REASONS FOR DECISION

Fair Work Act 2009
s.365—General protections (consent arbitration)

Kim Hodgkins
v
Rockcote Enterprises Pty Ltd
(C2021/5227)

DEPUTY PRESIDENT ASBURY BRISBANE, 27 JANUARY 2023

Application to deal with contraventions of general protections involving dismissal by consent arbitration – Applicant exercised workplace rights – Some rights sought to be exercised involved misconceptions – Adverse action taken against Applicant by Respondent standing Applicant down and dismissing her – Section 360 whether reasons for adverse action included prohibited reason – Section 361 onus of proof – Finding that reasons for adverse action did not include prohibited reason – Employer met onus of proof – Order dismissing application issued.

Background

[1] Ms Kim Hodgkins (Applicant) applied under s. 365 of the *Fair Work Act 2009* (the FW Act) for the Fair Work Commission (Commission) to deal with a general protections dispute involving dismissal (general protections dismissal application). The Applicant was employed by Rockcote Enterprises Pty Ltd (the Respondent) in the position of part-time Assistant Accountant. The Respondent is a manufacturer of paint and render. The Applicant commenced employment with the Respondent on 6 January 2020 and was dismissed with effect from 5 July 2021.

[2] In her general protections dismissal application, the Applicant alleged that adverse action was taken against her in contravention of the protections in Part 3 – 1 of the FW Act, by the Respondent standing her down, investigating her conduct and dismissing the Applicant, because she exercised a workplace right to inquire or complain about the terms and conditions of her employment and the remuneration of the Respondent's Chief Executive Officer, Mr Paul Eveleigh.

[3] The Respondent maintained that the Applicant was dismissed after an investigation into her conduct which established that she had discussed sensitive and confidential information about Mr Eveleigh's remuneration and leave entitlements with another employee, breached a lawful and reasonable direction not to discuss her stand down with other employees and misused confidential Company information not relevant to the performance of her work by sending that information to her private email address.

[4] The dispute was not resolved by conciliation. Section 369 of the Act empowers the Commission to deal with general protections dismissal disputes by arbitration, with the consent of the parties. Subsection 369(1) sets out the requirements which must be met before the Commission may deal with such a dispute by arbitration and it is not in issue that those requirements have been met. The parties notified the Commission that they had agreed to the Commission arbitrating their general protections dismissal dispute by filing a completed Form F8B.

[5] Directions were issued to the parties to file and serve submissions, and statements of witnesses on which they intended to rely. The Directions also dealt with the matter of permission to be represented. The parties were granted a brief extension to file material, as requested by the Applicant.

[6] The Respondent sought permission to be represented by a lawyer. The Applicant objected to permission being granted. Submissions were received from both parties in relation to permission. I conducted a hearing, by telephone, on 19 November 2021 at which I determined to grant permission for the Respondent to be legally represented at the substantive hearing. In granting permission, I had regard to the complexity of the matter, which was exacerbated by a range of irrelevant matters raised by the Applicant and concluded that to allow the Respondent to be legally represented would enable the hearing to be conducted more efficiently. Mr A J Smith of Counsel appeared for the Respondent instructed by Aitken Legal.

[7] The substantive hearing was held on 22, 23 and 24 November 2021 and 11 January 2022. Evidence was given by the Applicant on her own behalf. The Applicant's material was in the form of a brief witness statement and lengthy submissions. The Applicant was permitted to tender that material and to adopt her submissions as evidence in the proceedings.[1] Evidence for the Respondent was given by:

- Ms Lucy Dwyer, HR Manager;
- Mr Paul Eveleigh, Chief Executive Officer;
- Mr Kurt Muller, Director – People and Culture; (IT Leader & Member of the Executive Team)
- Ms Katie Atkinson, Credit Controller; and (People and Culture Advisor)
- Ms Judy Young, Credit Controller.

[8] On 4 April 2022 I decided to dismiss the Applicant's general protections dismissal application and issued an Order to that effect. These are my reasons for that Decision.

Issues in dispute

[9] The Applicant was self-represented and the identification of issues in dispute was difficult. The general protections dismissal application traversed a broad range of matters, many not relevant to such applications. There was also a lack of clarity in the Applicant's contentions in relation to the connection between the adverse action and the alleged reasons for the action. Further, the Applicant conflated the conduct that she alleged was adverse action with the reasons she asserted for the conduct. Essentially, the Applicant's case can be distilled into a contention that adverse action was taken against her because she exercised a workplace right to complain about three matters.

[10] Firstly, the Applicant contended that she complained about the leave accruals of the Respondent's CEO, Mr Paul Eveleigh, and alleged that those entitlements involved illegality and discrimination against the Applicant and other employees of the Respondent (the leave complaint). Secondly, the Applicant contended that she complained about being underpaid with respect to claimed entitlements under the *Clerks – Private Sector Award* (Clerks Award) including in relation to consultation and payment of overtime and to a reduction in her ordinary working hours associated with the implementation by the Respondent of the Commonwealth Government JobKeeper program (the underpayment complaint).

[11] The third issue was clarified during the hearing. The Applicant referred in her general protections dismissal application, to two earlier applications to the Commission: a General protections application not involving dismissal (general protections non-dismissal application) which was filed on Tuesday 15 June 2021[2] and a Notification of a dispute (dispute application) filed on 4 July 2021[3] (the FWC applications). The FWC applications dealt in part, with the same allegations that are canvassed in the Applicant's general protections dismissal application, subject of the present proceedings. The Applicant stated in her general protections dismissal application that she raised the fact that she had made these applications and their subject matter, at the meeting on 5 July 2021, prior to her dismissal.

[12] At the conclusion of the first day of the hearing, I had an exchange with the parties during which I pointed out that based on material tendered by the Applicant, the FWC applications were made after the Applicant was stood down, and before the Applicant was dismissed and that by making those applications, the Applicant may have exercised a workplace right, that was relevant for the present proceedings. The Applicant confirmed that she pressed this argument. During that exchange, I raised with the parties that Ms Roe had not been called to give evidence and whether it was sufficient for the Applicant to simply assert that she complained to Ms Roe about certain matters before the onus for the Respondent to prove that the dismissal was because of the Applicant's complaint, was engaged.

[13] The Applicant stated that she did not call Ms Roe to give evidence because Ms Roe had informed the Applicant that she would not attend the hearing voluntarily. The Applicant also stated that she was not aware that she could have issued Ms Roe with an attendance notice and sought to explore whether she could require Ms Roe's attendance at that stage of the proceedings. Counsel for the Respondent stated that Ms Roe had left the Respondent's employment and would not have voluntarily given evidence for the Respondent. It was also contended that the Respondent had not seen a need to call Ms Roe because the persons who took the action alleged by the Applicant to be adverse action, were giving evidence about their knowledge so that Ms Roe was not required to rebut the presumption as to the reason why action was taken. Counsel for the Respondent also submitted that while the Applicant had established a *prima facie* case that she complained to Ms Roe about an issue concerning her employment, Ms Roe was not involved in the adverse action alleged by the Applicant.

[14] Counsel for the Respondent indicated that he would consider these questions and provide a response about whether the FWC applications were complaints for the purposes of the exercise of a workplace right and advise the Respondent's position prior to the commencement of the second day of the hearing. During a further exchange at the commencement of the second day of the hearing, Counsel for the Respondent accepted that the Applicant made the FWC applications before she was dismissed[4] but maintained that this involved the Applicant asserting a position opposite to that which she had suggested at the point she raised these matters, and that this was not sufficient to engage the reverse onus in s. 361 of

the FW Act. Counsel for the Respondent then articulated his understanding of the issues in dispute in the present proceedings, subject to maintaining that this did not constitute an admission by the Respondent, nor an acceptance that the Applicant is entitled to the benefit of the reverse onus in s. 361.[5] I then confirmed with the Applicant, the allegations she was making in her general protections dismissal application.

[15] I then adjourned the hearing and produced a typed document setting out the issues in dispute as discussed with the parties, which I provided to the parties. That document set out the issues in dispute as follows:

> "**C2021/5227**
>
> **Issues in dispute**
>
> Whether for the purposes of Division 3 of Part 3 – 1 of Chapter 3 of the *Fair Work Act 2009*:
>
> A. The Respondent took adverse action against the Applicant by standing the Applicant down and investigating her conduct or dismissing the Applicant, because the Applicant exercised or proposed to exercise, a workplace right to inquire or complain about Mr Eveleigh's remuneration.
>
> B. The Respondent took adverse action against the Applicant by standing the Applicant down and investigating her conduct or dismissing the Applicant, because the Applicant exercised or proposed to exercise, a workplace right to inquire or complain about issues relating to underpayment of wages.
>
> C. The Respondent took adverse action against the Applicant by dismissing her because she exercised a workplace right by filing a Form F10 Application for the Commission to deal with a dispute and/or a Form F8C Application for the Commission to deal with a general protections application not involving dismissal."

[16] The Applicant and Counsel for the Respondent accepted that these were the issues in dispute and this is recorded in the Transcript of proceedings.[6] Counsel for the Respondent also accepted that if these were the allegations, there was no need to further cross-examine the Applicant. Counsel for the Respondent also proposed that given the point in the proceedings at which the issues in dispute were clarified, that its closing submissions should be made in writing after the hearing had concluded and both parties had been provided with a copy of the Transcript of proceedings. The Applicant did not oppose this course and agreed that she would also provide her closing submissions in writing after the hearing concluded and she had received a copy of the Transcript. I agreed with this course of action.

[17] Contrary to the position reached at the hearing, in written closing submissions made subsequent to the hearing, the Respondent contended that the third issue was "*included over the objection of the Respondent at the insistence of the Commission*." The Respondent also submitted that:

> "For the Commission to formulate an allegation, on day two of a hearing, which is inconsistent with the factual case of the Applicant, and require the Respondent to answer it, is procedurally unfair. Beyond that however, it requires the Respondent to answer a case which is inconsistent with the facts which the Applicant relied on in framing her case."

[18] I do not accept the Respondent's submissions. The initiating application does not contain precise pleadings and this is not required. It is usual for an unrepresented Applicant grappling with the complexities of the general protections provisions of the FW Act to complete

the Form F8 Application in a manner that is discursive and does not precisely define the nature of the adverse action alleged, or provide information to support the required causal nexus between the adverse action and the relevant general protection. The general protections dismissal application in the present case is no exception.

[19] It is clear from the general protections dismissal application that the Applicant asserts that she had made the applications to the Commission prior to her dismissal. In her written submissions the Applicant made various allegations of "*adverse action*", albeit these could more appropriately be described as workplace rights that the Applicant alleged, she had or had exercised. These included the FWC applications. Accordingly, the question of whether the making of the FWC applications was the exercise of a workplace right, was put in issue by the Applicant. There is also no submission advanced about what, if any, impact the Respondent suffered, because of the alleged denial of procedural fairness.

[20] *Prima facie,* the conduct on the part of the Respondent about which the Applicant complains – standing the Applicant down, instituting a show cause process and dismissing the Applicant – constitutes adverse action. The gravamen of the Applicant's case is whether the adverse action she identifies was taken because she exercised, or proposed to exercise, a workplace right or rights, as set out in the three allegations set out above.

Statutory provisions and principles

[21] Part 3 – 1 of the Act under which the application is made, prohibits, amongst other things, an employer from taking adverse action against an employee because that employee exercises a workplace right or proposes to do so. Section 340 of the FW Act relevantly provides:

> "(1) A person must not take adverse action against another person:
> (a) because the other person:
> (i) has a workplace right; or
> (ii) has or proposes to exercise a workplace right;
> (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."

[22] The meaning of "workplace right" is found in s. 341 which is in the following terms:

> **"*Meaning of workplace right***
>
> (1) A person has a workplace right if the person:
> (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
> (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
> (c) is able to make a complaint or inquiry:
> (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or
> (ii) if the person is an employee—in relation to his or her employment."
>
> **"*Meaning of process or proceedings under a workplace law or workplace instrument***
>
> (2) Each of the following is a *process or proceedings under a workplace law or workplace instrument*:
> (a) a conference conducted or hearing held by the FWC;

(b) court proceedings under a workplace law or workplace instrument;
(c) protected industrial action;
(d) a protected action ballot;
(e) making, varying or terminating an enterprise agreement;
(f) appointing, or terminating the appointment of, a bargaining representative;
(g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;
(h) agreeing to cash out paid annual leave or paid personal/carer's leave;
(i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);
(j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;
(k) any other process or proceedings under a workplace law or workplace instrument.

…"

[23] Item 1 of the table in s. 342 of the FW Act sets out the circumstances in which an employer takes adverse action against an employee, as follows:

"*Meaning of adverse action*

(1) The following table sets out circumstances in which a person takes adverse action against another person.

Meaning of *adverse action*		
Item	**COLUMN 1** ***ADVERSE ACTION* IS TAKEN BY ...**	**Column 2** **if ...**
1	an employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.

…

(2) ***Adverse action*** includes:
(a) threatening to take action covered by the table in subsection (1); and
(b) organising such action.

(3) ***Adverse action*** does not include action that is authorised by or under:
(a) this Act or any other law of the Commonwealth; or
(b) a law of a State or Territory prescribed by the regulations.

(4) Without limiting subsection (3), ***adverse action*** does not include an employer standing down an employee who is:
(a) engaged in protected industrial action; and
(b) employed under a contract of employment that provides for the employer to stand down the employee in the circumstances."

[24] In *Keep v Performance Automobiles Pty Ltd*[7] (*Keep*) a Full Bench of the Commission said in relation to the approach to consent arbitration of workplace rights matters:

"An employer contravenes s.340 if it can be said that the exercise by the employee of a workplace right was a 'substantial and operative factor' in the employer's reasons for taking the action which constitutes 'adverse action' within the meaning of s.342.[8]

…

The task of the FWC in a consent arbitration proceeding such as this is to determine three factual questions:

(i) Was the employee exercising a workplace right, within the meaning of s.341?
(ii) Did the employer take 'adverse action' against the employee, within the meaning of s.342?
(iii) (Did the employer take the adverse action against the employee because of a prohibited reason, or reasons which included that reason?

In the context of this case the applicant bears the onus of establishing that he had exercised a workplace right at the relevant time and that adverse action was taken against him. If so established, the respondent then bears the onus of establishing that the adverse action was not taken because Mr Keep had exercised a workplace right."[9]

[25] Sections 360 and 361 of the Act are important provisions in the legislative scheme concerning general protections. The Full Bench in *Keep* made the following observations in relation to those provisions:

"Sections 360 and 361, in Div 7 of Pt 3-1 of the FW Act, make it easier than it otherwise would be for an employee to establish a contravention of the protective provisions in Pt 3-1, including s.340. Section 360 provides that, for the purposes of Pt 3-1, 'a person takes action for a particular reason if the reasons for the action include that reason'. Section 361(1), casts an onus of proof on an employer to show that it did not take action for a prohibited reason, it says:

"If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took ... action for a particular reason ...; and
(b) taking that action for that reason ... would constitute a contravention of this Part; it is presumed, in proceedings arising from the application, that the action was ... taken for that reason or with that intent, unless the person proves otherwise."

It is important to note that s.361 does not obviate the need for an applicant to prove the existence of the objective facts which are said to provide the basis of the respondent's conduct. The onus does not shift from the applicant to the respondent until the applicant establishes the elements of each of the general protections upon which it seeks to rely. It is not enough for the applicant to merely make assertions regarding these elements, they must be determined objectively."[10]

[26] In *Alam v National Australia Bank Ltd*[11] (*Alam*) at [14] the Full Court of the Federal Court comprehensively set out matters bearing upon the application of s. 361 in relation to s. 340 as follows (citations omitted):

"Several matters bearing upon the application of s 361 in relation to s 340 are settled:

a. 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;

b. 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. 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;

c. 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.

d. 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;

e. 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;

f. 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;

g. 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, 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. 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;

h. 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;

i. 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: Nor does the fact that the adverse action has some association with a matter supporting a proscribed reason; and

j. adverse action taken against a person because of conduct resulting from the exercise of workplace rights may not offend the s 340(1) prohibition."[12] (Citations omitted)

[27] The Full Court in *Alam* was dealing with an appeal against a decision where the Judge at first instance found that one of 12 complaints made by an employee related to a workplace right but did not reach a conclusion with respect to the other 11 complaints. The Full Court determined that it was necessary for the Judge to consider whether each of the 12 complaints related to workplace rights and whether that the Applicant had been dismissed because of her conduct and not because she exercised a workplace right. In relation to the approach taken by the primary Judge, the Court said:

"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... The discharge of that task required the Judge to consider, and make findings concerning whether:

a. the appellant had made the complaints or inquiries she alleged;

b. the complaints or inquiries found to have been made had the content the appellant alleged;

c. 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

d. NAB had established, on the balance of probabilities, that none had been a substantial or operative reason for the termination."[13]

[28] In relation to the exceptions to the approach it had set out, the Court observed that there may be cases where the court may be satisfied that the actuating reason for the dismissal of an employee was the non-proscribed reason alleged by the employer because: "*The non-proscribed reason may be so obvious and so serious as to swamp any other reasons.*"[14] A second exception identified by the Court was described as factual and, in that case, where the dismissal was effected before the employee informed the employer that she intended to make "*an anti-bullying submission to the Commission*". The Court went on to identify the necessary elements for communications to be characterised as complaints or inquiries in relation to employment, for the purpose of s. 341(1)(c) as follows:

> "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."[15]

[29] The Full Court also referred to the judgement of Jessup J in *Murrihy v Betezy*[16]who found that an employee who proposed to seek advice from a solicitor was able to exercise a workplace right within the connotation of a complaint or inquiry within the meaning in s. 341(1)(c)(ii). The Full Court in *Alam* went on to observe that in the circumstances outlined by Jessup J in *Murrihy v Betezy*, the legal advice may be that the employee does, or does not, have the claimed entitlement.

[30] The Court also considered that the meaning of the expression "*is able to make a complaint or inquiry*" in relation to the employment in s. 341(1)(c) had been the subject of divergent views in the Court. Notwithstanding these divergent views, it had been accepted that the complaints or inquiries to which the section refers are not confined to those which can be made to an external authority or to persons with a capacity to seek compliance with a legal obligation, but include complaints or inquiries made to the employer itself, in relation to that person's employment. After extensively reviewing the cases on this point and the divergent views expressed in them, the Court compared the construction of s. 384(1)(c)(ii) in two earlier decisions – *Cigarette & Gift Warehouse Pty Ltd v Whelan*[17] (*Whelan*) and *PIA Mortgage Services Pty Ltd v R*[18] (*PIA Mortgage Services*). The Full Court in *Alam* set out the following conclusion of Rangiah and Charlesworth JJ in *PIA Mortgage Services*:

> "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."[19]

[31] The Court in *Alam* then went on to address the distinction in the construction of s. 341(1)(c)(ii) in *PIA Mortgage Services* and *Whelan* – with reference to the passage set out above from the former case, as follows:

> "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."[20]

[32] The Full Court in *Alam* went on to observe 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 an employee to make a "*complaint*" and that while it is not uncommon for instruments such as enterprise agreements or employment contracts to make provision for the making of complaints it is less common for provision to be made for the making of inquiries. The Court stated that:

> "…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."[21]

[33] The Full Court in *Alam* proceeded to construe s. 341(1)(c) based on the understanding indicated by the unanimous judgement of the Full Court in *Whelan* and reiterated its doubt that the approach preferred by the majority in *PIA Mortgage Services* will produce different outcomes.

[34] The principles that can be derived from *Alam* and other cases cited in relation to the proper construction of s. 341(1)(c) generally, can be summarised as follows:

- The words "*complaint or inquiry*" should be interpreted broadly with limits to be found in the nature and purpose of the legislation which includes the protection of workplace rights;[22]
- The term "*complaint*" connotes an expression of discontent or a particular grievance or finding of fault which seeks consideration, redress or relief from the matter about which the complainant is aggrieved;[23]
- It is not necessary that a particular form of words is used or that the complainant or inquirer identify the communication as a complaint or an inquiry; and
- An inquiry must also be more than a mere request for assistance or outlining concerns about a matter and may include, for example, an inquiry as to whether the recipient is able to provide the requested assistance.

[35] For the purposes of s. 341(1)(c)(ii) in particular:

- There must be a relationship between the subject matter of the employee's complaint and the employee's employment;

- The subject of the employee's complaint must be founded on a source of entitlement or right (such as an employment contract, award, enterprise agreement or legislation);
- It will be sufficient to attract the protections in Part 3-1 Division 3 of the Act if the complaint or inquiry relates to subject matter for which the employment contract makes provision.[24]
- It is not necessary for the ability to make a complaint or inquiry to itself have an instrumental source and the employee does not have to identify a grievance procedure or some other right to bring a complaint in their employment contract, award, enterprise agreement or legislation, in order to attract the protections in Part 3-1 Division 3 of the Act;[25]
- An inquiry may be made to an employer or to an external party such as a union or lawyer; and
- It is not necessary that the employee actually has the relevant right or entitlement for the complaint or inquiry to fall within the connotation of a complaint or inquiry within the meaning in s. 341(1)(c)(ii) – the advice received as a result of the employee making the complaint or inquiry may result in the employee being advised that he or she does, or does not, have the claimed right or entitlement.[26]

[36] The present case squarely raises the issue of whether an employee can make a complaint or inquiry (or foreshadow the making of a complaint or inquiry) in relation to a claim that has no merit or lacks an intelligible or legitimate basis or is misconceived. There is some force in the observation of Snaden J in *PIA Mortgage Services Pty Ltd v R*[27] that a person is not endowed with the ability complain about something merely because he or she has something to complain about. Here, the Applicant's assertions about Mr Eveleigh's remuneration arrangements being discriminatory with respect to other staff and/or illegal, are entirely misconceived. This is a matter to which I will return.

Evidence

Allegation A – Complaint about Mr Eveleigh's remuneration

[37] The Applicant's evidence about this allegation was that in May 2021, she identified and brought to the attention of "*HR*" a practice which was occurring with regards to the leave entitlements of the Respondent's CEO Mr Eveleigh. Essentially the issue identified by the Applicant was that Mr Eveleigh had been absent for a period of more than four months and leave had not "*been entered*" or deducted from Mr Eveleigh's leave balances. On 18 May 2021, at 10.15 am, an email with the subject line "*Leave irregularities that need to be rectified prior to EOFY*", in the following terms, was sent by the Applicant to Mr Kurt Muller, Ms Lucy Dwyer and copied to Ms Ally Roe, the Respondent's CFO to whom the Applicant reported:

> "Good morning Lucy and Kurt
>
> Sending you both this email in your capacity as HR representatives for Rockcote.
>
> As part of my role, I process both the payroll and leave benefits for the company into the financial system.
>
> During this process I noticed that Paul was still being paid during the 4+ months that he was absent from work, and his leave balances were also not reducing (they were in fact still continuing to increase).
>
> I checked on his leave history to see what was happening, and can see that appropriate leave (whether it be personal leave, LWOP or rec leave etc) has not been entered.

> This situation needs to be rectified, to ensure consistency of practices at Rockcote, and to ensure that there is no illegal discrimination between employees.
>
> Further, as it stands, with no leave having been processed for Paul for the period after 10/2/21, Rockcote's books are overstated to the tune of approximately $50K+ (this amount is not immaterial).
>
> I also note below, there was a 2 week leave period entered without medical certificate. I would have thought that such an extensive period of leave would require a medical certificate. Given doctor's will not generally issue medical certificate's for a consecutive period beyond 2 weeks, I would expect there to be approximately 10 medical certificates to cover this period of absence if personal leave was to be utilised (noting that a psychologist has no authority to issue medical certificates).
>
> I am aware that this situation may be sensitive, given Paul's position in the company as Chief Executive, so I have sent this to HR to resolve, given your role in entering leave, and also in ensuring discrimination in the workplace does not occur.
>
> This situation needs to be resolved in the near future, as EOFY is approaching in a months' time, and this anomaly needs to be rectified prior to closing off Rockcote's books for 30 June.
>
> On another issue, I can see from the below records that the reversal of annual leave appears to be incorrect. Annual leave was entered for $1230.90 and then reversed for $1846.34; I believe the amount reversed should actually be the $1230.90 amount.
>
> I would appreciate you maintaining my anonymity in raising this issue, as I do not want to be the recipient of any adverse actions for having done so.
>
> Many thanks.
> Kim"[28]

[38] Mr Muller responded to the Applicant's email at 12.26 pm on the same day thanking the Applicant for raising her concerns and advising that due to the sensitive nature of the content raised, he would personally look into those issues. Mr Muller assured the Applicant that he would address each concern and rectify them in accordance with the wishes of the owners of the Respondent.[29]

[39] On 3 June 2021 at 5.08 pm, the Applicant sent another email to Mr Muller and Ms Dwyer, copied to Ms Roe. The Applicant noted that "*the anomalies*" with respect to Mr Eveleigh's leave payments and balance had not been appropriately rectified. A screenshot of Mr Eveleigh's leave records was inserted into the email which displays information including Mr Eveleigh's hourly rate, salary and reasons for leave for the period between September 2020 and May 2021. The Applicant alleged that what had occurred with Mr Eveleigh's leave balance was "*illegal*" and foreshadowed contacting the Fair Work Commission or the Ombudsman should the issues remain unresolved. The Applicant said:

> "Given that further leave has since been entered, but the several months of missing leave has not, and also that Paul has been back at work now for more than a month, there has been more than adequate time for this to occur; I am beginning to suspect that there is no intention for this leave to be entered at all.
>
> If this is the case, in order for Rockcote not to discriminate against its employees, please let me know when you will be providing myself and all other Rockcote employees with 4 months-worth of leave with full pay, without it affecting our leave balances.

> If this situation isn't appropriately rectified in a non-discriminatory manner by the end of this week I will be forwarding advice to the Fair Work Commission/Ombudsman for an appropriate rectification of the current gross inequity in the workplace, which is illegal.
>
> This situation needs to be resolved now as there is only one more pay period left before the EOFY, and this has a significant impact on our accounts, more so now, since Paul's leave balance has this pay increased by 44% in line with Paul's recent pay rise.
>
> I also make the comment that on the very day that I sent my email to you about this previously, Paul happened to come and visit the Finance area, for no particular reason, which given he has never done this in the previous 15 months, was very odd. Therefore I believe, that my previous request regarding my anonymity being maintained, has not been followed.
>
> I look forward to your advice tomorrow.
>
> Many thanks
> Kim"[30]

[40] Also on 3 June 2021 at 5.42 pm, the Applicant sent a second email stating that she realised that she would not be viewed in a favourable light by the Executive Team for raising concerns about Mr Eveleigh's leave payments and balance, but that "*what it really boils down to, is what is happening here in the workplace is illegal, and if I did nothing about it, I would also be compliant (sic) in the illegal activity; and I am not willing to do that for anyone, sorry*."[31]

[41] Under cross-examination the Applicant maintained that she was instructed by Ms Roe to investigate Mr Eveleigh's leave entitlements and that there were emails on the server to that effect, sent prior to the email of 18 May 2021, which she had been unable to access. The Applicant also denied that she went trawling through the Respondent's payroll system to find Mr Eveleigh's leave balances and said that her job required her to process monthly leave balances. The Applicant agreed that Mr Eveleigh's pay details are sensitive, not readily accessible to anyone and that there is security in place to stop these from being accessed.[32] The Applicant disputed the proposition that she had become quite upset when she saw the arrangements Mr Eveleigh had or that she felt entitled to the same arrangement, and stated that she felt it was "*unconscionable*" for Mr Eveleigh to receive the additional leave "*when a year prior he thought it was reasonable to reduce the rest of Rockcote's pay by 20 percent with no legitimate reason*".[33] (This was a reference to the implementation of JobKeeper arrangements by the Respondent in 2020).

[42] In response to the proposition that her email of 3 June 2021 to Mr Dwyer and Mr Muller was a claim for something extra, the Applicant said that she was suggesting that there should be consistency in the workplace with respect to the additional leave granted to Mr Eveleigh. The Applicant denied that she had a discussion with Ms Young about Mr Eveleigh's leave and that she showed Ms Young details of his remuneration. In this regard, the Applicant said in response to a question in cross-examination about whether she had discussions with Ms Young:

> "…Well, no, I didn't, because if you would note – so, we worked - well, I worked at Rockcote for about a year and-a-half, right? And I never had lunch with Judy during that time, I never socialised with her outside of work. There's been no intimation that I told this information to anybody else, so why would it be that I would pick out Judy and tell her - what was she going to add to the issue?"[34]

[43] In response to a proposition that due to her position she should have understood the importance of keeping Mr Eveleigh's remuneration arrangements confidential, the Applicant

said that she did not complete all the modules of the Associate CPA course including the module dealing with confidentiality. The Applicant agreed that she signed a confidentiality declaration upon accepting employment with Rockcote to the effect that she would not divulge confidential information about a range of matters including employees of the Respondent. That declaration was part of the Terms and Conditions of the Applicant's employment tendered by Ms Atkinson. The Applicant maintained that she had not seen or read the Respondent's Code of Conduct prior to being stood down and it was not included on her employment file which she had been provided with as part of the processes she had commenced in the Commission.

[44] The Applicant was also shown a Working From Home Policy tendered by Ms Atkinson together with a covering email sent by the Applicant to Ms Atkinson on 20 April 2022, appending a signed copy of that Policy. The Applicant agreed that the Policy states that forwarding of work-related emails to an employee's personal email address without the prior approval of IT and the Process Improvement Executive is strictly prohibited and may result in termination of employment but maintained that she had not read the policy despite signing it to acknowledge that she had read and understood the policy.[35] The Applicant also agreed that she sent the following emails to her private email address:

- An email originally sent on 2 July 2020 from the Respondent's external accounting firm in relation to JobKeeper;
- An email about cost centres dated 12 November 2020; and
- The email sent by the Applicant on 18 May 2021 in relation to Mr Eveleigh's leave accruals to Ms Dwyer, Mr Muller and Ms Roe.

[45] The Applicant accepted that the JobKeeper email was sent to her private email address to pursue a complaint about the matter. In response to the proposition that there was no legitimate business purpose for the Applicant to send the email to her home address, the Applicant repeated her assertion that she did so to make a complaint which she was entitled to make and later conceded that she was not working on the JobKeeper issue at the time the email was forwarded to her home address. The Applicant agreed that she sent the email about Mr Eveleigh's leave entitlements to her home email address and said she thought it was appropriate to do so "*because of the prior culture and history within Rockcote was that adverse action was taken against anybody who complained about any of the issues within Rockcote*."[36]

[46] The Applicant also agreed that she spoke to a work colleague after leaving the stand down meeting and told that person that she had been stood down. The Applicant maintained that she could not ignore anyone who asked her a question about why she was packing up and disputed that she was told during the meeting that she should not discuss the fact that she had been stood down with anyone.

[47] Mr Eveleigh explained that he took a lengthy period off work commencing at the end of 2020 due to a combination of circumstances related to his health. It is not necessary to detail those circumstances. As an alternative to Mr Eveleigh making a workers' compensation claim, the Directors of the Respondent agreed to support him by paying an agreed percentage of his annual salary until such time as he decided whether to return to work. It was also agreed that there would be no deduction from his leave balances during that time. Mr Eveleigh returned to work on 27 April 2021.

[48] Ms Atkinson confirmed that in about February 2021, she was instructed verbally by the former People and Culture Executive, Ms Ryan, to continue paying Mr Eveleigh at a reduced

rate, and without any deduction from his leave balance. Ms Atkinson also confirmed her understanding that this was requested by the Directors of the Respondent. Ms Atkinson states that she did not have any concerns with the arrangements between the Respondent and Mr Eveleigh as those arrangements were reasonable in circumstances where Mr Eveleigh might otherwise apply for workers compensation and would have receive the similar benefits as a result.

[49] Mr Eveleigh stated that on 18 May 2021, Mr Muller met with him and showed him an email detailing matters relating to his absence, including that there had not been a deduction from his leave entitlements during the absence. Mr Eveleigh said that the name of the person who sent the email was "*blacked out*" although he was aware that it had been sent by someone from the finance team. On 19 May 2021, Mr Eveleigh provided an email response to Mr Muller, detailing the arrangement suggesting that confirmation to be sought from the directors and a file note be placed on his personnel file.[37] Mr Eveleigh states that he does not recall receiving a response from Mr Muller, and did not recall another specific interaction with Mr Muller about the matter. Mr Eveleigh stated that Mr Muller did not give him any indication as to the identity of the person who raised the matters about his leave entitlement.

[50] Mr Muller's evidence is that his first "*substantive interaction*" with the Applicant was the email exchange he had with the Applicant on 18 May 2021, when the Applicant corresponded with him directly about Mr Eveleigh's leave entitlements. After receiving that email from the Applicant, Mr Muller contacted the Applicant's direct supervisor, Ms Roe, to advise her that the Applicant had raised concerns about Mr Eveleigh being absent from work, where his leave balance did not reduce. Mr Muller said to Ms Roe that he would look into those issues personally and he would discuss with Ms Roe if he discovered any relevant information so that Ms Roe could discuss with the Applicant directly. Mr Muller responded to the Applicant's email on 18 May 2022 thanking her for raising her concerns.

[51] Mr Muller stated that he also spoke with Ms Atkinson about Mr Eveleigh's leave. Mr Muller was advised by Ms Atkinson that there was email correspondence in Ms Ryan's inbox about the arrangements pertaining to Mr Eveleigh's leave and remuneration. Ms Ryan no longer worked for the Respondent by that time. Mr Muller then accessed Ms Ryan's email account and found two relevant emails dated 10 and 15 February 2021 from Mr Peter Blake, a Non-Executive Director.

[52] The email from Mr Blake dated 10 February 2021 was sent to the Respondent's Directors, Ms Chris Cameron, and Mr Bob Cameron. It contains calculations as to how much Mr Eveleigh would receive if he was paid various percentages of his salary. The email of 15 February 2021 was sent to Ms Ryan and confirmed that the Directors had agreed to set in place a "*salary payment process*" for Mr Eveleigh and that no more sick leave or annual leave would be consumed during Mr Eveleigh's absence. Mr Muller also had a discussion with Ms Chris Cameron who confirmed that the arrangements with Mr Eveleigh had been agreed upon between the Board and Mr Eveleigh. Mr Muller stated that that on 18 or 19 May 2021 he had a discussion with Mr Eveleigh about the Applicant's email of 18 May 2021 and confirmed his understanding with respect to the arrangements between Mr Eveleigh and the Respondent. Mr Muller maintained that he did not reveal the Applicant's identity to Mr Eveleigh. Mr Muller also took external advice, and was satisfied that there was nothing illegal or improper about the arrangements with Mr Eveleigh.

[53] On 28 May and 3 June 2021, Mr Muller sent two emails to Ms Roe confirming that Mr Eveleigh's arrangements were made by the Directors and the arrangements were legally permitted. Mr Muller stated that he left it to Ms Roe to pass the information on to the Applicant as Ms Roe was her manager. In relation to the email received from the Applicant on 3 June 2021, Mr Muller said that he did not respond as events relating to the Applicant's stand down and dismissal intervened before he could do so. Ms Dwyer was also a recipient of the Applicant's email of 18 May 2022 with respect to Mr Eveleigh's leave entitlements. Ms Dwyer's evidence is that she was not aware of the arrangements with Mr Eveleigh until it was raised by the Applicant through her email. After receiving that email, Ms Dwyer says that Mr Muller "*took the lead*" investigating the matters, which in Ms Dwyer's view, he was entitled do, given that Mr Muller was a member of the executive team and an Executive Director for People and Culture at the time.

[54] Ms Dwyer also recounted some exchanges between her, Ms Roe and Ms Atkinson about Mr Eveleigh's leave arrangements a few days after 18 May 2022. Ms Dwyer said that she had a conversation with Ms Roe and Ms Roe expressed the view that Mr Eveleigh's arrangements were "*totally illegal, wrong, not fair and potentially fraudulent*". Ms Dwyer described Ms Roe as appearing to be "*out to get*" Mr Eveleigh. Following this conversation, Ms Dwyer had a discussion with Ms Atkinson, who explained that the arrangements with Mr Eveleigh were agreed to by the Directors and were highly confidential because they concerned Mr Eveleigh's health circumstances. Ms Dwyer stated that on the same day she relayed to Ms Roe what Ms Atkinson had told her, but Ms Roe did not seem to agree.

[55] Ms Young gave evidence about exchanges she had with the Applicant in relation to Mr Eveleigh's leave entitlements. Ms Young and the Applicant both worked in the finance team of the Respondent and reported to Ms Roe. Ms Young's evidence was that a few weeks before 3 June 2021, the Applicant mentioned to her that during Mr Eveleigh's lengthy absence in 2021 he had been accumulating leave on full pay. Ms Young recalled that the Applicant had previously made similar comments to her on more than one occasion. Ms Young said that she was not initially concerned about the comments as she thought that the Applicant "*would eventually just let the matter go*".

[56] Ms Young stated that approximately 2 weeks before 3 June 2021, the Applicant called Ms Young over to her desk to show Ms Young something. Ms Young recalled that the Applicant pointed to her and said, "*Don't you dare tell anyone about this*". The Applicant proceeded to pull a sheet of paper out of her handbag which Ms Young recognised as a copy of an email. Ms Young explains that while she was not wearing her glasses at the time, she could see clearly enough that the email contained Mr Eveleigh's name, and information about his remuneration and leave entitlements. Ms Young said that she knew immediately that the information that she had been shown, and that which the Applicant had told her, was confidential.

[57] Ms Young recalled that during that exchange, the Applicant also told her that Mr Eveleigh had given himself an increase to his renumeration which equated to more than the Applicant's hourly rate. Ms Young's view is that the Applicant felt that the increase was not justified because of Mr Eveleigh's long absence from work. According to Ms Young, the Applicant said that she had given the human resources department until the end of the month to address her concerns about Mr Eveleigh's leave entitlements. Ms Young recalled telling the Applicant that Mr Eveleigh was "*like a son to the Directors of Rockcote*" and that Mr Eveleigh was not going anywhere, and that the Applicant should "*drop it*". Ms Young confirmed that

she did not have access to information about employee remuneration and that the Applicant would have had to search to obtain that information.

[58] Ms Young stated that while she was concerned about her interaction with the Applicant, she did not immediately report it as she felt she had no one to report it to. Ms Young explained that her Manager, Ms Roe, and the Applicant, had a close working relationship and Ms Roe was deeply invested in the Applicant's actions. Ms Young had previously spoken to HR about the work ethics of Ms Roe and the Applicant but "*gained no traction*". Ms Young recalled that approximately a day or two prior to 3 June 2021, she had a discussion with Mr Eveleigh about a new employee who had recently been hired for the marketing team. Mr Eveleigh told Ms Young how impressed he was with this new person and Ms Young jokingly said that perhaps she should give Mr Eveleigh her resume in case there is an opening in his team. Ms Young explained that while she meant it as a joke, the context for her remarks related to concerns about the leadership of the finance team and in particular, Ms Roe's leadership.

[59] Ms Young stated that Mr Eveleigh contacted her afterwards asking whether her comments related to concerns about Ms Roe. Ms Young confirmed that this was the case. Ms Young stated that Mr Eveleigh asked her to elaborate, and Ms Young told Mr Eveleigh that something "*needed to be done*" about the Applicant's conduct and Ms Young did not believe that Ms Roe would take any action. Ms Young confirmed that during that conversation she told Mr Eveleigh that the Applicant was complaining about his leave entitlements and that Mr Eveleigh's leave balance did not reduce despite being on leave. Ms Young also told Mr Eveleigh that the Applicant had shown her information about renumeration that she should not have been shown. Ms Young recalled that Mr Eveleigh was aware that the Applicant had raised complaints about his leave entitlements. Ms Young also stated that she was asked by Mr Eveleigh whether she was prepared to put it in writing, and in response, said to Mr Eveleigh that she was reluctant to do so as she was concerned about the potential repercussions from Ms Roe and the Applicant as Ms Roe was her manager and the Applicant's manager.

[60] Mr Eveleigh confirmed that approximately a week before 3 June 2021, he had a discussion with Ms Young during which Ms Young stated: "*Paul, I think Kim's out to get you. She is working on something, and she showed me something about your leave - you have to be wary of her*". Mr Eveleigh said that he was concerned about what Ms Young said and sought clarification from her. Mr Eveleigh said that Ms Young became reluctant to speak further but and he understood that Ms Young was concerned about the potential repercussions from her manager, Ms Roe. Mr Eveleigh stated that he did not press the matter further. Mr Eveleigh also recounted an exchange he had with Ms Roe on 25 May 2021. Mr Eveleigh stated that he told Ms Roe that he had become aware of the questions raised about his leave entitlements and that he told Ms Roe that the arrangements had been agreed to by the Directors and that he had responded to Mr Muller about those questions. Mr Eveleigh recalled that Ms Roe told him not to worry any more about it.

[61] Mr Eveleigh confirmed that on the morning of 3 June 2021, he spoke to Ms Young at her desk and Ms Young advised him that the Applicant had shown her documents that contained information about his salary and leave balance. Mr Eveleigh said to Ms Young words to the effect of "*I really could not do anything with that information unless you are prepared to confirm that information to me in writing*". According to Mr Eveleigh, Ms Young indicated that she was hesitant to do so because of the potential repercussions, which Mr Eveleigh understood to be a reference to concerns about Ms Roe finding out. Mr Eveleigh says he made it clear to

Ms Young that she was not under any obligation to put her concerns in writing, but that if she did so, it would be appreciated.

[62] On 3 June 2021, Ms Young said that she stayed back late at the office and noticed that the Applicant was still at the office. Ms Young described this as unusual. Ms Young stated that she asked what the Applicant was doing in the office, and the Applicant said: "*dealing with this shit*". In response to a question from Ms Young seeking clarification, the Applicant said: "*Paul shit*". Ms Young stated that after she went home on 3 June 2022, she decided to formally report the Applicant for disclosing confidential and sensitive information. Ms Young sent two text messages and an email to Mr Eveleigh that day. Ms Young said in her evidence that she had not retained a copy of the text messages. A Text message exchange was tendered by Mr Eveleigh that he stated was sent to him by Ms Young on 3 June at 4.39 pm as follows:

> "Paul, I thought it was important to contact you and make you aware Kim is staying back in the office for another hour, hour and a half, normally I wouldn't be concerned, but I asked why she felt the need and her response came back to the subject about you. Maybe you could ring Katie and ask her to leave or ask Kurk (sic) to disconnect her. I suspect she has waited for everyone to leave to photo copy? Judy"

[63] Mr Eveleigh responded to this text message by thanking Ms Young and received a second text message as follows:

> "I send you email later should be enough to show her the door tomorrow Judy"[38]

[64] Ms Young agreed under cross-examination that these were the text messages referred to in her witness statement and sent to Mr Eveleigh on 3 June 2021.[39] Ms Young's email of 3 June 2022 sent at 7.16 pm stated that:

> "Paul,
>
> I have serious concerns when co-workers have access to sensitive information related to other employers and what they choose to do with that information. These concerns became very evident during conversations that I had with Kim Hodgkins.
>
> A couple weeks ago during a conversation Kim and I were having, Kim proceeded to tell me that Paul Eveleigh had been accumulating all his benefits including annual leave and sick leave during his time of absence. Kim claimed that what the company was doing was totally illegal and that he was not entitled to them.
>
> Kim pulled out of her handbag a copy of an email sent to HR (Kurt, Lucy, and copied Ally); requesting for Paul's entitlements to be reviewed. In the email, she had claimed that it was illegal and should be amended.
>
> The email I was shown had very personal information I was not wearing my glasses but certainly saw enough to know I should not be seeing what I was seeing.
>
> My comment to Kim was that it would not change anything. Her response was that she was giving HR until the end of June to amended it or she was reporting it. Kim clearly knew she was wrong sharing that Information when she proceeded to tell me, "Don't you dare tell anyone."
>
> Again, late last week Kim stated Paul had just given himself a pay increase, an increase she felt wasn't justified. She quoted that the increase was more than her hourly rate.
>
> Today I left the office around 4.30pm and asked Kim when was she planning to leave. She replied in hour or hour and half. I asked her why she was staying back so late when she was working tomorrow. The gist

> of her response was, 'month end', 'too much to do', and 'I still need to deal with that "Paul shit"'. l asked what "Paul shit"? her response was, 'to his entitlements'. I said to her to just let it go. Unfortunately, I do not think she is capable of just letting go her interest in Paul's entitlements.
>
> Paul, I support what action you feel is necessary in this situation.
>
> Judy Young
> Credit Controller"[40]

[65] Mr Eveleigh stated that upon receiving Ms Young's email, he forwarded it to Ms Dwyer, Ms Atkinson, Mr Muller, Ms Chris Cameron and Mr Bob Cameron that evening. Ms Dwyer stated that the conduct outlined in Ms Young's email was "*very concerning*" to her as a professional in human resources. Mr Muller describes being shocked because highly sensitive information about Mr Eveleigh's remuneration and entitlements was disclosed by the Applicant to Ms Young. Ms Atkinson described Ms Young's email as the catalyst for an investigation into the Applicant's conduct. This investigation culminated in the Applicant being required to attend a meeting on 4 June 2021, which culminated in a show cause process being initiated against her. The evidence in relation to this process is considered below.

Allegation B – The underpayment complaints

[66] There are two aspects to the Applicant's complaints about issues related to alleged underpayment of wages. Firstly, the Applicant contends that the Respondent (and in particular Mr Eveleigh and the HR Team) reduced her hours and salary by 20% during the COVID-19 Pandemic without first complying with the requirement in the Clerks Award to consult about the change. Secondly, the Applicant contends that she was not paid overtime as required by the Clerks Award for additional hours she worked during the period of her employment. The Applicant asserts that both complaints relate to her entitlements under the Clerks Award with which the Respondent failed to comply.

[67] The Applicant stated that, following a presentation by Mr Eveleigh in March 2020 regarding a response plan to the COVID – 19 Pandemic, her hours and salary were reduced by 20%. According to the Applicant, the purported reason for these reductions was the Respondent's sales turnover had been negatively impacted by COVID – 19. This was consistent with an email sent to all staff members by Mr Eveleigh on 20 April 2020, which advised that the Respondent was experiencing a reduction in sales turnover and confirmed that "*wages and salaries of staff members would remain at 20% below normal levels*".

[68] The Applicant alleges that she raised concerns about the reduction in her hours and salary in March 2020 with her immediate supervisor, Ms Roe. The Applicant said that she told Ms Roe "*that sort of action could not be taken without any consultation or notice given as per the Award*" and that "*people had mortgages and rent to pay, kids to support and other commitments*". The Applicant says that Ms Roe's response to her comments was that not even the Rockcote executive team had been advised of this measure, and that Mr Eveleigh had actioned it alone, and that the Applicant should consider herself lucky as the executive team had been told they had to accept a 20% pay cut but were still required to work normal hours.

[69] On 30 April 2020, Mr Eveleigh emailed staff members with another update on the company's response plan to the Pandemic. In that email, Mr Eveleigh confirmed that the Respondent had lodged an application for the JobKeeper Program and staff were advised that

the Program allowed Rockcote to move eligible staff who had signed and returned the JobKeeper consent form, back to their original hours and wage/salary.[41]

[70] The Applicant stated that she did not sign the JobKeeper consent form because she did not believe that the Respondent met the eligibility requirement of a 30% decline in turnover due to the Pandemic and she was "*offended*" by the Respondent making claims for government stimulus subsidies for which the Respondent was not eligible at the expense of taxpayers. The Applicant also tendered an email exchange with Ms Ryan, the Respondent's then People and Culture Executive, in which she informed Ms Ryan that she would not sign the JobKeeper form because she worked for another Company which had already claimed JobKeeper for her. In response, Ms Ryan expressed disappointment that the Applicant had not given Rockcote the preference to claim JobKeeper on her behalf, given that the Applicant worked four days a week for Rockcote.[42]

[71] The Applicant alleged that she was treated adversely in comparison to other employees of the Respondent who signed the consent form to nominate the Respondent as their employer for JobKeeper and were allowed to resume their previous hours and salary whereas the Applicant was kept at reduced hours. The Applicant also alleged that Mr Eveleigh singled her out for not signing a JobKeeper consent form but did not provide any evidence about how and when this occurred.

[72] Between March and June 2020, the Applicant says that she raised the issue of the reduction of her hours and salary with Ms Roe on a number of occasions, but it was not until June 2020 that her hours were restored to her usual arrangements of 4 days per week, Monday to Thursday. Under cross-examination the Applicant agreed that she did not raise the reduced working hours with Mr Eveleigh but maintained that she did raise this issue with Ms Roe who said that she would resolve the issue.[43] The JobKeeper complaint was one of the subjects included in the general protections non dismissal application filed by the Applicant on 15 June 2021 and the dispute application filed on 4 July 2021.

[73] In relation to overtime payments, the Applicant contended that in 2020 and 2021, she worked considerable overtime because of other staff absences and work requirements but was not remunerated correctly. The Applicant tendered her contract of employment, which stipulates that the Applicant is employed to the position of Accountant, but that the terms and conditions of her employment are governed by the Clerks Award.

[74] In relation to work hours and payments for overtime, the Applicant's employment contract provides that:

> "Core hours are currently between 7.00am and 4.30pm, Monday to Thursday and you may be requested to alter these hours to address workplace needs and requirements… you will be required to work a minimum of 7.6 hours per day plus reasonable additional hours (definitely a minimum of 2 hours per week, with no more than 5 hours per week on occasions). The company has taken into account its requirements on hours of work (ordinary hours and reasonable additional hours) and has factored those requirements into the agreed salary for your position."

[75] The Applicant stated that she raised her concerns regarding overtime payments with Ms Atkinson on at least three different occasions. The Applicant stated that she asked Ms Atkinson why she had not been paid for hours she worked on Fridays which were additional to her weekly hours of work, why her overtime hours were paid at the ordinary rate rather than the applicable overtime rates in accordance with the Award and why she was not paid for the hours worked in

addition to 7.6 hours per day. According to the Applicant, Ms Atkinson responded stating that the payments were correct because "*Rockcote does not pay that way*". The Applicant also alleged that she raised these concerns on multiple occasions with several other people at Rockcote including her manager, supervisor and team members and was told that Rockcote has always done it that way and they will never change and that she should just drop the matter.

[76] An exchange of emails dated between 8 and 20 April 2021 between the Applicant and Ms Atkinson was tendered by the Applicant. On 8 April 2021, the Applicant wrote to Ms Atkinson saying that her pay did not include the 8 hours she had worked on a Friday, being a day the Applicant did not normally work. Ms Atkinson apologised and stated that it was missed and reminded the Applicant that if she was planning to work extra days, she was to inform Ms Atkinson so that her salary for the pay cycle could be adjusted. The Applicant replied to the email stating: "*No problems, we've have been busy lately and I just forgot*."

[77] On 19 April 2021, the Applicant corresponded with Ms Atkinson again noting that she had worked an extra 18 hours and 15 minutes in the pay cycle, consisting of 8 hours on 26 March, 8 hours and 15 minutes on 9 April and 2 hours on 16 April 2021. The Applicant requested that Ms Atkinson adjust her salary for the pay cycle accordingly. Ms Atkinson responded by asking the Applicant to come and see her. The Applicant said that this exchange evidenced the fact that responses to her queries were made orally rather than in writing.[44] Apart from the exchanges with Ms Atkinson, the Applicant tendered an email from the Applicant to Ms Young dated 4 May 2021 expressing the view that "*they should be paying us overtime under the award*" with a subject line indicating that the email refers to changes to the *Manufacturing and Associated Industries and Occupations Award 2020*. That email was appended to the Applicant general protections non-dismissal application which was filed on 15 June 2021.[45]

[78] The Applicant also said that in response to the allegations of underpayment in her general protections non-dismissal application, the legal representative for the Respondent had stated that the reference to the Clerks Award in the Applicant's employment contract was an error because the Applicant, who was employed as an Accountant, was not covered by an Award.

[79] On 30 June 2022, the Applicant emailed Ms Dwyer seeking *inter alia* clarification of the purportedly erroneous reference to the Clerks Award in her employment contract and requested that Ms Dwyer advise the Applicant as to "*the Awards that Rockcote employees currently operate under, and the percentage of staff at Rockcote that is covered by each Award*." That email also raised several other procedural issues relating to a show cause meeting, which by this time had been programmed for 1 July 2021, and sought to defer the meeting due to the availability of her representative. Ms Atkinson responded to the Applicant and her representative on 1 July confirming that the reference to the Clerks Award in her contract was an error and declining to provide the Applicant with information pertaining to the Awards that applied to other employees. Ms Atkinson also stated that:

> "We note that when the position was advertised, it was not advertised as an accounts payable role, but rather as an Assistant Accountant role, which required a Bachelor of Accounting / Finance or higher qualification. Your Employment Contract also confirmed your position as an Accountant, as did your Rockcote email signature. Our view is that you were clearly engaged as an Accountant, and performed the duties of an accountant, and as such your position is not subject to a modern award."[46]

[80] The Applicant disputed that she was hired as an Accountant because she says her role was not intended to perform any functions of an Accountant. On 2 July 2022, the Applicant responded to Ms Dwyer's email stating that:

> "This evidences and confirms my previous comments that Rockcote has knowingly and intentionally being failing to operate in accordance with relevant Australian legislation, including but not limited to the Clerks Private Sector Award. As prior to notification by Aitken Legal, during their involvement in the show cause process against me (which commenced 4 June 2021), Rockcote was of the understanding that I was covered by the Clerks Private Sector Award, as stated in my contract.
>
> As I have previously stated Rockcote has operated in contradiction to the clauses of the Clerks Private Sector Award on numerous occasions, including but not limited to, payment of overtime and appropriate overtime rates, and also unilaterally reducing my take home pay without consultation on multiple occasions."[47]

[81] The subject of the Applicant's entitlements to overtime payments was also included in her dispute application filed with the Commission on 4 July 2021. During cross-examination, it was put to the Applicant that she had not raised any complaints about payment in accordance with the Clerks Award at any time before she was stood down. The Applicant maintained that there had been discussions about being paid overtime rates at finance team meetings but agreed that Mr Eveleigh, Ms Atkinson, Ms Dwyer and Mr Muller were not at those meetings.[48] The Applicant also accepted that she was paid for at least some of the additional hours she claimed but maintained that she was paid at her ordinary rate rather than the overtime rate she was entitled to under the Clerks Award. The Applicant also pointed to Ms Atkinson's evidence that the Applicant had spoken to Ms Atkinson on several occasions about why she was not being paid "*various overtime rates*". [49]

[82] In relation to the stand down meeting on 4 June 2021, the Applicant accepted that there was nothing that occurred during that meeting to place pressure on her not to make an external complaint to the Fair Work Ombudsman but maintained that her ability to make such a complaint was more difficult because her access to available evidence was removed. The Applicant also had the following exchange with Counsel for the Respondent:

> "But you don't say anyone suggested to you that you shouldn't have raised a complaint or that you shouldn't raise a complaint? No, Lucy Dwyer actually specifically said, I think, where I said, 'Oh, you have resolved any of the other issues, have you?' And she said no. And I said, 'So I should take them to the ombudsman or the Fair Work Commission.' She said yes.
>
> And no one at any other time suggested to you that you shouldn't make a complaint to the ombudsman or the Fair Work Commission, did they? No, not explicitly those words.
>
> Or any words to that effect?
>
> Or any words to that effect? Explicitly stating that I shouldn't make a complaint? No, those words were never explicitly stated. It was more - no, the workplace's actions were more - their actions in the workplace denied me being paid my appropriate pay and those sorts of things. Nobody specifically said, 'You can't make a complaint to the Fair Work Commission or the ombudsman.' The only thing that was is other workers had said, 'Don't raise issues, or they will just fire you', which was part of the culture. Pretty much in the first month that I was there, that was what the culture of Rockcote that I had heard from many different employees."[50]

[83] The Applicant agreed that the workers she was referring to did not include Mr Eveleigh, Ms Atkinson, Ms Dwyer or Mr Muller. Later in response to a question from the Commission, the Applicant repeated her assertion that during the stand down discussion she asked whether

Ms Atkinson and Ms Dwyer were "*ok*" for her to proceed to make a complaint to "*Fair Work*" and the Commission and Ms Dwyer said "*yes that's ok*". [51]

[84] Mr Eveleigh's evidence is that during the Applicant's employment, he was never made aware of any alleged complaint by the Applicant about the reduction of her hours from March 2020. He was also unaware of any complaint by the Applicant with respect to her hours not being reinstated for a 3-month period after she decided not to nominate the Respondent for JobKeeper payments. Mr Eveleigh explained that in March 2020, he made a decision, which was endorsed by the Respondent's Directors, to reduce employees' hours by 20% to deal with the impact of COVID – 19. Members of the executive team were to have their salaries reduced by 20% but were nevertheless required to continue to work their usual hours. Mr Eveleigh stated that he and other non-executive directors took an even larger percentage in reduction of remuneration. Mr Eveleigh says that this decision reflected a significant concern about the outlook of the construction industry at the start of the Pandemic as information available at the time indicated a significant risk of collapse for that industry.

[85] Mr Eveleigh stated that he conducted a presentation around that time for employees of the Respondent to explain his decision and that he expected that the managers would speak to their teams about the decision and take feedback with any significant feedback to be filtered back to himself. In April 2020, Mr Eveleigh and the Directors decided to apply for the JobKeeper subsidies. He stated that a decision was made that employees, who obtained JobKeeper from the Respondent would be returned to 100% of their usual hours and that employees, who did not obtain JobKeeper for the Respondent, would continue to work at the reduced hours. Mr Eveleigh stated that the Applicant was not the only person affected by that decision.

[86] Mr Eveleigh also stated that, for those employees who did not nominate the Respondent for JobKeeper, the business was unable to support the reinstatement of their usual hours. Mr Eveleigh considered that the decision was financially sound because the Respondent would not have received the fortnightly payment of $1,500 in subsidies. Mr Eveleigh said that it was purely a financial decision which was applied consistently across all employees, including the Applicant.

[87] Ms Dwyer's evidence was that during her employment with the Respondent between July 2020 and July 2021, the Applicant never raised a complaint or inquiry with her about any matters concerning JobKeeper or overtime payments. Ms Atkinson's evidence was that she only became aware of the Applicant's complaints about the reduction of her hours after the Applicant was stood down in June 2021. Ms Atkinson stated that she remembers on occasions during 2021 receiving emails from the Applicant advising that the Applicant had worked additional hours, but her pay did take them into account. Ms Atkinson confirms that sometimes those additional hours were missed, and that she regarded those emails as "*normal payroll matters*". Ms Atkinson also stated that the Applicant never claimed that she was entitled to overtime for those additional hours and was paid for them at her ordinary rate. Ms Atkinson tendered a series of emails which indicate that the Applicant claimed the hours as "*extra*" hours she had worked on Fridays and sought payment for them and that Ms Atkinson responded by asking the Applicant to "*flick her an email*" before the next pay, if she did extra hours.[52]

[88] Ms Atkinson recalled having three discussions with the Applicant about the payments for additional hours the Applicant had worked. According to Ms Atkinson, the first discussion occurred soon after the Applicant had commenced employment with the Respondent. The

Applicant enquired about working on a Friday and how she would be paid, as Fridays were not part of the Applicant's usual part-time hours. Ms Atkinson advised that it was up to the Applicant whether she wanted to work an extra day, and if she chose to work additional hours on a Friday, the Applicant would be paid her usual hourly rate. Ms Atkinson said that the Applicant accepted that information and did not challenge it. The second discussion occurred around April 2021. The Applicant asked Ms Atkinson about being paid for any extra days she worked. Ms Atkinson again told the Applicant that it was her decision whether she worked extra days, but if she did choose to work, she would be paid her normal hourly rate, or alternatively, the Respondent could agree that she could take time off in lieu.

[89] The third discussion occurred on 3 June 2021. Ms Atkinson recalled that the Applicant told her that she had worked the previous Sunday. Ms Atkinson asked her why she worked on a Sunday and the Applicant responded that, usually, she would work additional hours on a Friday if she had to, but she was not able to that week, so she decided to work on the Sunday. The Applicant said that she did not expect to be paid extra for working on Sunday. Ms Atkinson confirmed that she would be paid her normal hourly rate for those hours. Following the discussion, the Applicant sent Ms Atkinson an email outlining the hours she had worked on Sunday. Ms Atkinson maintained that at no stage during the discussion did the Applicant indicate that she believed she was entitled to overtime rates, and in fact confirmed she did not expect to be paid extra. Ms Atkinson did not take the discussion as the Applicant making a complaint about overtime. An email in relation to the Sunday work sent by the Applicant to Ms Atkinson on 3 June 2021, was tendered by Ms Atkinson to confirm her evidence. The Applicant did not dispute that she was paid at her ordinary rate for those hours.[53]

[90] Ms Young, who worked in the same team as the Applicant, confirmed that the Applicant had never complained to her about the 20% reduction in her hours between March and June 2020. Ms Young recalled a discussion with the Applicant in which the Applicant expressed the view that she should have been paid double time if she worked on one of her scheduled days off. Ms Young also stated that she received an email from the Applicant on 4 May 2021 with a screenshot of the *Manufacturing and Associated Industries and Occupations Award 2020* and provisions regarding overtime under that Award and said, *"they should be paying us overtime under the award*".

[91] At the hearing, the Applicant sought to put a proposition to Ms Atkinson that during the stand down meeting on 4 June 2021, she complained about underpayment of her wages by stating: "*so you think that the HR conduct is entirely compliant with all Australian legislation*". Ms Atkinson stated that she did not understand this comment to be a claim about underpayment or the Applicant's wages. In response to questions from me, the Applicant said that her intention in making the comment was to refer to underpayment of Award wages.[54]

Show cause process

[92] On 4 June 2021, the Applicant was asked to attend a meeting with Ms Dwyer and Ms Katie Atkinson, People and Culture Advisors of the Respondent. A voice recording of the meeting was played during the hearing. At the meeting, allegations of serious misconduct were put to the Applicant and the Applicant was notified that that she was being stood down and an investigation into her misconduct was commenced that day. The Applicant stated that she expressed concerns with "*existing bias, conflict of interest and procedural fairness*" if the investigation were to be carried out internally by the HR Team of the Respondent.

[93] The Applicant also stated that her access to the company server was immediately removed after the meeting on 4 June 2021. On 7 June 2021, an email was sent to the Applicant by Ms Dwyer attaching a letter headed "*Confirmation of Allegations and Show Cause Process*" signed by Ms Dwyer. The letter notes that while the Applicant appeared to focus on the issues around Mr Eveleigh's leave balance and payments during the meeting, the Applicant's stand down and the investigation into her conduct were separate matters from the concerns raised by the Applicant in relation to Mr Eveleigh's leave and pay. The letter contained particulars of the allegations against the Applicant and required a response from the Applicant by 9 June 2021. Relevantly, the letter states that:

> **Particulars of Allegations**
>
> We now confirm that the particulars of the allegations made against you are as follows:
>
> 1. We have been advised that on or around two weeks prior to 3 June 2021, you had a discussion with Judy Young where you disclosed to Judy that Paul Eveleigh had been accumulating all his benefits, including annual leave and sick leave, during his absence from work. You expressed to Judy your opinion that Rockcote was operating illegally and that Paul was not entitled to accrue his annual leave and sick leave during his absence.
>
> 2. You then pulled a copy of an email that you had sent to Kurt Muller, Ally Roe and myself from your handbag and showed it to Judy. That email is alleged to have contained highly confidential information pertaining to Paul's renumeration and leave entitlements. Whilst showing Judy the email, you made the allegation to Judy that the arrangement with Paul was illegal and should not be amended. When Judy said that the email would not change anything, your response to Judy was that you were giving HR until the end of June to amend it or that you were going to report it. You then said to Judy, "Don't you dare tell anyone".
>
> 3. Then, in the week ending 28 May 2021, you informed Judy that Paul had given himself a pay increase and you said that you did not feel the increase was justified. You also commented that the increase was more than your hourly rate.
>
> …We consider that if you are found to have engaged in all or part of the conduct outlined above, and to have disclosed details relating to remuneration/ leave arrangements entered into by Rockcote with the CEO, to another employee who had no authority or cause to receive that information, that conduct will constitute a serious breach of trust. As an additional item of potential serious misconduct, we also consider that it is potentially in breach of the Confidentiality Declaration in your Terms and Conditions of Employment…
>
> …in circumstances where you are an accountant for the business and have access to highly confidential information belonging to the business, such conduct will constitute a serious breach of your common law obligations of confidence and fidelity which you owe to Rockcote.
>
> …We consider that the alleged conduct, if substantiated, is conduct consistent with serious misconduct and would warrant immediate termination without notice.
>
> **Additional matters for response**
>
> There are also two additional matters that we wish to respond to. It is alleged that after the stand down meeting on 4 June 2021, and despite being directed not to contact any other employees during the stand down, you immediately proceeded to communicate with at least two employees that you had been stood down or 'suspended'. It is alleged that one of those communications was done quite loudly, and it is believed that a number of other employees also heard your announcement of your stand down…
>
> We are also concerned that following the stand down meeting, your [sic] proceeded to remove and place into your personal bag a number of documents. When confronted by Katie Atkinson about the documents

> in your bag, you stated that the documents were not documents belonging to Rockcote. However, we have been informed that another employee witnessed you placing what they believed were documents that had the Rockcote logo/letterhead on them in your bag.
>
> A review of your email history has also revealed to us that in the minutes leading up to the stand down meeting, you sent a tranche of four emails containing Rockcote confidential information to your personal email address.

[94] The Applicant said that during the meeting on 4 June 2021, she asked, "*when the timing of the allegation against me had occurred*" and the response provided to her was, "*we can't give you that detail*". The Applicant asserted that it was not until the Respondent filed a response to her general protections non-dismissal application that she learned that the alleged interaction involving Ms Young, the subject of the main allegation against her, was made known to the Respondent on the evening of 3 June 2021. As previously noted, the Respondent filed its response to the general protections non-dismissal application on 23 June 2021. The Applicant asserted that the allegations were raised against her only after she had informed the Respondent of her intention to escalate the matters referred to in her letter, to the Commission or the Ombudsman.[55]

[95] In relation to the meeting on 4 June 2021, Ms Dwyer stated that she invited the Applicant to bring a support person and allowed the meeting to be recorded. A decision was made to stand down the Applicant pending investigation into the allegations. Ms Dwyer describes this as a "*collaborative decision*" made by herself and Ms Atkinson, in conjunction with Mr Muller. Ms Dwyer said that she had regard only to the allegations raised by Ms Young in making the decision to stand down the Applicant.

[96] Ms Atkinson said that she did not recall being specifically appointed to conduct the investigation, but she assumed that she and Ms Dwyer would handle the matter in their capacity as People and Culture Advisors. Mr Muller said that he did not personally conduct the investigation but considered that it was appropriate for Ms Atkinson and Ms Dwyer to take charge. Mr Eveleigh stated that he "*actively and consciously*" removed himself from the matter and instructed Ms Atkinson and Ms Dwyer to handle it.

[97] Ms Dwyer's evidence is that during the stand down meeting the Applicant was directed "*not to talk to other employees about her stand down*". Ms Atkinson's evidence is that the Applicant was directed "*not to talk to other employees during the stand down period*." Both Ms Dwyer and Ms Atkinson stated that they heard, and subsequently confirmed with other employees, that the Applicant had disclosed that she had been stood down. The Applicant disputed that a direction was made by Ms Atkinson or Ms Dwyer that she was not to talk to other employees about being stood down. The Applicant said that after leaving the meeting, she was asked by a co-worker, "*are you okay*?", to which the Applicant spontaneously replied, "*they have stood me down*". The Applicant said that she did not stop to engage in conversation, nor did she initiate it, but continued down the stairs back to her workstation to collect her things."

[98] Ms Atkinson recounted that immediately after the stand down meeting, she received a text message from the Director, Ms Cameron, notifying Ms Atkinson that Ms Cameron's daughter (who was also an employee of the Respondent) was told by the Applicant that she had been stood down and Ms Cameron's daughter saw the Applicant "*grabbing paperwork and shoving it in her bag*". Ms Atkinson said that she then approached the Applicant and asked whether she had any company paperwork in her bag, to which the Applicant said "*no*". Ms

Atkinson recalled that Ms Cameron's daughter interrupted and said that she saw the Applicant putting documents in her bag. Ms Atkinson repeated her question and the Applicant advised that she had not put the Respondent's documents in her bag. Ms Cameron's daughter provided a signed contemporaneous note that recorded these exchanges. Following this interaction, immediate steps were taken to suspend the Applicant's access to the Respondent's IT systems.

[99] Ms Atkinson and Ms Dwyer stated that it was discovered that immediately before the stand down meeting on 4 June 2021, the Applicant sent 4 emails containing confidential information belonging to the Respondent, to her personal email account. Ms Dwyer tendered the emails and stated that they were as follows:

- confidential accounting advice from BDO to the Respondent with respect to the Respondent's turnover figures and assessment of eligibility for JobKeeper;
- other confidential internal email correspondence regarding JobKeeper;
- the Applicant's email to Mr Muller and Ms Dwyer dated 18 May 2021 pertaining to Mr Eveleigh's leave issues; and
- the Applicant's follow up email dated 3 June 2021 pertaining to Mr Eveleigh's leave entitlements.[56]

[100] As previously noted, the Applicant's general protections non-dismissal application was made on 15 June 2021. On 21 June 2021, the Applicant provided a response to the allegations which denied the alleged exchange between her and Ms Young, and stated that:

> "In the allegations letter, it is inferred that me previously raising an enquiry/concern with the Rockcote HR Team regarding the leave arrangements for Paul Eveleigh, was a focus for me during the stand down meeting. I believe it is prudent to point out, that it was in fact the HR team that brought up this issue in their opening statement, as can be evidenced in the recording taken of that meeting.
>
> My focus of the meeting, as can be confirmed by the recording, was why the HR team refused to provide me with any details of the allegations against me, specifically the timing of when the allegations had been made, and the timing of my stand down being the morning after I had previously advised that I would be going to the Fair Work Commission in response to valid concerns that I raised in the workplace which have not been resolved.
>
> With regards to allegations 1, 2 and 3, all I can say is those allegations are false. I have never had any such discussion with Judy.
>
> In response to the two additional matters raised in the Allegations letter I provide the following commentary.
>
> After me immediately leaving the meeting on 4 June, I was returning to my desk and one staff member asked me "are you OK, what's happened?" as I must not have looked my usual self, I believe this was Fran, although I cannot be 100% sure, as I was still quite shell shocked after the meeting. I spontaneously replied, "they have stood me down". I did not stop to engage in conversation, nor did I initiate it, I continued down the stairs back to my workstation to collect my things. Which is what I had been asked to do in the meeting, "get your things together and finish your day".
>
> I was of the understanding that the stand down took effect once I had left the workplace. As I am sure you can appreciate, I was quite overwhelmed in the circumstances. It was not until I was provided with the Allegations letter three days after this event, that I was advised "not to contact any other employee about the stand down".
>
> I did not remove any Rockcote items from the workplace, I confirmed this to Katie at the time, as indicated in your letter. I do not believe that I have ever had the need to use a document with the Rockote letterhead

> during my entire employ. I confirmed with Jess as well that I was not taking any material belonging to Rockcote, I believe I clarified my comments to Jess by stating that all work material is saved as electronic records on the server, I do not store any paper files for work purposes at all.
>
> The Allegations letter states "a review of your email history has also revealed to us that in the minutes leading up to the stand down meeting, you sent a tranche of four emails containing Rockcote confidential information to your personal email address". I would like to make several statements in relation to this comment.
>
> Firstly, I did not know the meeting on 4 June was a stand down meeting, the email invite I was provided simply said "meeting".
>
> The four emails I sent to my home email were FBT emails. I had sent these home as I had intended to finish the FBT return on the weekend for Ally's signing on Monday morning (as she had been away from the office that week). I needed to have several spreadsheets open at the same time to do this on multiple screens, and cannot do it on my laptop, as it has only one small screen. I had worked on the FBT return the prior weekend also; I believe I sent an email to Katie when she had previously queried my overtime. These records would be available in my email. I also mentioned during the meeting on 4 June 2021, that I was mid-way through several processes such as month end and FBT.
>
> This was not an uncommon practice, I, and other employees, have periodically done this when the need arose. For example, another recent example when I did this was when I had to work on the freight charges exercise for Dave, which was rather urgent."

[101] Ms Atkinson said that having considered the Applicant's response, including her denial of the conversation with Ms Young, it was decided to further investigate this issue. The evidence of both Ms Atkinson and Ms Dwyer, is that they had a discussion with Ms Young and considered that the information provided by Ms Young was consistent with the content of the email correspondence about Mr Eveleigh's leave arrangements sent by the Applicant to Ms Dwyer and Mr Muller on 18 May and 3 June 2021. Ms Atkinson also said that the information provided by Ms Young was information Ms Young would not have known unless she had been told by the Applicant. Ms Atkinson and Ms Dwyer both stated that they formed a preliminary view, subject to the further response from the Applicant, that they believed Ms Young's version of events and that the Applicant had engaged in misconduct on 4 June 2021. Ms Atkinson and Ms Dwyer also formed the view that the Applicant had disclosed to other employees that she had been stood down despite being directed to the contrary.

[102] In relation to the Applicant's sending confidential information to her personal email account, Ms Atkinson said that the Applicant had signed a Working from Home Policy which specifically prohibited workers from forwarding work-related emails to their personal email address without prior approval. Ms Dwyer stated that those confidential emails were not connected to the Applicant's own employment and in her view, it was inappropriate for the Applicant to have sent them to her own personal email account. Ms Atkinson stated that as part of the investigation she and Ms Dwyer discovered that the Applicant had printed those confidential emails at a third-party printing service in breach of her confidentiality obligations.

Allegation C – FWC applications

[103] As previously noted, the Applicant referred in her general protections dismissal application to earlier applications that she made to the Fair Work Commission – a general protections non-dismissal application and the dispute application. These applications were appended to the material the Applicant filed in relation to the general protections dismissal

application. The Applicant also said that she raised these applications and their subject matter, at a meeting on 5 July 2021 prior to her dismissal.

[104] The Applicant's general protections non-dismissal application is dated 15 June 2021, and the Applicant tendered a covering email indicating that it was filed with the Commission at 1.56 pm on that date.[57] In the general protections non-dismissal application, at 3.1, the Applicant alleged the following contraventions – actions of the Respondent that led to the application being made. Firstly, the Applicant stated that in March 2020 her wage was reduced by 20% without lawful or reasonable basis and she was forced to work reduced hours of 3 days per week instead of her usual 4 days, from March until June 2020. In relation to this allegation, the Applicant also stated that she had been adversely treated because she did not sign the JobKeeper form and had refused to do so because she did not believe that it was legitimate for the Respondent to claim JobKeeper as it had not suffered the required downturn in sales. Secondly, the Applicant alleged that she had a right to be consulted and that Mr Eveleigh had misrepresented the reasons for the reduction in her wages and hours. The detriment alleged by the Applicant was a reduction in take home pay and standard of living, an alteration to her standing in the Company and that this caused "*many sleepless nights*".

[105] Thirdly, the Applicant asserted that she had not been properly remunerated for overtime hours and had brought this matter to the attention of Ms Atkinson, who placed undue influence and pressure on the Applicant not to continue to pursue her underpayment claim and misrepresented the Applicant's workplace right, by implying that the Respondent was acting correctly. Fourthly, the Applicant stated raised the "*irregularity*" with Mr Eveleigh's leave accruals and that she had informed the Respondent on 3 June 2021 that she would be notifying the Fair Work Ombudsman about this matter. The Applicant also contended that the following morning she had been stood down and an investigation had been commenced against her. Further, the Applicant contended that under s. 340 of the FW Act, she had a right to raise possible unlawful behaviours aligned to her role and was adversely treated by being stood down and having her position altered to her detriment. In conclusion the Applicant said:

> "In summary, in response to valid concerns that I raised in the workplace in relation to my role and my rights as a worker, about not being given legal entitlements such as overtime pay and being provided with different terms and conditions to other employees, including but not limited to, leave requirements etc. not only has nothing been done, but the company has malicious (sic) manufactured an investigation against me and stood me down."

[106] Appended to the general protections non-dismissal application were numerous documents including the emails of 3 June 2022 containing a screen shot of Mr Eveleigh's leave entitlements, which had been printed out at "*Coolum Copy and Print*". The Applicant also tendered an email dated 21 June 2021, sent to Ms Dwyer of the Respondent, appending a copy of the general protections non-dismissal application and advising that it had been accepted by the FWC.

[107] Ms Dwyer stated that she received the Applicant's general protections non-dismissal application on 21 June 2021 at 4.29 pm together with the Applicant's response to the allegations set out in a show cause letter she was provided with on 7 June 2021. Both Ms Dwyer and Ms Atkinson stated that the Respondent contested the general protections non-dismissal application and the show cause process, which started on 4 June 2022, was placed on hold to enable the application to "*run its course*" in the Commission.

[108] The Respondent filed a response to the general protections non-dismissal application on 23 June 2021 describing it as misconceived and rejecting the allegations that it had breached the general protections provisions of the FW Act. In its response, the Respondent also contended that the general protections non-dismissal application was a reactionary response to the show cause process commenced on 4 June 2021. Further the Respondent contended that the matters raised by the Applicant in relation to the reduction in hours and alleged non-payment of overtime were some 12 months old and had not previously been raised by the Applicant and that the Applicant had been stood down for disclosing highly confidential information about the CEO's remuneration and leave entitlements to another employee, rather than because the Applicant complained about those matters.[58]

[109] Following a conference before the Commission on 29 June 2021 in relation to the general protections non-dismissal application, the show cause process was resumed, and a meeting with the Applicant was scheduled for 1 July 2021. On 30 June 2021, the Applicant requested by email that the meeting be postponed so as to enable Applicant to obtain advice about her position. In that email, the Applicant made a number of allegations including that the investigation was biased and procedurally unfair. The Applicant also stated in the email that:

> "The timing of this investigation appears to be predominantly to prevent me from providing information to external bodies about my concerns, by immediately removing my access to the servers and prohibiting my communication with other staff members, presumably so they do not become aware their workplace rights are also being violated, including but not limited to overtime pay. I make this comment, as the supposed allegation that was raised against me occurred in the evening after I had advised the workplace via email in the afternoon of 3 June 2021, at 5.08pm, that I would be taking all unresolved issues, being inconsistent leave practices, failure to pay overtime, and reduction in take home pay without cause to the Ombudsman and/or the FWC to resolve."

[110] The Applicant's request to delay the meeting was granted and it was rescheduled for 5 July 2021. The Applicant was advised of this by email received 2 July 2021. According to a covering email tendered by the Applicant, the FWC dispute application was filed at 10.59 pm on 4 July 2021. In that application, the Applicant stated that the relevant dispute settlement procedure was found in the Clerks Award. After setting out the Clerks Award provisions in relation to part-time employment, overtime, consultation about changes to hours of work and award flexibility during the COVID – 19 Pandemic, the Applicant set out essentially the same material that was included in the general protections non-dismissal application in relation to the reduction in her hours of work and salary and her allegations about non-payment of overtime, and references to general protections provisions of the FW Act.[59]

[111] On 12 July 2021, the Respondent filed a response to the application, maintaining that the Applicant's employment was not covered by the Clerks Award on the basis that she was employed as an Accountant and that a statement to the contrary in her contract of employment was an error. The response also stated, in the alternative, that the Applicant had not followed the dispute settlement procedure in the Clerks Award. Further, it was contended that dispute was lodged by the Applicant in retaliation and to avoid a show cause process instituted by the Respondent and that her employment had been terminated in any event. Finally, it was contended that the disputes were flawed in any event and would fail.[60]

Termination of the Applicant's employment

[112] On 5 July 2021, Ms Atkinson, Mr Muller and Ms Dwyer attended a meeting by video conference, with the Applicant and her support person. Both Ms Atkinson and Ms Dwyer stated

that Mr Muller played no significant part in the investigations or making the decision to terminate the Applicant's employment. Their evidence was that Mr Muller's attendance at the meeting on 5 July 2021, was because he was a member of the executive team, and it was appropriate to have someone from the executive team present.

[113] Ms Atkinson said that the additional confidential emails, which the investigation had revealed were sent by the Applicant to her personal email account, were put to the Applicant for her response during the meeting. The Applicant explained that she printed those emails at a third-party printing service because she did not own a printer and that she had sent the confidential emails to herself because she considered those emails to be highly relevant and was concerned that they would be destroyed by the Respondent. The Applicant also complained that she was not given sufficient time to prepare her response. Ms Atkinson said that having considered the Applicant's explanations, she was satisfied that no further information was required from the Applicant for a finding to be reached.

[114] The meeting was adjourned for about 45 minutes to consider the evidence and responses from the Applicant. Ms Atkinson and Ms Dwyer stated that they determined that the allegations against Applicant were established, and that she had engaged in serious misconduct. Mr Eveleigh said that he received an email from Ms Atkinson and Ms Dwyer on 5 July 2021 recommending the termination of the Applicant's employment. Mr Eveleigh then proceeded to authorise the termination. Mr Muller said that he signed the termination letter in his capacity as an executive.

[115] On 6 July 2021, the termination letter was provided to the Applicant. Ms Atkinson said that the content of the letter is an accurate account of the matters discussed with the Applicant during the meeting on 5 July 2021. The termination letter set out the allegations and the Applicant's response to them and the following findings:

- The allegation with respect to Ms Young was substantiated on the basis that Ms Young's evidence had been accepted over that of the Applicant because it was believed that the Applicant had shown herself to be significantly aggrieved over the arrangements between the Respondent's Directors and its CEO and the information provided by Ms Young was consistent with the Applicant's attitude about this issue;
- It had been concluded that the Applicant had breached a lawful and reasonable direction by informing at least two other employees that she had been suspended or stood down and her explanation that she did not believe that the standdown took effect until she left the workplace was not accepted;
- Allegations in relation to forwarding confidential information were substantiated and whilst it was not accepted that the Applicant had authority or consent of Rockcote to send work related emails to personal email addresses at any time, a review of the Applicant's email history had clearly demonstrated that she had been sending confidential information belonging to Rockcote to her personal email address for other purposes, not relevant to performance of her duties and adding to the seriousness of this conduct, had printed out confidential information at Coolum Copy and Print.

[116] The email went on to inform the Applicant that her employment was terminated for serious misconduct with immediate effect, and that she would be paid two weeks in lieu of notice in addition to her salary up to 5 July 2021. Ms Atkinson said that in reaching the decision, she did not have regard to the concerns and allegations raised by the Applicant in relation to Mr

Eveleigh's leave entitlement in her emails of 18 May and 3 June 2021. Ms Atkinson further said that the alleged complaints about overtime rates were not made by the Applicant until after she had been stood down and played no part in her decision making.

[117] In the Applicant's email response to her termination of 6 July 2021, the Applicant says, during the meeting, she asked whether all her responses and documentation, including the various applications she had made to the Commission, had been considered by Mr Muller as the decision maker in her dismissal. The Applicant's contention was that procedural fairness had not been accorded to her in the show cause process. Ms Dwyer's response was that Mr Muller was not the decision maker, but rather, Ms Dwyer and Ms Atkinson were the decision makers. The Applicant also states that Ms Atkinson confirmed that she had considered the material provided by the Applicant to the extent that it is relevant to the allegations against her.

Submissions

Applicant's submissions

[118] The Applicant submitted that it is not in dispute that she made complaints about Mr Eveleigh's leave entitlements and that after being stood down on 4 June 2021, filed two applications in the Commission. The Applicant contends that those applications set out her complaints about Mr Eveleigh's leave entitlements, as well as complaints about her hours and wages being reduced in March 2020 and not being afforded her entitlements to consultation and overtime under the Clerks Award. The Applicant further submitted that it is not in dispute that standing her down, instigating an investigation into her conduct and ultimately terminating her employment, constitute adverse actions for the purposes of Part 3-1 of the FW Act.

[119] The Applicant submitted that in circumstances where the existence of a workplace right and the taking of adverse action are established, there is a statutory presumption under s. 361 of the FW Act that the adverse action was taken for the proscribed reason as alleged unless the Respondent can discharge its onus of rebutting the presumption by proving that the adverse action was not taken for a proscribed reason. In this respect, the Applicant contended that there was significant motive on the part of the Respondent to "*silence* [her] *complaints*" and to prevent the Applicant from taking her complaints outside the workplace to the Commission or Ombudsman. The Applicant asserted that this was a substantial and operative reason for the adverse actions taken by the Respondent, in the sense discussed in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay.*

[120] The Applicant disputed the assertion by the Respondent that, aside from the complaints about Mr Eveleigh's leave entitlements which she had raised before being stood down on 4 June 2021, it had been unaware of her other complaints prior to the stand down. The Applicant contended that issues around Mr Eveleigh's leave entitlements, the reduction of her hours and wages in March 2020 and her concerns about JobKeeper, were intertwined and bound up with Mr Eveleigh being "*the common denominator in all these matters*". The Applicant described these issues collectively as "*Paul issues*" and contended that the evidence of Mr Muller, Ms Atkinson and Ms Dwyer demonstrated their awareness of the "*Paul issues*" prior to her stand down meeting on 4 June 2021.

[121] The Applicant submitted that during the stand down meeting, she was told that she would not be provided with a response to "*the issues regarding Paul*". According to the Applicant, the evidence of Mr Muller, Ms Atkinson and Ms Dwyer confirmed that concerns

around Mr Eveleigh's leave entitlements had been resolved prior to 4 June 2021 and, therefore, that the reference to the "*issues regarding Paul*" could not have been a reference to Mr Eveleigh's leave arrangements and must somehow have been a reference to the "*other Paul issues*" which, in the Applicant's view, included her inquiries or complaints about her hours and wages and Jobkeeper. The Applicant submitted that this is evidence of the Respondent's awareness of her inquiries or complaints prior to 4 June 2021.

[122] Further, the Applicant submitted that there is evidence to support her assertion that the substantive and operative reasons for the adverse action taken by the Respondent were to silence her complaints and prevent her from taking her complaints outside the workplace to an external body. In this respect, the Applicant contends that:

- Ms Dwyer gave evidence to the effect that, notwithstanding the seriousness of the matters raised by the Applicant, those matters have never been investigated; [61]
- The grounds relied upon by the Respondent to dismiss the Applicant were not justified;
- The close proximity in timing between the Applicant foreshadowing bringing her complaints to the Commission and her being stood down cannot be reasonably ignored or dismissed as being merely coincidental;
- The treatment of her complaints and her stand down by the Respondent were "*disparate*" in that urgent actions were taken against the Applicant based on her conduct whereas no action was taken with respect to her complaints;
- Mr Muller's evidence is that he had not undertaken any independent assessment of the validity of the investigation before signing the termination letter; and
- Ms Dwyer gave evidence at the hearing that she was not certain about some of the bases upon which she reached the decision to terminate the Applicant's employment.[62]

[123] The Applicant also submitted that the Respondent failed to discharge its onus to rebut the presumption that the adverse actions were taken for a proscribed reason. It is the Applicant's contention that Mr Muller, Ms Atkinson and Ms Dwyer, being the decision makers in her investigation and termination, were unable to "*significantly explain their reasons for taking adverse action*" against the Applicant and that apart from the letter of termination, no detailed evidence, documents or files about the investigation were produced which, the Applicant contends, "*usually exist with an investigation of this type and severity*".

[124] In her closing submissions the Applicant reiterated that by standing her down and dismissing her, the Respondent was motivated by a desire to "*silence* [her] *complaints and stop their progression outside the workplace, being a substantial and operative reason for* [her] *ultimate termination*". The Applicant made reference to her allegations in relation to the Respondent claiming JobKeeper and said that if her allegations were proven the Respondent would be liable for extensive backpay for the Applicant and other employees and to repay the JobKeeper subsidies it had received.

[125] The Applicant further contended that, as part of discharging the Respondent's reverse onus of proof, the Respondent ought to have called Ms Roe to give evidence before the Commission and that Ms Roe was in a position to provide evidence about many of the disputed facts, including whether the Applicant had made complaints to Ms Roe and, if so, whether Ms Roe had reported those complaints to anyone else. The Applicant submitted that the Respondent did not call Ms Roe as a witness because they were aware that her evidence would not help

their case. The failure by the Respondent to call Ms Roe to give evidence warrants an adverse inference to be drawn against the Respondent in accordance with the rule in *Jones v Dunkel.* [63]

[126] In relation to her own failure to call Ms Roe as a witness, the Applicant submitted that she was not aware of the process of the Commission with respect to an application for an order to attend and that it was her own erroneous assumption that the Commission would, on its own initiative, compel Ms Roe at to attend the hearing as a witness on the basis that her submissions mention that Ms Roe has evidence about the claims she made.

Respondent's submissions

[127] The Respondent accepted that both the dismissal of the Applicant and standing her down constituted adverse action for the purpose of Part 3-1 of the FW Act. With respect to the allegation that adverse action was taken because the Applicant has exercised or proposed to exercise a workplace right, the Respondent submitted that there is a rebuttable presumption in s. 361. That section places the onus on the Respondent to rebut the presumption by proving that the alleged action was taken for a reason other than the reason alleged by the Applicant. Section 360 of the FW Act further provides that "*a person takes action for a particular reason if the reasons for the action include that reason.*" The Respondent contended that, as a matter of law, s. 361 is only enlivened where the Applicant has discharged her burden of proving two matters on the balance of probabilities: (a) that the Applicant had exercised or proposed to exercise a workplace right; and (b) that adverse action was taken against her.

[128] As it is common ground that adverse action was taken, (b) is not a live issue in this dispute. In relation to the exercise of a workplace right under s. 341(c) of the FW Act, the Respondent submitted that there are two limbs. Section 341(c)(i) relates to circumstances where a person is able to make a complaint or inquiry to a person or body which has the capacity under a workplace law to seek compliance with that law. Section 341(c)(ii) relates to circumstances where an employee is able to make a complaint or inquiry in relation to *his* or *her employment* (emphasis added). The Respondent submitted that importantly s. 341(c)(ii) requires that the complaint or inquiry must concern the employment of the person who makes the complaint or inquiry and cannot be about another person's employment.

[129] Further, to establish an allegation that a workplace right was exercised or proposed to be exercised, the Respondent submitted that the allegation must be clearly particularised and knowledge of the decision maker about the workplace right must be proved so as to establish a *prima facie* causal connection between the conduct alleged and the workplace right. The Respondent contended that a mere temporal connection will not suffice[64] and only where such a *prima facie* causal connection is established will s. 361 be enlivened to shift the burden of proof to the Respondent. In this respect, the Respondent referred to the decision of the Full Court of the Federal Court in *Tattsbet Ltd v Morrow* where it was held that: "*the party making an allegation that adverse action was taken 'because' of a particular circumstance needs to establish the existence of the circumstance as an objective fact*".[65]

[130] It follows that in circumstances where those objective facts are not proved, or where a causal connection is not established, or where evidence is lacking to allow the tribunal of fact to draw at a minimum an inference of a connection, the Respondent is not required to discharge its onus of proof pursuant to s. 361 of the Act.

[131] The Respondent submitted that there are several difficulties with the Applicant's evidence including that:

- The Applicant suggested during the cross-examination of Ms Atkinson that Ms Atkinson's witness statement acknowledged that they had a discussion about overtime rates when Ms Atkinson's statement says the complete opposite;
- The Applicant denied that she felt she had an entitlement similar to Mr Eveleigh despite stating in her email, "*please let me know when you will be providing myself and all other Rockcote employees with 4 months-worth of leave with full pay without it affecting our leave balances*" and further denied that by using these words she was asking for something extra;
- The Applicant put the proposition to Ms Atkinson that the Applicant's comment, "*so you think that the HR conduct is entirely compliant with all Australian legislation*" made during the stand down meeting on 4 June 2021, was a complaint about alleged underpayment notwithstanding that the actual words used bear no resemblance to what the Applicant said she raised;
- The Applicant contended that she would be raising a range of issues with the Commission and the Fair Work Ombudsman including her complaints of reduction in her pay and non-payment of overtime and that she had been sanctioned for raising issues with Mr Eveleigh's leave, when what the Applicant actually said in her email is that she would be raising the matter of Mr Eveleigh's remuneration with the Fair Work Ombudsman on the basis of her allegation that it was a gross inequity and illegal; and
- In cross-examination of Ms Dwyer, the Applicant raised for the first time that the emails she sent to her home email address concerning Mr Eveleigh's leave were sent because she was working on an investigation of this matter at home.

[132] The Respondent submitted that where the Applicant's evidence not corroborated, particularly in respect of complaints she says she made, it should not be accepted. It is not suggested that this is because of any deliberate attempt to be dishonest or disingenuous, rather it is because the Applicant appeared to confuse what was actually said or done, with the lens of grievance through which she viewed her period working at Rockcote.

[133] The Respondent submitted that the first allegation should be dismissed once the basis of the allegation is considered. This allegation is based on the two emails sent by the Applicant on 18 May and 3 June 2021. The email of 18 May evidences a number of erroneous assumptions on the Applicant's part regarding Mr Eveleigh's leave entitlements but importantly the email does not constitute a complaint or inquiry to a person or body having a capacity to seek compliance with that law or a workplace instrument under section 341(1)(c)(i). This is because, it was raised internally within the business and was not made in relation to the Applicant's own employment and therefore does not meet the criteria in section 341(1)(c)(ii).

[134] The Respondent submitted that the email of 3 June contained a threat to take complaints about Mr Eveleigh's pay and conditions to the Fair Work Commission or the Ombudsman and also contained a complaint that the Applicant was not provided with the same leave arrangements as that received by Mr Eveleigh. The Respondent rejected the Applicant's contention that this involved the exercise of a workplace right under sections 341(c)(i) because the remuneration and leave arrangements between Mr Eveleigh and the Respondent were not made pursuant to any industrial instrument but are instead contractual matters, the legality or propriety of which can only be heard by a court. The Respondent contended that neither the

Commission nor the Ombudsman are bodies through which the Applicant can seek compliance in relation to these matters.

[135] The Respondent accepted that the email of 3 June could be characterised as involving the exercise of a workplace right under sections 341(1)(c)(ii). That being so, the Respondent contended that the only argument open to the Applicant is that the adverse action was taken because she asked for four months leave with full pay. The difficulty with this argument is that it was not put to the Respondent's witnesses as a basis for either the stand-down or the termination and consequently, it is not open to the Tribunal to make such a finding in accordance with the rule in *Browne v Dunn.*[66] On that basis, the Respondent submitted that this allegation should be dismissed. If the allegation is not dismissed on the aforementioned basis, it should nevertheless be dismissed on the basis of the evidence.

[136] The Respondent acknowledged the Applicant was stood down the day after her email was sent on 3 June 2021 and contends that the sole question for determination with respect to this allegation is "*whether or not the threat to complain about Mr Eveleigh's remuneration was a reason for the decision to stand the Applicant down or terminate her employment*." With respect to the decision to stand the Applicant down, the Respondent submitted:

- The reasons for the Applicant's termination are set out in the letter of termination and the evidence of Ms Dwyer, Ms Atkinson and Mr Muller given at the hearing did not deviate from those reasons. It is therefore not permissible for the Commission to "*ascribe any unconscious reasoning to the decision-making process*";[67]
- During cross-examination, questions were put to Ms Young and Mr Eveleigh by the Applicant which appeared to suggest that they conspired to "*get rid of her and Ms Roe*", though the Respondent notes that this was not pressed by the Applicant in her closing submissions. There could not be a conspiracy because neither Ms Young nor Mr Eveleigh was aware of the email of 18 May sent by the Applicant and there is no record of that email being forwarded to either of them. Mr Eveleigh's evidence is that he was unaware of the identity of the person who sent the email on 18 May. Ms Young's evidence is that she was not aware of the email of 18 May. Mr Eveleigh was only informed about the Applicant by Ms Young on the evening of 3 June. Even assuming that Mr Eveleigh was aware that the email of 18 May was sent by the Applicant, that email was not an exercise of a workplace right.
- The motives for the Respondent to take the action are highly relevant. The Respondent contended that the evidence is inconsistent with a motive to prevent the Applicant from exercising a workplace right or to punish her. In particular, the Applicant was told explicitly that it was a matter for her whether she wanted to take her complaint to the Commission or Ombudsman. The evidence of Mr Muller is that he took external advice about Mr Eveleigh's leave arrangements and was satisfied that there was no issue. From the Respondent's perspective, the matter had been resolved prior to the decision to stand the Applicant down. Thus, there was no motive for the Respondent to seek to take any action against the Applicant for her threat to raise entirely meritless complaints about Mr Eveleigh's income or leave.

[137] The Respondent also submitted that the seriousness of the allegations made against the Applicant by Ms Young was the reason for the decision to stand the Applicant down. The Applicant had previously made complaints to HR about the same subject matter, rendering the allegations raised by Ms Young more credible. Given the credibility and seriousness of the allegations, it would have been surprising had the Applicant not been stood down. Further, the

Respondent submitted that Mr Eveleigh did not recommend or suggest a particular course of action after receiving the complaint from Ms Young, but merely forwarded the email to other staff members of the Respondent.

[138] It is contrary to the Applicant's case that standing her down was a response to her threats of raising complaints or that the motive for standing her down was to prevent her from raising complaints. If that were the motive, the decision to stand the Applicant down would have rendered it more likely that a complaint would be made by the Applicant. From the Respondent's perspective, the complaints raised by the Applicant had no merit and it would not have been worth taking any action about them. The Respondent, therefore, submitted that the reasons set out in the letter of 7 June 2022 are the real reasons for the stand down and should be accepted.

[139] With respect to the decision to terminate the Applicant's employment, the Respondent submitted that there appear, broadly, to be two parts to the Applicant's allegation that her employment was terminated because of complaints or inquiries about Mr Eveleigh's remuneration:

a. that her employment was terminated so that the business would not have to conduct any investigations into the propriety of Mr Eveleigh's pay; and
b. that her employment was threatened because she had threatened to make a complaint to the Fair Work Ombudsman or the Commission about Mr Eveleigh's pay.

[140] The difficulty with the first of those arguments is that on receiving the first of the Applicant's complaints about Mr Eveleigh's pay on 18 May 2021, Mr Muller conducted investigations and in her closing submission the Applicant accepted that this issue had been dealt with by the time of her stand down. There is also no evidence to counter Mr Muller's evidence that he informed Ms Roe of the outcome so that she could speak to the applicant. There is no suggestion that there was any concern about the arrangement and objectively, there is nothing inappropriate about it. In the circumstances, it is difficult to see how a thesis that there was a concern about the complaints stands up and there was no reason for the Respondent or any of its personnel to be concerned about a complaint being made by the Applicant and therefore, no reason to take adverse action against her. All that the Applicant can allege is a temporal connection between her complaint about Mr Eveleigh and her dismissal. That is insufficient.[68] The real reasons for the termination of the Applicant's employment were:

a. discussing Mr Eveleigh's confidential remuneration details with Ms Young;
b. conduct in ignoring a direction not to tell anyone she had been stood down; and
c. forwarding of confidential Rockcote information to her personal email address.

[141] The decision to terminate the Applicant was made by Ms Dwyer and Ms Atkinson and this was accepted by the Applicant. This was also said to be apparent from the cross-examination of Mr Muller who had the following exchange with the Applicant:

> "But you're able to make no claims to anything that was part of that investigation. You're basically blindly relying on the judgment of Lucy Dwyer and Katie Atkinson. Isn't that fair to say?---As the HR team who were given the responsibility to do the investigation by the company, yes."[69]

[142] The Respondent submitted that it is uncontested that Ms Dwyer and Ms Atkinson believed that the Applicant had discussions with Ms Young about Mr Eveleigh's pay details. It

is also uncontested that in making the decision to terminate, they relied on those matters, in the genuine belief of their truth. Whether Ms Young's complaint was genuine or not is irrelevant, because Ms Dwyer and Ms Atkinson accepted it and acted on it in the belief it was true. It was also submitted that the reasons Ms Young's complaint was accepted, as set out in the termination letter, were rational and reasonable. That the complaint was accepted by the decision makers is of central importance. In this regard, reference was made to the decision of the Federal Court in *CFMEU v Anglo Coal (Dawson) Services Pty Ltd*[70] where an employer was found not to have contravened the adverse action provisions when it dismissed an employee because the employer believed the employee had dishonestly taken sick leave. This turned out to be a mistaken belief as the employee was genuinely unwell. However, as the reason for the dismissal was not the exercise of the workplace right (taking of the sick leave) but the belief that the employee was dishonest, the termination of his employment was not adverse action. As the belief of the Ms Dwyer and Ms Atkinson was not challenged here, it is not useful to explore this issue further and it must be accepted as a genuine reason for the decision. Similarly, it is uncontested that the Applicant told someone in the workplace about her stand down and the reliance on this as a reason for termination by Ms Dwyer and Ms Atkinson is not in dispute.

[143] It is also not in dispute that the Applicant forwarded confidential information to her home email address immediately before the stand down meeting, as follows:

a. An email of 2 July 2020 from accounting firm BDO providing advice about JobKeeper (BDO Email).[71] The Applicant admitted during cross-examination that she forwarded the material to Coolum Copy and Print[72] (an external printing company), and that she did not need that document to do any work.[73]
b. An email about the structure of accounting systems (Accounting Email).[74] The Applicant admitted that this was confidential material,[75] and that she had forwarded it to herself.[76]
c. an email containing her complaint about Mr Eveleigh's pay arrangements to herself (CEO Email).[77]

[144] Under cross-examination, the Applicant made the following statement in relation to sending the CEO email to herself:

> "No, I asked whether you thought it was appropriate, not why you did it?---Yes, I did think it was appropriate because I had done it because of the prior culture and history within Rockcote was that adverse action was taken against anybody who complained about any of the issues within Rockcote, which is why I did it."[78]

[145] It was submitted that in respect of at least the BDO Email and the CEO Email it must be accepted, following the Applicant's admissions, that there was no legitimate work purpose for her to forward those emails to herself. It was also submitted that the Rockcote placed a great deal of importance on the retention and protection of its confidential information evidenced by the confidentiality provisions in the Applicant's contract of employment and the terms of the Respondent's working from home policy which forbids sending work related material to private email addresses without permission and renders an employee who does so, liable for dismissal.[79]

[146] The show cause letter also highlighted the concern Rockcote had about the misuse of confidential information as did the evidence of Ms Dwyer and Ms Atkinson. As to the Applicant's case, that it was legitimate for her to send those emails to herself, at least in respect of the Accounting Email and the CEO Email (except for the invention during her cross-

examination of Ms Dwyer about an ongoing investigation into Mr Eveleigh), the Applicant admits that she sent those emails home for the purpose of furthering her complaint.[80] Likewise, there is no suggestion that the excuse the Applicant relies on now was ever raised as part of her show cause process.[81]

[147] The Respondent submitted that the Applicant was stood down, and had her employment terminated, is hardly surprising given the manner in which she conducted herself in relation her employer's confidential information. The reasons for the stand down and termination are clear. Firstly, Ms Young's complaint was sufficiently serious to justify a stand down. Once it was accepted it was also sufficiently serious, of itself, to justify dismissal. At no point has it been suggested that any of the decision makers did not believe Ms Young. Therefore, as a reason for both stand down and termination, it is unimpeachable. Secondly, as to the Applicant disclosing that she had been stood down, the only dispute there is, is who it was she disclosed it to. That is hardly relevant, in the sense it is not in dispute it was disclosed to someone, or that to the extent that Ms Dwyer and Ms Atkinson took it into account, they did so in the genuine belief that she was not permitted to do so. Thirdly, in respect of the confidential information, it is not in contest that the Applicant sent the BDO Email and the CEO email to her personal email address, without a legitimate business reason for doing so. The suggestion that sending oneself the personal pay details of the CEO of the organisation is not grossly inappropriate, is "*jaw dropping*", as is the suggestion that an employee should be sending herself confidential accounting advice her employer had received. The decision to terminate employment for this reason is unimpeachable.

[148] Set against those clear and compelling reasons for termination is the argument that instead, the stand down and termination were for reason of the complaints made internally about Mr Eveleigh's pay arrangements, and the threat to report them externally. That argument is without merit given that the 18 May 2021 complaint does not relate to a workplace right and even if it did, Mr Muller investigated it and received advice that the arrangement was appropriate. It was also submitted that the 3 June threat to report Mr Eveleigh's pay arrangements clearly generated no concern, which is hardly surprising given the earlier investigation by Mr Muller and obtaining external advice. Even looking at the issue objectively, Rockcote and its management had nothing to fear from a report to the FWO/FWC. Therefore the Applicant's case in respect of Allegation A must fail.

[149] In relation to the Applicant's allegation about underpayment (Allegation B), the Respondent submitted that there seem, broadly, to be two categories of complaint the Applicant says she made:

a. a reduction in wages of 25% due to the COVID-19 Pandemic; and
b. underpayment contrary to the Award.

[150] The first of those can be disregarded, because the Applicant accepts that she did not raise it with anyone other than Ms Roe. The Applicant also accepted that she did not raise the issue with Mr Eveleigh, or anyone in HR. Even if the Applicant had raised it with someone who had some involvement with the dismissal, it is not reasonably open on the evidence to conclude that concerns about this issue were harboured for over 12 months before forming a reason for stand down or termination. It was also submitted that at no time during evidence in chief, or cross-examination, has the Applicant identified any complaint she made in respect of any underpayment to Ms Atkinson or any of the other persons who decided to dismiss her. The best that the Applicant has been able to do is to point to some emails where she asked Ms

Atkinson to be paid for additional hours, and make some generalised allegations that Ms Atkinson told her that she was not entitled to overtime (which were rejected). Despite the Applicant's assertions, none of the emails contains a complaint about underpayment. What the Applicant now asserts she meant by those emails is irrelevant, their plain words do not contain a complaint or inquiry about underpayment. Further, in cross-examination of Ms Dwyer, the Applicant accepted that Ms Dwyer was not aware of her complaints about underpayment.

[151] The Applicant's generalised allegations that she made complaints to others (ie the finance team), do not assist as they were not made to the decision makers. Further, to the extent that it has been suggested that complaints were made, each of those suggestions is conclusionary. At no time in her evidence in chief did the Applicant identify a specific complaint which was made about an issue in the relevant words, or a specific occasion on which a complaint was made. She did try to cross-examine the making of a complaint in through other witnesses, but again fell well short of what is required, including by failing to identify what was alleged to have been said. In the absence of such evidence, the Applicant has not discharged her onus to prove that a workplace right was exercised by the making of a complaint. Therefore, this allegation must fail.

[152] In relation to Allegation C – the FWC applications – at no point was the allegation that the F10, F8A and F8C were reason for the dismissal put to Ms Dwyer. Ms Atkinson was asked the same sorts of questions. The complaint being raised here is that the allegations in the Forms were not investigated, not that the Applicant's employment was terminated because of them. A recurring theme of the Applicant's case is that unlike the complaints against her, these issues were not taken seriously. That is not a complaint about the taking of adverse action. That is a collateral complaint in support of her argument about the dismissal not being genuine. If that submission is not accepted, this allegation fails on its merits in any event. Not least because it is inconsistent with the factual position the Applicant has taken. Beyond that, in any event, as Ms Atkinson said when being cross-examined about whether the Applicant's various complaints had been investigated, the Respondent believed that there was nothing to investigate.[82]

[153] That is self-evidently the case for each of the decision makers. Beyond that, the suggestion that the filing of these applications had any impact on a process which was already in train is self-evidently flawed. In circumstances where it is uncontested that the Decision Makers believed Ms Young's complaint, and where the Applicant forwarded confidential emails to herself without a legitimate reason, it is difficult to see how the filing of these forms had any impact on a process which was leading to termination. The only thing which had an impact on that process was the Applicant's inability to provide a legitimate explanation for her serious misconduct.

Consideration

Was the Applicant exercising a workplace right/s within the meaning in s. 341?

[154] I commence consideration of this question with whether the Applicant has a workplace right in relation to the allegations which are the subject of this proceeding. Allegations A and B concern a workplace right within the meaning in s. 341(1)(c)(i) and/or (ii) of the FW Act. Allegation C concerns s. 341(b). By allegation A, the Applicant asserts that she had a workplace right to make a complaint or inquiry in relation to her employment within the meaning in s. 341(1)(c)(i) and that she had a workplace right within the meaning in s. 341(1)(c)(ii) to make a complaint or inquiry to a person or body having the capacity under a workplace law to seek

compliance with that law or a workplace instrument. The ability to make such complaints or inquiries, and the subject matter, is said to be encompassed in emails about Mr Eveleigh's remuneration, specifically his personal leave accruals, sent by the Applicant on 18 May and 3 June, to Mr Muller and Ms Dwyer and copied to Ms Roe.

[155] The Applicant contended that she exercised a workplace right by raising matters detailed in those emails, that she described in her closing submissions as "*valid concerns*" in the workplace, about being provided with different terms and conditions to other employees, including leave requirements and policy. The Applicant also contended that she was stood down and dismissed so that the Respondent was not required to investigate the matters she raised.

[156] Applying the principles established in the case law discussed above, I am of the view that the first email sent by the Applicant on 18 May 2021, was not a complaint or inquiry in relation to the Applicant's employment, within the meaning in s. 341(1)(c)(ii). The email of 18 May is an inquiry, that is in effect, a mere request for assistance by the Applicant, in the performance of her work. While it does indicate an expectation that the persons to whom it is addressed will assist in their capacity as HR representatives, on its face, the inquiry bears no relationship to the Applicant's employment. Rather, the inquiry is designed to identify benefits enjoyed by Mr Eveleigh, that the Applicant opines, are accounting anomalies she will be required to deal with in her role in processing payroll and leave benefits into the Company into the financial system. The email also includes observations and assertions the Applicant was not qualified to make, and which are without foundation, and does not relate to any terms and conditions of her employment. These include the Applicant's views about the acceptance by the Respondent of certificates issued by medical practitioners and vague claims of "*illegal discrimination between employees*".

[157] There is no basis for an assertion that an arrangement whereby the Board of a Company provides a benefit to the CEO exceeding benefits provided to other employees, is illegal, much less that it is discriminatory. The Applicant also appears to allege wrongdoing in relation to Mr Eveleigh not providing appropriate medical documentation to support a leave application, or the Respondent accepting inappropriate documentation, and noting that a psychologist's report would not be considered a medical certificate for the purpose of authorising the leave Mr Eveleigh had taken. Again, there is no basis for these assertions in relation to the arrangement with Mr Eveleigh. Proof about any incapacity on the part of Mr Eveleigh was a matter for the Board, not the Applicant.

[158] The Applicant makes no complaint or inquiry in the email of 18 May 2021, on her own behalf or in relation to her entitlements to personal leave. I accept that it is not necessary that the ability to make a complaint or inquiry within the meaning in s. 341(1)(c)(ii) has an instrumental source and, as I have previously noted, a complaint or inquiry may be misconceived or wrong, and yet be within the meaning in s. 341(1)(c)(ii). I also accept that it is only necessary that the substance of the complaint or inquiry is in relation to the employee's employment. However, in the present case, the complaint or inquiry in the email of 18 May 2021, bears no relationship to the Applicant's employment. Rather, the email is an attack on Mr Eveleigh calling into question his personal leave accruals. To the extent that the email refers to discrimination, it is a hypothetical assertion. The email raises discrimination generally rather than in relation to the Applicant's employment. The only apparent relevance of the complaint or inquiry to the Applicant's employment is her role in processing payroll and leave benefits into the Respondent's financial system, rather than to any right the Applicant may have asserted

or had, under an employment contract, award, enterprise agreement or legislation. In this regard, rather than being a direct complaint about the Applicant's rights, there is a general statement that the situation needs to be rectified to ensure consistency of practices at Rockcote and that there is no "*illegal discrimination*".

[159] The issue raised by the Applicant in the email of 19 May 2021 is an accounting issue, related to an alleged overstatement of Mr Eveleigh's leave accruals in the Respondent's books. That this is a matter that relates to some form of professional obligation on the part of the Applicant, is contrary to her insistence that she was not employed as an Accountant but rather was covered by the Clerks Award. It is also the case that the Respondent has a CFO and other persons with financial responsibilities and if there was an issue with the Respondent's books it would not be a matter for which the Applicant could be held responsible.

[160] In contrast, the emails sent on 3 June are, in my view, inquiries or complaints, within the meaning in s. 341(1)(c)(ii). The first such email, sent at 5.08 pm on 3 June 2021, in addition to raising concerns about the effect of Mr Eveleigh's leave on the Respondent's accounts, threatened that the Applicant would take her complaints about Mr Eveleigh's leave entitlements to the Fair Work Ombudsman or the Commission if the Applicant and other employees did not receive the same benefit as Mr Eveleigh. The second email sent at 5.42 pm on 3 June 2021, repeated the allegations of illegality and discrimination in relation to Mr Eveleigh's leave. These emails express discontent on the part of the Applicant with respect to her own conditions of employment and seek consideration, redress or relief about a matter that relates to those terms and conditions. In this regard, the Applicant is clearly aggrieved about Mr Eveleigh's leave and is claiming that other employees of the Respondent (including the Applicant) should be afforded the same benefit. The complaint or inquiry therefore relates to the Applicant's employment and is made to the Applicant's employer. This is sufficient to meet the requirements in s. 341(1)(c)(ii).

[161] While accepting that the sending of the second email involved the exercise of a workplace right under s. 341(1)(c)(ii), on the basis that it threatens to make a complaint to the Fair Work Commission or Fair Work Ombudsman, the Respondent submitted that it did not involve the exercise of a workplace right under s 341(1)(c)(i) because the complaint was not of a type that the Commission or the Fair Work Ombudsman is able to seek compliance in relation to. I do not accept that argument. It is contrary to the principles established in *Whelan* and *Alam* and the cases cited therein. The fact that the entity to which the complaint or inquiry is made is not able to act on the complaint as it is framed, does not remove the making of a complaint or inquiry from the protection in s. 341(1)(c)(i) of the Act. It is sufficient that the person or body to whom the complaint or inquiry is made has the capacity under a workplace law to seek compliance with the law or a workplace instrument dealing with the relevant subject matter – in the present case, personal leave. That the response from the Commission or the Ombudsman would in all probability be that the Applicant has no claim for similar leave accruals to those afforded to Mr Eveleigh, or that the matter would need to be pursued in a court, does not remove the complaint or inquiry from the connotation of a complaint or inquiry within the meaning in s. 341(1)(c)(ii).

[162] While I have some difficulty with the proposition that by complaining about Mr Eveleigh's leave entitlements in the manner that she did, the Applicant exercised a workplace right, for the reasons set out above, I find that the emails the Applicant sent to various managers of the Respondent on 3 June 2021, about Mr Eveleigh's annual leave accrual, constituted a complaint or inquiry to her employer. Personal leave is an NES entitlement, and the emails

sent by the Applicant on 3 June 2021, framed the issue so that the Applicant asserted a relationship between the leave granted to Mr Eveleigh and her own leave entitlements. Although such a complaint or inquiry is misconceived, it is a complaint or inquiry, nonetheless, and as a result the Applicant was able to make a complaint or inquiry in relation to her employment, to a person external to the Respondent's business.

[163] Accordingly, with respect to the emails sent on 3 June 2021, the Applicant had a workplace right to make a complaint or inquiry in relation to her employment within the meaning in s. 341(1)(c)(ii) and exercised that right in both cases. In addition, the first of the two emails sent by the Applicant on 3 June 2021, involved the Applicant being able to make a complaint or inquiry to a person or body having the capacity under a workplace law, to seek compliance with that law within the mearing in s. 341(1)(c)(i). In this regard, the *Fair Work Act 2009* deals with personal leave and is a workplace law as defined in s. 12.

[164] In relation to the assertions in Allegation B dealing with the introduction of JobKeeper by the Respondent, I do not accept that the Applicant made a complaint or inquiry within the meaning in s. 341(1)(c) about this matter. Other than asserting that she complained about this matter to Ms Roe, the Applicant provided no evidence to substantiate that she made a complaint within the meaning in s. 341(1)(c)(ii) in relation to this matter. The Applicant was required to establish that she exercised a workplace right at the relevant time and in relation to allegation B, the Applicant has not met this onus.

[165] In respect of this allegation, it is notable that the Applicant gave evidence of taking issue with the Respondent claiming JobKeeper because she did not believe that the Respondent was entitled to do so and that it was for this reason that she declined to complete a form that would have enabled a claim for such payments to be made in relation to her employment. There is no evidence to support the Applicant's assertion that the Respondent was not entitled to claim JobKeeper. To the contrary, evidence tendered by the Applicant, establishes that accounting advice provided to the Respondent was that it was entitled to claim this assistance. It is ironic that the totally inappropriate conduct the Applicant engaged in by emailing this material to her private email address, has in fact established that there was no issue with the Respondent claiming JobKeeper.

[166] I also note that the Applicant gave inconsistent evidence about why she refused to sign the JobKeeper form and that regardless of her personal principles about the Respondent's right to claim JobKeeper, the Applicant had already completed a form allowing another employer for whom she worked one day per week, to claim JobKeeper on her behalf, and could not have completed the same form with respect to her employment with the Respondent. In short, the Applicant had no compunctions receiving the full amount of JobKeeper for the loss of one day of work per week, while maintaining 3 of the four days she worked for the Respondent. Although the Applicant was not cross-examined about this matter, it is equally probable that her issue with the Respondent claiming JobKeeper was that it deprived her of a windfall benefit she would have otherwise received, had she maintained her four days of work for the Respondent and received JobKeeper with respect to the one day she worked for another employer, rather than the Applicant being motivated by a principled view that the Respondent was not entitled to claim JobKeeper.

[167] I accept that the Applicant inquired about payment for hours she worked for the Respondent on days other than those on which she usually worked her part-time hours. While I do not accept the spin that the Applicant attempted to put on this matter by asserting that she

complained about not being paid overtime, the articulation of the inquiry as being about overtime, was not necessary to enliven s. 341(1)(c)(ii). It is sufficient that the inquiry made by the Applicant in relation to this matter was an inquiry in relation to her employment – specifically about payment for hours worked – made to the employer. I do not accept the Respondent's submission that the fact that the Applicant did not specifically refer to overtime changes the nature of the inquiry. Nor do I accept that the obtuse comments made by the Applicant at the stand down meeting change the fact that she inquired about payment for hours worked, notwithstanding that she did not refer to those hours as overtime. By the time the stand down meeting took place, the Applicant had made inquiries about this matter and it was not necessary that those inquiries be repeated at the stand down meeting. Accordingly, I find that the Applicant had a workplace right to make a complaint or inquiry in relation to payment for hours she had worked in excess of, or outside, the core weekly hours in her contract of employment. I further find that the Applicant exercised that right by sending a series of emails to Ms Atkinson between 8 and 20 April 2021, querying payment for those hours.

[168] Further, the Applicant had a workplace right to complain or inquire about whether her employment was covered by the Clerks Award. This matter also clearly related to her employment. The Applicant exercised that right by sending an email to Ms Dyer on 30 June 2022, querying the Awards that the Respondent's staff operated under and the percentage of staff covered by each award. Despite the Applicant articulating her inquiry so that it involved other staff, about whom she had no right to make an inquiry or complaint, the Applicant included herself within the ambit of the issue that she raised. It is also the case that the Applicant made an inquiry or complaint about the conduct of the meeting she was required to attend to show cause as to why her employment should not be terminated. This is also a matter in relation to which the Applicant had a workplace right within the meaning in s. 341(1)(c)(ii). In this regard, the Applicant was inquiring about a meeting which, at the point the inquiry was made, had the potential to result in the termination of her employment. The Applicant exercised those rights by sending emails as detailed in her evidence in these proceedings.

[169] In relation to Allegation C, it is not in dispute that the Applicant made two applications to the Fair Work Commission prior to her dismissal. The first application, a general protections non-dismissal application, was made on 15 June 2021. The second application, seeking that the Commission deal with a dispute, was made on 4 July 2021. The applications related to the Applicant's employment including her entitlement to personal leave and assertions about unfair and unlawful treatment. The fact that the applications were misconceived, and that the Commission may not have had jurisdiction to deal with some of the issues raised in those applications, does not mean that they are not complaints or inquiries within the meaning in s. 341(1)(c)(i).

[170] Accordingly, I find that the Applicant was able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument – namely the Clerical Award which contained the dispute resolution procedure invoked by the Applicant in the dispute application. The Applicant exercised this right by making the applications.

Did the Respondent take adverse action against the Applicant within the meaning in s. 342?

[171] It is not in dispute that the Applicant was invited to a meeting at which she was informed that she would be required to show cause in relation to why her employment should not be terminated. The Applicant was then stood down while an investigation was conducted and was subsequently dismissed.

[172] By inviting the Applicant to show cause and standing her down, the Respondent injured the Applicant in her employment and altered her position to her prejudice. Both are forms of adverse action. The Respondent also took adverse action against the Applicant by dismissing her. I find that the Respondent took adverse action against the Applicant, within the meaning in s. 342 of the FW Act.

Did the Respondent take adverse action against the Applicant because of a prohibited reason or reasons that included a prohibited reason?

[173] I have found that the Applicant has established that she was exercising workplace rights within the meaning in s. 341(1) and that the employer took adverse action against her within the meaning in s. 342. These findings are sufficient to shift the onus to the Respondent, to establish that the adverse action was not taken because the Applicant exercised a workplace right and I do not accept the Respondent's arguments to the contrary. For the following reasons, I have also concluded that that the Respondent has established that it did not take adverse action against the Applicant for a reason or reasons that included the exercise of a workplace right by the Applicant. I have reached this conclusion for the following reasons.

[174] In relation to Allegation A, the Applicant sent the emails which she asserts raised a complaint or inquiry, on 18 May 2021 and 3 June 2021 at 5.08 pm and 5.42 pm respectively. The Applicant sending the email of 18 May 2021 did not involve the exercise of a workplace right while the emails of 3 June did involve such an exercise. Even if I am wrong about the email of 18 May 2021, the evidence establishes only that Mr Eveleigh was shown a redacted version of the email and did not know who sent it. Mr Muller's evidence confirmed that he did not inform Mr Eveleigh of the identity of the person who raised the complaint or inquiry about his leave. Neither Mr Eveleigh nor Mr Muller were challenged about this aspect of their evidence in cross-examination. Furthermore, there is no evidence that Mr Eveleigh played any part in the decision to dismiss the Applicant and his evidence that he deliberately abstained from involvement in the matter, given he was the subject of the inquiries or complaints, was not disputed.

[175] Mr Eveleigh discovered, on the afternoon of 3 June 2021 that it was the Applicant who had raised issues with his personal leave entitlements. Mr Eveleigh was informed of this by Ms Young and there is no evidence that he was provided with copies or either of the emails the Applicant sent on that date. If Mr Eveleigh knew or suspected the Applicant's involvement prior to 3 Jun 2021, there is no connection between Mr Eveleigh and the adverse action suffered by the Applicant. Furthermore, Mr Eveleigh had nothing to be concerned about with respect to his personal leave. There was nothing inappropriate, much less illegal or discriminatory, about the manner in which the Board of the Respondent dealt with Mr Eveleigh's leave accruals. It was within the discretion of the Board to grant the benefit to Mr Eveleigh and the arrangements were quite simply none of the Applicant's business. While the Applicant had the right to inquire or complain about this matter – vis-à-vis her own leave entitlements – her fixation with Mr Eveleigh's remuneration arrangements and her conduct in pursuing this issue, was inappropriate and for reasons set out below, the Respondent was perfectly justified to take the disciplinary action it took against her for that conduct. This is a case of the kind described in *Alam* where the conduct of the Applicant swamps her allegations of adverse action and the stand down, investigation and dismissal of the Applicant are completely justified in light of her conduct.

[176] In relation to the Applicant's conduct, Ms Young's evidence was that some two weeks prior to 3 June 2021, the Applicant had a discussion with her about Mr Eveleigh's leave entitlements and showed Ms Young confidential information about this matter. I accept Ms Young's evidence that the Applicant inappropriately disseminated Mr Eveleigh's private and confidential remuneration details to her, and that Ms Young should not have been provided with that information. Notwithstanding the obvious antipathy between Ms Young and the Applicant, there is no basis upon which I could doubt Ms Young's evidence. This evidence is consistent with the views about Mr Eveleigh's leave accruals expressed by the Applicant in her evidence to the Commission and her discussions with other representatives of the Respondent about this matter. It is also consistent with the Applicant taking the totally inappropriate step of emailing Mr Eveleigh's confidential employment information to her home email address and printing it at a public location, thereby evidencing the same conduct alleged against her by Ms Young.

[177] The fact that Ms Young emailed Mr Eveleigh and told him that she had information about the Applicant's conduct that would justify "*showing her the door*", or that Ms Young was seeking to move out of the area where she worked with the Applicant and Ms Roe and may have seen the provision of the information to Mr Eveleigh as a means of doing so, does not impugn Ms Young's evidence. Ms Young was right to recognise the seriousness of the Applicant's conduct and to raise it with Mr Eveleigh. If Ms Young determined to use the information the Applicant gave her, to the Applicant's detriment, then the Applicant only has herself to blame. The Applicant should not have shared confidential information about the remuneration of the Chief Executive Officer of her employer, with any person, much less one with whom she was not close enough to share lunch (the Applicant's description of the state of her relationship with Ms Young). I am satisfied that the Applicant did exactly what Ms Young alleges and inappropriately revealed confidential information about Mr Eveleigh's remuneration to Ms Young.

[178] Further, I note that Ms Young stated in her evidence that she spoke to Mr Eveleigh about the Applicant's conduct in showing her documents about his leave entitlements, early on the morning of 3 June 2021 – before the Applicant sent the 3 June emails. Ms Young's evidence establishes that she sent the text message to Mr Eveleigh advising him about the Applicant's conduct in showing Ms Young confidential information about Mr Eveleigh's remuneration, prior to the Applicant sending either of the emails she sent to Mr Muller and Ms Dwyer on 3 June 2021. Notwithstanding that Mr Eveleigh was alerted in advance of the Applicant's complaints or inquiries about this matter, there is no evidence that he took any steps to take adverse action against the Applicant as a result of what Ms Young told him. Rather, the investigation of the Applicant's conduct took a perfectly usual course in the circumstances.

[179] Finally, in relation to allegation A, I accept that the Applicant's conduct in disclosing Mr Eveleigh's private remuneration arrangements to Ms Young and by emailing information in this regard to her private email address and printing it at a public location, was utterly inappropriate and, of itself, deserving of disciplinary action up to and including dismissal. The Applicant knew that the information she disseminated was confidential and disregarded this. I am also satisfied that the Applicant had no legitimate purpose for emailing the information to her private email address and did so only to further her unmeritorious and inappropriate grievance about private remuneration arrangements entered between Mr Eveleigh and the Respondent's board of Directors. As I have previously stated, those arrangements were not a matter about which the Applicant could have had any legitimate concern. It is notable that the information the Applicant emailed to herself and showed to Ms Young include Mr Eveleigh's

salary. This conduct is unacceptable regardless of Mr Eveleigh's position, but is particularly egregious given that he is the CEO of the Respondent. Other than the Applicant's assertion, there is no evidence that Ms Roe directed the Applicant to investigate the matter.

[180] Mr Muller states, and it is not disputed, that he informed Ms Roe of the outcome of his inquiries into the Applicant's email in relation to Mr Eveleigh's leave entitlements and relied on her to pass this information to the Applicant. Ms Roe was the Applicant's direct supervisor, and this was an appropriate course for Mr Muller to take. If Ms Roe did not pass this information to the Applicant, that is not a matter that provides any basis for finding that adverse action was taken against the Applicant because she exercised a workplace right to complain about the matter. While I draw no inference about the fact that neither party called Ms Roe to give evidence, there was evidence from the Respondent's witnesses that Ms Roe shared the Applicant's view about Mr Eveleigh's leave entitlements and it is at least equally probable that Ms Roe and the Applicant were on a frolic of their own, pursuing this matter.

[181] In relation to Allegation B, there is no evidence that Mr Eveleigh knew that the Applicant had raised any issue in relation to the Respondent claiming JobKeeper payments. The Applicant's own evidence establishes that the Respondent had nothing to be concerned about with respect to any issue the Applicant may have raised. Rather, Mr Eveleigh stated that he knew the Applicant had not signed the JobKeeper form because she had signed a form allowing another employer, for whom the Applicant worked one day per week, to claim JobKeeper subsidy on her behalf. While Mr Eveleigh and other managers expressed disappointment at the Applicant doing this, there is no evidence that adverse action was taken against her because of it. Further, for the reasons set out above, the Applicant did not complain or inquire about JobKeeper within the meaning in s. 341(1)(c)(ii) in any event.

[182] Further, the email correspondence tendered by the Applicant makes it equally probable that her concern about the Respondent claiming JobKeeper was based on the Applicant's desire to maintain all her part-time hours on four days of the week, and payment for those hours by the Respondent, while receiving JobKeeper payments in relation to a second job in which the Applicant worked only one day per week. Had the Applicant's hours not been reduced by the Respondent, this is what would have occurred.

[183] The email correspondence tendered by the Applicant relating to the Respondent claiming JobKeeper also indicates that the Respondent had financial advice from its external accounting firm that it was entitled to claim these benefits. There is not a scintilla of evidence produced by the Applicant – beyond her bare assertion – that the Respondent faced any repercussions from a complaint by her about claiming JobKeeper. The Applicant's assertion in her submissions that if her allegations were proven the Respondent would be liable for extensive backpay and the return of the JobKeeper subsidies, and for lack of consultation in relation to the implementation of JobKeeper, is absurd as is the proposition that the Respondent would dismiss the Applicant for fear of such repercussions.

[184] The Applicant's assertion that she sent the material in relation to JobKeeper to her private email address because she was working on the issue, was raised only in cross-examination, and was entirely unconvincing, given that the email containing the material was sent over 12 months after the JobKeeper issue arose and at the same time as the Applicant was requested to attend a meeting with managers of the Respondent. It is equally probable that rather than working on JobKeeper related issues (which only ever existed in the mind of the Applicant), the Applicant sent a selection of material to her private email address to bolster

complaints about the Respondent, in circumstances where she suspected that the purpose of the meeting was to raise concerns about her own conduct.

[185] In relation to the Applicant's inquiries about payment for hours worked, I am satisfied that the Respondent has provided a complete response to this matter and has met its onus to establish that adverse action was not taken against the Applicant on this basis. The emails tendered by Ms Atkinson evidence that the Applicant requested to be paid for hours she worked outside her contracted part-time hours and was paid for those hours at her ordinary rate. There is no evidence that the Applicant sought to be paid overtime rates or raised any issue with the rate she was paid for working the additional hours. The Applicant's comments at the show cause meeting as to whether the Respondent's HR staff had complied with Australian legislation, do not constitute a claim for overtime payments and could refer to any of the multiple issues the Applicant had raised, including issues about the format of the meeting. Whether the Applicant was entitled to be paid overtime rates for those hours is not relevant and I make no finding in this regard. What is relevant is that the Respondent has established that this matter was not a reason for the Applicant being stood down and then dismissed.

[186] In relation to the FWC applications, I accept that the Respondent has also established that the Applicant was not stood down and dismissed for this reason. This assertion is contrary to the chronology of events. The general protections non-dismissal application was filed on 15 June 2021. There is no evidence that the Respondent was aware that the application had been filed until 21 June 2021. Regardless, at the point the application was filed, the show cause letter had been formulated and provided to the Applicant. The issues articulated in that letter, collectively or individually, warranted disciplinary action, up to and including termination of the Applicant's employment. The Respondent appropriately ceased the show cause process while the matter was before the Commission. No new grounds for termination of the Applicant's employment were added to those already under contemplation, other than the discovery of additional emails sent by the Applicant to her private email address. As previously noted, that conduct was itself, justification for the Applicant's dismissal.

[187] On 4 July when the Applicant lodged her dispute application with the Commission, the die was cast. The Respondent had put allegations to the Applicant, that if proven, would justify her dismissal. The Applicant did not provide a reasonable response to the allegations either at the time they were put to her or in her evidence to the Commission. Accordingly, to the extent that the onus shifted to the Respondent, it has met that onus and established that adverse action was not because of a prohibited reason or reasons that included a prohibited reason. In short, the misconduct of the Applicant, demonstrated by the Respondent in its evidence to the Commission, was a non-proscribed reason for dismissal, so serious that it swamped any other reason.

Conclusion

[188] For these reasons, I dismissed the application and issued an Order to that effect.[83] In conclusion, I accept the Respondent's submission that the Applicant's evidence to the Commission was not a deliberate attempt to be dishonest, but rather was shaped by the lens of grievance through which the Applicant viewed events during her period of employment with the Respondent,

DEPUTY PRESIDENT

Appearances:

Ms K Hodgkins, the Applicant.
Mr A J Smith of Counsel instructed by Aitken Legal, the Respondent.

Hearing details:

2021.
Brisbane:
November 22, 23, 24.

2022.
Brisbane (by video):
January 11.

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[1] Exhibit A1 Outline of Submissions by the Applicant.

[2] Exhibit A1 Annexure 23.

[3] Ibid Annexure 43.

[4] Transcript of proceedings 23 November 2021, PN 1210.

[5] Transcript of proceedings 23 November 2021, PN 1227 – 1240, PN1267 – PN1276.

[6] Transcript of Proceedings 23 November 2021, PN1346,1353.

[7] [2014] FWCFB 8941

[8] *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241 per Mason J; approved *in Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647 at [59] and [62] per French CJ and Crennan J and at [104] per Gummow J and Hayne J

[9] Ibid at [8] to [15]

[10] [2014] FWCFB 8941 at [12] citing *Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd* (1999) 140 IR 131 at [161]-[162] per Branson J; *Rojas v Esselte Australia (No. 2)* (2008) 177 IR 306 at [49] per Moore J; *Construction, Forestry, Mining and Energy Union v BHP Coal and Steven Rae* [2010] FCA 590; *Jones v Queensland Tertiary Admissions Centre (No. 2)* (2010) 186 FCR 22 at [10]

[11] [2021] FCAFC 178.

[12] Ibid at [14].

[13] Ibid at [21].

[14] Ibid at [25].

[15] Ibid at [59].

[16] *Ltd* (2013) 238 IR 307 at [141] – 143].

[17] (2019) 268 FCR 46.

[18] (2020) 274 FCR 225; [2020] FCAFC 15.

[19] *Alam v National Australia Bank Limited* [2021] FCAFC 178 at [80], citing *PIA Mortgage Services Pty Ltd v King* [2020] FCAFC 15 at [26].

[20] *Alam v National Australia Bank Limited* [2021] FCAFC 178 at [81].

[21] Ibid at [95].

[22] *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 2)* (2012) FCA 697 at [64].

[23] Ibid at [58] citing *Cummins South Pacific Pty Ltd v Keenan* (2020) 281 FCR 421; 302 IR 400; FCAFC 204 and *Shea v TRUenergy Services Pty Ltd (No. 6)* (2014) 314 ALR 346; 242 IR 1; (2014) FCA 271.

[24] Ibid at [75].

[25] *Alam v National Australia Bank Limited* [2021] FCAFC 178 at [59] citing *Cigarette & Gift Warehouse Pty Ltd v Whelan* (2019) FCR 46; [2019] FCAFC 16.

[26] *Alam v National Australia Bank Limited* [2021] FCAFC 178 at [96] citing *Shea v TRUenergy Services Pty Ltd (No. 6)* (2014) 314 ALR 346; 242 IR 1 and *Murrihy v Betezy.com.au Pty Ltd* (2013) 238 IR 307; (2013) FCA 908 at [141] – [143] per Jessup J.

[27] (2020) 274 FCR 225; [2020] FCAFC 15.

[28] Exhibit A1 Annexure 11.

[29] Ibid.

[30] Ibid Annexure 12.

[31] Ibid.

[32] Transcript PN451 – PN455.

[33] Transcript PN460.

[34] Transcript PN480.

[35] Transcript PN509 – 516.

[36] Transcript PN563.

[37] Exhibit R2 Witness Statement of Paul Anthony Eveleigh Annexure B.

[38] Ibid Annexure C.

[39] Transcript PN2905 – 2908.

[40] Exhibit R5 Witness Statement of Judy Anne Young Annexure A.

[41] Exhibit A1 Annexure 5.

[42] Ibid Annexure 4.

[43] Transcript PN395 – 403.

[44] Exhibit A1 Annexure 8.

[45] Exhibit A1 Annexure 23 Attachment 10.

[46] Ibid Annexure 17.

[47] Ibid.

[48] Transcript PN429 – 434.

[49] Transcript PN436.

[50] Transcript PN441 – 444.

[51] Transcript PN1114.

[52] Exhibit R4 Annexure B.

[53] Ibid Annexure A.

[54] Transcript PN2639 – 2643.

[55] Transcript of proceedings PN388.

[56] Exhibit R1 Annexure N.

[57] Exhibit A1 Annexure 23.

[58] Exhibit A1 Annexure 22.

[59] Ibid Annexure 43.

[60] Ibid Annexure 44.

[61] Ibid PN1416.

[62] Ibid PN1707.

[63] (1959) 101 CLR 298.

[64] *CFMEU v Endeavour Coal Pty Ltd* (2015) 231 FCR 150 at [32] – [33]

[65] (2015) 233 FCR 46 at [119].

[66] (1893) 6 R 67.

[67] *Board of Bendigo Technical and Further Education v Barclay* (2012) 248 CLR 500 at 146 per Heydon J

[68] *CFMEU v Endeavour Coal Pty Ltd* (2015) 231 FCR 150 at [32] – [33].

[69] Transcript PN 2381.

[70] (2015) 238 FCR 273.

[71] PN526 – PN547 Exhibit R4 page 84 – 202 including annexures.

[72] PN531 – PN532.

[73] PN537.

[74] Exhibit R1 at 191.

[75] PN552.

[76] PN548 – PN550.

[77] Exhibit R1 page 193.

[78] Transcript PN653.

[79] Exhibit R4 at 77.

[80] PN652 – PN653, PN1797

[81] PN1869 – PN1877

[82] Transcript PN2448.

[83] PR739978.