# Some recent authorities and approaches

# to section 341 of the FW Act

***An Examination***

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## Introduction – The nature of employment and workplace litigation[1]

1. The increased – and apparently, still plentiful[2] – issue of general protections claims including those involving dismissal under the *Fair Work Act 2009* (Cth) ('**FW Act**') has altered the nature of employment litigation. There are several reasons for this.

2. The first is the opposition of the two major types of claims, being unfair dismissal ('**UD claims**') which are brought under Part 3-2 of the FW Act, and general protections claims under Part 3-1 of the FW Act ('**GP claims**').[3] These are the main destination for post-termination claims brought by employees. The contrasting requirements of UD claims and GP claims has created a two-tiered level of litigation for employment disputes based upon termination of employment.

3. The further alteration involves success. Despite the prominence of GP claims being described as a 'fashionable' cause of action,[4] this fashion does not reflect the legal result. In fact, successful claims by individual employee-applicants under Part 3-1 are relatively rare. More common is an applicant who alleges a contravention – or multiple contraventions – and, after evidence is heard, fails.

4. In other words, many applications are not successful – as can be seen from reported cases.

5. There has been a recent shift from UD claims but – both anecdotally, and not the least of on the basis of the FWC statistics cited in footnote 2 on this page - there appears to be

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[1] Tim Donaghey, barrister. https://www.linkedin.com/in/tim-donaghey-726aa7a5/. See also https://www.timdonaghey.com.au/.

[2] 'Plentiful' is perhaps something of an understatement. In the 2020-1 annual report of the Fair Work Commission ('**Commission**' or '**FWC**'), a tally of 29,531 applications were lodged with the Commission, which was a decrease of about 13% upon the previous reported year. Whilst 13,281 UD claims were issued in that period, 4102 GP claims were issued, involving dismissal. Further examination of this statistic is not possible, as the total GP claims not involving dismissal was not separately reported by the FWC. See https://www.fwc.gov.au/sites/default/files/2021-11/fwc-annual-report-2020-21.pdf (accessed on 22 March 2022).

[3] In this paper, I concentrate on 'general protections court disputes', as set out in section 368(4) of the FW Act; but of course intra-employment general protections disputes are also available under the FW Act.

[4] Jessup QC, 'Adverse Action Protections Under the Fair Work Act: Fashioning the Fashionable' (2017) 43(3) Monash University Law Review 604, at 604-5. Available online at http://classic.austlii.edu.au/au/journals/MonashULawRw/2017/18.pdf (viewed on 23 March 2022). By way of comparison, see also Stevenson, 'The plaintiff's new black: adverse action' (online https://www.workplace-lawyers.com.au/wp-content/uploads/2014/11/Adverse_action_paper_2012.pdf) (viewed on 23 March 2022).

greater resort to termination cases as a whole, and not just UD claims as was formerly the case, than ever before.

*The role of GP claims*

6. It is necessary to take a moment to consider an overview and role of GP claims as a whole.

7. While the objects of the 'jeopardy' sections such as section 340 of the FW Act are intended to confer additional rights upon applicants – and protections greater than those provided by the general law[5] - the role of the GP claim is one of a narrow set of particular facts. A GP claim is not a general claim applicable in all circumstances.

8. To this extent – GP claims are comparable with other supra- contractual rights under the FW Act, and other legislation. The FW Act imposes obligations not otherwise present in contract: such as the National Employment Standards. Other legislation including both federal and State discrimination legislation, and the emerging bullying and sexual harassment legislation contained in the FW Act, also impose limited rights and restrictions not a part of the common law.

9. The role of GP claims can be examined from this perspective:

   a. first, whilst claims of a type or kind purely in contract law exist, and are litigated,[6] they are far more seldom brought than the far larger number of statutory claims. When they exist, they may be claims which are limited to failure to pay notice, or some remuneration entitlement;

   b. by contrast, a GP claim is more akin to a 'prohibited grounds' termination which remains in sections 772-4 of the FW Act, or a discrimination claim which prevents or limits the otherwise wide discretionary power of an employer or head contractor and;

   c. it is possible to discern, a more limited emphasis on UD claims, perhaps except when it comes to reinstatement.

[5] See section 336(1) of the FW Act for Boyd v Glenvill Pty Ltd [2021] FCCA 265, per Judge A Kelly, at [336].
[6] Principally in State courts, such as State Supreme Courts.

10. GP claims under Part 3-1 of the FW Act are ubiquitous amongst termination cases. Whilst anecdotally, GP claims are issued not only for termination cases but for 'intra-employment disputes'; the reported cases still overwhelmingly tend to consist of termination claims.

*Mechanics of GP claims – including allegation of dismissal*

11. It is desirable to set out some of the legal elements underpinning the cause of action we are speaking of: these are the fundamental building blocks involved in both pursuing and proving (or defending) a 'general protections dismissal complaint' under the FW Act.

12. When a party seeks relief in this way, the applicant must plead and prove certain elements. The *first element* is that there has been an exercise of a 'workplace right' under section 341 of the FW Act; and the *second element* is that there has been 'adverse action' within the limited scope and meaning of section 342 of the FW Act. Note that the first element is the major focus of this paper.

13. The *third element* which is often merely asserted, is causation. By its nature, causation has to be an assertion by an applicant because no applicant can know what is the mind of a respondent (or in the case of a group or collegiate decision, multiple minds); but this remains a real and tangible limit upon any proceeding.

**-This presentation-**

14. This presentation is not about the UD claims relating to section 387 of the FW Act, which I know tolerably well. This paper explores just one of the elements of GP claims (by way of certain case examples) and focuses on the case law behind these claims. It also explores changes, and in two dimensions: from the early decisions to those post key Full Court decisions such as PIA Mortgage.[7]

15. I now turn to the examination of the elements I have described.

[7] PIA Mortgage.

## Part A- fundamentals of the allegation of 'workplace right' as an element-

*A1. Previous law*

16. Previous law regarded the 'complaint' as in a sense, absolute. That is, any utterance which met the Shea (No 6)[8] test for content would be a 'workplace right' within the legislation.

17. It is not hard to find in the case law prior to 2016 decisions which treat 'complaints' under section 341 as being at large.

18. One such was in Walsh v Greater Metropolitan Cemeteries Trust (No 2).[9] In that case, Bromberg J found that a statement made by the applicant Ms Walsh, that a linen supplier provided sub-quality service was a "complaint" in relation to that employee's employment. His Honour found for the respondent on other grounds.

19. In so finding, His Honour observed that a complaint that raises "potential implications" about a person's employment was sufficient to satisfy the connection necessary for the finding of 'in relation to [the employee's] employment' required in section 341(1)(c)(ii).

20. My view is that this is undoubtedly true. Where my view differs from his Honour's is that the 'linen complaint' was not a complaint for the purposes of section 341 on the basis that it did not involve a right or entitlement pertaining to that particular employee. That is one of the focuses of this Part of the paper.

*A2. Four full Courts*

21. In overview, there are four Full Court decisions examining 'complaints and inquiries' in relation to section 341 of the FW Act. These are (in no particular order) Alam;[10] Cummins South Pacific,[11] Cigarette & Gift,[12] and PIA Mortgage.[13]

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[8] Shea v TRUenergy Services Pty Ltd (No 6) [2014] FCA 271 ('**Shea (No 6)**').
[9] [2014] FCA 456; (2014) 243 IR 468 per Bromberg J.
[10] Alam v National Australia Bank Ltd [2021] FCAFC 178 ('**Alam**').
[11] Cummins South Pacific Pty Ltd v Keenan [2020] FCAFC 204 ('**Cummins South Pacific**').
[12] Cigarette & Gift Warehouse Pty Ltd v Whelan [2019] FCAFC 16 ('**Cigarette & Gift**').
[13] PIA Mortgage, above n7.

22. A further decision, Wong,[14] is currently reserved having been heard by a Full Court in March 2022. The issues under appeal in Wong include the role of workplace rights in that case – and the interaction with the 'decision-maker' involving the section 360 and section 361 evidentiary rules. Being reserved, I cannot comment further on its contents.

23. In this section of the paper I examine the legislation, with a focus on the element of 'workplace rights'. From that examination, I give a summary both from reading the case law and experience in practice which examines how I would determine whether a 'workplace right' is arguable in a particular proceeding – or in many cases not.

*A3. Examining details*

24. It is necessary to set out the fundamentals of the legislation which affect allegations of contravention. I will take section 340(1) as an example; it being one of the 'charge' sections which provide for a contravention of the FW Act involving the parameters of this paper. That section provides relevantly:

***340. Protection***

*(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.*

[14] Wong v National Aust Bank Ltd [2021] FCA 671, per Snaden J. The appeal (which was heard on 3 March 2022, before Katzmann, Charlesworth and O'Sullivan JJ) is currently reserved.

25. In addition to omitting section 340(2),[15] I have also omitted the legislative notes from the section.

*Section 341*

26. Turning to the next section, the expression 'workplace right' in section 340 is a defined term. The definition is extensive, having the effect of expanding this term to include iterations of rights such as: conferences conducted or hearing held by the FWC; making, varying or terminating types of workplace agreements; and other hearings, processes or procedures under the FW Act itself or other workplace laws.

27. Section 341 provides (relevantly):

***341. Meaning of workplace right***

*Meaning of workplace right*

***(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.*

*Meaning of process or proceedings under a workplace law or workplace instrument*

*(2) Each of the following is a process or proceedings under a workplace law or workplace instrument:*

*(a) a conference conducted or hearing held by the FWC;*

[15] Which involves third-party contraventions.

*(b) court proceedings under a workplace law or workplace instrument;*

*(c) protected industrial action;*

*(d) a protected action ballot;*

*(e) making, varying or terminating an enterprise agreement;*

*(f) appointing, or terminating the appointment of, a bargaining representative;*

*(g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;*

*(h) agreeing to cash out paid annual leave or paid personal/carer's leave;*

*(i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);*

*(j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;*

*(k) any other process or proceedings under a workplace law or workplace instrument.*

28. Of these fifteen categories of workplace right (some of which are open and will include many different possible factual situations) the contents of section 341(1)(c) stands out. It does so for three tolerably clear reasons:

a. first, because of novelty. Complaints *per se*, were not previously a part of the rights protected by the pre FW Act legislation. A more confined category of complaint to a 'competent administrative authority' was; but this was seldom used,[16] in part because of the narrowness of the protection offered;

b. anecdotally, many more of the workplace rights alleged involve 'complaints and inquiries' than most other bases for that part of the claim; and

[16] See CSR Viridian Limited (formerly Pilkington Australia Limited) v Claveria [2008] FCAFC 177, per Gray, Goldberg and Jessup JJ. This (and the first instance decision at [2007] FCA 1917) are the very few proceedings ever brought, involving the then section 659(2)(e) of the post-Work Choices *Workplace Relations Act* 1996 (Cth).

c. in contrast to (b), many of those claims involve 'complaints and inquiries' do not succeed.

   This presentation focuses upon the 'complaints' (and, to a significantly lesser extent, inquiries) and recent law on this element in a GP claim.

29. I now turn to the case examinations of the element of 'workplace right'.

## A1. The nature of the first element

30. The case authorities have considered at length;

a. first, the bedrock of the GP claim as a cause of action is words stated, or message sent, which will amount to the 'complaint' qua 'workplace right'. It is desirable that some particularity be given in respect of what the applicant says the 'workplace right' is; and how it relates to other elements (specifically, the 'adverse action' element, and the causation' element).[17] These other elements, whilst significant for the cause of action as a whole, are beyond the scope of this paper.

   I observe that the injunction (in several cases, such as Carbone v McConvill)[18] to be particular is very frequently honoured in the breach by pleaders in this area. In addition to unclear pleadings of causation, there is a tendency to 'overload' pleadings with either multiple allegations, or multiple conclusions as to the legal effect of particular complaints;

b. when dealing with 'complaints and inquiries' the scope of what is or what is not included in each of these categories of action taken by the applicant is key. This means knowing:

   i. what, in the context of section 341(1)(c), is a 'complaint'. Case law has found (see Shea (No 6); and Alam) that the term 'complaint' involves an expression

[17] Whilst not confined to 'workplace right' note comments of Logan and Katzmann JJ in Sabapathy v Jetstar Airways [2021] FCAFC 25, particularly [87].

[18] Carbone v James McConvill & Associates [2021] FCCA 661 per Judge McNab. See paragraph [9] and following.

of discontent which seeks consideration, redress or relief from the matter about which the complainant is aggrieved.[19]

ii. a complaint is not a mere communication – of any kind. A complaint is more than a mere request for assistance and should state a particular grievance or finding of fault.[20]

iii. the legislative nature of the 'complaint' is open, in the sense that no particular form (no particular words, or writing) is required for a communication to fit the statutory description. It is reasonably understood in context as an expression of grievance and which seeks, whether expressly or implicitly, that the recipient at least take notice of, and consider, it. The characterisation of a communication as a complaint is to be determined as a matter of substance, and not of form.

c. The distinction between a complaint and a mere request for assistance had been made in earlier authorities: see for example Zhang v Royal Australian Chemical Institute Inc,[21] which considered a request for assistance, and Hill v Compass Ten Pty Ltd.[22] It is my view that when taken together with Shea (No 6), this puts the content of any putative complaint beyond serious doubt; and

d. because of the open nature of 'complaints and inquiries' in section 341 of the FW Act, it is possible that some requests for assistance may be able to be characterised as "inquiries" for the purposes of s 341(1)(c) (for example, an inquiry as to whether the recipient is able to provide the requested assistance). In practice, this characterisation is not often pursued by applicants. Even if that were to change, then the major difficulty for an applicant seeking to allege this is falling foul of the current law in PIA Mortgage, which will be set out below.

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[19] Cummins South Pacific at [13].

[20] Shea (No 6) at [579]-[581] per Dodds-Streeton J; Cummins South Pacific at [13] per Bromberg J. Note that Alam at [59] when reviewing Cummins South Pacific at [13] seems to attribute the finding there to Dodds-Streeton J, who was not a member of that Full Court. It is likely to be a typographical error.

[21] [2005] FCAFC 99, (2005) 144 FCR 347 at [36]-[37].

[22] [2012] FCA 761, (2012) 205 FCR 94 at [48].

## Part B – consequences of this construction of a 'complaint' and inquiry

*B1. Overview*

31. In this section of the paper, I set out some of the recorded case law, given the four major Full Court decisions on section 341 (which are set out in footnotes n9-12 above, and draw conclusions from some of them.

*B2. When is the complaint 'complaining'?*

32. There are limits as to when a communication falls within the ambit of 'complaining' about a workplace right, and when it forms some other communication.

*A. Form of communication*

33. In Shea (No 6), Dodds-Streeton J considered the form of certain complaints. Her Honour continued, at [626]-[627], by saying that it is unnecessary for the employee to identify expressly the communication intended to be put as a complaint or inquiry and to specify which communication is meant.

34. In plain terms, the employer can *admit* that the communication (to use a neutral term) has taken place, without admitting that the words spoken was or were a complaint.

*B3. Receiving or knowing about the 'complaint'*

35. Whilst such a course may seem counter-intuitive, I have been involved in several cases where *the complaint made* or said to be made, was not communicated widely, including to the decision-maker in respect of adverse action. This is paramount to the cause of action, of course: where the decision-maker does not know of a fact or thing, that may affect the logical capacity of the decision maker to make a decision prohibited by legislation.

36. There is little doubt that a complaint that falls within the scope of section 341 can be operative in the sense necessary to complete the cause of action *even if* that complaint was not made to the employer. However, where the applicant:

a. did not make the complaint to the employer; and

b. has no evidence that the complaint was ever *repeated* to the employer, or ever came to the employer's attention in some other way,

then this robs that particular complaint of an efficacy, under Part 3-1 of the FW Act.

37. The reason for this is disarmingly simple: the requirement from Barclay[23] that the adverse action be taken 'because of' the workplace right means that a complaint of which the employer knows nothing cannot be a 'substantial and operative' reason according to Barclay or Bowling,[24] nor a part of the reasons for taking adverse action (within the meaning of sections 360-1 of the FW Act).

38. I would go further than this mere logical conundrum: I would argue that where the complaint lacks this 'knowledge' element, then the presumption or reversal of onus in section 361 has no work to do, along the lines in Tattsbet. In effect, the reverse onus is not engaged; the applicant must necessarily fail.

39. There is only limited consideration of a 'non complaint' in these terms in decided cases. One is Milardovic, per Mortimer J. [28]. [166]. In Milardovic, the applicant complained to a HR Manager and to a director. The HR Manager was called as a witness and gave varying evidence including that complaints were not made to her; and that the complaints which were in fact made were not 'passed on' by the HR Manager to the decision-making director. The director denied knowing of the complaints actually made. Another is Green v Preston Motors,[25] a case handed down on 25 March 2022, which considered complaints made to a HR professional, but with no evidence that such complaints were ever communicated to a decision-maker.

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[23] Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32.

[24] General Motors-Holden Pty Ltd v Bowling (1976) 51 ALJR 235.

[25] Green v Preston Motors Pty Ltd [2022] FedCFamC2G 205, per Judge Blake at [203]-[204].

*B4. Is the complaint 'about' a workplace right?*

40. The cases have emphasised one particular limit on the 'complaint' being that the complaint must not be at large. That is, its *subject matter* must be about a right or entitlement which is a workplace right: PIA Mortgage. This authority did not further limit the 'complaint'. That is, the complaint may be about the non-payment of money in lieu of the 'right'; or the notice given to take leave (where that leave is a right), or any aspect of that right.

41. This conclusion grows from the decision by Dodds-Streeton J in Shea (No 6) at [625]. That decision is to this effect:

> *In my opinion, the requirement that the complaint be one that the employee "is able to make" in relation to his or her employment suggests that there are complaints which the employee is not able to make in relation to his or her employment. The ability to make a complaint does not arise simply because the complainant is an employee of the employer. Rather, it must be underpinned by an entitlement or right. The source of such entitlement would include, even if it is not limited to, an instrument, such as a contract of employment, award or legislation.*

[underlining mine]

42. PIA Mortgage applied this element of Shea (No 6). Whilst Snaden J dissented on the question of the whole meaning of 'able to' in section 341(1)(c), preferring a narrower definition, his Honour agreed with the underlined element in the quote from [625] of Shea (No 6). The key paragraphs from Rangiah and Charlesworth JJ from the majority decision in PIA Mortgage are:

*12. We respectfully agree with Dodds–Streeton J that section 341(1)(c)(ii) of the FW Act contemplates that not every complaint that an employee makes in relation to his or her employment is one the employee is "able to make" (for present purposes, it is unnecessary to address the ability to make an inquiry). The question then arises as to how the provision distinguishes complaints that come within its reach from those that do not.*

*13. Justice Dodds–Streeton considered that the word "able" refers to an entitlement or a right. We respectfully agree…*

*14. On the understanding that section 341(1)(c)(ii) requires an entitlement or right to make a complaint in relation to the employee's employment, there must be an identifiable source of that entitlement or right. In [Shea (No 6)], Dodds–Streeton J did not suggest that the entitlement or right is limited to one arising under an instrument such as legislation, an industrial instrument, or a contract of employment. In fact, her Honour was careful not to attempt any exhaustive description of the source of the right to make a complaint or inquiry. Nor did her Honour suggest that the entitlement or right must be conferred expressly or directly by the source.*

*…*

*19. Under the general law, an employee has a right to sue his or her employer for an alleged breach of the contract of employment. A suit may be regarded as the ultimate form of complaint. Accordingly, in our opinion, an employee is "able to make a complaint" about his or her employer's alleged breach of the contract of employment. That ability is "underpinned by" (to use Dodds-Streeton J's expression in [Shea (No 6)]) the right to sue, and extends to making a verbal or written complaint to the employer about an alleged breach of the contract.*

*20. Further, an employee who alleges that his or her employer has contravened a statutory provision relating to the employment is "able to make a complaint" within section 341(1)(c)(ii) of the FW Act. That right or entitlement derives from the statutory provision alleged to have been contravened. The ability encompasses making a complaint to the employer or an appropriate authority about the alleged contravention, whether or not the statute directly provides a right to sue or make a complaint.*

43. In stark contrast to PIA Mortgage, Cummins South Pacific per Bromberg J,[26] with whom Mortimer J agreed at [209], held that the ability of an employee to complain or inquire within the meaning of section 341(1)(c) need not be underpinned by a right or entitlement held by the employee. Anastassiou J (in Cummins South Pacific) dissented, preferring the PIA Mortgage approach. His Honour would have followed PIA Mortgage.

44. This means that (despite what Judge Tonkin found in Cavanagh)[27] the current position is that:

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[26] At [45].

[27] See Cavanagh v Lexastar Pty Ltd [2021] FedCFamC2G 375, per Judge Tonkin, at [219]-[220].

a. the complaining applicant must have an underpinning entitlement or right. In PIA Mortgage, (in line with the single-judge decision in Shea (No 6)) the majority held that the words "is able to make" in section 341(1)(c)(ii) are, impliedly, words of limitation, and not every complaint made by an employee in relation to his or her employment is one that the employee is "able to make"; and

b. the majority further held that section 341(1)(c)(ii) requires that an employee have an entitlement or right to make a complaint in relation to his or her employment. That does not (*contra* Snaden J) mean that the complaint requires an instrumental source, such as a dispute resolution mechanism. Rather, it means a source of such an entitlement (upon which the claim is based) must exist. That source may include a statute, a contract of employment, or the general law; and

c. the 'linen complaint', from Walsh, even if sincerely made cannot be a 'workplace right'. This is because that particular employee did not have a 'right' which the complaint would protect. Hypothetically, if the same employee, Ms Walsh had complained about her wages, her Award coverage, her commission entitlements or her remuneration then such complaint would fall within section 341.[28]

**Conclusion**

45. When an applicant complains (or when a proposed applicant seeks to advance a case including 'complaints' under the FW Act) there are a number of considerations to take into account.

46. These include whether (to the applicant's knowledge) the respondent *actually* or even potentially received the complaint (in any form); whether the statement or finding of fault was or was potentially a 'complaint' within the current authorities (and not some other form of communication, such as a request for assistance); and whether the complaint was underpinned by any (and if so what form of) entitlement, as required by PIA Mortgage.

47. Listing these requirements, even leaving aside the requirements of being 'in relation to employment' or the requirements of 'good faith' demonstrates quite ably how many factual and legal hurdles stand in the way of applicants seeking relief in a GP claim. To

[28] Walsh, above n8. See also The Environmental Group Ltd v Bowd [2019] FCA 951; 137 ACSR 352, per Steward J (as his Honour then was) at [126].

meet most of these requirements – let alone all of them in a single proceeding – is either a very particular case, with a particular set of facts. Otherwise, it is risk of loss.

**TIM DONAGHEY**

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