



GREENWAY CHAMBERS

GENERAL PROTECTIONS CLAIMS UNDER THE *FAIR WORK ACT 2009* (CTH): COMMON ISSUES AND RECENT AUTHORITY

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INTRODUCTION

1. Recent appellate decisions in which the general protections provisions under Part 3-1 of the *Fair Work Act 2009* (Cth) (the **FW Act**) have been judicially considered provide emerging clarity in respect of previously divergent principles. However, as is clear from a consideration of recent decisions, some diffuse judicial views remain.¹ This paper gives an overview of this authority and generally describes the elements of claims commonly made under the general protections provisions, principally claims alleging contravention of:
 - a) section 340 of the FW Act, which protects against adverse action because a person has a workplace right (within the meaning of that term as defined under section 341(1) of the FW Act), has exercised (or has not exercised) a workplace right, or proposes to (or not to) exercise a workplace right; and/or
 - b) section 351 of the FW Act, which protects against adverse action because of proscribed grounds such as race, sex, age or disability.²
2. A particular focus of recent decisions has been adverse action alleged to have been taken because an employee is able to make a complaint or inquiry in relation to the employee's employment within the meaning of section 341(1)(c) of the FW Act, which is also a focus of this paper.

ELEMENTS OF THE CLAIM

3. An initial issue to consider, whether acting for either employers or employees, is the identification in the application³ and/or pleadings of the elements of the claim. In respect of claims made alleging contravention of section 340, this includes identifying the specific workplace right, the exercise of or proposal to exercise the workplace right (or circumstance of it not being exercised or proposal not to exercise), how it is that the employee is 'able to' initiate or participate in a process or proceedings within the meaning of section 341(1)(b), is 'able to make'⁴ a complaint or inquiry within the meaning of section 341(1)(c), that the alleged complaint or inquiry is a 'complaint'⁵ or

¹ Most notably between the findings of the majority of the Full Court (Rangiah and Charlesworth JJ) in *PIA Mortgage Services Pty Limited v King* (2020) 274 FCR 225 and the findings of Bromberg J in *Cummins South Pacific Pty Ltd v Keenan* [2020] FCAFC 204 (Mortimer J agreeing), discussed below.

² The proscribed grounds under section 351 of the FW Act are: race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

³ To be filed with the Fair Work Commission (the Form F8) and, following issue of any certificate pursuant to section 368(3) of the FW Act should the matter not otherwise resolve, to be filed with the Federal Court of Australia or Federal Circuit Court of Australia.

⁴ *PIA v King* (2020) 274 FCR 225 [18]-[20], [26]-[27].

⁵ *Shea v TRUenergy (No 6)* (2014) 242 IR 1 [66]; *O'Kane v Freelancer* [2018] FCCA 933 [126].

- 'inquiry' within the meaning of section 341(1)(c) and/or that the complaint or inquiry relates to the employee's employment within the meaning of section 341(1)(c)(ii).⁶
4. In respect of claims made alleging contravention of section 351, the protected attribute must be pleaded, properly particularised and evidenced, given an applicant can be put to proof on the protected attribute alleged.⁷
 5. In relation to all general protections claims made under Part 3-1 of the FW Act, as a preliminary matter (or 'precondition' to the rebuttable presumption in section 361 being triggered) the applicant must not only make the allegation that a person took action for a particular reason, but must also satisfy the onus on him or her to prove the underpinning 'objective facts' to be determined to establish adverse action (on the one hand) as well as the exercise of a workplace right, protected attribute or other proscribed matter (on the other hand).⁸
 6. In *Australian Red Cross Society v Queensland Nurses' Union of Employees* (2019) 273 FCR 332 the Full Court (Greenwood, Besanko and Rangiah JJ) confirmed that, having established the above preconditions, an applicant must then also 'establish that the evidence is consistent with the hypothesis that the respondent was actuated by a proscribed purpose.'⁹ In *Australian Red Cross Society*, the Full Court put it this way at [65]-[67], [74]:

First, there must be an allegation in the application which satisfies the requirements of s 361(1)(a) [that a person took, or is taking, action for a particular reason/intent].

...

Secondly, the applicant must establish as an objective fact the circumstance said to be the reason for the taking of the adverse action.

Thirdly, and perhaps there is more scope here for debate as to precisely how the following consideration operates, it is said that an applicant must establish that the evidence is consistent with the hypothesis that the respondent was actuated by a proscribed purpose.

...

It may well be appropriate to describe the requirement that the evidence is consistent with the hypothesis that the respondent was actuated by a proscribed purpose a pre-condition or as operating before the presumption is engaged. After all, the presumption operates and continues to operate unless the person who took the action proves otherwise. (emphasis original)

⁶ *PIA v King* (2020) 274 FCR 225 [18]-[20], [26]-[27].

⁷ See for instance *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [119] per Jessup J; *Bahonko v Sterjov* (2007) 167 IR 43 at [103] per Jessup J (in relation to the evidence required to demonstrate the existence of a disability); *Qantas Airways Limited v Gama* (2008) 167 FCR 537 at [91] per French and Jacobson JJ; *Reay v Fuel & Gas Haulage Pty Ltd & Anor* [2019] FCCA 2473 at [36].

⁸ *Tattsbet Ltd v Morrow* [2015] FCAFC 62; (2015) 233 FCR 46 at [119] per Jessup J (with whom Allsop CJ and White J agreed); *Celand v Skycity Adelaide Pty Ltd* (2017) 256 FCR 306 at [154] per Bromberg J (with whom Charlesworth J agreed on this point); *ABCC v Hall* [2018] FCAFC 83; (2018) 261 FCR 347 at [16]; *Australian Red Cross Society v Queensland Nurses' Union of Employees* [2019] FCAFC 215; (2019) 273 FCR 332 [66] per Greenwood, Besanko and Rangiah JJ.

⁹ In *Australian Red Cross Society v Queensland Nurses' Union of Employees* [2019] FCAFC 215; (2019) 273 FCR 332 at [67], [74] per Greenwood, Besanko and Rangiah JJ.

7. Once an applicant establishes the above matters, it is then that section 361 of the FW Act creates the presumption, the onus of which is on the respondent to rebut, that the adverse action was taken for a prohibited reason or with a prohibited intent, dealt with below. However, the Full Court pointed out that an applicant need not go so far as to 'establish a prima facie connection between the alleged adverse action and a prohibited reason', saying that 'there is an obvious difference between establishing a prima facie connection and demonstrating that the connection between the reason alleged and the impugned conduct is not so remote as to be fanciful.'¹⁰

CLAIMS ALLEGING CONTRAVENTION OF SECTION 340 – WORKPLACE RIGHT

8. Section 340 of the FW Act relevantly provides:

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

Note: *This subsection is a civil remedy provision (see Part 4-1).*

(2) A person must not take adverse action against another person (the second person) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Note: *This subsection is a civil remedy provision (see Part 4-1).*

9. Section 341 provides the definition of 'workplace rights' for the purpose of section 340 of the FW Act. Section 341(1) of the FW Act 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.

¹⁰ *Australian Red Cross Society v Queensland Nurses' Union of Employees* [2019] FCAFC 215; (2019) 273 FCR 332 at [73].

CLAIMS ALLEGING CONTRAVENTION OF SECTION 340 – MEANING OF WORKPLACE LAW AND WORKPLACE INSTRUMENT

10. For the purposes of section 341(1)(a) of the FW Act, a ‘workplace law’ is defined in section 12 of the FW Act to mean the FW Act itself, the *Fair Work (Registered Organisations) Act 2009* (Cth), the *Independent Contractors Act 2006* (Cth) or ‘any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters).’ The latter has been held to extend to:

- a) Legislation that is also concerned with relationships not confined to (but includes) workplace relationships, and therefore includes anti-discrimination legislation such as the *Equal Opportunity Act 1995* (Vic)¹¹ and the *Sex Discrimination Act 1984* (Cth).¹²
- b) The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).¹³
- c) Workers compensation legislation such as the *Workers Compensation and Rehabilitation Act 2003* (Qld).¹⁴
- d) The *Work Health & Safety Act 2012* (SA).¹⁵

11. As was observed in *ALEA v Sunstate Airlines* (2012) 208 FCR 386, to be a ‘workplace law’, the law must be one that regulates the relationship between employers and employees¹⁶ and can extend to regulations as well as legislation,¹⁷ although did not in that case extend to regulation 51 or 215(9) of the *Civil Aviation Regulations 1988* (Cth) because the object of the regulation was not the relationship between employee and employer but ‘rather that of air safety by the imposition of particular reporting obligations.’¹⁸

12. Similarly, the following have been held not to constitute ‘workplace laws’:

- a) The provisions of Pt 9.4AAA of the *Corporations Act 2001* (Cth) (whistle blower provisions).¹⁹
- b) The *Superannuation Guarantee Charge Act 1992* (Cth).²⁰

¹¹ *Bayford v Maxxia Pty Limited* (2011) 207 IR 50 at [141].

¹² *Celand v Skycity Adelaide Pty Ltd* [2016] FCCA 399 at [128], not disturbed on appeal: *Celand v Skycity Adelaide Pty Ltd* (2017) 256 FCR 306 at [36] per Logan J.

¹³ *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* (2011) 193 FCR 526 at [238]-[239].

¹⁴ *CFMEU v Leighton Contractors Pty Ltd* (2012) 225 IR 197 at [2], [62].

¹⁵ *Celand v Skycity Adelaide Pty Ltd* (2017) 256 FCR 306 at [25] per Logan J observing that it was ‘uncontroversial’ that the *Work Health & Safety Act 2012* (SA) was a workplace law.

¹⁶ *Sunstate* at [32].

¹⁷ *Sunstate* at [31].

¹⁸ *Sunstate* at [33].

¹⁹ *Environmental Group Limited v Bowd* (2019) 288 IR 396 at [138].

²⁰ *Tattsbet Limited v Morrow* (2015) 233 FCR 46 at [103] per Jessup J.

- c) The *Aged Care Act 1997* (Cth) and ‘complaints principles’ statutorily created under that legislation.²¹
 - d) The *Privacy Act 1988* (Cth).²²
 - e) Rights under the common law including the contract of employment itself.²³
13. The term ‘workplace instrument’ is in addition defined under section 12 of the FW Act and means an instrument that:
- (a) *is made under, or recognised by, a workplace law; and*
 - (b) *concerns the relationships between employers and employees.*
14. An enterprise agreement or an award constitutes a ‘workplace instrument’²⁴ although a common law contract of employment does not.²⁵
15. For the purposes of section 341(1)(b), a ‘process or proceeding’ is defined under section 341(2) of the FW Act as meaning:
- (a) *a conference conducted or hearing held by the FWC;*
 - (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.*
16. Under section 341(3), a prospective employee is taken to have the same workplace rights as are provided under section 341(1), a prospective employer does not breach section 341(1) by making an offer of employment conditional upon the prospective employee accepting a guarantee of annual earnings or by refusing to employ the prospective employee because he or she would be entitled to protections under Part 2-8 or 6-3A of the FW Act upon a transfer of business: section 341(4) and (5).

²¹ *Buckley v Terrigal Grosvenor Lodge (Erina) Pty Ltd (No.2)* (2015) 298 FLR 429 at [72].

²² *Austin v Honeywell Limited* (2013) 234 IR 319 at [60].

²³ *Barnett v Territory Insurance Office* (2011) 196 FCR 116 at [31]-[32]; *Bayford v Maxxia Pty Limited* (2011) 207 IR 50 at [155]; *Martens v Indigenous Land Corporation & Anor* [2017] FCCA 896 at [17].

²⁴ See for instance *Celand v Skycity Adelaide Pty Ltd* [2016] FCCA 399 at [127], not disturbed on appeal: *Celand v Skycity Adelaide Pty Ltd* (2017) 256 FCR 306 at [35] per Logan J.

²⁵ *Barnett v Territory Insurance Office* (2011) 196 FCR 116 at [31]-[32].

CLAIMS ALLEGING CONTRAVENTION OF SECTION 340 – MEANING OF ‘ABLE TO MAKE A COMPLAINT OR INQUIRY’

17. The words ‘able to make a complaint or inquiry’ have been the subject of extensive judicial consideration. In *Shea v TRUenergy (No 6)* (2014) 242 IR 1, her Honour Dodds-Streeton J set out the following summary of findings in respect of the meaning of ‘complaint’ at [29]:

*(a) a complaint is a communication which, whether expressly or implicitly, as a matter of substance, irrespective of the words used, **conveys a grievance, a finding of fault or accusation;***

*(b) the grievance, finding of fault or accusation must be **genuinely held or considered valid by the complainant;***

*(c) the grievance, finding of fault or accusation **need not be substantiated, proved or ultimately established,** but the exercise of the workplace right constituted by the making of the complaint must be **in good faith and for a proper purpose;***

(d) the proper purpose of making a complaint is giving notification of the grievance, accusation or finding of fault so that it may be, at least, received and, where appropriate, investigated or redressed. If a grievance or accusation is communicated in order to achieve some extraneous purpose unrelated to its notification, investigation or redress, it is not a complaint made in good faith for a proper purpose and is not within the ambit of s 341(1)(c)(ii);

*(e) a complaint may be made not only to an external authority or party with the power to enforce or require compliance or redress, **but may be made to persons including an employer, or to an investigator appointed by the employer;***

*(f) a complaint that an employee is able to make in relation to his or her employment is **not at large, but must be founded on a source of entitlement,** whether instrumental or otherwise; and*

(g) a complaint is limited to a grievance, finding of fault or accusation that satisfies the criteria in s 341(1)(c)(ii) and does not extend to other grievances merely because they are communicated contemporaneously or in association with the complaint. Nor does a complaint comprehend contemporaneous or associated conduct which is beyond what is reasonable for the communication of the grievance or accusation. (emphasis added)

18. The finding in *Shea (No 6)* that a ‘complaint’ must ‘convey a grievance, a finding of fault or accusation’ was applied by Bromberg J in *Cummins South Pacific Pty Ltd v Keenan* [2020] FCAFC 204,²⁶ where his Honour stated at [13] (Mortimer J agreeing at [209] with Bromberg J’s interpretation of section 341(1)(c)(ii)):

*The natural meaning of the term “complaint” in the context in which it is used in s 341(1)(c) connotes an **expression of discontent which seeks consideration, redress or relief from a matter in relation to which the complainant is aggrieved.** A complaint is more than a mere request for assistance and **must state a particular grievance or finding of fault:** *Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271 at [579]-[581] (Dodds-Streeton J) and the authorities*

²⁶ As well as in decisions such as *Henry v Leighton Admin Services Pty Limited* (2015) 299 FLR 342 per Judge Manousaridis and *O’Kane v Freelancer* [2018] FCCA 933 at [126] per Judge Manousaridis.

*there cited. Whether an employee has made a complaint is a matter of substance, not form, and is to be determined in light of all the relevant circumstances, it being only necessary that **the relevant communication, whatever its form, is “reasonably understood in context as an expression of grievance or a finding of fault which seeks, whether expressly or implicitly, that the employer or other relevant party at least take notice of and consider the complaint”**: Shea at [626]-[627] (Dodds-Streton J). (emphasis added)*

19. However, in *Environmental Group Limited v Bowd* (2019) 288 IR 396, Steward J found at [128]-[129] that the applicant in that case (the CEO of a company) was not making a complaint such that he was exercising a workplace right when he reported on matters to the board of directors, but was instead simply complying with his contractual obligations to make such reports.
20. In addition, Dodds-Streton J's finding in *Shea* (No 6) that a complaint that an employee is 'able to make' must be 'founded on a source of entitlement' was adopted by the majority of the Full Court (Rangiah and Charlesworth JJ) in *PIA Mortgage Services Pty Limited v King* (2020) 274 FCR 225 at [11]-[12]. The majority in *PIA* concluded at [18]-[20] that:

...Section 341(1)(c)(ii) must at least apply where a contract of employment confers a right upon an employee to raise a grievance or otherwise complain about his or her employment. However, the broad language used does not purport to confine the right to complain to one arising under a contract of employment, and, in our opinion, extends to a right to complain arising under the general law.

*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-Streton J’s expression in *Shea*) the right to sue, and extends to making a verbal or written complaint to the employer about an alleged breach of the contract.*

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 s 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.

21. The scope of the term 'inquiry' was considered by Steward J in both *Maric v Ericsson Australia Pty Ltd* (2020) 293 IR 442 and *Flageul v WeDrive Pty Ltd* [2020] FCA 1666. In *Maric v Ericsson Australia Pty Ltd* (2020) 293 IR 442, Steward J observed (at 458 [45]) that an 'inquiry' is an investigation or an examination made for the purposes of acquiring knowledge or information, which was adopted in *Flageul* at [248]-[250]. The term was also considered by Judge Manousaridis in *Henry v Leighton Admin Services Pty Limited* (2015) 299 FLR 342, who at [40] distinguished between the terms 'complaint' and 'inquiry' (adopting the meaning of 'complaint' described in *Shea*

(No 6)) and expressed the view that '[t]he ordinary meaning of "inquiry" is the act of seeking information about or concerning something', similarly to Steward J in *Maric* and *Flageul*, although Steward J had not considered *Henry* in his reasoning.

22. In *Crispe v Bank of Queensland Limited* [2021] FCCA 115, the scope of the term 'inquiry' was again considered, with Judge Jarrett observing at [9] that neither *Shea* (No 6), *PIA* nor *Cummins South Pacific* were applicable because those decisions all concerned complaints rather than inquiries, and '[a]n inquiry is not necessarily a complaint.' After considering the distinction drawn between the two terms by Judge Manousaridis in *Henry v Leighton Admin Services Pty Limited* (2015) 299 FLR 342, Judge Jarrett in *Crispe* observed at [11] that:

*The applicant's case does not seem to be that he made a complaint for the purposes of s.341(1)(c)(ii) of the Act but rather an inquiry. That is to say he sought information about something – information about the benefits and entitlements and information about a pay rise. This case affords a good example of the difference between the two terms. **Seeking information about the possibility of a pay rise is making an inquiry about the terms and conditions of the inquirer's employment. So too is making an inquiry about the removal of fuel and parking allowance entitlements. It is difficult to see how such inquiries are not within the terms of s.341(1)(c)(ii) of the Act.** Even if analysed in accordance with the reasoning in *Shea*, it can be seen that the source of the ability to make the inquiry is the term or terms of the applicant's employment contract with the respondent that deal with remuneration.* (emphasis added)

23. The ability 'to make' an 'inquiry' was in addition considered in *Flageul*, in which Steward J applied the majority finding in *PIA*, observing at [273] that '[f]or a person to be "able" to make an inquiry, 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, in the sense described by Rangiah and Charlesworth JJ in *PIA Mortgage Services*.' Steward J said at [274] of *Flageul* that the 'same observation applies to the making of complaints'.

DICHOTOMY BETWEEN *PIA* AND *CUMMINS SOUTH PACIFIC*

24. Significantly, the Full Court's decision in *PIA* was issued before a differently constituted Full Court issued the decision in *Cummins South Pacific*. In *Cummins South Pacific*, at [64]-[67] Bromberg J (with Mortimer J agreeing in respect of the interpretation of section 341(1)(c)(ii) at [209]) disagreed with the findings of the majority in *PIA*, concluding that had it 'been necessary to decline to follow *PIA* and to do so on the basis that *PIA* was plainly wrong as to the proper construction of s 341(1)(c)(ii), I would have respectfully held that to be the case.'
25. In *Cummins South Pacific*, Bromberg J was of the view (expressed at [19] and [64]) that 'there is no textual or contextual basis for construing s 341(1)(c)(ii) as requiring a

complaint or inquiry to be underpinned by a right or entitlement to make it, whether sourced in the employee's contract or sourced elsewhere.' Bromberg J's view (at [14]) was that 'what is protected is the right of an employee to complain **about the employee's employment and the matters that relate to it.**' (emphasis added) In other words, Bromberg J's view in *Cummins South Pacific* was that all that is required is that the employee show that the complaint was 'in relation to' the employment. The 'strong dissent' expressed by the majority in *Cummins South Pacific* about the correctness of the majority finding in *PIA* was observed by Judge Jarrett in *Crispe v Bank of Queensland Limited* [2021] FCCA 115 at [8].

26. By contrast to the position of Bromberg and Mortimer JJ *Cummins South Pacific*, Anastassiou J in that case was of the view (at [214], [291]) that the majority finding in *PIA* was not 'plainly wrong' and should be followed.
27. In *National Tertiary Education Industry Union v University of Sydney* [2020] FCA 1709, Thawley J at [178]-[185] reviewed the dichotomy between the findings of the majority in *PIA* and the majority in *Cummins South Pacific*, observing at [186] that, 'as a single judge', he 'was bound by *PIA Mortgage Services* and [had] to follow it', meaning that he had to decide the case by reference to whether the employee had a relevant entitlement or right to complain. However, Thawley J ultimately held that the contraventions in *National Tertiary Education Industry Union v University of Sydney* were not made out and his Honour said that, therefore, the result would have been no different even if all the applicant had to show was the 'allied question' (at [191]) that the complaints were 'in relation to' the employment, rather than needing an entitlement or right to complain.
28. The present position, until the scope of section 341(1)(c) of the FW Act is again considered by a Full Court, is that the majority finding in *PIA* represents the current status of the law as to whether an employee 'is able to make a complaint or inquiry', the principles in respect of which Thawley J had helpfully summarised in *National Tertiary Education Industry Union v University of Sydney* [2020] FCA 1709 at [180] as follows:

(1) the complaint "must be underpinned by an entitlement or right to make a complaint"; s 341(1)(c)(ii) does not capture any complaint by an employee concerning an entitlement or right related to his or her employment: at [13] [of *PIA*];

(2) there must be an identifiable source of that entitlement or right: at [14] [of *PIA*];

(3) for the purposes of s 341(1)(c)(ii) there were three obvious potential sources of an employee's ability to make complaints which fall outside s 341(1)(a), (b) and (c)(i) but within (c)(ii): legislative provisions that are not workplace laws, contractual terms providing a right to make complaints and the general law: at [16]

[of PIA];

(4) under the general law, an employee is “able to make a complaint” about his or her employer’s alleged breach of the contract of employment; this ability is “underpinned by” the right to sue in respect of the breach and extends to making a verbal or written complaint to the employer about an alleged breach of the contract: at [19] [of PIA].

29. The following authorities have recently been distilled in the context of examining the scope of the words ‘in relation to’ for the purposes of section 341(1)(c)(ii) of the FW Act in *Thorpe v Vetis Consulting Services Pty Ltd & Anor* [2019] FCCA 2375 at [37]-[39] per Judge Lucev:

In Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3) [2012] FCA 697; (2012) AILR 101-659 at [60]- [64] per Katzmann J, the Federal Court in directly considering the phrase “in relation to”, found that **an employee who complained on behalf of another employee was still caught by the protection, as the complaint related to conditions which also impacted on the employment of the said employee.** This interpretation was accepted by Tracey J in *Trevana v Thiess Pty Ltd* [2016] FCA 468, whereby it was noted that “Nothing turns on the fact that it was made on his behalf by his brother”, where it was argued the applicant had not made a “complaint”, but rather his brother had made it on his behalf.

In Walsh v Greater Metropolitan Cemeteries Trust (No 2) [2014] FCA 456; (2014) 243 IR 468; (2014) 66 AILR 102-285 (“Greater Metropolitan Cemeteries Trust (No 2)”) [at [41] and [42]] per Bromberg J the Federal Court stated:

[41] The words “in relation to” are words of wide import. The use of that phrase in s 341(1)(c)(ii) **identifies that a relationship between the subject matter of the complaint and the complainant’s employment is required.** The nature of that relationship need not be direct and may be indirect: *Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697 at [61]- [64] (Katzmann J); *Shea v TRUenergy Services Pty Ltd (No 6)* (2014) 242 IR 1; 314 ALR 346; [2014] FCA 271 at [631] (Dodds-Streton J). I respectfully agree with Katzmann J’s observation in *Pilbara* at [64] that if some limit on the broad language utilised in the phrase “in relation to his or her employment” is to be imposed, it needs to be “found in the nature and purpose of the legislation, which includes the protection of workplace rights”.

[42] **Where the subject matter of the complaint raises an issue with potential implications for the complainant’s employment, it is likely that the requisite nexus will be satisfied:** *Pilbara* at [69].

In National Tertiary Education Union v Royal Melbourne Institute of Technology [2013] FCA 451; (2013) 234 IR 139; (2013) 65 AILR 101-914 at [44] per Gray J, it was recognised where a complaint concerning management practices where allegations of bullying and intimidation were made, that such a complaint was a complaint in relation to employment. (emphasis added)

CLAIMS ALLEGING CONTRAVENTION OF SECTION 351 – DISCRIMINATION

30. Section 351 of the FW Act is entitled ‘discrimination’ and provides that:

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Note: *This subsection is a civil remedy provision (see Part 4-1).*

(2) However, subsection (1) does not apply to action that is:

(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or

(b) taken because of the inherent requirements of the particular position concerned; or

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--taken:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

31. Subsection 351(3) lists the federal, State and Territory anti-discrimination legislation for the purposes of subsection 351(2)(a) of the FW Act.

32. While section 351 is entitled ‘discrimination’, it is established that ‘the absence of that word’ from section 351(1) itself means that there is ‘no grammatical link’ between section 351(1) and the definition of discrimination in anti-discrimination legislation.²⁷ In other words, section 351(1) is not to be understood by reference to any meanings within anti-discrimination legislation and what must be demonstrated is the ‘occurrence of adverse action and the fact that it was motivated for a reason prohibited by s.351(1).’²⁸

33. While the FW Act does not define discrimination for the purposes of section 351, it is understood to encompass the notion of both direct and indirect discrimination, authority for which is said to be *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 at [102],²⁹ although it is to be observed that the notion of ‘discrimination’ under consideration in *Klein* was in the context of the term ‘discriminates between’ within the meaning of ‘adverse action’ as contemplated by section 342, item 1(d), rather than section 351.

²⁷ *Hodkinson v Commonwealth* (2011) 248 FLR 409 at [140]-[141].

²⁸ *Hodkinson v Commonwealth* (2011) 248 FLR 409 at [140]-[141].

²⁹ *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 at [49]; *Tahi v Oxican Pty Ltd* [2018] FCCA 3722 at [10], citing *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 at [102].

34. As a first step an applicant must establish one of the protected attributes under section 351.³⁰
35. However, by operation of section 351(2) and (3), there will be no contravention of section 351(1) if the impugned conduct fails to constitute ‘unlawful’ discrimination in contravention of federal and state anti-discrimination legislation, which includes those set out non-exhaustively in section 351(3).³¹ Mortimer J in *Sayed v CFMEU* (2015) 327 ALR 460 held at [160]-[161] that the effect of this is that section 351(2) and (3) together ‘expressly pick up the detailed regimes’ of anti-discrimination legislation, as follows:

...By s 351, the “irrelevant” reasons for the different treatment (to adopt the concept used by Gaudron J in Street) are then specified. The inquiry is thus a straightforward one, to that point, and does look only for differential treatment, as the applicant submits.

However, the terms of s 351(2), read with subs (3), then must be applied. Those provisions expressly pick up the detailed regimes of each of the territory, state and federal anti-discrimination statutes. In other words, the requirements that there be “less favourable treatment”, the complicated requirements for indirect discrimination, and the exceptions for which each statute provides are, through these provisions, incorporated so as to limit the protections given by Div 5 of Part 3-1 of the Fair Work Act in a way which is intended to mirror the limits under those other legislative schemes. When read as a whole, s 351 and s 342(1) Item 1(d) will operate to render only conduct proscribed under other anti-discrimination regimes as conduct contravening s 351. That, in substance, is the outcome for which the respondent contended, although not because of the meaning of “discriminates” in Item 1(d) of s 342(1), but rather at the subsequent step of the application of the prohibition in s 351.

36. Therefore, as was said in *Western Union Business Solutions (Australia) Pty Limited v Robinson* (2019) 272 FCR 547 by O’Callaghan and Thawley JJ at [118], section 351(1) ‘does not apply, even though it otherwise would have applied, if the relevant action falls within section 351(2)...’ by reason of it *not* being unlawful under anti-discrimination legislation. In *Morton v Commonwealth Scientific and Industrial Research Organisation (No 2)* [2019] FCA 1754, Rangiah J observed at [66] that Mortimer J had held in *Sayed v CFMEU* (2015) 327 ALR 460 at [161] that sections 351(2) and (3) operate to:

...pick up the provisions of the provisions of the anti-discrimination laws that operate to make actions not unlawful. Her Honour did not hold that s 351(1) picks up and incorporates provisions of the anti-discrimination laws that make actions unlawful. (emphasis original)

³⁰ See for instance *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [119] per Jessup J and *Bahonko v Sterjov* (2007) 167 IR 43 at [103] per Jessup J (in relation to the evidence required to demonstrate the existence of a disability) cited in *Reay v Fuel & Gas Haulage Pty Ltd & Anor* [2019] FCCA 2473 at [24]; *Qantas Airways Limited v Gama* (2008) 167 FCR 537 at [91] per French and Jacobson JJ.

³¹ *RailPro Services Pty Limited v Flavel* (2015) 242 FCR 424 at [112]; *Sayed v CFMEU* (2015) 327 ALR 460 at [161]; *Reay v Fuel & Gas Haulage Pty Ltd & Anor* [2019] FCCA 2473 at [29]; *Rumble v HWL Ebsworth* (2019) 289 IR 72 [141]-[145] (not disturbed on appeal).

37. In *RailPro Services Pty Ltd v Flavel* (2015) 242 FCR 424, Perry J summarised the operation of section 351(2) and (3) as follows:

[112] First, it is true that s 351(2) of the FW Act provides that s 351(1) does not apply to an action that is, relevantly, not unlawful under any anti-discrimination law, including the Disability Discrimination Act. However, the primary judge has effectively substituted the “carve-out” in s 351(2) for the test to be applied under s 351(1). However, the question under subs (1) is simply “why did RailPro dismiss Mr Flavel?”. Thus, if the dismissal was “because of” Mr Flavel’s mental disability, s 351(1) is breached unless the dismissal falls with one of the “carve-outs” in s 351(2)(a), s 351(2)(b) or s 351(2)(c). Save therefore where the adverse action is that defined in column 2, para (d) of Item 1 of the table in s 342(1) (ie that the employer “discriminates between the employee and other employees of the employer”), s 351(1) does not require that any comparison be undertaken between the treatment of the employee in question and any other employee(s). As such, s 351(1) relevantly prohibits specific conduct which the Parliament has adjudged to be discriminatory in a general sense, in contrast to s 15(2) of the Disability Discrimination Act where the comparison must still be made in the particular case in order to determine whether there has been a breach of that Act. Moreover under the Disability Discrimination Act, it suffices if an act is done for a proscribed reason even if it is not a “substantial reason” in contrast to the need to establish that the proscribed reason is a substantial and operative reason under the FW Act. Moreover it is sufficient under the Disability Discrimination Act if the discrimination is referable to a perceived, as opposed to actual, disability or a disability of an associate (see “disability” defined in s 4(1) of the Disability Discrimination Act). That is not the case again under the FW Act.

[113] Understood in its context, therefore, the purpose of the “carve-out” is simply to ensure that conduct which would not contravene the general anti-discrimination laws, including relevantly the Disability Discrimination Act, equally does not contravene the FW Act and thereby avoids a result whereby the FW Act imposed more onerous obligations upon an employer than those already imposed upon her or him under general anti-discrimination laws. It is, in other words, a limitation or a check upon the scope of the prohibition in s 351(1). In effect s 351 proscribes a “subset” of that which is proscribed under the Disability Discrimination Act.

[114] The converse is not, however, true. It does not follow that conduct which contravenes the Disability Discrimination Act thereby also contravenes s 351(1) of the FW Act contrary to the assumption apparently made by the primary judge.

38. In *Morton*, Rangiah J expressly adopted the above analysis (at [68]).
39. The operation of subsections 351(2) and 351(3) therefore together give rise to a question as to which State or Territory legislation applies, given conduct proscribed under anti-discrimination legislation in one State or Territory may not be proscribed in another. In *Rumble v HWL Ebsworth* (2019) 289 IR 72 at [141]-[145], the issue arose as to which State or Territory anti-discrimination legislation applied, with the respondent employer arguing that it was New South Wales (where political opinion discrimination is not unlawful at State level)³² and the applicant employee arguing that

³² While at federal level the Australian Human Rights Commission is empowered to ‘inquire into any act or practice ... that may constitute discrimination’ (including political opinion discrimination) under section 31(b) of the *Australian Human Rights*

it was the Australian Capital Territory (where political opinion discrimination is unlawful under ACT anti-discrimination legislation).

40. Perram J in *Rumble* did not accept a submission by the respondent that the 'place where' the applicant's employment had been terminated was the place where the applicant had received the letter of termination (being New South Wales), which would have resulted in a finding that there was no contravention of section 351(1) by operation of section 351(2), because political opinion discrimination was not unlawful under anti-discrimination legislation in New South Wales. At [144]-[145], Perram J in addition refused to accept the applicant's submission that the 'place where' the termination occurred was to be determined by the proper law of the contract, instead finding that 'everything about [the employment] relationship was centred on the ACT' and that therefore the termination occurred in the ACT, where political opinion discrimination was unlawful. The applicant in *Rumble v HWL Ebsworth* (2019) 289 IR 72 was nonetheless unsuccessful for other reasons, as will be seen below.

WHAT CONSTITUTES ADVERSE ACTION

41. Section 342, item 1, provides that adverse action 'by an employer against an employee' occurs where 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 and other employees of the employer.*
42. There are not dissimilar meanings of adverse action, in items 2-7 of section 342 of the FW Act, in respect of prospective employees, principals and independent contractors, prospective principals and independent contractors, employees against employers, independent contractors and their sub-contractors, as well as industrial associations and members and officers of industrial associations. However, the focus in this paper is on decisions in which adverse action taken by employers against employees has been considered.
43. The threat of or organising adverse action also constitutes adverse action,³³ while action that is authorised under the FW Act, another Commonwealth law or prescribed state or territory law, as well as standing an employee down while the employee is engaging in protected industrial action, does not constitute adverse action.³⁴

Commission Act 1986 (Cth) by operation of the definition of 'discrimination' in section 3 of that legislation (which expressly includes political opinion discrimination), such an 'act or practice' is not categorized under the *Australian Human Rights Commission Act 1986* (Cth) as 'unlawful discrimination'.

³³ By operation of section 342(2).

³⁴ By operation of section 342(3) and (4).

ADVERSE ACTION - DISMISSAL

44. The term 'dismisses the employee' in item 1(a) of section 342 is not defined within Part 3-1 of the FW Act, although 'dismissed' is defined in Part 3-2 in respect of the unfair dismissal jurisdiction, under sections 12 and 386.
45. In *Morris v Allied Express Transport* [2016] FCCA 1589, Judge Smith considered (without needing to decide the issue) whether the definition of 'dismissed' in section 386 was applicable in respect of section 342. At [116]-[117], his Honour expressed the 'tentative view' that, because the preamble to the Dictionary in section 12 of the FW Act states 'In this Act:...' and then provides the definition of 'dismissed' as 'see section 386', the definition in section 386 was to apply throughout the FW Act and was not intended to be limited only to the unfair dismissal jurisdiction in Part 3-2 (in respect of which the Federal Circuit Court had no jurisdiction, as his Honour observed at [117]). His Honour went on to observe that the fact that section 342 used the word 'dismisses' rather than 'dismissed' does not matter, given the operation of section 18A of the *Acts Interpretation Act 1901* (Cth) which provides:

In any Act where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings.

46. In *Fair Work Ombudsman v Austrend International* (2018) 273 IR 439, a case in which the Fair Work Ombudsman's constructive dismissal claim against the employer was dismissed, the definition in section 386 (including the definition of constructive dismissal within section 386(1)(b)) was applied at [25]-[26] without discussion and without reference to the decision in *Morris*. In *Coles Supply Chain v Milford* [2020] FCAFC 152, the Full Court also unanimously applied the definition in sections 12 and 386 at [15], [86] without further discussion, thereby seemingly settling any issue as to whether the definition in section 386 applies to Part 3-1.
47. Section 386 of the FW Act provides that:

(1) A person has been dismissed if:

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

48. There are several implications of the definition of 'dismissal' in section 386 applying to that term in section 342. The first is that the second limb of this definition encompasses the common law notion of 'constructive dismissal,' applied in decisions such as *Austrend*.

49. In addition, the limitations in section 386(2) are captured. Section 386(2) provides that:

(2) However, a person has not been dismissed if:

(a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or

(b) the person was an employee:

(i) to whom a training arrangement applied; and

(ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;

and the employment has terminated at the end of the training arrangement; or

(c) the person was demoted in employment but:

(i) the demotion does not involve a significant reduction in his or her remuneration or duties; and

(ii) he or she remains employed with the employer that effected the demotion.

(3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.

50. Therefore, those engaged under a fixed term contract or for a specified task will not have been 'dismissed' if their contract simply comes to an end at the conclusion of the period or task (provided the purpose of the contract was not to avoid the employer's obligations). Similarly, those engaged on a casual basis will not have been dismissed if it can be shown that the engagement simply concluded and there was no obligation to provide further work.³⁵

JURISDICTIONAL OBJECTION - NO DISMISSAL

51. In *Coles Supply Chain v Milford* (2020) 300 IR 146, the Full Court held (Rares J, Collier J, Charlesworth J), at [67] (in respect of an argument by the employer that the applicant had been employed on a casual basis and that therefore there was no dismissal) that the issue of whether the employee had been dismissed was a jurisdictional issue by reason of the wording in section 365 of the FW Act, which provides:

If:

(a) a person has been dismissed; and

³⁵ *Thompson v Big Bert* (2007) 168 IR 309 at [61]; *Clarke v Premier Youthworks* [2020] FCCA 105 [243]-[244] (both held no legal basis on which to insist on offer of further work).

(b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.

52. In *Milford*, the applicant was engaged as a casual in 2010, injured in October 2014 and was terminated by a letter issued by Coles Supply Chain Pty Limited on 13 June 2016. In June 2018, the applicant filed an application under Part 3-1 of the FW Act. Coles argued that the application was out of time and (later in the proceedings) that the applicant had not been dismissed, but that his engagement had instead ceased, because he was a casual.
53. The Full Court in *Milford* held that (at [67]-[68]) because section 365(a) provides that an application under Part 3-1 of the FW Act can only be made where a person has been dismissed, whether there has been a dismissal is a jurisdictional issue that must be decided by the Fair Work Commission at the point at which the application is filed, if the objection is taken by the employer respondent. The Full Court observed at [79] that, if the Fair Work Commission errs in a decision as to whether there has been a dismissal, this is a jurisdictional error in respect of which either party can apply to the Federal Court and seek relief by way of judicial review, as occurred in *Milford*.
54. The Full Court in *Milford* at [68] referred to the power of the Fair Work Commission to make procedural rules by legislative instrument under section 609 of the FW Act to receive any such jurisdictional objections filed by employers. The Fair Work Commission respondent Form F8A, being the form to be filed in response to a general protections application under Part 3-1 of the FW Act, now contains procedures for jurisdictional objections to be made by a respondent (upon receipt of an application) where a respondent contends that there has been no 'dismissal'.³⁶

ADVERSE ACTION – CONSTRUCTIVE DISMISSAL

55. As is evident by the definition in section 386(1)(b) of the FW Act, a constructive dismissal occurs where the employee is in effect 'forced' to resign by some conduct, or a course of conduct, of the employer.³⁷ Whether a constructive dismissal has occurred requires an analysis of what actually occurred and whether the employer's conduct was the 'real and effective initiator of the termination': *FWO v Austrend International* (2018) 273 IR 439 [28].

³⁶ <https://www.fwc.gov.au/content/rules-form/response-general-protections-application>.

³⁷ *Austrend* at [27].

56. The decision in *Allison v Bega Valley Council* (1995) 63 IR 68 at 72-73, referred to in *Austrend* at [28], distils the principles relevant to identifying a constructive dismissal as follows:

Although the term “constructive dismissal” is quite commonly used it can deflect attention from the real inquiry. That inquiry should involve an analysis of what occurred. Did the employer behave in such a way so as to render the employer’s conduct the real and effective initiator of the termination of the contract of employment and was this so despite on the face of it the employee appears to have given his or her resignation?

It is obvious that a consideration of these matters must be made on a case-by-case basis and that an attempt to formulate general principles in the absence of particular facts will not assist in the overall determination of this issue.

In order to undertake the necessary analysis it is necessary to look carefully at all the relevant facts. It is necessary to determine whether the actual determination was effectively initiated by the employer or by the employee particularly where the dynamics within a factual situation may change. For example, an employer may demand a resignation with a threat of dismissal, negotiations may then ensue and the employee may ultimately be genuinely pleased with the outcome of those negotiations to the extent that any resultant resignation may be said to be given freely and without any undue influence being brought to bear by the employer.

57. Having analysed the authorities, Gilmour J in *Austrend* concluded that a constructive dismissal does not extend to the circumstance in which an employee ‘is willing and content to resign on the terms which he [or she] has negotiated and which are satisfactory to him [or her]’: *FWO v Austrend International* (2018) 273 IR 439 [30].
58. The circumstances capable of giving rise to a ‘forced’ resignation (within the meaning of section 386(1)(b) of the FW Act) have also been the subject of consideration of the Fair Work Commission and its predecessors.³⁸ The principles distilled from these authorities were recently summarised in *Ravi Sathananthan v BT Financial Group Pty Limited* [2019] FWC 5583 as follows:
- *The question as to whether the resignation was forced within the meaning of the FW Act is a jurisdictional fact that must be established by the applicant;*
 - *A termination at the initiative of the employer involves the conduct (or course of conduct) engaged in by the employer as the principal constituting factor leading to the termination;*
 - *The employer must have engaged in some conduct that intended to bring the employment relationship to an end or had that probable result;*
 - *Conduct includes an omission;*

³⁸ *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Shahin Tavassoli* [2017] FWCFB 3941 [27]-[34].

- *Considerable caution should be exercised in treating a resignation as other than voluntary where the conduct of the employer is ambiguous and it is necessary to determine whether the employer's conduct was of such a nature that resignation was the probable result such that the employee had no effective or real choice but to resign; and*
- *In determining the question of whether the termination was at the initiative of the employer, an objective analysis of the employer's conduct is required.*³⁹

59. Accordingly, it has been held that a business development manager was 'dismissed' when faced with a combination of "excessive working hours and the absence of any real recognition of this issue or steps taken by [his employer] to manage [his excessive working hours]".⁴⁰ A labourer was also found to have been 'dismissed' in circumstances his employer had failed to respond to sustained bullying, harassment, and discrimination to which he had been subjected.⁴¹

ADVERSE ACTION – INJURY IN EMPLOYMENT

60. The term 'injures the employee in his or her employment' in section 342, item 1(b), has been held to include:

- a) Any injury of a compensable kind.⁴²
- b) Deprivation of immediate practical incident(s) of employment.⁴³
- c) Any substantially differential treatment to the normal treatment of the employee that is injurious; 'singling out'.⁴⁴
- d) Narrower conduct than 'altering the position of the employee to the employee's prejudice'.

61. In *Elachi v O'Shea & Jolly Jointly Trading as NRG Legal* [2020] FCCA 2706 at [368], Judge Cameron observed that when injury to an employee in his or her employment or the alteration of an employee's position to his or her prejudice is alleged, an assessment of the impugned conduct calls for a comparison of the position of the employee before and after the employer's alleged acts to determine the nature of any injury or prejudicial alteration.⁴⁵ In *Elachi*, Judge Cameron went on

³⁹ *Ravi Sathananthan v BT Financial Group Pty Limited* [2019] FWC 5583 [82], applied in *Mr Billy Muhinyuza v Teys Australia Beenleigh Pty Ltd* [2020] FWC 2996 [98].

⁴⁰ *Ravi Sathananthan v BT Financial Group Pty Limited* [2019] FWC 5583 [92].

⁴¹ *Mr Billy Muhinyuza v Teys Australia Beenleigh Pty Ltd* [2020] FWC 2996 [4] and [120].

⁴² *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 17-18.

⁴³ *Commonwealth Bank of Australia v Finance Sector Union of Australia* [2007] FCAFC 18 [71]-[72] per Spender J citing *Childs v Metropolitan Transport Trust* (1981) IAS Current Review 946 at 948.

⁴⁴ *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155 at 164.

⁴⁵ *McIlwain v Ramsey Food Packaging Pty Ltd* (2006) 154 IR 111 at 198 [349] per Greenwood J.

to observe that, in *AWU v BHP Iron-Ore Pty Ltd* (2000) 106 FCR 482 Kenny J said that before an injury in employment or a prejudicial alteration will be found:

*... 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. (at 499 [54])*⁴⁶

ADVERSE ACTION – PREJUDICIAL ALTERATION OF THE EMPLOYEE’S POSITION

62. The following principles have been held to be applicable to the term ‘alters the position of the employee to the employee’s prejudice in section 342, item 1(c):

- a) The term is extremely broad, covering and extending beyond legal injury. It includes any adverse effect on, or deterioration in, previously enjoyed advantages and benefits of employee.⁴⁷
- b) It may occur even without loss or infringement of legal right.⁴⁸
- c) It will occur where the alteration is real and substantial rather than merely possible or hypothetical.⁴⁹
- d) Mere unfairness or injustice has been said not to be enough.⁵⁰

63. The principles were summarized in *Milardovic v Vemco Services Pty Limited* [2016] FCA 19 at [54] per Mortimer J and more recently in *National Tertiary Education Industry Union v University of Sydney* [2020] FCA 1709 at [199] and in *Rangi v Kmart Australia Ltd* [2019] FCA 1778 at [38] to [40] where Steward J stated as follows:

[38] In Blair v Australian Motor Industries Ltd [1982] FCA 143; (1982) 3 IR 176, Evatt J considered s 5(1)(e) of the Conciliation and Arbitration Act 1904 (Cth) (which was in comparable terms to s 342(1) of the FW Act) and the proper construction of “alter his position to his prejudice” in the opening sentences of that section. Her Honour adopted and applied the views of Smithers J in Childs v Metropolitan Transport Trust (1982) 29 ALR 24, where his Honour observed that the word “position” should be read to:

... refer to a man’s [sic] employment position in all its attributes and that to find what those attributes are in any particular case, you look at the terms of the agreement in relation to the particular employment ...

[39] In Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3) [1998] HCA 30; (1998) 195 CLR 1 (“Patrick Stevedores Operations”), in considering former s 298K(1)(c) of the Workplace Relations Act 1996 (Cth), the High Court held that “alter the position of an employee to

⁴⁶ See also *BHP Iron Ore Pty Ltd v Australian Workers’ Union* (2000) 102 FCR 97 at 108 [35]; *Unsworth v Tristar Steering and Suspension Australia Ltd* (2008) 216 FCR 122 at 137 [24], 139 [31].

⁴⁷ *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 18; *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 at [84]; *Australian and International Pilots Association v Qantas Airways Ltd* (2006) 160 IR 1 at [15]- [17].

⁴⁸ *Klein* at [84]; *Australian and International Pilots Association* at [17]; *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association* (2012) 202 FCR 244 at [32].

⁴⁹ *Klein* at [84]; *Australian and International Pilots Association* at [17]; *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association* (2012) 202 FCR 244 at [32].

⁵⁰ *Eg Lamont v University of Queensland (No 2)* [2020] FCA 720 at [66] and the authorities cited therein.

the employee's prejudice" is 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 18 [4]).

[40] More recently, as the primary judge recognised, Gyles J in Unsworth at 137 [24] stated that a "before and after" test is usually applied to see whether there has been any prejudicial alteration of position of the employee by reason of any act of the employer.

64. Altering the position of an employee prejudicially has been found to constitute a broad range of conduct including:

- a) Allocation of less favourable shifts, including where pay and leave entitlements were reduced.⁵¹
- b) Failing to re-employ a casual even where there was no prima facie legal entitlement to re-employment of the worker (given the worker was a casual), however there was an 'expectation of future work'.⁵² In *Employment Advocate v NUW* (2000) 100 FCR 454 [73]-[77], a labour hire company (Adecco) engaged casuals and supplied labour to David's Distribution Pty Limited. The NUW told David's to cease giving shifts to a particular casual because he refused to become a union member. It was held that the NUW had breached former s 298K(1) of the *Workplace Relations Act 1996* (Cth).
- c) The 'disappointment' of not being re-employed, even where there was no legal entitlement to be re-employed (similar to the above),⁵³ including as a result of being allocated a 'score' in a performance review below a particular level such as to jeopardise future re-employment.⁵⁴
- d) Conduct having the effect of rendering employment less secure, including investigating employee conduct,⁵⁵ for instance where the employer had sent letters to the employee investigating the distribution of leaflets critical of the employer⁵⁶ or where an investigation was made known to the entire workforce (rather than being kept confidential) thereby causing injury to the employee's reputation.⁵⁷ Where an investigation is commenced reasonably/with cause it has been found not to constitute adverse action, even where there is a failure to afford natural justice.⁵⁸

⁵¹ *CFMEU v Endeavour Coal* (2015) 231 FCR 150; *IEU v Canonical Administrators* (1998) 87 FCR 49.

⁵² *Employment Advocate v NUW* (2000) 100 FCR 454 [73]-[77].

⁵³ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 IR 16.

⁵⁴ *CFMEU v Pilbara Iron (No 3)* [2012] FCA 697 at [51] cited also in *Perez v Northern Territory Department of Correctional Services* [2016] FCA 476 at [81].

⁵⁵ *Bartolo v Dousta Galla Aged Services (No 2)* [2015] FCCA 345 at [123]-[133].

⁵⁶ *Kimpton v Minister for Education of Victoria* (1996) 65 IR 317 cited in *Bartolo* at [123].

⁵⁷ *Police Federation of Australia & Anor v Nixon & Anor* (2008) 168 FCR 340 cited in *Bartolo* at [124].

⁵⁸ *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22 at [121]-[122] cited in *Lamont v University of Queensland (No 2)* [2020] FCA 720 at [66].

- e) Implementing a 'spill and fill' following a restructure, given it makes the employment less secure, and particularly the non-selection of the affected employee despite achieving the criteria for selection for a role where others who were selected did not.⁵⁹
- f) Loss of a chance to access particular entitlements (such as study or sick leave entitlements, where those are withdrawn).⁶⁰

65. Labour hire arrangements in and of themselves can give rise to particular judicial scrutiny. In *Australian Building and Construction Commissioner v CoreStaff WA Pty Ltd* [2020] FCA 893, Banks-Smith J observed at [92] that the 'segmented approach to recruitment' in operation between a labour hire company and principal, 'having particular regard to the potential for a construct or contrivance', was:

'...to be viewed in the context of the objects of Part 3-1 of the FW Act as set out in s 336. The provisions of Part 3-1 are for the benefit of employees and are protective and remedial in nature. They should be interpreted in a way that achieves the FW Act's beneficial purposes: Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3) [2012] FCA 697 at [35]; and Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd [2015] FCAFC 76; (2015) 231 FCR 150 at [180]-[181]. Protection from discrimination is a feature of the FW Act and the consideration of when and whether there is a prospective employer with a vacancy proceeds in that context...'

ADVERSE ACTION – 'DISCRIMINATES BETWEEN' EMPLOYEES

66. Section 342, item 1(d), defines the fourth category of 'adverse action' against an employee as being where 'an employer discriminates between the employee and other employees of the employer.'
67. Two primary issues arise for consideration in respect of the construction of section 342, item 1(d), as follows:
- a) The meaning of the term 'discriminates between', which is not legislatively defined in the FW Act, and whether this term incorporates established notions of direct and indirect discrimination developed under anti-discrimination legislation; and
 - b) The interaction between the term 'discriminates between' in section 342, item 1(d), and 'discrimination' in the subject heading of section 351 of the FW Act, in the context of an allegation of adverse action within the meaning of section 342, item 1(d), in contravention of section 351(1).

⁵⁹ *Rowland v Alfred Health* [2014] FCA 2 at [48]-[49].

⁶⁰ *CBA v FSU* (2007) 157 FCR 329 at [145].

Meaning of ‘discriminates between’ in section 342, item 1(d)

68. In *CFMEU v Pilbara Iron Co (Services) Pty Limited (No 3)* [2012] FCA 607, both parties submitted that ‘discriminates between’ meant ‘treated less favourably’, being the definition of direct discrimination that commonly appears in anti-discrimination legislation. Katzmann J however did not have to decide this issue,⁶¹ observing as follows in respect of section 342, item 1(d):

Item 1(d) of the table in s 342(1) does not speak of discriminating against someone (which is the formulation in some anti-discrimination legislation and also in item 2(b) of the table) but discriminating between people. “Discriminates” is not defined so it must have its ordinary meaning which, relevantly, is simply to make a distinction (the first meaning in both the Oxford and the Macquarie Dictionaries). Still, the section is dealing with adverse action. I think it is unlikely — despite the difference in the prepositions used in items 1(d) and 2(a) — that the Parliament had in mind anything other than conduct which discriminated against one employee when compared with other employees. The applicants accepted this in their opening submissions, although they retreated from this position in their closing submissions. I rather think that the different expressions were used for syntactical reasons.

Both parties nevertheless accepted that discriminate in this context means “treat less favourably”. That necessarily imports the concept of discriminating against the employee who has been treated in this way.

*The real difficulty is in deciding how the comparison should be made. The difficulty is not as acute in the anti-discrimination legislation where the various statutes provide that a person discriminates against another on a particular ground in defined circumstances. Here, the circumstances are not defined. Section 5 of the Disability Discrimination Act 1992 (Cth), for example, relevantly provides that a person (the discriminator) discriminates against an aggrieved person on the ground of a disability if, because of the aggrieved person's disability, the discriminator treats the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different. In that context, the High Court held in *Purvis v State of New South Wales (Department of Education and Training)* [2003] HCA 62; (2003) 217 CLR 92 (a case of a disabled child whose disability caused him to behave violently at a school from which he was then excluded) that the relevant comparison was between the child concerned and another child without the disability who had behaved in a similar way. That is, the treatment of the alleged victim is to be compared with the treatment of another person with or without the relevant attribute or ground on which discrimination is prohibited. Here, however, item 1(d) of s 342 does not define the relevant attribute or ground. The prohibited reasons can be found in ss 340 and 346, but these provisions only apply once adverse action has been established.*

69. In *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 the meaning of the term ‘discriminates between’ in section 342, item 1(d), arose again for consideration. While Gordon J in *Klein* held (at [97], [102]) that the term ‘discriminates

⁶¹ As was observed in *Sayed v CFMEU* (2015) 327 ALR 460 at [157].

between' extends beyond only 'direct discrimination' to incorporate the notion of facially neutral 'indirect discrimination',⁶² her Honour appeared not to consider the discussion of Katzmann J in *Pilbara Iron (No 3)*. Ultimately, and despite Gordon J accepting that the term 'discriminates between' extended to indirect discrimination, the applicant employee in *Klein* was unsuccessful in his claim that an enterprise agreement which required him to consult with the union and which gave the union a veto right indirectly discriminated against him because he was not a union member.

70. In *Sayed v CFMEU* (2015) 327 ALR 460 (a case in which the employee unsuccessfully claimed that he was treated differently by being required to fly to Sydney for an inquiry into his involvement with the Socialist Alliance: [162]), Mortimer J considered the analysis by Katzmann J in *Pilbara Iron (No 3)* of section 342, item 1(d). After considering *Pilbara Iron (No 3)* and other authorities, and observing that Katzmann J had not had to decide the issue in *Pilbara Iron (No 3)*, Mortimer J accepted the applicant's submission that 'discriminates between' means simply 'treating people differently' in similar or the same circumstances, putting it this way at [157]-[160]:

In Pilbara Iron, Katzmann J observed (at [40]) that Item 1(d) speaks of discrimination occurring "between employees" and not "against" an employee, but concludes that, especially given the presence in Item 2 of the word "against", there is no material difference. In the matter before her Honour, both parties accepted that "discriminate" should be construed as "treat less favourably", so that her Honour did not have to decide this question. In contrast, the parties in this proceeding contended for different constructions. The construction issue is significant in this proceeding because, as I have found, the direction to attend the 18 July 2013 meeting did not alter the applicant's position in his employment to his prejudice and if the direction is not within Item 1(d) it cannot constitute adverse action.

The applicant submits "discriminates" in Item 1(d) should simply be construed as treating people differently....

I accept the applicant's submission as a matter of construction in relation to Item 1(d), but it does not assist him for the reasons I outline below. In my opinion, the language in Item 1(d), and its use of the word "between", suggests the conduct which is to be examined is the way in which the employer targets the particular employee. Is that employee treated differently from other employees?

71. More recently, in *Morton v Commonwealth Scientific and Industrial Research Organisation (No 2)* [2019] FCA 1754, the scope of section 342, item 1(d) was again considered, with Rangiah J focussing on the analysis of Mortimer J in *Sayed v CFMEU* (2015) 327 ALR 460, which in turn considered Katzmann J's analysis in *Pilbara Iron (No 3)*. His Honour Rangiah J in *Morton* observed at [65] that Mortimer J had held in *Sayed* that the phrase 'discriminates between' 'does not itself require less

⁶² Applied in *Taylor v Department of Health* [2020] FCA 1364 at [22] per Flick J.

favourable treatment of an employee’ (emphasis original). However, Rangiah J then went on at [70]-[71] to find that:

There is tension between the views expressed about the meaning of the phrase “discriminates between” in Item 1(d) in Sayed and Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3) [2012] FCA 697. In Sayed, Mortimer J held at [158] that “discriminate between” in Item 1(d) should be construed as “treating people differently”. In contrast, in Pilbara Iron, Katzmann J accepted at [40]–[41] that “discriminate between” should be construed as “discriminate against”, and means “treat less favourably”.

I prefer the construction given in Pilbara Iron...

72. Ultimately, Rangiah J concluded in *Morton* at [72] that ‘[a]ccordingly, Item 1(d) requires *less favourable treatment* of an employee (or a group of employees) in comparison to other employees of the employer’ (emphasis original). The finding in *Morton* was applied in *Elachi v O’Shea & Jolly Jointly Trading as NRG Legal* [2020] FCCA 2706 at [370] by Judge Cameron.
73. While Rangiah J concluded that ‘discriminates between’ in section 342, item 1(d) requires less favourable treatment, his Honour did not appear to apply the formulae distilled under anti-discrimination legislation (for instance, by identifying less favourable treatment by reference to a hypothetical or real comparator) to determine whether the alleged conduct amounted to less favourable treatment. At [289] of *Morton* Rangiah J instead found that the conduct (which included a colleague slapping or tapping the applicant on the backside with a riding crop) did not amount to ‘unfavourable treatment’ and that ‘[s]ince [the] conduct was not unfavourable treatment, it cannot amount to less favourable treatment of Dr Morton compared to other employees.’
74. Therefore, while the term ‘discriminates between’ is most recently interpreted as requiring less favourable treatment, it appears that the principles decided under anti-discrimination legislation are not automatically imported⁶³ and the term ‘discriminates between’ does not necessarily have an identical meaning as the term ‘discriminates’ or ‘discrimination’ under anti-discrimination legislation.

Interaction between section 342, item 1(d) and section 351 of the FW Act

75. In *Sayed v CFMEU* (2015) 327 ALR 460, Mortimer J found that section 351 and section 342, item 1(d), must be read together ‘as a whole’ (at [161]). Her Honour refers to the application of section 351 being the ‘subsequent step’, after first determining whether an employer had ‘discriminated between’ employees for the purposes of section 342 item 1(d). Therefore, after identifying whether adverse action

⁶³ As observed in Rinaldi et al, *Fair Work Legislation 2020-21*, Thomson Reuters, [FWA.342.110].

within the meaning of section 342, item 1(d), has occurred (in that the employer has 'discriminated between' employees), the court must then determine whether a contravention of section 351 had occurred.

76. This process appears to have been implicitly endorsed in *RailPro Services Pty Ltd v Flavel* (2015) 242 FCR 424 at [112] by Perry J, although not applied given that decision did not involve an allegation of adverse action as contemplated by section 342, item 1(d).
77. Both of these analyses were reproduced in full by Rangiah J in *Morton* at [61] and [64] and it seems that the approach was also generally adopted by his Honour in his overall consideration of the two sections at [58]-[72].

THE REBUTTABLE PRESUMPTION AND CAUSAL NEXUS: SECTIONS 360 AND 361 OF THE FW ACT

78. Section 360 of the FW Act provides:

Multiple reasons for action

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

79. The effect of section 360 is that the proscribed reason for the impugned conduct need not be the sole or dominant reason, but must comprise a 'substantial and operative factor'.⁶⁴ In *Sayed v CFMEU* (2015) 327 ALR 460, Mortimer J stated the effect this way:

Although the language in Bowling of "substantial and operative factor" is not the language of s 360 of the Fair Work Act, as Gummow and Hayne JJ pointed out in Barclay 248 CLR 500; [2012] HCA 32 at [103], the extrinsic material in relation to s 360 did refer to the intention to incorporate earlier jurisprudence from the former provision (s 792 of the Workplace Relations Act) and summarised the effect of that jurisprudence as being that the reason must be "an operative and immediate reason for the action", but not the "sole or dominant" reason.

80. Section 360 and section 361 of the FW Act are intended to operate in tandem, as was observed by the majority in *Rumble v HWL Ebsworth* (2019) 289 IR 72 (per Rares and Katzmann JJ) at [33]-[34].

81. Section 361 of the FW Act provides:

Reason for action to be presumed unless proved otherwise

(1) If:

⁶⁴ *Board of Bendigo Regional TAFE v Barclay* (2012) 243 CLR 500 at [56]-[59], [104], [140]; *CFMEU v BHP Coal* (2014) 253 CLR 243 [22], [90]-[93].

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.

82. The interaction between section 360 and 361 was summarised in *Rumble* by the majority at [33]-[34] in the following way:

The High Court observed that the Parliament intended ss 360 and 361 to provide a balance between the parties to a workplace dispute by, first, establishing a presumption in favour of an employee who alleges that an employer had taken, or is taking, adverse action against him or her because of a particular circumstance or fact of the kind specified in any of ss 340, 346, 351 or 354 and, secondly, enabling the employer to rebut that presumption (Barclay 248 CLR at 523 [61] per French CJ and Crennan J, 535–536 [103]–[105], 542 [127]–[128] per Gummow and Hayne JJ). The presumption and onus that ss 360 and 361(1) create are necessary because the employee cannot know or prove what was in the decision-maker's mind when he or she took the adverse action. The court must enquire into, and make findings about, the mental processes of the decision-maker for taking the adverse action complained of (at 517 [44]–[45], 523 [62], 534–535 [101], and per Heydon J at 544 [140]).

Accordingly, the employer or decision-maker acting on its behalf who took the alleged adverse action must prove, as a fact, that none of his or her reasons for that action included as a substantial and operative factor any reason or intent that the Act proscribed him or her from having: Barclay 248 CLR at 522–523 [56]–[59] per French CJ and Crennan J, 535 [104] per Gummow and Hayne JJ, 544 [140] per Heydon J. As French CJ and Crennan J held (Barclay 248 CLR at 516–519 [41]–[44]), the Court must determine the question of fact, namely “why was the adverse action taken?” ...

83. The majority in *Western Union Business Solutions (Australia) Pty Limited v Robinson* (2019) 272 FCR 547 (per O’Callaghan and Thawley JJ) distilled the principles (in respect of the application of section 360 and 361 of the FW Act to a claim under section 351) as follows:

...the Court’s task in determining the application of s 351(1) 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 – see: Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 248 CLR 500 at [5] (French CJ and Crennan J); at [101] (Gummow and Hayne JJ).

Secondly, where adverse action is taken as a result of a decision made by an individual within a corporation, the identification of the operative reasons for taking the adverse action turns on an inquiry into the mental processes of the relevant individual: Barclay at [140] (Heydon J); Construction, Forestry, Mining

and Energy Union v BHP Coal Pty Ltd (2014) 253 CLR 243 at [7] (French CJ and Kiefel J); [85] (Gageler J).

Thirdly, the object of that inquiry is to determine the actual reasons. These are determined from all of the facts and circumstances and inferences properly drawn from them. In light of s 361, one would ordinarily expect direct evidence from the individual responsible for the employer's action as to their reasons for that action, which may properly include positive evidence that the action was not taken for a prohibited reason. Of course such statements must be assessed against all of the facts and circumstances. In State of Victoria (Office of Public Prosecution) v Grant (2014) 246 IR 441 at [32], Tracey and Buchanan JJ summarised the following propositions from Barclay at 517 (French CJ and Crennan J); 542 (Gummow and Hayne JJ); 545-546 (Heydon J) and BHP at [19]-[22] (French CJ and Kiefel J); [85]-[89] (Gageler J):

- *The central question to be determined is one of fact. It is: "Why was the adverse action taken?"*
- *That question is to be answered having regard to all the facts established in the proceeding.*
- *The Court is concerned to determine the actual reason or reasons which motivated the decision-maker. The Court is not required to determine whether some proscribed reason had subconsciously influenced the decision-maker. Nor should such an enquiry be made.*
- *It will be "extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer."*
- *Even if the decision-maker gives evidence that he or she acted solely for non proscribed reasons other evidence (including contradictory evidence given by the decision-maker) may render such assertions unreliable.*
- *If, however, the decision-maker's testimony is accepted as reliable it will be capable of discharging the burden imposed on the employer by s 361.*

84. The above principles, plus additional principles applicable to the effect of section 360 and 361, have been expressed in various authorities in the following way:

- a) There must be more than a mere temporal connection between the adverse action and alleged proscribed reason: *Milardovic v Vemco Services* [2016] FCA 19 at [55]; *Barclay* at [60]; *CFMEU v BHP Coal* (2014) 253 CLR 243 at [19].
- b) Direct evidence of the decision maker is generally required to rebut presumption: *Barclay* at [42]-[45], [101], [127], [146]; *Sayed v CFMEU* (2015) 327 ALR 460 at [179]; *Milardovic* at [57].
- c) An express denial will not usually suffice, particularly where contradictory evidence/other facts proven: see for example the findings in *Roohizadegan v TechnologyOne Limited (No 2)* [2020] FCA 1407 [967]-[1006].⁶⁵

⁶⁵ An appeal and cross appeal have been filed in this matter.

- d) Where direct evidence of decision-maker not given, or not given on the reasons for termination, the statutory presumption has in the past been found not rebutted: eg *PIA Mortgage Services Pty Limited v King* (2020) 274 FCR 225 at [36], [148]-[156]; *Cigarette & Gift Warehouse Pty Limited v Whelan* (2019) 268 FCR 46 [29]-[31] (case ‘cried out’ for evidence of ‘relevant corporate actor’).
- e) An assessment of the state of mind of the decision maker is what is required (*Rumble v HWL Ebsworth* (2020) 294 IR 337 [33], [35] per the majority; *Milardovic* at [57]), but not an assessment of the ‘unconscious’ state of mind (*Barclay* [118], [124]-[126], [134], [145]-[147]).
- f) The court must ask ‘why’ the action was taken: *Barclay* [41]-[44]; *Rumble* [34] per majority; *Short v Ambulance Victoria* (2015) 249 IR 217 at [54]-[56].
- g) The decision maker being *aware* of various facts or matters does not make those the *reasons* for the conduct: *Milardovic* at [59]-[60]; *CFMEU v Endeavour Coal* (2015) 231 FCR 150 at [91] (special leave refused).
- h) The focus is not on the ‘fairness’ or otherwise of the employer’s conduct: *Tsilibakis v Transfield Services (Australia) Pty Ltd* [2015] FCA 740 at [16] (The “focus ... must be on whether the employer has taken the adverse action for a proscribed reason”); *Celand v Skycity Adelaide Pty Ltd* (2017) 256 FCR 306 at [101]; *Taylor v Department of Health* [2020] FCA 1364 at [23]; *Ermel v Duluxgroup (Aust) Pty Ltd (No 2)* [2015] FCA 17 at [48] (“A general protections proceeding is not a broad inquiry as to whether the applicant has been subjected to a procedurally or substantively unfair outcome”).

85. Several recent Full Court decisions underscore the nature of the evidence required to discharge the rebuttable presumption under section 361 of the FW Act. In *Rumble*, the applicant (Dr Rumble) had initially been engaged by a law firm (DLA Piper) not a party to the proceedings. In 2011, the Department of Defence had appointed DLA Piper to conduct a review into allegations of sexual and other abuse in the military. The Minister of Defence had appointed Dr Rumble (plus another professor and another partner of DLA Piper) to conduct that review. Later in 2011 all three reviewers left DLA Piper and were engaged by the respondent firm in the proceedings, HWL Ebsworth, to continue with the review. After delivering the first two volumes of the review to the federal government, Dr Rumble criticised two federal government Departments (both clients of the firm) in the media about the government’s response to the recommendations in the review. The respondent firm alleged that these criticisms made by Dr Rumble to the media were in breach of the

firm's media policy. Dr Rumble was terminated, which he said had occurred on the grounds of his political opinion in breach of s351 of FW Act.

86. The majority of the Full Court in *Rumble* upheld the first instance decision, finding at [40] that the primary judge was entitled to conclude that the firm's motivation for terminating Dr Rumble's engagement was not because Dr Rumble had expressed his political opinion, but because of the firm's desire to 'eliminate insubordination' and earn fees from the firm's federal government clients, as follows:

...The rationes decidendi in each of Barclay [2012] HCA 32; 248 CLR 500, BHP Coal [2014] HCA 41; 253 CLR 243 and Endeavour Coal [2015] FCAFC 76; 231 FCR 150 required the primary judge to find as a fact why Mr Martinez decided to terminate Dr Rumble's contract. His Honour found (at [139]):

I therefore find as a fact that Dr Rumble was not terminated for having or expressing a political opinion. Mr Martinez gave evidence to that effect and was extensively cross-examined on this issue. Although there were reasons to reject other parts of Mr Martinez's evidence, I am satisfied that this aspect of his testimony was correct. In truth, Mr Martinez did not care about Dr Rumble's views on the Government's implementation of his recommendations to which he was most likely indifferent. What he did care about was the earning of fees and the elimination of insubordination. (emphasis original in the Full Court decision)

87. The majority in *Rumble* concluded at [48], [50] that:

Accordingly, it is not to the point that, unless Mr Martinez waived the media policy, Dr Rumble was not able to express his political opinion in the media because of that policy. The media policy operated so that no employee, partner or consultant of the firm could criticise the firm's clients or potential clients in the media in breach of it, regardless of the subject matter of the actual or proposed criticism. Having seen and heard Mr Martinez and Dr Rumble, the primary judge found as a fact that the only substantial and operative reasons for the action taken against Dr Rumble were his insubordination and the threat he posed to the firm's commercial interest in earning fees.

...

...[Dr Rumble] could have modified his behaviour by adhering to the media policy and still would have been able to hold and express his political opinion using means other than the media, just as the unsuccessful employees could have acted differently in each of the trilogy of cases [Barclay, BHP Coal and Endeavour Coal] while exercising their respective workplace rights.

88. By contrast, in *PIA Mortgage Services Pty Limited v King* (2020) 274 FCR 225 the majority upheld the first instance decision of Judge Smith that the respondent employer had failed to discharge the rebuttable presumption. In *PIA*, the applicant had been employed by the respondent (PIA Mortgage Services Pty Limited) as CEO. The respondent was a finance company and, during his employment as its CEO, the applicant made internal complaints (including to the director) that the respondent had in effect engaged in issuing fraudulent loans. The director of the respondent

foreshadowed terminating the applicant, who said to the director in an email and in a letter that doing so had had the effect of (or would) breach the contract and Australian Consumer Law. Thereafter the director terminated the CEO's employment.

89. The majority in *PIA* held (at [18]-[32]) that both the email and the letter constituted 'complaints' about breach of contract and breach of the ACL, and that these were complaints that the applicant was 'able to make' under section 341(1)(c)(ii) (see above). In addition, because the decision-maker (the director) had failed to give evidence as to his reasons for terminating the employment of the CEO (although had given evidence on other matters), but instead relied on the written letter of termination as containing those reasons, the Full Court majority (agreeing with Snaden J on this point) found at [36] that the respondent had not discharged the rebuttable presumption. The Full Court majority held that the termination letter contained the reasons for the termination, which were expressly said to be the 'making of demands' by the CEO, which the majority held constituted complaints saying:

...the trial judge accepted that the letter itself provided evidence that one of the reasons given for the termination was that Mr King had made complaints in relation to his employment...

90. The express statements in the termination letter in combination with the failure of the director to give evidence as to the reasons for the termination resulted in the Full Court majority finding at [36] that the respondent had failed to discharge the presumption.
91. Similarly, in *Roohizadegan v TechnologyOne Limited (No 2)* [2020] FCA 1407 [967]-[1006]⁶⁶ Kerr J concluded that the respondent employer had failed to discharge the rebuttable presumption, but not because of a lack of evidence on this point by the decision maker. In *Roohizadegan*, the applicant had made 7 allegations of bullying under the respondent's workplace policy and thereafter the applicant's employment was terminated. Kerr J found at [60] that the allegations of bullying constituted 'complaints' that the applicant was 'able to make' based on 'contractual entitlements' to do so, adopting the reasoning in *PIA*: [60]. This was in addition conceded by the respondent at [53]-[54].
92. After examining evidence from 12 witnesses for the applicant (plus the applicant himself and expert evidence), and evidence from more than 13 witnesses for the respondent (plus expert evidence), Kerr J:
- a) Concluded that the executive chairman (Adrian Di Marco) was the sole decision maker in relation to the applicant's termination of employment: [913], [971].

⁶⁶ An appeal and cross appeal have been filed in this matter.

- b) Rejected the respondents' argument that Mr Di Marco made his decision to terminate at a point at which Mr Di Marco was not aware of any of the applicant's 7 complaints of bullying and found that Mr Di Marco made the decision to terminate only after becoming aware of all 7 complaints: [966], [973].
- c) Concluded that 'Mr Di Marco's evidence as to his actual state of mind cannot be relied on as the truth' and he did not accept Mr Di Marco's evidence as to the reasons for the termination: [981], [993].
- d) Stated that he would have come to the same view without the statutory presumption in section 361 of the FW Act: [995].
- e) Held that, contrary to the respondent's submissions, 'that Mr Di Marco was fully aware of, and acutely interested in knowing the scope and nature of, that bullying allegation': [983].

93. At [1002] of *Roohizadegan*, Kerr J summarised the evidence as disclosing that another senior employee had threatened to leave if Mr Roohizadegan did not (effectively with the ultimatum 'it's him or me'), that the other senior employee had been one of the employees who Mr Roohizadegan alleged had bullied him and, while Mr Di Marco did not want to lose either, he had to make a choice and chose to in effect lose Mr Roohizadegan. At [1005]-[1006], Kerr J concluded:

...I am satisfied that Mr Di Marco was fully aware of the significance of Mr Roohizadegan's exercise of his workplace rights. I am entirely satisfied that Mr Roohizadegan's exercise of those rights became and was a substantial and operative factor in Mr Di Marco's reasons for taking adverse action against him.

I therefore reject that the Respondents discharge their onus of rebutting the presumption provided for in s 361 of the Fair Work Act...

COMPENSATION AND BROAD SCOPE OF SECTION 545 OF THE FW ACT

94. In *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526 Barker J held at [448]-[449] that the broad scope of section 545 provided a power to award compensation for both economic and non-economic loss, observing:

In my view, if anything, the power of the Court to make an appropriate order under s 545 of the FW Act is more broadly cast than provisions of the former WR Act.

Additionally, I do not consider that the word "loss" in s 545(2), to the extent this provision must be relied upon for the making of a financial compensation order, limits the loss that may be claimed to economic loss. While the respondent contends that a distinction should be drawn between "loss" and "damage", and that shock, distress and humiliation should be considered as "damage", and not as "loss", I find the distinction elusive and unhelpful.

Shock, distress and humiliation may be considered, where it exists, as an injury the person suffers which is apt to be described as non economic loss or damage.

95. In decisions such as *Kassis v Republic of Lebanon* [2014] FCCA 155 compensation has been awarded for future economic loss up to the age of retirement, being determined in that case to be 65 years of age: [62]-[64]. In *CFMEU v Hail Creek Coal* [2016] FCA 1032 compensation for future economic loss was awarded for the life of the project in the sum of \$1,296,735 plus interest.
96. However, in assessing loss it is established that a causal connection between the loss and contravention of FW Act must be established: *IEU v AIAE* [2016] FCA 140; *RailPro Services v Flavel* (2015) 242 FCR 424 at [168] (for general damages, a mere assertion of non-economic loss is not enough).
97. In the decision of *Dafallah v FWC* (2014) 225 FCR 559, Mortimer J held that, in the assessment of damages for economic loss, the contractual principle that an employer would have in any event been entitled to terminate lawfully in a way most beneficial to it ought be applied, expressing the finding thus at [161]:

*In considering causation, in the circumstances of a clearly fraught employment relationship as was the case between Ms Dafallah and Melbourne Health, it is appropriate in my opinion to consider that the employer would have in any event been entitled to exercise any power it had to bring the employment contract lawfully to an end in a way most beneficial to itself. The likelihood of an employer taking such a step will be fact dependent but, in contractual terms, it has been held to be relevant to the assessment of damages: see *Bostik (Australia) Pty Ltd v Gorgevski* [1992] FCA 209; (1992) 36 FCR 20 at 32. In my opinion, it is a factor which can also be taken into account for the purposes of determining what compensation is appropriate under s 545(1), where compensation is limited to the loss caused by the contravention.*

98. In *Dafallah*, Mortimer J awarded 3 months compensation (at [178]) on the basis of evidence disclosing that that was 'how much longer the [employer's performance management] warning process, properly adhered to, would have taken.'
99. The decision in *Roohizadegan v TechnologyOne Limited (No 2)* [2020] FCA 1407 demonstrates again the broad scope of section 545 of the FW Act. In *Roohizadegan*, a sum of \$5,181,410 was awarded, consisting of approximately 4.5 years future economic loss in the sum of \$2.825M (after the deduction of 15% in respect of mitigation and contingencies) at [1032], plus \$756,410 in foregone share options at [1023] and \$1.59M in respect of incentives said to be payable since November 2009 as a percentage of profit before tax at [5] and [883]. This finding was based on the applicant's base salary of \$824,569 per annum. In addition to this, penalties and interest were awarded in later decisions.

100. In *Roohizadegan*, Kerr J refused (at [1035]) to accept the employer's submission (based on the principle in *Dafallah*) that Mr Roohizadegan was 'not entitled to any compensation at all for financial loss because the relationship between himself and the employer had irretrievably broken down' and Mr Roohizadegan 'would have been dismissed in any event,' saying at [1037]-[1040] that such a submission:

... involves a strained reading of Mortimer J's reasoning in Dafallah. I do not take anything her Honour there states in respect of the quite different factual matrix of that case (which did not involve a dismissal for a reason prohibited by s 340 of the Fair Work Act) to require the conclusion [the respondent] draws. In any event, that circumstance plainly distinguishes it. It cannot sensibly be suggested that a person who has been bullied out of their job is to be denied compensation for its loss because the counter-factual is that but for their dismissal, they would have returned to a hostile workplace in which they would have been harassed again until they left.

...

Having found that Mr Roohizadegan's dismissal to have been unlawful, in respect of the damages to which he is entitled I am satisfied on the balance of probabilities that Mr Harwood's conduct justified Mr Roohizadegan's want of trust in him. Mr Harwood's conduct, as I have found occurred, amounted to bullying. ... In those circumstances it would be an absurdly narrow construction of s 545 of the Fair Work Act to find that it precluded the availability of compensation for economic loss that that loss has been caused by a dismissal after bullying conduct: the continuation of which is the asserted reason why the employee is said to have no future in that workplace.

Second, there is no plausible or even faintly realistic factual foundation in the actual circumstances of this case for the Court to reduce what would otherwise be the award it would make to compensate Mr Roohizadegan for his loss on the basis of the premise articulated by [the respondent].

101. By contrast, the principle was applied in *Kennewell v Atkins* [2015] FCA 716, with Tracey J finding at [89]-[91] (in respect of a successful application pursuant to Part 3-1 of the FW Act) that the economic loss was to be capped at two weeks wages (or \$2,900.85) because, applying *Dafallah*, '[i]t was open to the company to terminate [the applicant's] services lawfully with little or no notice' given he was a casual who had only been engaged by the respondent for several weeks. Similar reasoning was applied in *Clarke v Premier Youthworks* [2020] FCCA 105 at [235]-[236], in which Judge Neville said that it would be 'almost impossible' for a casual to identify any loss where the casual had no 'regular' work (although *Dafallah* was not applied in that case).
102. The principle in *Dafallah* was also applied at first instance and by the majority of the Full Court in *PIA* at [50], on the basis that the employer in *PIA* 'was entitled to terminate the [applicant's contract of employment] for breach arising from his unauthorised absence from work', having been found to have had a period of unauthorized leave before termination of employment.

CONCLUSIONS

103. The judicial attention that provisions of Part 3-1 of the FW Act continue to receive demonstrates their importance to both employers and employees. The historical and continuing diversity of judicial views over the parameters of section 341(1)(c) of the FW Act in particular, currently epitomized by the divergence between the decisions in *PIA* and *Cummins South Pacific*, is likely to continue to be a focal point in first instance and Full Court decisions until settled by the High Court.
104. Similarly, the application of the principles in *Dafallah* in curtailing damages for future economic loss is also likely to be a characteristic of future decisions and could be the subject of comment or findings in any appeal decision delivered by a Full Court in *Roohizadegan*. Finally, while the principles applicable to the process of determining whether the statutory presumption under section 361 has been rebutted appear to be well settled, the scope and comprehensive nature of the evidence needed to rebut that presumption is key to each proceeding under Part 3-1 of the FW Act.

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