FEDERAL COURT OF AUSTRALIA

National Tertiary Education Industry Union v University of Sydney [2021] FCAFC 159

Appeal from:	*National Tertiary Education Industry Union v University of Sydney* [2020] FCA 1709
File number(s):	NSD 1373 of 2020
Judgment of:	**ALLSOP CJ, JAGOT AND RANGIAH JJ**
Date of judgment:	31 August 2021
Catchwords:	**INDUSTRIAL LAW** – university – right of intellectual freedom – whether primary judge erred in construction of right of intellectual freedom in enterprise agreement – whether primary judge erred in finding that exercise of intellectual freedom can constitute "misconduct" or "serious misconduct" within meaning of enterprise agreement – whether conduct in posting photo to social media was sufficiently connected to his employment to constitute "misconduct" – whether University gave lawful and reasonable instruction to remove photo – whether failing to remove photo constituted "misconduct" – appeal allowed – matters remitted to primary judge for hearing and determination.
Legislation:	*Fair Work Act 2009* (Cth) ss 50, 340, 539, 545
Cases cited:	*Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 *Branir Pty Ltd v Owston Nominees (No 2)* [2001] FCA 1833; (2001) 117 FCR 424 *Concut Pty Ltd v Worrell* [2000] HCA 64; (2000) 75 ALJR 312 *Dare v Pulham* [1982] HCA 70; (1982) 148 CLR 658 *Downer EDI Limited v Gillies* [2012] NSWCA 333; (2012) 92 ACSR 373 *Eldridge v Wagga Wagga City Council* [2021] NSWSC 312 *James Cook University v Ridd* [2020] FCAFC 123; (2020) 382 ALR 8 *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* [2015] FCAFC 99; (2015) 240 FCR 578

	Mercer v Whall (1845) 5 QB 447 *National Tertiary Education Industry Union v University of Sydney* [2020] FCA 1709; (2020) 302 IR 272 *Ridgway v Hungerford Market Company* (1835) 3 AD & E 171 *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 *Suttor v Gundowda* [1950] HCA 35; (1950) 81 CLR 418 *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84; (2014) 222 FCR 152 *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177; (2009) 74 NSWLR 618
Division:	Fair Work Division
Registry:	New South Wales
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	292
Date of hearing:	12 July 2021
Date of last submissions:	19 July 2021
Counsel for the Appellants:	Mr B Walker SC with Ms S Kelly
Solicitor for the Appellants:	National Tertiary Education Industry Union
Counsel for the Respondent:	Ms K Eastman SC with Mr D Lloyd
Solicitor for the Respondent:	Ashurst Australia

ORDERS

NSD 1373 of 2020

BETWEEN:	**NATIONAL TERTIARY EDUCATION INDUSTRY UNION** First Appellant
	TIM ANDERSON Second Appellant
AND:	**UNIVERSITY OF SYDNEY** Respondent

ORDER MADE BY: **ALLSOP CJ, JAGOT AND RANGIAH JJ**

DATE OF ORDER: **31 AUGUST 2021**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Order 1 made on 26 November 2020 be set aside.
3. The matter be remitted to the primary judge on terms to be decided.
4. The parties may file and serve written submissions not exceeding 10 pages identifying their proposed issues for the remittal and any amendment to the pleadings requested, and reasons in support, within 14 days of the date of these orders.
5. If any party files and serves written submissions in accordance with order 4, the other parties may file and serve written submissions in reply not exceeding 10 pages within a further seven days thereafter.

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

REASONS FOR JUDGMENT

ALLSOP CJ:

1 I have read the reasons for judgment of Jagot J and Rangiah J. I agree with the orders proposed by their Honours. Their Honours' detailed recounting of the facts and circumstances of the matter below and on appeal, which I gratefully adopt, permits me to express my reasons shortly.

2 I agree with the reasons of Jagot J and Rangiah J in relation to the "lunch photo". The conduct in relation to this was not asserted to be an exercise of intellectual freedom. Whilst it can be accepted that many features of world affairs give rise to contradictory and sometimes mutually hostile opinions, the apparently deliberate posting on Facebook of a photograph of a badge on the arm of a colleague on a social occasion that said "Death to Israel" and "Curse the Jews" can be characterised as anti-Semitic. I agree with Jagot J and Rangiah J that the refusal to take down the post can be characterised as Misconduct if the removal direction was lawful and reasonable. Whether posting the lunch photo was Misconduct or Serious Misconduct and if so, whether failing to remove the photo was Serious Misconduct is a question (for the reasons given by Jagot J and Rangiah J) that should be remitted to the primary judge, to be assessed in the light of all the circumstances.

3 I turn to the balance of the controversy. Subject to what follows, I agree with the reasons of Jagot J and Rangiah J.

4 Central to resolution of the controversy is the proper construction and ascription of meaning and content to cll 315–317 of the 2018 Enterprise **Agreement** (in relevant respects identical to cll 254–256 of the 2013 Enterprise Agreement).

5 The provisions deal with a central feature of university and academic life; indeed the subject, intellectual freedom, goes to the heart of the nature and character of the institution of the university itself.

6 The three clauses naturally fit together and are to be construed in the context of each other, and in the context of the whole of the Agreement. Clause 315, in terms, recognises the rights which are part of the concept of intellectual freedom to the protection and promotion of which concept, and which rights, the parties expressly state their commitment. These are not on their face words of mere aspiration. They are words of commitment. That the parties *are* committed, is not in its context a mere description of their respective views; it is the expression of a

commitment that they make, to each other. The freedom (to whose protection and promotion the parties express their commitment) is not apt for exhaustive definition, but it is apt for non-exhaustive description or identification of relevant conduct – a process undertaken by the parties in their inclusive list of rights in subcll (a) and (b)(i)–(iv). Those *rights* were stated to be part of the freedom. That the freedom is difficult or impossible to define exhaustively is no reason to diminish the clarity with which the Agreement expresses the nature of the *rights*. Rights to the protection and promotion of which the parties express their commitment is naturally the expression not of aspiration, but of obligation. The terms of cl 315 are apt to mean that the parties commit themselves to the contents of the clause, including the protection and promotion of the expressed rights. The Agreement is to be the basis of the relationship between the parties for its term. The words "are committed" should not be understood as speaking only as at 12 December 2017 when the Agreement was signed. The present tense should be seen as continuous and the commitment as ongoing and real. There does not need to be a separate promise to maintain the commitment made on 12 December 2017 into the future. Even if one did look at it in that restricted temporal fashion, the clause still is an express recognition of the rights set out, which the staff enjoy: such should be construed as legal rights that staff are free to exercise. The recognition of the rights is to be understood as a clear agreement that staff are permitted, indeed have the right, to act as set out in cl 315 (a) and (b).

7 Clauses 316 and 317 are expressed in terms as to how the parties will act in the future. Clause 317 can be seen to include an undertaking by staff to uphold the practice of intellectual freedom: that is to exercise the rights in practising intellectual freedom, in a way which accords with the highest ethical, professional and legal standards.

8 So, cl 315 recognises the rights and the parties' commitment to protecting and promoting them; and by cl 317 the parties agree to exercise the rights in accordance with the highest standards.

9 That the freedom involved is in its entirety not capable of precise and comprehensive or exhaustive definition does not mean that an expressed commitment to it for the life of the Agreement is not meaningful and no more than aspirational. The parties identified constituent rights with some clarity. Whether the commitment to the protection and promotion of the freedom and the rights has been contravened and whether conduct falls within the freedom or the rights as expressed can be the subject of evidence and debate. The freedom and rights are not so uncertain or indefinable as to be incapable of legal characterisation or as to make an assessment of a contravention or not of the commitment impossible. A breach of an express

undertaking to do something, the boundaries of which are unclear may be hard to prove, but it does not follow that the undertaking is legally unenforceable or lacking in enforceable content: see for example, in the context of an express obligation to negotiate the resolution of contractual differences in good faith, *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177; 74 NSWLR 618 at 639 [74].

10 It follows from this that the primary judge erred in not giving to cl 315 the legal reality which its terms admit.

11 The recognition of the right of staff to conduct themselves in accordance with cl 315, including relevantly here, right (b)(iv), means that Misconduct, Serious or otherwise, must be assessed within that frame of reference.

12 Also, the commitment to the protection and promotion of the freedom and the rights in cl 315 is capable of contravention. Any contravention of cl 315 was in the conduct of the University in seeking to have Dr Anderson desist from the activity complained of, to remedy the conduct, to take steps to discipline him, and eventually to terminate his employment. The relevant question is whether it can be concluded that the University, by its conduct, failed to protect or promote the freedom or the rights. One way of putting the matter is that the University is obliged not to discipline or punish or threaten to discipline or punish a member of staff if the member of staff exercises the freedom or right lawfully.

13 Breach of cl 317 was not pleaded by Dr Anderson and the Union. The reason for this is not curious, nor is it defining of the case. The right to which the University committed itself to protect and promote is, relevantly, that in cl 315(b)(iv). By cl 317, Dr Anderson agreed to uphold the practice of intellectual freedom and (reading cll 315 and 317 together) to exercise the right in cl 315(b)(iv) in accordance with the highest standards set out in cl 317. He could have added cl 317 to this pleading and have asserted that there was a breach of cl 315 by a failure of the University to protect and promote the right ((b)(iv)) exercised by him and also a breach of cl 317 by a failure of the University to uphold the practice of intellectual freedom by his exercise of the rights in (b)(iv) that he undertook in accordance with the highest standards. Or, he could confine himself to cl 315 and let the University say in answer to that, that any exercise of rights under cl 315 was not in accordance with the highest standards set out in cl 317 and so there could be no contravention of cl 315 by the University.

14 As the reasons of Jagot J and Rangiah J show, the second of those courses was taken by Dr Anderson and by the respondents, who were at all times alive to cl 317 and its significance and propounded it in answer (in the alternative) to the case made by Dr Anderson for contravention of cl 315. In opening (as discussed by Jagot J and Rangiah J) Dr Anderson's counsel also appeared to call in aid cl 317. The absence of reliance on a contravention of cl 317 as a foundation for a penalty (in the pleading and in final address) did not remove or make the clause irrelevant, either to assist in the construction of cl 315, or as available in partial answer to the claim made for contravention of cl 315.

15 Once one concludes that cl 315 contains an obligation to protect and promote the freedom and the relevant rights identified that is capable of being contravened, it becomes necessary to reconcile cll 315 and 317 with the balance of the Agreement. Clause 306 requires the staff to comply with the "Codes of Conduct (as defined in clause 3)". Clause 3 contains a definition of one Code, which in its terms incorporates the University's Public Comment Policy. Given that the Code of Conduct and Public Comment Policy are not part of the Agreement (whether referred to in the Agreement or not: see cl 14) a clear hierarchy of reconciliation can be seen in the Agreement between, on the one hand, the (general) Code of Conduct and Public Comment Policy and, on the other hand, the (specific) protection and promotion of the freedom and rights in cll 315–317, to which the parties are obligated. Those rights in cll 315–317 are not to be diluted, undermined or derogated from by some requirement otherwise on its face applicable in the Code of Conduct or Public Comment Policy. The freedom and rights in cl 315 are important and are specific rights to which the parties have committed, that is obligated themselves. A general obligation to conduct oneself in accordance with a Code of Conduct drawn from time to time by one party, the University, should not be seen to derogate from the mutual agreement to protect and promote a specific and important freedom and specific and important rights, albeit including the manner of the exercise of the freedom or of the rights. The question whether or not the Code of Conduct has been breached is subsidiary to an inquiry whether what occurred was an exercise or attempted exercise of one of the rights in cl 315 or otherwise an exercise or attempted exercise of intellectual freedom, recognising the obligation to exercise the right in the manner provided for by cl 317. That inquiry *may* make the Code of Conduct relevant to an assessment of compliance with the standards referred to in cl 317, but it does not follow that any breach of the Code of Conduct according to its own terms is a failure to exhibit the standards called for in cl 317. As the reasons of Jagot J and Rangiah J make clear, it is not easy to see how one finds in this Code of Conduct requirements that truly inform,

in any given case, the exercise of the right in cl 315(b)(iv) or of the freedom. The expression of unpopular or controversial views may well, for instance, be seen to lack sensitivity to the feelings of others. The Code of Conduct, as an inferior document in the hierarchy of documents in the Agreement, cannot, by its terms, reduce the content of cl 315, exercised in accordance with the standards set in cl 317.

16 The inquiry is not whether the Code of Conduct has been breached according to its terms, divorced from cll 315 and 317. The relevant inquiry calls for an assessment of whether or not a right or the freedom in cl 315 was being exercised or attempted to be exercised and if so whether it was exercised or attempted to be exercised in accordance with the standards in cl 317. To the extent that the Code of Conduct can inform the inquiry as to whether the standards referred to in cl 317 were manifested in the exercise of the freedom or right, it will be relevant. As the reasons of Jagot J and Rangiah J demonstrate, however, that last expression of the relevance of the Code of Conduct is more easily expressed than applied. For instance, to the extent that notions of demonstrating respect, impartiality, courtesy and sensitivity are required by the Code of Conduct, or exercising appropriate restraint by the Public Comment Policy, it may be difficult to see how, in a given case, these can qualify an exercise of the right to express unpopular or controversial views, provided that there is no harassment, vilification or intimidation. In any given case, the exercise of the right in cl 315(b)(iv) according to its terms might necessarily be seen by some as, or might necessarily be, discourteous or lack sensitivity. The relevant question is whether there has been an exercise of the freedom or right in cl 315 and whether it was to the standards referred to in cl 317. It is not just a question of whether the Code of Conduct or Public Comment Policy has been breached according to its terms. I agree with Jagot J and Rangiah J, and for the reasons their Honours give, that the approach of the Court in *James Cook University v Ridd* [2020] FCAFC 123; 382 ALR 8 can be distinguished by reference to the different terms of the enterprise agreement before the Court in that case.

17 If the conduct was an exercise of the right or freedom in cl 315, in accordance with the highest standards in cl 317, there can be no question of there having been Misconduct, Serious or otherwise, by reference to the Code of Conduct or Public Comment Policy. The rights and the freedom to which the parties have committed themselves are to be construed as superior in hierarchy in the Agreement to the general obligations in the Code of Conduct and the Public Comment Policy, if such on their face would be inconsistent with, or undermine, or dilute the exercise of the right to the standards agreed. If it be the case that what has occurred can be

characterised as the exercise or attempted exercise of the freedom or one of the rights, but one that was not in accordance with the standards required by cl 317, the question of any Misconduct would have to be assessed by reference to the failure to exercise the freedom or rights in accordance with the highest standards. The departure from those standards would be the conduct from which any judgment of Misconduct is to be made. The above enquiry should not be approached mechanically by concluding that the freedom or right in cl 315 was not validly exercised under cl 317 and so the conduct can be judged simply by reference to the Code of Conduct, ignoring otherwise cll 315 and 317. If the conduct is properly characterised as an exercise or attempted exercise of the freedom or right, but not at the highest standards, the vice of the conduct is in the departure from those standards, which may or may not be Misconduct, Serious or otherwise.

18 If the conduct cannot be characterised as an exercise of the freedom or one of the rights in cl 315, then the conduct will be assessed simply by reference to the Code of Conduct.

19 Thus, the Misconduct, relevantly here Serious Misconduct, must be assessed by reference to the freedom and rights in cl 315, to be exercised in accordance with the standards in cl 317. The terms of cl of 384(d)(iii) and cl 434 make clear that there must be the engagement by the member of staff in Serious Misconduct for the employment of the staff member to be terminated without notice. Dr Anderson at all times asserted that he had not engaged in Serious Misconduct. The state of satisfaction of a delegate (here, Professor Garton) was necessary for disciplinary action, but for the termination to be valid, the engagement in Serious Misconduct must have occurred, as a matter of fact. That was for the Court to decide.

20 There was a dispute about whether Dr Anderson engaged in Serious Misconduct. That dispute was not resolved by accepting Professor Garton's state of satisfaction, as not having been put in issue. The facts had to be assessed by the Court, recognising the legal rights of Dr Anderson under cl 315, qualified in the manner of exercise by cl 317, not diluted or undermined, by the Code of Conduct. In my respectful view, the errors of the primary judge, all of which can be seen to be encompassed within or stem from the success of grounds 1 and 2 of the notice of appeal, were:

(a) failing to give legal effect to cl 315;

(b) failing to assess the question whether there was Serious Misconduct in the context of the asserted exercise of the right to intellectual freedom and specifically to exercise the right in cl 315(b)(iv), and failing to make the

necessary finding whether there was an exercise of the right in cl 315(b)(iv) or the freedom otherwise, and if so whether such was in accordance with the standards set out in cl 317;

(c) failing to address the question of the general obligations in the Code of Conduct by reference to their subordinate status to the specific rights in cll 315 and 317 in the Agreement in the hierarchy of relevant documents in any such assessment;

(d) failing to recognise that an exercise of a right under cl 315 in accordance with cl 317 could not be Misconduct; and

(e) failing to make a finding necessitated by cl 384(d)(iii) (and indeed cl 434, though not pleaded nor the subject of submission) as to whether Serious Misconduct occurred and by addressing the issue of Serious Misconduct by relying upon Professor Garton's unchallenged state of satisfaction as to that matter and in so doing failing to address the question whether the University in fact had power to terminate Dr Anderson's employment.

21 The above was the proper framework for relevant fact finding and assessment as to whether Dr Anderson was guilty of Serious Misconduct to justify the termination of his employment and whether the Agreement had been contravened by the University's conduct in the case for remedies for a contravention of s 50 of the *Fair Work Act 2009* (Cth).

22 Whether or not there has been a contravention of the Agreement and so a contravention of s 50 of the *Fair Work Act* depends upon the provisions of the Agreement. If Dr Anderson's employment has been terminated without notice in circumstances where there had been no Serious Misconduct that would be a contravention of cl 384(d)(iii), or cl 434. (Even if cl 384 is construed as procedural, it nevertheless prevents, in terms, termination of a staff member's employment in the absence of Serious Misconduct.) Clause 434 was not pleaded. On appeal, the case under cl 384 was abandoned. Termination without notice in the absence of Serious Misconduct may also be a breach of the employment contract, but such was also not pleaded. Whether or not cl 315 was contravened depends on the question whether the University by its conduct failed to protect or promote the freedom or the right in cl 315(b)(iv). Whether there has been a contravention of cl 315 should be the subject of a remitted hearing as part of the hearing as to whether Dr Anderson engaged in Serious Misconduct as the basis for the termination of his employment.

23 As provided for in the orders, the parties will be heard on the question and terms of the remitter. The remitter should not be such as to reopen the hearing to more evidence, at least substantive evidence. The parties have had their trial. Whether or not the remitter should contain any leave to amend to accommodate matters not currently pleaded can be debated before us as to the terms of the order for remitter. As presently minded, I would tend to the view to keep the appellants substantially to the case they ran below.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop.

Associate: 

Dated: 31 August 2021

REASONS FOR JUDGMENT

JAGOT AND RANGIAH JJ:

25 These reasons for judgment explain why the appeal must be allowed and the matter remitted to the primary judge for further submissions and determination. The parties will be heard further about the scope of the remittal.

1. Background

26 The appellants, the National Tertiary Education Industry Union (the **NTEIU**) and Dr Tim Anderson, appeal against the orders of the primary judge dismissing their application: *National Tertiary Education Industry Union v University of Sydney* [2020] FCA 1709; (2020) 302 IR 272 (referred to below as **J**).

27 The appellants had applied for declarations that the respondents below, the **University** of Sydney, the Provost and Deputy Vice-Chancellor of the University (Professor Garton), and the Dean of the Faculty of Arts and Social Sciences (Professor Jagose) (together, the **respondents**), had contravened s 340(1) (the protection from adverse action) and s 50 (contravention of an enterprise agreement) of the ***Fair Work Act*** *2009* (Cth), and consequential orders that Dr Anderson be reinstated and paid compensation, and for pecuniary penalties to be paid to the NTEIU.

28 The University had terminated Dr Anderson's employment without notice on 11 February 2019 following a number of warnings relating to a series of comments and posts by Dr Anderson on social media and the convening of a review committee as required by the applicable enterprise agreement, the *University of Sydney Enterprise Agreement 2018-2021* (the **2018 agreement**).

29 Dr Anderson claimed that: (a) the comments as pleaded constituted the exercise by Dr Anderson of intellectual freedom within the meaning of cl 254 of the *University of Sydney Enterprise Agreement 2013-2017* (the **2013 agreement**) and the equivalent cl 315 of the 2018 agreement and, by reason thereof, did not constitute "misconduct" within the meaning of either agreement, (b) as a result, there was no lawful right, power or authority of the University to give any warning to Dr Anderson about the comments, (c) in giving Dr Anderson the warnings about the comments the University breached cll 254 and 309 of the 2013 agreement and cll 315 and 384 of the 2018 agreement (as applicable), and thereby contravened ss 50 and 340 of the Fair Work Act, (d) in posting the so-called lunch photo Dr Anderson did not engage in

misconduct as it was not sufficiently connected to his employment, (e) as a result, there was no lawful right, power or authority of the University to give any warning to Dr Anderson about the lunch photo, (f) in giving Dr Anderson a warning about the lunch photo the University breached cll 315 and 384 of the 2018 agreement, and thereby contravened ss 50 and 340 of the Fair Work Act, and (g) in terminating Dr Anderson's employment without notice the University breached cll 254 and 309 of the 2013 agreement and cll 315 and 384 of the 2018 agreement (as applicable), and thereby contravened ss 50 and 340 of the Fair Work Act.

30 The primary judge dismissed the amended originating application.

2. The appeal

31 The appeal is brought on three grounds.

32 First, the appellants contend that the primary judge erred by:

> (a) finding (at [7] and [140] …) that cl 254 of [the 2013 agreement**]** did not, and cl 315 of the University of [the 2018 agreement] does not, create any enforceable obligations; and
>
> (b) failing to find that cl 254 of the 2014 created, and cl 315 of the 2018 Agreement creates, an enforceable right to intellectual freedom consisting of, among other things, the rights enumerated in each clause.

33 Second, the appellants contend that the primary judge erred by:

> (a) finding (at [7], [140(4)], [140(5)] and [140(6)] …) that an exercise of intellectual freedom can constitute "misconduct" or "serious misconduct" within the meaning of the 2013 Agreement and the 2018 Agreement; and
>
> (b) failing to find that conduct that constitutes an exercise of intellectual freedom within the meaning of cl 254 of the 2013 Agreement and/or cl 315 of the 2018 Agreement could not constitute "misconduct" or "serious misconduct" within the meaning of cl 3 of the 2013 Agreement or cl 3 of the 2018 Agreement (as the case may be).

34 Third, the appellants contend that the primary judge erred by:

> (a) finding (at [227] and [236]) that Dr Anderson's conduct in posting a photograph to Facebook (defined in the statement of claim and the [reasons for judgment] as the Lunch Photo) was sufficiently connected to Dr Anderson's employment to constitute misconduct within the meaning of the 2018 Agreement;
>
> (b) finding (at [235]) that the University gave Dr Anderson a lawful and reasonable instruction to remove the Lunch Photo from his Facebook page; and
>
> (c) failing to find that:
>
> (i) the sole basis on which the University found that Dr Anderson's conduct in posting the Lunch Photo to Facebook constituted misconduct within

the meaning of cl 3 of the 2018 Agreement was that it allegedly infringed the University's code of conduct;

(ii) in posting the Lunch Photo, Dr Anderson was not performing any "University duties or functions" and that, accordingly, the University's code of conduct did not apply to his conduct;

(iii) further and in any case, Dr Anderson's conduct in posting the Lunch Photo to Facebook was not sufficiently connected to Dr Anderson's employment to authorise the University to discipline him for doing so;

(iv) accordingly, the University had no lawful right, power or entitlement to discipline Dr Anderson for posting the Lunch Photo; and

(v) the instruction the University issued to Dr Anderson to remove the Lunch Photo from Facebook was not a lawful and reasonable direction.

35 The appeal is brought against the University only. It appears that the appellants may not seek to disturb the orders below insofar as they relate to Professors Garton and Jagose. If so, it is not apparent how this is to be achieved other than through the orders relating to the remittal of the matter. On that basis, Professors Garton and Jagose are necessary parties to the appeal and an order should be made for their joinder as respondents. The parties should consider this aspect of the matter and address it in their proposed further submissions about the remittal.

36 Unfortunately, the hearing of the appeal descended into a debate about the case the appellants put below. The University submitted that the appellants had not put the case as they argued it in the appeal and were not entitled to do so. The appeals books did not contain the material necessary for this debate to be resolved and so the parties were given an opportunity to make further submissions in writing about it after the hearing of the appeal, and to file further supporting material. The University also contended that the appeal was moot in the sense that even if the primary judge had erred as alleged, the errors were not material as there were independent findings supporting the dismissal of the amended originating application. Further, the University said it wished to be heard further on the scope of any remittal of the matter to the primary judge.

37 The appellants contended that the only change to their case was that they no longer pressed the claim that the University had breached cl 384 of the 2018 agreement (and the equivalent cl 309 of the 2013 agreement). They also contended that the appeal was not moot as, if the appellants are correct, the primary judge did not make the necessary findings to dismiss the appellants' case.

38 The appellants are correct. To understand why the appellants are correct it is necessary to identify the claims made and arguments put below and the reasoning of the primary judge. It

should also be noted that senior counsel for the appellants, Mr Walker SC, did not appear below. In the appeal Mr Walker SC exposed a number of the problems below, but issues requiring further consideration (necessary for a sensible remittal of the matter to the primary judge) remain.

3. The enterprise agreements

39 The primary judge referred to the provisions of the 2018 agreement only, as the provisions of the 2013 agreement and the 2018 agreement are the same, albeit with different clause numbers. The same course is adopted below, recognising that Dr Anderson's employment was terminated under the provisions of the 2018 agreement, but some of the earlier warnings were given under the 2013 agreement.

40 The equivalent provisions are as follows:

2018 agreement	**2013 agreement**
315	254
316	255
317	256
384	309

4. Summary of conclusions

41 As will be explained, the primary judge did not receive adequate assistance from the parties below and his Honour's process of reasoning accordingly miscarried as follows:

(1) in respect of the claimed exercises of the right of intellectual freedom by Dr Anderson, the primary judge, in effect, said he was holding the appellants to their case as pleaded relying on cl 315 of the 2018 agreement and thus misconstrued cll 315-317 of that agreement, in circumstances where:

(a) in oral and written opening submissions before the primary judge, the appellants had accepted that cl 315 could not be construed in isolation from cl 317 and had accepted that any exercise of rights under cl 315 had to be in accordance with

that clause and cl 317, and the respondents made no objection to the appellants having done so;

(b) the respondents' primary and alternative cases before the primary judge were also to the effect that cl 315 could not be construed in isolation from cl 317. Their primary case was that cl 315 and/or both clauses conferred no enforceable rights capable of contravention. Their alternative case was that if, contrary to their primary case, cl 315 and/or both clauses did confer such rights, the rights had to be exercised in accordance with both clauses and the University's Code of Conduct;

(c) as a matter of forensic logic it was for the appellants to plead that Dr Anderson's conduct involved the exercise of the right in cl 315 (which they did) and for the respondents to plead that if cl 315 involved an enforceable right (which it does) then the right had to be exercised in accordance with cl 317 (which they did not plead, but did put to the primary judge); and

(d) as a result, if there was any deficiency in the appellants' pleading in not referring to cl 317 as a qualification on the right conferred by cl 315 (which there was not), the deficiency could not have been material;

(2) the parties did not draw the primary judge's attention to the consequences of the fact that the appellants had pleaded and were running a number of separate cases (apart from their adverse action case under s 340, rejected by the primary judge and no longer pressed), being:

(a) a case that the University's warnings and termination involved a breach of cl 384. It was said by the appellants that, as a result, the University contravened s 50 of the Fair Work Act, making available the relief of compensation and reinstatement as specified in s 545 of that Act (a provision regrettably not pleaded or mentioned in the appellants' submissions before the primary judge, despite it being the source of the main relief sought). The primary judge rejected this cl 384 case. The appellants did not press this case in the appeal. As explained below, however, this creates a problem for the appellants. It is also apparent that in rejecting the cl 384 case, again due to the oversight of the parties, the primary judge does not mention some other critical provisions (cll 90 and 434) which assist in identifying the role of cl 384 and would have made the function of cl 384(d)(iii) clear;

(b) a case that the University's warnings and termination were in breach of cl 315 of the 2018 agreement. It was said that, as a result, the University contravened s 50 of the Fair Work Act, making available the relief of compensation and reinstatement as specified in s 545 of that Act; and

(c) a case that, even if the fourth comments and the fifth and sixth comments did not involve the exercise of the right in accordance with cll 315-317 they were not, in any event, misconduct at all (as to the fourth comments) or serious misconduct (as to the fifth and sixth comments). This meant that the Court also had to determine these issues for itself, but the primary judge did not do so and instead confined himself to considering the reasonableness of the state of satisfaction reached by the University' delegate in this regard; and

(3) the primary judge's observation at J [141] that if the appellants had "pleaded a case based on breach of cl 317, the result would not have been any different" is incorrect as his Honour's observation to the same effect about the fifth comments at J [257]. This is because:

(a) the question whether conduct involved the exercise of the right of intellectual freedom in accordance with cll 315-317 is for the Court to determine for itself in all of the circumstances, whereas the primary judge (apparently relying on the respondents' erroneous submissions) confined himself to considering the reasonableness of the state of satisfaction reached by the University' delegate in this regard (which was an issue only in the cl 384 case and not otherwise);

(b) if conduct involved the exercise of the right in accordance with cl 315 (including the inbuilt qualifications on the exercise of that right in cll 315 and 317) then, as the appellants contended, that conduct could not be misconduct or serious misconduct. The primary judge's contrary conclusion (again based on the respondents' erroneous submissions) was in error; and

(c) if this was so, the appellants' contention that the University itself breached cll 315 if it gave warnings to and terminated Dr Anderson's employment based, in whole or in part, on conduct that involved the exercise of the right in accordance with cll 315-317 had to be addressed, but was not; and

(d) while the appellants' claims of breach of cl 384 were addressed, the primary judge did so on an erroneous basis (involving a misconstruction of cl 384(d)(iii)), apparently resulting from the fact that the parties never referred

his Honour to cll 90 and 434). If the University's conduct involved breach of cl 384(d)(iii) of the 2018 agreement, the University would have contravened s 50 of the Fair Work Act, making available the relief of compensation and reinstatement as specified in s 545 of that Act. The primary judge did not consider these issues.

42 The determination of the remitted matter may also miscarry if the basis and scope of the remittal is not carefully considered. The relevant issues are exposed below and preliminary views provided, but the parties will be given a further opportunity to address these matters. In summary, and without having heard from the parties, it appears that:

(1) the appellants remain able to contend that the University breached cl 315 and thus s 50 of the Fair Work Act by giving warnings to and terminating Dr Anderson's employment without notice (thereby engaging the potential for relief under s 545 of the Fair Work Act, being compensation and reinstatement, and the imposition of pecuniary penalties in s 539 of the Fair Work Act, s 50 being a civil remedy provision as specified in the table in s 539(2), item 4); and

(2) despite the appellants having said in the appeal that they did not press the cl 384 case, in one respect (the University's power to terminate employment without notice for serious misconduct as referred to in cl 384(d)(iii) of the 2018 agreement), that claim needs to be pressed. The appellants remain able to contend that the University breached cl 384(d)(iii) and thus s 50 of the Fair Work Act by terminating Dr Anderson's employment without notice (thereby engaging the potential for relief under s 545 of the Fair Work Act, being compensation and reinstatement, and the imposition of pecuniary penalties in s 539 of the Fair Work Act, s 50 being a civil remedy provision as specified in the table in s 539(2), item 4).

43 As noted, while not apparent from the submissions of the parties to the primary judge or in the appeal, s 545 of the Fair Work Act is the source of power for the orders for reinstatement and compensation sought by the appellants in paras 4 and 5 of the amended originating application.

44 Relevantly, s 545 of the Fair Work Act provides that:

> (1) The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.
>
> …

(2) Without limiting subsection (1), orders the Federal Court or Federal Circuit Court may make include the following:

(a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;

(b) an order awarding compensation for loss that a person has suffered because of the contravention;

(c) an order for reinstatement of a person.

45 Also not referred to by the parties, but critical to understanding cl 384(d)(iii) of the 2018 agreement, is cl 434, which provides that:

> A staff member's employment may be terminated by the University at any time without notice if the staff member engages in Serious Misconduct, subject to a right of review under **clause 460**.

46 For reasons which cannot be known, neither party drew the primary judge's attention to this clause of the 2018 agreement despite requiring his Honour to construe cl 384(d)(iii) which reflects cl 434.

5. The primary judge's reasoning

5.1 Overview

47 There was a statement of agreed facts. The agreed facts included that the University employed Dr Anderson. Dr Anderson was employed as a member of the University's academic staff on various bases since 1998. The University suspended Dr Anderson's employment on 3 December 2018 and terminated his employment without notice on 11 February 2019. The agreed facts also included all of the primary facts about Dr Anderson's conduct.

48 The primary judge recorded that, as Dr Anderson's impugned conduct extended over several years, both the 2013 agreement and the 2018 agreement were relevant. As the agreements were relevantly identical, references could be confined to the 2018 agreement: J [3]-[4]. This remains the position in the appeal (see above).

49 The primary judge identified three relevant events at J [2], being:

(1) the **first warning** made by the University on 2 August 2017;

(2) the **final warning** made by the University on 19 October 2018; and

(3) the **termination** of Dr Anderson's employment on 11 February 2019.

50 The primary judge divided the relevant issues in two groups at J [5] as follows:

(1) The first set of issues related to alleged contraventions of s 50 of the [Fair Work

Act] and concerned a claimed right to "intellectual freedom". As framed by the applicants, this part of the proceedings gave rise to the following questions:

(a) whether cl 315 of the 2018 Agreement created an enforceable right to the exercise of "intellectual freedom" and, if so, the content of that right;

(b) whether conduct constituting the exercise of "intellectual freedom" was capable of constituting misconduct or serious misconduct within the meaning of cl 3 of the 2018 Agreement;

(c) whether the conduct of Dr Anderson on which the first warning, final warning and the termination of his employment was based constituted the exercise of "intellectual freedom" and was therefore not capable of constituting "misconduct" or "serious misconduct" within the meaning of cl 3 of the 2018 Agreement; and

(d) whether, if cl 315 of the 2018 Agreement did not immunise the conduct of Dr Anderson leading to the final warning and the dismissal, that conduct was otherwise "misconduct" or "serious misconduct" within the meaning of cl 3 of the 2018 Agreement.

(2) The second set of issues related to alleged contraventions of s 340 of the [Fair Work Act]. This part of the proceedings gave rise to the questions whether:

(a) Dr Anderson exercised a workplace right by making "complaints" within the meaning of s 341(1)(c)(ii) of the [Fair Work Act]; and

(b) the University had established that it did not impose the first warning or the final warning or terminate Dr Anderson's employment because Dr Anderson exercised any one or more of the workplace rights.

51 As noted, the second set of issues, relating to s 340 of the Fair Work Act, does not form part of the appeal.

52 The primary judge answered the first set of issues in summary form at J [7]:

(1) The 2018 Agreement, including by cl 315, does not recognise the existence of, or give rise to, a legally enforceable right to intellectual freedom of the kind identified the exercise of which can never: (a) constitute "misconduct" or "serious misconduct"; or (b) be the subject of the processes contemplated by cl 384.

(2) The University did not contravene ss 50 or 340 of the [Fair Work Act].

(3) The question of accessorial liability on the part of Professor Garton does not arise in light of the fact that the contraventions are not made out. It is not appropriate to hypothesise what conclusions would have been reached if contraventions of ss 50 and 340 had been established, because the answer would depend on factual findings which have not been made.

5.2 Facts

53 The primary facts are not in dispute. The following summary is extracted from the primary judge's reasons as indicated.

54 Dr Anderson has been employed by the University since 1998. He was a senior lecturer: J [8]-[10]. At the time of his termination he was employed part-time and taught a post-graduate course, Human Rights and International Development (ECOP6130), in semester 2 of 2015, semester 2 of 2016 and semester 1 of 2018 and a third-year undergraduate unit, Human Rights in Development (ECOP3017), in semester 1 of each of 2015, 2016, 2017 and 2018: J [13].

55 Dr Anderson has a **Facebook account** under the name "Tim Anderson" accessible to the public and used only by Dr Anderson. Until at least mid-2018 the Facebook account identified Dr Anderson as working at the University: J [11].

56 Dr Anderson has a **Twitter account** accessible to the public and used only by Dr Anderson: J [12].

57 The University had numerous policies in place regulating conduct including a **Code of Conduct**, relevantly the Code of Conduct – Staff and Affiliates effective from 12 September 2016 and the Code of Conduct – Staff and Affiliates effective from 16 October 2017, and a **Public Comments Policy** effective from 1 February 2007: J [16].

58 Between 4 and 10 or 11 May 2017, Dr Anderson made various tweets on his Twitter account and posts on his Facebook account. The various tweets and posts, among other topics, related to media coverage concerning Mr Jay Tharappel, a tutor employed by the University in subjects taught by Dr Anderson. The focus of these posts and tweets was an allegation that "Murdoch journalist fools Armenian Council with fake genocide threat". In the posts Mr Tharappel is identified as having said "Kylar Loussikian … Armenian name right? ... traitor who wants a second Armenian genocide … stabbing Syria in the back". Amongst other things, Dr Anderson posted "Murdoch press fabricates 'genocide threat' story in attempt to intimidate anti-war academics. Academic Jay Tharappel said Daily Telegraph Journalist Kylar Loussikian was a traitor to his Armenian ancestry, inviting a 'second genocide' on the Armenian people by attacking (on false pretexts) the Syrian Government, a historic protector of the Armenian people. The Murdoch journalist responded with a fabricated 'genocide threat' story". A further tweet described United States Senator John McCain as "a key US war criminal". These are referred to in the further amended statement of claim (**FASOC**) as the **first comments**: J [18]-[19].

59 On 19 May 2017, Dr Anderson wrote to Professor Jagose. The letter concerned allegations against Mr Tharappel and the investigation of those complaints (the **first complaint**): J [20].

60 On 30 May 2017 the University sent to Dr Anderson a letter signed by Professor Jagose containing allegations that in making the tweets and posts Dr Anderson breached the University's Code of Conduct and Public Comments Policy (the **first allegations**). The letter directed Dr Anderson to refrain from "disclosing to, or communicating with, anyone, the contents of this letter, the Allegations or any information or documents relating to them, other than to members of your family (or support person), your professional adviser on the basis they provide you with an undertaking that they will comply with the above confidentiality direction or unless you are required to do so by law or with the prior written consent of the University": J [21]-[23].

61 Dr Anderson published a further post and tweet in response to the first allegations on 30 May 2017, the focus of which was "University of Sydney threatens to sack me for criticising the deceitful war propaganda of **News Ltd** journalists, and for showing that the university's latest guest **John McCain** is a key **al Qaeda** supporter" and that "University of Sydney policy says 'Staff and affiliates are encouraged to engage in debate on matters of public importance'. Apparently not!". These are referred to in the FASOC as the **second comments**: J [24]-[25]. He then sent an email on 31 May 2017 to the Department of Political Economy Board, Department of Political Economy Casual Tutors and Department of Political Economy Honorary Associates about "USyd management trying to gag anti-war academics" involving further details (the so-called **31 May email**): J [26]. He then sent an email to Professor Jagose on 6 June 2017 asking her to recuse herself from dealing with the first allegations (the so-called **second complaint** and **6 June email**): J [27]. Profesor Jagose responded on 8 June 2017: J [28]. The NTEIU supported Dr Anderson by letter to the University dated 9 June 2017: J [29]. On 23 June 2017 the University sent a letter to the NTEIU advising that the matters raised in Professor Jagose's letter dated 30 May 2017 would be referred to Professor Garton: J [30].

62 On 26 June 2017, the University sent a letter from Professor Garton to Dr Anderson with the subject line "Further Allegations Relating to Your Conduct" (the so-called **second allegations**): J [31]. The second allegations related to the post and tweet on 30 May 2017, the 31 May email, and the 6 June email and said these constituted a breach of the University's Code of Conduct and Public Comments Policy: J [32]. The letter also said:

> Tim, I remind you that the matters raised in this letter, and in the 30 May Letter, are **confidential**, and I direct you to refrain from disclosing to, or communicating with, anyone, the contents of this letter, the 30 May Letter, the Allegations, the Further Allegations, or any information or documents relating to them, other than to members of your family (or support person), your professional adviser on the basis they provide

> you with an undertaking that they will comply with the above confidentiality direction or unless you are required to do so by law or with the prior written consent of the University…
>
> I remind you that the University takes the need for confidentiality very seriously, and reserves the right to take disciplinary action if the confidentiality direction is not adhered to.

63 Dr Anderson responded to the first and second allegations on 5 July 2017: J [35].

64 On 2 August 2017, the University, by Professor Garton, sent to Dr Anderson a letter with the subject line "Re: Outcome – Allegations of Misconduct or Serious Misconduct". This letter concluded that the various allegations which had been set out in the first and second allegations letters had been made out. Professor Garton was satisfied that disciplinary action was appropriate and that the letter should be treated as a written warning in relation to Dr Anderson's conduct (the **first warning**): J [36].

65 On 21 April 2018, Dr Anderson delivered a PowerPoint presentation at a seminar titled "Reading Controversies", which he had organised (the **PowerPoint presentation**). The PowerPoint presentation contained an infographic which included what the parties described as an Israeli flag with a superimposed swastika (see the left hand side of the "infographic" in the paragraph below): J [39].

66 On 23 April 2018, Dr Anderson posted the slides from the PowerPoint presentation to his Facebook account, along with some comments. The infographic, described by the parties as the **third comments**, was as follows (J [41]):

67 On Sunday 22 July 2018, just before commencing annual leave, Dr Anderson posted on his Facebook account a photo referred to as the **lunch photo** (J [42]), shown below:

68 Mr Tharappel is second from the right. The patch on Mr Tharappel's shirt which is in Arabic says "Death to Israel". Other parts say "Curse the Jews" and "Victory to all Islam": J [220].

69 Dr Anderson was on approved annual leave between 23 and 30 July 2018. Between 31 July 2018 and 2 December 2018, Dr Anderson was on approved special study period leave. Between 3 and 10 December 2018, Dr Anderson was on approved annual leave: J [44].

70 On 2 August 2018, 7NEWS Sydney posted a video news story by Channel 7 reporter Mr Bryan Seymour about the lunch photo, focussing on the badge on Mr Tharappel's shirt and commenting on Dr Anderson. The story was titled "University student sparks outrage: A University of Sydney academic has outraged many in the Muslim and Jewish communities by wearing an offensive slogan". Among other things, Mr Seymour described Dr Anderson and Mr Tharappel as "fervent supporters of … Kim Jong Un": J [45].

71 On 3 August 2018, Dr Anderson:

(1) twice posted to his Facebook account:

> Colonial media promotes ignorance, apartheid and war. Channel 7's Bryan Seymour accuses Indian Australian student of 'racism' for siding with #Yemen and other Arab states against #ApartheidIsrael. Also lies about those in solidarity with #Korea #DPRK.
> https://m.facebook.com/story.php?story_fbid=2248128551877932&id=108878629136279

(2) tweeted on his Twitter account:

> Colonial media promotes ignorance, apartheid and war. Channel 7's Bryan Seymour accuses Indian Australian student of 'racism' for siding with #Yemen and other Arab states against #ApartheidIsrael. Also lies about those in solidarity with #Korea #DPRK . [Link attached to 7NEWS video story]

72 These were referred to in the FASOC as the **fourth comments**: J [47].

73 On 3 August 2018, Dr Anderson received a letter from the University, signed by Professor Jagose, which formally directed Dr Anderson to remove the lunch photo and the fourth comments from his social media accounts: J [48]. The letter also said:

> This letter is to be kept confidential and I especially require that you do not share this publicly or with any third party.
>
> Should you not comply with the directions in this letter, I note that disciplinary action may be taken against you.

74 Dr Anderson responded on 4 August 2018 saying (J [49]):

> I never respond favourably to secret demands and threats. You should know that you have no right to demand any censorship of my social communications. Your claim for secrecy of communications is also rejected.

75 Dr Anderson did not remove the lunch photo or the fourth comments: J [50].

76 On 10 August 2018, the University sent a letter from Professor Jagose to Dr Anderson with the subject line "Allegations Relating to Your Conduct". These were referred to in the FASOC as the **third allegations**. The third allegations related to the lunch photo and fourth comments and Dr Anderson not having deleted the same: J [51].

77 On 15 August 2018, Dr Anderson made a written complaint to the University's Director of Workplace Relations and Director of Safety, Health and Wellbeing making bullying and harassment allegations about the conduct of Professor Jagose (the so-called **third complaint**): J [53].

78 On 17 August 2018, Dr Anderson received an email from Michael Koziol, a journalist from Fairfax media about the University's investigation of Dr Anderson's conduct: J [54].

79 The same day Dr Anderson forwarded the email to Professor Jagose asking "Can i take it that someone in your team has provided information to journalists (see below) to smear me in the media?": J [55].

80 On 19 August 2018, the Sydney Morning Herald published an article by Mr Koziol entitled "Sydney Uni lecturer investigated for defending 'Death to Israel' badge": J [56].

81 On 20 August 2018, the University sent to Dr Anderson a letter signed by Professor Garton which stated that the "misconduct process" would be put on hold whilst Dr Anderson's bullying complaint against Professor Jagose was considered: J [57].

82 On 22 August 2018, Dr Anderson wrote to the University's Associate Director of Workplace Relations. This letter is described as the **fourth complaint**: J [58]-[59].

83 On 23 August 2018, Professor Garton sent an email to Dr Anderson denying anyone from the University had tried to "smear" Dr Anderson: J [60].

84 Dr Anderson responded on the same day saying "Dont [sic] be disingenuous. You know very well that that SMH story would not have run without that official statement": J [61].

85 On 24 August 2018 the NTEIU sent a letter to the University to the effect that the University should not have disclosed that Dr Anderson was being investigated for misconduct: J [62].

86 On 8 September 2018, Dr Anderson sent a concerns notice under the *Defamation Act 2005* (NSW) to the University's Vice Chancellor. This was described as the **fifth complaint**: J [63].

87 The University's Vice Chancellor responded on 14 September 2018 denying any defamation: J [64].

88 On 8 October 2018, Professor Garton sent a letter to Dr Anderson saying that the investigation into his complaints of bullying and harassment by Professor Jagose was completed and it had been determined that Dr Anderson's allegations could not be substantiated and that the "substance and fact of the investigation must be kept confidential": J [65].

89 Dr Anderson responded on 8 October 2018 requesting a full copy of the investigation report and saying "I will disregard your claims for secrecy in correspondence": J [66].

90 Professor Garton replied on 9 October 2018 saying (J [67]):

> I reaffirm that you are directed not to publish or disclose confidential information or correspondence relating to the bullying investigation, the misconduct process, or any other confidential information. Any breach of this direction may result in disciplinary action against you.

91 Professor Garton sent Dr Anderson a letter on 19 October 2018 (the **final warning**) advising that he was satisfied that the misconduct allegations against Dr Anderson had been largely substantiated, referred to the first warning, and said (J [68]-[69]):

> This letter constitutes a **final warning** that you must appropriately discharge your obligations pursuant to your contract of employment with the University, the Enterprise Agreement, the Code of Conduct and the Public Comment Policy going forward.

92 The letter referred to the PowerPoint presentation as posted on 23 April 2018 and said (J [70]):

> Given the period of time which had elapsed from when you had made the post and when it was referred to the University, a decision was made not to include it in the allegations. In the circumstances, the University will not raise this post with you formally. However, in my view, a reasonable person would regard the superimposition of a cropped Swastika over the Israeli flag as offensive.
>
> Please immediately add a disclaimer in any medium in which this post appears that the presentation is not connected in any way with the University of Sydney and remove any references to the University of Sydney from the relevant posts.

93 The letter referred to the lunch post (forming part of the allegations of misconduct), and said (J [71]):

> In my view a reasonable person is likely to find the Patch worn by Mr Tharappel and posted by you to be offensive and/or derogatory. This allegation is substantiated.

94 The letter referred to the posts about Mr Seymour on 3 August 2018 saying (J [72]):

> In my view, the statement made by you (and set out above) are, on any objective view, derogatory of Bryan Seymour and go beyond the expression of an opinion about the underlying issue.
>
> …
>
> This allegation is substantiated.

95 The letter referred to Dr Anderson's refusal to comply with the direction given by Professor Jagose on 3 August 2018 to remove the lunch photo and the fourth comments from his social media accounts, and said (J [73]):

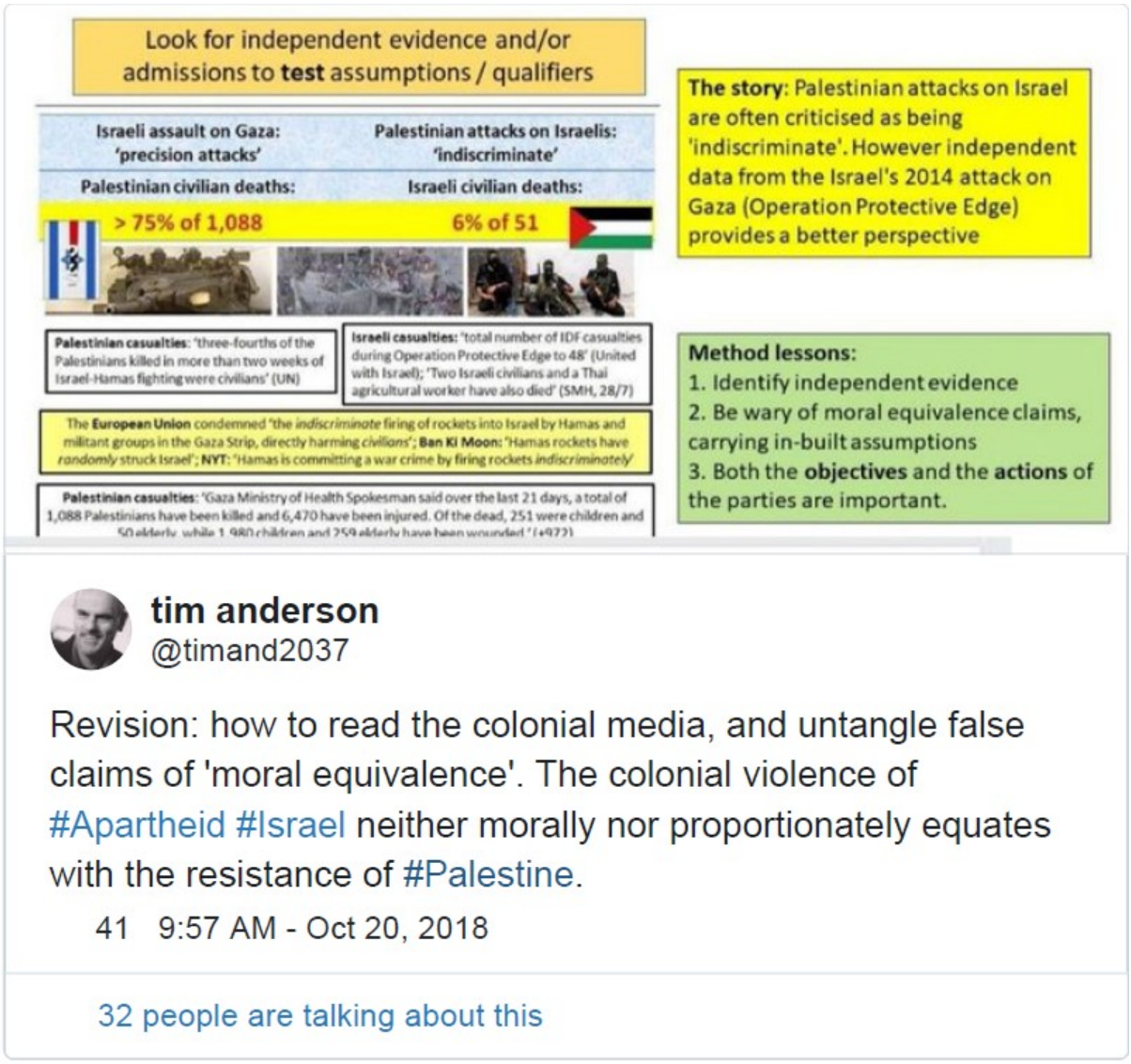
> Professor Jagose provided a lawful and reasonable direction to you, as someone in a supervisory position relating to your employment, that you remove posts that she considered had the potential to be in breach of University's expectation of employees under the *Code of Conduct* and *Public Comment Policy*. It was reasonable for her to issue that direction to you in circumstances where she had formed the view that the content of your posts was contrary to your obligations under the *Code of Conduct* and *Public Comment Policy*.
>
> You have admitted that you refuse to comply with Professor Jagose's direction.
>
> *Finding relating to Allegation 7*

The Allegation is substantiated.

96 Dr Anderson stated in his affidavit that, after receiving the final warning, he removed "the University of Sydney" from the "about" details of his Facebook and Twitter accounts: J [74].

97 On 19 or 20 October 2018, Dr Anderson posted an image from the PowerPoint presentation and tweeted that image on his Twitter account. These were referred to in the FASOC as the **fifth comments**. The Facebook post was (J [76]):

98 The Twitter post was (J [77]):



99 On 26 October 2018, the University sent a letter to Dr Anderson with the subject line "Further Allegations Relating to Your Conduct". The letter contained allegations that publication of the 19 or 20 October 2018 Facebook posts and Twitter tweets might constitute misconduct. These were referred to as the **fourth allegations**: J [79]. The letter said that the further allegations, if substantiated, would amount to "serious misconduct" and may justify the termination of Dr Anderson's employment: J [81]. The letter included an enlarged image of the Israeli flag from the Facebook posts and Twitter tweets as follows:

100 Dr Anderson responded on 26 October 2018 (the so-called **sixth complaint**): J [83].

101 The University suspended Dr Anderson on 3 December 2018 informing him that the fourth allegations had been found to be substantiated, saying (J [88]):

> I am satisfied that your conduct amounts to Serious Misconduct and is in breach of your obligations under the *University of Sydney Enterprise Agreement 2018 - 2021* (**Enterprise Agreement**), your contract of employment, the *Code of Conduct- Staff and Affiliates* and the *Public Comment Policy*.
>
> …
>
> I am proposing that the appropriate Disciplinary Action is the termination of your employment with the University due to your Serious Misconduct, particularly in the context of previous warnings issued on 2 August 2017 and 19 October 2018 in respect of similar conduct.
>
> You have the opportunity to have this proposed decision reviewed by a Review Committee in accordance with clause 460 of the Enterprise Agreement…

102 On 4 and 5 December 2018, Dr Anderson made posts and tweets to his Facebook and Twitter accounts: J [89]. Although not identified as such in the FASOC, these must be the so-called **sixth comments** referred to in paras 78, 79 and 80 of the FASOC. On 7 December 2018 the University sent a letter to Dr Anderson saying (J [89]):

I refer to my letter to you dated 3 December 2018 relating to the outcome of the further allegations about your conduct.

I have since become aware that on 4 December 2018 at approximately 12.55pm you made a post on your Facebook account (https://www.facebook.com/timand2037), as set out in **Annexure A**. The post refers to the proposal to terminate your employment, and then subsequently posts screenshots of the text of my 3 December 2018 letter to you (not including attachments/annexures) in the comments on that post.

I have also become aware that on 5 December 2018 at approximately 8.51pm you published a post on your Twitter account (https://twitter.com/timand2037), as set out in **Annexure B**. The post names the Fairfax media journalist who published a story commenting on your post and shows the statement you made on your Facebook account referred to above.

I consider your posts on social media, especially the fact that you posted my 3 December 2018 letter to you in full on social media as inappropriate and contrary to my previous statements that you are not to post University letters on social media.

I have confirmed in previous correspondence to you on 19 October 2018, and separate correspondence to the NTEU, that you are able to confirm the fact of the allegations more broadly, but not to disclose the substance of them. I have also confirmed that the contents of correspondence such as private and confidential University letters are not to be posted on social media.

In my letter to you dated 26 October 2018, I confirmed that the Allegations of misconduct against you are confidential and they were not to be discussed with anyone other than a support person, representative or personal adviser (such as a lawyer, doctor or counsellor) or disclosed in any manner or form on social media.

You were told that you "must not victimise or otherwise subject any person, to detrimental action as a consequence or that person raising, providing information about, or otherwise being involved in the resolution of a complaint, including **the disciplinary process**." This includes showing the names of individuals involved in disciplinary processes, such as your managers and those in support functions at the University.

You were also informed that it is open to the University to "take disciplinary action against you if you breach confidentiality, or knowingly become involved in victimisation or other detrimental action."

I understand that you have requested a review of the proposal to terminate your employment, as you are entitled to do. I respect your decision and will respect the outcome of that process.

Whilst that process is ongoing, the University will not take any further action relating to your disclosure of the letter on social media. However, the University reserves its rights to review this matter further after the review process has completed.

I confirm that you are directed to specifically not post this letter on social media or to disclose its contents more broadly, save for the letter or its contents being disclosed to a support person, representative or personal adviser (such as a lawyer, doctor or counsellor), or by either you or the University as part of the review of the proposal to terminate your employment.

103 On about 5 December 2018, Dr Anderson requested that a review committee review the proposed termination of his employment. A review committee was convened on 17 December

2018: J [90]. Following the making of submissions and a hearing the review committee published its findings on 8 February 2019. Two members of the review committee endorsed the termination of Dr Anderson's employment and one did not: J [90]-[91].

104 The University terminated Dr Anderson's employment on 11 February 2019: J [92].

5.3 The Enterprise Agreements

105 The 2013 and 2018 agreements are in the same terms, albeit with different clause numbers. Relevant provisions of the 2018 agreement include (J [95]-[98]):

> **DEFINITIONS**
>
> 3 In this Agreement:
>
> …
>
> **Code of Conduct** means the University's *Code of Conduct - Staff and Affiliates* or *Research Code of Conduct*, as amended or replaced from time to time.
>
> …
>
> **Misconduct** means conduct or behaviour of a kind which is unsatisfactory. Examples of conduct or behaviour which may constitute Misconduct include:
>
> (a) a breach of a Code of Conduct (as defined in this clause); or
>
> (b) a refusal or failure to carry out a lawful and reasonable instruction.
>
> …
>
> **Serious Misconduct** means:
>
> (a) serious misbehaviour of a kind that constitutes a serious impediment to the carrying out of a staff member's duties or to other staff carrying out their duties; or
>
> (b) a serious dereliction of duties.
>
> Examples of conduct which may constitute Serious Misconduct are:
>
> (a) a serious breach of a Code of Conduct (as defined in this clause);
>
> (b) theft;
>
> (c) fraud;
>
> (d) assault;
>
> (e) serious or repeated bullying or harassment, including sexual harassment;
>
> (f) persistent or repeated acts of Misconduct; or
>
> (g) conviction of an offence that constitutes a serious impediment to the carrying out of a staff member's duties.
>
> …

RELATIONSHIP TO OTHER AGREEMENTS, AWARDS AND POLICIES

13 This Agreement is a closed and comprehensive agreement and wholly displaces any awards and agreements which, but for the operation of this Agreement, would apply.

14 Policies, guidelines, procedures and Codes of Conduct of the University, whether referred to in this Agreement or not, do not form part of this Agreement. The University will consult with the Joint Consultative Committee and through the University's collegial processes in relation to the introduction or amendment of policies, guidelines, procedures and Codes of Conduct that have a significant and substantial impact on matters pertaining to the employment of staff under this Agreement, including for example, policies dealing with recruitment and selection, performance planning and development, performance management and academic promotion.

…

PART G: MANAGEMENT OF WORK AND PERFORMANCE

PERFORMANCE OF WORK

305 Staff may be directed by the University to carry out such functions and duties as are consistent with the nature of their appointment, classification/level and employment fraction, and are within their skill, capability and training and are without risks to health and safety. Other factors to be taken into account when assigning work will include:

(a) the importance of maintaining an appropriate balance between work and family life;

(b) provision of appropriate opportunities for career development;

(c) the working hours specified in this Agreement; and

(d) ensuring equity within each work unit.

WORKPLACE CONDUCT

306 Staff must comply with the Codes of Conduct (as defined in **clause 3**).

307 Workplace bullying is unacceptable behaviour and is defined as repeated, unreasonable behaviour directed towards a staff member or a group of staff that creates a risk to health and safety. It does not include reasonable management action or practices.

308 The University is committed to eliminating workplace bullying and to providing staff with information and training about this. This commitment is supported by the *Bullying, Harassment and Discrimination Prevention Policy* and the *Bullying, Harassment and Discrimination Resolution Procedures*, which provide a framework for managing any incidents of workplace bullying in a fair and timely manner. These policies will remain in force and will not be changed without consultation with the Unions through the normal process and through the Joint Consultative Committee, including consultation over the final form of the policy.

309 Staff must co-operate with the University and comply with all reasonable directions of the University directed at preventing, responding to or minimising the risk of workplace bullying.

…

312 Staff who want to make a complaint of bullying should do so in accordance with the *Bullying, Harassment & Discrimination Resolution Procedures*. In these circumstances, the University will appropriately deal with the complaint, including:

(a) conducting any preliminary assessment of alleged bullying in a timely manner;

(b) where it is determined by the University that an investigation is appropriate, an Investigator will be appointed by the University;

(c) taking reasonable steps to secure the safety of the complainant, the respondent and other impacted staff during the investigation and resolution; and

(d) if it is determined that bullying has occurred, the University will take reasonably practicable steps and actions to address the bullying.

313 Where a staff member does not accept the outcomes of a preliminary assessment or the actions taken under **clause 312(d)**, they may have the matter referred to the Delegated Officer (Staffing) for a review.

314 Nothing in this Agreement prevents a staff member from applying to the Fair Work Commission at any time for Anti-Bullying orders under the Fair Work Act.

INTELLECTUAL FREEDOM

315 The Parties are committed to the protection and promotion of intellectual freedom, including the rights of:

(a) Academic staff to engage in the free and responsible pursuit of all aspects of knowledge and culture through independent research, and to the dissemination of the outcomes of research in discussion, in teaching, as publications and creative works and in public debate; and

(b) Academic, Professional and English Language Teaching staff to:

(i) participate in the representative institutions of governance within the University in accordance with the statutes, rules and terms of reference of the institutions;

(ii) express opinions about the operation of the University and higher education policy in general;

(iii) participate in professional and representative bodies, including Unions, and to engage in community service without fear of harassment, intimidation or unfair treatment in their employment; and

(iv) express unpopular or controversial views, provided that in doing so staff must not engage in harassment, vilification or intimidation.

316 The Parties will encourage and support transparency in the pursuit of intellectual freedom within its governing and administrative bodies, including through the ability to make protected disclosures in accordance with relevant

legislation.

317 The Parties will uphold the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards.

…

MISCONDUCT AND SERIOUS MISCONDUCT

384 Where a staff member's Supervisor or a relevant Delegate becomes aware of allegations that the staff member may have engaged in Misconduct or Serious Misconduct:

(a) The Supervisor or relevant Delegate may undertake or arrange such preliminary investigations or enquiries as they consider necessary to determine an appropriate course of action to deal with the matter;

(b) The Supervisor or relevant Delegate may, in the case of a less serious matters, seek to resolve the matter directly with the staff member concerned through guidance, counselling, warning, mediation or another form of dispute resolution;

(c) In cases other than those which are dealt with under **clause 384(b)**, the staff member will be provided with allegations in sufficient detail to ensure that they have a reasonable opportunity to respond. The staff member will be given ten days to respond to the allegations.

(i) If the staff member admits the allegations in full, the relevant Delegate may take Disciplinary Action.

(ii) In other cases the relevant Delegate may:

(A) proceed to deal with the matter under clause 384(d); or

(B) if the Delegate considers it appropriate to do so, appoint an Investigator to investigate the allegations and report to the relevant Delegate on their findings of fact and any other matters requested by the relevant Delegate. The Investigator will determine the procedure to be followed in conducting the investigation, subject to the requirement that such procedure must allow the staff member concerned with a reasonable opportunity to respond to the allegations against them, including any new matters, or variations to the initial allegations resulting from the investigation process. The Investigator will provide a written report to the relevant Delegate and a copy to the staff member.

(d) Where the relevant Delegate is satisfied that a staff member has engaged in Misconduct or Serious Misconduct, the relevant Delegate may take Disciplinary Action against the staff member, provided that:

(i) before taking Disciplinary Action the relevant Delegate must be satisfied the staff member has been given a reasonable opportunity to respond to the allegations against them;

(ii) in any case of Disciplinary Action other than counselling, a direction to participate in mediation or an alternative form of dispute resolution or a written warning, the staff member must be given notice of the proposed Disciplinary Action and an

opportunity to have the allegations examined by a Review Committee in accordance with **clause 460**, A request for a review must be made within five working days of receipt of notice of the proposed Disciplinary Action; and

(iii) a staff member's employment may be terminated only if they have engaged in Serious Misconduct, as defined in **clause 3** of this Agreement …

5.4 Code of Conduct

106 The University's Code of Conduct includes these provisions (J [99]):

> **1 Principles**
>
> This Code has been formulated to provide a clear statement of the University's expectations of its staff and affiliates in respect of their professional and personal conduct.
>
> The Code reflects, and is intended both to advance the object of the University, namely the promotion of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence, as well as to secure the observance of its values of:
>
> - responsibility and service through leadership in the community;
> - quality and sustainability in meeting the needs of the University's stakeholders;
> - merit, equity and diversity in our student body;
> - integrity, professionalism and collegiality in our staff; and
> - lifelong relationship and friendship with our alumni.
>
> These values must inform the conduct of staff and affiliates in upholding and advancing:
>
> - freedom to pursue critical and open inquiry in a responsible manner;
> - recognition of the importance of ideas and ideals;
> - tolerance, honesty, respect, and ethical behaviour; and
> - understanding the needs of those we serve.
>
> …
>
> **4 Personal and Professional Behaviour**
>
> In performing their University duties and functions, the behaviour and conduct of staff and affiliates must be informed by the University's object and its values and the principles enunciated in Part 1 above. All staff and affiliates must:
>
> - maintain and develop knowledge and understanding of their area of expertise or professional field;
> - exercise their best professional and ethical judgement and carry out their duties and functions with integrity and objectivity;
> - act diligently and conscientiously;

- act fairly and reasonably, and treat students, staff, affiliates, visitors to the University and members of the public with respect, impartiality, courtesy and sensitivity;
- avoid conflicts of interest;
- maintain a co-operative and collaborative approach to working relationships; and
- comply with all applicable legislation, industrial instruments, professional codes of conduct or practice and University policies, including in relation to:
    - the conduct of research;
    - confidentiality and privacy of information;
    - equal opportunity;
    - health and safety policies and practices;
    - efficient and effective use of University resources including information communication and technology resources; and
    - protection of the University's interests in intellectual property arising from its teaching and research.

…

9 Public Comment

Staff and affiliates are encouraged to engage in debate on matters of public importance.

However, staff and affiliates who make public comment or representations and, in doing so, identify themselves as staff or affiliates of the University must comply with the University's *Public Comment Policy*.

5.5 Public Comment Policy

107 The University's Public Comment Policy included these provisions (J [100]):

Vision

The University actively encourages and facilitates high quality contributions by staff to public debate and deliberation on issues spanning local, national and international boundaries.

The University's Charter of Academic Freedom, in particular, provides that the University "supports the responsible transmission of … knowledge ... openly within the Academy and into the community at large, in conformity with law and the policies and obligations of the University".

Purpose

The purpose of this policy is to outline the responsibilities and obligations of staff when making public comment and simultaneously identifying themselves as staff members of the University.

The policy differentiates between academic freedom of staff as members of a learned profession and their personal or professional comments as University officers.

Public Comment policy applies to all full-time, part-time and casual staff of the University of Sydney, including staff on fixed term contracts and holders of Honorary, Adjunct or Clinical titles.

Scope

Academic staff are encouraged to contribute to public comment in their area of expertise. The University encourages the ideal of the "public academic" willing and able to comment on matters.

All staff have a professional responsibility to uphold the outstanding reputation of the University in the community and to exercise good and ethical judgement in any public comment.

All staff have an obligation to respect the confidentiality and privacy of information entrusted to them in the course of their employment.

…

Guidelines

a) The University encourages academic staff to participate in public debate and be available to the media for comment in their field of expertise.

b) Staff contributing to public commentary should identify themselves using their University title, appointment and/or qualifications when they are writing or speaking publicly on a matter within their academic or professional field of expertise or specialisation.

c) Statements should be accurate, professional and exercise appropriate restraint.

…

f) When commenting in public, staff are expected to act in good faith and not misrepresent their expertise.

…

h) Staff should maintain the highest professional and ethical standards when they associate themselves with the University in public statements. Any public statement made by a member of staff should not bring the University into disrepute.

i) Staff should be aware that the University may take disciplinary action where this policy or the Code of Conduct have been breached.

…

l) If a member of Staff is concerned that a statement they have made or are about to make may be defamatory or if they receive a claim or an intimation of a claim that a statement which they have made is alleged to be defamatory they should contact the Office of General Counsel [redacted phone number] for advice as to the options which are available to them.

5.6 Appellants' contentions below

108 The primary judge recorded the appellants' contentions as he understood them to be. Certain passages are shown in bold below as they are relevant to the University's argument that the

appellants were seeking to run a different case in the appeal from that which they ran below. References to "applicants" in this section have been replaced with "appellants".

109 According to the primary judge, the appellants contended that **cl 315** of the 2018 agreement created "an enforceable right to intellectual freedom" and that **any conduct which was properly classified as an exercise of that right** was incapable of constituting "misconduct" or "serious misconduct" within the meaning of cl 3 of the 2018 agreement and, accordingly, was not able to be the subject of action taken under cl 384 of the 2018 agreement: J [101]. It was submitted that cl 315, properly construed, created legally enforceable rights of a kind referred to therein and that the ability to exercise those rights was limited only to the extent provided in the clause itself: J [103].

110 According to the primary judge, the respondents contended that **cl 315** was **incapable of being contravened** because it did not create rights; rather, it was a clause which was in the nature of a statement of commitment or purely aspirational and did "not confer an immunity from the operation of the Code of Conduct and/or from any lawful right of the University to impose any sanction upon [Dr Anderson] or give him directions as to his conduct": J [111].

5.7 Ridd

111 The primary judge dealt with *James Cook University v* ***Ridd*** [2020] FCAFC 123; (2020) 382 ALR 8 at J [115]-[121]. The primary judge noted that cl 14(1) of the enterprise agreement in *Ridd* was in terms which included that James Cook University (**JCU**) "is committed to act in a manner consistent with the protection and promotion of intellectual freedom within the University and in accordance with JCU's Code of Conduct": J [115]. Clause 14(2) provided that intellectual freedom includes the right of staff to, amongst other things, "[p]articipate in public debate and express opinions about issues and ideas related to their respective fields of competence". By cl 14(3) staff had "the right to express unpopular or controversial views. However, this comes with a responsibility to respect the rights of others and they do not have the right to harass, vilify, bully or intimidate those who disagree with their views": J [116].

112 The primary judge observed that the majority in *Ridd* noted at [95] to [97] that there is no common understanding across the university sector as to the content of any principle of intellectual freedom or as to where the bounds of any such freedoms should be set: J [120].

113 The primary judge said that whilst the reasoning of the majority in *Ridd* (Griffiths and SC Derrington JJ) and of Rangiah J (dissenting in the result) is instructive, the ultimate conclusion

in *Ridd* turned on the particular clauses in that case and was by no means determinative of the issues raised in the present case: J [121].

5.8 Primary judge's consideration

5.8.1 Construction issues

114 Having dealt with the relevant principles of construction at J [122]-[125], about which there is no dispute, the primary judge considered the competing contentions. Insofar as relevant to the grounds of the appeal, the primary judge concluded as follows (J [140]):

(1) clause 315 is not capable of being contravened because it does not create any enforceable obligation;

(2) clause 317 does create obligations enforceable according to its terms but does not give rise to an unfettered or unqualified enforceable right to exercise intellectual freedom of a kind which falls within cl 315. Rather, so far as it concerns the exercise of the right to intellectual freedom, cl 317 requires that the manner in which the right is "practiced" must be in accordance with "the highest ethical, professional and legal standards";

(3) an exercise of intellectual freedom can constitute "misconduct" or "serious misconduct" within the meaning of cl 3 of the 2018 agreement. Clause 315 does not recognise, and cl 317 does not give rise to, "rights" the exercise of which cannot constitute "misconduct" or "serious misconduct" or which cannot be the subject of the processes contemplated by cl 384;

(4) where it is asserted that particular conduct constitutes the exercise of intellectual freedom within the meaning cl 315, the question whether the conduct involves "misconduct" or "serious misconduct", if it arises, must be answered by reference to all of the circumstances including the fact that cl 317 creates an obligation to "uphold the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards". Those standards might be reflected in Codes of Conduct with which staff must comply by reason of cl 306; and

(5) clause 315 does not identify as part of the concept of intellectual freedom a general and unfettered "right" to make whatever comment one might wish to make on the basis that the making of a comment involves an intellectual process. The concept of "intellectual freedom" as used in the 2018 agreement is not the same as free speech. It is significantly more limited.

115 The primary judge said this at J [141]:

> **The [appellants] did not plead a case based on cl 317 creating an enforceable right to intellectual freedom**. In its submissions, the University recognised that cl 317 created obligations which would be inconsistent with the unfettered right to intellectual freedom which the [appellants] contended was created by cl 315. **If the [appellants] had pleaded a case based on breach of cl 317, the result would not have been any different**.
>
> (Emphasis added).

5.8.2 The role of the Court according to the primary judge

116 The primary judge also rejected the appellants' argument that the Court had to reach its own conclusion about whether Dr Anderson had engaged in misconduct or serious misconduct with the consequence that, if the Court disagreed with the University in that regard, the University would be in breach of cl 384 of the 2018 agreement. The primary judge said that (J [143]-[150]):

(1) the appellants did not plead a case directed to the decision-maker's satisfaction about the conduct amounting to "misconduct" or "serious misconduct";

(2) there was no real attack in cross-examination on Professor Garton being satisfied that the relevant conduct was misconduct or serious misconduct (as applicable);

(3) in any event, a breach of cl 384 is not established by convincing a Court in civil remedy proceedings asserting a contravention of s 50 of the Fair Work Act that, had the Court been in the position of the employer, it would not have been satisfied on the merits that the relevant conduct amounted to "misconduct" or "serious misconduct". If it were otherwise, disciplinary action taken on a perfectly reasonable and open view that certain conduct constituted misconduct or serious misconduct would amount to a contravention of s 50 of the Fair Work Act on the happenstance that the Court took a different view on the merits which was equally open and reasonable; and

(4) clause 384 is engaged on the satisfaction of the decision-maker. It is not engaged only once there is in fact serious misconduct (or, presumably, misconduct).

5.8.3 The first warning

117 As to the specific allegations the subject of the warnings and which led to the termination of Dr Anderson's employment, the primary judge reasoned as follows (again, confined to the matters relevant to the grounds in the notice of appeal, with relevant parts shown in bold):

(1) it is by no means clear that the first and second comments were the exercise of "intellectual freedom" falling within cl 315(a) and (b)(iv) of the 2018 agreement: J [160];

(2) however, **assuming for the purposes of argument that the first and second comments were exercises of intellectual freedom** within cl 315 (J [161]):

(a) the imposition of the first warning did not breach cl 315 (cl 254 of the 2013 agreement) because cl 315 did not create a legally enforceable right to exercise intellectual freedom and did not have the effect that anything that could be classified as an exercise of intellectual freedom falling within cl 315 could not constitute "misconduct": J [162];

(b) neither cll 315 nor 317 immunise an exercise of the "rights" referred to in cl 315 so as to prevent the University from engaging the processes contemplated by cl 384 (cl 309 of the 2013 agreement) or from reaching a conclusion that it was satisfied that conduct purportedly or in fact constituting an exercise of intellectual freedom within cl 315 was "misconduct": J [163]; and

(c) by reason of cl 317 (cl 256 of the 2013 agreement) an exercise of intellectual freedom must be practiced in accordance with the "highest ethical, professional and legal standards". **It is open to the University to invoke the processes contemplated by cl 384 and to be satisfied that there has been "misconduct" where, in the context of an exercise of intellectual freedom, the standards required by cl 317 or other relevant clauses of the relevant enterprise agreement have not been met**: J [164], and

(3) accordingly, the University did not breach cl 315, did not fail to comply with cl 384 and did not contravene s 50 of the Fair Work Act in relation to the first warning: J [165].

118 It is convenient to refer to the three reasons set out in (2)(a)-(c) of the above paragraph as the **three reasons**, as these reasons re-appear in subsequent parts of the primary judge's reasoning.

5.8.4 The final warning

119 The primary judge reasoned in these terms (with relevant parts shown in bold):

(1) the appellants submitted that the lunch photo was not conduct engaged in by Dr Anderson in the course of his employment, and was therefore not capable of constituting misconduct within the meaning of cl 3 of the 2018 agreement: J [212];

(2) the appellants submitted that the fourth comments were acts of intellectual freedom protected by cl 315 of the 2018 agreement and were therefore not capable of constituting misconduct and, thereby, Dr Anderson did not engage in misconduct within the meaning of cl 3 of the 2018 agreement and, consequently, the University did not have power to discipline him under cl 384 of the 2018 agreement: J [213];

(3) as to the lunch photo, it is sufficient to note that the view taken by Professor Garton was open (that the conduct amounted to misconduct) and that his actually being satisfied was not directly challenged or shown to be affected by some vitiating error: J [227];

(4) **if it is assumed that the fourth comments could be the exercise of intellectual freedom** (J [214]) then, because of the three reasons (J [215]-[217]), the University did not breach cl 315, did not fail to comply with cl 384 and did not contravene s 50 of the Fair Work Act in relation to the final warning;

(5) in any event, as to the fourth comments, it is unnecessary for the Court to state what conclusion it would have reached as to whether the relevant posts amounted to misconduct on the basis that the conduct was "unsatisfactory" and/or because it breached the Code of Conduct. **It is sufficient to note that the view taken by Professor Garton was open** and that his actually being satisfied was not directly challenged or shown to be affected by some vitiating error: J [233];

(6) as to the refusal of Dr Anderson to remove the fourth comments from his social media accounts, the appellants submitted that the instruction to do so was not lawful or reasonable – the lunch photo was not connected to Dr Anderson's employment and the fourth comments did not constitute misconduct: J [234];

(7) the directions to remove the posts were lawful:

   (a) the posting of the lunch photo to the Facebook account which identified Dr Anderson as employed by the University and which was used by him, amongst other things, to post commentary connected with his areas of academic interest was sufficiently connected to Dr Anderson's employment: J [236]; and

   (b) **it was open to the University to conclude that posting of the Seymour posts was misconduct** and to give a direction that they be removed: J [237], and

(8) accordingly, the University did not breach cl 315, did not fail to comply with cl 384 and did not contravene s 50 of the Fair Work Act in relation to the final warning: J [238].

5.8.5 Termination

120 The primary judge reasoned as follows (with relevant parts shown in bold):

(1) the final warning issued to Dr Anderson on 19 October 2018 recorded that the University had become aware of the teaching materials posted to Dr Anderson's Facebook account. The final warning stated that, in Professor Garton's view, a reasonable person would regard the superimposition of a cropped swastika over the Israeli flag as offensive and directed Dr Anderson to add disclaimers in any medium in which the post appears that the presentation was not connected in any way with the University and to remove any references to the University from the posts: J [251];

(2) on 19 or 20 October 2018, following receipt of the final warning, Dr Anderson posted to his Facebook and Twitter accounts the slide that the University had stated it considered offensive (the fifth comments). This gave rise to the "fourth allegations": J [252];

(3) the real issue is whether the posting of the infographic on 19 or 20 October 2018 (fifth comments) constituted the exercise of intellectual freedom: J [254];

(4) **the fifth comments were not a genuine exercise of intellectual freedom in the senses given in cl 315(a) or (b)(iv) of the 2018 agreement**, being the clauses upon which the appellants relied, but were intended by Dr Anderson as an assertion of an unfettered right to exercise what he considered to be intellectual freedom, intended to convey that Dr Anderson could post such material if he wanted and the University had no right or entitlement to prevent him from doing so, and deliberately provocative: J [255]-[256];

(5) **even if the fifth comments were a genuine exercise of intellectual freedom in the senses given in cl 315(a) or (b)(iv), it would not matter to the result** (J [257]) because the three reasons applied: J [258]-[260];

(6) **the appellants did not establish that Professor Garton was not satisfied that the conduct engaged in by Dr Anderson, relevant to termination, was "serious misconduct" or that his satisfaction was in some way vitiated or not open**. No such case was put to Professor Garton: J [263];

(7) a refusal to follow lawful directions, with the result that the employments duties are not carried out in a way which the employer can lawfully direct that they be carried out, **is capable of being** "serious misbehaviour of a kind that constitutes a serious impediment to the carrying out of a staff member's duties": J [265];

(8) the University's letter of 19 October 2018 included a direction that Dr Anderson add a disclaimer to any post in which the fifth comments appeared that the presentation is not connected in any way with the University of Sydney and remove any references to the University of Sydney from the relevant posts and said he must also make it clear in any future posts relating to the Centre for Counter Hegemonic Studies that it is not associated with, or endorsed by, the University of Sydney in any way, consistent with guideline (e) of the Public Comment Policy: J [266]. However (J [267]):

   (a) Dr Anderson did not add a disclaimer to the Facebook post;

   (b) the Facebook account and linked articles or pages made it apparent that Dr Anderson was connected with the University of Sydney and with the Centre for Counter Hegemonic Studies, including a link to an article posted on the Centre for Counter Hegemonic Studies website;

   (c) the "About" page of the Centre for Counter Hegemonic Studies website indicated that Dr Anderson was the Director of that Centre and that he was from the University of Sydney. There was nothing on that page or the Facebook account to indicate that the Centre was "not associated with, or endorsed by, the University of Sydney";

(9) in the circumstances of this case, which included that Dr Anderson had refused to follow lawful directions and where it would be reasonable to infer that he would continue to refuse to follow lawful directions, **it was reasonably open for Professor Garton to conclude that the making of the fifth comments was such as to constitute "serious misconduct"**: J [268]; and

(10) the University did not breach cl 315, did not fail to comply with cl 384 and did not contravene s 50 of the Fair Work Act in the ways contended in relation to the termination of Dr Anderson's employment: J [269].

6. Alleged change in the appellants' case before the primary judge

121 As noted, the parties made further written submissions after the hearing of the appeal to deal with the dispute about the case which the appellants ran before the primary judge.

6.1 The University's submissions in the appeal

122 In oral submissions during the appeal the University contended that the appellants' case before the primary judge had been that if Dr Anderson merely asserted that he was exercising intellectual freedom in accordance with cl 315 then he could not be engaged in misconduct or serious misconduct. As the University put it in its oral submissions in the appeal:

> - there has never been a case advanced, either in the notice of appeal or below, that the court should, itself, determine whether misconduct occurred;
> - the way in which the case was conducted below raised no issue of questioning whether or not there was a role for the court in determining or being satisfied that there was misconduct or serious misconduct;
> - [that the primary judge had to] form a sense of whether the conduct was misconduct or serious misconduct was no part of the cases at all;
> - the way in which the case was pleaded didn't raise any issue that the court had to engage itself in making any decision as to whether or not the conduct comprising the making of the first warning, the final warning, or the termination was conduct that satisfied that definition of misconduct or serious misconduct in the enterprise agreement;
> - this case was never run like an unfair dismissal where the court or tribunal was asked to determine questions of whether the conduct in issue constituted misconduct or serious misconduct. The whole of the case put below proceeded on a construction of clause 315, conferring a right on Dr Anderson that had the effect of immunising him from any misconduct, investigations, any misconduct finding or any disciplinary action as described in the enterprise agreement being taken against him. It was on that basis that the claim put against the [University] was that it had contravened clause 315 and the effect of 315 was to create a complete immunity from the [University] taking any actions. That's the way in which the matter was presented;
> - his Honour, at no point, saw or understood that it was his role to substitute the decision-making of the – Professor Garton or Professor Jagose in relation to each of the first final of termination decisions;
> - [the appellants' case below was that] if Dr Anderson could personally characterise his conduct as an exercise of intellectual freedom, then he was absolved from his obligations as an employee and could act in a way that he was immune from any investigation or sanction;
> - his [Dr Anderson's] argument was that if he determined that clause 315 had application to him, then he had a cloak of immunity.

123 In their further written submissions the University acknowledged that the appellants' case before the primary judge had identified the task for the Court as determining whether the relevant conduct of Dr Anderson was an exercise of a right of intellectual freedom, but also observed that the appellants had put that:

> … it was for Dr Anderson to determine whether he was exercising his right of intellectual freedom and how he would exercise that right, subject only to the in-built

limitations of cl 315 (see, **for example, T 299/8 to 25; 287/46 to 288/4, 14/13 to 19**).

124 Accordingly, the first proposition of the University, in summary, is that the appellants contended below that it was for Dr Anderson and not the Court to determine if his conduct constituted the exercise of a right of intellectual freedom (referred to below as **the role of the Court issue**).

125 The University also said that in their oral submissions in the appeal the appellants put a different case from that put before the primary judge about the role of cl 317 of the 2018 agreement. In oral submissions in the appeal the University said:

- that was not the way the argument was put below. Certainly, no reliance was placed on clause 317 having any operative effect in the sense that clause 317 was capable of being contravened by the [University]. Where my learned friend's approach is a significant departure is, first of all, the acceptance that the effect of clause 315 is not a clause that creates a complete cloak of immunity;
- the third very significant departure, in my respectful submission, is the contention that's now put that the approach the court should have taken below was to satisfy itself, not just simply accept that the decision-maker was satisfied, but had to go the further step of the court itself being satisfied that, first of all, clause 315 was engaged, and secondly, given the nature of the way in which clause 315 was engaged, that then read with [clause] 317, capable of holding the [University] to a contravention…;
- We understand Mr Walker's reframing of the arguments to include an abandonment of the contention that clause 315 creates a cloak of immunity, and in effect, sterilises the [University's] rights in relation to taking any action for misconduct … it's accepted that the clause has to be read and construed in the context of the whole of the enterprise agreement;
- We have never shied away from clause 317 having some operative work to do … But importantly to the practice of intellectual freedom, clause 317 is much broader than clause 315, and clause 317 commits to upholding the practice of intellectual freedom, but it does so in couching the way in which that is to be done. [Clause] 317 does not attach to the content of intellectual freedom, but it attaches to the manner – the exercise of intellectual freedom. And that has to be informed and done in accordance with ... and professional and legal standards.
- There was no reliance on clause 317 – and I will put it crudely: the case put against us is that clause 315 created an immunity for Dr Anderson on whatever he sought to assert to be his intellectual freedom … but his argument was if he was covered by [clause] 315, then that was the end of it. It trumped – I mean, even that word "trumped" was used. His Honour asked the question in the proceedings below to the [appellants], "Do you say that clause [315] trumps 306?". That was the way the case was put, is that clause 315 lifted out and rose above everything else in the agreement because it created this complete cloak of immunity;
- That case is now abandoned, but that has to form the context in understanding how his Honour approached the case as it was advanced below;

- in terms of what can be a contravention of the promises in the agreement, the promise is, if I may use that expression, the promise is to uphold the principle and practice of intellectual freedom in accordance with the highest ethical professional and legal standards;

- We said that clause 315 cannot be read or considered in isolation of [clause] 317. [Clause] 317 necessarily requires attention to the exercise of that intellectual freedom by reference to the highest ethical, professional and legal standards and our contention was that the expressions "ethical and professional standards" included standards identified in this enterprise agreement and also identified in the codes of conduct which are incorporated into the definition of misconduct and serious misconduct. That's the way in which we put the case.

126 When asked whether the University intended to address the case as put for the appellants in the appeal, that it was for the Court to determine if Dr Anderson's conduct engaged cl 315 (even if was a new case because of the reliance on cl 317), senior counsel for the University said:

> No, I'm not – no, your Honour, I'm not going to address that because that's a materially different case to the one that was put below and raised on this appeal. And I will make a submission that that – if that case is allowed to proceed, that has significant prejudicial consequences to our client in terms of the way in which the case was run below, how the evidence was dealt with and the approach taken by his Honour on – given the parameters of this case. Puts it materially differently. It wasn't – there are numerous amendments to these pleadings. It was open to the [appellants] to advance the case as your Honour describes, but that is not the way in which the case was presented. And in that respect, the [University] has always accepted that clause 317 has work to do, but it does not accept and submit on the proper construction of clause 315 that the language in [clause] 315 is capable of having sufficient clarity and definition to be an obligation which, if breached, could give rise to a pecuniary penalty by virtue of the section 50 of the Fair Work Act. That's the context in which the question of construction has to be advanced.

127 When asked if the University's position was that cl 317 was capable of being contravened by the University, senior counsel for the University answered "yes". It is important to recognise that this answer involves a fundamental change to the University's primary position before the primary judge.

128 As will be explained, before the primary judge, the respondents' primary case was that the clauses (cl 315 in particular, but also cl 317) were not capable of being contravened (that is, as the respondents put it, there was no enforceable right but, rather, only a commitment which had to be practised in accordance with the limitations in both cll 315 and 317). The respondents' alternative case was that if, contrary to their primary case, the clauses (cl 315 in particular, but also cl 317) did involve an enforceable right capable of contravention, then that right had to be exercised in accordance with cl 317 and the Code of Conduct.

129 The fact that the University now accepts that cl 317 is capable of being contravened exposes the aridity of the debate before the primary judge about whether cl 315, in and of itself, involves

an enforceable right which could only be exercised in accordance with cl 317 or involves a mere commitment. Clause 315 could never be construed in isolation. It always had to be construed in context, including cll 316 and 317. Under these provisions, intellectual freedom is a right, a duty and an aspiration. The relevant rights are in cl 315, as the appellants submitted to the primary judge. But they are rights qualified by and subject to the co-extensive rights and duties in cll 316 and 317. This is why, as a matter of forensic logic, the appellants having pleaded exercise of the right in accordance with cl 315, it was for the respondents to plead that any such exercise had to being accordance with cl 317. The respondents did not so plead, but did put this to the primary judge.

130 Further, the summary of the respondents' own case before the primary judge set out in the paragraph above (which will be demonstrated by reference to the submissions before the primary judge later in these reasons) also exposes the inaccuracy of the University's submissions about the appellants' case in the appeal.

131 According to the University's (inaccurate) submissions in the appeal, the appellants' case before the primary judge was that the sole source of the right of intellectual freedom was cl 315 of the 2018 agreement and cl 315 was "self-contained". However, according to the University, the appellants now say in the appeal that "the enforceable obligation in cl 315 [of the 2018 agreement] is a commitment to protect and promote intellectual freedom (and not the conferral of a right of intellectual freedom)" and otherwise seek to rely on cl 317 of the 2018 agreement, read with cl 315, as the source of the relevant right of intellectual freedom. The University submitted that this change in the appellants' case should not be permitted as:

(1) the "case changes the character of the right of intellectual freedom alleged". It is a case that could have been advanced by the appellants before the primary judge but was not;

(2) "[h]ad the [appellants] advanced this case before the primary judge, it would have required a proper pleading alleging Dr Anderson had exercised intellectual freedom in accordance with the highest ethical, professional and legal standards and evidence to support the allegations. It would have required an examination not only of each occasion Dr Anderson claimed to have exercised the right to intellectual freedom but also the context and manner in which he exercised his claimed intellectual freedom. The University would also have had to respond to, and lead evidence on, these matters There was no evidence directed to these issues before the primary judge"; and

(3) "[t]he [appellants'] case at first instance alternatively could have been (but was not) that the University contravened cl 317 because it failed to act with highest ethical, professional and legal standards for each alleged contravention. This case would have required the [appellants] to have pleaded and particularised how the University departed from those standards on each occasion. The University would have to have had the opportunity to lead evidence to respond to such allegations. This new case cannot proceed on the same proven facts, particularly where there was no attempt by the [appellants'] counsel to obtain evidence through cross-examination of Professor Jagose or Professor Garton that could permit such findings to be made".

132 In its further written submissions filed after the appeal the University (again, inaccurately – see below) said that, before the primary judge, the respondents did not dispute the existence of a right of intellectual freedom, but disputed that "on the proper construction of cl 315 alone, the clause created an enforceable obligation on the University that was capable of contravention for the purpose of s 50" of the Fair Work Act. They also submitted that the respondents' case before the primary judge was that the right of intellectual freedom was referred to but not conferred by cl 315 and "it was clear from cl 317 that any exercise (i.e. the practice) of the right of intellectual freedom had to be in accordance with the highest professional, legal and ethical standards, as reflected in the Code of Conduct".

133 Apart from the last part of the latter proposition, none of this is borne out by the record of the hearing below. In fact, the respondents' primary case was that there was no right of intellectual freedom granted by the enterprise agreements at all. The respondents' alternative case was that if there was such a right it had to be exercised in accordance with cll 315-317 which encompassed the Code of Conduct. The respondents were correct, as were the appellants, that cl 315 cannot be construed other than with cll 316 and 317. Nevertheless, the University (inconsistently with its own case below that cl 315 must be construed with cll 316 and 317) now wants to confine the appellants to a construction case based on cl 315 alone purportedly in accordance with the appellants' pleading. The University thus submitted that, leaving aside the lunch photo, the appeal is properly confined to the proper construction of cl 315 of the 2018 agreement. As will be explained, this is untenable. The appellants never proposed that cl 315 could be construed in isolation. They proposed only that the relevant rights were in cl 315, which is correct, but they always accepted that cl 317 was relevant both to the issue of construction and because the rights had to be exercised in accordance with cl 315.

134 Accordingly, the second proposition of the University, in summary, is that the appellants only ran a case before the primary judge based on cl 315 being construed in isolation from, relevantly, cl 317 of the 2018 agreement (referred to below as **the cl 317 issue**).

135 It is necessary to decide both the role of the Court issue and the cl 317 issue to ascertain if the appellants' oral submissions in the appeal involve a departure from their case before the primary judge in a manner which is impermissible.

6.2 The role of the Court - discussion

136 The appellants described the University's first proposition as a "travesty" of the case which they had put below. The appellants submitted that it had always been their case that the Court had to determine for itself, objectively, whether the conduct was or was not an exercise of intellectual freedom within the meaning of cl 315 (which they said they also always accepted had to be construed in the context of cl 317) and, thereby, was or was not misconduct or serious misconduct.

137 The appellants' submissions must be accepted. The University's submissions in the appeal about the appellants' case as pleaded and put below are without foundation.

138 It is difficult to understand how the University could have reached the view that the appellants did not contend before the primary judge that it was necessary for the primary judge to determine, objectively and by reference to all of the evidence, whether Dr Anderson's conduct involved an exercise of intellectual freedom. One potential basis for the confusion is the University's erroneous view about the role of cl 384 of the 2018 agreement in the proceeding. The potential confusion about cl 384 is explained below. For present purposes what is relevant is that the University's assertions in the appeal about how the appellants put the role of the Court issue to the primary judge are fundamentally wrong.

139 The parts of the transcript on which the University relied do not support the University's first proposition. The point the appellants' counsel was making in those parts of the transcript was not that it was for Dr Anderson to finally determine whether the conduct was or was not a legitimate exercise of intellectual freedom. That was the role of the Court. The point being made was that if the conduct was the legitimate exercise of intellectual freedom then it was immaterial that Dr Anderson could have put the same position in a different way. The submission which was put, that "[i]t is not for anybody to tell Dr Anderson the way in which he chooses to make his point" supported this proposition only – that the potential for Dr

Anderson to have communicated the same matters in another way (including a way which did not offend any person) was immaterial. It is nevertheless clear that the appellants' proposition, expressly stated, was that it was an issue for the Court to determine for itself whether or not the conduct was a legitimate exercise of intellectual freedom.

140 There was also extensive debate in the oral submissions between the primary judge and the appellants' counsel at that hearing which put it beyond argument that the appellants' position was that the Court had to determine for itself whether Dr Anderson was or was not exercising a right of intellectual freedom and was not confined to asking whether it was reasonably open to the University to reach the views that it did that Dr Anderson had engaged in misconduct or serious misconduct.

141 The problem is not any change in this regard between the appellants' case as pleaded and put before the primary judge and their case in the appeal. The problem may be that the appellants did not explain to the primary judge (and thus the respondents) that:

(1) even if they were wrong about cl 384(d)(i)-(ii) (the pre-condition to giving warnings being the delegate's state of satisfaction), they were not wrong about cl 384(d)(iii) (the pre-condition for termination being the objectively determined fact of serious misconduct). They also failed to point out to the primary judge the relevance of cll 90 and 434 to the construction of cl 384 which would have made the role of cl 384 clear and the proper construction of cl 384(d)(iii) unarguable; or

(2) even if they were wrong about cl 384 altogether, it was not fatal to their other separate cases as described above. The primary judge still had to determine for himself, on all of the evidence, if the conduct of Dr Anderson was misconduct or serious misconduct which, apart from the lunch photo, depended on whether it was an exercise of the right of intellectual freedom in accordance with cll 315-317. If it was the exercise of such a right the conduct could not be misconduct or serious misconduct. The University therefore could not terminate Dr Anderson's employment without notice on this basis.

142 The primary judge appears to have assumed that his rejection of the appellants' case based on cl 384 necessarily meant that their separate cases must fail on the same basis. This was not so as those cases depended not on the state of satisfaction of the University's delegate (which the appellants did not challenge), but the objective fact of whether the conduct was or was not the exercise of the right of intellectual freedom and the objective fact of whether the fourth

comments and the fifth and sixth comments were, respectively, misconduct or serious misconduct.

143 This aspect of the case as put by the appellants to the primary judge also accorded with their pleading. The appellants did not plead that it was a matter for Dr Anderson to determine if his conduct constituted the exercise of the right of intellectual freedom. To the contrary, the appellants pleaded that his conduct, as identified, was in fact the exercise of the right of intellectual freedom. Accordingly:

(1) para 61 of the FASOC alleges that "[t]he First Comments and the Second Comments, and each of their constituent parts, constituted the exercise by Dr Anderson of intellectual freedom within the meaning of cl 254 of the 2013 Agreement";

(2) para 69 of the FASOC alleges that "[t]he Fourth Comments, and each of their constituent parts … constituted the exercise by Dr Anderson of intellectual freedom within the meaning of s 315 of the 2018 Agreement"; and

(3) para 78 of the FASOC alleges that "[t]he Fifth Comments and the Sixth Comments, and each of their constituent parts … constituted the exercise by Dr Anderson of intellectual freedom within the meaning of s 315 of the 2018 Agreement".

144 For these reasons, the University's submissions that the appellants have changed their case from that put to the primary judge by now alleging that it is for the Court and not Dr Anderson to determine if his conduct constituted the exercise of the right of intellectual freedom must be rejected. The appellants' case in this regard has not changed in any respect.

6.3 The cl 317 issue - discussion

6.3.1 At the time of termination

145 To understand the position of the parties about cl 317 in the proceeding before the primary judge it is necessary to start with the University's position at the time it terminated Dr Anderson's employment.

146 In the University's letter to Dr Anderson of 19 October 2018 giving Dr Anderson a final warning Professor Garton said (J [72]):

> Clause 315 refers to the right of academic staff to "engage in the free and **responsible** pursuit of all aspects of knowledge and culture ..." (my emphasis). Further, the right recognised in **clause 315 needs to be read alongside the commitment in clause 317** to "uphold the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards."

> This means, among other things, that an exercise of a freedom of intellectual freedom must be responsible and considered and in compliance with the standards of behaviour set in the *Code of Conduct*.

(Emphasis in the second sentence added).

147 Before the litigation, this remained the University's position. In its letter of 3 December 2018 to Dr Anderson proposing that Dr Anderson's employment would be terminated (subject to the review process under cl 384(f)(ii) of the 2018 agreement) Professor Garton said (J [88]):

> The University supports the principles of academic freedom and the right of academic staff to discuss and express opinions on controversial topics. However, as you have been reminded on several occasions, **any expression of academic freedom must be in accordance with the highest ethical, professional and legal standards**, and must comply with the University's policies including the *Code of Conduct - Staff and Affiliates* and the *Public Comment Policy*. The inclusion of the altered image of the Israeli flag in your Twitter Posts, Facebook Posts and teaching materials is disrespectful and offensive, and contrary to the University's behavioural expectations and requirements for all staff.

(Emphasis added).

148 The words shown in bold above ("in accordance with the highest ethical, professional and legal standards") are a quote from cl 317 of the 2018 agreement.

149 In other words, the University did not accept that Dr Anderson's conduct constituted the exercise of a right within cl 315 of the 2018 agreement because, according to the University, that right is qualified by cl 317 and the Code of Conduct. As the University did not accept that Dr Anderson's conduct complied with the requirements of cl 317 or the Code of Conduct, it considered his conduct could be and was misconduct or serious misconduct within the meaning of cl 3 of the 2018 agreement and ultimately, after the conclusion of the review process, the University terminated Dr Anderson's employment for serious misconduct.

150 This is the background against which the appellants commenced the proceeding and pleaded their case as set out in the FASOC. In that context, why the respondents put in issue the existence of a right of intellectual freedom rather than simply running their alternative case is a mystery. Professor Garton had accurately identified the real issue between the University and Dr Anderson – he did not consider Dr Anderson's conduct amounted to the exercise of the right of intellectual freedom in cl 315 of the 2018 agreement because it did not comply with cl 317 and it did not comply with the Code of Conduct. Had the University's lawyers accepted this as the relevant legal framework, the matter below may not have miscarried. In the event, as will

be explained, Professor Garton was right about cl 317 but wrong about the Code of Conduct given its lack of content relevant to the terms of cl 317.

6.3.2 The pleadings

151 Contrary to the University's submissions, the appellants did refer to cl 317 of the 2018 agreement in the FASOC. In para 12 the appellants pleaded that at all material times cll 315, 316 and 317 of the 2018 agreement were in the terms as set out in that agreement. Paragraphs 61, 69 and 78 of the FASOC are set out above. In those paras the appellants alleged that the impugned conduct constituted the exercise of intellectual freedom within the meaning of cl 315 of the 2018 agreement (and the equivalent cl 254 of the 2013 agreement). The appellants also pleaded in paras 63 and 64, 71 and 72, 75 and 76, and 80 and 81 of the FASOC that, by reason of Dr Anderson's conduct constituting the exercise of intellectual freedom within the meaning of cl 315 of the 2018 agreement (and the equivalent cl 254 of the 2013 agreement), the University had no right, power or authority to discipline Dr Anderson for that conduct and, in doing so (by the giving of the warnings and the termination of Dr Anderson's employment) had itself breached cl 315 of the 2018 agreement (and cl 254 of the 2013 agreement).

152 In their defence the respondents admitted para 12 of the FASOC. The respondents denied, amongst other allegations, the allegations in paras 61, 69 and 78, as well as paras 63 and 64, 71 and 72, 75 and 76, and 80 and 81, of the FASOC.

6.3.3 Written opening submissions

153 In their opening written submissions filed in advance of the hearing before the primary judge the appellants submitted as follows:

(1) **clauses 315-317** of the 2018 agreement appear under the heading "Intellectual Freedom";

(2) on its proper construction, cl 315 of the 2018 agreement creates enforceable rights;

(3) read in the context of the 2018 agreement as a whole, it is seen that, amongst other things, cl 315 creates an enforceable right and "**cl 317 … regulates the manner in which the right is to be exercised**";

(4) the 2018 agreement operates such that conduct that constitutes the exercise of intellectual freedom cannot constitute misconduct or serious misconduct within the meaning of cl 3 of the 2018 agreement; and

(5) the impugned conduct of Dr Anderson constituted the exercise of intellectual freedom in accordance with cl 315 of the 2018 agreement.

(Emphasis added).

154 In their opening written submissions filed in advance of the hearing before the primary judge the respondents submitted:

(1) clause 315 of the 2018 agreement is not capable of being contravened and reflects aspirational statements; and

(2) if cl 315 of the 2018 agreement conferred any right of intellectual freedom capable of being contravened (which is denied) then it does not mean that conduct constituting the exercise of that right cannot also be misconduct or serious misconduct because:

(a) staff of the University are expressly required in the agreements to comply with the Code of Conduct (cl 306 of the 2018 agreement and cl 256 of the 2013 agreement); and

(b) "[**clause] 317 recognises that the parties will uphold the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards**". Further:

> Those professional standards that apply to staff of the University (and with which staff are required to comply) include the Code [of Conduct]. **The essence of the [appellants'] contentions is that the so-called right to "intellectual freedom" is only constrained by the obligation 'not [to] engage in harassment, vilification or intimidation'. This contention ignores cl 317**, which is reinforced by cl 306 (as to the Code [of Conduct]);

(Emphasis added).

155 It is apparent from this that while the appellants contended that cl 315 was the source of the relevant right, they accepted that the manner in which that right could be exercised was subject to cl 317. The appellants also thus must be taken to have maintained that Dr Anderson's conduct involved an exercise of the right in cl 315 in a manner which accorded with the requirements of cl 317. Otherwise, the appellants could not have maintained, as they did, that Dr Anderson's conduct was authorised by cl 315.

156 It is also apparent that the respondents denied that cl 315 involved an enforceable right of intellectual freedom but said, in the alternative, that if it did then the right was subject to both the Code of Conduct and cl 317. The respondents maintained that Dr Anderson's conduct, if it

involved an exercise of an enforceable right under cl 315, which the respondents denied, was not an exercise of the right which accorded with the Code of Conduct or cl 317.

157 In other words, the appellants contended that cl 315 involved an enforceable right of intellectual freedom which had to be exercised in accordance with cl 317 and the respondents contended that cl 315 did not involve an enforceable right of intellectual freedom but if it did then that right had to be exercised in accordance with both cl 317 and the Code of Conduct. On this basis, the only real issues of construction for determination were: (a) did cl 315 involve a right of intellectual freedom which had to be exercised in accordance with cl 317, and (b) if so, could the Code of Conduct qualify that right in any way.

6.3.4 Oral opening submissions

158 In their oral opening submissions before the primary judge the appellants identified that there was no dispute about the fact of Dr Anderson's conduct – the only dispute was about "the legal characterisation of that conduct and how the legal framework of his employment applies to that conduct". The appellants said that if the agreements conferred a right to exercise intellectual freedom then "your Honour will be called on to examine the conduct that Dr Anderson engaged in to determine whether or not that conduct was an exercise of his right to intellectual freedom" and, if so, whether "the exercise of the right to intellectual freedom can ever constitute misconduct or serious misconduct within the meaning of the agreement."

159 This accords with the conclusion reached above that it was always the appellants' case that it was for the Court, not Dr Anderson, to determine if his conduct constituted an exercise of intellectual freedom.

160 The appellants also submitted that whether Dr Anderson had engaged in misconduct or serious misconduct was a matter of objective fact for the Court to determine for itself. It was not a matter for the mere satisfaction of the University.

161 The appellants further submitted in these terms:

> - **properly construed, clauses 315 to 317 confer an enforceable right on persons** including Dr Anderson;
> - **conduct that is authorised by clauses 315 to 317**, cannot constitute misconduct because conduct that is authorised by the agreement cannot be unsatisfactory… [or] serious misconduct because conduct that is authorised by the agreement cannot constitute serious misbehaviour;
> - **this clause is self-contained**, both as to the right and as to the limitations of the right. And therefore, that **a code of conduct has no work to do in relation**

to conduct that is permitted by these clauses;

- in the alternative … the code of conduct which is not incorporated into the agreement and is expressed not to be incorporated into the agreement, and is therefore subordinate to the agreement, cannot be inconsistent with, or cannot cut down or impair **a right under the agreement**;
- the [appellants] say that the proper construction of **these clauses**, in the context of the agreement as a whole, bearing in mind the misconduct definition that I've taken your Honour to… [is that] the code has no work to do … academic employees have an obligation to engage in public discourse. It's a requirement that they are obliged to engage within the course of their employment. They work in an environment where they do not need permission to engage in public discourse;
- **these clauses** have to be construed in the very unique and particular context of an academic environment. **That, your Honour, is the legal framework**.

(Emphasis added).

162 The appellants submitted further that the context of Dr Anderson's conduct was relevant, specifically that he was commenting in response to "vicious media attacks on him personally and his reputation". The appellants submitted also that "engaging with the media and calling out misinformation or incorrect or inaccurate reporting is a key feature of Dr Anderson's activities as an academic". These matters were relevant to the appellants' case, as put in opening, that the right in cl 315 had to be exercised in the manner regulated by cl 317.

163 The respondents, in their opening submissions before the primary judge, complained that the appellants' case as put in opening differed from the appellants' pleaded case (which, to the extent the appellants referred to cl 317, it did), but the respondents appear never to have identified the alleged differences. After the close of the evidence, the respondents objected to any direction for written closing submissions and the parties instead made oral closing submissions only. These oral closing submissions do not expose any objection by the respondents to the case as put by the appellants orally including the reliance on cl 317.

6.3.5 Oral closing submissions

164 In oral closing submissions the appellants submitted in these terms:

> The issues that your Honour is called on to determine in this part of the proceeding are as follows: firstly, **whether clause 315 of the 2018 agreement creates an enforceable right to intellectual freedom** and, if so, the content of that right, whether conduct constituted in the exercise of intellectual freedom was capable of constituting misconduct within the meaning of clause 3 of the 2018 agreement, and if your Honour is satisfied as to those two matters, the first in the affirmative and the second in the negative, whether the conduct of Dr Anderson, on which the first warning, final warning and then the termination of his employment was based, constituted the

> exercise of intellectual freedom and was, therefore, not capable of constituting misconduct or serious misconduct within the meaning of clause 3 of the [2018] agreement.

(Emphasis added).

165 The appellants said that the "relevant term" of the 2018 agreement is cl 315. They said that their principal submission was that cl 315 is "self-contained", with in-built limitations on the nature of the right. In particular, while they accepted that an exercise of intellectual freedom which involved "harassment, vilification or intimidation" would not be within the scope of cl 315(b)(iv), the appellants did not accept that an exercise of intellectual freedom which involved subjective or objective offence to others or which might not comply with the Code of Conduct was thereby outside the scope of the right. As the appellants put it to the primary judge, "…the [Code of Conduct] doesn't have a role to play because the limitations are inbuilt. They are embedded in this notion of what intellectual freedom is, which is not without limitation". In other words, to take a clear example, conduct which constitutes harassment, vilification or intimidation could never be an exercise of intellectual freedom on the appellants' case as put to the primary judge because cl 315(b)(iv) excludes such conduct. The appellants also said to the primary judge that the Court's role is to "determine whether or not the [University] could lawfully [have] applied the disciplinary action, and that requires determining whether or not there was misconduct or serious misconduct … the role of the court is to determine whether or not Dr Anderson engaged in the right prescribed by clause 315". The appellants also said:

> And this is important, your Honour, because it doesn't matter that you or I, or anybody else, might not like the slide. It doesn't matter that you or I, or anybody else, might be offended by the slide. It doesn't matter at all. **The only thing that matters is whether or not it was done in the exercise of a right contained in clause 315**, and that, your Honour, might initially sit uncomfortably but we have to recall the context. The broad freedom given to academics to research, and teach, and disseminate in the way that they choose.

(Emphasis added).

166 The appellants also submitted:

> The point is, did it have – the slide as a whole – **the purpose or the function described by clause 315, and if it does, that is the end of the inquiry**. And I must emphasise this, your Honour: it doesn't matter that Dr Anderson could have made the same point in a different way … It is not for anybody to tell Dr Anderson the way in which he chooses to make his point. **If his point is a legitimate exercise of intellectual freedom, those considerations are irrelevant**. He was entitled to make the point in the way that he chose to make the point within the limitations that I've described to your Honour. So the moment, your Honour, in my submission, this becomes a debate

> about whether it was offensive or objectively offensive, or whether there was another way in which Dr Anderson could have communicated the views that he had we move into error.
>
> **The only question before the court, in my submission, is whether it was a legitimate exercise of intellectual freedom within the meaning of the clause and if that's so, that is the end of the inquiry** … **All that matters is whether Dr Anderson was doing that which clause 315 allows him to do.**
>
> **There is, your Honour, however, context. When you assess what Dr Anderson did and the way in which he did it, there is context**.
>
> …
>
> **Then, your Honour, we look at, well, what did Dr Anderson do and why, and he did two things, your Honour**.

(Emphasis added).

167 The respondents submitted in answer that the first aspect of the matter "turns on the proper construction of a number of **clauses** of the respective enterprise agreements". The respondents said "this claim should be dismissed either because **the clauses are not capable of being contravened** or that the clause, particularly that concerning intellectual freedom, does not confer an immunity from the operation of the [Code of Conduct] and/or any lawful right of the [University] to impose a sanction on Dr Anderson or to give directions to him in relation to his conduct" (Emphasis added).

168 The respondents then turned to cl 315 and their senior counsel said "I'm not entirely clear exactly how the [appellants] put their case on this clause. It seems that the way in which the claim is now being advanced is that this clause, 315, operates as a shield is the sense that this clause gives you an immunity from misconduct because that's the only context in which it has really been raised in this case". The respondents submitted that this proposition should be rejected. As to the construction of cl 315, the respondents maintained that the clause did not create any enforceable right, but merely described a "collective aspiration of the parties to be committed to the protection and promotion of intellectual freedom". The respondents then submitted:

> When you look at [clause] 315 and to also understand what the University does to provide and what the parties collectively do, **you also have to have regard to clause 316 and 317. And [clause] 317 is critical to understand the context of the commitment to the protection and promotion. And that is that the parties, and this is for all:**
>
> > ***Will uphold the principle and practice of intellectual freedom in accordance with the highest ethical, professional, and legal standards.***
>
> Those "legal standards" can import a range of things. It might be legal standards, for

example, picking up clause 306:

> *Staff must comply with the Codes of Conduct*
>
> So what's clear is that you can't just leap onto intellectual freedom and attach to those words a sense of rights **outside the proper construction of [clause] 315**.

(Emphasis added).

169 The respondents' submissions then turned to cl 315(b)(iv) in particular (the right to "express unpopular or controversial views, provided that in doing so staff must not engage in harassment, vilification or intimidation"). The respondents said this:

> **But (iv) doesn't stand alone**. It has to be read in the context that this is applicable to all of the staff of The University. And when read in the context of (i) through to (iii) and then (iv), it's all about life within The University. So it's not conveying, it's not seeking to convey personal types of rights that extend outside The University in the concepts of intellectual freedom. **And then, when read with clauses 316 and 317, it's clear that what's intended by this clause which is reflecting a commitment to the promotion and protection of intellectual freedom is that it comes with responsibility and those responsibilities are:**
>
> ***the highest ethical, professional, and legal standards***
>
> That is far removed from the suggestion that it is up to any one academic to decide for himself what he can and can't do, what is or isn't a right, and the extent to which his contact might be constrained. **The highest ethical standards necessarily have to be informed by the Code of Conduct and the Core Values that The University sets out in that Code of Conduct**. It cannot be said that the academics, themselves, can determine what they consider to be high ethical standards or not.
>
> So, it's for those reasons, your Honour, that we would say on a proper construction, there is absolutely no doubt that the parties are committed, and the University is committed, to the protection and promotion of intellectual freedom. But this clause does not imply a contractual right and nor does it elevate the concept of intellectual freedom into an indemnity, or a protective cloak against anything else. It does not create an immunity from an allegation of misconduct.
>
> **And in fact, it would be antithetical if it did that, because what the parties are required to do, is that they will uphold the principle and practice, so both the value and concept, and the practice of intellectual freedom in accordance with the highest ethical, professional and legal standards**.

(Emphasis added).

170 Again, these submissions reflected the respondents' primary position before the primary judge that cll 315 and 317 were not capable of being contravened as they did not involve enforceable rights.

171 In their closing oral submissions in reply the appellants reiterated that the whole of the context, including the media attacks on Dr Anderson, were relevant to the legal characterisation of his conduct as an exercise of the right of intellectual freedom or not.

6.3.6 Notice of appeal

172 In the notice of appeal the appellants refer in grounds 1 and 2 to cl 315 of the 2018 agreement and cl 254 of the 2013 agreement.

6.3.7 Written submissions in the appeal

173 In their written submissions in chief in support of the appeal the appellants said in one part (para 13) that they did not rely on cl 317 before the primary judge. Insofar as this relates to the existence of the relevant rights this is correct. In another part (paras 24-25 of their written submissions in chief) the appellants accepted that cl 315 could not be construed in isolation from cl 317. This also correct – the appellants always accepted that cl 315 had to be construed with cll 316 and 317. Further, they submitted (para 26) that "the primary judge's findings as to the proper construction of cll 315-317 of the [2018] Agreement were erroneous" and the primary judge "should have found that cl 315 created an enforceable right to engage in intellectual freedom as described in subparagraphs (a) and (b) of the clause".

174 The University's written submissions in the appeal said (correctly) that no contravention of cl 317 by the University was alleged before the primary judge, as only a contravention of cl 315 had been alleged.

175 In their written submissions in reply in the appeal the appellants said "cl 315 must be construed in the context of cll 315-317 and having regard to the purpose of those provisions".

6.3.8 Consideration

6.3.8.1 Clauses 315 and 317 and the role of the Court

176 Six things will be apparent from the summary above about the course of the hearing (as opposed to the pleading) before the primary judge.

177 First, while the appellants focused on cl 315 as the source of the relevant right of intellectual freedom, they also expressly accepted that: (a) cl 315 had to be construed in the context of cll 316 and 317, and (b) the right was subject to the limitations in cll 315 and 317. They did not accept, however, that the right was subject to the Code of Conduct or any other University policy.

178 Second, the appellants consistently maintained that it was necessary for the Court itself to determine, in the context of all of the circumstances, whether Dr Anderson's conduct amounted to an exercise of the right of intellectual freedom. In the context of the appellants' case as put this meant that the appellants were contending that the primary judge had to decide if Dr Anderson's conduct, given all of the evidence about the circumstances in which that conduct occurred including the so-called vicious media attacks on Dr Anderson, constituted an exercise of the right of intellectual freedom in accordance with all of the requirements in cll 315 and 317. In that regard, the appellants said further that the fact that Dr Anderson's conduct may have caused subjective and objective offence or that he could have exercised the right in a way that did not cause subjective or objective offence were immaterial. According to the appellants, these were not relevant criteria for determining the legal characterisation of Dr Anderson's conduct.

179 Third, the respondents' primary case was that cl 315, as construed in the context of the 2018 agreement as a whole including cll 316 and 317, did not give rise to any enforceable right of intellectual freedom. The respondents' alternative case was that if cl 315, as construed in the context of the 2018 agreement as a whole including cll 316 and 317, did give rise to any enforceable right of intellectual freedom, then that right was qualified by the limitations in cll 315 and 317, as well as the Code of Conduct and other University policies referred to in the Code of Conduct. The respondents did not accept before the primary judge that there was an enforceable right and duty of intellectual freedom capable of being contravened granted to the parties by cll 315 or 317. Their position in the appeal in this regard is different from their position before the primary judge.

180 Fourth, the assertion of the respondents to the primary judge that the appellants had suggested that it was for Dr Anderson to determine "what he can and can't do, what is or isn't a right, and the extent to which his contact might be constrained" is unfounded. The appellants never put that proposition.

181 Fifth, the respondents never objected to the appellants contending in their oral opening submissions before the primary judge that "clauses 315 to 317 confer an enforceable right on persons", or that "conduct that is authorised by clauses 315 to 317, cannot constitute misconduct … or serious misconduct", or that the relevant legal framework was set by cll 315-317. It may be inferred that the respondents did not do so because their own primary position before the primary judge was that cl 315 and/or cll 315 and 317 are not capable of being

contravened as they involve no enforceable right and, in the alternative, that if there was any such right granted then cl 315 could not be considered in isolation from cl 317 and the Code of Conduct. In other words, on both of the respondents' cases, cl 317 was in play.

182 Sixth, the University is correct that the appellants never pleaded or submitted to the primary judge that the University had contravened cl 317 of the 2018 agreement by giving warnings to or terminating Dr Anderson's employment. The contention of breach of the agreements by the University, in the pleadings and submissions, was confined to cl 315 of the 2018 agreement (as well as cl 384).

183 Accordingly, before the primary judge, cl 317 was in issue on the case of the appellants and the respondents. In these circumstances, the primary judge's ultimate recourse to the pleadings to identify the matters in issue is understandable but involved error.

184 In the circumstances of the present case nothing precluded the appellants from putting to the primary judge, as they in fact did, that Dr Anderson was exercising a right of intellectual freedom granted by cl 315 and in accordance with that clause and cl 317. This is because, the appellants having asserted the conduct was the exercise of the right in accordance with cl 315, forensic logic required the respondents to raise cl 317, which they did. The appellants were then permitted to assert, in response, that the conduct complied with cl 317, which they did.

185 In any event, while it has always been recognised that pleadings perform important functions and that any relief granted must be founded on the pleadings (for example, ***Dare v Pulham*** [1982] HCA 70; (1982) 148 CLR 658 at 664), the principle that a party is bound by its pleading is not absolute. As *Dare v Pulham* also discloses, parties may choose to conduct a case which departs from the pleadings. If they do so, or one party does so and the other party does not object, then the parties or the party which did not object cannot later complain about the departure from the pleadings.

186 The fact that pleadings are important but do not operate as an absolute limit to the case that a party or parties may legitimately put in a hearing is reinforced by the relevant principles of appellate review. The Full Court summarised these in ***Linkhill*** *Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* [2015] FCAFC 99; (2015) 240 FCR 578. Accordingly, given the requirement for the finality of litigation:

(1) the general principle is that parties are bound by the case they in fact ran below, which is not necessarily the case as pleaded below: at [30] citing ***Suttor v Gundowda*** [1950] HCA 35; (1950) 81 CLR 418 at 438; and

(2) the general principle is not absolute:

(a) it applies if "evidence could have been given [below] which by any possibility could have prevented the point from succeeding": at [30] citing *Suttor v Gundowda* at 438;

(b) putting it another way, "[t]he possibility of evidence or the possibility that the hearing would have taken a different course, if not fanciful, may well suffice to deny raising of the new point": *Branir Pty Ltd v Owston Nominees (No 2)* [2001] FCA 1833; (2001) 117 FCR 424 at [38];

(c) however, it is generally in the interests of justice for the appeal court to decide questions of law or of construction raised for the first time on appeal if there is no disputed question of fact: at [30] citing *Suttor v Gundowda* at 438.

187 If these principles are applied to the circumstances of the present case, the following matters become apparent:

(1) while the appellants did not plead below that the right was in cll 315 and 317, they did not need to do so. The right is in cl 315 but has to be exercised in accordance with both cll 315 and 317. The appellants accepted that cl 317 conditioned the exercise of the right in their oral and written opening submissions and the respondents did not object to them doing so. The appellants' case on appeal has not changed in this regard;

(2) even if it were the case that the appellants did not refer to cl 317 below in respect of the exercise of the right of intellectual freedom by Dr Anderson, as noted, the respondents themselves relied on cl 317 below. As will be explained, the University cannot suggest in these circumstances that the issue is the construction of cl 315 in isolation or that it is possible that it (or the other respondents) could have adduced further evidence relevant to cl 317 when they also relied on that very provision;

(3) there has been no change of case by the appellants in the appeal by their submission that the primary judge erred by not deciding, as a matter of objective fact, whether or not Dr Anderson's conduct was an exercise of the right of intellectual freedom in accordance with the agreements; and

(4) there has been no change of case by the appellants in the appeal that the primary judge erred by not finding that the University had no lawful right, power or authority to give Dr Anderson the warnings or to terminate his employment because the legitimate exercise of the right of intellectual freedom cannot be misconduct or serious misconduct.

188 The primary judge's construction of cll 315-317 also involved error. The provisions relating to intellectual freedom, cll 315-317 of the 2018 agreement (and cll 254-256 of the 2013 agreement), must be construed together. The statement of the commitment of the parties in cl 315 to protect and promote intellectual freedom is expressed as including specified "rights". Those specified rights include the right to engage in public debate (cl 315(a)). The rights include the right to express opinions about the operation of the University (cl 315(b)(ii)) and to express unpopular or controversial views, provided that in doing so they must not engage in harassment, vilification or intimidation (cl 315(b)(iv)). Clause 315 thus does involve a conferral of rights, contrary to the conclusions of the primary judge and the arguments of the University.

189 It is also the case, however, that those rights cannot be separated from the terms of cll 316 and 317. By cl 316 the parties "will" encourage and support transparency in the pursuit of intellectual freedom within its (that is, the University's) governing and administrative bodies. The intellectual freedom the subject of cl 316 is the intellectual freedom identified in cl 315. By cl 317 the parties "will" uphold the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards. Again, the intellectual freedom in cl 317 is the intellectual freedom in cl 315. Clauses 315-317 thus embody an integrated and inter-related scheme of enforceable mutual rights and duties, as well as aspirations. The clauses are not merely aspirational and incapable of contravention as the respondents contended below in their primary case.

190 The fact that minds may reasonably differ about what might constitute "harassment, vilification or intimidation" in cl 315(b)(iv) or upholding the "the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards" in c 317 does not make the provisions mere exhortations or aspirations. Nor does the fact that the scope of the commitment to intellectual freedom is not precisely defined as the specified rights are merely included within and are not exhaustive of the concept of intellectual freedom. Contrary

to the University's submissions, exhaustive definition is not required to make the provisions capable of enforcement.

191 The University's suggestion that cl 315 does not authorise the exercise of the rights nominated is untenable. The concept of the exercise of the rights is inherent within the actions authorised as specified in cl 315(a)-(b)(i)-(iv). It is also inherent within the commitment to the protection and promotion of intellectual freedom in the preamble to cl 315.

192 Other provisions of the 2018 agreement, on which the respondents relied, such as cl 306 contrasted with cl 308, are of little assistance. The provisions perform different functions using different language. The commitment in cl 315 is expressed to include the specified rights.

193 Accordingly, cl 315 cannot be characterised as involving nothing more than a commitment which is exhortatory and unenforceable. The framers of the enterprise agreement identified the commitment to the protection and promotion of intellectual freedom as including the specified rights. The commitment is the embodiment of the duty and the rights are part of the right of intellectual freedom which the parties bound by the agreements are obliged to protect and promote. It is true that those rights are confined by the terms of cl 315 itself (the appellants never suggested otherwise) and by the terms of cl 317 (and, again, the appellants never suggested otherwise). But it cannot be denied that cl 315 involves the enumerated rights which, together, are part of the right of intellectual freedom.

194 The primary judge's conclusion that only cl 317 involves enforceable obligations at J [140]-[141] is not sustainable. Clause 317, by imposing duties on the persons bound by the agreement, to "uphold the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards" assumes that the right to practice intellectual freedom otherwise exists. That right does otherwise exist and is to be found in cl 315. Clause 315 contains both rights and duties. Just as there is a right in academic staff, for example, to "express unpopular or controversial views, provided that in doing so staff must not engage in harassment, vilification or intimidation", so also must there be a corresponding duty on the University to not prevent academic staff from exercising that right. This is because the University is also bound by the commitment to protect and promote intellectual freedom including each of the specified rights. This is the basis for the appellants' contention that if (as they allege) Dr Anderson was exercising the right in cl 315, and they are correct that he was also doing so in accordance with cl 317, then for the University to take disciplinary action against him in respect of that exercise of right, the University itself breached its duty in cl 315

to protect and promote intellectual freedom including by ensuring that academic staff are able to exercise the right of intellectual freedom. The fact that the preamble to cl 315 uses the language of "commitment" is immaterial. The commitment is the duty to protect and promote intellectual freedom including the specified rights. In the context of cll 315-317 overall, it must be concluded that cl 315 involves corresponding rights and duties capable of both exercise and breach, albeit that the exercise must also satisfy cl 317.

195 The primary judge's observation at J [134] that "there is no express statement in the 2018 Agreement that cl 384 is subject to the 'rights' identified in cl 315 as ones which the parties are committed to protecting and promoting" is based on his Honour's misconception about the role of cl 384 in the 2018 agreement (discussed below). The conclusion that the exercise of the right of intellectual freedom in accordance with cll 315-317 cannot also be misconduct or serious misconduct follows from the fact that what is specifically authorised cannot involve a wrong. This also is explained below.

196 The University's submissions to the contrary are also not persuasive. The enumerated rights in cl 315 are clearly expressed. The fact that breach of cl 315 may result in pecuniary penalties being imposed does not justify construing cl 315 as if it did no more than contain aspirational statements. The rights specified are rights capable of exercise and enforcement. The commitment to protect and promote intellectual freedom including the exercise of the specified rights must include a duty on the University, at the least, not to punish or threaten to punish a member of academic staff for exercising the right of intellectual freedom in accordance with cll 315-317. If the University punishes or threatens to punish a member of academic staff for lawfully exercising or proposing to exercise the right of intellectual freedom in accordance with cll 315-317 it cannot matter that the University has reached its view that those provisions are not satisfied in good faith and reasonably. Conduct either is or is not the lawful exercise of the right in accordance with cll 315-317; if it is, and the University takes or threatens to take disciplinary action against the member of academic staff for that conduct the University will breached the commitment, that is, the duty, in cl 315. The fact that the characterisation of conduct as being in accordance with cll 315-317 will be fact-dependent and may be difficult does not support a contrary conclusion.

197 It is now necessary to deal directly with the further submissions which the University made about the alleged changes in the appellants' case on appeal in relation to cll 315-317.

198 First, and for the reasons already given, the case put for the appellants in the appeal does not change the character of the right of intellectual freedom asserted by the appellants. The asserted right continues to be the asserted right. The appellants continue to accept (as they expressly did below) part of the alternative argument that the respondents put – that if cl 315 does include a right of intellectual freedom it is a right that is necessarily subject to the terms of cl 317. In putting that alternative argument below the respondents did not suggest to the primary judge that: (a) the appellants could not succeed because they had not pleaded that Dr Anderson had exercised intellectual freedom in accordance with the highest ethical, professional and legal standards as required by cl 317, (b) the appellants could not succeed because they had not adduced evidence that Dr Anderson had exercised intellectual freedom in accordance with the highest ethical, professional and legal standards to satisfy cl 317, or (c) the respondents had been denied the opportunity to call evidence that Dr Anderson had not exercised intellectual freedom in accordance with the highest ethical, professional and legal standards as required by cl 317. This is so despite the fact that in their primary and alternative case the respondents expressly relied on cl 317 to defeat the appellants' claims.

199 Second, given the way in which the case was run by both parties before the primary judge (as explained above), it is not the case that in order to succeed the appellants were required to plead that Dr Anderson had exercised intellectual freedom in accordance with the highest ethical, professional and legal standards. The appellants were entitled to do what they did – plead an exercise of the right in accordance with cl 315 and leave it to the University to rely on cl 317, which the University did. The appellants were also entitled also to allege (as they did), in response to the University's case, that the exercise of the rights did in fact satisfy cl 317.

200 Third, the appellants put before the primary judge the evidence on which they wished to rely to support the claim that Dr Anderson had been exercising the right of intellectual freedom in accordance with cll 315 and 317 (and the equivalent provisions of the 2013 agreement). The appellants do not suggest otherwise. This is hardly surprising given that, as discussed, both parties relied on cl 317 in the hearing before the primary judge. If the appellants' evidence is inadequate, then so be it. But the alleged inadequacy of the appellants' evidence is not a reason to accept that, on the appellants' case, cl 315 had to be construed in isolation from cl 317.

201 Fourth, it is correct that cl 317, having been raised below by both parties, required the primary judge to examine all circumstances relevant to each and every claimed exercise of the right of intellectual freedom. This was the point of the appellants having submitted that the entire

context, including the so-called media attacks on Dr Anderson, were relevant to that issue. A major part of the appellants' case in the appeal is that the primary judge did not undertake that exercise but limited himself to the construction of cl 315 alone when both parties relied also on cl 317.

202 Fifth, it cannot be the case that the University (or other respondents) could and would have led other evidence about the context and manner in which Dr Anderson had purportedly exercised his right of intellectual freedom. The University's submissions that there was no evidence about these matters is wrong. The appellants had adduced the evidence on which they wished to rely to support their case that Dr Anderson's conduct satisfied cll 315 and 317 (and they said the Code of Conduct was irrelevant). The respondents, in the face of that case as put, did not suggest that they needed an adjournment to obtain other evidence. Moreover, given the respondents' alternative case was that Dr Anderson's conduct did not satisfy cl 317 or the Code of Conduct it must also be taken that the respondents had adduced all the evidence they wished to in order to support that alternative case. It is specious for the University now to submit to the contrary.

203 Sixth, it is correct and has been accepted above that the appellants did not claim that the University had breached cl 317 of the 2018 agreement. The appellants had pleaded that the University breached cl 315 (and cl 384) of the 2018 agreement, which the respondents denied. The only claim by the appellants was that, if (as they alleged) in engaging in the conduct Dr Anderson was exercising the right of intellectual freedom, by the University giving warnings to Dr Anderson and terminating his employment for that conduct, those facts alone established breach of cll 315 and 384 of the 2018 agreement. This is because the exercise of the right of intellectual freedom in accordance with cll 315 and 317 can never be misconduct at all (let alone serious misconduct). No pleading or particulars about how the University acted in breach, beyond those, was required.

204 It also necessarily follows that there was (and is) no further evidence the University could adduce relevant to the alleged breaches of cll 315 and 384(d)(iii) of the 2018 agreement. This is because the appellants are either right or wrong about this as well as all other aspects of their case. That is, the appellants are either right or wrong that:

(1) clause 315 involves an enforceable right for Dr Anderson to exercise intellectual freedom. As noted, the appellants' arguments to this effect are right;

(2) the Code of Conduct is irrelevant to the question whether Dr Anderson was, on each or any occasion, exercising that right of intellectual freedom. As will be discussed, the appellants are right about this, but even if they were wrong and the Code of Conduct is relevant, that does not mean that the appellants' case is necessarily defeated. In that event, it would remain for the primary judge to determine if Dr Anderson's impugned conduct did or did not involve an exercise of the right to intellectual freedom in accordance with cll 315 and 317 and the Code of Conduct;

(3) Dr Anderson's impugned conduct involved an exercise of the right to intellectual freedom in accordance with cll 315 and 317;

(4) if so, in terminating Dr Anderson because of the conduct (other than the lunch photo) the University, by reason of those facts alone, breached cll 315 and 384(d)(iii) and thus s 50 of the Fair Work Act;

(5) if so, should Dr Anderson be reinstated and is he entitled to compensation for the contraventions of s 50 of the Fair Work Act; and

(6) if so, should pecuniary penalties for contravention of s 50 be imposed on the University (and other respondents).

205 Seventh, and for the same reasons, it is irrelevant that the appellants did not cross-examine Professor Garton or Professor Jagose about the University's compliance or non-compliance with the standards imposed by cl 317. As discussed, the appellants' case was only that, if Dr Anderson was exercising a right of intellectual freedom in accordance with cll 315 and 317, then the same conduct could not also be misconduct or serious misconduct so the University's warnings and termination were unlawful and in breach of cll 315 and 384. The University's claims that the respondents would have had the opportunity to call additional evidence if the appellants had relied on cl 317, in these circumstances, are specious.

206 Finally, the University's submissions that the appellants in the appeal were accepting that cl 315 did not "immunise" Dr Anderson's conduct and that cl 315 did not confer a right of intellectual freedom are both incorrect. The appellants maintain that cl 315 confers a right of intellectual freedom but accept (as they did below) that the right was conferred and qualified by both cll 315 and 317. That was the essence of their case as put to the primary judge. Further, the appellants still maintain that any exercise of the right in accordance with cll 315 and 317 cannot be misconduct or serious misconduct at all.

6.3.8.2 Clause 384

207 It was noted above that a potential source of confusion in the case before the primary judge was the role of cl 384 of the 2018 agreement. The appellants identify in their further submissions that the appellants had put two separate claims below. They said that the University, in giving the warnings to Dr Anderson and terminating his employment, breached cl 315 of the 2018 agreement and thus contravened s 50 of the Fair Work Act. They also said that by the same conduct the University breached cl 384 of the 2018 agreement and thus contravened s 50 of the Fair Work Act. These were separate and distinct claims. This is correct so far as it goes, but the FASOC discloses the appellants also contended in the pleading, separately again from those two claims, that the University taking disciplinary action (the warnings and termination of Dr Anderson) was without "lawful right, power or authority" (paras 63, 71, 75, 80, and 85 of the FASOC). In any event, even the two separate cases the appellants identified are important, because they explain some confusion before the primary judge and reinforce why the appeal, contrary to the University's submissions, is not moot.

208 Accordingly, and as discussed above, it is necessary to recognise the appellants' argument was: (a) Dr Anderson exercised his right of intellectual freedom in accordance with cll 315 and 317, (b) if that was so as a matter of objective fact (to be determined by the Court on all of the evidence, including that Dr Anderson was responding to so-called personal vicious media attacks), his conduct could not also be misconduct or serious misconduct, (c) as such, the University could not lawfully take disciplinary action against him either at all or under cl 384, (d) the University did take disciplinary action against him for that conduct by giving the warnings and terminating his employment without notice, and (e) by reason of those facts alone, the University breached cll 315 and 384 (and, thereby, s 50 of the Fair Work Act).

209 The University appears to have misunderstood the appellants' case as involving an allegation of breach by the University as based on something more or other than the fact of the University having taken disciplinary action against Dr Anderson for what was, on the appellants' case, the exercise of a right vested in Dr Anderson by cl 315, in accordance with cl 317. There was no need for the appellants to plead more than they did. If the conduct did involve the exercise of a right vested in Dr Anderson by cl 315, in accordance with cl 317, then the argument was the taking of disciplinary action by the University for that conduct necessarily breached cll 315 and 384.

210 The appellants also separately alleged that the University had no lawful right, power or authority to terminate Dr Anderson's employment because the legitimate exercise of the right of intellectual freedom cannot be misconduct or serious misconduct. While the appellants did not plead or make submissions about this claim taking it to its logical conclusion, there was always a live issue in the case about the lawfulness of the termination. This aspect of the case also seems to have become mired in the confusion generated by the breach of cl 384 case.

211 No matter what view is taken of Dr Anderson's conduct, this case concerns his livelihood and profession. He is no more and no less entitled than anyone else to a fair determination of his application in accordance with law.

212 Perhaps most importantly for the scope of the remittal, it must be recognised that a judgment does not involve a series of self-contained and unconnected conclusions. Conclusions about one issue affect conclusions about other issues. In this case, the primary judge believed that his conclusion about the proper construction of cl 315 did not ultimately matter because the appellants had never challenged Professor Garton's state of satisfaction as the delegate of the University under cl 384. As noted, the primary judge said "[i]f the [appellants] had pleaded a case based on breach of cl 317, the result would not have been any different": J [141]. This was in error because the appellants' case of breach by the University was never confined to breach of cl 384 and, in any event, cl 384(d)(iii) is not conditioned on the delegate's state of satisfaction (and could not be given cl 434). The separate case(s) about cl 315 (and about there being no lawful right, power or authority to discipline Dr Anderson) identified above also still had to be determined. It is not possible to know what the primary judge would have done had he appreciated that the construction issue mattered.

213 As discussed above, it is also clear that the appellants' case was that the Court had to determine for itself, as a matter of objective fact, if Dr Anderson's conduct involved an exercise of intellectual freedom as provided for in cl 315 (and in accordance with cll 315 and 317). It is also equally clear that it was the appellants' case that it was for the Court to determine for itself, as a matter of objective fact, if the University had itself breached cl 315. Clause 384 was different in part but the appellants did not acknowledge this difference before the primary judge.

214 Part of the confusion is that, at least insofar as termination is concerned, cl 384 is clearly not the source of a power for the University to engage in that disciplinary action. Clause 384 pre-

supposes that this power otherwise exists and that the right must be exercised in accordance with the requirements of cl 384.

215 In the case of termination, the right does otherwise exist. Termination is otherwise expressly provided for in Pt L, cll 431 to 435. The substantive right on which the University must have relied to terminate Dr Anderson's employment was necessarily cl 434 of the 2018 agreement (set out above).

216 But for cl 434 the University could not have terminated Dr Anderson's employment without notice as required by cl 433. Clause 434 specifies that the only lawful basis for termination without notice is the fact of serious misconduct, not a University delegate being satisfied about the fact of serious misconduct. This must be why cl 384(d)(iii) is worded to ensure that termination for serious misconduct can only occur if there has in fact been serious misconduct. Yet, as noted, no mention of cl 434 was made to the primary judge.

217 If it is necessary to support this proposition about cl 434, then cl 90 of the 2018 agreement is also relevant, as it permits termination of employment for serious misconduct if an academic staff member is within a "confirmation period" (up to four years after the successful completion of probation). It would be anomalous to say the least if a member of the University's academic staff could not have their employment terminated during the "confirmation period" for academic staff under cl 90 of the 2018 agreement other than with notice or "immediately without notice or payment in lieu of notice if the staff member has engaged in Serious Misconduct", but a member of academic staff beyond the confirmation period could have their employment terminated merely because the delegate under cl 384 was reasonably satisfied (even if incorrectly so) that the staff member had engaged in "Serious Misconduct".

218 It is apparent, accordingly, that the primary judge was in error at J [150] in concluding that cl 384(d)(iii) operated to make clear that termination was available only if the delegate was satisfied that there had been "serious misconduct". This is not what cl 384(d)(iii) says. Nor is it consistent with cll 434 or 90 as discussed above. And as explained below, it is also irreconcilable with the general law relating to the termination of employment; in the ordinary course, an employee can only be lawfully terminated without notice under the 2018 agreement if they in fact have engaged in serious misconduct.

219 In the case of warnings, there is no equivalent provision in the agreements that the University may give a warning to an employee for misconduct. The primary judge noted this at J [150],

and it seems this reinforced the view that cl 384 was the source of the power of the University to take disciplinary action. This is also problematic.

220 Assume this as an example. A University delegate is satisfied misconduct has occurred and an academic is suspended for 12 months without pay. The University delegate is wrong – it is a case of mistaken identity. There would be no breach of cl 384(d) because the University delegate, at the time of the disciplinary action, was reasonably and lawfully satisfied the suspended academic did engage in misconduct. But was the suspension in fact lawful (as opposed to in breach of cl 384)? Would the academic have the capacity to require the University to end the suspension despite the fact that it was imposed in compliance with cl 384? The answer to these questions might lie in the fact that there is a contract of employment separate from the enterprise agreements which is subject to the doctrine of implied terms (which was not part of the case below). Whatever the answer, the notion that cl 384 is a source of power for the University to take disciplinary action is incorrect insofar as termination is concerned and must be subject to serious doubt insofar as any disciplinary action other than termination is concerned.

221 The problem with the appellants' case below was their contention that if they proved Dr Anderson's conduct was not in fact misconduct or serious misconduct, the University would have breached cl 384 by taking disciplinary action. Given the terms of cl 384(d)(i) and (ii), that proposition cannot be right for any disciplinary action other than termination. The University would have breached cl 315 if the conduct was the exercise of intellectual freedom in accordance with cll 315-317. Further, the University might have breached some implied term of the contract of employment that the University could only take disciplinary action other than by way of termination for misconduct but that case was never pleaded or put below, and should not be permitted to be raised as part of the remittal. However, what cannot be said is that by taking disciplinary action other than termination the University breached cl 384(d)(i) or (ii) provided the University's delegate reached a reasonable state of satisfaction about the misconduct. To this extent, the primary judge was right to reject the appellants' case about the warnings involving a breach of cl 384 (as opposed to cl 315).

222 As discussed, however, cl 384(d)(iii) is different. While cl 384 may be a procedural provision (as the appellants observed in the appeal), cl 384(d)(iii) says what it says and is clear. As set out in cl 434, cl 384(d)(iii) only permits termination without notice if the employee in fact has committed serious misconduct. Having pleaded and run the cl 384 case below, the appellants

should not be precluded from relying on the termination having been in breach of cl 384(d)(iii) in the remitted hearing merely because, in oral submissions in the appeal, they said that they no longer pressed the cl 384 case. Relevant to this is that the context is the individual rights of Dr Anderson including the right not to be unlawfully dismissed from employment if he has not committed serious misconduct.

223 Having rejected the cl 384 case (correctly in the case of breach by reason of the warnings given the terms of cl 384(d)(i) and (ii) and incorrectly in the case of breach by reason of the termination given the terms of cl 384(d)(iii)), the primary judge did not then deal with the other separate cases. So much is apparent from J [164], [217], [237], [260] and [268] where the primary judge said in answer to the appellants' case as a whole that it was open to the University to be satisfied there had been misconduct if the standards set by cl 317 or other relevant clauses of the agreements had not been met. That was not the issue outside of the context of cl 384.

224 As noted, general principles support the conclusions reached above. Absent some provision to the contrary, it has always been for a court to determine, objectively on all information available to it (not merely information that was available to the employer), whether a termination of employment is lawful or not. This accords with basic and long-standing principles. For example, it is axiomatic that the issue of the lawfulness of a termination may be established by an employer by reference to sufficient misconduct of an employee even if the employer was unaware of that misconduct at the time of termination: *Ridgway v Hungerford Market Company* (1835) 3 AD & E 171 at 177-178; *Mercer v Whall* (1845) 5 QB 447 at 466; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 at 357-359; *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 377; *Concut Pty Ltd v Worrell* [2000] HCA 64; (2000) 75 ALJR 312 at [27]-[29]; *Downer EDI Limited v Gillies* [2012] NSWCA 333; (2012) 92 ACSR 373 at [136]-[138]; *Eldridge v Wagga Wagga City Council* [2021] NSWSC 312 at [8]. This is because the issue is the lawfulness of the termination which is to be objectively determined and not the reasonableness of the employer's state of satisfaction about alleged misconduct. The same principle would ordinarily apply to the lawfulness of any disciplinary action.

225 In these circumstances the fact that the appellants never challenged Professor Garton's state of satisfaction that Dr Anderson had engaged in misconduct or serious misconduct was and is immaterial to all of the claims other than those now abandoned claims for breach of cl 384. The appellants did not have to challenge Professor Garton's state of satisfaction to succeed in

relation to the issues, first, that the University had no lawful right, power or authority to terminate Dr Anderson's employment if his conduct was the exercise of the right of intellectual freedom and, second, that in doing so the University breached cll 315 and 384(d)(iii) by reason of no more than having terminated Dr Anderson's employment if he was in fact exercising that right (and cl 315 by reason of no more than having given warnings to Dr Anderson if he was in fact exercising that right).

226 These considerations also explain why the primary judge erred at J [141] in concluding that if the appellants had pleaded their case by reference to the University having breached cl 317 "the result would not have been any different". This conclusion reflected the focus on cl 384 as the sole source of the appellants' case that the University had acted unlawfully when that was not the case.

7. Errors below

227 Given the conclusions set out above it is apparent that the primary judge's reasoning leading to the dismissal of the amended originating application is affected by error. The errors are understandable because the primary judge was not well assisted by the parties in the various ways described above. It is convenient to identify each of those errors below so the interactions between the various components of the appellants' case below are exposed to assist in the remitted hearing.

228 First, as noted, given the way in which the parties ran their cases the primary judge erred at J [141] where the primary judge said:

> The [appellants] did not plead a case based on cl 317 creating an enforceable right to intellectual freedom. In its submissions, the University recognised that cl 317 created obligations which would be inconsistent with the unfettered right to intellectual freedom which the [appellants] contended was created by cl 315. If the [appellants] had pleaded a case based on breach of cl 317, the result would not have been any different.

229 While it is true that the appellants did not plead a case based on cl 317 they did plead a case based on cl 315 creating an enforceable right to intellectual freedom and accepted at all times that this right had to be exercised in accordance with cl 317. As a matter of forensic logic, the appellants' pleading referring to cl 315 was sufficient and it was for the respondents to raise, as they did, cl 317. The appellants' acceptance of the respondents' proposition about the relevance of cl 317 did not make the appellants' pleading inadequate.

230 Second, the primary judge did not correctly construe cll 315-317. Clause 315 contains enforceable rights and duties with respect to intellectual freedom. One such right, in cl 315(b)(iv), is to express unpopular or controversial views, provided that in doing so staff must not engage in harassment, vilification or intimidation. Dr Anderson's case was (and is) necessarily that he exercised that right in engaging in the conduct (other than the lunch photo) and did so in accordance with cl 317.

231 Third, the fact that the primary judge did not determine for himself, as a matter of objective fact, whether in all of the circumstances Dr Anderson's conduct (excluding the lunch photo) did or did not constitute the exercise of intellectual freedom in accordance with cll 315-317 involved error. This error is apparent at J [161], [214], and [257].

232 Fourth, as discussed, the primary judge's observation at J [141] that if the appellants had pleaded a case "based on breach of cl 317, the result would not have been any different" reflects the conclusions the primary judge reached about the appellants' case based on cl 384. It does not deal with the appellants' separate cases that if the impugned conduct was in accordance with cll 315-317 of the 2018 agreement (or cll 254-256 of the 2013 agreement) the conduct could not be misconduct or serious misconduct and the University had no lawful right, power or authority to, relevantly, terminate Dr Anderson's employment.

233 Fifth, the role of the Code of Conduct remains in issue between the parties and should be resolved. It is integral to grounds 1 and 2 of the appeal and the remittal.

234 At J [140(5)] the primary judge said:

> Where it is asserted that particular conduct constitutes the exercise of intellectual freedom within the meaning cl 315, the question whether the conduct involves "misconduct" or "serious misconduct", if it arises, must be answered by reference to all of the circumstances including the fact that cl 317 creates an obligation to "uphold the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards". Those standards might be reflected in Codes of Conduct with which staff must comply by reason of cl 306.

235 The University agrees with that statement. The only part of that statement with which the appellants disagree is the last sentence. That is, the appellants agree (and it was always their case) that where it is asserted that conduct involved an exercise of the right of intellectual freedom it is necessary for the Court to determine that issue by reference to all of the factual circumstances. The appellants do not accept, however, that the Code of Conduct can qualify the exercise of the right of intellectual freedom.

236 Other relevant provisions of the agreement, as the primary judge identified, are cll 13, 14 and 306. By cl 306 employees must comply with the Code of Conduct. By cll 315-317 academic staff have a right to exercise intellectual freedom provided they do so in a manner which does not constitute harassment, vilification or intimidation and does not involve a failure to uphold the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards.

237 Accordingly, there is a duty in cl 306 (to comply with the Code of Conduct) and a right and a duty in cll 315-317 (to exercise intellectual freedom as specified). The ordinary principles of construction of an instrument such as an enterprise agreement indicate that the framers of the document intended the parties to both comply with the duty in cl 306 and to be able to exercise the rights and to comply with the duties in accordance with cll 315-317. However, this is more easily expressed than applied, and its glibness is exposed on further consideration.

238 Other matters relevant to the construction of these provisions is that the rights and duties with respect to intellectual freedom are part of the 2018 agreement in cll 315-317. The Code of Conduct is not incorporated by reference into the 2018 agreement (see cll 13-14). Clause 306 does not have the effect of incorporating the Code of Conduct into the 2018 agreement. It merely imposes a duty on those bound by the agreement to comply with the Code of Conduct. Clause 3 defines the Code of Conduct as that document as it exists from time to time. The Code is thus able to be changed within the term of the 2018 agreement. While the consultation provisions in Pt N of the 2018 agreement would presumably apply to changes to the Code of Conduct, the Code is ultimately the University's document. As a result, the Code of Conduct is not itself a reflection of a negotiated outcome between the parties. Neither of course are the agreements negotiated as if they were contractual documents, but the notion of the intention of the framers of the agreements (as opposed to the intention of parties to a contract) remains relevant: *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84; (2014) 222 FCR 152 at [88]-[90]. These considerations support the conclusion that, in the event of inconsistency, cl 306 must yield to cll 315-317.

239 Having regard to these considerations, the relationship between cl 306 and cll 315-317 discussed above (the framers of the document intended the parties to both comply with the duty in cl 306 and to be able to exercise the right in accordance with cll 315-317) needs to be re-assessed. The re-assessment requires recognition of the fact that cl 306 involves a general duty to comply with the Code of Conduct as it may exist from time to time. Clauses 315-317 involve

specific rights and duties, to protect, promote and exercise intellectual freedom and to uphold the principle and practice of intellectual freedom as specified. If that is correct, the specific rights and duties in cll 315-317, to the extent of any inconsistency, must prevail over the general duty in cl 306 to comply with the Code of Conduct.

240 The appellants took as an example the concept of offence (in the sense of something that offends a person). To offend someone involves "1. to irritate in mind or feelings; cause resentful displeasure in" (Macquarie Dictionary online). The appellants submitted to the primary judge that the right to exercise intellectual freedom necessarily involves the right to offend another person or to be offensive, subjectively or objectively. They submitted further that the right to exercise intellectual freedom necessarily means that if the right was exercised and results in subjective and objective offence, but could have been exercised in such a way as not to cause subjective or offensive offence, that fact cannot take the exercise outside of the scope of the right afforded by cll 315-317.

241 These submissions are persuasive. The right of intellectual freedom expressly includes the right to express unpopular or controversial views. The expression of such views is bound to cause offence to some, perhaps even many, people. It may also cause "objective" offence in the sense that the taking of offence to the expression of unpopular or controversial views may be objectively reasonable in all of the circumstances. The measure of whether conduct is within or outside the scope of the right afforded by cll 315-317 cannot be whether the conduct caused subjective or objective offence in another person or could have been carried out in a different way so as not to cause subjective or objective offence in another person.

242 Accordingly, if (for example) the Code of Conduct provided that employees must not cause offence to another person (which it does not), the obligation in cl 306 to comply with the Code of Conduct could operate to take conduct otherwise within cll 315-317 outside of the scope of those provisions merely because the conduct caused subjective or objective offence in another person or could have been carried out in a different way so as not to cause subjective or objective offence in another person.

243 Further, to take an actual example from the Code of Conduct, section 4 of that Code provides that an employee must treat, amongst others, members of the public with "respect, impartiality, courtesy and sensitivity". The expression of many unpopular or controversial views is likely to be both perceived to be and in fact to be discourteous or to lack sensitivity to some people. Insensitivity to the feelings of others may not involve harassment, vilification or intimidation

as excluded from the exercise of the right of intellectual freedom by cl 315(b)(iv). Could a lack of sensitivity, in apparent breach of the Code of Conduct, remove conduct that is otherwise within cll 315-317 beyond the scope of those provisions on the basis that the requirements of the Code of Conduct inform the content of the concept of the "highest ethical, professional and legal standards" as specified in cl 317?

244 Again, the answer to this question must be "no". The framers of the enterprise agreement could not have intended, on the one hand, to vest in the persons bound by the agreement a right (indeed, a duty) to protect, promote, and exercise intellectual freedom including the freedom to express unpopular or controversial views provided they did not engage in harassment, vilification or intimidation and to uphold the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards and, on the other hand, to exclude from the exercise of that right conduct which may breach the Code of Conduct because it is perceived to be or is in fact insensitive. The highest ethical, professional and legal standards cannot require "sensitivity" in the sense of avoiding any offence to others consistently with the concept of intellectual freedom. The right would be meaningless if it is subject to qualifications such as not involving offence to others, not being discourteous to others, or not involving insensitivity to others.

245 However, the same conclusion would not necessarily apply to other kinds of behaviour. For example, if the Code of Conduct provided that the highest professional and ethical standards included not engaging in abuse of any colleague or any person then that might meaningfully inform the content of the duties in cl 317. This is because the relevant meaning of "abuse" (4. To speak insultingly to; revile – Macquarie Dictionary online) involves a concept that is not inherently inconsistent with the right of intellectual freedom. The same applies to the concepts of "harassment", "vilification" and "intimidation" which are referred to in cl 315(b)(iv). None of these concepts are inherently inconsistent with the right of intellectual freedom. The Code of Conduct, however, does not perform this function. It does not identify concepts and standards relevant to the exercise of the right of intellectual freedom in accordance with the highest ethical and professional standards.

246 The result is that, given the terms of the Code of Conduct in the present case, it could not be relevant to the exercise of the right of intellectual freedom in accordance with cll 315-317.

247 The contrary conclusion of the majority in *Ridd* involved different considerations.

248 The view of the majority in *Ridd* about the Code of Conduct was based on the provisions of the enterprise agreement in that case, cl 14.1 of which provided that the university was "committed to act in a manner consistent with the protection and promotion of intellectual freedom within the University and in accordance with JCU's Code of Conduct" (at [47], the importance of which is described at [87]). Thus, the intellectual freedom embodied in that enterprise agreement had to be in accordance with the Code of Conduct. There is no equivalent provision in the enterprise agreements in the present case.

249 The majority in *Ridd* considered that there was no inconsistency between the right of intellectual freedom as expressed in the enterprise agreement there under consideration, including cl 14.1, and the Code of Conduct (*Ridd* at [103]). The same cannot be said in the present case insofar as the Code contains an obligation for employees to treat everyone with respect courtesy and sensitivity.

250 The distinction between "academic freedom" and "intellectual freedom" discussed by the majority in *Ridd* at [100] has no foundation in the present case. In *Ridd* the enterprise agreement referred to "intellectual freedom" whereas the Code of Conduct referred to "academic freedom" (at [98]). The majority considered the distinction explained at [90] to be important. In the present case, the Code of Conduct does not refer to either "academic freedom" or "intellectual freedom".

251 This does not mean that employees of the University are free to engage in such disrespect, discourtesy and insensitivity as they see fit. It means that if a member of academic staff is engaging in the exercise of the right to intellectual freedom, the fact that so doing may reasonably be characterised as disrespectful, discourteous and insensitive to some people (contrary to the Code of Conduct) does not, of itself, take the conduct outside of the scope of cll 315-317. Contrary to the University's submissions, the fact that "misconduct" and "serious misconduct" are both defined in a manner which includes, respectively, a breach or serious breach of the Code of Conduct is immaterial. Breaches of the Code of Conduct are mere examples of misconduct or serious misconduct provided in the definitions.

252 What then of the University's Public Comment Policy? Section 9 of the Code of Conduct provides that staff who make public comment or representations and, in doing so, identify themselves as staff of the University must comply with the University's Public Comment Policy. The University's Public Comments Policy contains "Guidelines" which include the following:

c) Statements should be accurate, professional and exercise appropriate restraint.

…

h) Staff should maintain the highest professional and ethical standards when they associate themselves with the University in public statements. Any public statement made by a member of staff should not bring the University into disrepute.

253 Again, it is not apparent how obligations to "exercise appropriate restraint" and not to "bring the University into disrepute" are reconcilable with the specific rights and duties in cll 315-317 with respect to intellectual freedom. It must be concluded that if conduct involves the exercise of the right in accordance with cll 315-317 then the fact that the conduct may not have involved the exercise of appropriate restraint and may have brought the University into disrepute in the eyes of some or even many people also cannot take the exercise of the right outside of cll 315-317.

254 For these reasons the appellants are correct that cll 315-317 of the 2018 agreement vest specific rights and duties in the parties with respect to the protection and promotion and the exercise of intellectual freedom. Those specific rights and duties prevail over any other rights and duties in the agreements, including the obligation in the agreements to comply with the Code of Conduct to the extent that obligation is inconsistent with the provisions relating to intellectual freedom.

255 Sixth, the appellants' contention that, on the proper construction of the enterprise agreements, conduct which in fact satisfies the requirements of cll 315-317 cannot also be misconduct or serious misconduct, must be accepted. To put it another way, conduct that is authorised by cll 315-317, by definition under the agreements, cannot also be "conduct or behaviour of a kind which is unsatisfactory" (as specified in the definition of misconduct) or "serious misbehaviour of a kind that constitutes a serious impediment to the carrying out of a staff member's duties or to other staff carrying out their duties" or a "serious dereliction of duties" (as specified in the definition of serious misconduct).

256 This is a necessary conclusion of the operation of the agreements. In the context of these agreements conduct or behaviour cannot be both authorised under cll 315-317 and otherwise "unsatisfactory" or "misbehaviour" or any form of "dereliction". This is because that which is specifically authorised by the 2018 agreement cannot involve any wrong. The concepts of "unsatisfactory", "misbehaviour", and "dereliction" necessarily involve some kind of wrong having been done or having occurred. In the context of these agreements, however, there can

be no wrong of any kind in doing what is specifically authorised. The primary judge's contrary conclusion at J [140] involves error.

257 The primary judge was correct, however, to stress the in-built qualifications on the right in cl 315 in that clause and cl 317. Thus, for example, the free pursuit of knowledge through research must be the "responsible" pursuit of knowledge. An irresponsible pursuit of knowledge could not be an exercise of the right of intellectual freedom as specified in cl 315(a). Nor could research which is not in accordance with the highest ethical, professional and legal standards as specified in cl 317. The right to express opinions about the operation of the University in cl 315(b)(ii) would be subject to the obligation in cl 315(b)(iv) not to engage in harassment, vilification or intimidation because such opinions, by definition, may also involve the expression of unpopular or controversial views. The right to express opinion about the operation of the University also has to be in accordance with the highest ethical, professional and legal standards as specified in cl 317. The right to express unpopular or controversial views in cl 315(b)(iv) must not involve harassment, vilification or intimidation and must also be in accordance with the highest ethical, professional and legal standards as specified in cl 317. Further, a Code of Conduct may contain provisions relevant to the highest ethical and professional standards as the primary judge recognised at J [140(5)]. The applicable Code of Conduct, however, does not do so. As a result, in the present case, if the conduct is within the scope of cll 315-317 (which the Court must determine for itself in all of the circumstances) the conduct is incapable of also being misconduct or serious misconduct.

258 For these reasons the primary judge also erred at J [140(4)], [163], [216], and [259] in concluding that conduct authorised by cll 315-317 could also be misconduct or serious misconduct.

259 Seventh, it has already been noted above that the primary judge erred in construing cl 384(d)(iii) of the 2018 agreement by concluding that it operated to enable termination if the delegate was satisfied the employee had engaged in serious misconduct rather than mere misconduct. Given the terms of cl 384(d)(iii) and cl 434 and 90, as well as the general law, cl 384(d)(iii) did not have this effect. The termination of Dr Anderson was not lawful if the Court, deciding for itself, concludes that as a matter of objective fact Dr Anderson did not engage in serious misconduct. The satisfaction of the delegate or the University about this matter does not immunise the termination from judicial determination.

260 The University's submissions that the appellants are wrong to submit that cl 384 is the "sole source of the University's right to impose disciplinary action on Dr Anderson" and that "the disciplinary action against Dr Anderson was taken by the University pursuant to cl 384" expose the confusion about cl 384 below. The confusion is not, as the University would have it, that the University also had rights at common law (which is correct, as there is also a contract of employment between the University and Dr Anderson). It is that cl 384 imposes a duty on the University, in taking disciplinary action that the University is otherwise authorised to take, to do so in accordance with a particular procedure. The state of satisfaction of the University delegate as specified in cl 384 is relevant only to the University's compliance with cl 384. It is not relevant to the existence or not of misconduct or serious misconduct or the legality of disciplinary action which depends on the fact of misconduct or, for termination, serious misconduct. These concepts are fundamental.

261 Eighth, it has also been noted above that the primary judge erred by assuming that his rejection of the appellants' case about cl 384 answered the balance of the appellants' case when this is not so. As discussed, this erroneous assumption is apparent at J [164], [217], [237], [260] and [268] which focus only on the unchallenged state of satisfaction of the University's delegate.

8. Is the appeal moot?

262 The University's argument that the appeal is moot because certain findings of the primary judge are not challenged is incorrect. A principal point of the appeal is that the primary judge did not make the findings necessary to resolve the appeal, which is correct for the reasons given. The findings the primary judge did make are immaterial to the effect of the errors discussed above.

263 The one example which the University identified where the primary judge did make relevant findings, at J [254]-[256] about the fifth comments (that they did not constitute the exercise of the right to intellectual freedom), cannot be taken to be unaffected by error.

264 First, the primary judge had already rejected the proposition that cl 315 involved any enforceable rights when, cl 315 does involve enforceable rights (albeit rights which must be exercised in accordance with cll 315 and 317), including the rights specified to express opinions about the operation of the University and to express unpopular or controversial views.

265 Second, the primary judge had also already accepted the University's submission that the rights in cll 315-317 were subject to the Codes of Conduct and other University policies when, for the reasons given, this is not so.

266 Third, the primary judge considered that the exercise of the right of intellectual freedom could also be misconduct or serious misconduct when, for the reasons given, this is not so.

267 It cannot be assumed that the primary judge would have reached the conclusions in J [254]-[256] leaving aside these errors. In particular, if: (a) an exercise of intellectual freedom in accordance with cll 315 and 317 cannot be misconduct at all (which is the case), and (b) posting the PowerPoint presentation initially was an exercise of that right in accordance with cll 315 and 317 (an issue of fact the Court must determine for itself on the remittal), then:

(1) Dr Anderson would be acting lawfully in wanting to "express his view that he had a right to post material of that kind if he wished" and would be right to insist he had the right to do so "without censure". His self-described "assertion of my intellectual freedom" would be lawful. Contrary to J [256], these factors would not indicate that the conduct was not an exercise of the right of intellectual freedom;

(2) also contrary to J [256], it was not necessary for Dr Anderson to prove or explain what course he was teaching at the time that made it relevant to re-post the PowerPoint presentation. The right of intellectual freedom is not confined to public comments about the content of courses being taught or taught at the time of the public comment; and

(3) if Dr Anderson intended the re-posting of the PowerPoint presentation to be "an assertion of an unfettered right to exercise what he considered to be intellectual freedom" and was being "deliberately provocative" in conveying that Dr Anderson "could post such material if he wanted and the University had no right or entitlement to prevent him from doing so", he would have been correct and entitled to make that point to the University by the re-posting of the material.

268 Consider the PowerPoint presentation in more detail. It is the Israeli flag superimposed with the swastika which is the issue. Everything else in the PowerPoint presentation involves the expression of a legitimate view, open to debate, about the relative morality of the actions of Israel and Palestinian people. Dr Anderson is making a public comment asserting that the concept of moral equivalence between Israel and Palestinian people who attack Israel is false, in part, because of an asserted higher number of deaths of civilian Palestinians in Gaza from purportedly "precision attacks" by Israel compared to an asserted far lower number of deaths of people in Israel from purportedly "indiscriminate" attacks by Palestinians. He is including Israel within a long history of colonial exploitation by one political entity over another weaker entity or people. It does not matter whether this comparison may be considered by some or

many people to be offensive or insensitive or wrong. As discussed, offence and insensitivity cannot be relevant criteria for deciding if conduct does or does not constitute the exercise of the right of intellectual freedom in accordance with cll 315 and 317.

269 What then of the swastika superimposed over the Israeli flag? That is deeply offensive and insensitive to Jewish people and to Israel. It may involve an assertion of the very kind of false moral equivalence (comparing Israel to Nazi Germany) against which Dr Anderson is advocating in the PowerPoint presentation. Again, however, the relevant issue cannot be the level of offence which the conduct generates or the insensitivity which it involves. The issue is only whether the conduct involves the exercise of the right of intellectual freedom in accordance with cll 315 and 317. Whether this part of the PowerPoint presentation operates to take the otherwise legitimate expressions of intellectual freedom elsewhere in the PowerPoint presentation outside of the scope of cll 315 and 317 is a question of fact which must be determined on the whole of the evidence. For example, did the evidence support an inference that the superimposition of the swastika over the flag of Israel was a form of racial vilification intended to incite hatred of Jewish people? That is a matter which may only be determined on the whole of the evidence as part of the remittal of the matter.

270 Accordingly, the primary judge was required to decide, as a matter of objective fact by reference to the evidence of all the relevant circumstances, whether each or any of the instances of Dr Anderson's impugned conduct (excluding the lunch photo) constituted an exercise of the right of intellectual freedom in accordance with cll 315-317 of the 2018 agreement (or, if applicable, the equivalent provisions of the 2013 agreement). This included consideration of whether the conduct did or did not involve harassment, vilification or intimidation or the upholding of the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards.

271 If all of the impugned conduct (other than the lunch photo) constituted exercises of the right to intellectual freedom in accordance with cll 315-317 of the 2018 agreement (or, if it applied, the equivalent provisions in the 2013 agreement), then the University had no lawful right, power or authority to give warnings to or terminate Dr Anderson's employment because of that conduct as it could not be misconduct or serious misconduct in fact authorising warnings or termination. In that event, the appellants' argument is that the unlawful warnings and termination must have involved the University in breaching the duty on it in cll 315 and 384 of the 2018 agreement (or, if it applied, the equivalent provisions in the 2013 agreement) to permit

the exercise of the right and thus contravened s 50 of the Fair Work Act. If all factual pre-conditions are satisfied, this argument would be correct insofar as termination is concerned. For the warnings, as discussed, the argument would be correct as to breach of cl 315, but incorrect in respect of breach of cl 384.

272 If the fourth comments and/or the fifth and sixth comments did not constitute an exercise of intellectual freedom in accordance with cll 315-317 of the 2018 agreement (or, if it applied, the equivalent provisions in the 2013 agreement), then the primary judge would be required to decide, as a matter of objective fact by reference to the evidence of all the relevant circumstances, whether, as pleaded, the fourth comments did not constitute misconduct and the fifth and sixth comments did not constitute serious misconduct (paras 69(b) and 78(b) of the FASOC). If they did not, the same considerations as set out in the paragraph above relating to cl 384 would apply. These same considerations would also apply if the primary judge decides as a matter of fact that the fourth comments and/or the fifth and sixth comments merely constituted misconduct as opposed to serious misconduct because the University would be in breach of cll 384(d)(iii) if it terminated Dr Anderson's employment without notice for anything other than serious misconduct.

9. The lunch photo

273 The appellants (wisely) did not allege that the lunch photo involved the exercise of the right of intellectual freedom. Their contentions about the lunch photo are set out above as identified in ground 3 of the notice of appeal.

274 Consistent with the principles discussed above, it is not to the point that the University relied on breach of the Code of Conduct to found its conclusion that the lunch photo involved misconduct and its delegate was satisfied, on that basis, that the posting of the lunch photo did involve misconduct. It was for the primary judge to determine if the posting of the lunch photo constituted misconduct or not. In assessing that issue the primary judge would have been required to consider the provisions of the Code of Conduct (as it was not suggested that posting of the lunch photo engaged cll 315-317). However, the primary judge confined himself to the question whether it was open to Professor Garton, as the relevant delegate under cl 384, to decide that the posting of the lunch photo was misconduct: J [225]-[227]. This involved error for the reasons already given. The primary judge did decide that the posting of the lunch photo was sufficiently connected to Dr Anderson's employment to be capable of constituting

misconduct at J [223], [226] and [227]. The appellants contend in ground 3 of the appeal that the primary erred in so concluding.

275 The assumption underlying the appellants' submissions about the lunch photo, that misconduct or serious misconduct can only occur in the course of an employee carrying out duties for the University, is misconceived. As the primary judge concluded at J [227], a connection with the employee's employment may suffice. Take the definition of serious misconduct as an example. Examples of serious misconduct include "conviction of an offence that constitutes a serious impediment to the carrying out of a staff member's duties". The definition does not suggest that the offence must have been committed in the course of the employee carrying out their duties as an employee. It suffices if the "conviction constitutes a serious impediment to the carrying out of a staff member's duties". The same logic must apply to the other examples. The conduct may be connected to a person's employment by having occurred in the course of the employee carrying out their duties as an employee or it may be connected to their employment in the sense that, for one reason or another, the conduct adversely impacts on or constitutes a serious impediment to the carrying out of their duties.

276 The factors on which the primary judge relied to conclude that the lunch photo was sufficiently connected with Dr Anderson's employment are compelling. The relevant facts at J [227] are that: (a) Dr Anderson chose to make posts to his personal Facebook account which he described in the proceeding as the exercise of his intellectual freedom as an academic employed by the University, (b) the lunch photo was a photograph of friends connected in academic interest, and (c) the lunch photo was, and was intended, to be accessed by people interested in hearing Dr Anderson's expressions of academic opinion.

277 These facts are sufficient to support the requisite connection between the conduct and the potential characterisation of the conduct as misconduct or serious misconduct. This conclusion is also supported by the fact that until at least mid-2018 the Facebook account identified Dr Anderson as working at the University: J [11] and [236]. Even if this identification had been removed before the lunch photo was posted, the fact that the Facebook account so identified Dr Anderson up to mid-2018 also supports the existence of a sufficient connection between his employment and the posting of the lunch photo.

278 The contrary submissions for the appellants are not persuasive. Insofar as the issue is one of connection to employment, it does not matter that Dr Anderson was not under any duty to post photographs or anything else on social media. He chose to do so in the described circumstances

which create the sufficient connection to his employment. It does not matter that the posting of a social event does not "obviously" constitute public debate. The photo was made public and includes Mr Tharappel, an academic colleague of Dr Anderson's at the University (see J [17]), wearing a jacket with the badge saying, in Arabic, "Death to Israel", "Curse the Jews" and "Victory to all Islam": J [220]. These are political comments connected with Dr Anderson's academic work as an employee of the University. It does not matter that Dr Anderson was on leave or on about to be on sabbatical. He was still an employee of the University. It does not matter that the lunch photo was not captioned. The badge worn by Mr Tharappel spoke for itself. It does not matter that Dr Anderson made no comment about the badge. Dr Anderson chose to post the lunch photo on his Facebook account. It does not matter that in attending the lunch and posting the lunch photo Dr Anderson was engaging in a personal social activity. A person can be both engaging in a personal social activity and conduct themselves in a manner connected to their employment.

279 The question whether the University gave Dr Anderson a lawful and reasonable direction to remove the lunch photo depends on whether the lunch photo in fact constituted misconduct or serious misconduct which the primary judge did not decide. If it was in fact misconduct or serious misconduct to post the lunch photo, the University's direction to remove the lunch photo was lawful and reasonable. If it was not misconduct or serious misconduct to post the lunch photo, the University's direction to remove the lunch photo was unlawful and unreasonable.

280 It is also not possible to resolve the question whether Dr Anderson's refusal to remove the lunch photo itself constituted serious misconduct. If the University's direction was lawful and reasonable then it would seem to go without saying that a refusal to comply with the direction constituted, at the least, misconduct. Whether it constituted serious misconduct, however, would depend upon all of the evidence including (as they are relevant for this purpose) each factor on which the appellants relied to deny a sufficient connection with Dr Anderson's employment (set out above), as well as the state of mind of Dr Anderson (as to whether the lunch photo was or was not connected with his employment) and the reasonableness of his state of mind in all of the circumstances. The primary judge did not make findings about these matters. Nor do we have access to the whole of the evidence that was before the primary judge about these matters. The parties have also not addressed these matters in their submissions. These must remain matters for the primary judge on the remittal.

281 Certain further observations can be made relevant to the characterisation of the conduct as involving misconduct or serious misconduct or not.

282 It appears that Dr Anderson never suggested that he did not know the meaning of the badge which Mr Tharappel wore ("Death to Israel", "Curse the Jews" and "Victory to all Islam"), and no argument to that effect was made. Whether the inference should be drawn that Dr Anderson knew what the badge said and was nevertheless content to post it to his public Facebook account would be an important matter for the primary judge to consider. Other inferences might also be available, including that Dr Anderson did not consider the meaning of the badge one way or another given that he was merely posting a photograph of people at lunch.

283 Further, it is relevant that the badge worn by Mr Tharappel did not merely express a political opinion about the existence of the state of Israel. As Professor Garton considered, the badge "is an incitement for the death of people of the predominantly Jewish inhabitants of the state of Israel and not a purely political statement seeking the demise of a nation state". So much is clear from the calls for "death" to Israel and the "curse" upon the Jews.

284 While Professor Garton was not satisfied that the badge worn by Mr Tharappel endorsed or promoted racial hatred and/or racism, and this was view was reasonably open to him, the primary judge would need to consider whether the badge is a statement endorsing and promoting hatred of the Jewish people and whether, in publishing the lunch photo and no more, Dr Anderson was himself endorsing or promoting anti-Semitic beliefs and actions. If that is so, it would be relevant that Dr Anderson's academic responsibilities included teaching courses about human rights: J [13]. While it may well be legitimate for any such course to involve a very wide range of views (from the notion that there are no such human rights, only human duties, to the notion that human rights are immanent and immutable), that range does not extend to the promotion or endorsement of hatred against groups of people on account of their race or religion. Expressions of anti-Semitic beliefs and calls for anti-Semitic acts would be fundamentally inconsistent with Dr Anderson's role as a teaching academic responsible for subjects concerning human rights. Had Dr Anderson been wearing the badge in question, or had he made any statement endorsing the content of the badge, it would have been difficult to avoid these conclusions. As it is, however, Dr Anderson did not do either of these things.

285 It is also important to recognise that, as noted, all of the facts on which the appellants relied to dispute the requisite connection between the posting of the lunch photo and Dr Anderson's employment are relevant to the question whether this conduct constituted misconduct or serious

misconduct. These include that: (a) Dr Anderson was not wearing the badge in question, (b) Dr Anderson did not make any statement endorsing the contents of the badge, (c) Dr Anderson did not draw attention to the badge other than by the act of posting the lunch photo which includes Mr Tharappel wearing the badge, and (d) the lunch photo involves a social occasion not occurring in the course of Dr Anderson's duties as an employee of the University.

10. The relevance of the basis on which the University terminated Dr Anderson's employment

286 The University did not plead or argue that if any one or more of the comments did not constitute serious misconduct because it involved the exercise of the right to intellectual freedom, then Dr Anderson's termination was lawful in any event because of any one or more of the comments, in isolation, was serious misconduct justifying the termination in accordance with cl 384(d)(iii). Nor, consistent with the views expressed above, can the University now be permitted to do so because that would involve setting the hearing below at naught. Had the University pleaded such a case, it is obvious that there might have been different questions asked of Professor Garton, in particular, as he was the University's delegate under cl 384 and the University's apparent agent for deciding that Dr Anderson had engaged in serious misconduct justifying termination without notice as authorised by cl 434.

287 Accordingly, the primary judge should determine the basis on which the University in fact terminated Dr Anderson's employment. The terms of the University's correspondence at J [69], [79]–[81], [88], as well as J [91] and the contents of the letter referred to at J [92], support the appellants' case that the University terminated Dr Anderson's employment without notice because of the fifth and sixth comments in the cumulative context set by all of the earlier comments. However, there may be other evidence relevant to identifying the basis upon which the University terminated Dr Anderson's employment without notice.

288 If it is correct that the University terminated Dr Anderson's employment without notice because of the fifth and sixth comments in the cumulative context set by all of the earlier comments then it is arguable that, if any of the comments constituted the exercise of the right in accordance with cll 315-317 of the 2018 agreement (or, if applicable, the equivalent provisions of the 2013 agreement), the University's decision to terminate Dr Anderson's employment necessarily miscarried because such comments cannot be misconduct or, as required for termination, serious misconduct. In that event, by reason of the termination, the

University breached cll 384(d)(iii) and 315 of the 2018 agreement by basing its termination of Dr Anderson's employment, even if in part only, on the lawful exercise of the right in cl 315.

11. Proposed orders including preliminary view as to scope of remittal

289 For these reasons, it is necessary that the appeal be allowed. No application for costs should be encouraged under s 570 of the Fair Work Act as both parties are responsible for the miscarriage of the primary judge's process of reasoning.

290 Preliminary views have been expressed above relating to the scope of any remittal.

291 Consistent with the conclusions and preliminary views about the appropriate scope of the remittal expressed above, it would appear that further orders should be made that the matter be remitted to the primary judge for hearing and determination, based on the evidence as it currently exists, but permitting the filing and/or making of further submissions addressing at least the following:

(1) *Did any one or more instances of the conduct (excluding the lunch photo) constitute the exercise of the right of intellectual freedom in accordance with cll 315-317 of the 2018 agreement or, as applicable, cll 254-256 of the 2013 agreement?*

If any instance of impugned conduct (excluding the lunch photo) did constitute the exercise of this right then that conduct could not also be misconduct or serious misconduct. The University had no lawful right, power or authority to terminate Dr Anderson's employment on that basis either in whole or in part. Termination of Dr Anderson's employment on that basis, in whole or part, would mean the University breached cll 384(d)(iii) and 315 and, thereby, s 50 of the Fair Work Act, enlivening the potential remedies in s 545 (reinstatement and compensation).

(2) *Did the University terminate Dr Anderson's employment in whole or in part based on any conduct which constituted the exercise of the right of intellectual freedom in accordance with cll 315-317 of the 2018 agreement or, as applicable, cll 254-256 of the 2013 agreement?*

If the University did terminate Dr Anderson's employment on that basis (in whole or in part) then the University necessarily did so in breach of its duties in cll 384(d)(iii) and 315 and, thereby, contravened s 50 of the Fair Work Act, enlivening the potential remedies in s 545 (reinstatement and compensation).

(3) *If the answer to question 2 is "no", on what basis did the University terminate Dr Anderson's employment? Specifically, did the University terminate Dr Anderson's employment on the basis of: (a) all of the conduct considered cumulatively constituting serious misconduct, or (b) instances of the conduct constituting serious misconduct?*

It is necessary to answer this question because, given that the University did not plead or argue an alternative basis for the termination being lawful (such as any one or more of the acts of impugned conduct in isolation), the primary judge must decide the basis of the termination.

(4) *If the answer to question 2 is "no", did the conduct on which the University relied to terminate Dr Anderson's employment include the fourth comments being misconduct and/or the fifth and sixth comments being serious misconduct?*

If the answer to this question is "yes", it is necessary to consider the next question.

If the answer to this question is "no", the amended originating application must be dismissed because the appellants did not otherwise challenge the fact that the conduct other than the fourth comments and the fifth and sixth comments was not, respectively, misconduct at all or serious misconduct.

(5) *If the answer to question 2 is "no" and the answer to question 4 is "yes", did: (a) the fourth comments constitute misconduct, or (b) the fifth and sixth comments constitute serious misconduct?*

If the answer to 5(a) and 5(b) is "yes", the termination of Dr Anderson's employment was lawful. The amended originating application must be dismissed.

If the answer to 5(a) and 5(b) is "no", the University had no lawful right, power or authority to terminate Dr Anderson's employment on that basis either in whole or in part. Termination of Dr Anderson's employment on that basis, in whole or part, would mean the University breached cl 384(d)(iii) and, thereby, s 50 of the Fair Work Act, enlivening the potential remedies in s 545 (reinstatement and compensation).

292 The only other observation which should be made is this. The Court expects and relies upon represented parties, particularly sophisticated parties such as the first appellant and the University, to argue their cases in sufficient detail to be clear and intelligible. Where alternative cases are run such parties are expected to be able to: (a) inform the Court of the relevant law applicable to each strand of the case, (b) identify whether the cases are interdependent in any way or separate, (c) identify the issues in dispute which the primary judge must decide, and

(d) identify the consequences of each decision about each relevant issue. The submissions of the parties must enable the Court to work its way through each issue aware of the consequences of each decision for each stand of the case. Had this been done in the present case, the appeal may have been unnecessary.

I certify that the preceding two hundred and sixty-nine (269) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Jagot and Rangiah.

Associate:

Dated: 31 August 2021