[2024] FWC 1441

The attached document replaces the document previously issued with the above code on 3 June 2024.

1. The following grammatical and typographical corrections have been made to paragraph numbers [4], [14], [17], [19(e)], [20(b)], [21], [23], [34(a)], [35], [47], [63], [94(a)], [105], [107], and [110(d)].

2. Removing the question-mark (?) in the heading above paragraphs [77] and [81].

Associate to Deputy President Boyce

Dated 25 September 2024

DECISION

Fair Work Act 2009
s.773—Termination of employment

Ms Antoinette Lattouf
v
Australian Broadcasting Corporation
(C2023/8096)

DEPUTY PRESIDENT BOYCE SYDNEY, 3 JUNE 2024

Application to deal with an unlawful termination dispute – first jurisdictional objection – no termination (dismissal) at employer's initiative – casual employment – five day casual engagement - meaning of 'employment relationship' – identification of basis upon which an employment relationship comes to an end – second jurisdictional objection – claim or parts of claim prohibited by s.723 of the Fair Work Act 2009 – both jurisdictional objections dismissed.

Overview

[1] On 22 December 2023, Ms Antoinette Lattouf (**Applicant**), filed an unlawful termination application with the Fair Work Commission pursuant to s.773 of the *Fair Work Act 2009* (**Act**) on the ground of alleged unlawful termination of employment (on 20 December 2023) for reasons of "political opinion" (**Application**).

[2] The Respondent (employer) to the Application is the Australian Broadcasting Corporation (**ABC**). The ABC is a statutory authority constituted and operating under the provisions of the *Australian Broadcasting Corporation Act 1983* (Cth).

[3] The Applicant was employed by the ABC for a five day engagement as a casual employee. The ABC has raised two separate jurisdictional objections to the Application. One of those objections is that the ABC did not terminate the Applicant's employment. It is perhaps trite to acknowledge from the beginning that the fact that the Applicant was a casual employee, who was only engaged for five days, does not alter the position that her employment as a matter of fact and law, can be terminated (or brought to an end at the ABC's initiative). Depending upon the relevant facts and circumstances, any contract of employment, and the employment relationship arising from same (no matter how short or long, permanent or casual) can be prematurely brought to an end. This decision concerns whether the Applicant's employment was, or was not, terminated at the ABC's initiative, it does not concern the reason/s as to 'why' her employment was terminated.

Events leading up to the hearing

[4] The Application was amended on 10 January 2024 to include (in addition to 'political opinion' as a stand-alone unlawful ground for termination) two further alleged unlawful reasons for termination, namely political opinion and "race" (Lebanese and/or Arab and/or Middle Eastern) and/or "national extraction" (Lebanese and/or Arab and/or Middle Eastern heritage, based upon the Applicant, at least in part, being a descendant of a foreign born person) (**Amended Application**).[1]

[5] The ABC filed an Employer Response to the Amended Application on 15 January 2024 (**Response**). In that Response, the ABC denied that it terminated the Applicant's employment unlawfully, but did not deny that it terminated the Applicant's employment.

[6] A private conciliation conference was conducted between the parties on 18 January 2024, however, the proceedings did not resolve.

[7] On 22 January 2024, the ABC filed an Amended Employer Response to the Amended Application (**Amended Response**). In that Amended Response, the ABC objected to the Amended Application proceeding on two jurisdictional grounds:

a) *firstly*, the Amended Application is jurisdictionally barred in that the Applicant's employment was not 'terminated' at the ABC's initiative, or at all (i.e. the employment came to an end by effluxion of time); and

b) *secondly*, or further or in the alternative, the Amended Application be dismissed, or not be permitted to proceed, on the basis of, or to the extent that, the Amended Application makes or includes distinct allegations as to conduct based upon "race" and/or "national extraction", because the Applicant is (or was at the time she originally filed her Application) entitled to make a General Protections Involving Dismissal Application in relation to such conduct under s.365 of the Act (see s.723 of the Act).

[8] On 23 January 2024, I issued directions for the filing of submissions and evidence, and listed the matter for hearing (to resolve the ABC's two jurisdictional objections).

[9] On 7 February 2024, the Applicant applied for orders seeking that the ABC produce certain documents. On 8 February 2024, the ABC notified my Chambers that it objected to the orders sought. A hearing was conducted in respect of the ABC's objections on 13 February 2024. On 16 February 2024, I issued a decision, and ordered that the ABC was to produce only some of the documents to which the Applicant had requested.[2]

[10] On 26 February 2024, the Applicant applied under ss.615 and/or 615A of the Act to have the ABC's jurisdictional objections dealt with at first instance by a Full Bench of the Commission, which was refused (on 1 March 2024) by the President of the Commission, Justice Hatcher.[3]

[11] A hearing was conducted before me on 8 and 11 March 2024 to deal with the ABC's jurisdictional objections. At this hearing, the Applicant was represented (with permission) by Mr *Mark Gibian*, of Senior Counsel, instructed by Mr *Josh Bornstein*, Principal, and Ms *Penelope Parker*, Senior Associate, Maurice Blackburn Lawyers, and the ABC was represented

(with permission) by Mr *Ian Neil*, of Senior Counsel, and Ms *Vanja Bulut*, of Counsel, instructed by Mr *Ben Dudley*, Partner, Ms *Mary-Anne Nolan*, Associate, and Ms *Gabrielle Wilson*, Associate, Seyfarth Shaw Australia lawyers.[4]

The task at hand

[12] I concur with the following succinct submission of Mr *Neil SC* in relation to the task for the Commission to undertake to resolve the ABC's jurisdictional (no termination) objection:

> "The task that the Commission has at this stage of the proceedings is to ascertain whether the statutory concept of termination of employment at the initiative of the employer is satisfied in this case; is engaged by the Applicant's substantive application. That will entail making findings of fact about how the Respondent [ABC] objectively conducted itself towards the Applicant in a way that was manifest to or communicated to the Applicant, and then making an assessment of its own about the legal effect of what was said and done of those objective facts. That's the only task."[5]

The Applicant

[13] The Applicant started her career as an employed journalist in 2007.

[14] From 2022, the Applicant became (or repositioned herself) as a freelance journalist, content creator, commentator, and public presenter through the mediums of television, podcast, radio and social media. Her focus, or preference, is for public facing work engagements as either a presenter, or commentator, in the presence of a live (including online) audience.[6] She also describes herself as a multi-award-winning journalist, social commentator and columnist, diversity advocate, and TEDx presenter.[7]

[15] The Applicant determined to work on a 'freelance' basis so as to be able to develop her own personal brand, enabling her to "work across a range of different projects, styles and reach broader and varied audiences". A non-exhaustive list of examples of work or other engagements involving the Applicant, include:

a) the writing of articles or opinion pieces for the Guardian and Sydney Morning Herald newspapers, the Mamamia website, and Marie Claire magazine;

b) authoring a book titled "How to Lose Friends and Influence White People", and engaging in various book launches and tours to publicise same;

c) presenting or appearing on podcasts such as "Business in Colour", "The Briefing", "Uncomfortable Conversations with Josh Szeps", "EQ Minds", and "Black Magic Woman";

d) being featured in the "Cultures" section of a Special Broadcasting Service (SBS) publication;

e) appearing at the Sydney Writers Festival in 2022 at a session titled "Manners Maketh the Woman";

f) appearing on TV programs such as Q&A, The Drum, Insiders, The Project, and Studio 10; and

g) on occasion, working for ABC Radio Sydney as a casual replacement (or fill-in) presenter.[8]

The Applicant's employment history at the ABC pre December 2023

[16] The Applicant's employment history with the ABC has been sporadic and irregular.[9] All of her work engagements at the ABC have been on a casual basis, the first (on the evidence) commencing in May 2022.[10]

[17] In terms of work engagements at the ABC pre December 2023, the Applicant presented on an ABC weekly digital radio program for six weeks from early May 2022 (i.e. for one day a week across six weeks), filled in as a presenter for the ABC's "Sydney Afternoons" radio program for two days in mid-May 2022, filled in for the ABC's "Evenings" radio program each weekday for two weeks in mid-September 2022, and in December 2022 hosted the ABC's "Summer National Mornings" program each weekday for two weeks.[11] None of these engagements were varied or otherwise cut short by the ABC after they commenced.

The Applicant's engagement on the ABC's "Sydney Mornings" radio program

[18] On 17 November 2023, being just short of a year after her last engagement at the ABC, the Applicant was contacted by Ms Elizabeth Green, ABC Sydney Content Director, to fill in on the ABC's "Sydney Mornings" radio program (**SM Program**) as the presenter, in place of Ms Sarah McDonald, for five consecutive weekday shifts commencing on Monday, 18 December 2023.[12]

[19] Post this brief discussion, the Applicant exchanged various emails (between 17 November 2023 and 13 December 2023) with Ms Green and Ms Julia O'Shea, Planning Coordinator (ABC Content Division), in respect of her terms and conditions of employment. My findings as to the substance of those email exchanges are as follows:

a) the ABC's preliminary offer of employment to the Applicant was:

i) to be engaged as a casual employee, paid at a casual hourly rate of pay for each hour worked, with such rate of pay and casual loading determined by the applicable enterprise agreement (being the *ABC Enterprise Agreement 2022-2025*[13] (**ABC EA**));

ii) to work five consecutive weekday shifts, between 6:00AM to 2.36PM (with a one hour break), commencing on Monday, 18 December 2023; and

iii) during each shift, to be the presenter on the SM Program during the hours of 8:30AM to 11:00AM;

b) if the Applicant wishes to accept the preliminary offer, she will first need to promise or agree to be bound by (i.e. accept) "another set of ABC engagement Ts & Cs [terms and conditions]". These Ts & Cs are set out in a written casual employment contract (**Casual Employment Contract**). I observe that it does not appear to be in issue between the parties that the Casual Employment Contract offered to the Applicant, to which the Applicant agreed to be bound by, is a standard casual employment contract (drafted by the ABC) that is ordinarily offered to any employee employed by the ABC on a casual basis;[14]

c) the process to enter into the Casual Employment Contract is a similar process to that to which the Applicant had undertaken in respect of her previous casual engagements at the ABC in 2022;[15]

d) the Applicant will attend upon the ABC's premises in Ultimo NSW on 14 December 2023 for a studio refresh and segment planning session (on a paid basis, for a duration of 1.5 hours, between 11:00AM and 12:30PM) (**Refresh Day**); and

e) the Applicant's physical building/studio pass, still held by her from her last engagement in December 2022, will be reactivated to enable her to enter and access relevant ABC premises. The Applicant's entry/access pass (or related details) are still in the ABC's electronic security system, and simply need to be updated and reactivated (prior to the Refresh Day).[16]

[20] Ms Monica Vagg, ABC's Head of People Services and Remuneration, gave uncontested evidence as to the manner in which casual staff are engaged and terminated by the ABC, as well as the ABC's employment and remuneration records for the Applicant.[17] The summary of Ms Vagg's evidence is that:

a) the ordinary ABC processes were followed when engaging the Applicant as a casual employee for the period 18 to 22 December 2023;[18]

b) the ABC's employment and remuneration records for the Applicant do not show that the Applicant had been terminated (or dismissed), on 20 December 2023, or otherwise. Rather, the ABC's employment and remuneration records show that the Applicant continues to be employed by the ABC as a casual employee. Indeed, the end date of the Applicant's employment, as contained in the ABC's employment and remuneration records, is specified as 8 December 2024;[19]

c) none of the relevant procedures to bring the Applicant's employment to an end at the ABC have taken place, or been otherwise actioned;[20]

d) the Applicant's computer network account and email address at the ABC remains active (i.e. accessible by the Applicant herself);[21]

e) the Applicant's ABC security pass (to enter the workplace) has an expiry date of 8 December 2024, but was disabled (i.e. not cancelled) on 22 December 2023, making it inactive and unusable. This was done due to ABC security concerns at that time concerning active protests taking place outside ABC buildings;[22] and

f) the Applicant has been paid (her full wages) for her shift on 14 December 2023, and for the period 18 to 22 December 2023 (despite not attending the workplace on 21 and 22 December 2023). The payment for the period 18 to 22 December 2023 was made to the Applicant during the ABC's normal fortnightly pay cycle on 4 January 2024.[23]

The ABC's management and decision-making structure

[21] The evidence identifies that the ABC's (relevant) hierarchical structure is as follows:

a) Mr Christopher Oliver-Taylor is the ABC's Chief Content Officer, who is responsible for all content that goes to air across all ABC platforms (screen, audio and digital), apart from news content. He is based in Melbourne, and reports directly to Mr David Anderson, ABC Managing Director.

b) Mr Ben Latimer, ABC Head of Audio Content, reports to Mr Oliver-Taylor. Whilst Mr Oliver-Taylor has overall responsibility for ABC Radio Sydney (that includes the SM Program),[24] Mr Latimer and others have direct management responsibility for ABC Radio Sydney.[25]

c) As at December 2023:

i) Mr Ahern was in the role of Acting Head of Capital City Networks. This role involves overseeing and managing the operation of all of the ABC's Australian capital city radio stations. The managers of each of these radio stations report to the Head of Capital City Networks. Mr Ahern's permanent (or normal) role is that of Manager, ABC Radio Sydney. The ABC Head of Capital City Networks reports to Mr Latimer.

ii) Mr Spurway was in the role of Acting Manager, ABC Radio Sydney, whilst Mr Ahern was undertaking the role of Acting Head of Capital City Networks (i.e. until this latter roll is filled).[26] The Manager of ABC Radio Sydney is responsible for its day-to-day management (including Breakfast, Mornings, Afternoons, Drive, Evenings and Nightlife shows), and reports to the ABC Head of Capital City Networks (at this time, Mr Ahern).

d) Ms Green's role of Content Director, ABC Radio Sydney, reports to the Manager of ABC Radio Sydney. Each ABC Radio Program in Sydney has its own production team. The Content Director oversees and manages those teams. The Applicant reported directly to Ms Green.

e) Mr Simon Melkman is referred to throughout the evidence, but essentially only in terms of being copied into various emails (to which he does not reply). His role at the time appears to be that of ABC Acting Director of Editorial Standards.[27] It is not clear from the evidence what his permanent role is.

[22] I note that ultimate approval for the appointment of permanent ABC Radio presenters rests with Mr Oliver-Taylor. Candidates for ABC permanent presenter roles are identified, and go through an annual internal up/down ABC "commissioning process", before a final list is then sent to Mr Ben Latimer, who thereafter puts forward names for final approval to Mr Oliver-Taylor.[28]

[23] In relation to replacement (or fill-in) radio presenters, Mr Ahern is the person with approval authority. In this case, Mr Ahern, upon the recommendation of Ms Green, and after consulting up and down the ABC hierarchy, approved the engagement of the Applicant to replace Ms McDonald (during Ms McDonald's absence on the SM Program between 18 and 22 December 2023).[29]

The Casual Employment Contract

[24] The Applicant agreed to (accepted) the Casual Employment Contract on 27 November 2023 via an email to Mr Aidan Fonternel of the ABC,[30] being over two weeks prior to the Refresh Day on 14 December 2023.

[25] The Applicant concedes that the Casual Employment Contract applied to her in respect of her engagements at the ABC on 14, and 18 to 22 December 2023.[31] It is appropriate to set out the relevant terms of the Casual Employment Contract, as agreed to by the Applicant:

> "Dear ANTOINETTE LATTOUF,
>
> Please reply with your agreement to the below terms and conditions, to this email address.
>
> **Proposed:**
>
> **Job Role: Content Maker**
>
> **Date of Agreement: 13/12/2023** (the terms and conditions in this letter apply to all casual work performed after this date)
>
> **Base Hourly Rate of Pay:** $[Omitted] Schedule A, 2 week rostered Casual Band [Omitted]
>
> **Please note that this email confirms the terms of engagement that will apply to any offers of casual employment from the ABC after the date of this email, and you will be taken to have accepted these terms if you perform any such work for the ABC. It does not constitute an offer or guarantee of employment with the ABC.**
>
> Your casual employment with the ABC is also covered by the *ABC Enterprise Agreement 2022-2025* (EA), which is available at [Omitted] (but the EA does not form part of these terms).
>
> **1. BASIS OF ENGAGEMENT**

You will be employed as a casual employee. The ABC is not obligated to offer, and you are not obligated to accept, any particular engagement or offer of work. There is no guarantee or commitment by the ABC that you will receive offers of work at any time or for any duration.

The terms and conditions in this email will apply if you are offered and accept a casual engagement. Each engagement that you accept will be separate and will cease at the end of that engagement without the need for any action by the ABC.

In relation to each engagement, you will be advised of:
(a) the duration of the engagement;
(b) the hours of work required;
(c) the location(s) of work;
(d) to whom you must report for work; and
(e) the work to be performed.

Should you be offered and accept any further engagements then, unless you are advised otherwise, any such further engagements will be on the same basis as the initial engagement.

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

2. PAYMENT

You will be paid as follows:

(a) base hourly rate of pay $[Omitted] per hour
(b) casual loading $[Omitted] per hour

In addition to the hourly rate you will receive, you will be entitled to receive payment of any entitlements to overtime, penalties, allowances, and other special rates under the EA.

To avoid doubt, the casual loading:

(a) is payable only on the basis that, and only for so long as, you are employed on a casual basis;

(b) is paid in satisfaction of any entitlement you have to receive casual loading under the terms of an applicable industrial instrument; and

(c) may be used to set off against, or absorb, any later claim you make to take or be paid for any paid leave entitlements.

You agree that all amounts paid to you by the ABC in respect of your employment (including the base hourly rate of pay):

(a) compensate you for all hours worked by you, including any reasonable additional hours and are paid in satisfaction of all obligations the ABC has under legislation, any industrial instrument or otherwise to make payments, or give benefits to, you (including, without limitation, minimum rates of pay, overtime, penalty rates, loadings or allowances); and

(b) are specifically set off against, applied to and absorb any existing or newly introduced payments or benefits to which you are or may become legally entitled under any legislation, award, the Instrument or other industrial instrument (howsoever described).

Where, in a given pay period, amounts paid to you by the ABC in respect of your employment exceed the total amounts payable to you under legislation, any industrial instrument and/or otherwise:

(a) if any amounts are owing to you by the ABC in respect of past pay periods, the excess amount will be applied in satisfaction of those obligations; and otherwise; and

(b) will be regarded as an advance payment which may be applied in satisfaction of any entitlement of any kind which arises at any future time under these terms, any industrial instrument, legislation, or otherwise.

…

7. ABC VALUES AND POLICIES

You must comply with the ABC's Code of Conduct and all other ABC Policies as amended from time to time, including Editorial Policies. Copies of these are available from ABC People & Culture and the ABC Intranet. It is your obligation to familiarise yourself with these policies including any changes made during your employment.

…

11. EXTERNAL WORK & CONFLICT OF INTEREST

You must ensure that any work you perform for other employers does not create any actual, potential or perceived conflict with any responsibilities and obligations you have to the ABC.

You must adhere to the ABC's Conflict of Interest Policy. You have a duty to declare to your manager, at the earliest opportunity, any real, perceived or potential incompatibility between your duties as an employee and your private interests.

…

13. TERMINATION

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

If either party gives such notice of termination, the ABC may bring your employment to an end immediately and make a payment to you in lieu of any outstanding period of notice.

On cessation of your employment you are to return promptly to the ABC all property of the ABC under your control or possession including (but not limited to) all files, correspondence, documents, lists, records, memoranda, computer disks and files, keys, credit cards, security cards, membership cards, mobile phones, other electronic devices (including iPads) and motor vehicles.

After termination of your employment you must not make any adverse comment, publicly or otherwise, about the ABC and you must not represent yourself as being associated with the ABC, unless authorised by the Divisional Director.

14. NOTICE OF THE RIGHT TO SEEK CONVERSION TO ONGOING EMPLOYMENT

In accordance with clause 14.7 of the EA, offers and requests for conversion from casual employment to full-time or part-time employment are provided for in the National Employment Standards, under the *Fair Work Act 2009* (Cth).

15. GENERAL

This contract (including any document referred to in this contract) contains the entire agreement between you and the ABC regarding your casual employment, and it replaces all prior or contemporaneous agreements, letters, understandings and representations regarding employment.

You acknowledge and agree that any grievances or disputes which arise in relation to your employment will be dealt with in accordance with Part O of the EA.

The terms of this contract of employment may be varied by agreement in writing between you and the ABC.

Whilst the provisions of the contract (including any document referred to in this contract) are considered reasonable by the parties, it is agreed that if any provision of this contract is held by a court having jurisdiction to be invalid, illegal, void or voidable, that provision will be deemed to be deleted to the same extent and effect as if it was never incorporated, and the remainder of the contract will continue in full force and effect.

Any failure by the ABC to exercise any of its rights in connection with any default or breach of this contract by you will not operate as a waiver of its rights in the event of any subsequent default or breach by you.

16. INDEMNITY

Subject to clause 16.3 and 16.4, the ABC will, to the extent allowed by law:

16.1 indemnify you in respect of any actions, suits, claims and demands for alleged defamation or injurious falsehood arising by reason of the production and/or broadcasting of any matter by the ABC; and

16.2 provide, at its expense, legal representation and meet the costs of any fines that may be imposed on you in respect of any action for contempt or criminal libel arising by reason of the production and/or broadcasting of any matter by the ABC.

The indemnities in clause 16.1 and 16.2 will only be available to you provided that:

16.3 you have complied with all applicable ABC policies and procedures in relation to the broadcasting of programs; and

16.4 the ABC retains absolute discretion in relation to all aspects of the resolution of any actions, suits, claims and demands (including defences or terms of settlement).

17. LIABILITY FOR DAMAGES

The ABC will not be liable in damages or otherwise for alleged loss of publicity or opportunity for you to enhance your professional reputation or for any other reason should a recording, broadcast or other scheduled event not take place as arranged for any reason whatsoever.

18. AGREEMENT

By performing work for the ABC, you acknowledge that:

(a) You are employed by the ABC as a casual in accordance with the ABC Enterprise Agreement 2022-2025 (as varied from time to time);

(b) You are employed by the ABC on a casual basis and nothing that the ABC does or omits to do indicates any commitment to ongoing permanent employment;

(c) You may be subject to overt workplace surveillance. The surveillance is for a range of reasons but primarily it is to ensure the safety and security of ABC workplaces and appropriate use of ABC resources. The overt surveillance is in the form of computer and video surveillance and is of an ongoing and continuous nature, in accordance with ABC policy as amended from time to time; and

(d) You will comply with ABC Policies as amended from time to time. You are aware that copies of these are available from your manager, your ABC People & Culture HR Team or the ABC Intranet.

19. FAIR WORK INFORMATION STATEMENTS

> The ABC is required to give you copies of the:
>
> • Fair Work Information Statement
> • Casual Employment Information Statement
>
> Each of the Statements can be accessed through the links above. By accepting this offer of casual employment, you acknowledge and agree that the ABC has given you copies of the Statements.
>
> This is an automated message. Please do not reply if the sender is [Omitted]."[32]

[26] The Casual Employment Contract is in the same (or substantially the same) terms as three previous casual employment contracts entered into by the Applicant in 2022.[33]

[27] In relation to the Applicant's casual engagement at the ABC, I observe that such engagement, under the terms of the Casual Employment Contract, is not inconsistent with s.15A of the Act in terms of the statutory definition (or meaning) of a "casual employee".[34] Section 15A of the Act provides certainty to a casual engagement in that it is not open to relevant courts or tribunals to consider either the overall nature of the employment relationship, or other factors which might be present at the end of an employment relationship.[35] In other words, s.15A of the Act essentially removes the notion that a person specifically engaged as a casual employee somehow becomes something else (e.g. a part-time or full time employee). This is equally made plain in the detailed statutory "Casual Employment Information Statement" that is provided to new casual employees (such as the Applicant).

Events of 14, 18 and 19 December 2023

[28] The Applicant attended the Refresh Day (for one and a half hours duration) on 14 December 2023.

[29] She undertook her first shift on Monday, 18 December 2023, between 6:00AM and 2:36PM, including presenting the SM Program between 8:30AM and 11:00AM that day.

[30] Mr Oliver-Taylor first became aware that the Applicant had started working at the ABC on 18 December 2023, after receiving an email from Mr Anderson that forwarded on external email complaints that the ABC had received for placing the Applicant on-air.[36] At the time that he received Mr Anderson's email, Mr Oliver-Taylor was not aware as to whether the Applicant was working in an area falling within his responsibilities, or an area falling within the responsibilities of Mr Justin Stevens (ABC Director of News).[37]

[31] After looking into the matter, Mr Oliver-Taylor reported back to Mr Anderson (on 18 December 2023) that he was not aware of any concerns with the Applicant being on-air arising from the external complaints identified within Mr Anderon's email.[38] However, Mr Oliver-Taylor (later in the day on 18 December 2023) became aware of yet further complaints received by the ABC about the Applicant being or remaining on-air.[39] He instructed Mr Latimer to get someone to have a chat with the Applicant about not making posts to social media. It appears that Mr Latimer instructed Mr Ahern, who in turn instructed Ms Green, to have this 'chat' with the Applicant. In this regard:

a) At 1:49PM on 18 December 2023, Mr Oliver-Taylor sent the following email to Mr Ahern (copying in Mr Latimer, Mr Simon Melkman, and Ms Sashka Koloff (ABS Standards Editor)):

> "Hi Steve,
>
> I have been forwarded a number of complaints this morning from the MD's office about Antoinette Lattouf and her position on the Israel/Gaza war. You may need to seek Simon Melkman or Sashka's advice here, but can we ensure that Antoinette is not and has not been posting anything that would suggest she is not impartial, I am concerned her public views may mean that she is in conflict with our own editorial policies, but Simon and Sashka would be able to advise. Can we also advise why we selected Antoinette as stand in host?
>
> I am not suggesting we make any changes at this time, but the perceived or actual lack of impartiality of her views are concerning.
>
> Thanks …"[40]

b) There is no evidence that Mr Ahern responded to the foregoing email of Mr Oliver-Taylor, however, at 1:52PM on 18 December 2023, Mr Ahern sent the following email to Ms Green, copying in Mr Spurway (which forwarded on Mr Oliver Taylor's email above):

> "Elizabeth,
>
> Can you give me some feedback on the item in question please.
>
> We will need to talk to Antoinette urgently about what she says about Gaza."[41]

[32] At about 3:35PM on 18 December 2023, the Applicant's evidence is that she had a telephone conversation with Ms Green (**Impartiality Conversation**) to the following effect:

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

Me: Have I done or said anything wrong?

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

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

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

> Me: Thank you for your honesty.
>
> Ms Green: It's probably best that you keep a low profile on Twitter and maybe don't tweet anything.
>
> Me: I think it's a bit unfair to ask me not to tweet or post at all. What if I stick to completely factual information from reputable sources, like an Amnesty International Report? If another journalist dies, I can't just say nothing. I would share something from the committee to protect journalists. Of course, I am not going to rely on conjecture or spread misinformation.
>
> Ms Green: Yes, Ok, I understand. That's fine, facts and reputable organisations."[42]

[33] I take Ms Green's reference to "Twitter" in the foregoing conversation as a reference to public social media platforms generally (e.g. Tik Tok, Instagram, Facebook, etc, accessible via the internet or an Application (App) contained on an electronic device such as a mobile telephone).

[34] From the evidence, I find that the substance of the Impartiality Conversation between the Applicant and Ms Green was, in summary, to the following effect:

a) the Applicant was told by Ms Green that the ABC had received heaps of complaints from pro-Israel lobbyists who were not happy that ABC Radio Sydney had placed the Applicant on-air;

b) Ms Green asked the Applicant to keep a low profile on social media;

c) the Applicant agreed that she would keep a low profile, but advised Ms Green that she would make social media posts (during 18 to 22 December 2023) from "reputable sources" about "facts"; and

d) Ms Green's overall advice to the Applicant was that it would be best to make no social media posts at all for the rest of the week.

[35] I note that Ms Green's evidence is that during the Impartiality Conversation she 'advised' the Applicant not to make posts, as opposed to 'directing' her not to make posts.[43] It can be seen from the evidence covered later in this decision, that there appears to be some misunderstanding or confusion within the ABC as to what was said by Ms Green to the Applicant during the Impartiality Conversation (i.e. in terms of what was told to the Applicant about the making of social media posts in respect of her short tenure at the ABC of only five days). Mr Oliver-Taylor seems to understand that Ms Green conveyed his 'direction' to the Applicant to not to make any social media posts at all, whilst Mr Ahern seems to understand that Ms Green 'directed' (as opposed to 'advised') the Applicant not to make any social media posts about anything that could be perceived, or otherwise considered, to be controversial.

[36] Subsequent to the Impartiality Conversation, the Applicant sent Ms Green an email, referring to the Impartiality Conversation, and outlining her quoted responses to questions

asked of her by an individual from Women's Agenda (on the topic of shared female experiences concerning the Murdoch press allegedly targeting (bullying) female media personalities for their critical thinking, such as the Applicant, Ms Patrcia Karvelas, Ms Jeanette Francis, and Ms Clementine Ford). The Applicant had provided Women's Agenda with her comments (to the questions asked of her) on 18 December 2023 (prior to the Impartiality Conversation), and was making Ms Green aware of such comments for transparency purposes,[44] given that the Women's Agenda article was likely to be published that evening or shortly thereafter.

[37] The Applicant's evidence is that Ms Green advised her the next day (19 December 2023) that the responses that she had made to Women's Agenda were "all completely fine".[45] There is no evidence that Ms Green, between 18 and 20 December 2023, made anyone else at the ABC aware of the comments made by the Applicant to Women's Agenda (or the fact that the Applicant had even provided comments to Women's Agenda). Nor is there any evidence that anyone at the ABC was otherwise aware of the Women's Agenda article during this time.

[38] On Tuesday, 19 December 2023, the Applicant undertook her second shift, between 6:00AM and 2:36PM, including presenting the SM Program between 8:30AM and 11:00AM that day.

The Human Rights Watch Instagram Post

[39] The Applicant discloses in her evidence that she "shared" (i.e. passed on) a post (on the social media platform Instagram) originally made by a non-government organisation called "Human Rights Watch" (**Insta Post**). The Insta Post was publicly shared by the Applicant at 5:51PM on 19 December 2023 (i.e. post the Impartiality Discussion).[46]

[40] The Insta Post shared by the Applicant reads:

> "HRW [Human Rights Watch] reporting starvation as a tool of war"
>
> "The Israeli government is using starvation of civilians as a weapon of war in Gaza"

[41] The Insta Post appears to contain video footage that lasts for a period of 52 seconds. This video footage was not put into evidence.

[42] The Applicant's contends in her evidence that the Insta Post is not contrary to the Impartiality Conversation with Ms Green. In other words, according to the Applicant, Human Rights Watch is a "reputable source" (like Amnesty International, or the Committee to Protect Journalists) that only reports completely factual information.[47] I note that it is unnecessary for the purposes of these proceedings for me to consider or otherwise resolve this contention, or the assertions made by the Applicant that Human Rights Watch is a reputable (as opposed to, for example, a controversial) organisation, which only reports on factual matters (as opposed to, for example, drawing its own conclusions or opinions from asserted (disputed and/or undisputed) facts).

[43] The Applicant does not explain in her evidence her reasons for sharing the Insta Post, or the necessity to do so on the second day of her five day tenure at the ABC.

[44] Ms Green's evidence is that she did not consider the Insta Post to be a problem,[48] as Human Rights Watch is (in her opinion) a respected organisation,[49] and either the ABC News, or the BBC News, reported about the same Human Rights Watch story on 20 December 2023.[50] Again, it is unnecessary for the purposes of these proceedings for me to consider or otherwise resolve whether or not Human Rights Watch is a reputable or respected organisation, or the assertion that the Insta Post is not a problem (or not controversial) because ABC News, or BBC News, reported on the same Human Rights Watch story.

The ABC's decision to not require the Applicant to present the SM Program on 21 and 22 December 2023

[45] Mr Oliver-Taylor gave evidence that after becoming aware of the Insta Post, and consulting with others at the ABC, he made the ultimate decision to take the Applicant "off-air", such that the Applicant would not be required to attend for work (or present the SM Program), on 21 and 22 December 2023.[51]

[46] In reaching this decision to take the Applicant off-air, Mr Oliver-Taylor first consulted with three other staff at "Local Radio Sydney" (being Mr Ahern, Mr Latimer, and Mr Melkman) over a Teams Meeting to discuss options and recommendations surrounding the Insta Post.[52] Mr Ahern and Mr Latimer advised Mr Oliver-Taylor that their respective assessments were that the Insta Post was fundamentally a breach of instruction (such instruction arising from the Impartiality Conversation with Ms Green).[53] Mr Melkman is understood to have agreed with this assessment. It was the "recommendation" of Mr Ahern, Mr Latimer, and Mr Melkman,[54] to Mr Oliver-Taylor, that the Applicant be taken off-air. Mr Oliver-Taylor wanted further time to consider this "recommendation" before he made a final decision.[55]

[47] Mr Oliver-Taylor himself considered that the Insta Post may have, or did, breach ABC policy (namely, ABC social media policy).[56] It is unnecessary for the purposes of this jurisdictional contest that I determine whether or not:

a) the Insta Post did or did not breach any ABC policy (that the Applicant had agreed to be bound by);

b) Mr Oliver-Taylor held an honest but mistaken belief that the Insta Post breached (or likely breached) ABC policy/s, including having regard to the reasonableness of Mr Oliver-Taylor's belief in the context of the views and recommendations expressed to him by Mr Ahern, Mr Latimer, and Mr Melkman at the Teams meeting on 20 December 2023;[57]

c) the Applicant disobeyed what had been requested of her at the Impartiality Conversation, including as to whether the Applicant had been given a specific direction, or was only advised, not to make any social media posts, or not to make social media posts that could be perceived or considered to be controversial (whatever that means) during her five day engagement at the ABC; or

d) the Insta Post could be perceived or considered as controversial in the context of, for example:

i) the HRW organisation itself having a history of causing public disagreement or controversial or unconventional debate;

ii) the veracity of previous posts made, or information distributed, by HRW, including whether or not such posts or information have been considered to be impartial and accurate by governments and commentators of all persuasions; and/or

iii) previous posts made by the Applicant, or previously published (or publicised) opinions of the Applicant.

[48] After consulting with Mr Latimer and Mr Ahern, Mr Oliver-Taylor took some time out to consider what decision he would ultimately make in respect of the Insta Post. Mr Oliver-Taylor and Mr Anderson also had a telephone discussion about the matter.[58] Once Mr Oliver-Taylor had made a decision about the Insta Post, he sent Mr Anderson the following text:

> "D [David Anderson], confirming my view is that she [the Applicant] has breached our editorial policies whilst in our employment. She also failed to follow a direction from her producer [Ms Green] not to post anything whilst working with the ABC. As a result of this, I have no option but to stand her down. Call me if you can, but if not possible, I will action within the hour".[59]

[49] Mr Anderson concurred (agreed) with the "decision" that Mr Oliver-Taylor had made.[60]

[50] I observe that whilst each case will be determined upon its own facts and circumstances, the mere fact that a Managing Director or Chief Executive Officer may hold some form of veto power over, or bear ultimate responsibility for, decisions made, or actions taken, within a corporate structure, does not mean that such Managing Director or Chief Executive Officer automatically becomes the decision-maker in respect of each and every decision made in an organisation (i.e. whether consultation has occurred with them in respect of a decision, or otherwise).

[51] In this case, Mr Oliver-Taylor is quite clear in his evidence that his text message to Mr Anderson was for the purpose of informing Mr Anderson of Mr Oliver-Taylor's decision, as opposed to Mr Oliver-Taylor seeking some form of approval or green light from Mr Anderson to give effect to that decision (being a decision that Mr Oliver-Taylor had already made, and had the authority to make).[61] Mr Oliver-Taylor wanted Mr Anderson to have the 'heads-up' on the decision that was about to be implemented, give Mr Anderson time to call him if he needed any further clarification of the circumstances, and all-in-all not have Mr Anderson be unaware or blindsided by Mr Oliver-Taylor's decision should Mr Anderson subsequently receive inquiries (internally or externally) about the matter. I equally note that whilst Mr Oliver-Taylor's management approach is to engage in up/down consultation, there is no evidence before me to the effect that Mr Oliver-Taylor's role as the ABC's Chief Content Officer, including his responsibilities and decision-making authority and delegations, were compromised or undermined by Mr Anderson or any specific individual at the ABC. To extent that it is relevant to the factual matrix in this case, I find that Mr Oliver-Taylor was the decision-maker who made the decision to take the Applicant off-air, after engaging in an up/down consultation process.

[52] Mr Oliver-Taylor subsequently telephoned Mr Latimer to advise him that he had made a decision to take the Applicant off-air, and requested that he advise Mr Ahern to call the Applicant in for a meeting to advise her of this decision.

Events of 20 December 2023

[53] After the Applicant presented the SM Program on Wednesday, 20 December 2023, between 8:30AM and 11:00AM, she then attended an all staff Station meeting, and a further internal planning meeting.

[54] Between around 1:00PM and 1:30PM on 20 December 2023, Mr Ahern received a telephone call from Mr Latimer. In that call, Mr Ahern's evidence is that Mr Latimer stated to him:

> "We have had some discussions and we will have to take Antoinette off air. Can you tell her that she won't be needed for the rest of the week, please?"[62]

[55] Post this telephone call, the Applicant was asked to attend a meeting with Mr Ahern, Mr Spurway, and Ms Green (**20 December Meeting**).

[56] In respect of what was said or discussed at the 20 December Meeting, Mr Ahern sets out his contemporaneous recollection of the discussion in an email sent to Mr Oliver-Taylor, Mr Latimer and Mr Melkman, as follows:

> "Chris and Ben,
>
> Confirming that I had a short conversation with Antoinette in the manager's office of ABC Radio Sydney at about 1245 today. Witnesses were Mark Spurway and Elizabeth Green.
>
> In that conversation I made the following points:
>
> 1. Elizabeth [Ms Green] backgrounded you earlier this week on a perception of bias on the Israel-Gaza situation.
>
> 2. Elizabeth advised you not to post anything that could be perceived as controversial on your socials, while you are on air with us this week. You acknowledged that you understood.
>
> 3. 20 hours ago you shared a post that could be considered controversial and was about Israel-Gaza.
>
> 4. In the context of your other posts, this is considered a breach of ABC policies and so you will not be required to present the last two programs you have been booked to present tomorrow and Friday.

> Antoinette was quiet and accepted the information without comment. At the end she said that she had been asked not to comment on Israel-Gaza on her program and she had not done so, she had kept it a light holiday feel. I acknowledged her points and agreed that she had not discussed Israel-Gaze in the show, I also said that this was not about the show, it was about social media posting that she had been asked not to do.
>
> She also said she considered the post factual. I did not comment on whether the post was factual or not, but repeated that it was a post about Israel-Gaza, and that she had been asked not to post about that while she was on air with us this week. She did not reply to that.
>
> The meeting took about 5 minutes. At the end, I asked her to explain to her production team that she would not be doing the show on Thursday and Friday then to leave as soon as possible after that.
>
> I then explained the situation to the production team using the points above. Two of the three in the team are experienced ABC producers and understood, the third is a younger producer who did not have any experience of such things. One of the experienced producers asked did the ABC cave in to the Jewish lobby, I explained that this was about a breach of ABC policies and that Antoinette had been asked not to post about it but had done so.
>
> …"[63]

[57] I do not consider there to be significant or important differences between the recollections of the 20 December Meeting by those persons present. On the evidence,[64] I make the following specific findings as to what was said at the 20 December Meeting:

a) the Applicant was reminded of the Impartiality Conversation with Ms Green;

b) the Applicant was advised that because she shared the Insta Post concerning (or relating to) the on-going conflict between Israel and Hamas, being a post that was, or could be considered to be, controversial, she breached ABC policies;

c) the Applicant was advised that a decision had been made for her to be taken off-air. She was no longer required to present the SM Program, or otherwise come into work, on 21 (Thursday) and 22 (Friday) December 2023;

d) the issue did not concern the Applicant's work or performance on the SM Program itself, rather, the issue was that she had been told not to make social media posts for the whole of the five days she would be presenting on the show, but she did so anyway; and

e) the Applicant was requested, at the conclusion of the meeting, to advise her relevant work colleagues that she will not be presenting the SM Program for the remainder of the week, collect her personal belongings, and leave the ABC premises at her earliest convenience (i.e. not complete the remainder of her shift that day).[65]

Events after the 20 December Meeting

[58] At the conclusion of the 20 December Meeting, the Applicant immediately returned to her desk to collect her belongings and made her way out of the ABC's premises. Whilst she was leaving, she ended up having a further conversation with Ms Green in an empty ABC boardroom. What the Applicant says was said during that conversation is disputed by Ms Green.[66] In circumstances where the essential elements of the conversation are based upon hearsay and opinion (as to who made the decision to take the Applicant off-air and why), I do not consider it necessary to make findings as to the content of this conversation, beyond that it is agreed by both the Applicant and Ms Green that in concluding their conversation, words to the following effect were exchanged between them:

> Applicant: I will never work at the ABC again [as a presenter].
>
> Ms Green: Not if I can help it. I would love to have you back.

[59] At 5:23PM on 20 December 2023, the Applicant sent an email to Mr Ahern, Mr Spurway and Ms Green (**Clarification Email**), which reads:

> "Hello Mark, Steve and Elizabeth,
>
> I have some questions regarding my departure that I would like answered please. I believe I was unfairly dismissed and there will also be reputational damage due to the unfair manner in which I was let go and the very quick leak to the media.
>
> As you are aware, today, at approximately 1.45pm, I was summoned by Steve for a quick chat. Mark and Elizabeth also joined the meeting.
>
> In this short meeting, I was told that I was being let go because of one specific social media post (an Instagram story) which I have attached below. Can you please confirm whether the attached Instagram story is the social media post which the ABC alleges was in breach of the social media policy? Can you please also:
>
> • specify exactly which section of the ABC's social media policy I allegedly breached by sharing that post; and
>
> • explain as to how this post is said to be in breach of the guidelines.
>
> I note that, on Monday 18th December I received a call from Elizabeth Green at approximately 3.30pm. We had a very honest and respectful discussion during which she told me that Jewish lobbyists were unhappy that I was on air. Elizabeth told me multiple times that she has absolute faith in my "journalistic integrity" and gave me a heads up to be mindful on social media. We talked about the show that day, and I was told the content was excellent, "no issues whatsoever". I responded by saying "I don't think it's fair to expect me to stop posting all together but I will be even more mindful". Elizabeth responded by saying that "I know that you are. You're smart and professional which is why I chose you and trained you to present". I then specifically asked if another "journalist gets killed or a reputable NGO like Amnesty International has information,

am I able to share that without any loaded commentary or anything, but just quote an agency" and Elizabeth said, "yes that's fine." Elizabeth also repeated in the meeting that, yes, she has told me that sharing straight facts and reputable sources was a "fine" and that she had told other senior management this too.

> • Can you please explain how I'm said to have breached the social media guidelines when I was following an express direction given to me about the application of social media? Can you please also explain why any such breach warrants summary dismissal?

Further, at lunchtime today (Wednesday 20th) there was a station meeting where the following two things were expressed:

> - I was singled out by Mark, thanked for the work I am doing, told I am "sounding great" and the audience are "responding very well"
>
> - The team was also reminded not to leak internal ABC Radio Sydney information to the media following the SMH leak as it erodes team trust.

In light of this can you please:

> • Explain why I was dismissed less than an hour after being told my work was "great?"
>
> • Can you please shed some light as to how the story got to The Australian so quickly because there was an article published before I even got home. It was less than an hour from when we had our discussion in Mark's office.
>
> • Who made the final decision that my dismissal was warranted?

This has been an incredibly stressful week, since receiving that call on Monday, I have had trouble sleeping and worked incredibly hard to produce excellent radio. The manner in which this has unfolded is incredibly distressing.

Given how swiftly this is playing out in the media, I would appreciate a swift reply as I have already been contacted by five media outlets and would like to respond to them by 8pm.

Many thanks,

Antoinette"[67]

[60] There was no response from anyone at the ABC to the Clarification Email. Rather, the Clarification Email was forwarded on internally to ABC legal.[68]

[61] There is no evidence before me of any concerns or other issues with the Applicant's on-air presenting on the SM Program for the three days of 18, 19 and 20 December 2023.

The media interest

[62] At 1:30PM on 20 December 2023, Journalist and Media Writer for the Australian newspaper, Ms Sophie Elsworth, sent an email to Mr Nick Leys, ABC Head of Communications, and Ms Sally Jackson, ABC Deputy Head of Communications, making various inquiries as to the Applicant's engagement by, and tenure at, the ABC.[69]

[63] Ms Elsworth's questions went unanswered, however, Mr Leys did provide the following email response to Ms Elsworth (at 2:05PM that day):

> "From an ABC spokesman please:
>
> ABC Sydney casual presenter Antoinette Lattouf will not be back on air for her remaining two shifts this week."[70]

[64] There were subsequent reports published across a range of media outlets asserting that the Applicant had been sacked, removed from the airwaves, or was not returning to ABC programming ever again. These media reports are advanced by the Applicant in these proceedings in support of her contention that she was dismissed by the ABC. Given that they are sought to be relied upon for this purpose, it is unnecessary for me to consider them. In this regard, the media reports contain references to various so-called leads, selective quotes, and alleged data leaks (from WhatsApp groups). I equally observe that some of these media reports appear to have derived much of their content from 'backgrounding', or anonymous and undisclosed sources, and contain matters of hearsay and opinion (which on their face, do not have their origins from any identifiable or verifiable evidence before me). The fact that these media reports exist takes the resolution of these proceedings nowhere.

The legislation – unlawful termination – requirement for an employee's employment to have been "terminated" to be resolved by the Commission

[65] Section 772(1) of the Act reads:

> "(1) [When employer must not terminate employment]
>
> An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:
>
> (a) temporary absence from work because of illness or injury of a kind prescribed by the regulations;
>
> (b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;
>
> (c) non-membership of a trade union;

(d) seeking office as, or acting or having acted in the capacity of, a representative of employees;

(e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

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

(g) absence from work during parental leave;

(h) temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

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

[66] Section 773 of the Act reads:

"If:

(a) an employer has terminated an employee's employment; and

(b) the employee, or an industrial association that is entitled to represent the industrial interests of the employee, alleges that the employee's employment was terminated in contravention of subsection 772(1);

the employee, or the industrial association, may apply to the FWC for the FWC to deal with the dispute."

[67] Section 776 of the Act reads:

"(1) [When FWC must deal with disputes (other than by arbitration)]

If an application is made under section 773, the FWC must deal with the dispute (other than by arbitration).

Note: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(2) [Conferences must be private]

Any conference conducted for the purposes of dealing with the dispute (other than by arbitration) must be conducted in private, despite subsection 592(3).

Note: For conferences, see section 592.

(3) [Certificate if dispute not resolved]

If the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then:

(a) the FWC must issue a certificate to that effect; and

(b) if the FWC considers, taking into account all the materials before it, that arbitration under section 777, or an unlawful termination court application, in relation to the dispute would not have a reasonable prospect of success, the FWC must advise the parties accordingly.

(4) [Meaning of unlawful termination court application]

An *unlawful termination court application* is an application to a court under Division 2 of Part 4-1 for orders in relation to a contravention of subsection 772(1)."

[68] Aside from consent arbitration, the Commission's only role in an unlawful termination application is to conduct a conference between the relevant parties (so as to assist them in attempting to resolve the unlawful termination application by agreement), or issue a certificate if a resolution is unable to be agreed (a certificate is a prerequisite to being able to progress a claim onto an eligible court for judicial determination). That said, the power to conduct such a conference and issue a certificate is provided for under the Act, and the Commission has no jurisdiction to conduct a conference (s.776(1)), or issue a certificate post that conference (where resolution is unable to be reached, s.776(3)), unless a 'valid' (or within jurisdiction) unlawful termination application has been filed. It is for the Commission to resolve any disputes or issues as to its jurisdiction in this regard for itself.[71]

What does 'termination' mean under s.773(a) of the Act?

[69] It can be seen that under s.773(a) of the Act, for an application based upon an alleged "unlawful" termination of employment to proceed, an employee must have been "terminated" from their employment.

[70] The term "termination" is not defined by the Act. Both parties submit that the term should be defined by reference to the meaning of the term "dismissed" under s.12 and (relevantly) s.386(1)(a) of the Act, and applicable case law authorities in respect of same.[72] I see no reason as to why the position of the parties ought not be adopted in these proceedings.[73]

'Dismissal' under s.386(1) of the Act

[71] Section 386(1) of the Act reads:

"(1) A person has been dismissed if:

> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
>
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer."

[72] In *Khayam v Navitas English Pty Ltd t/a Navitas English*[74] (**Navitas**), the Full Bench majority held that the analysis as to whether there has been a termination (dismissal) at the initiative of the employer for the purposes of s.386(1)(a) of the Act is to be conducted by reference to the employment relationship, not by reference to the termination of an employment contract operative immediately before the cessation of employment.

[73] Post the decision in *Navitas*, the Full Bench majority in *NSW Trains v James*[75] determined that the expression "*employment … has been terminated*" (in s.386(1)(a) of the Act) refers to termination of the employment relationship and/or termination of the contract of employment.[76]

[74] In *Alouani-Roby v National Rugby League Limited*[77], the Full Bench of the Commission stated:

> "[123] Before turning to consider the appeal grounds in the present case, we make some general observations. As the cases establish, the central question posed by s.386(1)(a) is whether a person has been dismissed by virtue of the person's employment being terminated on the employer's initiative. The use of the verb "*terminated*" does not require the legal event that ends the relationship to be an action of the employer and simply requires that the employer initiate the ending of the employment.
>
> [124] Sections 386(1)(a) (and (b) which deals with forced resignation and is not presently relevant) exclusively define the circumstances in which a person has been dismissed. There is no reference in s.386(1) to the concept of an employment contract or an employment relationship and generally such a distinction is not central to the analysis of whether a person has been dismissed. However, the distinction may be relevant in circumstances, such as those which arose in *Khayam v Navitas* and *NSW Trains v James*. Such a distinction was also of significance in *Broadlex* which concerned the entitlement of an employee to be paid redundancy pay in circumstances where the employee remained in employment with the employer but her status and working hours were altered from full time to part time, because the employer's contracted cleaning hours were reduced. Relevantly in that case, s.119(1) of the FW Act provides that an employee is entitled to redundancy pay "*if the employee's employment is terminated … at the employer's initiative*".
>
> [125] The employment relationship and the employment contract are interrelated. The contract of employment creates the basis of and underpins, the employment relationship. As McHugh and Gummow JJ observed in *Byrne v Australian Airlines Ltd*:

> "The evolution in the common law as to the relationship of employment has been seen as a classic illustration of the shift from status (that of master and servant) to that of contract (between employer and employee)."

[126] And in *WorkPac v Rossato* the plurality cited the judgement of French CJ, Bell and Keane JJ in *Commonwealth Bank v Barker* who said:

> "The employment relationship in Australia operates within a legal framework defined by statute and by common law principles, informing the construction and content of the contract of employment."

[127] Also, as Katzman J observed in *Broadlex*: "*The employment relationship is inherently a contractual one. Consequently, there can be no employment relationship without a contract of employment*."

[128] The Full Bench in *Khayam v Navitas* did not determine that the contract of employment is irrelevant to the question posed by s.386(1)(a) and nor did it establish a principle that the circumstances of the entire employment relationship trump the terms of an employment contract in all cases. Rather, it emphasised that there may be cases where, notwithstanding that employment has ended at the same time as the end date in a time-limited contract, and ostensibly in accordance with the terms of the contract, it will be necessary to analyse the entire employment relationship to determine whether an employee has been dismissed within the meaning of s.386(1)(a).

[129] Further, the Full Bench in *Khayam v Navitas* did not assert in the first principle [at paragraph [75] of its decision] that in all cases, the question of whether a person has been dismissed, is answered by focusing only on the employment relationship and whether it has ended, in isolation from whether there has been a termination of the contract of employment. The paragraphs preceding the principle in paragraph [75](1) deal with propositions that the definition of "*dismissed*" in s.386(1) is not to be read as excluding in all circumstances, a termination of employment that occurs at the end of a time limited contract of employment, and that the mere fact that an employer has decided not to offer a new contract of employment at the end of a time limited contract, which represents a genuine agreement by parties that employment should come to an end not later than a specified date, will not by itself, constitute termination of employment.

[130] This is also evident from the fact that the first principle in [75](1) is expressed with an important qualification, that where the employment relationship is made up of a sequence of time-limited contracts, analysing whether there has been a dismissal for the purposes of s. 386(1)(a) of the FW Act, may, depending on the facts, require consideration of the circumstances of the entire employment relationship rather than the terms of the last of those employment contracts. Subsequent principles set out by the Full Bench make clear that this broader analysis will not be appropriate in all cases and there will be cases where the circumstances of the entire employment relationship do not establish anything other than a genuine agreement, constituted by a time limited contract, that employment will not continue after a specified date.

> [131] For the purposes of analysing whether there has been a dismissal, within the meaning in s.386(1)(a), consideration of the entire employment relationship as posited by the Full Bench in *Khayam v Navitas*, includes consideration of the contract of employment in operation at the time of the employment ending and may also include consideration of other employment contracts during the entire employment relationship (or series or employment relationships as posited by Katzman J in *Broadlex*). As we have noted, the contract of employment is fundamental to, and underpins, the employment relationship. In addition to the terms of the contract, consideration of the entire employment relationship may, depending on the facts, require examination of a range of matters encompassed in the principles set out in paragraph [75] by the Full Bench in that case, including: the field of employment in which the contract operates; the terms of any industrial instruments including awards and enterprise agreements applicable to the relevant employment; all contracts in a series of time limited contracts; the context in which the contract of employment and the employment relationship operated; conduct of the parties during the relationship and the circumstance in which the employment ended. Consideration may also be required as to whether there are vitiating factors so that there is no legally effective time limit on the employment."[78] (citations omitted)

Termination at the employer's initiative

[75] In *Quirk v Construction, Forestry, Maritime, Mining and Energy Union*[79] (**Quirk**), a decision by the Divisional Executive of a union to remove two employees from their elected positions, which consequently caused their employment to be terminated, was found to constitute a "dismissal" for the purposes of section 386(1)(a) of the Act. After pointing out that a termination will be at the employer's initiative if the act of the employer directly or consequentially results in termination,[80] Perram J stated:

> "218. The Applicants submitted that the act of the Divisional Executive in removing them from office under Rule 11 [of the union's rules] was the principal contributing factor to the termination of their employment. The Respondents, on the other hand, denied that the employment relationship had been terminated at all. In their submission, what had in fact happened was that the employment relationship had ended by operation of law on their removal from office.
>
> …
>
> 221. I do not think that it can be doubted that the actions of the Divisional Executive are directly linked in a causal sense to the *ending* of the relationship of employment. The question which arises is whether it can be said in terms of s.386(1) that the *ending* of the employment relationship in that way falls within the expression 'has been terminated on [the Federal Union's] initiative'.
>
> 222. It is established that the use of the passive verb 'terminated' does not require the legal event which ends the relationship to be the employer's. Thus in *Mohazab*, the employer accused the employee of the theft of an item of stock. It invited him to resign otherwise the police would be called in to investigate. The employee resigned. The question was whether the termination of the employment relationship was at the

> initiative of the employer. It was held, notwithstanding the fact that it was the employee who had brought the employment relationship to an end by resigning, that what had occurred was a termination of the employment at the initiative of the employer (and hence a dismissal). The correctness of this analysis was affirmed in a considered obiter dictum by the Full Court of this Court (Jessup, Tracey and Barker JJ) in *Mahony*[81] at [21].
>
> 223. The question at hand is the meaning of the word 'terminated' in s.386(1). What that provision requires is two things: (a) an initiative of the employer; that (b) results in the termination of the employment relationship. The provision does not require the employer to pull the trigger but only to load the gun. In my view, the provision is expressed in such a way that it is agnostic as to the precise means by which the employment relationship comes to an end. Its focus is upon, however it might have ended, at whose initiative this occurred.
>
> 224. I do not accept that a contract which comes to an end under its own terms cannot in any circumstance constitute a termination within the meaning of s 386 (although this issue does not strictly arise). If it does then the termination provisions contain a lacuna. For example, if a contract of employment made provision for the issue of a notice of termination by an employer in certain circumstances and a later provision saying that the employment relationship would come to an end 7 days after the issue of the notice then this would be an example of the employment relationship coming to an end by operation of law. The termination clause would take its effect upon the occurrence of a given factual circumstance but it is the operation of the contract and not the factual circumstance which would result in the termination of the employment relationship.
>
> 225. I therefore do not accept the Respondents' submission that there can be no termination of an employment relationship purely because the contract of employment came to an end by operation of law. Nor do I accept that *Mylan*[82] stands in the way of that conclusion. As I have already indicated, the critical part of his Honour's reasoning is the statement that 'any employment was at an end without any necessity for action by the union'. I do not read his Honour's statement 'In any event, Mr Mylan's office (and any employment) was lost by operation of law as a result of the Orders' as a holding that in every case where a contract of employment ends by operation of law there can be no termination within the meaning of s.386. I would accept that *Mylan* is authority for the proposition that where a contract of employment ends by operation of law without any act by the employer then there will be no termination within the meaning of s.386. But I do not accept that his Honour intended to say, or did say, anything about the situation where a contract of employment ends by operation of law as a result of the actions of the employer. Facts of that kind were not before the Court in *Mylan*."[83]

Acceptance of a breach (or repudiation) is not required to terminate an employment relationship

[76] In *Broadlex Services Pty Ltd v United Worker's Union*[84] (**Broadlex**) Justice Katzmann clarified that acceptance of a breach of contract (election) is not required for an employment relationship to be terminated:

> "By repudiating the contract the employer terminates the employment relationship. By accepting the repudiation the employee brings the employment contract to an end."[85]

Applicant's Submissions - The Applicant's employment was terminated at the ABC's initiative

[77] The Applicant submits that any reasonable person in her position (who had knowledge of the background facts and dealings between the parties) would have understood that they had been terminated from their employment by the ABC (i.e. 'dismissed' within the meaning of s.386(1)(a) of the Act). This is especially so in circumstances where the ABC did not respond to the Applicant's email of 20 December 2023, 5:23PM (see paragraphs [59] to [60] of this decision).[86]

[78] In closing oral submissions, Mr *Gibian SC* put the Applicant's primary case as one of 'termination' (i.e. a 'dismissal' within the meaning of s.386(1)(a)), as follows:

> "… our primary submission is that the ABC expressly terminated Ms Lattouf's employment by its conduct on 20 December 2023 by calling her to a meeting; informing her that it was alleged that she had breached ABC policy; informing her that as a consequence of that alleged breach in policy she was not to complete the only remaining work in her employment, that is presenting the on air shifts on the Thursday and Friday, and in directing her to leave the premises. That is an express termination plainly falling within the concept of termination on the employer's initiative."[87]

> "… the applicant's case does not depend upon demonstrating a contractual right to perform the work on the Thursdays and the Fridays at all. That is a complete distraction from the primary argument that we make which focuses upon the termination correctly consistently with authority upon the termination of employment relationship. To the extent that that argument has any relevance it's only to the alternative repudiation argument. It has no relevance with respect to the principal argument that we seek to advance that there was an express termination of the employment relationship.
>
> To grapple with that argument one has to understand, well what is the employment relationship here. Here it is clear, consistent with the authorities, that the relationship is not necessarily coincidental with or restricted to the contract of employment. Here the relationship, and the only employment relationship which Ms Lattouf had as at 20 December 2023, was the particular engagement to perform on air work on the five morning shifts between Monday 18 December and Friday 22 December 2023."[88]

[79] Mr *Gibian SC* also identified the following propositions from case law:

a) a termination of employment at the initiative of the employer is one where the action of the employer is the principal contributing factor to the termination of the employment relationship;

b) the act of the employer that terminates the employment relationship is not only the act that puts in train the process leading to its termination, but is, in substance, the

entire process, i.e. it is not simply a question of whether the act of the employer resulted directly or consequentially in the termination of employment;

c) there must be some action on the part of the employer which is either intended to bring the employment relationship to an end or have the probable result of bringing the employment relationship to an end;

d) a termination of the employment relationship may occur even if the employment contract is not breached, or otherwise persists post the employment relationship ending. The focus is upon the action of the employer, whether it be authorised by the contract or not, such that it was intended, or had the probable result of, bringing the employment relationship to an end;

e) determining whether or not there has been a termination of the employment relationship requires an objective analysis, but the full context of what occurred must be properly considered in any such analysis;

f) the objective analysis to be made focuses upon what a reasonable person in the position of the parties (or a party), who had knowledge of the background dealings between the parties, would have understood;

g) the use of words such as 'dismissed', 'sacked' and 'terminated' are not determinative of a termination taking place. Such words need not be said for a termination of the employment relationship to occur; and

h) the mere possibility that an employee may be offered further work into the future does not mean that a termination of employment did not occur;[89]

[80] As to the status of the Casual Employment Contract, Mr *Gibian SC* submitted:

a) The Casual Employment Contract is not a contract at all, as it contains no offer of work. Rather, its terms only become operative or take effect in the event that there is a particular engagement. Indeed, on its own terms, the Casual Employment Contract states that it does not constitute an offer or guarantee of employment. This is fundamentally inconsistent with the ABC's primary submission that there is some sort of free standing employment relationship which persists whether or not offers of any particular engagement have ever been made.

b) Whilst the Casual Employment Contract did apply on its terms to the Applicant's engagement between 18 and 22 December 2023, the Casual Employment Contract is not of itself some form of ongoing overarching or 'Umbrella' contract. It equally follows that there can be no ongoing or persistent employment relationship between the Applicant and the ABC, independent of any offer and acceptance of an actual or specific engagement to undertake work. Accepting this, the only employment relationship (or employment) that the Commission is considering in these proceedings is that arising from the employment offer to the Applicant to work five on-air shifts on the SM Program from 18 to 22 December 2023.[90]

ABC's Submissions - The Applicant's employment was not terminated at the ABC's initiative

[81] The ABC relies upon the following written submissions on the issue of the Applicant's termination (which it says never occurred):

> "[33] For the reasons that follow, the ABC's evidence clearly demonstrates that Ms Lattouf's employment was not terminated by the ABC.
>
> [34] *First*, the [Casual Employment] Contract contemplated that:
>
> > (a) Ms Lattouf would be offered, from time to time, casual engagements, which she was free to accept or decline.
> >
> > (b) Each engagement, if accepted, would be separate and, importantly, "will cease at the end of that engagement without the need for any action by the ABC" – that is, it would cease by effluxion of time in accordance with the terms of the [Casual Employment] Contract.
> >
> > (c) The ABC would advise Ms Lattouf of the duration of the engagement, the hours of work required, and the work to be performed.
> >
> > (d) At any time before an engagement commences, or during the period of an engagement, the ABC might advise Ms Lattouf of changes to the engagement, including the hours of work required or the work to be performed.
> >
> > (e) Any engagement under the [Casual Employment] Contract might be terminated by either party with one hour's notice.
> >
> > (f) If either party gives such notice of termination, the ABC might bring Ms Lattouf's employment to an end immediately and make a payment to her in lieu of any outstanding period of notice.
>
> [35] *Second*, what occurred on the evidence …, as a matter of fact, is that:
>
> > (a) Ms Lattouf was offered and accepted the Engagement, being a fill in position for "Sydney Mornings" from 18 to 22 December 2023, inclusive. Ms Lattouf was rostered to work 7:36 hours each day.
> >
> > (b) On Wednesday, 20 December 2023, she was advised that she would not be required to present on Thursday and Friday, being the last two shifts of the Engagement. That is, the ABC altered the work that Ms Lattouf was required to undertake on the last two shifts (that is, the ABC did not require her to undertake any work).
> >
> > (c) The ABC paid Ms Lattouf for all five shifts of the Engagement.

[36] *Third*, the ABC did not exercise its right to terminate the Engagement in accordance with [Casual Employment] Contract. It could (and it was required to) have done so on one hour's notice, or payment in lieu of notice. On the objective business records, that did not happen.

[37] *Finally*, and by reason of the above, the Engagement came to an end on 22 December 2023, whereupon the Engagement ceased by effluxion of time in accordance with, and by the operation of, the terms of the [Casual Employment] Contract, without the ABC doing, or needing to do, anything to terminate the Engagement.

[38] It follows that the ABC did not do anything that terminate Ms Lattouf's employment, or that had the effect of doing so.

[39] Accordingly, the Commission should uphold the first jurisdictional objection."[91]

[82] In oral submissions, Mr *Neil SC* made the following supplementary points on behalf of the ABC:

a) When determining whether a termination was at the employer's initiative, an objective analysis of what the ABC said and did is required. Subjectivity is irrelevant.[92]

b) The salient facts in this case are as follows:

i) whatever complaints (about the ABC putting the Applicant on its radio airwaves) that the ABC received on 18 and 19 December 2023, nothing was done in response to those complaints as they concern the Applicant (i.e. beyond requesting that the Applicant not make social media posts, per the Impartiality Conversation with Ms Green on 18 December 2023);

ii) on 20 December 2023, the ABC became aware that the Applicant had made the Insta Post the day prior. This gave rise to a series of internal deliberations in the ABC, which culminated in Mr Oliver-Taylor making the decision that the Applicant would not be required to work the last two days of her casual engagement (or present on the SM Program on those two days);

iii) at no time did the ABC consider, let alone utilise, it's right under the Casual Employment Contract to terminate the Applicant on one hour's notice;

iv) what was said to the Applicant at the 20 December Meeting was that she was told she would not be required to present on the SM Program on 21 and 22 December 2023, and that she was to leave the ABC premises at her convenience (i.e. she would not need to wait around until her shift finished at 2:36PM that day). The Applicant was never told that she was dismissed, terminated, or sacked;

v) the Applicant was not asked to return her security pass, return any information belonging to the ABC, and she remains an employee on the

ABC's electronic employment systems. Indeed, the Applicant continues to have access to the ABC's electronic employment systems; and

vi) the Applicant was paid her wages for the whole of the five day casual engagement in the ordinary pay cycle.

c) The ABC's case in a nutshell is that from the perspective of the employment contract, or the employment relationship, there has been no termination at the initiative of the ABC. In this regard:

i) from a contractual perspective, the ABC was entitled to do as it did. The ABC's actions left both the Casual Employment Contract (as an Umbrella contract), and the Applicant's casual engagement for the period 18 to 22 December 2023, contractually intact. The Casual Employment Contract simply continues on, and the casual engagement for the period of 18 to 22 December 2023 ended in accordance with the terms of the Casual Employment Contract - by way of effluxion of time;

ii) from the employment relationship perspective:

- the relationship continues on (i.e. notwithstanding the conclusion or expiry of the casual engagement for the period 18 to 22 December 2023); or

- in the alternative, the relationship was suspended, following the casual engagement for the period 18 to 22 December 2023 coming to an end in accordance with the terms of the Casual Employment Contract (and not by way of termination).

d) In respect of the Applicant's submissions that the Casual Employment Contract does not 'on its face' purport to constitute a contract,[93] that submission is contrary to the express terms of the contract;[94]

e) In respect of the Applicant's submissions that the Casual Employment Contract is not a contract,[95] such submissions must be rejected. The Casual Employment Contract is a contract that operates at two levels:

i) *firstly*, it constitutes the contract of casual employment between the Applicant and the ABC, and gives rise to the relationship of employment;[96] and

ii) *secondly*, it operates as an Umbrella contract that governs particular engagements between the parties, and in doing so it does three things, by setting out or stipulating:

A. a scheme by which casual engagements will be offered and accepted;

B. a contractually mandated mechanism for establishing the details of each engagement; and

C. the terms that will apply to each engagement.[97]

f) The conventional position is that casual employment involves a series of contracts, or one or more contracts or engagements. This gives rise to two possibilities, depending upon the contractual framework, and the facts, as follows:

a) one possibility is that the employment relationship continues in intervals between each casual engagement. This is what the ABC says occurred here, in that "the incidents of the relationship that the Umbrella contract [Casual Employment Contract] contemplated would subsist in the intervals between particular engagements, [which includes] the continued existence of the Umbrella contract, and the fact that during the continuation of the Umbrella contract the Applicant remained on the ABC's books (holding a security card, being present (or alive) on the ABC's electronic employment systems, and available to be offered work pursuant to the terms of the Umbrella contract)."[98]

b) the second possibility is that the employment relationship is suspended during each of the intervals between engagements. And if that is what occurred here, then it did not occur at the ABC's initiative, but by operation of the contract.[99]

g) The core issue in this case is that the Applicant's case, on every basis that it is put, depends upon the Applicant's contention that she had a contractually recognised right to work, or to do the work of a presenter on the SM Program for five consecutive shifts commencing on Monday, 18 December 2023. But the terms of the Casual Employment Contract (express or implied) do not provide for such right to work (as a presenter, or at all). An analogy is to be made with the concept of 'gardening leave', whereby an employee is directed not to attend or perform work, but is nonetheless paid in accordance with the terms of their employment contract. If the employee's employment contract does not provide them with a right to work, then a direction not to attend or perform work does not terminate either the employment relationship or the employment contract (or give rise to a right to terminate the employment contract or the employment relationship by either party). Gardening leave is essentially what happened in this case, and is expressly authorised under the terms of the Casual Employment Contract.[100]

h) The Applicant's contention as to a right to work, by reference to the express terms of the Casual Employment Contract, does not grapple with the "entire agreement" term. This term ought to be given its ordinary meaning, and conventional operation. It means exactly what it says, which is that the employment contract between the Applicant and the ABC is wholly written (being the words, and the meaning of those words, contained in the Casual Employment Contract).

i) The Applicant's contention that the Casual Employment Contract is incomplete and missing terms that one would expect to see in an employment contract (e.g. the nature of work to be performed, and the time of its performance) is central to her

case. Indeed, it is the basis upon which the Applicant says that asserted gaps in the contract can be filled with additional terms, and that the entire agreement clause is to be disregarded, or not be taken to mean what it says, or operate as it says, or not be applied to the new or additional terms that fill the gaps.

j) The ABC understands that the Applicant's case as to incompleteness proceeds as follows:

   i) the Casual Employment Contract is incomplete;

   ii) by virtue of (i), notwithstanding the entire agreement clause, the Casual Employment Contract also contains terms extraneous to its written words. For example, an express term that the employment contract between the parties required the ABC to allow the Applicant to work as a presenter on the SM Program for five successive shifts, in the week commencing Monday, 18 December 2023. Such an express term is said to arise from the Applicant's conversation with Ms Green on 17 November 2023 (when Ms Green first telephoned the Applicant to ask her if she was available, and would like, to present on the SM Program in the working week commencing 18 December 2023).[101]

k) However, the Applicant's incompleteness argument is flawed, because the Casual Employment Contract is not incomplete. In this regard:

   i) the plain meaning and effect of clause 1 of the Casual Employment Contract, particularly clause 1, is that the contract is made an express term of each engagement; and

   ii) each engagement under the contract cannot be to do a specified thing (such as being the presenter on the SM Program), because that thing can be unilaterally changed by one party (the ABC) at any time;

l) the Applicant's submission, that a clause permitting a unilateral variation of an employee's duties should not be construed to permit a change to the express terms of the contract without the clearest words (especially if the change alters the essence of the contract to allow the Applicant to perform the work of presenter on the SM Program), beguiles the fact that the words of the Casual Employment Contract could not be clearer;[102]

m) there is no express term of the Casual Employment Contract that can be construed as the ABC being obliged to have the Applicant be the presenter on the SM Program for the period 18 to 22 December 2023;

n) drawing the strings together, *firstly*, the conversation with Ms Green on 17 November 2023 is excluded by the entire agreement clause. *Secondly*, even if the entire agreement clause does not apply, the Casual Employment Contract cannot be construed to do a specific or particular thing, because that thing can be unilaterally changed (varied) at any time.

o) as to the Applicant's case that a term is to be implied into the Casual Employment Contract that the Applicant had a recognised right to work, as a presenter, or at large, the ABC says that:

   i) the case law determinations in which such a term has been implied are exceptional, in a special category, and/or anomalous;

   ii) whether a term is to be implied depends upon the terms of the particular contract being construed. In this case, the Casual Employment Contract has express terms that are wholly inconsistent with the term that the Applicant asserts ought to be implied; and

   iii) the Casual Employment Contract is to be construed and understood in the context of 'casual employment'. That context is antithetical to a guarantee of work. Indeed, the Casual Employment Contract, provides expressly that there will be no guarantee of work. The express right for an employer not to provide work, is the reason as to why a guarantee of work is not to be implied.[103] Further, the termination provision of the Casual Employment Contract provides for termination on one hour's notice, which is an express term that is equally inconsistent with an obligation upon the ABC to provide work to the Applicant.[104]

p) there are two answers to the claim made by the Applicant that the variation term contained in the Casual Employment Contract cannot be construed so as to confer a right for the ABC to provide no work at all to the Applicant:

   i) firstly, the claim puts the cart before the horse in that it necessarily assumes that a right to be provided with work exists in the first place; and

   ii) secondly, the ABC could have achieved the same result by exercising its unilateral rights to change the duration of an engagement, including by reducing its outer limit to correspondence with the time that the Applicant has already been engaged.[105]

q) It follows that there is no reason to doubt that the unilateral right to change the work to be performed encompasses the right to change that work by requiring the performance of no work at all.[106]

r) The express absence of a negative covenant under the Casual Employment Contract (per clause 11), which allows for the Applicant to do other work during the course of her engagements and the contract is indicative of there being no implied term requiring the Applicant be allowed to work as the SM Program presenter.[107]

s) Further, the express absence of an obligation on the part of the ABC to publicise the Applicant, or her work at the ABC, equally points against the implication of a term that requires the Applicant be allowed to work at the ABC as the SM Program

presenter. Born out on the Applicant's own evidence is the fact that she never requested such publicity from the ABC.[108]

t) To imply a term of the kind that the Applicant asserts ought to be implied, an employee must be able to show that their future depends upon the implied term being used during their term of employment in the business envisaged by the particular employment contract in question. "The [employee] must be able to show that the publicity resulting from the particular employment in question – not the employment generally with the ABC but this contract, this engagement, they must be able to show that the publicity that resulted from this engagement is of great importance to the future financial position and reputation of that person." It is patently obvious that this necessary test of essentiality cannot be met by an engagement to perform the presenter role on the SM Program for five two and a half hour slots on a casual fill-in engagement. Indeed, none of the case law identifies that a term has been implied for such a slight and insubstantial engagement as the one in this case.[109]

Case law – What is the 'employment relationship'?

[83] The inquiry as to whether or not an employee was dismissed for the purposes of s.386(1)(a) of the Act (and thus terminated for the purposes of s.773(a)) requires focus upon the circumstances of the employment relationship, as opposed to (only) the employment contract. But the circumstances of the employment relationship (including the rights and duties of the parties to that relationship) are at all times directly referrable (and in many cases deferrable) to the terms and conditions contained in the applicable employment contract.[110] This is especially so in cases where the parties have taken the approach that any agreed terms and conditions of employment are to be set out in a written document that constitutes the entire agreement between the parties. As Gageler J stated in *WorkPac Pty Ltd v Rossato*:

> "Mr Rossato relied on non-contractual aspects of his employment relationship (principally the operation of the roster system) only to establish the existence of a firm advance commitment as to the hours that he was to work during his employment. To the extent he sought to establish a firm advance commitment as to the duration of his employment, he was driven to rely solely on the terms of each contract of employment."[111]

[84] The statements of the High Court that "It would be unusual to find an employment relationship defined purely by contract"[112], or that "It would be unusual for [the employment relationship] to be purely contractual"[113] do not assist in defining or otherwise articulating what is actually meant by the term, or concept of, an "employment relationship". Rather, these statements simply highlight that the employment relationship includes the employment contract (encompassing the written and/or oral agreements of the parties, and terms (where applicable) implied by law or fact), the operation of relevant statutory provisions (including awards and enterprise agreements created under same), and applicable fiduciary (or loyalty) and equitable (e.g. confidence) duties.

[85] In *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[114] (**Personnel Contracting**), Gageler and Gleeson JJ stated:

> "Employment at common law has its roots in the relationship of service which the common law recognised between master and servant. Employment is a voluntary relationship between an individual, the employee, and another person, the employer, within which the employee performs a genus of work for the employer – what was traditionally called "service" – in exchange for some form of remuneration."[115]
>
> "Typically, although not universally, the relationship of employment is established and maintained under a contract between the employer and the employee. Throughout the nineteenth century, a contract under which a relationship of master and servant was established was routinely referred to as a contract of service. Moving into the twentieth century, a contract under which a relationship of employer and employee was established and maintained came more commonly to be referred to as a contract of employment."[116]
>
> "…Expressed using other prepositional terms, a contract "of" employment is a contract "for" a relationship of employment. The employment relationship is established and maintained "within" the contractual relationship, the employment relationship does not subsist simply "in" the contractual relationship."[117]
>
> "The relationship of employment is, however, not to be conflated with the contract under which the relationship is established and maintained. The two are "distinct". "The employment is the continual relationship, not the engagement or contracting to employ and to serve." "It is the service ... carried on."[118]
>
> "Whether a continual relationship for which a contract might make provision actually exists at any given time is a question of fact. Whatever the contract might say about the obligations of the parties, a relationship of employment does not exist until the relationship is in fact formed, and the relationship of employment ceases to exist when the relationship is in fact broken. …"[119]

[86] In my view, in its most simple terms, the bringing of an employment relationship to an end concerns the ending of an employee's 'service', such that (for whatever reason) it is, or becomes, no longer necessary for the employee to perform any work for the employer.[120] A determination by an employer to cease an employee's service will end the employment relationship, although it may not bring the employment contract to an end until the employee makes an election for that to occur.[121] A wrongful failure to allow an employee to continue in the employer's service is equally a breach of contract,[122] giving rise to a 'wrongful' dismissal at common law. As Higgins J stated in *Lucy v Commonwealth*:

> "The contract [of employment] is not a mere promise to pay money, but to pay wages for service; and the breach of contract consists in not allowing the employee to continue in the service so as to get the wages. This is the view which I accepted in *Williamson v Commonwealth* [(1907) 5 CLR 174, at 185]."[123] (citations omitted)

[87] The focus upon the ending of 'service' in concluding that the relevant 'employment relationship' has come to an end, also speaks against, when assessing all of the facts and circumstances of a relevant case, the elevation of amorphous concepts (such as non-contractual understandings, or expectations based upon conduct, that are inconsistent with the terms of a

contract) into matters that are relevant (or the real) issues to be weighed when reaching any ultimate finding/s. This focus upon 'service' is also consistent with the outcome in *Broadlex*, whereby an employment relationship (and service under that employment relationship) came to an end when a breach of contract occurred, which, whilst not accepted, gave rise (between the same parties) to a new employment relationship.[124]

Consideration - Was the employment relationship terminated by the ABC in this case?

[88] There is no suggestion in these proceedings that the Applicant's engagement by the ABC has been other than casual.[125]

[89] In *Shortland v The Smith's Snackfood Co Ltd*[126], the Full Bench of the (then) Fair Work Australia pointed out that:

> "As a matter of the common law of employment, and in the absence of an agreement to the contrary, each occasion that a casual employee works is viewed as a separate engagement pursuant to a separate contract of employment. Casual employees may be engaged from week to week, day to day, shift to shift, hour to hour or for any other agreed short period. In this sense no casual employee has a continuous period of employment beyond any single engagement. …"[127]

[90] Casual employees can be dismissed within the meaning of s.386 of the Act, bringing an end to their employment relationship with their employer. There is no general rule that a casual employee, simply because of the distinct manner of their engagements (on a contract by contract basis), cannot ever be dismissed at the employer's initiative. Sections 382-384 of the Act relate to the question of whether or not an employee is protected from unfair dismissal. They are not a consideration in respect of the definition of "dismissal" (or "termination") for the purposes of ss.365 or 773 of the Act.

[91] The employment relationship in this case is both referrable and deferrable to the terms of the Casual Employment Contract. The Applicant accepts that she was bound by its terms. I concur with the position of the parties that the evidence discloses that the Casual Employment Contract is valid and enforceable as between the Applicant and the ABC. I also concur with the submissions of the ABC that the entire agreement term, found at clause 15 of the Casual Employment Contract, is equally valid and enforceable, and is to be applied as it reads. I am not aware of any basis (on the evidence) upon which it is to be considered unenforceable, read down, or be diminished in scope.

[92] At its most basic, when construing a written contract:

a) the evidence to be used is the contractual document itself;

b) the tools to be used are *firstly*, an elemental understanding of the English language, and *secondly*, a dictionary; and

c) the process involves the giving of meaning to text, in a harmonious manner (i.e. having regard to relevant context, including the words of the document as a whole).

[93] Clause 1 of the Casual Employment Contract provides that the Applicant, as a casual employee, will be employed on an engagement by engagement basis, subject to offer and acceptance in respect of each engagement. For each "engagement" that is offered, the ABC is to specify the duration, hours of work, work location, reporting lines, and work to be performed.

[94] The casual engagement that was offered to, and accepted by, the Applicant (**December Engagement**), as required by clause 1 of the Casual Employment Contract, consisted of the following specific details or particulars:

a) the Applicant working on a casual basis for five consecutive weekday shifts, between 6:00AM to 2:36PM (with a one hour break), commencing on Monday, 18 December 2023;

b) during each shift, to be the presenter on the SM Program during the hours of 8:30AM to 11:00AM; and

c) the Applicant being paid at a casual hourly rate of pay for any hours worked.

[95] The Casual Employment Contract contains a term (at clause 13) which provides that a casual engagement may be terminated at any time on one hour's notice (or payment in lieu). Whilst clause 13 states in its first sentence that any "engagement" may be terminated on notice, it is apparent when reading the rest of the words of clause 13 that it is referring to termination of employment (in addition to any engagement). Clause 13 was not utilised by the ABC in respect of the December Engagement, or the Applicant's employment.

[96] The Casual Employment Contract, at clause 1, has a term that provides that 'during' a specific engagement, the ABC, in its absolute discretion, may make unilateral changes to the engagement provided that the Applicant is advised of such changes (**Engagement Change Term**). The Engagement Change Term allows the ABC to make changes to a specific engagement for good reason, for bad reason, or for no reason at all (excluding, of course, unlawful reasons). Changes made pursuant to the Engagement Change Term might include the duration of the engagement (e.g. cutting it short), or altering the work to be performed (e.g. from work as a presenter, to work as a back of house production team member).

[97] The ABC submits that it utilised the Engagement Change Term at the 20 December Meeting so as to vary the remaining 'work to be performed' by the Applicant under the December Engagement, by reducing it to nil. The 'duration' of the December Engagement remained unchanged (i.e. it was not varied). The employment relationship between the Applicant and the ABC thereafter either:

a) ended when the December Engagement ended (or expired) on 22 December 2023 of its own accord (i.e. not at the ABC's initiative); or

b) was suspended when the December Engagement ended (or expired) on 22 December 2023, pending (or awaiting) offer and acceptance to occur in respect of a new engagement (pursuant to the terms of the Casual Employment Contract).

[98] I concur with the foregoing analysis as to the status of the employment relationship if the December Engagement ended on its own terms,[128] however, whether the ending of the December Engagement caused the Applicant's employment with the ABC to end, or be suspended, pursuant to the terms of the Casual Employment Contract, is not material in these proceedings. The Applicant's case is that her employment was terminated, at the ABC's initiative, during the December Engagement (on 20 December 2023), not at its end (on 22 December 2023).

[99] There was nothing said to the Applicant during the 20 December Meeting about the Engagement Change Term being used to alter the work to be performed by her to nil, whilst at the same time leaving the 5 day duration of the engagement unchanged. But this is not to suggest that the ABC needed to, or should have, communicated to the Applicant at the 20 December Meeting that it was expressly relying upon the Engagement Change Term (clause 1) to reduce her work to be performed to nil. Contractual terms can certainly be relied upon in respect of, or retrofitted to, events that have already happened.

[100] There was also nothing said to the Applicant during the 20 December Meeting about her being paid for the whole of her five day engagement (absent her being required to perform work).[129]

[101] Mr Ahern's evidence is that shortly after the 20 December Meeting, Mr Spurway raised in conversation with him about paying the Applicant for the whole of her five day engagement (including for the times that she was rostered to work, but told not to work). Contrary to the evidence of Mr Oliver-Taylor,[130] Mr Ahern says that this is the first time that anyone had raised with him any issue as to the payment of the Applicant for her remaining shifts. Mr Ahern was in agreement for the Applicant to be paid as suggested by Mr Spurway.[131]

[102] Mr Spurway's evidence as to the payment to be made to the Applicant, despite her not being required to work, is consistent with that of Mr Ahern.[132] He gives no evidence of discussing the matter with Mr Oliver-Taylor. Mr Spurway followed up ABC payroll in respect of the payment on 28 or 29 December 2023.[133] The payment ended up being made to the Applicant during the ordinary ABC pay cycle. It is not clear from the evidence as to why Mr Spurway would need to chase-up ABC payroll. I say this in circumstances where the ABC's case is put on the basis that the Applicant had merely been taken off-air, and that it was roundly understood at the ABC internally (pre and immediately post the 20 December Meeting), that any use of the Engagement Change Term was to reduce the Applicant's work to nil, but the Applicant's employment was otherwise to continue (on pay, for no work) until the expiration of the December Engagement on 22 December 2023.

[103] Mr Oliver-Taylor's evidence is that because the Applicant was paid for the whole of her rostered shifts across the five days of her engagement, his opinion is that she was not terminated.[134] Putting to one side Mr Oliver-Taylor's subjective opinion, the issue with this evidence is how Mr Oliver-Taylor became aware that the Applicant was going to be paid after she had been taken off-air.

[104] When Mr Oliver-Taylor instructed Mr Latimer on 20 December 2023 to ask Mr Ahern to hold a meeting with the Applicant to advise her that she was to be taken off-air, the issue as to whether payment would be made to her for the remainder of her shifts was not discussed.[135]

In other words, any intention to pay the Applicant for the remainder of the December Engagement was never raised with Mr Ahern prior to the 20 December Meeting. At no time after his conversation with Mr Latimer, did Mr Oliver-Taylor direct anyone at the ABC to make payment to the Applicant for time she would not be working, however, it might be accepted that this was not within Mr Oliver-Taylor's realm of responsibility. It is not clear from Mr Oliver-Taylor's evidence as to whether the issue of a payment being made to the Applicant for shifts that she was not going to be working was ever discussed prior to the 20 December Meeting. Whilst Mr Oliver-Taylor's evidence is that issues as to "payment", or a "pay out", or "adhering to the terms of the contract", were discussed (or were likely discussed) during the Teams Meeting with Mr Ahern, Mr Melkman, and Mr Latimer on 20 December 2023,[136] Mr Ahern's evidence is that there was no such discussion about payment at the Teams Meeting,[137] and Mr Latimer and Mr Melkman have not given evidence.

[105] I find that the weight of the ABC's own evidence points toward there being no firm position, or even an understanding, leading up to, or immediately after, the 20 December Meeting, that the Applicant was to be paid for the remainder of her shift hours after she was told to leave the ABC's premises. Rather, the Applicant was simply told at the 20 December Meeting that she was being taken off-air (and relieved from performing any further work whatsoever for the remainder of the December Engagement) because of conduct that was considered to be in breach of ABC instruction and/or policy. Another ABC employee immediately took over the presenting (or was swapped in) for the remaining on-air times that the Applicant would have presented (if she had not been taken off-air), and an unplanned or early change, to "summer programming", occurred.[138]

[106] It is also apparent that the payment made to the Applicant for work that was not performed by her is not strictly a payment of "wages", in that it concerns a payment that does not relate to service rendered under the Casual Employment Contract. This is equally consistent with clause 14.6.2 of the ABC EA, which states that "A casual employee is engaged by the hour in return for payment for the hours worked". The situation is not comparable to an ordinary "gardening leave" term, which expressly provides for an employee to be paid, but to perform no work, for a period of time 'after' the employee has already been notified of their termination.[139]

[107] In *Delaney v Staples (t/a De Monfort Recruitment)*[140], Lord Browne-Wilkinson pointed out that a lump sum payment made in lieu of notice is not strictly a payment in respect of 'wages', since it is not remuneration for work done during the continuance of employment.[141] Accepting that the payment made to the Applicant was not a payment in lieu of notice under clause 13 (termination) of the Casual Employment Contract, the question becomes - What is the payment to the Applicant to be classified as? I consider that given the payment does not concern the performance of work, it is not a payment of wages pursuant to the terms of the Casual Employment Contract (i.e. Clause 2 of the Casual Employment Contract, and clause 14.6.2 of the ABC EA, are to be construed as a (casual) rate of pay that is only payable for time worked). If it be classified or defined as anything, the payment for work not performed in this case is perhaps best defined as an *ex gratia* payment, or a gratuity. It is therefore contrary to, or not consistent with, the continued existence of the employment relationship (between the ABC and the Applicant) in that it does not arise from service.

[108] As the ABC has pointed out in its submissions, in the (modern day) ordinary course, a term requiring an employer to provide relevant work to an employee so that wages can be earned will not be implied. In other words, as long as the employee continues to be paid their wages, the employer will not breach the employment contract (or bring an end to the employment relationship) merely by not providing work for the employee to perform. There are, of course, exceptions in respect of special categories of employment (e.g. actors or performers), or where the non-provision of work is for an indefinite period. But the question as to whether or not a direction not to come to work and still be paid wages is the exercise of a valid contractual right, a breach of contract, and/or a termination of the employment relationship, will come down to the relevant facts and circumstances, considered objectively.

[109] Whilst the Applicant was only told at the 20 December Meeting that she was being "taken off-air", the ABC used terminology internally such as "not needed for the rest of the week",[142] and "standdown".[143] The ABC's internal communications in this regard are not relevant, in that they were not communicated to the Applicant at the 20 December Meeting. But the outcome of the 20 December Meeting is relevant. That outcome was that the Applicant would not be continuing to work or provide service pursuant to, or for the remainder of, the December Engagement. The findings at paragraph [57] of this decision directly link this outcome to being at the initiative of the ABC.

[110] In this case, I find that the employment relationship between the Applicant and the ABC, was terminated at the ABC's initiative. The objective facts that I rely upon in making this ultimate finding are:

a) the employment relationship in this case concerns the December Engagement. This relationship is governed by the terms of the Casual Employment Contract;

b) the Casual Employment Contract contains the Engagement Change Term;

c) the outcome of the 20 December Meeting was that the Applicant would not perform any further work at, or service for, the ABC in respect of the remainder of the December Engagement. The Applicant was advised that a decision had been made by the ABC to take her off-air for her remaining two shifts of the December Engagement. The Applicant was not allocated any further or other work to perform, and she was asked to politely leave (sooner rather than later) the ABC premises (meaning that she was immediately relieved of performing any further work or service for the remainder of her shift that day);

d) the ABC's case is that the December Engagement simply came to end by way of the effluxion of time on 22 December 2023, in accordance with the terms of the Casual Employment Contract. It also says that the Applicant being taken off-air (and given no work at all) ought to be found to be a valid exercise of the Engagement Change Term, meaning that the ABC simply did what it was entitled to do under the Casual Employment Contract, and the duration of the December Engagement was not in any way altered. The difficulty is that even if both of these propositions are true, the Applicant's service in her relationship with the ABC ended when she was taken off-air and allocated no further work to do, which on the objective facts of this case,

gave rise to the Applicant no longer being in the service of the ABC, terminating the employment relationship; [144]

e) even if the payments made to the Applicant after she was taken off-air can be said to be attributable to the Casual Employment Contract, which I have significant doubts about, at best they extend the December Engagement from a contractual perspective, but not from an employment relationship perspective;

f) the employment relationship was also brought to an end at the ABC's initiative. As Perram J stated in *Quirk*, s.386(1)(a) of the Act "does not require the [ABC] to pull the trigger but only load the gun".[145] The focus is upon at whose initiative the employment relationship was ended, rather than the precise means by which it ended.[146] The proposition "that there can be no termination of an employment relationship purely because the contract of employment came to an end by operation of law" (e.g. by the effluxion of time) cannot be accepted unless it is accompanied by the words "without any act by the employer";[147]

g) the ABC did not reply to the Applicant's Clarification Email at all, let alone confirm or deny that the Applicant remained employed by the ABC;[148]

h) I do not accept that Ms Green's parting words to the Applicant to the effect of "I would love to have you back" gives rise to any inference that the Applicant remained employed by the ABC in the sense that further engagements are on the cards. Mr Ahern holds the authority to make decisions about engaging temporary or fill-in presenters, and he gave no evidence to the effect that the Applicant would be invited back; and

i) whilst I have taken into account Ms Vagg's evidence in relation to the status of the Applicant's employment on the ABC's software programs and systems, that ordinary procedures were not followed internally to terminate the Applicant, that the Applicant remained in possession of a deactivated building pass, and that she continued to have the ability to access some ABC computer systems, none of this evidence is decisive in the context of the events that have happened.

[111] Given my finding that the Applicant's employment with the ABC was terminated at the ABC's initiative on 20 December 2023 (at the 20 December Meeting), it is unnecessary for me to deal with the remainder of the Applicant's alternative arguments, essentially going to questions of contractual repudiation and acceptance.

The s.723 objection

[112] Paragraph 3, Item 3.1, of the Amended Application (relevantly, with amendments in underline) reads:

> "3. The substantial and operative reasons for Ms Lattouf's dismissal ~~was~~ were or include:
>
> (a) political opinion; or

> (b) political opinion and her race (Lebanese and/or Arab and/or Middle Eastern) and/or national extraction (her Lebanese and/or Arab and/or Middle Eastern heritage and that she is a descendant of foreign immigrants) …"

[113] Section 723 of the Act reads:

> "A person must not make an unlawful termination application in relation to conduct if the person is entitled to make a general protections court application in relation to the conduct."

[114] The ABC submits that whilst the Amended Application is not in conflict with s.723 of the Act to the extent that it contains an allegation as to termination based upon 'political opinion', it is in conflict with s.723 (and cannot proceed further in its current form) to the extent that it seeks to rely upon race and/or national extraction as alternative unlawful conduct grounds. The ABC says that its jurisdictional objection in this regard arises from the application of the Full Bench decision in *Krcho v University of New South Wales*[149] (**Krcho**).

[115] In *Krcho*, the Full Bench held that the prohibition under s.723 of the Act does not extend to allegations as to conduct that are caught by the prohibition, where at least one ground of the combined grounds of alleged conduct is not caught by the prohibition. The ABC says that because the Applicant in this case does not rely upon each of the conduct grounds as aggregated, but as alternatives via the use of the phrase "and/or", the alleged unlawful ground of political opinion can be "hived off". The net effect of the Applicant's "distinct alternatives" approach is that race and/or national extraction are each grounds of conduct that can and ought to be made under a general protections not involving dismissal application, and are thus prohibited from being made in a valid claim under s.773 of the Act.

[116] The Applicant highlights that the Amended Application alleges termination for the unlawful reasons of political opinion, or political opinion 'and' race 'and/or' national extraction, such that political opinion (which is not caught by the s.723 prohibition) is an essential integer in every way that the Applicant puts her case.[150]

[117] I concur with the submissions of the Applicant on this issue. I do not accept that the use of the words 'and/or' have a disjunctive effect upon the ground of political opinion. Rather their disjunctive effect concerns the grounds of race and national extraction, noting that all of the grounds still have a conjunctive effect, or remain aggregated with, political opinion. It follows that consistent with the Full Bench decision in *Krcho*, I find that the allegations as to unlawful conduct made by the Applicant in her Amended Application are not caught by the prohibition under s.723 of the Act. In the formal sense, I grant leave for the Application filed on 22 December 2023 to be amended to the form of the Amended Application filed on 10 January 2024.

Conclusion

[118] For the reason set out in this decision, I have rejected both of the jurisdictional objections raised by the ABC. It is therefore appropriate that both of the ABC's jurisdictional objections

be dismissed. I will make Orders, to be issued contemporaneously with this decision, in the following terms:

A. The jurisdictional objection made by the Respondent in these proceedings that the Applicant's employment was not 'terminated' within the meaning of s.773(a) of the *Fair Work Act* (**Act**), is ***dismissed***.

B. The jurisdictional objection made by the Respondent in these proceedings that the Amended Application (filed on 10 January 2024) has been made contrary to the requirements of s.723 of the Act, is ***dismissed***.

C. Pursuant to s.586(a) of the Act, leave is granted for the Application filed on 22 December 2023 to be amended to the form of the Amended Application filed on 10 January 2024.

[119] If the parties wish to hold a further private conference before the Commission, as presently constituted or with another member of the Commission, they should notify my Chambers via email. Alternatively, a certificate can be issued pursuant to s.776(3) of the Act.

DEPUTY PRESIDENT

Appearances:

Mr *Mark Gibian*, of Senior Counsel, instructed by Mr *Josh Bornstein*, Principal, and Ms *Penelope Parker*, Senior Associate, Maurice Blackburn Lawyers, appeared for the Applicant.

Mr *Ian Neil*, of Senior Counsel, and Ms *Vanja Bulut*, of Counsel, instructed by Mr *Ben Dudley*, Partner, Ms *Mary-Anne Nolan*, Associate, and Ms *Gabrielle Wilson*, Associate, Seyfarth Shaw Australia lawyers, appeared for the Respondent.

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[1] Amended Application (Form F9, filed 10 January 2024), at Item 3.1 [3(b)]. I note that the Amended Form F9, at Item 3.1, fails to make any mention of race and/or national extraction (as combined with political opinion, or otherwise), and at Item 4.1 it fails to seek any declaratory relief based on the grounds of race and/or national extraction (as combined with political opinion, or otherwise).

[2] [2024] FWC 423.
[3] [2024] FWC 570.
[4] Permission was granted under s.596 of the *Fair Work Act 2009* for each party to be legally represented generally in these proceedings.
[5] Transcript, 13 February 2024, PN107.
[6] Exhibit A1, Antoinette Lattouf Witness Statement (19 February 2024), at [4]-[9], CB pp.146-147.
[7] Amended Form F9, 10 January 2024, at Item 3.1.
[8] Transcript, PN1725-PN1802. Amended Form F9, 10 January 2024, at Item 3.1.
[9] Exhibit A1, Antoinette Lattouf Witness Statement (19 February 2024), at [10]. CB p.147.
[10] Ibid, at [11], CB p.147. However, note Amended Form F9, 10 January 2024, at Item 3.1, [7].
[11] Ibid, at [12]-[16], CB p.147. There is also a reference to the Applicant's "most recent previous employment" at the ABC as being on 15 May 2023 (CB, p.11), however, there is no other evidence of this engagement.
[12] Ibid, at [17], CB pp.147-148; Transcript, PN1264. The SM Program presenter timeslot is (ordinarily) on-air between 8:30AM and 11:00AM each weekday.
[13] [2023] FWCA 2591, AE521150.
[14] The Applicant's submissions refer to the Ts &Cs contained in the Casual Employment Contract as "Standard Terms".
[15] See paragraph [17] of this decision in relation to previous casual engagements, and Exhibits R8 (CB pp.212-218); R9 (CB pp.226-230); and R10 (CB pp.235-240). See also, CB pp.219-222.
[16] Exhibit A1, Antoinette Lattouf Witness Statement (19 February 2024), Annexure AL1, CB pp.155-162. This is consistent with the evidence of Ms Green: Exhibit R7, Elizabeth Green Witness Statement (26 February 2024), at [9]-[13], CB pp.137-139.
[17] Exhibit R2, Monica Vagg Witness Statement (2 February 2024). CB pp.66-101.
[18] Ibid, at [9]-[10], [18], and [20], CB pp.68 and 70-71.
[19] Ibid, at [24] and [26], CB pp.72-73.
[20] Ibid, at [11]-[16], and [19], CB pp. 69 and 71.
[21] Ibid, at [24], CB p.72.
[22] Ibid, at [25], CB p.73. Transcript, PN1915-PN1917.
[23] Exhibit R2, Monica Vagg Witness Statement (2 February 2024), at [23], and Annexure MV-6, CB pp. 72 and 98.
[24] Transcript, 8 March 2024, PN198.
[25] Exhibit R1, Christopher Oliver-Taylor Witness Statement (2 February 2024), at [6]-[8], CB p.61.
[26] Transcript, PN213-PN214.
[27] Transcript, PN291.
[28] Ibid, 8 March 2024, PN209-PN219 (I do not accept that Mr Oliver-Taylor's use of words such as "rarely" and 'maybe" lifts his status to that of decision-maker or contributor in relation to the selection of replacement presenters). Note also, Transcript, PN786-PN796, PN801-PN807, and PN1259.
[29] Transcript, PN786-PN796, PN801-PN807, and PN1259. CB, p.13 (Applicant's engagement was approved by Mr Ahern on 24 November 2023, at 3:41PM).
[30] The Casual Employment Contract was sent to the Applicant via email on 24 November 2023 by Mr Aidan Fonternel of the ABC. See, Exhibit A1, Antoinette Lattouf Witness Statement (19 February 2024), at [21]-[22], CB p.148. Applicant's reply email can be found at Exhibit R2, Ms Monica Vagg Witness Statement (2 February 2024), Annexure MV-3, CB p.79.
[31] Applicant's Submissions, 19 February 2024, at [15]. Transcript, PN2175.
[32] Exhibit A1, Antoinette Lattouf Witness Statement (19 February 2024), Annexure AL2, CB pp.163-167.
[33] See Exhibits R8 (CB pp.212-218); R9 (CB pp.226-230); and R10 (CB pp.235-240).
[34] See clause 14.6.1 of the *ABC Enterprise Agreement 2022-2025*.
[35] That is, in the absence of a documented conversion to full or part-time employment, or pursuant to an agreement of the relevant employer and employee concerned to alter the employee's status as a casual employee.
[36] Transcript, PN223, 233-234, PN313, PN343 .
[37] Ibid, PN303 PN313, PN343.
[38] Ibid, PN406.
[39] It is apparent from the evidence that external complaints about the Applicant being or remaining on-air were received by the ABC throughout the week commencing 18 December 2023.
[40] Exhibit A5.

[41] Ibid. This is the first time that Ms Green became aware that any complaints had been made about the Applicant: Transcript, PN1340-PN1342.
[42] Exhibit A1, Antoinette Lattouf Witness Statement (19 February 2024), at [26], CB p.149.
[43] Transcript, PN1416. See also at PN1449-PN1451. But note email from Mr Ben Latimer, 20 December 2023 (12:19PM), to Mr Ahern (and others), "Subject: 702 guest presenter", stating that the clear instructions were to direct Antoinette not to post to socials for the rest of this week", found at Exhibit R4, Steve Ahern Witness Statement (2 February 2024), Annexure SA-3, CB p. 122. See also Transcript, PN378-PN382, and PN411.
[44] Exhibit A1, Antoinette Lattouf Witness Statement (19 February 2024), at [27], and Annexure AL3, CB pp.168-171.
[45] Ibid, at [28], CB p.149. Confirmed by Ms Green, see Transcript, PN1373.
[46] Amended Form F9, 10 January 2024, at Item 3.1, [12].
[47] Exhibit A1, Antoinette Lattouf Witness Statement (19 February 2024), at [26] and [39], CB pp.149-150.
[48] Transcript, PN1386-PN1387, PN1424-PN1425, and PN1455.
[49] Ibid, PN1430.
[50] Ibid, PN1410-PN1411, and PN1430. See also Amended Form F9, 10 January 2024, at Item 3.1, [15].
[51] Exhibit R1, Christopher Oliver-Taylor Witness Statement (2 February 2024), at [9]-[10], and [12] CB pp.61-62.
[52] Ibid, at [9], CB p.61. See also Transcript, PN479-PN486, PN578, and PN645-PN648.
[53] Transcript, PN461.
[54] Ibid, PN471.
[55] Ibid, PN481-PN485.
[56] Ibid, PN463-PN464, PN570-PN574.
[57] See paragraph [46] of this decision.
[58] Ibid: PN542-PN551 and PN557-PN577.
[59] Exhibit A3.
[60] Transcript, PN560-PN568.
[61] Ibid, PN488, PN496, PN503, PN561-PN565.
[62] Ibid, PN871-PN874, PN1044, PN1096, and PN1099. The context for this telephone call arises from the Teams meeting held between Mr Oliver-Taylor, Mr Ahern, Mr Latimer and Mr Melkman on 20 December 2023 (see paragraph [46] of this decision).
[63] Exhibit R1, Christopher Oliver-Taylor Witness Statement (2 February 2024), Annexure COT-1, CB pp.63-64.
[64] Exhibit A1, Antoinette Lattouf Witness Statement (19 February 2024), at [37]-[39], and [58]-[61], CB pp.150-151 and 153-154; Exhibit R3, Ronald (Mark) Spurway Witness Statement (2 February 2024), at [11]-[13], CB p.104; Exhibit R4, Steve Ahern Witness Statement (2 February 2024), at [14]-[21], CB pp.114-116; Exhibit R5, Steve Ahern Reply Witness Statement (26 February 2024), at [8]-[11], CB pp.135-136; Exhibit R6, Ronald (Mark) Spurway Reply Witness Statement (27 February 2024), at [4]-[5], CB pp.110-111; Exhibit R7, Elizabeth Green Witness Statement (26 February 2024), at [17], CB pp.140; Note also Exhibit R1, Christopher Oliver-Taylor Witness Statement (2 February 2024), at [9]-[10], [12], and Annexure COT-1, CB pp.61-64; Transcript: Mr Ahern (PN1110-PN1134, PN1152, PN1168, PN1175, PN1190, and PN1196), Ms Green (PN1434-PN143, PN1448, PN1457-PN1474); Mr Spurway (PN1627, PN1638-PN1642); Ms Lattouf (PN1838, PN1843-PN1844, PN1852, PN1866, PN18765-PN1877, PN1883-PN1884, PN1898-PN1899).
[65] I note that Mr Ahern texted Mr Latimer at 1:35PM on 20 December 2023 stating: "It's done.": Exhibit R4, Steve Ahern Witness Statement (2 February 2024), Annexure SA-2, CB p.120.
[66] Exhibit A1, Antoinette Lattouf Witness Statement (19 February 2024), at [43], CB pp.151-152; Exhibit R7, Elizabeth Green Witness Statement (26 February 2024), at [20]-[27], [36], and Annexure EG-01, CB pp.140-141 and 143-145;
[67] Exhibit A1, Antoinette Lattouf Witness Statement (19 February 2024), Annexure AL7, CB pp. 177-179.
[68] Exhibit R4, Steve Ahern Witness Statement (2 February 2024), Annexure SA-5, CB p.128-129.
[69] Exhibit A4.
[70] Ibid.
[71] See the decision of the Full Federal Court in *Coles Supply Chain v Milford* [2020] FCAFC 152, at [74]-[75], and *Lipa Pharmaceuticals Ltd v Mariam Jarouche* [2023] FWCFB 101, at [23].
[72] ABC's Submissions, 2 February 2024, at [23]-[27]. Applicant's Submissions, 19 February 2024, at [5].
[73] In relation to the application of s.386 to general protections involving dismissal claims, see *Coles Supply Chain v Milford* (2020) 300 IR 146, and *Fair Work Ombudsman v Austrend International* (2018) 273 IR 439. See also the discussion in *Morris v Allied Express Transport* [2016] FCCA 1589, at [116] and [117], and *Searle v Moly Mines Limited* [2008] AIRCFB 1088; (2008) 174 IR 21, at [17].

[74] [2017] FWCFB 5162; (2017) 273 IR 441.
[75] [2022] FWCFB 55; (2022) 316 IR 1.
[76] Ibid, at [45].
[77] [2022] FWCFB 171; (2022) 318 IR 389.
[78] Ibid, at [123]-[131].
[79] [2021] FCA 1587. Note appeal in *Construction, Forestry, Maritime, Mining and Energy Union v Quirk* [2023] FCAFC 16. Endorsed in *Alouani-Roby v National Rugby League Limited* [2022] FWCFB 171; (2022) 318 IR 389.
[80] Ibid, at [216] (citing, *Mahony v White* [2016] FCAFC 160; 262 IR 221, at [22], which in turn cited *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* [1995] IRCA 625; (1995) 62 IR 200, at 205-206).
[81] *Mahony v White* [2016] FCAFC 160; 262 IR 221.
[82] *Mylan v Health Services Union NSW* [2013] FCA 190.
[83] [2021] FCA 1587, at [218]-[225].
[84] [2020] FCA 867; (2020) 296 IR 425.
[85] Ibid, at [91].
[86] Applicant's Submissions, 19 February 2024, at [1]-[9]. The Applicant's Submissions use the term "summary dismissal", however, it is of no moment as to whether the Applicant was dismissed, or summarily dismissed, for the purposes of these proceedings.
[87] Transcript, PN2088.
[88] Ibid, PN2119-PN2120. See also, at PN2231-PN2233, and PN2326.
[89] Ibid, PN2096-PN2117, PN2170, PN2269-PN2294, PN2319-PN2323, and PN2295-PN2296.
[90] Ibid, PN2144-PN2230, PN2296, and PN2315, PN2325.
[91] ABC's Submissions, 2 February 2024, at [33]-[39]. ABC's Reply Submissions, 26 February 2024, at [37]-[39].
[92] Transcript, PN2004-PN2008.
[93] Applicant's Submissions, 19 February 2024, at [12].
[94] Transcript, PN2026-PN2027.
[95] Applicant's Submissions, 19 February 2024, at [12].
[96] Transcript, PN2028.
[97] Ibid, PN2028-PN2034, and PN2052.
[98] Ibid, PN2036.
[99] Ibid, PN2037.
[100] Ibid, PN2039-PN2041
[101] Transcript, PN2048-PN2050.
[102] Applicant's Submissions, 19 February 2024, at [30].
[103] *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32, at [16].
[104] Transcript, PN2070.
[105] Ibid, PN2067-PN2068.
[106] Ibid, PN2069.
[107] Ibid, PN2072-2073.
[108] Ibid, PN2074-PN2076. Contrast the facts in *Marbe v George Edwardes (Daly's Theatre) Ltd* [1928] 1 KB 269, and *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322.
[109] Transcript, PN1809-PN1834, and PN2078-PN2080.
[110] *WorkPac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 CLR 456, at [117], per Gageler J. See DP Cross' summary of the key take-outs from the High Court *Rossato* decision in *Timothy Andrew Alouani-Roby v National Rugby League Limited, Bernard Sutton and Graham Annesley* [2021] FWC 6282, at [50]. These key take-outs were untouched by the Commission's Full Bench on appeal in [2022] FWCFB 171; (2022) 318 IR 389, with a judicial review of the Full Bench decision dismissed in [2024] FCA 12.
[111] *WorkPac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 CLR 456, at [117].
[112] *Commonwealth Bank of Australia v Barker* [2014] HCA 32, at [16].
[113] *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312, at [17] and [26].
[114] [2022] HCA 1; (2022) 275 CLR 265.
[115] Ibid, at [104].
[116] Ibid, at [105].
[117] Ibid, at [106].
[118] Ibid, at [110].
[119] Ibid, at [111].

[120] *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435, at 450-452, 454, 461-462, 463 and 476; *Tullett Prebon (Australia) Pty Limited v Purcell* [2009] NSWSC 1079, per Ward J, at [38]-[41]; *Lucy v Commonwealth* (1923) 33 CLR 229, at 248.8; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361, at 369-370; *Searle v Moly Mines Limited* [2008] AIRCFB 1088; (2008) 174 IR 21, at [22]; *Trollope & Sons v Martyn Bros* [1934] 2 KB 436, at 456 (the provision of an opportunity for the plaintiffs to earn a commission being removed by the conduct of the defendants).

[121] *Conway-Cook v Town of Kwinana* [2001] WASCA 250; (2001) 108 IR 421, at [29]; *Broadlex Services Pty Ltd v United Worker's Union George* [2020] FCA 867; (2020) 296 IR 425, at [61]-[91].

[122] *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435, at 450. See also *Liddle v Central Australia Legal Aid Service* (1999) 150 FLR 142, at 155; *Health Services Union of West Australia v Director General of Health* (2008) 175 IR 13, at 62-68, and *Francis v Municipal Council of Kuala Lumpur*, [1962] 3 All ER 633, at 637.

[123] *Lucy v Commonwealth* (1923) 33 CLR 229, at 248.8.

[124] *Broadlex Services Pty Ltd v United Worker's Union George* [2020] FCA 867; (2020) 296 IR 425, at [70].

[125] *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456; Section 15A of the *Fair Work Act 2009*.

[126] [2010] FWAFB 5709, at [10].

[127] Ibid.

[128] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*, [2022] HCA 1; (2022) 275 CLR 265, at [109]. Note also the use of the words "the employment is terminated at the end of the [period, task, season or training arrangement] under s.386(2)(a) and (b) of the *Fair Work Act 2009*.

[129] Exhibit R3, Ronald (Mark) Spurway Witness Statement (2 February 2024), Annexure SA-3, CB pp.121-122.

[130] See paragraphs [100]-[104] of this decision.

[131] Transcript, PN1191-PN1197; Compare Steve Ahern Witness Statement (2 February 2024), at [22], CB p.116, "always my intention".

[132] Transcript, PN1644-PN1655.

[133] Exhibit R3, Ronald (Mark) Spurway Witness Statement (2 February 2024), at [18]-[19]. CB pp.104-105.

[134] Transcript, PN623-PN632.

[135] Exhibit R1, Christopher Oliver-Taylor Witness Statement (2 February 2024), at [10-[12], CB p.61.

[136] Transcript, PN635-PN652.

[137] See paragraphs [100]-[104] of this decision. The Teams meeting was held between Mr Oliver-Taylor, Mr Ahern, Mr Latimer and Mr Melkman on 20 December 2023 (see paragraph [46] of this decision).

[138] Transcript, PN831.

[139] *Delaney v Staples (t/a De Monfort Recruitment)* [1992] 1 AC 687; [1992] 1 All ER 944, at 947(c) to 948(c).

[140] [1992] 1 AC 687; [1992] 1 All ER 944.

[141] [1992] 1 All ER 944, at 947(c) to 948(c).

[142] See paragraph [54] of this decision.

[143] Exhibit A3. Transcript, PN642.

[144] *Quirk v Construction, Forestry, Maritime, Mining and Energy Union* [2021] FCA 1587, at [218]-[225].

[145] Ibid.

[146] Ibid.

[147] Ibid,

[148] See paragraphs [59] and [60] of this decision, and the case of *Zvetanka Raskov v Adecco Australia Pty Ltd* [2024] FWC 584, at [49].

[149] [2021] FWCFB 3908, especially at [38]-[39].

[150] Applicant's Submissions, 19 February 2024, at [51]-[54].