

## NOTICE OF FILING

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Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Registrar

### Important Information

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FEDERAL COURT OF AUSTRALIA  
REGISTRY: NEW SOUTH WALES  
DIVISION: FAIR WORK

**ANTOINETTE LATTOUF**

Applicant

**AUSTRALIAN BROADCASTING CORPORATION**

Respondent

**RESPONDENT'S OPENING SUBMISSIONS**

**A. THE APPLICANT'S CLAIMS**

[1] The Applicant, Ms Antoinette **Lattouf**, brings two claims arising out of her casual employment with the Respondent, the Australian Broadcasting Corporation (**ABC**).

[2] Ms Lattouf's first claim, as pleaded in the Further Consolidated Amended Statement of Claim dated 14 October 2024 (**FCASOC**), is that her employment was terminated on 20 December 2023 in contravention of s 772(1)(f) of the *Fair Work Act 2009* (Cth)<sup>1</sup>, in that the ABC terminated Ms Lattouf's employment for reasons that included:<sup>2</sup>

- a. one or more of Ms Lattouf's alleged "political opinions", as pleaded in paragraph 1A of the FCASOC; or
- b. one or more of Ms Lattouf's alleged "political opinions", as pleaded in paragraph 1A of the FCASOC and either or both of her:
  - (i) race, being any one or more of what are said to be the Lebanese, Arab and Middle Eastern races; and
  - (ii) national extraction, being what is said to be one or more of her Lebanese, Arab and Middle Eastern heritage, and that she is a descendant of foreign immigrants.

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<sup>1</sup> All further statutory references are to provisions of the *Fair Work Act*, unless specified otherwise.

<sup>2</sup> FCASOC at paras 45B and 45C.

- [3] Ms Lattouf’s second claim is that the ABC breached the *ABC Enterprise Agreement 2022–2025* by:
- a. failing to follow the investigative process prescribed in cl 55.2<sup>3</sup>; and
  - b. summarily terminating Ms Lattouf’s employment on 20 December 2023, in contravention of cl 57.1.1<sup>4</sup>; or
  - c. repudiating Ms Lattouf’s employment contract, thereby terminating her employment on a basis not set out in cl 57.1.1<sup>5</sup>; or
  - d. not allowing Ms Lattouf to present the *Sydney Mornings* radio programme on ABC Radio Sydney on 21 and 22 December 2023, being a sanction not authorised under the *Enterprise Agreement*.<sup>6</sup>
- [4] Ms Lattouf has abandoned her earlier claim for reinstatement, and now seeks only monetary compensation in the amount of \$100,000 to \$150,000, for what she claims is non-economic loss and damage, being hurt and distress suffered by reason of one or more of the contraventions pleaded in the FCASOC. Ms Lattouf no longer claims loss suffered by reason of reputational harm, nor does she claim economic loss.
- [5] For the reasons that follow, the ABC’s case is that it did not contravene the *Fair Work Act* or breach the *Enterprise Agreement*, whether as alleged or at all, and that Ms Lattouf has not, in any event, established a case for compensation.

## **B. DRAMATIS PERSONAE**

- [6] The ABC is a Commonwealth statutory corporation established by s 5(1) of the *Australian Broadcasting Corporation Act 1983* (Cth). By s 6(1) of that Act, the functions of the ABC include to provide broadcasting services and programmes. Independence and impartiality are central to its statutory obligations.<sup>7</sup>
- [7] Ms Lattouf describes herself as “a freelance journalist”, a “content creator”, a “public presenter”, and a “speaker”.<sup>8</sup> Her evidence is that she “frequently appeared on mainstream television and radio, including on panel shows such as Studio10, Q&A, Insiders, Sky News, The Drum, local radio as

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<sup>3</sup> FCASOC at para 30.

<sup>4</sup> FCASOC at para 35.

<sup>5</sup> FCASOC at para 41.

<sup>6</sup> FCASOC at para 44.

<sup>7</sup> Affidavit, Anderson, 14.10.24, [15]-[26]; Affidavit, Melkman, [12]-[14], and the “Independence, integrity and responsibility” and “Impartiality and diversity of perspectives” Editorial Policies, at Ex SM-1, Tab 1, pp 6-7 and 11-12.

<sup>8</sup> Affidavit, Lattouf, 09.09.24, [4], [15].

well as creating [her] own content”.<sup>9</sup> She had done some work for the ABC in 2022, including as “a casual radio presenter”.<sup>10</sup>

[8] *Mornings* is a programme broadcast by the ABC on a radio station known as **ABC Radio Sydney**.<sup>11</sup> The ABC’s website says about *Mornings*, “Keep informed, amused, entertained and inspired each weekday morning with local Sydney stories, political insights, your opinions and engaging discussions”. Christopher **Oliver-Taylor**, who as the ABC’s Chief Content Officer at the time was ultimately responsible for *Mornings*, endorsed that as an accurate description of the programme. His evidence continued:<sup>12</sup>

While it is a light programme, it includes political content. A feature of the programme is that listeners “phone in” to discuss their opinions with the presenters. These can, and often do, involve political subjects. The programme is regularly punctuated by the ABC’s regular news segments. At the time of the events that are the subject of [these proceedings], those segments often featured news items about the Israel-Gaza war.

[9] In December 2023, the ABC was relevantly organised as follows:

- a. Ita **Buttrose** was the Chair of the ABC’s Board.
- b. David **Anderson** was the ABC’s Managing Director.
- c. As the Chief Content Officer, Mr Oliver-Taylor headed the Content Division. He reported to Mr Anderson. Mr Oliver-Taylor was responsible for all content that went to air on the ABC across all platforms – screen, audio and digital – apart from news content. His portfolio included responsibility for ABC Radio Sydney, although he had “very limited interaction on a daily basis with particular programmes such as [*Mornings*]”.<sup>13</sup>
- d. Ben **Latimer** was the ABC’s Head of Audio Content. He reported to Mr Oliver-Taylor. Mr Latimer had the direct management responsibility for the programmes on ABC Sydney Radio.<sup>14</sup>
- e. Stephen **Ahern** was the Acting Head of the ABC’s Capital City Networks.<sup>15</sup> In that position he was responsible for overseeing and managing the operation of all Australian capital city radio stations operated by the ABC.<sup>16</sup> One of those stations was ABC Radio Sydney.

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<sup>9</sup> Affidavit, Lattouf, 09.09.24,[7].

<sup>10</sup> Affidavit, Lattouf, 09.09.24,[16]-[19].

<sup>11</sup> Affidavit, Ahern, 14.10.24, [18]; Affidavit, Spurway, 11.10.24, [8].

<sup>12</sup> Affidavit, Oliver-Taylor, 11.10.24, [14].

<sup>13</sup> Affidavit, Oliver-Taylor, 11.10.24, [11]-[13].

<sup>14</sup> Affidavit, Oliver-Taylor, 11.10.24, [12]-[13]; Affidavit, Latimer, 14.10.24, [8]-[10].

<sup>15</sup> Affidavit, Ahern, 14.10.24, [15]-[17].

<sup>16</sup> Affidavit, Ahern, 14.10.24, [16].

- f. Mark **Spurway** was then the Acting Manager of ABC Radio Sydney. He reported to Mr Ahern.<sup>17</sup>
- g. Elizabeth **Green** was the Content Director ABC Radio Sydney.<sup>18</sup> Her responsibilities included leading and developing teams to deliver programmes that go to air on ABC Radio Sydney.<sup>19</sup> *Mornings* was one of those programmes. Ms Green reported to Mr Spurway.<sup>20</sup>
- h. Simon **Melkman** was the Acting Editorial Director, reporting to Mr Anderson.<sup>21</sup> In this (acting) position, Mr Melkman headed up the ABC's Editorial Policies division, which is responsible for providing pre-broadcasting editorial advice to content makers across the ABC.<sup>22</sup>

### C. THE SALIENT EVENTS

[10] The salient events involve five distinct phases.

#### Phase One: November 2023

[11] The ABC employed Ms Lattouf as a casual employee.<sup>23</sup> Her immediate engagement was as a “stand in host” to fill in for five days in December 2023 when the presenter of *Mornings* was to be on leave. The last day on which Ms Lattouf was to go to air was Friday, 22 December. One factor in the decision to engage Ms Lattouf was that she was from a “racially diverse background”.<sup>24</sup> No one checked Ms Lattouf's previous social media activity.<sup>25</sup>

#### Phase Two: Monday, 18 December 2023

[12] Ms Lattouf presented her first show on Monday, 18 December.

[13] Controversy quickly followed. The ABC began to receive **Complaints** about her engagement; it was said that she was a partisan for one perspective on the events in Gaza that were then a particular focus of public interest and controversy. Some of the Complaints went to Ms Buttrose and Mr Anderson.

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<sup>17</sup> Affidavit, Ahern, 14.10.24, [15]-[16]; Affidavit, Spurway, 11.10.24, [4], [10].

<sup>18</sup> Affidavit, Green, 14.10.24, [6].

<sup>19</sup> Affidavit, Green, 14.10.24, [9(c)].

<sup>20</sup> Affidavit, Green, 14.10.24, [11].

<sup>21</sup> Affidavit, Melkman, 14.10.24, [10].

<sup>22</sup> Affidavit, Melkman, 14.10.24, [9].

<sup>23</sup> Affidavit, Vagg, 11.10.24, Ann MV-3.

<sup>24</sup> Affidavit, Green, 14.10.24, [18(c)].

<sup>25</sup> Affidavit, Green, 14.10.24, [18(a)]; Affidavit, Ahern, 14.10.24, [30].

- [14] Mr Anderson raised the fact that he had received Complaints with Mr Oliver-Taylor, who then sent an email early that afternoon to Mr Ahern:
- a. querying whether Ms Lattouf’s “public views may mean that she is in conflict with [the ABC’s] own editorial policies”;
  - b. instructing Mr Ahern to “ensure that [Ms Lattouf] is not and has not been posting anything that would suggest she is not impartial”; and
  - c. indicating that he was “not suggesting [they] make any changes at this time, but the perceived or actual lack of impartiality of her views [were] concerning”.<sup>26</sup>
- [15] The enquiries this email initiated included consideration of whether anything Ms Lattouf had written or posted before her engagement began conflicted with the ABC’s editorial policies. Mr Melkman was consulted; his advice was placatory.<sup>27</sup>
- [16] Reassured by this, and by Mr Ahern’s assurance that Ms Lattouf’s show did, and would, not “contain any content about Israel-Gaza”, Mr Oliver-Taylor wrapped up the enquiries occasioned by the Complaints by telling, *inter alia*, Mr Ahern, Mr Latimer, and Mr Melkman that he would explain to Mr Anderson that “we have reviewed and expect [Ms Lattouf] to continue on air this week and finish on Friday”.<sup>28</sup>
- [17] Mr Oliver-Taylor then sent an email to Mr Anderson in which he said, “[Ms Lattouf] will finish on Friday”.<sup>29</sup>
- [18] Mr Anderson read, considered and accepted this position, which he understood to be that Ms Lattouf would continue to present *Mornings* until the end of the week.<sup>30</sup>
- [19] At Mr Ahern’s direction, Ms Green spoke with Ms Lattouf about her social media activity while she was presenting *Mornings*. The evidence will be that the substance of Mr Ahern’s direction was that Ms Lattouf should be reminded not to post anything on her social media that would suggest that she was not impartial. There is an issue as to what words Ms Green used when she spoke with Ms Lattouf. Nevertheless, whatever may be the resolution of that issue, the ABC’s case is that it should have been clear to Ms Lattouf from her conversation with Ms Green that the ABC expected that she would not post anything controversial on her social media about events in Gaza during the period she was presenting *Mornings*.
- [20] Central to the case constructed by Ms Lattouf is the allegation that Mr Anderson and Mr Oliver-Taylor desired “to be rid” of her by her “immediate removal” once they discovered that she had

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<sup>26</sup> Affidavit, Oliver-Taylor, 11.10.24, Ex COT-01, Tab 5.

<sup>27</sup> Affidavit, Melkman, 14.10.24, Ex SM-01, Tab 5.

<sup>28</sup> Affidavit, Oliver-Taylor, 11.10.24, Ex COT-01, Tab 14.

<sup>29</sup> Affidavit, Oliver-Taylor, 11.10.24, Ex COT-01, Tab 15.

<sup>30</sup> Affidavit, Anderson, 14.10.24, [41].

particular views.<sup>31</sup> In fact, their conduct in Phase Two was emphatically to the opposite effect: by the end of Phase Two, notwithstanding the Complaints, Mr Anderson and Mr Oliver-Taylor had made and enacted a definite decision that she would *stay on air* until the end of her engagement on *Mornings* at the end of that week.

[21] Also central to Ms Lattouf's construct is the thesis that the Complaints had an enduring significance, and were the ultimate cause of the later decision that she not be required to present *Mornings* on Thursday, 21 December and Friday, 22 December. In fact, the Complaints ceased to have any operative significance by the end of Phase Two. They had caused the ABC to consider both her activities before her engagement began, and her presentation of *Mornings*. That consideration resulted in a decision that, notwithstanding the Complaints, Ms Lattouf would "continue on air this week and finish on Friday".<sup>32</sup> The ABC's case is that the only legacy of the Complaints that endured after the end of Phase Two was that they had initiated a sequence of events that culminated in Ms Green communicating to Ms Lattouf the ABC's expectation that she would not post anything controversial about events in Gaza during the period when she was presenting *Mornings*.

### **Phase Three: the evening of Monday, 18 December 2023 and the morning of Tuesday, 19 December 2023**

[22] During the evening of Monday, 18 December, Mr Anderson, acting alone, looked for and found some of Ms Lattouf's social media posts. Seemingly, these were posts that had not previously come to the notice of the senior management at the ABC. Mr Anderson thought that the posts were "full of ant-Semitic [sic] hatred", and became seriously alarmed that they gave rise to a "reputational issue", in that they might cause Ms Lattouf to be perceived as not impartial.<sup>33</sup>

[23] Mr Anderson sent the posts to Mr Oliver-Taylor, who shared Mr Anderson's concern.<sup>34</sup> Mr Oliver-Taylor, now apprised of what he thought was the partisan quality of some of Ms Lattouf's posts, initially thought that Ms Lattouf's position was "hugely problematic" and indicated that Mr Melkman and Mr Ahern would look at Ms Lattouf's social media posts.<sup>35</sup> Mr Ahern immediately raised the question about whether Ms Lattouf would need to be taken off air, but that if that was to be done the next day it would be disruptive.<sup>36</sup> Mr Oliver-Taylor responded saying "Not tomorrow" and "let's cautiously review"<sup>37</sup>, and later "carefully think things through".<sup>38</sup>

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<sup>31</sup> Applicant's Outline, 13.01.25, [19].

<sup>32</sup> Affidavit, Oliver-Taylor, 11.10.24, Ex COT-01, Tab 14.

<sup>33</sup> Affidavit, Anderson, 14.10.24, Ex DA-01, Tab 6.

<sup>34</sup> Affidavit, Anderson, 14.10.24, Ex DA-01, Tab 6.

<sup>35</sup> Affidavit, Oliver-Taylor, Ex COT-01, Tab 17.

<sup>36</sup> Affidavit, Oliver-Taylor, 11.10.24, Ex COT-01, Tab 19.

<sup>37</sup> Affidavit, Oliver-Taylor, 11.10.24, Ex COT-01, Tab 20.

<sup>38</sup> Affidavit, Oliver-Taylor, 11.10.24, Ex COT-01, Tab 23.

- [24] Mr Melkman quickly intervened. Writing late that night to Mr Oliver-Taylor, Mr Latimer and Mr Ahern, he advised caution, and that cutting Ms Lattouf's engagement short on account of the newly discovered posts would not be warranted.<sup>39</sup>
- [25] The following morning, on Tuesday, 19 December, Mr Ahern, Mr Latimer and Mr Melkman met to discuss Ms Lattouf's previous social media activity. Mr Melkman confirmed the views he had expressed in Phase Two. Mitigants were discussed for the purpose of reducing risk to the ABC and for Ms Lattouf's protection, including that Ms Lattouf keep a low profile on social media, and that the *Mornings* team be reminded to use the "dump button" to drop any live radio talk-back caller who raised the topic of the Israel-Gaza conflict. Mr Melkman summarised the discussion in an email, including: "I don't believe there's any justification for pulling her off air".<sup>40</sup>
- [26] That position was communicated to, and accepted by, Mr Oliver-Taylor as "our position".<sup>41</sup>
- [27] Mr Oliver-Taylor then sent an email to Mr Anderson, copied to Mr Latimer and Mr Melkman, advising Mr Anderson that "our view is that as [Ms Lattouf's] contract finishes on Friday, we do not believe we should pull her off air at this time".<sup>42</sup>
- [28] Late on the morning of Tuesday, 19 December, Mr Anderson read, considered and accepted this advice, which he understood to be that at that time, having regard to all that was known about Ms Lattouf's social media activity and public statements, there was no justification for taking her off air.<sup>43</sup>
- [29] Mr Anderson then met with Ms Buttrose, still in the morning on Tuesday, 19 December. The evidence will be that Ms Buttrose was nonplussed by Complaints that she had been receiving about Ms Lattouf's engagement, but that Mr Anderson told her, as was the case, that it had been decided that Ms Lattouf would stay on air until her engagement came to an end on Friday, 22 December.
- [30] Early in the afternoon of Tuesday, 19 December, Mr Ahern confirmed to Mr Latimer, Mr Melkman and Mr Oliver-Taylor that the agreed mitigants were in place.<sup>44</sup>
- [31] The conclusion of Phase Three marked the end of any suggestion that Ms Lattouf's previous social media activity should result in her not presenting *Mornings* until Friday, 22 December. The conduct of Mr Anderson and Mr Oliver-Taylor in Phase Three again belies the allegation that they desired to be "rid of" Ms Lattouf by immediately removing her. In fact, having carefully considered in Phase Three whether Ms Lattouf should be taken off air because her social media activity and public statements gave rise to a risk that she might be perceived not to be impartial, they had made

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<sup>39</sup> Affidavit, Melkman, 14.10.24, Ex SM-01, Tab 13.

<sup>40</sup> Affidavit, Melkman, 14.10.24, Ex SM-01, Tab 18.

<sup>41</sup> Affidavit, Oliver-Taylor, 11.10.24, Ex COT-01, Tab 28.

<sup>42</sup> Affidavit, Oliver-Taylor, 11.10.24, Ex COT-01, Tab 29.

<sup>43</sup> Anderson, 14.10.24, [58].

<sup>44</sup> Affidavit, Ahern, 14.10.24, [77], Ex SA-01 Tab 28.



and enacted a definite decision to confirm the position they had arrived at by the end of Phase Two. Ms Lattouf was to stay on air until the end of her engagement on *Mornings*.

#### **Phase Four: the evening of 19 December and the morning of 20 December 2023**

- [32] The theme of Phase Four is the maintenance of the decision arrived at by the end of Phase Three.
- [33] On Tuesday, 19 December, in the evening, Ms Buttrose emailed Mr Anderson, forwarding more Complaints about Ms Lattouf. She pointedly asked whether Ms Lattouf had been “replaced”; she was “over getting emails about her”.<sup>45</sup>
- [34] Ms Lattouf is excited by the fact and content of Ms Buttrose’s emails, seeing them as indicative of a desire on the part of the ABC, instigated or inspired at the highest level, to bring her engagement on *Mornings* to an end. However, the significant fact is not what Ms Buttrose may then have wanted to happen, but that Mr Anderson forcefully pushed back, telling her, unequivocally, that Ms Lattouf “will finish up on Friday”.<sup>46</sup>
- [35] During the evening on Tuesday, 19 December, Mr Anderson forwarded correspondence that he was receiving from Ms Buttrose, to Mr Oliver-Taylor. In doing so, Mr Anderson ensured that Mr Oliver-Taylor knew that, whatever Ms Buttrose had said, the position continued to be that Ms Lattouf would stay on air until her engagement came to an end on Friday, 22 December. When Mr Oliver-Taylor wrote anxiously to Mr Anderson that, if the ABC did as Ms Buttrose suggested, “[t]he blow back will be phenomenal”, and that his recommendation was that “we hold until Friday...It’s not perfect, but it’s the right course of action at this point”<sup>47</sup>, Mr Anderson responded, “hold the position”.<sup>48</sup> Once again, these statements – made contemporaneously in writing at the time – belie the suggestion that Mr Anderson and Mr Oliver-Taylor were desperate to be “rid of” Ms Lattouf.
- [36] The case constructed by Ms Lattouf illogically and unreasonably sees something sinister in the communications between Mr Anderson and Mr Oliver-Taylor in Phase Four.<sup>49</sup> In fact, those communications evince a settled determination on the part of both Mr Anderson and Mr Oliver-Taylor that, notwithstanding all that had happened, and the “pain” that Mr Anderson had been getting from Ms Buttrose,<sup>50</sup> the position at the end of Phase Four continued to be that Ms Lattouf would stay on air until the end of her engagement on *Mornings* at the end of that week.
- [37] The end of Phase Four is marked by correspondence between Mr Anderson and Ms Buttrose on the morning of Wednesday, 20 December. At 10.58 am, Mr Anderson sent a long and considered email to Ms Buttrose. In that email, Mr Anderson reiterated and explained the position that he had

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<sup>45</sup> Affidavit, Buttrose, 14.10.24, Ex IB-01, Tab 3.

<sup>46</sup> Affidavit, Anderson, 14.10.24, Ex DA-01, Tab 12.

<sup>47</sup> Affidavit, Oliver-Taylor, 11.10.24, Ex COT-01, Tab 46.

<sup>48</sup> Affidavit, Anderson, 14.10.24, Ex DA-01, Tab 18.

<sup>49</sup> Applicant’s Outline, 13.01.25, [19].

<sup>50</sup> Affidavit, Anderson, 14.10.24, Ex DA-01, Tab 18.

put to Ms Buttrose the night before: Ms Lattouf would remain “on air for the remainder of her contract”. He acknowledged the conundrum in which the ABC found itself: Ms Lattouf’s engagement had caused damage for the ABC, but ending it before Friday, 22 December, would lead to claims that the ABC had “caved to pro-Israeli lobbying”.<sup>51</sup> At 11.00 am, Ms Buttrose replied, “Thanks for the explanation, David - it must be Christmas.”<sup>52</sup> The evidence will be that Ms Buttrose told Mr Anderson that she accepted that to be the position in a conversation prior to them going to Christmas lunch together later that day.

### **Phase Five: the afternoon of Wednesday, 20 December 2023**

[38] That position changed in the early afternoon of Wednesday, 20 December, as a consequence of the interposition of a new factor.

[39] At or about 12.05 pm on Wednesday, 20 December, Mr Latimer became aware that Ms Lattouf had been posting on social media the previous evening “regarding Israel-Gaza” contrary, as he saw it, to “clear instructions” that had been given “to direct [Ms Lattouf] not to post on socials for the rest of this week”.<sup>53</sup>

[40] The evidence will be that there was a Microsoft Teams meeting early in the afternoon of Wednesday, 20 December that, at various times, included each of Mr Oliver-Taylor, Mr Ahern, Ms Green, Mr Latimer, and Mr Melkman. Each of them will give evidence about their recollections of the meeting. The evidence will be that there was discussion about what Ms Green had told Ms Lattouf in relation to her social media activity while she was presenting *Mornings*. There will be evidence that Mr Oliver-Taylor consulted with Mr Ahern, Mr Latimer, and Mr Melkman, and then made the decision that Ms Lattouf should be “stood down”. This is the decision that is the focus of Ms Lattouf’s unlawful termination claim.

[41] Mr Oliver-Taylor then communicated that decision to Mr Anderson, disturbing Mr Anderson’s Christmas lunch with Ms Buttrose for that purpose. He informed Mr Anderson by text that his view was that Ms Lattouf “has breached our editorial policies whilst in our employment. She also failed to follow a direction from her producer not to post anything whilst working with the ABC. As a result of this, I have no option but to stand her down”.<sup>54</sup>

[42] On the following day, Mr Oliver-Taylor composed a note of these events, writing:<sup>55</sup>

At around 1130am [Mr Latimer] informed [Mr Ahern], [Mr Melkman] and myself that [Ms Lattouf] has posted a couple of things to social media. One was a comment about diversity of voices and the other was a repost of [f] how Israel is using starvation tactics in the War.

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<sup>51</sup> Affidavit, Anderson, 14.10.24, Ex DA-01, Tab 20.

<sup>52</sup> Affidavit, Anderson, 14.10.24, Ex DA-01, Tab 21.

<sup>53</sup> Affidavit, Latimer, 14.10.24, Ex BL-01, Tab 8.

<sup>54</sup> Affidavit, Oliver-Taylor, 11.10.24, Ex COT-01, Tab 64.

<sup>55</sup> Affidavit, Oliver-Taylor, 11.10.24, Ex COT-01, Tab 68.

On review, and in discussion with this group, it was agreed that she has breached the trust of the program by not following a request and she has also breached impartiality around personal use of social media.

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I asked [Mr Melkman] whether he thought that we had no option whether we could put her to air. He thought we had no choice but to not allow her back. A view supported by the group.

I explained to the MD via text initially that Local Radio Sydney had decided to not put [Ms Lattouf] back on air due to this breach. I then briefly spoke to the MD and told him this (at lunchtime on Wednesday). I did not ask the MD to make a decision, I told him that due to a breach and potential risk of impartiality to the ABC that [Ms Lattouf] could not continue on air. He did not disagree.

[43] At Mr Oliver-Taylor's direction, Mr Ahern enacted that decision in a meeting with Ms Lattouf later than day.

[44] Ms Lattouf was paid for all five shifts between Monday, 18 December 2023 and Friday, 22 December 2023 that she had been rostered to perform, even though she did not perform the last two of those shifts on 21 and 22 December.

#### D. ONUS

[45] As to the Enterprise Agreement component of her claim, Ms Lattouf bears the legal and evidentiary onus of establishing each element of each the three contraventions that are alleged.

[46] As to the unlawful termination component of her claim, Ms Lattouf has the benefit of s 783 of the *Fair Work Act* which, like its s 361 counterpart, contains what is colloquially referred to as the "reverse onus", as to which see *Celand v Skycity Adelaide Pty Ltd* (2017) 256 FCR 306 at [94] and [148].

[47] However, the bare making of an allegation that particular action has been taken for proscribed reasons will not, without more, enliven the presumption: *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [119]. There are two conditions inherent in s 361 (and, by analogy, s 783), as to each of which Ms Lattouf has the onus. *First*, she must establish as an objective fact the circumstance said to be the reason for the taking of adverse action: *Qantas Airways Ltd v TWU* (2022) 292 FCR 34 at [68] and [143], applying *Alam v National Australia Bank Ltd* (2021) 288 FCR 301 at [14(b)]. *Second*, she must establish that "the evidence is consistent with the hypothesis" that the Respondent was actuated by a proscribed reason in respect of the particular action in question: *Celand* at [155], citing *Australian Building and Construction Commissioner v Hall* (2017) 269 IR 28 at [25] and *General Motors- Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241 (Mason J); see also *Australian Building and*

*Construction Commissioner v Hall* (2018) 277 IR 75 at [13]–[19], *Australian Red Cross Society v Queensland Nurses' Union of Employees* (2019) 273 FCR 332 at [67]–[73], citing *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2015) 230 FCR 298 at [192].

## E. UNLAWFUL TERMINATION CLAIM

### Ms Lattouf's case

- [48] Ms Lattouf pleads, and the ABC admits, that she is “a woman of Lebanese and Arab and Middle Eastern descent”.<sup>56</sup> Ms Lattouf later pleads, albeit obliquely, that her “race” is “Lebanese and/or Arab and/or Middle Eastern”, and that her “national extraction” consists of “her Lebanese and/or Arab and/or Middle Eastern heritage and that she is a descendant of foreign immigrants”.<sup>57</sup> These assertions are not admitted.<sup>58</sup> Ms Lattouf's evidence is that she is “of Arab descent”, and that her parents are Lebanese and are “first generation migrants to Australia”. Ms Lattouf was born in Australia.
- [49] Ms Lattouf also pleads in paragraph 1A of the FCASOC that she “at all [unparticularised] material times ... held political opinions” which included (a) opposing the Israeli military campaign in Gaza; (b) supporting Palestinians' human rights; (c) questioning the authenticity of footage of demonstrators chanting antisemitic chants at the Sydney Opera House; and (d) that media organisations should report about the conflict between Israel and Palestinians accurately and impartially. All of these pleas are in issue.<sup>59</sup>
- [50] Ms Lattouf then simply pleads an allegation that her asserted termination was for reasons that included these asserted attributes.<sup>60</sup>
- [51] Importantly, this plea is completely untethered from the series of Instagram stories posted on social media by Ms Lattouf on Tuesday, 19 December 2023, which included the reposting of a report from Human Rights Watch with additional text reading “HRW reporting starvation as a tool of war”.<sup>61</sup> For example, Ms Lattouf does not plead that any of these Instagram stories was an expression or a manifestation of one of more of her asserted political opinions. In the result, Ms Lattouf's claim is limited to the allegation that the ABC terminated her employment because she held the asserted political opinions as pleaded, either alone or in combination with her asserted race and national extraction. The ABC does not consent to any expansion of Ms Lattouf's case

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<sup>56</sup> FCASOC at para [1(d)]; Defence filed on 12 August 2024 (Defence) at para [1], and Agreed Statement of Facts filed on 20 December 2024 (ASOF) at para [1].

<sup>57</sup> FCASOC at para [12C(b)(ii)].

<sup>58</sup> Defence at para [12C]. The Applicant's Outline at para [25] wrongly asserts that the ABC admits that Ms Lattouf's Lebanese, Arab and Middle Eastern descent constitute the attributes of “race”, “national extraction” or “social origin”. It is not clear why “social origin” is included in this list, as it is not pleaded by the Applicant.

<sup>59</sup> Defence at para [1A].

<sup>60</sup> FCASOC at para 45B.

<sup>61</sup> See ASOF at [83].

beyond that which is pleaded: *Construction Forestry Mining and Energy Union v BHP Coal Pty Ltd* (2016) 262 IR 176 at [19].

### “Political opinion”

- [52] “Political opinion” is not defined in the *Fair Work Act*. An opinion will be “political” if it concerns the machinery, processes, form, role, structure, feature, purpose, obligations, duties or some other aspect of government or the state: *V v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 355 at [33]; *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 149 ALD 88 at [164]-[174]; *Henry v Leighton Admin Services Pty Ltd* (2015) 299 FLR 342 at [101]-[104].
- [53] There is an open question whether s 772(1)(f) proscribes dismissal for *expressing* a political opinion: *Rumble v The Partnership (t/as HWL Ebsworth Lawyers)* (2019) 289 IR 72 at [131]. The ABC’s case is that (a) it does not, but (b) the question does not arise in this case, for the reasons given in [51] above.
- [54] It is accepted that paragraph 1A(a) of the FCASOC pleads a “political opinion”, but the ABC’s contention is that subparagraphs (b), (c) and (d) have no “political” character, and subparagraph (c) is not an “opinion”.

### “Race”

- [55] “Race” is not defined in the *Fair Work Act*. It has its ordinary meaning: *Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liq) (No 4)* [2021] FCA 1242 at [725]-[726]. Dictionary definitions of “race” focus on groupings or divisions of humankind, defined by distinct genetic characteristics and physical features, or shared ethnicity: *Fair Work Ombudsman v Yenida Pty Ltd* (2018) 276 IR 108 at [248], citing the *Macquarie Dictionary* and the *Shorter Oxford English Dictionary*; see also *Oxford English Dictionary*, 2<sup>nd</sup> ed, ‘race’ (noun), senses 1.1.b, c and d. *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmanian Dams Case*) at 244 and 276 referred to common or shared biological origins, physical characteristics, history, religion, spiritual beliefs, culture, belief, knowledge and tradition. See also *Foot & Thai Massage* at [721]-[722], quoting *Mandla v Dowell Lee* [1983] 2 AC 548 at 562, 564, and at [728]-[729], citing *King-Ansell v Police* [1979] 2 NZLR 531 at 536.
- [56] Whether there is a Lebanese, Arab, or Middle Eastern “race” is a complex multi-faceted question of fact. The facts must be proved. Ms Lattouf has led no evidence of any relevant fact: cf *Foot & Thai Massage* at [719], [726]; *Jones v Ekermani (EOD)* [2012] NSWADTAP 50 at [111]-[112]. There is therefore no basis on which to find, as a fact, that there is a Lebanese, Arab, or Middle Eastern “race” within the meaning of s 772(1)(f).
- [57] It follows that Ms Lattouf’s case under s 772(1)(f), insofar as it depends on “race” as an attribute, must fail.

[58] In the alternative, if the Court finds, contrary to the foregoing submission, that there is a Lebanese, Arab or Middle Eastern “race”, then it is accepted that Ms Lattouf is a member of any such race, and therefore has “race” as an attribute for the purposes of s 772(1)(f).

#### “National extraction”

[59] “National extraction” is not defined in the *Fair Work Act*. It must be a different concept than “social origin” (which is not pleaded). It certainly involves the nationality that a person acquires from birth. There is an argument that it also includes a person’s national antecedents, in the sense of the nation from which they are derived: see *Foot & Thai Massage* at [730]-[733], citing *Merlin Gerin (Australia) Pty Ltd v Wojcik* [1994] VSC 209. However, that argument has never definitively been accepted. The ABC’s contention is that the argument is not correct. If that contention is accepted, then it would follow that Ms Lattouf’s case under s 772(1)(f), insofar as it depends on “national extraction” as an attribute, must fail. In the alternative, if the Court finds, contrary to the foregoing submission, that there is a Lebanese “national extraction”, then it is accepted that Ms Lattouf has that attribute for the purposes of s 772(1)(f). However, on any view, there cannot be an Arab or Middle Eastern “national extraction”, because neither is a nation.

#### Termination of employment

[60] “Terminated” is not defined in the *Fair Work Act*. However, the word “dismissed” is defined in the Act by reference to s 386: see s 12 (Dictionary). Section 386(1) excludes scenarios in which the contract of employment comes to an end at neither the employer’s nor the employee’s initiative, nor by agreement between the employer and employee. There is no reason why that would not also be so of s 773(a). The ABC contends that this is such a case. A finding to that effect would, by itself, dispose of Ms Lattouf’s unlawful termination case.

[61] Ms Lattouf argues that the ABC is estopped (by reason of abuse of process or otherwise) from denying that her employment was terminated by the finding to that effect by the Fair Work Commission in *Lattouf v Australian Broadcasting Corporation* (2024) 332 IR 127. The Commission has not resolved, and cannot definitively resolve, Ms Lattouf’s claim of contravention of the *Fair Work Act*. The Commission has merely made findings which relate to the performance of its statutory functions: *Aerocare Flight Support Pty Ltd v Australian Municipal, Administrative, Clerical and Services Union* [2018] FCA 128 at [20]. Estoppel cannot arise in circumstances where the Commission did not possess jurisdiction to decide the matter conclusively and for all purposes between the parties, and not merely incidentally and for a limited purpose: *Ex parte Amalgamated Engineering Union (Australian Section); Re Jackson* (1937) 38 SR (NSW) 13 at 19–20 (Jordan CJ), cited with approval in *Miller v University of New South Wales* (2003) 132 FCR 147 at [65].

[62] Any finding the Commission may make as to the contractual rights of the parties, the entitlement or otherwise of the employer to terminate the employment, and the fact (or otherwise) of any

termination, is merely an opinion as to such matters, as a step to the determination of future rights: *Miller* at [17]. No such expression of opinion can bind this Court or give rise to an estoppel operative in this Court.

[63] Indeed, so much was made plain by Hatcher J, the President of the Commission and a judge of this Court, in *Lattouf v Australian Broadcasting Corporation* [2024] FWC 570. In dismissing Ms Lattouf's application for the jurisdictional matter below to be heard by the Full Bench of the Commission, his Honour correctly observed, at [17], that "if the matter eventually comes before a court for determination following the issue of a s 776(3)(a) certificate, the court will not be bound by any decision the Commission makes and the Respondent will be at liberty to raise any challenges to jurisdiction again".

[64] For the reasons that follow, Ms Lattouf's employment was not terminated by the ABC within the meaning of s 773(a).

[65] *First*, the contract of casual employment expressly contemplated the following scenarios:

- 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, the engagement would cease by effluxion of time in accordance with the terms of the contract.
- c. The ABC would advise Ms Lattouf of an engagement's duration, hours of work required, and work to be performed.
- d. At any time before an engagement commenced, 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 contract might be terminated by either party with one hour's notice.
- f. If either party gave 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.

[66] *Second*, what occurred, as a matter of fact, are the following events:

- a. Ms Lattouf was offered and accepted an engagement for a fill-in position to present *Mornings* from 18 to 22 December 2023.
- b. On Wednesday, 20 December 2023, Ms Lattouf was advised that she would not be required to present on Thursday, 21 December and Friday, 22 December, 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 by not requiring her to undertake any work – as it was contractually expressly entitled to do. (Ms Lattouf does not appear for the purposes of this issue now to be

relying on an argument that her contract of employment expressly or impliedly gave rise to an obligation on the part of the ABC to give her the opportunity to work).

c. The ABC paid Ms Lattouf for all five shifts of the engagement.

[67] *Third*, the ABC did not exercise its right to terminate the engagement in accordance with the contract. It could (and 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.

[68] *Finally*, and by reason of the above, the engagement came to an end on 22 December 2023, ceasing by effluxion of time in accordance with, and by the operation of, the terms of the contract, without the ABC doing, or needing to do, anything to terminate the engagement.

[69] To the extent that *Lattouf* is thought to have any significance, the ABC contends that it was wrongly decided in two respects. The effect of the decision was that there could be – and in this case was – a termination of employment within the meaning of s 773(a) when the employment relationship, as distinct from the contract of employment, was terminated. The *first* error was that, in this case, there was no distinct termination of an employment relationship. The ABC's case is that the written contract of employment was an umbrella contract that contemplated and regulated more than one casual engagement. Ms Lattouf was engaged under the contract to present *Mornings*. That was the first engagement made under the contract. There was no underlying relationship that could give rise to an expectation that there would be more engagements; indeed, the contract expressly disavowed any such expectation. There was therefore no relationship that was capable of being terminated. In this case, the relationship was co-terminous with the contract. It persisted in accordance with the terms of the contract of casual employment.

[70] The *second* error in *Lattouf* was that, even if there was a termination of the relationship, the contract remained on foot. In that circumstance, there was no termination in the statutory sense. The decisions of the Commission referred to in *Lattouf* at [72]-[74] concern the materially different circumstance of the relationship being terminated after the contract had come to an end.

[71] It follows that the ABC did not do anything that terminated Ms Lattouf's employment, nor anything that had the effect of doing so. On that basis, Ms Lattouf's unlawful termination claim (and also the Enterprise Agreement claim insofar as it depends on the allegation that her employment was terminated) must fail.

## **The ABC's reasons**

### The ABC's three alternative contentions

[72] The ABC's first contention on this issue is that, for the reasons set out above at [48]-[59], Ms Lattouf has not established as an objective fact that she has any of the protected attributes that she



has pleaded, with the result that the reverse onus is not enlivened, and her unlawful termination claim must fail.

[73] The ABC’s second, and alternative, contention is that, if and to the extent that Ms Lattouf is found to have any of the protected attributes that she has pleaded, she has not led evidence consistent with the hypothesis that the ABC was actuated by any such reason. In the result, again, the reverse onus is not enlivened, and her unlawful termination claim must fail.

[74] The ABC’s third, and alternative, contention is that, if and to the extent the Court finds that the reverse onus has been enlivened, the ABC’s evidence will discharge that onus. The principles applicable to the third contention are authoritatively set out in *Alam* at [14]. Important in this case, but ignored in Ms Lattouf’s case, is that the Court is concerned with the “operative and *immediate* reason” (emphasis added) (*Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* (2015) 238 FCR 273 at [132]–[135]), rather than with contextual influences, or the reasons for the reason. The enquiry is not concerned with *mere* causation. It is not sufficient that there is factual or temporal connection between two matters: *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243 (*Scab Sign Case*) at [18]–[20]. The only question for the Court is determining the immediate reason that mobilised the decision-maker. An enquiry as to what was in the mind of the members of the “Jewish lobby group” when they sent the Complaints, which led to some chain of events, is not part of that enquiry. See also *Wong v National Australia Bank Ltd* (2022) 318 IR 148 at [32].

#### Whose reasons are relevant?

[75] Where, as here, the Respondent is a corporation, it is “necessary to examine the state of mind of the human actor or actors who (alone or together) caused the corporation to take the action that it did or...who ‘played the decision-making part in the joint administrative activities’ culminating in the actual act that constitutes the adverse action”: *Wong* at [25]. The decision-making process can incorporate the states of mind of the decision-maker and “other people, including by adopting facts or opinions asserted by them”: *Wong* at [25]. The enquiry is confined to the reason or reasons of the person or persons who made the decision in question, or whose involvement “had ‘a material effect on the ultimate outcome’ or made an ‘indispensable contribution’ to the outcome”: *Laing O’Rourke Australia Management Services Pty Ltd v Haley* [2024] FCA 1323 [296] (emphasis added, citations omitted), see generally at [287]–[297]; see also *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at [43]–[45], [71]; *Scab Sign Case* at [7], [85], [146]; and *Serpanos v Commonwealth* [2022] FCA 1226 at [123].

[76] The ABC’s case is that the decision that Ms Lattouf would not be required to present *Mornings* on 21 and 22 December was taken by Mr Oliver-Taylor, and that in the statutory sense he was the sole decision-maker.

### Mr Oliver-Taylor's reasons

[77] It follows that the Court is only concerned (if at all) with the reasons of Mr Oliver-Taylor. He will deny that any of the alleged protected attributes pleaded by Ms Lattouf were a reason, or part of the reasons, for his decision that Ms Lattouf would not be required to present *Mornings* on 21 and 22 December. He will give evidence that he was motivated only by these considerations:

- a. a view that Ms Lattouf had not complied with a direction not to post anything about the Israel-Gaza war (whether that view was right or wrong does not matter: see *Anglo Coal (Dawson Services)* at [37], [133]–[135], cited with approval in *Crossing v Anglicare NSW South, NSW West & ACT* [2021] FCA 1112 at [18]);
- b. as a result, a lack of confidence that Ms Lattouf would not say something on air that could reasonably be perceived as not being impartial in relation to the Israel-Gaza war;
- c. a view that Ms Lattouf had contravened the ABC's Personal Use of Social Media Guidelines (again, it does not matter whether that view was right or wrong);
- d. a concern that Mr Ahern did not have control of the situation, notwithstanding the mitigants that had been put in place, and contrary to assurances that Mr Oliver-Taylor had given to Mr Anderson, and that to his knowledge had been passed on to Ms Buttrose;
- e. a consciousness that, at that time, issues pertaining to the Israel-Gaza war were highly contentious; and
- f. a view that it was always within the discretion of the ABC to decide that a presenter or programme would not be aired.

[78] The reasons set out above do not include the prohibited reason of “political opinion” or any of the other pleaded protected attributes. The substance of any political opinion purportedly held by Ms Latouf was not raised by any person involved in any of the relevant discussions. It formed no part of Mr Oliver-Taylor's reasons. The concern as to the lack of impartiality is not synonymous with “political opinion”.<sup>62</sup> A person can display impartiality irrespective of what (if any) political opinions the person holds.

### **The Applicant was not unlawfully terminated**

[79] For the reasons set out above, Ms Lattouf's unlawful termination claim must fail.

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<sup>62</sup> Cf Applicant's Outline, [57].

## F. ENTERPRISE AGREEMENT CLAIM

- [80] The principles governing the interpretation of enterprise agreements are set out in *Kucks v CSR Limited* (1966) 66 IR 182 at 184, *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426 at 438 and 440 and *James Cook University v Ridd* (2020) 382 ALR 8 at [65].
- [81] There is no dispute that the ABC did not follow the process set out in cl 55.2 of the Enterprise Agreement. The only question for the Court is whether the ABC was *required* to undertake such a process.
- [82] The salient textual and contextual considerations include:
- a. Clause 55 of the Enterprise Agreement is contained within Part N, which is titled “Misconduct, Incapacity and Separation”.
  - b. Clause 55.2 is titled “Process” and sets out what is to occur “where an allegation of misconduct is made”.
  - c. Clause 55.3 deals with suspension with or without pay while an investigation is conducted.
  - d. Clause 55.4 deals with forms of disciplinary action which the ABC “may impose” where an allegation of misconduct is substantiated.
  - e. Clause 55.5 deals with written warnings and cl 55.6 preserves the right to summarily dismiss an employee.
  - f. Clause 55 plays an important role for the purposes of cl 57 of the Enterprise Agreement – namely, “Termination of Employment”. Clause 57.1.1 limits the basis on and circumstances in which the ABC can terminate the employment of an employee. One of the bases on which it can do so, on notice, is “misconduct (in accordance with clause 55)”: see cl 57.1.1(b)(iv).

### **The ABC was not required to follow the process in clause 55.2 of the Enterprise Agreement**

- [83] Properly construed in its context, cl 57 limits the ABC’s ability to terminate the employment of an employee (or otherwise discipline the employee pursuant to cl 55.4) who has been accused and found guilty of misconduct by, relevantly, requiring the ABC to first follow the process set out in cl 55.2. The “work” of cl 55.2 is intrinsically tied to cll 55.4 and 57. Clause 55.2 is not an otherwise beneficial clause for employees of the ABC. The “benefit” of cl 55.2 is that the employee cannot be dismissed (or otherwise disciplined pursuant to cl 55.4), without the process in cl 55.2 being followed. Contrary to Ms Lattouf’s argument, cl 55.4 does not purport to prescribe “the universe of disciplinary actions” that the ABC could take against an employee<sup>63</sup>; instead, it identifies the disciplinary actions for which a prescribed process is mandatory.

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<sup>63</sup> Applicant’s Outline at para [68].

- [84] It is telling, contextually, that the disciplinary action listed in cl 55.4.1 does not include the allocation or re-allocation (or non-allocation) of work. Managerial decisions regarding programming sit outside the Enterprise Agreement.
- [85] Put simply, Ms Lattouf’s claim that the ABC has breached cl 55.2 of the Enterprise Agreement proceeds on the false premise that the ABC made an allegation of misconduct against Ms Lattouf and that it sought either to (a) discipline her pursuant to cl 55.4; or (b) terminate her employment pursuant to cl 57.
- [86] The ABC sought neither of these things. Mr Oliver-Taylor made a programming decision based on views he had formed and concerns he had come to hold about Ms Lattouf’s ability to be trusted on air. Ms Lattouf had no entitlement (contractual or otherwise) to be on air. At most, she had the entitlement to be paid for all five shifts – which she was.
- [87] The ABC at no stage made any “allegations of misconduct” against Ms Lattouf, nor did it seek to rely on cl 55.4 or cl 57, separately or together. Attempting to shoe-horn Mr Oliver-Taylor’s reasons into the definition of misconduct set out in cl 55.1.1 (see FCASOC, paragraph 27) is misconceived. Clause 55.1.1 is an inclusive definition. It identifies circumstances where an employee may be said to have engaged in misconduct.
- [88] Ms Lattouf’s claim as it relates to the alleged breach of cl 55.2 of the Enterprise Agreement must fail.

#### **The ABC did not contravene clause 57.1 of the Enterprise Agreement**

- [89] Ms Lattouf alleges that the ABC breached cl 57.1.1 of the Enterprise Agreement in one of two (alternative) ways: summary dismissal or repudiatory conduct. For the reasons set out below, the ABC did neither of these things.

#### The Applicant was not summarily dismissed

- [90] The first way in which Ms Lattouf alleges that the ABC has breached cl 57.1.1 of the Enterprise Agreement (see FCASOC, paragraph 35) is premised on the pleaded material fact that the ABC “purported to summarily dismiss” Ms Lattouf on Wednesday, 20 December 2023.<sup>64</sup>
- [91] For the reasons set out above in [60] to [71] the ABC did not dismiss Ms Lattouf (summarily or otherwise) on 20 December 2023, or at all.

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<sup>64</sup> FCASOC at para 32.

### The Applicant was not terminated by repudiatory conduct

[92] The second way in which Ms Lattouf alleges that the ABC has breached cl 57.1.1 of the Enterprise Agreement is that the ABC repudiated the contract, being a means of termination not provided for in cl 57.1.1 of the Enterprise Agreement.<sup>65</sup>

[93] The repudiatory conduct in which the ABC allegedly engaged was a breach of one or both of the alleged contractual terms pleaded in paragraphs 6(a) and 7 of the FCASOC.<sup>66</sup> Those alleged terms are that Ms Lattouf was to:

- a. present *Mornings* on ABC Radio Sydney; and
- b. be given a reasonable opportunity to present on air during the term of the contract.

[94] For the reasons set out below, the terms pleaded at paragraphs 6(a) and 7 of the FCASOC were not terms of the contract and the ABC did not repudiate the contract.

*What were the terms of the employment contract between the Applicant and the ABC?*

[95] The FCASOC proceeds on a conflation of two separate and distinct concepts – the contract and the engagement.

[96] As noted above, for the purposes of the contract, the relevant “engagement” that Ms Lattouf was contracted to undertake was the fill-in presenter role for Sarah Macdonald on the *Mornings* programme in the week of Monday, 18 December 2023 to Friday, 22 December 2023 inclusive.

[97] The contract stipulates, in unambiguous terms:

- a. that Ms Lattouf may be offered engagements in the role of “Content Maker”;
- b. the rate of pay that will apply to any casual work performed by Ms Lattouf;
- c. that the ABC does not guarantee any offers of casual work to Ms Lattouf;
- d. that any offers of casual work offered and accepted by Ms Lattouf will be on the terms set out in the contract; and
- e. that the contract, accepted on 27 November 2023,<sup>67</sup> replaced all prior or contemporaneous agreements, letters, understandings and representations regarding employment (cf FCASOC, paragraph 5(a) and (b)).

[98] The contract evidently does not contain express terms to the effect pleaded at paragraphs 6(a) and 7 of the FCASOC. Ms Lattouf does not plead the basis on which any such term would be implied.

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<sup>65</sup> FCASOC at para 41.

<sup>66</sup> FCASOC at para 37.

<sup>67</sup> Affidavit, Vagg, 11.10.24, Ann MV-3.

- [99] In any event, even if the pleaded terms did form part of Ms Lattouf’s contract of employment (which is denied), the Court should reject any submission that the terms imposed an obligation (express or implied) on the ABC to provide work to Ms Lattouf as an on-air radio presenter on Thursday, 21 December 2023 and Friday, 22 December 2023.
- [100] As a starting point, there is no general duty on an employer to provide work to perform unless specifically required by contract or in “exceptional cases”. Applying the general rule, the employer is required to pay the employee the agreed wages, regardless of whether they have enough work to perform: *Collier v Sunday Referee Publishing Co Ltd* [1940] 2 KB 647 at 650; *Forbes v New South Wales Trotting Club* (1979) 143 CLR 22 at 260-261; *Mann v Capital Territory Health Commission* (1981) 54 FLR 23 at 29-30; *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 at 342F; *Ramsey Butchering Services Pty Ltd v Blackadder* (2003) 127 FCR 381 at [65], [70].
- [101] In line with the above principles, courts have found, in rare and factually distinctive circumstances, that some employers have a duty to provide work for some employees. These include actresses<sup>68</sup> and actors<sup>69</sup>; producers<sup>70</sup>; comic artists<sup>71</sup>; and television presenters.<sup>72</sup>
- [102] Each case where the court has found that an employer had a duty to provide work has depended on its own particular facts. Such cases have been described as “anomalous”.<sup>73</sup> As observed by Morritt LJ in *William Hill Organisation Ltd v Tucker* [1998] IRLR 313 at [16]:
- Given that the question must be resolved by construing the particular contract of employment in the light of its surrounding circumstances previous cases decided on their own wording and circumstances are of limited value.
- [103] In *Marbe v George Edwardes (Daly’s Theatre) Ltd* [1928] 1 KB 269 at 288, Lawrence LJ noted that the question of whether a contract of employment falls into the unique category “depends primarily on the express words of the contract, but may also depend upon the character of the employment, and possibly upon the nature of the remuneration”.
- [104] The adoption of *Marbe* in Australia has been cautious. In *Blackadder v Ramsey Butchering Services Pty Ltd* (2002) 118 FCR 395, Madgwick J noted, at [60], that “Australian courts have been prepared to proceed cautiously, by way of glosses on *Marbe* ...: see for example *Australian Rugby League Ltd v Cross* (1997) 39 IPR 111 and *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32”.
- [105] In the present case, for the reasons that follow, nothing in the express words of the contract (which Ms Lattouf pleads formed part of her contract of employment<sup>74</sup>), nor in any of the surrounding

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<sup>68</sup> *Marbe v George Edwardes (Daly’s Theatre) Ltd* [1928] 1 KB 269.

<sup>69</sup> *Herbert Clayton and Jack Waller Ltd v Oliver* (1930) AC 209.

<sup>70</sup> *White v Australian & New Zealand Theatres Ltd* (1943) 67 CLR 266.

<sup>71</sup> *Associated Newspaper Ltd v Bancks* (1951) 83 CLR 322.

<sup>72</sup> *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337.

<sup>73</sup> *Collier v Sunday Referee Publishing Co* [1940] 2 KB 647.

<sup>74</sup> FCASOC at para 5(c).

circumstances, would lead the Court to conclude that the ABC had a duty to provide work to Ms Lattouf on the Thursday and the Friday.

- [106] *First*, the contract provided that Ms Lattouf’s role will be as a “Content Maker”. It expressly stated that Ms Lattouf “will be advised of” particular matters, namely: the duration of the engagement, the hours of work required, the location(s) of work, to whom she must report for work, and the work to be performed. Importantly, the contract expressly provided that the ABC – but not Ms Lattouf – may change “the details” of any engagement before or after it begins (**Variation Term**).
- [107] Under the Variation Term, the ABC expressly had the discretion, exercisable before an engagement commenced or during the period of an engagement, to “advise” Ms Lattouf of “changes” to any of those matters. The discretion afforded to the ABC is not consistent with an express or implied obligation on the part of the ABC to provide Ms Lattouf a particular kind of work on each day of her engagement.
- [108] The Variation Term is clear, unambiguous and express, and expressly replaced all prior or contemporaneous agreements, letters, understandings and representations regarding employment (see cl 15 of the contract).
- [109] *Second*, the nature of the work for which Ms Lattouf was engaged speaks against any implied obligation or commitment on the part of the ABC to provide Ms Lattouf with a particular kind of work. Ms Lattouf was a casual employee. She was expressly not guaranteed work of any kind or duration. Her work on *Mornings* was the subject of a single and discrete engagement, which was offered and assigned to Ms Lattouf for casual work, for a fixed and very limited period of five days. The engagement could be terminated on only one hour’s notice and was not exclusive. Indeed, cl 13 of the contract made it plain that Ms Lattouf was able to take up other opportunities (including to enhance her public profile), subject only to there being no conflict.
- [110] *Third*, on each day of the engagement, Ms Lattouf was to present on air for (at most) 2.5 hours (between 8:30 am and 11:00 am). The balance of her approximately 7.5-hour shift was taken up with preparation and attending to other matters. Over the five days, the total on-air time envisaged by the pleaded terms (if such terms existed, which is denied) was 12.5 hours.
- [111] *Fourth*, the contract did not include any provision that required the ABC to publicise Ms Lattouf’s engagement, or that indicated the parties expected that publicity would be an incident of the engagement.
- [112] *Fifth*, the contract did not include a negative covenant on the part of Ms Lattouf. Her capacity to do other work was left entirely unaffected by the contract.
- [113] *Finally*, Ms Lattouf’s remuneration was fixed at an hourly rate. It was not conditional and did not depend on her performing any work, or particular kind of work.

[114] There is nothing in the contract, nor in the circumstances of Ms Lattouf’s employment, that would lead to the conclusion that the ABC had any contractual duty to give Ms Lattouf the opportunity to present *Mornings* on 21 and 22 December, or to provide any work to Ms Lattouf.

*The ABC did not repudiate the contract*

[115] A contract of employment can be terminated by a party in response to a repudiation of the contract by the other. Whether a party has repudiated a contract is a question of fact.<sup>75</sup> Repudiatory conduct can be either:

- a. conduct amounting to a breach which evinces an intention not to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party’s contractual obligations<sup>76</sup> – that is, a renunciation of a fundamental obligation under the contract<sup>77</sup>; or
- b. a breach of an essential term of the contract, or of an innominate term that is of a sufficiently serious nature, such that it gives rise to a right to terminate.<sup>78</sup>

[116] Repudiation of either type is not lightly to be found.<sup>79</sup> Neither exists in this case.

*Conclusion*

[117] Ms Lattouf’s case fails at two levels: (a) she has not identified for the purposes of her case a fundamental obligation under the contract, or an essential or sufficiently serious term of the contract; and (b) she has failed to establish a breach. The ABC did what it was entitled by the contract to do. There was no repudiation. On any view of the evidence, all that happened was that the ABC exercised its contractual right to change unilaterally, inter alia, the work to be performed, without disturbing the continued operation of the contract, which subsisted until it expired, according to its terms by effluxion of time, along with the relationship created by the contract.

[118] It follows, for the reasons set out above, that Ms Lattouf’s claim, as it relates to the alleged breach of cl 57.1.1 of the Enterprise Agreement, fails on both bases upon which it is pleaded.

### **The Applicant was not taken off air in contravention of the Enterprise Agreement**

[119] The final element of Ms Lattouf’s claim is that the ABC breached an unspecified provision of the Enterprise Agreement because it allegedly imposed a “sanction” that was not authorised under the Enterprise Agreement.

[120] This aspect of Ms Lattouf’s claim has two premises: (a) the notion that taking Ms Lattouf off air for two of her rostered shifts amounted to disciplinary action and (b) because the action of taking

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<sup>75</sup> *English and Australian Copper Co Ltd v Johnson* (1911) 13 CLR 490 at 497.

<sup>76</sup> *Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)* [2017] FCAFC 102 at [70].

<sup>77</sup> *Gramotnev v Queensland University of Technology* [2019] QCA 108 at [207].

<sup>78</sup> *Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)* [2017] FCAFC 102 at [70].

<sup>79</sup> *Gunnedah Shire Council v Grout* (1995) 62 IR 150 at 159.



Ms Lattouf off air is not one of the listed sanctions in cl 55.4 of the Enterprise Agreement, that action is not permitted under the Enterprise Agreement.

- [121] For the reasons set out above, both of these premises are incorrect. The decision as to the programming of *Mornings* for two days of that week, being an exercise of managerial prerogative, was not “disciplinary action” for the purposes of cl 55.4.
- [122] The fact that the list of actions constituting “disciplinary action” in cl 55.4 is limited to the issuing of warnings and reprimands, or matters related to reduction in pay, lends weight to the notion that the provision is not intended to cover the allocation or re-allocation (or non-allocation) of duties as part of the day-to-day managerial decisions that are made by a public broadcaster.
- [123] The construction advanced by Ms Lattouf is not industrially sensible. On Ms Lattouf’s construction, a radio or TV presenter who, while live on air, was inciting an act of terrorism, could not be taken off air as such action is not contemplated by cl 55.4. The Court should readily reject the construction advanced by Ms Lattouf.
- [124] The ABC did not take disciplinary action (for the purposes of the Enterprise Agreement) against Ms Lattouf, and the decision to take Ms Lattouf off air was a decision that sits wholly outside the Enterprise Agreement.

## **G. COMPENSATION**

- [125] For the reasons set out above, Ms Lattouf is not entitled to any of the relief she seeks.
- [126] In the event that the Court finds to the contrary, the Court will need to consider what, if any, compensation is payable to Ms Lattouf. Two steps are required:
- a. Ms Lattouf is required to prove that she has suffered a loss because of the contravention(s) as found, which can be established if the contravening conduct is proved on the balance of probability to have been “a cause” of the loss. The onus lies with Ms Lattouf. The loss must be actual, not merely potential or likely.
  - b. Once (and if) a loss is identified, the Court must quantify that loss and consider the appropriate compensation (if any).

### **Ms Lattouf has not suffered any compensable loss**

- [127] As noted above, Ms Lattouf now seeks only monetary compensation for what she claims is non-economic loss and damage (hurt and distress) suffered by reason of one or more of the contraventions pleaded in the FCASOC.
- [128] On the question of hurt and distress, Ms Lattouf’s evidence is singularly focused on the impact of the alleged termination on her health and wellbeing. There is no evidence as to the impact (if any)

that the alleged breaches of the Enterprise Agreement have had on her. It can only be inferred that there are none.

[129] Given the singular focus of Ms Lattouf's evidence, it follows that if the Court finds that Ms Lattouf's employment was not terminated by the ABC, no compensation should be ordered even if some contravention is established by reason of a breach of the Enterprise Agreement.

#### **Any amount of compensation must be minimal**

[130] Even in the event that the Court finds that Ms Lattouf's employment was terminated by the ABC, the expert evidence filed by Ms Lattouf does not support a substantial amount of compensation. Her expert psychiatrist has opined (some seven months ago) as follows:

- a. Ms Lattouf was (at that time) suffering from an exacerbation of her underlying persistent depressive disorder with high levels of anxiety.
- b. The cause of the aggravation of Ms Lattouf's pre-existing condition is her purported dismissal.
- c. Ms Lattouf's prognosis is good.
- d. Ms Lattouf continues to work (and seemingly has at all times been able to work).
- e. Ms Lattouf is able to work anywhere.
- f. The only matter which is preventing Ms Lattouf from being able to work on a full-time basis are these legal proceedings.

#### **H. THE APPLICANT'S OUTLINE**

[131] This section addresses some particular aspects of the **Applicant's Outline** filed on 13 January 2025.

[132] **Paragraph [25]:** The statement that the ABC admits that Ms Lattouf's Lebanese, Arab and Middle Eastern descent constitute the statutory attributes of "race", "national extraction" or "social origin" is incorrect. No such admission is made. It is not clear why "social origin" is included in this list, as it is not pleaded by the Applicant.

[133] **Paragraph [44(a)]:** Mr Oliver-Taylor did not "assume" that a direction had been given. The evidence will be that he directed that it be given, and he was told that it had.

[134] **Paragraph [44(b)]:** The erroneous premise of this submission is a false equivalence between, on the one hand, Ms Lattouf's role at the ABC, the perceptions reasonably created by her previous social media activity and public statements, and what she was told by the ABC not to do while she was engaged by it, and, on the other hand, reporting that appeared in different contexts elsewhere in the ABC.

- [135] **Paragraph [44(c)]:** The evidence will be that no one on the part of the ABC was motivated by the fact that Ms Lattouf held an opinion about events in Gaza, or the content of any such opinions that she may have held; indeed, every witness will say that they would have conducted themselves in the exactly same way in relation to Ms Lattouf if the content of her published opinions were pro-Israeli rather than pro-Palestinian. What concerned Mr Anderson and Mr Oliver-Taylor was that the fact and content of Ms Lattouf’s social media activity, and the publication of statements by her, was capable of giving rise to reasonable perceptions that she was not impartial in relation to events in Israel-Gaza, and the consequences of such a perception for the ABC’s reputation for, and obligations of, impartiality and independence.
- [136] **Paragraph [44(d)]:** This unfair submission assumes each of its premises to be not just correct, but axiomatically so. The ABC’s case is that each of them is incorrect.
- [137] **Paragraph [44(e)]:** The account of the salient events in Section C is based on contemporaneous documents.
- [138] **Paragraph [45]:** The accusation that Mr Anderson and Mr Oliver-Taylor “contriv[ed] a concern” as “an excuse to be rid of [Ms Lattouf]”<sup>80</sup> is flatly contrary to every contemporaneous document. It is an allegation of fraud. If it is to be maintained, then there must be an identified basis for doing so. None exists.
- [139] **Paragraphs [47]-[49]:** This submission depends on the absence of a false equivalence. There is no evidence that any other ABC presenter had engaged in social media activity that was capable of giving rise to reasonable perceptions that they were not impartial in relation to events in Israel-Gaza.
- [140] **Paragraphs [50]-[56]:** The authorities referred to in these paragraphs deal with issues of fact that can arise when examining a process of decision-making by a corporation. None of them goes so far as to hold, or even suggest, the outlandish proposition, advanced in paragraph [56], that the motivations of people wholly outside a corporation can become the motivations of the corporation. That submission is wrong.
- [141] **Paragraph [57]:** This paragraph is the heart of Ms Lattouf’s unlawful termination claim. It is wrong at two levels: *First*, each of Ms Buttrose, Mr Anderson and Mr Oliver-Taylor will give evidence that they were not motivated by the fact or content of any opinions Ms Lattouf may have held. They were concerned about the perceptions of partiality to which Ms Lattouf’s social media activity could give rise, and the consequences that might thereby ensue. That reason is not proscribed by s 772(1)(f). The reasoning of the majority in the *Scab Sign Case* illustrates the distinction. *Second*, the blithe expression “reasons of impartiality” wrongly conflates the materially different concepts of

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<sup>80</sup> Applicant’s Outline, [45].

the content of an opinion, the fact and mode of its expression, and the consequences for the ABC of perceptions about impartiality.

[142] **Paragraph [58]:** There is no evidence to support this submission. It is fanciful.

[143] **Paragraph [59]:** Each of the people named in this paragraph will give evidence denying that they were motivated in relation to anything they materially did in relation to Ms Lattouf by any of the alleged unlawful reasons, and will give an account of their complete reasoning processes that exclude any operative effect of any such reason.



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**20 January 2025**