DECISION

Fair Work Act 2009
s.604—Appeal of decision

University of Technology Sydney
v
Ruoyun (Lucy) Zhao
(C2020/2026)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT COLMAN
COMMISSIONER JOHNS

SYDNEY, 8 JULY 2020

Appeal against decision [2020] FWC 416 of Deputy President Sams at Sydney on 11 March 2020 in matter number U2019/10216 – permission to appeal refused.

DECISION OF VICE PRESIDENT CATANZARITI AND COMMISSIONER JOHNS

Overview

[1] On 11 September 2019, Dr Ruoyun (Lucy) Zhao (**the Respondent**) made an application for an unfair dismissal remedy. In his Decision[1] dated 11 March 2020, Deputy President Sams (**the Deputy President**) found that the Respondent's dismissal was 'harsh' and 'unreasonable' within the meaning of s 387 of the *Fair Work Act 2009* (Cth) (**the Act**). The Deputy President ordered that the Respondent be reinstated to her former position as Lecturer (Level B) with the University of Technology Sydney (**the Appellant**). Additionally, the Deputy President made orders concerning the Respondent's continuity of service and lost remuneration.

[2] On 1 April 2020, the Appellant lodged an appeal against the Decision. On 6 April 2020, Deputy President Asbury made a consent stay order that the Decision and orders of the Deputy President be stayed. The stay order was to be operational from 1 April 2020 and until a further order or determination of the appeal.

[3] The matter was subject to a telephone hearing on 8 May 2020. The Appellant and the Respondent sought permission to be legally represented. The Full Bench granted the parties' applications for permission to be represented pursuant to s 596(2)(a) of the Act in the hearing.

[4] The Full Bench has now heard the parties on permission to appeal and the substantive appeal.

[1] *Dr Ruoyun (Lucy) Zhao v University of Technology Sydney* [2020] FWC 416 (**the Decision**).

The Decision

[5] The Respondent was employed as a lecturer (Level B – Academic Staff) by the Appellant in the UTS Business School. The Respondent commenced employment on 3 February 2005 and was dismissed on 21 August 2019 for reasons of alleged unsatisfactory performance. The Respondent was employed under the terms and conditions of the *University of Technology, Sydney Academic Staff Enterprise Agreement 2018* (**the 2018 Agreement**).

[6] As stated at [2] in the Decision, the reasons for the Respondent's dismissal were set out in a 'show cause' letter, dated 10 June 2019, from Professor Andrew Parfitt, Provost and Senior Vice President. It was noted in the letter that the Respondent had failed to reach the required performance standards of an academic at her level and with her years of experience as an academic. This concerned the Respondent's failure to have at least one research article published in an A* or A ranked journal over a two-year period, after having been placed on an extended Performance Improvement Plan (**PIP**).

[7] The Deputy President considered whether the Respondent's dismissal was 'harsh, unjust or unreasonable' and the matters listed under s 387 of the Act.

[8] At [107] in the Decision, the Deputy President stated that the setting of the Respondent's performance target of publication in an A* or A ranked journal was intrinsically linked to the University Business School's Academic Workload Guidelines (**the Guidelines**) and the Benchmarks. It was noted that there was no contradiction that the Benchmarks would not come into full effect until 2021, however the Respondent's performance was measured against them.

[9] The Deputy President was not satisfied that the Appellant had a valid reason for dismissing the Respondent. The Deputy President reasoned that insufficient weight was given to a number of matters, which rendered the Respondent's dismissal for poor performance unreasonable. Such matters included the Appellant's workload allocations, the Respondent's improved teaching performance and the disconnect between the *University of Technology Sydney Academic Staff Agreement 2014* (**the 2014 Agreement**) and the 2018 Agreement requirements and the Appellant's expectations.

[10] The Deputy President then considered relevant matters under s 387(b)-(h) of the Act. Critically, in considering s 387(h) of the Act, the Deputy President found that in addition to being satisfied that the Respondent's dismissal was unreasonable, her dismissal was also harsh based on a number of facts.

[11] In determining the appropriate remedy for the Respondent, the Deputy President stated that there was little evidence that the employment relationship between the Appellant and the Respondent was irretrievably broken. Further, no evidence was available to indicate that the Respondent's reinstatement would damage the Appellant's reputation or its rankings. The Deputy President found it appropriate that the Respondent be reinstated and made an order to give effect to this. As stated earlier, other orders were made regarding continuity of employment, service and payment for lost remuneration.

Appeal grounds and submissions

Appellant's submissions

[12] In summary, the grounds of appeal and the Appellant's submissions were as follows:

- Ground 1.1 in the Appellant's notice of appeal was that the Deputy President erred in finding that the Appellant did not have a valid reason to the terminate the Respondent's employment by taking into account irrelevant matters. It was argued that the Deputy President's observations at [104]-[106] should not have formed part of the Decision. This is because, amongst other reasons, they did not reflect the tenor of any of the evidence or submissions before him, they were generally erroneous, they demonstrated a disregard for the importance of research in tertiary education and they attributed a pejorative motivation to universities in general.

- Furthermore, the observations at [104]-[106] had no relevance to the determination of the unfair dismissal application. It is not a matter for the Fair Work Commission (**the Commission**) to express views as to how universities should operate or what their purposes should be, and the Deputy President's views in effect were stepping 'into the shoes of the employer' by substituting his own reasoning for the reasoning of the employer as to the appropriate standards to impose on academics. The Deputy President's observations were not inconsequential musings, having regard to the Deputy President's statements at [103] and [112](i).

- Ground 1.2 of the appeal concerned various alleged significant errors of fact made by the Deputy President in finding that there was not a valid reason to terminate the Respondent's employment. In relation to ground 1.2(a), it was argued that the Deputy President made a number of errors of fact and other irrelevant considerations were taken into account. In relation to the Respondent's workload allocation (40% research, 40% teaching, 20% service), the Deputy President did not address whether in fact the Respondent had met the research component of her duties. There is an error in the premise that because an employer does not take issue with parts of an employee's performance, the employer's actual concerns with a fundamental aspect of the employee's performance may be disregarded. An employee could merely neglect a major part of their workload as long as they put all their efforts into the other two aspects. The formulation conceived by the Deputy President was contrary to the way in which an academic's work is assessed. By not addressing whether the Respondent was meeting the standards expected of her, and which were agreed with her in writing, the Deputy President engaged in error. The Deputy President should have found as a matter of fact that the Respondent was not performing at the level of expected of her in relation to her research output and this gave rise to a valid reason for termination.

- In relation to ground 1.2(b), it was submitted that the Respondent's performance was measured against the criteria specified in her work plan, development plan and performance reviews that she had agreed over several years. This is contrary to the Deputy President's finding that the Benchmarks were used to measure the Respondent's performance. Having regard to the 2014 Agreement, the 2018 Agreement and the Guidelines, it was open for each faculty within the university to determine the appropriate expectations for academic performance. Ultimately, the Respondent's performance was measured against the criteria discussed with her and determined to various development and improvement plans. The failure to grasp these issues and the consequent findings meant that the Deputy President engaged in

significant errors of fact which affected his determination that there was not a valid reason for dismissal.

- In relation to ground 1.2(c), contrary to the Deputy President's finding that the Respondent was not made aware that she faced the prospect of termination, an email sent by Professor Michayluk demonstrates that termination was a potential outcome if the Respondent did not improve her performance. To this extent, the Deputy President erred at [117] of the Decision.

- In relation to ground 1.2(d), contrary to the Deputy President's finding that the Appellant had given insufficient weight to the Respondent's earlier publications, Professor Michayluk acknowledged the Respondent's previous high-quality journals in email. The Deputy President thereby erred.

- In relation to ground 1.2(e), the Deputy President took into account other irrelevant considerations at [112] in the Decision, including that the Respondent was not obstructive or belligerent or that her two mentors were overseas.

- In relation to appeal grounds 2 and 3 which related to the Deputy President's findings regarding the harshness of the dismissal and remedies ordered, it was submitted that the outcome on harshness and remedy depends on the outcome of the appeal as to valid reason. There was ample evidence before the Deputy President showing the lack of confidence that the Appellant had in the ability of the Respondent to perform the inherent requirements of her position. The Deputy President should have found that the employment relationship was at an end and erred in not doing so.

Respondent's submissions

[13] In summary, the Respondent made the following submissions:

- In relation to appeal ground 1.1, the Deputy President's observations at [104]-[106] were merely general observations and did not express any operative aspect of the Decision or actuate the findings of the Deputy President. The Deputy President's analysis at [107] are when the Deputy President commences his analysis of the evidence relevant to his findings pursuant to s 387 of the Act. To the extent that paragraph [112](i) indicates an evident manifestation of the Deputy President's views expressed between [104]-[106], such flexibility is expressly contemplated by the Guidelines. There is no basis in the argument that the Appellant was denied procedural fairness in respect of the Deputy President's observations at [104]-[106].

- In regards to appeal ground 1.2(a), the Respondent contended that the gravamen of the Deputy President's reasoning at [110] was that when the Respondent's performance was considered as a whole, her work performance did not justify her dismissal. The Deputy President was tasked with assessing objectively whether was a valid reason for dismissal connected with capacity and the Deputy President found that there was not a valid reason.

- In relation to appeal ground 1.2(b), it was argued that this appeal ground and the related submissions overlook the substantive way in which the Benchmarks were

applied to the Respondent. The Review Committee noted its concerns that the Respondent's alleged underperformance in relation to research was made by reference to the Benchmarks, which contained a performance standard higher than currently required of staff in the Appellant's Business School. This is apparent upon close examination of the Guidelines and the Benchmarks. The submission that the Respondent was not assessed by reference to the Benchmarks because she was not required to achieve the publication points contained with them must be rejected. This was what the Respondent was required to do in relation to publishing A* or A ranked journals, albeit in less than the 5 years permitted under the Benchmarks and the revised performance standards set by the Association to Advance Collegiate Schools of Business (**AACSB**).

- In relation to the other allegedly erroneous findings of the Deputy President, the Respondent notes that the Deputy President accepted the Respondent's evidence that it was not sufficiently clear to her that her termination was inevitable if she failed to meet the PIP. In relation to the relevance of earlier publications, the Deputy President did not find that the Appellant failed to consider the Respondent's earlier publication record, and that it was open for the Deputy President to make the conclusion that he did regarding the Respondent's earlier publication record. Furthermore, the matters considered by the Deputy President at [112] were relevant to the validity of the reason for the Respondent's dismissal, whether other disciplinary options were appropriate and, in any event, to the extent that such matters are considered 'errors' are not significant errors of fact.

- In relation to appeal grounds 2 and 3, the Deputy President's approach in finding that the Respondent's dismissal was harsh was correct. Such findings stand as an independent basis for concluding that the Respondent's dismissal was unfair. Regarding the Deputy President's remedy findings, the Appellant's submissions that the Respondent had not demonstrated the ability to perform the full range of duties expected of her stands cannot stand against the Deputy President's findings on this subject or his conclusions on harshness. The Appellant's submissions regarding the employment relationship between the Appellant and the Respondent are in contrast to the Deputy President's conclusion that the employment relationship was not irretrievably broken down or untenable.

Permission to appeal

[14] In their submissions on why permission to appeal should be granted, the Appellant argued that the public interest is enlivened pursuant to s 400 of the Act because the Decision, if left to stand, would raise difficulties about how universities could guarantee their stakeholders that research conducted in such institutions is adequate. This follows from an inability on the part of universities to be able to performance manage academics by holding them to quality standards for both research and teaching. Additionally, the Decision is counter intuitive in its reasoning, and manifests injustice as to both why the dismissal was unfair and/or that reinstatement was determined to be an appropriate remedy.

[15] The Respondent's submission in relation to permission to appeal was that the Decision concerns very specific facts in relation to the Respondent's case. Such facts relate to the performance by the Respondent of the research component of her job, whether she was held to a performance standard higher than required by the relevant agreements and whether she

was held to a performance standard which was not yet implemented by the Appellant and which was higher than required of staff in the Appellant's Business School. Overall, on a plain reading of the Decision, the subject matter is confined to an assessment of how one UTS faculty managed the performance of one academic in relation to one aspect of her role.

[16] An appeal under s 604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[2] There is no right to appeal and an appeal may only be made with the permission of the Commission.

[17] Section 400 of the Act applies to this appeal. It provides:

> "(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
>
> (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact."

[18] In *Coal & Allied Mining Services Pty Ltd v Lawler and others*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s 400 of the Act as "a stringent one".[3] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[4] The public interest is not satisfied simply by the identification of error, or a preference for a different result.[5] In *GlaxoSmithKline* a Full Bench of the Commission identified some of the considerations that may attract the public interest:

> "… the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters."[6]

[19] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence

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[2] *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 [17] per Gleeson CJ, Gaudron and Hayne JJ.

[3] (2011) 192 FCR 78; (2011) 207 IR 177 [43].

[4] *O'Sullivan v Farrer and another* (1989) 168 CLR 210 [216] – [217] per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 243 CLR 506 [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78; (2011) 207 IR 177 [44]-[46].

[5] see: *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27], 197 IR 266 ('*GlaxoSmithKline'*); *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 388, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663 at [28].

[6] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 [27]; (2010) 197 IR 266.

of appealable error.[7] However, that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.

Consideration

Ground 1.1 – Irrelevant considerations

[20] The Appellant argued that the observations at [104]-[106] in the Decision amounted to irrelevant considerations in the context of finding that the Appellant did not have a valid reason to terminate the Respondent's employment. It was argued that, accordingly, this constitutes a *House v King* (1936) 55 CLR 499 error. Whilst we acknowledge that the comments made at paragraphs [104]-[106] were unhelpful, we do not agree with this proposition for the following reasons.

[21] First, in reading paragraphs [104]-[106] in the proper context of the Decision, it is apparent that these paragraphs were inconsequential musings. They did not constitute a driving part of the Deputy President's reasoning in the Decision when read fairly and as a whole.

[22] The Appellant argued that the first sentence of paragraph [103] supports the notion that the Deputy President's observations in paragraphs [104]-[106] influenced his later analysis under s 387 of the Act. For completeness, we have extracted paragraph [103] of the Decision below:

> "For the reasons which follow, I have come to the view that the reasons for Dr Zhao's dismissal were not 'soundly based' or 'well founded'. Accordingly, the dismissal was not for a valid reason and when all the relevant matters are properly taken into account, her dismissal attracts the epithet of '*unreasonable*', within the meaning of s 387 of the Act. I shall return to these matters shortly."

[23] On one view, by the Deputy President stating that 'for the reasons which follow' at [103], one may assume that his subsequent observations at [104]-[106] logically formed part of his view that the reason for the Respondent's dismissal was not soundly based. However, by having regard to the final sentence in paragraph [103], it is clear that the observations at [104]-[106] were not material to the Deputy President's findings in relation to the validity of the reason for the Respondent's dismissal. The Deputy President expressly noted that he would "return to these matters" (implying his analysis under s 387 of the Act) shortly. This final sentence indicates that the Deputy President's findings relevant under s 387(a) of the Act would be revisited shortly. That is to say, the observations at [104]-[106] were a diversion from which the Deputy President later returned from.

[24] Paragraphs [104]-[106] are then prefaced with the heading 'General observations'. This heading reinforces that the Deputy President would then proceed to make highly generalised observations.

[25] Regard must also be had to the final sentence of [106] of the Decision which reads: 'I turn now to the particular features of this case'. The definitive and unequivocal diction in the

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[7] *Wan v AIRC* (2001) 116 FCR 481 at [30].

final sentence at [106] demonstrates that the Deputy President's general observations have concluded and that the specific features of the case would now be examined. We discern no basis for the proposition that paragraphs [104]-[106] were more than mere 'observations' and therefore would reject them being characterised as 'irrelevant considerations'.

[26] Accordingly, we accept the Respondent's submission that, in focussing on the opening words of [103] but not the Deputy President's reasons as a whole, the Appellant's reading of the Decision is one that could be characterised as the type of 'over-zealous judicial review' that a majority of the High Court warned against at [31] in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259:

> "… the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed."

[27] Overall, to the extent that the Appellant relies on the aforementioned words expressed at [103] to argue that the comments at [104]-[106] constitute more than mere musings, we view this reading as narrow and one that fails to grasp the tenor of the reasons later stated by the Deputy President in assessing the reasonableness of the Respondent's dismissal.

[28] The Appellant also argued that the Deputy President's finding at [112](i) shows clearly that paragraphs [104]-[106] were matters taken into account in his assessment under s 387(a). However, the Deputy President's view that insufficient weight was given to flexible work allocations for the Respondent was one that was informed by the evidence before him, rather than by some express or implied link to a standard ostensibly explicable from his observations at [104]-[106].

[29] As noted in the Respondent's submissions, the flexibility contemplated by the Deputy President was something expressly enshrined in the Guidelines. Clause 4.1 of the Guidelines states (emphasis added):

> "The typical pattern of academic workload for the majority of academic staff across the university is 40% teaching, 40% research and 20% other activities (see clause 37.9 UTS Academic Staff Agreement 2014). **Some staff members may be allocated a greater or lesser load in the three areas of activity as outlined below.**"

[30] Clause 4.3 of the Guidelines stipulates that:

> "Workload weightings may encompass a range of combinations depending on both the skills and achievements of individual staff members, and the needs of the academic unit. The 'normal' pattern of academic workload is 40% Teaching, 40% Research and 20% Service assumes AACSB Scholarly Academic status."

[31] Accordingly, the Deputy President's reasoning at [112](i) was not pursuant to an 'undefined normative standard' in relation to how universities should manage employees, as argued by the Appellant. In fact, the 'flexible work allocations' referred to by the Deputy President were allocations which the Guidelines make specific reference to.

[32] We also note that, in the matters of mitigation raised by the Respondent on 14 May 2019, the Respondent requested the Appellant to move the Respondent to a teaching focussed

role if concerns still existed about the Respondent's research quality. It was reasonably open for the Deputy President to have regard to the Respondent's request in the context of whether a valid reason for dismissal was present. Clause 53.6 of the 2018 Agreement allowed for mitigation matters to be raised:

> "53.6 Before deciding to take disciplinary action above a verbal warning, the Provost will:
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> …
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> b. inform the staff member in writing:
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> …
>
> ii. provide the staff member five working days to put any matters in mitigation."

[33] Accordingly, it is not apparent that the matters at [104]-[106] were matters taken into account in the Deputy President's analysis at [112](i), nor in the Deputy President's analysis more broadly in relation to s 387(a) of the Act. The Deputy President's comments at [112] bear no relationship to the observations made at [104]-[106].

[34] In oral submissions, the Appellant also argued that the Deputy President's comments at [104]-[106] were manifested in the final sentence at [110] in the Decision. We reject this submission on the basis that this sentence related to the Deputy President's evaluation that, notwithstanding the workload allocation weightings assigned to the Respondent, there was no valid reason for the Respondent's dismissal. We will further deal with paragraph [110] in the Decision in our consideration of appeal ground 1.2(a) below.

[35] To the extent that the Deputy President's observations at [104]-[106] influenced his findings relevant to the Respondent's dismissal being deemed 'unreasonable', in any event, we note the Deputy President also found on an independent basis that the dismissal was 'harsh'. The facts that were contemplated in finding that the dismissal was 'harsh' were confined to the personal and economic consequences of the dismissal on the Respondent and are not in any way connected to the Deputy President's observations at [104]-[106]. Accordingly, there is no reasonable possibility that a different result would follow in a re-hearing of the matter. Accordingly, the grant of permission to appeal would not be of any utility.

[36] We also reject the assertion that any *House v King*[8] error is enlivened by the argument that the Appellant was deprived of the opportunity to be heard on the matters mentioned at [104]-[106]. The comments were not material to the outcome determined by the Deputy President.

[37] We would also note that the mere fact that a Full Bench of the Commission might have decided the matter differently will not enliven the public interest. For the reasons which we have outlined, we do not believe the Deputy President erred in exercising his discretion.

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[8] (1936) 55 CLR 499.

[38] Overall, it is apparent that the Deputy President's comments at [104]-[106] were merely observational and did not influence his analysis under s 387 of the Act. Whilst we would note that those comments were unhelpful, they did not form part of the gravamen of the Deputy President's reasoning when read fairly and as a whole. The comments did not go to his reasoning as to whether there was a valid reason for dismissal. Therefore, appeal ground 1.1 would fail and does not attract the public interest.

Ground 1.2(a) – Significant error of fact regarding findings as to the 40:40:20 split

[39] The Appellant argued that the Deputy President made a significant error of fact by misunderstanding the operation and mistakenly applying an erroneous mathematical approach to the allocation of work applicable to the Respondent between teaching, research and services. The Appellant had specific regard to the Deputy President's reasoning at [110] in the Decision, where the Deputy President stated:

> "… It is difficult to conceptually and rationally conclude that a 60% performance rating equated to poor or unsatisfactory performance overall."

[40] In essence, the Appellant's submission concerned the failure of the Deputy President to consider as a matter of fact that the Respondent was not meeting the standards expected of her in relation to research. By not considering this issue, it was argued, the Deputy President engaged in error.

[41] The Deputy President's statements at [110] in the Decision were made in the context of considering whether a valid reason for her dismissal was her poor research performance. As is made clear from the case law to which the Deputy President had regard to at [102] in the Decision, a valid reason for termination must be justifiable on an objective analysis of the relevant facts.[9]

[42] Accordingly, contrary to the Appellant's submissions, the relevant 'question' or test was not whether the Respondent was, as a matter of fact, meeting the standards expected by the Appellant. This approach, as argued by the Respondent, is erroneous as it treats the Appellant's view of whether the Respondent was meeting the standards expected of her as the prism through which a valid reason for dismissal is to be determined. The Deputy President was tasked with assessing objectively, pursuant to s 387(a) of the Act, whether there was a valid reason for dismissal connected with the Respondent's capacity. It was reasonably open for the Deputy President to find on the evidence that a valid reason did not exist, notwithstanding how the Respondent's workload allocations were structured.

[43] We also do not accept the Appellant's submission that the logical conclusion of the Deputy President's comments is that an academic could neglect a major part of their workload as long as they put their effort into the other aspects of their workload. The Appellant suggests that under the Deputy President's formulation, if an employer does not take issue with parts of an employee's performance, the employer's actual concerns with a fundamental aspect of the employee's performance may be swept aside.

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[9] *Rode v Burwood Mitsubishi Print* R4471 (AIRCFB, Ross VP, Polites SDP, Foggo C, 11 May 1999) [19].

[44] On a fair reading of the Decision, the Deputy President's statement in the final sentence at [110] was confined to the notion that the performance of the Respondent cannot be assessed pursuant solely to the raw workload allocation weightings assigned to the Respondent and alleged failure to meet one allocation weighting. The Deputy President's reasoning was that the Respondent's performance, when assessed as a whole or overall, did not justify her dismissal. Accordingly, we reject the proposition that the Deputy President made a significant error of fact by misapplying an erroneous mathematical approach in considering the Respondent's workload allocations.

[45] The gravamen of the Deputy President's reasoning is sound and therefore appeal ground 1.2(a) would fail and does not attract the public interest.

Ground 1.2(b) – Significant error of fact as Respondent's performance was not measured against the Benchmarks

[46] The factual issue within this ground of appeal concerns whether the Respondent's performance was measured against the Guidelines or Benchmarks.

[47] For completeness, the relevant comments made by the Deputy President at [107] in the Decision are extracted below (emphasis added):

> "[107] There was some attempt by Professor Michayluk to differentiate the benchmarks from the PIP with the Professor stating that the benchmarks were not used for Dr Zhao's PDP or the PIP. **However, it seems to me that the setting of a Lecturer Level B's performance target of publication in an A* or A ranked journal is intrinsically linked to the Faculty's Workload Guidelines and the benchmarks.** It was certainly how the University's evidence was expressed and developed. Professor Rhodes' evidence was that the Workload Guidelines work alongside the benchmarks document – Managing for Performance Academic Benchmarks. I note the seeming overlapping and confusion between the PIP and the Workplace Guidelines requiring publication in two A* or A ranked journals over five years. **In my view, it is somewhat unrealistic and artificial to suggest that the benchmarks were not used in Dr Zhao's PIP, when that is exactly what she was measured against and said to not have been met.**

[48] At [108] in the Decision the Deputy President further stated that:

> "There was no contradiction that the benchmarks would not come into full effect until 2021, yet the applicant was measured against them. Moreover, the link is clear when the uncontested evidence of Associate Professor Kaine was that the revised benchmarks have been drafted and sent to the Provost for approval. They reflect a requirement for a Lecturer Level B to publish a minimum of two papers every three years in quality journals."

[49] Additionally, the Deputy President at [111] stated:

> "Further, there appears to be a contradiction in that the performance measurements expected of Dr Zhao were claimed to be higher than those required by either the 2014 or 2018 Agreements. At best, there may be a disconnect between the Agreement requirements and the University's expectations …"

[50] At the heart of the Appellant's submission in this ground of the appeal is the contention that the Respondent's performance was not measured against the Benchmarks, but rather the criteria set in the Respondent's work plan, development plan and performance reviews.

[51] Having regard to a number of materials including the relevant enterprise agreements and the Guidelines, the Appellant argued each university faculty was given scope to determine appropriate expectations and work allocations. Accordingly, it was open to the UTS Business Faculty to set the standards for academic performance. This included the standards set out in work plan and development plans. It was also noted by the Appellant that the Respondent agreed to the requirements in the PIP.

[52] As correctly identified by the Respondent, the problem with the Appellant's submissions is that they elevate form over substance. This is because it is clear on the evidence that the Appellant did notionally take the Benchmarks into account when measuring the Respondent's performance. This is notwithstanding the fact that the Benchmarks would not come into effect until 2021.

[53] In assessing workload allocation procedures, clause 4.1.2 of the Guidelines required consideration of ABDC journal rankings. Such rankings were inclusive of A and A* journals, but not limited to such journals. As noted by the Deputy President at [112](h) in the Decision, the Process Review Committee that reviewed the process in the determination to terminate the employment of the Respondent stated:

> "Our concern is that the strategic objectives have not yet resulted in the implementation of the Academic Benchmarks and there is no reference in the Agreement to the Benchmarks, yet the standards incorporated in the PIP are of a higher standard than is currently required of staff generally in the Business School. We question whether the performance target set for Dr Zhao was appropriate …"

[54] Furthermore, the email correspondence between Professor Michayluk and the Respondent in relation to the Respondent's performance in 2018 expressly made reference to the Benchmarks. We accept the Respondent's submission that no other standard other than the Benchmarks was referred to in measuring the performance of the Respondent in her PIP. Professor Michayluk in an email sent to the Respondent dated 26 February 2018 stated:

> "So that we can continue to support you and improve your performance to move towards meeting the UTS Business School Managing for Performance Academic Benchmarks, I informed you during the meeting that we are implementing a Performance Improvement Plan (PIP), a copy of which is attached."

[55] The Appellant is correct to submit that the Respondent was not subjected to having her performance measured against the Benchmarks in the sense that she was required to reach the point system specified within a 5-year period. However, as the Deputy President acknowledged at [108], although the Benchmarks were not formally applied in a strict sense, they were practically applied. It was open for the Deputy President to find that, in substance, the Respondent's performance was assessed against the standards set out in the Benchmarks.

[56] It follows that, it was reasonably open for the Deputy President to have regard to this evidence in finding that the Respondent's dismissal was 'unreasonable' within the meaning contemplated in s 387 of the Act.

[57] The Appellant also argued that the Respondent agreed to and signed the PIP in regards to improving her research output. Whilst we note that the Respondent was at the time an experienced academic and had the benefit of being represented by the National Tertiary Education Union in the PIP process, we do not see these facts as being material to disturbing the Deputy President's finding that the Respondent's performance was measured as against the Benchmarks. The Respondent's agreeance to the research expectations in her PIP does not nullify the fact that such expectations were derived from the Benchmarks.

[58] Overall, the Deputy President did not make a significant error of fact by wrongly finding that the Respondent's performance was measured against the Benchmarks. Accordingly ground 1.2(b) of this appeal would fail and does not attract the public interest.

Grounds 1.2(c), 1.2(d), 1.2(e), 2 and 3

[59] The Appellant made brief written submissions in relation to grounds 1.2(c), 1.2(d) and 1.2(e). In the hearing, Mr Y *Shariff* of Counsel for the Appellant noted that such submissions in effect relate to further irrelevant considerations or errors that follow from grounds 1.1, 1.2(a) and 1.2(b). Mr *Shariff* conceded that each of these grounds (meaning 1.2(c), 1.2(d) and 1.2(c)) on their own would not be sufficient for the appeal to succeed.

[60] Mr *Shariff* also accepted that grounds 2 and 3 of the appeal, dealing with harshness and the remedy ordered in the matter, are contingent upon the success of the primary grounds (which we take to mean appeal grounds 1.1, 1.2(a) and 1.2(b)).

[61] As we have found earlier that grounds 1.1, 1.2(a) and 1.2(b) would fail and do not attract the public interest, it is unnecessary for us to consider the other grounds of appeal.

Should permission to appeal be granted?

[62] Contrary to the Appellant's submissions, the Decision does not raise difficulties in respect of how universities can guarantee their stakeholders that quality research is undertaken in their institutions. The Decision does not stand for any general proposition regarding the inability for universities to performance manage their staff in respect of meeting expectations regarding research. Additionally, the findings in the Decision do not raise any novel questions of law.

[63] Critically, as found in our analysis earlier, the 'musings' of the Deputy President at [104]-[106] in the Decision did not influence the Deputy President's reasoning and thus did not effectuate any procedural unfairness. Whilst such observations were unhelpful, they did not influence the critical findings in the Decision. Accordingly, there is no manifest injustice rendered by the Decision, nor is the result counter intuitive. As the findings in the Decision are not disturbed, we find no substance in the submission that the Decision manifests injustice in any respect.

[64] In considering whether this appeal attracts the public interest, we are not satisfied that:

- there is a diversity of decisions at first instance for which guidance from a Full Bench is required;

- the appeal raises issues of importance and/or general application to the Commission's unfair dismissal jurisdiction;

- the Decision manifests an injustice, or the result is counter-intuitive; or

- the legal principles applied by the Deputy President were disharmonious when compared with other Commission decisions dealing with similar matters.

Conclusion

[65] For the reasons set out above, we are not satisfied, for the purpose of s 400(1) of the Act, that it would be in the public interest to grant permission to appeal.

[66] Permission to appeal is refused.

DECISION OF DEPUTY PRESIDENT COLMAN

[67] I have had the benefit of reading the decision of Vice President Catanzariti and Commissioner Johns. I agree with their summary of the background and the contentions of the parties however I have reached a different conclusion as to the disposition of the appeal. I consider that permission to appeal should be granted in the public interest and that the appeal should be upheld, on the basis that the appellant, University of Technology Sydney ('university'), was not given an opportunity to be heard on the matters referred to at [104] to [106] of the Deputy President's decision, and was therefore denied procedural fairness.

[68] The university dismissed Ms Zhao for unsatisfactory performance, because she had failed to meet its requirement that she publish at least one research paper in an A* or A ranked journal over a two-year period. Ms Zhao had not published in such a journal for over six years.

[69] The Deputy President concluded that the university did not have a valid reason to dismiss Ms Zhao. Having set out the background, the evidence, and the contentions of the parties, the Deputy President stated:

> "[103] For the reasons which follow, I have come to the view that the reasons for Dr Zhao's dismissal were not 'soundly based' or 'well founded'. Accordingly, the dismissal was not for a valid reason and when all the relevant matters are properly taken into account, her dismissal attracts the epithet of '*unreasonable*', within the meaning of s 387 of the Act. I shall return to these matters shortly."

[70] Then, under a heading of 'General Observations', the Deputy President said the following:

> "[104] It is generally accepted that most modern universities in Australia and internationally, serve a twofold focus and purpose; namely, to provide an excellent and inquisitive tertiary teaching environment for students and to provide a collegiate centre

for the pursuit and achievement of high-level academic research in particular fields of endeavour. Views might differ as to what focus is more important and therefore, afforded the most priority. However, in my humble opinion, the teaching of future generations of tertiary qualified students of all ages is the primary purpose of a first-class university. Of course, it is also notorious that many universities have a singular reputation for excellence in a specific discipline or academic pursuit.

[105] That said (and as is sometimes cynically observed), universities can become ruthlessly competitive, if not obsessed, with achieving the top research rankings and reputation in order to attract students ('code' for income) which, to my mind, may tend to distract from the focus of providing a quality learning experience for students.

[106] I also consider it is self-evident that an academic, like all of us, will have different interests, perspectives, strengths and weaknesses. A university, of all of society's institutions, should have the flexibility to accommodate an academic's personal and professional qualities and attributes, and maximise a particular individual's interests and talents to enhance the best outcomes for the common good. I turn now to the particular features of this case."

[71] The Deputy President then addressed the evidence about the university's performance requirements of Ms Zhao, including in relation to the performance improvement plan that the university had set for her, and the significance of university benchmarks, which were due to come into effect in 2021. The Deputy President then stated:

"[110] In my opinion, the University did not give weight or sufficient weight to a number of matters, which when viewed objectively, renders Dr Zhao's dismissal for unsatisfactory/poor performance as unreasonable. This includes, but is not limited to, the University's own raw workload allocations of 40% teaching, 40% research and 20% service. Dr Zhao had effectively met and exceeded her teaching performance (40%) and there was no evidence that the 20% for service was not satisfactory. This means Dr Zhao's alleged poor performance (assuming poor performance captured the entire 40% research rating – which is not realistic), still left her at 60% of achieved performance. It is difficult to conceptually and rationally conclude that a 60% performance rating equated to poor or unsatisfactory performance overall."

[72] The Deputy President identified ten further matters to which the university had not given appropriate weight:

"[112] That said, in my view, appropriate weight was not given to:

(a) Dr Zhao's markedly improved teaching performance;
(b) recognising that journal publications are entirely at the whim of the editor/s and involve a range of factors outside a contributor's control, as explained by Associate Professor Kaine;
(c) appreciating that Dr Zhao was doing her best, she had prepared the paper required by the PIP and had received feedback, which was not as critical as Professor Michayluk contended. While criticised for not expressing any issues with the PIP, this is not a matter telling against her; rather, she had cooperated because of her willingness to engage and strive to improve her performance;

(d) Dr Zhao's cooperation and engagement with the PDP and the PIP. She was not obstructive, uncooperative or belligerent;
(e) the publication of a paper in an A* or A ranked journal has notoriously low acceptance rates. It is well accepted that the process can be long and drawn out and may involve many reviews (by different reviewers) and resubmissions;
(f) the fact that Dr Zhao had published in a range of ranked journals over many years, including in three A* or A ranked journals. There was a failure to recognise that she was capable of publication in high quality journals, subject to appropriate peer and other support being provided;
(g) not recognising the loss of her two mentors overseas;
(h) not appreciating that the Review Committee expressed reservations about the process when it stated that:

> 'Our concern is that the strategic objectives have not yet resulted in the implementation of the Academic Benchmarks and there is no reference in the Agreement to the Benchmarks, yet the standards incorporated in the PIP are of a higher standard than is currently required of staff generally in the Business School. We question whether the performance target set for Dr Zhao was appropriate.'

(i) considering flexible work allocations based on Dr Zhao's very good teaching performance by insisting on a rigid 40:40:20 formula. I note Professor Michayluk was somewhat dismissive that her teaching performance was based on student surveys. There was no other basis propounded as being relevant for such an assessment. It seemed to be uncontroversially accepted as the means of judging an academic's teaching performance. No other basis for assessment was suggested by Professor Michayluk or anyone else; and
(j) consideration of other disciplinary outcomes under the 2018 Agreement, rather than the most draconian, such as demotion, loss of grade or pay.

For these reasons, I am not satisfied that the University had a valid reason for Dr Zhao's dismissal."

[73] The Deputy President proceeded to consider the other matters in s 387 of the Act. He concluded that the matters in s 387(b), (c), (d), (f) and (g) were neutral factors in Ms Zhao's case, and that the consideration in s 387(e) told slightly in favour of a conclusion that the dismissal was unfair, because the relevant warning was in his view not sufficiently clear. In respect of s 387(h), the Deputy President said that he considered the dismissal was harsh because of the personal and economic consequences of the dismissal on Ms Zhao.

[74] The university's notice of appeal contended, by its first ground of appeal, that the Deputy President erred by taking into account the matters at [104] to [106], which it said were irrelevant. By this the university meant that the Deputy President's observations in these passages were erroneous. However, in its written appeal submissions, the university amplified the first ground of appeal and contended that it had been given no notice of the matters referred to by the Deputy President at [104] to [106]. The university contended that these matters did not reflect the tenor of any of the evidence or submissions before the Deputy President, and that it was not afforded an opportunity to respond to these matters and was therefore denied procedural fairness. Ms Zhao raised no objection to the university's enlargement of its first ground of appeal. I would in any event have granted leave to amend the notice of appeal.

[75] Ms Zhao acknowledged that the matters referred to by the Deputy President at [104] to [106] were not raised in the proceedings by the parties or the Deputy President. However, she contended that these were inconsequential musings. She pointed to the last sentence in [103], where the Deputy President signalled an intention to 'return' to the analysis of the unreasonableness of the dismissal, implying that he was at that point departing from this analysis. Ms Zhao referred then to the final sentence of [106], where his Honour stated that he would 'turn now' to the particular features of this case. Ms Zhao contended that these were, in effect, structural parentheses that separated the 'musings' at [104] to [106] from the deliberative part of the decision.

[76] The majority accepts this contention and considers the passages at [104] to [106] to be a diversion, containing mere observations which, when read fairly and as a whole, do not form part of or affect the Deputy President's reasoning as to whether there was a valid reason for dismissal, or whether the dismissal was unfair.

[77] I disagree. The matters referred to in the passages at [104] to [106] were highly relevant to the issues in dispute. They were not observations of fact. They were expressions of opinion on relevant matters: that teaching is the primary purpose of a first-class university ([104]); that universities can become ruthlessly competitive, if not obsessed, with research rankings (at [105]); and that universities should have the flexibility to maximise an academic's interests (at [106]). These matters went to the nub of the dispute. Ms Zhao's contention was that she was a very good teacher, and that she should not have been dismissed for failing to have a paper published in an A* or A rated journal. The university's contention was that, good teacher or not, it was very important for Ms Zhao to publish a paper in such a journal, and that her failure to do so over a protracted period meant that her dismissal was not unfair. Because the views of the Deputy President at [104] to [106] were so directly relevant to the matters in dispute, I consider that it is unnecessary to identify further indications in the decision that these passages affected the deliberative process and the outcome. But such indications exist.

[78] In my opinion, the views of the Deputy President expressed at [104] to [106] have a clear connection with the reasoning in succeeding paragraphs of the decision. The passage at [110], extracted above, concluded that Ms Zhao's 40% teaching component had been met, that the 20% administrative component had not been in dispute, and that this resulted in '60% of achieved performance', leaving the 40% for the research component unfulfilled. The Deputy President stated that it was difficult to conclude that a 60% performance rating equated to a poor or unsatisfactory performance overall. To my mind, this statement must be understood in the context of the Deputy President's opinion that teaching is the primary purpose of a first-class university. That is, in the Deputy President's view, teaching is the primary purpose, and Ms Zhao was good at teaching, therefore her 60% performance rating was satisfactory. Without that context, I fail to see how a 60% performance rating could be regarded as satisfactory.

[79] Then at [112], of the various matters that the Deputy President considered not to have been given 'appropriate weight' by the university, two concern Ms Zhao's positive teaching performance ([112](a) and (i)). As teaching has been identified as the primary purpose of a first-class university, one infers that these two matters carry special weight. The matter identified by the Deputy President at [112](i) is that the university failed to consider flexible work allocations for Ms Zhao based on her very good teaching performance, and instead insisted on the 40:40:20 formula. This has a direct connection with the Deputy President's

views that universities should give primacy to teaching and be flexible so as to allow academics to pursue their interests. The strength of this connection is not diminished by the fact that the university's guidelines allow for the possibility of variation in the application of the formula.

[80] Not every denial of procedural fairness entitles the aggrieved party to a new hearing. The university needs to establish that the denial of procedural fairness deprived it of the possibility of a successful outcome.[10] In my view, it has done so.

[81] If the Deputy President had not held the view that teaching is the primary purpose of a first-class university ([104]), that universities can become obsessed with research rankings ([105]), and that universities should maximise an academic's interests ([106]), his assessment of Ms Zhao's application generally, and the weight to be given to the matters at [110] and [112] in particular, might have been different.

[82] If the university had been afforded an opportunity to be heard on the matters in [104] to [106], it might have been able to persuade the Deputy President that, for example, both teaching and the publication of quality research in leading journals are primary purposes of a first-rate university; that universities are not obsessed by, but have an interest in research rankings, which are affected by publications; that academic interests are important but do not displace the need to publish papers in journals of the required standard; and that, if after the provision of reasonable assistance over a reasonable period, publication requirements are not met, dismissal is a reasonable response. In short, there is at least a *possibility* that the university might have been able to alter the Deputy President's views on the matters referred to at [104] to [106], and that this might have led to a different conclusion on the question of valid reason and the merits of Ms Zhao's application, or a different conclusion on the question of remedy.

[83] Ms Zhao contended that, even if the matters at [104] to [106] influenced the Deputy President's decision, there would be no utility in granting permission to appeal, because there was an 'independent basis' upon which the Deputy President concluded that the dismissal was harsh, related to the personal and economic consequences of the dismissal. I reject this contention. The Deputy President did not say that, even if there had been a valid reason for dismissal, he would nevertheless have found the dismissal to be harsh and therefore unfair. He said that, although he had found Ms Zhao's dismissal to be unreasonable, he was also satisfied that the dismissal was 'harsh' (at [119]). Further, the question of whether a dismissal was harsh needs to be assessed in the context of whether there was a valid reason for dismissal. Had a different conclusion been reached on the question of valid reason, it might have affected the consideration of whether the dismissal was harsh.

[84] I quite agree with the majority that a Full Bench should avoid over-zealous review and should not, in the words of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,[11] seek to glean some inadequacy from the way in which the reasons are expressed. But my concern about paragraphs [104] to [106] has nothing to do with the manner in which his Honour's reasons are expressed. It relates to the fact that those passages form part of the reasons for the decision, and that the university had no notice of those matters.

[10] *Stead v State Government Insurance Commission* [1986] HCA 54, 161 CLR 141 at 145, 147; see also *AWU v Job Connect Recruitment Pty Ltd* [2019] FWCFB 5132 at [15].

[11] (1996) 185 CLR 259 at 272.

Moreover, it seems to me that, in order to read the decision fairly and as a whole, it is necessary to take proper account of the passages from [104] to [106], and that to dismiss these passages as irrelevant or inconsequential is to read the decision as something less than a whole.

[85] The fact that an appeal bench might disagree with a decision of a member at first instance is not a basis to ascribe error to the decision. The reason for upholding the appeal is not that the Deputy President held the views that he expressed at [104] to [106]. The reason is that the university did not know that these were the Deputy President's views and was not given an opportunity to be heard in relation to them. This deprived it of the possibility of a different outcome, because the views were relevant to the issues in dispute and formed part of the Deputy President's reasoning.

[86] It is not necessary to consider the other grounds of appeal. The university was denied procedural fairness. This was an error of jurisdiction attracting the public interest for the purpose of s 400(1) of the Act. I would grant permission to appeal, uphold the appeal, quash the decision and remit the application for redetermination.

VICE PRESIDENT

Appearances:

Mr Y *Shariff*, of Counsel, for the Appellant.
Mr M *Harding*, Senior Counsel and Ms K *Burke*, of Counsel, for the Respondent.

Hearing details:

2020.

Telephone hearing:

8 May.

Final written submissions:

Appellant's submissions dated 21 April 2020
Respondent's submissions dated 5 May 2020

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