[2024] FWC 1368 [Note: An appeal pursuant to s.604 (C2025/139) was lodged against this decision.]



# **DECISION**

Fair Work Act 2009 s.394—Unfair dismissal

## **Dr Aleksander Owczarek**

 $\mathbf{v}$ 

The University of Melbourne

(U2023/13159)

DEPUTY PRESIDENT BELL

MELBOURNE, 20 DECEMBER 2024

Application for an unfair dismissal remedy – allegations of misconduct partially sustained – applicant informally warned and issued apology in March 2021 – no further misconduct - delay in conducting formal investigation until 2023 – dismissal unfair – reinstatement appropriate – order for lost pay not appropriate.

#### Overview

- [1] The applicant, Dr Aleksander Owczarek, was summarily dismissed by the respondent, The University of Melbourne (the University), on 14 December 2023. The applicant seeks an order for an unfair dismissal remedy under s 394 of the *Fair Work Act 2009* (Cth) (Act), primarily in the nature of reinstatement.
- [2] The reasons for dismissal were alleged serious misconduct, said to be constituted by a combination of sexual harassment (primarily in the nature of the extended pursuit of an unwelcomed romantic or non-platonic relationship) and inappropriate workplace behaviour by the applicant toward a work colleague (primarily unwelcome communications or attempts to communicate on repeated occasions for non-work matters), the latter of whom is described in these reasons as the "Complainant". During the period of alleged misconduct, the applicant was Acting Dean of the School of Sciences at the University, and the Complainant reported directly to him.
- [3] The critical incident of conduct commences at a dinner between the applicant and the Complainant on 26 September 2019, at a restaurant in Melbourne. At that dinner, the applicant was said to have placed his hands on his colleague's hands (the applicant says they jointly held hands) and said "I love you" or similar words (the applicant takes issue with the exact form of words said, the context and alleged reciprocation by the Complainant). The University then relies on a series of communications or unwelcome attempts at contact over the course of the following 15 months to January 2021. Many of those communications, being text messages or emails, were not in dispute and none of them were in any way sexual. What was in dispute was the characterisation of those actions, with the University contending they were said to be in furtherance of pursuing a romantic relationship.

- [4] In addition to disputing aspects of the conduct relied upon by the University and the characterisation of other conduct, a central element of Dr Owczarek's case concerns a meeting he had with human resources on 18 March 2021, where Dr Owczarek was told to "stop" all contact with the Complainant. Dr Owczarek's contention was that he completely complied with that directive and he did not attempt to, or make, contact with the Complainant at all from that date. This period essentially coincided with a change in work roles by the applicant, such that he no longer had any professional dealings with the Complainant.
- [5] In the beginning of 2023, Dr Owczarek applied for a position that would once again see him working with the Complainant. At that stage, the Complainant made a formal complaint to the University about the matters from 2019 to early 2021, which the University formally investigated, and led to his dismissal.
- [6] Upon the matter being allocated to me, I issued directions for the filing of evidence and submissions. While there ended up being some extensions to those dates, in part for matters outside the parties' control, those directions were complied with.
- [7] The applicant filed witness statements on his own behalf, and a number of supporting documents. The University filed statements by Mr Mark Dean (the CEO of Enmasse, a consultancy firm that provided workplace behaviour consultancy services to the University), Ms Erica Edmands (a solicitor appointed by the University to conduct its investigation), Professor Nicola Phillips (Provost at the University), Ms Julia Hampshire (Human Resources Director for the Faculty of Science at the University), and the Complainant. All witnesses were cross-examined. The hearing spanned six days in total, supplemented by extensive written submissions.
- [8] The parties were represented by solicitors and counsel, with permission having previously been given.

#### **Factual findings**

- [9] Dr Owczarek completed undergraduate studies in physics in 1985 at the University of Queensland and then his PhD in theoretical physics in 1989 at the Australian National University. After completing a postdoctoral fellowship at the University of Oxford throughout 1989 to 1991, he was continuously employed at the University of Melbourne since February, 1992. His employment at the University was all within the Department of Mathematics and Statistics or within the broader Faculty of Science.
- [10] In December 2000, Dr Owczarek was 'tenured' and in 2010 was appointed a full professor. The applicant's research record is impressive. At the time of the hearing, he had published 134 refereed journal articles, many within leading international journals. He has been the principal or sole chief investigator for more than nine Australian Research Council grants and chief investigator in a further ten.

#### Employment obligations and policies

- [11] Dr Owczarek's most recent contract of employment was dated 2 November 2016. His contract provided that he was required to comply with the University's "Discrimination, Sexual Harassment and Bullying Policy and Procedures" and to complete the online learning course "Promoting Positive Workplace Behaviours". The contract also provides that Dr Owczarek's employment was subject to the University enterprise agreement and various policies and regulations.<sup>2</sup>
- [12] The University had a policy known as the Appropriate Workplace Behaviour Policy. Version 3 of the Appropriate Workplace Behaviour Policy came into effect on 19 August 2019 and applied to the allegations between August 2019 and 7 November 2019. Version 4 of the Appropriate Workplace Behaviour Policy came into effect on 8 November 2019 and applied in respect of all allegations occurring after that date.
- [13] The objectives of the Appropriate Workplace Behaviour Policies are expressed to detail the standards, values and expectations for appropriate behaviour in the workplace, in particular the obligations on individuals to act in good faith, with trust, ethically, and with integrity in the best interests of the University.<sup>3</sup>
- [14] Both versions 3 and 4 of the Appropriate Workplace Behaviour Policy contain the following values (which are separately stated to be obligations) at clause 4.2:
  - "Consistent with the University's strategic imperatives in the pursuit of excellence, the University's values are:
    - (a) maintaining the highest international standards of ethics and quality in research, teaching and administration;

. . .

(d) advocating and upholding fundamental human rights;

. . .

- (g) [version 3] / (h) [version 4] maintaining a respectful, safe, rewarding and environmentally sustainable learning and working environment."
- [15] Both versions of the Appropriate Workplace Behaviour Policy provide, at clause 7.3:
  - "An individual must not directly or indirectly, or incite others to, engage in any of the following behaviours, in any circumstance which may have an impact on the workplace:

. . .

(c) engage in sexual harassment;".

- [16] Both versions of the Appropriate Workplace Behaviour Policy contain a definition of sexual harassment, which is as follows:
  - "Sexual harassment is unlawful in accordance with the Sex Discrimination Act 1984 and Equal Opportunity Act 2010. Sexual harassment is any unwelcome and uninvited harassment where the behaviour has a sexual element or implication and the harasser in all the circumstances should have reasonably anticipated that the other person would be offended, humiliated or intimidated. The harasser does not need to intend to offend, humiliate or intimidate, or even to know, that this was the effect of the behaviour for this conduct to breach this policy or be against the law."
- [17] The University also has a Sexual Misconduct Prevention and Response Policy, which came into effect on 14 October 2021. The scope of that policy was expressed to apply to a "disclosure or complaint" about a "current incident or one that has occurred at any time in the past". The University's case before the Commission, at least as based upon breaches of University policies, was confined to relevant version of the Appropriate Workplace Behaviour Policy. For clarity, I understand that the Sexual Misconduct Prevention and Response Policy governed how complaints or disclosures would be managed but the assessment of breaches of any policy was measured against the policy in force at the time of the alleged conduct.
- [18] At all relevant times, the terms of the *University of Melbourne Enterprise Agreement* 2018 (the enterprise agreement) also applied to Dr Owczarek's employment.
- [19] Dr Owczarek completed training on the Appropriate Workplace Behaviour Policy on, relevantly, 25 February 2018 and 12 February 2020.<sup>4</sup> As accepted by Dr Owczarek under cross-examination, the above obligations are important values which staff, and, in particular, the Dean must take seriously. He also accepted that it was a matter of personal and professional responsibility for him in his role as Dean (i.e. a leader) to establish and maintain appropriate boundaries in his workplace relationships.<sup>5</sup>

#### Overview of allegations

- [20] In 2023, the University conducted an investigation into the allegations against Dr Owczarek. The period of allegations spanned mid-2019 to March 2021. That investigation culminated in various documents that set out which allegations the University considered were substantiated, and how they were characterised. There were initially 13 allegations in total (including sub-categories), typically under headings "Allegation 1" and so forth.
- [21] For the purposes of the matters relied upon by the University for the dismissal and in the hearing before the Commission, it relied upon:<sup>6</sup>
  - "inappropriate workplace behaviour" in breach of sections 4.2(a), (d) and (g)/(h) of the Appropriate Workplace Behaviour Policy, allegations 1(c), 2(a), 7 and 11; and
  - both "sexual harassment" and "inappropriate workplace behaviour" in breach of section 7.3(c) of the Appropriate Workplace Behaviour Policy, allegations 2(b), 2(c), 12(b), 13(a)(ii), 13(a)(iii), 13(d), 13(e) and 13(f).

- [22] A summary of the findings from the investigation was provided to Dr Owczarek on 11 August 2023.<sup>7</sup> An important feature of the investigator's findings was how the issue of sexual harassment was approached and the types of conduct that might constitute sexual harassment. The summary document provided to Dr Owczarek concluded that "None of the conduct complained of, other than possibly the unnecessary familiarity Professor Owczarek engaged in regarding [the Complainant's] family and/or questions about her private life (mother, children) which [the Complainant] found intrusive, fall within any of these concepts. There are no allegations of inappropriate touching, no suggestive comments or jokes, no sexually explicit texts or emails and no requests for sex."
- [23] The distinguishing feature was that the investigator found that Dr Owczarek had a "strong romantic attraction to [the Complainant] and by behaving in the way he did (in terms of the substantiated behaviours) he was motivated by romantic attraction as well as/in addition to work."
- [24] It was the combination of a "romantic attraction" or motivation with some of the conduct that led to the specific findings of sexual harassment.
- [25] With those explanations, it is convenient to extract the allegations relied upon by the University (original emphasis) for both sexual harassment and inappropriate workplace behaviour:

Allegation	Finding
(Allegation 1(c)) "On a date unknown [in or about early	"Partially substantiated
– mid September 2019), took your wife to a store that you	-
are aware [the Complainant] shopped at Camilla and	Conduct was unwelcome at the
Marc. Whilst there you took photos on your phone of	time but was not conduct of a
your wife. In the Dean's office in the Old Geology	sexual nature. The behaviour
Building, University of Melbourne you showed [the	was inappropriate given the
Complainant] the photos on your iPad of your wife in the	professional nature of the
clothes, saying to [the Complainant] words to the effect	relationship between Professor
that 'these were clothes you felt would suit [the	Owczarek and [the
Complainant]'."	Complainant]." (original
	emphasis)
(Allegation 2(a) & (b)) "You were both at a work dinner	[For 2(a)] Substantiated
at DiStasio on 26 September 2019 to celebrate [the	
Complainant] being appointed to the role of Faculty	Inappropriate behaviour given
Executive Director (FED). At the time you were the	the nature of the professional
Acting Dean of Science.	relationship between Professor
	Owczarek and [the
It is alleged you:	Complainant].
a. Held [the Complainant's] hand across the table;	[For 2(b)] Substantiated
b. At the conclusion of the dinner when outside, said to	Sexual harassment and
[the Complainant] words to the effect 'I have never felt	inappropriate behaviour given
like this before, I have strong feelings' and 'I love you."	the nature of the professional
	relationship between Professor

Owczarek and [the Complainant]. Substantiated (Allegation 2(c)) The following morning, 27 September 2019 at 11.54am you sent [the Complainant] a text which said: 'As I have potted around an empty house this Sexual harassment and morning kept company only by a sleepy furball until a inappropriate behaviour given few moments ago and during a slow meditative run I have the nature of the professional relationship between Professor been supremely serene and a feeling of utter happiness has pervaded my existence. I am extremely grateful to be Owczarek and [the alive. Thank you so much for the most wonderful Complainant]. evening. Yours always. Aleks. P.s who needs white powder when you have this.' (Allegation 7) It is alleged that during the period November – December 2019, you engaged in unwelcome conduct of a sexual nature and/or inappropriate workplace behaviour given the professional nature of the relationship between you and [the Complainant]. Partially substantiated **Particulars** Conduct unwelcome. No sexual element or implication to the You were aware that [the Complainant] did not want behaviour. Not sexual contact from you and did not engage in text or email harassment. exchange conversations with you. Given that [the Complainant] had been clear about the professional It is alleged: During mid-late 2019, you sent regular, unsolicited, and nature of the relationship she unwelcome text messages or made unwelcome telephone wanted at this point, calls to [the Complainant] when she was on personal inappropriate behaviour was leave. [the Complainant] was on leave 18 November the nature of the given 2019 to 2 December 2019. In that time, you sent her texts professional relationship on dates including on 21 November 2019, 27 November between Professor Owczarek and 2019, 5 December 2019, 6 December 2019, 18 December [the Complainant]. 2019. (Allegation 11) It is alleged that on 16 June [2020] you engaged in workplace behaviour that, given the nature of the professional relationship between you and [the Complainant], was inappropriate. **Particulars** Substantiated It is alleged: You engaged in behaviour that was inappropriate, Unwelcome and inappropriate unreasonable, and distressing and that was intended to get given of the nature [the Complainant's] attention and to engage her into professional relationship replying to you. [the Complainant] sent you a text the between [the Complainant] and

Professor Owczarek.

next day to say that had upset her.

It is alleged that on 16 June 2020, you sent [the Complainant] two texts about 2pm. [the Complainant] did not respond to you. At 6.37pm that evening you sent another text and at the end said, 'on a sad note Malte (an academic staff member that [the Complainant] did not know personally) had lost a baby and that puts things in perspective'.	
(Allegation 12(b)) It is alleged that on various dates during 2020 you engaged in unwelcome conduct of a sexual nature and/or workplace behaviour that, given the nature of the professional relationship between you and [the Complainant], was inappropriate in attempting to find ways to meet face to face with [the Complainant] when face to face meetings were not necessary.	
It is alleged:	Substantiated
b. When cafes re-opened on 16 November 2020 and [Melbourne residents] were permitted to go to cafes, you requested [the Complainant] meet you at a café for a meeting. You said you would come to her and proceeded to arrange a meeting in a cafe in the street adjacent to [the Complainant's] personal residence. You required her to meet you there a couple of times. [the Complainant] sent you a text asking if you could go back to Zoom meetings	Inappropriate behaviour  Unwelcome conduct with a sexual element or implication that Professor Owczarek should have realised was likely to offend, in the sense of causing [the Complainant] displeasure or distaste.  Sexual harassment.
(Allegations 13(a)(ii), 13(a)(iii), 13(d), 13(e) and 13(f))	
It is alleged that between 3 and 20 December 2020 you engaged in unwelcome conduct of a sexual nature and/or workplace behaviour which, given the nature of the professional relationship between you and [the Complainant], was inappropriate.	
Particulars	
In the first week of December 2020 when the new Dean commenced there was a farewell dinner for you held in Carlton on a Friday night, 4 December 2020 and another event held in the city on the Monday night 7 December.	
It is alleged:	
a. At the Friday 4 December 2020 event:	
i;	a i Not Substantiated

ii. After the event you sent [the Complainant] text messages, which were unwelcome, saying you did not get to catch up with [the Complainant] and that you would come to Gertrude St, where she lives, for a catch up.	ii Substantiated  Inappropriate behaviour Unwelcome conduct with a sexual element or implication that Professor Owczarek should have realised was likely to offend, in the sense of causing [the Complainant] displeasure or distaste. Sexual harassment.
iii. [the Complainant] responded saying she 'did not have any time between now and Xmas'. As soon you received this text you started calling her and sending her multiple unwelcome texts that she did not respond to	Inappropriate behaviour  Unwelcome conduct with a sexual element or implication that Professor Owczarek should have realised was likely to offend, in the sense of causing [the Complainant] displeasure or distaste.  Sexual harassment.
d. At the time of these two events, between 3 and 10 December you sent repeated unsolicited, unwelcome messages in which you invited [the Complainant] for lunches despite her being very clear she did not want to meet with you and failing to respond to you.	Inappropriate behaviour  Unwelcome conduct with a sexual element or implication that Professor Owczarek should have realised was likely to offend in the sense of cause [the Complainant] minor displeasure or distaste.  Sexual harassment.
e. On 10 December 2020 [the Complainant] sent you a text advising you she had 'no free time between now and Christmas. Despite this, you called [the Complainant] and continued to ask her to catch up with you, and have coffee and continued to contact her, including on New Years Day at 12.04 am. [the Complainant] did not respond.	Substantiated Inappropriate behaviour Unwelcome conduct with a sexual element or implication that Professor Owczarek should have realised was likely to offend in the sense of cause [the

	Complainant] minor displeasure or distaste.
	Sexual harassment.
f. On 1 January 2021 [sic 31 January 2021] at 5.31pm you sent an unwelcome	Substantiated
texts to [the Complainant] including photos of your dog. [the Complainant] did not respond.	Inappropriate behaviour
(the Complamant) and not respond.	Unwelcome conduct with a sexual element or implication that Professor Owczarek should have realised was likely to offend in the sense of cause [the Complainant] minor displeasure or distaste.
	Sexual harassment.

# *Events of 2017 to mid 2018*

- [26] Relevantly for the current proceeding, the applicant was appointed as Deputy Dean in the Faculty of Science in February 2017.
- [27] Pertinently, from about 2017, the Complainant was working in a role within the Faculty of Science in which the applicant and her began to have occasional work interactions, although there was no professional interaction at the time.
- [28] The applicant contends the relationship between them was friendlier than the Complainant suggests during this initial period from 2017. The applicant's witness statement exhibited a number of emails and text messages said to demonstrate a friendly relationship between the two, although there were only a few predating August 2018 (the significance of which is described below). I prefer the Complainant's account for this period and find there was nothing demonstrative of a "friendship which had developed around common interests" as the applicant suggests in his first witness statement.
- [29] In around March 2018, the Complainant commenced in the role of Manager, Strategy, Performance and Major Initiatives, which acted as a "2IC" role to a different Faculty executive role. At that time, the Complainant started to attend the same meetings as Dr Owczarek.
- [30] During this period, there was an unrelated workplace issue concerning a former senior administrator. There were, on the limited evidence of that matter before me (mostly of an historical hearsay basis), complaints made by the Complainant and, possibly, other staff at the time, which were resolved by the University at the time. The then-administrator relocated to a different role in a different faculty on the applicant's understanding, he considered this was causally connected to the Complainant's influence, and is a basis for the applicant's contention that the Complainant had "significant power" to the extent that enabled her to "remove" a person of that seniority. To be clear, I express no views about that workplace issue nor even the

accuracy of the factual circumstances described, save to note that Dr Owczarek placed some importance on them concerning his perception of the Complainant.

- [31] I pause here to note that the issue of "power" or "power imbalances" is a recurring theme in both parties' submissions. It is a matter that I will return to below but I do not accept the submission in the applicant's reply witness statement that the events from around mid-2018 demonstrated "power" or "significant power" by the Complainant at the time. The evidence, such as it was before me of these tangential events, was that the Complainant's involvement in those events was simply as but one of a number of other actors.
- [32] I also do not accept the applicant held a *belief* at the time (or for some years later) that the Complainant was capable of wielding such power. At least according to a record of interview of Ms Hampshire signed on 29 June 2023<sup>10</sup>, Dr Owczarek was concerned at the time to help "protect" the Complainant. The applicant's own evidence of his "protective" role is similar. While that is not inherently inconsistent with a belief or the fact of "significant" power, I consider that Dr Owczarek's views on such matters were coloured by the later complaint lodged against him by the Complainant that led to his dismissal.

August 2018 to August 2019

- [33] In about August 2018, the Complainant was appointed to an acting role within the Faculty of Science. The role was a 'professional' role, in the sense to distinguish it from an academic role. At around that time, the University undertook a restructure of the Faculty of Science, which resulted in the applicant being elevated from the role of Deputy Dean to Acting Dean.
- [34] The role of Dean was a senior appointment. The Dean was to represent the Faculty of Science on the University's Executive Committee. The Dean was ultimately responsible for the management of the Faculty, setting the Faculty's strategic direction, dealing with campuses, courses, budgets, resources, marketing, communications and other aspects of teaching and learning. The Dean discharged those functions with the assistance of professional and academic staff.
- [35] In the Complainant's executive role, her contract of employment dated July 2019<sup>12</sup> (whose terms appeared to be reflective of the Complainant's duties and accountabilities while in her acting role from August 2018) provided that she was accountable to the Dean to "undertake duties, functions, responsibilities and behaviours required to achieve the performance requirements of the position set from time to time by the Dean." The contract stated that the "Dean will assess the performance of the Executive within a timeframe and against criteria determined by the University."
- [36] From August 2018, the professional working relationship between the applicant and Complainant became much closer, as did their friendship.
- [37] As to the professional relationship, the applicant regarded the Complainant "as my effective 2IC even though I had a Deputy Dean reporting to me."

- [38] While there is some disagreement between the applicant and Complainant about the degree of personal closeness between the two, from outward appearances the two were good friends. For avoidance of any doubt at all, the circumstances I am describing here are not intended to convey any non-platonic relationship.
- [39] While that friendship was largely manifested within the confines of the working relationship, there were some instances where the two would associate essentially in a social context. For example, Dr Owczarek refers to a dinner at his house hosted by Dr Owczarek and his wife in which the Complainant and her family attended, although the only such event in question appears to have occurred in 2018 and others from work were invited. Dr Owczarek also identifies various other occasions or instances of what I consider to be purely social interactions. They include some drinks after work and other events (although all but one during this period included other work colleagues), and exchanges about their respective personal interests. The interactions were not all initiated by Dr Owczarek the evidence discloses the Complainant inviting Dr Owczarek and his wife to the Complainant's and her husband's birthdays.
- [40] In his oral evidence, Dr Owczarek contends that over the 10 month period up to September 2019, there were four dinners and two other social occasions. Nonetheless, the majority of these involved other people.
- [41] Dr Owczarek asserts that the Complainant would "often" comment about what she considered was the "uniqueness" of their working relationship. The Complainant denies that, and I prefer her evidence. The Complainant did acknowledge that her relationship with Dr Owczarek was the "best working relationship I ever had with a manager" during this period and considered their relationship productive and effective.
- [42] Beginning around March 2019, the Complainant began to experience an increasing sense of disquiet about her perceptions of Dr Owczarek's behaviour toward her. One event concerned him dropping off a second-hand toy horse to her house for her children. There were other events of more banal nature but the net effect of them was that the Complaint felt that Dr Owczarek was "infatuated" with her.
- [43] I pause at this junction to make some observations about aspects of the evidence from this period of time and the challenges of dealing with matters of nuance that occurred nearly half a decade prior to the time of the hearing. A number of matters concern relatively fleeting interactions in conversations between ostensibly good work colleagues. Friendships at work are not new. The degree of friendships is extremely varied. Part and parcel with friendships are that people will share information with each other, not necessarily equally, that would not be shared with someone who was not a friend. So much is well-known as ordinary human experience.
- [44] However, when the task falls to assess the character of some of these interactions, the starting point will necessarily include words spoken (for interactions involving a conversation) or websites viewed (another example in this matter) or photographs shown (a further example). But in making these assessments as to the overall character of an event, context and nuance might count significantly.

- [45] For a number of the general interactions between Dr Owczarek and the Complainant up to September 2019, neither witness could (and nor would I expect them to) give an account of the actual words in conversations surrounding the relevant events in any complete detail. A further difficulty with such a delay between the events in question and the individuals giving evidence about them is that much of the context and nuance is particularly difficult to capture.
- [46] As I describe further below, Dr Owczarek demonstrated a significant lack of insight into how his conduct might have impacted on the Complainant. While I generally prefer the evidence of the Complainant to Dr Owczarek on a number of the matters during this period of time, the Complainant herself was clearly viewing some matters coloured by her perceptions of Dr Owczarek's intentions. To the Complainant's credit, she candidly acknowledged a number of matters from early to mid-2019 "seemed trivial on an individual basis" but, in totality, she felt it was constant attention-seeking behaviour.

## Allegation I(c) - photographs

- [47] The first allegation of conduct in the chronology relied upon by the University concerned Dr Owczarek showing a photograph of his wife to the Complainant. The allegation states that "On a date unknown" Dr Owczarek "took your wife to a store that you are aware [the Complainant] shopped at Camilla and Marc. Whilst there you took photos on your phone of your wife" which he later showed to the Complainant.
- [48] While the date of this event is unknown, the best evidence is that this event possibly occurred in September 2019 (and before the dinner on 26 September 2019). There was a dispute as to whether the clothing was the brand 'Camilla and Marcs' (the Complainant's recollection) or a different brand, 'Anna Thomas' (Dr Owczarek's best guess). There is no suggestion that there was anything untoward about the photo as such (eg, being only partially dressed). Dr Owczarek's evidence was that there were no photographs he possessed from around that time of his wife wearing Camilla and Marcs but only of Anna Thomas. No photographs were in evidence by either party. Dr Owczarek's evidence in chief was that he had no recollection of showing those photographs (presumably the Anna Thomas photographs) to the Complainant. Somewhat inconsistently, he did speculate in a statement dated 18 May 2023 to the University during the course of its investigation that he "may" have shown photographs but contended the "context" was "that we had been to [the Complainant's and her husband's] birthday party, and they had been to our house. It was a polite comment to show off how beautiful my wife is look at her new outfit. [The Complainant] had shown me purchases of her own and where she shops — my wife and I have never shopped in any of these stores."
- [49] The allegation by the University forming part of its reason to dismiss Dr Owczarek was that the conduct was unwelcome but not conduct of a sexual nature. The University found the behaviour was inappropriate given the professional nature of the relationship between Dr Owczarek and the Complainant. I agree that the conduct was not of a sexual nature.
- [50] I also accept that the conduct was unwelcome, given that the Complainant's view by this point was that there was far too much intrusion of personal matters into the working relationship with Dr Owczarek. However, I find that Dr Owczarek was not aware that the conduct was unwelcome and nor ought he have reasonably believed it was unwelcome at this point in time, although that is a belief that ought to have changed shortly after.

- [51] The University's findings for this allegation underpinning the dismissal was that the behaviour was "inappropriate given the professional nature of the relationship" between Dr Owczarek and the Complainant. While the reference to "inappropriate" in this context is a reference to the University's policies (which I described above), I briefly record here that am unable to share that conclusion. As I indicated above, nuance can sometimes be important. In this case it is. I do not accept Dr Owczarek's speculation as to the "context" he described to the University's investigator but, in fairness to Dr Owczarek, I cannot see how he could be expected to give accurate evidence of the context for what was at the time, for him, a relatively benign event. At least at that point in time, independent observers such as Ms Hampshire considered that Dr Owczarek and the Complainant were "close". This was not an exchange between strangers and, even though the Complainant reported to Dr Owczarek, an event of that nature is capable of being part of a friendly relationship overlaying the professional relationship, albeit the context will be important.
- [52] In circumstances where the event occurred about five years prior to giving evidence, the photograph in question (or any possible photograph) was not in evidence and that Dr Owczarek and the Complainant were still being friendly at that point, I am unable to feel actual or positive persuasion that the event occurred in such a manner to constitute inappropriate workplace behaviour.

Allegations 2(a), (b) and (c) – the 26 September 2019 dinner and 27 September text message

- [53] The events in relation to a dinner on Thursday, 26 September 2019 ('the 26 September dinner') are described by the University as the "critical incident", a matter I agree with. As with my observations above, the 26 September 2019 dinner was an event occurring over four years from the time of the dismissal and closer to five years from the time of giving evidence. Neither party made contemporaneous notes of the event and, in those circumstances, neither party is capable of giving a complete account of it.
- [54] It is not entirely clear what the reason for the dinner was. The Complainant's guess is that the dinner was to celebrate her permanent appointment as Faculty Executive Director. Dr Owczarek denies this but does not provide a clear reason of his own. The Complainant's evidence, which I accept, is that Dr Owczarek suggested the dinner and location, which was Di Stasio Citta, a restaurant in the Melbourne central business district and a short distance from the University.
- [55] It is also not clear when the dinner was arranged. The best evidence is some point in September 2019.
- [56] The Complainant's evidence is that, particularly as the event came closer, she did not wish to go to the dinner but felt that she could not cancel, in part because Dr Owczarek had organised it and was her boss and in part because she felt he would keep asking her to go out to dinner. The Complainant's reasons for not wishing to attend were mixed. They included a general desire to avoid further encroachment on her personal life with time spent with Dr Owczarek and her view he was overly interested in her. The reasons also included a general preference to be spending time with her family (and the day following the dinner was a public holiday in Melbourne). I accept the Complainant's evidence of her feelings about the matter.

- [57] Such was the Complainant's feelings about the pending dinner that she contacted Ms Hampshire, the Faculty's HR Manager (her role at the time), about what to do. The Complainant's evidence is that prior to the dinner, she had been sharing with Ms Hampshire her concerns about Dr Owczarek. While I accept that evidence, the details of what was shared were not before me.
- [58] About one day before the scheduled dinner, the Complainant told Ms Hampshire she did not want to go to the dinner. Ms Hampshire recalls, and I accept, that the Complainant said that Dr Owczarek had asked her out for drinks again and that she did not want to be out with Dr Owczarek all evening. Ms Hampshire told the Complainant that if she felt like she could not say no to Dr Owczarek's invitation, she would call her while the two of them were out together, and she could tell Dr Owczarek that it was a member of her family and that she had to leave. This plan was agreed between the two.
- [59] On 26 September 2019, Dr Owczarek and the Complainant caught a tram from the University and then walked to the restaurant. The two had a few drinks between them but neither gave evidence of anything excessive or considered either party was particularly inebriated.
- [60] Ms Hampshire did contact the Complainant by telephone as planned. That call occurred at around 7.00pm 8.00pm and was brief. Ms Hampshire recalls the Complainant laughed and said words to the effect of "it's fine, I'm having a good time." At 9.20pm, the Complainant then sent a text message to Ms Hampshire with a picture of two drink glasses clinking, which was an actual picture she took of her and Dr Owczarek holding their respective glasses. Accompanying that photograph to Ms Hampshire was two brief statements, the first being "We're behaving ourselves" and the second "Thanks for calling x".
- **[61]** The conversation at the dinner ranged. Each participant discussed various personal matters. As each party requested (and I made) confidentiality orders about those matters, I will not repeat them but I have had regard to them. While there are some differences in degree, those differences are not particularly material in my view.
- **[62]** Despite the Complainant's apprehensions conveyed to Ms Hampshire, she states that the dinner was not as bad as she feared. Indeed, I infer the dinner started well and was generally enjoyable for both participants at least up until the closing stages of the dinner having regard to the above matters.
- [63] What followed at the concluding stages of the dinner were two critical allegations made by the University. The first allegation is that towards the conclusion of the dinner Dr Owczarek placed his hand on the Complainant's hand at the dinner and the second, and related allegation, is he said something to the effect of "I have never felt like this before, I have strong feelings" and "I love you". In the Complainant's evidence, she also refers to an additional statement that was not put by her to the University investigator, which was that Dr Owczarek also said "I can see us being in each other's lives for the rest of our lives" before saying "I love you".
- [64] The parties addressed me on the applicability of the '*Briginshaw*' standard or principles. Some precision needs to be adopted when the *Briginshaw* standard is invoked. Specifically, in the context of this matter, there is a factual difference between the physical acts that occurred

and the factual state of mind of Dr Owczarek accompanying those acts. On the question of the physical acts that occurred, Dr Owczarek does not dispute holding hands but contends, not with consistency, that it was mutual. He also accepts that he said "I love you" but that the Complainant replied "I love you too". The Complainant denies any mutuality and states Dr Owczarek took her hand from across the table and this immediately made her feel uncomfortable. I am comfortably satisfied that the Complainant's evidence is to be preferred and I accept it to a level of actual persuasion that this event occurred consistent with the Complainant's recollection.

- [65] Focusing firstly on the Complainant's evidence, it is unchallenged and corroborated that the Complainant was significantly apprehensive prior to the dinner, so much so that she had arranged for the HR Manager to call and, if necessary, pass that call off as a family matter requiring her to leave. While up to this point the dinner had in fact gone very well, it is improbable she would have mutually reached out to hold hands with the very person she had been making plans to avoid. Then there is the Complainant's reaction to the dinner. While she initially presented with a positive disposition to Dr Owczarek, that belied the reality. She expressed her concerns in the days following to her husband and sister. She also expressed her concerns to the HR Manager, Ms Hampshire. The Complainant took leave for the week following to deal with her distress. More generally, I consider that the Complainant's evidence was the more credible of the two key witnesses and I also prefer her evidence on that basis.
- [66] The forensic significance of these discussions about personal matters was primarily put in issue by Dr Owczarek to explain or respond to those two critical allegations.
- **[67]** Focusing on Dr Owczarek's evidence, I find his explanations about "context" unpersuasive and inconsistent. In his initial statement dated 17 May 2023 to the University investigator, he firstly referred to the personal matters each of the two had discussed including a "very private" matter on his own account, before stating:
  - "In the context of our friendship I felt privileged that someone could be so open with me and allow me to do the same. It occurred to me that this was truly a special friendship and to express this indeed I said something like "you know I love you" to which [the Complainant] immediately and enthusiastically replied with the same complement. We mutually held hands. It was absolutely meant as two besties would say to each other the context is vital and the whole evening had been about our friendship and sharing much more than the professional."
- [68] Dr Owczarek's signed statement to the University investigator was in different terms. In that, he stated:
  - "There was an article in the Age about special work relationships which mentioned love. We both acknowledged we had that sort of deep working relationship that had a friendship to it. I was loving that feeling and we accomplished so much. It was me holding her hands saying; 'you know I love you' in that context friendship, not sexual love."

- **[69]** In his first witness statement, Dr Owczarek explained for the first time that he held the Complainant's hands to "reassure" her about the personal matters she was disclosing, even though those matters apparently made Dr Owczarek "uncomfortable". He stated:
  - "I told [the University investigator] Erica Edmands that I probably did hold [the Complainant's] hands in the course of this dinner. She was telling me things which were clearly causing her some distress and I recall trying with my responses to reassure her that I was there for her. I was uncomfortable hearing some things she was telling me but I felt privileged that she considered me such a friend that she would disclose such personal parts of her life."
- [70] In cross-examination, Dr Owczarek first stated that his recollection was that their hands "moved together" into the centre of the table but eventually "I may have moved my hands first, and then she's reciprocated."
- [71] In his first witness statement, Dr Owczarek takes umbrage at a statement by the University investigator that, at the dinner, "the two were engaged in an in-depth personal conversation". Dr Owczarek's evidence (which is in fact little more than argumentative submission) on that issue was that the investigator's statement was a "gross mischaracterisation and underplaying [the Complainant's] unsolicited disclosures" on personal matters.
- [72] The different explanations provided by Dr Owczarek are not inherently contradictory, however I do not consider them persuasive. Much of Dr Owczarek's "contextual" evidence is no more than Dr Owczarek's subjective assessment of events, imputing a state of friendship that did not exist as he believed it.
- [73] While I accept that, up to and including the dinner, the Complainant had not conveyed her increasing discomfort about Dr Owczarek to him, which had the result that he was genuinely unaware (nor, I consider, ought reasonably should have been aware) of those matters, it does not follow that there was any objectively reasonable basis for Dr Owczarek, at the end of those conversations, to place his hand on the Complainant's hand and to state either at that time or shortly after "I love you" in essentially unqualified terms.
- [74] What Dr Owczarek evidently failed to understand was that work colleagues will often share quite personal matters about themselves to other work colleagues. Sometimes it is because the colleagues are very good friends but, in many cases, they are simply just colleagues and that matters of a personal nature can and do arise in conversation or some particular context. Many work colleagues will often talk about family members, or friends, including about sensitive or personal subjects. It is a general part of the human experience that many people share their experiences with each other and many do so at work even though many will almost never converse with those same work colleagues out of work. Some employees might not share very much, some will overshare. There is nothing in the personal disclosures contained in the confidential evidence or the otherwise close working relationship between Dr Owczarek and the Complainant up until that point in time that justified Dr Owczarek's conduct. Many if not nearly all were matters the Complainant had communicated with other work colleagues.

- [75] Dr Owczarek lost all sense of professional and personal objectivity, particularly in the context where he was Dean of the Faculty at a dinner alone with a younger, female work colleague who was a direct report to him.
- [76] At no point did Dr Owczarek appear to consider the potential impact of his conduct on the other. Dr Owczarek was cross-examined at some length. On the question of his insight, or lack thereof, it is somewhat of an understatement to observe that Dr Owczarek did not fare well as a result of that cross-examination. I consider that Dr Owczarek's lack of insight into his effect on the Complainant and her responses (and lack of responses) to him was quite profound, not just about the dinner but also in the matters through to early 2021 which I describe below.
- [77] After the dinner, Dr Owczarek and the Complainant exchanged some text messages that night. Dr Owczarek relies on the messages sent by the Complainant to demonstrate that the events of the dinner had the character he contended. By way of example, the Complainant in one message referred to their "wonderful" evening. There is no doubt that those messages in part explain Dr Owczarek's interpretation of events and I am not critical of him for his misunderstanding of the true position based upon them but I accept the Complainant's explanation about them. Moreover, it is clear to me that the Complainant was affected by the events at the dinner, albeit I consider that the impact of the dinner did not fully manifest until the Complainant's receipt of a text message the following day from Dr Owczarek.
- [78] The next day, Dr Owczarek sent the Complainant a text message ('the 27 September text message') as follows:
  - "As I have potted around an empty house this morning kept company only by a sleepy furball until a few moments ago and during a slow meditative run I have been supremely serene and a feeling of utter happiness has pervaded my existence. I am extremely grateful to be alive. Thank you so much for the most wonderful evening. Yours always. Aleks. P.s who needs white powder when you have this."
- [79] It is difficult to read such a message, sent as it was by a Faculty Dean to an employee directly reporting to him. It must have been difficult for the Complainant to receive and I have no hesitation in accepting her evidence that this text message confirmed in her mind that Dr Owczarek had deeper feelings for her than friendship.
- [80] In his evidence in chief, Dr Owczarek says little of this text message of substance other than:
  - "My intention was simply to follow up on my concern that [the Complainant] was clearly troubled by the matters she had raised with me at the dinner. I was trying to convey the sentiment that life could be good just doing ordinary everyday things and I would be there to support her as a platonic friend."
- [81] Dr Owczarek's explanation is simply unpersuasive and I do not accept it. There is no part of the 27 September text message that expresses any indication of "concern". To the contrary, the euphoric language of the text message provides further objective indication that Dr Owczarek's placement of his hand on the Complainant's hand at the 26 September dinner was not about his concern for her feelings but an expression of his own feelings.

29 September 2019 – 1 October 2019

- [82] On Sunday, 29 September 2019, the Complainant responded to the 27 September text message. The Complainant's message apologised for the "slow reply" and was generally light in tone and states (among other matters) she "hope you've continued to have a restful and happy weekend" and concludes with a friendly sign off.
- [83] Dr Owczarek submits the Complainant's text message supports the contention that she took no offence to Dr Owczarek's text message. I do not accept this submission. I do accept Dr Owczarek's submission that he was unaware of the Complainant's actual state of mind. However, I accept the Complainant's evidence that at this stage she did not know how to respond to Dr Owczarek and her response was a holding message to "keep the peace" while she worked out what to do.
- [84] On the same day, the Complainant later sent an email to Dr Owczarek and to Ms Hampshire stating that she had been feeling unwell and would not be attending work the next day, which she did not do.
- [85] On 30 September 2019, Dr Owczarek sent the Complainant a text message in reference to her email, expressing (appropriately in my view) that he was hoping the Complainant would be feeling well soon. Over the course of that day and the next, he sent a total of nine text messages, none of which were responded to. A number of those text messages were of a level of banality multiple photographs of Dr Owczarek with work colleagues in a dress up at a work function that did not need to be sent but I acknowledge that, at the time they were sent, Dr Owczarek was unaware of the Complainant's distress.
- [86] Also on 30 September 2019, the Complainant and Ms Hampshire spoke and exchanged messages. The Complainant's evidence is that she told Ms Hampshire about the 26 September dinner and that Dr Owczarek had said he "loved" her. Ms Hampshire's recollection is marginally less detailed but consistent. Ms Hampshire's witness statement says she advised the Complainant to tell Dr Owczarek that she did not reciprocate his feelings. The Complainant told Ms Hampshire she would do that in writing.
- [87] The Complainant remained away on personal (sick) leave.
- 2 October 2019 text message and reply
- [88] On 2 October 2019, the Complainant sent Dr Owczarek the following text message ('the 2 October text message'):
  - "Hi Aleks, I haven't been able to come into work this week because what you said on Thursday night made me very uncomfortable. We are friends but no more than that. I need to establish more space between work and personal life and I hope our working relationship can continue. I'm not able to talk to you about this at the moment. [Complainant]"

[89] On the same day, Dr Owczarek replied to the 2 October text message in the following terms:

"Hi [Complainant]

I am very sorry to have made you feel at all uncomfortable and will work with you to make sure you feel right.

Aleks"

[90] Also on 2 October 2019, Dr Owczarek sent the Complainant a second message. The substantive parts of what he wrote were:

"As you may appreciate I am struggling to undertake my work understanding I have so deeply hurt you

I am cognizant of the number of issues in my inbox and of course PBC [Planning and Budget Conference] next week

I do understand your need to have some time as a breather

However, I would appreciate the earliest opportunity to apologize in person and hopefully get our working relationship back on track"

- [91] Notwithstanding the implied contrition on Dr Owczarek's behalf in his reply text messages, that was not the reality. The evidence Dr Owczarek gave was that he did not consider he had done anything wrong but he was "simply responding to [the Complainant] telling me I had made her uncomfortable", a matter that he did feel sorry about.
- [92] However, further diminishing his apparent contrition, Dr Owczarek states that the Complainant in fact "caused me discomfort" by the extent of the "very personal" information she shared at the 26 September dinner (I refer to my observations about those matters, above). Dr Owczarek's second text message on 2 October 2019, above, further indicates that Dr Owczarek was as much focussed on the impact to him as exhibiting concern for the Complainant.
- [93] In his first witness statement, Dr Owczarek states that he "accept[s] that [the Complainant's] message to me was implying that I had wanted something more than friendship", albeit he considered her assumption wrong. It is not clear from Dr Owczarek's evidence if that was his state of mind at the time of or in the weeks after the message was received or merely at the hearing, but I infer the former.
- [94] In Dr Owczarek's closing submissions, he submits:

"The Complainant's 2 October 2019 text message says "we are friends, but no more". That is exactly the nature of the relationship which ensued."

- [95] The 2 October text message was an important communication. I conclude that the gravamen of what it conveyed, given the circumstances in which it was delivered, were significantly understated by the applicant.
- [96] The evidence and submissions of Dr Owczarek focus on a selected aspect of the literal text from that communication and fundamentally disregards what messages it conveyed.

[97] Focusing simply on the text of the 2 October text message, the following matters are plain:

- *First*, it states (as was the case) the Complaint had not come into work that "week". That itself was a strong signal that there was serious concern.
- Second, it states the reason the Complainant had not been at work was "because" of what "you" [i.e. Dr Owczarek] said on "Thursday night". The reference to Thursday night can only be to the dinner on Thursday, 26 September 2019.
- *Third*, what Dr Owczarek said made the Complainant "very uncomfortable". This ought to have immediately caused Dr Owczarek to reflect on what he "said" that night. There is no serious evidence of anything else Dr Owczarek said, other than his declaration that "I love you", that might possibly have caused the possible result that the Complainant would be so affected so as to be unable to work for the following week. Dr Owczarek was aware he said those words.
- *Fourth*, and with the above context, the statement "We are friends but no more [than] that" is hardly a declaration of any solid or robust friendship in the context of an employee treading a fine line in how to address a matter of conduct concerning her direct supervisor.
- *Fifth*, the concept of friendship itself is a spectrum. I acknowledge different people may view that spectrum differently. But here the Complainant was expressly stating she would "need to establish more space between work and personal life". That is, whatever the state of perceived friendship between the two prior to the dinner, the Complainant was unambiguously indicating that, from this point in time, it would need to be different and, specifically, more strictly professional.
- *Sixth*, the Complainant merely said she "hope[d]" the working relationship can continue. Again, far from providing a ringing endorsement of the health of their working relationship at that time, the Complainant could simply "hope" that it might continue. Whether those hopes would be realised was a matter for the future.
- Seventh, if further cues were required for Dr Owczarek, the Complainant was "not able" to even talk about the matter with Dr Owczarek at the time.

[98] What also did not occur to Dr Owczarek was to reflect on the 2 October text message in the context in which this was written. That context arose directly out of a one-on-one dinner he had with a direct report, to whom he said "I love you" and who had clearly been made "very" uncomfortable (this, self-evidently, being an understatement) and for whom a working relationship would need to continue. It should have been apparent to Dr Owczarek that writing such a message was *itself* a matter of considerable difficulty for a person in the Complainant's position.

#### 7 October 2019 meeting

[99] The Complainant sent Ms Hampshire a copy of the 2 October text message on the day she sent it. In addition, the Complainant had "frequent discussions" with Ms Hampshire while she was on leave. Among other matters, Ms Hampshire told the Complainant that she should also discuss with Dr Owczarek her feelings on the matter. The Complainant determined to do so.

[100] At some point while the Complainant was on leave, Dr Owczarek requested to meet with Ms Hampshire. I infer the timing of the meeting was after the 2 October text message but before the Complainant returned to work.

[101] Dr Owczarek's purpose for the meeting with Ms Hampshire was to inquire about the Complainant. Unsurprisingly, both witnesses' recollection of the meeting are imperfect. I am satisfied that Dr Owczarek told Ms Hampshire, with sincerity, that he had not meant to upset the Complainant but also said he wanted to hear the Complainant's voice. At some point during the conversation, Ms Hampshire said to the effect that Dr Owczarek needed to stop this, at which Dr Owczarek responded that he did not understand. Ms Hampshire said to the effect "but you do".

[102] On 4 October 2019, the Complainant returned to work.

[103] On 7 October 2019, the Complainant and Dr Owczarek had a meeting. There is some dispute about whether the meeting took place in a "scheduled" meeting time or not but nothing turns on this.

[104] In Dr Owczarek's first witness statement, he provides very little detail of the event. He states that the Complainant "told" him that she did not think that Dr Owczarek had been suggesting anything "illicit or inappropriate" in his "conversation" with her or subsequent message. Dr Owczarek's oral evidence was a little different. He said in oral evidence he raised that particular subject<sup>13</sup> by asking, 'You know I wasn't suggesting anything illicit or inappropriate in what I said or did', and she said, 'Alek, I didn't think you were.' In the Complainant's oral evidence, she denied that she told Dr Owczarek that she did not consider there was anything illicit or inappropriate but agreed that Dr Owczarek raised the matter. She denied agreeing with Dr Owczarek that there was nothing illicit or inappropriate but did not contradict him.<sup>14</sup>

[105] The balance of Dr Owczarek's evidence is that he and the Complainant "agreed" that the issue was regarded as "resolved and concluded" and, for his part, he "confirmed" that he was not interested in any "intimate" relationship with her. As to the first of these two items, the Complainant recalls saying something like "so I don't need to worry about this" and being assured "no". She also states one of them "may" have said "we would move on and put the matter behind us" but it was not put to her that the words "resolved and concluded" were used. The Complainant agreed in her oral evidence that Dr Owczarek said he was not interested in an "intimate" relationship with her.

[106] The Complainant's evidence in chief also includes her telling Dr Owczarek that she did not have "feelings" for him and asked him to confirm he had no feelings for her. Dr Owczarek agreed he said in the meeting he denied having feelings for the Complainant.

[107] The Complainant's evidence in chief described her saying to Dr Owczarek to the effect that their relationship was "only a professional one, that we were only colleagues and that I did not have feelings for him". While Dr Owczarek acknowledged the topic of "feelings", he denies in his reply evidence that the Complainant said "that we were no longer friends but only professional colleagues". Dr Owczarek's denial elides what the Complainant said. She did not assert she said "we were no longer friends", she said "I told Dr Owczarek that our relationship

was only a professional one, that we were only colleagues and that I did not have feelings for him".

[108] Again noting the passage of time between this event and the hearing, neither witnesses' recollection of the meeting is particularly clear and there are no contemporaneous notes. The Complainant acknowledges there are matters she may not recall. And, despite the "very clear" recollection of the meeting that Dr Owczarek asserts he has in his first witness statement, the high-level conclusionary language of his evidence – we "agreed...", I "confirmed ..." and "I felt it had cleared the air" – and differences in his oral evidence belies that clarity. Curiously, in his oral evidence, Dr Owczarek states the Complainant "hardly spoke" in the meeting, a proposition I have some difficulty accepting so far as indicating that the few instances where the Complainant did speak included assuring Dr Owczarek that the matter was "resolved and concluded" and he did nothing "illicit or inappropriate". The Complainant was attending the meeting in (for her) very difficult circumstances and with particular objectives in mind, which was to reiterate her lack of "feelings" for Dr Owczarek and to convey that their relationship was only to be a "professional" one as "colleagues". I again find that the Complainant's evidence is more reliable of the two.

[109] I am satisfied that at the 7 October meeting, the Complainant stated that she and Dr Owczarek were "only colleagues" and their relationship a "professional one". Dr Owczarek provided assurances that he did not have "feelings" for the Complainant. I accept that Dr Owczarek stated he was not suggesting (from the 26 September dinner or 2 October text message) anything "illicit" or "inappropriate" and the Complainant did not contradict him (notwithstanding her private reservations about the matter). I do not find that either party stated the matter was "resolved and concluded", although I accept that Dr Owczarek formed that belief.

[110] The Complainant felt that she was treading a fine line between what she could say and not impacting her employment. I accept that is how she viewed matters and the events were clearly very difficult for her. She also did not take at face value the assurances that Dr Owczarek had provided her about his lack of interest, a matter I now address.

# Dr Owczarek's state of mind

[111] A recurring element of the University's case is that Dr Owczarek was motivated by the pursuit of a romantic (non-platonic) relationship. On the University's case, it was the coexistence of the pursuit of a romantic relationship together with certain specific communications or events between October 2019 and March 2021 that amounted to sexual harassment.

[112] This question of Dr Owczarek's state of mind is a difficult one. On the one hand, the largely unqualified declaration of "love" at the 26 September dinner, coupled that evening with the unsolicited placing of his hand on the Complainant's is plainly indicative of a romantic or non-platonic interest. The gushing, unsolicited language of the 27 September text message reinforces this view.

[113] On the other hand, Dr Owczarek was adamant throughout his evidence that he was not so motivated. He did not deviate from that view and appeared sincere in doing so, despite a

number of other difficulties I had with other aspects of Dr Owczarek's evidence (such as his lack of insight about the expectations of the Complainant and Dr Owczarek's conduct toward her). The positions are difficult to reconcile.

[114] During the University's investigation in 2023, Ms Hampshire was asked by the investigator to describe Dr Owczarek. She did so, with particular bluntness:<sup>15</sup>

"Describe Aleks: He is fairly typical of someone in maths and stats and in that particular school. Very little in way of EQ. Wants to be admired, to be liked. He is a dandy very vain and buys this ridiculously expensive stuff (designer clothes, artworks) — He doesn't seem to have grown up. I would say he is like a teenage boy with a romanticised view of what life is like and what women are like. He is a ditherer, cannot make his mind up, a very poor public speaker as he stutters a lot, very emotional. He is a disaster waiting to happen because he romanticises friendships."

[115] Ms Hampshire's observations in her record of interview did not make their way into her witness statement. While her record of interview was tendered into evidence, I do not adopt her observations as proof of any of those observations (which they plainly cannot prove). However, Ms Hampshire's description of someone who has a "romanticised" view of the world is one that rings true.

**[116]** To adapt Ms Hampshire's observations, I conclude that Dr Owczarek had a romanticised world view of his *friendship* with the Complainant (and quite likely others) but I do not feel an actual sense of persuasion that he was pursuing or was motivated to pursue any romantic or non-platonic relationship with her. That is not to be taken as an endorsement of his conduct or to excuse it - Dr Owczarek clearly crossed a professional boundary and, for reasons described later, the events of the 26 September dinner constituted sexual harassment. But for the following events of November 2019 to March 2021, I find that Dr Owczarek was not motivated by the pursuit of a romantic or non-platonic interest.

[117] A different aspect of Dr Owczarek's state of mind concerns his assessment of the strength of friendship between himself and the Complainant after the events of September and October 2019. I note this in the specific context of Dr Owczarek's reply evidence, where he states "There was no indication given to me that we were no longer friends until 10 March 2021 and when [the Complainant] made this clear to me for the first time, I acted on her request."

[118] As with the 2 October text message, the 7 October meeting was an important event. In addition to the matters actually said at the meeting, there is what was conveyed. Putting to one side that the spectrum of "friendship" is a very broad one, the evidence of Dr Owczarek that there was no "indication" by mid-October 2019 that he and the Complainant were no longer friends seriously misinterprets the clear messages being conveyed by the Complainant, first by the 2 October text message and now in the 7 October meeting where she states the two are "only" colleagues.

[119] It is difficult to read the 2 October text message, followed by the discussion at the 7 October meeting, as conveying much room for a genuine friendship – as distinct from a cordial and professional working relationship – but I accept that was Dr Owczarek's subjectively held view. Unfortunately, Dr Owczarek's understanding of their relationship seemed only to be a

slightly muted version of his understanding of their friendship prior to the 26 September dinner. This was not the case. Dr Owczarek's misguided view of matters had another consequence, which was that he overestimated the strength of the work collegiality with the Complainant after the 26 September dinner. It meant he continued to send communications to the Complainant that were unwelcome, caused her unnecessary distress, and further caused her to consider that he was attempting to pursue her romantically.

Events of November to December 2019 (allegation 7)

[120] The Complainant was on pre-planned annual leave from 14-29 October 2019. In early November 2019, the Complainant and Dr Owczarek attended a work conference in Brisbane. A number of events during this period continued to cause the Complainant distress due to her perceptions about Dr Owczarek's intentions towards her. However, as no allegations of misconduct are alleged by the University in this period, it is unnecessary to set them out.

[121] Between 21 November 2019 and 2 December 2019, the Complainant took leave. She did so to avoid Dr Owczarek. Dr Owczarek was aware that the Complainant was on leave but the reason for that leave was not known to him.

[122] On 21 November 2019, the first day of the Complainant's leave, Dr Owczarek sent the Complainant the following text message:

"Hi [Complainant]

Hope things are ok with you and your [a family member] is on an even keel

We are having so much fun here

We had to evacuate Creswick [a University rural campus] today because of the bushfires All good - everyone out

Not before some academics went into the forest and were nearly crushed by falling trees It was very windy!

I can't fathom what they were thinking !!!

Tonight is the launch of the John McKenzie fund event so I think that should be good On Tuesday I saw photograph 51 and had dinner with 19 female STEM leaders which was inspiring

Today I had lunch with Gen and Emma which was pleasant

Physics is still a pain...

Take care Aleks"

- [123] The Complainant did not respond to his message.
- [124] On 27 November 2019, Dr Owczarek sent the Complainant the following text message:

"Hi [first name initial], Hope all is looking better for you mate. Tres amicalement. A"

- [125] The Complainant did not respond to his message.
- [126] On 5 December 2019, Dr Owczarek called the Complainant on her mobile phone at about 4.47pm. The call was not answered and Dr Owczarek did not leave a message. The Complainant did not call him back.

[127] On 6 December 2019, Dr Owczarek sent a text message stating "On my way". The message, sent at 2.01pm on a Friday, appears to be a work-related message and no evidence was led to the contrary. There is no reply to the text message.

[128] On 18 December 2019, Dr Owczarek sent a text message of what is obviously a presentation he was viewing or some work-related document on a computer screen in front of him. There was no reply to that message.

[129] I would not have commented upon the telephone call of 5 December 2019, or text messages on 6 and 18 December 2019, save that these three events were included in 'allegation 7' as inappropriate behaviour. As I understand their relevance, to be inappropriate conduct, it could only be due to the fact that the communication attempts were unnecessary and outside of the working relationship. I cannot make that conclusion and observe that the two text messages ostensibly appear to have a positive connection to work. While I accept it is clearly possible that communications ostensibly about work matters may in fact be unnecessary (and, in the context of this case, be said to demonstrate attempts to further a romantic or non-platonic relationship) I cannot draw that conclusion on the material before me. I again reiterate my observations concerning the difficulties of adducing reliable evidence about isolated communications or attempted communications as part of a wider working relationship, particularly when that forensic task is being undertaken years after the events in question.

[130] Toward the end of December 2019 (the exact date is not clear), Dr Owczarek gave the Complainant a Christmas card and a small gift. The card stated:

"What an extraordinary year we have had: full of challenges at every turn. You should feel very proud of what you have accomplished. Thank you so very much for being such an amazing leader. I admire your tenacity, your intelligence and your determined authority. You inspire me every day and drive me to do better all the time. I trust you, and your judgement across the whole business, implicitly. I know of no other colleague, academic or professional I could say that of. Our work partnership is something I truly cherish. We are formidable team and I am looking forward to next year (and hopefully the years to come)! I will do my utmost to support you – I will always have your back.

Your friendship is something I also deeply respect and will endeavor [sic] to be the best and true friend I can be to you. You have my commitment in that. You have made me a better person. Hopefully we will have time for some laughter and negronis to make the undoubtedly new challenges in 2020 seem less so!"

[131] In response, the Complainant purchased Dr Owczarek a small gift and gave him a Christmas card. Her card was less effusive than Dr Owczarek's card, and stated:

"Dear Aleks

Best wishes for the festive period and I hope you have a wonderful break with your family.

Thank you for your support and calm guidance over the past 12 months.

Looking forward to a great 2020! [Complainant]."

- [132] The Complainant's evidence, which I accept, is she gave Dr Owczarek the card and gift because he gave her a card and gift and she felt obliged. Dr Owczarek was not aware of the Complainant's reservations (and, to be clear, that is not a criticism of the Complainant, who was plainly having difficulty managing her concerns about her direct supervisor).
- [133] At least in relation to the communications described in allegation 7, Dr Owczarek says:

"In the proper context of our working relationship and my friendship with [the Complainant] (and her husband), this engagement with [the Complainant] was simply a continuation of the same communications that had been a feature of the interactions previously between us. I had no reason to believe that anything had changed" (my emphasis). 16

[134] The above view of Dr Owczarek, namely that his relationship with the Complainant after the 26 September dinner was "simply a continuation of the same" relationship prior to that event, is an unfortunate illustration of the significant lack of insight Dr Owczarek ought to have had in light of the very clear messages conveyed by the Complainant in the 2 October text message and at the 7 October meeting. In a similar vein, he states that the text of 21 November 2019 was "chatty" and sent "in the usual way we had been accustomed to engage with each other", further illustrating that the messages that had been clearly conveyed to him by the Complainant had unfortunately not been understood.

Events of 16 June 2020 (allegation 11)

[135] The investigation conducted by the University initially canvassed a number of allegations spanning the first half of 2020, albeit the allegations were ultimately found not to be established and were not otherwise pressed. Notwithstanding, aspects of these allegations made their way into the evidence and, for the purposes of the chronology, I will very briefly note them.

[136] The first two allegations (allegations 8 and 9) concerned COVID-19 'lockdowns' in Victoria for the period March 2020 to May 2020. During March 2020, Dr Owczarek scheduled a "Daily Catchup" meeting of 30 minutes' duration, which was then scheduled for every second day in April 2020 and were stopped when the lockdown stopped. For the same period, it was initially alleged that meeting agendas for meetings between Dr Owczarek and the Complainant had items added to them that were unnecessary to their work relationship. While the Daily Catchup meetings and agenda items were found by the investigator to be "unwelcome" from the Complainant's perspective, the investigator found they were neither inappropriate or sexual harassment and the proceeding before me was maintained on that basis.

[137] On 2 June 2020, Dr Owczarek sent the Complainant a text message. The message, sent at 8.59pm, was plainly unrelated to work and contained a newspaper link to a story reporting

the death of the fashion designer, Anna Thomas, who is mentioned above. The Complainant did not respond to the message. While this text message was included in the University's evidence, it did not form part of the allegations against Dr Owczarek during the investigation nor was it conduct relied upon by the University as a valid reason.

[138] I note that the University asserts<sup>17</sup> more broadly that, during 2020, there was unchallenged evidence that Dr Owczarek continued to contact the Complainant "frequently" about personal matters. While it is correct that the Complainant's witness statement did state Dr Owczarek "frequently" contacted her, the only examples given were those described above and what follows for allegation 11.

[139] Allegation 11 relies upon a text message sent on 16 June 2020 at 6.37pm. Dr Owczarek sent three text messages that day. The first two were sent at 2.08pm and, on their face, were work-related. One of those two messages was about a "steering committee" meeting and the other about a discussion with a work colleague, which Dr Owczarek stated he "can elaborate next time we talk". The Complainant did not respond to either message.

[140] The third text message, at 6.37pm, addressed two items: the first was, on its face, a work-related matter. While that matter was work-related, it is doubtful that it needed to be sent at that particular time, although it appears broadly of the character of other work-related messages sent by Dr Owczarek. The second item the text message addressed was a highly personal matter<sup>18</sup> about a work colleague. I accept the Complainant's evidence that the colleague in question was a colleague she had never met although she knew of. As the Complainant stated in her reply text message the next morning, she found the message upsetting.

[141] The University took issue with Dr Owczarek's statement to the University investigator, which was to the effect that Dr Owczarek considered it was appropriate for the Complainant to know about the issue with the work colleague out of care and concern for that colleague. The University contends the message was "designed" to get the Complainant's attention so that she would respond to him on a personal level and was inappropriate workplace conduct, although it does not contend it was sexual harassment. While I consider there was nothing about that part of the text message that could not wait until Dr Owczarek and the Complainant next spoke – and, indeed, it would have been more appropriate to convey that information in that forum – I am not persuaded the message was a device or hook designed to elicit a response. Unknown to the Complainant at the time, Dr Owczarek himself had been told that information by a very senior University academic for the very purpose of ensuring that the Faculty of Science dealt with that staff member "gently", in the context of other changes about to occur that would affect that staff member. Dr Owczarek was passing that information on, as the evidence before me indicates he did with others (although no communications are included). I note that Dr Owczarek apologised to the Complainant after she told him his message upset her.

Events of September 2020 (allegation 12(b))

[142] In September 2020, there was an announcement that the permanent position of Dean of Science had been finalised. Dr Owczarek was unsuccessful for the position. The new Dean of Science would be commencing on about 7 December 2020, with Dr Owczarek remaining as Acting Dean until then.

- [143] At the beginning of November 2020, there were evidently some changes to the work environment associated with the pending exit of Dr Owczarek as Acting Dean. Dr Owczarek gave a specific example of a "stressful situation" at that time, where he considered it was necessary to defend his team, which included defending the Complainant. Between 2 and 5 November 2020, the Complainant and Dr Owczarek exchanged text messages about it. Those messages were, in my view, positive.
- [144] Allegation 12(b) states that, after about 16 November 2020 (which is identified as when 'cafes re-opened' in Melbourne), Dr Owczarek requested to meet the Complainant at a cafe. The context to the cafes reopening was that, during September 2020 in Melbourne, 'lockdowns' were ongoing due to Victorian Government impositions at the time. The cafe meetings were about work, although the Complainant states that at the end of the meetings, Dr Owczarek would keep talking as if it was a social catchup. The meetings made the Complainant uncomfortable and, after two meetings, she requested their meetings return to Zoom meetings rather than in-person, which appears to be what occurred.
- [145] I acknowledge that the Complainant did not want to be meeting face to face with Dr Owczarek, however I accept Dr Owczarek's evidence that there was no inappropriate motive in doing so and, as his evidence indicates, he considered sitting in a cafe at that time in Melbourne a "novelty" after the extended periods of restrictions that had recently been imposed.

Events of December 2020 to February 2021 (allegation 13)

- [146] By 7 December 2020, the direct working relationship between Dr Owczarek and the Complainant was to cease, as Dr Owczarek would be concluding his role within the Faculty of Science executive and would be returning to a substantive position of Professor with the School of Mathematics.
- [147] Relevantly, on Friday 4 December 2020, there was a farewell event for Dr Owczarek, held in Carlton. The event was a dinner, which a number of people attended, including the Complainant.
- [148] The event on 4 December 2020 was not isolated, as Dr Owczarek had organised lunches with a number of different staff. However, the event was one of the two main 'farewell' group events, with the other being on Monday, 7 December 2020.
- [149] It appears that the Complainant and Dr Owczarek did not speak at the dinner. So much is explicable, given the Complainant was generally trying to avoid him at the time.
- [150] On Sunday, 6 December 2020 at 5.04pm, Dr Owczarek sent the Complainant the following text message:
  - "Hi [Complainant's first name]
    - I hope the weekend has treated you well strange weather today for sure Thanks for Friday evening with the team it was a special night and I appreciate it I reflected over the weekend on that amazing team we built and I know the Faculty is in safe hands

Good luck for tomorrow, the week ahead and beyond Best wishes Aleks"

[151] The Complainant did not respond to the message.

[152] On Monday, 7 December 2020 a farewell party was being held for Dr Owczarek. The Complainant attended for 20 minutes, which I infer was because she did not wish to be there.

[153] On 8 December 2020 at 11.25am, Dr Owczarek sent the Complainant the following text message:

"Hi [Complainant's first name]

It was so much fun catching up with everyone last night

Let's book in lunch one day before Christmas on [a street location near the Complainant] What day would suit?

Cheers Aleks"

[154] The Complainant did not respond to that message.

[155] On 10 December 2020, Dr Owczarek sent the Complainant the following text message:

"Hi [Complainant's first name]

Hope all is going well this week

I am sure it's hectic

I can give a quick update on DRG and interested to know your take on how Comms and Marketing is coming along.

Seems like there is progress on savings!

How does next Friday sound for lunch?

I can do Wednesday or the following Monday or Tuesday if better for you

Cheers Aleks"

[156] The Complainant replied to the above message on the same day in the following terms:

"Hi Aleks Unfortunately, I don't have any free time between now and Christmas to catch up. Work and school commitments have filled my days. You know what it's like. Hope you can relax and have some downtime over the break! [Complainant's first name]"

[157] Also on the same day, Dr Owczarek attempted to call the Complainant by telephone. She did not answer or call back.

[158] Finally on that day, Dr Owczarek sent the Complainant a further text message as follows:

"Hi [Complainant's first name]

Oh it would be great just to catch up briefly as I missed talking to you on Monday before the end of the evening

Coffee? If not of course I understand

Also [Dr Owczarek's wife] and I were wondering whether you and [the Complainant's husband] would like to come over during the break Aleks"

[159] The Complainant did not reply to the above text message.

[160] While the exact timing is unclear, at some point in December 2020, an issue arose regarding farewell cards signed by other staff at the event on 7 December 2020. Dr Owczarek noticed that two cards were missing: one from the Complainant and the other from a male colleague. Dr Owczarek asked the Deputy Dean to look for both cards, because Dr Owczarek wanted a complete set and he wanted to acknowledge any cards he received – I accept Dr Owczarek's explanation for this matter. The Complainant had not given Dr Owczarek any card or gift.

[161] Dr Owczarek accepted that, from 7 December 2020, there was no longer any work reason for catching up with the Complainant and that he was making the attempts after that purely as a social catchup as friends.

[162] It was put to Dr Owczarek that, it ought to have been clear to him that the Complainant had no interest in speaking to him by around mid-December 2020 (the timing is not clear). The message from the Complainant on 10 December 2020 stating that she had "no free time between now and Christmas" ought to have been a signal to him about the Complainant's unwillingness to meet or speak with him, particularly where that message failed to offer any other time at all. The non-response to a second, shorter "coffee" catch-up was a further signal. While Dr Owczarek's incapacity to judge the situation was pronounced, I accept his evidence that (from his perception of events) he was attempting to provide a final acknowledgement upon (his view) of a friendly working relationship.

[163] One further explanation given by Dr Owczarek, for the first time in cross-examination, for his continued attempting to contact the Complainant was to give her a gift he had purchased for her. While it was put to Dr Owczarek that his intention to provide a gift was a recent invention, I accept Dr Owczarek's evidence. Dr Owczarek had purchased gifts for a number of staff, and the Complainant was one. Moreover, Ms Hampshire's evidence refers to the "lead-up" to Christmas 2020 when Dr Owczarek took her out for lunch. Dr Owczarek gave Ms Hampshire a gift as well as giving her a gift to pass onto the Complainant.

[164] On 19 December 2020, Dr Owczarek sent the Complainant a further text message as follows:

"Hi [Complainant's first name]
Julia mentioned you have been / are unwell. Hope you feel better soon
Hope also you have a stellar Christmas and get some quality break time
Thanks again for everything
Take care and best wishes
Aleks"

[165] The Complainant did not reply to the above text message.

- [166] At 12.04am on New Year's Day, 1 January 2021, Dr Owczarek sent the Complainant a text message stating "Happy New Year". Dr Owczarek also sent an identical message to other staff members (male and female). Some responded with enthusiasm, others did not respond.
- [167] The Complainant did not reply to the above text message.
- [168] At 5.31pm on 31 January 2021,<sup>19</sup> Dr Owczarek sent the Complainant a text message with three photographs of his new puppy. The accompanying message included "Thought you might like to see the latest family member here".
- [169] The Complainant did not reply to the above text message.
- [170] The Complainant states that in "early 2021", she was finding Dr Owczarek's "continued contact" very difficult to manage. Other than the text messages on New Years Day and 31 January 2021 referred to above, the only further communication in evidence was a message Dr Owczarek sent on 10 February 2021. On 10 February 2021, Dr Owczarek sent the Complainant a text message referring to some workplace issue that he perceived would be affecting the Complainant. He concluded "Please reach out if you need someone to listen". The Complainant did not reply.
- [171] While the text message sent on 10 February 2021 does not appear to be relied upon by the University as one of the communications supporting its decision to dismiss Dr Owczarek, it is the penultimate communication referred to in the Complainant's evidence about that period.

Events of March 2021 – the request for no further contact and the apology

- [172] What also appears to be of concern to the Complainant during the period of early 2021 was not the communications she was receiving from Dr Owczarek but her concerns arising from her perception of Dr Owczarek's interaction with other female staff members. It is a perception Ms Hampshire appeared to share. Those meetings largely appear to have occurred during the 'farewell' period for Dr Owczarek. There does not appear to be any dispute that Dr Owczarek met (at some point) with three staff members. Dr Owczarek's evidence also indicates he met with a larger number of male staff members.
- [173] Ms Hampshire's concern, which I infer was shared by the Complainant, was that these were "young" female members of Ms Hampshire's HR team. The evidence of these events is very scant and appears to be entirely based on accounts of others who did not give evidence and, for those reasons, I do not find Dr Owczarek acted inappropriately at any of these events. However, I accept that each of Ms Hampshire and the Complainant held a concern, which appeared to be developing in late 2020 and early 2021, that such meetings were inappropriate in and of themselves.
- [174] On 10 March 2021, Dr Owczarek sent the Complainant an email stating (formalities excluded) "It would be great to catch up over lunch sometime. Hope all is going ok."
- [175] The Complainant's reply on the same day requested that Dr Owczarek cease all contact with her. Her email stated (formalities excluded):

"Hello Aleks

Your perceived closeness to me makes me feel uncomfortable and I do not wish to catch up. That will not change and I would appreciate it if you stopped asking me to meet. And please stop enquiring after me through my colleagues."

[176] Within a few minutes of receiving the above message, Dr Owczarek replied "I will comply with your request".

[177] Other than one further email (described below), this was the final communication Dr Owczarek had or attempted to have with the Complainant.

[178] On 11 March 2021, the Complainant sent Ms Hampshire a text message stating that Dr Owczarek had taken a particular female staff member out to lunch, a matter of evident concern to the Complainant. The details of the lunch are not in evidence and that individual – referred to by the parties as "XY" in the proceeding – did not give evidence.

[179] While XY did not give evidence in the proceeding, a record of interview she signed during the investigation process was tendered.<sup>20</sup> There was nothing in that record indicating a concern by XY regarding herself. I refer to this record of interview in greater detail below.

[180] Ms Hampshire refers to the text message she received from the Complainant on 11 March 2021 and then states, by this stage, she was "fed up" with her perception of Dr Owczarek's "behaviour" and she "wanted to inform him directly about appropriate boundaries and at the same time convey [the Complainant's] request that he stop contacting her." I also infer from Ms Hampshire's witness statement that she spoke to the Complainant about the email exchange on 10 March 2020 or at the very least about the Complainant's request in that email. In this respect, I note the Complainant's evidence states that she and Ms Hampshire had been communicating "frequently" at around that time, although the exact timing is not clear.

[181] Ms Hampshire wanted an independent witness to attend the meeting she was contemplating with Dr Owczarek. She arranged for Mr Mark Dean to be in attendance. Mr Dean was a consultant who had considerable experience in assisting the University with training regarding "appropriate workplace behaviours" and other related programs of work. Ms Hampshire felt Mr Dean's presence would be helpful in case Dr Owczarek needed support, as Ms Hampshire believed Dr Owczarek would find that the matters raised during the meeting distressing or at the least confronting. Based upon Mr Dean's experience, Ms Hampshire's decision to involve him was understandable and appropriate.

[182] Ms Hampshire kept the Complainant apprised of the steps she was taking with Dr Owczarek and of Mr Dean's involvement. On 15 March 2021, Ms Hampshire sent the Complainant a text message referring to her initial meeting with Mr Dean to discuss her thoughts about her next steps with "our problem."

[183] Ms Hampshire refers to one discussion she had with the Complainant at around that time, where Ms Hampshire told the Complainant "I was going to be very clear to Dr Owczarek that he should stop trying to contact [the Complainant] through other people, and that he needed to stop contacting members of the HR team."

[184] Ms Hampshire also told the Complainant that "I would support her, whatever her decision, including if this was to make a formal complaint against Dr Owczarek."

[185] Ms Hampshire's evidence is that the Complainant "wanted Dr Owczarek to apologise for his behaviour."

[186] Ms Hampshire arranged a meeting with Dr Owczarek during a dinner meeting with those two and another person from the University's workplace relations group. Ms Hampshire's concerns were not raised at the dinner meeting but Ms Hampshire told Dr Owczarek that she wanted to check out his new office. She did not tell him about Mr Dean or the purpose of her coming over to discuss the Complainant or related matters, because she thought Dr Owczarek might not agree to the meeting if forewarned. Dr Owczarek was not aware of the purpose of the meeting until the meeting began.

[187] The meeting ('the 18 March meeting') was arranged for 18 March 2021, initially at 10.30am although it was rescheduled to start by an hour. The Complainant was updated by Ms Hampshire as the meeting came closer, including an update on 17 March 2021 about the delay to the start time. Ms Hampshire sent a message to the Complainant stating she "will text you afterwards".

[188] On the morning of 18 March 2021, a news article was published in *The Age* newspaper titled "Melbourne Uni allowed 'sexual harasser' professor to keep jobs". The timing of the article and the meeting appears to be entirely coincidental. The article reported upon a complaint of sexual harassment by a junior female employee at the University, which had been investigated by the University regarding events alleged from about 2015. The investigation report, which was finalised in 2019, concluded on the balance of probabilities that the allegations (or some of them) were established. I note the article reports that the professor in question denied the allegations. And, as the title of the article suggests, the professor was not dismissed despite the apparent findings of the investigation report referred to in the article.

[189] The Complainant evidently saw a copy of that news report in the early morning of 18 March 2021. She sent a link to the article by text message to Ms Hampshire at 5.28am that morning. At 11.13am, the Complainant sent a further text message to Ms Hampshire stating "Good luck Julia and thank you for doing this".

[190] In preparation for the meeting, Ms Hampshire had prepared a script to assist her. As the script refers to the newspaper article above, I infer Ms Hampshire prepared her notes on the morning of the meeting. The script was in evidence. It is not necessary to recite it but it catalogues a chronology of matters that were seriously concerning Ms Hampshire, which included her view that Dr Owczarek "expected a relationship with [the Complainant] that went well beyond that of a colleague" and ongoing attempts to continue to meet with the Complainant. The script dealt also with Ms Hampshire's concerns with meetings or interactions with other employees, which were approximately half of the script.

[191] Ms Hampshire's evidence is that she largely followed her script during the meeting. I accept that evidence.

[192] During the meeting, Ms Hampshire asked Dr Owczarek to write a letter of apology to the Complainant. She also requested that Dr Owczarek stop contacting the Complainant and other members of the Faculty secretariat.

[193] There is some dispute about whether Dr Owczarek was "directed" to prepare an apology. I do not consider that Dr Owczarek was directed in such terms. Mr Dean's evidence, which was credible, is closer to the mark. He stated that "At no time did Ms Hampshire instruct Dr Owczarek to write a letter to [the Complainant], however, it was clear that she was recommending this as a sensible course of action."

[194] Dr Owczarek's evidence is that he believes he was directed to prepare the apology. I accept he felt that way. Objectively, it is difficult to see how he would have considered otherwise in circumstances where his planned social catchup with Ms Hampshire had been converted to a serious intervention by the (then) HR Manager, accompanied by a workplace consultant, with him being "asked" to prepare an apology. The final entry in Ms Hampshire's notes record "Letter to [Complainant] apology – no more meetings with staff". Objectively assessed, I consider that the recommendation for an apology letter was no less directive than being told "no more meetings with staff" – the objectively clear expectation is that both steps would be complied with.

[195] Unsurprisingly, Dr Owczarek took the "sensible course of action" identified by Mr Dean and prepared a letter of apology. At around this point, Ms Hampshire left and Mr Dean remained to support Dr Owczarek. Dr Owczarek says Mr Dean "essentially dictated" the contents of the letter. Mr Dean disputes this. I prefer Mr Dean's evidence and record that I found Mr Dean to be a credible witness, who gave his evidence without embellishment. Mr Dean stayed with Dr Owczarek while Dr Owczarek worked out what to write and Mr Dean also listened as Dr Owczarek read out loud what was being written. At the point where the letter had been finalised, Mr Dean offered to make himself available to talk with Dr Owczarek at any stage if Dr Owczarek wanted to and then departed.

[196] After Ms Hampshire left Dr Owczarek with Mr Dean, she exchanged text messages with the Complainant as follows:

- Ms Hampshire: "It's done left him with Mark"
- Complainant: "Thanks Julia. I'm seriously considering making a formal complaint"
- Complainant: "But won't do anything that could harm others"
- Ms Hampshire: "You will be getting an apology shortly"
- Complainant: "But does he understand? I don't think so"

[197] Dr Owczarek sent a letter of apology ('the apology letter') to the Complainant by email at 1.14pm that day. The apology letter was as follows:

"Dear [Complainant],

After your email the other day Julia has spoken to me about the situation including the impacts on you. I had no idea how this has been affecting you and I am mortified that this has had such an effect. I humbly apologize for any distress that I have caused you.

Please accept my undertaking, as outlined in my email response, that I will honour your request to cease contact with you.

I sincerely wish you all the best in your professional and personal future.

Yours sincerely, ..."

[198] At essentially the same time, Dr Owczarek sent Ms Hampshire two text messages. The first simply stated "Letter sent" and the second:

"Thank you for your care in this awkward situation I am mortified
I do hope you are ok
Best wishes
Aleks"

[199] Ms Hampshire responded "Thanks for letting me know".

[200] Four minutes after the Complainant received the apology letter from Dr Owczarek, she forwarded the letter and cover email to Ms Hampshire. The Complainant and Ms Hampshire also then exchanged further text messages as follows:

- Complainant: "I've sent you the letter. What bullshit, no idea that it had an impact"
- Ms Hampshire: "It's early days, he is in shock and the full impact of the conversation will happen, probably in a cold sweat in the middle of the night"
- Complainant: "Of course. I'm not sure why he is shocked when I've repeatedly told him I don't want to see him. But anyway [emoji of shrugging person] male entitlement"

[201] A further issue regarding the apology letter sent by Dr Owczarek and the meeting with Ms Hampshire and Mr Dean was whether the complaint was "resolved". Dr Owczarek's evidence is that upon the Complainant "obtaining some formal apology from me [this] would resolve matters as far the University of Melbourne was concerned." Dr Owczarek's reply witness statement contains similar contentions. I address the significance of the 18 March 2021 meeting and the apology letter below but, as a factual matter, there were no express statements made by Ms Hampshire (or Mr Dean) that the matter was or would be "resolved", whether in those terms or something equivalent. Dr Owczarek may well have felt that was the case, but nothing to that effect was said.

[202] A final aspect of the events from 18 March 2021 require mention, which was Dr Owczarek's state of mind. The issue is relevant to the University's contention that Dr Owczarek possessed little insight into his conduct towards the Complainant at the time it occurred and had gained no appreciable insight during the investigation process that led to his dismissal. The University's position has some force.

[203] First, Dr Owczarek's protests that he was "directed" to write the apology and only did so with Mr Dean "been called in to effectively stand over me whilst" it was written belies the sincerity of the apology letter sent. Dr Owczarek's witness statement goes further (emphasis added):

"69. I did not know Mark Dean very well (I had only met him a few times before and never in a social context) but I trusted Julia so I complied with Julia's direction. I recall that my feeling at the time was that if I had in some manner of which I was not aware caused some pain or offence to [the Complainant] then I did not think it could hurt me to express some regret that I had unwittingly caused her distress.

70. I assumed (Julia never said anything outright to this effect) that Julia was dealing with some complaint which had been made by [the Complainant] and that obtaining some formal apology from me would resolve matters as far the University of Melbourne was concerned.

71. So I wrote the letter and signed it. ..."

[204] In fairness to Dr Owczarek, I understand his lack of awareness of any distress held by the Complainant as potentially being to events *after* the 7 October 2019 meeting. If he was referring to events before 7 October 2019, his written evidence is insincere in circumstances where, only a week before on 2 October 2019, Dr Owczarek had been told his "perceived closeness" made the Complainant "very" uncomfortable. The language by the Complainant in her email on 10 March 2021 was an echo of what she wrote in the 2 October text message when she stated Dr Owczarek made her "very uncomfortable". Notwithstanding the email on 10 March 2021 from the Complainant now being the second of such communications from her, there appeared to be no meaningful reflection on any event that might have caused pain or offence – they were matters that Dr Owczarek was "not aware".

[205] Notwithstanding Dr Owczarek's apparent lack of insight, it is important to record that, when Dr Owczarek stated that he would comply with the Complainant's request in the 10 March 2021 email, the unchallenged evidence is that he did so within the letter and spirit of his undertaking. Other than to issue to the apology letter on 18 March 2021, he did not contact her again.

[206] An issue relevant to Dr Owczarek's case is whether the actions of Ms Hampshire fully and finally resolved the earlier complaints or concerns about his conduct. I will return to this matter below but it is necessary to record here that I am satisfied that Ms Hampshire's actions were actions taken within the bounds of her authority on behalf of the University.

June 2021 events

[207] On 29 June 2021, Ms Hampshire met with Dr Owczarek for lunch. The discussion was wide-ranging but generally about Dr Owczarek's continuing career development now he was no longer Dean. The topics did not appear to touch on the events described above. After the lunch, Ms Hampshire evidently spoke to her colleague XY, who told Ms Hampshire that Dr Owczarek had invited XY and her husband to an art gallery. That invitation was of concern to Ms Hampshire.

[208] On 30 June 2021, Ms Hampshire sent Dr Owczarek a text message that read:

"Hello Aleks it was good to catch up yesterday. On reflection I should have restated that it is not a good idea, for your own reputation and well being to begin making social

invitations to any of the women we discussed back in March. Hope you understand that nothing has changed with the passage of time in terms of what is acceptable and what is not. If you would like me to talk this through with you I will be happy to do so. I am pretty tied up over coming week or so but should have some availability mid July. Julia"

[209] Dr Owczarek replied the same day in these terms:

"Hi Julia

yes it was pleasant yesterday

I am a little dismayed at the contents of the rest of your text as I can explain more fully when we meet next.

Let us arrange a time when you are free Aleks"

[210] Witness XY did not give evidence. A record of interview signed by XY was tendered in evidence. 21 XY's record of interview included statements about the above matters:

- In response to a question asking whether Dr Owczarek had ever behaved toward her in a manner she felt was inappropriate, XY replied "I would not classify it as inappropriate or any form of misconduct under the policy. He is very friendly. He tries to be very friendly, and I think sometimes he does not understand boundaries."
- XY elaborated on two instances as follows: "After his appointment as Acting Dean concluded about Nov/Dec 2021 he went back to his substantive role as Prof as maths and stats he invited me and my husband to have dinner with him and his wife at his home. I felt uncomfortable. Another time he invited me and my husband to attend an art gallery with him and his wife. I have very strong boundaries about socialising with my stakeholders outside of work. I said no to him the first time when it was to go to the gallery and then spoke to my manager the second time. I was not comfortable."
- In relation to the dinner invitation referred to, I also note XY stated: "I responded to his text to say that I was not available and was not 100% comfortable coming over to his house for dinner. He was fine with it, respectful of my decision and didn't push the issue. He has not tried to engage with me since."

[211] Regarding XY's statement that Dr Owczarek "has not tried to engage with me since", there was no evidence before me to the contrary.

[212] Toward the end of 2021, Dr Owczarek and Ms Hampshire again sought to meet up for lunch. They were unable to do so, because Ms Hampshire was too busy at the time. Perhaps because Dr Owczarek had been reflecting on Ms Hampshire's communication on 30 June 2021, Dr Owczarek sent her the following text message on 3 December 2021 (formalities omitted):

"Thank you for you email. It is a pity that we can't meet up this year as I had several things I wanted to talk to you about. However, I also definitely want to put this year behind me and start afresh next year. This year has been particularly challenging.

In the second half of the year it became clear to me that I neither understood the meaning nor motivation of many things that were said and written to me this year. I accept that this will be where it finishes.

I am proud of the way I have treated my many colleagues, some of whom I consider friends, with kindness, respect, trust and honesty. I am not sure whether it is needs to be said, or relevant, but I am particularly proud of the way I always treated [AB] with kindness and respect. I know you are very fond and protective of her. Also, as you know, I have been scrupulously truthful with you.

So, when we meet next year I will not talk about this but rather look forward to an exciting 2022."

# [213] On 6 December 2021, Ms Hampshire responded:

"I have read your text Aleks. I don't intend to enter into any further correspondence on the topic. Please do not raise this further with any other member of the HR team. Julia"

Evidence relating to reinstatement

- [214] The factual summary above primarily deals with my findings concerning the allegations against Dr Owczarek, as based on the allegations of conduct relied upon by the University.
- [215] Beyond those matters, the University led evidence of other aspects of alleged conduct, which was said to demonstrate "that Dr Owczarek had engaged in similar blurring of personal and professional boundaries in respect of other female staff of the University". The purpose of that evidence was in support of its contention that, if the dismissal was found to be unfair, that an order for reinstatement would be inappropriate.
- [216] It is convenient to set out the University's submission referring to the factual matters relied upon from its closing written submissions. The submission states (footnotes omitted):
  - "193. In respect of Witness AB, she had had a close working relationship with Dr Owczarek and had fallen in love with him and discussed the "next stage" of their relationship with him. Under cross-examination, Dr Owczarek accepted that his response to Witness AB's declaration of love could have caused her distress. Despite this, he saw no problem with buying her gifts in the years that followed. At one of Dr Owczarek's farewell events, Witness AB was crying to him because she would no longer be working with him. Dr Owczarek accepted, under cross-examination, that he realised she still had feelings for him because she was crying at the thought of no longer being able to work with him. Despite having this realization, he considered it appropriate to hold Witness AB's hands to seek to comfort her. He appeared to have no insight into the impact his conduct may have on Witness AB or how his actions may be misconstrued or the need to modify his behaviour. His attitude towards Witness AB demonstrates that he lacks the relevant insight to be able to modify his behaviour and maintain appropriate boundaries in the workplace.

194. Witness XY provides a further example of another junior female staff member who would have "alarm bells ringing" around Dr Owczarek and required the assistance of HR to assist her to establish boundaries with him.

195. Ms Hampshire also gave evidence that Dr Owczarek had sought out friendships with Witness AB and other younger female staff and that she saw no evidence that he believed he did anything wrong. In those circumstances she was of the view that there was a risk of repeat behaviour if he were to be reinstated."

[217] The evidence relied upon by the University to support the above propositions was a mixture of hearsay statements – mostly via Ms Hampshire's witness statement – a record of interview (from a witness who did not give evidence) and, most probatively, from evidence given by Dr Owczarek to questions in cross-examination.

[218] In relation to 'Witness' AB, she was not a witness and did not prepare a witness statement. There was no record of interview obtained from her during the investigation. The only non-hearsay evidence about those matters concerning her is from Dr Owczarek himself in response to questions in cross-examination. With that observation, a number of elements of Dr Owczarek's evidence was itself hearsay, such as his opinions on the state of mind of AB for various matters. A fair reading of Dr Owczarek's evidence is that he was the recipient of unsolicited attention of a non-platonic intent from another staff member. Dr Owczarek did not invite it, did not reciprocate it and, to the contrary, took steps to have the conduct of AB brought to a halt. These events were also from the period in about 2018 or prior. The events during Dr Owczarek's 'farewell events' were years later, being December 2021. I do not consider the evidence of the later events – i.e. about seeking to comfort AB - as persuasive of any particular lack of insight, let alone what "impact his conduct may have on Witness AB or how his actions may be misconstrued".

[219] For 'witness' XY, she too was not called as a witness nor did she prepare a witness statement. I have extracted an aspect of her record of interview above, which was tendered. The statement relied upon by the University that XY had "alarm bells ringing" is from that record of interview but appears in the context of the more fulsome statement that follows:

"I think that there is something lacking with Aleks - I would have alarm bells ringing sometimes — it is his desire to be liked, accepted, and admired — he really likes to be admired and looked up to, in my perception and that overtakes some of his rational thinking and he doesn't understand the boundaries. Not unusual for academics, particularly in Maths and Stats — In my experience, I feel like they lack the social cues, and they could be on the spectrum (not trying to diagnose here, just observing). Aleks is not very different to them. You need to give him very black and white feedback; if it is grey he does not see/hear the feedback. There is no malice in him. I don't think he has a bone in his body to be sexually inappropriate. It is not sexual; he is a not mature; he has a playful way of behaving. In my opinion he is not very mature."

[220] While the above statement of XY is superficially supportive of the University's position that Dr Owczarek does not understand "boundaries", the University's position is undermined where XY also states:

"I have not personally seen where he has crossed a boundary with others. I have heard that sometimes he can get a bit excited and cross boundaries. I have not experienced or witnessed it firsthand"

[221] XY's overall assessment of Dr Owczarek was somewhat more generous than Ms Hampshire's assessment at paragraph [114]. XY stated Dr Owczarek was "Supportive, easy to work with, always go to him with questions on things, very easy to work with, very engaging, polite, respectful and our work interactions helped me to do my job better. Very supportive overall."

[222] I do not consider Ms Hampshire's evidence about AB in particular and the more general reference to "other younger female staff" persuasive. This is not levelled as criticism of Ms Hampshire, who I generally considered was a very reliable witness who conducted herself professionally and with a keen eye to protecting her colleagues, but it is a long bow to accept such evidence as sufficiently reliable to establish matters that she did not herself observe. I make a similar observation about the Complainant's evidence, where she gave evidence about matters she "personally observed" concerning Dr Owczarek interacting with others. Those observations appear to be based on what she had been told by the relevant individuals, or told by another person who in turn was said to have observed a matter. <sup>23</sup>

### Events relating to the investigation

[223] It is uncontroversial that in around February 2023, Dr Owczarek applied for the position of Director of the Bachelor of Science. The role reported to the Dean of Science and was part of the Faculty Executive team. The Complainant, who was still working within the Faculty Executive at the time, became aware of Dr Owczarek's application. She was particularly concerned that if Dr Owczarek's application was successful, she would have been working closely with him again, including meeting with him on a weekly or fortnightly basis.

[224] It is unclear whether Dr Owczarek considered how he could perform that role, if successful for the appointment, and comply with his undertaking to the Complainant to cease contact with her but the matter was not explored. Quite clearly, the Complainant considered the matter at the time and considered that further contact was inevitable and likely to be regular.

[225] Given those matters, the Complainant made a complaint to the Dean. She did so to "stop him getting the role" and also to "stop him working with me and a team of other young female professional staff."

[226] In her oral evidence, the Complainant stated that she did not make her complaint with a view to having Dr Owczarek dismissed from his employment, although she acknowledged that was a possibility.

[227] In early March 2023, the University engaged Ms Erica Edmands to conduct a workplace investigation into the complaint. Ms Edmands is a practising solicitor, operating a legal practice trading as Workplace Investigations and Training.

[228] The investigation by Ms Edmands saw her initially interview the Complainant, which occurred on 13 March 2023 by Zoom. Following the interview, Ms Edmands sent the Complainant a record of interview based on Ms Edmands' notes. The initial record of interview was incomplete, in that Ms Edmands included a number of prompts for the Complainant to provide further information about.

- [229] On 21 April 2023, the Complainant sent Ms Edmands the record of interview containing the Complainant's responses to the various queries raised by Ms Edmands.
- [230] Based upon the record of interview, Ms Edmands prepared a 'notice of allegations'. That document was sent to the University for the purpose of being sent by the University to Dr Owczarek.
- [231] On 3 May 2023, Dr Owczarek was contacted by the University's workplace investigations team. The complaint against him was foreshadowed, and he was informed that Ms Edmands had been engaged to conduct the investigation.
- [232] On 5 May 2023, the University provided Dr Owczarek with the notice of allegations.
- [233] On 17 May 2023, Dr Owczarek sent an email to Ms Edmands attaching a background statement, a bundle of emails and a bundle of one note entries.
- [234] On 18 May 2023, Ms Edmands conducted an in-person interview with Dr Owczarek. Dr Owczarek had a support person with him. During this meeting, Ms Edmands took notes.
- [235] On 22 May 2023, Ms Edmands provided Dr Owczarek with a record of interview, including various of the matters he raised during the meeting. That record of interview contained a number of follow up queries. There were some delays in Dr Owczarek responding due to a short unavailability of his support person.
- [236] On 31 May 2023, Dr Owczarek sent Ms Edmands a marked-up version of his record of interview and a signed, clean PDF version of the edited document.
- [237] In June 2023, Ms Edmands conducted a number of further interviews with other individuals. They included interviews with Ms Hampshire, Mr Dean, XY, and others.
- [238] In relation to the interview with Mr Dean, Dr Owczarek states that the investigation itself was biased and flawed, because Ms Edmands had previous commercial dealings with Mr Dean, as well as some redactions Ms Edmands made to some documents, including communications with Mr Dean, that were produced during the course of the proceeding. None of those matters satisfy me that there was any relevant bias or apprehension of bias. The commercial dealings were limited and historical. Ms Edmands approached the investigation on the basis as an independent investigator. She is a qualified, practising solicitor and in my view she understood her obligations of independence and, importantly, sought to discharge them. In any case, I do not consider Dr Owczarek was disadvantaged. In the case of Mr Dean, I consider he was a reliable, honest witness. Ms Edmand's acceptance of Mr Dean's evidence regarding his limited involvement in the matter made no difference.
- [239] On 15 June 2023, Ms Edmands conducted a second interview with the Complainant, primarily to follow up on various matters raised during the investigation. Ms Edmands provided the Complainant with a written record of interview. The Complainant made some changes to that document.

- [240] On 22 June 2023, the Complainant returned her written record of interview, with her changes, to Ms Edmands. Ms Edmands then proceeded to review the material before her and commence on the process of making her findings in relation to each of the allegations in the notice of allegations. In doing so, she prepared a draft investigation report.
- [241] On 26 July 2023, Ms Edmands provided a draft copy of her report to the University. At this stage, that draft had not been fully proof read and there was one draft finding that was unable to be finalised without further information from Ms Hampshire (which was pending).
- [242] In the week beginning 31 July 2023, Ms Edmands spoke with the University about her report. The University requested further information about her assessment of Dr Owczarek's understanding of the impact of his behaviour on others. Ms Edmands then prepared an addendum to her report dealing with those matters.
- [243] On 4 August 2023, Ms Edmands provided the University with her addendum report, as well as a copy of her finalised substantive report. The final report was 102 pages in total (the 'final report'). The addendum was 9 pages in length (the 'addendum'). Dr Owczarek was not provided with a copy of either document, which is a matter that I will return to.
- [244] Ms Edmands concluded that a number of the allegations against Dr Owczarek had been substantiated. I have set out those allegations earlier, by reference to 'allegations 1(c)' etcetera through to 'allegation 13'. Ms Edmands also found a number of allegations were not substantiated or partially substantiated, either in the sense that the factual conduct was not established or because the character of that conduct was not established as sexual harassment (including being unwelcome) or being inappropriate.
- [245] Allegation 13(g) concerned a substantiated finding of misconduct, based on Dr Owczarek allegedly telling colleagues in "HR words to the effect that [the Complainant] 'rejected' you and repeatedly asked other colleagues about her." The conduct was said to have occurred in December 2020. That allegation was not put to Dr Owczarek as part of the investigation and, for that reason, was withdrawn. Despite being withdrawn, Dr Owczarek submits to the effect that reasoning behind the allegation had infected the University's deliberation process.
- [246] Ms Edmands was cross-examined extensively about her findings and, more specifically, about her characterisation of a number of matters, such as the 2 October text message, or whether or not a particular communication could be said to have a sexual connotation. Much of the cross-examination was unnecessary, repetitive and irrelevant but was largely directed at Ms Edmand's conclusion that Dr Owczarek was romantically motivated toward the Complainant. My observation about the cross-examination of Ms Edmands unfortunately extends to the cross-examination of most of the respondent's witnesses, which frequently involved cross-examining witnesses about their *characterisation* of factual matters eg what was conveyed by the 2 October text message or inferences to be drawn about Dr Owczarek's state of mind based on other facts.
- [247] After Ms Edmands sent the final report and addendum to the University, she was requested by the University to provide a summary report. Ms Edmands did so and provided that document 22 pages in length to the University by email on 8 August 2023. As Ms Edmands'

cover email to the University indicated<sup>24</sup>, her intention was to ensure "there is no evidence that can identify witnesses included here, but enough that each can understand why the findings were made." She also asked the University if it wanted "less/more/changes" – no further request by the University was made.

[248] On 11 August 2023, Dr Owczarek was sent by email a letter and the 22 page summary version of the investigation report I referred to in paragraph [22]. The author of the letter stated (among other matters) "I confirm that in the University's view your conduct constitutes sexual harassment within the meaning of that term in the Appropriate Workplace Behaviour Policy as it was in force at the time of the conduct." Dr Owczarek was given seven calendar days to provide a response, although that time was extended.

[249] On 1 September 2023, Dr Owczarek provided a detailed written response. It is not necessary to set out the details of his response, which are broadly consistent with his evidence I described above, although he denied any romantic interest or motivation toward the Complainant and also denied he breached any relevant policy or engaged in misconduct. Dr Owczarek also expressed remorse if he had hurt anyone and committed to "making all necessary adjustments to my Behaviour" and promised "to ensure that my behaviour in the future not only is but is clearly seen to be above reproach." He stated he was "humbly contrite and ready to take all appropriate actions moving forward." Dr Owczarek also objected to 'allegation 13(g)' on the basis that it had not been put to him.

[250] In light of Dr Owczarek's objection that the investigation was not procedurally fair, the University obtained the services of another solicitor to review the procedure of the investigation. The outcome of that review was that the University disclaimed any reliance on allegation 13(g).

[251] Professor Nicola Phillips is the Provost at the University of Melbourne. As Provost, she is the standing deputy to the Vice-Chancellor of the University and holds various responsibilities as the University's Chief Academic Officer. As part of her role, she has the ultimate decision-making power in relation to the termination of employment of academic staff members, which included Dr Owczarek.

[252] Professor Phillips had been aware, since about February 2023, in broad terms of the nature of the allegations against Dr Owczarek. In November 2023, she was told she would soon receive materials relating to Dr Owczarek's case. The material provided to Professor Phillips were the final report (i.e. 102 page version), the addendum and two memoranda. The first-dated memorandum was dated 8 August 2023, and was issued to the University Director of Workplace Relations. The second-dated memorandum was dated 22 November 2023. The memoranda provided an executive summary of the allegations and conclusions of relevant breaches of the University's policies that were alleged.

[253] In relation to the addendum, Professor Phillip's evidence is that she specifically clarified the purpose of that document and then considered the matter in the absence of the material in the addendum. I accept her evidence on that issue. Professor Phillips agreed with the factual findings by the investigator and the breaches said to ensue from those findings. Professor Phillips also concluded that there was "no indication that Dr Owczarek understood the seriousness of the matter, or that he accepted that any of his behaviour was questionable or

could constitute misconduct. Dr Owczarek's showed very little understanding of the issues at play in the behaviour that was documented, and the impact that his behaviour had on [the Complainant]."

[254] Finally, and I consider it important to note, that this case was not simply about an allegation of sexual harassment (although that allegation was significant) but that the University placed considerable importance on the management of its "power imbalance" concerns and unacceptable conduct where such imbalances exist. Professor Phillips states that the third issue of concern to her was:

"The existence of a significant power imbalance. Dr Owczarek was the Acting Dean when much of the conduct occurred, and therefore in a position of considerable power in relation to all employees in the Faculty. He was also one of the most senior leaders in the University, and therefore in a position of significant trust. As [the Complainant's] direct supervisor, Dr Owczarek had considerable influence over key parts of [the Complainant's] employment, including her appointment to the role, her remuneration and performance ratings. I considered that his position of power in this respect had been abused. Regardless of whether there was ever a time where any aspect of an interaction had been mutual, it is the responsibility of all employees – but most particularly someone in a position of such seniority and authority – to establish and maintain appropriate workplace boundaries. In this case, the boundaries had been systematically breached."

#### Consideration

[255] The determination of whether Dr Owczarek was unfairly dismissed falls to the question of whether his dismissal was harsh, unjust or unreasonable. Section 387 of the Act sets out the matters I must take into account before being satisfied whether the dismissal was harsh, unjust or unreasonable.

 $Valid\ reason - s\ 387(a)$ 

[256] Despite the extensive cross-examination of the respondent's witnesses about their characterisation of various factual matters, there was no dispute that I was required to determine for myself whether the alleged misconduct occurred. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.<sup>25</sup>

[257] The alleged misconduct had two elements: first, there were disputes about what occurred; and, second, there were disputes about the characterisation of that conduct with reference to the University's policies and the statutory definition of sexual harassment.

[258] In this matter, there is also a further factor, which arises from the "intervention" events of the 18 March 2021 meeting and the period of time that elapsed before the University dismissed Dr Owczarek from employment. The period of time that has elapsed since that intervention established a real reservation whether the conduct relied upon by the University – which predates that intervention – may be properly relied upon as a valid reason in support of dismissal.

*Valid reason – was there misconduct?* 

- [259] Turning firstly to the question of whether there was misconduct constituted by sexual harassment, the University policy definition of sexual harassment is set out at paragraph [16]. There was a dispute between the parties as to whether a subjective or objective test applied to the University's policy for sexual harassment.
- [260] I accept the University's submission that on a fair reading, the policy definition of sexual harassment set out at paragraph [16] was intended to reflect the definition of sexual harassment under the *Sex Discrimination Act 1984* (Cth) and the *Equal Opportunity Act 2010* (Vic), as at the relevant date.
- [261] As to the statutory prohibition on sexual harassment, the University relies on the statements by Perram J in *Hughes trading as Beesley and Hughes Lawyers v Hill* (2020) 277 FCR 511 at paragraphs [21] to [25] (Collier and Reeves JJ agreeing at [1] and [2], respectively), stating that there are essentially three elements of the definition of sexual harassment in section 28A of the *Sex Discrimination Act 1984* (Cth):
  - "(a) First, the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed or engages in other conduct of a sexual nature;
  - (b) Second, if such conduct occurred it must have been unwelcome to the harassed. This is a question of fact which is subjective and which turns only on the allegedly harassed person's attitude to the conduct at the time; and
  - (c) Third, the circumstances must be such that a reasonable person, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. The test is an objective one."
- [262] Dealing with the allegations in their chronological order, I am not satisfied that allegation 1(c) has been established. I refer to my conclusion at paragraph [52] and my findings about that event.
- [263] The "critical incident" identified by the University was the 26 September dinner. I am satisfied that, objectively assessed, the conduct of Dr Owczarek at that dinner included "conduct of a sexual nature", namely placing his hand on the Complainant's hand, saying "I love you" or similar words. This conduct, along with the text message the following morning, comprise allegations 2(a), (b) & (c).
- [264] Not all declarations or utterances of love will constitute conduct of a sexual nature. In Spencer v Dowling & KL Dowling & Co (a firm) [1997] 2 VR 127, Hayne J stated (in the context of considering what might constitute a "sexual advance") the following:
  - "Clearly, the question whether an approach made by one individual to another is properly to be classified as a "sexual advance" may involve difficult questions of fact and degree. Not every proposal for social contact between two individuals can be classified in this way whatever the sex, marital status or sexual preference of the participants may be. In the present matter the board founded its conclusion that the letter of 4 January was a

sexual advance upon references which the respondent had made in the letter to a "complete relationship" and to the possibility of marriage and children. I cannot say that the conclusion that the letter was a sexual advance was one to which the board could not come but it is as well to recall that statements, be they oral or written, which are alleged to constitute a sexual advance must always be examined in their entire context and with considerable care lest meanings not reasonably intended or understood are attributed to words divorced from their context. Taken as a whole, the letter of 4 January is a declaration of love by a man for a woman and it may therefore be thought probable that it has at least some resonances of sexuality, but is every declaration of love to be characterised as a "sexual advance"? If it is, it would seem to follow that had the respondent said no more than "I love you" to the complainant it could properly be said to be a sexual advance. That appears to stretch the meaning of "sexual advance" beyond ordinary usage of the term. However, as I say, the question is one of fact and degree and I do not consider that it was not open to the board to conclude that, taken in its context, the letter of 4 January did constitute a sexual advance." (emphasis added).

[265] Taylor v August and Pemberton Pty Ltd [2023] FCA 1313 (Taylor v August and Pemberton) is a case about sexual harassment which is illustrative of two propositions: the first is the circumstances in which a declaration of feelings or love might itself constitute sexual harassment and the second is whether other conduct, not of itself overtly sexual in nature, might be sexual harassment when coupled with romantic or non-platonic motives.

[266] In *Taylor v August and Pemberton*, Katzmann J considered whether various gifts given by, and a declaration of "feelings" from, the owner of the business in which Ms Taylor worked might be unwelcome sexual advances or other conduct of a sexual nature. As her Honour recorded, none of the gifts were explicitly sexual in the strict sense (at [356], [371]). A number of gifts were jewellery, although important in that context was that the business itself was a small business jeweller. Further context was the finding that the owner had a "generous nature", and gave gifts to other employees (at [391]). The timing of events was important. A number of gifts were given in 2019 and in 2020. By around mid-2019, her Honour found that the gift-giver and business owner, Mr Grew, did not have "any romantic interest in Ms Taylor before July or August 2019" but evidently did so after that time (at [372]). On 6 January 2020, Mr Grew expressly declared having "feelings" for Ms Taylor, before which it did not appear Ms Taylor "knew" of those feelings (at [368]).

[267] A number of gifts were given after July 2019, when Mr Grew had developed feelings but *prior* to expressly declaring his feelings in January 2020 or known to Ms Taylor. Those gifts were Gemini earrings in about November 2019 (at [139], [375]) and a business-branded 'bomber jacket' in December 2019 ([148], [375]). After January 2020, there were gifts of two signet rings and gold earrings. For all these gifts given after July 2019 (whether or not before Ms Taylor knew about Mr Grew's feelings), her Honour concluded that the gifts were "expressions of Mr Grew's affection for Ms Taylor and his desire to enter into a romantic relationship with her and were therefore, both individually and collectively, either a sexual advance or other conduct of a sexual nature. In substance, they were part of an attempt to woo her."

[268] Taylor v August and Pemberton supports the University's position that conduct which is not of itself of a sexual nature may nonetheless constitute such conduct when coupled with a romantic motivation or desire, whether or not that motivation is expressed or known to the recipient. That does not mean that ostensibly innocuous conduct pursued to "woo" a person will necessarily be sexual harassment where the recipient was unaware of those intentions. As Taylor v August and Pemberton illustrates, the conduct must also be "unwelcome" and a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. In Taylor v August and Pemberton, for the two relevant gifts given before the declaration of "feelings", Katzmann J concluded only the 'bomber jacket' was unwelcome (at [368]) but that gift would not cause a reasonable person to anticipate the possibility Ms Taylor would be offended, humiliated or intimidated (at [391]). For the two gifts given after the declaration of feelings, both gifts were unwelcome (at [369]) but it was concluded neither gift would cause a reasonable person to anticipate the possibility Ms Taylor would be offended, humiliated or intimidated (also at [391]).

[269] By contrast, her Honour was satisfied that "Mr Grew sexually harassed Ms Taylor when he slapped her on the bottom in July 2019; when he declared his feelings for her in January 2020, implicitly inviting her to enter into an intimate personal relationship with him when she neither solicited nor welcomed it — despite the closeness of their professional and personal relationship" (at [393]).

[270] Returning to the 26 September dinner, I am satisfied that the combined conduct at that dinner of Dr Owczarek placing his hand on the Complainant's hand and telling her "I love you" constituted conduct of a sexual nature (and I note it is unnecessary to consider if it was a sexual advance, as the University did not rely upon that element of the definition of sexual harassment for any of the sexual harassment allegations). The 27 September text message would only reinforce, not dilute, the above assessment, although there is a degree of unreality in breaking those events into constituent elements. My factual findings also differ somewhat from the investigator's findings, in that I consider it most likely that Dr Owczarek's exclamation of "love" occurred in close proximity to the hand-holding, not at the conclusion of the dinner. It was the larger temporal gap between these events that appears to have caused the investigator to conclude that allegation 2(a) – i.e. the hands – was not sexual harassment.

[271] To adapt the language of Katzmann J, the objective picture is that Dr Owczarek was attempting to "woo" the Complainant, although I accept that, subjectively, Dr Owczarek was not in fact in love with the Complainant and nor was he in fact motivated in the pursuit of any romantic or non-platonic purpose. However, the objective position is too difficult to ignore. Notwithstanding the supposed 'context' matters advanced by Dr Owczarek to explain that dinner and the "sharing" of private matters, the other context is that Dr Owczarek was the Complainant's direct supervisor and they were dining alone at a reasonably expensive Melbourne restaurant, involving at least some alcohol. While there were no doubt many matters about work discussed that night, it was not a work dinner. Importantly, despite the apparent close friendship to that point, there was no objectively reasonable basis for Dr Owczarek to conclude that it might be acceptable to place his hand on the Complainant's hand nor to start using language such as "I love you". The lack of perspective on Dr Owczarek's behalf was significant.

[272] I am also satisfied that the above conduct was unwelcome from the Complainant's perspective and that a reasonable person would have anticipated the possibility that the Complainant would be offended, humiliated or intimidated. I make the same conclusions for all the declarations of "love" and having "strong feelings" and being in each others' lives, as well as the 27 September 2019 text message, which I consider was, objectively, a continuation of the same.

[273] Even if I took the view that the above conduct was not sexual harassment within the meaning of the statute or the University's policy at the time (being version 3), the conduct in allegations 2(a), (b) & (c), as I have found them to have occurred, also constituted "inappropriate workplace behaviour" by failing to abide by a respectful or safe working environment. This does not make the conduct less serious. Dr Owczarek lost all objective sense of the proper nature of his professional working relationship with the Complainant. It was this kind of conduct that the University was specifically animated about with its Appropriate Workplace Behaviour training (among others), which made it clear that a person should not "invade someone's personal space, make... unwelcome advances". 27

[274] The University accepts that, prior to the above incidents of misconduct, there was a friendship and close working relationship between Dr Owczarek and the Complainant, but it submits this is a significant step removed from a declaration of love or a romantic relationship. I accept that submission. I also accept the University's submission that Dr Owczarek clearly overstepped the boundaries of that friendship during the dinner on 26 September 2019, which changed irrevocably the nature of their relationship.

[275] Unfortunately, Dr Owczarek failed to perceive the changed nature of their relationship. On 2 October 2019, the Complainant's text message was a very clear message that boundaries needed resetting. I have provided my explanation about this text message above and will not repeat those matters. Suffice to say, Dr Owczarek did not understand the clear implications of the message and what was told to him on 7 October 2019. Dr Owczarek appeared to hear only what he wanted to hear.

[276] This leads to the next set of allegations comprised by allegation 7, which concern a number of communications between 21 November 2019 and 18 December 2019. I have set these out above. The University does not assert the conduct amounted to sexual harassment but does constitute inappropriate workplace behaviour in breach of version 3 of its relevant policy. I accept the University's submission in relation to the text messages on 21 and 27 November 2019, as well as the Christmas card for that year.

[277] First, the context of the relevant subset of communications comprised of allegation 7 are closely proximate to the 2 October text message imploring more "space" between the personal and working lives of the Complainant and Dr Owczarek. That lack of space was expressly stated to have made the Complainant "very uncomfortable". Unfortunately, Dr Owczarek's continuation of banal communications, with little in the way of equivalent reciprocation, shows a tone-deaf understanding that he needed to adjust his behaviour. The University's policies and training make it clear that people in positions of responsibility over others need to be particularly alert to such matters. Dr Owczarek failed to do so but instead engaged in a "continuation of the same" without any insight or adjustment. I am satisfied that the conduct in allegation 7, based on the subset of them I have identified, constituted

"inappropriate workplace behaviour" by failing to abide by a respectful or safe working environment.

[278] The next events did not take place until June 2020, forming allegation 11. Allegation 11 comprised a text message containing a highly personal matter about a work colleague, which had followed two unreciprocated text messages that day. Allegation 11 asserts the message was "intended to get [the Complainant's] attention to engage her into replying to you" and constituted inappropriate workplace behaviour. My earlier findings were that Dr Owczarek had a proper basis to send that text message, albeit it was a message that could have waited until the next day, and I am not satisfied the message was designed to elicit a response beyond perhaps an acknowledgement of the subject matter. I am not satisfied that the conduct alleged in allegation 11 was inappropriate workplace behaviour.

[279] Allegation 12(b) is said to constitute sexual harassment and inappropriate workplace behaviour. The allegation concerns 'cafe' meetings arranged by Dr Owczarek on or shortly after 16 November 2020 when Melbourne residents were permitted to go to cafes after another extended COVID-19 'lockdown' for most residents of that city. Having regard to my finding that Dr Owczarek was not motivated by the romantic or non-platonic pursuit of the Complainant, it follows I do not conclude these meetings constituted any sexual harassment. There was no sexual advance or other conduct of a sexual nature and, while the requests were unwelcome. I also conclude that the requests are not conduct that a reasonable person would have anticipated the possibility that the Complainant would be offended, humiliated or intimidated. I am also not persuaded that the meetings were inappropriate workplace behaviour, either. The meetings were about work and there is nothing improper about a manager proposing a meeting in a cafe following the extended period in which many employees had been effectively restricted to their own home. The position might be different if Dr Owczarek persisted in arranging these meetings over the objection of the Complainant but he did not do so. When the Complainant requested that their meetings return to an online 'Zoom' format, that is what occurred.

[280] Allegation 13 comprises a number of discrete events, which are relied upon by the University as establishing sexual harassment and inappropriate workplace behaviour. As with allegation 12(b), based on the first and third elements of the definition of sexual harassment, I am not satisfied that there was any sexual harassment, albeit I acknowledge that the communications and attempts to communicate on Dr Owczarek's behalf were unwelcome to the Complainant. The question of whether the communications, or some of them, constituted inappropriate workplace behaviour (now version 4 of the policy) is more evenly balanced.

[281] In one sense, there is nothing inappropriate in a person as part of their 'farewell' events seeking to speak to and arrange specific farewell catch-ups with staff with whom they have worked closely. But that is not the extent of matters.

[282] The University submits, with some considerable force, that the obvious explanation for the Complainant's non-responses in the period between 3 December and 31 January was that she did not want to communicate or meet with Dr Owczarek or be friends with him. At least by 10 December 2020 this position was uncomfortably clear, which is when the Complainant indicated she was unavailable at all with "no free time between now and Christmas". Again, if there was no background between the parties, the position might be different. But there was significant background context, which returns to the 2 October text message and meeting on 7 October 2019. Dr Owczarek's conduct, at least from 10 December 2020, demonstrated the same lack of insight that he exhibited a year earlier in December 2019. I do not consider that Dr Owczarek was improperly motivated by any of his communications with the Complainant during this period but his lack of insight reflects poorly upon his ability to exercise sound judgment in such matters. His lack of insight is no answer, however, to the conclusion that his conduct failed to provide a respectful, safe, rewarding and environmentally sustainable learning and working environment (c.f. clause 4.2(h) of version 4 of the Appropriate Workplace Behaviour Policy) in light of the demonstrated request for "space" the year earlier.

*Valid reason – effect of March 2021 events and delay* 

[283] A significant matter in this proceeding are the events from March 2021 and, more generally, the knowledge of the University about key events from late September 2019.

[284] Firstly, there was the direction by the Complainant to Dr Owczarek for no further contact. Dr Owczarek undertook to comply with that request and he abided by it. Notwithstanding Dr Owczarek's profound lack of insight in very important matters before that time, there is no question that he has fully understood the boundaries between himself and the Complainant since his email on 10 March 2021 and reiterated more formally in his apology sent on 18 March 2021.

[285] Second, there was the 18 March 2021 meeting. That meeting raises a number of issues about the University's later reliance about conduct anterior to that meeting as a basis for dismissal.

[286] Dr Owczarek submits there was an "election to affirm" the employment contract on the University's behalf, such that the University is precluded from later exercising any right to terminate on the grounds said to be affirmed.

[287] The University states that contentions regarding the alleged affirmation of contract are misconceived and says that the existence of a valid reason is not assessed by reference to a contractually legal right to dismiss.<sup>28</sup> At common law, the University also states that without "full knowledge" of the conduct in question, there can be no waiver of the right for summary dismissal at law or condonation of misconduct.<sup>29</sup>

[288] I also consider that misconduct in the form of sexual harassment is likely to provide greater latitude for delay. As quoted by Katzmann J in *Taylor v August and Pemberton* at [332]:

"Those who experience workplace sexual harassment are often caught in a bind when deciding on the timing of making a complaint to their employer. When they report the behaviour immediately, observers perceive them as more credible and the harasser as

more responsible. Yet for an individual to reach a point where they are ready to make a complaint, they must first process what has happened to them, weigh up the available options open to them, and determine the possible detriments that may result from making a complaint. Consequently, there can be a significant, yet legitimate delay between experiencing sexual harassment and reporting it, if indeed it ever gets reported."

[289] Version 4 of the Appropriate Workplace Behaviour policy contemplates informal responses to dealing with misconduct as well as formal complaints. The policy also makes clear that a formal complaint might follow whether or not informal attempts to deal with the misconduct have been attempted.<sup>30</sup> This aspect of the policy is broadly supportive of the University's position that informal steps might be taken, including after the effluxion of a reasonably long period of time, before a "formal" complaint is made. But that is also not the end of the matter. The policy also established a "positive duty" on the University about such matters<sup>31</sup> and provides that the University "may, at its discretion, determine that suspected or alleged non-compliance with this policy may warrant investigation of the matter without necessity of a complaint being raised." <sup>32</sup>

[290] In *Chol v Vivesco Pty Ltd* [2024] FWC 1220 at [18], Colman DP considered that "a valid reason will lose its window of 'currency'" through the effluxion of time, although the Deputy President considered it would be wrong to punish leniency, and to encourage hasty dismissals, by adopting too narrow an approach to this window. For context, the circumstances before the Deputy President involved about an eight-week delay from an initial incident in December 2023. That incident, known to the employer at the time, was not acted upon by the employer at the time but was later relied upon as a basis for dismissal when further complaints about fresh conduct toward the employee were made in the subsequent weeks.

[291] In the case before me, the delay is significantly greater. It at least extends to 18 March 2021 but, in a real sense, begins much earlier. The University had substantial knowledge of the "critical incident" from almost the time it occurred, over four years prior to the time it dismissed Dr Owczarek. I accept that the University did not have "full knowledge" of all the events it later relied upon, although I consider that elides the question of what it did know (or believed). Quite unusually, the "critical" evening of 26 September 2019 was one in which Human Resources was aware of as it was occurring and made a telephone call to the Complainant to offer an excuse to leave the dinner. Quite clearly, the details of what was occurring were not known to Ms Hampshire but she was told by the Complainant on 30 September 2019 Dr Owczarek has said he "loved" her and Ms Hampshire advised the Complainant to tell Dr Owczarek that she did not reciprocate his feelings. Ms Hampshire was aware that the conduct was sufficiently serious to cause the Complainant to take a week off work and Ms Hampshire was regularly checking in by telephone during that period.

[292] Ms Hampshire's actions were not merely the actions of a concerned work colleague, although she was also that. She was clothed in the ostensible authority of her position, which included being authorised to expend University funds to involve Mr Dean, to conduct the "intervention" leading to the apology, among other steps. She was not merely acting as a friend or confidant of the Complainant, but considered herself to be acting independently as a HR practitioner in the Faculty.<sup>33</sup>

[293] I do not wish my observations to be impliedly critical of Ms Hampshire. To the contrary, I consider that throughout the relevant period, Ms Hampshire acted out of fierce concern for the Complainant (and others, as Ms Hampshire perceived those matters) and acted in accordance with the Complainant's wishes, while providing support where requested, and taking action when appropriate. Ms Hampshire had very clear views about the maintenance of appropriate workplace boundaries.

[294] Moving forward to 18 March 2021, Ms Hampshire had determined in the week preceding on a course of action involving Dr Owczarek. That course of action included the involvement of Mr Dean, an apology, and a meeting without notice to Dr Owczarek. Again reflecting Ms Hampshire's steps to assist with the Complainant's concerns, she kept the Complainant apprised of her plans.

[295] While the University may not have had full knowledge, it had (or assumed) a lot through Ms Hampshire. According to the Complainant, Ms Hampshire had the idea that she would set up a meeting with Dr Owczarek as an "intervention". An "intervention" is not something undertaken without some assumed state of affairs warranting it. Ms Hampshire clearly considered such a state of affairs existed.

[296] The Complainant's evidence also records that Ms Hampshire suggested that she take with her Mr Dean. Ms Hampshire told the Complainant that Dr Owczarek was not clearly understanding that these behaviours needed to "stop" and that Ms Hampshire felt that this "intervention" would be firmer and having Mr Dean there in a supporting role would provide safety for Ms Hampshire and also offer Dr Owczarek someone to speak to if he needed it. Reflecting again that Ms Hampshire was acting in accordance with the Complainant's approval, the Complainant's evidence was:

"I was comfortable with Ms Hampshire's suggestion. While I had thought about making a formal complaint, at this stage, I just wanted the behaviours to stop, and I wanted to be left alone so I could get on with my job."

[297] The Complainant's evidence is also consistent with her contemporaneous text message to Ms Hampshire on 18 March 2021, following the "intervention". The Complainant wrote "Thanks Julia. I'm seriously considering making a formal complaint" and then "But won't do anything that could harm others".

[298] The Complainant's position about a formal complaint changed when, with some understandable alarm to her, she learnt in early 2023 about the prospect of herself and Dr Owczarek having to work directly with each other again. She made a "formal" complaint to prevent that occurring, but not to get Dr Owczarek dismissed.

#### Conclusions on valid reason

[299] I agree with the University that Dr Owczarek had engaged in instances of misconduct, although my findings are much more limited in scope than the University found. Further, I agree with the University that allegations 2(a) - (c) (as I found them established) are serious misconduct, being sexual harassment albeit not with that intention by Dr Owczarek. I also consider that the conduct underpinning allegation 7 was serious misconduct, following as it did

directly in the shadow of allegation 2. Given the effluxion of time, I do not consider allegations 13 (as relevant) are serious misconduct but they were misconduct nonetheless for reasons I gave earlier.

[300] While much of Dr Owczarek's attack on the University's case understandably focused on the sexual harassment allegations, that attack does not address some fundamental aspects of the University's reasons for dismissal focussed on the wider course of conduct. Professor Phillips concluded that there was serious misconduct warranting dismissal in part because she saw "no indication that Dr Owczarek understood the seriousness of the matter, or that he accepted that any of his behaviour was questionable or could constitute misconduct. Dr Owczarek's showed very little understanding of the issues at play in the behaviour that was documented, and the impact that his behaviour had on [the Complainant]".

### [301] Further, Professor Phillips concluded:

"Regardless of whether there was ever a time where any aspect of an interaction had been mutual, it is the responsibility of all employees – but most particularly someone in a position of such seniority and authority – to establish and maintain appropriate workplace boundaries. In this case, the boundaries had been systematically breached."

[302] Putting aside her conclusion that the boundaries had been 'systematically' breached, Professor Phillips' concern for appropriate workplace boundaries, particularly for persons in positions of seniority and authority, are entirely appropriate. In no way do I wish my decision to be taken as doubting the University's position on these matters.

[303] With those observations having been made, there is a significant caveat to the University's reliance on Dr Owczarek's misconduct: delay in circumstances of informal outcomes having been taken.

[304] It is well-established that a valid reason must be sound, defensible and well-founded and a reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason.<sup>34</sup> There is no suggestion that the University's actions were capricious, fanciful, spiteful or prejudiced.

[305] However, for the purposes of assessing whether a reason is a valid reason for dismissal, I do not consider it sound or defensible for an employer to allow a significant period of time to pass — in this case two years at the lower end and nearly three and a half years for the core allegation — where the employer is on notice about, and to a significant extent has dealt with, fundamental aspects of the conduct. Put simply, an employer should not sit on a serious allegation to be possibly acted upon "formally" at some indeterminate point later on following further reflection or receipt of a formal complaint. Such delay is not sound, because it can cause real difficulties in getting to the bottom of the allegations in question. That delay creates unfairness to the employee accused of misconduct but also to other employees who might be asked to remember subtle, but very important, details involving nuance from months or years earlier.

[306] Such delay is not defensible because the University had undertaken or been involved in steps for the informal resolution of the matter. The University had taken steps by its Human

Resources staff to warn Dr Owczarek about his conduct and obtained the procurement of an apology for the Complainant. The University's actions were taken with the sanction of the Complainant, who wanted the conduct to "stop". While there are differences about what type of conduct was to be stopped, the evidence before me all points one way that all relevant conduct stopped. It took longer than it ought to have for Dr Owczarek to get the message in relation to the Complainant, but he did finally get the message.

[307] In the circumstances, I am not satisfied that there is a valid reason to support the dismissal of Dr Owczarek.

Notification of the reason for dismissal -s 387(b)

[308] I am satisfied that Dr Owczarek was notified of the reasons for his dismissal in explicit, plain and clear terms.

[309] First, particularised allegations were provided to Dr Owczarek on 5 May 2023. Second, the 11 August 2023 letter was accompanied by a summary of the investigation findings, including a summary of the factual findings and identified policy breaches. Third, in the meeting between Dr Owczarek and Professor Phillips on 12 December 2023, Professor Phillips confirmed that the University relied on the allegations substantiated, except for allegation 13(g), in determining that Dr Owczarek had engaged in serious misconduct and that his employment should be terminated without notice. A letter dated 12 December 2023, confirmed the matters discussed during the meeting that day. Fourth, the termination letter dated 14 December 2023 confirmed that Dr Owczarek's employment was terminated for serious misconduct based on the findings of the investigation (other than allegation 13(g)).

*Opportunity to respond* – s 387(c)

[310] With the exception of allegation 13(g), I am satisfied that Dr Owczarek was given adequate opportunity to respond to the allegations being put to him.

[311] Those opportunities included his written response provided to the investigator on 17 May 2023, his verbal responses during the meeting with the investigator on 18 May 2023 and his written response to the University on 1 September 2023 (for which the University granted him an extension of time to submit). In relation to allegation 13(g), the University accepted Dr Owczarek's complaint about that allegation and it was withdrawn by the University as a matter relied upon.

*Unreasonable refusal of support person* - *s* 387(d)

[312] I am satisfied that there was no unreasonable refusal – or any refusal – to permit Dr Owczarek have a support person to assist him at any relevant time.

Whether warning about unsatisfactory performance – s 387(e)

[313] Dr Owczarek was not dismissed for reasons associated with his performance. Both parties submit, and I accept, that the factor in s 387(e) of the Act is a neutral consideration.

Whether employer size / absence of expertise impacted on procedures followed – s 387(f)&(g)

[314] The University is a large employer with dedicated human resources management expertise. Sections 387(f) and (g) are neutral factors. In the present case, the University also engaged the services of an independent specialist to assist with the investigation.

Other matters -s 387(h)

[315] For the purposes of section 387(h) of the Act, Dr Owczarek submits<sup>35</sup> the following matters are relevant:

- a. The Applicant's conduct did not constitute serious misconduct and did not justify summary dismissal;
- b. The Applicant immediately complied with the Complainant's "one and only" request for him to cease contact with her in March 2021 and has never spoken to the Complainant or communicated with her since his letter of apology of 18 March 2021 nor attempted to do so;
- c. The University took steps to deal with the Complainant's grievance in March 2021 and affirmed the employment contract at that time;
- d. The external investigation was conducted with unfairness and bias;
- e. The Applicant's employment history and his personal circumstances;
- f. To ensure the objective of a "fair go all round".

[316] The matters in (a) - (c) of the above paragraph I have previously addressed. Notwithstanding, I consider that if, contrary to my view regarding the effect of the events from March 2021 on valid reason, I accept Dr Owczarek's submission that they - and the issue of delay I described above - are relevant as 'other matters' pursuant to s 387(h).

[317] In relation to the allegation of bias against Ms Edmands, I reject that allegation. The allegation was founded on two elements: first, an apparent commercial connection with a "material" witness, Mr Dean; second, the infected reasoning said to be evident concerning allegation 13(g). Neither are persuasive. Notwithstanding that Ms Edmands has had some limited professional dealings previously with Mr Dean, there is no sensible basis for me to conclude anything other than that Ms Edmands approached her task professionally and objectively. Mr Dean's materiality to the case before me was limited. The complaints about allegation 13(g) really go no higher than challenging Ms Edmands' conclusion that Dr Owczarek was motivated to romantically pursue the Complainant. While I have reached a different conclusion to Ms Edmands about those matters, I have had advantages in my fact-finding process that Ms Edmands did not possess and could not be reasonably expected to possess, the most obvious being the ability to take sworn evidence from witnesses tested in open court. I also observe that it was not inherently unreasonable for Ms Edmands and the University to conclude that Dr Owczarek was romantically motivated towards the Complainant. As part of their assessment, they were confronted with Dr Owczarek's repeated reliance on

unpersuasive 'contextual' matters. If Dr Owczarek had demonstrated greater insight as to his own conduct during that investigation, the conclusions may well have been different. Of course, if Dr Owczarek had demonstrated greater insight with his professional relationship with the Complainant more generally, it is quite likely he would never have been the subject of investigation.

[318] Dr Owczarek's personal circumstances are matters weighing in his favour. He is a career academic of considerable success and renown, and had been employed by the University for almost 32 years. In his field of expertise, I accept Dr Owczarek's submission that there is a relatively limited and specialised employment market of the closely interconnected tertiary education academic sector.

Whether harsh, unjust or unreasonable

[319] I am required to consider each of the criteria in s 387, to the extent they are relevant to the factual circumstances before me. The following statement from *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 465 is well-known:

"It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

[320] Having regard to my lengthier factual findings and conclusions regarding the constituent elements of s 387 above, my overall conclusion can be stated more shortly.

[321] I am satisfied that the dismissal of Dr Owczarek was harsh, unjust and unreasonable in all of the circumstances. The University has established misconduct on Dr Owczarek's behalf, albeit not to the extent that he was dismissed for. They are matters that would ordinarily weigh in favour of upholding the dismissal.

[322] To my mind, a very significant factor in this case concerns my conclusion that, in a real and practical sense, the misconduct (and other perceptions of misconduct) had been dealt with by March 2021 and commitments given to prevent their recurrence. The catalyst that led to the formal complaint being made against Dr Owczarek was the validly held concern that, if Dr Owczarek successfully applied for a new Faculty position, he would be working again with the Complainant (and her concern for others in the Faculty with whom he would also work). Whether those matters are considered in the context of being a 'valid reason' or as 'other matters', I reach the same conclusion. A proportionate response would have been refusing to appoint Dr Owczarek to that position for those reasons, and possibly other steps short of dismissal. Dismissal was disproportionate in circumstances where there was no credible evidence of any ongoing misconduct or similar conduct since March 2021 and the complaint was not lodged to have Dr Owczarek dismissed but to preclude his reappointment to a Faculty-

level position (although the Complainant considered that dismissal was a possibility). The personal circumstances of Dr Owczarek reinforce the harshness of dismissal.

[323] As the other statutory prerequisites under s 385 of the Act have been met, I am satisfied that Dr Owczarek was unfairly dismissed.

# Remedy

- [324] Dr Owczarek seeks reinstatement.
- [325] By s 390(1) of the Act, the Commission may (not must) order reinstatement, or the payment of compensation to a person, if satisfied that the person was protected from unfair dismissal and was unfairly dismissed. Satisfaction of those conditions is met.
- [326] By s 390(3), the Commission must not order the payment of compensation to a person unless satisfied that reinstatement of the person is "inappropriate" and an order for compensation is appropriate. Section 381(1) provides that an objective of Part 3-2 of the Act is to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.
- [327] The University submits that Dr Owczarek's misconduct was totally destructive of the necessary trust and confidence between himself and the University and he has shown no insight into his own behaviour and the effect of his behaviour on others. It submits the Commission could have no confidence that Dr Owczarek's behaviour would change.
- [328] The University's submission raises a number of discrete considerations. First, when the University is referring to Dr Owczarek's misconduct, it is referring to the allegations forming the basis for his dismissal. While the University has had some success on those matters, I consider that a significant emphasis for the dismissal included Dr Owczarek's alleged motivation of a romantic pursuit, which I do not accept.
- [329] By contrast, the University's legitimate concern about Dr Owczarek's profound lack of insight about appropriate workplace boundaries has real force and, if Dr Owczarek was in the position of Dean at the time of his dismissal or with ongoing wider managerial supervision of others, the outcome in this proceeding may well have been very different. But I do not accept the proposition that there can be no confidence that Dr Owczarek's behaviour would change. Dr Owczarek *had* been performing in his tenured professorial role since March 2021 without incident. The process of the unfair dismissal proceeding itself is capable of establishing insight or self-awareness that might weigh on the question of reinstatement. <sup>36</sup> I anticipate these reasons will reinforce the University's expectations about proper boundaries for the future. I did not find the University's evidence regarding reinstatement persuasive and, while it would not affect my conclusion, the Complainant herself no longer works at the University.
- [330] I am not satisfied that the reinstatement of Dr Owczarek would be inappropriate. That enlivens my discretion to make an order for his reinstatement. I consider it appropriate to exercise that discretion and will order that Dr Owczarek should be reinstated. I will also make an order for continuity of employment, given the length of tenure prior to dismissal. I will order that reinstatement take effect within 28 days of this decision.

- [331] The remaining issue concerns what, if any, order for lost pay ought be made under section 391(3). For avoidance of doubt, there is no basis for a compensation order under section 392, as an order under that provision can only be made "in lieu" of reinstatement.
- [332] In Millington v Traders International Pty Ltd [2014] FWCFB 888, a Full Bench stated:
  - "[73] The capacity under s.391(3) to seek an order for pay lost or likely to have been lost as a result of the dismissal cannot be equated to an action for damages for wrongful dismissal. An order under s.391(3) can only be made if an order for reinstatement is made under s.391(1); it is therefore entirely ancillary to and not severable from the personal remedy of reinstatement. Further, there is no right to a lost pay order even where reinstatement is ordered; a lost pay order may only be made where the Commission "considers it appropriate to do so" and is therefore discretionary in nature. The Commission and its predecessors have not infrequently declined to make lost pay orders even though reinstatement has been ordered." (citations omitted).
- [333] In a footnote to the above quotation, reference was made by the Full Bench to paragraph [104] of the decision of Hatcher VP in *Ismail Gurdil v The Star Pty Ltd* [2013] FWC 6780 (*Gurdil*), referred to above, and to an earlier Full Bench decision *Regional Express Holdings Limited trading as REX Airlines v R Richards* [2010] FWAFB 8753. In both those matters, a factor found relevant to the exercise of discretion to refuse to make an order for lost pay under s 391(3) was the conduct of the employee leading to the dismissal.
- [334] In *Gurdil*, Hatcher VP also considered that declining an order for lost pay "will also serve to reinforce with Mr Gurdil that his conduct on 1 March 2013 was inappropriate and must not happen again." It is sufficient in my view to refuse to make any order for lost remuneration under s 391(3) for the sole basis of serving to reinforce to Dr Owczarek that his conduct was inappropriate and must not happen again I refer to my numerous observations about Dr Owczarek's troubling lack of insight as a matter calling for any order for lost remuneration to be refused. If it were necessary to do so, I would also consider that Dr Owczarek's misconduct would make an order for lost pay to be not appropriate.
- [335] In reaching these conclusions, I have taken into account the amounts earned since dismissal and likely to be earned up to reinstatement: s 393(4). The amounts "earned" are in dispute in one sense, which requires some explanation. In February 2024, Dr Owczarek successfully obtained a fixed term professorial contract with Monash University. He did so after having disclosed to Monash University a copy of the adverse findings made against him. That contract was to run until December 2024, albeit with a possibility of renewal.
- [336] Within about a week, Dr Owczarek was stood down. Evidently, different levels of the Monash University administration took a different view about his employment, and sought further details from the University of Melbourne (which were provided). It is sufficient to note that Dr Owczarek's employment with Monash University was terminated on 1 March 2024, for the reasons stated as follows:
  - "In the circumstances, whilst I acknowledge your co-operation in this process and that you dispute the University of Melbourne findings, I have determined that it is not tenable for you to continue in employment with Monash University. To do so would be

inconsistent with the University's values, its positive duty to take all reasonable steps to prevent sexual harassment and obligations to ensure a safe workplace, including in respect of staff or others who are aware from the public announcements at the University of Melbourne of those matters and consequently have concerns and anxiety about your employment with Monash University.

As you are employed on a fixed term contract that expires on 31 December 2024 the University will make payment in respect of the remaining period of the Contract in satisfaction of its contractual obligations to you."

[337] Dr Owczarek's evidence is that the position with Monash University was "essentially the same" as his previous professorial position with the University of Melbourne. I infer this to include the same remuneration among other matters, albeit at the University of Melbourne, Dr Owczarek stated his remuneration included "an additional allowance paid to me by the University of Melbourne in recognition of my status as a Redmond Barry Distinguished Professor." The character of that allowance was not elaborated upon by either party, including whether it might be withdrawn or altered, although I infer it was paid in direct connection with Dr Owczarek's performance as a professor of mathematics and statistics.

[338] Dr Owczarek contends that the monetary amounts he received from Monash University should not be taken into account for any order for lost pay under s 391(4). He submits those amounts are "damages", as distinct from remuneration. In light of the final sentence from the above letter from Monash University stating that the payments made to Dr Owczarek were "in satisfaction of its contractual obligations to you", I have very real doubts these payments are to be excluded from consideration under s 391(4). But even if that were to be the case, they are plainly capable of bearing on the question under s 391(3) as to whether any order for lost remuneration is "appropriate". I consider these payments reinforce my conclusion that any payment for lost remuneration is not appropriate, as they are plainly on account of remuneration that would have been earned, even if (which I doubt) they are correctly characterised as damages and fall outside of the amounts to be taken into account under s 391(4).

[339] Dr Owczarek also submits that the University "was directly involved in procuring Monash University's breach of contract" and engaged in "the intentional interference" of Dr Owczarek's attempts to gain alternative employment. I am not satisfied on the evidence before me that the University "procured" or "intentionally" interfered with any breach of contract, let alone there was any breach of contract. But even if there was, the payout (to use a neutral term) by Monash University remains a matter I would take into account and my conclusion remains unchanged.

[340] The final matter concerns the Redmond Barry Distinguished Professor allowance. The order I will make for reinstatement is that Dr Owczarek be reappointed to the position in which he was employed immediately before the dismissal. I have proceeded on the assumption that this position included the Redmond Barry Distinguished Professor honorific and concomitant allowance. If that was not part of Dr Owczarek's position, then my order has no application to that element. I make the same observation concerning the role of Principal Chief Investigator for the ARC grant Dr Owczarek was working on at the time he was dismissed.

#### **Orders**

[341] An Order<sup>37</sup> giving effect to my reasons above will be published together with this decision.



### **DEPUTY PRESIDENT**

# Appearances:

M. Rinaldi of Counsel, instructed by A J Macken & Co for the Applicant.

M. Felman with F. Leoncio of Counsel, instructed by Lander & Rogers Lawyers for the Respondent.

### Hearing details:

2024.

Melbourne:

May 27 - 30;

June 21;

July 11.

Printed by authority of the Commonwealth Government Printer

# <PR775318>

<sup>&</sup>lt;sup>1</sup> There are ongoing orders relating to confidentiality made in this proceeding, including in relation to the Complainant and to two other employees referred to as 'AB' and 'XY' in this proceeding.

<sup>&</sup>lt;sup>2</sup> Court Book (CB) p.988 and 990.

<sup>&</sup>lt;sup>3</sup> CB p.873 and 879.

 $<sup>^{\</sup>rm 4}$  Witness statement of Professor Phillips, Annexure NP-5, CB p.980.

<sup>&</sup>lt;sup>5</sup> Transcript PN328 – PN333.

<sup>&</sup>lt;sup>6</sup> Respondent's Outline of Submissions dated 16 April 2024 at [45], CB p.1205.

<sup>&</sup>lt;sup>7</sup> Witness Statement of Professor Owczarek, Annexure 22.

<sup>&</sup>lt;sup>8</sup> For example, paragraph [39] of the summary of findings provided to Dr Owczarek on 11 August 2023, CB p.273.

<sup>&</sup>lt;sup>9</sup> Further Witness Statement of Professor Owczarek at [196], CB p.1349.

<sup>&</sup>lt;sup>10</sup> Exhibit A4, [11].

<sup>&</sup>lt;sup>11</sup> Witness Statement of Professor Owczarek at [12], CB p.33.

<sup>12</sup> Exhibit R6

<sup>&</sup>lt;sup>13</sup> Transcript PN1068, with a transcript correction from 'elicit' to 'illicit'.

<sup>&</sup>lt;sup>14</sup> Transcript PN3615 – PN3619.

<sup>&</sup>lt;sup>15</sup> Exhibit A4, Record of interview of Julia Hampshire signed 29 June 2023.

<sup>&</sup>lt;sup>16</sup> Witness Statement of Professor Owczarek at [43], CB p.39.

<sup>&</sup>lt;sup>17</sup> University closing submissions, para [89].

<sup>&</sup>lt;sup>18</sup> CB p.1266. Having regard to the nature of the matter, I will not set it out.

<sup>&</sup>lt;sup>19</sup> This text message comprises allegation 13(f), which contains typographical reference to 1 January 2021.

<sup>&</sup>lt;sup>20</sup> Exhibit A5, Record of Interview of [XY] signed on 26 June 2023.

<sup>&</sup>lt;sup>21</sup> Exhibit A5.

<sup>&</sup>lt;sup>22</sup> Witness statement of Complainant at [161], CB p.1239.

<sup>&</sup>lt;sup>23</sup> Witness statement of Complainant at [117] – [118], CB p.1234

<sup>&</sup>lt;sup>24</sup> Exhibit A8.

<sup>&</sup>lt;sup>25</sup> Gelagotis v Esso Australia Pty Ltd [2018] FWCFB 6092 at [111].

<sup>&</sup>lt;sup>26</sup> The conduct (and the other inappropriate workplace conduct breaches I describe below) would likely also constitute contraventions of the other policy clauses relied upon by the University, but I do not consider anything turns on the fact that a particular instance of conduct might constitute a breach of multiple provisions of the policies.

<sup>&</sup>lt;sup>27</sup> Appropriate Workplace Behaviour training module, CB p.951.

<sup>&</sup>lt;sup>28</sup> Titan Plant Hire Pty Ltd v Malsen [2016] FWCFB 5520 at [28], citing Sharp v BCS Infrastructure Support Pty Limited [2015] FWCFB 1033 at [32].

<sup>&</sup>lt;sup>29</sup> Rankin v Marine Power International Pty Ltd (2001) 107 IR 117; [2001] VSC 150 at [352].

<sup>&</sup>lt;sup>30</sup> Clause 13.3, CB p.904.

<sup>&</sup>lt;sup>31</sup> Clause 13.1(e), CB p.903.

<sup>&</sup>lt;sup>32</sup> Clause 13.3, CB p.904.

<sup>&</sup>lt;sup>33</sup> Transcript PN4121.

<sup>&</sup>lt;sup>34</sup> Selvachandran v Peteron Plastics Pty Ltd (1995) 62 IR 371, 373.

<sup>&</sup>lt;sup>35</sup> Applicant's Outline of Submissions at [147], CB p.362.

<sup>&</sup>lt;sup>36</sup> See Ismail Gurdil v The Star Pty Ltd [2013] FWC 6780 at [103].

<sup>&</sup>lt;sup>37</sup> PR775319