for all staff.

## Events of 2010

63. In May 2010 Mr Fraser sent a proposed updated position description for the administration manager to Ms Ingersole to check whether it was accurate and if there were any alterations she wanted to make. She made what she described as "*a couple of minor changes*". The position description was finalised by Mr Fraser in August 2010. There is no evidence from Mr Fraser as to the circumstances in which this

occurred. Nor is any issue raised about whether these particular circumstances involved the exercise of workplace rights by Ms Ingersole.

64. Mr Geraghty's evidence is that he recalled various discussions with members of the Board in July to August 2010 about the Club's excessive salary costs and under-utilisation of staff members. Mr Muter gave evidence of a meeting with Mr Geraghty and another Board member (Mr Hayton) on 6 August 2010 at which he claimed he was told that in July 2010 the Executive Remuneration Committee had agreed to make Ms Ingersole redundant if Mr Muter and Mr Hayton agreed. Mr Geraghty did not recall that he had said that to Mr Muter and Mr Hayton but agreed that it was possible that he had.

65. The Minutes of the Executive Remuneration Committee meeting of 20 July 2010 record a discussion of what were described as behavioural matters and approaches by staff to Mr Geraghty about their treatment by the CEO and by Ms Ingersole, as well as a consideration of whether the Club management had the right structure, roles and responsibilities. The Minutes also record discussion about the contract, performance and remuneration of the CEO, the need for a greater level of performance from and expansion of the role of the CEO and the fact that as a result positions may need to change or be made redundant. The issue of the possible redundancy of the position of administration manager was considered at the Remuneration Committee meeting, albeit in the context of considering the role and remuneration of the CEO.

66. The Remuneration Committee's role related to remuneration of the CEO. Given that staff redundancies were matters for the Board, while I accept that, as the Minutes record, there was a discussion of the possibility of making the position of administration manager redundant at the Remuneration Committee meeting, I am not satisfied that the Remuneration Committee had made such a decision, as distinct from being of the view that such a redundancy should be considered. Consistent with this position, and the need for a decision by the Board in relation to any staff redundancy, Mr Muter stated that he wanted to hear from the other directors.

67. A Special Board meeting was held on 10 August 2010 to discuss the outcome of the Remuneration Committee meeting in relation to the CEO's package and responsibilities and the possible need for position changes or redundancies. Again this highlights the fact that such matters were for the Board to decide. Mr Fraser did not attend this meeting. The Minutes record discussion of the need for greater performance from and an expanded role for the CEO and the possible implications for other staff positions. It was agreed that the President and Vice-President would advise the CEO that the Board sought a higher level of performance and direct responsibility from him and that he was to consider the overall management structure and the roles and responsibilities of management staff, including the possibility that positions and roles may need to be made redundant or change. The Board decided that the CEO was to prepare a Management Plan prior to the September 2010 Board meeting.

68. At the August 2010 Board meeting held on 25 August 2010. Mr Muter addressed the Board (in the absence of the CEO) about his doubts regarding any redundancy process. He suggested that legal advice, the support of the CEO and a formal board meeting at which all members of the Board should be present and discussions recorded and minuted would be necessary.

## The Auction Issue

69. Ms Ingersole and Mr Muter gave evidence about Mr Geraghty's response to Ms Ingersole's action on 26 August 2010 in arranging the sale of a prize that was not sold at a Club charity auction on 25 August 2010. The prize was sold to a Club staff member at the same price that Ms Ingersole had paid for another such item in the auction. Mr Muter's evidence is that the member who donated the prize complained. The issue was considered at the Board meeting on 30 September 2010. Mr Geraghty expressed disapproval ofMs Ingersole's actions and suggested that she should be disciplined or counselled and the incident noted in her personnel file.

70. The Minutes of the Board meeting of 30 September 2010 record that Mr Geraghty requested that his view be included in the Minutes. The majority of the Board concluded that during the auction Ms Ingersole

had acted on the CEO's directions in withdrawing the item in question from the auction and that there was no intentional wrongdoing on her part. It was however resolved that staff would not be allowed to bid on items at future Club auctions and that reserve prices would be set for all items. There is no evidence that Ms Ingersole exercised or proposed to exercise workplace rights at this time. The relevance of this incident to Mr Geraghty's motivation in 2012 is also discussed below.

## The Management Plan

71. As required by the Board, Mr Fraser prepared a Management Plan in 2010. He showed a copy to Ms Ingersole. The Plan suggested that no position should be made redundant and that the Club was understaffed. The Plan opposed making the position of administration manager redundant and suggested that it had expanded significantly. The Management Plan was presented to the Board Meeting of 30 September 2010.

72. Mr Geraghty's view was that Mr Fraser had consulted with Ms Ingersole about certain aspects of the Plan and that she had assisted him with its preparation (given her past role in preparing documents for Mr Fraser using Microsoft Word and Microsoft Excel programs of which Mr Fraser had limited knowledge). He has no direct knowledge in this respect. There is no evidence from Mr Fraser. Ms Ingersole denied assisting Mr Fraser in preparing the Management Plan or being consulted by Mr Fraser about any aspect of the Management Plan but agreed that Mr Fraser had shown her the Plan. However, it is pleaded that in 2010 the CEO took action to investigate the justification for any redundancy including consulting, notifying and discussing the proposal with Ms Ingersole. Whether or not Ms Ingersole was involved in preparation of the Management Plan, it is not in dispute that in 2010 she was consulted, notified of and included in discussion in relation to the possibility that her position would be made redundant.

73. According to Mr Geraghty, at the September 2010 Board meeting another Board member raised the need for more financial detail to justify proposed staff expansion suggested in the Plan. Mr Geraghty suggested that comparative information should be obtained from other

clubs. Mr Fraser indicated that he could not get information from other clubs regarding remuneration of CEOs, their roles and responsibilities and remuneration of other management as such information was confidential. The Board resolved that Board members should report their feedback on the Management Plan to Mr Fraser. Mr Geraghty did so.

74. The events of 2010 are relied on by the Applicant in support of the propositions that when Ms Ingersole exercised workplace rights and/or there was consultation with her, proposed action against her did not proceed and that part of the reason for the 2012 adverse action was that she had exercised or proposed to exercise workplace rights in the past. These issues are discussed below.

## Board Changes in October 2010

75. In October 2010 Mr Geraghty ceased to be President. He did not stand for re-election as a member of the Board for the year from October 2010.

76. Mr Allsop again became President. The Minutes of the Board meeting of 21 October 2010 are in evidence. They make no reference to the Management Plan or to comments on the Plan. Mr Allsop's evidence is that a biennial "*bench marking summary*" conducted in 2010 while he was not a member of the Board showed the Club was run efficiently and was not overstaffed. He did not think the Club required any management structure changes. There is no evidence of any 2010 report other than the Management Plan (which refers to "*benchmarking*" issues"). I accept that this was the report to which Mr Allsop referred. While Mr Allsop was President, Ms Ingersole again attended Board meetings.

## Board Changes in October 2011

77. In October 2011 Mr Geraghty again became President of the Club. Mr Allsop and Mr Muter ceased to be members of the Board. Mr Moore became Vice-President, Mr Dakin and Ms Michel became Board members. There were three other members of the Board who were not witnesses in these proceedings.

## Events leading up to the Board Meeting on 29 February 2012

78. On 13 January 2012 the CEO, Mr Fraser, suffered an aneurysm. He subsequently had brain surgery. He was on sick leave from 13 January 2012 to 2 May 2012.

79. As staff were informed by email, during Mr Fraser's absence Mr Duncan Walker (the operations manager) acted as a "*conduit*" between the Board and the staff. Ms Ingersole was aware that Mr Walker was to act as a conduit.

80. On 22 February 2012 Mr Geraghty, Ms Michel, Mr Moore and one other member of the Board (Mr Moynihan, the Treasurer) attended a Finance Sub-Committee meeting at which the Financial Reports to the end of January 2012 were considered.

81. On the evening of 29 February 2012 a Club Board meeting was held which was attended by Mr Geraghty as President and Chairman, Mr Moore, Mr Moynihan, Mr Verdon and Mr Kelly, Ms Michel and Mr Dakin. Mr Walker was initially in attendance at the meeting.

82. The Minutes of the meeting record that Mr Geraghty asked Mr Walker to leave the meeting prior to discussion of general business. Under the heading "*General Business*" the Minutes of the meeting record:

> *David Geraghty advised the meeting that the club's operating result of a loss of $219,000 (prior to below the line items) was grossly unacceptable, and that the measures on cost cutting decided at the last board meeting and finance meeting (re ceasing free chips and nuts) were merely tinkering around the edges, and some tough decisions needed to be made to trim our costs. Mr Geraghty noted that entrance fees were thought of historically as funds to be set aside for future capital works however they have been used to prop up the operating costs of the club and mask the real operating result. Mr Geraghty also commented that we are looking at significant capital outlays in the years ahead ie electricity upgrade, greens shed and clubhouse roof and we as a Board need to be mindful of that when reviewing our operating costs.*
>
> *Mr Geraghty commented that the club is incurring exceptionally high management salary costs and that the Club cannot/should not continue to incur such costs. Mr Geraghty proposed a restructure of the staffing levels of the club. As part of the*

*proposed restructure, the positions of Administration Manager and Events Coordinator would be made redundant. Mr Geraghty stated that the estimated annual saving to the club of making the respective positions redundant would be as follows: Administration Manager – $108,000, and Events Coordinator – $69,000 inclusive of on costs. There would be a one-off costs to the club in paying out notice periods and redundancy entitlements however those would be outweighed by the ongoing annual savings (Admin Manager – $31,000, Events Manager – $11,000). All other entitlements would be paid and offset against existing provisions and accordingly would have no impact on the P&L.*

*Mr Geraghty proposed that the following reporting changes occur as part of the restructure:*

> *House Manager – rename Operations Manager*
>
> *Receptionist – reports to Financial Accountant*
>
> *Golf Office administrator – reports to Head Professional*
>
> *Golf Office Assistant – reports to Head professional*
>
> *Functions supervisor – role expanded to include organising and promoting events and continue to report to the House/Operations Manager.*

*Mr Geraghty proposed that the Administration Managers position be made redundant with immediate effect (ie tomorrow – 1st March 2012) and that the Events Coordinators position be made redundant with immediate effect on 30th March 2012.*

*Mr Geraghty advised the Board that, due to previous leaks of Board discussions, he was only going to raise this proposal once. Mr Geraghty commented that due to the deplorable weather conditions in February to date, he expected the financial results to look even worse and that now was the time to make harsh decisions concerning the clubs financial future. Mr Geraghty reminded the Board members of their fiduciary duty to look after the members interests and invited comments on the proposal prior to it being voted upon.*

*Following discussion on the matter by all board members, it was agreed by a majority of 4:3, (Paul Moynihan requested his vote against the proposal be minuted) that the restructure be approved and that the Administration Manager's position be made redundant effective 1st March 2012 and that the Event Coordinators position be made redundant effective 30th March*

*2012There being no further business the meeting was declared closed at 8.45 pm*

83. In fact as recorded in the Club's Income and Expenditure Statement for January 2012 and as Mr Geraghty stated that he put to the Board meeting on 29 February 2012, the operating loss to January 2012 was $228,000. $219,097 was the budgeted loss.

84. Each of the Board members who voted for the redundancy resolution gave evidence as to what was said at this meeting and their reasons for voting for the resolution. Their accounts of what was said at the meeting were broadly consistent and provide some elaboration on what was recorded in the Minutes. There is no evidence to the contrary. Each attested that Mr Geraghty referred to continuing and worsening losses in circumstances where there was a need for capital expenditure. He suggested that the Club had to do something about what was variously described as "*saving money*", "*trimming overheads*" or "*reducing overheads in an effort to reduce operating losses*" or "*improving the financial position*" of the Club. Mr Geraghty proposed a restructure of management staffing whereby the administration manager's position would be made redundant immediately and the Event Coordinator's position made redundant from 30 March 2012. He advised that this would save about $108,000 per annum in relation to the administration manager's role and $69,000 for the event coordinator's role.

85. Mr Moore supported the motion put by Mr Geraghty. He recalled that at the meeting he had referred to his experience that it was not appropriate for a business to be suffering such a loss not to restructure its affairs, to the need to do more than just remove chips and nuts (a Finance Committee proposal which Mr Geraghty had described as "*just tinkering around the edges*" according to Mr Dakin and Mr Moore) and to the fact that members would want the Club to make savings.

86. Mr Dakin also spoke in support of the proposal, indicating that in his experience as a chief financial officer and chief operating officer serious action must be taken immediately and without delay, that they had to save money and reduce expenditure, that businesses could not support "*huge wage costs*" or "*such overheads*" when their financial position was in "*dire straits*" (or in "*times of crisis*") and that he would

undertake such a restructure in his then employment (as chief operating officer of a medical research facility) in such a situation. He was in favour of the restructure.

87. According to these witnesses, Mr Moynihan stated that he did not support the motion but, when asked by Mr Moore, had no other suggestions.

88. Ms Michel also indicated her support for such a restructure. She observed that "*trimming the edges*" would not suffice and suggested that there was a need to *"tackle this issue head on*", to save money and to reduce expenditure. Her recollection is that she also said she had thought about other options, but that restructure was the only option that would make headway in turning the Club around.

89. According to the evidence of the Board Members, Mr Kelly indicated that he thought that input from the CEO would be appropriate before voting for a restructure. Mr Moore pointed out that they did not know when or if Mr Fraser would return and suggested the matter could not be put on hold. There is no evidence that Mr Verdon said anything in relation to the proposal.

90. Messrs Kelly, Moynihan and Verdon voted against the redundancy resolution.

91. Mr Geraghty, Mr Moore, Ms Michel and Mr Dakin voted in favour of the resolution. Accordingly it passed by majority.

92. Prior to 1 March 2012 there were no relevant discussions in 2012 with Ms Ingersole in relation to her possible redundancy or pursuant to any workplace rights that she might have.

93. After the Board meeting on 29 February 2012 Mr Geraghty and Mr Moore informed Mr Walker of the redundancy resolution and asked him to attend a meeting the next morning to inform Ms Ingersole that her role had been made redundant, that there were no other suitable positions for her within the Club and that the Club would assist her with recruitment services free of charge to help her find alternative employment and to advise her about what she would be paid on

94. Ms Ingersole, Mr Walker, Mr Geraghty and Mr Moore all gave evidence about events on 1 March 2012. Relevantly, Mr Moore and Mr Geraghty were in the boardroom when Mr Walker went to ask Ms Ingersole to attend a meeting. Insofar as Ms Ingersole takes issue with the capacity in which he did so, it is not in dispute that Mr Geraghty sent an email to all staff members advising that Mr Walker would be a conduit between the board and the staff in the absence of Mr Fraser.

95. As to the precise words used by Mr Walker in asking Ms Ingersole to attend the boardroom, it is clear on either account that Mr Walker communicated to Ms Ingersole that her presence was required in the boardroom and that he advised her that Mr Geraghty and Mr Moore were in the boardroom. Ms Ingersole acted in a way that appeared to demonstrate some reluctance to proceed to the boardroom for a meeting. On her own evidence, when asked (or told) to attend the boardroom for a meeting she walked in the direction of her office, telling Mr Walker than she needed a pen and notebook, and then started to turn on her computer. She then went upstairs to get a coffee (accompanied by Mr Walker). She claimed that because of her anxiety about the meeting she returned to her office. Mr Walker followed her. She picked up her phone. When Mr Walker told her to put the phone down, Ms Ingersole walked out of her office and into Mr Fraser's office and locked the door. On her evidence she then telephoned Mr Fraser and expressed concern that she did not know what was going on, but did not feel good about it. Meanwhile, Mr Walker returned to the boardroom and informed Mr Geraghty and Mr Moore that Ms Ingersole would not come to the boardroom, that she had wanted to make phone calls, that he had asked her if this could wait, that she said it could not and that she had ignored him and she was talking on the phone. Mr Geraghty said that they would go with him and ask Ms Ingersole to come to the boardroom. Subsequently Mr Walker unlocked Mr Fraser's office door. A conversation took place between Mr Geraghty and Ms Ingersole in which Ms Ingersole indicated that she had not started work and Mr Geraghty said that if she was not working she should get off Club property to make the call. While there is some difference in the recollection of this conversation I am satisfied on the evidence of Mr Moore and Mr Walker that Ms Ingersole

indicated that she had not started work. Ms Ingersole left the building and again telephoned Mr Fraser.

96. After Ms Ingersole returned to the Clubhouse, Mr Walker asked her if she was able to join them in the boardroom. She stated that she would get herself a cup of coffee first, then that she needed to get something from the office and then that she wanted to go to the toilet and return to her office before proceeding to the boardroom. As both Ms Ingersole and Mr Walker attested, she asked if it was the sort of meeting at which she was entitled to have a representative and Mr Geraghty attested that he had answered no.

97. When Ms Ingersole and Mr Walker arrived in the boardroom, Mr Walker informed Ms Ingersole that her position had been made redundant effective immediately. Ms Ingersole's evidence (consistent with Mr Walker's evidence that he had written down in advance what he had to say) is that Mr Walker continued reading from a document advising her of her statutory entitlements, that the Club would assist her to gain alternative employment, that she would be paid in lieu of notice and that she was to hand in her keys and leave that day. Mr Geraghty also informed her that it was an operational decision, that the Club was "*not tracking financially*" and that it was not personal.

98. I accept Mr Walker's evidence about the matters canvassed in the meeting with Ms Ingersole, including that she asked about re-deployment and that Mr Geraghty indicated that no other suitable positions for her existed. Mr Walker told her that the Club would meet the cost of a recruitment firm to assist her in finding re-employment. When she indicated that it sounded like a termination and not a redundancy, Mr Walker indicated that it was a redundancy, not a termination. Ms Ingersole asked if it was a unanimous decision and was told by Mr Geraghty that the Board was not required to pass on that information and that the decision of the Board was by majority vote. She asked to work out the four week notice period but was told by Mr Walker that this was not necessary.

99. Whether in that conversation or thereafter, there was a discussion between Mr Walker and Ms Ingersole on 1 March 2012 about whether or not she would receive something in writing. He indicated to her that the details would be confirmed in a letter to be sent by certified mail by

close of business that day. Mr Walker also told her that he required her keys, the password for her computer and any Club materials and told her that he wanted to accompany her to her office so that she could collect her personal belongings.

100. Mr Walker's evidence is that he was instructed to accompany Ms Ingersole to her desk after the meeting to collect her personal belongings. Mr Geraghty explained to Mr Walker that it was necessary for him to do this as it was not appropriate for the Board to communicate with staff directly and the CEO was absent.

101. When Mr Walker accompanied Ms Ingersole to her office she swore at him. I accept that he asked her (or told her) not to access her computer and told her he had been directed to stay with her. He offered her boxes for her belongings (which she accepted) and to telephone the Mr Fraser to help her emotionally (which she declined). However she subsequently telephoned Mr Fraser in Mr Walker's presence. Mr Fraser also spoke to Mr Walker and Mr Geraghty and was told of the redundancy resolution. On Ms Ingersole's evidence she again telephoned Mr Fraser after she left the Club premises and went to his home to discuss the matter. Ms Ingersole left the Club premises at about 10:00 am after she had completed collecting her belongings.

102. On the afternoon of 1 March 2012 the Club sent Ms Ingersole a letter by registered mail notifying her of her termination due to redundancy. The letter advised that her position would become redundant effective 28 March 2012. However it also stated that the Club did not require her to work out her notice period, that her notice period would be paid out to her on termination of her employment and that her last day of employment with the Club would be on 1 March 2012. She was provided with a schedule of her estimated monetary entitlements to be deposited into her bank account by close of business on 1 March 2012 in a total amount of $64,387.21. This amount included payment of four weeks' salary in lieu of notice, annual leave and leave loading, accrued time in lieu of additional days worked, accrued long service leave, outstanding salary allowances and 16 weeks redundancy pay.

103. Ms Ingersole's evidence is that to the best of her recollection she received the letter dated 1 March 2012 after she received a subsequent letter notifying her of her redundancy dated 6 March 2012. I accept

this evidence insofar as it is consistent with Ms Turner's evidence that a fresh letter of notification was hand-delivered to Ms Ingersole on 6 March 2012 and that the first letter was not collected from the post office until 13 March 2012.

## The Adverse Action Claim

104. Ms Ingersole contended that the Club took adverse action against her in breach of s.340(1) the Act. This claim relates not only to her dismissal but also to the circumstances in which she was dismissed from her employment on the grounds of redundancy. Section 340(1) of the Act is as follows:

> *(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.*

105. Workplace right is defined in s.341 of the Act which provides:

> *(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; or*
>
> *(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or*
>
> *(c) is able to make a complaint or inquiry:*
>
> *(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or*

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

106. Under s.342(1) of the Act adverse action is taken by an employer against an employee in specified circumstances, relevantly if the employer:

*(a) dismisses the employee; or*

*(b) injures the employee in his or her employment; or*

*(c) alters the position of the employee to the employee's prejudice; or*

*(d) discriminates between the employee other employees of the employer.*

107. Section 360 of the Act provides that "*a person takes action for a particular reason if the reasons for the action include that reason.*" Section 361(1) (the so-called "reverse onus" provision) is as follows:

*(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.*

108. It was asserted that "*at all material times*" the Applicant had workplace rights pursuant to s.341(1)(a), and/or (b) and/or (c)(ii) of the Act to be notified or consulted or to discuss any "*definite decision*" within cl.8 of the Award, to participate in a dispute resolution process under cl.9 of the Award and to make a complaint or inquiry in relation to her employment.

109. These asserted rights are of two kinds. First, Ms Ingersole claimed to have a right to be able to make a complaint or inquiry to her employer in relation to her employment. It was submitted that she had a right to

complain or inquire about any "*proposal*" to terminate her employment on the grounds of purported redundancy or otherwise.

110. Secondly, Ms Ingersole also claimed to have workplace rights under the Award, in particular to be able to be consulted and notified and to initiate or participate in a process or proceeding under cl.8 of the Award whereby she might be able to have the benefit of discussions with the Club as contemplated by cl.8.2 of the Award. As discussed below, such rights were said to include a right to initiate or participate in such a process in relation to any decision or proposal to terminate her employment on proposed grounds of redundancy.

111. The Applicant submitted that there was a Club "*proposal*" to terminate her position and also that of another named employee on purported grounds of redundancy and that in the circumstances of the relatively small workforce of five administrative staff, this clearly came within the meaning of "*major workplace change*" in cl.8 of the Award. However there was said to have been no relevant notification or discussion.

112. Insofar as the Respondent asserted there was notification or discussion in the context of proposals to terminate the employment of the Applicant on grounds of redundancy in 2010, it was submitted that the 2010 notification or discussion was inadequate in relation to the events of 2012.

113. It was also contended that Ms Ingersole had a workplace right to be able to participate in a dispute resolution process as provided for by cl.9 of the Award. It was submitted that this included, relevantly, a right to undertake or take part in such a process about any decision or proposal to terminate her employment on purported grounds of redundancy or otherwise.

114. The Applicant tendered extracts from the Award in support of this claim and the claim that the Club contravened s.45 of the Act in that it failed to consult with her regarding a definite decision to introduce a major workplace change or breached the dispute resolution procedures in the Award.

115. Clauses 8 and 9 in the Award appear under the heading "Consultation and dispute resolution" and are as follows:

> *(8) Consultation regarding major workplace change.*
>
> *(8.1) Employer to notify*
>
> *(a) Where an employer has made a definition to decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.*
>
> ***(b) Significant effects** include termination of employment; major changers in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotional opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where the Award makes provision for alteration of any of these matters and alteration is deemed not to have significant effect.*
>
> *(8.2) Employer to discuss change.*
>
> *(a) The employer must discuss with the employees affected and their representatives, if any, the introduction of the changes referred to in clause 8.1, the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the change.*
>
> *(b) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 8.1.*
>
> *(c) For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including nature of the*

*changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests.*

*(9) Dispute resolution*

*(9.1) In the event of a dispute about a matter under this award, or a dispute in relation to the NES, in the first instance the parties must attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisors. If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner by discussions between the employee or employees concerned and more senior levels of management as appropriate.*

*(9.2) If a dispute about a matter arising under this award or a dispute in relation to the NES is unable to be resolved at the workplace, and all appropriate steps under clause 9.1 have been taken, a party to the dispute may refer the dispute to Fair Work Australia.*

*(9.3) The parties may agree on the process to be utilised by Fair Work Australia including mediation, conciliation and consent arbitration.*

116. In the Amended Statement of Claim it was contended that "*on 1 March 2012*" the Club took adverse action against Ms Ingersole. The particulars include both the fact of her dismissal from employment on that day on the grounds of redundancy and, in addition, address the manner and circumstances of that dismissal. Apart from the dismissal, the Respondent was said to have injured Ms Ingersole in her employment and/or altered her position to her prejudice by:

*The Respondent injured the Applicant in her employment and/or altered the Applicant's position to her prejudice by:*

*(i) dismissing the Applicant from her employment without any notice or warning; and/or*

*(ii) Refusing or failing to consult or notify the Applicant about any decision the Club had made to introduce major change in organisation or structure that was likely to include termination of her employment; and/or*

*(iii) Dismissing the Applicant from her employment in a way that was peremptory including arrangement that she be immediately escorted from the Respondent's premises, with directions that she not be allowed to speak to any other employee or board member of the Respondent before leaving; and/or*

*(iv) Dismissing the Applicant from her employments without allowing her to participate in a dispute resolution process.*

117. The Applicant's contention is that an operative reason for the Club acting in the way it did on 1 March 2012 was to prevent her from exercising one or more of her workplace rights, in particular to prevent her from exercising such rights with a view to changing or ameliorating the effect of the redundancy proposal or decision or because she had such rights or because she had or proposed to exercise such rights in the past.

118. The particulars in support of this claim assert that in or about August 2010 there had been a proposal by certain board members (in submissions said to have been led by Mr Geraghty in his then capacity as President of the Club) to make the Applicant redundant. It was said that other Board members and/or the CEO, Mr Fraser, took action to investigate the justification for any redundancy, including notifying, consulting, and discussing the proposal with Ms Ingersole and that the Club then determined there was no need for such redundancy to proceed. It was submitted that this was at least substantially because of input from and recommendations by club officers, including the CEO and Mr Muter, who was then a Board member. However, it was submitted that insofar as there had been a proposal for major workplace change made in September 2010 any claimed notification and consultation with the Applicant in that respect was not adequate in relation to the events of 2012.

119. The Applicant contended that when the Club took adverse action in 2012 there was no notification, consultation or discussion with her in relation to any decision to introduce what was said to be a major change likely to have significant effects on her employment and no notification or warning of the Club's intention to terminate her employment.

120. It was pleaded that such alleged adverse action was taken in circumstances where the CEO, to whom Ms Ingersole was able to make a complaint or inquiry, was not advised of the decision and was on leave and that the Club knew or ought to have known that Mr Fraser would have advocated compliance with cl.8 before the adverse action was taken. The Applicant also contended that the Club knew or ought to have known that if there had been consultation, notification and/or discussion about the major change, then the decision to terminate Ms Ingersole's employment on the grounds of redundancy "*would likely have been obviated*". Reference was also made to what was said to be the peremptory manner of the dismissal.

121. In these circumstances the Applicant submitted that, whether or not her position was genuinely redundant, s.340 would be enlivened because the reasons for the adverse action included a prohibited reason and under s.361 of the Act the posited reasons were to be presumed unless the Respondent proved otherwise.

122. The Club submitted that Ms Ingersole's workplace rights were more confined than suggested. In particular it was contended that insofar as the Applicant relied on rights under the Award said to arise upon "*a proposal*" to terminate her employment on purported grounds of redundancy, the obligation to consult under cl.8 of the Award arose only once a "*definite decision*" was taken to introduce "*major change*". It was submitted that the "*decision*" in this context was the decision taken by the Board on 29 February 2012 to make the Applicant's position redundant and that there was no obligation to consult in relation to that decision until after it was made. There was said to have been the requisite notification of and consultation with Ms Ingersole about implementation of the decision in the meeting on 1 March 2012.

123. The Club also submitted that there was no evidence that Ms Ingersole ever took steps to invoke the dispute resolution process in cl.9 of the Award and that nothing in the Club's actions precluded the exercise of such rights.

124. Insofar as the Applicant took issue with what was said to be the peremptory manner and circumstances of her dismissal, the Club submitted that her assertions were not supported by the evidence and

that there was no workplace right clearly identified as being infringed or a motivating factor in respect of this particular.

125. The Club submitted that notwithstanding the s.361 presumption, it was for an Applicant to make out the allegations of adverse action and that except in relation to the fact of dismissal she had not done so. It was also submitted that the asserted reasons for the alleged adverse action did not accord with Ms Ingersole's evidence that Mr Geraghty was motivated by a claimed interaction with her concerning a 2009 Board decision about two tee starts on Sundays, which clearly did not involve the exercise of a workplace right.

126. In any event, the Club submitted that the evidence established that those on the Board who voted for the redundancy resolution (who were said to be the relevant decision-makers) each had the financial position of the Club as his or her real reason for such decision. It was submitted that the Respondent had discharged any s.361 onus to establish that the decision of 29 February 2012 and any actions of 1 March 2012 that constituted adverse action were not taken for a prohibited reason.

## Consideration of the adverse action claim

127. Section 340 is in Part 3.1 of the Act. It proscribes taking action against a person "*because*" that person has or had a workplace right or for one of the other specified reasons associated with the exercise or proposed exercise of a workplace right by that person. An object of this Part of the Act is to protect workplace rights and to provide *"effective"* relief to those adversely affected by reason of holding or exercising such rights (see s.336). The Applicant must establish objectively that she had the asserted workplace right and that adverse action was taken against her (see *Wolfe v Australia and New Zealand Banking Group Limited* [2013] FMCA 65 at [72]). It is then presumed, unless the Respondent proves otherwise, that the alleged adverse action was taken for the asserted prohibited reason (see ss.360 and 361).

128. The requirement that the Applicant establish matters objectively means that she must first:

> *...prove the existence of objective facts which are said to provide a basis for the alleged adverse action, before the onus shifts to the*

*employer in respect of the prohibited reason...It is not sufficient for [the Applicant] to simply allege that she had a workplace right and that she was the subject of adverse action – rather on the assumption that [the Applicant] is able to prove these allegations, the burden is then cast on to [the Respondent] to prove that adverse action was not taken against [the Applicant] because of her workplace right for the purposes of s340 and s361 of the Act"Jones v Queensland Tertiary Admissions Centre Ltd (No.2) (2010) 186 FCR 22; [2010] FCA 399 at [10] per Collier J).*

129. While the contraventions alleged are civil contraventions, the proceedings are penal in nature (see *Liquor, Hospitality and Miscellaneous Union v Arnotts Biscuit Ltd* (2010) 188 FCR 221; (2010) 198 IR 143; [2010] FCA 770). As Logan J pointed out in *Arnotts* at [13], subject to the operation of ss.360 and 361, the Applicant carries the burden of proving the alleged contraventions on the balance of probabilities with due regard being given to the matters in s.140(2) of the *Evidence Act 1995* (Cth).

## Workplace Rights

130. The Applicant asserted that she had the ability to make a complaint or an inquiry in relation to her employment within s.341(1)(c)(ii) of the Act. As Katzmann J stated in *Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697 (at [64]) under s.340(1)(c)(ii) the relationship between the complaint or inquiry and the employee's employment may "*be direct or indirect*" and the words should be interpreted broadly having regard to the nature and purpose of the legislation, including the protection of workplace rights. It is not necessary that the right to make a complaint or inquiry arise from an express provision in an applicable Award. Nor, as the Explanatory Memorandum to the Act makes clear (and see *Begley v Austin Health* [2013] FMCA 68 at [368]), is it a prerequisite that the employee has recourse to a competent administrative authority. It was not disputed that this provision extends to situations where an employee makes or has a right to make an inquiry or complaint to his or her employer in relation to his or her employment.

131. Ms Ingersole had such a right. In the normal course of events she would have been able to make such complaint or inquiry to the CEO. In the absence of the CEO, Ms Ingersole still had the ability to make a complaint or inquiry, for example to Mr Walker who, as she was informed, acted as conduit to the Board for staff members during Mr Fraser's absence on extended sick leave. However such a workplace right to complain or make an inquiry does not necessarily encompass a right to be notified in advance about proposals which, if adopted by the employer, would or may have an impact on the employee. Ms Ingersole has not established that her workplace rights to complain or inquire in relation to her employment included a right to be informed in advance of possible changes that might impact on her employment.

132. Ms Ingersole also claimed to have workplace rights within s.340(1)(a) and (b) of the Act as follows:

- *to be consulted or notified and/or to have the ability to discuss with the Respondent any definite decision by the Respondent to introduce major changes in, inter alia, organisation and/or to structure that were likely to have significant effects on her employment - pursuant to clause 8 of the Award; and/or*

- *to be able, inter alia, to participate in a process or proceeding under clause 8 of the Award whereby she might be able to have the benefit of discussions with the Respondent – as contemplated by clause 8.2 of the Award; and*

- *to be able, inter alia, to participate in a dispute resolution process as provided for by clause 9 of the Award.*

133. Such rights may arise under a workplace instrument. It is not in dispute that the Award is a workplace instrument. From the time of the making of a "*definite decision*" to introduce major changes as described in cl.8 of the Award, the Applicant had workplace rights to the application of the consultation and notification provision of the Award. She also had the right to participate in dispute resolution procedures as provided for in cl.9 of the Award.

134. However there is an issue as to when such rights were activated. The extent of such rights is to be determined in light of the construction of the relevant provisions of the Award, consistent with the principles outlined by Judge Raphael in *Australian Licenced Aircraft Engineers Association v Qantas Airways Limited* [2013] FCCA 592 at [26] – [27]. Thus the clauses in the Award are to be interpreted to give effect to their plain and ordinary meaning in the industrial context, having regard to the subject matter, text and purpose of the Award as a whole.

135. The starting point is the construction of the Award in question. What is in issue, in essence, is when the obligation to notify, discuss and consult arises under cl.8 of this Award, in particular when the clause contemplates that the specified discussions will be held with employees. In that respect the language of cl.8 is clear. The obligations under that clause arise only "*where an employer* ***has made a definite decision*** *to introduce major changes in production... organisation, structure or technology that are likely to have significant effects on employees*" (emphasis added). The Award does not use terms that impose a consultation obligation in relation to mere proposals that have not been decided upon by the employer.

136. While "*significant effects*" may include (under cl.8.1(b)) termination of employment, the notification and consultation obligations under this provision will not arise until after a "*definite decision*" is made. If the only relevant definite decision is a decision to terminate employment of an employee or employees the obligations will not arise prior to that decision. In contrast, if the employer engages in a two-step decision-making process, the obligation will arise when the initial "*definite decision*" to introduce major change is made by the employer.

137. Moreover, as French J pointed out in *Municipal Officers Association of Australia v City of Bayswater* (1988) 30 AJLR 15; (1987) 22 IR 45 (at [39]) (albeit in the context of considering penalties for an admitted contravention of a clause that imposed a legal obligation to consult with the Union prior to termination of employees), even if a consultation requirement was expressed in terms that might make it appear that the decision was a *"fait accompli"* before discussions were commenced, the rationale for consultation may be apparent from

specification in the clause in question of what is to be the subject of the consultation.

138. Counsel for the Applicant accepted that cl.8 of the Award was in substantially similar terms to the clause requiring consultation in a workplace determination that was considered by Judge Raphael in *Qantas*. Initially it was submitted that his Honour had erred and was plainly wrong in finding that such clause did not require consultation to provide employees (and, in that case, the Union) with an opportunity to persuade the employer that it should not go ahead with the introduction of a proposal. In later oral submissions counsel for the Applicant withdrew from the submission that Judge Raphael was wrong in his construction of the particular clause in question in *Qantas*. It was conceded that it would be open to the Court to take the approach that the consultation required and envisaged by cl.8 of the Award was, as stated in cl.8.2(a), essentially consultation in order to avoid or mitigate the adverse effects of a redundancy decision that had already been made. However it was contended that the obligations in cl.8 were activated in the present case.

139. It is clear that regard should be had to the principles in *Kucks v CSR Limited* (1996) 66 IR 182 at 184 per Madgwick J (referred to with approval by Kirby and Callinan JJ in *Amcor Limited v Construction, Forestry, Mining and Energy Union and Others* (2005) 222 CLR 241 at 271 and 282-283; [2005] HCA 10). In *Kucks* Madgwick J stated at 184:

> *It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for.*

140. The Applicant submitted that cl.8 of the Award was in essence the standard clause brought in under the Award modernisation process in

2010. It appeared to be suggested that such historical context was relevant to the construction of the clause. While any such context is relevant, there was no evidence put before the Court to support this contention. Only extracts from the Award were in evidence. There is no evidence as to the legislative or industrial background against which the Award was made. Thus meaningful recourse cannot be had to the history of cll.8 and 9 in interpreting those provisions.

141. However as Callinan J suggested in *Amcor* at 283: "*It is important to keep in mind... the desirability of a construction, if it is reasonably available, that will operate fairly towards both parties*". There is also a general principle that the court will apply a presumption that the parties did not intend the terms of an award to operate unreasonably. I have borne these principles in mind.

142. A number of authorities in relation to the interpretation of award provisions which require consultation with employees and/or unions were relied on by the Applicant in support of the proposition that the Club failed to comply with the requirements of the Award by failing to notify/consult and discuss with her the possibility of her redundancy on the basis that a definite decision had been made by the Club which activated the obligations in cl.8 of the Award prior to the passing of the redundancy resolution.

143. *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2005) 146 IR 37 was referred to as encapsulating the essence of the Applicant's claim. In that case, in circumstances where bank staff had been employed by the Bank under industrial agreements, the Bank had decided that in future staff in a core business unit would be employed by a subsidiary (which could employ people under individual employment contracts). It had not informed the Union of this decision. The Federal Court found that such non-disclosure was a breach of clauses in applicable certified agreements and hence of the *Workplace Relations Act 1986* (Cth). Reliance was placed on that part of the judgment of Merkel J in which his Honour made the point that the breaches that were established (including the breaches of consultation provisions in applicable certified agreements) appeared to be serious because (at [126]):

*...they appear to be consistent with a plan to make and implement the ... decision in a manner that ensured [the Union], which would have opposed the ... decision, was not aware of it until after it had already been implemented.*

144. The Applicant submitted that the same could be said in this case. However the relevant clauses in the certified agreements in issue in *FSU v CBA* were not in the same terms as cl.8 of the Award. Rather, one set of clauses applied where the Bank was "*considering or implementing change that impacts upon working arrangements and could give rise to potential redundancy and/or redeployment situations*" (at [115]) and required the Bank to give the Union certain information to enable it to seek discussions "*on the proposals*" (at [117]). The other set of clauses considered in *FSU v CBA* specifically defined the requisite consultation on major issues as consultation "*before decisions are made*" and required information be provided on "*proposals for major change*" (at [118]). In contrast, cl.8 of the Award refers only to consultation "*where an employer has made a definite decision to introduce major changes...that are likely to have significant effects on employees*".

145. It was also submitted for the Applicant that in substance cl.8 was an "*ancient*" clause that should have been construed as including a duty to consult to avert future changes (not merely the prejudicial effects of a decision that had already been made). Insofar as such contention was initially put on the basis that Judge Raphael was clearly wrong in his interpretation of the part of the clause considered in *Qantas* that was similar to cl.8.2(a) of the Award, this argument was not maintained. In any event, consistent with the principles of construction considered in *Kucks*, on the clear wording of cl.8 of the Award it is apparent that no consultation is required until a definite decision has been made and then the consultation envisaged is as set out in cl.8.2(a), in relation to the introduction and likely effects of the changes decided upon and measures "*to avert or mitigate the adverse effects of such changes on employees*", not to avert (or avoid) the changes themselves.

146. While cl.8 of the Award refers to notification of the proposed changes about which a definite decision has been made, it is not expressed in terms requiring consultation on mere "*proposals*" (cf. the clause considered in *Communications, Electrical, Electronic, Energy,*

*Information, Postal, Plumbing and Allied Services Union of Australia v QR Ltd* (2010) 198 IR 382; [2010] FCA 591 as discussed in *ALAEA v Qantas* at [40] – [41]). What was said in *QR Limited* about the content of the "*requirement to consult*" reflects the fact that in that case the agreement in question required consultation in response to proposals. In that context Logan J pointed out (at [44]) that the concept of consultation carried with it a requirement that the party to be consulted be given notice of the subject on which views were being sought and that there must be "*a meaningful opportunity*" to present such views. Such principles would also apply in relation to an obligation to notify and consult about a definite decision that had been made. However, as Logan J observed at [44]:

> *...what will constitute such an opportunity will vary according to the nature and circumstances of the case. In other words, what will amount to "consultation" has about it an inherent flexibility. Finally a right to be consulted, though a valuable right, is not a right of veto.*

147. The Applicant also pointed to the fact that in *National Tertiary Education Industry Union v Central Queensland University* [2008] FCA 481 Logan J had referred with approval to *Electrical Trades Union of Australia v Sims Products Pty Ltd* (1988) 42 IR 250 at 253 per Gray J in support of the proposition that "*when the terms of a collective agreement come into operation per force of statute they become part of the law of the land and must be obeyed by all of those bound by the agreement*". So much is clear. It is also clear that where there is a consultation obligation, liability for a breach (and the imposition of penalties) is not avoided by a contention that even if there had been the requisite consultation it would have made no difference to the eventual outcome (*NTEIU v CQU* at [28] – [31]) and see *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 221; (1992) 42 IR 255). However the clause in question in *NTEIU v CQU* required a staged process of consultation commencing when "*rationalisation or reorganisation of staffing levels is considered necessary...about the need and incidence of such a process*" (at [10]).

148. Further, while the clauses under consideration in both *ETU v Sims* and *Gibbs v Altona* required consultation on a "*definite decision*", the

decision in question was a decision "*that the employer no longer wishes the job the employee has been doing done by anyone...and that decision may lead to termination of employment*". Such clauses clearly separated the initial decision and any subsequent termination of employment and required consultation at the earlier stage.

149. Insofar as the Applicant maintains the contention that the construction of cl.8 of the Award is in doubt, having regard to the particular clause in question and the general principles of construction considered in *Qantas* and cases referred to therein, I am satisfied that the wording of cl.8 of the Award makes it clear that the obligation to consult does not arise unless and until a definite decision has been made by the employer. In other words, the obligation under cl.8 is not an obligation to consult on mere proposals or possible major changes which, if adopted, would have the effect of introducing major changes likely to have significant effects on employees (such as termination of employment).

150. While cl.8 of the Award would clearly encompass a two-step process involving a definite general policy decision to introduce major changes in organisation or structure on which consultation would be required before any subsequent impacts, such as particular redundancies, were put into effect, not all decision-making that involves termination of employment (particularly for smaller employers) necessarily proceeds by way of a preliminary definite decision. Rather, the employer may make a definite decision to introduce major change in organisation or structure which consists of a decision to terminate particular employees' employment.

151. Even though in one sense a definite decision to introduce a change consisting of a termination of employment would be a "*fait accompli*" before the mandated discussions were to commence (*Municipal Officers Association* at [39]), the rationale and scope for a requirement of consultation in such a case is clear on the language of cl.8 of the Award, in particular cl.8.2(a). It extends to the introduction of the changes about which there has been a definite decision, the effects such changes are likely to have on employees and measures to avert or mitigate the adverse effects on employees of such changes. I am satisfied that the obligation on the Club under the Award was to notify,

consult and discuss in relation to the results or effects of changes that the Club had made a definite decision to introduce.

152. Hence it is necessary to determine when a definite decision was made by the Club that activated the consultation and other obligations in cl.8 of the Award in relation to Ms Ingersole.

## The decision-makers in relation to the definite decision by the Club

153. Identification of the relevant decision-maker(s) is a pre-requisite to resolution of the issue of when a definite decision was made. Whether the Club (Ms Ingersole's employer) made a definite decision that activated the notification, consultation and discussion obligations in cl.8 of the Award involves consideration of whose mind or minds constituted the operative mind of the Club for the purposes of making such a definite decision (see generally the discussion by Gray J in *National Tertiary Education Union v Royal Melbourne Institute of Technology* [2013] FCA 451 at [25] – [29]). In addition, whether the Respondent has met the reverse onus in s.361 is to be determined by reference to the reasons of the decision-maker or decision-makers who constituted the directing mind and will or operative mind of the Club (ibid).

154. The Applicant contended, in the alternative, that either Mr Geraghty was for all practical purposes the mind of the Respondent, at least insofar as it concerned the effects of major workplace change on the Applicant or that the four Board members who voted for the redundancy resolution of 29 February 2012 were the relevant decision-makers but that prior to the passing of the redundancy resolution they agreed on a proposal, decision or plan that activated the cl.8 obligation.

155. The Respondent submitted that the relevant decision-makers were the four members of the Board who voted for the redundancy resolution. It was accepted that the Club made a definite decision within cl.8 of the Award at the Board meeting of 29 February 2012 when the redundancy resolution was passed by a majority of the members of the Board. However it was submitted that there was no earlier relevant definite decision and that it could not be said that Mr Geraghty was the directing mind and will or operative mind of the Club.

156. In determining who were the decision-makers for the Club it is relevant to have regard to the fact that under cl.43(g)(ii) of the Club's Constitution the Board of directors had the power "*to engage, appoint, control, remove, discharge and dismiss ... employees*". Such an issue was a matter to be decided by a majority of votes of members of the Board (cl.48). It was not a matter for the President alone. Nor was it a matter for the CEO.

157. Insofar as the Applicant submitted that Mr Geraghty had made a definite decision on behalf of the Club to make her position redundant at some time prior to the Board meeting on 29 February 2012, there is no evidence of delegation to Mr Geraghty of the authority to make any such decision on behalf of the Club. He did not have actual or apparent authority to make such decisions on behalf of the Club. It has not been established that Mr Geraghty alone was the directing mind and will of the Respondent or otherwise the sole decision-maker for the purpose of the Club making a definite decision or in relation to adverse action against Ms Ingersole attributable to the Club. Insofar as the Applicant submitted that the evidence of the other Board members supported the proposition that Mr Geraghty was the operative mind of the Club or that the other Board members rubber-stamped a decision by him, as discussed further in relation to the s.361 reverse onus, this is not supported by the evidence.

158. I accept that Mr Geraghty was one of the decision-makers. He was one of the majority members of the Board who voted for the redundancy resolution. I also accept that he had formed the view prior to the meeting of 29 February 2012 that a restructure was necessary and that Ms Ingersole's position should be made redundant. He had decided to put such a motion to the Board at that meeting.

159. However the fact that Mr Geraghty (or indeed other Board members) had formed a view as to an appropriate decision to be taken by the Club and that he put a proposal to the Board in a formal way is not such as to constitute a definite decision **by the Club**.

160. The Applicant submitted that even if the four Board members were the relevant decision-makers there was a two-stage decision-making process during the Board meeting on 29 February 2012 such that there should have been consultation with Ms Ingersole after the first step.

However it has not been established that there was an initial and separate decision to introduce workplace change. Not only is this inconsistent with the evidence of the directors who voted for the proposition, it is also not supported by the Board minutes. There is no warrant for finding that a two-step process occurred during the Board meeting of 29 February 2012 whereby an initial "*definite decision*" was made by the Club to engage in a restructure that activated the cl.8 obligations and then a second decision was made by the Club to make the Applicant's position redundant.

161. Insofar as the possibility of a delay in decision-making by the Board to obtain the views of the CEO may be seen as being raised by Mr Kelly's view at the meeting that he would abstain until he had the CEO's feedback (as Mr Geraghty recalled it), or would not vote for the proposed resolution (as Ms Michel and Mr Dakin recalled it), or would vote against the motion because he felt the Board should have the CEO's feedback (as Mr Moore recalled it), this does not demonstrate there was a two-stage decision-making process at the Board meeting such that the cl.8 obligations were activated before the redundancy resolution was passed by the Board. The fact that the Board would have had the opportunity to make an initial decision on restructure at that point does not mean that any such initial decision was made by the Club.

162. There was not a point at which it was clear, during the Board meeting of 29 February 2012, that major changes were to be adopted by the Club such as to constitute a definite decision to introduce major changes within cl.8 of the Award. That did not occur until the vote on the specific proposal to make two specified positions redundant had been put and passed. While an employer could make a definite decision to introduce major changes in general terms (separate from specific consequences such as particular redundancies), that is not what occurred in this case. Rather, the only relevant definite decision on 29 February 2012 was the specific decision by the Board to make the positions of the Applicant and another nominated employee redundant. The evidence of the Board members supports this conclusion.

163. Insofar as the Applicant contended that the four Board members made a decision prior to 29 February 2012 that activated the cl.8 obligation

this is not made out. I note first that whether or not a definite decision, such as to plan a restructure of management, was made by the Club in 2010 is not determinative. The Applicant referred to the events of 2010 in support of the proposition that she exercised workplace rights in 2010. Insofar as the Amended Response appears to assert that the Applicant had the benefit of notification, consultation and discussion about a 2010 major workplace change, that is apparently conceded by the Applicant in para 6(b)(i) of the Amended Statement of Claim, but is not an answer to her claim. Consultation in 2010 in relation to a different definite decision made in a different context arising out of a perceived need to address the management structure because of concern about the CEO's responsibilities and remuneration would not be adequate in relation to any definite decision of 2012. In submissions the Respondent accepted that a definite decision was made by Ms Ingersole's employer on 29 February 2012 that activated the notification and consultation provisions in cl.8 of the Award.

164. In relation to the events of 2013, I accept that Ms Michel attended the Finance Committee meeting on 22 February 2012, subsequently mentioned to Mr Geraghty her concerns about the Club's financial situation and expressed her view that they needed to restructure. He agreed that restructure was an option. Between 22 and 29 February 2012 Ms Michel formed the view that there was a need to reduce operating costs and that her "*preferred option*" in this respect would be to restructure by making the positions of the administration manager and the event coordinator redundant. However I accept that she only saw this as an "*option*" until after discussion and determination by the Board. I accept Ms Michel's evidence that she did not speak to Mr Moore or Mr Dakin about her views in this respect before the Board meeting of 29 February 2012. She made clear in cross-examination that prior to the meeting on 29 February 2012 no decision had been made by the Club or by the Board members concerned to restructure or to make Ms Ingersole's position redundant or to terminate her employment.

165. In particular, I accept Ms Michel's evidence that there was no earlier decision amounting to a "*secretive plan*" among Board Members who voted for the redundancy resolution that Ms Ingersole's position would be made redundant (as Counsel for the Applicant suggested). The

Applicant's assertions in this respect are not supported by the evidence before the Court. Nor does the evidence establish that Ms Michel was complicit in any plan to propose Ms Ingersole's redundancy.

166. I also accept Mr Dakin's evidence that prior to 29 February 2012, probably sometime after Christmas 2011 he was concerned that the Club was sustaining losses. In a brief discussion on the golf course he raised the issue of the need to reduce operating costs with the Club President, Mr Geraghty. Mr Dakin made a general comment about his concern that the "*organisation had salary bills that exceeded members' dues*". His recollection was that Mr Geraghty agreed they were in an "*operating loss situation*" and "*needed to do something to rectify it*".

167. I am not satisfied that it can be inferred that Mr Geraghty or Mr Dakin raised more specific issues (such as making Ms Ingersole's position redundant) in this conversation. Mr Dakin did not recall any such discussion and there is no basis for inferring that the conversation was other than the general conversation he described. I accept that, consistent with Mr Dakin's evidence, he did not have conversations with any of the other Board Members about the issue of restructure or redundancy before the meeting on 29 February 2012.

168. In particular, I accept that prior to 29 February 2012 Mr Dakin was not aware of any concern on the part of Mr Geraghty (including in 2010) about whether the position of administration manager should exist and that he had not heard about or had any discussions about Ms Ingersole's position being made redundant or ceasing to exist before the issue was raised at the end of the meeting on 29 February 2012. The evidence does not support any inference that Mr Dakin was party to a decision by the four Board members prior to 29 February 2012, a secretive plan or a proposal to make Ms Ingersole's position redundant.

169. Mr Moore's acknowledgement that he had asked Mr Dakin and also Ms Michel (probably at the Finance Committee Meeting) their opinions about the financial position of the Club is consistent with the evidence of Ms Michel and Mr Dakin about the absence of specific discussion of issues of restructure and redundancies. I accept that there was no such discussion between Mr Moore and either Ms Michel or Mr Dakin prior to the meeting on 29 February 2012.

170. In cross-examination Mr Moore recalled a discussion with Mr Geraghty before the 29 February 2012 Board meeting. Although he acknowledged in re-examination that he had no actual specific recollection of what was said, he gave evidence of areas of discussion. He indicated that he gave Mr Geraghty the benefit of his knowledge and 45 years' experience in business as to what had to happen to stop a company that was losing money from "*going under*" on the basis that a Club was no different. He agreed that there was discussion of the need to restructure and that Mr Geraghty's proposal at the Board meeting did not come as any surprise to him because the discussion they had had was about what alternatives the Club had. His evidence was that making one or two positions (such as the administration manager's position) redundant was discussed. However Mr Moore's recollection was that he had initiated the discussion about the possibility of making the position of the administration manager redundant.

171. I accept Mr Moore's evidence that he and Mr Geraghty had previously discussed cutting costs and that their discussion on 29 February 2012 included discussion of what positions could be made redundant in a restructure, including the administration manager's position and another position. Mr Moore did not have any discussion that included reference to redundancy with anybody else before the meeting on 29 February 2012.

172. While I accept that Mr Moore was aware of the likelihood that Ms Ingersole's position would be made redundant (if a majority of the Board voted for it), it is also clear from his evidence that he understood that any "*decision*" on redundancy would have to be made by the Board, that no redundancy would occur unless the Board voted for it and that one did not "*make assumptions on how boards will vote*". Even if, before the Board meeting, Mr Moore was of the same view as Mr Geraghty about the desirability of such an approach, this does not mean that a *"definite decision"* had been made by the Club at that time.

173. The fact that individual Board members had considered the need to address the Club's financial position, discussed possible responses to the Club's financial position and that some of them had formed views (whether about the desirability of making the administration manager's

position redundant or more generally about the need to restructure or otherwise to take some action to address the Club's financial position), is not such as to establish that a definite decision to do any of these things was taken by the Board members as decision-makers for the Club prior to the meeting on 29 February 2012.

174. The evidence, including the evidence of earlier discussions in which the directors who voted for the redundancy proposal were involved, does not establish that prior to the Board meeting on 29 February 2012 those persons had made a "*decision*" on behalf of the Club, either to restructure its management or to make two positions, including the Applicant's position, redundant. Indeed such a proposition was not put to any of the Board members who gave evidence. Nor, as discussed further below in relation to s.361, can it be said that Mr Moore, Ms Michel and Mr Dakin merely 'rubber-stamped' a decision made by Mr Geraghty. Their evidence is clearly to the contrary.

175. On the evidence before the Court there is no warrant for finding that a *"definite decision"* was made by the Club (that is, by relevant decision-makers on behalf of the Club) to make Ms Ingersole's position redundant before the redundancy resolution was passed on 29 February 2012. It has not been established that the Club (through its decision-makers) made a definite decision (such as a decision to restructure its management) separate from and prior to the decision it made to make two positions, including the Applicant's position, redundant. While there are circumstances in which an employer's decision-making in relation to a change which could eventuate other changes such as redundancy may involve a two-step process (as may be seen to have occurred in 2010) this is not such a case.

176. I am satisfied that there was only one relevant definite decision. That was the decision made by the Board at the meeting on 29 February 2012 to make two positions, including that of the administration manager, redundant. Thereupon there was an obligation to consult under cl.8 of the Award in relation to the substantial workplace change consisting of making the positions of administration manager and event coordinator redundant.

177. As discussed above, contrary to any suggestion for the Applicant that it was necessary for the Club to enter into consultation in relation to

something less than a definite decision to introduce major changes, cl.8 of the Award refers to a *"definite decision"*, not a proposal (cf *QR Limited*). The obligation to notify, consult and discuss under cl.8 of the Award did not arise prior to the making of a definite decision by the Club.

178. The Applicant has not proved the existence of objective facts providing a basis for the contention that the Respondent made a relevant definite decision prior to the Board meeting of 29 February 2012 such as to activate the notification, consultation and other provisions in cl.8 of the Award prior to that time.

179. Rather, the workplace rights asserted by the Applicant to be consulted or notified of and/or to discuss any definite decision and to be able to participate in a process or proceeding under cl.8 of the Award were not activated until after the redundancy resolution passed on 29 February 2012.

180. The Respondent did not dispute that an obligation to notify and consult with Ms Ingersole as an affected employee arose once such decision had been made by the passing of the resolution by a majority of the Board. The question of whether it met that obligation is addressed in the context of consideration of whether the Club engaged in the asserted adverse action.

## Clause 9 of the Award

181. The Applicant also asserted that she had a workplace right to be able to participate in a dispute resolution process as provided for in cl.9 of the Award. Clause 9.1 applies "*in the event of a dispute in relation to NES*". It requires initial discussion between employee or employees concerned and the relevant supervisor and then between the employees and more senior levels of management. If a dispute did arise, any "*employee concerned*" would have the right to be involved in discussions as provided for in cl.9.1 and, if any such dispute was unable to be resolved at the workplace, to have the benefit of referral to the Fair Work Commission.

182. However while the Applicant had such workplace rights, there is no evidence of a relevant "*dispute*" arising during her employment in

relation to a matter under the Award or the "*NES*" (which, in the absence of a complete copy of the Award, I take to be a reference to the National Employment Standards). Indeed, there is no evidence that at any stage in her employment the Applicant sought to activate the dispute resolution process provided for in cl.9 of the Award.

183. Thus, while the Applicant had such workplace rights, it is relevant to bear in mind the limited nature of those rights, in particular when considering whether the Respondent has met the onus under s.361 of the Act.

## Adverse action

184. It is also necessary for the Applicant to prove the existence of objective facts establishing that after Part 3.1 of the Act came into effect on 1 July 2009 the Respondent took adverse action against her within the meaning of s.342(1) of the Act (see *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333 at [280]). Ms Ingersole complains of termination of her employment. That constitutes adverse action within Item 1(a) in the Table in s.342(1). Insofar as it appeared from the Applicant's written submissions that the adverse action claim was not based on the dismissal per se, Counsel for the Applicant clarified that this claim was pursued.

185. Adverse action also relevantly extends to situations in which an employer "*injures the employee in his or her employment*" or "*alters the position of the employee to the employee's prejudice*".

186. In the Amended Statement of Claim it is asserted that in addition to dismissing the Application from her employment on the grounds of redundancy the Club took adverse action on 1 March 2012 in that it injured the Applicant in her employment and/or altered her position to her prejudice in four respects, pleaded both cumulatively and in the alternative as follows:

> *The Respondent injured the Applicant in her employment and/or altered the Applicant's position to her prejudice by:*
>
> *(i) Dismissing the Applicant from her employment without any notice or warning; and/or*

*(ii) Refusing or failing to consult or notify the Applicant about any decision it had made to introduce major change in organisation or structure that was likely to include termination of the Applicant's employment; and/or*

*(iii) Dismissing the Applicant from her employment in a way that was peremptory including arranging for her to be immediately escorted from the Respondent's premises with directions that she not be allowed to speak to any other employee or board member of the Respondent before leaving the premises; and/or*

*(iv) Dismissing the Applicant from her employment without allowing the Applicant to participate in a dispute resolution process.*

187. Section 342 proscribes conduct in terms used in earlier industrial relations legislation, in relation to which Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ observed (in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 641; (1998) 72 ALJR 868; [1998] HCA 31 at [4]) that the concept "*injure an employee in his or her employment*" ... "*covers injury of any compensable kind*". It may extend to a "*legal injury or an adverse effect on an existing legal right*" (*Wolfe v ANZ* at [82]).

188. In *Patrick Stevedores* the majority also stated that the concept "*alter the position of an employee to the employee's prejudice*" was:

> *...a broad additional category which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question" (at [4]).*

189. In other words, this concept encompasses something done by an employer short of dismissal that is harmful to an employee in his or her employment position in all its attributes. A prejudicial alteration to the position of an employee may occur even though the employee suffers no loss or infringement of a legal right, provided the alteration in position is "*real and substantial rather than merely possible or hypothetical*" (*Qantas Airways Limited v Australian Licensed Aircraft Engineers Association* (2012) 202 FCR 244; [2012] FCAFC 62 at [32] and see *Wolfe v ANZ* at [82]). The determination of the attributes of an applicant's "*position*" involves consideration of the particular terms of employment of the employee in question.

190. Counsel for the Applicant referred to the discussion in *McIlwain v Ramsey Food Packaging Pty Ltd* (2006) 154 IR 111; [2006] FCA 828 at [347] – [350] per Greenwood J. *McIlwain* involved dismissal of a number of employees as part of dismissal of a cohort of employees at an abattoir and an alleged subsequent refusal to employ some of the dismissed employees for a prohibited reason under the Workplace Relations Act. In that context Greenwood J made the point that s.298K(1) of the Workplace Relations Act (the forerunner to s.342(1)) addressed bilateral conduct between an employer and an employee and that the circumstances of the affected individual must be examined (at [348]). Relevantly, his Honour accepted at [348] that, as Kenny J had stated in *Australian Workers' Union v BHP Iron Ore Pty Ltd* (2000) 106 FCR 482; [2000] FCA 39 at [54], before such a provision can apply:

> *...it must be possible to say of an employee that he or she is, individually speaking, in a worse situation after the employer's acts than before them; that the deterioration has been caused by those acts; and that the acts were intentional in the sense that the employer intended the deterioration to occur.*

191. It was accepted that when determining whether there was an injury or prejudicial alteration it was necessary to compare the position of the employee before the alleged adverse action and the position thereafter to determine whether it was altered to the employee's detriment as a result of the alleged adverse action (see *McIlwain* at [349], but cf *Jones* at [64] – [65]).

192. The onus is on the Applicant to prove on the balance of probabilities, having regard to the factors in s.140(2) of the *Evidence Act 1995* (Cth) (see *Liquor, Hospitality and Miscellaneous Union v Arnotts Biscuits Limited* (2010) 188 FCR 221; (2010) 198 IR 143; [2010] FCA 770 at [137]) that the Respondent engaged in adverse action against her within the meaning of s.342(1) of the Act.

## Dismissal

193. As indicated, it is not in dispute that the Applicant was dismissed from her employment and that this constituted adverse action within s.342(1) Item 1(a).

## Whether dismissal without notice or warning

194. It is clear that Ms Ingersole was told of her dismissal consequent on the redundancy of her position at the meeting on 1 March 2012. This meeting was held at the earliest reasonably practicable opportunity after the decision had been made by the Board to make the position redundant.

195. It has not been established that there was any obligation on the Club to notify or warn the Applicant before that time. This was not a case of summary dismissal. Ms Ingersole received payment in lieu of notice in accordance with the terms of the Award and the Act. Notice was provided, albeit by payment in lieu of notice as permitted under s.117 of the Act. It has not been established that the Club injured Ms Ingersole in her employment by failing to give her notice.

196. As to the claim that she was dismissed without warning, Ms Ingersole was not dismissed for reason of unsatisfactory performance or serious misconduct and there is no evidence that she had a contractual or other right to a warning before being made redundant. These are not unfair dismissal proceedings.

197. Insofar as it was intended to be contended that this aspect of the asserted adverse action consisted of the Club's failure to notify or warn Ms Ingersole prior to the redundancy resolution of 29 February 2012, the pleadings refer to adverse action on 1 March 2012. In any event, as discussed above, it has not been established that the Club made a definite decision before the Board meeting on 29 February 2012 to dismiss Ms Ingersole. Nor as discussed further in relation to s.361, has it been established that prior to this meeting the Board members had made a secretive plan to dismiss Ms Ingersole in relation to which it could be said there was a failure to warn or notify Ms Ingersole.

198. Mr Geraghty was not the directing mind or will of the Respondent or authorised to make such decisions on behalf of the Club. There is no basis in the evidence for any suggestion that Ms Ingersole should have been notified or warned before the Board Meeting that Mr Geraghty or any other Board member was of the view that she should be made redundant or of the fact that Mr Geraghty intended to put such a motion to the Board.

199. In circumstances where there was no obligation on the Club to warn Ms Ingersole in advance of her dismissal on grounds of redundancy and where the requisite notice was given by payment in lieu thereof, it has not been established that the Club took adverse action against Ms Ingersole either as an injury in her employment or as a "*real and substantial*" alteration to her employment position to her prejudice consisting of dismissal from employment without notice or warning.

## Whether failure to notify Applicant of a decision

200. It is also claimed in para 5(b)(ii) that the Club engaged in adverse action in "[r]*efusing or failing to consult or notify the Applicant about any decision it had made to introduce major change in organisation or structure that was likely to include termination of the Applicant's employment*".

201. As discussed above, the consultation obligation under cl.8 of the Award that governed Ms Ingersole's employment arose only once a definite decision had been made. As each of the Board members attested, the decision to introduce change in the organisation was coextensive with and the same as the decision to make the Applicant's position vacant. The Club notified the Applicant about the decision to make her redundant as soon as practicable after it had been made. The fact that under other consultation provisions in other awards an employer may be obliged to consult about a proposed redundancy does not assist the Applicant. This was not such a case.

202. The Club had an obligation to notify, consult and have discussions with Ms Ingersole as early as practicable after the definite decision was made on 29 February 2012 (cl.8.2(b) of the Award). Under cl.8.2(a) the discussion was to be in relation to the introduction of the changes decided upon, the effects the changes were likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees. The employer was required to give prompt consideration to matters raised by the employee/s in relation to the change (cl.8.2(a)).

203. In this case the Club had discussions with Ms Ingersole on the morning of 1 March 2012. As outlined above, in the 1 March 2012 meeting

involving Ms Ingersole, Mr Walker, Mr Geraghty and Mr Moore, there were discussions about the implementation and introduction of the change consisting of the redundancy resolution insofar as that change affected Ms Ingersole, the effects the change had on her and of any measures to avert or mitigate the adverse effect of such change. I accept that the events happened in the way that Mr Walker described them. On his evidence it is plain that Ms Ingersole was consulted as soon as practicable after the decision to make her redundant. She asked questions. She made complaints. She was given explanations. She asked whether it was a unanimous vote of the Board and was given a response and told that decisions could be made by a majority. She asked about alternative positions and was told that there were none suitable. The discussions about the implementation of the redundancy decision included the offer of assistance in relation to outplacement counselling services.

204. In written submissions the Applicant submitted that the redundancy was presented to her at the meeting on 1 March 2012 as a *"fait accompli"*. However there is nothing in the Award or the Act to support any contention that the right to be consulted is a right to change a decision that has been made by the employer. As French J acknowledged in *City of Bayswater* at [39], where a provision that imposes an obligation on an employer contemplates that discussions will not be held until after an employer has made a definite decision (such as the decision that particular employees be made redundant) "*to that extent it may be said that the decision is a fait accompli before the discussions are commenced*". However, as His Honour went on to point out at [40], and as may be said in the present case, the rationale for consultations in such circumstances may be apparent. Thus cl.8.2(a) of the Award contemplates that parties would traverse reasons for the termination and measures to avert or mitigate the adverse effects of any such change.

205. In this case the Applicant was notified of and consulted about the definite decision made on 29 February 2012 to introduce major workplace change by making her position redundant as soon as reasonably practicable. There was a discussion of measures to ameliorate the effects of the decision, including the offer of assistance in relation to outplacement consulting services. The Applicant was

able to enquire as to whether other positions existed into which she could be placed, but was told there were none. There is no evidence that, contrary to what she was told, there were any such positions or alternatives. The fact that the answers to the Applicant's questions were not as she had wished does not mean that there was a failure to comply with the obligation to notify and consult and have discussions. On the evidence before the Court, it has not been established that the Club refused or failed to notify, consult with or have discussions with the Applicant about the redundancy decision in the manner required by cl.8 of the Award.

206. If this particular is intended to amount to a broader assertion of a lack of notifcation not limited to the Award obligation, there was prompt notification of the decision the Club made (which was the redundancy resolution). There was no earlier restructuring decision in 2012.

207. As discussed elsewhere, it has not been established that a two-step process occurred either prior to and in the Board meeting or during the Board meeting of 29 February 2012 whereby an initial decision was made by the Club to engage in a restructure and then a second decision was made by the Club to make the Applicant's position redundant. Nor does the evidence establish a secretive plan among the Board members, to make Ms Ingersole redundant or otherwise. Insofar as it is intended to be claimed that there was a refusal or failure to notify the Applicant about a decision made by the Club prior to 29 February 2012, this is not what is pleaded, but in any event there was no relevant decision prior to that time.

208. If this particular is intended to refer to events of 2010, in para 6(b)(i) of the Amended Statement of Claim the Applicant acknowledged that she was consulted, notified and had discussions in relation to what was described as the "*proposal*" to make her redundant in 2010. It has not been established that there was a "*definite decision*" to make Ms Ingersole's position redundant in 2010. Rather, there was a Board decision to investigate possible management changes (by obtaining a Management Plan), in relation to which Ms Ingersole admits consultation insofar as such change was likely to include termination of her employment. The intimated redundancy of her position in 2010 did not proceed.

209. The Applicant has not proved the existence of objective facts supporting the assertion of adverse action on 1 March 2012 in the manner pleaded in para 5(b)(ii) of the Amended Statement of Claim either consisting of injury in her employment or prejudicial alteration to her position.

## Whether Peremptory Dismissal

210. Paragraph cl.5b(iii) of the Amended Statement of Claim asserts adverse action on 1 March 2012 consisting of "*Dismissing the Applicant from her employment in a way that was peremptory including arranging for her to be immediately escorted from the Respondent's premises with directions that she not be allowed to speak to any other employee or board member of the Respondent before leaving the premises.*"

211. The evidence discussed above provides only limited support for the assertions made in this particular. There is nothing to support any claim of compensable injury to Ms Ingersole in her employment. Nor does the evidence establish a prejudicial alteration to Ms Ingersole in her employment position in the sense considered in *Patrick Stevedores* consisting of the manner in which she was treated on 1 March 2012. After she was informed of her redundancy effective that day, the Applicant was accompanied to her office and observed by Mr Walker in the steps she took before departure. On her own evidence and the evidence of Mr Walker, Ms Ingersole was able to and did contact Mr Fraser, the CEO, on 1 March 2012 both before and after she left the Club. She spoke to Board members, being Mr Geraghty and Mr Moore. She was not immediately escorted from the Respondent's premises. She was allowed to pack up her things in boxes that were provided and she left the premises on her own while Mr Walker stayed in the office. Indeed on the same day Ms Ingersole also spoke to Mr Allsop (a former board member) and to a solicitor. While this was clearly not an enjoyable process, it has not been established that the manner in which the Club dismissed the Applicant on 1 March 2012 was peremptory such as to amount to an injury in her employment or to a real and substantial alteration to Ms Ingersole's employment position to her prejudice in the manner pleaded.

212. Nor has it been established that the manner of the termination on 1 March 2012 was peremptory such that the Applicant was unable to make a complaint or inquiry or raise questions in relation to the decision of 29 February 2012, as she did on 1 March 2012.

213. Insofar as it was intended to be more generally submitted that there was a secretive plan among the Board members prior to 29 February 2012 that there should be a "*peremptory*" termination of the Applicant's employment designed to prevent her from exercising rights to consultation or to make a complaint, as discussed further in relation to the s.361 reverse onus the evidence does not support such a proposition.

214. If it is intended to be contended that the redundancy itself was invalid (despite the redundancy payment of over $54,000), there is nothing in the evidence before the Court to establish such a contention.

## Dismissal and Dispute Resolution Process

215. Particular 5(b)(iv) asserts adverse action consisting of "*Dismissing the Applicant from her employment without allowing* [The Applicant] *to participate in a dispute resolution process*."

216. On the assumption that the dispute resolution procedure in cl.9 of the Award would have been applicable to the decision about termination of Ms Ingersole's employment, there is nonetheless no evidence that at any stage the Applicant sought to participate in any dispute resolution process in relation to the Club's decision to make her redundant, including under the dispute resolution procedures in cl.9 of the Award whether in the meeting on 1 March 2012, or otherwise on that day or since that time. Nor is there any evidence that at any time the Club (or, indeed, any Board member) took any action to prevent the Applicant from engaging in such process. Counsel for the Applicant conceded that this part of the Applicant's claim was not made out.

217. The Applicant has not proved the existence of objective facts providing a basis for the alleged adverse action particularised in cl.5(b)(iv) of the Amended Statement of Claim either as an injury or prejudicial alteration to her position within s.342(1) of the Act.

## The Reasons for the Adverse Action and s.361

218. Insofar as it is made out, adverse action would, if taken for a proscribed reason, constitute a contravention of s.340 of the Act. Where the Applicant has proved the existence of objective facts establishing that the Respondent took adverse action against her, the Respondent bears the onus in relation to motivation under s.361 of the Act.

219. The Applicant alleged that the Respondent took particularised adverse action against her to prevent the exercise by her of the workplace rights pleaded and/or because she either had such workplace right(s) and/or proposed to exercise them or had exercised or proposed to exercise such rights in the past.

220. The particulars in relation to the alleged reason or reasons for the adverse action are as follows:

> *(i) In or about August 2010, certain board members of the Respondent proposed that the Applicant be dismissed from her employment on grounds of redundancy in circumstances where certain other board members and/or the Chief Executive Officer, Mr Stuart Fraser, took action to investigate the justification for any redundancy, including consulting, notifying and discussing the proposal with the Applicant. The Respondent thereafter determined that there was no need for the Applicant's job to be made redundant.*
>
> *(ii) When the Respondent took the said adverse action, it failed to provide the Applicant with any consultation or notification or discussions in relation to any decision to introduce the said major change;*
>
> *(iii) When the Respondent took the said adverse action, it failed to provide the Applicant any notification or warning of its intention to terminate the Applicant's employment on the grounds of redundancy or any other grounds;*
>
> *(iv) The said adverse action was taken against the Applicant in circumstances where the Chief Executive Officer, Mr Stuart Fraser, was not advised of the decision and at a time when he was on leave from work and who the Respondent knew, or ought to have known, would have*

*advocated compliance with clause 8 of the Award before the said adverse action was taken;*

*(v) The Respondent knew, or ought to have known that if there had been consultation and/or notification and/or discussion about the said change, the decision to terminate the Applicant's employment on the grounds of redundancy would likely have been obviated.*

*(vi) Dismissing the Applicant from her employment in a way that was peremptory including arranging for her to be immediately escorted from the Respondent's premises with directions that she not be allowed to speak to any other employee or board member of the Respondent before leaving the premises;*

*(vii) When the Respondent took the adverse action against the Applicant the person to whom the Applicant was able to make a complaint or inquiry was Mr Stuart Fraser and the Respondent took adverse action at a time when Mr Stuart Fraser was on leave.*

221. Under s.361 of the Act, to the extent that the adverse action alleged is objectively established as the basis for the contravention alleged, it is presumed that it was taken for the particular reason or reasons alleged. The Respondent bears the onus of proof in relation to its motivation for taking adverse action. I have considered this issue in relation to the circumstances leading up to and including the dismissal of the Applicant from her employment on 1 March 2012. However, no reverse onus arises in relation to an asserted adverse action which has not been made out. For example, there is no issue about why prior to the redundancy resolution, the Club did not notify, condult or have discussions with Ms Ingersole in accordance with cl.8 of the Award. As discussed above, the cl.8 regulations did not arise until the Club made the definite decision on 29 February 2012 consisting of the redundancy resolution.

222. As submitted for the Club, the correct approach to ascertaining whether a respondent has discharged the onus under s.361 of the Act was summarised by Whelan FM (as she then was) in *Wolfe* at [89] by reference to the principles considered by the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v*

*Barclay* (2012) 290 ALR 647; (2012) 86 ALJR 1044; [2012] HCA 32. As Her Honour stated in *Wolfe* at [89]:

> *... the question of whether a particular action or decision was taken because of a proscribed reason, or for reasons which included a proscribed reason, is a question of fact to be determined on the whole of the evidence. Generally the following principles may be taken to apply:*
>
> - *The proscribed reason must be a 'substantial and operative reason' for taking the adverse action;*
> - *Direct evidence of the decision-maker's state of mind, intent or purpose, will bear upon the question of why adverse action was taken;*
> - *Direct evidence from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer;*
> - *Mere declarations by a witness as to his or her 'mental state' may not be sufficient to discharge the burden of proof;*
> - *Direct evidence of the decision-maker may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker's evidence;*
> - *The test of whether action was taken for a proscribed reason is neither a subjective nor an objective test; and*
> - *It is not possible or appropriate to enquire into the 'unconscious' state of mind of the decision maker.*
>
> (Footnotes omitted).

223. While in *Barclay* there was no issue as to whether there was more than one decision-maker, it is instructive to consider further the approach taken by the High Court in relation to the operation of s.361 of the Act. The High Court was considering an alleged contravention of s.346 of the Act, but the principles canvassed in relation to the correct approach to the Court's task of determining whether the statutory presumption has been rebutted in s.361 are directly in point.

224. As French CJ and Crennan J pointed out in *Barclay* at [5] the Court's task is to determine *"on the balance of probabilities, why the employer took adverse action against the employee, and to ask whether it was for a prohibited reason or reasons which included a prohibited reason"* However their Honours rejected the proposition that a general protections proceeding should not be resolved in favour of an employer unless the evidence objectively established that the employer's reasons for taking adverse action were "*dissociated*" from any proscribed reason (at [6]).

225. French CJ and Crennan J set out *"the correct approach"* as follows (at [41] – [45]):

> *The question of why an employer took adverse action against an employee is a question of fact arising from the operation of interdependent provisions of the Fair Work Act. These provisions must be construed together in accordance with the principles of statutory construction established by this Court, which must begin with a consideration of the text of the relevant provisions and may require consideration of the context including the general purpose and policy of the provisions.*
>
> *Determining why a defendant employer took adverse action against an employee involves consideration of the decision-maker's "particular reason" for taking adverse action (s 361(1)), and consideration of the employee's position as an officer or member of an industrial association and engagement in industrial activity ("union position and activity") at the time the adverse action was taken (ss 342, 346(a), 346(b), 347 and 361(1)).*
>
> *Clearly a defendant employer interested in rebutting the statutory presumption in s 361 can be expected to rely in its defence on direct testimony of the decision-maker's reason for taking the adverse action. The majority in the Full Court correctly rejected an argument put by the respondents that the introduction of the statutory expression "because" into a legislative predecessor to s 346, in place of the previous statutory expression "by reason of", rendered irrelevant the state of mind of the decision-maker.*
>
> *There is no warrant to be derived from the text of the relevant provisions of the Fair Work Act for treating the statutory expression "because" in s 346, or the statutory presumption in s 361, as requiring only an objective enquiry into a defendant employer's reason, including any unconscious reason, for taking adverse action. The imposition of the statutory presumption in s*

> *361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains "why was the adverse action taken?".*
>
> *This question is one of fact, which must be answered in the light of all the facts established in the proceeding. Generally, it will be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer. Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker's evidence. However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer even though an employee may be an officer or member of an industrial association and engage in industrial activity.*
>
> (Footnotes omitted)

226. Instead of the factors in s.346 referred to in *Barclay* at [42], in the context of an alleged breach of s.340 of the Act, factors such as the "*particular reason*" of the decision-maker(s) for taking adverse action, the employee's position as the holder or exerciser of workplace rights within s.341 and any relevant nexus to such rights are to be considered, bearing in mind that s.340 is intended to protect the exercise of workplace rights. However, even though an employee may hold workplace rights, and, indeed may have exercised or proposed to exercise such rights (see *Barclay* at [45]), reliable direct testimony from the decision-maker(s) is capable of discharging the burden on an employer under s.361.

227. Relevantly, French CJ and Crennan J also referred with approval to the approach taken in *General Motors-Holden's Pty Ltd v Bowling* (1976) 136 CLR 676; (1976) 51 ALJR 235 in relation to a legislative predecessor to s.361 of the Act (see in particular Gibbs J in *Bowling* at 239 referring to whether a prohibited reason was a "*substantial and operative factor*" as cited in *Barclay* at [56] – [57] and Mason J (with whom Stephen and Jacobs JJ agreed) at 241 – 242)).

228. In *Barclay*, French and Crennan JJ rejected the proposition that the onus on the employer was made heavier because an employee affected by adverse action happened to have a proscribed characteristic (at [66]). Their Honours stated (at [62]) that it would be an error "*to treat an employee's union position and activity as necessarily being a factor which must have something to do with adverse action, or which can never be dissociated from adverse action.*" The same may be said in relation to the fact that an employee has an entitlement to workplace rights (see *Ramos v Good Samaritan Industries* [2013] FCA 30 at [140]). Thus, in the context of an adverse action claim based on s.340 of the Act it would be a "*misunderstanding*" to require that the establishment of the reason for adverse action "*must be entirely dissociated from an employee's*" workplace rights or exercise of such rights (see *Barclay* at [62]).

229. Rather, the onus is on the Respondent to prove that such workplace rights and/or their exercise or proposed exercise "*was not an operative factor in taking adverse action*". Such onus is to be discharged on the balance of probabilities "*in the light of all the established evidence*" (ibid and see s.140(2) of the Evidence Act).

230. In *Barclay* what was in issue was adverse action affecting an employee with union involvement. Their Honours saw it as "*appropriate*" that the decision-maker give positive evidence comparing the position of the employee affected by the adverse action with that of an employee who had no union involvement (at [63]). In this case there was evidence that the Club also made the event coordinator's position redundant. There is no evidence that that action was in any way related to the existence or exercise of workplace rights of the event coordinator.

231. In *Barclay* Gummow and Hayne JJ also referred to the fact that in *Bowling* Mason J and Gibbs J had each accepted that it was sufficient to discharge the onus of proof on the employer if the employer established that the prohibited reason was "*not a substantial and operative factor*" in the action (at [85] – [88]) and to the adoption of this approach in subsequent cases (at [89] – [91]). Their Honours were of the view that the phrase "*a substantial and operative reason*" was relevantly indistinguishable from the "*operative or immediate reason*"

to which s.360 of the Act relates (at [103] and see *Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326; [2002] FCA 513 at [54] – [55]).

232. Hence an employer would contravene s.340 of the Act if it could be said that the existence, exercise or proposed exercise of workplace rights by the employee comprised a "*substantial and operative*" reason for action by the employer constituting adverse action. It is for the employer to establish that such workplace rights were not an operative factor in taking adverse action.

233. Gummow and Hayne JJ also discussed the meaning of "*because*" in s.346 (which adopts a similar format to s.340 of the Act), pointing out that the term is not defined and that it appears elsewhere in the Act (including in s.340). It was suggested that this concept "*invites attention to the reasons why the decision-maker so acted*" (at [101]). Their Honours accepted that in a determination of whether adverse action was taken "*because*" of a proscribed reason, "*to engage upon an inquiry contrasting "objective" and "subjective" reasons is to adopt an illusory frame of reference*" (at [121]) and that a "*reference to "unconscious reasoning"* [was] ... *apt to confuse and mislead the finder of fact*" (at [124]). Rather, the Court was to assess whether the proscribed attribute or activity (at [127]):

> *...was a "substantial and operative factor" as to constitute a "reason", potentially amongst many reasons, for adverse action to be taken against that employee. In assessing the evidence led to discharge the onus upon the employer under s 361(1), the reliability and weight of such evidence was to be balanced against evidence adduced by the employee and the overall facts and circumstances of each case; but it was the reasons of the decision-maker at the time the adverse action was taken which was the focus of the inquiry.*

234. Heydon J made the point in *Barclay* that to satisfy s.360 the particular reason referred to must be an "*operative or immediate reason for the action*" and observed that an examination of whether a particular reason was an operative or immediate reason for an action "*calls for an inquiry into the mental processes of the person responsible for that action*" (at [140]). Thus where there are several decision-makers it is necessary to inquire into the mental processes of each decision-maker

or person responsible for the action in question. Heydon J acknowledged that "*mere declarations*" by a witness as to his or her mental state may not be sufficient to discharge the employer's burden of proof under s.361, insofar as "*external circumstances could put into question the reliability or credibility of those declarations*" (at [141]).

235. As to the search for the "*reason*" for adverse action, Heydon J stated that this was a "*search for the reasoning **actually employed** by the person who acted*" (emphasis added) and that nothing in the Act expressly suggested, and nor could it be implied, that courts were to search for "*unconscious*" elements in the impugned reasoning of the person or persons who acted (at [148]).

236. Insofar as the Applicant proceeded on the basis that whether the Respondent met the reverse onus in s.361 would turn on the view taken by the Court as to the credit of the Respondent's witnesses, it is clear from *Barclay* that the question of whether an adverse action was taken "*because*" of a proscribed reason is a question of fact to be determined by an analysis of all the facts and circumstances, with a focus on the actual reasoning of the person or persons who acted at the time the adverse action was taken. External circumstances may put into question the reliability or credibility of any declaration by a witness as to his or her mental state. This issue is considered in more detail in relation to each Board member, particularly Mr Geraghty with whose reasons most issue was taken.

237. It is however to be borne in mind that in *Barclay* there was a single decision-maker. No issue arose as to the possible involvement of more than one person in the making of the decision (see *NTEU v RMIT* at [25]).

238. The Court's task is to determine "*in whose mind or minds was to be found the operative mind*" of the Club in making the decision to dismiss the Applicant or in engaging in any other conduct constituting adverse action and then to consider whether the Respondent has discharged the onus under s.361 in relation to the motivation of such decision-makers (*NTEU v RMIT*).

239. As discussed above, insofar as the Applicant submitted that Mr Geraghty was the directing mind and will of the Club, such a

contention is not made out. Mr Geraghty was the President of the Club, but he did not have actual or apparent authority to make a relevant decision on behalf of the Club, let alone a *"definite decision"* to dismiss the Applicant from her employment, to make her redundant or to otherwise take the action complained of by the Applicant on behalf of the Club. However he was (together with the other three Board Members who voted for the redundancy resolution) one of the decision-makers on behalf of the Club in relation to the dismissal of the Applicant on the grounds of redundancy pursuant to the redundancy resolution. Insofar as he, Mr Moore and Mr Walker met with Ms Ingersole on 1 March 2012, they did so on behalf of the Club.

240. The evidence of the three other Board Members discussed below is not consistent with any suggestion that Mr Geraghty was the *"operative mind of the Club"* or that they merely *"rubber-stamped"* a decision made by him.

241. In considering the motivation for the asserted adverse action in relation to the termination of Ms Ingersole's employment on the grounds of redundancy and the circumstances leading up to and surrounding such termination, it is also necessary to bear in mind that no decision to dismiss her was made by the Club until the redundancy resolution was passed by a majority of the members of the Board members voting at the Board meeting on 29 February 2012. There was no prior "*first step*" in 2012 consisting of a decision to introduce major change such as to enliven the consultation, notification and other obligations in the Award before the redundancy resolution was passed.

242. For the reasons that follow, having regard to all the evidence, I am satisfied that the Respondent has met the onus under s.361 of the Act of establishing that, insofar as adverse action was taken against Ms Ingersole, it was not taken for a reason that included a proscribed reason under the Act.

243. Each of the Board members gave direct evidence as to his or her real reasons for voting for the redundancy resolution. They were cross-examined in relation to their motivation for voting for the redundancy resolution and in relation to what occurred in the period leading up to and, where relevant, after the redundancy resolution. As discussed further below, while there were some differences in recollection of past

conversations, in particular between Mr Geraghty and Ms Michel and Mr Moore, these and the other issues raised for the Applicant are not, on all the evidence, such as to lead me to find the direct evidence of any of the Board members unreliable in relation to their states of mind with respect to the adverse action in issue. The evidence before the Court goes beyond mere declarations by each Board member as to his or her mental state. It is not inconsistent with objective material, in particular in relation to the Club's financial position. This is not a case in which other objective facts have been proven which contradict the Board members' direct evidence such as to render it unreliable.

244. Mr Dakin, who I found to be a witness of truth, clearly saw himself as one of the decision-makers in relation to the termination of Ms Ingersole's employment. He specifically denied that he voted for the redundancy resolution for reasons associated with the past or present exercise of a workplace right by Ms Ingersole. He explained that his "*real reason*" was "*the business case for redundancy*". He gave affidavit evidence of the discussion at the meeting of 29 February 2012.

245. In cross-examination Mr Dakin confirmed that he had not been a Board member of the Club prior to October 2011. There is no substance in any contention that Mr Dakin was motivated by any past exercise of workplace rights by Ms Ingersole in response to any actions of the Board in 2010 or at any other time. While Mr Dakin recalled that at the Board meeting on 30 November 2011 Mr Geraghty had raised an issue about the CEO's contract and the fact that his employment could only be terminated for serious misconduct with unanimous Board approval, I accept that he had not ever had any discussion with Mr Geraghty about what Mr Geraghty thought of Mr Fraser and did not know what the relationship was between Mr Geraghty and Mr Fraser. Moreover, Mr Dakin had not heard that Mr Geraghty had any concern prior to 2012 about whether the position of administration manager should exist. I accept his evidence that he had no knowledge of any attempts led by Mr Geraghty in 2010 to inquire into whether the administration manager's position should be made redundant. I am satisfied on the evidence that Mr Dakin was not motivated in any adverse action taken against Ms Ingersole by the past or present

existence, exercise or proposed exercise of workplace rights by Ms Ingersole.

246. Before the Board meeting on 29 February 2012 Mr Dakin had never heard about or discussed the possibility of Ms Ingersole's position being made redundant. He was not aware that this particular issue was going to be raised by Mr Geraghty at the Board meeting. There is no support in the evidence for any contention that he was complicit in not allowing Ms Ingersole the benefit of her workplace rights or preventing her from using them because of concern that she would have made complaints or inquiries or conducted negotiations which would have resulted in opposition to her position being made redundant.

247. I accept that Mr Dakin saw it as appropriate to vote for the redundancy resolution despite the absence of input from the CEO because Mr Fraser was very ill at that stage, there was no known date for his return and Mr Dakin believed that they "*had to act fairly rapidly*" given the Club's financial circumstances.

248. Mr Dakin also explained the basis for his concern about the financial position of the Club (having regard to the cash flow situation, the continuing losses and the extent of the salaries paid by the Club), viewed from his perspective of working for not-for-profit organisations as a chief financial officer and chief operating officer.

249. He gave evidence of a short general discussion on the golf course with Mr Geraghty that he thought was some time in time in early 2012 in which he raised his concern about the Club finances and expressed the view that the Club should reduce its expenditure. He regarded the financial situation as "*pretty appalling*". Mr Dakin recalled that he said that he "*was very concerned that an organisation that had salary bills that exceeded members' dues, in other words, an operating issue could be a major problem*".

250. Mr Dakin did not initially have a particular concern about whether the problem was with the salaries of course staff or administrative staff. He did not recall any discussions with Mr Geraghty about his relationship with Ms Ingersole. He had not heard of any concern of Mr Geraghty about whether the position of administration manager should exist. He had not discussed this issue with anyone prior to the

meeting on 29 February 2012. Mr Dakin did not recall any discussion with Mr Geraghty about the possibility of redundancies or making Ms Ingersole's position redundant or any other conversations with Mr Geraghty or with anyone else about concerns about expenditure on salaries prior to the meeting on 29 February 2012. I accept his evidence in this regard. It is contrary to any suggestion that there was a "*secretive plan*" among the Board members to make Ms Ingersole's position redundant.

251. The fact that Mr Dakin was concerned about the Club's financial position and had a discussion with Mr Geraghty, the Club President, about possible financial problems is not such as to render his evidence about his motivation for his involvement in Ms Ingersole's dismissal unreliable.

252. Mr Dakin provided an explanation for his agreement with the proposal put by Mr Geraghty at the Board Meeting of 29 February 2012. His view was that making the two positions redundant was "*necessary for the continued viability of the Club*" in circumstances where he knew the Club was continuing to lose money and knew from being a member of other golf clubs that "*the only real area*" in which the Club could save money was "*in workers*". He knew the ratio between course and administrative staff and "*as a golfer* [wanted] *as much money as the Club* [could] *reasonably afford spent on wages of the course staff*". He denied that in making his decision he simply relied on what Mr Geraghty said at the Board meeting. There is no reason to doubt this denial. Mr Dakin had regard to the financial statements attached to the Minutes of the 22 February 2012 Finance Committee meeting prior to making his decision. His focus was on the total operating profit and loss rather than the overall profit and loss of the Club.

253. There is no logical foundation in the evidence for the Applicant's contention that Mr Dakin somehow improperly refused to concede that prior to the meeting of 29 February 2012, he already had a *"particular type of staff"* in mind, on the basis that his denial of that assertion and the fact that he did not recall discussions with others on this issue was inconsistent with the manner at which the discussion preceded at the meeting. Mr Dakin explained the basis for his views and why he agreed with the proposal to make the two suggested positions

redundant. There is objective evidence of increasing total operating losses in early 2012 that is consistent with Mr Dakin's asserted reasons for his action. The fact that the discussion at the Board meeting was not more detailed than recorded in the minutes or recalled by the participants is not such as to raise doubt about or lead to a rejection of Mr Dakin's evidence that he was not aware of the specific proposal to make Ms Ingersole's position vacant prior to the meeting on 29 February 2012. The motion put by Mr Geraghty addressed matters that were already of concern to Mr Dakin in his capacity as a director of the Club. However that pre-existing concern does not mean that a decision or plan had been made by the Board members about Ms Ingersole's redundancy prior to the meeting on 29 February 2012 or that Mr Dakin was complicit in Mr Geraghty's decision to propose the redundancy resolution. I accept Mr Dakin's evidence in this regard.

254. Contrary to the Applicant's submission, Mr Dakin's evidence does not support the conclusion that the mind of Mr Geraghty was for all practical purposes the mind of the Respondent, either insofar as it concerned the effects of major workplace change on the Applicant or more generally. Mr Dakin saw himself as one of the decision-makers. He voted for the redundancy resolution. He did not simply rubber-stamp a decision of Mr Geraghty. I accept the explanation he provided based on the financial position of the Club. It was consistent with the financial information before him, even if others, like Mr Allsop and Mr Muter who were not members of the Board at the time, may not have taken the same view of the Club's financial position in early 2012.

255. Insofar as this criticism of Mr Dakin's evidence relates to the fact that Mr Geraghty put the motion, that does not establish that Mr Geraghty was the directing mind and will of the Respondent in any relevant respect. Although Mr Geraghty was the President of the Club, he could not make a staff redundancy decision on behalf of the Club. The fact that he raised issues of concern in relation to the financial situation of the Club and possible ways to address that with other directors (both at the Finance Committee meeting and in individual discussions prior to the Board meeting) does not contradict the evidence of Mr Dakin as to the reason he supported the motion and voted for redundancy of the Applicant. There is nothing in the evidence to contradict Mr Dakin's evidence that he was not motivated by any reason that related to the

past or present existence, exercise or proposed exercise of workplace rights by Mr Ingersole.

256. Mr Dakin was not directly involved in the events of 1 March 2012. However he provided reasons in relation to the manner in which the redundancy was implemented which I accept. His belief was that they had to act rapidly despite Mr Fraser's absence because of the Club's financial situation. He explained that at the Board meeting on 29 February 2012 Mr Geraghty had gone around the table and asked for the views of the other Board members. He rejected the suggestion that it was the "*usual practice in business*" to have a discussion with a person whose job was proposed to be made redundant.

257. I am satisfied that Mr Dakin was one of the decision-makers for the Club in relation to termination of Ms Ingersole's employment and that it has been established that no adverse action taken by Mr Dakin in relation to Ms Ingersole was taken for an operative reason that included any of the asserted proscribed reasons.

258. Ms Michel also clearly saw herself as a decision-maker in relation to termination of Ms Ingersole's employment. She also gave direct evidence that she did not vote in favour of making the administration manager's position vacant because Ms Ingersole had or proposed to exercise a workplace right in particular because she had exercised or proposed to exercise a right to consult. She explained that her real reason for voting in favour of the redundancy was the business case for the redundancy. As discussed above, Ms Michel was a generally reliable witness. She gave evidence in an open manner, acknowledging areas in which she had no recollection.

259. Ms Michel explained that from her attendance at Board meetings from October 2011 she became aware that the Club was losing money and that each month the position was deteriorating. In her view, by February 2012 the financial position of the Club was "*dire*" and the losses were serious compared to the previous year. She pointed out that at that time it was not known if or when the CEO (who had a life threatening condition) would return.

260. The meeting of the Finance Committee on 22 February 2012 was attended by Mr Geraghty, Mr Moore and Ms Michel and chaired by

Mr Moynihan, the Club Treasurer. The Minutes refer to summaries of financial reports for various aspects of Club activities and, among other things, record that the Club would cease to provide complimentary peanuts to members from 1 March 2012.

261. Ms Michel's evidence, which I accept, is that by this time it had become extremely evident to her that the Board had to take remedial action with respect to the financial position of the Club. Her evidence (and that of the other Board Members) is to be seen in the context of the financial statements revealing that to the end of January 2012 the Club had suffered an operating loss (above the line and not including monthly management accounts and entrance fees allocated towards major capital projects) of $228,000 compared to a budgeted loss of $219,097. Forecasted poor weather meant there was a foreshadowed further loss of $25,000 in February 2012. In fact the actual loss to the end of February was $315,062. Such evidence about the Club's financial position is consistent with Ms Michel's asserted actual reason for voting in favour of making Ms Ingersole's position redundant as a cost-saving measure (notwithstanding the views Mr Allsop and Mr Muter now express to the contrary about the Club's financial position at that time).

262. Contrary to the contention that there was no real or genuine consideration given to making any position other than that of Ms Ingersole redundant, I accept that during the period 22 February 2012 to 29 February 2012 Ms Michel, a member of the Finance Committee and of the Board of the Club, of her own volition considered a number of cost-saving options and looked at the roles and responsibilities of all staff. As a Board member she had received copies of all staff position descriptions. She came to the view that the most obvious option for a long-term beneficial effect was a restructure of staff with a view to making positions redundant within the Club. There is no evidence to suggest that such a view was inconsistent with material considered by Ms Michel.

263. Ms Michel's evidence in cross-examination was that the action was about reducing costs. It was her view that the positions of administration manager and event coordinator "*appeared to have the most potential for cost reduction with minimal service reduction to the*

*members*" and that there were no other "*long term beneficial options*". She did not see it as appropriate to cut the positions of course staff. She reached these views of her own accord without talking to anyone else about these possible redundancies. She saw this as an option to be considered by the Board.

264. Ms Michel admitted that she had formed the view that a restructure involving redundancies was appropriate as an option to be discussed by the Board. Her acknowledgement in response to cross-examination that she was proposing restructure is to be seen in this light.

265. Ms Michel acknowledged that she had mentioned her concerns about the Club's financial situation to Mr Geraghty after the Finance Committee meeting. To the best of her recollection she did so after the meeting closed. She could not remember exactly what she said, other than words to the effect that she thought it "*a very dire situation*". She could not recall exactly what he said in response, but was of the view it may have been an acknowledgment. Ms Michel's recollection of briefly speaking to Mr Geraghty before 29 February 2012 to voice her concerns about the costs of the administration, involved her saying "*something about* [having] *been looking at opportunities more than peanuts and chips. We have to save money. I think we need to restructure.*" Mr Geraghty responded to the effect that: *"It's an option we have to look at*".

266. The fact that a Board member on the Finance Committee had such short general discussion with the Club President is not indicative of a plan or decision between Board members to make Ms Ingersole's position redundant. Nor is it indicative of Ms Michel rubber-stamping a decision made by Mr Geraghty. I accept Ms Michel's evidence that no *"decision"* had been made by the Board members to make Ms Ingersole's position vacant between 22 and 29 February 2012. The fact that this was part of her preferred option for the reduction of costs is to be seen in the context of her view that minimal service reduction to members of the golf club was desirable. I accept that Ms Michel herself formed this view, and that it was not reflective of some arrangement or secretive plan or decision among the Board members prior to 29 February 2012 to make Ms Ingersole's position redundant. I also accept Ms Michel's evidence that at the time Mr Geraghty put

the motion to the meeting on 29 February 2012 she did not "*know*" that the positions of administration manager and event coordinator would be made redundant. There is no foundation in the evidence for the contention that Ms Michel was complicit in not allowing the Applicant the benefit of her workplace rights or preventing her from using them because Ms Michel was concerned that Ms Ingersole would have made complaints or inquiries or conducted negotiations which would have resulted in opposition to her position being made redundant. There was no obligation on Ms Michel or on any of the other Board members to give the Applicant the opportunity to respond to or discuss mere proposals that were in the mind of or discussed among Board members prior to the meeting of 29 February 2012. Indeed under the Club's Regulations individual members of the Board are not to give directions or instructions regarding the terms of employment. The evidence before the Court is not such as to render Ms Michel's evidence in this respect unreliable.

267. Ms Michel also explained that she voted for the redundancy resolution (which she saw as a long-term beneficial option) notwithstanding Mr Fraser's absence on sick leave and despite the possible duplication of some duties between the CEO and the administration manager on the basis that it was to save costs. She did not think it was appropriate to postpone the vote to contact Mr Fraser for his views when he was away ill and they had strict instructions for his health reasons not to contact him. She explained that in the absence of the CEO, staff members with a complaint could have gone to Mr Walker, who was the conduit between the staff and the Board.

268. I accept Ms Michel's evidence that she was not aware that in 2010 Mr Geraghty had taken steps to look into the question of whether the administration manager's position should be made redundant. There is no basis for any assertion that she was motivated by any past exercise or past proposed exercise of workplace rights by Ms Ingersole.

269. Ms Michel was not directly involved in dealings with Ms Ingersole on 1 March 2012. However she also provided reasons in relation to the manner in which the redundancy was implemented, which I accept. She rejected the proposition that if a restructure of an organisation that involved the potential for roles to be lost was "*being thought about*" it

was "*usual*" for there to be a discussion with the persons occupying those roles before the jobs were lost. It did not occur to her that there should be some facilitation of discussion between staff and management between 22 and 29 February 2012, as in her view no decision had been made by the Club to restructure or as to redundancy at that time.

270. Ms Michel accepted that Ms Ingersole had not been told about any proposal to make her redundant before the meeting on 29 February 2012. However she rejected the proposition that there was a secretive plan or that the termination happened in a secretive way to prevent Ms Ingersole being able to complain about it.

271. The fact that Ms Michel knew that Ms Ingersole had a workplace right to inquire or complain in relation to her employment is not such as to raise doubt about or contradict her evidence about her motivation (see *Barclay* at [62]), given her clear and logical evidence about the circumstances in which she formed her views about restructure and redundancy and the rationale for such views.

272. It is not the case that the only realistically possible explanation for the failure to give Ms Ingersole an opportunity to respond to or discuss the restructure Ms Michel considered appropriate was to prevent her from complaining or inquiring about it. There is nothing in Ms Michel's evidence to support the Applicant's contention that there was a plan in place among the Board members to terminate Ms Ingersole's employment. While Ms Michel felt that this was an option the Board should discuss, she did not know in advance that Mr Geraghty intended to propose a restructure involving making the positions of administration manger and event coordinator redundant and was not a party to any secretive plan.

273. Insofar as the Applicant appeared to contend that there must have been complicity or a secretive plan among the four Board members to make Ms Ingersole's position redundant and that such secretiveness was to prevent her exercising her workplace rights I am not satisfied that there was such a plan or that that the evidence before the Court renders unreliable Ms Michel's evidence that she was not motivated in any way by reasons that included preventing Ms Ingersole exercising her workplace rights.

274. There were, as Ms Michel explained, only limited cost-saving options available to the Club. As both Ms Michel and Mr Dakin observed in cross-examination, their individual preferences were for cost-saving options that did not reduce services to members of the golf club. Ms Michel explained that in considering restructure options she had considered the roles and responsibilities of all the staff and that she had concerns about the costs of the administration. Moreover, as Mr Dakin and Ms Michel also explained, prior to the redundancy resolution being passed they were each of the view that it would have been inappropriate to discuss options being considered by individual Board members with staff members, given that such options might not be adopted by the Board.

275. I am satisfied that Ms Michel was a decision-maker for the Club in relation to the termination of Ms Ingersole's employment. Her evidence as to her reason for voting for the redundancy resolution and the circumstances preceding 29 February 2012 is reliable. It is not contradicted by her other evidence or by objective evidence before the Court. I am satisfied that it has been established that Ms Michel did not participate in taking adverse action against Ms Ingersole for reasons that included an operative reason associated with the past or present existence, exercise or proposed exercise of workplace rights by Ms Ingersole.

276. Mr Moore was Vice President and a Member of the Finance Committee of the Club in the year from October 2011. He had previously been President of the Club (in 2000, 2001 and 2002). He also clearly saw himself as a decision-maker and actor in relation to the termination of Ms Ingersole's employment and the surrounding circumstances. I am satisfied he was a truthful witness. He gave evidence that in his view during the 2011-2012 financial year the financial position of the Club was under enormous stress, reflecting falling golfing revenue and escalating management and administration costs and that the position continued to deteriorate from October to January 2012.

277. Mr Moore gave direct evidence that his real decision for voting in favour of the redundancy was the business case for the redundancy. He rejected the proposition that he did so because Ms Ingersole had or had

proposed to exercise a workplace right, including because she had exercised or proposed to exercise a right to complain.

278. Mr Moore's evidence in cross-examination about his motivation was consistent with his direct evidence. He became concerned about the losses soon after the first Board after the October 2011 elections. He saw these as large losses (including relative to the previous year). He strongly rejected the proposition that a substantial reason for voting the way he did was because he wanted to prevent Ms Ingersole exercising a right to complain or inquire about the fact her job was to be made redundant, explaining that he did it "*for business reasons*".

279. Insofar as the Applicant suggested that there was a secretive plan or decision by the Board members on behalf of the Club to make Ms Ingersole's position redundant prior to the redundancy resolution, Mr Moore's evidence is to the contrary. Mr Moore explained that in the February 2012 Finance Committee meeting he had been very critical of the financial management of the Club. His evidence, which I accept, was that prior to the start of the Board meeting on 29 February 2012 he had a discussion with Mr Geraghty in which he gave Mr Geraghty "*the benefit of my knowledge and experience of what has to happen to stop companies going under*". In the context of cross-examination about this conversation with Mr Geraghty on 29 February 2012, that he was aware before the Board meeting that Ms Ingersole's position was "*likely*" to be made redundant (if voted for by the Board). However, there is no suggestion that Mr Geraghty initiated the conversation, that he sought Mr Moore's agreement with or complicity in any proposal to make Ms Ingersole's position vacant or that he told Mr Moore he intended to put a motion to this effect to the meeting.

280. Mr Moore did not have an actual specific recollection of what was said in that conversation of some 18 months before he gave evidence. When asked in cross-examination if "*the discussion was about the proposal to make the administration manager's job redundant*", his evidence was that it was broader than that and was about "*what alternatives have we got, basically. And making one or two positions within the club was one of the subjects*". He recalled that he raised the possibility of significant restructuring of the Club to save losses, of which one alternative would be redundancy of one or two people.

Mr Moore agreed in this context that the discussion related in part to the administration manager's job. However he explained that he had had the other position in mind and that the discussion was general, being about what positions could be made redundant, of which the administration manager's was one.

281. Mr Moore's recollection was that the initiation may have come from him to suggest that they had to make some significant changes and that in a Club of their size there were limited choices that would make a significant impact on expenses. However his recollection was that the issue of "*shedding*" the administration manager's job was not specifically raised until this conversation.

282. The occurrence of a discussion between the Vice-President and President about the need for restructure to save losses and the available options, including possible redundancies, is consistent with Mr Moore's evidence that he was of the view, prior to the Board meeting on 29 February 2012, that there needed to be some change or restructure in the Club. I accept that this was the first and only specific discussion that he had. He acknowledged that he had probably discussed the financial position of the Club with Mr Dakin and Ms Michel at some time prior to 29 February 2012, but did not recall discussions about the specific issue of redundancy.

283. I am not satisfied that it can be inferred that Mr Moore's evidence about his reasons for voting for the redundancy motion was unreliable on the basis that he was prepared to keep the information about the proposed redundancy confidential from Ms Ingersole because of concern about her making complaints, or inquiries or engaging in negotiations which would have resulted in opposition to her position being made redundant. In a discussion with Mr Geraghty about possibly restructuring to save losses where one of the alternatives was redundancy of one or two of the Club's personnel Mr Moore canvassed the issue of which positions could be made redundant (of which the administration manager's role was one). However, as Mr Moore explained, he saw it as appropriate to keep confidential proposals of this nature (which would involve a major significant event within the Club) before they had been voted on by the Board. Consistent with this view, he gave evidence that it was his experience in business that

for confidentiality and safety reasons one did not consult with an employee before he or she was made redundant. He also explained that in his view information about such a proposal should be kept confidential because the Board may have voted "*no*". He made the point that one does not make assumptions on how Boards would vote. This is a logical rational explanation for the manner in which the redundancy was implemented. It does not cast doubt on the reliability of Mr Moore's evidence about his reasons.

284. Mr Moore was not asked about the events of 2010 or the relationship between Mr Geraghty and Ms Ingersole. He provided consistent evidence about his business motivation. He gave unchallenged evidence about his involvement in and observations of the events of 1 March 2012 which I accept. He informed Mr Walker that he had to lead the discussion on 1 March 2012. This is consistent with the absence of the CEO and the restriction in the Club Regulations on Board members communicating with staff members about their terms of employment. He told Mr Walker he should accompany Ms Ingersole to her desk afterwards to collect any personal belongings she may want to take with her. He explained that she had access to a lot of important information at the Club. I accept Mr Moore's evidence about the events of and meeting with Ms Ingersole on 1 March 2012 in which she was afforded the notification consultations and discussion obligations imposed under cl.8 of the Award. His evidence in this respect does not render unreliable Mr Moore's evidence about his reason for adverse action in relation to Ms Ingersole or in any way suggest that he was motivated by her possession or past or possible exercise of workplace rights. Such evidence is not consistent with the claims about 'peremptory' dismissal on 1 March 2012 to prevent Ms Ingersole complaining, or inquiring, whether to Mr Fraser or otherwise.

285. Insofar as there may be some suggestion that because of his presence in the Club house on 1 March 2012 Mr Moore was in some way involved in the claimed peremptory dismissal of the Applicant, as set out above it has not been established that the manner in which the Applicant was dismissed and dealt with on 1 March 2012 was peremptory as claimed in the Amended Statement of Claim. Nor is there any substance in the

contention that the Club failed to meet its obligations under cl.8 of the Award in the 1 March 2012 meeting with Ms Ingersole.

286. I am satisfied that it has been established that Mr Moore's operative reasons for any adverse action in relation to Ms Ingersole did not include any of the proscribed reasons relied on by the Applicant.

287. Moreover, I am not satisfied that Mr Moore's evidence supported the proposition that Mr Geraghty's mind was the practically operative mind of the Club in this regard. Contrary to this suggestion, I am satisfied that Mr Moore was an independent decision-maker who had formed his own view about the need for a restructure. Mr Moore, like Ms Michel and Mr Dakin, provided a logical explanation for his view that the restructure by making two positions redundant was an appropriate response to the Club's financial circumstances. The fact that he discussed this issue and the possibility of the administration manager's position being made redundant with Mr Geraghty and subsequently agreed with and voted for the particular proposal put by Mr Geraghty at the Board meeting of 29 February 2012 does not go to show that Mr Geraghty's mind was the practically operative mind of the Club in this respect or that Mr Moore and the other Board members simply "*rubber-stamped*" a decision made by Mr Geraghty.

288. Mr Geraghty also gave direct evidence about his reasons for voting in favour of making the Administration Manager's position redundant based on the business case for redundancy. His evidence is that he did not vote in favour of making this position redundant because Ms Ingersole had or had proposed to exercise a workplace right, in particular a right to consult.

289. In his affidavit Mr Geraghty referred to his accountancy qualifications and his employment history. He was a Club Board member from October 2002 to October 2010 and again from October 2011 on. He was Vice President from October 2005 to October 2009 as well as President for the year from 2009 and from October 2011 on. He was a member of the Finance Committee throughout his Board membership, except in the year 2003.

290. In relation to the circumstances leading up to the redundancy resolution, Mr Geraghty gave evidence that in his view the Club's

financial position leading up to Christmas 2011 was "*not sound.*" The financial statements for the Club provide an objective basis for such a view. He did not consider the operating loss of $210,460 for the six months up until December 2011 was "*acceptable under any standards*" and he was of the view that the Club needed to generate additional revenue and find additional cost saving measures. He referred to the fact that the Board had identified the need for significant capital works.

291. Mr Geraghty gave evidence about the principles used by the Board in assessing the Club's financial performance and determining the extent of capital projects to be undertaken and their affordability. He explained that "*below the line*" items, such as monthly management accounts and entrance fees were notionally not relied on to top up operating costs of the Club but were allocated towards major capital projects. Mr Dakin's evidence about relevant operating losses was to the same effect.

292. Mr Geraghty maintained that his "*deep*" concern about the Club's financial position started in January 2012. His evidence was that he then considered how income could be increased and expenses decreased and "*ended up*" with staffing levels and the issue of duplication of responsibilities of responsibilities of management staff. I accept that from Mr Geraghty's perspective that the Club's financial situation was not the same issue as the performance and remuneration of the CEO which was of concern in 2010.

293. In cross-examination Mr Geraghty explained that after the February 2012 Finance Committee meeting he felt that the operating profit was not up to standard, that the Club was losing money and that hard decisions had to be made to save costs. In his view one way to save costs was to reduce staff costs and this led him to review position descriptions. He identified duties that could be redistributed if the administration manager's position were to be made redundant by the Board.

294. Mr Geraghty did not recall speaking to Ms Michel at or soon after the Finance Committee Meeting of 22 February 2012 "*about the need to look at the expenditure on staff as part of the concern about expenditure generally*". Mr Geraghty's denial that he spoke to anyone about his review of position descriptions and did not recall discussion

of restructure is not necessarily inconsistent with Ms Michel's evidence about their conversations.

295. Mr Geraghty's evidence is that he formed the opinion, at the latest in the week prior to the Board meeting of 29 February 2012, that the administration manager's and event coordinator's positions should be made redundant. He accepted that a decision to restructure in this way would be a major change in the administration department of the Club. However his view in this respect does not mean he was the *"directing mind and will"* of the Club or that adverse action in relation to Ms Ingersole was taken on behalf of the Club prior to 29 February 2012.

296. As to the circumstances and manner of the redundancy, Mr Geraghty's explanation that the issue of proposed redundancies was not put on the agenda for the Board meeting of 29 February 2012 that it was a very sensitive issue that affected staff and because a decision had not been made by the Board in relation to any redundancies is logical and supported by the evidence of the other Board members. The fact that he was of the view that there was no point leading staff to be concerned about possible redundancies if the information "*got out*" before it was discussed and a decision was made by the Board does not lead to an inference that his concern was that he did not want Ms Ingersole to find out about his proposal, because she would complain or inquire to Mr Fraser or otherwise.

297. Mr Geraghty's evidence was that he had formed an opinion prior to the Board meeting as to a course of action that could be taken (that is, the redundancies), but that whether action was to be taken would be a matter for deliberation by the Board and a majority decision. This is consistent with the evidence in this respect of the other Board members. He agreed he had an opinion and expressed that opinion at the Board meetings, but having regard to the evidence of the other Board members this does not establish that he was the decision-maker for the Club or that the other Board members rubber-stamped his decision.

298. Mr Geraghty denied that he had spoken to other members of the Board "*about this important matter*" before the Board Meeting of 29 February 2012. It is possible, given the context in which this response occurred,

that the reference to this "*matter*" was taken to relate to his opinion that the redundancies he proposed were appropriate. Mr Geraghty also denied having a discussion with Ms Michel about "*it.*" Ms Michel's evidence about brief general discussion with Mr Geraghty about Club finances is not inconsistent with this evidence. When it was put to Mr Geraghty, he accepted that it was possible that he and Ms Michel had a discussion about the finances of the Club after the Finance Committee meeting.

299. However Mr Geraghty did not recall any relevant conversation with Mr Moore before the Board meeting on 29 February 2012. As indicated, I accept Mr Moore's evidence that shortly before the meeting on 29 February 2012, in the context of a broader discussion Mr Geraghty made him aware of his view that the position of the administration manager should be made redundant. However, accepting Mr Moore's limited recollection of that conversation, the fact that Mr Geraghty informed Mr Moore of his view does not mean Mr Geraghty informed Mr Moore of the proposed motion. Indeed Mr Moore did not accept such a proposition in cross-examination. The fact of this conversation does not support any inference that before the Board meeting the Board members had made a decision or secret plan on behalf of the Club to make Ms Ingersole redundant. It does not support the contention that that Mr Geraghty was the directing mind and will of the Club in this context. There is nothing in Mr Moore's evidence to indicate that, contrary to their direct evidence, either he or Mr Geraghty had as an operative reason for the action taken to dismiss Ms Ingersole on grounds of redundancy (or the manner in which this occurred), the existence or exercise or proposed exercise of workplace rights by Ms Ingersole. In particular Mr Moore's evidence does not support any inference that he and Mr Geraghty were complicit in keeping the possibility of her redundancy from Ms Ingersole to prevent her from exercising her workplace rights to complain or inquire, whether to Mr Fraser or elsewhere.

300. In cross-examination Mr Geraghty elaborated on the reasons he proposed and voted for the redundancy resolution, reiterating his concern about the need to make significant savings that would not jeopardise member services. While I accept that prior to the 29 February 2012 Board meeting he came to the view that the

administration manager and event coordinator's positions should be made redundant, consistent with the Club's Constitution, he drew a clear distinction between his having such a view and the need for the Board to adopt such a proposal.

301. Mr Geraghty also gave evidence in relation to his concern about confidentiality and about what occurred at the Board meeting of 29 February 2012 that was generally consistent with the evidence of Mr Moore, Ms Michel and Mr Dakin. The minutes are consistent with the asserted reasons for the redundancy resolution.

302. I accept that after Mr Geraghty excused Mr Walker from remaining at the meeting, Mr Geraghty referred to the Club continuing to suffer losses, to the figures to the end of January 2012 and to likely suffer further losses from decreasing golf cart numbers. He expressed the view that the inclusion of entrance fees in operating income had the effect of making the financial results look better than they really were, that the Club had high operating expenses and must look to save money. The objective evidence is not inconsistent with such views. He referred to the fact that Board Members had in the past discussed "*over management*" of the Club. He stated that he believed that a restructure of management would save the Club money and not jeopardise member services. He proposed that the roles and responsibilities of the administration manager and the event coordinator be made redundant effective immediately in relation to the administration manager and from 30 March 2012 for the event coordinator position. He referred to the total savings that would result and to other aspects of the proposed restructure. The resolution was passed by a majority of four votes out of seven in accordance with the Board's Constitution.

303. The Applicant submitted that Mr Geraghty's direct evidence about his state of mind, intent and purpose was not reliable and should not have been accepted for several reasons. I have considered whether the concerns about the evidence of Mr Geraghty are such as to render unreliable his direct evidence in relation to his state of mind and reason or reasons for taking the adverse action that has been objectively established by the Applicant.

304. In determining why Mr Geraghty (as one of the relevant decision-makers) took adverse action against Ms Ingersole in 2012 I have considered all the evidence and the overall facts and circumstances, bearing in mind that the Club bears the onus to prove that Ms Ingersole's workplace rights and/or their exercise or proposed exercise was not an operative factor in the mind of Mr Geraghty as one of the decision-makers for the Club (see *Barclay* at [62] per French CJ and Crennan J and *NTEU v RMIT* at [25] – [29]). The search is for his "*particular reason*" that is his actual reasoning as one of the relevant decision-makers. It is for the Respondent to establish that the existence or exercise of workplace rights by Ms Ingersole in the sense relied on in her claim was not a substantial and operative reason for taking adverse action (see *Barclay* at [42] and [148]).

305. In particular, what is in issue is whether having regard to the overall facts and circumstances Mr Geraghty's direct evidence is unreliable because of other contradictory evidence from him or the other decision-makers or because other objective facts or external circumstances are proven which contradict his evidence (see *Barclay* at [45] and [141]).

306. As *Barclay* makes clear, the question of whether adverse action was taken because of a proscribed reason is a question of fact to be determined having regard to all the evidence in relation to the facts and circumstances of the case. The fact that Ms Ingersole had or had exercised or proposed to exercise workplace rights (in particular rights either under cl.8 of the Award or the right to complain or inquire in response to the 2010 Management Plan or decision to consider restructure) is not to be treated as necessarily a factor which must have had something to do with Mr Geraghty's reasons for the particular adverse action taken (*Barclay* at [62]). Of particular relevance in relation to Mr Geraghty's reasons is the fact that it would be a "*misunderstanding*" to require that the establishment of a decision-maker's reasons for adverse action "*must be entirely dissociated from an employee*" possessing proscribed attributes (*Barclay* at [62]). Moreover the search is not for unconscious or objective reasons but rather for the reasoning actually employed in relation to the adverse action in question (*Barclay* at [121] – [124]).

307. According to the Applicant, Mr Geraghty's motivations in 2012 went back to the events in May 2009 relating to the two tee start, his interaction with Ms Ingersole in relation to that issue and the criticism he received at the next Board meeting. Insofar as it appears to be contended that Mr Geraghty "*had it in for*" Ms Ingersole because of the two tee incident and the 2010 auction incident, this was specifically addressed by Mr Geraghty. Such a suggestion is contrary to objective evidence about subsequent dealings between Mr Geraghty and Ms Ingersole and the evidence about the Club's financial position in 2012.

308. I do accept that Mr Allsop and Mr Muter were of the view that Mr Geraghty's attitude to Ms Ingersole changed from that time to one of coolness, although I note to the contrary polite and appropriate emails between Mr Geraghty and Ms Ingersole thereafter in evidence before the Court. However, if Mr Geraghty was, contrary to my view, motivated by some long-held underlying malice towards Ms Ingersole that developed over the two tee start issue in May 2009 that would have nothing to do with proscribed reasons relating to her workplace rights. Nor could it have anything to do with the past exercise of rights and entitlements under the Award, which did not come into effect until 1 January 2010.

309. Such evidence as there is in this respect is not such as to render unreliable Mr Geraghty's evidence that the dismissal of Ms Ingersole in 2012 was not because Ms Ingersole had or proposed to exercise or had exercised a workplace right. I am not satisfied that this incident informed Mr Geraghty's motivations in suggesting to the Board that Ms Ingersole's position should be made redundant, such that his direct evidence about his reasons for the dismissal should not be accepted. Not only is Mr Geraghty's evidence plainly to the contrary, but ultimately his evidence about his reasons in 2012 was consistent with the views of the other Board members who voted for the proposal. His evidence was that from an accounting perspective the Club had excessive recurrent expenditure and there was a need to stem the outflow of cash. He was of the view that making a decision to make two particular administrative positions redundant (including the administration manager's position) would make relatively significant savings and the responsibilities could be performed by other

employees. Even if Mr Geraghty did not like Ms Ingersole, that does not render unreliable his evidence that the action he took was not for reasons that included a reason related to Ms Ingersole's workplace rights given the evidence that is consistent with his asserted reliance on the Club's financial situation.

310. The Applicant also drew attention to Mr Geraghty's action in stopping Ms Ingersole's attendance at Board meetings while he was President and to the events of 2010. I accept that Mr Geraghty expressed the view in October 2009 that Ms Ingersole was capable of influencing Board members. He was also of the view that recording the minutes was a matter for the CEO as Club Secretary. However such views are not such as to support the inference that in 2012 Ms Ingersole was "*singled out*" by Mr Geraghty for redundancy with no real or genuine consideration of other options to deal with the financial situation of the Club such as to raise doubt about whether his reasons for adverse action, in particular his role in voting for her redundancy, was for an operative reason that related to her workplace rights.

311. Again, what is in issue is not whether Mr Geraghty liked Ms Ingersole or even whether Ms Ingersole's redundancy was objectively justified (see *Barclay* at [44] and [121] – [127]). Rather, the inquiry is whether the reasons of the decision-makers at the time the particular adverse action in question was taken included, as a substantial and operative factor, a proscribed reason relating to Ms Ingersole's workplace rights. The fact that there is evidence to suggest some *"coolness"* in the relationship between Ms Ingerosle and Mr Geraghty and of some relatively minor interactions or incidents (including in relation to the 2010 auction issue) that Ms Ingerole felt reflected a changed attitude on Mr Geraghty's part in 2009 to 2010 does not, seen in the context of the overall facts and circumstances of the case (in particular the evidence about the financial position of the Club), render Mr Geraghty's direct evidence about his reasons for the adverse action relating to the dismissal of MsIngersole on grounds of redundancy and the surrounding circumstances or the absence of a proscribed reason for such action relating to the existence or exercise of workplace rights unreliable.

312. I am satisfied that Mr Geraghty contemplated the redundancy of the administration manager's position in the context of the events leading up to the requirement that the CEO prepare a Management Plan. However there is evidence in the Minutes of the Remuneration Committee and 2010 Board meetings indicating that this proposal arose in different circumstances out of a primary concern about the CEO's pay, performance and roles. The mere fact that Ms Ingersole had exercised workplace rights in 2010 does not make the onus on the Club heavier (*Barclay* at [62] – [66]) per French CJ and Crennan J). I note in this respect that the redundancy resolution moved by Mr Geraghty also proposed making redundant a position of another employee in relation to whom there is no evidence about exercising workplace rights (see *Barclay* at [63]).

313. Although the evidence does not go so far as to show that Ms Ingersole was the main target for redundancy in 2010, I am satisfied such a possibility was under consideration and was discussed by Mr Geraghty in his August 2010 conversation with Mr Muter. However the objective circumstances in 2010 and 2012 differed. The Management Plan was a response to concerns expressed at the 2010 Remuneration Committee Meeting, largely about the role and remuneration of the CEO. In 2012 there was clear financial evidence before Mr Geraghty and the other Board members on which it was open to them to be of the view that immediate savings were necessary. That is so despite the fact that Mr Allsop and Mr Muter (who were not members of the Board at the relevant time) were of the view that in February/March 2012 the Club was in a strong and viable financial position (Mr Allsop) and was not in financial difficulties (Mr Muter).

314. The Management Plan did not propose making Ms Ingersole redundant. Ms Ingersole was consulted in 2010 (although the evidence does not go so far as to show that the reason there was no decision to make her redundant was because she exercised workplace rights). Mr Allsop's evidence is that there was a benchmarking survey in 2010 which showed the Club was run efficiently and profitably and was not overstaffed. I accept that this was a reference to the Management Plan. Mr Geraghty did not stand for re-election to the Board for the year from October 2010. He was not privy to Board discussions during that period. Consistent with the recommendations in the Management Plan,

no further action was taken to make Ms Ingersole's position redundant prior to the events of 2012.

315. The Applicant submitted that Mr Geraghty was not prepared to concede that he had wanted to make the Applicant's position redundant in 2010 and that it was likely her position was the position that would have been affected by any 2010 management restructure arising out of issues about the CEO's roles and responsibilities. There is some force in the this contention, although Mr Geraghty's view in 2010 that the administration manager's position should be made redundant is to be seen in light of issues raised at that time to the effect that the CEO was under-utilised and that he could perform the tasks of the administration manager. I accept that Mr Geraghty came to this view in 2010. However what is in issue is Mr Geraghty's reasons for adverse action in 2012.

316. The Applicant submitted that Mr Geraghty's concern that she had some input into the Management Plan Mr Fraser prepared in 2010 was consistent with the fact that the 2012 proposals were deliberately kept from her because of her past exercise of workplace rights. Mr Geraghty denied that he was motivated to dismiss Ms Ingersole in 2012 because she had exercised or proposed to exercise workplace rights in 2010 (in particular by complaining or making an inquiry to the CEO). Involvement in preparing a Management Plan is not the exercise of workplace rights. Given the evidence in relation to the financial circumstances of the Club in 2012, the evidence before the court about past events does not amount to evidence of external circumstances or facts that goes so far as to render unreliable Mr Geraghty's evidence that his reasons for adverse action in 2012 (in particular in relation to the redundancy resolution and the surrounding circumstances) did not include as an operative reason Ms Ingersole's possession or exercise of workplace rights.

317. I accept the evidence of the other Board members to the effect that there was no decision by the Club or secretive plan among the Board members prior to the Board meeting on 29 February 2012. While Mr Geraghty had come to a decision before the Board meeting that the Applicant's job should be made redundant if the Board voted for redundancy, there was no such decision by the Club. There was no

obligation on an individual Board member to discuss proposals or views he or she had formed with Ms Ingersole. Any such discussion in advance of a decision by the Board would, as the other Board members attested, have been inappropriate.

318. The Applicant raised a number of other issues in relation to the reliability of Mr Geraghty's evidence. The fact that Mr Geraghty was familiar with the rights of an employee to inquire or complain about his or her employment and the application of the Award to Ms Ingersole is to be seen in light of the remarks by French CJ and Crennan J in *Barclay*. It would be an error to treat this fact or Mr Geraghty's knowledge in this respect as necessarily a factor which must have had something to do with the adverse action in question.

319. The fact that Mr Geraghty had marked the administration manager's position description with a view to redistributing a significant part of her duties is consistent with his evidence that he was considering whether such duties could be redistributed. Counsel for the Applicant took issue with the fact that Mr Geraghty was not prepared to agree that 50 per cent of the duties had been struck out by him and submitted generally that an examination of the document suggested that the striking out would be at least 50 per cent and that the proposed redistribution accounted for all the duties. However this criticism of Mr Geraghty's frankness in his evidence overlooks the fact that not all the duties were "*struck out*" by him on the position description and that there is no evidence as to the work involved in each area of responsibility described in the position description. It is the case that the position description for the administration manager also bears other notations that appear to indicate possible reallocation of duties. That does not render Mr Geraghty's evidence about his view of the percentage of duties he "*struck out*" incorrect. It is not demonstrative of such a lack of frankness in his evidence as to raise doubt about the reliability of his evidence in relation to his reasons for his involvement in the decision-making and actions that constituted adverse action.

320. The absence of evidence of other position descriptions was also raised, apparently in support of the proposition that Mr Geraghty "*had it in for*" Ms Ingersole. However these proceedings only involved Ms Ingersole. Mr Geraghty's evidence was that he also came to the

view that the event coordinator's duties could be performed by other employees. Consistent with this view, at the Board meeting of 29 February 2012 he suggested a new reporting regime and that the function supervisor's role could be expanded to include organising and promoting events.

321. The Applicant also took issue with Mr Geraghty's evidence that while he was of the view that one way to address the Club's financial situation was to reduce staff costs and that this led him to review position descriptions, he did not speak to anybody "*about this*". He agreed he "*just did this totally off* [his] *own bat*" and that he "*didn't speak to*" any of the other board members until the meeting on 29 February 2012.

322. Mr Geraghty's evidence in this respect is to be seen in the context of the questioning about the procedure he followed. He did not recall any discussion with Ms Michel at or after the Finance Committee meeting about the need to look at the expenditure on staff as part of her concern about expenditure generally, but later conceded that it was possible they had a conversation about the finances of the Club after the Finance Committee meeting. He acknowledged that Ms Michel was concerned about the finances, did not recall she said anything to do with a restructure, but that they certainly needed to look at cutting costs. Having regard to the manner in which the questioning proceeded the differences in recollection between Mr Geraghty and Ms Michel are not such as to amount to an inconsistency that would support the view that his evidence about his motivation was unreliable.

323. While on its face the evidence of Mr Moore (which came after Mr Geraghty's cross-examination) may in one sense be seen as inconsistent, Mr Moore did not suggest that he was told that Mr Geraghty intended to propose a resolution at the Board Meeting and on Mr Moore's account he initiated the meeting to give Mr Geraghty the benefit of his years of experience and raised the issue of possible redundancies.

324. Mr Geraghty's failure to recollect such a discussion raises concern about his recollection of factual events. As indicated, where there is a difference in this respect I prefer the evidence of the other witnesses. However seen in light of the evidence of the other three Board

members and having regard to the manner in which Mr Geraghty's evidence emerged, it is not indicative of a lack of credibility in relation to his reasons for the particular adverse action in issue.

325. Much of the criticism of Mr Geraghty appeared premised on the contention that he was the directing mind and will or the effective decision-maker for the Club or that the other Board members merely rubber-stamped a decision made by Mr Geraghty. This is contrary to the evidence of the other Board members. Nor, on their evidence, was there any "*secretive plan*" prior to the meeting. Having regard to all the evidence Mr Geraghty's lack of recollection of discussions with other Board members does not suggest the contrary.

326. Mr Geraghty's failure to recall the number of apprentice greenkeepers, what they earned or whether some of them were casuals was also criticised by the Applicant as "*vagueness*" supporting the proposition that there was no real or genuine consideration of other options in dealing with the financial situation other than the redundancy of the positions of the Applicant and the event coordinator. It was submitted that this also suggested that the Applicant was "*singled out*". Mr Geraghty's failure to recall such specific details about course staff is not such as to raise doubt about his motivation in the manner contended for by the Applicant, let alone such as to suggest that his reasons related in any way to her holding or exercising workplace rights to complain or inquire. Mr Geraghty explained his concern that salaries for five administrative employees were disproportionately high compared to the course staff. It was his view that it was desirable not to jeopardise member services and that the responsibilities of both the administration manager's and the event coordinator's roles were transferable and could easily be re-delegated to other employees.

327. Issue was also taken with Mr Geraghty's denial that the concern he expressed at the meeting on 29 February 2012 about previous leaks of Board discussions in some way related to the events of 2010 and Mr Muter's 2010 address to the Board about exercising care in implementation of any proposed redundancy process. Mr Geraghty's denial was said to be "*unlikely*". This is not supported by the evidence. Mr Geraghty explained that his concern was that over the years members had often approached Board members saying they had heard

particular things and that he was not blaming anyone in particular for such leaks. There is nothing in the evidence to support the contention that Mr Geraghty had a concern in 2012 that Mr Muter (who was not then a Board member) had previously leaked certain Board discussions. Mr Geraghty's evidence about his concern about confidentiality and how he raised the redundancy resolution is not such as to raise doubt about the reliability of his evidence about his reasons for adverse action.

328. Moreover the fact that Mr Geraghty proposed making Ms Ingersole redundant is to be seen in light of his explanation and evidence as to his reasons for that proposal based on the financial situation of the Club. He explained the basis of his proposal at the Board meeting. His explanation to the Court of the basis of the proposal is consistent with the objective evidence. On all the evidence the fact that there had been an earlier proposal to make Ms Ingersole's position redundant in 2010 which did not proceed is not supportive of the proposition that Mr Geraghty, as one of the decision-makers, reached the view in 2012 that Ms Ingersole should be made redundant and voted for that proposal for reasons that included a prohibited reason related to her possession, exercise or proposed exercise of workplace rights.

329. Nor are the circumstances supportive of the proposition that the 2012 decision was concealed or carried out in a way so that the Applicant was not able to make complaints or inquiries. Much of the Applicant's criticism in this respect was on the basis that there was a decision before the Board meeting of 29 February 2012 and that there was concealment for a proscribed reason prior to that date. Thus, the Applicant submitted generally that the "*unsatisfactory nature*" of the Board Members' evidence, in particular that of Mr Geraghty, went to show that the decision or proposal to make Ms Ingersole redundant was kept confidential because of the concern that she would have made some complaints or inquiries and that this "*concealment*" was for the purpose of trying to obviate or avoid opposition or the initiation of a dispute resolution process by Ms Ingersole which might have jeopardised the proposal to make her job redundant.

330. However, there was no decision by the Club before the redundancy resolution. Consistent with the evidence of the other Board members,

Mr Geraghty rejected the proposition that he knew in advance what the Board decision would be. He provided a logical, reasonable explanation for why the proposal was kept confidential before the Board made a decision. This does not suggest "*concealment*" for some ulterior motivation related to Ms Ingersole's having or exercising workplace rights either in the past or at that time.

331. While Mr Geraghty had formed a clear view prior to 29 February 2012 that Ms Ingersole's position should be made redundant, I am satisfied that an operative reason for his actions, including the manner in which he put the proposal to the Board, did not include preventing the exercise of workplace rights by Ms Ingersole, in particular the exercise of rights to be consulted and/or notified and/or participate in discussion.

332. Mr Geraghty was involved in the events of 1 March 2012 on behalf of the Club. However, as discussed in relation to Mr Moore, the Club met its obligations under cl.8 of the Award and it has not been established that there was a peremptory dismissal constituting adverse action within s.342 of the Act.

333. The Applicant submitted generally that the fact that her dismissal occurred in circumstances where Mr Fraser was on leave and would have advocated compliance with Clause 8 before the adverse action was taken went to show it was kept secret for the reason that had she been informed about it she would have exercised her workplace rights under the Award or to complain. However, there was no definite decision by the Club before the redundancy resolution. Insofar as it is alleged that the fact that Mr Fraser was on leave at the time of the adverse action was relevant because he was the person to whom the Applicant could make a complaint or inquiry, Mr Geraghty provided an explanation consistent with the evidence of other Board members about why he kept the proposal he decided to put to the Board confidential. The decision to make Ms Ingersole redundant was a matter for the Board, not the CEO. The CEO was on indefinite sick leave.

334. In relation to the events of 1 March 2012, as discussed above, Mr Geraghty acknowledged that Mr Walker was instructed to meet Ms Ingersole on her arrival. However this was to ensure she met with Mr Walker, Mr Geraghty and Mr Moore to be notified, consulted and

have discussions about the major change within cl.8 of the Award. Mr Walker was not told to follow her all around the Club until she came to the Boardroom. Mr Moore provided an explanation for the instruction to Mr Walker to accompany her back to her office after the meeting. Mr Geraghty did tell Ms Ingersole (who claimed she had not started work when they opened the door to Mr Fraser's office) that if she was going to make a private call, then she could make it off the premises. However it cannot be suggested that this was a prohibition on allowing her to speak to any other employee or Board member. Notably, Ms Ingersole spoke to Mr Fraser on the phone in this sense and had the opportunity to complain or inquire in relation to her employment. Ms Ingersole was consulted and notified about the redundancy decision in the meeting on 1 March 2012. These events are not such as to render unreliable Mr Geraghty's evidence about his reasons for voting for the redundancy resolution or the surrounding circumstances.

335. I am satisfied that Mr Geraghty was one of the decision-makers for the Club in relation to the termination of Ms Ingersole's employment and that it has been established that no adverse action taken by him in relation to Ms Ingersole was taken for a reason that included as an operative reason any of the proscribed reasons.

## Conclusions in relation to adverse action claims

336. The evidence of the Board Members who voted in favour of the redundancy resolution satisfies me that they, as the directing mind and will of the Club, did not take adverse action against Ms Ingersole for a prohibited reason. They each gave evidence, which I accept, that the reason they each voted in favour of the proposal was because of the financial circumstances of the Club. The witnesses were unshaken on that aspect of their evidence. It was also plain on the evidence of these witnesses that a decision of the Board could not be taken for granted.

337. There is no basis for suggesting that independently-minded Board members, each with substantial corporate experience, who clearly took their responsibilities as directors seriously, were merely ciphers and that Mr Geraghty was the directing mind and will of the Club, or that they had each in some way prejudged the outcome of a meeting of the

Board, or that the manner in which the Applicant was dismissed from her employment on the grounds of redundancy was for a purpose that included a prohibited purpose that related to the fact that she had or had exercised workplace rights or to prevent her exercising workplace rights.

338. Moreover there was evidence before the Board (and before the Court) supportive of their views in relation to the financial position of the Club. It is not to the point that former members of the Board or those who voted against the proposal would or may have taken a different view as to the appropriate response, if any, to the financial situation of the Club.

339. What is in issue is whether a proscribed reason was an operative reason for the decision-makers taking adverse action and the manner in which that occurred, not whether or not those reasons were, objectively, right or wrong (see *Barclay*). Having regard to such evidence as there is in relation to the Club's financial situation that was considered by the Board members, the views of Mr Allsop and Mr Muter in relation to the financial viability of the Club do not amount to contradictory evidence or proof of objective factors contradicting the evidence of the decision-makers.

340. Insofar as issue was taken with the circumstances leading up to the redundancy resolution, it is the case that some individual Board members formed the view that Ms Ingersole's position should be made redundant before the Board Meeting on 29 February 2012. Mr Geraghty was of this view. Ms Michel individually came to the same view in her own mind. There was a discussion between Mr Geraghty and Mr Moore prior to the Board Meeting of 29 February 2012 at which the redundancies of the administration manager's position and the event coordinator's position were canvassed.

341. However the fact that Mr Geraghty was of this view and that some of the other directors had themselves formed the view that such action would be appropriate, has to be seen in light of the fact that there could be no redundancy until there was a decision to this effect by a majority of the Board members in favour of the redundancy. As discussed above, it has not been established that a "*definite decision*" had been made by the four members of the Board who ultimately voted for this

proposal prior to the meeting of 29 February 2012. Nor does the evidence establish that any prior secretive plan amounting to adverse action was made among the Board members.

342. The Respondent has discharged the onus on it under s.361 of the Act. It has demonstrated that it did not take the adverse action of dismissal of the Applicant for a proscribed reason or for reasons that included a proscribed reason.

343. Hence this part of the Applicant's adverse action claim is not made out.

344. It was asserted that the Applicant was dismissed without any notice or warning. As discussed above this claim was not made out. Ms Ingersole was given notice in a meeting on 1 March 2012. More generally, I accept the explanation that Mr Geraghty and the other Board members gave for not informing Ms Ingersole of any proposal to make her redundant before it was voted on by the Board. There was, in any event, no obligation to inform her of any such proposal.

345. The Club did not refuse or fail to consult Ms Ingersole about the decision it made to introduce major changes, which was the decision to make her redundant. As discussed above, she was consulted and notified in the sense required under cl.8 of the Award in the meeting on 1 March 2012.

346. There was also said to be a peremptory dismissal on 1 March 2012, after the Board Meeting on 29 February 2012 Mr Geraghty and Mr Moore had a discussion with Mr Walker in which he was informed he would have to notify Ms Ingersole the next day. His account of what occurred on 1 March 2012 and that of Ms Ingersole do not support the claimed adverse action. To the extent that the manner in which Ms Ingersole was advised of her redundancy and what occurred thereafter could be characterised in any sense as "*peremptory*", it has not been established that what occurred went so far as to injure the Applicant in her employment or alter her employment position to her prejudice within s.342 of the Act.

347. The Applicant did not maintain the contention that she was not allowed to participate in a dispute resolution process. The adverse action claim is not made out.

## Breach of section 45 of the Fair Work Act 2009

348. The Applicant also contended that the Respondent failed to comply with the provisions of cl.8 of the Act and in so doing contravened a term of the Award in breach of s.45 of the Act.

349. However, as discussed in detail above, cl.8 of the Award only imposed a duty to consult once a relevant "*definite decision*" had been made as is clear from cl.8.2(b). As the Respondent submitted, the obligations under cl.8 direct attention to the nature of the decision in issue. In this case the decision was the decision by the Board of 29 February 2012 to make the position occupied by the Applicant redundant. No obligation to consult arose in relation to that decision until the definite decision had been made. The obligation under cl.8 is not an obligation to discuss proposals. Nor is it an obligation on individual directors to discuss with the Applicant their views, however firm, in advance of a meeting of the Board (cf. the type of clause considered in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Ltd* (2010) 198 IR 382; [2010] FCA 591).

350. It has not been established that the nature of the decision in question was a two-step process of which the first step (whether in the meeting on 29 February 2012 or beforehand) was a decision in relation to organisation or structure in relation to workplace change which activated the cl.8 obligation in anticipation of a second step identifying what positions were to be made redundant. Rather, the only *"definite decision"* in question was the decision to make the Applicant's and one other position redundant.

351. Thus the obligation was to consult about the way in which that definite decision was to be implemented. As discussed above, that was done in the meeting on 1 March 2012 which was at the earliest practicable opportunity after the decision was made. For the reasons set out above it has not been established that there was a failure by the Respondent to comply with the provisions of cl.8 of the Award.

352. Insofar as it was submitted that the Respondent failed to comply with cl.9 of the Award and by so doing it contravened s.45 of the Act, this has not been made out. There is nothing in the evidence before the

Court to support any contention that the Applicant either sought to participate in a dispute resolution process or that the Respondent in any way prevented her or hindered her from doing so or precluded the exercise of such right. No breach of s.45 of the Act has been established.

**Sections 44 and 117 of the FW Act**

353. Ms Ingersole also claimed that the Club contravened s.44 of the Act in that it failed to give her the notice required under s.117 of the Act.

354. Section 44(1) of the Act provides that an employer must not contravene a provision of the National Employment Standard. The National Employment Standards in Part 2-2 of the Act (including s.117) are minimum standards that apply to the employment of employees and cannot be displaced (see s.61(1)).

355. Section 117 of the Act is relevantly as follows:

*Notice specifying day of termination*

*(1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).*

*Note 1. Section 123 describes situations in which this section does not apply.*

*Note 2. Sections 28A and 29 of the Acts Interpretation Act 1901provide how a notice may be given. In particular, the notice may be given to an employee by:*

*(a) delivering it personally; or*

*(b) leaving it at the employee' last known address; or*

*(c) sending it by pre-paid post to the employee's last known address.*

*Amount of notice or payment in lieu of notice*

*(2) The employer must not terminate the employee's employment unless:*

*(a) the time between giving the notice and the day of the termination is at least the period (the* ***minimum period of notice*** *) worked out under subsection (3); or*

*(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.*

....

[Subsection 3 provides a method of calculation of the requisite period of notice to be given to an employee based on his or her period of continuous service "*at the end of the day the notice is given.*"]

356. Section 28A of the *Acts Interpretation Act 1901* (Cth) is as follows:

*(1) For the purposes of any Act that requires or permits a document to be served on a person, whether the expression "serve", "give" or "send" or any other expression is used, then the document may be served:*

*(a) on a natural person:*

*(i) by delivering it to the person personally; or*

*(ii) by leaving it at, or by sending it by prepaid post to, the address of the place of residence or business of the person last known to the person serving the document; or*

*(b) on a body corporate – by leaving it at, or sending it by prepaid post to, the head office, a registered office or a principal office of the body corporate.*

*(2) Nothing in subsection (1):*

*(a) affects the operation affects the operation of any other law of the Commonwealth, or any law of a State or Territory, that authorises the service of a document otherwise than as provided in that subsection; or*

*(b) affects the power of a court to authorise service of a document otherwise than as provided in that subsection.*

357. Section 29 of the Acts Interpretation Act is headed "*Meaning of service by post*" and is as follows:

> *(1) Where an Act authorizes or requires any document to be served by post, whether the expression "serve" or the expression "give" or "send" or any other expression is used, then the service shall be deemed to be effected by properly addressing, prepaying and posting the document as a letter and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.*
>
> *(2) This section does not affect the operation of section 160 of the Evidence Act 1995.*

358. Under s.160(1) of the Evidence Act, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address in Australia was received at that address on the fourth working day after having been posted.

359. Ms Ingersole did not raise any issue in relation to the minimum period of notice to which she was entitled. Rather, her contention was that the Club failed to comply with s.117(1) of the Act because she was dismissed from her employment on 1 March 2012 but was not "*given*" written notice of her dismissal until on or after 6 March 2012.

360. The Respondent did not dispute that s.117 was applicable. However, the Club denied that it contravened s.117(1), primarily on the basis that the letter dated 1 March 2012 sent that day by prepaid post to the Applicant's last known address, gave written notice to Ms Ingersole on the day of termination by operation of s.28A(1)(a)(ii) of the *Acts Interpretation Act 1901* (Cth).

361. The unchallenged evidence of Ms Turner, the receptionist and membership coordinator for the Club, is that at 16:58 on 1 March 2012 she posted a notification of termination letter addressed to Ms Ingersole dated 1 March 2012 by registered post. There is no issue about the address to which the letter was sent. A delivery confirmation from Australia Post indicates that the letter sent by registered post on 1 March 2012 was collected by or on behalf of Ms Ingersole on 13 March 2012.

362. Ms Turner also attested to the fact that on or about 6 March 2012 she made arrangements with a courier to courier another copy of the notice of redundancy letter to Ms Ingersole. Annexed to her affidavit was a copy of an invoice from Pack and Seal, Castle Hill stating that this letter was delivered on 6 March 2012. It was signed for by "*Libby*".

363. Ms Ingersole's evidence is that sometime after 6 March 2012 (to the best of her recollection two or three days after that date), she received two letters in the mail from the Club: one of which, dated 1 March 2012, was the original notification of termination due to redundancy and the other of which, dated 6 March 2012, enclosed a copy of that letter and referred to the fact that while it had been sent to her by registered mail on 1 March 2012, the Club understood that it had not been received. Both letters provided details of the entitlements paid into Ms Ingersole's bank account on 1 March 2011. Contrary to Ms Ingersole's recollection, on the basis of Ms Turner's evidence I accept that the letter of 6 March 2012 was delivered on that date and that the letter of 1 March 2012 was collected on 13 March 2012.

364. Ms Ingersole contended that the day of her termination was 1 March 2012. She accepted that oral notice was given to her that day and that she was given payment in lieu of notice pursuant to s.117(2) but contended her employment was terminated before she was given written notice of the day of the termination as required under s.117(1) of the Act.

365. The Applicant submitted that when regard was had to ss.28A and 29 of the Acts Interpretation Act (referred to in Note 2 to s.117(1)), it was apparent that while s.28A allowed for service of a document on a person by sending it by prepaid post to the address of the place of residence of that person, the effect of s.29 was that service by post was not effected until the time that the document would be delivered in the ordinary course of post. It was submitted that by virtue of s.160 of the Evidence Act that would be the fourth working day after posting.

366. The Applicant accepted that the notice of termination was posted at 16:58 on 1 March 2012 by Sandra Turner. However, it was submitted that the notice was not given to the Applicant until the time at which service by post was deemed to have occurred or she actually received such written notice.

367. The Respondent submitted that it was not necessary for the purposes of s.117(1) of the Act for the notice to have been received by the employee, that the Club met the requirement to "*give*" Ms Ingersole written notice at the time the notice was posted and that s.29 of the Acts Interpretation Act was not determinative, as there was nothing in the Fair Work Act that required notice to be effected by a particular date.

368. In the alternative, counsel for Respondent submitted that as the notice of termination letter gave four weeks' notice (although it provided for payment in lieu of notice) the day of termination of Ms Ingersole's employment could be seen as 28 March 2012. It was accepted that there were other statements in the notification letter that might indicate that the day of termination was 1 March 2012 and that there might be some infelicity in expression in that letter. However the Respondent submitted that while s.117(2) required a minimum period of notice, the fact that it was effectively commuted by payment in lieu did not alter the characterisation of what had occurred, so that it could be said that a four week period of notice was given which would expire on 28 March 2012.

369. The written notice of termination dated 1 March 2012 is not entirely consistent. Somewhat confusingly, it stated that that Ms Ingersole's position was "*now*" redundant, but then that her position "*will become redundant effective on 28 March 2012*". However in all the circumstances I am not persuaded that the Club intended that its employment relationship with Ms Ingersole should continue until 28 March 2012. The letter continued:

> *As discussed with you, CHCC does not require you to work out your notice period. Your notice period will be paid out to you on termination of your employment.* ***Your last day of employment with CHCC will be on 1 March 2012.*** (emphasis added)

370. The letter also referred to a Schedule of estimated monetary entitlements that would be paid to Ms Ingersole "*on the termination*" of her employment. It advised her that these payments would be deposited into her bank account by close of business on 1 March 2012. Read as a whole, this letter made clear to Ms Ingersole that her employment was to terminate immediately and that payment was being

made in compensation for the payments she would have received if she had been given four weeks notice.

371. The resolution passed at the Board Meeting of the Club on 29 February 2012 was, relevantly, "*that the administration manager's position be made redundant effective 1 March 2012*". It is clear from all accounts of the meeting between Ms Ingersole and Messrs Walker, Geraghty and Moore on 1 March 2012 that she was advised orally that she was being made redundant on that day and that she would be paid out in lieu of four weeks' notice. She was required to relinquish Club property that day. She ceased to work at the Club that day. These factors also suggest that the day of termination of Ms Ingersole' employment was 1 March 2012.

372. The concept "*the day of the termination*" appears in legislation which suggests that there should be no uncertainty in ascertainment of that date. Under s.117(2) of the Act the day of termination may be either the time at which notice that is worked out in accordance with s.117(3) expires or in a case in which the employer has paid the employee in lieu of notice, the day on which the employment is terminated. In this case the Club paid Ms Ingersole in lieu of notice. Moreover s.117(2)(b) refers to payment in lieu of notice "*of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked* ***had the employment continued until the end of the minimum period of notice***." (Emphasis added). Such provisions support the view that, as there was payment in lieu of notice Ms Ingersole's employment was terminated on 1 March 2012. It did not continue until 28 March 2012. As Wilcox J stated in *Siagian v Sanel Pty Ltd* (1994) 122 ALR 333 at 355:

> *It seems to me that, in the absence of evidence of a contrary intention, it should usually be inferred that the employer intended the termination to take effect immediately. This conclusion not only reflects the more accurate meaning of the phrase "payment in lieu of notice"; it accords with common sense. An employer who wishes to terminate an employee's services, and is prepared to pay out a period of notice without requiring the employee to work, will surely usually wish to end the relationship immediately. If the employee is not to work, there is no advantage to the employer in keeping the relationship alive during the period for*

*which payment is made; and there is the disadvantage that the employer will be burdened with employment related costs, such as workers' compensation insurance, payroll tax, liability for leave payments etc. The employer also incurs the risk that some new burden will be imposed in respect of the employment during the period.*

373. In this case there is no contrary intention. It is clear that the Club paid Ms Ingersole in respect of the hours she would have worked between 1 March 2012 and 28 March 2012 in lieu of notice in purported compliance with s.117(2)(b) of the Fair Work Act. Having regard to the language of s.117(2)(b), such a payment in lieu of notice did not have the effect of extending the employment until the date of the end of the minimum period of notice (see s.117(2)(b) and *Siagian v Sanel*).

374. I am satisfied that the day of termination of Ms Ingersole's employment was 1 March 2012. Hence it was necessary for the Club to give Ms Ingersole written notice on or before 1 March 2012.

375. I agree with Ms Ingersole's submission that merely posting the written notice of termination on 1 March 2012 did not suffice to "*give*" her written notice of the day of termination as required under s.117(1) when regard is had to that section and to ss.28A and 29 of the Acts Interpretation Act.

376. The question is not the meaning of "*given*" in some abstract sense but its meaning in s.117 of the Act which clearly envisages that there will be some certainty in relation to the day on which written notice is given. On the general principle that in interpreting an Act primacy should normally be given to the substantive provisions of the Act. It is relevant that it is consistent with the language of s.117(1) of the Act that the written notice be received (or at least deemed to have been given or received) on or before the day of termination. Section 117(1) contains not only a prohibition on termination unless the employer has given written notice of the day of termination but also a specification that the day of termination cannot be before the day the notice is given. On its face this provision envisages written communication being received by the employee no later than the day of termination itself. Such an interpretation is reinforced by the fact that s.117(3) calculates the minimum period of notice based on an employee's period of continuous service "*at the end of the day the notice is given*". Further,

under s.117(2)(a), where there is no payment in lieu of notice (calculated based on the period of service up to the end of the day notice is "*given*") the employer must not terminate the employee's employment unless the time between giving the notice and the day of termination is at least the minimum period of notice.

377. Section 28A(1)(a)(ii) of the Acts Interpretation Act provides that for the purpose of an Act requiring or permitting the service of a document on a person, whether or not the expression "*give*" is used, the document may be served on a person by leaving it at, or by sending by prepaid post to, the address of the place of residence or business of the person last known to the person serving the document. Section 117(1) is a provision that requires or permits the service of a document on a person. It was not disputed that posting a letter by registered post to Ms Ingersole would meet the requirement of sending it by prepaid post to Ms Ingersole's place of residence (see *Minister for Immigration v Singh* [2000] FCA 377 in which O'Connor and Mansfield JJ stated at [30] that the use of registered prepaid mail would satisfy the requirements of sections 28A and 29 of the Acts Interpretation Act).

378. However, what is in issue is not the method of giving written notice, but rather when a notice sent by prepaid post on 1 March 2012 is "*given*" for the purposes of s.117 of the Act, in particular whether such a notice was "*given*" when the letter was posted, or at some later time. In the absence of anything to the contrary in the Act, s.29 of the Acts Interpretation Act has the effect that service of a notice given by post is deemed to have been effected at the time at which the letter would be delivered in the ordinary course to post (unless the contrary is proved).

379. The Respondent submitted that s.29 of the Acts Interpretation Act was not applicable. However both ss.28A and 29 are referred to in the Notes to s.117. Section 13 of the Acts Interpretation Act provides that all material from and including the first section of an Act to the end of the last Schedule to the Act, is part of the Act. It is clear from s.13 and *the Explanatory Memorandum to the Acts Interpretation Amendment Bill 2011* which introduced the present s.13, that Explanatory Notes within an Act are to be treated as part of the Act, albeit the weight to be given to such material in interpreting the terms of the Act will (as in the past) ordinarily be less than the words of a section itself, given the

function of such notes (see *Wacando v The Commonwealth* (1981) 148 CLR 1; [1981] HCA 60 at 16 per Gibbs CJ).

380. The inclusion of the Notes to s.117 in the Act supports the view that both s.28A and s.29 of the Acts Interpretation Act are applicable in determining when notice under s.117 is given. That is also consistent with the language and purpose of s.117 as discussed above.

381. Section 117 of the Fair Work Act authorises service of a written notice of termination by post (albeit it uses the expression "*give*"). Hence, in the absence of proof to the contrary, under s.29 service is deemed to have been effected at the time the letter would be delivered in the ordinary course of post (as to which see s.160 of the Evidence Act).

382. Thus, s.29 would deem a written notice of termination sent by post to be given at the time the letter would be delivered in the ordinary course of post.

383. In this case Ms Turner posted the notification of termination to Ms Ingersole on Thursday, 1 March 2012. In my view merely posting the letter did not satisfy the requirement in s.117(1) that Ms Ingersole be "*given*" written notice of the day of termination in circumstances where the day of termination could not be before the notice was given. Rather, unless the contrary was proved, the notice posted on 1 March 2012,would be deemed to have been given to Ms Ingersole at the time the letter would be delivered in the ordinary course of the post (despite the evidence that the notice posted on 1 March 2012 was not actually received by Ms Ingersole until 13 March 2012). Under s.160(1) of the Evidence Act that would be on 7 March 2012.

384. However, on 6 March 2012 a copy of the written notice of termination of employment was delivered to Ms Ingersole. Under s.28A of the Acts Interpretation Act personal delivery constitutes giving notice to Ms Ingersole. Such notice was given on 6 March 2012. Hence, under s.117(1) of the Fair Work Act the date of termination of Ms Ingersole's employment could not be prior to 6 March 2012. In this respect there has been a contravention of s.117(1) of the Fair Work Act.

## Orders

385. Counsel for the Applicant indicated that she sought penalties for breaches of the Fair Work Act. The hearing proceeded on the basis that any penalty hearing would be conducted at a later date.

386. Under s.545 of the Act the Court may make any order it considers appropriate if satisfied a person has contravened a civil remedy provision, including (see s.545(2)(b)) an order awarding compensation for loss that a person has suffered because of the contravention. Ms Ingersole should be paid for the period between 1 March 2012 and 6 March 2012. There is no suggestion of any other entitlement to compensation for the contravention of s.117. There has been no quantification of salary she would have been entitled to on the basis that her employment continued until 6 March 2012 or of any increase in her entitlements when this additional period is included in the calculations. I intend to give the parties the opportunity to make submissions (unless they are able to agree on proposed consent orders) in relation to an appropriate order for compensation for loss Ms Ingersole has suffered because of the contravention of s.117 of the Act and to agree on directions in relation to the hearing on penalty. Otherwise the application should be dismissed.

**I certify that the preceding three hundred and eighty six (386) paragraphs are a true copy of the reasons for judgment of Judge Barnes**

Associate:

Date: 11 March 2014