Tim Donaghey
Barrister

Level 22, Aickin Chambers
200 Queen Street
Melbourne, Victoria 3000

Level 8, Latham Chambers
67 Castlereagh Street
Sydney, NSW 2000

CASENOTE: Wibowo v Vehicle Monitoring Systems Pty Ltd [2022] FedCFamC2G 23

The Applicant, Mr Erwin Wibowo (also '**Employee'**) was a data analyst employed by the Respondent (also '**Vehicle Monitoring Systems**'). The Employee claimed that his redundancy was because of his complaint (within the meaning of section 341 of the *Fair Work Act* 2009 ('**FW Act**')) and sought relief from VMS.

Background
On 24 February 2020, the Applicant sent an email to his manager and Mr Welch, who was a director of the Respondent, in these terms (part email omitted):

> *Hi Fraser and Chris,*
>
> *I have some concerns regarding my current role's duty, responsibilities, and expectation in the company. I believe that I have been working on a significant portion of tasks falling well outside of my scope of role as a data analyst. At the same time, there is an expectation for me to do all of these tasks to the standard set beyond the expectation for the role for which I am contracted by the company to perform.*
>
> *This has impacted my work-life balance, while also compromising my commitment to my original role. Hence, I would like to highlight the following points:*
>
> 1. *From now onwards, I would like to focus more on my core data analyst responsibilities as outlined in my original contract, dated Dec 2017. If the company would require me to do some reasonable amount of work outside my role, I would do my best to carry on. However, I could not provide guarantee in regard to the quality standard of my work and the timeliness of the task delivery.*
>
> [. . .]

On the following day, one of the recipients of the 24 February email informed the Applicant that he was redundant. The Applicant then brought his claim in the Federal Circuit and Family Court of Australia

Applicant's claim
Based upon the complaint of 24 February, the Applicant made two main claims under section 342 of the FW Act: namely dismissal from his position, and failure to redeploy him.[1] The Respondent responded that the company had been operating at a loss for some years, and it had insufficient work to give to the Applicant.

As is widely known, there are two major elements of a general protections claim. The first relates to workplace rights, and in this instance alleged that there has been an exercise of such rights. Section 340 provides relevantly:

> (1) A person has a workplace right if the person:
>
> [. . .]
>
> (c) is able to make a complaint or inquiry:

[1] The Applicant was self-represented before Judge Riley and sought declarations pursuant to the *Small Business Fair Dismissal Code* which relates principally to unfair dismissal under Part 3-2 of the FW Act - and the *Occupational Health and Safety Act* 2004 (Vic). These appear not to have been pursued with evidence by the Applicant.

[. . .]

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

The Respondent has the burden, by reason of section 361 of the FW Act, to prove that it did not take the adverse action for the prohibited reason or reasons alleged. If the Respondent cannot discharge that burden of proof by evidence, then the Court is bound to accept that adverse action was taken for the prohibited reason and find a breach of section 340.

Judge Riley heard the Application in Wibowo v VMS. Her Honour considered whether the 24 February 2020 email (set out in part above) was a 'complaint' within section 341 of the FW Act. Her Honour found that the Full Court Alam and Whelan, were authority on this question. As noted in Alam (at [75] per Full Court):

> *… it is sufficient if the complaint or inquiry relates to a subject matter for which the contract of employment makes provision.*

Evidentiary considerations
The judge examined 6 December 2019 board minutes which were evidence. Her Honour found that the allegation that VMS was making a loss was made out; but that neither the directors as a group, nor Mr Welch individually, made a decision to make any position redundant prior to the 24 February email being sent.

Her Honour also found that without the 24 February email, it was possible that the Respondent would have decided to make one of the other two roles redundant, rather than the Applicant's, or none at all. Her Honour found that VMS had not discharged the evidentiary burden, entered judgment for the Applicant and indicated the Court would hear the parties on the question of quantum of compensation and penalties.

Significance of the decision

One of the key indicators of a prohibited reason is timing. The fact that the Respondent terminated the Applicant's employment *the day after* the 24 February email – and that the termination was notified by one of the recipients of that email – are key facts. This is so, as they each heighten the likelihood that the Applicant's email was the reason, or one reason for the decision to terminate.

Leaving this aside, Wibowo v VMS has several problems which may cause those considering it to conclude that it is not a useful authority – much less an addition to the list of 'workplace right' authorities, which include Alam, Whelan, PIA Mortgage and others. Due to the nature of the reasons, it's possible that the learned Judge Riley has omitted to give fulsome reasons; or the case is wrongly decided.

Both such issues relate to the 'complaint'. The *first issue* relates to *the terms* of a 'complaint' in section 341. As established by Shea (No 6),[2] in order to fall within the section, the putative 'complaint' must find fault or seek redress'.[3] In effect, the terms of the 'complaint' in this case which is said to be a workplace right is relatively confined: it deals with the duties performed

---

[2] Shea v TRUenergy Services Pty Ltd (No 6) [2014] FCA 271; 314 ALR 346. Note that Shea (No 6) was referred to in the judge's extract from Alam, (see Alam v National Australia Bank Ltd [2021] FCAFC 178, per White, O'Callaghan and Colvin JJ) considering Cigarette & Gift Warehouse Pty Ltd v Whelan [2019] FCAFC 16: see Wibowo v VMS at [41].

[3] See Shea (No 6) above, n2 at [29] and [625]. Note that Shea (No 6) was appealed on grounds not affecting the conclusion I have reached: see [2015] FCA 14. Note also that this paragraph of Shea (No 6) has been applied by many single judges and appeal Courts of the Federal Court of Australia, see for example: SBP Employment Solutions Pty Ltd v Smith, per Rangiah J; Cigarette & Gift Warehouse Pty Ltd v Whelan above n2 at [28]; The Environmental Group Ltd v Bowd [2019] FCA 951 at [128]; PIA Mortgage Services Pty Ltd v King [2020] FCAFC 15 at [10] – [27]; see also Cummins South Pacific Pty Ltd v Keenan [2020] FCAFC 204 per Anastassiou J at [291] where his Honour dissented on this point with the majority, constituted by Bromberg and Mortimer JJ.

by the Applicant and the effect (the 'work-life balance') of his work. In effect, the trial judge treats the 24 February email as if it is a complaint 'about' the employment globally is a workplace right, without there being a complaint about an entitlement. In my view, the Applicant's cause of action (without more) fails at this early hurdle.

The *second issue* when considering whether a complaint has the necessary basis in an 'identifiable source of the entitlement or right' (as that term is used in PIA Mortgage).[4] As Maric v Ericsson Australia[5] found, when considering the Full Court decision in PIA Mortgage:

> *For a person to be 'able to make an inquiry within the meaning of* [section] *341(1)(c)(ii) of the* [FW] *Act, that capacity must be anchored in a legal entitlement of some kind, whether it be statute, contract law, the common law of Australia or some other instrument or thing that confers legal rights.*

This rule from PIA Mortgage, as recited in Maric, is one of the main limitations of section 341 and one not analysed or reflected in the reasoning in Wibowo v VMS.

In effect, the 'complaint' is not about any right or 'entitlement' – but rather about what he, Mr Wibowo is being asked to do during his engagement, when compared to the terms of his contract. The 24 February email, at its heart, is about the Applicant's increased or increasing workload; to the effect that he is being asked to do work apart from his 'core duties'. For this to be a 'workplace right' then Mr Wibowo must have an *entitlement* which corresponds to those duties, not merely a complaint which reflects the 'subject matter', or a subject matter such as the contract. This is treating the contract globally as if it gives rise to a 'workplace right' as a whole.

Mr Wibowo may have such an 'entitlement', but Judge Riley does not say in Wibowo v VMS. In many instances, the employer reserves a power or capacity to give the Employee further duties, or any other duties within an employee's competence – and it is not clear whether this is so here, nor whether that power would be subject to restrictions. Whilst it is not impossible for a contract to do this; it would be extremely unlikely (and in terms a necessary fact for the Court to find, namely that an employee's 'core duties' amounted to a right or entitlement in contract). If this is not the case for Mr Wibowo's contract, then this is a basis for Judge Riley to find that the 24 February email was not a workplace right.

TIM DONAGHEY
AICKIN CHAMBERS
LATHAM CHAMBERS
17 February 2022

[4] PIA Mortgage Services Pty Ltd v King [2020] FCAFC 15; 274 FCR 225; 292 IR 317, per Rangiah, Charlesworth and Snaden JJ. See in particular at [14], per Rangiah and Charlesworth JJ. Note that Snaden J dissented on unrelated issues, going to the words 'able to make' in section 341 of the FW Act.

[5] Maric v Ericsson Australia Pty Ltd [2020] FCA 452; 293 IR 442, per Steward J. This is taken from the headnote at 293 IR.