



# FEDERAL COURT OF AUSTRALIA

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### Lattouf v Australian Broadcasting Corporation (No 2) [2025] FCA 669

File number:	NSD 189 of 2024
Judgment of:	<b>RANGIAH J</b>
Date of judgment:	25 June 2025
Catchwords:	<b>INDUSTRIAL LAW</b> – unlawful termination – whether the respondent contravened s 772(1) of the <i>Fair Work Act 2009</i> (Cth) (FWA) by terminating the applicant’s employment for reasons including political opinion, race or national extraction – whether s 772(1) should be construed similarly to Part 3-1 of the FWA – what constitutes “political opinion” – whether s 772(1) (f) protects the expression, as well as the holding, of political opinion – whether the findings of the Fair Work Commission give rise to an issue estoppel – whether there was a termination of the employment contract or of the employment relationship – whether termination of the employment relationship constitutes termination under s 772(1) – where the employer had an obligation to provide work – where a substantial and operative reason of the relevant decision maker was the applicant’s holding of a political opinion – compensation awarded for non-economic loss under s 545 of the FWA <b>INDUSTRIAL LAW</b> – whether disciplinary action taken by the respondent breached the Enterprise Agreement – where the respondent made an allegation of misconduct – where the applicant was not notified or given an opportunity to respond – denial of procedural fairness required by the Enterprise Agreement – applicant dismissed when no grounds for dismissal - contravention of s 50 of the FWA
Legislation:	<i>Acts Interpretation Act 1901</i> (Cth) s 15AA <i>Australian Broadcasting Corporation Act 1983</i> (Cth) ss 5(1), 6(1), 7, 8, 8(1)(c), 9, 10, 12 and 32 <i>Evidence Act 1995</i> (Cth) ss 140(1) and 140(2) <i>Fair Work Act 2009</i> (Cth) ss 3, 50, 119, 119(1), 195(1), 340, 340(1)(a), 342, 346, 346(a), 351, 351(1), 351(2), 352, 360, 361, 386, 386(1), 386(2), 386(3), 545, 595(2), 595(3), 771, 772, 772(1), 772(1)(f), 772(2), 772(2)(a), 772(2)(b), 773, 776, 776(1), 776(3), 776(3)(a), 778, 783, 783(1), Pt 3-1 and Pt 6-4, Div 2 <i>Industrial Relations Act 1988</i> (Cth) ss 170CA, 170CB and 170EA <i>Workplace Relations Act 1996</i> (Cth) s 659 <i>Federal Court Rules 2011</i> (Cth) Rule 16.02(1) Explanatory Memorandum, Fair Work Bill 2008 (Cth)

*International Covenant on Civil and Political Rights* Arts 2, 19 and 26

*Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation* Art 1(1)

*Convention (No. 158) Concerning Termination of Employment at the Initiative of the Employer*

Cases cited:

*Aitken v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia — Western Australian Branch* (1995) 63 IR 1

*Alam v National Australia Bank Limited* (2021) 288 FCR 301

*Australian Building and Construction Commissioner v Hall* (2018) 261 FCR 347

*Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526

*Australian Red Cross Society v Queensland Nurses' Union of Employees* (2019) 273 FCR 332

*Australian Rugby League Ltd v Cross* (1997) 39 IPR 111

*Australian Securities and Investments Commission v BHF Solutions Pty Ltd* (2022) 293 FCR 330

*Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435

*Banque Commerciale SA (En Lign) v Akhil Holdings Ltd* (1990) 169 CLR 279

*Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212

*Blair v Curran* (1939) 62 CLR 464

*Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]* (2012) 248 CLR 500

*Briginshaw v Briginshaw* (1938) 60 CLR 336

*Broadlex Services Pty Ltd v United Workers' Union* [2020] FCA 867; 296 IR 425

*Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144

*Byrne v Australian Airlines Ltd* (1995) 185 CLR 410

*Canada (Attorney-General) v Ward* [1993] 2 SCR 689

*Carr v The State of Western Australia* (2007) 232 CLR 138

*Celand v Skycity Adelaide Pty Ltd* (2017) 256 FCR 306

*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1

*CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384

*City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426

*Collier v Sunday Referee Publishing Co Ltd* [1940] 2 KB 647

*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466

*Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* (2015) 238 FCR 273

*Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243

*Construction, Forestry, Mining and Energy Union v Clermont Coal Limited* [2015] FCA 1014; 253 IR 166

*CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514

*Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337

*Dare v Pulham* (1982) 148 CLR 658

*Duncombe v Porter* (1953) 90 CLR 295

*Ex parte Amalgamated Engineering Union (Australian Section); Re Jackson* (1937) 38 SR (NSW) 13

*Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liquidation) (No 4)* [2021] FCA 1242

*Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31

*General Motors-Holden Pty Ltd v Bowling* (1976) 12 ALR 605

*Geys v Societe Generale, London Branch* [2013] 1 AC 523

*Goodman v Pocock* (1850) 15 QB 576

*Gould, Birbeck and Bacon v Mount Oxide Mines Ltd (In Liq)* (1916) 22 CLR 490

*In re Rubel Bronze and Metal Co Ltd v Vos* [1918] 1 KB 321

*Jacobs v Adelaide Theosophical Society Inc* [2022] FWCFB 79; 316 IR 108

*James Cook University v Ridd* (2020) 278 FCR 566

*Kazal v Thunder Studios Inc (California)* [2023] FCAFC 174; 416 ALR 24

*Kingdom of Spain v Infrastructure Services Luxembourg sarl* (2023) 275 CLR 292

*Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115

*Kowalski v Trustee, Mitsubishi Motors Australia Ltd Staff Superannuation Pty Limited* [2003] FCAFC 18

*Lattouf v Australian Broadcasting Corporation* [2024] FWC 1441; 332 IR 127

*Lattouf v Australian Broadcasting Corporation* [2024] FWC 570

*Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623

*Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 369

*Mahony v White* [2016] FCAFC 160; 262 IR 221

*Maritime Union of Australia v Fair Work Ombudsman* [2015] FCAFC 120

*Miller v University of New South Wales* (2003) 132 FCR 147

*Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273

*Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200

*Patrick Stevedores Holdings Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union (No 4)* [2021] FCA 1481

*Pearce v W D Peacock & Co Ltd* (1917) 23 CLR 199

*Pillai v Singapore City Council* [1968] 1 WLR 1278

*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355

*Qantas Airways Ltd v Transport Workers' Union of Australia* (2022) 292 FCR 34

*Qantas Airways Ltd v Transport Workers' Union of Australia* (2023) 278 CLR 571

*Quirk v Construction, Forestry, Maritime, Mining and Energy Union* [2021] FCA 1587; 312 IR 359

*Ralph M Lee (WA) Pty Ltd v Fort* (1991) 4 WAR 176

*Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611

*Re-JRL; Ex parte CJL* (1986) 161 CLR 342

*Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)* [2017] FCAFC 102

*Rumble v The Partnership (t/as HWL Ebsworth Lawyers)* (2020) 275 FCR 423

*Rumble v The Partnership (t/as HWL Ebsworth Lawyers)* [2019] FCA 1409; 289 IR 72

*Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27; 327 ALR 460

*Siagian v Sanel Pty Ltd* (1994) 122 ALR 333

*State of Victoria (Office of Public Prosecutions) v Grant* [2014] FCAFC 184; 246 IR 441

*Stefanovski v Digital Central Australia (Assets) Pty Ltd* [2018] FCAFC 31; 368 ALR 607

*Sunrise Brokers LLP v Rodgers* [2015] ICR 272

*SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362

*Tattsbet Ltd v Morrow* (2015) 233 FCR 46

*The Administration of the Territory of Papua and New Guinea v*

*Daera Guba* (1973) 130 CLR 353  
*Thiess v Collector of Customs* (2014) 250 CLR 664  
*Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507  
*Transport Workers' Union of Australia v Qantas Airways Ltd* [2021] FCA 873; 308 IR 244  
*Transport Workers' Union of Australian v Qantas Airways Limited (Compensation Claim)* [2024] FCA 1216; 334 IR 1216  
*Turner v Sawdon & Co* [1901] 2 KB 653  
*Visscher v Giudice* (2009) 239 CLR 361  
*Voitenko v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 355  
*Western Union Business Solutions (Australia) Pty Ltd v Robinson* (2019) 272 FCR 547  
*White v Australian & New Zealand Theatres Ltd* (1943) 67 CLR 266  
*White v Bristol Rugby Ltd* [2002] IRLR 204  
*William Hill Organisation Ltd v Tucker* [1999] ICR 291  
*Wong v National Australia Bank Ltd* [2022] FCAFC 155; 318 IR 148  
*WorkPac Pty Ltd v Skene* (2018) 264 FCR 536

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27–28 February 2025  
Counsel for the Applicant: Mr O Fagir with Mr P Boncardo  
Solicitor for the Applicant: Maurice Blackburn  
Counsel for the Respondent: Mr I Neil SC with Ms V Bulut  
Solicitor for the Respondent: Seyfarth Shaw Australia

## ORDERS

**NSD 189 of 2024**

**BETWEEN:** **ANTOINETTE LATTOUF**  
Applicant

**AND:** **AUSTRALIAN BROADCASTING CORPORATION**  
Respondent

**ORDER MADE BY:RANGIAH J**  
**DATE OF ORDER: 25 JUNE 2025**

**THE COURT DECLARES THAT:**

1. The respondent, the Australian Broadcasting Corporation (the **ABC**) contravened s 772(1) of the *Fair Work Act 2009* (Cth) (the **FWA**) by terminating the employment of the applicant, Antoinette Lattouf, for reasons including that she held a political opinion opposing the Israeli military campaign in Gaza.
2. The ABC contravened s 50 of the FWA by contravening cl 55.2.1(a), (b), (c), (f), 55.2.2 and 55.4.1(f) of the *ABC Enterprise Agreement 2022–2025*.

**THE COURT ORDERS THAT:**

3. The ABC pay Ms Lattouf compensation of \$70,000.
4. The matter be set down for a hearing to determine the question of whether the ABC should be ordered to pay any pecuniary penalty and, if so, in what amount, on a date to be fixed.
5. The parties are to agree upon the procedural steps necessary to bring the question of any pecuniary penalty to a hearing and provide a draft order.

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

**REASONS FOR JUDGMENT**

The parties and the witnesses	[13]
The pleadings	[34]
Interpretation of s 772(1) of the FWA	[45]
Whether the principles applying to the construction of Part 3-1 apply to s 772(1)	[49]
The principles bearing on the application of s 772(1)	[89]
What is required to be pleaded and proved to enliven the presumption under s 783?	[92]
The standard of proof	[96]

Whether the opinions pleaded by Ms Lattouf are “political opinions”	[100]
Whether “political opinion” in s 772(1) encompasses the expression of political opinion	[117]
Whose reasons for the termination are relevant?	[131]
The evidence	[140]
Events before Monday, 18 December 2023	[143]
Events on Monday, 18 December 2023 – Day	[149]
Events on Monday, 18 December 2023 – Night	[184]
Events on Tuesday, 19 December 2023 - Day	[203]
Events on Tuesday, 19 December 2023 - Night	[241]
Events on Wednesday, 20 December 2023 – Morning	[257]
Events on Wednesday, 20 December 2023 – Afternoon	[274]
Events on Thursday, 21 December 2023	[331]
Subsequent events	[334]
Impartiality of the ABC	[337]
Assessment of witnesses	[350]
The issues concerning Ms Lattouf’s allegation of contravention of s 772(1) of the FWA	[371]
Whether the ABC terminated Ms Lattouf’s employment	[373]
Whether there is any issue estoppel or abuse of process	[384]
The FWC’s finding that Ms Lattouf’s employment was terminated	[395]

The parties' submissions concerning whether Ms Lattouf's employment was terminated	[400]
Construction of the phrase "terminate an employee's employment" in s 772(1) of the FWA	[405]
Did the ABC terminate Ms Lattouf's employment?	[424]
Whether the evidence is consistent with the hypothesis that the ABC was actuated by Ms Lattouf's race or national extraction	[462]
Who, on behalf of the ABC, made any decision to terminate Ms Lattouf's employment or materially contributed to that decision?	[470]
Whether the ABC has proved that the reasons for termination did not include any of Ms Lattouf's pleaded political opinions	[490]
Whether it was the intention of the ABC Managers all along to get rid of Ms Lattouf because of her political opinions	[499]
Events leading to the termination of Ms Lattouf's employment	[524]
Mr Ahern's evidence about the Teams Meeting	[542]
Mr Latimer's evidence about the Teams Meeting	[551]
Mr Melkman's evidence about the Teams Meeting	[557]
Mr Oliver-Taylor's evidence about the Teams Meeting	[560]
Analysis of Mr Oliver-Taylor's asserted reasons for his decision	[577]
What were the actual reasons for Mr Oliver-Taylor's decision?	[591]
The allegation of contravention of s 50 of the FWA	[635]
Relief	[656]
Conclusion	[684]

## RANGIAH J:

1 On 7 October 2023, the Palestinian militant group, Hamas, launched a major attack on Israel, killing about 1,200 people and taking more than 250 hostages. Israel responded by bombing and launching an invasion of the Gaza Strip, causing massive destruction and killing many thousands of people.

2 The applicant, Antoinette Lattouf, made numerous social media posts expressing her views about the Israel/Gaza war. The major theme of her posts was condemnation of the mass killing of Palestinian civilians by Israeli forces, although some of her posts also condemned the killing of Israeli civilians by Hamas.

3 The Israel/Gaza war quickly became the most covered, contested and controversial news story in the world, with each side claiming that coverage by mainstream media was inaccurate and biased. A state of hostility developed between supporters of each side. In Australia, heated rallies and protests were held and widespread campaigns of vilification, including doxxing and cancelling, were conducted.

4 It was in the midst of this maelstrom that Ms Lattouf came to be employed by the respondent, the Australian Broadcasting Corporation (the **ABC**), to present the *Sydney Mornings* radio program for five days from Monday, 18 December to Friday, 22 December 2023.

5 Soon after Ms Lattouf presented her first program, the ABC began to receive complaints from members of the public. The complaints asserted she had expressed anti-Semitic views, lacked impartiality and was unsuitable to present any program for the ABC. It became clear that the complaints were an orchestrated campaign by pro-Israel lobbyists to have Ms Lattouf taken off air.

6 The complaints caused great consternation amongst the senior management of the ABC. Ms Lattouf was given what has been characterised by the ABC as a “direction” not to post anything on social media that would suggest she was not impartial in relation to the Israel/Gaza war. However, I find Ms Lattouf was merely provided with advice that it would be best not to post anything controversial about the war. That advice was also qualified by an indication that posting fact-based material from a verified source would be fine.

7 The campaign to have the ABC remove Ms Lattouf continued. At the same time, pro-Palestinian activists organised a protest outside the ABC’s Melbourne offices, presumably because they too were asserting that the ABC was biased.

8 On Wednesday, 20 December 2023, ABC managers became aware that on the previous day, Ms Lattouf had reposted a Human Rights Watch (**HRW**) video report entitled, “The Israeli Government is using starvation as a weapon of war in Gaza”, on her Instagram account, adding the words, “HRW reporting starvation as a tool of war” (the **HRW Post**). The HRW report had already been the subject of a story on ABC News. The consternation of senior managers of the ABC turned into what can be described as a state of panic.

9 Within the hour, a decision was made that Ms Lattouf would be taken off air. She was called into an office and informed she had shared a post that could be considered controversial and had breached the ABC’s policies. She was told that she would not be required for her two remaining shifts and to leave the premises. The policies she was alleged to have breached were not identified, nor was she given any opportunity to defend herself against the allegations. That was

the end of Ms Lattouf's employment with the ABC.

10 Section 772(1)(f) of the *Fair Work Act 2009* (Cth) (the **FWA**) provides an employer must not terminate an employee's employment for reasons which include political opinion, race or national extraction. Ms Lattouf claims the ABC terminated her employment for reasons that included her political opinions, race and national extraction.

11 Section 50 of the FWA provides a person must not contravene a term of an enterprise agreement. Ms Lattouf also claims the ABC failed to comply with its obligations under the *ABC Enterprise Agreement 2022–2025* (the **Enterprise Agreement**), including by failing to give her an opportunity to respond to allegations of misconduct made against her.

12 Ms Lattouf asks the Court to make declaratory orders, award her compensation for non-economic loss and impose pecuniary penalties on the ABC.

## **The parties and the witnesses**

13 Ms Lattouf describes herself as a “freelance journalist”, “content creator”, “public presenter”, and “speaker”. She has appeared on television panel shows such as *Studio10*, *Q&A*, *Insiders*, *Sky News* and *The Drum*, as well as on local radio. In pursuing her career, she has sought to maintain a high public profile, including through social media.

14 Ms Lattouf is of the Lebanese race and Lebanese national extraction. Her parents migrated to Australia from Lebanon before she was born.

15 Ms Lattouf gave evidence at the trial. She also called a consultant psychiatrist, Dr Nigel Strauss, who gave evidence relevant to her claim for compensation. They were both cross-examined.

16 The ABC is a body corporate continued in existence under s 5(1) of the *Australian Broadcasting Corporation Act 1983* (Cth) (the **ABC Act**). Section 6(1) of the ABC Act sets out the ABC's Charter, which includes the function of providing innovative and comprehensive broadcasting services of a high standard as part of the Australian broadcasting system.

17 Section 7 of the ABC Act provides for the governance of the ABC by a Board of Directors (the **Board**). Sections 9 and 10 require that there is a Managing Director, whose function is to manage the affairs of the ABC. Under s 12, the members of the Board include the Chairperson, the Managing Director and no fewer than four other directors.

18 Section 8 sets out the duties of the Board, which include ensuring that the functions of the ABC are performed efficiently and with the maximum benefit to the people of Australia while maintaining the ABC's independence and integrity. It is important to note that under s 8(1)(c) of the ABC Act, the Board has a duty:

...to ensure that the gathering and presentation by the [ABC] of news and information is accurate and impartial according to the recognized standards of objective journalism.

19 Section 32 of the ABC Act provides the ABC may engage such employees as are necessary

for the performance of its functions and the exercise of its powers, on terms and conditions determined by the ABC.

20 The ABC called the following witnesses to give evidence, each of whom was cross-examined:

Ita Buttrose;

David Anderson;

Christopher Oliver-Taylor;

Ben Latimer;

Stephen Ahern;

Mark Spurway;

Simon Melkman; and

Elizabeth Green.

21 I will briefly describe the positions held by the ABC's witnesses at the time of the relevant events in December 2023 and their involvement in those events.

22 Ms Buttrose was the Chair of the Board. Ms Buttrose made clear her displeasure at Ms Lattouf, whom she regarded as an "activist", having been engaged by the ABC. Ms Lattouf alleges Ms Buttrose materially contributed to the decision to terminate her employment.

23 Mr Anderson was the ABC's Managing Director. Mr Anderson also repeatedly expressed his displeasure at Ms Lattouf having been employed by the ABC. Ms Lattouf alleges that Mr Anderson was one of the persons who made the decision to terminate her employment, or at least materially contributed to the decision.

24 Mr Oliver-Taylor was the ABC's Chief Content Officer. He reported to Mr Anderson. Mr Oliver-Taylor was responsible for all content, apart from news content, that went to air across all ABC platforms – screen, audio and digital. His portfolio included responsibility for ABC Radio Sydney, although he had very limited interaction on a daily basis with particular programs such as *Mornings*.

25 The ABC asserts that Mr Oliver-Taylor was solely responsible for the decision to take Ms Lattouf off air. Mr Oliver-Taylor's evidence was that he made the decision for six reasons, including his view that Ms Lattouf had not complied with a direction given to her not to post anything about the Israel/Gaza war and that she had contravened the ABC's Personal Use of Social Media Guidelines (the **Social Media Guidelines**). The controversial issues in the case include whether these were Mr Oliver-Taylor's actual reasons for the decision, and whether his actual reasons included Ms Lattouf's political opinion, race or national extraction.

26 Mr Latimer was the ABC's Head of Audio Content. He reported to Mr Oliver-Taylor.

Mr Latimer had direct management responsibility for the programs on ABC Radio Sydney. Ms Lattouf alleges that Mr Latimer materially contributed to the decision to terminate her employment.

27 Mr Ahern was the Acting Head of the ABC's Capital City Networks. He reported to Mr Latimer. Mr Ahern was responsible for overseeing and managing the operation of all Australian capital city radio stations operated by the ABC. It was Mr Ahern who decided to engage Ms Lattouf and, on Mr Oliver-Taylor's instructions, informed Ms Lattouf that she would not be required for her two remaining shifts.

28 Mr Spurway was the Acting Manager of ABC Radio Sydney. He reported to Mr Ahern.

29 Mr Melkman was the Acting Editorial Director of the ABC within the Editorial Policies Division. He reported to Mr Anderson. The Editorial Policies Division is responsible for providing pre-broadcast editorial advice across the ABC. Mr Melkman provided advice to management about whether Ms Lattouf's social media posts had breached the ABC's editorial policies.

30 Ms Green was the Content Director for ABC Radio Sydney. She reported to Mr Spurway. Her responsibilities included leading teams to deliver programs going to air on ABC Radio Sydney. One of those programs was *Mornings*.

31 It was Ms Green who advised Ms Lattouf it would be best not to post anything controversial about the Israel/Gaza war. Ms Green asserts that, before the decision to take Ms Lattouf off air was made, she expressly told Mr Ahern, Mr Spurway and Mr Melkman that her communication to Ms Lattouf had not been a direction. The controversial issues include whether Ms Green made that statement and, if she did, whether her statement was communicated to Mr Oliver-Taylor before he decided to remove Ms Lattouf.

32 The ABC also relies on the affidavit of Monica Vagg, Head of People Services and Remuneration. Ms Vagg's affidavit addresses the ABC's processes for engaging casual employees and terminating employment. Ms Vagg produces and explains the ABC's records concerning Ms Lattouf's engagement. Ms Vagg was not required for cross-examination.

33 I will use the term **ABC Managers** to refer generally to some or all of Mr Anderson, Ms Buttrose, Mr Oliver-Taylor, Mr Latimer, Mr Ahern, Mr Spurway and Mr Melkman.

## **The pleadings**

34 Although Ms Lattouf alleges contravention of both s 50 and s 772(1) of the FWA, the parties' focus was substantially upon the latter provision. Section 772 provides, relevantly:

### **772 Employment not to be terminated on certain grounds**

- (1) An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:

...

(f) race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin;

...

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

(2) However, subsection (1) does not prevent a matter referred to in paragraph (1) (f) from being a reason for terminating a person's employment if:

(a) the reason is based on the inherent requirements of the particular position concerned; or

(b) if the person is a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—the employment is terminated:

(i) in good faith; and

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

...

35 Section 783(1) of the FWA then provides, relevantly:

### **783 Reason for action to be presumed unless proved otherwise**

(1) If:

(a) in an application in relation to a contravention of subsection 772(1), it is alleged that a person took, or is taking, action for a particular reason; and

(b) taking that action for that reason would constitute a contravention of subsection 772(1);

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

...

36 It may be seen that if it is alleged the employment of an employee was terminated for reasons that include particular attributes, characteristics or conduct specified in s 772(1), then s 783 imposes an onus on the employer to prove the termination of employment was not for reasons that included any such attributes, characteristics or conduct.

37 Section 50 of the FWA provides:

## **50 Contravening an enterprise agreement**

A person must not contravene a term of an enterprise agreement.

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

...

38 The Enterprise Agreement applied to Ms Lattouf and to the ABC at the time of the relevant events. Clause 55.2.1 of the Enterprise Agreement provides where an allegation of misconduct is made, the employee will be, *inter alia*, advised of the nature of the alleged misconduct and given an opportunity to respond. Clause 55.4.1 provides that when an allegation of serious misconduct is substantiated, the ABC may dismiss the employee without notice.

39 Ms Lattouf's current pleading, her Further Consolidated Amended Statement of Claim (**FCASOC**), alleges, in summary:

Ms Lattouf "held political opinions", including:

- (a) opposing the Israeli military campaign in Gaza;
- (b) supporting Palestinians' human rights;
- (c) questioning the authenticity of footage of demonstrators chanting antisemitic chants at the Sydney Opera House; and
- (d) that media organisations should report about the conflict between Israel and Palestinians accurately and impartially.

On Monday, 18 December 2023, Ms Lattouf commenced an engagement as a casual employee presenting *Mornings* on ABC Radio Sydney for five days.

Ms Buttrrose and Mr Anderson received multiple letters and emails complaining about Ms Lattouf, which sought to pressure the ABC to not employ her and/or terminate her employment for reasons including her political opinion and/or race and/or national extraction.

Ms Lattouf's race is Lebanese and/or Arab and/or Middle Eastern. Her national extraction is Lebanese and/or Arab and/or Middle Eastern and she is a descendant of foreign immigrants.

On Monday, 18 December 2023, Ms Green told Ms Lattouf that:

- the ABC had received a large number of complaints from pro-Israel lobbyists about Ms Lattouf being on air;

- Ms Lattouf should keep a low profile on Twitter; and
- Ms Lattouf could post factual information from reputable sources like Amnesty International.

On Tuesday, 19 December 2023, Ms Lattouf made the HRW Post.

On at least four occasions between Monday, 18 December and Wednesday, 20 December 2023, the ABC reported on HRW's claims that Israel was "weaponising starvation in Gaza".

Ms Lattouf's HRW Post did not contravene the social media policy of the ABC; or contravene any direction given by the ABC to Ms Lattouf.

On Wednesday, 20 December 2023, Mr Ahern told Ms Lattouf that:

- as a result of a specific social media post she had shared on Instagram, the ABC had decided that she would not be returning to complete her last two shifts on air;
- she had been asked not to post, and had breached the ABC's social media policy by reposting the HRW Post because it called into question the ABC's impartiality; and
- she could return to her desk, get her bag and leave.

The ABC terminated Ms Lattouf's employment (she ultimately submits the decision to terminate was made by Mr Anderson and Mr Oliver-Taylor and that Ms Buttrose and Mr Latimer materially contributed to the decision).

Ms Lattouf's termination was for reasons including her political opinions and/or race and/or national extraction and the ABC thereby contravened s 772(1)(f) of the FWA.

The allegation conveyed by Mr Ahern was an allegation of "misconduct" for the purposes of cl 55.1.1 of the Enterprise Agreement.

An allegation of misconduct having been made, the ABC was obliged to comply with the process in cl 55.2.1 of the Enterprise Agreement, but failed to do any of the things required by the process and thereby contravened s 50 of the FWA.

The ABC purported to summarily dismiss Ms Lattouf in circumstances where she was not guilty of, and had not committed, "serious misconduct" within the meaning of cl 55.6.1 and 57.1.1(a) and thereby contravened cl 57.1.1 of the Enterprise Agreement and s 50 of the FWA.

Alternatively, the ABC breached contractual terms that Ms Lattouf was to present *Mornings* for five days commencing on Monday, 18 December 2023 and/or she would be given a reasonable opportunity to present on air during the term of the contract.

By repudiating the contract, the ABC terminated Ms Lattouf's employment on a basis that was not set out in cl 57.1.1 and thereby contravened the Enterprise Agreement and s

50 of the FWA.

In the alternative, if the ABC did not summarily dismiss Ms Lattouf or terminate her employment, then not allowing her to present *Mornings* on Thursday, 21 December and Friday, 22 December 2023 was not a sanction or disciplinary action that was authorised under the Enterprise Agreement and the ABC thereby contravened s 50 of the FWA.

40 In its Consolidated Amended Defence, the ABC broadly denies Ms Lattouf's allegations concerning the reasons, circumstances and consequences of her removal and, relevantly, pleads in response:

It was an express term of the contract that the ABC could unilaterally and at any time change the details of any engagement with Ms Lattouf, including the duration of the engagement, hours of work required and/or the work to be performed.

On Monday, 18 December 2023, Ms Green directed Ms Lattouf not to post anything related to the Israel/Gaza war, or, alternatively, anything related to the conflict which could be perceived as unbalanced, during the week.

On Wednesday, 20 December 2023, Mr Ahern informed Ms Lattouf that the ABC did not require her to perform any work for the remaining two shifts; the effect of this statement being that her employment would continue until the conclusion of her shift on Friday, 22 December 2023.

The ABC denies it was required to follow the process set out at cl 55.2 of the Enterprise Agreement.

The ABC did not allege or assert that Ms Lattouf engaged in serious misconduct within the meaning of cl 55.6.1 and 57.1.1(a) of the Enterprise Agreement.

The ABC did not terminate Ms Lattouf's employment (summarily or otherwise), but instead her employment ended by the effluxion of time at the conclusion of the rostered shift on Friday, 22 December 2023.

Mr Oliver-Taylor was the decision-maker, and his reasons for not requiring Ms Lattouf to perform any work for her two remaining shifts were:

- his view that Ms Lattouf's HRW Post meant she may have breached the ABC's policies or guidelines;
- his view that she had not complied with a direction given to her in relation to her use of social media; and
- his loss of trust and confidence in her to present live radio in accordance with directions issued to her.

The ABC did not terminate Ms Lattouf's employment for reasons which included any of Ms Lattouf's political opinions as pleaded, her race or national extraction.

41 In summary, the ABC defends the allegation of contravention of s 772(1) of the FWA principally on the following bases:

Ms Lattouf's employment was not terminated, and she was merely taken off air (or not required to present) on Thursday, 21 December and Friday, 22 December 2023, as the ABC was entitled to do under the contract of employment; and her employment ended by the effluxion of time.

Mr Oliver-Taylor was the sole decision-maker for the ABC in respect of the decision to take Ms Lattouf off air; and his reasons did not include the pleaded political opinions, her race, or national extraction.

Even if it is found on the evidence that the ABC's reasons included Ms Lattouf's *expression* of political opinions, Ms Lattouf would not succeed because she has only alleged in her pleading that the ABC's reasons included that she *held* such opinions.

While subparagraph (a) of paragraph 1A of the FCASOC pleads a "political opinion", the allegations in subparagraphs (b), (c) and (d) do not have a "political" character, and subparagraph (c) does not plead an "opinion".

42 Ms Lattouf points out that the ABC has not argued s 772(2) of the FWA is applicable. That is, the ABC has not submitted, that in view of the obligation of the Board to ensure the impartial presentation of information under s 8(1)(c) of the ABC Act, it is an inherent requirement that an ABC presenter be impartial and be perceived by the public as impartial.

43 The ABC points out that Ms Lattouf's allegation is of contravention of s 772(1) of the FWA. Ms Lattouf has not alleged, as she might have, that the ABC took "adverse action" against her because of her political opinions, race or national extraction in contravention of s 351(1) of the FWA.

44 I will consider Ms Lattouf's allegation of contravention of s 772(1) of the FWA before turning to consider her allegations concerning s 50 of the FWA.

## **Interpretation of s 772(1) of the FWA**

45 Section 772(1) appears in Pt 6-4, Div 2 of the FWA, under the heading, "Termination of employment". The section provides, relevantly:

An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:

...

(f) race...political opinion, national extraction...

46 Section 770 provides that in Pt 6-4, "employer" and "employee" have their ordinary meanings.

47 It is common ground that s 772(1) requires Ms Lattouf to prove her employment was terminated. Beyond that, there is little agreement between the parties as to the construction of the provision. There is very little authority concerning s 772(1).

48 A fundamental issue in dispute is that the ABC submits s 772(1) should be construed in the same way as the “General Protections” provisions of Pt 3-1 of the FWA, whereas Ms Lattouf contends to the contrary. In particular, Ms Lattouf submits the width of the connection between the termination and the protected attribute required by the word “for” in s 772(1) is broader than the phrase “because of” under Pt 3-1.

### ***Whether the principles applying to the construction of Part 3-1 apply to s 772(1)***

49 The ABC argues there is no difference in the meaning of “for” in s 772(1) and the expressions “because” and “because of” in Pt 3-1 of the FWA. The ABC submits that s 772(1) should be construed in the same way as s 346 was construed by Gageler J (as the Chief Justice then was) in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243 (**BHP Coal**) at [85]. His Honour considered the unanimous holding of *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]* (2012) 248 CLR 500 (**Barclay**) was that the word “because” in s 346 of the FWA requires a particular reason to be “an operative and immediate reason” for the taking of the adverse action.

50 The construction of a statutory provision proceeds by reference to its text considered from the outset in context and having regard to the legislative purpose: *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408; *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22]. In *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, the plurality explained at [14]:

This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

51 The meaning of the provision must be determined by reference to the language of the statute “viewed as a whole”, and must be construed, “on the *prima facie* basis that its provisions are intended to give effect to harmonious goals”: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[70].

52 The interpretation that would best achieve the legislative purpose is to be preferred to any other interpretation: *Acts Interpretation Act 1901* (Cth), s 15AA. However, this principle may be of little assistance in interpreting a statutory provision that, “strikes a balance between competing interests”: *Carr v The State of Western Australia* (2007) 232 CLR 138 at [5].

53 Part 3-1 of the FWA is entitled “General Protections” and consists of ss 334-378. A number of provisions of Pt 3-1 prohibit the taking of action “because” or “because of” specified factors. Unlike s 772(1), those provisions have been the subject of extensive judicial consideration.

54 Section 351(1) in Pt 3-1 of the FWA is closely comparable to s 772(1), and provides:

An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer **because of** the person's race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin.

(Emphasis added.)

55 Section 340(1)(a)(i) provides, relevantly, "A person must not take adverse action against another person because the other person...has a workplace right...".

56 Section 346(a) provides, relevantly, "A person must not take adverse action against another person...because the other person...is...an officer or member of an industrial association...".

57 Section 361 (which applies to an alleged contravention of Pt 3-1) is in very similar terms to s 783 (which applies to an alleged contravention of s 772(1)). Each section provides, relevantly:

If...it is alleged that a person took, or is taking, action for a particular reason...[and] taking that action for that reason...would constitute a contravention...it is presumed that the action was, or is being, taken **for** that reason...unless the person proves otherwise".

(Emphasis added.)

58 Section 361 has been described as enacting a "reverse onus": see *Celand v Skycity Adelaide Pty Ltd* (2017) 256 FCR 306 (**Celand**) at [94] and [148].

59 The only case in which the Court has considered s 772(1) is *Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liquidation) (No 4)* [2021] FCA 1242 (**Foot & Thai Massage**). In that case, Katzmann J was concerned with the meaning of "race", "national extraction", and "social origin" in s 351(1) of the FWA. Her Honour noted s 772(1) also contains those expressions and continued at [680]:

In contrast to Pt 6-4 Div 2, however, Pt 3-1, which includes s 351, does not rely on the external affairs power in the Constitution in the same way as the unlawful termination protections, which, unlike the provisions in Pt 3-1, apply to all employees in Australia (see Explanatory Memorandum at [1342]). Nevertheless, the attributes listed in s 351(1) also appear in s 772(1)(f). It has been said that "[i]t is a sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise". Notwithstanding the different constitutional foundations for the different parts of the [FWA], I do not consider that there is reason to do otherwise in determining the true meaning of the same terms in s 351(1).

(Citations omitted.)

60 It may be observed while Katzmann J held that the expressions “race”, “national extraction”, and “social origin” in s 351(1) have the same meanings they bear in s 772(1), her Honour had no occasion to consider whether the phrase “because of” in s 351(1) has the same meaning as “for” in s 772(1).

61 Ms Lattouf submits the “narrow approach” taken to ss 340(1) and 352 in *BHP Coal* is inapplicable to s 772(1). She points out that the language of s 772(1) (“for”) is different from ss 340, 346, 351 and 352 (“because” or “because of”) and submits the use of different language shows the legislature intended a different meaning.

62 Ms Lattouf also submits the statutory context of s 772(1) is different from Pt 3-1. She argues the express purpose of Pt 6-4, Div 2, as set out in s 771, is to give effect to the international conventions specified in that section. She points to Arts 2 and 19 of the *International Covenant on Civil and Political Rights* (the **ICCPR**) and the International Labour Organisation’s *Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation* (the **ILO Discrimination Convention**). The *Convention (No. 158) Concerning Termination of Employment at the Initiative of the Employer* (the **Termination of Employment Convention**) is relevant to the construction of a different aspect of s 772(1), as will be discussed later (collectively, the **International Conventions**).

63 Ms Lattouf submits that the dominant consideration is the need to give effect to the statutory object expressed in s 771, and requires s 772(1) be read in a way which best gives effect to the International Conventions’ guarantees of freedom of opinion and expression, protection against discrimination on the basis of political opinion and the provision of effective remedies. Ms Lattouf contends the alternative approach urged by the ABC would be destructive of the protective effect of s 772(1).

64 Ms Lattouf submits, on the correct approach to s 772(1), a decision maker’s actual reasoning process and state of mind are relevant to the existence of a causal relationship but are not determinative. She submits the causative inquiry is not limited to those matters to which the decision maker actually adverted. I understand the submission to be that the existence of a causal relationship is enough to satisfy s 772(1).

65 The ABC submits there are textual and contextual considerations which support the submission that the word “for” in s 772(1) ought to be given the same meaning and effect as “because” in Pt 3-1. It submits the construction contended for accords with the ordinary and natural meaning of the word “for”. The ABC points out that the word “for” is used in ss 360 and 361 which apply to allegations of contravention of Pt 3-1 and therefore have the same meaning as “because” in relevant provisions of Pt 3-1. It submits a cohesive and harmonious reading of Pt 3-1 with s 772(1) would give the same meaning to the word “for”.

66 I will start by considering Ms Lattouf’s submission that as s 772(1) uses the word “for” while the provisions of Pt 3-1 use the expressions “because” and “because of”, s 772(1) must be intended to have a different meaning.

67 The words “for” and “because” are prepositions expressing a relationship between things. There is a very substantial overlap in the ordinary meanings of the two words. This is illustrated by the *Macquarie Dictionary* definition of “because” as including “for the reason that”, and the definition of “for” as including “because of” and “because”.

68 In *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* (2022) 293 FCR 330 at [156], O'Bryan J described "for" as, "a protean word in that its meaning, being the nature of the relationship expressed, is governed by the nouns or verbs it connects". The same is true of the word "because".

69 The word "for" is capable of denoting a variety of causal relationships. The degree of closeness of the relationship conveyed in the statutory provision must be determined by reference to the language of the relevant statutory provision as a whole and the statutory context.

70 The breadth of the relationship conveyed by the words "because" or "because of" in Pt 3-1 has been authoritatively determined.

71 In *BHP Coal*, French CJ and Kiefel J held at [7]:

The focus of the inquiry as to whether s 346(b) has been contravened is upon the reasons for [the employer] taking the adverse action. This is evident from the word "because" in s 346, and from the terms of s 361. The inquiry involves a search for the reasoning actually employed by [the employer]. The determination to be made by the court is one of fact, taking account of all the facts and circumstances of the case and available inferences.

(Citations omitted.)

72 In *Barclay*, Gummow and Hayne JJ noted that the inquiry is whether a proscribed reason was a "substantial and operative" or "operative or immediate" reason for the adverse action. Their Honours held:

[103] ... The phrase "operative or immediate reason" used in [*Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326] is relevantly indistinguishable from the phrase "a substantial and operative factor" used by Mason J in [*General Motors-Holden Pty Ltd v Bowling* (1976) 12 ALR 605].

[104] ... An employer contravenes s 346 if it can be said that engagement by the employee in an industrial activity comprised "a substantial and operative" reason, or reasons including the reason, for the employer's action and that this action constitutes an "adverse action" within the meaning of s 342.

73 In *BHP Coal*, Gageler J described the inquiry as being directed into "the operative and immediate reason" for the adverse action. His Honour held at [85]:

Analysis in the appeal to this Court must begin...with consideration of this Court's decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]*. The unanimous holding in that case was that, read in the context of ss 360 and 361 of the Act and of its legislative history, the word "because" in s 346 of the Act connotes the existence of a particular reason as an operative and immediate reason for taking adverse action. Where the adverse action taken is in consequence of a decision made by a responsible individual within a corporation, the existence or

non-existence of a particular reason as an operative and immediate reason for taking that adverse action turns on an inquiry into the mental processes of that individual.

(Citations omitted.)

74 In Pt 3-1, the words “for” and “because” are used interchangeably. For example, s 346 prohibits taking, “adverse action against another person *because* the other person...is...an officer or member of an industrial association...”; and s 361 then provides that if it is alleged that, “a person took, or is taking, action *for* a particular reason...it is presumed that the action was, or is being, taken *for* that reason...unless the person proves otherwise” (emphasis added). It has not been doubted that the presumption under s 361 applies to an allegation of contravention of s 346: see *BHP Coal* at [6], [8], [38], [55], [85], [93].

75 Section 360 of the FWA provides that, for the purposes of Pt 3-1, “a person takes action *for* a particular reason if the reasons for the action include that reason” (emphasis added). Again, it has not been doubted that the word “for” in s 360 has the same meaning as “because” and “because of” in Pt 3-1.

76 In *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, Gray and Bromberg JJ observed at [24] that the expressions “because” and “for the reason that” in s 346 are different only in style and not substance.

77 Accordingly, in Pt 3-1, the word “for” has the same meaning as “because” and “because of”.

78 In *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618, Mason J (as the Chief Justice then was) observed that, “It is a sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise”. The word “for” has been treated synonymously with “because” and “because of” in Pt 3-1 and can be taken to have the same meaning in s 772(1) unless there is some adequate reason to regard it as having a different meaning.

79 In some provisions of the FWA, “because of” and “for” are used in a single phrase. Section 153 prohibits the inclusion of terms in a modern award that discriminate against an employee “because of, or for reasons” including an employee’s race, political opinion or national extraction. Section 195(1) defines a term of an enterprise agreement as a “discriminatory term” to the extent it discriminates “because of, or for reasons” including an employee’s race, political opinion or national extraction. It is arguable that “because of” and “for” were intended to cover different but overlapping territory, but an alternative construction is that “for” was merely included to reinforce the connection imported by “because of”. It is unnecessary to determine whether the words are intended to have the same or different meanings in those provisions, but it does seem unlikely they intend to apply *both* a narrower test of causation connoted by “because of” and a broader test of causation connoted by “for”. If that were the intended meaning, it would not have been necessary to include the supposedly narrower expression “because”.

80 As Katzmann J observed in *Foot & Thai Massage*, Pt 6-4 Div 2 of the FWA applies to all employees in Australia whereas Pt 3-1 does not. The Explanatory Memorandum for the *Fair Work Bill 2008* (Cth) states at [1342]:

Part 3-1 does not rely on the external affairs power in the Constitution in the same

way as the existing unlawful termination protections (which apply to all employees in Australia). To maintain existing protections, Division 2 of Part 6–4 provides for unlawful termination protections for employees who do not have a remedy under this Part. This ensures that every employee in Australia has a remedy for unlawful termination.

81 In *Jacobs v Adelaide Theosophical Society Inc* [2022] FWCFB 79; 316 IR 108, the Full Bench of the Fair Work Commission (FWC) explained at [72]:

...[Section] 772 enables an employee who is not entitled to take action under Pt 3-1 in respect of a dismissal, to make an unlawful termination application. Reasons for an employee not being entitled to take action under Pt 3-1 may include that the relevant employer is not a national system employer or the discriminatory reason alleged by the employee for the dismissal, is not unlawful because of ss 351(2)(a) or (b).

82 Section 351(1) of Pt 3-1 confines the circumstances where the provision is contravened to where there is a “substantial and operative” or “operative and immediate” connection between the adverse action (which includes, under s 342, dismissal) and a specified attribute in respect of national system employees. It seems unlikely such a limitation was intended in respect of some employees under s 351(1), only to be removed in respect of all employees under s 772(1).

83 Ms Lattouf argues the High Court’s narrow construction of “because” was influenced by the concern of Pt 3-1 with workplace rights and industrial activity, contrasting Pt 6-4 which is said to be concerned only with the implementation of the International Conventions. She submits that factors such as, “the balance between employers and employees central to the operation of s 361” (see *Barclay* at [61]), are not relevant to Pt 6-4. However, the object of the FWA stated in s 3 is, “to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians”. That “balanced framework” is to be achieved, *inter alia*, by “tak[ing] into account Australia’s international labour obligations”. Accordingly, the objective of achieving “balance between employers and employees” cannot be disregarded when interpreting s 772(1).

84 In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38, the plurality held courts should, “favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty”. That is because, as Mason CJ and Deane J explained in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287, in the enactment of a statute, Parliament is regarded, *prima facie*, as intending to give effect to Australia’s obligations under international law: see also, *Kingdom of Spain v Infrastructure Services Luxembourg sàrl* (2023) 275 CLR 292 at [16]; *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 at [44]; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [8].

85 Section 771 of the FWA states that the object of Pt 6-4, Div 2 is to “give effect, or further effect, to” the specified International Conventions. Ms Lattouf relies on Arts 2 and 19 of the ICCPR. Under Art 2, each State Party undertakes to, “ensure to all individuals...the rights recognized in the present Covenant, without distinction of any kind, such as race...political or other opinion, national or social origin...”; and to, “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy”. Under Art 19, “Everyone shall have the right to hold opinions without interference”, and, “Everyone shall have

the right to freedom of expression". However, s 771(f) of the FWA only refers to Art 26 of the ICCPR, not Arts 2 and 19. Article 26 provides that, "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race...political or other opinion...national or social origin". It is plain that Parliament did not intend to adopt Art 26 in full in enacting s 772(1) of the FWA.

86 Ms Lattouf also relies on the *ILO Discrimination Convention*, which relevantly provides under Art 2 that, "Each Member...undertakes to declare and pursue a national policy designed to promote...equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof". However, the protections enacted in s 772(1) are limited to *termination* of employment and are subject to the limitations set out in s 772(2). It is apparent s 772(2) does not purport to eliminate "distinction of any kind" or "any discrimination" in employment. Accordingly, s 772(1) cannot be construed as if Parliament intended to enact the International Conventions regardless of the objective of "balance" described in s 3 of the FWA.

87 In her supplementary submissions filed after the hearing, Ms Lattouf asserts that the existence of the "inherent requirements defence" in s 772(2)(a) and the "religious susceptibilities defence" in s 772(2)(b) weigh decisively against the ABC's construction because, on the ABC's construction, both defences would be "otiose, and inutile". The submission is difficult to understand in the form in which it is put. In any event, s 351(2) is in very similar terms to s 772(2) and it has not been doubted that the principles from *Barclay* and *BHP Coal* apply to s 351(1): see *Western Union Business Solutions (Australia) Pty Ltd v Robinson* (2019) 272 FCR 547 at [114]-[120]; *Rumble v The Partnership (t/as HWL Ebsworth Lawyers)* (2020) 275 FCR 423 (**Rumble FCFCA**) at [32]-[34], [36]-[37] and [40]-[41]; *State of Victoria (Office of Public Prosecutions) v Grant* [2014] FCAFC 184; 246 IR 441 at [32].

88 In my opinion, the degree of connection required by the word "for" in s 772(1) is indistinguishable from that imported by "because" and "because of" in Pt 3-1. The principles relevant to interpretation of those expressions in Pt 3-1 are relevant to the construction of s 772(1).

### ***The principles bearing on the application of s 772(1)***

89 In *Alam v National Australia Bank Limited* (2021) 288 FCR 301 (**Alam**), the Full Court held at [14] that the following matters bearing upon the application of s 361 in relation to s 340 are well settled:

- (a) in order to attract the application of s 361, an applicant should allege with sufficient particularity both the action said to constitute "adverse action" and the particular reason or particular intent with which it is said the action was taken;
- (b) the party making the allegation that adverse action was taken "because" of a particular circumstance must establish the existence of that circumstance as an objective fact. That is, it is for the applicant to establish all the elements of the alleged contravention other than the reasons of the respondent for taking the adverse action;
- (c) an employer takes adverse action in contravention of s 340 if a proscribed

reason is a “substantial and operative” reason for the action or if the reasons for the action include the proscribed reason;

(d) the discharge of the s 361 onus requires proof on the balance of probabilities and usually requires decision-makers to give direct evidence of their reasons for taking the adverse action;

(e) the determination of why an employer took adverse action against an employee requires an inquiry into the *actual* reason or reasons of the employer and is to be made in the light of *all* the circumstances established in the proceeding;

(f) while the evidence of the decision-maker as to the reasons for the taking of the adverse action may, if accepted by the Court, satisfy the s 361 onus, such evidence is not a necessary pre-condition;

(g) the Court’s rejection of the evidence of the decision-maker as to the reasons for the adverse action will ordinarily be “a weighty consideration and often a determinative consideration” in the determination of whether the reason alleged by the applicant was a substantial and operative reason for the action, but such a rejection does not relieve the Court from considering *all* the evidence probative of whether the reason asserted by the applicant has been negated. When there is evidence of a broad range of facts and circumstances, which are not dependent on acceptance of the decision-maker’s evidence about his or her asserted reason for the dismissal, such evidence must be taken into account in assessing whether the reasons asserted by an applicant were a substantial and operative reason for the action;

(h) even if the reasons advanced by a respondent as the actual reasons for the decision are accepted, the absence of evidence that there were no additional reasons or that the actual reasons did not include the alleged proscribed reasons, may result in a failure to rebut the presumption;

(i) the decision-maker’s knowledge of the circumstance asserted by an applicant to be the reason for the adverse action, and even its consideration, does not require a finding that the action was taken because of that circumstance. Nor does the fact that the adverse action has some association with a matter supporting a proscribed reason; and

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

(Citations omitted.)

90 These principles are applicable to the construction and application of ss 772(1) and 783 of the FWA.

91 The ABC submits the appropriate test of the connection between the termination and a

protected attribute under s 772(1) imported by the word “for” is whether the attribute is an “operative and immediate” reason for the termination, adopting the language of Gageler J in *BHP Coal*, which I applied in *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* (2015) 238 FCR 273 (*Anglo Coal (Dawson Services)*) at [132]-[135]. However, in *Alam*, the Full Court applied the formulation given by Gummow and Hayne JJ in *Barclay* at [104] of a “substantial and operative” reason for the action. It is not apparent that anything turns upon the difference, but I will adopt the formulation given by the Full Court.

### ***What is required to be pleaded and proved to enliven the presumption under s 783?***

92 The ABC submits the bare making of an allegation that a particular action has been taken for a proscribed reason will not, without more, enliven the presumption under s 783, relying on *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [119].

93 There are two conditions inherent in s 783 (by analogy with s 361) upon which Ms Lattouf has the onus of proof. First, she must establish as an objective fact the circumstance said to be the reason for the termination decision: see *Qantas Airways Ltd v Transport Workers’ Union of Australia* (2022) 292 FCR 34 (*Qantas FCFCA*) at [68] and [143]; *Alam* at [14(b)]. Second, she must establish, “the evidence is consistent with the hypothesis”, that the ABC was actuated by a proscribed reason in respect of the particular action in question: *Celand* at [155].

94 In *Australian Building and Construction Commissioner v Hall* (2018) 261 FCR 347, the Full Court held:

[13] ...Before [the presumption under s 361] operates, however, two pre-conditions must be met. First, under s 361(1)(a) the **particular** reason or the **particular** intent for the contravening action must be alleged in the application. It is with respect to that alleged reason or that alleged intent that the person concerned must prove otherwise. The word “particular” in s 361(1)(a) must be given its ordinary and natural meaning. Relevantly, that is: “2. being a definite one, individual, or single, or considered separately: *each particular item*. 3. distinguished or different from others or from the ordinary; noteworthy; marked; unusual. ... 6. dealing with or giving details, as an account, description, etc., of a person; detailed; minute; circumstantial”.

[14] It follows that an allegation under s 361(1)(a) must precisely and distinctly identify the alleged reason, or the alleged intent, for the contravening conduct...

[15] The second pre-condition which must exist for the presumption in s 361(1) to operate is of equal importance in this matter. It is the requirement in s 361(1)(b) that “taking that action for that reason or with that intent would constitute a contravention of this Part”. This pre-condition therefore requires more than an allegation with respect to an action, reason or intent. Additionally, it requires that taking the alleged action, for the alleged reason or with the alleged intent (or both), “would constitute a contravention of that Part”.

...

[19] Having regard to these observations and, in particular, to the provisions of s 361(1)(b), we consider that an applicant wishing to take advantage of the presumption in s 361, in addition to making the allegation in a form that meets the requirements of s 361(1)(a), must provide sufficient information about the action, and the related reason or intent (or both) for which that action was taken, to show that, in combination, they would constitute a contravention of a provision of Pt 3-1 of the FWA. This means that, in a proceeding such as the present one, which was conducted on pleadings, an applicant is required to plead in his or her statement of claim all the material facts concerning the contraventions alleged against the respondent...

(Citations omitted.)

95 In *Australian Red Cross Society v Queensland Nurses' Union of Employees* (2019) 273 FCR 332 (**Australian Red Cross Society**), the Full Court observed at [74]:

It may well be appropriate to describe the requirement that the evidence is consistent with the hypothesis that the respondent was actuated by a proscribed purpose [as] a pre-condition or as operating before the presumption is engaged.

### ***The standard of proof***

96 Section 140(1) of the *Evidence Act 1995* (Cth) provides, “the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities”.

97 Section 140(2) of the *Evidence Act* requires that the Court’s satisfaction must be reached by taking into account the nature of the cause of action, the nature of the subject matter of the proceeding and the gravity of the matters alleged. These considerations reflect the judgment of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-363: see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 at [31].

98 The allegations made against the ABC are of contraventions of provisions that attract civil penalties. I accept, for the purposes of s 140(2) of the *Evidence Act*, that the allegations are serious and may have serious consequences. These circumstances call for the application of the *Briginshaw* principles.

99 If the presumption under s 783 is enlivened, the ABC is required to prove on the balance of probabilities that its reasons for any termination of Ms Lattouf’s employment did not include her pleaded political opinions, race or national extraction.

### ***Whether the opinions pleaded by Ms Lattouf are “political opinions”***

100 Ms Lattouf alleges at paragraph 45B of her FCASOC that the ABC terminated her employment, “for reasons including...one or more of the applicant’s political opinions as pleaded in paragraph 1A”.

101 At paragraph 1A, Ms Lattouf alleges she “held” the following “political opinions”:

- (a) opposing the Israeli military campaign in Gaza;
- (b) supporting Palestinians' human rights;
- (c) questioning the authenticity of footage of demonstrators chanting antisemitic chants at the Sydney Opera House; and
- (d) that media organisations should report about the conflict between Israel and Palestinians accurately and impartially.

102 The ABC admits that subparagraph 1A(a) of the FCASOC pleads a “political opinion” but contends the matters alleged in subparagraphs (b), (c) and (d) do not have a “political” character, and subparagraph (c) does not allege any “opinion”.

103 The expression “political opinion” is not defined in the FWA.

104 In *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27; 327 ALR 460 (*Sayed*) at [164]-[177], Mortimer J (as the Chief Justice then was) considered the meaning of the term “political opinion” in s 351 of the FWA. Her Honour concluded at [172]:

...there is no doubt at all that membership of a political party, and engaging in activities associated with a political party, is one of the clearest examples of the holding and manifestation of a political opinion, such membership and involvement being one of the quintessential ways in which people seek to bring about change to governments, and to government policies and priorities.

105 In arriving at that conclusion, Mortimer J reviewed cases that had considered the same or similar expressions in the context of anti-discrimination, extradition, and refugee law.

106 Citing *Canada (Attorney-General) v Ward* [1993] 2 SCR 689 at 746, Mortimer J observed at [170] that under refugee law, the ground of “political opinion” may encompass, “any opinion on any matter in which the machinery of state, government and policy may be engaged”.

107 Her Honour at [171] cited the following passage from the judgment of Hill J in *Voitenko v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 355 at [33]:

...It suffices here to say that the holding of an opinion inconsistent with that held by the government of a country explicitly by reference to views contained in a political platform or implicitly by reference to acts (which where corruption is involved, either demonstrate that the government itself is corrupt or condones corruption) reflective of an unstated political agenda, will be the holding of a political opinion. With respect, I agree with the view expressed by Davies J in *Minister for Immigration & Ethnic Affairs v Y...* that views antithetical to instrumentalities of government such as the Armed Forces, security institutions and the police can constitute political opinions for the purposes of the Convention. Whether they do so will depend upon the facts of the particular case.

108 In *Ralph M Lee (WA) Pty Ltd v Fort* (1991) 4 WAR 176, Anderson J held at 183:

I do not consider there is any reason to give the word ‘political’ in [*the Equal Opportunity Act 1984 (WA)*] a wider meaning than it bears in normal usage. In my opinion a complainant alleging discrimination on the ground of his political conviction is required to show that the conviction possessed by him and shown to have been the ground for his disadvantageous treatment by the respondent, was a conviction which had to do with government — the policies of government, the structure, composition, role, obligations, purposes or activities of government. Convictions about these things and other things of that kind relating to government or the relationship between citizens and government may be properly described as political convictions.

109 Section 772(1) prohibits termination of employment for reasons that include the attributes, characteristics and conduct specified in the provision. Section 772(1), like s 351(1), can be described as an anti-discrimination provision. I consider *Sayed*, and the authorities considered in that case concerning the meaning of “political opinion”, have equal application to s 772(1).

110 The expression “political opinion” within s 772(1) of the FWA encompasses the opinion of an employee about the policies or actions of the government of a country or its armed forces. It encompasses Ms Lattouf’s opinions about the policies or actions of the government of Israel and its armed forces, and may extend to the way media organisations report about such policies or actions, in the context of the Israel/Gaza war.

111 The question of whether the matters pleaded in paragraph 1A of the FCASOC are “political opinions” falls to be considered in the context of the pleading as a whole and the case that Ms Lattouf seeks to establish.

112 Ms Lattouf alleges that she held a “political opinion” opposing the Israeli military campaign in Gaza. The ABC admits this is a “political opinion”.

113 Ms Lattouf alleges she held a “political opinion” supportive of Palestinians’ human rights. The context is that her Instagram posts, including the HRW Post, made it clear that she believed Palestinians’ human rights were being violated by the Israeli government and its armed forces. I find Ms Lattouf’s support for Palestinians’ human rights was a political opinion.

114 Ms Lattouf alleges she held a “political opinion” that media organisations should report about the Israel/Gaza war accurately and impartially. That allegation must be understood in the context of her contribution to an article in *Women’s Agenda*, of which she informed Ms Green and which included:

It is the worst humanitarian crisis and violence against children in modern times... and yet sections of our media would rather invest time and energy in targeting female journalists and commentators who dare to deviate from reciting IDF talking points, rather than interrogating those responsible for fractures in social cohesion locally and the ongoing slaughter of children in Gaza.

The intention of tabloid media campaigns which target individuals with a platform is

to get us to shut up. To look away, to stop investigating and stop revealing harm.  
Essentially to stop doing our job...

115 In the context of Ms Lattouf’s evident belief that the media was attempting to deflect attention from atrocities perpetrated by the Israeli armed forces, I consider her opinion that the media should report about the war accurately and impartially was a political opinion.

116 Ms Lattouf alleges she held a political opinion, “questioning the authenticity of footage of demonstrators chanting anti-Semitic chants at the Sydney Opera House”. Although the allegation could be better phrased, viewed in context, I understand the allegation to be that Ms Lattouf held an opinion that media reports claiming that demonstrators’ chants were anti-Semitic were unverified. In the context of her opinion that the media should report on the Israel/Gaza war accurately and impartially, I consider her opinion can be described as a “political opinion”.

### ***Whether “political opinion” in s 772(1) encompasses the expression of political opinion***

117 Ms Lattouf argues the prohibition in s 772(1) against the termination of employment for reasons including “political opinion” encompasses both *holding* and *expressing* a political opinion. The ABC submits that termination for *expressing* a political opinion is not prohibited, although its primary submission is that the question need not be determined because Ms Lattouf has only pleaded her termination was for reasons including she “held” (not that she “expressed”) political opinions.

118 In *Rumble v The Partnership (t/as HWL Ebsworth Lawyers)* [2019] FCA 1409; 289 IR 72 at [131], Perram J at first instance and, on appeal in *Rumble FCFCA* at [43], the Full Court, preferred to leave open the question of whether s 351 of the FWA proscribes dismissing an employee for *expressing* a political opinion.

119 Ms Lattouf relies on *Sayed*, where Mortimer J regarded both the holding and manifestation of political opinion as protected attributes under s 351 of the FWA. Accordingly, her Honour found at [177], “the applicant’s membership of, and involvement in the activities of, the Socialist Alliance constituted the holding and manifestation of a political opinion”.

120 Section 772(1)(f) provides an employer must not terminate an employee’s employment for reasons that include their “political opinion”. The provision is not expressly restricted to the holding of a political opinion. The language of the phrase is wide enough to encompass both holding a political opinion and expressing a political opinion. If the provision is to be read as only prohibiting termination for reasons including that an employee *holds* a particular political opinion, but not as prohibiting termination for reasons including that an employee has *expressed* a particular political opinion, then such a construction must appear from the context.

121 There is a distinction between holding a political opinion and expressing a political opinion. To hold an opinion is to have or possess a particular view. A person may hold an opinion without expressing it; and a person may express an opinion without holding it. The latter category may include an actor in a political advertisement or a politician. It may be acknowledged that in most cases the distinction will have no practical consequence: a person who expresses an opinion will usually be attributed with holding that opinion. However, the distinction may be of importance in the context of s 772(1) of the FWA.

122 An employee's employment would not ordinarily be terminated because they *hold* an *unexpressed* political opinion. An employee's employment could only be terminated for holding a particular political opinion if the employer knows or believes the employee holds that opinion. The termination of an employee's employment for their political opinion would usually result from the expression, communication or manifestation of that political opinion. The employer might then terminate the employee's employment for reasons such as vehement disagreement with the opinion or the potential for damage to the employer's business.

123 The holding of an unexpressed political opinion could result in termination of employment where the employer *attributes* the holding of such an opinion to an employee. An employer might, for example, perceive an employee to hold a particular political opinion because that opinion has been articulated by the employee's spouse or associates. In *Sayed*, Mortimer J saw no relevant distinction between a person *having* a protected attribute, and the *perception* of a person having a protected attribute or characteristic associated with that attribute, observing:

[194] ...The respondent seeks to separate a protected attribute from characteristics either associated with it, or perceived by the decision-maker to be associated with it. In the days before pregnancy became a distinctly protected attribute in anti-discrimination law, becoming pregnant was seen as a characteristic associated with women, or perceived to be associated with women. An employer might say: I refused to give the female applicant the job because she might become pregnant, not because she was a woman. As it has been found, that is still sex discrimination: see, eg, *Wardley v Ansett Transport Industries (Operations) Pty Ltd* (1984) EOC 92-002. This approach was not the subject of appeal...

[195] At base, distinctions between protected attributes and real or perceived characteristics associated with those attributes permits the kind of stereotyping which anti-discrimination laws are designed to prevent. If there is an apprehension about what an individual might do, or how she or he might act, because of views or behaviour attributed to people with the protected attribute of that individual, acting on such an apprehension is just as discriminatory as treatment because of what the individual has done, or how the individual has acted.

124 However, in most cases it would be the expression of a political opinion that might lead an employer to terminate an employee's employment. It seems evident that one aim of s 772(1) is to prevent an employer from terminating the employment of an employee at the behest or encouragement of political lobbyists who seek to prevent the employee from voicing their political opinions. It seems quite unlikely to have been intended that the expression of a political opinion is excluded from protection under s 772(1)(f).

125 The view that s 772(1)(f) protects against termination both for holding and expressing political opinions is reinforced by considering the protected ground of "religion". It is not specified whether "religion" means holding a religious belief, or engaging in religious practice, or both. However, it seems most unlikely that only holding a religious belief, and not any manifestation of that belief, is protected.

126 One of the international treaties specified in s 771 of the FWA is the *ILO Discrimination Convention*. Article 1(1) provides that the term "discrimination" includes, "any distinction,

exclusion or preference made on the basis of...political opinion...which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".

127 In an article entitled, "The concept of discrimination in ILO Convention No.111" (1994) ICLQ 43(4), the author, Henrik Nielsen, states at 837-838:

It is the established case law of the ILO supervisory bodies that, in protecting workers against discrimination on the basis of political opinion, Convention No.111 implies that this protection is afforded to them also in respect of activities expressing or demonstrating opposition to the established political principles - since the protection of opinions which are neither expressed nor demonstrated would be pointless... In this way, two other human rights, namely freedom of expression and freedom of association, become central elements in the criterion of "political opinion" in Convention No.111.

128 The article cites the *Report of the Committee set up to consider the representation presented by the International Confederation of Free Trade Unions under article 24 of the ILO Constitution alleging non-observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) by Czechoslovakia (CGT)*. That report stated at [17]:

As regards the relationship among these provisions of the Convention, the Committee of Experts on the Application of Conventions and Recommendations has observed that "in protecting workers against discrimination on the basis of political opinion, the Convention implies that this protection shall be afforded to them in respect of activities expressing or demonstrating opposition to the established political principles-subject only to the limitations referred to below - since the protection of opinions which are neither expressed nor demonstrated would be pointless...".

129 In my opinion, the protection for employees under s 772(1) against termination of employment for reasons including "political opinion" encompasses not only the holding of a political opinion but also the expression of a political opinion.

130 I will later consider the significance of Ms Lattouf having pleaded in her FCASOC that her employment was terminated for reasons including she *held* political opinions, but not for her *expression* of such political opinions.

### ***Whose reasons for the termination are relevant?***

131 In her written closing submissions, Ms Lattouf alleges that the decision to terminate her employment was made by Mr Anderson and Mr Oliver-Taylor in the sense they had, and exercised, authority to terminate her employment, and their decision was influenced or materially contributed to by Ms Buttrose and Mr Latimer.

132 Ms Lattouf's allegation of contravention of s 772(1) is against the ABC as her employer. The ABC is a body corporate. In *Wong v National Australia Bank Ltd* [2022] FCAFC 155; 318 IR 148, the Full Court held:

[25] [T]he word "because" as it appears in s 340 of the [FWA] directs attention to

the reason for an action, which is to be found in the state of mind of the person alleged to have taken the adverse action. Where (as here) that person is a corporate entity, it will in all cases be necessary to examine the state of mind of the human actor or actors who (alone or together) caused the corporation to take the action that it did or, to adopt a phrase from *Wood*, who “played the decision-making part in the joint administrative activities” culminating in the actual act that constitutes the adverse action. It may be convenient to refer to the person whose conduct directly visited the adverse action on the employee as the “decision-maker” but his or her decision-making process may incorporate the state of mind of other people, including by adopting facts or opinions asserted by them.

[26] The authorities show that in asking whether an adverse action was taken by a corporate entity, the Court should remain alert to the possibility that the answer may reside in the mind of more than one natural person. The state of mind of the human actor who said or did the thing that bound the corporation to the action will of course be important, and in many cases determinative. However, the cases illustrate that a person who does the act or thing constituting the adverse action may act on information or advice the provision or content of which is actuated by a prohibited reason. The adoption of such information or advice may necessitate the conclusion that the corporation’s reasons for the adverse action include that prohibited reason. In such cases, it matters not that the person providing the information and advice does not formally possess the authority or power to effect the decision based on the information and advice. Whether the person performing the act constituting the adverse action is aware that he or she is acting on information or advice given for a prohibited reason may not be relevant in cases of that kind.

133 The inquiry is into the reasons of the person or persons who made the decision in question, or whose involvement had, “a material effect on the ultimate outcome”, or made an “indispensable contribution” to the outcome: see *Construction, Forestry, Mining and Energy Union v Clermont Coal Limited* [2015] FCA 1014; 253 IR 166 (Reeves J) at [122]; *Australian Red Cross Society* at [90]; *Qantas FCFC* at [221].

134 In *Australian Red Cross Society*, the Full Court stated at [91]:

We accept that a person who is involved in the process leading to the decision may be a decision-maker for the purpose of a proscribed purpose, but we do not need to formulate a precise test for the purpose of this case and consider it prudent to refrain from doing so.

135 For reasons that will be explained, I find the decision to terminate Ms Lattouf’s employment was made solely by Mr Oliver-Taylor. It is therefore necessary to examine his reasons for making that decision when considering whether the ABC has established that none of Ms Lattouf’s pleaded political opinions was a substantial and operative reason for the termination of employment.

136 It will be necessary to consider whether Mr Oliver-Taylor’s reasons incorporated the state of mind of Mr Anderson, Ms Buttrose or Mr Latimer such that it can be said they made a material

contribution to the decision to terminate Ms Lattouf's employment.

137 Ms Lattouf submits that the members of the public who made complaints to the ABC about her employment also made a material contribution to the decision and that their reasons or motivations are relevant. In response, the ABC submits what was in the minds of the persons who made the complaints is not relevant. It is submitted that any wider inquiry would involve straying beyond ordinary principles of corporate attribution and aggregation in a way that is not justified by any provision of the FWA.

138 I accept the complaints made to the ABC by members of the public about Ms Lattouf's employment may be relevant to the question of whether Mr Oliver-Taylor's decision was for reasons which include her political opinions. If an employer terminates an employee's employment at the behest, urging or encouragement of a person outside the employer's organisation, the termination may be "for" a relevant attribute. If Mr Oliver-Taylor's reasons included that complaints had been made or might be made about the ABC's employment of Ms Lattouf because she held or expressed political opinions, then the termination may have been "for" reasons that include her political opinions.

139 However, the reasons or motivations of the members of the public for making the complaints are not relevant.

## **The evidence**

140 In this section of my reasons, I will describe the evidence given at the hearing. There is no dispute about much of the evidence, including the content of extensive email exchanges between the ABC Managers. I have taken much of what is set out below from a narrative of the evidence helpfully prepared by the parties.

141 What is significantly in dispute is the content of some verbal communications and the motivations of the ABC Managers who were involved in the decision to take Ms Lattouf off air. I will comment upon some of the evidence and make some findings of fact in this section of the reasons, but propose to set out my findings more extensively in the next section.

142 I will only set out the relevant parts of the emails.

### ***Events before Monday, 18 December 2023***

143 In November 2023, Ms Green recommended to Mr Ahern that Ms Lattouf be engaged to fill in for the regular presenter of *Mornings* who intended to take leave in December. Mr Ahern accepted the recommendation.

144 On 17 November 2023, Ms Green telephoned Ms Lattouf and offered her five days work presenting *Mornings* from Monday, 18 December to Friday, 22 December 2023, and Ms Lattouf responded saying she would "love to" accept the engagement.

145 On the same day, Ms Green sent an email to Ms Lattouf, saying:

Hi Antoinette, good to chat on the phone. Confirming that we'd love you to present *Mornings* with us for the week commencing 18 December. The shift is 0600 - 1436

(with one hour break).

146 Ms Lattouf responded to Ms Green's email and to a further logistical email, saying:

I would be delighted to host ABC Mornings from **Monday 18<sup>th</sup> – Friday 22<sup>nd</sup> December** and yes, I still have my ABC pass.

(Emphasis in original.)

147 On 24 November 2023, Aidan Fonternel (a Unit Coordinator for ABC Radio Sydney) sent an email to Ms Lattouf (the **Terms of Engagement**), which described the "Job Role" as "Content Maker" and stated, relevantly:

"You will be employed as a casual employee".

"The terms and conditions in this email will apply if you are offered and accept a casual engagement".

"Each engagement that you accept will be separate and will cease at the end of that engagement without the need for any action by the ABC".

"In relation to each engagement, you will be advised of...the duration of the engagement...the hours of work required...the work to be performed".

"However, at any time during the period of an engagement, the ABC may advise you of changes to the above details".

"Any engagement may be terminated by either party with one hour's notice".

"You will comply with ABC Policies as amended from time to time".

148 On 27 November 2023, Ms Lattouf replied to Mr Fonternel, saying, "Read and agreed thank you".

### ***Events on Monday, 18 December 2023 – Day***

149 On Monday, 18 December 2023 Ms Lattouf presented her first show on *Mornings* from 8.30 am to 11.00 am.

150 After the show had ended, Mr Anderson and the ABC began to receive emails complaining about Ms Lattouf. There were 32 such complaints received that day, all to the same effect and using similar language. In his oral evidence, Mr Anderson accepted the complaints could be characterised as a co-ordinated email campaign.

151 Mr Anderson formed the impression that the focus of the complaints was that Ms Lattouf should not have been engaged by the ABC because her activities outside the ABC were perceived by the complainants to indicate she was not impartial in relation to the Israel/Gaza war. He considered that it was of critical importance for the ABC to have a high degree of actual and

perceived impartiality in relation to the Israel/Gaza war.

152 The following email of Monday, 18 December 2023 is an example of the complaints received by the ABC:

Please find below an impassioned letter I wrote earlier to Minister Rowland. I have forwarded it to all of you in the hope that you can enforce your own Code of Practice by both recognising the problematic nature of allowing this person to continue to use the ABC as a platform for her spouting her biased views, incitement to prejudice, and consequently fragmentation of social cohesion. Please do not give her 'air'.

153 The attached letter to the then federal Minister for Communications included the following:

Just wondering why is it that the ABC has chosen to defy its own Code of Practice. According to Clause 4 the ABC has a statutory duty to ensure that the gathering and presentation of news and information is impartial according to the recognised standards of objective journalism.

Why is it then the ABC has employed Antoinette Lattouf to host the morning ABC Sydney show? This person has very loudly, clearly and widely announced her partiality regarding the current crisis in the Middle East. Most recently she has cast doubt on the veracity of the Sydney Opera House demonstration where the vile antisemitic chants were recorded. The constant theme of her recent posts have been all slanted into the condemnation of Israel, dissemination of false statistics, and the promulgation of antizionist [aka antisemitic] rhetoric. There has been no equivalent decrying of the brutality of Hamas's October 7 bloodbath, nor of the rape and mutilation of women and girls, not condemning the taking and holding of hostages in unspeakable conditions or calls for their release. There is no equivalence in this and clearly no balanced or impartial view.

The tragedy of the current Israel-Gaza war is overwhelming and what is even more distressing in Australia is the social divisiveness and increase in reported antisemitic incidents [over [sic] 750% since October 7 that are a consequence.

No one is winning in this tragic set of events but the harmony of the multicultural Australia we all aspire to reside in is also being broken. In part due to the agitation and bias being disseminated by tpeople [sic] like Antoinette Lattouf. More concerning is that she is using the ABC to bolster her credibility and exposure. The ABC is then used as a platform for her to spread and promulgate hatred and social dissension.

Please live up to the Honourable part of your title and ensure that the ABC abides by its own Code of Practice.

Please do not allow this woman unfettered access to a wider audience than she already has. Lets all try and return to the civil society which we had.

(Errors in the original.)

154 The following email provides another example:

I would like to understand how Ms Lattouf is the correspond for the ABC for reporting on the Middle East. She is not impartial and, as ABC is a public broadcasting company which is funded by Australian taxpayers.

Furthermore, she has incorrectly claimed that the Jewish community said “gas the Jews” was a lie and there have now been 4 statutory declarations by independent witnesses (some of whom are not part of the Jewish community) attesting to this.

Clause 4 of the ABC code of practice is to be impartial and employing Ms Lattouf to report on this, there is no impartiality. ABC is in breach of their obligations by allowing her to continue to report on the conflict.

Please advise how you intend to handle this matter.

(Errors in the original.)

155 The complaints, as they developed over the ensuing days, were evidently a coordinated campaign to pressure the ABC into taking Ms Lattouf off air or ceasing to employ her. They articulated similar themes and, in most cases, recited identical or near identical objections. As Mr Anderson put it, the wording was the same in each email, but it was, “top-and-tailed slightly differently” and, “it looked like a copy and paste coming through”.

156 At 1.35 pm, Mr Anderson forwarded some of the complaints to Mr Oliver-Taylor, Justin Stevens (Director of News) and Mr Melkman, asking, “Can someone please look into it.”

157 Mr Oliver-Taylor subsequently learned Ms Lattouf had been engaged as a casual broadcaster filling in on ABC Radio Sydney. At 1.40 pm, Mr Oliver-Taylor responded to Mr Anderson’s email, saying he would, “speak to the team about this and come back to [Mr Anderson] with some thinking”.

158 At 1.49 pm, Mr Oliver-Taylor sent an email to Mr Ahern, copied to Mr Latimer, Mr Melkman and Sashka Koloff (Editorial Standards and Compliance Manager):

I have been forwarded a number of complaints this morning from the MD’s office about Antoinette Lattouf and her position on the Israel/Gaza war. You may need to seek Simon Melkman or Sashka’s advice here, but can we ensure that Antoinette is not and has not been posting anything that would suggest she is not impartial, I am concerned her public views may mean that she is in conflict with our own editorial policies, but Simon and Sashka would be able to advise. Can we also advise why we selected Antoinette as stand in host?

I am not suggesting we make any changes at this time, but the perceived or actual lack of impartiality of her views are concerning.

159 Mr Oliver-Taylor deposes:

I instructed Mr Ahern that he should make sure that Ms Lattouf '*is not and has not been posting anything that would suggest she is not impartial*'. As to this, my expectation at the time when I wrote those words was that Mr Ahern would understand that he should take steps to ensure that Ms Lattouf did not post anything that would suggest that she was not impartial in relation to the Israel- Gaza war; to my mind, that would inevitably require him to give her an instruction or direction to that effect, and to ensure that she understood that she was to comply with that instruction or direction.

160 It may be observed that Mr Oliver-Taylor's email stating, "can we ensure that Antoinette is not...posting anything that would suggest she is not impartial" did not unequivocally require that an authorization or direction to be given to Ms Lattouf.

161 At 1.51 pm, Mr Ahern responded by email to Mr Oliver-Taylor, saying, amongst other things, that he would, "get on to this immediately and let you know". Mr Oliver-Taylor deposes:

When I read this email, I assumed that I could rely on Mr Ahern to comply with the instruction to which I have referred...Thereafter, my assumption was that he had in fact done so.

162 At 1.52 pm, Mr Ahern sent an email to Ms Green and Mr Spurway forwarding Mr Oliver-Taylor's email of 1.49 pm and asking Ms Green to, "give me some feedback on the item in question", also stating, "We will need to talk to Antoinette urgently about what she says about Gaza".

163 At 1.57 pm, Mr Oliver-Taylor sent an email to Mr Ahern, Ms Koloff, Mr Melkman and Mr Latimer forwarding the three complaints sent by Mr Anderson.

164 At 2.03 pm, Ms Green telephoned Mr Ahern. Mr Ahern deposes it is likely they discussed the content of his and Mr Oliver-Taylor's emails and that he asked Ms Green to provide him with information about Ms Lattouf. He deposes his reason for having the conversation was to comply with what he understood to have been the instruction given to him by Mr Oliver-Taylor. Mr Ahern deposes that as a result of the conversation he was satisfied Ms Lattouf had not said anything about the Israel/Gaza war on air that morning, and that the topic was not part of the program brief for the week.

165 Ms Green deposes that at 2.03 pm, she called Mr Ahern in response to his email. Mr Ahern informed her about the complaints concerning Ms Lattouf. Mr Ahern asked Ms Green whether the *Mornings* program presented by Ms Lattouf that day had covered any content in relation to the Israel/Gaza war and if there had been any content on air that could be considered controversial. Ms Green told Mr Ahern that she did not believe so, but said she would review the content of the show to check. Later in the conversation, Mr Ahern suggested it would be best if Ms Lattouf limited her use of social media whilst with the ABC for the week so as not to give any ammunition for further complaints. Mr Ahern asked Ms Green to, "please have a word with Antoinette about her social media", and said that Ms Green should tell Ms Lattouf to, "keep a low profile and not post anything controversial".

166 As I will explain later, I accept Ms Green to be a reliable witness and accept her account of all her discussions with Mr Ahern.

167 While on the phone to Mr Ahern, Ms Green sent an email to him at 2.07 pm containing a link to a *Crikey* article co-authored by Ms Lattouf and published on 13 December 2023. In the article, Ms Lattouf labelled media reports, that there were chants of “gas the Jews” at a protest at the Sydney Opera House, as “unverified”.

168 Mr Ahern began to “follow” Ms Lattouf’s Instagram account, looked at some of her recent Instagram posts, her LinkedIn profile and her Wikipedia page and read the *Crikey* article provided to him by Ms Green.

169 Later that afternoon, Ms Green had two related telephone calls with Mr Ahern. The first began at 2.36 pm and lasted for eight minutes. The second began at 3.35 pm and lasted for six minutes.

170 Mr Ahern does not recall the details of either conversation. However, he recalls that he asked Ms Green whether Ms Lattouf was aware of the obligations to comply with the ABC’s Editorial Guidelines and policies and instructed Ms Green to speak to Ms Lattouf about not posting about the Israel/Gaza war during that week. He recalls Ms Green said words to the effect, “Don’t worry. I’ve already had that conversation with her. She won’t post anything controversial”. It seems Mr Ahern is confused about the making of such a comment as Ms Green had not had any conversation with Ms Lattouf about social media by that time. Mr Ahern says he remembers Ms Green using the word “controversial”, but did not attach any particular significance to it because he did not conceive anything could be posted in relation to the Israel/Gaza war at that time and not be controversial.

171 Ms Green deposes that at 2.36 pm, she called Mr Ahern to inform him about the enquiries she had made and to seek clarification of what she should say to Ms Lattouf. At 3.35 pm, she called Mr Ahern again. During this call, Ms Green sought further clarification and guidance from Mr Ahern before having any conversation with Ms Lattouf. Mr Ahern confirmed the approach that had been discussed in their previous two phone calls. During one of the two conversations, Ms Green wrote down the following two points in her notebook in preparation for her conversation with Ms Lattouf:

Perceived public position, gather that pro-Gaza

Ammunition – don’t give ammunition best not to post whilst here

172 At 2.53 pm, Mr Melkman sent the following email to Mr Oliver-Taylor, Mr Ahern and Ms Koloff:

I understand the criticisms of Antoinette stem at least in part from her work on this story in Crikey last week: [link to the Crikey article], which was the subject of criticism on Sky News: [link to a video], which Antoinette responded to on Instagram: [link to the Instagram post]. I note she’s also a signatory to the recent open letter [link to the letter] from journalists to media outlets.

From what she said on-air this morning, she’s only filling in on Mornings for a week.

In terms of how we apply the personal use of social media guidelines, it's important to consider the person's role and the extent to which their personal social media activity can affect the ABC's reputation for impartiality. Presenting the Mornings program on ABC Sydney is a high-profile role of course, but if she's only doing it on a temporary basis (for a week) it wouldn't be reasonable to expect that all of her previous social media activity would necessarily adhere to our guidelines. I'm not suggesting she's breached those guidelines – I haven't pored through her social media accounts – but just making the point that *we ought to take a reasonable approach based on the fact that she's only in this role for a week.*

Also, the fact that her recent work for Crikey has been the subject of criticism on Sky News doesn't automatically mean the criticism is justified or that the work itself was problematic. And it was clearly journalistic work (on a contentious subject) rather than commentary or opinion, which I think is relevant in determining whether it has any bearing on her (again, temporary) ABC role.

Question for Steve: is Antoinette likely to cover this subject (not the specific issue of the 'gas the Jews' chant at the Opera House, but the Israel-Gaza conflict more broadly) on Mornings this week?

(Emphasis in original.)

173 At 3.32 pm, Mr Ahern sent the following email to Mr Oliver-Taylor:

Here are some details:

**Selection of Antoinette Lattouf**

- As part of our diversity policy a couple of years ago, a number of people were identified as potential future presenters for ABC Radio, Antoinette was one of them.
- She was trained in ABC radio presenting, including editorial policies. She presented a series of development shifts on digital channels about two years ago as part of her training, there were no incidents during those shifts.
- She is a journalist who previously worked for SBS and other media. She has also reported for ABC News [link inserted]
- Her background is Lebanese Christian, she grew up in Western Sydney, the child of Lebanese immigrants.
- She presented two weeks of our national summer lineup last year without incident.
- This current stint is one week on air only in Sydney. She will finish on Friday

and has not been booked up for any other shifts this season

### **Views on the Israel-Gaza War**

- She has expressed views about being a child of migrants and views on discrimination, but has not, as far as we know, expressed personal views that would position her as biased in the current conflict. She has, however, recently reported on the Opera House protest.
- She has done reporting that the chants of 'gas the Jews' were unverified. She has investigated that position in an article for Crikey, which could be perceived as taking a position, but, when read in full, it appears balanced and journalistically sound. [link inserted]
- She also posted a similar commentary on Instagram on the 'gas the Jews' chants [link inserted]
- Some of the criticism relates to the reporting in these articles/posts

### **On Air program**

- Today's program did not contain any content about Israel-Gaza, a full rundown is attached below.
- The show followed the brief, to reflect Sydney in the first week of the school holidays, which is what she did very well last year in a light bright presentation style.
- Antoinette and the production team have been advised that there should not be any Israel-Gaza War coverage in her show this week, as it does not fit the holiday Sydney brief for the show.
- One segment, about 'boycotts' and 'buycotts' in today's show did mention that at the current time there is a lot of people who are worried about the state of the world at the moment, but there was no specific Gaza reference (double checking the whole show now)
- This is the rundown from today's show

...

### **Perceived position**

- Some of the complaints received so far seem to be based more on audience perception, not content in the program. We see similar perceptions about other presenters on the network with Jewish backgrounds.

- A couple of the complaints say that she is “reporting on the Middle East situation.” She is not doing so in this program and that is not the brief of the program she is presenting.
- The criticism is largely about the choice of presenter, not about the content within the program.

174 At 3.44 pm, Ms Green and Ms Lattouf spoke by telephone. Ms Green deposes:

At 3:42 pm on Monday, 18 December 2023, I called Ms Lattouf, and she did not answer. Ms Lattouf returned my call at 3:44 pm. My phone records indicate that we spoke for five (5) minutes During my call with Ms Lattouf, I had in front of me the two points that I had written down during my conversation with Mr Ahern ... While I do not now recall the precise words used, to the best of my recollection Ms Lattouf and I had a conversation with words to the following effect ...

Me: I have been told there have been a number of complaints about you being on air because of a perceived stance on the Israel/Palestine conflict based on your social media posts. As you know, the ABC has strict editorial guidelines. So you just need to be mindful about what you’re posting. It’s all about a perception of bias.

Ms Lattouf: What kind of complaints?

Me: I haven’t seen the complaints but I have been told about them, I imagine they’re from lobbyists.

Ms Lattouf: Have I done anything wrong on air?

Me: No, you didn’t do anything wrong on air, you were balanced while on air.

Ms Lattouf: Well it doesn’t surprise me there are complaints about me.

Me: I wanted to talk to you because these complaints have apparently happened so we need to address it.

Ms Lattouf: Thanks for letting me know, I appreciate the situation

Me: Obviously as an ABC presenter, you need to be impartial, that includes on social media. I wouldn’t give anyone any ammunition for complaints, so would be best if you don’t post anything related to the Israel/Palestine situation on social media whilst you’re with us

Ms Lattouf: I think it’s a bit unfair to ask me not to tweet or post at all. What if I stick to completely factual information from reputable sources, like an Amnesty International Report? If another journalist dies, I can’t just say nothing. I would share

something from the committee to protect journalists. Of course I will be fair and balanced.

Me: I understand. If something is fact based and from a verified source I am sure it would be fine, but best not to post anything that would be considered controversial while you're with us.

175 On Thursday, 21 December 2023, Ms Green wrote a note, in the form of an email to Ms Vanessa MacBean (Head of Employee Relations), recounting her conversation with Ms Lattouf:

Hi Vanessa, I had a phone conversation with Antoinette at 3.44 pm on Monday (18<sup>th</sup> December).

I told her that the ABC had received some complaints about her being on-air in relation to her perceived stance on the Israel/Palestine conflict based on her social media posts. With that in mind, and that clearly the ABC has strict editorial guidelines, I advised that she should avoid posting anything related to the Israel/Palestine situation whilst she was with us for the week. Antoinette's response was a question about what she could post, using the example of a death of journalist or other fact based events. I said providing it was fact based or a verified source that was ok, however it might be better not to post anything that could be perceived as unbalanced whilst she was working with us...

176 Ms Green deposes that her note, "generally accords with my memory". She also deposes she, "considered that, in context, the words 'unbalanced' and 'uncontroversial' are to the same effect".

177 Ms Lattouf's evidence about the content of her conversation with Ms Green is as follows:

Ms Green: We have received heaps of complaints from pro-Israel lobbyists who are not happy that we have put you on air.

Me: Have I done or said anything wrong?

Ms Green: No, the show was excellent. Your journalistic integrity is excellent. I back you.

Me: If I say the sky is blue, they are going to have a problem with it.

Ms Green: Yes, I agree. I just wanted to give you a heads up. And be honest with you. It really angers me that we even have to have this conversation, it's unfair.

Me: Thank you for your honesty.

Ms Green: It's probably best that you keep a low profile on Twitter and maybe don't

tweet anything.

Me: I think it's a bit unfair to ask me not to tweet or post at all. What if I stick to completely factual information from reputable sources, like an Amnesty International Report? If another journalist dies, I can't just say nothing. I would share something from the committee to protect journalists. Of course, I am not going to rely on conjecture or spread misinformation.

Ms Green: Yes, ok I understand. That's fine, facts and reputable organisations.

178 Ms Green and Ms Lattouf were cross-examined about their respective recollections of the conversation. There are, unsurprisingly, some differences. While I consider that little turns upon the differences, I am assisted in accepting Ms Green's account of the conversation by her email of Thursday, 21 December 2023, which was prepared only three days afterwards.

179 Ms Green states that, in hindsight, when she told Ms Lattouf, "If something is fact based and from a verified source, I am sure it would be fine", she was saying something she had not been instructed to say by Mr Ahern or anyone else.

180 At 3.45 pm, Mr Ahern sent an email to Mr Melkman, Mr Oliver-Taylor, Ms Koloff and Mr Latimer, responding to Mr Melkman's email of 2.53 pm:

Thanks for pointing out that she signed the journalists' letter to media outlets, I didn't note that in my email just sent. She was booked for this shift a couple of months ago before the letter happened.

Confirming that she will not be covering the Israel-Gaza conflict and it is not within the program brief to talk about this topic.

181 At 3.54 pm, Mr Oliver-Taylor sent an email to Mr Ahern, Mr Melkman, Ms Koloff and Mr Latimer, which included:

I will respond to the MDO [Managing Director's Office] now and explain that we have reviewed and expect her to continue on air this week and finish on Friday.

182 At 4.07 pm, Mr Oliver-Taylor sent the following email to Mr Anderson, copied to Mr Stevens, Mr Melkman and Mr Latimer:

A follow up to the earlier notes regarding Antoinette Lattouf and all credit to Steve Ahern for working so quickly to come back to us on the details.

[Mr Ahern's email of 3.32 pm was set out]

...

After consultation with Simon on the above points, this is our agreed position:

In terms of how the ABC applies the personal use of social media guidelines, it's important to consider the person's role and the extent to which their personal social media activity can affect the ABC's reputation for impartiality. Presenting the Mornings program on ABC Sydney is a high-profile role, but if she's only doing it on a temporary basis (for a week) it wouldn't be reasonable to expect that all of her previous social media activity would necessarily adhere to our guidelines. We are not suggesting she's breached those guidelines, rather making the point that the ABC ought to take a reasonable approach based on the fact that she's only in this role for a week.

Please let any of us know David if you require further information.

183 At 4.07 pm, Mr Oliver-Taylor forwarded the email to Mr Ahern, Ms Koloff, Mr Melkman and Mr Latimer.

### ***Events on Monday, 18 December 2023 – Night***

184 On the evening of Monday, 18 December 2023, Mr Anderson reviewed Ms Lattouf's social media activity.

185 At 8.44 pm, Mr Anderson sent the following text message to Mr Oliver-Taylor:

Also, I think we have an Antoinette issue. Her socials are full of ant-Semitic [sic] hatred. I'll send you a link. I'm not sure we can have someone on air that suggests that Hamas should return to their ethnic cleansing in Gaza and move onto the West Bank

186 At 8.48 pm, Mr Anderson sent to Mr Oliver-Taylor by text message, the following screenshot of a post on Ms Lattouf's Instagram account that was created at some time prior to her engagement at the ABC:



Orna Mazer769

After the massacre of 1500 Israelis and the kidnapping of 240 hostages. Do you expect Israel to keep quiet?

4h Reply



Antoinette Lattouf · Creator

Hell no! They should finish off the ethnic cleansing job they started. Then move on the West Bank. Kill and annex. Then same with Lebanon and Jordan

1s ago Reply



• • •



951 likes

antoinette\_lattouf Swipe. The best part of my job are the fans. I do this — all of this — for you guys. ❤️❤️❤️

[View all 107 comments](#)

187 Mr Anderson thought Ms Lattouf was saying that Hamas should return to their ethnic cleansing in Gaza and move onto the West Bank. Read in context, Ms Lattouf was in fact responding to a comment by sarcastically suggesting that Israel should finish off its ethnic cleansing of Palestinians and then kill the people of, and annex, the West Bank, Jordan and Lebanon. While Mr Anderson was mistaken in his interpretation of the post, it does demonstrate that he attributed to Ms Lattouf hateful anti-Semitic opinions.

188 At 8.49 pm, Mr Oliver-Taylor replied to Mr Anderson by text message, saying, “Copy, We’ll check socials now. And agree”.

189 Also at 8.49 pm, Mr Anderson sent a text message to Mr Oliver-Taylor with a hyperlink to the following post of December 2023 which appeared on Ms Lattouf’s Instagram page:



instasaranade and camwilsonreporter



# Breaking: Viral footage showed protesters chanting 'g\*s the Jews'. Nobody can verify it.

As reported in Crikey today 13.12.2023  
with thanks to journalists  
Antoinette Lattouf and Cameron Wilson

Please note these tiles are a summary of the original article put together to the best of my ability without sacrificing the meaning or message of the piece.

Content warning: these tiles contains mention of subjects some readers may find distressing.



Q 126



View likes

instasaranade Without diminishing from the seriousness of the original antisemitic chant at the rally by a few – the idea that this footage may have been tampered with has dangerous ramifications, especially in an era of mis/disinformation.

..

That unverified footage like this went viral is only possible because of how seeped we are in

190 At 8.51 pm, Mr Oliver-Taylor sent an email to Mr Latimer, Mr Ahern and Mr Melkman attaching the screenshot received from Mr Anderson at 8.48 pm, writing, “Team, MDO [Managing Director’s Office] just sent me this. I think we have a problem”.

191 At 8.54 pm, Mr Anderson sent a text message to Mr Oliver-Taylor:

I was have [sic] a staff member do the same – what would you do?

Mr Anderson deposes he had intended to write something to the effect of, “If an ongoing staff member had done this, what would you do?”.

192 At 8.55 pm, Mr Oliver-Taylor sent a text message to Mr Anderson saying, “I think this is hugely problematic”.

193 At 8.57 pm, Mr Ahern sent an email to Mr Oliver-Taylor, Mr Latimer and Mr Melkman:

Does [Ms Lattouf] need to come off air? If so, it can be done, but may be disruptive if done tomorrow.

194 At 9.01 pm, Mr Oliver-Taylor sent the following email in reply to Mr Ahern, Mr Latimer and Mr Melkman:

Not tomorrow. Can you work with Simon [Melkman] and assess what is going on? Suspect very hard for her to stay on air to the end of this week if her tweets are correct. But let's cautiously review.

195 At 9.00 pm, Mr Anderson responded to Mr Oliver-Taylor's earlier text message of 8.55 pm:

It's a reputational issue. And clearly we need to research anyone as a replacement presenter rather than just Steve be happy they've done [Editorial Policies] training. As per Justin's note to News staff, the perception of our people's impartiality is as important as their adherence to the policies. Anyway, let's chat tomorrow.

196 At 9.01 pm, Mr Oliver-Taylor replied to Mr Anderson:

Agree. I've just spoken to Steve again, Simon had [sic] him are reviewing her socials asap. Likely on air tomorrow but I presume she gets pulled off air after tomorrow's shift.

197 At 9.26 pm, Mr Anderson texted a further screenshot to Mr Oliver-Taylor of a social media post that had been made by Ms Lattouf on 25 November 2023:

Log in Sign up

Follow ...

Antoinette Lattouf  
@antoinette\_news

Watching Israeli hostages & Palestinian children who've been imprisoned reunited with loved ones is truly heartwarming. They should never have had to endure these atrocities. We need a PERMANENT ceasefire and to address the ROOT of the problem - unlawful occupation of Palestine

10:09 PM · Nov 25, 2023 · 7,651 Views

34 Reposts 2 Quotes 175 Likes 1 Bookmark

198 At 9.49 pm, Ms Lattouf sent the following email to Ms Green:

Firstly, many thanks for the open and honest discussion this afternoon. I appreciate the difficult position lobby groups are putting you in, but in particular your transparency and support.

I am writing to provide a heads up that is pertinent to our conversation today, I thought it best to share and be open.

Women's Agenda reached [out] this morning about a story they are doing about Murdoch press targeting female media personalities like PK, Jan Fran, myself and Clementine Ford especially re: Gaza.

I replied not long after coming off air this morning. It might be published in tomorrow's newsletter, or some time this week, and in the spirit of honesty and our discussion earlier, I thought it was important to share with you before it's out.

My measured responses in defence of good journalism, not bowing to intimidation are below. Olivia's questions can be read in the sms screenshot attached.

"It seems like an orchestrated attempt to bully critical thinking and fact checking out of the craft of journalism. Nowhere is this more obvious than around reporting of and discussion around Gaza. It is the worst humanitarian crisis and violence against children in modern times, and yet sections of our media would rather invest time and energy in targeting female journalists and commentators who dare to deviate from reciting IDF talking points, rather than interrogating those responsible for fractures in social cohesion locally and the ongoing slaughter of children in Gaza"

"The intention of tabloid media campaigns which target individuals with a platform is to get us to shut up. To look away, to stop investigating and stop revealing harm. Essentially to stop doing our job. And if we don't shut up they discredit us in a bid for us to lose our jobs. No tactic is off the table from reporting blatant lies about us, mischaracterisations, and pressuring employers. I will continue to report and comment without fear or favour, especially when so many innocent lives are at stake and there's so much hate and division in Australia"

Her questions are below:

Two quick questions:

This is clearly a shared experience from a number of journalists, particularly women journalists, in Australia - being targeted by mainstream media and particularly Murdoch media. Why do you think this is the case?

How does it affect you as a professional in the media industry?

Per our discussion today, I hope you can appreciate my responses to these questions. I will continue to be mindful to ensure accuracy and professionalism in my engagements across all of my channels.

I look forward to having a great rest of week on air connecting with audiences and entertaining them as they arrive that little bit closer to Christmas.

199 At 10.12 pm, Ms Green forwarded the email to Mr Ahern and Mr Spurway.

200 At 10.30 pm, Mr Ahern replied to Ms Green and Mr Spurway, attaching the screenshot of Ms Lattouf's social media activity that he had received from Mr Oliver-Taylor at 8.51 pm, and stating:

Difficult but not in itself a reason for Antoinette not to be on air. However there is a post from what appears to be from her social media account that goes too far.

Attached.

Tomorrow after she comes off air, could you ask her for an explanation about it please.

201 At 11.00 pm, Mr Melkman sent an email to Mr Oliver-Taylor, Mr Latimer and Mr Ahern:

At this stage I'd advise caution. A single screenshot taken out of the context of the full post (and even that post, taken out of the context of her full account) can be easily mis-construed. The full post (from November 12) is here: [link was inserted]. It's a series of nine screenshots of Antoinette's responses to abhorrent, abusive or stupid comments people had made on some of her other posts. She titled it 'RESPONDING TO FAN MAIL ABOUT GAZA'. From seeing the full post it's reasonably apparent that she was sharing tongue-in-cheek / humorous retorts – i.e. she's collated what she regards as her 'best comebacks' to the sort of trolls or nonsense comments she evidently receives. I've put the post into one image so you can see it in full:

[Image of the posts in full inserted]

While it's not the sort of thing I would want a prominent current/ongoing presenter to post – because it treats such a serious subject with levity, and has the potential to be misunderstood – it doesn't strike me as egregious enough to warrant pulling her off air. It's consistent with her outspoken but humorous approach on Instagram – her fans/followers would have understood the comments weren't meant to be taken seriously. I'm also mindful that this is such a short-term engagement (which limits the extent to which listeners would regard her as a representative of the ABC, especially in social media activity predating her week on air) and this is a post from more than five weeks ago, well before her on-air role began.

The other factor to consider is the risk of jumping the gun or overreacting to this. Given that Antoinette is quite outspoken (e.g. via her work with Media Diversity Australia), and clearly has strong views on the current conflict and the Australian media's coverage of it (hence her decision to sign the open letter), I think there's a high chance that if the ABC was to cut her presenting role short because of this Instagram post – a post which she would presumably argue was entirely defensible, and not reflective of offensive views etc. – she would make it a very big (and very public) issue. I'm not suggesting our decisions as to how to manage people's personal social media activity should be driven by fear of them criticising any disciplinary action we might take, but I do think it's worth treading carefully in a case like this, on an issue like this, and being mindful of how things might play out.

One last point – in the event that you're inclined to pursue disciplinary action and cut her contract short (which, for the reasons mentioned above, I don't think would be warranted), it would be worth looping in P&C [People & Culture]. There's an established process for this, which involves formally investigating and giving the person procedural fairness etc. (to be honest I'm not sure how much of that process is needed when someone is on such a short-term contract, but P&C can advise).

202 At 11.03 pm, Mr Oliver-Taylor sent an email to Mr Melkman, Mr Ahern and Mr Latimer:

Thanks Simon, as ever, thoughtful and considerate advice. Let's carefully think things through Steve. I just need to ensure the MD is across our thinking tomorrow.

### ***Events on Tuesday, 19 December 2023 - Day***

203 At 6.51 am, Mr Ahern sent an email to Ms Green attaching the screenshots which Mr Melkman had included in his email of 11:00 pm the previous night, saying:

This is the full context of that post I sent.

It is satirical, understandable in context.

Seeking further advice. No need to talk to her about that post yet.

See attached.

204 Between 8.30 am and 11.00 am, Ms Lattouf presented her second *Mornings* program.

205 Mr Latimer, Mr Ahern and Mr Melkman arranged a meeting to discuss Ms Lattouf. At 9.06 am, Mr Latimer asked via email, "Do we need P&C on the call also?" Mr Ahern replied at 9.06 am, "At this stage I don't think so". At about 10.48 am, Mr Melkman, Mr Ahern, and Mr Latimer met.

206 At 10.54 am, the ABC published an article on its website entitled, "Israel-Gaza war: Human Rights Watch says starvation is being used as a 'weapon of war' by the Israeli

government”.

207 Mr Melkman reviewed complaints about Ms Lattouf logged in the ABC’s internal system and at 11.10 am, sent the following email to Mr Ahern, Mr Latimer and Mr Oliver-Taylor:

Good to chat just now. As discussed:

Based on the complaints we’ve seen thus far, I haven’t identified any breaches of our personal use of social media guidelines. That’s not a guarantee that she hasn’t breached the guidelines – motivated complainants may trawl through her accounts and uncover something problematic that we haven’t seen, and we should look into anything that complainants raise. But for the time being I don’t believe there’s any justification for pulling her off air.

Any assessment of her social media activity against the guidelines needs to take into account:

- the short-term nature of her engagement (which limits the extent to which she would be perceived as a representative of the ABC, and the extent to which it’s reasonable to impose the guidelines in an overly restrictive way, especially on activity that predates her engagement);
- the fact that she’s done (and will continue to do) lots of non-ABC work (e.g. her reporting for Crikey last week) – i.e. she isn’t solely associated with the ABC, and her personal social media activity reflects that; and
- the agreement that she won’t be discussing the Israel-Gaza war on the program this week (which reduces the risk that something she’s said on social media in connection to the conflict could come into conflict with her ABC role, or undermine perceptions of her impartiality on the issue – since she won’t be covering it on the ABC anyway).

...Antoinette, on the other hand, has done nothing (as far as we’ve seen) that would be in breach of her contract or relevant ABC guidelines.

A couple of steps you could consider taking: (1) you can ask Antoinette to keep a low profile on social media this week (for her own protection as much as anything else, given the campaign against her which appears to be growing – there were 8 complaints logged yesterday, and another 15 today), and (2) if you think it’s warranted (personally I don’t), you could ask her to switch her profiles to private/protected for the rest of the week. (These two options would [sic] also potentially worth considering for other fill-in presenters, depending on the issues they’re dealing with and the nature of their social media activity.)

It’s also worth reminding the Mornings team about being vigilant and prepared to use the dump button when Antoinette is taking talkback calls, as there’s a risk that a

motivated detractor could deceive their way on-air by saying they're going to talk about something innocuous, and then instead accost Antoinette about her views on Israel/Gaza etc. The team should be ready to dump any caller who does anything like that.

208 At 11.15 am, Mr Oliver-Taylor replied to Mr Melkman's email of 11.10 am. His reply was sent to Mr Melkman, Mr Ahern and Mr Latimer. He wrote, relevantly:

Thanks all, I think this makes sense to me. Steve, will leave it with you to take whatever proactive action you and the Sydney team think appropriate to manage and assist Antoinette. I will pass on this note, copy Simon to the MD as our position at this time. He may well hold a different view and we will need to pivot. But I think the advice provided below is sage and appropriate.

209 Mr Latimer deposes that:

My recollection is that, at some time before I received the email from Mr Oliver-Taylor at 11.15 am, I had a discussion with Mr Ahern during which I instructed him to direct Ms Lattouf that she should not post anything on social media while she was engaged by the ABC that week. In particular, I distinctly recall saying the following words to Mr Ahern:

*You are to direct Antoinette Lattouf not to post anything on social media.*

My recollection is that my instruction to Mr Ahern was clear and unambiguous. Ms Lattouf was to be directed not to post anything on social media for the period that she was performing work with the ABC: that is, for the rest of that week.

My best recollection is that I gave this instruction to Mr Ahern during the meeting between Mr Ahern, Mr Melkman and I that morning. However, it is possible that I did so in a telephone or video call. To the best of my recollection, Mr Ahern said to me words to the effect that he would make sure Ms Lattouf was given that direction. I left this conversation feeling confident that Mr Ahern would action my request, particularly as he had said he would do so.

(Emphasis in original.)

210 Mr Latimer did not record in any email or other document that he had given Mr Ahern that instruction. Mr Ahern's affidavit makes no reference to any such instruction provided by Mr Latimer.

211 Mr Latimer's oral evidence was that he had certainly talked to Mr Oliver-Taylor about the direction. No such conversations are referred to in Mr Latimer's affidavit, nor does Mr Oliver-Taylor refer to any such information given to him by Mr Latimer.

212 At 11.19 am, Mr Oliver-Taylor sent an email to Mr Anderson, Mr Melkman and Mr Latimer:

Simon has reviewed where we are with Antoinette. A summary of his views following discussions with our team are below, our view is that as Antoinette's contract finishes on Friday, we do not believe we should pull her off air at this time, mainly as she has not breached the personal use of social media guidelines that we are aware of, she has three shifts remaining and the link to the ABC is nascent due to her casual employment. Steve has been made aware that significantly more diligence is required for fill in hosts in the future.

Simon's advice which I support.

[Mr Melkman's email of 11.10 am was copied in]

Please let Simon and I know if there are further options you would like to discuss

213 Mr Anderson deposes he agreed with and accepted Mr Oliver-Taylor's advice which he understood to be that nothing was then known to indicate Ms Lattouf had breached the Social Media Guidelines; and at that time there was no justification for pulling Ms Lattouf off air. He deposes he understood this meant that Mr Oliver-Taylor had decided Ms Lattouf would continue to present *Mornings* until the end of the week. He says the decision was within Mr Oliver-Taylor's sphere of responsibility and that he supported the decision.

214 At some time after 11.00 am, Mr Anderson and Ms Buttrose met for their regular weekly meeting. The agenda prepared by Ms Buttrose included the following item as a topic for discussion:

Antoinette Lattouf Complaints

27 emails and counting.

3 email examples attached.

215 Mr Anderson gave the following evidence about his meeting with Ms Buttrose:

During my meeting with Ms Buttrose on the morning of Tuesday, 19 December 2023, as we had a conversation to the following effect:

Ms Buttrose: How on earth did it happen that an activist has ended up hosting ABC radio?

Me: I don't know.

Ms Buttrose: Whoever hired her, do they understand what the job is? They must not have checked references or background properly before hiring her.

Me: Our assessment is that she hasn't done anything wrong. She is a casual employee whose engagement will come to an end on Friday. The decision is that she will stay on air until then.

Ms Buttrose: Was it Steve Ahern's decision to hire her?

Me: Yes, probably.

Ms Buttrose: I am going to send all of my complaints to Chris Oliver-Taylor.

Me: I would prefer you send them to me.

Ms Buttrose: No, I am going to send them to Chris so that he understands what we are fielding here and he can draft a response for them all.

Me: They will be avoiding discussing Israel-Gaza this week.

216 Mr Anderson was not cross-examined about this evidence.

217 Ms Buttrose's version of her meeting with Mr Anderson was as follows:

During my meeting with Mr Anderson on Tuesday, 19 December 2023, we had the following conversation:

(a) I asked Mr Anderson: 'What is going on? We have all of these complaints coming in about Antoinette Lattouf. What are we doing about it?'

(b) Mr Anderson said something that indicated to me Ms Lattouf had been hired as a casual employee for five days as a holiday relief.

(c) Mr Anderson also said something that gave me the impression that he thought there was an issue about whether Ms Lattouf had been hired without proper checks having been made of her activities and references. This was a matter of significant concern to me.

(d) Mr Anderson told me to forward the complaints that I had received about Ms Lattouf to Mr Chris Oliver-Taylor, ABC Chief Content Officer. This was a departure from my usual practice in relation to complaints, which was to send them to Mr Anderson. My understanding was that Mr Oliver-Taylor had been given the task of officially responding to complaints about Ms Lattouf.

218 Ms Buttrose was cross-examined about this conversation:

Did you tell Mr Anderson during your meeting with him on 19 December that Ms Lattouf shouldn't have been hired at all?---Well, if she wasn't checked, yes. If her -- if her background wasn't checked, perhaps she shouldn't have been.

What was her background?---I don't know. I never saw it. Because it wasn't done.

You said she shouldn't have been hired because background checks weren't taken about her?---Well, David Anderson told me they hadn't been done.

And what aspect of her background was problematic?---The fact that she was a controversial broadcaster, and I think in relation to the Gaza/Israel conflict, she was an activist. That was quite apparent. I drew the conclusion. And I don't think we should have hired an activist of any kind, regardless of whatever view they held.

And you drew that conclusion from reading the complaints?---No, not just from reading the complaints but just being a general observer of life.

What aspects of life did you observe beyond the complaints that caused you to reach that conclusion?---The ABC life.

What aspects of the ABC life? What are you - - -?---Every aspect ..... impartiality came up many times at the ABC. It's one of the - one of the - one of the challenges we have. Or the ABC has.

Mr Anderson didn't tell you she was a pro-Palestinian activist, did he?---If he did, I don't remember.

Did anyone else?---No, not that I'm aware of.

I suggest to you that the only basis you had for drawing that conclusion was the complaints you had read?---She was an activist. She shouldn't have been - I wouldn't support her hiring.

I'm asking about the basis for drawing that conclusion, and I'm suggesting to you - - -?---You don't draw conclusions from these things You just answer them, you deal with them, you send them off to be investigated.

And you sent Mr Anderson off to investigate, did you?---Yes. Well, that's - that's his role. Or he can delegate it down the line.

The upshot of the meeting you had with Mr Anderson was that the complaints were to be forwarded to Mr Oliver-Taylor?---That was David's suggestion.

You agreed with it?---Well, he's the managing director. If that's what he wants to be done, I'm happy to do it.

219 Ms Buttrose's evidence in some of these passages is difficult to understand. She denies she formed the view that Ms Lattouf was an activist solely on the basis of the complaints. However, her evidence that, being "a general observer of life" or of "ABC life" contributed to her view, seems quite unrealistic. The point may be somewhat peripheral, but it contributes to my preference for Mr Anderson's version of his conversations with Ms Buttrose. I find it was Ms Buttrose, not Mr Anderson, who insisted on sending the complaints to Mr Oliver-Taylor so

that he, “understands what we are fielding here and he can draft a response for them all”.

220 On Tuesday, 19 December 2023, Mr Anderson told Mr Oliver-Taylor he supported the plan Mr Oliver-Taylor had put in place. Mr Anderson also said that Ms Buttrose was going to send Mr Oliver-Taylor the complaints that had been received and asked him to prepare a standard response to the complaint emails.

221 Ms Lattouf’s evidence was that she and Ms Green had a conversation on the morning of Tuesday, 19 December 2023. Ms Lattouf deposed:

On Tuesday, 19 December 2023, when I arrived for my usual shift, I had a conversation with Ms Green to the following effect:

Me: Did you see my email from last night?

Ms Green: Yes, sorry I didn’t get back to you. That’s all completely fine.

222 Ms Green’s evidence was that she did not recall a conversation to this effect. Instead, she deposes that soon after 12.00 pm on Tuesday, 19 December 2023, she had a conversation with Ms Lattouf in her office in the following terms:

(a) we talked about the show that Ms Lattouf had presented that morning and planning for Ms Lattouf to present the show on Wednesday, 20 December 2023;

(b) I acknowledged Ms Lattouf’s email to me at 9.49 pm on Monday, 18 December 2023, and her text message to me at 11.10 am on Tuesday, 19 December 2023, with words to the effect of:

*Me: Sorry I haven’t emailed you back, I’ve checked with Mark and Steve and that is fine, just remember our conversation from yesterday, it would be a good idea to keep a low profile, best not to post anything.*

(c) also during that conversation, Ms Lattouf raised a question with words to the effect of:

*Ms Lattouf: Are you saying that I cannot post if another journalist dies?*

*Me: I think it would be okay if you reposted from a verified source, but I think it would be better if you held off whilst you’re with us.*

223 When it was suggested to Ms Green in cross-examination that she did not again mention to Ms Lattouf the recommendation from the previous day about social media, Ms Green said:

I remember the conversation well, and I said, you know, “It was a good show. That sounds like it’s going to be great fun tomorrow, and just remember what I said about being – following on from the Women’s Agenda article – about being mindful about posting on social media.”

224 Under cross-examination, Ms Lattouf denied there was a second discussion about her social media use as that of the conversation on Monday, 18 December 2023. When asked about the conversation on Tuesday, 19 December 2023, Ms Lattouf denied that Ms Green had told her again, "It would be a good idea to keep a low profile", or that it would be, "best not to post anything".

225 Ms Green's file note of Thursday, 21 December 2023 (in the form of an email to Ms MacBean) included the following reference to the conversation on Tuesday, 19 December 2023 with Ms Lattouf:

My recollection is that we had another conversation in person in my office on Tuesday 19th December about her presentation and content in relation to radio craft and a part of that conversation was that we spoke again about balance.

226 I prefer Ms Green's evidence as to her conversation with Ms Lattouf on Tuesday, 19 December 2023. What Ms Green told Ms Lattouf was not relevantly different to what Ms Green had said the day before. Ms Green confirmed it would be okay if Ms Lattouf reposted from a verified source. Ms Green also reiterated her advice that it would be best not to post about the Israel/Gaza war, but did not give Ms Lattouf a direction not to do so. That is confirmed by Ms Green's evidence that what she said was to the effect that Ms Lattouf should remember what they had previously discussed, "about...being mindful about posting on social media".

227 At 1.16 pm on Tuesday, 19 December 2023, Mr Ahern sent an email to Mr Latimer and Mr Melkman, copied to Mr Oliver-Taylor. The email is a significant one for the case:

You asked for dot points from me, but Simon's excellent analysis covers everything we talked about, so there's nothing else to add.

I can confirm that our Content Director Elizabeth has reiterated to Antoinette the importance of not talking about Israel-Gaza in her shows this week. She has also suggested that Antoinette may be wise not to post anything on her socials this week.

Elizabeth has also spoken to the production team to be particularly vigilant about using the dump button if needed.

(Emphasis added.)

228 Mr Ahern's email demonstrates his understanding that Ms Green had given Ms Lattouf a suggestion that it may be wise not to post anything on social media that week. It also demonstrates he communicated that understanding to Mr Oliver-Taylor and Mr Latimer.

229 Mr Oliver-Taylor deposes:

I will set out the time and date stamped on emails that I have received. I read and considered each of those emails. It is my usual practice to read emails that I receive shortly after receiving them. I cannot now remember precisely when I read any of the received emails to which I will refer, but I cannot remember any reason why I would

not have followed my usual practice in relation to each such email.

230 In respect of Mr Ahern's email of 1.16 pm, Mr Oliver-Taylor deposes:

I read this email against the background of my assumption that Ms Lattouf had been given the instruction or direction not to post anything that would suggest that she was not impartial in relation to the Israel-Gaza war...I understood the 'reiteration' that is referred to in the first sentence of Mr Ahern's email to have been a reiteration of that instruction or direction. I understood the suggestion that is referred to in the second sentence of Mr Ahern's email to have been wider in scope than the instruction or direction, being a suggestion that Ms Lattouf not post anything at all on her social media during the week of her engagement. When I saw the words '*suggested that Antoinette may be wise not to post anything on her socials this week*', it seemed clear to me that an employee in the position of Ms Lattouf would, in the circumstances, understand such a suggestion to be a clear indication that the ABC was seriously concerned about her social media activity during the week of her engagement.

(Emphasis in original.)

231 At 1.20 pm, Mr Ahern sent an email to Ms Green, copied to Mr Spurway:

Could you speak to the Mornings production team and make sure that they are very vigilant about using the dump button if needed.

It is not in the program brief of this week for Antoinette to talk about Israel-Gaza, so the only risk is if someone sneaks on air on talkback under false pretences then talks about Gaza.

If that happens, please instruct the team that they should dump the call immediately. Antoinette should then wrap up the talkback session and play a song, then recover momentum on the next topic.

232 At 1.21 pm, Ms Green replied to Mr Ahern's email, including Mr Spurway in the reply, "Hi Steve, yes I spoke to Michaela and Yuske about this yesterday, they are aware".

233 At 1.23 pm, Mr Oliver-Taylor sent an email to Mr Ahern, Mr Melkman and Mr Latimer in reply to Mr Ahern's email of 1.16 pm, saying, "Still having further discussions here Steve, standby."

234 At 1.43 pm, Ms Green sent an email to Mr Ahern and Mr Spurway in which she extracted positive feedback about Ms Lattouf that had been received via the text line (through which viewers can send text messages to the ABC during a live show).

235 At 1.47 pm, Mr Ahern sent the content of Ms Green's 1.43 pm email to Mr Latimer, writing:

This is only small in the bigger scheme of things, but just to let you know that

Antoinette is getting a lot of positive feedback from listeners. ... That may give balance to the impression that there is a lot of negative feedback.

236 At 3.28 pm, Lauren Stokes (Executive Assistant to Ms Buttrose) sent an email to Mr Oliver-Taylor, attaching 29 email complaints received by the ABC regarding Ms Lattouf, and writing:

The Chair/Board has received several emails regarding Antoinette Lattouf. After a discussion between Ita and David [Anderson] we've been advised to forward these emails to you – please find them attached.

A brief acknowledgement email has been sent to each of the attached emails from the Chair's Office.

237 At 3.45 pm, Mr Oliver-Taylor forwarded Ms Stokes' email to Mr Melkman and Mr Latimer, and wrote:

Many of [the complaint emails] make claim [sic] that by engaging Ms Lattouf, the ABC is in breach of clause 4 of the Code of Practice, calling into question the ABC's impartiality. I am not sure if this is correct, but clearly this is a hugely complex matter. Should the three of us get together this afternoon to discuss?

238 At 3.57 pm, Mr Melkman replied to Mr Oliver-Taylor and Mr Latimer:

I've seen some of these – a lot of the complainants submitted complaints via the usual complaint form (so they're logged in the complaints database) in addition to writing directly to the Board and MD.

The reference to clause 4 of the Code of Practice (i.e. our impartiality standards) is seriously misguided ... [T]he Code applies to content we broadcast, not our hiring decisions[.] Some of the complainants seem to think we've breached our impartiality standards because of her Crikey story ... but we aren't responsible for that story and it certainly isn't subject to our Code of Practice.

...

By the way – if you haven't already seen it, this Women's Agenda article (published earlier today) is worth a read: [Link to the article inserted]. Antoinette is quoted in it as saying:

"The intention of tabloid media campaigns which target individuals with a platform is to get us to shut up. To look away, to stop investigating and stop revealing harm. Essentially to stop doing our job. And if we don't try to shut up they discredit us in a bid for us to lose our jobs. No tactic is off the table from reporting blatant lies about us, mischaracterisations, and pressuring employers. I will continue to report and comment without fear or favour,

especially when so many innocent lives are at stake and there's so much hate and division in Australia.”

(The ‘pressuring employers’ reference makes me think that if the ABC was to take any action against her in response to complaints being made to the Board and MD etc., she’d definitely go public about it.)

239 Mr Melkman provided a screenshot of a Microsoft Teams call record which shows a meeting began at 4.34 pm, that it lasted for 20 minutes and 57 seconds, that it was initiated by Mr Oliver-Taylor, and that Mr Latimer and Mr Melkman were invited.

240 At 4.49 pm, Mr Melkman sent an email to Mr Oliver-Taylor and Mr Latimer, setting out a draft pro forma response to the complainants.

### ***Events on Tuesday, 19 December 2023 - Night***

241 At 6.19 pm, Mr Oliver-Taylor sent an email to Mr Anderson and Mr Melkman setting out the pro forma response that had been drafted by Mr Melkman.

242 At 8.49 pm, Ms Buttrose sent an email to Mr Anderson forwarding another complaint from a member of the public and stating:

Has Antoinette been replaced. I am over getting emails about her.

243 At 9.07 pm, Mr Anderson forwarded Ms Buttrose’s 8.49 pm email to Mr Oliver-Taylor, writing, “Just FYI – I’ll talk to Ita tomorrow”. At 9.08 pm, Mr Oliver-Taylor responded to Mr Anderson saying, “Noted. If we need to discuss, call me at anytime”.

244 Mr Oliver-Taylor deposes that:

When I received the email...and read what Ms Buttrose was writing to Mr Anderson, I understood that Ms Buttrose wanted Ms Lattouf to cease presenting *Sydney Mornings*. That did not reflect my position at that time, which was that Ms Lattouf’s casual engagement would continue until its scheduled completion on Friday 22 December 2023. I did not consider that I was obliged to, or should, change my position to accommodate Ms Buttrose. My view was, and remained, that what should be done in relation to Ms Lattouf was a matter entirely for management, as to which I was responsible to Mr Anderson, and not to Ms Buttrose.

245 At 9.27 pm, Mr Anderson replied to Ms Buttrose’s email of 8.49 pm:

Antoinette will finish up on Friday. It’s a managed exit given the situation. I can explain more tomorrow.

I plan to respond to all those that have emailed on Friday afternoon.

246 Mr Anderson deposes he meant that Ms Lattouf’s engagement would naturally come to an

end on Friday, 22 December 2023, and that “managed exit” was a reference to the need for “mitigants” as addressed in Mr Oliver-Taylor’s email of 11.19 am that day.

247 Mr Anderson forwarded that email to Mr Oliver-Taylor, writing “FYI”, and Mr Oliver-Taylor acknowledged receipt.

248 Mr Oliver-Taylor deposes that Mr Anderson’s statement that Ms Lattouf would “finish up on Friday” was an accurate reflection of his own position at that time.

249 At 9.34 pm, Emma Burnett (Mr Anderson’s Executive Assistant) sent an email to Mr Oliver-Taylor stating that Mr Anderson had asked her to forward correspondence about Ms Lattouf to Mr Oliver-Taylor. Ms Burnett noted there were 45 emails.

250 At 9.36 pm, Mr Oliver-Taylor responded to Ms Burnett:

We have a lot of them, but happy for you to send them to Ben [Latimer], Steve Ahern and I as an email. I understand David [Anderson] is keen to respond on Friday to any correspondence.

251 At 10.00 pm, Ms Buttrose responded to Mr Anderson’s email of 9.27 pm:

I have a whole clutch more of complaints. Why can’t she come down with flu? Or Covid. Or a stomach upset? We owe her nothing, we are coping criticism because she wasn’t honest when she was appointed.

Managed exit. Really.

I don’t like emailing you late but I am wrapping present[s].

We should be in damage control not managed exits David.

252 I interpolate to say there is no evidence of dishonesty on Ms Lattouf’s part. The email reflects Ms Buttrose’s desire for Ms Lattouf to be taken off air immediately under the pretence of illness.

253 At 10.10 pm, Mr Anderson sent an email to Mr Oliver-Taylor forwarding the email he had received from Ms Buttrose at 10.00 pm, writing “FYI”. At 10.12 pm, Mr Oliver-Taylor responded:

The blow back will be phenomenal. I recommend we hold until Friday. No comment on the war, it’s not related, no beach [sic] of our own editorial protocols or the act. It is not perfect, but it’s the right course of action at this point.

254 Mr Oliver-Taylor deposes that:

When I received the email...and read what Ms Buttrose was writing to Mr Anderson, my view that Ms Buttrose wanted Ms Lattouf to cease presenting *Sydney Mornings*

was reinforced. However, as I have said, that did not reflect my position at that time, and, for the reasons that I have given, I did not consider that I was obliged to, or should, change my position to accommodate Ms Buttrose.

255 At 10.42 pm, Mr Anderson responded to Mr Oliver-Taylor's email of 10.12 pm, saying, "I know that – hold the position, just sharing the pain". At 10.45 pm, Mr Oliver-Taylor responded to Mr Anderson, "Sorry boss". He deposes he intended this as an acknowledgement of Mr Anderson's statement about "sharing the pain".

256 At some time in the afternoon or evening of Tuesday, 19 December, Ms Lattouf made the HRW Post.

### ***Events on Wednesday, 20 December 2023 – Morning***

257 At 7:32 am, the ABC published a video report on its website entitled, "Human Rights Watch accuses Israel of weaponising starvation in Gaza".

258 Between 8.30 am and 11.00 am on Wednesday, 20 December 2023, Ms Lattouf presented her third *Mornings* program.

259 At 10.58 am, Mr Anderson sent a response to Ms Buttrose's email of 9.59 pm the night before, saying, "We are absolutely in damage control." The email went on to explain that the consequences of pulling Ms Lattouf off air compared to managing her until the end of her contract had been weighed and it had been concluded that she would be managed. The email then explained the measures that had been put in place, including directing Ms Lattouf that the topic of the Middle East was off limits on air. I will set the email out in full later in these reasons.

260 At 11.00 am, Ms Buttrose replied to Mr Anderson, saying:

Thanks for the explanation, David – it must be Christmas.

See you at lunch.

261 Between 11.04 am and 11.31 am, Ms Buttrose sent emails to 26 members of the public, saying:

Thank you for your email. The contents have been noted.

I have forwarded your email on to Chris Oliver-Taylor, the ABC's Chief Content Officer, who is dealing with this matter.

262 At 11.07 am, Mr Anderson forwarded to Mr Oliver-Taylor the email he had sent to Ms Buttrose at 10.58 am, and said:

FYI below sent to Ita just now. I will be writing to you later this week regarding the consequences of all of this. There are two elements.

Firstly, I will be alleging serious misconduct by Steve Ahern, given your first response to me this week indicating he was editorially responsible and the delegate for choosing Antoinette Lattouf as a presenter this week.

Secondly, I will be asking you to provide assurance that your team have steps [sic] have been taken to ensure that a situation like this never arises again.

I will write to you regarding that on Friday once Ms Lattouf's engagement has ceased.

263 At 11.14 am, Mr Oliver-Taylor replied to Mr Anderson's email:

I understand David. Again, I apologise that we have put you in this position. It is completely unacceptable.

264 At 11.13 am, Ms Buttrose sent an email to Mr Oliver-Taylor, attaching 13 complaints received about Ms Lattouf. At 11.15 am, Mr Oliver-Taylor replied, saying:

Thank you Ita, we are dealing with this issue at hand and apologise that you are receiving this correspondence. It is not acceptable.

265 At 11.19 am, Ms Buttrose sent an email to Mr Oliver-Taylor with the subject line, "More complaints Antoinette 702", attaching a further five complaints about Ms Lattouf. At 11.24 am, Mr Oliver-Taylor sent an email to Ms Buttrose acknowledging receipt. At the same time, Ms Buttrose sent another email to Mr Oliver-Taylor with subject line, "The complaints keep coming Antoinette 702", attaching another three complaints.

266 At 11.24 am, Sophie Elsworth (Media Writer at *The Australian* newspaper) sent an email to Nick Leys (ABC's Head of Communications) and Sally Jackson (ABC's Deputy Head of Communications) as follows:

I have the following questions please regarding Antoinette Lattouf hosting ABC Sydney's mornings [sic] show.

- 1) Since she began hosting this week, how many complaints has the ABC received about Lattouf?
- 2) What are the main grievances from listeners?
- 3) Is the ABC investigating Latouff's [sic] conduct, including her social media use, relating to commentary she has made about the Israel-Gaza war?
- 4) Who appointed Latouff [sic] to fill in for ABC Sydney mornings [sic]?
- 5) How long will she be on air as a fill-in host?

6) Is management reviewing her tenure as a fill-in host?

Can you please come back to me by 1.30pm today.

(Emphasis in original.)

267 At 11.25 am, Ms Buttrose replied to Mr Oliver-Taylor's email of 11.14 am, saying:

It goes with the job Chris.....I think we will keep getting these complaints until Antoinette leaves.

268 At 11.26 am, Mr Oliver-Taylor replied to Ms Buttrose:

I agree. We have been left in an untenable position as to how to resolve and are working to find the best solution to this predicament. Again I apologise to you, David and the Board for putting you in this position.

269 At 11.27 am, Ms Buttrose sent an email to Mr Oliver-Taylor attaching another complaint. At 11.32 am, Ms Buttrose sent a further email to Mr Oliver-Taylor forwarding additional complaints from members of the public, with the subject line, "This is the lot for now Chris...".

270 At 11.31 am, Mr Oliver-Taylor sent the following email to Mr Ahern, copied to Mr Latimer:

The decision to place Antoinette Latouff [sic] on air as a guest presenter looks ill-informed.

Can we please find out the process of how she was selected, approached and approved to fill in for this week. It appears on face value that background checks were not completed to a sufficient degree, if they were at least two issues would have come to light.

(i) Her position on the Gaza/Israel war, which at the very best means she comes with a perception of bias to Local Radio

(ii) She signed the recent petition, something that the ABC has clearly asked its staff not to do, yet we engaged someone who had, again compromising their impartiality

271 At 11.33 am, Mr Ahern replied to Mr Oliver-Taylor's email, saying:

I will come back to you with full details by the end of today.

272 At or around 11.30 am, until at or around 12.00 pm, an "all-station meeting" took place at ABC Radio Sydney. Mr Ahern, Ms Green, Ms Lattouf, Mr Spurway and others attended the meeting. Ms Lattouf recounts the following:

Following the show, Ms Green invited me to attend an all-station meeting, where the entire 702 [ABC Radio Sydney] production team participated in a debrief.

During the meeting, Mark Spurway, Acting Station Manager, ABC Radio Sydney commented that I was “sounding great on air”.

Additionally, during the meeting, Steve Ahern, Manager, ABC Radio Sydney also said words to the effect of “As you know, we won’t be covering Israel and Palestine. We will leave that to AM, PM and the World Today”.

273 At some time during the morning, Mr Spurway said to Ms Lattouf words to the effect of, “You are sounding good”, and, “You’re doing a great job”. Mr Ahern indicated his agreement with this praise during the meeting.

### ***Events on Wednesday, 20 December 2023 – Afternoon***

274 At 12.05 pm, Ms Koloff sent a text message to Mr Latimer with a screenshot of a social media post by Ms Lattouf made on Tuesday, 19 December 2023. The post read:

The intention of tabloid media campaigns which target individuals with a platform is to get us to shut up. To look away, to stop investigating & stop revealing harm. Essentially to stop doing our job. If we don’t try to shut up they try to discredit us[.]

275 Mr Latimer recalls that at or around 12.05 pm, he received a communication from someone containing other screenshots of Ms Lattouf’s Instagram account. Mr Latimer asserts he cannot recall who sent him the email and cannot locate a record of the communication. Mr Latimer then looked at Ms Lattouf’s social media accounts.

276 Mr Latimer and Mr Oliver-Taylor spoke about Ms Lattouf’s social media. At 12.19 pm, Mr Latimer sent an email to Mr Ahern, Mr Melkman and Mr Oliver-Taylor, stating:

I have just seen Insta story posts by Antoinette regarding Israel-Gaza posted 18-hours ago.

The clear instructions were to direct Antoinette not to post to socials for the rest of this week.

Simon, Chris, Steve – can you please review the Insta stories and then let’s chat as soon as possible this afternoon?

277 I infer that one of the “Insta story posts” was Ms Lattouf’s HRW Post.

278 Mr Oliver-Taylor deposes that:

Shortly after receiving that email from Mr Latimer, I spoke to Mr Latimer by telephone. During that conversation, Mr Latimer suggested that that [sic] Ms Lattouf’s Instagram story posts on 19 December 2023 could be considered a

breach of the ABC's editorial guidelines, or a breach of a direction not to post anything on social media while she was presenting *Sydney Mornings*, or both. I asked Mr Latimer to consider whether Ms Lattouf's conduct did in fact amount to any such breaches, and to arrange a meeting with Mr Ahern, Mr Melkman and me to discuss the next steps.

279 At 12.23 pm, Mr Oliver-Taylor sent an email to Mr Latimer, Mr Ahern and Mr Melkman saying, "As per chat Ben [Latimer], please send screenshot. Then let's review asap". Mr Latimer cannot recall whether he responded to that email and cannot find any record of having responded. He may have sent a screenshot of social media activity to Mr Oliver-Taylor using the Signal messaging application. Mr Latimer's messages from that date can no longer be accessed on Signal.

280 At 12.29 pm, Mr Oliver-Taylor sent a text message to Mr Anderson:

Looks like she [Ms Lattouf] has breached editorial impartiality. We are clarifying now and I will call you with a response. If correct she will be stood down.

281 Mr Anderson deposes that he did not read this text message until about 1.18 pm, by which time he was at lunch with Ms Buttrose.

282 An important meeting then took place on Microsoft Teams (the **Teams Meeting**). The ABC's call logs show:

The Teams Meeting began at 12.34 pm, when Mr Latimer dialled in Mr Ahern and Mr Melkman.

At 12.36 pm, Ms Green joined.

At 12.42 pm, Ms Green left.

At 12.43 pm, Mr Oliver-Taylor joined.

The Teams Meeting ended at 12.58 pm.

283 Ms Green deposes that while she was present at the Teams Meeting:

(a) Mr Latimer, Mr Ahern and Mr Melkman were talking amongst themselves and Mr Melkman said that I had given Ms Lattouf a 'direction' or 'directive' not to post on social media (I cannot now recall whether Mr Melkman used the term 'direction' or 'directive');

(b) I told the group that I had not given any 'directive' to Ms Lattouf. I explained that I had had [sic] 'spoken with' or 'had a word with' Ms Lattouf and advised her against posting on social media while she was presenting *Mornings*, but that I did not consider my conversation with Ms Lattouf about posting on social media to have been a 'direction'. This is because I wanted to communicate to them that I had not

told Ms Lattouf that she would suffer some adverse consequence if she didn't do what had told her [sic]. In my mind, for me to have issued a 'directive' I would have explicitly stated what the consequences would be if that instruction was not followed, which I did not explicitly state to Ms Lattouf in the Monday Conversation or the Tuesday Conversation;

- (c) I asked the group what Ms Lattouf had posted that was causing concern;
- (d) I was told by Mr Latimer that it was something that Ms Lattouf had posted on her Instagram story; and
- (e) I was asked to leave the call because Mr Oliver-Taylor was about to join.

(Emphasis added.)

284 Ms Green's evidence is supported by her file note of the meeting made on Thursday, 21 December 2023. Ms Green recorded the following:

Conference call by Ben Latimer on 21/12 at 1236 with Steve and Simon M (didn't know who he was but found out later his title). Lasted about 5 mins, was told that COT was joining so told that I could leave. I asked what Antoinette posted that was the problem, he replied that it was her Insta story which I later checked and it had the Human Right[] Watch post... Simon talked about me giving directive for Antoinette not to post, I said I hadn't directed her, only advised her to be careful about what she posted and that she might be best not to post anything whilst with us.

285 Mr Ahern's affidavit does not make any reference to Ms Green being present at the Teams Meeting. His recollection is the discussion proceeded and concluded on the basis that Ms Lattouf had been given a direction not to post. He deposes that the direction given to Ms Lattouf was to the effect, "not to post to socials for the rest of the week". He says there was discussion about what should be done as a consequence of Ms Lattouf's breach of the direction. Mr Oliver-Taylor proposed that Ms Lattouf should be taken off air and said he could not, or did not, trust Ms Lattouf not to do or say something on air that could undermine the ABC's impartiality. Mr Ahern deposes he is confident that everyone said something that aligned with Mr Oliver-Taylor's idea. He left the Teams Meeting with the understanding there would be further discussion between Mr Oliver-Taylor, Mr Melkman and Mr Latimer, and that someone would let him know what action to proceed with.

286 Mr Latimer's evidence about the Teams Meeting is that Ms Green was invited to join the meeting, but he cannot recall whether she in fact attended. He says Mr Ahern confirmed Ms Lattouf had been told not to post anything on social media and they discussed that Ms Lattouf had failed to follow a direction given to her. Mr Latimer deposes that they looked at, "the nature of the Instagram post, being that it clearly related to the Israel-Gaza conflict". Mr Latimer says he shared the view that it could compromise the ABC's impartiality to continue to have Ms Lattouf on air in circumstances where she was sharing content on social media that expressed a partisan view on the Israel/Gaza war. They discussed a number of social media posts, but Mr Latimer is unable to identify them now. They discussed what should be done with Ms Lattouf, including whether she should be taken off air. They reached a consensus that Ms Lattouf would be told that

she would not complete the rest of her shifts for the week and would be taken off air. Mr Latimer deposes his sole reason for supporting the decision was Ms Lattouf's conduct, where making the posts was in breach of a direction that he understood had been given to her in accordance with his instructions.

287 Mr Melkman's evidence about the Teams Meeting was that they discussed what action should be taken now Ms Lattouf had made social media posts about the Israel/Gaza war. He recalls there was some discussion about the content of the direction that had been given to Ms Lattouf. He understood it was either a direction not to post on this particular issue (the Israel/Gaza war), or a direction not to post on controversial matters during the week she was on air with the ABC. He understood, in either case, Ms Lattouf had not followed the direction. He recalls at one point, Ms Green joined the call and Mr Latimer or Mr Ahern asked Ms Green to confirm the nature of what she had told Ms Lattouf about posting on social media. He deposes that he now does not recall what Ms Green said. Mr Oliver-Taylor asked Mr Melkman whether he was comfortable with taking Ms Lattouf off air. Mr Melkman said he did not have any objections.

288 Mr Oliver-Taylor deposes that during the Teams Meeting there was discussion about whether the making of the HRW Post gave rise to a breach by Ms Lattouf of the ABC's policies in relation to impartiality. He formed a view that Ms Lattouf's conduct had breached the Social Media Guidelines. His recollection is there was not a consensus about this question. He deposes the discussion then turned to whether Ms Lattouf's conduct in making the posts involved a breach of a direction given to her by the ABC. His view was she had been directed not to post anything in relation to the Israel/Gaza war during the week of her engagement and had clearly breached that direction. He says that each person in the Teams Meeting agreed with his view. Mr Oliver-Taylor deposes the discussion then turned to what should be done as a consequence of Ms Lattouf having breached the direction. Mr Oliver-Taylor considered that taking Ms Lattouf off air was the best course of action in the circumstances and the others agreed. He made the decision Ms Lattouf should be taken off air, such that she would not present *Mornings* on Thursday, 21 December 2023 or Friday, 22 December 2023.

289 Mr Oliver-Taylor deposes that he had the following six considerations in mind:

First, his view that Ms Lattouf had not complied with a direction not to post anything about the Israel-Gaza war.

Second, as a consequence of the view that she had failed to comply with that direction, Mr Oliver-Taylor did not have confidence that Ms Lattouf would not say something on air that could reasonably be perceived as not being impartial in relation to the Israel-Gaza war.

Third, that Ms Lattouf had contravened the Social Media Guidelines.

Fourth, concern that Mr Ahern did not have control of the situation, which exacerbated Mr Oliver-Taylor's lack of confidence in Ms Lattouf.

Fifth, consciousness that, at that time, issues pertaining to the Israel-Gaza war were highly contentious.

Sixth, that the ABC was not obliged to put anyone on air; in other words, Mr Oliver-Taylor's view was it was always within the discretion of the ABC to decide that a

presenter or programme would not be aired.

290 Mr Oliver-Taylor also deposes that he did not consider or take into account:

Anything that he knew about the fact or content of any political opinions that Ms Lattouf had or may have had; and/or

Ms Lattouf's race or national extraction, including that Ms Lattouf has a Lebanese and/or Arab and/or Middle Eastern heritage and that she is a descendant of foreign immigrants.

291 At 12.42 pm, Mr Leys forwarded to Mr Oliver-Taylor the email he had received from Ms Elsworth of *The Australian* adding, "Clearly complaints have been shared".

292 At 12.43 pm, Mr Oliver-Taylor replied to Mr Leys' email, copying in Mr Latimer:

It looks like [Ms Lattouf] has now breached abc [sic] editorial guidelines. Ben [Latimer] reviewing, but if she has we will have to stand her down. If we do that we should do it before the story runs.

293 Mr Anderson and Ms Buttrose had arranged to have a Christmas lunch that day. At about 12.30 pm (around the time the Teams Meeting was commencing), Mr Anderson recalls he and Ms Buttrose had the following conversation outside her office:

Ms Buttrose: David, let's get this out of the way. I read your email and we are just going to have to agree to disagree on the position you've taken in relation to Antoinette Lattouf.

Me: Yes, that's the best way forward. I know you are unhappy with it, but that is what we are doing for the rest of the week.

294 At 12.58 pm, at about the time that the Teams Meeting was ending and while Mr Anderson was at lunch, Mr Oliver-Taylor attempted to call Mr Anderson but was unable to reach him.

295 At 1.00 pm, Mr Oliver-Taylor sent the following text message to Mr Anderson:

D, confirming my view is that [Ms Lattouf] has breached our editorial policies whilst in our employment. She also failed to follow a direction from her producer not to post anything whilst working with the ABC. As a result of this, I have no option but to stand her down. Call me if you can, but if not possible, I will action within the hour.

296 At 1.04 pm, Mr Oliver-Taylor emailed Mr Leys and Mr Latimer in relation to, "Questions from The Australian", and stated:

Nick, I am trying to reach the MD, on review of overnight posts, the view from Local Sydney Radio management is that AL has breached ABC editorial policy by posting commentary on the Gaza/Israel war. I am expecting the recommendation to be that

we will not continue with her remaining two shifts as a result of this breach. We may need to put out a statement in due course.

297 At 1.17 pm, Mr Oliver-Taylor again attempted to call Mr Anderson. Mr Oliver-Taylor also sent a text message to Mr Anderson, stating:

Aus [*The Australian*] are going to run a yarn. I'm going to action this now and try and beat the story

298 At 1.18 pm, Mr Anderson called Mr Oliver-Taylor. Mr Oliver-Taylor estimates the conversation took no more than one minute. He says that he explained Ms Lattouf had posted on social media about the Israel/Gaza war, even though she had been told not to, and that Mr Anderson responded by saying "Ok" or "Alright".

299 Mr Anderson deposes his conversation with Mr Oliver-Taylor was to the following effect:

Mr Oliver-Taylor: Sorry to disturb you. I've got a bunch of people in the room at the moment. We have decided we need to take her off air. She has put something up on social media despite being directed not to

Me: Are you sure?

Mr Oliver-Taylor: Yes, we've got no choice.

Me: Okay.

300 Mr Anderson deposes that when he said, "Okay", this was, "to indicate that he had heard and understood the information given to him by Mr Oliver-Taylor".

301 At 1.18 pm, Mr Leys wrote to Mr Oliver-Taylor and Mr Latimer saying:

Do we have the tweets or posts?

Is it an edpols issue or SM guidelines?

There was no response to Mr Leys' email.

302 At 1.20 pm, Mr Leys responded to Mr Oliver-Taylor's email of 1.04 pm, with what seems to have been a draft statement for the ABC to issue:

The ABC has received complaints about RL [*sic AL's*] social media use. We are reviewing those posts but in the meantime RL [*sic AL*] won't be returning on air for the remaining two weeks of her contract.

303 After the Teams Meeting, Mr Ahern, Ms Green, Mr Spurway and Ms O'Shea (a Planning Coordinator) attended a general planning meeting in Mr Spurway's office. At about the same time, Mr Oliver-Taylor had a telephone conversation with Mr Latimer in which they discussed

“actioning” the decision. Mr Latimer then had a telephone conversation with Mr Ahern and communicated the decision.

304 After the telephone call with Mr Latimer had ended, Mr Ahern discussed the decision and the next steps with Mr Spurway, Ms Green and Ms O’Shea. The announcement of the decision came out of the blue so far as Mr Spurway was concerned. Ms Green expressed disagreement with the decision to take Ms Lattouf off air, pointing out the HRW story had been on the ABC and BBC that morning and she did not see what was wrong with the post.

305 At 1.25 pm, Mr Leys responded to the email as follows:

Amended:

Following a review of her social media activity, casual presenter Antoinette Lattouf will not be back on air for the remaining two shifts of her contract.

306 At 1.28 pm, Mr Latimer responded to Mr Leys’ email as follows:

Steve A is messaging me as soon as the chat has been had – stand by

307 At 1.28 pm, Mr Leys responded to Mr Latimer’s email, also including Mr Oliver-Taylor, saying, “We need to see the posts”. No response was provided to this email.

308 Mr Ahern then composed notes which he says reflected his understanding of the reasons Ms Lattouf was to be taken off air.

309 At approximately 1.30 pm, Ms Lattouf attended Mr Spurway’s office at Mr Ahern’s request. Ms Green and Mr Spurway were present during the conversation that followed with Ms Lattouf.

310 At 1.35 pm, Mr Ahern sent a text message to Mr Latimer stating, “It’s done”. Mr Ahern and Mr Latimer then had a telephone call in which Mr Ahern explained what had occurred and said he had told Ms Lattouf she would not be performing her shifts on air for the remainder of the week.

311 An email was sent by Mr Ahern at 2.57 pm to Mr Oliver-Taylor, Mr Latimer and Mr Melkman, recounting what had happened during that meeting:

Confirming that I had a short conversation with Antoinette in the managers office of ABC Radio Sydney at about 1245 today. Witnesses were Mark Spurway and Elizabeth Green.

In that conversation I made the following points:

1. Elizabeth backgrounded you earlier this week on a perception of bias on the Israel-Gaza situation

2. Elizabeth advised you not to post anything that could be perceived as controversial on your socials, while you are on air with us this week. You acknowledged that you understood.

3. 20 hours ago you shared a post that could be considered controversial and was about Israel-Gaza.

4. In the context of your other posts, this is considered a breach of ABC policies and so you will not be required to present the last two programs you have been booked to present tomorrow and Friday.

Antoinette was quiet and accepted the information without comment. At the end she said that she had been asked not to comment on Israel-Gaza on her program and she had not done so, she had kept it a light holiday feel. I acknowledged her points and agreed that she had not discussed Israel-Gaze [sic] in the show, I also said that this was not about the show, it was about social media posting that she had been asked not to do.

She also said she considered the post factual. I did not comment on whether the post was factual or not, but repeated that it was a post about Israel-Gaza, and that she had been asked not to post about that while she was on air with us this week. She did not reply to that.

The meeting took about 5 minutes. At the end, I asked her to explain to her production team that she would not be doing the show on Thursday and Friday then to leave as soon as possible after that.

I then explained the situation to the production team using the points above. Two of the three in the team are experienced ABC producers and understood, the third is a younger producer who did not have any experience of such things. One of the experienced producers asked did the ABC cave in to the Jewish lobby, I explained that this was about a breach of ABC policies and that Antoinette had been asked not to post about it but had done so.

...

312 After the meeting, Ms Lattouf left the room and went to her desk in the *Mornings* production area where she spoke with her producers.

313 Before Ms Lattouf left the building, she had a conversation with Ms Green. Ms Lattouf deposes:

As I approached the lift, I saw Ms Green. We had a conversation to the following effect:

Ms Green: (crying) I am so sorry I tried to stop them. This is coming from higher

up.

Me: I just don't understand. How did it breach the social media policy? I just shared a Human Rights Watch post like we agreed.

Ms Green: I know, I know. It's just that the post wasn't balanced.

Me: How do you make starvation balanced?

Ms Green: I fought so hard for you. I'm sorry I tried so hard. They were going to try to get rid of you on Tuesday. I shouldn't be telling you this but the decision came from David Anderson.

Me: Well, they won. I will never be on air again.

Ms Green: Not if I have anything to do with it. I trained you I picked you and I believe in you. I'm so sorry.

### 314 Ms Green deposes:

Soon afterwards, I met Ms Lattouf in the reception area as she was preparing to leave the building. The reason I went to meet Ms Lattouf before she left was because she looked really upset and I wanted to check she was okay. Ms Lattouf and I went into a nearby boardroom which was empty at the time and shut the door for privacy because she was crying (the boardroom is a thoroughfare to go to the toilets so I didn't want people walking through). We stood in the empty boardroom and had a short discussion (**Subsequent Discussion**).

Ms Lattouf was crying when we entered the boardroom together and at times throughout the Subsequent Discussion. I picked up a box of tissues and offered Ms Lattouf a tissue. I also cried at some point during the Subsequent Discussion because it was emotional, I always cry when other people are crying, and I felt sorry for her.

The Subsequent Discussion was to the following effect:

Me: I am so sorry. I did try to stop this from happening. There was pressure from Monday about you being on-air.

Ms Lattouf: What was it that I posted that was the problem?

Me: I understand it's the human rights watch post because it was considered unbalanced.

Ms Lattouf: Was it Steve's decision?

Me: No it wasn't. These kinds of decisions are big decisions and they are

referred upwards. It could have been referred up as high as David Anderson's office.

Ms Lattouf: This always happens to me. It doesn't surprise me. Does this mean I will never work at the ABC again?

Me: Not if I can help it. We will have to talk about that but I would love to have you back. Do you need any help getting home? Do you want me to call you a cab?

Ms Lattouf: I'll be fine. You've got a great team there.

Me: Yeah I know.

Ms Lattouf and I exited the boardroom and walked together to the reception area. Before Ms Lattouf went through the doors towards the lift area, I said words to the effect of:

Me: I am sorry this has happened. Have a good Christmas and speak soon.

315 On 27 December 2023, Ms Green wrote the following note:

I wanted to make sure Antoinette was ok following the meeting in which she was asked to go off-air. She was very upset. I said that I was sorry that this had happened but that her removal was because she had not adhered to the ABC's social media policy. She asked whose decision it was to take her off air, was it Steve's. I don't recall the exact wording used but I said something to the effect that the decision had been referred up and was made at a higher level (than the station's), possibly as high up as the Managing Director, David Anderson. I did reiterate that the issue was her continuing to post on social media, which is something I had asked her not to do whilst on air for the week at the ABC Radio Sydney. She asked if this meant she would never be employed again by the ABC and I said that that [sic] would be something to discuss at a later date. I said to call me if she needed anything and that I hoped that she had a good Christmas.

316 Ms Green and Ms Lattouf were cross-examined about their respective versions of the discussion. I do not consider the differences between their versions to be significant. Ms Lattouf was quite distressed at the time, and it was clear when she gave evidence at the hearing that she was still distressed when recalling the conversation. Ms Green's version is substantially supported by her note that was written one week later.

317 At 1.43 pm, Mr Oliver-Taylor sent a text message to Mr Anderson, saying:

Actioned. Statement going out. I have requested a full review as to how she was hired in the first place. Apologies again.

318 Also at 1.43 pm, Mr Melkman wrote to Mr Oliver-Taylor, stating:

I reckon she'll come out swinging, and she'll get a sympathetic run in the Guardian or Nine. She'll say we've buckled to pressure from the lobby and she did nothing wrong – she's being silenced/censored, she was only sharing what reputable organisations like Human Rights Watch are saying, etc. Expect questions like: who conducted the review, what activity was deemed in breach of guidelines, why was it deemed problematic if she wasn't covering the conflict on-air, etc.

It's the right call in the circumstances, but it's going to get uglier.

...

319 Mr Oliver-Taylor replied to Mr Melkman at 1.46 pm, saying:

Copy. I think we are in a hard place regardless and ultimately she was asked not to post. She did, she also posted comments directly relating to the war thus potentially compromising her impartiality as a host of a show.

...

320 Mr Anderson recalls that at, or around, 2.00 pm on Wednesday, 20 December 2023, when he was in the taxi back to the ABC office from lunch with Ms Buttrose, he looked at his phone and saw the text message from Mr Oliver-Taylor that had been sent at 1.43 pm.

321 Mr Anderson deposed that during the taxi ride back to the ABC office from lunch, he called Mr Oliver-Taylor and had a conversation to the following effect:

Me: What happened?

Mr Oliver-Taylor: She posted on social media against instructions. There were two posts, one on Instagram and one on X. It undermines her ability to be impartial at work. It increases the risk for the ABC, and we don't trust her to get back on air for the final two days.

322 At 2.05 pm, Mr Leys sent an email to Ms Elsworth at *The Australian* in response to her email of 11.24 am:

From an ABC spokesman please:

ABC Sydney casual presenter Antoinette Lattouf will not be back on air for her remaining two shifts this week.

323 At or around 2.39 pm, an article with the headline, “ABC presenter Antoinette Lattouf sacked after anti-Israel social media posts”, written by Ms Elsworth, appeared on the website of *The Australian*. Another version of the same article appeared on *The Australian*'s website with the headline, “ABC summer host Antoinette Lattouf sacked over anti-Israel activism that enraged Ita Buttrose”. Amongst other things, the article stated:

A fill-in host for one of the ABC's most coveted radio spots has been sacked for a slew of anti-Israel posts after an influx of complaints from the Jewish community reached the public broadcaster's chairwoman Ita Buttrose.

...

The Australian understands that the complaints over Lattouf's appointment were raised with Ms Buttrose and the board, with sources close to ABC management saying the chairwoman was "furious" with the decision to hire the anti-Israel broadcaster.

The sacked host posted on her social media accounts on Wednesday night that she was "disappointed by the ABC's decision" and she believed she "was terminated unlawfully."

...

Ms Buttrose, the board and managing director David Anderson received many complaints about Lattouf's conduct and on Wednesday afternoon she was sacked just hours after finishing her program for the day.

...

Ben Latimer is the ABC's head of audio and oversees the radio arm but it is understood Sydney manager Steve Ahern appointed Lattouf to the role as a fill-in presenter.

Management will be reviewing the matter to determine how Lattouf was given the fill-in hosting role despite her outspoken and often offensive comments to the Jewish community that she has continued to make in recent months.

...

An ABC spokesman said Lattouf would not be returning to the show and her replacement had not been decided.

"ABC Sydney casual presenter Antoinette Lattouf will not be back on air for her remaining two shifts this week," he said...

324 At or around 2.53 pm on Wednesday, 20 December 2023, Ms Lattouf sent a text message to Ms Green with a screenshot of *The Australian*'s headline, asking:

I've only just gotten home. How did this make the news already [emoji]

325 At 3.00 pm on Wednesday, 20 December 2023, Ms Green replied, stating, "I'm so sorry, I have no idea how it's there".

326 At 4.38 pm on Wednesday, 20 December 2023, Mr Ahern sent an email to Mr Oliver-Taylor and Mr Latimer:

Thanks for your note. I agree, choosing Antoinette for the one week casual fill in on Sydney mornings [sic] was ill-informed, and I accept responsibility for the mistaken decision.

In considering fill in presenters we looked at the following factors:

- Availability - many of our other fill in presenters were not available or were already being used for other national or local shifts.
- Antoinette was available and had done a similar shift during the national summer lineup last year, without incident or objections.
- Antoinette has a long history of employment with the ABC and was aware of ABC policies. Her ABC work history is attached.
- She was previously identified as a potential future presenter for the network.

I consulted with Content Director Elizabeth Green and acting manager Mark Spurway about her, but the decision was ultimately mine as substantive manager of ABC Radio Sydney and as acting Head of the Network. I accept responsibility and acknowledge that putting her on air was a mistake. I did not check her social posts before the engagement. I agree with the two points you have made about perception of bias and lack of impartiality from her social media posts.

...

327 At 5.10 pm, Ms Buttrose forwarded an email to Mr Anderson from a member of the public and included the message:

It's nice to get congratulatory emails.

FYI

Ita

328 At 5.23 pm, Ms Lattouf sent an email to Mr Ahern, Ms Green and Mr Spurway, saying:

I have some questions regarding my departure that I would like answered please. I believe I was unfairly dismissed and there will also be reputational damage due to the unfair manner in which I was let go and the very quick leak to the media.

As you are aware, today, at approximately 1.45pm, I was summoned by Steve for a quick chat. Mark and Elizabeth also joined the meeting.

In this short meeting, I was told that I was being let go because of one specific social media post (an Instagram story) which I have attached below. Can you please confirm whether the attached Instagram story is the social media post which the ABC alleges was in breach of the social media policy? Can you please also:

- specify exactly which section of the ABC's social media policy I allegedly breached by sharing that post; and
- explain as to how this post is said to be in breach of the guidelines.

I note that, on Monday 18th December I received a call from Elizabeth Green at approximately 3.30pm. We had a very honest and respectful discussion during which she told me that Jewish lobbyists were unhappy that I was on air. Elizabeth told me multiple times that she has absolute faith in my "journalistic integrity" and gave me a heads up to be mindful on social media. We talked about the show that day, and I was told the content was excellent, "no issues whatsoever". I responded by saying "I don't think it's fair to expect me to stop posting all together but I will be even more mindful". Elizabeth responded by saying that "I know that you are. You're smart and professional which is why I chose you and trained you to present". I then specifically asked if another "journalist gets killed or a reputable NGO like Amnesty International has information, am I able to share that without any loaded commentary or anything, but just quote an agency" and Elizabeth said "yes that's fine." Elizabeth also repeated in the meeting that, yes, she has told me that sharing straight facts and reputable sources was a [sic] "fine" and that she had told other senior management this too.

- Can you please explain how I'm said to have breached the social media guidelines when I was following an express direction given to me about the application of social media? Can you please also explain why any such breach warrants summary dismissal?

Further, at lunchtime today (Wednesday 20th) there was a station meeting where the following two things were expressed:

- I was singled out by Mark [Spurway], thanked for the work I am doing, told I am "sounding great" and the audience are "responding very well"
- The team was also reminded not to leak internal ABC Radio Sydney information to the media following the SMH leak as it erodes team trust.

In light of this can you please:

- Explain why I was dismissed less than an hour after being told my work was "great?"
- Can you please shed some light as to how the story got to The Australian so

quickly because there was an article published before I even got home. It was less than an hour from when we had our discussion in Mark's office.

- Who made the final decision that my dismissal was warranted?

This has been an incredibly stressful week, since receiving that call on Monday I have had trouble sleeping and worked incredibly hard to produce excellent radio. The manner in which this has unfolded is incredibly distressing.

Given how swiftly this is playing out in the media, I would appreciate a swift reply as I have already been contacted by five media outlets and would like to respond to them by 8pm.

329 At 6.02 pm, Mr Ahern forwarded Ms Lattouf's email of 5.23 pm to Mr Oliver-Taylor and Mr Latimer with the following message:

Please see this email from Antoinette.

I do not propose to respond at this time. Nor will Mark or Elizabeth.

If you would like me to take any other action today, please let me know.

330 Between 5.33 pm and 5.46 pm, Ms Buttrose replied to a series of earlier complaints saying, "You are probably unaware that Ms Lattouf no longer works at the ABC". She forwarded these emails to Mr Oliver-Taylor at 5.48 pm.

### ***Events on Thursday, 21 December 2023***

331 On Thursday, 21 December 2023, Mr Oliver-Taylor sent an email to himself in which he described his recollection of events and matters relating to Ms Lattouf. Mr Oliver-Taylor had written the email in stages, first jotting down the notes in dot points earlier in the week (though he does not recall exactly when). Then, as best he can recall, either on the afternoon of the Wednesday, 20 December, or on the Thursday, 21 December 2023, he then opened the same draft email, wrote the numbered paragraphs under the dot points and sent the email to himself.

332 Mr Oliver-Taylor's email reads:

- Main lightning rod is the contentious journalism in crikey. It was a "fact based, research based" article. Debating how jews were described in Sydney on the October evening
- Other comments on social media are clearly polarising on instagram
- But she has not breached any ABC Editorial policies
- or Code 4 of the Code of Practice (i.e. our impartiality standards). the Code

applies to content we broadcast, not our hiring decisions. Some of the complainants seem to think we've breached our impartiality standards because of her Crikey story...but we aren't responsible for that story and it certainly isn't subject to our Code of Practice.

- She has signed the petition, but we have other people on staff who have signed the petition and we have not fired them
- Her work is not related to anything on Gaza/Israel war. This week is significantly watered down content in the lead up to Christmas
- Screened producers/bolstered approach to phone calls
- **Highest potential controversy is us pulling her off air and the story is that there is unjustifiable complaints from a pro Israel lobby that has led to her sacking**
- Women's Agenda article (published earlier today) is worth a read: [A link was inserted]
  - Antoinette is quoted in it as saying: "The intention of tabloid media campaigns which target individuals with a platform is to get us to shut up. To look away, to stop investigating and stop revealing harm. Essentially to stop doing our job. And if we don't try to shut up they discredit us in a bid for us to lose our jobs. No tactic is off the table from reporting blatant lies about us, mischaracterisations, and pressuring employers. I will continue to report and comment without fear or favour, especially when so many innocent lives are at stake and there's so much hate and division in Australia."

1. AF [sic: AL i.e. Antoinette Lattouf] engaged as a casual presenter for 5 shifts in the week before Christmas
2. Apparently no checks were made as to whether she could be considered impartial for the ABC's audience
3. AF [sic: AL] started on Monday 18th December – the show passed without incident and no reference to the War
4. Complaints did start to come in about her suitability to present
5. Following Tuesday's show, more complaints were delivered
6. These complaints were forwarded to myself – in turn discussed them with Ben and Simon, advice and decision was that she has not breached any ABC social media guidelines nor clause 4 of The Act
7. A/Cap City Manager was asked to ensure that AF [sic: AL] did not post anything controversial about the War whilst on air, and ideally refrain from posting anything at all. Meeting held by Content Director on Tuesday

afternoon. She “understood”

8. I briefed the MD as he had been receiving the complaints and explained that our recommendation was that she had not breached and therefore should stay on air. The show [makes] no mention of the war, there is a heightened focus on talkback management and that the “dump” button will be used if required. The MD agreed.

9. On Wednesday. She presented her third shift. At around 1130am Ben informed Steve, Simon and myself that she has posted a couple of things to social media. One was a comment about diversity of voices and the other was a repost of [f] how Israel is using starvation tactics in the War. On review, and in discussion with this group, it was agreed that she has breached the trust of the program by not following a request and she has also breached impartiality around personal use of social media.

10. Simultaneously The Australian were chasing me and the ABC for comment as they had a story about this.

11. I asked Steve whether he thought that we had no option whether we could put her to air. He thought we had no choice but to not allow her back. A view supported by the group.

12. I explained to the MD via text initially that Local Radio Sydney had decided to not put AF [sic: AL] back on air due to this breach. I then briefly spoke to the MD and told him this (at lunchtime on Wednesday). I did not ask the MD to make a decision, I told him that due to a breach and potential risk of impartiality to the ABC that AF [sic: AL] could not continue on air. He did not disagree.

13. I then actioned Ben to tell Steve and his team to action a brief meeting to discuss with AF which happened shortly thereafter.

14. AF [sic AL] was bri[e]fed, see Steve’s record for that meeting and AF [sic AL] left shortly thereafter.

15. The Australian ran a story saying AF(sic AL) had been “sacked” which was not true.

16. Around 5pm AF [sic: AL] sent a letter to local radio Sydney asking a number of questions and threatening legal action, something she repeated online later that night.

(Emphasis in original. Underlining added.)

333 Also on Thursday, 21 December 2023 at 5.15 pm, Ms Buttrose forwarded to Mr Anderson the five complaint emails to which she had responded to. The subject of Ms Buttrose’s email was, “Acknowledged complaints about the dismissal of Antoinette FYI – Ita”.

## ***Subsequent events***

334 Mr Spurway deposes that soon after the meeting with Ms Lattouf on Wednesday, 20 December 2023, he spoke to Mr Ahern about arrangements for Ms Lattouf to be paid her full entitlements for the whole period of her casual agreement. Mr Ahern agreed that Ms Lattouf should be paid for Thursday, 21 December and Friday, 22 December 2023, even though she would not be required to perform the last two of her remaining shifts. Mr Spurway recalls on either 28 December or 29 December 2023, he asked the administrative assistant for ABC Radio Sydney to check Ms Lattouf would be paid for those rostered shifts in the normal fortnightly pay cycle.

335 On 4 January 2024, Ms Lattouf received payment of wages, including payment represented to be for Thursday, 21 December and Friday, 22 December 2023.

336 On Friday, 22 December 2023, Ms Lattouf filed an application under s 773 of the FWA for the FWC to deal with the dispute.

## **Impartiality of the ABC**

337 The ABC's submissions place emphasis upon the ABC's need to be, and to appear to be, impartial.

338 Section 8(1)(c) of the ABC Act provides the Board has a duty:

...to ensure that the gathering and presentation by the [ABC] of news and information is accurate and impartial according to the recognised standards of objective journalism...

339 The duty is not confined to the gathering and presentation of "news" and expressly extends to "information". The concept of "presentation" of news and information that is impartial is not confined to the content that is presented. It may also extend to the way content is presented. In some cases, it may also extend to the identity of the presenter: for example, if the presenter were to present news or information on a controversial topic about which they have publicly expressed a partisan view.

340 Ms Lattouf's period of employment with the ABC commenced only three months after the October 7 attacks and Israel's invasion of Gaza. The ABC Managers became aware Ms Lattouf had expressed opinions on social media about the conflict that were undoubtedly controversial.

341 The ABC Managers were acutely aware of the deep controversy surrounding the Israel/Gaza war and the sensitivity of the public to any hint of impartiality in the ABC's coverage of the conflict. The ABC had been accused of partiality in its coverage by supporters of each side. Mr Oliver-Taylor was also extraordinarily sensitive to the risk of criticism by *The Australian*.

342 The evidence of the ABC Managers makes it clear they regarded themselves as having a responsibility for ensuring the ABC was both impartial and perceived by the public to be impartial. For example, Mr Anderson deposes:

Pursuing impartiality can lead to strong criticism of the ABC, often by groups or individuals who want the ABC to take a specific stance or ‘take a side’ on matters in a manner that aligns with their honest beliefs and values. In relation to the reporting of news on conflicts which are of great public significance and that can personally affect thousands of people, it is not uncommon for the ABC to receive contrasting criticism on the same pieces of reporting from all ‘sides’, with all arguing the ABC unduly favoured another in its reporting.

Given impartiality is enshrined in the ABC Act, there is no room to then choose whether or not the ABC is to be impartial, or an advocate for one side. The ABC must be impartial in accordance with recognised standards of objective journalism. That objectivity requires ABC journalists to set aside personal views, and is assisted by editorial policies, guidelines, and rigorous prepublication processes.

...

I consider that I have no higher responsibility in my position as Managing Director than to protect and maintain the ABC’s independence and integrity, and to ensure that it is, and is seen by the Australian people to be, impartial.

The discharge of that responsibility was the governing consideration in my mind in relation to every decision and action that I took in relation to the events that are the subject of this affidavit.

In my view, impartiality on the part of the ABC requires that it both be impartial, and be seen by the Australian public to be so. If the conduct of a person who is reporting or presenting on the ABC is reasonably perceived not to be impartial, particularly in relation to a contentious issue, then that undermines the ABC’s independence and integrity.

#### 343 Ms Buttrose deposes:

I was concerned that it appeared, based on the complaints, a significant number of ABC listeners were unhappy that the ABC had hired someone as a presenter who they perceived to be not impartial. I was concerned at the damage Ms Lattouf’s appointment was doing to the ABC’s and ABC Radio Sydney’s reputation for impartiality. This issue was a significant concern for me.

#### 344 Mr Oliver-Taylor deposes:

The fact or content of employees’ opinions are not matters with which I consider that I can ever properly be concerned, and in practice I treat them as being irrelevant to any decisions that I take on behalf of the ABC... However, the expression by employees of their opinions about contentious issues, including by conduct external to their work for the ABC, is a matter about which I am concerned, if by engaging in such conduct an employee could reasonably be perceived as not being impartial in

relation to a contentious issue.

345 The ABC's Code of Conduct reflects the need for impartiality and the appearance of impartiality. It requires that employees must:

- Ensure activities including commercial, personal, and political relationships, do not constitute an actual, potential or perceived conflict of interest compromising the integrity, independence, impartiality and high standards of the ABC.

...

- Be conscious of responsibility to protect the ABC's reputation, impartiality, independence and integrity where personal use of social media may intersect with their professional life.

346 Section 4 of the ABC's Editorial Guidelines has the heading, "Impartiality and diversity of perspectives", and provides relevantly:

### **Principles**

The ABC has a statutory duty to ensure that the gathering and presentation of news and information is impartial according to the recognised standards of objective journalism.

...

The ABC takes no editorial stance other than its commitment to fundamental democratic principles including the rule of law, freedom of speech and religion, parliamentary democracy and non-discrimination.

Judgements about whether impartiality was achieved in any given circumstances can vary among individuals according to their personal and subjective view of any given matter of contention. Acknowledging this fact of life does not change the ABC's obligation to apply its impartiality standard as objectively as possible

...

### **Standards**

4.1 Gather and present news and information with due impartiality.

...

347 The Social Media Guidelines provide, relevantly:

### **PURPOSE OF THESE GUIDELINES**

The ABC Code of Conduct requires Workers to be conscious of their responsibility to protect the ABC's reputation, independence, impartiality and integrity where personal use of social media may intersect with their professional life.

The vast majority of personal social media activity by ABC Workers is innocuous and has no bearing on their ABC work or the ABC's reputation. However, personal use of social media is not without risk. Misjudgements and indiscretions can have consequences for Workers and the ABC.

...

The purpose of the Personal Use of Social Media Guidelines (Guidelines) is to assist ABC Workers and managers to navigate the risks associated with personal use of social media and to take appropriate step [sic] to ensure compliance.

...

## **CONSEQUENCES OF BREACH**

While the ABC does not control or endorse a Worker's use of personal social media if a Worker's social media content could reasonably be considered to breach the Guidelines outlined below, the ABC may:

- direct the Worker to delete that content;
- take disciplinary action against the Worker (including dismissal or cessation of engagement);
- exercise contractual remedies.

...

## **PERSONAL SOCIAL MEDIA STANDARDS**

For all ABC Workers personal use of social media is subject to the following standards:

- Do not damage the ABC's reputation for impartiality and independence.
- Do not undermine your effectiveness at work.

...

## **OFFICIAL ACCOUNTS, PERSONAL ACCOUNTS AND EDITORIAL POLICIES**

The ABC distinguishes between its official social media accounts and Workers' personal accounts. Content on official accounts is ABC content and it must adhere to the Editorial Policies, just like ABC content on other platforms. Personal social media activity is not ABC content; it is not subject to the Editorial Policies and the ABC does not take editorial responsibility for it.

This means that if a complaint is received about content on a Worker's personal account, it will not be investigated as an editorial complaint or assessed against the Editorial Policies. Any issues related to personal use of social media will be managed by line managers, in consultation with People & Culture where required.

However, while personal social media activity is not required to adhere to the Editorial Policies, there are two key areas of the Editorial Policies which are nonetheless relevant to Workers' personal use of social media:

(1) **Impartiality:** For many Workers, remaining impartial in the public eye is crucial to maintaining effectiveness in their ABC roles. A thoughtless post or tweet can instantly compromise this perception of impartiality. The Editorial Policies guidance note on impartiality is a useful resource.

...

## **ADVICE FOR ALL WORKERS**

- Any publication or distribution of ABC content must be in accordance with these Guidelines.

...

- Consider privacy and that of colleagues and sources. For example, before posting a group photo, it is advisable to seek permission from those in the photo.

## **ADVICE FOR HIGH RISK WORKERS**

Your profile and seniority determine if you are a high risk Worker. The higher your profile or seniority the greater the reputational damage to you and the ABC if you breach the Guidelines, and the more likely a breach will attract attention.

If you are a Worker with a high profile, such as a presenter or a journalist, you should assume you are a high risk worker.

High risk Workers should:

- Treat personal content with the same care as if being published or distributed on an ABC platform.

- Consider regular review or automated removal of historical posts on public facing social media. What may have been appropriate to say a decade ago could be seen in a different light now.
- Consider including a statement on each of their public-facing social media sites that the content published or shared reflects their own and not their employer's/ABC's views.
- Engage in debate in a respectful manner, avoiding abusive language.
- Avoid anything that could be construed as personal disapproval or personal support for policies and actions or inactions of public figures.
- Avoid engaging in advocacy on matters of contention.
- Where appropriate include a statement on each of their social media sites that the content published or shared reflects their own and not their [sic] ABC's views.

The ABC must ensure that its independence and integrity is maintained, and that news and information is accurate and impartial according to the recognised standards of objective journalism.

High risk Workers with a high profile must be particularly cautious when publishing any material using personal social media, because it has the potential to affect the perception of the ABC's independence, impartiality and integrity.

...

This does not prevent High risk Workers using personal social media for the purposes of news and fact gathering (for example, engaging with sources), provided that in doing so High risk Workers do not breach the Guidelines...

348 I accept a factor influencing the conduct of all the ABC Managers was their motivation to maintain the ABC's impartiality and appearance of impartiality in the context of Ms Lattouf's posts about the Israel/Gaza war. However, that does not necessarily exclude Ms Lattouf's pleaded political opinions from being a substantial and operative reason for the termination of her employment.

349 As Ms Lattouf has emphasised, the ABC has not pleaded reliance on s 772(2) of the FWA and has not argued that impartiality, or perceived impartiality, is an inherent requirement for a position as an ABC presenter.

## **Assessment of witnesses**

350 In assessing the credibility and reliability of the witnesses, I have taken into account that the relevant events happened some ten months before they gave evidence at the hearing. It is

unsurprising that memories have faded and there are inconsistencies between witnesses about what happened, particularly the content of conversations, discussions and meetings.

351 However, many of the relevant events were recorded in contemporaneous emails and text messages. I adopt the observations of Lee J in *Transport Workers' Union of Australia v Qantas Airways Ltd* [2021] FCA 873; 308 IR 244:

[16] Although this is an industrial case, as those experienced in commercial litigation are aware, in determining contested factual issues, what matters most is usually “the proper construction of such contemporaneous notes and documents as may exist, and the probabilities that can be derived from those notes and any other objective facts”: *Mealey v Power* [2015] NSWSC 1678 (at [4] per Pembroke J). As Leggatt J (as his Lordship then was) said in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) (at [22]):

“... the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.”

[17] Whether, as Full Court recently observed (in *Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126 (at [239] per Allsop CJ, Besanko and Middleton JJ)), this approach is best seen as a helpful working hypothesis rather than a form of rule or general practice of placing little reliance on recollections is not something that matters for present purposes. What presently matters is that, at least in part, such an approach has an unstated assumption: that is, that the contemporaneous notes and documents that do exist emerged as the extemporaneous and unvarnished product of the conduct of internal dealings or communications between the contesting parties. The confidence that can be placed in the narrative that emerges from the contemporaneous record is increased when the relevant documents can be seen as the unfiltered and sufficiently complete record of what people were thinking and doing in “real time”.

352 I also adopt the approach of Lee J in *Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 369 at [763]:

This is an unusual case where there is a very comprehensive contemporaneous documentary record, including text and other messages and lengthy audio records. We know what people were saying (and can infer what people were thinking) by reference to real time records. I do not propose to accept representations, made at a high level of generality, about what was in a person’s mind or what they said when the relevant state of mind or action is contradicted by facts otherwise established by the contemporaneous material, or particular circumstances in that reliable material point to its rejection.

353 I consider the emails and text messages generally provide reliable evidence of what witnesses were thinking at the time the relevant communications were written, sent and received.

354 I have taken into account that emails and text messages are an instant form of communication that are sometimes composed and read in haste, without close attention to their language. However, the witnesses are all intelligent people who worked in senior positions for a large media organisation and are skilled in their use of language and written communications. They can generally be taken to have meant what they said and to have understood what was being said to them by others.

355 It was apparent from observing Ms Lattouf giving oral evidence that the circumstances in which she came to be taken off air and the subsequent fallout caused her great distress. I consider her an honest and generally reliable witness, although her heightened emotions may have affected her perception and recollection of some conversations and events to some extent. I do not consider the differences between Ms Lattouf's version of relevant conversations with Ms Green to be significant, but, where there are differences, I prefer the evidence of Ms Green.

356 Ms Green's evidence is important for two principal reasons. First, the effect of Ms Green's evidence is that she did not *direct* Ms Lattouf not to post anything about the Israel/Gaza war on social media but instead *advised* her not to post such material. That advice was also qualified by saying it would be okay to post material provided it was fact based or from a verified source. That qualification was itself qualified by Ms Green, saying it might be better for Ms Lattouf not to post anything that could be perceived as unbalanced whilst she was working for the ABC. Secondly, Ms Green's evidence was that she told Mr Latimer, Mr Ahern and Mr Melkman in the Teams Meeting that she had *not* given any *direction* to Ms Lattouf.

357 I have found Ms Green to be an honest and reliable witness. She impressed me as being an organised and thorough person who took care to make notes about the relevant events. She gave her evidence in a straightforward way without embellishment. She had a good, although understandably imperfect, recollection of the relevant conversations and events. Her evidence was consistent with the file notes she made.

358 Although the ABC called Ms Green, it submits her evidence that she told Mr Latimer, Mr Ahern and Mr Melkman she had not given Ms Lattouf any direction should be rejected. However, I have no hesitation in accepting Ms Green's evidence of what she said in the Teams Meeting.

359 Mr Oliver-Taylor deposes that his reasons for his decision to take Ms Lattouf off air did not include any political opinions held by her. It is necessary to consider whether Mr Oliver-Taylor's evidence as to his actual reasons for the decision should be accepted.

360 I was unimpressed with Mr Oliver-Taylor's evidence under cross-examination. The difficulties with accepting his evidence include that his assertion he believed Ms Lattouf had disobeyed a *direction* is inconsistent with the content of his own notes, as well as emails he received from Mr Ahern. I reject Mr Oliver-Taylor's evidence that he was not made aware of Ms Green having informed Mr Latimer, Mr Ahern and Mr Melkman, that she had not given Ms Lattouf any direction. In addition, Mr Oliver-Taylor's evidence shifted between claiming a reason for his decision was his view Ms Lattouf *had* breached the Social Media Guidelines, to a

belief she *may have* breached the Guidelines. There were other issues with Mr Oliver-Taylor's evidence, as I will discuss. Ultimately, I am unable to accept his evidence that his reasons for taking Ms Lattouf off air did not include her pleaded political opinions.

361 An issue is whether Mr Anderson made or materially contributed to the decision to take Ms Lattouf off air and, if so, his reasons. Mr Anderson denies the reasons for his actions included Ms Lattouf's political opinions. It is necessary to assess the credibility of that denial.

362 I consider that Mr Anderson understated his role in the decision made on Tuesday, 19 December 2023 that Ms Lattouf would remain on air for the remainder of the week. The chain of emails demonstrates he in fact made that decision, together with Mr Oliver-Taylor. The emails also demonstrate Mr Anderson did not make the decision to take Ms Lattouf off air on Wednesday, 20 December 2023. That decision was made solely by Mr Oliver-Taylor.

363 However, I find Mr Anderson materially contributed to the decision to take Ms Lattouf off air. He attributed to Ms Lattouf the holding of anti-Semitic opinions. Mr Anderson shared that view with Mr Oliver-Taylor, who agreed with him.

364 Ms Buttrose's evidence under cross-examination was somewhat theatrical and difficult to follow at times. She had a strong belief that Ms Lattouf was an activist who should have never been engaged by the ABC and she wanted Ms Lattouf gone as soon as possible. Ms Buttrose ultimately accepted the initial decision that Ms Lattouf would remain on air for the remainder of the week and did not have any direct role in the later decision to take Ms Lattouf off air. Ms Buttrose was concerned to remind Mr Oliver-Taylor of the error made in engaging Ms Lattouf, which placed pressure on Mr Oliver-Taylor. However, I find that she did not materially contribute to the decision to take Ms Lattouf off air.

365 The principal issue concerning the evidence of Mr Latimer, Mr Ahern and Mr Melkman is whether they conveyed to Mr Oliver-Taylor in the Teams Meeting, Ms Green's information that she had not given Ms Lattouf a direction and had only given her advice.

366 Mr Ahern denies Ms Green gave such information in the Teams Meeting. I do not accept Mr Ahern's denial and prefer the evidence of Ms Green.

367 Mr Latimer's evidence is he cannot even recall Ms Green being at the Teams Meeting.

368 Mr Melkman's evidence is he remembers Ms Green being asked to confirm the nature of what she had told Ms Lattouf about posting on social media but he cannot recall her answer.

369 I do not accept the evidence of Mr Latimer and Mr Melkman about their lack of recollection of what Ms Green said in the Teams Meeting.

370 The evidence of Mr Latimer, Mr Ahern and Mr Melkman under cross-examination left me with substantial doubts as to the reliability and credibility of their evidence on controversial matters. I reject their evidence asserting that Mr Oliver-Taylor was not informed in the Teams Meeting that Ms Green had not given Ms Lattouf a direction and had only given her advice.

## **The issues concerning Ms Lattouf's allegation of contravention of s 772(1) of the FWA**

371 Ms Lattouf summarises the substance of her case in her written closing submissions as follows:

The most senior executives of the ABC, including its managing director and chair of its board, were sympathetic to the complaints. Once alerted to Ms Lattouf's opinions, they determined that she ought never have been employed by the ABC and sought to be rid of her. Their efforts to do so were temporarily stymied by internal advice that there was no proper basis to take Ms Lattouf off air. They continued to express their deep unhappiness at her continued employment, and in due course they achieved their objective of removing her from air.

...

The stated bases for her removal were that she had breached a direction, and breached ABC policy on the use of social media. It is now admitted by the ABC that Ms Lattouf, at the point of her dismissal, had not breached any ABC policy, procedure or guideline. And the ABC's own evidence makes clear that she was not given, and did not breach, any direction, and that the senior managers who dismissed her were told that she had been given no such direction.

372 The issues upon which it is necessary to make findings include:

Whether Ms Lattouf's employment was terminated or, as the ABC alleges, she was merely not required to work her final two shifts with her employment then ending by the effluxion of time.

Whether the evidence is consistent with the hypothesis that the ABC was actuated by Ms Lattouf's race or national extraction.

Who, on behalf of the ABC, made any decision to terminate Ms Lattouf's employment, or materially contributed to the decision.

Whether the ABC has proved that the reasons for any termination did not include any of Ms Lattouf's pleaded political opinions. This requires consideration of whether the reasons for her termination pleaded by the ABC were the actual reasons.

## **Whether the ABC terminated Ms Lattouf's employment**

373 In order to prove the ABC contravened s 772(1) of the FWA, Ms Lattouf must prove the ABC terminated her employment.

374 Ms Lattouf argues her employment was terminated on Wednesday, 20 December 2023 when she was told she would not be performing any further work and told to leave the ABC's premises.

375 The ABC denies that Ms Lattouf's employment was terminated and argues her duties were merely changed, as the ABC was entitled to do under the contract of employment, such that she

was allocated no work for the last two shifts. The ABC submits her employment came to an end by the effluxion of time on Friday, 22 December 2023, in accordance with the contract.

376 Ms Lattouf observes that the question of whether her employment was terminated was decided in her favour by the FWC in *Lattouf v Australian Broadcasting Corporation* [2024] FWC 1441; 332 IR 127 (***Lattouf v ABC (FWC)***), in the context of determining whether the FWC had jurisdiction to deal with the dispute. Ms Lattouf submits that the ABC's attempt to relitigate the issue is an abuse of process and is also precluded by an issue estoppel. The ABC argues there is no abuse of process or issue estoppel.

377 On 17 November 2023, Ms Green sent an email to Ms Lattouf, saying:

Hi Antoinette, good to chat on the phone. Confirming that we'd love you to present Mornings with us for the week commencing 18 December. The shift is 0600 - 1436 (with one hour break).

...

378 Ms Lattouf responded saying that she would be delighted to host *Mornings* from Monday, 18 December to Friday, 22 December 2023.

379 On 24 November 2023, the ABC sent the Terms of Engagement to Ms Lattouf. On 27 November 2023, Ms Lattouf replied saying, "Read and agreed thank you".

380 On Friday, 22 December 2023, Ms Lattouf made an application under s 773 of the FWA for the FWC to deal with the dispute. The ABC claimed the FWC lacked jurisdiction to "deal with the dispute" under s 776(1) of the FWA because the ABC had not "terminated [Ms Lattouf's] employment".

381 In *Lattouf v ABC (FWC)*, Deputy President Boyce determined Ms Lattouf's employment had been terminated. The FWC proceeded to deal with the dispute through mediation pursuant to s 776(1). The FWC subsequently issued a certificate under s 776(3) to the effect that all reasonable attempts to resolve the dispute (other than by arbitration) had been, or were likely to be, unsuccessful. That certificate allowed Ms Lattouf, under s 778, to make an application to the Court alleging contravention of s 772(1).

382 Ms Vagg (ABC People Services and Remuneration) deposes that when engaging a casual employee, a form is generated and a nominated end date is entered. When the nominated end date passes, the casual employee record becomes inactive and their network account, including their email address, is deactivated. In order for the nominated end date to be brought forward, a request has to be made to the payroll team. There was no such request made in respect of Ms Lattouf. The ABC's records show Ms Lattouf did not work the shifts she was rostered to work on Thursday, 21 December and Friday, 22 December 2023 but was paid for these shifts. It is common ground she was paid within the normal pay cycle.

383 Ms Vagg deposes that Ms Lattouf's security pass was disabled on Friday, 22 December 2023 but was not cancelled. The evidence does not indicate Ms Lattouf was made aware her security pass had been or would be disabled.

## **Whether there is any issue estoppel or abuse of process**

384 An issue estoppel operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in an earlier proceeding: *Blair v Curran* (1939) 62 CLR 464 at 531-533; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 (**Tomlinson**) at [22]. It has been held the doctrine extends to a decision of any tribunal which has jurisdiction finally to decide a question arising between the parties, even if it is not called a court: *The Administration of the Territory of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 453 (Gibbs J); *Kazal v Thunder Studios Inc (California)* [2023] FCAFC 174; 416 ALR 24 at [399]. It has not been settled whether an estoppel can arise to prevent an issue that has been determined by a Commonwealth administrative tribunal from being raised in a court: see *Miller v University of New South Wales* (2003) 132 FCR 147 (**Miller**) at [56] and [63]. However, the parties' submissions proceeded on the basis that a decision of the FWC may give rise to an issue estoppel in a proceeding before this Court. I will proceed on the same assumption since it does not affect the outcome.

385 Ms Lattouf submits the FWC could only "deal with" the dispute under s 776 of the FWA if it determined Ms Lattouf's employment was terminated by the ABC. Had the question been determined in the negative, her application would have been dismissed. She argues that, unlike the circumstances considered in *Miller*, the issue of Ms Lattouf's termination was the "central and determinative issue" in the FWC proceeding and was final as between the parties. Ms Lattouf submits the ABC is accordingly estopped from denying in *this* proceeding that her employment was terminated.

386 The ABC argues, principally, that the FWC has not resolved, and cannot resolve, Ms Lattouf's claim of contravention of s 772(1) of the FWA. It argues no estoppel can arise because the FWC did not possess jurisdiction to decide the matter conclusively and for all purposes between the parties.

387 For the following reasons, I reject Ms Lattouf's submission that an issue estoppel arises preventing the ABC from raising the issue of whether the ABC terminated Ms Lattouf's employment for the purposes of s 772(1).

388 In *Kowalski v Trustee, Mitsubishi Motors Australia Ltd Staff Superannuation Pty Limited* [2003] FCAFC 18 (**Kowalski**), the Full Court held:

[12] Mansfield J held that the effect of that finding by the Full Commission was that the appellant was estopped from challenging its finding in these proceedings. We are not prepared to do so. It is clear that a party will be estopped from arguing that which has already been decided against him or her, even by a different court. This can also extend to decisions by a tribunal where such a tribunal has the capacity to make final and binding decisions: see *Administration of the Territory of Papua New Guinea v Daera Guba* (1973) 130 CLR 353. The issue raised in this case is whether there can be any issue estoppel in respect of the determinations of a Commonwealth administrative body. Such bodies cannot exercise the judicial power of the Commonwealth. Can they nevertheless make a determination that is sufficiently "final" and "determinative" to give rise to an issue estoppel? There are two chains of authority. The first denies that they can. The relevant cases are discussed by Weinberg J in *Bramwell v Repatriation Commission* (1998) 158 ALR 623 at 635-637.

The second says that they can, particularly where the power being exercised is very similar to judicial power: see Branson J in *Miller v University of New South Wales* [2002] FCA 882 at [68]-[77].

[13] It is unnecessary for us to resolve these differences. What is absolutely clear is that the decision of an administrative tribunal in respect of a “jurisdictional fact” is neither conclusive, nor binding: see *Craig v South Australia* (1995) 184 CLR 163 at 179. The decision in this instance was given in relation to what was clearly a “jurisdictional fact” i.e. the question whether the termination of employment was on or before or was after 30 March, 1994. The decision of the AIRC on that matter could not be conclusive. Consequently the decision of the AIRC of 1 March, 2002 that the contract of employment was terminated on 16 March, 1994 does not have the effect that the appellant can not argue to the contrary in this Court. There is no issue estoppel.'

(Emphasis added.)

389 Section 776(1) provides, “If an application is made under section 773, the FWC must deal with the dispute (other than by arbitration)”. Section 773 provides, relevantly, “If...an employer has terminated an employee’s employment...the employee...may apply to the FWC for the FWC to deal with the dispute”. The FWC’s jurisdiction to “deal with” the dispute is therefore conditioned upon the relevant employer having terminated the relevant employee’s employment. The question is one of mixed fact and law. The FWC is required to determine that question in order to determine whether it has jurisdiction to deal with the dispute. It follows, as was the case in *Kowalski* at [13], that the FWC’s determination of that question “is neither conclusive, nor binding”.

390 Further, in *Miller*, the Full Court at [65] referred to the following passage from the judgment of Jordan CJ in *Ex parte Amalgamated Engineering Union (Australian Section); Re Jackson* (1937) 38 SR (NSW) 13 at 19-20:

But in order that a judicial decision may involve an estoppel as to the matter decided, it is necessary that the tribunal should possess jurisdiction to decide the matter conclusively and for all purposes between the parties, and not merely incidentally and for a limited purpose...The reason is that no estoppel can arise from a decision by a tribunal of limited jurisdiction of a matter lying outside its jurisdiction.

(Citations omitted.)

391 The FWC’s jurisdiction under s 776 of the FWA to determine whether an employer has terminated an employee’s employment is for the limited purpose of determining whether it has jurisdiction to deal with the dispute. Under ss 595(2) and (3), the FWC may deal with a dispute in which it has jurisdiction as it considers appropriate, including by mediation, conciliation, making a recommendation, or expressing an opinion, but not by arbitration. The FWC has no jurisdiction to decide whether there has been a contravention of s 772(1). Whether there has been a contravention of s 772(1) depends in part upon whether the employer has terminated the employee’s employment, and that is a matter for the Court to finally decide. Accordingly, the FWC had no jurisdiction to decide whether the ABC terminated Ms Lattouf’s employment

conclusively and for all purposes between the parties. In these circumstances, no issue estoppel can arise.

392 Ms Lattouf has not developed any submissions concerning her claim of abuse of process. In *Tomlinson*, the High Court held at [25]:

Abuse of process, which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although insusceptible of a formulation which comprises closed categories, abuse of process is capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.

393 The Court's function in the present case is to determine whether there has been a contravention of s 772(1) of the FWA, necessarily requiring determination of whether the ABC terminated Ms Lattouf's employment. Since the FWC's determination is not binding on the parties or the Court, the ABC's agitation of the issue cannot be "unjustifiably oppressive" to Ms Lattouf, nor, "bring the administration of justice into disrepute".

394 In the course of determining an application by the ABC to have a Full Bench of the FWC deal with Ms Lattouf's application, Hatcher J observed, "if the matter eventually comes before a court for determination following the issue of a s 776(3)(a) certificate, the court will not be bound by any decision the Commission makes": *Lattouf v Australian Broadcasting Corporation* [2024] FWC 570 at [17]. I respectfully agree with that observation.

### ***The FWC's finding that Ms Lattouf's employment was terminated***

395 It is informative to consider the reasons given in *Lattouf v ABC (FWC)* for determining that Ms Lattouf's employment had been terminated by the ABC.

396 Deputy President Boyce recorded that the parties agreed the meaning of "terminate" in s 772(1) should be "defined" according to the definition of "dismissed" under s 386(1)(a) of the FWA. The Deputy President adopted that approach. Section 386(1)(a) provides a person has been dismissed if, "the person's employment with his or her employer has been terminated on the employer's initiative". Sections 386(2) and (3) set out circumstances where a person is not "dismissed".

397 The approach of the parties before the FWC, that the definition of "dismissed" in s 386(1) is simply to be transposed into s 772(1) as providing the meaning of "terminate", does not seem to me to have been appropriate. While it is true the definition of "dismissed" in s 386(1) requires consideration of the meaning of "terminate", there is also an express requirement that the termination be "on the employer's initiative", a phrase that does not appear in s 772(1). Further, it is not clear whether the second part of the definition in s 386(1)(b), dealing with forced resignation, has application to s 772(1). And there is no equivalent of ss 386(2) and (3) in s 772. The meaning of "terminate an employee's employment" in s 772(1) must be considered according to its own terms and in its own context. Having said that, the cases that have considered s 386(1)

are informative.

398 Deputy President Boyce noted the Terms of Engagement provided, “In relation to each engagement, you will be advised of...the work to be performed”, and, “at any time...during the period of an engagement, the ABC may advise you of changes...”. The Deputy President described this as the **Engagement Change Term**. Ms Lattouf’s engagement to work from Monday, 18 December to Friday, 22 December 2023, was described as the **December Engagement**. The meeting where Mr Ahern informed Ms Lattouf that she was not required to present the last two programs was described as the **20 December Meeting**.

399 Deputy President Boyce reached the following conclusion at [110]:

In this case, I find that the employment relationship between the Applicant [Ms Lattouf] and the ABC, was terminated at the ABC’s initiative. The objective facts that I rely upon in making this ultimate finding are:

- a) the employment relationship in this case concerns the December Engagement. This relationship is governed by the terms of the Casual Employment Contract;
- b) the Casual Employment Contract contains the Engagement Change Term;
- c) the outcome of the 20 December Meeting was that the Applicant would not perform any further work at, or service for, the ABC in respect of the remainder of the December Engagement. The Applicant was advised that a decision had been made by the ABC to take her off-air for her remaining two shifts of the December Engagement. The Applicant was not allocated any further or other work to perform, and she was asked to politely leave (sooner rather than later) the ABC premises (meaning that she was immediately relieved of performing any further work or service for the remainder of her shift that day);
- d) the ABC’s case is that the December Engagement simply came to end by way of the effluxion of time on 22 December 2023, in accordance with the terms of the Casual Employment Contract. It also says that the Applicant being taken off-air (and given no work at all) ought to be found to be a valid exercise of the Engagement Change Term, meaning that the ABC simply did what it was entitled to do under the Casual Employment Contract, and the duration of the December Engagement was not in any way altered. The difficulty is that even if both of these propositions are true, the Applicant’s service in her relationship with the ABC ended when she was taken off-air and allocated no further work to do, which on the objective facts of this case, gave rise to the Applicant no longer being in the service of the ABC, terminating the employment relationship;
- e) even if the payments made to the Applicant after she was taken off-air can be said to be attributable to the Casual Employment Contract, which I have significant doubts about, at best they extend the December Engagement from a contractual perspective, but not from an employment relationship perspective;

f) the employment relationship was also brought to an end at the ABC's initiative. As Perram J stated in *Quirk*, s 386(1)(a) of the Act "does not require the [ABC] to pull the trigger but only to load the gun". The focus is upon at whose initiative the employment relationship was ended, rather than the precise means by which it ended. The proposition "that there can be no termination of an employment relationship purely because the contract of employment came to an end by operation of law" (e.g. by the effluxion of time) cannot be accepted unless it is accompanied by the words "without any act by the employer";

g) the ABC did not reply to the Applicant's Clarification Email [sent by Ms Lattouf at 5.23 pm on Wednesday, 20 December 2023] at all, let alone confirm or deny that the Applicant remained employed by the ABC;

h) I do not accept that Ms Green's parting words to the Applicant to the effect of "I would love to have you back" gives rise to any inference that the Applicant remained employed by the ABC in the sense that further engagements are on the cards. Mr Ahern holds the authority to make decisions about engaging temporary or fill-in presenters, and he gave no evidence to the effect that the Applicant would be invited back; and

i) whilst I have taken into account Ms Vagg's evidence in relation to the status of the Applicant's employment on the ABC's software programs and systems, that ordinary procedures were not followed internally to terminate the Applicant, that the Applicant remained in possession of a deactivated building pass, and that she continued to have the ability to access some ABC computer systems, none of this evidence is decisive in the context of the events that have happened.

### ***The parties' submissions concerning whether Ms Lattouf's employment was terminated***

400 Ms Lattouf submits that, for the reasons articulated in *Lattouf v ABC (FWC)*, her employment was terminated on Wednesday, 20 December 2023. Ms Lattouf was told she would not be performing any further work for the ABC, and she was in fact not allocated any further work. She was told to leave the ABC's premises and her access card was revoked. At that time, there was no suggestion she would be paid for her remaining shifts. She submits that, "Any reasonable person in her position who had knowledge of the background facts and dealings between the parties would have understood that their employment was terminated".

401 The ABC contends that *Lattouf v ABC (FWC)* was wrongly decided. The ABC submits the first error is there was no distinct termination of an employment relationship. The ABC submits the contract of employment was an umbrella contract that contemplated and regulated more than one casual engagement. This was the first engagement made under the contract. The ABC submits there was no underlying relationship that could give rise to an expectation there would be more engagements; indeed, the contract expressly disavowed any such expectation. It is submitted there was therefore no relationship capable of being terminated.

402 The ABC submits the second error in *Lattouf v ABC (FWC)* was that, even if there was a termination of the relationship, the contract remained on foot, and, in that circumstance, there was

no termination in the statutory sense.

403 The ABC submits, as a matter of fact, that the following events occurred:

- a. Ms Lattouf was offered and accepted an engagement for a fill-in position to present *Mornings* from 18 to 22 December 2023.
- b. On Wednesday, 20 December 2023, Ms Lattouf was advised that she would not be required to present...[for] the last two shifts of the engagement. That is, the ABC altered the work that Ms Lattouf was required to undertake on the last two shifts by not requiring her to undertake any work – as it was contractually expressly entitled to do.
- c. The ABC paid Ms Lattouf for all five shifts of the engagement as part of the usual pay cycle.
- d. The ABC did not exercise its right to terminate the engagement in accordance with the contract

404 The principal argument advanced by the ABC in its oral submissions is that an employment relationship can only be terminated, relevantly, by the employer's repudiation of the employment contract. The ABC submits there was no obligation under the employment contract to provide Ms Lattouf with work to do and its obligation was only to pay her for the duration of the contract, which it did. The ABC argues it was expressly authorised under the contract to make changes to the work to be performed and the hours of work and was thereby able to reduce the work to nil. It submits its conduct in taking Ms Lattouf off air was not repudiatory. The ABC submits the contract of employment came to an end on Friday, 22 December 2023, ending by effluxion of time in accordance with, and by the operation of, the terms of the contract.

### ***Construction of the phrase “terminate an employee’s employment” in s 772(1) of the FWA***

405 The expression “terminate” is not defined in the FWA. An initial question arises as to whether the phrase, “an employer must not terminate an employee’s employment”, in s 772(1) refers to termination of the employment relationship, or termination of the employment contract. There is a distinction, as will be discussed.

406 Section 772 largely reproduces s 659 of the *Workplace Relations Act 1996* (Cth) and traces its lineage back to ss 170CA, 170CB and 170EA of the *Industrial Relations Act 1988* (Cth) (the **IRA**).

407 Section 170EA of the IRA, which provided, “A person (‘the employee’) may apply to the Court for a remedy in respect of termination of his or her employment”, was considered in *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* [1995] IRCA 625; 62 IR 200. The Full Court held the meaning of “termination” was imported from the *Termination of Employment Convention* and meant, “termination at the initiative of the employer”. The Full Court indicated it would, “proceed on the basis that the termination of the employment relationship is what is comprehended by the expression “termination of employment””, citing *Siagian v Sanel Pty Ltd*

(1994) 122 ALR 333 (*Siagian*).

408 In *Siagian*, Wilcox J identified four difficulties in confining the expression “termination of ... employment” in s 170EA of the IRA to termination of the contract of employment. First, that construction would significantly limit the operation of the IRA, and would do so in an arbitrary and technical way. Secondly, such a construction would be difficult to reconcile with the power to make an order requiring the employer to reinstate the employee. Thirdly, where an employer breached the contract of employment by unlawfully dismissing an employee, but the employee (wishing to retain the employment) had not yet accepted the breach as a termination of the contract, the Court would be powerless to intervene. Fourthly, the statute was concerned with the practical matter of industrial relations, and unfair dismissal can give rise to an industrial relations problem whether or not it is accepted by the employee as a termination of the contract. His Honour concluded at 351 that, “it seems preferable to treat the words “termination of ... employment”...as including any act that brings to an end the employer-employee relationship, whether or not the act, or any acceptance of it, also brings to an end the contract of employment”.

409 I consider that similar reasoning ought to be applied in determining the meaning of “terminate an employee’s employment” in s 772(1) of the FWA. In my opinion, the phrase refers to termination of the employment relationship. This construction is consistent with the way similar phrases have been construed in ss 119 and 386(1) of the FWA: see *Broadlex Services Pty Ltd v United Workers’ Union* [2020] FCA 867; 296 IR 425 (**Broadlex**) at [90]; *Quirk v Construction, Forestry, Maritime, Mining and Energy Union* [2021] FCA 1587; 312 IR 359 (**Quirk**) at [223].

410 In *Broadlex*, Katzmann J considered the meaning of the phrase, “if the employee’s employment is terminated” in s 119(1) of the FWA, a provision dealing with entitlement to redundancy pay. Her Honour gave the following analysis of the distinction between termination of an employment relationship and termination of a contract of employment:

[61] The employment relationship is “inherently” a contractual one. Consequently, there can be no employment relationship without a contract of employment. As McHugh and Gummow JJ observed in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 436:

The evolution in the common law as to the relationship of employment has been seen as a classic illustration of the shift from status (that of master and servant) to that of contract (between employer and employee).

[62] Nevertheless, there is a difference between the employment relationship and the contract of employment. A contract of employment can come into existence before the employment relationship is formed and an employer who withdraws an offer of employment after it has been accepted or an employee who resigns before the starting date can be liable for breach of contract. Furthermore, a contract of employment can include obligations, such as a restraint of trade covenant, which continue after the employment relationship has come to an end.

[63] There is also a conceptual difference between the termination of an

employment relationship and the discharge of a contract of employment.

[64] The central flaw in Broadlex's argument is that it proceeded on the false premise that the employment relationship survived the termination of the employment contract.

[65] In the 8th edition of *Macken's Law of Employment*, published in 2016, Professor Sappideen and her fellow authors wrote (at [9.60]):

The employer-employee relationship will also end when the contract of employment ends, if that relationship has not ended earlier. The possibility of the contract of employment existing after the employment relationship has ended seems established, although ordinarily it will be of 'no real significance'.

(Citations omitted.)

411 Accordingly, the employment relationship ends when the contract of employment ends, but it can end earlier in circumstances where one party has repudiated the contract and the repudiation has not been accepted by the other party.

412 The ABC submits an employment relationship can only be "terminated" for the purposes of s 772(1) of the FWA by the employer's repudiation of the employment contract, and as the ABC did not repudiate the contract, there was no termination.

413 In *Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)* [2017] FCAFC 102 at [70], the Full Court, applying *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [49], explained that repudiatory conduct can be either:

- (a) conduct amounting to a breach which evinces an intention not to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's contractual obligations; or
- (b) a breach of an essential term of the contract, or of an innominate term that is of a sufficiently serious nature, such that it gives rise to a right to terminate.

414 In *Visscher v Giudice* (2009) 239 CLR 361, the plurality observed at [53] that it does not follow from the fact a wrongful dismissal is effective to bring the employment relationship to an end, that it thereby terminates the contract of employment. Their Honours observed that the "elective theory of termination" requires acceptance by the innocent party of a repudiation for the contract to be terminated.

415 In *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 (**Byrne**), the plurality, explaining the distinction between termination of an employment relationship and an employment contract, observed at 427-428:

It does not appear to have been doubted in this country that a wrongful dismissal terminates the employment relationship notwithstanding that the contract of

employment may continue until the employee accepts the repudiation constituted by the wrongful dismissal and puts an end to the contract. That was accepted by both the majority and minority in *Automatic Fire Sprinklers Pty Ltd v Watson*. As Latham CJ said:

An employer terminates the employment of a servant when he dismisses him, though, as I say hereafter, such a dismissal does not put an end to the contract between the parties...

And as Dixon J said:

[T]here is nothing in the general law preventing the wrongful dismissal of a servant operating to discharge him from service, notwithstanding that he declines to accept the dismissal as absolving him from further performance but keeps the contract open and remains ready and willing to serve.

In England, the position was for a time not so clear, although the view taken in Australia appears now to be accepted there. Of course, even if an employee who is wrongfully dismissed chooses to keep the contract of employment on foot, he or she cannot claim remuneration in respect of any period after the wrongful dismissal because the right to receive remuneration for services is dependent upon the services having been rendered. The employee is also under a duty to mitigate any damage. Moreover, a court will not, save in exceptional circumstances, order specific performance of a contract of personal service. The possible continuation of the contract of employment after a wrongful dismissal will, therefore, ordinarily be of no real significance as it will for all practical purposes be at an end.

416 In *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 (***Automatic Fire Sprinklers***), the High Court held the employer's purported dismissal of the employee was wrongful because, first, it was in breach of contract and, second, it was in breach of a wartime regulation prohibiting dismissal without the consent of a particular government official. The employee had not accepted the wrongful repudiation and sued for his wages for the year following his dismissal. As to the first issue, the High Court unanimously held that while the contract was not at an end (as the repudiation had not been accepted), the employee was not entitled to sue for his wages and was only entitled to sue for damages for breach of contract. That was because as Dixon J explained at 466, "wages are for the service reasonably demanded under a subsisting relationship of master and servant", but the employee had been "discharged from service". And Latham CJ explained at 451:

Thus the wrongful dismissal determines the relationship of master and servant created by the contract, even though the servant may not have accepted his dismissal as entitling him to regard the contract as discharged. Any other view would in effect grant specific performance of a contract of personal service, a remedy which the courts have always refused in such a case...

417 In *Geys v Societe Generale, London Branch* [2013] 1 AC 523 at [82], Wilson LJ suggested the High Court's reference to the termination of the *relationship* of master and servant, as distinct from termination of the *contract*, was no more than a convenient shorthand for the common law's

long rejection of a claim for wages or salary after a wrongful dismissal. His Lordship considered that the Victorian work ethic helped to explain that rejection, citing *Goodman v Pocock* (1850) 15 QB 576 at 583-584, where Erle J held:

I think that the servant cannot wait till the expiration of the period for which he was hired, and then sue for his whole wages on the ground of a constructive service after dismissal. I think the true measure of damages is the loss sustained at the time of the dismissal. The servant, after dismissal, may and ought to make the best of his time; and he may have an opportunity of turning it to advantage.

418 Accordingly, the distinction drawn at common law between termination of an employment relationship and termination of a contract of employment serves to explain why an employee who has been wrongfully dismissed cannot claim wages even though the employee has not accepted the repudiation and the contract remains in force. It may also be noted that an employee who repudiates a contract by refusing to work cannot claim wages even if the employer has not accepted the repudiation: see *White v Bristol Rugby Ltd* [2002] IRLR 204 at [65]; *Sunrise Brokers LLP v Rodgers* [2015] ICR 272 at [18] and [26]; *Automatic Fire Sprinklers* at 465; *Byrne* at 428.

419 In *Automatic Fire Sprinklers*, Latham CJ observed at 450, that the wrongful dismissal of a servant is sometimes described as a repudiation of the contract of employment, citing *In re Rubel Bronze and Metal Co Ltd v Vos* [1918] 1 KB 321 (**Rubel**). In that case, McCardie J held at 321-322:

[I]t is desirable to briefly consider the meaning of the words “wrongfully dismiss.” The phrase has often been used, but never defined. Does it indicate a peculiar contractual feature of the relationship between master and servant, or does it denote a mere application to such relationship of the well-known principles of law as to the repudiation of contracts? The relation of master and servant differs in important respects from other contracts. The power of dismissal sprang into existence at a late stage of the development of the common law...It was practically unknown in the eighteenth century. It first took clear form in the year 1817, when Lord Ellenborough tried the case of *Spain v. Arnott* (1817) 2 Stark 256. There the servant refused to obey his master’s orders, and Lord Ellenborough held that the master was justified in terminating the employment. In my view the ratio of that decision was that the servant had, in substance, refused to fulfil his essential obligations under the contract, whereby the master was entitled to treat the contract as ended. Thenceforward the law as to dismissal developed rapidly, though the principles are but rarely revealed and the jurist may seek in vain for the ordered rules of growth.

To-day it is well settled that a master may dismiss his servant for many reasons, such as misconduct, substantial negligence, dishonesty, and the like. Such matters may, I think, be said to constitute such a breach of duty by the servant as to preclude the further satisfactory continuance of the relationship and to justify the master in electing to treat the contract as repudiated by the servant...It is clear, however, that if a dismissal be without just cause the master is deemed to have wrongfully repudiated his contractual obligations to the servant. “Wrongful dismissal” is, I think, a mere illustration of the general legal rule that an action will lie for unjustifiable repudiation

of a contract...

Now in the ordinary case of wrongful dismissal a master purports completely to terminate the contract. He refuses to accept further service. He wholly declines to pay further remuneration. The repudiation, as a rule, is undoubted, decisive, and complete. But if a claim for wrongful dismissal be founded on repudiation by the master, then I think that the general and recognized rules which apply in the case of ordinary contracts should apply also in the case of master and servant.

420 In *Mahony v White* [2016] FCAFC 160; 262 IR 221 at [19], the Full Court, considering s 386(1) of the FWA, observed the *Termination of Employment Convention*, “applied only to a termination at the employer’s initiative, that is to say, to a termination which, in Anglo-Australian systems of law, would be described as a dismissal”.

421 It can be accepted that there might be peculiar circumstances where a contract that comes to an end under its own terms might constitute a termination of employment under s 772(1) of the FWA: cf *Quirk* at [224]. However, termination of an employment relationship by an employer will generally require repudiation of the contract of employment by the employer.

422 The concept of termination of the employment relationship has a broader relevance under s 772(1) than under the common law. It allows an employee to commence a proceeding for contravention of the provision even though the employee has not accepted the repudiation and the contract remains in force.

423 I pause to note the words “at the employer’s initiative” appearing in ss 119(1) and 386(1) of the FWA seem to have been left out of s 772(1) because they were thought to be unnecessary. That is because s 772(1), in contrast to ss 119(1) and 386(1), directly prohibits an employer from terminating an employee in the enumerated circumstances.

### ***Did the ABC terminate Ms Lattouf’s employment?***

424 I will consider whether the ABC repudiated the contract of employment and thereby terminated its employment relationship with Ms Lattouf on Wednesday, 20 December 2023.

425 In *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623, Brennan J held at 647:

Repudiation is not ascertained by an inquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party’s inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way.

426 In the same case, Deane and Dawson JJ held at 658:

An issue of repudiation turns upon objective acts and omissions and not upon uncommunicated intention. The question is what effect the lessor’s conduct “would be reasonably calculated to have upon a reasonable person”. It suffices that, viewed

objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it.

427 The Terms of Engagement provided to Ms Lattouf relevantly contained the following terms:

**Job Role: Content Maker**

**Date of Agreement: 13/12/2023** (the terms and conditions in this letter apply to all casual work performed after this date)

**Base Hourly Rate of Pay: \$52.72** Schedule A, 2 week rostered Casual Band 7

**Please note that this email confirms the terms of engagement that will apply to any offers of casual employment from the ABC after the date of this email, and you will be taken to have accepted these terms if you perform any such work for the ABC. It does not constitute an offer or guarantee of employment with the ABC.**

Your casual employment with the ABC is also covered by the ABC Enterprise Agreement 2022-2025 (EA), which is available at <https://www.abc.net.au/careers/pay-and-conditions/12007800> (but the EA does not form part of these terms).

**1. BASIS OF ENGAGEMENT**

You will be employed as a casual employee. The ABC is not obligated to offer, and you are not obligated to accept, any particular engagement or offer of work. There is no guarantee or commitment by the ABC that you will receive offers of work at any time or for any duration.

The terms and conditions in this email will apply if you are offered and accept a casual engagement. Each engagement that you accept will be separate and will cease at the end of that engagement without the need for any action by the ABC.

In relation to each engagement, you will be advised of:

- (a) the duration of the engagement;
- (b) the hours of work required;
- (c) the location(s) of work;
- (d) to whom you must report for work; and

(e) the work to be performed.

Should you be offered and accept any further engagements then, unless you are advised otherwise, any such further engagements will be on the same basis as the initial engagement. However, at any time before an engagement commences, or during the period of an engagement, the ABC may advise you of changes to the above details.

...

## **7. ABC VALUES AND POLICIES**

You must comply with the ABC's Code of Conduct and all other ABC Policies as amended from time to time, including Editorial Policies. Copies of these are available from ABC People & Culture and the ABC Intranet. It is your obligation to familiarise yourself with these policies including any changes made during your employment.

...

## **13. TERMINATION**

Any engagement may be terminated by either party with one hour's notice.

If either party gives such notice of termination, the ABC may bring your employment to an end immediately and make a payment to you in lieu of any outstanding period of notice.

...

## **15. GENERAL**

This contract (including any document referred to in this contract) contains the entire agreement between you and the ABC regarding your casual employment, and it replaces all prior or contemporaneous agreements, letters, understandings and representations regarding employment.

...

## **18. AGREEMENT**

By performing work for the ABC, you acknowledge that:

(a) You are employed by the ABC as a casual in accordance with the ABC Enterprise Agreement 2022-2025 (as varied from time to time);

(b) You are employed by the ABC on a casual basis and nothing that the ABC does or omits to do indicates any commitment to ongoing permanent employment;

...

(d) You will comply with ABC Policies as amended from time to time. You are aware that copies of these are available from your manager, your ABC People & Culture HR Team or the ABC Intranet.

(Emphasis in the original.)

428 The Terms of Engagement described the “Job Role” as “Content Maker” but provided no explanation of what that job entailed. Nor did it indicate the dates and duration of the engagement. Clause 1 indicated Ms Lattouf would be advised *inter alia* the duration of the engagement, the hours of work required and the work to be performed. That information was provided in Ms Green’s email of 17 November 2023. The ABC’s written submissions accept that:

Ms Lattouf, a freelance journalist, was employed to fill in for the regular presenter of a prominent programme on ABC Sydney Radio, *Sydney Mornings*. The casual engagement contemplated that she would present five programmes, to be aired each day from Monday, 18 December 2023 to Friday, 22 December 2023.

429 On Wednesday, 20 December 2023, Mr Oliver-Taylor made a decision that Ms Lattouf would be taken off air and Mr Ahern then informed Ms Lattouf of the decision at about 1.30 pm. In an email of 2.57 pm the same day, Mr Ahern recounted what he had told Ms Lattouf:

In that conversation I made the following points:

1. Elizabeth backgrounded you earlier this week on a perception of bias on the Israel-Gaza situation
2. Elizabeth advised you not to post anything that could be perceived as controversial on your socials, while you are on air with us this week. You acknowledged that you understood.
3. 20 hours ago you shared a post that could be considered controversial and was about Israel-Gaza.
4. In the context of your other posts, this is considered a breach of ABC policies and so you will not be required to present the last two programs you have been booked to present tomorrow and Friday.

Antoinette was quiet and accepted the information without comment. At the end she said that she had been asked not to comment on Israel-Gaza on her program and she had not done so, she had kept it a light holiday feel. I acknowledged her points and agreed that she had not discussed Israel-Gaze [sic] in the show, I also said that this

was not about the show, it was about social media posting that she had been asked not to do.

She also said she considered the post factual. I did not comment on whether the post was factual or not, but repeated that it was a post about Israel-Gaza, and that she had been asked not to post about that while she was on air with us this week. She did not reply to that.

The meeting took about 5 minutes. At the end, I asked her to explain to her production team that she would not be doing the show on Thursday and Friday then to leave as soon as possible after that.

...

430 I accept Ms Lattouf's evidence that Mr Ahern showed her the HRW Post during the meeting. Mr Ahern said the post had called into question the ABC's impartiality.

431 The reasons given by Mr Ahern for Ms Lattouf not being required to present the last two programs must be understood in the context of what Ms Lattouf had previously been told by Ms Green. On Monday, 18 December 2023, Ms Green informed Ms Lattouf there had been a number of complaints about Ms Lattouf being on air because of the stance she was perceived to have taken about the Israel/Gaza war in her social media posts. The reason evidently underlying Ms Green's advice that Ms Lattouf should avoid posting about the Israel/Gaza war was that further posts while Ms Lattouf was an ABC employee would lead to an escalation in complaints about the ABC's employment of Ms Lattouf. Ms Green reiterated her advice on Tuesday, 19 December 2023.

432 Ms Lattouf was rostered to work from 6.00 am to 2.36 pm each day. The *Mornings* program was on air for two-and-a-half hours. Ms Lattouf's duties also involved preparation of the next day's program and participating in production meetings.

433 Mr Ahern told Ms Lattouf, "you will not be required to present the last two programs you have been booked to present tomorrow and Friday". In the context, a reasonable observer would understand this to be a euphemistic way of saying the ABC was refusing to allow her to present the program.

434 Mr Ahern also told Ms Lattouf to inform her production team and then, "to leave as soon as possible after that", and to, "get all of your belongings". It was a direction that she leave the workplace and implied she should not return.

435 Mr Ahern gave Ms Lattouf two reasons for not being, "required to present the last two programs". The first was that contrary to advice given to her by Ms Green, she had made a post about the Israel/Gaza war that could be considered controversial. That was a reference to the HRW Post. The second was she had committed, "a breach of ABC policies". Each of these reasons involved criticism of Ms Lattouf's conduct while she was an employee of the ABC.

436 A reasonable observer would understand the ABC had determined, for the two reasons given, that Ms Lattouf had engaged in misconduct which exposed the ABC to criticism for its

employment of her and harm to its reputation for impartiality. The ABC was refusing to allow Ms Lattouf to present *Mornings* or perform any of her other duties and requiring her to leave the premises. A reasonable observer would understand this action to have been taken, *first*, as a disciplinary measure for the misconduct, and, *second*, because the ABC would otherwise be subjected to further complaints about her ongoing employment.

437 The ABC characterises its conduct as exercising its contractual entitlement “during the period of an engagement” to advise Ms Lattouf of “changes” to “the work to be performed” and “the hours of work required”. The ABC submits the contract of employment did not expressly or impliedly give rise to an obligation to provide Ms Lattouf with work to do. It argues it did not exercise its right to terminate the contract. The ABC contends it did not repudiate or terminate the contract of employment.

438 I will consider whether the ABC repudiated the contract by not allowing Ms Lattouf a reasonable opportunity to present *Mornings*, before considering whether the ABC went further by terminating the contract.

439 It can be accepted that there is generally no obligation on an employer to provide work to perform under a contract of employment. In *Collier v Sunday Referee Publishing Co Ltd* [1940] 2 KB 647 at 650, Asquith J described the position in the following way:

It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out. In some exceptional cases there is an obligation to provide work. For instance, where the servant is remunerated by commission, or where (as in the case of an actor or singer) the servant bargains, among other things, for publicity, and the master, by withholding work, also withholds the stipulated publicity...but such cases are anomalous...

440 Where an employer fails to provide work, the employer is still required to pay the employee the agreed wages: *Turner v Sawdon & Co* [1901] 2 KB 653 at 657; *Automatic Fire Sprinklers* at 466 (Dixon J).

441 The exceptional categories where an employer has a duty to provide work include cases where the employee can be described as a “performer”. Each such case has depended on its own particular facts: see *William Hill Organisation Ltd v Tucker* [1999] ICR 291 at 298.

442 In *White v Australian & New Zealand Theatres Ltd* (1943) 67 CLR 266, where artists agreed to render their exclusive professional services to act and perform at such theatres as required and directed by the employer, Starke J held at 273-274:

The contract belongs to the class or category ... in which the employer engages not only to pay the agreed remuneration but also to afford the employee an opportunity of doing the work for which he is engaged ... But it agrees to give the artist a reasonable opportunity of rendering the service for which the artist was employed, and it has no right to say that the artist shall not perform at all or shall not perform what the artist has been required to do.

(see also Latham CJ at 271, Williams J at 281.) (Citations omitted.)

443 In *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 (*Curro*), the NSW Court of Appeal considered whether the employer of a television presenter was obliged to provide the presenter with work. The Court held at 342-344:

Ordinarily an employee cannot demand to be given work and the obligation of the employer is limited to payment of the agreed remuneration...However there is a well-established exception to this general rule in the case of actors and others in a similar position who are vitally interested in opportunities to perform or exercise a skill or talent in public.

...

An employer in the entertainment industry who engages an employee such as Miss Curro for work of that kind contemplates that the employee wants not only the agreed remuneration but also the opportunity to keep her name and talents before the viewing public. In these circumstances the court will construe ambiguous provisions in the contract as imposing an obligation on the employer to provide real work of that kind...and if the contract is silent will readily imply such a term to give effect to the presumed intentions of the parties...

...

Success as a television presenter no less than as an actor or actress, in the words of Sir John Romilly MR "entirely depends on pleasing the public and upon being constantly before the public". In these circumstances the presumed intention of the parties was that Beyond impliedly contracted to give Miss Curro a reasonable opportunity of performing services of the kind specified in Schedule 1 of the agreements and of appearing before the public. This did not mean that she was entitled to appear as host or presenter in any particular program since Beyond retained a broad managerial discretion to make use of her services as and when required. However she was entitled to be given work of appropriate quality to keep her name and talents before the public with reasonable frequency.

In our opinion therefore Beyond had no contractual right to sterilise Miss Curro's services and keep her away from the viewing public. On the contrary any attempt by Beyond to act in that way would be a repudiatory breach entitling Miss Curro to rescind and sue for damages. The contracts as such are therefore not in unreasonable restraint of trade.

(Citations omitted.)

444 It is apparent from Mr Ahern's email of 3.32 pm on Monday, 18 December 2023, that Ms Lattouf was selected as the fill-in presenter of *Mornings* for reasons including her previous exposure presenting for ABC News, SBS and other media, and for ABC Radio for two weeks

during the previous year. The Terms of Engagement contemplated that Ms Lattouf was free to take up engagements with other employers from time to time and that she might also be offered work by the ABC in the future. Mr Oliver-Taylor and Mr Melkman described presenting *Mornings* on ABC Radio Sydney as “a high-profile role”. The parties can be taken to have anticipated that exposure on the *Mornings* program would keep Ms Lattouf before the public and assist her to establish her profile as a presenter.

445 The ABC can appropriately be described as an employer in the entertainment industry. The ABC’s website described *Mornings* as a program to keep listeners, “informed, amused, entertained and inspired each weekday morning with local Sydney stories, political insights, your opinions and engaging discussions”. Mr Oliver-Taylor agreed with this description of the program. The parties contemplated Ms Lattouf’s role would be to present information and content to the ABC’s listeners in a light, amusing and engaging way. Ms Lattouf was, in other words, engaged to provide entertainment. Ms Lattouf’s position was analogous to that of the television presenter in *Curro*, where it was accepted the opportunity of exposure before the public was important to the presenter’s career.

446 The ABC submits its express contractual entitlement to advise Ms Lattouf of changes to the work to be performed and the hours of work is inconsistent with any implied term that the ABC was required to provide her with a reasonable opportunity to present the *Mornings* program.

447 In *The Contract of Employment* (2<sup>nd</sup> ed, LexisNexis Butterworths, 2019) Mark Irving KC observes at 412 that very little has been said in the authorities which hold that an employer has an implied obligation to provide work about whether the term is implied in law, or in fact, or is simply a question of construction of the promise to employ in that context. Irving suggests in respect of the recognised categories of employment contracts, the better view is that the term is implied in law. In any event, as Irving notes, the judgment of Windeyer J in *Australian Rugby League Ltd v Cross* (1997) 39 IPR 111 at 121 provides support for the view that in public performance cases, the term is implied in law.

448 A term will be excluded where its implication is inconsistent with the express terms of the contract: *Byrne* at 449. A term implied in law is not excluded in the absence of a contrary intention that is clearly expressed by the parties: *Duncombe v Porter* (1953) 90 CLR 295 at 306.

449 The entitlement of the ABC under cl 1 of the Terms of Engagement to advise of “changes” to “the work to be performed” did not confer an entitlement to stipulate that Ms Lattouf was to perform no work. The word “changes” refers to a variation of the work to be performed, not complete removal of any work. To any extent the clause may be ambiguous the principle stated in *Curro* at 343 that ambiguous provisions are readily construed as imposing an obligation to provide real work, must be applied. The ABC’s entitlement to advise of changes to the work to be performed is not inconsistent with an implied obligation to provide Ms Lattouf with work.

450 The expression “hours of work required” is used in contradistinction to “the duration of the engagement”. The preferable construction of the “hours of work required” is as a reference to the times (“hours”) between which she would be required to work. It might arguably also refer to the number of hours she would be required to work in a day or over the duration of the engagement. However, again applying *Curro* at 343, the clause should not be construed as allowing the ABC to provide no hours of work for the remainder of the duration of the contract. Otherwise, it would render redundant the entitlement to change the duration of the contract. The ABC’s contractual entitlement to advise Ms Lattouf of changes to the “the hours of work required” is not

inconsistent with an implied obligation to provide work.

451 I do not understand the ABC to submit its contractual entitlement to advise Ms Lattouf of changes to the “duration of the engagement” is inconsistent with an implied obligation to provide work. The entitlement to change the duration of an engagement is not inconsistent with an obligation to provide work within whatever the duration of the engagement is or is changed to.

452 The ABC points to several other factors which it submits are inconsistent with any obligation to allow Ms Lattouf to present *Mornings*. These include the short nature of the engagement, the limited amount of time she was on air each day, that the contract did not require the ABC to publicise Ms Lattouf’s engagement and her remuneration did not depend on her performing any particular kind of work. In my opinion, these factors are not significant. What is significant is that the contract contemplated that Ms Lattouf would be given a reasonable opportunity to present *Mornings* on each day for the duration of the engagement.

453 In support of its argument that the duration of the engagement was not changed, the ABC points to the fact Ms Lattouf was paid for the remaining two shifts in the normal pay cycle. Mr Oliver-Taylor deposes he does not recall any discussion about whether Ms Lattouf would be paid for the two shifts. Mr Spurway deposes soon after the meeting with Ms Lattouf at about 1.30 pm on Wednesday, 20 December 2023, he spoke to Mr Ahern about Ms Lattouf being paid her full entitlements and Mr Ahern agreed Ms Lattouf should be paid for the remaining two days. I do not accept that any thought was given by the ABC Managers as to whether Ms Lattouf would be paid for the two days until after Ms Lattouf was told she was not required and to leave the premises. That does not affect the question of whether Ms Lattouf’s employment had already been terminated by repudiation of the contract. I agree with Deputy President Boyce’s analysis that since Ms Lattouf provided no service on the last two days, the payment was merely in the nature of an ex-gratia payment.

454 The ABC’s uncommunicated recording of Ms Lattouf as an ongoing employee in its internal systems does not affect an objective analysis of whether the employment relationship was terminated.

455 The merely theoretical possibility that the ABC might have decided to offer Ms Lattouf work in the future under a new contract did not mean the ABC had not brought to an end the employment relationship.

456 I find it was an implied term of the employment contract that the ABC would provide Ms Lattouf with a reasonable opportunity to present *Mornings* to the public on each of the five days from Monday, 18 December to Friday, 22 December 2023. The ABC repudiated the contract by informing Ms Lattouf on Wednesday, 20 December 2023 that she would not be “required” (permitted) to present *Mornings* for the remaining two days and excluding her from the premises. In other words, the ABC discharged her from service. At that point, the employment relationship was terminated by the ABC.

457 The analysis so far proceeds on the basis that it was only the employment relationship, and not the contract of employment, that was terminated. The ABC submits it did not exercise its right to terminate the contract. Clause 13 of the Terms of Engagement provided:

Any engagement may be terminated by either party with one hour’s notice.

If either party gives such notice of termination, the ABC may bring your employment to an end immediately and make a payment to you in lieu of any outstanding period of notice.

458 A reasonable observer would understand that on Wednesday, 20 December 2023, the ABC had determined Ms Lattouf had engaged in misconduct by failing to follow advice and breaching policies and, consequentially, refused to allow Ms Lattouf to present *Mornings* or perform any other work.

459 A reasonable observer would understand the ABC to have been taking disciplinary action against Ms Lattouf because of the misconduct it determined had occurred. Ms Lattouf's usual hours of work were from 6.00 am to 2.36 pm. She was informed of the action taken against her at about 1.30 pm. The ABC was not merely requiring her not to perform work on the following two days. Instead, she was required to cease work immediately and leave the workplace without completing her shift.

460 In these circumstances, the ABC's conduct cannot be regarded as merely changing the duration of the engagement. If the duration was being changed, there would have been no need to inform her that she had engaged in misconduct or require her to cease work immediately and leave the workplace without delay. A reasonable observer would understand the ABC to have exercised its contractual right to give notice of termination and bring an end to Ms Lattouf's employment immediately.

461 I find the ABC "terminated [Ms Lattouf's] employment" within s 772(1) of the FWA.

### **Whether the evidence is consistent with the hypothesis that the ABC was actuated by Ms Lattouf's race or national extraction**

462 The ABC admits Ms Lattouf is of Lebanese, Middle Eastern and Arab race and national extraction.

463 The ABC submits Ms Lattouf has failed to lead evidence consistent with the hypothesis that the ABC was actuated by her race or national extraction, with the consequence that the reverse onus under s 783 of the FWA is not enlivened. The ABC also argues there is no evidence to support the allegation that any termination was motivated to any degree by her race or national extraction.

464 The ABC Managers were aware that Ms Lattouf is of Lebanese Christian background and is the child of Lebanese immigrants. That information was contained in an email sent on Monday, 18 December 2023 by Mr Ahern to Mr Oliver-Taylor, the content of which was passed on to Mr Anderson, Mr Melkman and Mr Latimer. None of that information was provided to Ms Buttrose.

465 The highest Ms Lattouf's case gets is an inconsistency in Mr Oliver-Taylor's evidence. Mr Oliver-Taylor deposes, "I had no actual knowledge about Ms Lattouf's race or national extraction". Mr Oliver-Taylor accepted under cross-examination this aspect of his affidavit was wrong. Ms Lattouf's submissions describe Mr Oliver-Taylor as having told a lie, presumably giving rise to some kind of consciousness of guilt. However, I accept this was a mere failure by Mr Oliver-Taylor to recall being aware of information that was of peripheral relevance at the time

of the relevant events.

466 I do not accept there is evidence consistent with the hypothesis that the decision to terminate Ms Lattouf's employment was for reasons that included her race or national extraction. Accordingly, the ABC does not have any onus of proof under s 783.

467 The onus remains on Ms Lattouf to prove her employment was terminated for reasons including her race or national extraction.

468 The evidence does not support Ms Lattouf's claims that Mr Anderson, Ms Buttrose, Mr Oliver-Taylor or Mr Latimer made or materially contributed to a decision to terminate her employment for reasons that included her race or national extraction. I have no hesitation in accepting the evidence of those witnesses that their actions were not motivated to any extent by Ms Lattouf's race or national extraction.

469 Even if s 783 applied, I would have reached the same conclusion.

### **Who, on behalf of the ABC, made any decision to terminate Ms Lattouf's employment or materially contributed to that decision?**

470 In her closing address, Ms Lattouf submits the decision to terminate her employment was made by Mr Anderson and Mr Oliver-Taylor in the sense they had authority to terminate her employment and exercised that authority, and their decision was materially contributed to by Ms Buttrose and Mr Latimer. The ABC contends Mr Oliver-Taylor was the sole decision maker.

471 Mr Anderson's evidence is that Mr Oliver-Taylor informed him in their telephone call at 1.18 pm on Wednesday, 20 December 2023 that Mr Oliver-Taylor had decided to take Ms Lattouf off air. Mr Anderson deposes the decision was within Mr Oliver-Taylor's sphere of responsibility, and he did not consider it was his role to second guess or approve the decision. Mr Anderson says he understood the purpose of the conversation was for Mr Oliver-Taylor to inform him of the decision, which was a change from the plan of the previous day that she should not be pulled off air at that time. Mr Anderson accepted under cross-examination he had a power of veto over the decision to take Ms Lattouf off air, but maintained he had not made the decision.

472 Mr Oliver-Taylor deposes he formed the view that he should let Mr Anderson know it had been decided that Ms Lattouf should be taken off air. He wanted to make sure Mr Anderson was not "blindsided" by the decision to take her off air since Mr Anderson had informed Ms Buttrose that Ms Lattouf would be staying on air for the whole week.

473 Ms Lattouf submits Mr Oliver-Taylor consulted with Mr Anderson at every step, and had consistently characterised his own views as mere "recommendations", pointing to the following examples:

“I will pass on this note, copy Simon to the MD as our position at this time. He may well hold a different view and we will need to pivot”.

“A couple of steps you could consider taking”.

“I recommend we hold until Friday”.

“I briefed the MD as he had been receiving the complaints and explained that our recommendation was that she had not breached and therefore should stay on air”.

“I am expecting the recommendation to be that we will not continue with her remaining two shifts as a result of this breach”.

474 Ms Lattouf submits Mr Oliver-Taylor similarly consulted Mr Anderson on Wednesday, 20 December 2023 and obtained Mr Anderson’s approval for the decision to take Ms Lattouf off air.

475 I accept that up to Wednesday, 20 December 2023, Mr Oliver-Taylor had been careful to consult with Mr Anderson and to obtain his approval of the proposed course of action. That was unsurprising in circumstances where it was clear Mr Anderson regarded the issue as important and troubling.

476 I consider on Tuesday, 19 December 2023, Mr Oliver-Taylor and Mr Anderson jointly made a decision that Ms Lattouf would remain on air until the end of the week.

477 However, on Wednesday, 20 December 2023, Mr Anderson was at a Christmas lunch with Ms Buttrose from 12.30 pm and Mr Oliver-Taylor was initially unable to contact him by telephone. Mr Oliver-Taylor sent a text message to Mr Anderson at 1.00 pm stating:

...I have no option but to stand her down. Call me if you can, but if not possible, I will action within the hour.

478 The text message indicates Mr Oliver-Taylor wished to consult Mr Anderson, but had decided if he did not hear from Mr Anderson within the hour, he would proceed to take Ms Lattouf off air.

479 Mr Oliver-Taylor then sent an email to Mr Leys and Mr Latimer at 1.04 pm indicating, “I am expecting the recommendation to be that we will not continue with her remaining two shifts as a result of this breach”. At that stage, Mr Oliver-Taylor was still contemplating that Mr Anderson would make the final decision.

480 After Mr Oliver-Taylor had again unsuccessfully tried to call Mr Anderson, his intention changed. He sent a text message to Mr Anderson at 1.17 pm saying, “I’m going to action this now and try and beat [*The Australian*’s] story”. The text message indicates Mr Oliver-Taylor had by then made a decision to take Ms Lattouf off air.

481 Mr Anderson returned Mr Oliver-Taylor’s call a minute later. I find in that call, Mr Oliver-Taylor informed Mr Anderson he had decided to take Ms Lattouf off air.

482 Mr Oliver-Taylor deposes that during the telephone call, Mr Anderson responded by saying “okay” or “alright”. Mr Anderson deposes he said “okay”, or something to that effect, to indicate he had heard and understood the information provided by Mr Oliver-Taylor. I accept Mr Anderson’s explanation and find he was not, by his response, giving Mr Oliver-Taylor permission to proceed.

483 Mr Anderson did not ask Mr Oliver-Taylor about the content of Ms Lattouf’s post during the telephone call. It seems quite unlikely that Mr Anderson would not have done so if he was

being asked to make a decision.

484 I do not accept Mr Oliver-Taylor's evidence that all his attempts to contact Mr Anderson on Wednesday, 20 December 2023 were because he wanted to, "let Mr Anderson know that it had been decided that Ms Lattouf should be taken off air". Mr Oliver-Taylor patently wanted Mr Anderson to make the decision. However, I accept Mr Oliver-Taylor ultimately made the decision and the decision was not made by Mr Anderson.

485 I accept Mr Anderson's evidence that Ms Buttrose decided the complaints should be sent to Mr Oliver-Taylor, "so that he understands what we are fielding here". Ms Buttrose and Mr Anderson proceeded to have the complaints forwarded to Mr Oliver-Taylor, which had the intended effect of making Mr Oliver-Taylor aware of their view that a serious error had been made in employing Ms Lattouf and Mr Oliver-Taylor bore part of the responsibility for that error.

486 In *Qantas Airways Ltd v Transport Workers' Union of Australia* (2023) 278 CLR 571, Steward J observed at [104]:

Corporate decision-making is often the product of many motivations, causes, influences and processes of reasoning. Depending on their level of seniority or function, officers of a company may well emphasise different aspects or factors as to why something is to be done. For example, those in the area of human resources may well have a focus on employment outcomes. But the task is the identification of the actual, immediate or operative reason or reasons for taking adverse action. That is a question of fact. In a given case, it may well require one to reject as a reason for taking adverse action the musings or thoughts of employees that ultimately play no part in the ultimate decision-making process. It may also require one to differentiate between the actual reasons for taking adverse action, and factors or issues which may have contributed in only some causal way in the lead up to the occurrence of such conduct. Perram J explained this well in *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150, when his Honour observed that factoring something into one's consideration or taking something into account does not necessarily make it a reason for taking adverse action. Perram J said at [91]:

"[T]here is a factual distinction between factoring something into one's consideration of a matter and making a decision about the matter itself. To give an example: in reaching the conclusions I have reached on this appeal I have taken the CFMEU's submissions into account and they have formed an important element in my decision-making processes. However, as will be apparent, the fact that I have had regard to them does not entail that they may therefore be described as constituting a part of my subjective reasons for decision. Of course, if by reason one means 'cause' then one gets a different result. On that view of things, [the employee's] prior record was causally connected to the decision to transfer him to a different shift. That approach to the identification of the reason in question is prevented, however, by CFMEU v BHP. The inquiry thrown up by s 340 is not one concerned with causation but, rather, the subjective reasons for action of the decision-maker."

487 I consider that the pressure applied by Mr Anderson and Ms Buttrose to Mr Oliver-Taylor by forwarding the complaints falls within the category of, “contributed in only some causal way in the lead up to the occurrence of such conduct”. That pressure contributed to Mr Oliver-Taylor’s view that he needed to act quickly after becoming aware of Ms Lattouf’s HRW Post. In the absence of that pressure, he may have acted with less haste and with more careful consideration. The pressure felt by Mr Oliver-Taylor helps to understand the context of his decision-making, but does not provide one of the “actual reasons” for the decision. I find that the pressure exerted by Mr Anderson and Ms Buttrose did not materially contribute to the decision in the sense described in cases such as *Australian Red Cross*.

488 However, I find Mr Anderson made a material contribution to Mr Oliver-Taylor’s decision in another way. That contribution was by Mr Anderson conveying his opinion that Ms Lattouf held anti-Semitic views. Mr Anderson’s opinion was then adopted by Mr Oliver-Taylor. I will discuss this issue later in these reasons.

489 A consensus was reached between Mr Oliver-Taylor and Mr Latimer and the other participants in the Teams Meeting on Wednesday, 20 December 2023 that Ms Lattouf should be taken off air. I find Mr Oliver-Taylor was influenced in reaching his decision by Mr Latimer’s view. I am satisfied that a substantial and operative reason for Mr Latimer’s view was that Ms Lattouf had expressed in her HRW Post a political opinion opposing the Israeli military campaign in Gaza. However, I am satisfied Mr Latimer’s view that Ms Lattouf should be taken off air was not contributed to by any attribution to her of holding such an opinion. I will later discuss the significance of the distinction.

### **Whether the ABC has proved that the reasons for termination did not include any of Ms Lattouf’s pleaded political opinions**

490 The ABC pleads in its Consolidated Amended Defence that the reasons for Mr Oliver-Taylor’s decision not to require Ms Lattouf to perform any work for her two remaining shifts were:

his view that Ms Lattouf’s activity on her Instagram account on Tuesday, 19 December 2023 meant she may have breached the ABC’s policies or guidelines;

his view that Ms Lattouf had not complied with a direction given to her in relation to her use of social media; and

his loss of trust and confidence in Ms Lattouf to present live radio in accordance with directions issued to her.

491 I find no direction or instruction in relation to Ms Lattouf’s use of social media was ever given. Ms Green told Ms Lattouf it, “would be best if you don’t post anything related to the Israel/Palestine situation on social media whilst you’re with us”. Ms Lattouf responded it was unfair to ask her not to tweet or post at all and asked if she could stick to completely factual information from reputable sources like Amnesty International. Ms Green then said that, provided it was a fact-based and verified source, she was sure it would be fine, but it might be better not to post anything that could be “considered controversial” or “considered unbalanced” while she was working for the ABC.

492 On Tuesday, 19 December 2023, Ms Green had another conversation with Ms Lattouf in which she gave similar advice. In particular, she said, “it would be okay if you [Ms Lattouf] reposted from a verified source, but I think it would be better if you held off whilst you’re with us”.

493 That Ms Lattouf was not in fact given a direction in relation to her use of social media does not resolve the case against the ABC. It is necessary to examine what Mr Oliver-Taylor’s actual reasons for the decision to take Ms Lattouf off air were, including whether his evidence that he was not motivated to any degree by any political opinions held by Ms Lattouf ought to be accepted.

494 Ms Lattouf has pleaded the ABC terminated her employment because she “held” the following “political opinions”:

- (a) opposing the Israeli military campaign in Gaza;
- (b) supporting Palestinians’ human rights;
- (c) questioning the authenticity of footage of demonstrators chanting antisemitic chants at the Sydney Opera House; and
- (d) that media organisations should report about the conflict between Israel and Palestinians accurately and impartially.

495 The ABC admits the first of these allegations pleads a “political opinion”, but submits the remainder do not have a “political” character, and also that the third does not allege any “opinion”. I have rejected this aspect of the ABC’s submissions.

496 I find Ms Lattouf in fact held such political opinions. The ABC has not argued there is no evidence consistent with the hypothesis that any decision to terminate Ms Lattouf’s employment was for reasons that included she held such opinions.

497 The ABC has the onus, under s 783 of the FWA, of proving that its reasons for the termination did not include that Ms Lattouf held any of the political opinions she has pleaded.

498 Ms Lattouf submits Mr Oliver-Taylor’s evidence concerning his reasons for his decision to take Ms Lattouf off air should be rejected. She advances a theory that, once alerted to Ms Lattouf’s political opinions, the ABC Managers determined she ought to never have been employed by the ABC and sought to be rid of her, and in due course they achieved their objective. That theory asserts, in effect, that it was the intention of the ABC Managers to get rid of Ms Lattouf all along because she held the pleaded political opinions and her HRW Post then provided the excuse to do so. I will consider the theory by first examining the events on Monday, 18 December and Tuesday, 19 December 2023.

### ***Whether it was the intention of the ABC Managers all along to get rid of Ms Lattouf because of her political opinions***

499 After Ms Lattouf had presented her first *Mornings* program on Monday, 18 December

2023, the ABC began receiving complaints about her employment from members of the public. The complaints appeared to be a campaign to have Ms Lattouf removed from her employment. The complaints asserted she was anti-Semitic and anti-Israel and had expressed such sentiments in her social media posts. The complaints accused the ABC of breaching its obligation of impartiality by employing Ms Lattouf and giving her a platform.

500 The complaints caused Mr Anderson, Ms Buttrose and Mr Oliver-Taylor great consternation. They believed Ms Lattouf had publicly expressed views that were not impartial about the Israel/Gaza war, a topic about which there was a deep division of public opinion. They were concerned Ms Lattouf's employment by the ABC could damage public perception of the impartiality of the ABC.

501 Mr Anderson deputed Mr Oliver-Taylor to look into the complaints. Mr Oliver-Taylor sent an email at 1.49 pm on Monday, 18 December 2023 to Mr Ahern, copied to Mr Latimer and Mr Melkman, saying, relevantly, "can we ensure that Antoinette is not and has not been posting anything that would suggest she is not impartial". Mr Oliver-Taylor deposes his expectation was Mr Ahern would understand he was required to take steps to ensure Ms Lattouf would not post anything that might suggest she was not impartial in relation to the Israel/Gaza war; and he subsequently assumed such an instruction or direction had been given.

502 Mr Ahern asked Ms Green to speak to Ms Lattouf about her social media, and Ms Green subsequently spoke to Ms Lattouf, giving her the advice described above.

503 Mr Ahern advised Mr Oliver-Taylor in an email at 3.32 pm on Monday, 18 December 2023 that Ms Lattouf, "has not, as far as we know, expressed personal views that would position her as biased in the current conflict". He noted she had "done reporting" that the demonstrators' chants of "gas the Jews" were unverified, but that her reporting, "appears balanced and journalistically sound". Later, he confirmed Ms Lattouf would not be covering the Israel/Gaza war and it was not within the *Mornings* brief to talk about that topic.

504 That evening, Mr Anderson proceeded to examine Ms Lattouf's social media posts and sent a text message to Mr Oliver-Taylor at 8.44 pm, saying:

Also, I think we have an Antoinette issue. Her socials are full of ant-Semitic [sic] hatred. I'll send you a link. I'm not sure we can have someone on air that suggests that Hamas should return to their ethnic cleansing in Gaza and move onto the West Bank

505 Mr Anderson evidently thought Ms Lattouf was suggesting Hamas should return to their ethnic cleansing in Gaza and then move on to the West Bank. Mr Anderson was mistaken in his interpretation of the post, but it does demonstrate he attributed to Ms Lattouf anti-Semitic views and questioned how someone with those views could remain on air at the ABC.

506 Mr Oliver-Taylor responded to Mr Anderson at 8.49 pm, saying, "Copy, We'll check socials now. And agree", indicating he shared the views articulated by Mr Anderson.

507 At 11.10 am on Tuesday, 19 December 2023, Mr Melkman sent an email to Mr Ahern, Mr Latimer and Mr Oliver-Taylor stating he had not identified any breaches of the Social Media Guidelines. He considered that, for the time being, there was no justification for pulling

Ms Lattouf off air.

508 At 11.15 am, Mr Oliver-Taylor replied saying Mr Melkman's advice made sense and he would leave it to Mr Ahern to take "whatever proactive action" was considered appropriate to manage and assist Ms Lattouf.

509 Mr Oliver-Taylor sent an email to Mr Anderson at 11.19 am on Tuesday, 19 December 2023 saying, "as Antoinette's contract finishes on Friday, we do not believe we should pull her off air at this time, mainly as she has not breached the Personal Use of Social Media Guidelines that we are aware of".

510 Mr Anderson deposes he agreed with and accepted Mr Oliver-Taylor's advice, which he understood meant Mr Oliver-Taylor had decided that Ms Lattouf would continue to present *Mornings* until the end of the week.

511 During Mr Anderson's meeting with Ms Buttrose that morning, she asked, "How on earth did it happen that an activist has ended up hosting ABC radio?". Mr Anderson said an assessment had been made that Ms Lattouf had not done anything wrong, that she was a casual employee whose engagement would come to an end on Friday, and it was decided she would stay on air until then.

512 Mr Ahern sent an email to Mr Latimer, Mr Melkman and Mr Oliver-Taylor at 1.16 pm on Tuesday, 19 December 2023. The email, which is a significant one, included the following passage:

I can confirm that our Content Director Elizabeth has reiterated to Antoinette the importance of not talking about Israel-Gaza in her shows this week. She has also suggested that Antoinette may be wise not to post anything on her socials this week.

513 I accept that, in context, the words "anything on her socials this week" could only have referred to anything concerning the Israel/Gaza war.

514 Ms Buttrose sent an email to Mr Anderson at 8.49 pm on Tuesday, 19 December 2023 asking, "Has Antoinette been replaced. I am over getting emails about her". Mr Anderson replied at 9.26 pm, "Antoinette will finish up on Friday. It's a managed exit given the situation".

515 Ms Buttrose responded at 9.59 pm, saying:

I have a whole clutch more of complaints. Why can't she come down with flu? Or Covid. Or a stomach upset? We owe her nothing, we are coping criticism because she wasn't honest when she was appointed.

Managed exit. Really.

...

We should be in damage control not managed exits David.

516 The email reflects Ms Buttrose's desire for Ms Lattouf to be taken off air immediately.

517 Mr Anderson forwarded Ms Buttrose's email to Mr Oliver-Taylor, who replied at 10.12 pm, saying:

The blow back will be phenomenal. I recommend we hold until Friday. No comment on the war, it's not related, no b[r]each of our own editorial protocols or the act. It is not perfect, but it's the right course of action at this point.

518 At 10.42 pm, Mr Anderson responded to Mr Oliver-Taylor, saying, "I know that – hold the position, just sharing the pain".

519 The following morning, at 10.58 am on Wednesday, 20 December 2023, Mr Anderson responded to Ms Buttrose's email of the night before, saying:

We are absolutely in damage control.

Local Radio management, specifically Steve Ahern, has put us in an unacceptable position. Mr Ahern made a negligent, error of judgement by employing Ms Lattouf without assessing her prior media and social media activity. I am taking action through Chris Oliver-Taylor alleging serious misconduct resulting in reputational damage to the ABC as a result of his actions.

We have weighed up the consequences of prematurely pulling Antoinette Lattouf off air, versus managing this until Friday as per her contract. We have concluded that the best possible outcome from here is to manage this such that Ms Lattouf does not editorial[ly] engage in the Middle East conflict while on air for the remainder of her contract.

This protects the ABC (and ou[r] staff) from the consequence of removing her, without her having breached any of our standards this week, when her position on the matter was known by Mr Ahern when Ms Lattouf was engaged. If we do remove her, there will be claims of doing so without cause given her position on the Middle East was widely known prior to her engagement, we have caved to pro-Israeli lobbying, and she hasn't actually breached impartiality this week. Again, we have been placed in an untenable position.

We have directed Ms Lattouf and the produce[r]s that the topic of the Middle East conflict is off limits, there is a lengthy off-air delay in place, and we will use the dump button if that direction is disobeyed. We have also instructed producers not to allow callers through who wish to discuss that topic. To date, that direction has been followed.

There is without doubt already damage caused by her engagement. I expect the WhatsApp group email campaign where we are receiving emails regarding her 'appointment' to continue until we reveal on Friday that Ms Lattouf will not be

returning next week.

...

520 Ms Buttrose replied to Mr Anderson at 11.00 am, saying, “Thanks for the explanation, David – it must be Christmas”. Her reply indicates acquiescence to the course indicated in Mr Anderson’s email.

521 Mr Anderson and Mr Oliver-Taylor were acutely aware of the ABC’s dilemma. They considered Ms Lattouf’s employment to have been a grave mistake that had exposed the ABC to criticism. They wanted her removed. However, they also understood if they took Ms Lattouf off air, the ABC would appear to have caved-in to the pro-Israel campaigners and would be exposed to further criticism from another front. They sought to resolve the dilemma by keeping Ms Lattouf on air until the end of the week and putting in place strategies to mitigate the risk involved in that course.

522 By the morning of Wednesday, 20 December 2023, a decision had been made that Ms Lattouf would remain on air until she finished her engagement on the Friday. Ms Buttrose had acquiesced.

523 I reject Ms Lattouf’s submission that it was the intention of the ABC Managers all along to get rid of her. If Ms Lattouf had not made any further social media posts about the Israel/Gaza war, she would have remained in her employment with the ABC for the remainder of the week.

### ***Events leading to the termination of Ms Lattouf’s employment***

524 Mr Oliver-Taylor remained acutely aware that the ABC’s Chair and Managing Director were extremely unhappy with the decision to engage Ms Lattouf without having done adequate background checks. Mr Oliver-Taylor understood he was being attributed with at least some of the blame and he apologised repeatedly.

525 Under cross-examination, Mr Oliver-Taylor agreed the complaints had been, “dumped in [his] lap”, and he was, “experiencing some real stress”. In response to the proposition that he was, “under a great deal of pressure”, Mr Oliver-Taylor responded, “I was getting very confused and concerned as to what we should do”.

526 Mr Oliver-Taylor explained in his oral evidence that on the morning of Wednesday, 20 December 2023:

The position there was that there was a clear view from others within the ABC, senior members of the ABC, that we potentially had put on air, on live radio, someone who had published views that would then risk the impartiality of the ABC. But I had no evidence or reason at this point in time to remove Ms Lattouf from air, therefore the situation continues and is untenable.

...

I think as per our previous discussion, the pressure was now building, the concerns

were rising. We are trying to build a scaffold around Ms Lattouf to protect her and the show about not posting and calling and – call-ins. At that moment in time, that was holding, but the position was becoming harder and harder, I felt.

....

Complaints were coming in to me directly from the chair's office predominantly at that time. I felt there was more that I wasn't aware of, more evidence that was coming in, more concerns were coming in. How long could – was it reasonable for the ABC to host – sorry, for the ABC to have a presenter live on air holding views which were potentially impartial, how long could we hold that position?

....

So there was pressure there, and I feel due diligence was not done as it should have been. There was pressure from above. I accept that.

527 It may be seen Mr Oliver-Taylor acknowledged that “the position was becoming harder and harder”, and he had concerns about, “how long we could hold that position”. The “position” he was referring to was keeping Ms Lattouf on air until the end of her engagement.

528 Mr Oliver-Taylor’s concerns about the ABC holding the position must have been substantially amplified by the receipt of Mr Latimer’s email at 12.19 pm on Wednesday, 20 December 2023, saying:

I have just seen an Insta story posts by Antoinette regarding Israel-Gaza posted 18-hours ago. The clear instructions were to direct Antoinette not to post to socials for the rest of this week.

529 The previous day, Ms Lattouf had made the HRW Post. To reiterate, her Instagram story was a repost of a HRW video report entitled, “The Israeli government is using starvation of civilians as a weapon of war in Gaza”, to which Ms Lattouf had added a caption, “HRW reporting starvation as a tool of war”. The same HRW report had already been aired by the ABC, but there is no evidence Mr Oliver-Taylor knew of that fact.

530 Mr Latimer had also seen a post where Ms Lattouf had said, *inter alia*, “The intention of tabloid media campaigns which target individuals with a platform is to get us to shut up”, but that post does not seem to have played any significant role in the events that followed.

531 It may be noted Mr Latimer did not purport to suggest instructions were *given to* Ms Lattouf not to post to social media: he said only that instructions were given to *someone* to direct Ms Lattouf not to post to social media.

532 Mr Oliver-Taylor viewed screenshots of Ms Lattouf’s HRW Post. He does not suggest he viewed the HRW video itself.

533 The pressure on Mr Oliver-Taylor was also amplified by the email from Sophie Elsworth of

*The Australian* forwarded to him at 12.42 pm, asking a series of questions and asking for a response by 1.30 pm. It was apparent *The Australian* intended to publish a story about the complaints regarding Ms Lattouf's social media posts and her ongoing employment with the ABC.

534 Mr Oliver-Taylor indicated in an email that if Ms Lattouf had to be stood down, it should be done before the story ran. Mr Oliver-Taylor later indicated that he wanted to "beat the story", demonstrating extraordinary sensitivity to the prospect of adverse comment by *The Australian*.

535 After Mr Oliver-Taylor received the email from Mr Latimer at 12.19 pm on Wednesday, 20 December 2023, events unfolded very quickly. It took less than an hour for Mr Oliver-Taylor to revoke the more carefully considered decision to leave Ms Lattouf on air until the end of the week. That haste was, in my view, substantially contributed to by the pressure Mr Oliver-Taylor was under, his inability to reach Mr Anderson, who was uncontactable for a crucial hour, and the deadline set by *The Australian* for a response. Mr Oliver-Taylor's haste led him into action that might have benefitted from more sober reflection.

536 Mr Oliver-Taylor deposes that Mr Latimer suggested to him during a telephone call that Ms Lattouf's Instagram story could be considered a breach of the ABC's Editorial Guidelines, or a breach of a direction not to post anything while she was presenting *Mornings*, or both. Mr Oliver-Taylor asked Mr Latimer to consider whether Ms Lattouf's conduct did in fact amount to any such breaches, and to arrange a meeting to discuss the next steps.

537 The Teams Meeting then took place, commencing at 12.34 pm when Mr Latimer dialled in Mr Ahern and Mr Melkman. Ms Green joined the meeting for six minutes before leaving. Mr Oliver-Taylor joined after Ms Green left. The meeting ended at 12.58 pm. It is relevant to note Ms Green and Mr Oliver-Taylor were never in the Teams Meeting at the same time.

538 There are two issues concerning the Teams Meeting. The first is whether Ms Green told Mr Latimer, Mr Ahern and Mr Melkman that she had not given a direction to Ms Lattouf and had merely given advice. The second is whether the information given by Ms Green was conveyed to Mr Oliver-Taylor during the Teams Meeting.

539 Ms Green's evidence was that she told Mr Latimer, Mr Ahern and Mr Melkman she had not given any "direction" to Ms Lattouf and that she had merely, "spoken with" or "had a word with" Ms Lattouf and "advised her against" posting on social media while she was presenting *Mornings*. Ms Green told the group she did not consider her conversation with Ms Lattouf about posting on social media to have been a "direction". In summary, Ms Green made it explicitly clear she had not given any direction to Ms Lattouf and had merely provided advice.

540 I have rejected the ABC's submission that I ought to reject Ms Green's evidence about what she said in the Teams Meeting. I have no doubt about the reliability and accuracy of Ms Green's evidence. Her evidence is consistent with her file note of the meeting. It is also consistent with the fact that she had not in fact given Ms Lattouf any *direction*, confirmed by Mr Ahern's emails of Tuesday, 19 December at 1.16 pm and Wednesday, 20 December 2023 at 2.57 pm and by Ms Lattouf's evidence. It is consistent with the evidence that on the afternoon of Wednesday, 20 December 2023, Ms Green told Ms Lattouf that she, "did try to stop this from happening".

541 Ms Green's evidence as to what she said in the Teams Meeting is not contradicted by

Mr Latimer and Mr Melkman. Mr Ahern's evidence swayed between consistency and inconsistency with Ms Green's evidence.

### ***Mr Ahern's evidence about the Teams Meeting***

542 Mr Ahern's evidence about the Teams Meeting is as follows:

I don't remember the exact words used, but my recollection is that during the Teams Meeting:

(a) There was discussion about [Ms Lattouf's] posts...

(b) There was discussion about the direction that Ms Lattouf had been given in relation to posting on social media. I cannot remember the precise content of the discussion about that direction. In particular, I cannot remember with precision what was said about the content of the direction. However, I am confident in my recollection that neither I nor anyone else said anything that differed from how Mr Latimer described the direction in [Mr Latimer's email sent at 12.19 pm]. My recollection is that the discussion in the Teams Meeting proceeded and concluded on the basis that Ms Lattouf had been given a direction to the effect recorded by Mr Latimer. That was my view about the content of the direction. I have a general recollection that the word "controversial" may have been used in connection with the content of the direction.

(c) There was discussion about whether Ms Lattouf's conduct in making the post...was a breach of the direction. I cannot remember the precise content of that discussion. My recollection is that there was consensus among all of the participants in the Teams Meeting that Ms Lattouf's conduct in making the post...was a breach of the direction. That was my view. I expressed that view when I was asked.

(d) There was discussion about what should be done as a consequence of Ms Lattouf's breach of the direction. I knew that, of the participants in the Teams Meeting, only Mr Oliver-Taylor had authority to make a decision about that matter. My recollection is that:

i. There was a discussion of the proposal that Ms Lattouf should be taken off air, such that she would not present the remaining two programmes of *Sydney Mornings* for that week.

ii. That idea originated with Mr Oliver-Taylor, who then asked each participant for their view. Mr Oliver-Taylor said something to the effect that he could not, or did not, trust Ms Lattouf not to do or say something on air that could undermine the ABC's impartiality. Otherwise, I cannot recall precisely what Mr Oliver-Taylor said, or the words that were used when [sic] by the other participants in expressing their views. However, I am confident in my recollection that everyone said something that aligned with Mr Oliver-Taylor's

idea. For my part, when I was asked for my view about this, I said something to the effect, *'I guess we will have to take her off air.'*

(e) I left the Teams Meeting with the understanding that there would be further discussion between Mr Oliver-Taylor, Mr Melkman and Mr Latimer, and that someone would then then [sic] let me know what action to proceed with.

543 Mr Ahern's affidavit strangely omits any reference to Ms Green being present at the Teams Meeting. Under cross-examination, Mr Ahern admitted that Ms Green was present. Mr Ahern denied Ms Green said she had not given a direction to Ms Lattouf, saying that would be at odds with what Ms Green had been telling him, so he would remember if she had said that. However, in his email sent the previous day at 1.16 pm, Mr Ahern had stated Ms Green, "suggested that Antoinette may be wise not to post anything on her socials this week". Mr Ahern confirmed, under cross-examination, he understood there is "a world of difference" between a "suggestion" that Ms Lattouf may be wise not to post and a "direction" that she was not to post.

544 The following exchange took place during Mr Ahern's cross-examination:

Can I suggest to you that Ms Green made very clear to you, Mr Melkman and Mr Latimer while she was in the meeting that she had never given Ms Lattouf a direction not to post on social media? ---Well, from what I recall, she explained what she had said to Antoinette. And that seemed to me like very clear guidance not to post on social media and not to say anything impartial.

545 That was an admission by Mr Ahern that Ms Green had explained in the Teams Meeting she had given "guidance" to Ms Lattouf. That is consistent with Ms Green's evidence that she had informed the Teams Meeting participants she had given advice, not a direction.

546 Under cross-examination, Mr Ahern was taken to his diary notes. Mr Ahern's evidence was that he prepared most of the notes at about 1.20 pm (after the Teams Meeting) for use in his 1.30 pm meeting with Ms Lattouf. Mr Ahern then made some annotations after the meeting with Ms Lattouf to reflect what had been said. Mr Ahern's notes included, "Eliz [Ms Green] advised you [Ms Lattouf] not to post anything perceived as controv [controversial]". The notes are consistent with Ms Green having said during the Teams Meeting that she had not given any direction and had merely given advice to Ms Lattouf.

547 Mr Ahern sent an email to Mr Latimer, Mr Melkman and Mr Oliver-Taylor at 2.57 pm on Wednesday, 20 December 2023 confirming he had informed Ms Lattouf at about 1.30 pm that she was not required to present the last two *Mornings* programs. The email was, of course, sent after the Teams Meeting. Mr Ahern stated he had informed Ms Lattouf that, "Elizabeth advised you not to post anything that could be perceived as controversial on your socials, while you are on air with us this week".

548 It is apparent from Mr Ahern's email that his understanding after the Teams Meeting was that Ms Green had merely given advice to Ms Lattouf, not a direction. The email is an important one.

549 I reject Mr Ahern's evidence that Ms Green did not say in the Teams Meeting she had not given a direction to Ms Lattouf.

550 Mr Ahern agreed under cross-examination if Ms Green had said in the Teams Meeting that she had not given a direction to Ms Lattouf, it would be “inconceivable” that this would not have been communicated to Mr Oliver-Taylor. I accept that aspect of Mr Ahern’s evidence, which is consistent with common sense and logic.

### ***Mr Latimer’s evidence about the Teams Meeting***

551 Mr Latimer’s evidence about the Teams Meeting is as follows:

Soon after I received the email from Mr Oliver-Taylor at 12.23 pm...I attended a meeting with Mr Ahern, Mr Melkman and Mr Oliver-Taylor. The meeting took place by way of video-conference using the Microsoft Teams software. I recall Elizabeth Green, Content Director, was invited to join the meeting but I cannot now recall whether she, in fact, attended.

To the best of my recollection:

(a) at the beginning of the meeting, there was some frustration expressed by Mr Oliver-Taylor and me towards Mr Ahern, given that I had asked Mr Ahern to make sure that Ms Lattouf be directed not to post anything on social media but had still done so. I recall asking Mr Ahern why Ms Lattouf had posted on social media when she had been asked not to do so;

(b) Mr Ahern confirmed that Ms Lattouf had been told not to post anything on social media and I recall that he was unable to provide an explanation at the time as to why she had done so;

(c) we looked at the nature of the Instagram post, being that it clearly related to the Israel-Gaza conflict...I shared the view that it may compromise the ABC’s impartiality to have Ms Lattouf on air in circumstances where she shared content on social media that expressed a partisan view on the Israel-Gaza war. There were a number of posts we discussed in the meeting, including the [HRW] post...as well as 2 or 3 other posts that had been shared with me (...noting that I cannot now locate these messages);

(d) we discussed that Ms Lattouf had failed to follow a direction given to her;

(e) Mr Melkman spoke about whether Ms Lattouf had breached the ABC’s editorial policies, but I otherwise do not recall Mr Melkman speaking much during the call;

(f) we discussed what should be done with Ms Lattouf, including whether she should be taken off air. I recall that everyone on the call was asked what they thought about taking Ms Lattouf off air. I recall saying that I did not have any objection to that being done; and

(g) we reached a consensus as a group that Ms Lattouf would be told that she would not complete the rest of her shifts on-air for week [sic], and would be taken off air (Decision). In particular, I recall Mr Oliver-Taylor using words to the effect of: “*does anybody disagree with the course of action outlined*”. In response to this question, I recall that none of the attendees at the meeting objected to the Decision.

I recall feeling comfortable that taking Ms Lattouf off air was the right course of action.

My sole reason for supporting the Decision was my view that Ms Lattouf’s conduct in making the posts referred to in paragraphs 28 and 30 was in breach of a direction that I understood had been given to her in accordance with my instructions.

(Emphasis in original.)

552 Mr Latimer’s evidence is that he cannot recall whether Ms Green attended the meeting. A necessary inference is he cannot recall what Ms Green said at the meeting. I find the inability of Mr Latimer to recall Ms Green even being present to be implausible in view of his apparent recollection of the discussions between the other participants. Mr Latimer’s apparent inability to recall Ms Green’s presence, when she was undoubtedly there, means he cannot contradict her account of what she said. Further, even if it were accepted that he genuinely cannot recall Ms Green being present, his faulty memory would make his recollection of what was said during the meeting unreliable.

553 There are other troubling aspects of Mr Latimer’s evidence.

554 Mr Latimer gave evidence that on the morning of Tuesday, 19 December 2023, he told Mr Ahern, “You are to direct Antoinette Lattouf not to post anything on social media”. At 1.16 pm on the same day, Mr Ahern sent his email saying that Ms Green had, “suggested that Antoinette may be wise not to post anything on her socials this week”. Mr Latimer deposes when he read Mr Ahern’s email, he was, “satisfied that Ms Lattouf had been given a direction in accordance with the instruction I had given to Mr Ahern”. Mr Latimer deposes that Mr Ahern had a “gentle style of communicating”, so the language Mr Ahern used in his email did not suggest to Mr Latimer that his direction had not been followed, and he was not scrutinising the precise words Mr Ahern used in the email. Mr Latimer deposes, “I read his email as conveying that he had actioned my request”. Under cross-examination, Mr Latimer said the email had confirmed in his mind that the direction had been given.

555 I do not accept Mr Latimer’s evidence that when he read Mr Ahern’s email, he was satisfied Ms Lattouf had been given a direction not to post anything on social media. The email was quite inconsistent with any direction having been given to Ms Lattouf. It is not plausible that Mr Latimer, even on a brief reading of the email, could genuinely have thought a direction had been given to Ms Lattouf. In any event, any notion that any direction had been given was firmly and directly disabused by Ms Green during the Teams Meeting.

556 Mr Latimer was asked about Mr Ahern’s email of 2.57 pm on Wednesday, 20 December 2023, in which Mr Ahern recounted he had told Ms Lattouf that Ms Green had, “advised you not to post anything that could be perceived as controversial on your socials”. Mr Latimer’s evidence was that even after reading that email he was, “very confident that it [a direction] had been

conveyed" to Ms Lattouf. Mr Latimer failed to give a plausible explanation for his confidence in the face of the contradictory statement in Mr Ahern's email. I consider Mr Latimer's evidence that even after the Teams Meeting he believed a direction had been given to Ms Lattouf to be implausible.

### ***Mr Melkman's evidence about the Teams Meeting***

557 Mr Melkman's evidence about the Teams Meeting is:

- (a) we discussed what action should be taken now that Ms Lattouf had made social media posts about the Israel-Gaza war. Where I refer to social media "posts" here, I am referring to several different posts made by Ms Lattouf on her Instagram over one or several "stories";
- (b) one of the actions that was discussed was taking Ms Lattouf off air;
- (c) I understood from what was being discussed that there were two main issues in terms of possible reasons for taking Ms Lattouf off-air:
  - i. that she had possibly breached the [Personal Use of Social Media] Guidelines by posting what she had posted; and
  - ii. that she had been issued a direction and had contravened that;
- (d) I recall there was some discussion about the content of the direction that had been given to Ms Lattouf. However, I understood that it was either a direction not to post on this particular issue (the Israel-Gaza war) or a direction not to post on any "controversial" matters during the week she was on air. I understood that, in either case, Ms Lattouf had not followed the direction;
- (e) at one point, Ms Green joined the call. Either Mr Latimer or Mr Ahern (although I cannot now recall who) asked Ms Green to confirm the nature of what she had told Ms Lattouf about posting on social media. I do not now recall what Ms Green said about what she had said to Ms Lattouf;
- (f) Mr Oliver-Taylor asked me whether I was comfortable with taking Ms Lattouf off-air, or whether I had any objections. I said that I did not have any objections;
- (g) Mr Oliver-Taylor may have asked Mr Latimer and Mr Ahern whether they had any objections, but I cannot now recall that.

...

I did not raise any objection when asked, because I thought it was not an unreasonable conclusion to draw...

(Emphasis added.)

558 Mr Melkman's evidence was that he understood a direction had been given to Ms Lattouf either not to post about the Israel/Gaza war, or not to post on any controversial matters, and she had not followed the direction. Mr Melkman recalls that Ms Green was asked to confirm the nature of what she had told Ms Lattouf about posting on social media. His evidence was, "the purpose of her [Ms Green] having been brought into the call, was to ask her to clarify that". However, Mr Melkman asserts he now does not recall Ms Green's answer.

559 Mr Melkman indicates the reason for the Teams Meeting was to consider what action should be taken about Ms Lattouf having posted about the Israel/Gaza war. The question Ms Green was asked was seemingly critical to whether Ms Lattouf ought to be taken off air. It seems quite improbable that Mr Melkman would remember the question asked yet forget such a crucial answer. That is particularly so when he does profess to remember various other aspects of what was said during the Teams Meeting. I find Mr Melkman's asserted lack of recollection of Ms Green's answer to be implausible.

### ***Mr Oliver-Taylor's evidence about the Teams Meeting***

560 Mr Oliver-Taylor deposes:

At some time before or during the Teams Meeting I looked at screenshots of the Instagram story posts...but I can no longer recall when I did so, or by what means it was made available to me.

Early in the Teams Meeting, there was discussion about whether the making of the Instagram story posts...gave rise to a breach by Ms Lattouf of the ABC's policies in relation to impartiality. As to this question, I formed a view that Ms Lattouf's conduct had breached the Personal Use of Social Media Guidelines. My recollection is that there was not a consensus about this question in the Teams Meeting.

The discussion then turned to the question of whether Ms Lattouf's conduct in making the posts...involved a breach of a direction given to her by the ABC. In this regard, my view was that Ms Lattouf had been directed not to post anything in relation to the Israel-Gaza war during the week of her engagement.

As to this, I said words to the effect of, '*In my view, Antoinette was directed not to post anything about the Israel-Gaza war this week, and she has clearly breached that direction*'.

I asked each person in the Teams Meeting whether they agreed with my view, and each person said that they did so.

The discussion then turned to what should be done as a consequence of that the [sic] view that Ms Lattouf had breached a direction not to post anything about the Israel-Gaza war. Two options were discussed:

- (a) leave Ms Lattouf on air for the remainder of the week; or
- (b) take Ms Lattouf off air, such that she would not present *Sydney Mornings* on Thursday, 21 December 2023 or Friday, 22 December 2023.

After both options had been discussed, I said words to the effect of, '*I consider that taking Ms Lattouf off air is the best course of action in the circumstances.*'

Again, I asked each person in the Teams Meeting whether they agreed with my view, and each person said that they did so.

I specifically remember asking Mr Ahern a question to the effect of: '*Steve, are you comfortable after reviewing all the information that we need to take her off-air?*' He replied with words to the effect of, '*I am comfortable taking her off air.*'

I also specifically remember asking Mr Ahern whether he had '*checked the contract*', and that he said that he had done so.

Having considered the contributions of the other participants in the Teams Meeting, I made the decision that Ms Lattouf should be taken off air, such that she would not present *Sydney Mornings* on Thursday, 21 December 2023 or Friday, 22 December 2023.

(Emphasis in original.)

#### 561 Mr Oliver-Taylor also deposes:

In making that decision, I had the following six considerations in mind, and was motivated only by those considerations. First, the view that Ms Lattouf had not complied with a direction not to post anything about the Israel-Gaza war. Second, as a consequence of the view that she had failed to comply with that direction, I did not have confidence that Ms Lattouf would not say something on air that could reasonably be perceived as not being impartial in relation to the Israel-Gaza war. Third, my view was that she had contravened the Personal Use of Social Media Guidelines. Fourth, my concern that Mr Ahern did not have control of the situation, which exacerbated my lack of confidence in Ms Lattouf. Fifth, my consciousness that, at that time, issues pertaining to the Israel-Gaza war were highly contentious. Sixth, I considered that the ABC was not obliged to put anyone on air; in other words, my view was it was always within the discretion of the ABC to decide that a presenter or programme would not be aired. I considered that the first five considerations that I have identified in this paragraph justified the exercise of that discretion in this case.

I did not consider, or in any way take into account, anything that I knew about the fact or content of any political opinions that Ms Lattouf had or may have had, or her race or national extraction (including that Ms Lattouf has a Lebanese and/or Arab

and/or Middle Eastern heritage and that she is a descendant of foreign immigrants).

None of those matters were reasons for the decision...

562 Under cross-examination, Mr Oliver-Taylor denied he was told by Mr Ahern, Mr Latimer or Mr Melkman during the Teams Meeting that Ms Green said she had not given any direction to Ms Lattouf and had merely provided advice. If that were true, it would be quite extraordinary.

563 Mr Oliver-Taylor joined the meeting immediately after Ms Green had left. Within the previous six minutes, Ms Green had expressly told Mr Latimer, Mr Ahern and Mr Melkman that she had not given any direction and had merely provided advice to Ms Lattouf. They could not have forgotten what Ms Green had said by the time the meeting concluded some 18 minutes later.

564 According to Mr Oliver-Taylor, a major issue discussed in the Teams Meeting was whether Ms Lattouf's conduct involved a breach of a direction given to her. It is inconceivable, in that context, that Mr Latimer, Mr Ahern and Mr Melkman would not have conveyed to Mr Oliver-Taylor the critical information that had just been provided by Ms Green.

565 I have referred to Mr Ahern's email to Mr Latimer, Mr Melkman and Mr Oliver-Taylor at 1.16 pm on Tuesday, 19 December 2023, saying, relevantly:

I can confirm that our Content Director Elizabeth has reiterated to Antoinette the importance of not talking about Israel-Gaza in her shows this week. She has also suggested that Antoinette may be wise not to post anything on her socials this week.

566 Mr Oliver-Taylor deposes he understood the "reiteration" referred to in the first sentence of Mr Ahern's email, to have been a reiteration of the instruction or direction given to Ms Lattouf not to post anything that would suggest she was not impartial in relation to the Israel/Gaza war. I do not accept that this could have been Mr Oliver-Taylor's understanding of the first sentence. The first sentence said nothing about posting on social media. The reiteration was about, "the importance of not talking about Israel/Gaza *in her shows this week*" (emphasis added).

567 What Mr Ahern said in his email about Ms Lattouf's use of social media was contained in the second sentence, namely, "[Ms Green] has also suggested that Antoinette may be wise not to post anything on her socials this week". Mr Oliver-Taylor deposes it seemed clear to him that an employee in Ms Lattouf's position would, "understand such a suggestion to be a clear indication that the ABC was seriously concerned about her social media activity during the week of her engagement". Accordingly, it is apparent Mr Oliver-Taylor understood the second sentence to refer to a suggestion, and not a direction.

568 On no sensible reading of Mr Ahern's email could Mr Oliver-Taylor have thought Ms Lattouf had been given a direction. I reject Mr Oliver-Taylor's evidence that he understood the email to have provided a reiteration of an instruction or direction to Ms Lattouf not to post anything that would suggest she was not impartial in relation to the Israel/Gaza war.

569 Mr Oliver-Taylor was cross-examined about Mr Ahern's email sent at 2.57 pm on Wednesday, 20 December 2023, which recounted that Mr Ahern had told Ms Lattouf that Ms Green had, "advised you not to post anything that could be perceived as controversial on your socials". Mr Oliver-Taylor read the email the same afternoon. His evidence was he felt being *advised* not to post and being *directed* not to post, "was the same thing". That aspect of

Mr Oliver-Taylor's evidence is quite implausible. Mr Oliver-Taylor also suggested that Mr Ahern's comment in his email, "it was about the social media posting that she had been asked not to do", indicates a direction had been given. He was asked if he understood there is a difference between asking someone to do something and directing them, to which he responded, "I don't know if there is. I ask or direct – I don't know if there's a difference". Having regard to the context of the email, that answer is also implausible. I do not accept that Mr Oliver-Taylor could have understood Mr Ahern's email to indicate anything other than that Ms Green had provided advice, not a direction, to Ms Lattouf.

570 During the week starting Monday, 18 December 2023, Mr Oliver-Taylor commenced writing an email addressed to himself with the subject line, "File Note COT December 23". He recounted the issues and events of the past few days. On the afternoon of Wednesday, 20 December or on Thursday, 21 December 2023 he added a number of paragraphs, including:

On Wednesday. She presented her third shift. At around 1130 am Ben informed Steve, Simon and myself that she has posted a couple of things to social media. One was a comment about diversity of voices and the other was a repost od [sic] how Israel is using starvation tactics in the War. On review, and in discussion with this group, it was agreed that she has breached the trust of the program by not following a request and she has also breached impartiality around personal use of social media.

571 Mr Oliver-Taylor wrote that paragraph after the Teams Meeting. He was cross-examined about his use of the expression "a request". The exchange included the following:

Now, you understand perfectly well, Mr Oliver-Taylor, that there is a significant difference between a request and a direction? --- I do, but I could have written direction or request. They're interchangeable to me in this context. There's a requirement to do something.

...

Mr Oliver-Taylor, you suggest, do you, that a requirement and a request are, in this context, indistinguishable? --- I am saying yes. There is no deviation from my view that a request, direction must be followed.

572 Mr Oliver-Taylor's evidence that, in the context, "direction" was interchangeable with "request", and that both meant there was a "requirement to do something" which "must be followed", is simply implausible. It is apparent from his affidavit and his oral evidence that Mr Oliver-Taylor is an intelligent and literate person who occupied a high executive position within the ABC. I find Mr Oliver-Taylor well understood the distinction between Ms Lattouf being *directed* not to post anything about the Israel/Gaza war and being *requested* not to do so.

573 I return to complete my consideration of whether Mr Oliver-Taylor was told during the Teams Meeting that Ms Green said she had not given a direction to Ms Lattouf and had merely given her advice. Before the meeting, Mr Oliver-Taylor understood from Mr Ahern's email at 1.16 pm on Tuesday, 19 December 2023, that Ms Green had, "suggested that Antoinette may be wise not to post anything on her socials this week". That understanding must have been put in doubt by Mr Latimer's email of 12.19 pm on Wednesday, 20 December 2023 saying, "The clear

instructions were to direct Antoinette not to post to socials for the rest of this week". It was obvious that whether or not any direction had been given to Ms Lattouf needed to be clarified.

574 After the Teams Meeting, Mr Oliver-Taylor, Mr Latimer and Mr Melkman were aware from Mr Ahern's email of 2.39 pm that Mr Ahern had told Ms Lattouf that Ms Green had, "advised you not to post anything that could be perceived as controversial on your socials". If they thought Ms Lattouf had not merely been given advice but had been given a direction, they would surely have replied saying Mr Ahern had misinformed Ms Lattouf about that important issue. They did not.

575 Mr Oliver-Taylor's own notes demonstrate that after the Teams Meeting, he understood a request had been made to Ms Lattouf. In view of the crucial importance of Ms Green's statement that she had not given a direction, I infer Mr Oliver-Taylor must have been informed of that information by Mr Latimer, Mr Ahern or Mr Melkman during the Teams Meeting.

576 Mr Oliver-Taylor sent a text message to Mr Anderson at 1.00 pm on Wednesday, 20 December 2023, saying Ms Lattouf, "also failed to follow a direction from her producer not to post anything whilst working with the ABC". The "producer" was apparently a reference to Ms Green. He could not have believed his statement to Mr Anderson to be accurate.

### ***Analysis of Mr Oliver-Taylor's asserted reasons for his decision***

577 Mr Oliver-Taylor deposes the first reason for his decision to take Ms Lattouf off air was she, "had not complied with a direction not to post anything about the Israel-Gaza war". Mr Oliver-Taylor's notes in the email to himself provide a more reliable guide to his thinking at the time he made his decision. Mr Oliver-Taylor wrote, "she has breached the trust of the program by not following a *request*" (emphasis added). I find when he made the decision, Mr Oliver-Taylor understood that Ms Lattouf had not been given any direction and had merely been given advice or requested not to post anything about the Israel/Gaza war on social media.

578 The second reason offered by Mr Oliver-Taylor for his decision to take Ms Lattouf off air was, "as a consequence of the view that she had failed to comply with that direction, I did not have confidence that Ms Lattouf would not say something on air that could reasonably be perceived as not being impartial in relation to the Israel-Gaza war". The second asserted reason is consequential upon the first. I have rejected Mr Oliver-Taylor's evidence concerning his first asserted reason. It follows that I also reject the second.

579 Mr Oliver-Taylor deposes the third reason for his decision was his view, "she had contravened the Personal Use of Social Media Guidelines". Mr Oliver-Taylor resiled from that assertion in the course of his oral evidence. He accepted that his evidence before the FWC about what he had told Mr Anderson on Wednesday, 20 December 2023, was, "I can't recall the exact words, I'm sorry, but along the lines of the text message that there had been, I think, a potential breach of the social media policy was my language". That was quite inconsistent with his affidavit in this proceeding.

580 Mr Oliver-Taylor was asked the following question in cross-examination and gave the following answer:

So is this the position: that you were sure on 20 December that there was a breach,

but you've since become unsure?---I believe I've been consistent here in that I thought there may well be a potential breach, but I wasn't sure, and I maintain that position.

581 Later, Mr Oliver-Taylor gave evidence that, "I don't think I ever said that she did breach those guidelines".

582 However, when Mr Oliver-Taylor was later asked, "As at 20 December 2023, was it your view that Ms Lattouf had breached the Personal Use of Social Media Guidelines?", he answered, "I will say yes". When asked what about the HRW Post contravened the Social Media Guidelines, he answered, "Impartiality and bias". Earlier, Mr Oliver-Taylor had said he did not have an opinion on the partiality or impartiality of the relevant posts. He was unable to give any cogent explanation of how Ms Lattouf may have breached the Social Media Guidelines.

583 It may be seen while Mr Oliver-Taylor expressly deposed that a reason for his decision was Ms Lattouf, "had contravened the Personal Use of Social Media Guidelines", his evidence changed to, "I thought there may well be a potential breach", and then changed back again.

584 Further, none of Mr Oliver-Taylor's emails on Wednesday, 20 December 2023 refer to any possible or actual breach of the Social Media Guidelines. They refer to breach of "editorial guidelines", "editorial impartiality" and "editorial policies".

585 It may be noted that the ABC was ultimately unable to identify any breaches of any editorial guidelines or policies and the ABC's Consolidated Amended Defence admits that Ms Lattouf's HRW Post "did not contravene the social media policy of the ABC".

586 I do not accept Mr Oliver-Taylor's evidence that a reason for his decision was his view that Ms Lattouf had breached the Social Media Guidelines. I accept Mr Oliver-Taylor had a suspicion that Ms Lattouf might "potentially" have breached some ABC guideline or policy and I find that this suspicion of such misconduct was one the reasons for his decision to take Ms Lattouf off air.

587 The ABC's Consolidated Amended Defence does not rely on the fifth and sixth reasons given by Mr Oliver-Taylor for his decision and it is unclear whether it relies on the fourth. However, I will briefly consider those asserted reasons.

588 Mr Oliver-Taylor's fourth reason is asserted to be his concern that Mr Ahern did not have control of the situation, which exacerbated his lack of confidence in Ms Lattouf. The lack of confidence he apparently refers to were concerns Ms Lattouf would say something about the Israel/Gaza war on live radio, and stems from her asserted failure to follow a direction. As I have rejected Mr Oliver-Taylor's evidence that he believed Ms Lattouf had been given a direction, this cannot be a reason for the decision.

589 Mr Oliver-Taylor's fifth reason was his consciousness that issues pertaining to the Israel/Gaza war were highly contentious. It can be accepted this was a factor that influenced his decision to take Ms Lattouf off air.

590 Mr Oliver-Taylor's sixth reason was he considered the ABC was not obliged to put anyone on air: that it was always within the discretion of the ABC to decide that a presenter or program would not be aired. It can be accepted Mr Oliver-Taylor had such a view, although it does not

explain his reasons for deciding Ms Lattouf ought to be taken off air. In any event, Mr Oliver-Taylor ultimately deposed that he relied upon the first five reasons.

### ***What were the actual reasons for Mr Oliver-Taylor's decision?***

591 The question is why Mr Oliver-Taylor decided to take Ms Lattouf off air and thereby terminate her employment.

592 I have rejected Mr Oliver-Taylor's evidence concerning the three (or possibly four) reasons pleaded by the ABC. However, it remains necessary to determine whether I should accept Mr Oliver-Taylor's evidence that, "I did not consider, or in any way take into account, anything that I knew about the fact or content of any political opinions that Ms Lattouf had or may have had". More particularly, it is necessary to determine whether the ABC has proved that none of Ms Lattouf's pleaded political opinions were a substantial and operative reason for Mr Oliver-Taylor's decision. It is sufficient to focus on Ms Lattouf's political opinion opposing the Israeli military campaign in Gaza.

593 Mr Oliver-Taylor's evidence was that the ongoing influx of complaints was making it harder to maintain the ABC's position that Ms Lattouf would remain on air for the rest of the week. The final straw was Ms Lattouf making the HRW Post on her Instagram account. The HRW Post was different because it was made while she was an employee of the ABC. The "position" could no longer be maintained.

594 The emailed file note written by Mr Oliver-Taylor is informative of his thinking on Wednesday, 20 December 2023. The file note must be understood as a whole and in the context of the surrounding circumstances. Mr Oliver-Taylor described Ms Lattouf's post as a, "repost o[f] how Israel is using starvation tactics in the War". Mr Oliver-Taylor continued, "it was agreed that she has breached the trust of the program by not following a request". Mr Oliver-Taylor apparently understood Ms Lattouf to have been requested to refrain from posting anything about the Israel/Gaza war while employed by the ABC. He considered Ms Lattouf had been expected ("trusted") to comply with ("follow") that request but that she had failed to do so.

595 Mr Oliver-Taylor continued, "and she has also breached impartiality around personal use of social media". In his text message of 12.29 pm on Wednesday, 20 December 2023 to Mr Anderson, he had said, "Looks like she has breached editorial impartiality...If correct she will be stood down". I have accepted that he suspected she may have breached some policy or guideline of the ABC by making a post which he regarded as biased. I infer that Mr Oliver-Taylor thought that by making the HRW Post, Ms Lattouf was supporting a view that Israel was using starvation tactics in the war.

596 Mr Oliver-Taylor also said in his file note, "I explained to the MD via text initially that Local Radio Sydney had decided to not put AF [sic: AL] back on air due to this breach". The "breach" appears to refer to both the breach of "trust" and "impartiality".

597 The concerns expressed by Mr Oliver-Taylor in his file note are understandable. Ms Lattouf had made the HRW Post, which was bound to be controversial, when she was an employee of the ABC. It was ill-advised and inconsiderate of her employer. It was one thing for the ABC to publish the report as a news story: it was quite another for Ms Lattouf, having already made social media posts complained of as reflecting anti-Semitic and anti-Israel views, to repost the story. Although Ms Green said that if a post was fact based and from a verified source she was

sure it would be fine, she also reiterated that it would be best not to post anything that would be considered controversial.

598 The ABC would have to brace itself for the inevitable criticism — whether fair or unfair — for permitting one of its presenters to make a controversial post and then allowing her to remain on air. To be fair to Mr Oliver-Taylor, he had already been placed under a great deal of pressure over Ms Lattouf's engagement through the public complaints and Mr Anderson's and Ms Buttrose's trenchant criticism of him and his staff. Now that pressure had been amplified by Ms Lattouf's heedless action.

599 However, Mr Oliver-Taylor knew Ms Lattouf had not been given any direction not to post anything about the Israel/Gaza war. This was not a case where her employment could be terminated for failing to comply with a lawful and reasonable direction. Further, Mr Oliver-Taylor had no more than a suspicion that Ms Lattouf may have breached some editorial ABC policy or guideline.

600 Mr Oliver-Taylor decided that Ms Lattouf would not be permitted to present *Mornings* or perform any other duties on the following two days (the **decision**). The decision operated to terminate Ms Lattouf's employment. I infer that Mr Oliver-Taylor made the decision for several reasons, each of which was multifactorial, but stemmed from, and was interconnected with, Ms Lattouf having made the HRW Post.

601 First, Mr Oliver-Taylor thought it was misconduct for Ms Lattouf to make a post about the Israel/Gaza war when she had been advised or requested not to do so while she was an ABC employee. Mr Oliver-Taylor thought that by making the HRW Post, Ms Lattouf was expressing support for the view that Israel was adopting starvation tactics in Gaza. Mr Oliver-Taylor's motivation of taking action against Ms Lattouf for misconduct cannot be separated from Ms Lattouf's making of the politically charged post.

602 Second, Mr Oliver-Taylor believed that Ms Lattouf had expressed a biased view about the Israel/Gaza war by making the HRW Post and suspected that she may thereby have engaged in misconduct by breaching some editorial ABC policy or guideline. Again, Mr Oliver-Taylor's motivation of taking action against Ms Lattouf for misconduct cannot be separated from his view that Ms Lattouf had made a politically charged post that was biased.

603 Third, Mr Oliver-Taylor understood that the ABC would now face accusations of supporting and facilitating Ms Lattouf's opinion that Israel was adopting starvation tactics in Gaza. In addition, *The Australian* intended to publish a story that was likely to be critical of the ABC's employment of Ms Lattouf in light of her social media posts, and had asked who had appointed Ms Lattouf. I infer that Mr Oliver-Taylor sought to mitigate the anticipated deluge of complaints and criticism of the ABC and his team for its employment of Ms Lattouf by taking her off air and "beat[ing] the story". In that sense, the decision was made to appease the pro-Israel lobbyists who would inevitably escalate their complaints about the ABC employing a presenter they perceived to have anti-Semitic and anti-Israel opinions in such a public position.

604 Fourth, Mr Oliver-Taylor thought that taking Ms Lattouf off air might consequentially mitigate damage to the ABC's reputation for impartiality. I accept that protection of the ABC's reputation can be regarded as a substantial or operative reason for Mr Oliver-Taylor's decision. However, it cannot be regarded as the only substantial or operative reason.

605 Each of Mr Oliver-Taylor's first three reasons was interconnected with Ms Lattouf having made the HRW Post and his opinion that she was thereby expressing support for the view that Israel was adopting starvation tactics as part of its military campaign in Gaza. I find that Ms Lattouf's expression of opposition to the Israeli military campaign in Gaza in the HRW Post was a substantial and operative reason for the decision.

606 It is clear a substantial and operative reason for Mr Oliver-Taylor's decision was that in the HRW Post she had *expressed* a controversial opinion opposing the Israeli military campaign in Gaza. What is less clear is whether a substantial and operative reason for the decision was that Ms Lattouf *held* that opinion.

607 I have accepted, "for reasons including...political opinion", in s 772(1) of the FWA extends to the expression of political opinions and is not confined to the holding of political opinions.

608 However, the ABC argues Ms Lattouf has only alleged in her FCASOC that her employment was terminated for reasons including she "held" the political opinions pleaded by her. The ABC argues Ms Lattouf is bound by the case she has pleaded and she has not pleaded her employment was terminated because she "expressed" political opinions.

609 I construe Ms Lattouf's pleading that she "held political opinions" as encompassing the attribution to her by others of holding such political opinions. Such a position is reflected in Ms Lattouf's submission that the ABC acted upon the urging of a lobby group which insisted on her being removed for the political opinions they attributed to her. In any event, in the absence of a person expressly stating a particular opinion, the holding of such an opinion can only be attributed to them as a matter of inference.

610 A fundamental aspect of our legal system is that a case before a court is decided on the basis of the evidence and arguments presented by the parties. As Mason J observed in *Re-JRL; Ex parte CJL* (1986) 161 CLR 342 at 350, "a judge tries the case...on the evidence and arguments presented...in open court by the parties or their legal representatives and by reference to those matters alone".

611 Rule 16.02(1) of the *Federal Court Rules 2011* (Cth) requires a pleading must, relevantly, identify the issues the party wants the Court to resolve; and state the material facts on which a party relies that are necessary to give the opposing party fair notice of the case to be made against that party at trial.

612 One of the functions of a pleading is to state with sufficient clarity the case that must be met: *Gould, Birbeck and Bacon v Mount Oxide Mines Ltd (In Liq)* (1916) 22 CLR 490 at 517; *Dare v Pulham* (1982) 148 CLR 658 at 664; *Banque Commerciale SA (En Liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286 (**Akhil Holdings**). In that way, "pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her": *Akhil Holdings* at 286.

613 A failure to plead a particular fact or issue is not necessarily fatal. In *Stefanovski v Digital Central Australia (Assets) Pty Ltd* [2018] FCAFC 31; 368 ALR 607, the Full Court observed at [65], "A fair amount of tolerance can be justified so long as the circumstances are such that all parties to the action have had fair notice of what will be determined".

614 In the present case, Ms Lattouf was put on notice prior to the hearing that the ABC took the

point that she had only pleaded her employment was terminated because she “held” certain political opinions and had not pleaded her employment was terminated because she had “expressed” such opinions.

615 The point was taken in the ABC’s opening written submissions. The submissions stated:

...Ms Lattouf does not plead that any of these Instagram stories was an expression or a manifestation of one o[r] more of her asserted political opinions. In the result, Ms Lattouf’s claim is limited to the allegation that the ABC terminated her employment because she held the asserted political opinions as pleaded...The ABC does not consent to any expansion of Ms Lattouf’s case beyond that which is pleaded.

616 Ms Lattouf has not made any application for leave to amend her FCASOC to assert her employment was terminated for reasons including she had “expressed” any political opinions.

617 Mr Oliver-Taylor deposed that while he may be concerned about an employee’s expression of an opinion upon a contentious issue if the employee could reasonably be perceived as not impartial in relation to the issue, the content of the opinion is irrelevant to any decision he makes on behalf of the ABC. He says, in other words, he is not concerned about whether an employee *holds* a particular opinion, but only with whether the employee has *expressed* an opinion that may affect perception of the ABC’s impartiality.

618 This aspect of Mr Oliver-Taylor’s evidence sounds reasonable on its face. It is natural that Mr Oliver-Taylor’s role in protecting the ABC’s reputation for impartiality would focus on the fact an employee has expressed a controversial opinion, not whether he agrees or disagrees with the opinion held by the employee. However, there is not always a clear line between the expression of an opinion and the holding of an opinion. In most cases, if a person expresses an opinion, the person will naturally be attributed with holding that opinion.

619 The ABC relies on the judgment of the Full Court in *Rumble FCFCA*, which concerned an allegation that an employer had contravened s 351(1) of the FWA by terminating an employee’s employment because of his political opinion. The employee had written newspaper articles criticising the government. The primary judge found the substantial and operative reasons of the decision-maker for terminating the employee’s employment were the protection of the employer’s business interests and the employee’s repeated acts of insubordination. The ABC’s submission, as I understand it, is I should similarly find that no-one at the ABC “cared about” Ms Lattouf’s political opinion, but very much cared about protecting the ABC’s reputation for impartiality.

620 However, there are indications Mr Oliver-Taylor was not merely concerned by the fact Ms Lattouf had expressed controversial opinions in her HRW Post, but also by the content of those opinions.

621 In his oral evidence, Mr Oliver-Taylor said:

How long could – was it reasonable for the ABC to host – sorry, for the ABC to have a presenter live on air holding views which were potentially impartial (sic), how long could we hold that position?

That was an attribution to Ms Lattouf of “holding” political views that were controversial and

which made it difficult for the ABC to keep her on air.

622 On the evening of Monday, 18 December 2023, Mr Anderson sent the following text message to Mr Oliver-Taylor:

Also, I think we have an Antoinette issue. Her socials are full of ant-Semitic [sic] hatred. I'll send you a link. I'm not sure we can have someone on air that suggests that Hamas should return to their ethnic cleansing in Gaza and move onto the West Bank

623 Mr Anderson's text message indicates his deep concern about the content of Ms Lattouf's social media posts and his perception they were "full of ant[i]-Semitic hatred". Mr Anderson's comment was about the content of Ms Lattouf's posts and, in the context of the message as a whole, was an attribution of "ant[i]-Semitic hatred" to Ms Lattouf herself. The text message indicates a belief that Ms Lattouf had suggested, "Hamas should return to their ethnic cleansing in Gaza and move onto the West Bank". It was not merely a criticism of the fact she had made a post about a controversial issue, but a criticism of the perceived content of the post and the anti-Semitic view attributed to Ms Lattouf. Mr Oliver-Taylor replied saying, "Copy, We'll check socials now. And agree".

624 Under cross examination, Mr Oliver-Taylor was referred to his text message to Mr Anderson. The following exchange occurred:

Now, did you agree with [Mr Anderson's] view that – did you come to agree with his view that Ms Lattouf's socials were full of anti-Semitic hatred?---All I saw was what was sent here, from memory.

...

Did you agree with the view that Mr Anderson had put to you? Do you think he was right about that?---As I read this, what I thought was happening, this was live. This was happening live. I don't want to pass comment on whether I understand, for example, if you forgive me:

*I'm not sure we can have someone on air that suggests that Hamas should return to their ethnic cleansing in Gaza and move on to the West Bank.*

I don't understand that well enough to know how that would play. So I don't want to make comment on that. What I was concerned about was that these were live – I think they're tweets, are they, or Instagram posts. These were live, and that we now had someone live on there about to go to air within 12 hours or so, 10 hours the next morning, what do we now do. That was my concern.

What exactly was the concern?--- The concern that we now had someone posting something potentially that put the ABC in an impartial position.

...

You were agreeing with what Mr Anderson had said in his text message? --- I'm agreeing that if this is all correct and this is happening live, that we have a problem.

625 I consider Mr Oliver-Taylor's evidence about whether he agreed with Mr Anderson's view to be evasive. Mr Oliver-Taylor's evidence was that his only concern was Ms Lattouf posting something that potentially put the ABC in a position where it was seen as not impartial. However, I find that Mr Oliver-Taylor's text message indicated concurrence with the whole of Mr Anderson's opinions including the attribution of anti-Semitic views to Ms Lattouf.

626 It may be noted that an email from Mr Melkman subsequently sought to contextualise the post about which Mr Anderson was concerned, but Mr Oliver-Taylor did not give evidence that Mr Melkman's email caused him to resile from his agreement with Mr Anderson's opinion that Ms Lattouf had anti-Semitic views.

627 I find Mr Anderson materially contributed to Mr Oliver-Taylor's decision by expressing his opinion that Ms Lattouf had anti-Semitic views to Mr Oliver-Taylor, who adopted his opinion.

628 In addition, Mr Oliver-Taylor's email to Mr Ahern at 11.31 am on Wednesday, 20 December 2023 stated:

Can we please find out the process of how she was selected, approached and approved to fill in for this week. It appears on face value that background checks were not completed to a sufficient degree, if they were at least two issues would have come to light.

(i) her position on the Gaza/Israel war, which at the very best means she comes with a perception of bias to Local Radio

(ii) She signed the recent petition, something that the ABC has clearly asked its staff not to do, yet we engaged someone who had, again compromising their impartiality

629 Mr Oliver-Taylor indicated his concern was with Ms Lattouf's "position on the Gaza war". This was not merely a concern about the fact she had *expressed* an opinion about the war, but also about the opinions she *held*.

630 Mr Oliver-Taylor thought that Ms Lattouf had "breached impartiality" by expressing support for the view that Israel was adopting starvation tactics in Gaza. The fact that Mr Oliver-Taylor thought that the HRW Post was biased suggests that he attributed her with actually holding that biased view.

631 I am satisfied Mr Oliver-Taylor attributed to Ms Lattouf the holding of a political opinion opposing the Israeli military campaign in Gaza which, in his view, made her unsuitable to work as a presenter at the ABC.

632 Further, Mr Oliver-Taylor's decision was influenced by the complaints already received, and which he anticipated would escalate following the HRW Post if Ms Lattouf were not taken off air. The complaints criticised the ABC for employing Ms Lattouf as a presenter when she had

made social media posts and written articles that were alleged to be anti-Israel and anti-Semitic. The complaints attributed to Ms Lattouf the holding of such opinions. Mr Oliver-Taylor thought that Ms Lattouf would again be attributed with holding such opinions following her HRW Post. Mr Oliver-Taylor sought to appease members of the public who would attribute to Ms Lattouf the holding of anti-Israel and anti-Semitic opinions by taking her off air. I find that Mr Oliver-Taylor's reasons for his decision included his desire to mitigate further complaints about the ABC employing someone attributed with holding a political opinion opposing the Israeli military campaign in Gaza.

633 Ultimately, I am not satisfied the ABC has proved that its substantial and operative reasons for the termination of Ms Lattouf's employment did not include that Ms Lattouf was attributed with holding a political opinion opposing the Israeli military campaign in Gaza.

634 I hold that the ABC contravened s 772(1) of the FWA by terminating Ms Lattouf's employment for the political opinion she held opposing the Israeli military campaign in Gaza.

## **The allegation of contravention of s 50 of the FWA**

635 There is no dispute about the construction of s 50 of the FWA. Ms Lattouf has the onus of proving that the ABC contravened the Enterprise Agreement.

636 The Enterprise Agreement applied to Ms Lattouf and to the ABC at the time of the events. It provides, relevantly:

### **55. Misconduct**

#### **55.1 Definition**

55.1.1 Misconduct (including serious misconduct) includes but is not limited to one or more circumstances where an employee:

- a. wilfully disobeys or disregards a reasonable and lawful direction;
- b. is inefficient or incompetent for reasons within their own control;
- c. is negligent or careless in the discharge of their duties;
- d. engages in improper conduct as an employee of the ABC;
- e. engages in improper conduct which brings, or is likely to bring, the ABC into disrepute;
- f. fails to comply with, or contravenes, a term or condition of this Agreement;

- g. deliberately provides at any time incorrect or misleading information which is relevant to their employment;
- h. exercises unlawful discrimination, patronage or favouritism in relation to employment matters within the ABC.

## 55.2 Process

55.2.1 Where an allegation of misconduct is made, the employee will be:

- a. advised in writing of the nature of the alleged misconduct;
- b. advised that at any stage during these or subsequent proceedings they may choose to be accompanied or represented by a person of their choice;
- c. advised in writing of the process to be undertaken by the ABC to determine whether the alleged misconduct is substantiated;
- d. in the event that an investigation is required, the employee will be advised in writing that an independent investigator will be appointed by the ABC who will report their findings back to the relevant delegate;
- e. provided with a right of access to any material that is reasonably necessary for the employee to respond to the allegation, provided that:
  - i. the ABC, where appropriate, may de-identify or otherwise anonymise that material where the ABC has a reasonable concern about the potential victimisation of a witness or complainant, provided that the employee (and their representative) has access to sufficient material to understand and respond to the allegation; and
  - ii. the ABC may require the employee to keep confidential the material provided, other than to seek advice from their representative;
- f. given an opportunity to respond and/or explain their actions or inactions and any mitigating factors they seek to have taken into consideration, provided that explanation is provided in a timely manner.

55.2.2 Where the ABC forms the view that the alleged misconduct is likely to constitute serious misconduct, the ABC will advise the employee of that view at the earliest opportunity.

...

## 55.4 Disciplinary Action

55.4.1 Where an allegation of misconduct is substantiated, the ABC may impose

one or more of any of the following forms of disciplinary action, as appropriate to the nature and seriousness of the misconduct:

- a. reprimand the employee;
- b. issue a written warning to the employee;

and in the case of serious misconduct;

- c. transfer the employee to another position at an equal or lower salary;
- d. withhold the employee's salary for part or all of the period of suspension;
- e. reduce the employee's salary within the band;
- f. dismiss the employee with notice or payment in lieu in accordance with the relevant provisions of clause 57 - Termination of Employment; or
- g. dismiss the employee without notice in accordance with subclause 57.1.1.a.

55.4.2 The ABC may, in its discretion, determine that although the misconduct is substantiated, no disciplinary action should be taken, but the employee will be counselled and the counselling recorded on the employee's file.

...

## **55.6 Summary Dismissal**

55.6.1 Nothing in this Agreement limits or affects in any way the ABC's right to dismiss an employee summarily if the employee has committed serious misconduct.

...

## **57. Termination of Employment**

### **57.1 Basis for Termination**

57.1.1 Subject to 57.2.2, the ABC may terminate an employee's employment on the following basis:

- a. Summarily, if the employee is guilty of serious misconduct.
- b. On notice (or the provision of payment in lieu of notice), on the following grounds:
  - i. Redundancy (in accordance with clause 54)

- ii. Medical incapacity (in accordance with clause 56)
- iii. Unsatisfactory performance (in accordance with clause 23)
- iv. Misconduct (in accordance with clause 55)
- v. Abandonment of employment.

c. On notice (or the provision of payment in lieu of notice) during probation.

637 Ms Lattouf summarises her case concerning breaches of the Enterprise Agreement as follows:

**First**, in the events which occurred on 20 December 2023, the ABC was alleging that Ms Lattouf had failed to comply with a direction (and in some aspects of its evidence to have breached a policy). These were allegations of misconduct. The procedural provisions of the Agreement regulated how allegations of misconduct were to be dealt with and were enlivened. They operate as a code for dealing with [allegations] of misconduct. They were not followed and the ABC contravened s50 in multiple respects. This claim does not depend upon Ms Lattouf's argument that her employment was terminated being accepted.

**Second**, the sanction imposed on Ms Lattouf was not permitted by the Agreement and the ABC contravened s50. This claim also does not depend upon Ms Lattouf's argument that her employment was terminated being accepted.

**Third**, if Ms Lattouf's contention that her employment was terminated is accepted, the ABC unlawfully terminated her employment summarily in circumstances where she was not guilty of any misconduct, let alone serious misconduct and in a manner not permitted by the Agreement resulting in a further contravention of s50.

638 The ABC submits Ms Lattouf's claim that the ABC breached cl 55.2 of the Enterprise Agreement proceeds upon false premises that the ABC made an allegation of misconduct against Ms Lattouf and it sought either to discipline her pursuant to cl 55.4 or terminate her employment pursuant to cl 57. The ABC argues the only benefit cl 55.2 provides an employee is that they cannot be disciplined pursuant to cl 55.4 or dismissed under cl 57, unless the processes in cl 55.2 are followed. The ABC submits Mr Oliver-Taylor merely made a programming decision based on views he had formed and concerns he had come to hold about Ms Lattouf's ability to be trusted on air. The ABC submits it neither disciplined Ms Lattouf pursuant to cl 55.4 nor terminated her employment pursuant to cl 57.

639 In *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426, French J (as his Honour then was) gave the following exposition of the approach to the construction of industrial instruments:

[53] The construction of an award, like that of a statute, begins with a

consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to "... the entire document of which it is a part or to other documents with which there is an association". It may also include "... ideas that gave rise to an expression in a document from which it has been taken.

...

[57] It is of course necessary, in the construction of an award, to remember, as a contextual consideration, that it is an award under consideration. Its words must not be interpreted in a vacuum divorced from industrial realities. There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned. It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies. But while fractured and illogical prose may be met by a generous and liberal approach to construction, I repeat what I said in *City of Wanneroo v Holmes* (1989) 30 IR 362 at 380:

"Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties."

(Most citations omitted.)

640 The relevant principles were also summarised by the Full Court in *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [197] and *James Cook University v Ridd* (2020) 278 FCR 566 (**Ridd**) at [65].

641 There is no requirement at common law to provide an employee with procedural fairness before taking disciplinary action: *Byrne* at 443; *Pillai v Singapore City Council* [1968] 1 WLR 1278 at 1284. It is evident that cl 55.2 of the Enterprise Agreement aims to fill that gap by requiring the ABC to, *inter alia*, inform an employee of the content of an allegation of misconduct and provide them with a reasonable opportunity to defend themselves *before* a decision is made as to whether the allegation is substantiated.

642 After complying with the prescribed procedures, the employer may decide the allegation of misconduct is not substantiated. Alternatively, the employer may decide the allegation is substantiated, in which case, the employer may decide to take no further action under cl 55.4.2 or take one or more of the disciplinary actions described in cl 55.4.1.

643 The ABC's argument that the procedures in cl 55.2 do not apply unless the employer decides a misconduct allegation is substantiated and decides to take one of the disciplinary actions set out in cl 55.4 is inconsistent with the clear language of cl 55.2. The employer's obligation to follow the process arises "where an allegation of misconduct is made", not after the

allegation has been determined by the ABC.

644 A consequence of the ABC's construction of cl 55.2 would be that the ABC is entitled to keep secret an allegation of misconduct, determine the allegation to be substantiated and then decide under cl 55.4.2 that no disciplinary action should be taken. Even if no disciplinary action were ultimately taken, it would be a troubling and serious consequence for any employee to have a finding of misconduct made against them. A finding of misconduct would be particularly egregious if the employee were not advised of the nature of the alleged misconduct or given an opportunity to respond before the employer determined the allegation to be substantiated. The ABC's construction would be entirely inconsistent with the purpose of the clause, namely to require the ABC to provide procedural fairness before it is decided whether an allegation of misconduct is substantiated.

645 I also reject the ABC's submission that no allegation of misconduct was made against Ms Lattouf and that no disciplinary action was taken against her. On Wednesday, 20 December 2023, Mr Ahern told Ms Lattouf she was "not required" to present the two remaining *Mornings* programs and she should "leave as soon as possible" after informing her production team.

646 Mr Ahern provided two reasons for the ABC's decision: *first*, she had posted social media content about the Israel/Gaza war which she had been advised or asked not to do; and, *second*, she had committed, "a breach of ABC policies". The reasons involved adverse findings against Ms Lattouf's because of her improper conduct in failing to comply with a request and breaching policies.

647 The sequence was peculiar because Mr Ahern first conveyed the ABC's decision that Ms Lattouf would not be permitted to present the last two programs and then he explained the allegations and findings that had been made against her.

648 I find the ABC made allegations of "misconduct" against Ms Lattouf within cl 55.1.1 of the Enterprise Agreement, even though those allegations had already been determined to be substantiated. The expression "misconduct" is given an inclusive definition in cl 55.1.1. The ABC alleged, in effect, that Ms Lattouf had engaged in improper conduct as an employee of the ABC, or improper conduct which brought, or was likely to bring, the ABC into disrepute. It may be noted that no allegation was conveyed by Mr Ahern that Ms Lattouf had wilfully disobeyed or disregarded a direction and I have found that disobedience or disregard of a direction was not in fact a reason for the action taken against her.

649 I find the ABC breached cl 55.2 of the Enterprise Agreement by failing to:

advise Ms Lattouf in writing of the nature of the alleged misconduct;

advise her that she may choose to be accompanied or represented by a person of her choice;

advise her in writing of the process to be undertaken by the ABC to determine whether the alleged misconduct was substantiated; and

give her an opportunity to respond and/or explain her actions and any mitigating factors that she may have sought to have taken into consideration.

650 The action taken against Ms Lattouf, namely refusing to permit her to present *Mornings* and excluding her from the workplace, was represented by Mr Ahern to be a consequence of the two reasons he gave. In *Rubel* at 321, a dismissal was described as a refusal by the employer to accept further service. The ABC “dismissed” Ms Lattouf within the meaning of cl 55.4.1 by refusing to allow her to provide further service when it was obliged to do so under an implied term of the employment contract. It also “dismissed” Ms Lattouf by terminating the contract of employment.

651 Ms Lattouf was not given a direction not to post on social media about the Israel/Gaza war. The ABC admits Ms Lattouf’s HRW Post was not in breach of the Social Media Guidelines. In Mr Oliver-Taylor’s email of 11.19 am on Tuesday, 19 December 2023, he accepted that there had not been a breach of those Guidelines by reason of her previous posts. Nor have any other “ABC policies” been identified as having been breached. Ms Lattouf had only been given advice not to post on social media about the Israel/Gaza war and there was no misconduct or serious misconduct in her failing to take advice. I find the ABC contravened cl 55.4.1(f) of the Enterprise Agreement by dismissing Ms Lattouf for serious misconduct in circumstances where she had not engaged in serious misconduct, thereby contravening s 50 of the FWA.

652 I also find that the ABC contravened cl 55.2.2 of the Enterprise Agreement by failing to inform Ms Lattouf at the earliest opportunity that the alleged conduct was likely to constitute serious misconduct. That was also a contravention of s 50 of the FWA.

653 In case I am wrong in my finding that Ms Lattouf was dismissed, I will consider Ms Lattouf’s alternative argument that the sanction imposed on Ms Lattouf was not permitted by the Enterprise Agreement.

654 Clause 55.4.1 of the Enterprise Agreement provides where an allegation of misconduct is substantiated, the ABC may impose one or more of any of the disciplinary actions specified in the clause. The clause must be construed as prohibiting the ABC from imposing any forms of disciplinary action that are not specified. The permitted forms of disciplinary action do not include refusing to allow an employee to perform work or excluding the employee from the workplace.

655 Accordingly, if I am wrong in finding the ABC dismissed Ms Lattouf, the imposition upon Ms Lattouf of forms of disciplinary action that were not permitted was a contravention of cl 55.4.1 of the Enterprise Agreement and a contravention of s 50 of the FWA.

## **Relief**

656 In her Further Consolidated Amended Originating Application, Ms Lattouf seeks the following relief:

- (a) declarations that the ABC contravened ss 50 and 772(1)(f) of the FWA;
- (b) an order for compensation for non-economic loss;
- (c) orders that the ABC pay pecuniary penalties for its contraventions;
- (d) an order that the ABC implement a compliance program to educate its managers on

the requirements of cl 55 of the Enterprise Agreement.

657 Ms Lattouf's closing submissions do not address her claim for a compliance program and I proceed on the basis that the claim has been abandoned.

658 The claim for the imposition of a pecuniary penalty will be set down for hearing on another date.

659 I propose to make declarations that the ABC contravened ss 50 and 772(1) of the FWA.

660 I will proceed to determine Ms Lattouf's claim for compensation for non-economic loss.

661 Section 545 of the FWA provides, relevantly:

#### **545 Orders that can be made by particular courts**

*Federal Court and Federal Circuit and Family Court of Australia (Division 2)*

(1) The Federal Court...may make any order the court considers appropriate if the court is satisfied that a person has contravened...a civil remedy provision.

...

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

...

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

...

662 Compensation may be awarded for non-economic loss, including for shock, distress, hurt or humiliation because of a contravention of the FWA: *Ridd* at [155]-[157].

663 In *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526, Barker J observed at [423] that if compensation is to be awarded, one of the principal tasks is to ensure there is an appropriate causal connection between the contravention and the loss claimed: see also *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 at 155.

664 In *Aitken v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia — Western Australian Branch* (1995) 63 IR 1, Lee J held at 9, that the Court will:

...have regard to what is reasonable in the circumstances and will look at what would have been likely to occur had the Act not been contravened. The Court will consider the detriment occasioned to the employee by the employer's contravention of the Act,

and the extent to which it is reasonable to compensate the employee for such consequences.

(Citation omitted.)

665 In *Maritime Union of Australia v Fair Work Ombudsman* [2015] FCAFC 120, the Full Court held at [28]:

The task of the primary judge, having found the relevant contraventions, was to assess the compensation, if any, that was causally related to those contraventions. That involved not an examination of what did happen, but an assessment of what would or might have occurred, but which could no longer occur (because of the contraventions).

666 In *Transport Workers' Union of Australian v Qantas Airways Limited (Compensation Claim)* [2024] FCA 1216; 334 IR 1216 (**Qantas (Compensation Claim)**), Lee J observed at [208]:

As is well recognised, the assessment of compensation for emotional distress or the like is inherently imprecise and non-scientific due to the fact that the Court is required to place a monetary value on something that is not easily able to be financially quantified. In this sense, it has been observed that it is impossible to precisely translate such non-economic loss into a monetary sum. Nevertheless, the Court must, doing the best that it can, award an amount it considers to be reasonable compensation for the non-economic loss sustained, taking into account the individual facts of each case.

(Citations omitted.)

667 In *Patrick Stevedores Holdings Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union (No 4)* [2021] FCA 1481, Lee J observed at [28]:

Other factors that have contributed to a loss are beside the point unless they point to the loss not being causally related or the proposed compensatory order being other than “appropriate”.

668 Ms Lattouf deposes that immediately after she was terminated, she felt shock and humiliation. She says the termination of her employment, including the allegation that she had engaged in editorial wrongdoing and breached a management directive, was widely publicised. Ms Lattouf felt this affected her reputation and perception of her integrity, causing her great distress. Over the following weeks she experienced notable dips in her mood, became increasingly anxious and found herself crying frequently throughout the day.

669 Ms Lattouf deposes that due to the public scrutiny surrounding her termination, she also experienced feelings of paranoia which caused her to feel unsafe. She had never experienced such feelings before.

670 Ms Lattouf deposes she has had trouble sleeping, her anxiety is heightened, her appetite has

been suppressed and she has had three panic attacks. She drinks alcohol more frequently now and takes sedatives to help her sleep.

671 Ms Lattouf deposes that she is seeing her psychologist more frequently. Her personal relationships have been adversely affected to some extent.

672 Ms Lattouf deposes that on two occasions after her termination she has received threatening phone calls, resulting in her becoming increasingly worried for her safety and the safety of her family. However, I am not satisfied the threatening calls and death threats were related to the termination of her employment. Ms Lattouf made a number of controversial posts on publicly accessible social media platforms about the Israel/Gaza war. It is far more likely the threats against her resulted from her social media posts rather than the termination of her employment and its associated publicity.

673 It is apparent from observing Ms Lattouf in the witness box that the termination of her employment and the circumstances in which it occurred caused her great distress and continues to do so. That is unsurprising. She was dismissed on short notice. She was not given any opportunity to answer the allegations against her in circumstances where she had compelling answers to give. Any person would feel utterly dismayed and humiliated in those circumstances.

674 The high-profile nature of Ms Lattouf's position as the presenter of *Mornings* meant her termination was bound to attract a high level of publicity. Indeed, *The Australian* had already indicated that it intended to write about the complaints concerning Ms Lattouf's employment with the ABC and published an article shortly after the event stating that she had been "sacked". I accept the negative publicity associated with her termination added to her distress.

675 Ms Lattouf relies upon the evidence of Dr Nigel Strauss, a consultant psychiatrist. Dr Strauss describes Ms Lattouf as having a reasonably long psychiatric history. I do not propose to describe the details of that history.

676 Dr Strauss diagnoses Ms Lattouf with an exacerbation of her underlying persistent depressive disorder with high levels of anxiety. Dr Strauss considers that Ms Lattouf's prognosis is good and with the lapse of time, resolution of her legal dispute and ongoing treatment, she should eventually overcome the exacerbation.

677 The ABC submits that Dr Strauss' opinion ought to not be accepted for reasons including that he made his diagnosis retrospectively and on the basis of only one consultation which was based entirely on Ms Lattouf's subjective account. The ABC points out that Dr Strauss accepted under cross examination that the subject matter of the proceedings was just one of a number of factors that had exacerbated her underlying and pre-existing condition. Dr Strauss understandably did not attempt to identify the extent to which her termination exacerbated her pre-existing condition in comparison to other factors.

678 I accept Ms Lattouf's evidence as to the distress and symptoms she has experienced as a result of the termination of her employment. I also accept Dr Strauss' opinion that the termination of Ms Lattouf's employment and the circumstances in which it occurred resulted in an exacerbation of her underlying and pre-existing psychiatric condition.

679 However, I find Ms Lattouf's condition was also exacerbated by other factors, including ruminations about the conflict in Gaza and the threats she received. These are not causally related

to her termination.

680 The extent to which the termination of Ms Lattouf's employment exacerbated her underlying psychiatric condition cannot be separated out from other factors with any precision. Nevertheless, I accept the termination contributed significantly to the exacerbation. I find the exacerbation caused by the termination will resolve in time.

681 Ms Lattouf relies on cases involving discrimination or sexual harassment where compensation ranging between \$90,000 and \$140,000 was awarded for non-economic loss. In *Qantas (Compensation Claim)*, Lee J awarded \$100,000 to an unlawfully terminated employee who developed a major psychiatric illness as a result of the contravening conduct. I consider that those cases are not comparable with the present case.

682 Ms Lattouf contends an amount between \$100,000 and \$150,000 should be awarded to her for non-economic loss. The ABC submits that the Court should not award, "anything more than modest compensation".

683 I consider that the appropriate award of compensation for Ms Lattouf's non-economic loss is \$70,000.

## **Conclusion**

684 I have found that the ABC contravened s 772(1) of the FWA by terminating Ms Lattouf's employment for reasons including that she held political opinions opposing the Israeli military campaign in Gaza. I have rejected Ms Lattouf's allegations that the reasons for her termination included her race or national extraction.

685 I have held that the ABC contravened s 50 of the FWA by contravening cl 55.2.1, 55.2.2, and 55.4.1(f) of the Enterprise Agreement.

686 I will make declarations that the ABC breached ss 50 and 772(1) the FWA.

687 I have determined that Ms Lattouf will be awarded \$70,000 for her non-economic loss pursuant to s 545(1) of the FWA.

688 I will make directions to bring the matter to a hearing on the question of whether any pecuniary penalty ought to be imposed on the ABC pursuant to s 546 of the FWA and, if so, in what amount.

I certify that the preceding six hundred and eighty-eight (688) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah.

Associate:

Dated: 25 June 2025