Alam v National Australia Bank Limited [2021] FCAFC 178

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| Appeal from: | *Alam v National Australia Bank Limited (No 2)* [2020] FCCA 2491 |
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| File number: | NSD 1176 of 2020 |
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| Judgment of: | **WHITE, O'CALLAGHAN AND COLVIN JJ** |
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| Date of judgment: | 8 October 2021 |
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| Catchwords: | **INDUSTRIAL LAW** – appeal against the dismissal of an adverse action claim – Appellant claimed that her employment had been terminated because of her exercise, and proposed exercise, of her workplace right to make complaints or inquiries in relation to her employment – whether the primary Judge erred in failing to consider whether each alleged complaint or inquiry was one to which s 341(1)(c) of the *Fair Work Act 2009* (Cth) referred – whether the primary Judge erred in failing to apply s 361 of the FW Act in relation to each of the alleged complaints or inquiries – whether the Appellant was denied procedural fairness – appeal allowed in part.  |
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| Legislation: | *Australian Consumer Law* s 31*Evidence Act 1995* (Cth) ss 98, 99, 100*Fair Work Act 2009* (Cth) ss 340, 341, 342, 360, 361,*Federal Court of Australia Act 1976* (Cth) s 28(1)(c)  |
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| Cases cited: | *Alam v National Australia Bank Limited (No 2)* [2020] FCCA 2491*Australian Building and Construction Commissioner v Hall* [2018] FCAFC 83; (2018) 261 FCR 347*Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333, (2011) 193 FCR 526*Australian Red Cross Society v Queensland Nurses’ Union of Employees* [2019] FCAFC 215, 273 FCR 332*Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; (2012) 248 CLR 500*Cigarette & Gift Warehouse Pty Ltd v Whelan* [2019] FCAFC 16; (2019) 268 FCR 46*Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* [2015] FCAFC 157; (2015) 238 FCR 273*Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41; (2014) 253 CLR 243*Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* [2012] FCA 1218*Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* [2015] FCAFC 76, (2015) 231 FCR 150*Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697*Cummins South Pacific Pty Ltd v Keenan* [2020] FCAFC 204; (2020) 302 IR 400 *Flageul v WeDrive Pty Ltd* [2021] FCAFC 102*General Motors–Holden’s Pty Ltd v Bowling* (1976) 136 CLR 676; (1976) 12 ALR 605*Hill v Compass Ten Pty Ltd* [2012] FCA 761; (2012) 205 FCR 94*Maric v Ericsson Australia Pty Ltd* [2020] FCA 452; (2020) 293 IR 442 *Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153*Murrihy v Betezy.com.au Pty Ltd* [2013] FCA 908, (2013) 238 IR 307*MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17*National Tertiary Education Industry Union v University of Sydney* [2020] FCA 1709*National Territory Education Union v Royal Melbourne Institute of Technology* [2013] FCA 451;(2013) 234 IR 139*PIA Mortgage Services Pty Ltd v King* [2020] FCAFC 15; (2020) 274 FCR 225*Salama v Sydney Trains* [2021] FCA 251*SBP Employment Solutions Pty Ltd v Smith* [2021] FCA 601*Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271, (2014) 242 IR 1*Shea v EnergyAustralia Services Pty Ltd* [2014] FCAFC 167; (2014) 242 IR 159*Short v Ambulance Victoria* [2015] FCAFC 55; (2015) 249 IR 217*Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141*Tattsbet Ltd v Morrow* [2015] FCAFC 63; (2015) 233 FCR 46*TechnologyOne Ltd v Roohizadegan* [2021] FCAFC 137*Whelan v Cigarette & Gift Warehouse Pty Ltd* [2017] FCA 1534; (2017) 275 IR 285*Wong v National Australia Bank Limited* [2021] FCA 671*Zhang v Royal Australian Chemical Institute Inc* [2005] FCAFC 99; (2005) 144 FCR 347  |
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ORDERS

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|  | NSD 1176 of 2020 |
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| BETWEEN: | SUMYYA ALAMAppellant |
| AND: | NATIONAL AUSTRALIA BANK LIMITED ACN 004 044 937Respondent |

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| order made by: | WHITE, O'CALLAGHAN AND COLVIN JJ |
| DATE OF ORDER: | 8 October 2021 |

THE COURT ORDERS THAT:

1. The appeal is allowed.
2. The judgment of the Federal Circuit Court Judge is set aside in part.
3. All issues in the proceedings other than that concerning whether the Appellant sent to herself the Data Breach email of 12 January 2019 are remitted to the Federal Circuit Court for re‑trial before another Judge.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

## Introduction

1. The appellant commenced employment with the respondent (NAB) on 15 October 2018 as an Associate Financial Planner at its Dee Why Branch in Sydney. Just over three months later, on 30 January 2019, NAB terminated her employment.
2. In the proceedings in the Federal Circuit Court (the FCC), the appellant alleged that, in dismissing her, NAB had taken adverse action against her by reason of her exercise, and proposed exercise, of workplace rights (the making of complaints or inquiries and a foreshadowed application to the Fair Work Commission (FWC) in relation to her employment) and that it had thereby contravened s 340(1) of the *Fair Work Act 2009* (Cth) (the FW Act). She sought an order for her reinstatement, orders for payment of lost salary and damages for non‑economic loss, the imposition of a pecuniary penalty, and other relief. The appellant also alleged that NAB had, by the termination, breached her contract of employment and sought damages with respect to that breach.
3. NAB asserted that it had terminated the appellant’s employment because of evidence that the appellant had, in breach of its policies and practices, sent an email from her work email address to her personal email accounts on 12 January 2019 which attached confidential customer information and because the appellant had not provided an adequate explanation for doing so. NAB referred to this as “the Data Breach” and “the Data Breach email”. It denied that it had had any other reason for the termination.
4. The FCC Judge dismissed the appellant’s claim: *Alam v National Australia Bank Limited (No 2)* [2020] FCCA 2491. His Honour found that:
5. the appellant had made 12 complaints during her employment but noted that there was a dispute as to whether these complaints related to her workplace rights and employment with NAB, at [28]. The Judge found, in effect, that on 27 and 29 January 2019 the appellant had foreshadowed the exercise of at least one workplace right (the “making of [an] anti‑bullying submission to the Fair Work Commission”) and, in the light of that finding, considered it unnecessary to consider whether the other 11 complaints had related to workplace rights, at [34];
6. the relevant decision makers within NAB were the members of the Professional Standards Committee (PSC), being Ms Maini, Mr Smith, Mr De Silva and Mr King, at [36]‑[37]. His Honour rejected the appellant’s contention that the relevant decision makers had included Ms Butler (a member of NAB’s Employment Relations Team), Ms Gorbunova, the appellant’s immediate supervisor, and three others (Ms Mullavey, Ms Chehade and Ms Harrison) who had, as “non‑sitting members”, attended the PSC meeting on 24 January 2019 at which the decision to terminate the employment had been made; and
7. although one of the four members of the PSC (Mr King) had taken into account as “a substantial and operative but nonetheless … non‑exclusive factor that the Applicant had made complaints and enquiries in relation to her employment”, the other three members had not. Their decisions had been based on the appellant’s conduct in relation to the Data Breach. Accordingly, as a majority had not made the decision to terminate for a reason which included a proscribed reason, NAB had discharged the onus cast on it by s 361 of the FW Act of rebutting the statutory presumption that it had made the decision to dismiss for a reason which included a proscribed reason.
8. The Judge then went on to consider at some length the evidence bearing upon whether the appellant had sent the Data Breach email of 12 January 2019 to herself. The counter hypothesis was that someone else had obtained access to the appellant’s account and personal identifiers and had sent the email. The Judge found, despite the appellant’s evidence to the contrary, that she had sent the email to personal accounts, at [79], [92], [122], [165] and [173]. His Honour said, at [143]‑[144], that in the light of that finding, he would not, even if he had found a contravention of s 340(1)(a), have granted the appellant any of the remedies which she sought, they all being of a discretionary kind.
9. The Judge took an adverse view of the reliability of the appellant’s evidence generally – see [22], [51], [67], [68], [157], [164], [166], [170] and [173].

## The Appeal and the Notice of Contention

1. The appellant appeals against the dismissal of her application in the FCC on 11 separate grounds. For reasons which will become apparent, it is not necessary to address all these grounds. By a Notice of Contention, NAB contends, on six different grounds, that the decision of the FCC Judge should be affirmed for reasons other than those on which his Honour relied.

## Statutory provisions and principles

1. Section 340(1) of the FW Act precludes “adverse action” being taken against another because, amongst other things, that person has exercised, or purported to exercise, a workplace right. It provides (relevantly):

**340 Protection**

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

(a) because the other person:

(i) has a workplace right; or

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

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

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

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

1. Section 341 defines the circumstances in which a person has a workplace right:

(1) A person has a ***workplace right*** if the person:

…

(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.

…

1. By s 342(1) of the FW Act, an employer takes adverse action against an employee if (relevantly) the employer dismisses the employee.
2. Sections 360 and 361 facilitate proof by an applicant of a claim of adverse action. Section 360 provides that, for the purposes of Pt 3‑1 of the FW Act, “a person takes actions for a particular reason if the reasons for the action include that reason”.
3. Section 361(1) creates a rebuttable presumption:

**361 Reason for action to be presumed unless proved otherwise**

(1) If:

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

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

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

…

Its purpose is to throw onto respondents the onus of proving that which is peculiarly within their knowledge: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; (2012) 248 CLR 500 at [50] (French CJ and Crennan J), citing *General Motors–Holden’s Pty Ltd v Bowling* (1976) 136 CLR 676; (1976) 12 ALR 605 at 617.

1. As already noted, the appellant alleged that NAB had breached s 340(1)(a) of the FW Act by dismissing her because of her exercise of workplace rights in making complaints or inquiries and because of her foreshadowed exercise of a workplace right in making an application to the FWC, respectively. Accordingly, s 361 was engaged. It had the effect that it was to be presumed that NAB had terminated her employment because of her exercise (or foreshadowed exercise) of these rights unless NAB proved otherwise.
2. Several matters bearing upon the application of s 361 in relation to s 340 are settled:
3. in order to attract the application of s 361, an applicant should allege with sufficient particularity both the action said to constitute “adverse action” and the particular reason or particular intent with which it is said the action was taken: *Short v Ambulance Victoria* [2015] FCAFC 55; (2015) 249 IR 217 (Dowsett, Bromberg and Murphy JJ) at [55];
4. the party making the allegation that adverse action was taken “because” of a particular circumstance must establish the existence of that circumstance as an objective fact: *Tattsbet Ltd v Morrow* [2015] FCAFC 63; (2015) 233 FCR 46 at [119]. That is, it is for the applicant to establish all the elements of the alleged contravention other than the reasons of the respondent for taking the adverse action: *Australian Building and Construction Commissioner v Hall* [2018] FCAFC 83; (2018) 261 FCR 347 (*ABCC v Hall*) at [100];
5. an employer takes adverse action in contravention of s 340 if a proscribed reason is a “substantial and operative” reason for the action or if the reasons for the action include the proscribed reason: *Bendigo v Barclay* at [104] (Gummow and Hayne JJ).
6. the discharge of the s 361 onus requires proof on the balance of probabilities and usually requires decision‑makers to give direct evidence of their reasons for taking the adverse action: *Bendigo v Barclay* at [43]‑[44];
7. the determination of why an employer took adverse action against an employee requires an inquiry into the *actual* reason or reasons of the employer and is to be made in the light of *all* the circumstances established in the proceeding: *Bendigo v Barclay* at [41], [45] (French CJ and Crennan J); at [101] (Gummow and Hayne JJ); *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41, (2014) 253 CLR 243 (*CFMEU v BHP Coal*) at [7] (French CJ and Kiefel J); *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* [2015] FCAFC 157, (2015) 238 FCR 273 (*CFMEU v Anglo Coal*) at [27]; *ABCC v Hall* at [19];
8. while the evidence of the decision‑maker as to the reasons for the taking of the adverse action may, if accepted by the Court, satisfy the s 361 onus, such evidence is not a necessary pre‑condition: *CFMEU v BHP Coal* at [192]; *Australian Red Cross Society v Queensland Nurses’ Union of Employees* [2019] FCAFC 215, 273 FCR 332 at [72];
9. the Court’s rejection of the evidence of the decision‑maker as to the reasons for the adverse action will ordinarily be “a weighty consideration and often a determinative consideration” in the determination of whether the reason alleged by the applicant was a substantial and operative reason for the action (*Cummins South Pacific Pty Ltd v Keenan* [2020] FCAFC 204; (2020) 302 IR 400 at [116]), but such a rejection does not relieve the Court from considering *all* the evidence probative of whether the reason asserted by the applicant has been negated: *ibid*; *CFMEU v Anglo Gold* at [27]; *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333, (2011) 193 FCR 526 at [272]. When there is evidence of a broad range of facts and circumstances, which are not dependent on acceptance of the decision‑maker’s evidence about his or her asserted reason for the dismissal, such evidence must be taken into account in assessing whether the reasons asserted by an applicant were a substantial and operative reason for the action; *ibid* at [113]; *TechnologyOne Ltd v Roohizadegan* [2021] FCAFC 137 at [105]‑[106];
10. even if the reasons advanced by a respondent as the actual reasons for the decision are accepted, the absence of evidence that there were no additional reasons or that the actual reasons did not include the alleged proscribed reasons, may result in a failure to rebut the presumption: *National Territory Education Union v Royal Melbourne Institute of Technology* [2013] FCA 451,(2013) 234 IR 139 at [20]; *PIA Mortgage Services Pty Ltd v King* [2020] FCAFC 15, (2020) 274 FCR 225 at [154] (Snaden J);
11. the decision‑maker’s knowledge of the circumstance asserted by an applicant to be the reason for the adverse action, and even its consideration, does not require a finding that the action was taken *because* of that circumstance: *Bendigo v Barclay* at [62]; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* [2012] FCA 1218 at [80] (Jessup J); *Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271, (2014) 242 IR 1 at [777]. Nor does the fact that the adverse action has some association with a matter supporting a proscribed reason: *CFMEU v BHP Coal* at [20], [87]‑[88]; *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* [2015] FCAFC 76, (2015) 231 FCR 150 at [32], [47]‑[48] (Jessup J); and
12. adverse action taken against a person because of conduct resulting from the exercise of workplace rights may not offend the s 340(1) prohibition: *CFMEU v BHP Coal*; *Endeavour Coal* at [52] (Perram J).

### The pleading of the complaints or inquiries

1. The terms of s 361 and [14(a)] above suggest that some specificity in the allegations is required in order to attract the application of s 361. The appellant’s Further Amended Statement of Claim (FASC) did not provide that specificity. The appellant pleaded:

[2] From the commencement of that employment, the Applicant was subjected to a wide spectrum of unfair treatment and repeated unreasonable behaviour by her direct manager (Ms Alla Gorbunova); Ms Gorbunova’s direct manager (Ms Sandhya Maini); senior financial planning staff with whom she was required to work (Mr Dominic Sgro and Mr Stephen Cordaiy), and other co-workers in the Respondent’s Dee Why branch.

…

[4] The Applicant repeatedly made requests to her managers and co-workers that the unfair treatment and unreasonable behaviour cease.

…

[6] In making the requests referred to in paragraph 4, the Applicant was exercising a workplace right under s.341(1)(c)(ii) of the Act and thus engaging the general protections provisions of the Act.

[7] For the reasons set out at paragraph 4, the Respondent through its responsible employees must be taken as having been on notice that the Applicant was asking the Respondent that she should be treated fairly and for the unreasonable behaviour to cease, and that she was exercising, or attempting to exercise, a workplace right.

[7A] On 17 January 2019 the Applicant raised concerns to Ms Gorbunova that because he issues the Applicant had raised were continuing that the Applicant was preparing to seek an anti-bullying order from the Fair Work Commission.

[7B] By virtue of one or more of the matters set out in paragraphs 4 and 7A, the Applicant proposed to exercise a workplace right within the meaning of s.340(1)(a)(iii) of the Act.

…

[10B] By virtue of one or more of the matters set out in paragraphs 7C – 10A, the Respondent as an employer took adverse action against the Applicant as an employee because the Respondent injured the employee in her employment and/or altered the position of the employee to the employee’s prejudice.

[10C] The Respondent took the adverse action referred to in paragraph 10B because of reasons that included what is set out in paragraphs 6 and 7B.

…

[20] The Respondent has taken adverse action, in the form of dismissal, against the Applicant because of her exercise, or attempted exercise, or proposed exercise, of workplace rights, in breach of s.340 of the Act.

1. As is apparent, these pleas were very generalised. The appellant relied on unparticularised “requests” to, and concerns raised with, her managers and co‑workers and her notification to Ms Gorbunova on 17 January 2019 that, because the issues she had raised were continuing, she was “preparing to seek an anti‑bullying order from the [FWC]”.

### The evidence of the appellant’s complaints

1. The appellant provided the particularisation of the complaints or inquiries on which she relied in the principal affidavit containing her evidence in chief. That evidence can be summarised as follows:

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| Complaint or Inquiry No 1:16 October 2018 | The applicant said that on 16 October 2018 (the day after she had commenced employment) she had expressed “concerns” to Ms Gorbunova in relation to the conduct of Ms Cambridge, the Personal Assistant to another NAB employee: “I expressed concerns about [Ms Cambridge] unreasonably encouraging me to make a complaint to Human Resources (HR)/Employee Relations (ER) about illegitimate personal and/or health issues, although I did not have any health or personal issues, and without any reason for requesting me to do this … I explained to [Ms Gorbunova] that [Ms Cambridge] was treating me as though I was a person with a “disability” who needed help … I told [Ms Gorbunova] that I responded to both of [Ms Cambridge’s] unreasonable requests that I did not have any issue relating to me personally, and that I did not need to make a complaint … I raised concerns with [Ms Gorbunova] that I believed that [Ms Cambridge’s] treatment of me was discriminatory of the basis of false health issues/imputed disability, and that she was bullying me. After expressing concerns, I asked [Ms Gorbunova] that I should not be subjected to unreasonable behaviour or unfair treatment of any kind.” |
| Complaint or Inquiry 2:22 October 2018 | The appellant sent an email to Ms Gorbunova on 22 October 2018, the substance of which was as follows: “Hi Alla,  I have attempted to send an email to [email address stated] to get a user name and password set up in order to complete the Licencee Standards Exam and Accreditation. However, I still do not have an account set up. Could you please advise what needs to be done here to complete this? I am just letting you know in advance that without a login set up I cannot complete the training required, and that the delay has also further impacted the time utilised for training completion.” |
| Third Complaint or Inquiry:3 November 2018 | The appellant sent an email to Ms Gorbunova on 3 November 2018. After referring to some concerns involving conduct by her co‑workers the appellant said: “My greater concern has however been a number of things which have hindered my training and work. I’ve already mentioned some of these things with you: IT malfunctions; lack of computer and account passwords and access, and of access to databases and shared drives; delays in being provided with a passcode and key access to the Dee Why office and rooms within it; and problems with logging into systems generally. Again, I understand that the onboarding of new arrivals may not entirely be completed on the first day, and that technology may sometimes be affected by problems of one kind or another; but the issue is that all of these things have arisen for me every part of the way, in the short time I’ve been with NAB. … So this email is to ask if you will arrange for the issue of the letter of authority forthwith or, if further information as a matter fact is needed for the letter to be provided, at least to let me know what those are and when they will be completed …”.  |
| Fourth Complaint or Inquiry:3 November 2018 | The appellant deposed that she had raised a number of concerns orally with Ms Gorbunova on 3 November 2018, including concerns about: * unreasonable behaviour by some of the co‑workers in the Dee Why Business Banking Centre;
* repeated loud and disruptive malicious gossip and rumours directed towards herself;
* the fact that she had not been invited to the Dee Why office team lunch on 19 October 2018 nor to the Dee Why office team Melbourne Cup event or Christmas party;
* issues hindering her training and work including IT malfunctions, lack of computer and account passwords and of access to databases and shared drives;
* the impact on her ability to complete the new employee mandatory training required to meet Clause 5 of her employment contract resulting from a lack of “proper onboarding”; and
* the fact that she had not been issued a “Letter of Authority” (LoA).
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| Fifth Complaint or Inquiry:16 December 2018 | The appellant sent an email to Ms Gorbunova on 16 December 2018, the substance of which was as follows: “Dear Alla, I hope all is great with you. There are a couple of things that are hindering my work including:* The “rotating” schedule arrangement between Dominic Sgro and Stephen Cordaiy, which in effect has caused conflicting priorities, inefficient use of time and unreasonable workloads with the absence of reasonable time for completion.
* Business cards not being provided [to] the New Associate Financial Planner causing inappropriate introductions to clients.
* Exclusion from client appointments.
* Dominic’s request for me to do work inappropriate to my role as Associate Financial Planner e.g. producing/writing Statements of Advice (SoAs).

I would appreciate a chance to speak with you, perhaps during your scheduled meeting with me next week, for the purpose of fixing the areas impacting my work.”  |
| Sixth Complaint or Inquiry:20 December 2018 | The appellant had a regular monthly meeting with Ms Gorbunova. The appellant deposed that in the meeting on 20 December 2018, she had raised with Ms Gorbunova the matters referred to in her email of 16 December 2018 and had then been criticised by Ms Gorbunova for making a written complaint (because it had to be escalated within NAB). |
| Seventh Complaint or Inquiry:7 January 2019 | The appellant sent an email to Ms Gorbunova on 7 January 2019, the substance of which was as follows: “Hi Alla, I hope you’ve had a great Christmas and start to the new year! I would like to discuss with you the types of tasks allocated to given roles and the operating arrangement between senior financial planners, associate financial planner and client service officers, particularly in light of the proposed changes with a client service officer based offsite. For the purpose of allocation of reasonable tasks appropriate to given roles, please let me know if we can discuss during your scheduled meeting with me.”  |
| Eighth Complaint or Inquiry:9 January 2019 | The appellant deposed that she had raised six complaints orally in a meeting with Ms Maini (the State General Manager (ACT and NSW) for NAB’s Financial Planning Division) on 9 January 2019. These were her dissatisfaction with her “operating arrangement”, “unreasonable workloads”, exclusion from client interviews and isolation in the office, the demeaning impression about her being given to clients, difficulties in completing her training, and her intention to raise her complaints at the next meeting with Ms Gorbunova. The appellant deposed to having been given positive and encouraging feedback by Ms Maini.  |
| Ninth Complaint or Inquiry:14 January 2019 | The appellant deposed that she had, on 14 January 2019, raised concerns orally with Mr Cordaiy (Senior Financial Planner) regarding the unfairness she perceived in the way in which her performance was being assessed pursuant to “score cards” recently released by Ms Gorbunova: “I raised issues with Stephen that, former Associate Financial Planner, Alex carried the workload of Stephen only, and not two senior financial planners, and that during Alex's time in the same role as me he was not given unreasonable revenue targets of $120,000 per each Senior Financial Planner, where in my situation that was double the revenue target of $240,000 as I was being requested to do work under an unreasonable operating arrangement carrying the unreasonable workload of two senor financial planners, and further unreasonable because there was only eight months left in the year disproportionate to a twelve month revenue target. I explained that this unreasonable measure of performance was unfair to me because it was not commensurate to my duties and it was not a like-for-like comparison because I was being compared to those in more senior positions, and because others in comparable positions were not allocated as high a workload as I was. Stephen told me that he would raise this matter to Ms Gorbunova.” |
| Tenth Complaint or Inquiry:17 January 2019 | The appellant deposed that on 17 January 2019, she raised orally with Ms Gorbunova the issues arising from her email of 7 January 2019 concerning perceived unreasonable operating arrangements, unreasonable workloads, exclusion from client appointments, lack of proper support from the client service officer, the lack of access to the NAB Siebel system, and her belief that she was being subjected to bullying. She deposed that she had told Ms Gorbunova that she was “preparing to seek an anti‑bullying order from the [FWC]”. |
| Eleventh Complaint or Inquiry:27 January 2019 | The appellant deposed that she had notified Ms Gorbunova on 27 January 2019 that she was seeking legal advice and asked for her lawyer (Mr Baldwin) to be present during the meeting which on 25 January, Ms Gorbunova had scheduled for 29 January 2019.  |
| Twelfth Complaint or Inquiry28 January 2019: | On 28 January 2019, the appellant sent an email to Ms Gorbunova stating “this is to inform you that I am making the anti‑bullying submission to the Fair Work Commission in light of my experience”.  |

## Errors in the primary judgment

1. The Judge’s reasons for concluding that it was unnecessary to determine whether 11 of the appellant’s complaints related to workplace rights appear in the following paragraphs of his judgment:

[29] In closing submissions Counsel for the Respondent submitted that there was a real doubt about whether 11 out of 12 complaints were underpinned by any entitlement at law, or by Award or contract and thus were not matters in respect of which a workplace right existed.

[30] At paragraphs 131 and 132 of the Applicant’s above mentioned Affidavit she deposes:

*[131] On 27 January 2019, I notified Alla that I was seeking legal advice and asked for my previous lawyer Mr Geoff Baldwin (“Geoff”) to be present during Alla’s requested meeting.*

*[132] On 29 January 2019, I sent an email to Alla in relation to “bullying” by proposing to exercise a workplace right and I told Alla, “This is to inform you that I am making the anti-bullying submission to the Fair Work Commission in light of my experience.”*

[31] This evidence was not challenged in cross-examination.

[32] The Court finds, therefore, that on 27 January 2019 the Applicant had a workplace right that was underpinned by law i.e. she was going to make an application to the Fair Work Commission pursuant to the *Fair Work Act 2009* (Cth). This proposed action is a workplace right for the purposes of s.341(1). The fact that she did not actually do so until after her employment was terminated does not change the character of the workplace right.

[33] The Applicant only needs to establish that one of the complaints she made related to her employment and that the making of the complaint was the exercise of a workplace right. She has established this.

[34] There is no need, therefore, for the Court to consider whether the other complaints made by the Applicant related to workplace rights.

1. It is plain that the particular complaint of the appellant which the Judge found to have been established was Complaint or Inquiry No 12, ie, the complaint made on 28 January 2019. NAB’s trial counsel had acknowledged that this was a complaint of the requisite kind and this was the complaint to which the Judge referred in [32].
2. The Judge’s conclusion that the appellant’s complaint on 28 January 2019 was the exercise of a workplace right and that it was, accordingly, unnecessary for him to consider whether the other 11 complaints related to workplace rights is, with respect to his Honour, affected by two errors.
3. The first is that it was wrong as a matter of approach. Subject to one qualification, the Judge’s acceptance that the decision to terminate the appellant’s employment was made because of her conduct in the Data Breach did not relieve him from considering, in the light of *all* the evidence, whether the making of any one or more of the complaints or inquiries alleged by the appellant had *also* been a substantial or operative reason for the termination of her employment: see [14(i)] above. The discharge of that task required the Judge to consider, and make findings concerning whether:
4. the appellant had made the complaints or inquiries she alleged;
5. the complaints or inquiries found to have been made had the content the appellant alleged;
6. the making of those complaints or inquiries constituted the exercise of a workplace right within the meaning of ss 340 and 341 of the FW Act; and
7. NAB had established, on the balance of probabilities, that none had been a substantial or operative reason for the termination.
8. The Judge did not consider the first, second or third of these elements. In relation to the fourth, the Judge found only:
9. “there is no other direct or indirect evidence to suggest the other 3 members of the Committee made the decision for a proscribed reason”, at [44];
10. “despite rigorous cross‑examination, the Court finds that the evidence of Messrs (sic) Maini, Smith and De Silva records no direct or indirect evidence of a proscribed reason”, at [45]; and
11. “all of the evidence led in the Applicant’s case and elicited from the Respondent’s witnesses does not create a sufficient doubt in the Court’s mind about the veracity of Messrs (sic) Maini, Smith and De Silva about the central issue of what motivated the decision to terminate the Applicant”, at [46].
12. While this reasoning goes some of the way towards a statement of satisfaction of the fourth of the elements identified above, it was not an express finding and it did not address the particular evidence on which the appellant had relied, namely, the manner and circumstances in which she had made the complaints or inquiries, the content of those complaints or inquiries and the evidence bearing on whether the appellant’s “behavioural issues” about which the PSC had been informed included her conduct in making complaints and inquiries.
13. We mentioned a qualification. There may be more than one way by which an applicant’s allegation that there were multiple proscribed reasons for the adverse action may be addressed without each of the steps just outlined being considered. There may, for example, be cases in which the Court may be positively satisfied that the actuating reason for the dismissal was the non‑proscribed reason alleged by the employer and that that reason was exclusive of all other reasons. The non‑proscribed reason may be so obvious and so serious as to swamp any other reasons. Depending upon the circumstances, a finding to that effect may relieve a court from the necessity to consider the first, second and third elements in relation to the elements alleged by an applicant. But even so, all of the reasons alleged by an applicant to be proscribed reasons have to be addressed in some way. That did not occur here.
14. The second is a factual matter. The appellant’s notification to Ms Gorbunova on 28 January 2019 of her intention to make an “anti‑bullying submission” to the FWC could not, on the uncontentious evidence at trial, have been taken into account in the dismissal decision as that had been made by the PSC four days previously, on Thursday, 24 January 2019. The Judge did not make an express finding to that effect but it is implicit in his findings concerning the identity of the relevant decision makers, to which we referred earlier. The lapse of six days before the decision was implemented on 30 January 2019 was attributable to Ms Gorbunova meeting the appellant’s convenience as to the timing of the meeting. Following the PSC meeting, Ms Maini instructed Ms Gorbunova to meet with the appellant and to terminate her employment. Ms Gorbunova deposed that she had, in accordance with that instruction, arranged a meeting with the appellant on Friday, 25 January 2019. However, the appellant asked for the meeting to be deferred because of a circumstance of “family urgency”. Ms Gorbunova agreed to that request. The Australia Day long weekend then intervened. On Tuesday, 29 January 2019, Ms Gorbunova acceded to the appellant’s request that the meeting not take place that day, because of the unavailability of her lawyer. Ms Gorbunova then met the appellant and her lawyer at 2 pm on 30 January 2019 and effected the termination of the appellant’s employment. However, it is plain on the evidence, and the appellant did not contend to the contrary, that the termination decision had been made on 24 January 2019.
15. In these circumstances, it could not have been held that NAB had taken adverse action against the appellant because she had, on 28 January 2019, told Ms Gorbunova of her intention to make a complaint to the FWC. Nor could the communication by the appellant to Ms Gorbunova on 27 January, which is the subject of the Complaint or Inquiry No 11, have been material.
16. This by itself required the Judge to address the other reasons alleged by the appellant.
17. This means that, subject to consideration of NAB’s Notice of Contention, the appeal must succeed. We are not overlooking the Judge’s finding that he would not, in any event, have granted the appellant a remedy. That may be an understandable finding in the light of the Judge’s finding concerning the appellant’s involvement in the Data Breach, but the Judge may well have taken a different view had he upheld the appellant’s claims with respect to one or more of Complaints or Inquiries Nos 1‑10.
18. Before addressing the grounds in the Notice of Contention, it is appropriate to address the appellant’s claim that the Judge had erred in finding that she had sent the Data Breach email to her personal email addresses on 12 January 2019. This claim was made in various ways in Grounds 7, 9 and 10 of the Amended Notice of Appeal.

## The finding that the appellant sent the Data Breach email

1. As already noted, the Judge found that the appellant had sent the Data Breach email on 12 January 2019 to herself. His Honour did so, after an extensive review of the evidence, for the following reasons:
2. despite 12 January 2019 being a Saturday, and the evidence of the appellant and her father that she had been on a family outing that day, the appellant had had the means while out of the workplace to send an email from her work email address to her personal email addresses. The evidence of Mr Meehan, the Senior Consultant‑Cyber Investigations at NAB, explained how the appellant had had that access;
3. documents which the appellant attached to her own affidavit containing her evidence in chief had been attached to emails sent from her work email account to her private email addresses, with some having been sent out of work hours, including on weekends;
4. Exhibit R2, tendered by NAB, comprised 14 bundles of documents which, on their face, had been sent from the appellant’s work email to one or other or both of her personal email accounts. Exhibit R2 included, but was not limited to, the documents which the appellant had annexed to her own affidavit and the documents attached to the Data Breach email. The appellant had been unable to explain satisfactorily how she had come to be in possession of these documents;
5. Mr Hains, the forensic expert called by the appellant, had confirmed that a person with the appellant’s credentials had accessed “remotely” NAB’s data on 12 January 2019 at about the time of the Data Breach email, at [115], and that the appellant was the most likely person to have done so, at [127];
6. the appellant’s hypothesis that it was someone else who had accessed her account so as to send the Data Breach email was implausible, at [122]; and
7. his general adverse view of the reliability of the appellant’s evidence.

## The alleged denial of procedural fairness

1. The principal matter which the appellant advanced on the appeal in challenging the Judge’s finding concerning the sending of the Data Breach email was a complaint of a denial of procedural fairness. That denial was said to have occurred in the cross‑examination of the appellant on the documents in Exhibit R2 and in the admission into evidence of that Exhibit.
2. In Ground 9 of the Amended Notice of Appeal, the appellant alleged:

[9] The primary judge denied the Appellant procedural fairness by admitting exhibit R2, the soft copy “PM-04” to the Paul Meehan affidavit and the Annabelle-Paxton Hall affidavit into evidence. The respondent’s bundle of documents, R2, “PM-04” to the Paul Meehan affidavit and the affidavit of Annabelle Paxton-Hall should not have been allowed or accepted by the judge.

1. As is apparent, Ground 9 concerns only the Judge’s admission into evidence of the specified documents. It did not allege a denial of procedural fairness in the manner of the appellant’s cross‑examination. However, no point was taken about this at the appeal hearing.
2. Exhibit R2 comprised 354 pages made up of 14 separate bundles of documents. Each bundle comprised documents which (as the Judge found) NAB had ascertained, from a forensic examination of the appellant’s email account after her termination, had been sent from her work email to her personal email accounts. As indicated, some of the documents in Exhibit R2 had been annexed by the appellant to the affidavit containing her evidence in chief.
3. Following the appellant’s termination, Mr Meehan conducted an analysis of her NAB email account and produced a document which he described as “the Alam Proxy Log”. This was Annexure PM‑04 to Mr Meehan’s affidavit. It was in the form of an Excel spreadsheet but its content could not be interpreted without specialist assistance. Mr Meehan deposed to what the Alam Proxy Log disclosed with respect to the usage of the appellant’s email account on 12 January 2019. The appellant made a successful challenge to NAB’s ability to lead expert evidence from Mr Meehan on that topic, but her counsel then led evidence from Mr Hains about some of the same matters.
4. Mr Meehan also sent an email to Ms Paxton‑Hall, a solicitor at King & Wood Mallesons (KWM), the solicitors for NAB, on 24 December 2019 to which he attached a “PST file” containing 78 emails. In her affidavit made on 22 April 2020 (ie, after the commencement of the trial), Ms Paxton‑Hall deposed to her analysis of those emails, and noted that each had been sent from the appellant’s NAB email account to one or other of three accounts (two of which were the appellant’s personal accounts). Ms Paxton‑Hall attached her analysis of the emails to her affidavit of 22 April 2020 and noted that the bundle of emails had been marked as Exhibit MFI‑1 in the proceedings. As we understand it, Exhibit MFI‑1 became Exhibit R2. The Judge said that he did not rely on Ms Paxton‑Hall’s summary, saying that it was “nothing more than an aide memoire” and that he had had regard to Exhibit R2 itself on the basis, as we understand it, that it contained the primary documents. There is no indication that the Judge did not act in accordance with that view of Ms Paxton‑Hall’s affidavit. It is accordingly unnecessary to address the complaint in Ground 9 concerning Ms Paxton‑Hall’s affidavit.
5. The issue concerning Exhibit R2 arose in the following way. In [16] of the affidavit of 6 March 2020 containing her evidence in chief, Ms Maini deposed that she had reviewed a table prepared by KWM summarising the emails sent from the appellant’s work email to one or other of her personal email accounts. Ms Maini referred to the appellant having sent a total of 45 emails, of which 31 had been sent outside work hours and 17 had been sent on a Saturday.
6. In her responding affidavit of 10 April 2020, the appellant deposed (relevantly):

[20] … I have not been provided with a copy of any of what is alleged as “Ms Alam sent a total of 45 emails to either her NAB Account, Hotmail Account or Gmail Account.” I am therefore concerned that I have been denied an adequate opportunity to respond.

[21] I confirm again that I did not send any email from my NAB email address to my NAB or personal email accounts. Without obtaining a copy of all of the alleged emails in “SM-03” of [Ms] Maini’s 6 March 2020 affidavit, it appears to me I did not send any of the alleged emails in the allegations made in “SM‑03” of [Ms] Maini's 6 March 2020 affidavit.

1. The trial commenced on Monday, 20 April 2020. On the afternoon of that day, counsel for NAB commenced cross‑examining the appellant with respect to the statements in [20] and [21] of her 10 April affidavit and did so by reference to the emails which the appellant had annexed to her own affidavit of 19 December 2019. On the following morning, counsel for NAB foreshadowed cross‑examining the appellant by reference to the bundle of documents which became Exhibit R2. Counsel for the appellant objected to that course, contending variously that the appellant was being ambushed; that NAB should, in accordance with the pre‑trial timetabling orders, have annexed the documents to an affidavit of one of its witnesses; that the foreshadowed evidence was subject to s 98 of the *Evidence Act 1995* (Cth) (the Coincidence Rule) and NAB had not given notice as required by s 99 of the Evidence Act; that the foreshadowed evidence of Ms Maini was “hearsay upon hearsay upon hearsay”; and that NAB was not proposing to adduce evidence concerning “the continuity or chain of custody” of the emails.
2. The Judge overruled the objection to the foreshadowed cross‑examination saying:

I am going to allow this cross‑examination, without in any way – and I want to emphasise – without in any way detracting from any objection that might be taken to Ms Maini’s affidavit. But I think that the fundamental principle that [counsel for NAB] was articulating is that there is simply nothing that I’m aware of in the *Evidence Act*, or any other principle of law, or any prejudice of law, or understanding, that would prevent this line of cross‑examination …

1. The transcript concerning this objection and ruling was provided during the course of the appeal hearing only in response to queries from the Bench about what had happened at the trial by way of objection to Exhibit R2. The appellant did not appeal against the ruling just set out or seek to identify errors in it. Furthermore, she did not provide the Court with a copy of the FCC pre‑trial timetabling orders, nor take the Court to any passages in the trial transcript in which objections had been made to the tender of Exhibit R2, Annexure PM‑04 or to Ms Paxton‑Hall’s affidavit.
2. The appellant’s cross‑examination continued on 21 April and was concluded on 22 April.
3. The Judge relied on the content of Exhibit R2 and the appellant’s evidence in relation to it in a number of his findings:
4. the appellant’s evidence that the remote access which she had to her NAB email account had not enabled her “to log into my computer outside of the office” was inconsistent with the content of documents in Exhibit R2, at [53];
5. the appellant’s evidence that she had been “finally given an Xplan system log in and access” on 27 November 2018 was inconsistent with one of her own emails of 1 November 2018 to Ms Gorbunvoa in which she had stated “I have been provided with log in for Xplan”, at [54], as well as with other evidence which the appellant had given in the trial, at [54];
6. although the appellant had not worked in the Dee Why premises on weekends, five of the emails from the appellant’s work account to her personal email accounts in Exhibit R2, including the Data Breach email, had been sent on weekends, at [59];
7. the appellant’s claims that she had not had access at NAB to particular documents was inconsistent with her annexure to her own affidavit of documents of the same kind, at [60]‑[61];
8. the assertions made in the appellant’s own file note of her meeting with Ms Maini on 9 January 2019 as to her lack of access to the computer system, accounts and database “for months into the job” were inconsistent with communications comprised in Exhibit R2 which had emanated from the appellant herself, at [68];
9. the conduct attributed to the appellant in relation to the Data Breach on 12 January 2019 was consistent with the actions evident in the emails comprised in Exhibit R2, at [72]; and
10. the appellant had been unable to explain satisfactorily how many of the emails and other documents which were clearly the property of NAB had come to be in her personal possession, at [79].
11. The Judge found specifically that the appellant had sent emails from the work email account to her personal account on 1, 25, and 27 November 2018, on 1, 10 and 16 December 2018 and on 4, 7 and 17 January 2019 (in addition to the Data Breach email on 12 January 2019).
12. Counsel’s written submissions with respect to the asserted denial of procedural fairness were:

[27] [T]he admission of R2 into evidence in the trial and the cross‑examination amounted to ‘trial by ambush’ and the Court below erred in permitting this to happen. Given that the parties’ evidence in chief was to be by way of affidavit, the Appellant was entitled to know the Respondent’s case a reasonable time in advance of the hearing. However, the Appellant was served with a significant volume of material which she and her counsel did not have time to properly consider.

[28] It is submitted that it is incorrect that the material which was contained in exhibit R2 were the Appellant’s own emails. The bundle of documents in exhibit R2:

a) were produced for the first time during the Appellant’s cross-examination,

b) were not served on the Appellant before getting in the witness box,

c) were not mentioned in the Respondent’s filed Defence,

d) not subject to s67 notice or a s100 dispensation of notice order under the Evidence Act 1995,

e) not allowed for by the orders made by the Court below,

f) “there’s nothing stopping it being an exhibit to the affidavit of Ms Maini in the trial, is there? --- No” (Paxton-Hall T50.24), which corroborates that there was no basis for excusing the lack of notice,

g) included a large volume of approximately 355 pages,

h) on its face contained material factual errors and confusion for e.g. date and time stamps, email signatures and fonts etc., and

i) the Appellant was in the situation where she was required to address ‘on the spot’ during cross-examination on an unclear and distorted video conference of a large volume of emails which she was alleged to have sent some two years prior to the hearing, despite that fact that she had denied sending the alleged emails in her affidavits and in cross-examination. It is unsurprising that there may have been some inconsistency in her evidence regarding those alleged emails.

[29] … It is likely that had the Appellant been given the material in a timely manner she would have been able to properly explain the circumstances of the alleged email. This is not fabrication. Rather, it is being given a proper and reasonable opportunity to respond to the other party’s evidence. It is submitted that the Court below was in error.

1. Counsel made like submissions with respect to the Excel spreadsheet, being Annexure PM‑04 to Mr Meehan’s affidavit and with respect to Ms Paxton‑Hall’s affidavit.
2. In his oral submissions, counsel for the appellant described the Judge’s use of Exhibit R2 and Annexure PM‑04 to Mr Meehan’s affidavit as being “at the heart of the appeal”. Counsel submitted that the material should have been provided as part of the affidavits provided by NAB in accordance with the FCC’s pre‑trial timetable so that she would have had notice of the documents before being cross‑examined about them. He submitted that the appellant had been put into “an invidious situation” when presented with the material in cross‑examination and that “as consequence of that, and perhaps because of no more [than] the appellant adopting a defensive posture with respect to some of the contents, credit findings were made against the appellant in such a way that may likely have caused all the other difficulties in his Honour’s judgment”.
3. Counsel is correct in submitting that the appellant was cross‑examined extensively by reference to the documents in Exhibit R2.
4. Neither counsel referred the Court to authority concerning denials of procedural fairness. The issue was argued out at the factual level. The general principle, endorsed by the High Court in *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141 at 145 is that litigants are entitled to a fair trial in which they can put their case properly before the Court. It is accepted that a fair trial is one in which litigants have had a reasonable opportunity to prepare for the trial and to meet the case advanced against them. However, a litigant asserting a denial of procedural fairness has the onus of establishing, on the balance of probabilities, the primary facts relied upon for the denial alleged: *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 at [161] (Edelman J).
5. In our opinion, in the circumstances described above, the appellant does not establish that she did not have an adequate opportunity to address the case advanced by NAB and accordingly does not establish a denial of procedural fairness, let alone a denial of procedural fairness having any material consequence. We have reached that conclusion having regard to the following:
6. the appellant had been alerted by Ms Maini’s affidavit, provided well in advance of the trial, to the intention of NAB to rely on evidence indicating that emails had been sent from her NAB email account to her private email accounts before 12 January 2019 and indeed that such emails had been sent outside of work hours and on Saturdays. The appellant had had ample time in which to seek discovery of those emails if she wished. The appellant did not provide the Court with any evidence concerning her consideration of pre‑trial discovery or requests made of NAB for particularisation of the evidence of Ms Maini;
7. a good number of the emails comprised in Exhibit R2 were also emails which the appellant had annexed to her own affidavit of 19 December 2019. Plainly, the appellant had had the opportunity in advance of the trial to consider these documents and their source. Despite that, time and time again in the cross‑examination she was unable to explain how she had come to have the documents shown as attached to these emails in her possession. The documents in Exhibit R2 provided that explanation as they indicated that the appellant had emailed them to herself;
8. even now, the appellant has not adduced evidence of what she could have proffered by way of explanation for her possession of NAB’s records, that is to say, evidence of what she could have said had she had the claimed opportunity to consider the documents in advance of the trial;
9. by reason of the length of time over which the appellant’s evidence extended and the adjournments which occurred during that time, she had the opportunity to reflect on the position and to advance any explanation, in the light of that reflection, which she thought appropriate. These included adjournments after the cross‑examination had concluded. However, no explanation was proffered in the re‑examination; and
10. the appellant could, before or during the re‑examination, have sought further time in which to give instructions with respect to any explanation for her possession of the documents evidenced in Exhibit R2.
11. In all these circumstances, we do not consider that it could be held that the appellant did not have a reasonable opportunity to meet the case advanced by NAB. There was no denial of procedural fairness in NAB’s use, and later tender, of Exhibit R2 and certainly no “practical injustice” to the appellant: cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 at [37]‑[38 (Gleeson CJ). This attempt by the appellant to avoid the Judge’s adverse findings concerning her conduct in sending the Data Breach email does not succeed.

## Other complaints

1. The appellant also contended that the Court had erred by failing to have regard to her evidence and that of her father that she had been on a family outing on 12 January 2019 and in failing to take into account and give weight to the evidence of Mr Hains. These submissions cannot be accepted. His Honour did consider these matters and gave reasons for rejecting them or, in the case of Mr Hains, for the use he made of his evidence. The appellant did not point to any error in the Judge’s reasons.
2. Counsel did not advance any submission to support Ground 10 in the Amended Notice of Appeal, namely, that the Judge had engaged in “impermissible tendency and/or coincidence reasoning” and should not have dispensed with the requirement for notice to be given pursuant to s 100 of the Evidence Act. We took this ground to have been implicitly abandoned. In fact, in the oral submissions, counsel for the appellant acknowledged that there was no basis other than the alleged denial of procedural fairness upon which the appellant could impugn the findings concerning the sending of the Data Breach email.
3. Plainly, the findings of the Judge concerning the Data Breach are not affected by his Honour’s failure to apply s 361 of the FW Act in the required manner.

## NAB’s Notice of Contention

1. In the oral submissions on the appeal, senior counsel for NAB accepted that the Judge had not addressed each of the complaints or inquiries alleged by the appellant; had not considered whether each was a complaint or inquiry for the purposes of s 341 of the FW Act; and had not considered, in relation to each complaint found to be established, whether NAB had discharged the s 361 onus of showing that it had not been a substantial or operative reason for the termination.
2. Counsel submitted nevertheless that the appeal should be dismissed because:
3. none of the Complaints or Inquiries Nos 1‑9 was a complaint or inquiry to which s 341(1)(c) refers, with the consequence that the Judge’s failure to consider those complaints and inquiries individually was immaterial;
4. it should be found that Complaint or Inquiry No 10 had not been made;
5. alternatively, the Judge’s reasoning with respect to Complaint or Inquiry No 12 had “equal force and effect” to Complaint or Inquiry No 10, given their substantial identity; and
6. to extent that the PSC had considered “the behavioural issues” concerning the appellant, their subject matter was different from the appellant’s exercise of a workplace right in making complaints or inquiries.
7. We will address these in turn.

## Characterisation of the Complaints or Inquiries alleged by the appellant

1. Counsel contended first that the communications said by the appellant to constitute the making of Complaints or Inquiries 1‑9 in relation to her employment for the purpose of s 341(1)(c) were not, properly understood, of that character, with the consequence that the prohibition in s 340, let alone the rebuttable presumption in s 361, was not attracted.
2. In the context of s 341(1)(c), the term “complaint” connotes an expression of discontent which seeks consideration, redress or relief from the matter about which the complainant is aggrieved: *Cummins South Pacific* at [13]. A complaint is more than a mere request for assistance and should state a particular grievance or finding of fault: *Shea v TRUenergy* at [579]‑[581]; *Cummins South Pacific* at [13] per Dodds‑Streeton J. Her Honour continued, at [626]‑[627], by saying that it is unnecessary for the employee to identify expressly the communication as a complaint or grievance, or to use any particular form of words. Instead, what is required is a communication which, whatever its precise form, is reasonably understood in context as an expression of grievance and which seeks, whether or expressly or implicitly, that the recipient at least take notice of, and consider, it. The characterisation of a communication as a complaint is to be determined as a matter of substance, and not of form.
3. The distinction between a complaint and a mere request for assistance had been made in earlier authorities: *Zhang v Royal Australian Chemical Institute Inc* [2005] FCAFC 99, (2005) 144 FCR 347 at [36]‑[37]; and *Hill v Compass Ten Pty Ltd* [2012] FCA 761, (2012) 205 FCR 94 at [48]. It is possible that some requests for assistance may be able to be characterised as “inquiries” for the purposes of s 341(1)(c) (for example, an inquiry as to whether the recipient is able to provide the requested assistance) but it was not suggested that a characterisation of that kind was appropriate in relation to any of the appellant’s alleged requests or inquiries.
4. In our view, each of the Complaints or Inquiries Nos 2, 3 and 7 should be characterised as a request and not as a “complaint” or “inquiry” of the kind contemplated by s 341(1)(c). Plainly, Complaint or Inquiry No 2 was simply a request for assistance in establishing an account which the appellant required for her work. Likewise, Complaint or Inquiry No 3 was simply a request that Ms Gorbunova arrange the issue of a letter of authority. In Complaint or Inquiry No 7, the appellant did no more than request a meeting with Ms Gorbunova for the purpose of discussing particular work arrangements.
5. We also consider that Complaint or Inquiry No 1 cannot reasonably be characterised as a complaint or inquiry of the requisite kind. The appellant asserted no more than that she was acquainting Ms Gorbunova with concerns she had concerning the conduct of another employee but stated expressly that she had told Ms Gorbunova that she did not “need to make a complaint”.
6. However, we accept that the 4th‑6th and 8th‑10th Complaints or Inquiries as articulated by the appellant are capable of constituting a complaint or inquiry of the requisite kind and, to this extent, do not accept NAB’s submission. That is so because in each the appellant claims that she had raised a grievance in respect of which she had sought Ms Gorbunova’s assistance.

### Was the appellant “able to make” the complaints or inquiries?

1. NAB submitted that, even if the alleged complaints or inquiries could be properly characterised as complaints or inquiries for the purposes of s 341(1)(c), they were not complaints or inquiries which the appellant was “able to make … in relation to … her employment” for the purposes of s 341(1)(c).
2. The meaning of the expression “is able to make a complaint or inquiry” in relation to the employment in s 341(1)(c) has been the subject of divergent views in this Court. It has been accepted, however, that the complaints and inquiries to which the section refers are not confined to those which can be made to an external authority or to persons with the capacity to seek compliance with a legal obligation, but include complaints or inquiries made to the employer itself in relation to the person’s employment: *Murrihy v Betezy.com.au Pty Ltd* [2013] FCA 908, (2013) 238 IR 307 at [141]‑[143] (Jessup J); *Shea v TRUenergy* at [600].
3. An early case was *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697 in which the principal allegations were that the employer had taken adverse action because of complaints made by the employee about work safety issues. Katzmann J was not required to consider the expression “is able to” but did consider whether the employee’s complaints were in relation to his employment. Her Honour prefaced her findings that the complaints were of this character by saying:

[64] In my view, in s 341(1)(c)(ii) the requisite relationship between the complaint or inquiry with the employee’s employment may be direct or indirect. No contrary indication may be gleaned from the context of the words or the drafting history. Mr Fernon SC, who appeared for the respondent, conceded that the words should be interpreted broadly, though he submitted they were not without limits. That qualification may be accepted but the limits are to be found in the nature and purpose of the legislation, which includes the protection of workplace rights.

1. In *Murrihy v Betezy*, Jessup J adopted a broad view of the ability to make a complaint or inquiry to which s 341(1)(c) refers. His Honour said:

[141] … Read literally, s 341(1)(c)(ii) would cover the making of a complaint or inquiry to the relevant employer. On one view, that would be a wide reading of the provision, but there seems to be little doubt but that the provision was intended to mean what it says …

[142] In the present case, it was not the employer to whom the applicant proposed to make a complaint or inquiry: it was her solicitor. Indeed, she had been making complaints to her employer over an extended period. It was the inefficacy of those complaints, and the applicant’s frustrations with the respondents’ failure to address them, that led to her advising Mr Kay on 20 September 2011 that she proposed to seek legal advice. *The question, therefore, is whether the seeking of legal advice falls within the connotation of a complaint or inquiry within the meaning of s 341(1)(c)(ii)*. A significant innovation introduced by the FW Act was the imposition of an obligation upon a “national system employer” (such as each of the respondents was) to pay its employees amounts payable to them in relation to the performance of work in full at least monthly: s 323(1) of the FW Act. Thus the legislation picks up, amongst other things, entitlements arising under contracts of employment and gives statutory consequences to an employer’s failure to make good on them. In this respect, s 323(1) is a civil remedy provision. There is – and there would have been at the time of the introduction of this provision – no reason to assume that the employees for whose benefit s 323(1) was enacted would be confined to those in unionised sectors and occupations. Perhaps more than ever before, *it must realistically be accepted that individual employees, without the benefit of union representation, will often need to seek their own advice and representation in relation to rights arising under federal industrial legislation*.

[143] Against the wide terms of s 341(1)(c)(ii), I can think of no reason to assume that the legislature did not regard the protection of an unrepresented employee, who had rights under his or her contract of employment or other agreement with his or her employer, as within the range of protections provided by the provision. *That such an employee should be able to have recourse to his or her solicitor, without the fear of repercussions in the nature of “adverse action” taken by the employer, would be well within the purposes of the section as they may be perceived in the legislative context to which I have referred. Further, to regard the seeking of legal advice as an “inquiry” within the meaning of para (c) is, in my view, a natural reading of the provision* …

(Emphasis added)

1. Section 341(1)(c) was considered in some detail by Dodds‑Streeton J in *Shea v TRUenergy*. In the summary of her conclusions, her Honour said that a complaint which an employee is able to make in relation to his or her employment is not at large, but “must be founded on a source or entitlement, whether instrumental or otherwise”, at [29(f)]. In the substantive part of her reasons, Dodds‑Streeton J said:

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

(Emphasis added)

1. As is apparent, Dodds‑Streeton J considered that, for a complaint to be one which an employee is able to make, it must be underpinned by “an entitlement or right” of the employee. Her Honour’s reasons did not make clear the nature of the requisite “underpinning”, for example, whether it is the ability to make a complaint or inquiry which must be “underpinned” by an entitlement or right or whether it is the subject of the complaint or inquiry which must have that underpinning.
2. Dodds‑Streeton J distinguished *Murrihy v Betezy* by saying:

[594] In my view, it does not follow from Jessup J’s reasoning that s 340(1)(c)(ii) would cover a complaint or inquiry made to any person at all in relation to employment. Nor, contrary to the applicant’s submission, did his Honour hold that the ability to make a complaint required no instrumental source of entitlement. To the contrary, his Honour’s reasoning appeared to assume the existence of an entitlement or right under an instrument, such as the contract of employment or relevant legislation.

1. It is to be observed that the focus of Dodds‑Streeton J in *Shea v TRUenergy* was on the ability of an employee to make a complaint, rather than the ability to make an inquiry. This is particularly manifest in the summary of her Honour’s conclusions in [29] of the judgment.
2. The appeal against the decision of Dodds‑Streeton J was dismissed: *Shea v EnergyAustralia Services Pty Ltd* [2014] FCAFC 167; (2014) 242 IR 159 without it being necessary for the Full Court to discuss the meaning of the term “able to make a complaint or inquiry … in relation to his or her employment”. However, the Full Court did say, at [12], that considerable care should “be exercised” before implying into s 341 any constraint which would inhibit an employee’s ability to freely exercise the important statutory right to make a “complaint”.
3. The approach of Dodds‑Streeton J has been followed by judges at first instance in a number of cases. With limited exceptions, it is not necessary to refer to the single judge decisions because the issues have now been considered more than once by the Full Court.
4. In *Whelan v Cigarette & Gift Warehouse Pty Ltd* [2017] FCA 1534; (2017) 275 IR 285, Collier J found that the workplace right exercised by the employee was the making of inquiries in the weeks prior to, and on the day of, his dismissal about either payment of a bonus or the establishment of a bonus plan. Her Honour stated the principles she was applying in the following terms:

[33] Section 341(c)(ii) defines a workplace right in an employee as being the entitlement of the employee to make a complaint or inquiry in relation to his employment. In such cases as *Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271; (2014) 242 IR 1 (***Shea***), *Murrihy v Belezy.com.au Pty Ltd* [2013] FCA 908; 238 IR 307 and *Walsh v Greater Metropolitan Cemeteries Trust (No 2)* [2014] FCA 456; 243 IR 468 (***Walsh***), s 341(c)(ii) was interpreted broadly. In *Walsh* [41], Bromberg J observed that the requirement in s 341(c)(ii) that a complaint or inquiry by the employee be “in relation to” his employment means that there must be a relationship between the subject matter of the complaint and the complainant’s employment. As Dodds-Streeton J further observed in *Shea*, 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.

[34] As a general proposition, a complaint or inquiry to the employer by an employee in relation to his or her entitlement to an incentive bonus, or the failure of the employer to prepare an incentive bonus plan, where the terms of employment of that employee make provision for payment of such bonuses or the preparation of such plans, would fall within the scope of s 341(c)(iii) of the FW Act.

1. It is evident that, in applying the approach of Dodds‑Streeton J in *Shea v TRUenergy*, Collier J proceeded on the basis that a complaint or inquiry to an employer about an entitlement for which the contract of employment makes provision is within the scope of s 341(1)(c)(ii). Her Honour did not proceed on the basis that either s 341(1)(c) or *Shea v TRUenergy* required that the right or entitlement to make a complaint or inquiry be itself found in the contract of employment: it is sufficient if the complaint or inquiry relates to a subject matter for which the contract of employment makes provision. It is also to be noted that Collier J did not purport to state exhaustively the kinds of complaints or inquiries which would be within, and without, s 341(1)(c).
2. On the appeal (*Cigarette & Gift Warehouse Pty Ltd v Whelan* [2019] FCAFC 16; (2019) 268 FCR 46), the Full Court (Greenwood, Logan and Derrington JJ) at [28] described the statement of principle by Collier J in [33]‑[34] as “unremarkable and correct” and held that the pleaded complaint or inquiry in relation to a bonus constituted, for the reasons given by Collier J, the exercise of a workplace right for the purposes of the FW Act.
3. Section 341(1)(c) was considered by the Full Court (Rangiah, Charlesworth and Snaden JJ) in *PIA Mortgage*. In that case, the employee alleged that he had been dismissed in contravention of s 340 because of his exercise of two workplace rights. The first was his right to complain to the employer about its foreshadowed breach of his contract of employment by terminating the employment before the expiry of the agreed term. The second was his exercise of his right to complain to the employer about its alleged contravention of s 31 of the *Australian Consumer Law* (the ACL), said to be constituted by its misleading conduct when he was seeking the employment. The majority (Rangiah and Charlesworth JJ) held that these were complaints which the employee was able to make under the general law and sufficient to found the exercise of a workplace right. Snaden J dissented on this issue.
4. Rangiah and Charlesworth JJ noted, at [13], that the statement of Dodds‑Streeton J that the complaint “must be underpinned by an entitlement or right” could refer to an entitlement or right to *make a complaint* or could encompass any complaint by employees concerning an entitlement or right *related to their employment*. Their Honours concluded, at [13]‑[14], that the former was the preferable understanding. With respect to their Honours, that conclusion seems inconsistent with the reasoning of the Full Court in *Whelan*, including its endorsement of the statement of principle by Collier J.
5. However, Rangiah and Charlesworth JJ went on to give a seemingly expansive view of the nature of the right or entitlement which may form the basis of a workplace right to make a complaint or inquiry. Their Honours considered that an employee may have the requisite ability to make a complaint or inquiry not only by reason of a workplace law, a workplace instrument or an order made by an industrial body (being the source of the entitlements referred to in s 341(1)(a) and (b)), but also from legislative provisions which are not workplace laws, contractual terms providing a right to make complaints, and from the general law, at [16]. Rangiah and Charlesworth JJ explained:

[18] … 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.

[19] Under the general law, an employee has a right to sue his or her employer for an alleged breach of the contract of employment. A suit may be regarded as the ultimate form of complaint. Accordingly, in our opinion, an employee is “able to make a complaint” about his or her employer’s alleged breach of the contract of employment. That ability is “underpinned by” (to use Dodds-Streeton J’s expression in *Shea*) the right to sue, and extends to making a verbal or written complaint to the employer about an alleged breach of the contract.

[20] Further, an employee who alleges that his or her employer has contravened a statutory provision relating to the employment is “able to make a complaint” within 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.

1. Rangiah and Charlesworth JJ concluded:

[26] An employee is “able to complain” to his or her employer within s 341(1)(c)(ii) of the FW Act concerning the employer’s alleged breach of the contract of employment. The source of that ability is the general law governing contracts of employment. Further, an employee is “able to complain” to the employer or to a relevant authority of their employer’s alleged contravention of a statutory provision relating to the employment. That ability derives from at least the statutory provision alleged to have been contravened. The statute need not expressly or directly confer a right to bring proceedings or to complain to an authority. As Dodds-Streeton J held in *Shea* at [29], the complaint must be made genuinely, in good faith and for a proper purpose.

1. Rangiah and Charlesworth JJ considered that this construction of s 341(1)(c)(ii) was consistent with the judgment of the Full Court in *Whelan*. There is, however, a difference. Whereas *Whelan* had not required that the right or entitlement to make a complaint or inquiry itself have an instrumental source, that is the construction preferred by Rangiah and Charlesworth JJ in *PIA Mortgage*, although, as noted, their Honours adopted an expansive view of the circumstances in which that right or entitlement may be found. Their Honour’s view, in effect, is that if an employee has a right or entitlement derived from legislation, an instrument or a contract of entitlement, the employee has the right or entitlement required by *Shea v TRUenergy* to make a complaint or inquiry about it. The difference in practice of the application of the two approaches may not be significant.
2. In his dissenting judgment in *PIA Mortgage*, Snaden J said that, in order for the applicant to demonstrate that his complaint or inquiry was one which he was “able to make”, he had to “identify the source of an entitlement or right to complain or inquire as he did”, at [165]. His Honour considered that such an entitlement or right to complain or inquire may be found in a clause in an employment contract regulating the manner in which disputes are to be resolved, an award or other statutory instrument providing for the airing of employment‑related grievances, or in a statutory procedure for the prosecution of alleged safety (or other employment‑related) infractions, or in an applicable workplace policy or procedure document which stipulates the means by which an employee might procure certain information from his or her employer, at [165]. His Honour continued:

[168] … A person is not endowed with an *ability* to complain about something merely because he or she has something to complain about. What must be shown is some right or entitlement to complain or inquire: some conveyed ability that distinguishes a complaint or inquiry that qualifies as the exercise of a workplace right from a complaint or inquiry made merely as an incident of the complainant’s ability to communicate.

[169] That reasoning is consistent with what Dodds-Streeton J concluded in *Shea* and, at least at the level of principle, with the court’s endorsement of that conclusion in *Whelan* (both at first instance and on appeal). It recognises, as her Honour and their Honours did (and as the majority here does), that a distinction must be drawn between complaints that employees are able to make for the purposes of s 341(1)(c)(ii) of the FW Act and complaints that employees are *not* able to make for the purposes of s 341(1)(c)(ii) of the FW Act. With respect to those who think otherwise, complaints that are aired in aid of asserting rights allegedly conferred by statute or the general law are the latter. There is nothing inherent in an ability to vindicate rights under the law that confers a related ability to complain about their trespass beforehand. Absent some instrumental right to do so, a person who complains that their legal rights have been (or are being) interfered with does so not by dint of an ability conferred by the statute or law that establishes those rights; but, rather and more simply, by exercising nothing more than his or her freedom to communicate.

1. Snaden J concluded at [173]‑[174]:

[173] … In my view, it cannot be said that [an ability to complain or inquire] such an ability exists merely because the subject about which a grievance is aired or an inquiry is advanced is one for which a prevailing employment contract makes provision. That circumstance will undoubtedly qualify as a *reason* why an employee might see fit to prosecute a complaint or inquiry; but it does not confer a relevant *ability* to do so.

[174] A person does not possess—and, therefore, cannot exercise—an ability to complain or inquire of the kind to which s 341(1)(c)(ii) of the FW Act refers merely because he or she may have legal rights that are or might imminently be adversely affected by another person’s conduct, or that otherwise might potentially be the subject of some later vindication in court (whether under the general law of contract or otherwise). To the extent that *Whelan* (at first instance and on appeal) holds as authority otherwise, it represents what appears to be an unintended deviation from *Shea*, which, at the risk of repetition, holds in any event as a correct statement of the law.

(Emphasis in the original)

1. As is apparent from [174], Snaden J considered that the reasoning in *Whelan*, both at first instance and on appeal, had involved a “deviation” from *Shea v TRUenergy*. His Honour had expressed the same view earlier, at [164]. Snaden J considered nevertheless that it was open to him to apply his preferred approach to the construction of s 341(1)(c) on the basis of his belief that the deviation was “unintended”.
2. Section 341(1)(c) was considered again in *Cummins South Pacific*. Bromberg J (with whose reasons Mortimer J agreed) described as “problematic” the statement of Dodds‑Streeton J in *Shea v TRUenergy* that the ability to make a complaint had to be underpinned by an entitlement or right found in (but not necessarily limited to) an instrument such as a contract of employment, award or legislation, at [15]. His Honour undertook a review of the predecessors of s 340 and made a detailed textual and contextual analysis of s 341 itself. Bromberg J expressed his conclusion as to the meaning of the term “is able to” as:

[34] The words “is able to” are not of themselves words of limitation. Their function when used in paras (b) and (c) of s 341(1) is to identify an actuating circumstance by reference to an ability held by the person that the scheme seeks to protect. The subject of that ability or those abilities is then specified in the remainder of the paragraph. The plain words of the provision only raise one inquiry. Does the protected person hold or possess the particular ability specified? That is a factual inquiry made as part of an exercise for discerning whether a particular circumstance does or does not exist. There is nothing in the text and in particular the words “is able to”, which suggests that any inquiry is required as to the provenance of the ability held, that is, how the ability was acquired or whether or not there is some underlying foundation for its existence. All that matters, on the plain words of the provision and in the context of its function, is whether or not the circumstance exists that the protected person has or holds the specified ability.

1. Bromberg J then continued:

[44] … There is neither a purposive nor a rational basis for confining that protective field to complaints or inquiries about an extant right or entitlement of the employee.

[45] For many of the reasons already canvassed, there is no textual basis for the other way in which the observations in *Shea* have been understood – that the ability to complain or inquire referred to in s 341(1)(c) must be underpinned by a right or entitlement. It is the fact that the protected person has the particular ability described that is the actuating circumstance serving the function which I have explained. As earlier stated, how the person acquired that ability, or the source or provenance of that ability is not addressed by the text of s 341(1). It may be accepted that the text contemplates that not all persons will necessarily have the particular ability in question, but, contrary to the approach taken by Dodds-Streeton J, it does not follow that the intended beneficiaries of the protective reach of the provision are only those persons who have that ability because of some right or entitlement. The actuating circumstance is the fact that the protected person has the ability and not a right or entitlement which has enabled that ability to be held. Read in context with its operative prohibition (s 340(1)(a)(i)), if an ability specified by s 341(1) held by the protected person actuates the adverse action taken, the prohibition will have been engaged.

[46] The position may have been different if a person’s ability to initiate or participate in a process or proceeding under a workplace law or workplace instrument or the ability to make a complaint or inquiry were necessarily acts only able to be done as of right or by virtue of some legal entitlement. But that is not the case. In particular, a complaint or an inquiry are both simple acts constituted by a communication. It is difficult to think of a circumstance in which the ability of a person to make an inquiry depends upon a legal right to do so. People are ordinarily free to make an inquiry of others without some legal right or entitlement to do so. So too in relation to the making of a complaint. These are activities which are not ordinarily enabled by some legal right or entitlement …

1. The reasons of Bromberg J in *Cummins South Pacific* are *obiter* because his Honour concluded that the appeal should be allowed on other grounds, at [67]. Bromberg J did say, however, 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”: *ibid*. His Honour did not state a similar view with respect to the decision of the Full Court in *Whelan* but it may be inferred that was his Honour’s view – see also [59]‑[60] in *Cummins South Pacific*.
2. Although Anastassiou J agreed with the result in *Cummins South Pacific*, his Honour disagreed with the construction of s 341(1)(c)(ii) adopted by Bromberg J. After referring to a number of the authorities and reviewing in some detail the reasons of Rangiah and Charlesworth JJ in *PIA Mortgage*, his Honour concluded:

[285] In my opinion, it is plain from the reasoning of the majority in *PIA Mortgage* that the ability to complain within the meaning of s 341(1)(c)(ii) remains dependent upon the identification of an anterior right or entitlement to complain. The source of such right may be founded in an express right under or pursuant to the contract, in the general law or pursuant to statute. But there is nothing in their Honours’ reasoning which rejects the requirement that an anterior right or entitlement is a necessary element to satisfy the meaning of “able to” in s 341(1)(c)(ii).

[286] On the contrary, their analysis proceeds from an acceptance that there are limits to the protection afforded by s 340, accepts that Dodds-Streeton J in *Shea* identified the requirement that there be some anterior right or entitlement upon which the complaint is to be founded and then examines the potential sources of such rights or entitlements. For these reasons I respectfully disagree with Bromberg and Mortimer JJ that the majority in *PIA Mortgage* “significantly relaxed” the requirement in s 341(1)(c)(ii) that an ability to make an inquiry or complaint must be underpinned by a right or entitlement to do so.

…

[291] In my view, this Court should follow *Cigarette & Gift* and *PIA Mortgage* in relation to the application of criterion (f) from *Shea* unless shown to be clearly wrong. I respectfully disagree with the view expressed by Bromberg J, with whom Mortimer J agrees, that were it necessary for the disposition of this appeal to do so, they would decline to follow *PIA Mortgage* as to the proper construction of s 341(1)(c)(ii) on the basis that it was plainly wrong.

1. For completeness, we note that the Full Court in *Flageul v WeDrive Pty Ltd* [2021] FCAFC 102, considered it unnecessary to determine the ground of appeal challenging the application of the approach in *Shea v TRUenergy* in the decision at first instance.
2. Counsel for NAB submitted that this Court should regard the reasons of the majority in *PIA Mortgage* as both correct and as binding. He noted that *PIA Mortgage* has been followed at first instance in *Maric v Ericsson Australia Pty Ltd* [2020] FCA 452, (2020) 293 IR 442 at [27] (Steward J); *National Tertiary Education Industry Union v University of Sydney* [2020] FCA 1709 at [186]‑[187] (Thawley J); *Salama v Sydney Trains* [2021] FCA 251 at [102] (Burley J); *SBP Employment Solutions Pty Ltd v Smith* [2021] FCA 601 at [130]‑[143] (Rangiah J); and *Wong v National Australia Bank Limited* [2021] FCA 671 at [74] (Snaden J).
3. Counsel for the appellant contended that the Court should follow the approach stated by Bromberg J (with whom Mortimer J agreed) in *Cummins South Pacific*. He submitted that in the context of “competing constructions by different Full Benches … it is a matter for this Court to [have] regard and give such weight as the Court considers appropriate to each of their fellow judges and the constructions they put on that particular statute … [W]hen there is a conflict between different Benches … the Court … is not constrained by comity in having to find that … a judgment of another Bench, differently composed, was “plainly wrong””. Counsel did not advert to the effect of *Whelan*.
4. The underlying principle of comity to which counsel referred in this submission is an important one. The principle and the authorities bearing on it were reviewed recently by Allsop CJ in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153. It is that generally the Full Court of this Court will follow one of its earlier decisions unless entertaining a conviction that the earlier decision is wrong: *FAK19* at [4]‑[9].
5. The submission of the appellant with respect to the choice available to this Court between the approaches in *PIA Mortgage* and *Cummins South Pacific* cannot be accepted. The reasoning of Rangiah and Charlesworth JJ in *PIA Mortgage* was part of the *ratio decidendi* for the decision in that case, whereas the reasoning of Bromberg J was by way of *obiter*. It is accordingly not a matter for this Court to choose between two equally available alternatives. In this circumstance, this Court would, in accordance with the principles reviewed and explained by the Chief Justice in *FAK19*, refrain from applying the approach stated in a decision of a Full Court having precedential effect only if convinced that that approach was “plainly wrong”. That is not a state of satisfaction easily reached.
6. It could be said that the issue does arise with respect to the different approaches in *Whelan* and *PIA Mortgage*. However, as already noted, while there is some difference between the principles endorsed by the Full Court in *Whelan* and the approach of the majority in *PIA Mortgage*, any difference in the application of those two approaches is unlikely to be significant.
7. It does seem to us, with respect, that, in some of the decisions construing s 341(1)(c), the ability of an employee to make an “inquiry” has not been given the same prominence as has the ability of the employee to make a “complaint”. Section 341(1)(c) should be construed having regard to both limbs. It is not uncommon for instruments, whether they be an industrial award, a collective agreement such as an enterprise agreement, an order of an industrial body, or a contract of employment, to make provision for the making of complaints. It is, however, much less common for instruments of these kinds to make provision for the making of inquiries. This is a matter to which Jessup J referred in *Murrihy* at [143] (set out above), as did Bromberg J in *Cummins South Pacific* at [46] (also set out above). It is possible, but in our view unlikely, that the legislative intention is that employees should be regarded as having the ability to make an “inquiry” in relation to their employment only when a right or entitlement to do so has been formally granted or acknowledged by some form of instrument. In our view, this points against a requirement that the ability to make a complaint or inquiry have itself an instrumental source. In our view, this may point against a requirement that the ability to make a complaint or inquiry must itself have an instrumental source.
8. Several authorities have emphasised that an object of Div 3 in Pt 3‑11 of the FW Act is to protect employees from retribution in the form of adverse action because they have exercised a workplace right by making a complaint or inquiry in relation to their employment: *Shea v TRUEnergy* at [619]; *Cummins South Pacific* at [14]. As Jessup J noted in *Murrihy*, the inquiry may involve a request for legal assistance, for example, as to whether an employee is receiving his or her proper entitlements. Such an inquiry may be made to the Fair Work Ombudsman, to the employee’s union, or to a lawyer retained by the employee. It may result in the employee being advised that he or she does have a claimed entitlement, or does not, and in the employee being advised as to the way in which a claim may be pursued. It would be a curious consequence, and seemingly inconsistent with the protection which the FW Act affords to those engaged in the orderly conduct of industrial affairs, if an employee making such an inquiry does not have the protection of s 340 because he or she does not have a right or entitlement, bestowed by a relevant instrument, to make that inquiry.
9. We consider that, irrespective of our own views concerning the proper construction of s 341(1)(c), this Court should proceed on the understanding of s 341(1)(c) indicated by the unanimous decision of the Full Court in *Whelan*. Doing so gives effect to the important principle of comity to which we have referred.
10. As we have indicated, we doubt that the approach preferred by the majority in *PIA Mortgage* will produce different outcomes in practice than the approach stated in *Whelan*.
11. It is difficult for this Court to assess whether each of the appellant’s Complaints or Inquiries Nos 4‑6 and 8‑10 are sourced in a right or entitlement in the sense explained in *Whelan*. Not only does the Court not have findings by the trial Judge as to the relevant instruments, it was not, with one qualification, taken during the submissions to the appellant’s contract of employment, the relevant enterprise agreement and the relevant industrial award. Nor did the Court receive any submissions as to terms which may have been implied into the appellant’s contract of employment arising from her probational status and the requirement that she “attend and complete the NAB Financial Planning Online Induction Course to the required standard”. Nor did the Court receive submissions concerning the implications which may arise from Pt 6‑4B of the FW Act (which authorises the FWC to deal with applications by employees who believe that they have been bullied at work).
12. For these reasons, while we consider that Complaints or Inquiries 1‑3 and 7 are not complaints or inquiries to which s 341(1)(c) refers, we are unable to uphold NAB’s submission that Complaints or Inquiries Nos 4‑6 and 8‑10 were not complaints or inquiries which the appellant was able to make in relation to her employment. Accordingly, Ground 1 of the Notice of Contention could succeed only in part.

## Was Complaint or Inquiry No 10 made on 17 January 2019?

1. NAB accepted that this was a matter which the Judge had not addressed. It submitted, however, that “in light of the adverse credit findings made against Ms Alam … the Full Court should find that, had the Primary Judge addressed the issue, he would have resolved the conflict of evidence [between Ms Alam and Ms Gorbunova] in favour of Ms Gorbunova and found that the complaints about bullying were not made on 17 January 2019”.
2. We do not accept this submission. The fact of the matter is that the Judge did accept that the appellant had made the 12 complaints, at [28]. It is true that in making that finding, his Honour did not address specifically the content of the complaint said to have been made on 17 January but his Honour was, despite his reservations about the reliability of the appellant’s evidence, willing to accept that the complaints had been made.
3. In any event, the Judge’s general adverse view of the appellant’s credit did not mean that her evidence on all topics in dispute would have been rejected. It is open to a trier of fact to reject parts of a witness’s evidence but to accept other parts.
4. Accordingly, Ground 2 in the Notice of Contention does not succeed.

## The similarity of Complaint or Inquiries Nos 10 and 12

1. NAB’s next contention was that the substantial identity between Complaint or Inquiry Nos 10 and 12 meant that the Judge’s reasoning with respect to Complaint or Inquiry No 12 had “equal force and effect” to Complaint or Inquiry No 10 with the consequence that it should be found that, even if it be accepted that the complaint or inquiry had been made, the making of this complaint or inquiry had not been a substantial or operative consideration in the dismissal decision.
2. An initial difficulty for this submission is that the Judge did not make any specific finding concerning whether Complaint or Inquiry No 12 had been a substantial or operative consideration in the decision dismissal. In fact, he did not make any separate finding about it at all. Had his Honour done so, he would no doubt have adverted to the fact that Complaint or Inquiry No 12, having been made on 28 January 2019, could not have been taken into account in the dismissal decision made on 24 January 2019.
3. Secondly, the Judge’s finding at [45], that the evidence of the three PSC members other than Mr King “records no direct or indirect evidence of a proscribed reason” is not the equivalent of a finding that the substance of Complaint or Inquiry No 12 had *not* formed part of the reason for the dismissal.
4. Thirdly, on the assumption that the appellant did prove that she had made Compliant or Inquiry No 10 in the terms alleged, s 361 required NAB to prove that her making of *that* complaint had not been a substantial or operative reason for the dismissal. It would not discharge that onus by proof that it had not been actuated by the making of some other complaint, even if that other complaint had common elements.
5. This submission of NAB fails.

## Knowledge of the behavioural issues

1. Finally, counsel for NAB sought to negate the possibility that any inference adverse to NAB could be drawn from the evidence that there had been some discussion of the appellant’s “behavioural issues” at the PSC. He did so by submitting that the “behavioural issues” drawn to the attention of the PSC members had concerned aspects of the appellant’s conduct other than her conduct in making the alleged complaints or inquiries.
2. However, with one qualification, in neither the written or oral submissions was the Court’s attention drawn to the evidence bearing upon the content of the “behavioural issues” about which the PSC had been informed. The only evidence of this topic to which the Court was referred was the document provided to the PSC members in advance of their discussion, referred to in the evidence as “the PSC template”. In relation to the Data Breach, the PSC template stated:

14 Jan 2019 - RWE Alla Gorbunova received an email from Data protection that Sumyya Alam (AFP) had sent an e-mail on 1.12.18 to her personal email address (gmail and Hotmail) [email address redacted] that included attachments as listed below.

17 Jan 2019 - Alla had a face to face meeting with Sumyya and questioned why she would send NAB FP information to herself. She looked puzzled and said that she doesn't recall doing that and proposed that it must have happened in accident, by misspelling e-mail address. She promised that she will look into her outbox and personal e-mail to delete the e-mail.

18 Jan 2018 - Alla called Sumyya to ask if she did find the e-mail, she said that the e-mail doesn't exist. Alla than raised her concerns about confidential information being sent to her personal e-mail addresses and explained that she will need to raise RiskSmart event and asked her to explain the reason the e-mails in writing. Sumyya said that she never sent any e-mails and they are not in her personal e-mails or NAB outbox. She said that it must have happened by mistake by mis‑typing e-mail address.

1. In a later section, the PSC template sought information as to the employee’s “Engagement/Attitude” with the direction:

Please rate the adviser’s engagement from (1) Low engagement/poor attitude to (5) High engagement/Very Good Attitude. Please provide comment around behaviours demonstrating engagement to improve their compliance.

1. In this section, Ms Gorbunova entered:

5. behavioural issues Alla is working through. Personality issues and conflict with 2 SFP that she has been working with. Alla can see improvement. Previous employer mentioned she had similar argumentative nature (employee is now with us), she is difficult to deal with because she is confrontational.

1. As is apparent, Ms Gorbunova gave the appellant the highest Engagement/Attitude rating available but indicated that the appellant was working through “behavioural issues” and that there were “personality issues and conflict” with the two senior financial planners. We agree with counsel for NAB that, at least on its face, this is not an express reference to the making of the complaints.
2. However, it is possible that the matters reported to the PSC concerning the appellant’s “Engagement/Attitude” and the “behavioural issues” did include the making of the alleged complaints and inquiries. Accordingly, before it could be concluded that the PSC had not otherwise been made aware of the appellant’s complaint or inquiries, it would be necessary for there to be findings on the evidence of what was said in the PSC meeting about these issues. The Court does not have these findings and was not referred to the evidence. We note that Ms Gorbunova thought that the PSC meeting had extended over 30 minutes and that there had been some discussion about the “behavioural issues”. She denied that the discussion of the “behavioural issues” had included the appellant’s email of 3 November 2018 and said “it was actually more the tone, and the way the emails were sent but, more importantly, her conduct in the workplace and communication with other team members” which had been canvassed.
3. It is not possible for this Court to make the required assessment of this evidence. Accordingly, Ground 3 in NAB’s Notice of Contention fails.

## The assessment of Mr King’s evidence

1. By Ground 6 in its Notice of Contention, NAB submitted that the Judge had erred in his assessment of the evidence of Mr King, one of the members of the PSC who had made the decision to dismiss.
2. The Judge’s reasons appear in the following paragraphs:

[41] During the cross-examination of one of the relevant decision-makers, Mr Matthew King, the following question was asked and answered:

*Mr Docking: Given without looking at the minutes you have no recollection of what was said at this meeting, you cannot deny that it was raised at the meeting part of the reason that the Applicant was to be dismissed was because she had made complaints and enquiries in relation to her employment?*

*Mr King: Yes.*

[42] … Counsel for the Respondent was permitted to re-examine. The following question was asked and answered.

*Mr Seck: Mr Smith, when you gave the answer that you cannot deny it was raised during the meeting that the reason for Ms Alam’s dismissal was because she made complaints or enquiries in relation to her employment, can you confirm whether ..... you recall your state of mind when you made the decision?*

*Mr King: Yes. I cannot deny it was present during the meeting because I wasn’t aware of it during the meeting and the decision I made to support the determination was in the specificity of the Professional Standards Committee and was based on the professional conduct and the issue with professional conduct being brought to me as opposed to anything else.*

[43] The Court is concerned about the weight that can be given to the evidence this witness gave in re-examination in the unfortunate circumstances of this case. The question that he was asked in cross-examination was quite clear, as was his answer. When the answer to the question is assessed in light of the legitimate (but unfortunately late) objection, what the Court is prepared to find is that in making his decision at the meeting, Mr King *did* take into account as a substantial and operative but nonetheless as an non-exclusive factor that the Applicant had made complaints and enquiries in relation to her employment.

(Emphasis in the original)

1. We uphold this contention of NAB. Even taking it at face value, Mr King’s inability to deny that the appellant’s making of complaints and inquiries had been raised at the PSC meeting as a reason for her termination was not the equivalent of an acknowledgment that Mr King himself had taken into account the making of the complaints or inquiries as a substantial and operative factor for the dismissal decision. As noted in [14(i)], the mere fact that there has been some adversion to a proscribed reason in the making of the decision to take adverse action, does not necessarily have the consequence that the action was taken *because* of that reason. The Judge erred in overlooking this circumstance.
2. However, the upholding of this Ground in the Notice of Contention does not warrant the dismissal of the appeal.

## Notice of Contention Grounds 4 and 5

1. NAB did not advance any submissions in support of Grounds 4 and 5 in its Notice of Contention and we have taken them to have been implicitly abandoned.

## Should there be a remittal to the FCC?

1. The appellant in particular sought to have this Court make its own decision on her application. We are not unsympathetic to that application, bearing in mind that the appellant has already had to undergo a four‑day trial as well as the appeal. However, as we have indicated, there are unresolved issues in the proceedings which it is not possible, for this Court, sitting without seeing and hearing the witnesses, to determine. These include whether the appellant did in fact make the complaints or inquiries she alleges; whether, if so, they were in the terms she alleges; whether there was any consideration by the PSC about her having made those complaints or inquiries; and, if so, whether NAB has established that the making of the complaints (or any one of them) or inquiries was not a substantial or operative reason for the dismissal. These are matters to be addressed in a trial at first instance. It is for a trial judge to make the determination of whether the reasons impugned by an applicant were considered at all by the decision‑maker and, even if considered, whether they formed a substantial or operative part of the reasons for the dismissal. That did not occur in this case.
2. Accordingly, subject to one matter, we see no alternative but to order the remittal of the matter to the FCC for re‑trial before another Judge.

## The extent of the remitter

1. As noted earlier, the Judge’s finding concerning the appellant’s sending of the Data Breach email is not affected by his errors in the application of s 361 in determining whether there had been a breach of s 340.
2. By s 28(1)(c) of the *Federal Court of Australia Act 1976* (Cth), the Court on an appeal may set aside the judgment appealed from “in whole or in part” and remit the proceeding to the FCC for further hearing and determination ‘subject to such directions as the Court thinks fit”.
3. The Court raised with the parties whether, in the event that it was satisfied that the FCC Judge had dealt extensively with the evidence bearing on who had sent the Data Breach email and that his Honour’s finding that it was the appellant who had sent the Data Breach email was not affected by error, it may be inappropriate for that issue to be remitted. Counsel for NAB supported that course. Counsel for the appellant sought a remittal of all issues but acknowledged that the sole ground on which he contended that the Data Breach issue should be remitted was the claim that there had been a denial of procedural fairness which had affected the Judge’s assessment of the appellant’s credit concerning that issue.
4. We are of course conscious that a re‑trial of some issues only could give rise to difficulties not readily foreseen. However, we are also conscious that the issue of whether the appellant had sent the Data Breach email to herself took up a significant portion of the time at trial, even though it was not at the core of the matters to be decided. The Judge’s finding at [144] that the appellant had herself perpetrated the Data Breach on 12 January 2019 has not been shown to be in error. On the contrary, it is supported by a substantial body of evidence. In the circumstances, we consider it inappropriate to remit the issue of whether the appellant sent the Data Breach email to her personal email accounts for re‑trial.
5. Although we consider that Complaint or Inquiry Nos 1‑3 and 7 cannot reasonably be regarded as complaints or inquiries to which s 341(1)(c) refers, we will include them in the remittal. The FCC Judge will have to determine their status in accordance with these reasons and in the light of any further evidence received and submissions made at the re‑trial.
6. In addition to the appellant’s claim for damages for breach of contract, the issues on the remittal will be whether the appellant establishes that she had made any one or more of Complaints or Inquiries Nos 1‑12, whether those Complaints or Inquiries had the content she alleges, whether the making of those Complaints or Inquiries constituted the exercise of a workplace right within the meaning of s 341(1)(c) and, if so, whether NAB establishes that the appellant’s exercise of any one or more of the workplace rights was not a substantial and operative reason for her dismissal. In the case of Complaint or Inquiry No 10, the same issues will arise but in respect of the appellant’s claim that she had foreshadowed to Ms Gorbunova the making of an “anti‑bullying application” to the FWC.
7. We make the following orders:
8. The appeal is allowed.
9. The judgment of the Federal Circuit Court Judge is set aside in part.
10. All issues in the proceedings other than that concerning whether the appellant sent to herself the Data Breach email of 12 January 2019 are remitted to the Federal Circuit Court for re‑trial before another Judge.
11. We will hear from the parties with respect to costs.

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| I certify that the preceding one hundred and thirty-one (131) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices White, O'Callaghan and Colvin. |

Associate:

Dated: 8 October 2021