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

File No. NSD 189 of 2024

ANTOINETTE LATTOUF

Applicant

AUSTRALIAN BROADCASTING CORPORATION

Respondent

RESPONDENT'S OUTLINE OF CLOSING SUBMISSIONS

A. WHAT IS THIS CASE ABOUT?

[1] The Applicant, Ms Antoinette **Lattouf**, brings two claims arising out of a brief casual engagement with the Respondent, the **A**ustralian **B**roadcasting **C**orporation, in December 2023.

[2] Ms Lattouf, a freelance journalist, was employed to fill in for the regular presenter of a prominent programme on ABC Sydney Radio, *Sydney* ***Mornings***. The casual engagement contemplated that she would present five programmes, to be aired each day from Monday, 18 December 2023 to Friday, 22 December 2023. On Wednesday, 20 December 2023, she was told that she would not be required to present the last two programmes. She was paid for the whole engagement. In these proceedings, she claims that this constituted a termination of her employment within the meaning of s. 772(1)(f) of the *Fair Work Act* 2009 (Cth)[1], which she says was for reasons that included her alleged political opinions, and her race and national extraction.[2] She also claims that the *ABC* ***Enterprise Agreement*** *2022–2025* was contravened in various ways.[3]

[3] The ABC denies that Ms Lattouf's employment was terminated[4]; that the decision that Ms Lattouf would not be required to present on Thursday, 21 and Friday, 22 December 2023 (**Decision**) was motivated to any degree by Ms Lattouf's political opinions, race or national extraction; and that the Enterprise Agreement was contravened.

[4] Ms Lattouf has abandoned earlier claims for reinstatement, compensation for reputational damage, and compensation for economic loss. It can be inferred that she dropped the claim for reinstatement because she belatedly recognised that it was hopeless, and the claims for reputational damage and economic loss because they were obviously not sustainable; the evidence is that her profile has been enhanced by her exploitation of the events that are the subject of these proceedings. All that is left in her case is a claim for compensation in the amount of $100,000 to $150,000[5], for what she says is non-economic loss and damage, being hurt and distress allegedly suffered by reason of one or more of the contraventions pleaded in the FCASOC.

B. THE RESPONDENT'S NARRATIVE OF SALIENT FACTS

[5] These submissions are designed to be read together with the accompanying Respondent's Narrative of Salient Facts.

C. WHAT REALLY HAPPENED?

[6] As the ABC submitted in opening its defence, the salient events involve five distinct phases. The case theory constructed by Ms Lattouf creates a misleading impression by jumbling the actual sequence of events, and omitting important steps in the chronology.

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[1] All further statutory references are to provisions of the *Fair Work Act*, unless specified otherwise.
[2] Paragraphs 1A, 45B and 45C of the **F**urther **C**onsolidated **A**mended **S**tatement **o**f **C**laim dated 14 October 2024.
[3] Paragraphs 30, 35, 41 and 44 of the FCASOC.
[4] Paragraphs 32, 45A and 45B of the **Defence** to the Consolidated Amended Statement of Claim dated 12 August 2024.
[5] **A**pplicant's Closing **S**ubmissions, [412].

Phase One: November 2023

[7] The ABC employed Ms Lattouf as a casual employee.[6] 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 2023. One factor in the decision to engage Ms Lattouf was that she was from a "racially diverse background".[7] No one at the ABC checked Ms Lattouf's previous social media activity.[8]

Phase Two: Monday, 18 December 2023

[8] Ms Lattouf presented her first programme on Monday, 18 December 2023.[9]

[9] 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.[10]

[10] Mr Anderson raised the fact that he had received Complaints with Mr Oliver-Taylor,[11] 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".[12]

[11] This is the earliest reference to the ABC's obligations of impartiality, and to the issue of perceptions of not being impartial. These concepts are central to a correct appreciation of the ABC's conduct; they are central to the ABC's statutory obligations, to its reputation, and to the fulfilment of its public purpose as the national broadcaster. They are misunderstood and misrepresented in Ms Lattouf's case. They are discussed in the next section of these submissions.

[12] Mr Oliver-Taylor's email was also the original source of what, on the ABC's case, became a direction to Ms Lattouf in relation to her social media activity whilst she was engaged by the ABC. The evidence pertaining to that direction is set out in Appendix A to these Submissions.

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[6] N [21].
[7] N [9].
[8] N [8], [14].
[9] Respondent's **N**arrative of Salient Facts [23].
[10] N [24].
[11] N [25].
[12] N [28].

[13] Enquiries initiated by Mr Oliver-Taylor's email included consideration of whether anything Ms Lattouf had written or posted before her engagement began conflicted with the ABC's editorial policies.[13] Mr Melkman was consulted; his advice, based on the limited social media activity of Ms Lattouf's uncovered at that time, was placatory.[14]

[14] Reassured by this, and by Mr Ahern's assurance that Ms Lattouf's show on *Mornings* did, and would, not "contain any content about Israel-Gaza",[15] 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".[16]

[15] Mr Oliver-Taylor then sent an email to Mr Anderson in which he said, "[Ms Lattouf] will finish on Friday".[17]

[16] 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.[18]

[17] Mr Ahern executed Mr Oliver-Taylor's instruction to ensure that Ms Lattouf was not and has not been posting anything that would suggest she was not impartial, by causing Ms Green to speak with Ms Lattouf about her social media activity while she was presenting *Mornings*. The gist or substance of Mr Ahern's instruction was that Ms Green was to tell Ms Lattouf that she was not to post anything that would suggest she was not impartial in relation to the conflict in Israel and Gaza. There is an issue as to what words Ms Green used when she spoke with Ms Lattouf. This issue is discussed in Appendix A. 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 on her social media anything that would suggest she was not impartial in relation to the conflict in Israel and Gaza during what remained of the five days over which she was presenting *Mornings*. There was nothing "peculiarly demanding" about this[19]; all that the ABC required was that Ms Lattouf restrain her social media activity for a few days, while she discharged her obligations as its employee, including to comply with the ABC's Code of Conduct, Editorial Policies, and **P**ersonal **U**se of **S**ocial **M**edia Guidelines. (These instruments are discussed in the next section of these Submissions.) This was one of a suite of mitigants that the ABC put in place to address the issue posed by Ms Lattouf's past social media activity.[20] These mitigants were expressly designed to protect both "the impartiality of the ABC" and Ms Lattouf.[21]

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[13] N [34], [36], [38].
[14] N [48].
[15] N [50], [58].
[16] N [62].
[17] N [64].
[18] N [67].
[19] *cf* AS [32].
[20] N [111].
[21] T345.23; T370.13; T389.17; T417.23-25; T418.27-32; T562.24-26; T563.1-2; T563.16-19; N [110].

[18] Central to the case constructed by Ms Lattouf is the allegation that Mr Anderson and Mr Oliver-Taylor wished to be rid of Ms Lattouf as soon as they became aware of her opinions on the conflict in Israel and Gaza.[22] 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, in consultation with Mr Latimer, Mr Ahern, and Mr Melkman, 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.[23]

[19] Also central to Ms Lattouf's construct is the thesis that the Complaints had an enduring significance, and were the ultimate cause of the Decision. 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".[24] 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*.[25]

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

[20] During the evening of Monday, 18 December 2023, Mr Anderson, acting alone, looked for and found some of Ms Lattouf's social media posts.[26] Seemingly, these were posts that had not previously come to the notice of the ABC senior management. Mr Anderson thought that the posts were "full of ant-Semitic [sic] hatred"[27], 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.[28]

[21] Mr Anderson sent the posts to Mr Oliver-Taylor, who shared Mr Anderson's concern.[29] 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.[30] Mr Ahern immediately raised the question about whether Ms Lattouf would need to be taken off air, but that if that was

[22] AS [3] , [341].
[23] See T417.23-25.
[24] N [62].
[25] See Appendix A.
[26] N [69].
[27] N [70]. See also paragraph 141 of these Submissions.
[28] N [83].
[29] N [72].
[30] N [78], [87].

to be done the next day it would be disruptive.[31] Mr Oliver-Taylor responded saying "[n]ot tomorrow" and "let's cautiously review"[32], and later "carefully think things through".[33]

[22] 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.[34]

[23] The following morning, on Tuesday, 19 December 2023, Mr Ahern, Mr Latimer and Mr Melkman met to discuss Ms Lattouf's previous social media activity.[35] Mr Melkman confirmed the views he had expressed in Phase Two. As referred to above, 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".[36]

[24] That position was communicated to, and accepted by, Mr Oliver-Taylor as "our position".[37]

[25] 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".[38]

[26] Late on the morning of Tuesday, 19 December 2023, 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.[39]

[27] Mr Anderson then met with Ms Buttrose, still in the morning on Tuesday, 19 December 2023.[40] The evidence is that Ms Buttrose was nonplussed by Complaints that she had been receiving about Ms Lattouf's engagement.[41] Mr Anderson's evidence is that he told Ms Buttrose that it had been decided that Ms Lattouf would stay on air until her engagement came to an end on Friday, 22 December 2023[42]; in any event, that is in fact what had by then been decided.

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[31] N [80].
[32] N [81].
[33] N [98].
[34] N [96].
[35] N [108].
[36] N [111].
[37] N [120].
[38] N [120].
[39] Anderson, [58], CB Tab 15 p 906.
[40] N [113].
[41] N [115]-[117A].
[42] N [117].

[28] Early in the afternoon of Tuesday, 19 December 2023, Mr Ahern confirmed to Mr Latimer, Mr Melkman and Mr Oliver-Taylor that the agreed mitigants were in place.[43]

[29] Mr Oliver-Taylor gave this unchallenged evidence about his state of mind as at the end of Tuesday afternoon: "I felt we were managing it at this…point…I felt we had made a clear message to Ms Lattouf, to her team, to say, "Don't post anything." And Ms Lattouf was performing well on air…There were no concerns there. And I felt we were managing it."[44]

[30] 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 2023. 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 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

[31] The theme of Phase Four is the maintenance of the decision arrived at by the end of Phase Three.

[32] On Tuesday, 19 December 2023, in the evening, Ms Buttrose emailed Mr Anderson, forwarding a complaint about Ms Lattouf. She pointedly asked whether Ms Lattouf had been "replaced"; she was "over getting emails about her".[45]

[33] Ms Lattouf's case theory is that Ms Buttrose's emails are indicative of her being "intensely interested in Ms Lattouf's ongoing employment with the ABC" and "so desirous to be rid of [Ms Lattouf".[46] However, the significant fact is not what Ms Buttrose may then have wanted to happen, but that Mr Anderson forcefully and decisively pushed back, telling Ms Buttrose, unequivocally, that Ms Lattouf "will finish up on Friday".[47]

[34] During the evening on Tuesday, 19 December 2023, Mr Anderson forwarded correspondence that he was receiving from and sending to Ms Buttrose, to Mr Oliver-Taylor.[48] 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 2023, and that Mr Oliver-Taylor's decision to that effect had Mr Anderson's support.[49] When Mr Oliver-Taylor wrote 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

[43] N [131].
[44] T381.01-06.
[45] N [155].
[46] AS [255].
[47] N [158].
[48] N [156], [159], [164].
[49] Anderson, [67], [71], [76], CB Tab 15 p 908-910.

until Friday...It's not perfect, but it's the right course of action at this point"[50], Mr Anderson responded, "hold the position".[51] Once again, these statements – made contemporaneously in writing at the time – belie Ms Lattouf's theory that Mr Anderson and Mr Oliver-Taylor were desperate to be "rid of" Ms Lattouf.

[35] The case constructed by Ms Lattouf illogically and unreasonably perceives something sinister in the communications between Mr Anderson and Mr Oliver-Taylor in Phase Four.[52] 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,[53] the position at the end of Phase Four continued to be that Ms Lattouf would stay on air, with all of the agreed mitigants in place, until the end of her engagement on *Mornings* at the end of that week.

[36] The "blow back" to which Mr Oliver-Taylor referred is central to a correct appreciation of the problem that the ABC was trying to manage. Ms Lattouf's case seeks to invest with a sinister connotation the ABC's appreciation that it was in an "unacceptable"[54] or "untenable"[55] "predicament" in relation to Ms Lattouf. The ABC had unwittingly engaged as the presenter of a prominent radio programme, with an audience of "several hundred thousand people"[56], a person who, by their past social media activity, had publicly advocated for, and associated themselves with, one perspective of what was at that time "the hottest topic in the world"[57]. Ms Lattouf was, as Ms Buttrose correctly characterised her, "an activist".[58] (There is nothing pejorative about that characterisation; it is an objectively accurate description of the impression conveyed by Ms Lattouf's social media activity.[59]) Ms Lattouf's public *persona* as an activist for one perspective was known by many complainants, with the result that Mr Anderson was obliged to tell Ms Buttrose that "[t]here is without doubt already damage caused by her engagement".[60] There was a realistic prospect that, if the ABC responded to those circumstances by taking Ms Lattouf off air, it would attract other, but different, criticism, for having "caved in to pro-Israeli lobbying"[61], when Ms Lattouf had done nothing wrong[62] in the period when she was an employee of the ABC. There was also "a high chance" that Ms Lattouf would "make it a very big (and very public) issue".[63] If the ABC kept her on air, that posed risks for perceptions of the ABC's impartiality.[64] This was the

[50] N [165].
[51] N [167].
[52] Applicant's Outline, 13.01.25, [19]; AS [231], [316].
[53] N [167].
[54] N [172].
[55] N [184].
[56] T439.27-36.
[57] T343.18-21.
[58] N [116].
[59] cf AS [10], [11].
[60] N [172].
[61] N [165], [167], [172]
[62] N [96], [122], [165].
[63] N [96]
[64] N [172].

conundrum that it had been decided would be addressed by a "managed exit" on "Friday" that Mr Anderson described to Ms Buttrose in his email of 9.27 pm on Tuesday, 19 December 2023.[65]

[37] All of this being so, the ABC had "weighed"[66] the competing risks, and decided to keep Ms Lattouf on air for the rest of the week in order to avoid the risks that taking her off air would entail, while trying to "manage"[67] the risks posed by keeping her on air by putting in place "mitigating plans".[68] As Mr Oliver-Taylor said in a text to Mr Anderson at 10.12 pm on Tuesday, 19 December 2023, "It is not perfect, but it's the right course of action at this point."[69] Mr Oliver-Taylor's unchallenged evidence was that this text accurately reflected his then state of mind.[70] The direction given to Ms Lattouf in relation to her social media activity was one of those mitigants – that is, a particular response to particular circumstances.[71]

[38] 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.[72] In that email, Mr Anderson reiterated and explained the position that he had put to Ms Buttrose the night before: Ms Lattouf would remain "on air for the remainder of her contract".[73] He acknowledged the conundrum in which the ABC found itself: Ms Lattouf's engagement had caused damage to the ABC, but ending it before Friday, 22 December 2023, would lead to claims that the ABC had "caved to pro-Israeli lobbying".[74] At 11.00 am, Ms Buttrose replied, "Thanks for the explanation, David - it must be Christmas."[75]

Phase Five: the afternoon of Wednesday, 20 December 2023

[39] That position changed in the early afternoon of Wednesday, 20 December 2023, as a consequence of the interposition of a new factor.

[40] At or about 12.05 pm on Wednesday, 20 December 2023,[76] 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".[77]

[41] There was a Microsoft Teams meeting early in the afternoon of Wednesday, 20 December 2023 (**Teams Meeting**) that, at various times, included each of Mr Oliver-Taylor, Mr Ahern, Ms Green,

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[65] N [158].
[66] N [172].
[67] N [172],
[68] T410.05; see also Oliver-Taylor [57], [61], CB Tab 11, pp 419 and 422.
[69] N [165].
[70] N [166].
[71] See Appendix A.
[72] N [172].
[73] N [172].
[74] N [172].
[75] N [173].
[76] N [191].
[77] N [195].

Mr Latimer, and Mr Melkman.[78] Mr Oliver-Taylor consulted with Mr Ahern, Mr Latimer, and Mr Melkman, and then made the Decision that Ms Lattouf should be "stood down"[79]; that is, taken off air.[80] This is the Decision that is the focus of Ms Lattouf's unlawful termination claim: see Appendix C to these Submissions.

[42] Mr Oliver-Taylor then communicated the Decision to Mr Anderson, disturbing Mr Anderson's Christmas lunch with Ms Buttrose for that purpose.[81] 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".[82]

[43] At Mr Oliver-Taylor's direction,[83] Mr Ahern enacted the Decision in a meeting with Ms Lattouf later than day.[84]

[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 2023. The payment was made as part of the usual fortnightly pay cycle.[85]

D. IMPARTIALITY AND THE ABC

[45] Ms Lattouf's case repeatedly asked, what is the rule that she is said to have contravened?[86] That question is a red herring. There was never a "rule". None of the ABC's witnesses embraced the concept of a "rule". Nothing that was done in relation to Ms Lattouf depended, whether expressly or by implication, on the existence of a "rule".

[46] The correct position is that the ABC, by its senior officers and in its published policies, accepted that it had statutory obligations to be, and to be seen to be, impartial, and made it known to employees that it was expected that they would not conduct themselves so as to compromise the appearance of impartiality. That position included employees' conduct out of work.

[47] The ABC's obligations of impartiality, and the need for it to ensure that it was perceived to be impartial, were a value, or norm, that informed the reasoning of everyone at the ABC who was involved in dealing with the dilemma with which Ms Lattouf presented them: see Appendix B to these Submissions.

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[78] N [200]-[218].
[79] N [219].
[80] Oliver-Taylor, [112], CB Tab 11 p 432.
[81] N [223]-[230].
[82] N [224].
[83] N [235]-[236].
[84] N [238]-[239].
[85] N [261].
[86] See, for example, AS [340(b)], [346] and [348].

[48] The ABC is a corporation established by the *Australian Broadcasting Corporation* Act (1983) (**ABC Act**).

[49] Contained within the ABC Act is the ABC Charter, which prescribes the ongoing functions and responsibilities of the ABC.

[50] Independence is enshrined as a foundational principle in the ABC Charter, and is set out in, and supported by, the ABC Act. To protect the ABC's independence, the ABC is a self-regulating entity, primarily accountable to the ABC Board. It is the duty of the ABC Board to "maintain the independence and integrity" of the ABC.

[51] Under s. 8(1)(c) of the ABC Act, the Board of the ABC has a duty to "ensure that the gathering and presentation by the Corporation of news and information is accurate and impartial according to the recognised standards of objective journalism".

[52] The concept of "presentation" is wide. It includes every aspect of the way in which the ABC is presented to the Australian people, including by the identity of the presenters who are its public face. The concept is not confined to the presentation of "news"; it explicitly embraces the presentation of any "information".

[53] The obligations imposed by, and that flow from, s. 8(1)(c) of the ABC Act are not, as Ms Lattouf's case suggests at AS[11], merely "highly contestable premises" or "a highly contestable normative outlook". They are central to the ABC's public purpose as the national broadcaster. They are intractable. If Ms Lattouf's case goes so far as to suggest that there is a conflict between the ABC's obligations as a consequence of s. 8(1)(c) of the ABC Act and the *Fair Work Act*, then the ABC would respond by submitting that (a) there is no such conflict, and (b) in the alternative, if there is, then the specific obligations flowing from the ABC Act prevail over the general provisions of the *Fair Work Act*.[87]

[54] The ABC's Editorial Policies lay down what Mr Anderson regarded as "inviolable standards", including to "[g]ather and present news and information with due impartiality", and not to "unduly favour one perspective over another."[88]

[55] The Editorial Policies introduce the concept of impartiality by saying:

> 'Impartiality is a fundamental standard to the ABC. It is central to its public service purpose and to its reputation as a credible and trustworthy broadcaster. Audiences expect the ABC to provide accurate, fair and unbiased information and a wide range of perspectives to help them to make up their own minds on contentious or controversial issues... The ABC's requirement for impartiality is defined in the statutory obligation in the ABC Act to gather and present news and information that

[87] *Barker v Edger* [1898] AC 748, 754; *Commissioner of Police v Eaton* (2013) 252 CLR 1 at [46].
[88] Anderson, [18], CB Tab 15 p 896.

is 'accurate and impartial according to the recognized standards of objective journalism'... The ABC standards require that all news and information is duly impartial.'[89]

[56] (The modest qualification that Mr Anderson made to this statement in the course of his cross-examination – T203.23-32 – attracts adverse comment at AS [238(a)], but the reason for that is obscure, undeveloped and goes nowhere.)

[57] The ABC Code of Conduct provides as follows (emphasis in original):

> **PRINCIPLES:**
>
> The ABC is an independent media organisation providing broadcasting and digital media services within and outside Australia. This Code of Conduct outlines the required values, behaviours and standards which all ABC workers must demonstrate.
>
> **WHO AND WHEN:**
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> This policy applies to all ABC employees, all ABC suppliers, contractors and subcontractors, work experience students, interns and all ABC volunteers (Workers).
>
> …
>
> **STANDARDS:**
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> ABC Workers must also conduct themselves in accordance with specified standards of behaviour as follows:
>
> …
>
> Comply with any lawful and reasonable direction given by a person in the ABC who has authority to give such a direction.
>
> …
>
> Be conscious of responsibility to protect the ABC's reputation, impartiality, independent and integrity where personal use of social media may intersect with their professional life.[90]

[58] The ABC's PUSM Guidelines provide as follows (emphasis in original):

> The purpose of these Guidelines is to examine those areas where your personal use of social media may intersect with your professional life and to provide some information and direction on managing the risks that may arise.
>
> …
>
> **PURPOSE OF THESE GUIDELINES**
>
> The ABC Code of Conduct requires Workers to be conscious of their responsibility to protect the ABC's reputation, independence, impartiality and integrity where personal use of social media may intersect with their professional life.

[89] Anderson, [19], CB Tab 15 p 896.
[90] Ex 19.

…

The purpose of the Personal Use of Social Media Guidelines (Guidelines) is to assist ABC Workers and managers to navigate the risks associated with personal use of social media and to take appropriate step to ensure compliance.

WHO THESE GUIDELINES APPLY TO

All ABC Workers defined as:

"Any person who carries out work in any capacity for the ABC, including work as: an employee…

CONSEQUENCES OF BREACH

…if a Worker's social media content could reasonably be considered to breach the Guidelines outlined below, the ABC may:

…

- exercise contractual remedies.

…

PERSONAL SOCIAL MEDIA STANDARDS

For all ABC Workers personal use of social media is subject to the following standards:

- Do not damage the ABC's reputation for impartiality and independence.
- Do not undermine your effectiveness at work.

…

However, while personal social media activity is not required to adhere to the Editorial Policies, there are two key areas of the Editorial Policies which are nonetheless relevant to Workers' personal use of social media:

> (1) Impartiality: For many Workers, remaining impartial in the public eye is crucial to maintaining effectiveness in their ABC roles. **A thoughtless post or tweet can instantly compromise this perception of impartiality** [A link to the ABC Editorial Guidance note on impartiality is inserted in the document at this point]. The Editorial Policies guidance note on impartiality is a useful re-source.
>
> (2) Independence and integrity: Editorial Policy standard 1.4 states: "External activities of individuals undertaking work for the ABC must not undermine the independence and integrity of the ABC's editorial content." A Worker's personal social media activity can affect the independence and integrity of any ABC content.

APPLYING THE STANDARDS

A Worker's risk level is largely determined by their role with the ABC, whether they are involved in content making and their public profile and recognition as an ABC Worker.[91]

[91] Melkman, Ex SM-01 Tab 2, CB Tab 18 p 1220-1223.

[59] The ABC Editorial Policies include:

> **4 Impartiality and diversity of perspectives**
>
> Principles
>
> The ABC has a statutory duty to ensure that the gathering and presentation of news and information is impartial according to the recognised standards of objective journalism.
>
> …
>
> The ABC takes no editorial stance other than its commitment to fundamental democratic principles including the rule of law, freedom of speech and religion, parliamentary democracy and non-discrimination.
>
> Judgements about whether impartiality was achieved in any given circumstances can vary among individuals according to their personal and subjective view of any given matter of contention. Acknowledging this fact of life does not change the ABC's obligation to apply its impartiality standard as objectively as possible.[92]

[60] Mr Anderson's unchallenged evidence was that the ABC's pursuit of impartiality can lead to strong criticism of the ABC, often by groups or individuals who want the ABC to take a specific stance or 'take a side' on matters in a manner that aligns with their honest beliefs and values. In relation to the reporting of news on conflicts which are of great public significance and that can personally affect thousands of people, it is not uncommon for the ABC to receive contrasting criticism on the same pieces of reporting from all 'sides', with all arguing the ABC unduly favoured another in its reporting.[93]

[61] Mr Anderson went on to say, again without challenge:

> Given impartiality is enshrined in the ABC Act, there is no room to then choose whether or not the ABC is to be impartial, or an advocate for one side. The ABC must be impartial in accordance with recognised standards of objective journalism. That objectivity requires ABC journalists to set aside personal views, and is assisted by editorial policies, guidelines, and rigorous prepublication processes.[94]

[62] The distinction between, on the one hand Editorial Policies and Editorial Guidelines, and the Code of Conduct and PUSM Guidelines on the other hand, is not as sharp as Ms Lattouf's case would have it.[95]

[63] The PUSM Guidelines relevantly state:

> The ABC distinguishes between its official social media accounts and Workers' personal accounts. Content on official accounts is ABC content and it must adhere to the Editorial Policies [A link to the Editorial Policies is inserted into the PSUM Guidelines at this point], just like ABC content on

[92] Melkman, Ex SM-01 Tab 1, CB Tab 18 p 1202.
[93] Anderson, [21], CB Tab 15 p 896-897.
[94] Anderson, [22], CB Tab 15 p 897.
[95] See, for example, AS [51].

other platforms. Personal social media activity is not ABC content; it is not subject to the Editorial Policies and the ABC does not take editorial responsibility for it.

This means that if a complaint is received about content on a Worker's personal account, it will not be investigated as an editorial complaint or assessed against the Editorial Policies. Any issues related to personal use of social media will be managed by line managers, in consultation with People & Culture where required.

However, while personal social media activity is not required to adhere to the Editorial Policies, there are two key areas of the Editorial Policies which are nonetheless relevant to Workers' personal use of social media:

> (1) Impartiality: For many Workers, remaining impartial in the public eye is crucial to maintaining effectiveness in their ABC roles. A thoughtless post or tweet can instantly compromise this perception of impartiality. The Editorial Policies guidance note on impartiality [A link to the Editorial Policy Guidance Note entitled 'Impartiality' is inserted into the PSUM Guidelines at this point] is a useful resource.
>
> (2) Independence and integrity: Editorial Policy standard 1.4 states: "External activities of individuals undertaking work for the ABC must not undermine the independence and integrity of the ABC's editorial content." A Worker's personal social media activity can affect the independence and integrity of any ABC content.[96]

[64] The PUSM Guidelines refer to the "ABC Code of Conduct" under the heading "Other relevant procedures and guidelines".[97]

[65] Mr Melkman deposed in his affidavit that the Editorial Policies and the PUSM Guidelines were organisationally distinct, but that that the guidance notes are "in practice, considered an integral component of the complete Editorial Policy framework".[98]

[66] Mr Melkman explained that "[o]ften at the ABC, the terms 'Editorial Policies' or 'Ed Pols' or 'Editorial Standards' are used colloquially and broadly to encompass both the Editorial Policies and the Guidelines".[99]

[67] That is a cogent explanation for Mr Oliver-Taylor's references to Editorial Policies when, in context, he plainly had the subject matter of the PUSM Guidelines in mind.

[68] In his affidavit Mr Melkman described ways in which a worker's activity on social media (the activity which is the subject of the PUSM Guidelines) could intersect with Editorial Policies:

> (c) A worker's personal social media activity can be relevant to the application of the impartiality and independence standards because it may undermine the independence or integrity of editorial content they contribute to, or create perceptions that their editorial decisions have been improperly influenced by personal interests, or create perceptions of a lack of impartiality in ABC content they

[96] Melkman, Exhibit SM-01 Tab 2, CB Tab 18 CB p 1222-1223.
[97] Melkman, Exhibit SM-01 Tab 2, CB Tab 18 CB p 1224.
[98] Melkman, [16], CB Tab 18 p 1171.
[99] Melkman, [17], CB Tab 18 p 1171.

> have contributed to or will contribute to, or an inability on their part to be appropriately impartial on subjects covered in ABC content they have contributed to or will contribute to.
>
> (d) If a worker's personal social media activity reveals that they hold a strong personal position on a matter of contention (such as advocating for one side in a contentious political or social debate), the risk of a breach of the impartiality and independence standards arises regardless of the specifics of the position itself. That is, it does not matter which side of the debate a person sits on, it is the fact that they do sit on one side of it if publicly revealed via their personal social media activity or some other means that is pertinent to the application of the standards.[100]

[69] An email from Justin Stevens, the Director of ABC News, sent to all news staff on 24 November 2023, specifically in relation to the Israel-Gaza conflict made a related point:

> Please be conscious of your conduct on social media, how it reflects on our organisation and how it can make life difficult for your colleagues who are committed to impartial journalism.[101]

E. ONUS

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

[71] 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].

[72] However, contrary to the submission advanced by Ms Lattouf in opening,[102] 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].

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[100] Melkman, [26(c)-(d)], CB Tab 18 p 1173.
[101] N [85]-[86]; Ex 20.
[102] T23.9-14.

[73] The AS are conspicuously silent on the question of onus.

F. WAS MS LATTOUF'S EMPLOYMENT TERMINATED?

[74] The first factual question the Court will be required to resolve is whether Ms Lattouf's employment was terminated by the ABC. That question is one of fact and law. It is also a question that is critical, and on the ABC's case fatal, to the unlawful termination aspects of Ms Lattouf's claim. It is also central to two of the four alleged contraventions of the Enterprise Agreement.

[75] "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.

[76] 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 constitutionally 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].

[77] 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.

[78] Indeed, so much was made plain by 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".

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

[80] *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.

[81] *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.[103]

b. On Wednesday, 20 December 2023, Ms Lattouf was advised that she would not be required to present on Thursday, 21 December 2023 and Friday, 22 December 2023, being the last two shifts of the engagement.[104] 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, notwithstanding that that assertion is pleaded in the FCASOC[105]).

c. The ABC paid Ms Lattouf for all five shifts of the engagement as part of the usual pay cycle.[106]

d. No steps were taken, internally within the ABC, to terminate her employment.[107]

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[103] N [15]-[20].
[104] N [238]-[239].
[105] FCASOC, [7]. See also, [37]-[38].
[106] N [261]; Affidavit, Vagg, 11.10.24, [17(d)(i)].
[107] Vagg, [18], CB Tab 13 p 726-27.

[82] *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.

[83] *Finally*, and by reason of the above, the engagement came to an end on Friday 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.

[84] 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. Ms Lattouf pins her case to this proposition, which is wrong in two respects. The *first* error is 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 coterminous with the contract. It persisted in accordance with the terms of the contract of casual employment.

[85] 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.

[86] Ms Lattouf's submission in AS [332] that "[a]ny reference to the contractual position is a distraction" is not maintainable in the face of *Workpac Pty Ltd v Rossato* (2021) 271 CLR 456, *CFMMEU v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 and *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254.

[87] 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.

[88] Ms Lattouf makes much of Ms Buttrose's statements that Ms Lattouf had been "dismissed" or "was no longer employed" by the ABC or "no longer works at the ABC". However, the evidence is that Ms Buttrose had only a general knowledge of what had actually happened.[108] She was not in

[108] N [232].

a position to make an informed assessment of the legal character of what had happened capable of constituting an admission.[109]

G. UNLAWFUL TERMINATION CLAIM

What is Ms Lattouf's case?

[89] Ms Lattouf pleads, and the ABC admits, that she is "a woman of Lebanese and Arab and Middle Eastern descent".[110] Ms Lattouf later pleads (and the ABC does not contest) 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".[111]

[90] 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.[112]

[91] Ms Lattouf then pleads a bare allegation that her asserted termination was for reasons that included these asserted attributes.[113]

[92] 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 (**Human Rights Watch Story**) reading "HRW reporting starvation as a tool of war".[114] 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. This case does not concern expressions of Ms Lattouf's opinions.[115] The ABC has expressly not consented to any expansion of Ms Lattouf's case beyond that which is pleaded: *Construction Forestry Mining and Energy Union v BHP Coal Pty Ltd* (2016) 262 IR 176 at [19].

[93] Contrary to the AS, differential, or discriminatory, treatment is also no part of Ms Lattouf's pleaded case. The AS are replete with references to the "bespoke" direction or "rule" given or applied to

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[109] AS [19] and AS [336].
[110] 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].
[111] FCASOC at para [12C(b)(ii)].
[112] Defence at para [1A].
[113] FCASOC at para 45B.
[114] See ASOF at [83].
[115] cf AS [33].

Ms Lattouf.[116] The correct position is that it was a considered response to a 'bespoke' set of particular circumstances: see paragraphs [36] to [38] of these Submissions above.

[94] That said, the direction was given within a framework that applied generally in the ABC. The Code of Conduct and the PUSM Guidelines laid down principles about the personal use of social media with which the direction given to Ms Lattouf was closely aligned: see paragraphs [47] to [64] of these Submissions above. On 24 November 2023, the Director of ABC News wrote to staff about the conflict in Israel and Gaza, saying "Please be conscious of your conduct on social media, how it reflects on our organisation and how it can make life difficult for your colleagues who are committed to impartial journalism."[117] And it appears that Mr Melkman was alive to the possibility that similar circumstances might arise in relation to "other fill in presenters".[118]

"Political opinion"

[95] "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].

[96] 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 paragraph [92] above.

[97] 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) do not have a "political" character, and subparagraph (c) is not an "opinion".

"Race" and "National extraction"

[98] The ABC does not put in issue (that is, does not dispute or contest) that:

a. the Lebanese, Middle Eastern and Arab races exist, or that Ms Lattouf is of one or more of those races;

b. there is a Lebanese, Middle Eastern and Arab national extraction or that Ms Lattouf has one or more of those national extractions.

[116] See, for example, AS [31], AS [32] and AS [346]
[117] N [85]-[86]; Ex 20.
[118] N [111].

The ABC's reasons

The ABC's three alternative contentions

[99] The ABC's first contention on this issue is that, for the reasons set out above, Ms Lattouf has not established as an objective fact that she has the relevant protected attributes related to political opinions (b) – (d) that she has pleaded, with the result that the reverse onus is not enlivened, and her unlawful termination claim on those bases must fail.

[100] The ABC's second contention applies to so much of Ms Lattouf's unlawful termination case as concerns her race and national extraction. As to that, the ABC's case is that Ms Lattouf 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. In the alternative, if that is not accepted, then the ABC's case is that, while the Applicant's race and background were a factor in the decision to engage her, it denies that anything else that was done in relation to the Applicant was motivated to any degree by her race or national extraction. There is absolutely no evidence to support these aspects of Ms Lattouf's claims.

[101] The ABC's third, and alternative, contention is that, if and to the extent the Court finds that the reverse onus has been enlivened in relation to any pleaded protected attribute, 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.

[102] In this regard, the Court ought to adopt the reasoning in ***Anglo Coal (Dawson Services)*** at [132]-[135], per Rangiah J (emphasis added):

> [132] In the present case, Mr Byrne's dismissal was certainly connected with his taking sick leave. **There was a causal nexus**. If Mr Byrne had not taken sick leave, then he would not have been dismissed. However, **that does not necessarily mean that Mr Byrne was dismissed because he took sick leave**. The word "because" in s 340(1) and s 352 **requires an enquiry as to the operative and immediate reason or reasons for his dismissal**.
>
> [133] The primary judge accepted that the reason why the respondent dismissed Mr Byrne was that Mr Power believed that Mr Byrne had acted dishonestly by taking sick leave when he was not sick. Her Honour accepted Mr Power's evidence that if Mr Byrne had not given the employer reason to think that he was acting dishonestly, there would have been no problem with Mr Byrne taking sick leave. In my opinion, **the taking of sick leave cannot itself be described as an**

> **operative reason for the dismissal**. **Nor can it be described as an immediate reason for his dismissal.** On the findings of fact made by the primary judge, the only operative and immediate reason for the dismissal was Mr Power's belief that Mr Byrne had acted dishonestly.
>
> [134] As it turned out, Mr Power's belief that Mr Byrne had acted dishonestly by taking sick leave was wrong. The primary judge found that Mr Byrne was genuinely sick. However, **the question of what the employer's reasons for dismissing Mr Byrne were must be considered on the basis of what the employer knew or believed at the time of the dismissal**. The primary judge found that the decision-maker genuinely, although wrongly, believed that Mr Byrne had acted dishonestly. That belief was brought about by Mr Byrne's conduct. The fact that it was demonstrated at the trial that Mr Byrne was in fact genuinely sick and entitled to take sick leave could not be determinative of the employer's reasons for dismissing him at an earlier time.
>
> [135] On the facts found by the primary judge, her Honour was right to conclude that Mr Byrne was not dismissed because he had exercised a workplace entitlement or because he was temporarily absent from work because of illness. I respectfully agree that the respondent did not contravene s 340(1) or s 352 of the FWA.

Whose reasons are relevant?

[103] 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].

[104] An inquiry as to what was in the mind of the authors of the Complaints when they sent the Complaints, which led to some chain of events, is not part of that inquiry. In its opening submissions, the ABC called the proposition that a corporation can contravene s. 772 by the reasons of someone outside the corporation "outlandish".[119] It was right to do so. Ms Lattouf's closing submissions cite no authority to support this proposition. None exists. As with all of the authorities in this area, the first of the authorities cited – *Wong v National Australia Bank Ltd* (2022) 318 IR 148 – deals only with decision-makers within the corporation. At paragraph [25], the Full Court cites *Wood v City of Melbourne Corporation* (1979) 26 ALR 430, in which it was held that

[119] Respondent's Opening Submissions, [140].

decision-makers include those who "played the decision-making part in the joint administrative activities" culminating in the act that constitutes the adverse action. That description is apt to include only persons within the corporation. In *Laing O'Rourke Australia Management Services Pty Ltd v Haley* [2024] FCA 1323 at [297] the statutory inquiry is expressly described as being into "the conduct and states of mind of persons within a corporation". Anything wider than that "would involve straying well beyond ordinary principles of corporate attribution and aggregation in a way not justified by any statutory rule contained in the [Act]".

[105] The policy behind the reverse onus imposed by s. 783 supports the ABC's submission. The reverse onus recognises that knowledge of the reasons for action taken by an employer lies uniquely within the employer.[120] That policy is inapt for someone outside a corporate employer. The employer has no means of knowing the motivations of such a person, and is not equipped, in any sensible way, to disprove an allegation that such a person is motivated by an unlawful reason. In such a case, s. 783 would operate in such an oppressively unfair manner as to indicate that it should not be construed or applied so as to bring within its scope any person outside the corporation.

Mr Oliver-Taylor and his reasons

[106] The ABC's case is that the Decision that Ms Lattouf would not be required to present *Mornings* on 21 and 22 December 2023 was taken by Mr Oliver-Taylor, and that in the statutory sense he was the sole decision-maker.

[107] If that case is accepted, it follows that the Court is concerned (if at all) only with the reasons of Mr Oliver-Taylor.

[108] Mr Oliver-Taylor denied 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 2023.[121]

[109] Mr Oliver-Taylor gave evidence that he was motivated only[122] by these considerations:[123]

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 PUSM Guidelines (again, it does not matter whether that view was right or wrong);

[120] *Qantas Airways Ltd v TWU* (2023) 412 ALR 134 at [63].
[121] Oliver-Taylor, [114], CB Tab 11 p 433.
[122] *Alam* at [14(d), (e) and (h)].
[123] Oliver-Taylor, [113], CB Tab 11 p 432.

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.

[110] Mr Oliver-Taylor did not resile from any of this evidence under cross-examination. There was no real challenge to his reasons, beyond colourable assertions that they were "absolute nonsense", and that his evidence was "shambolic" – all of which were categorically rejected by Mr Oliver-Taylor.[124]

[111] Ms Lattouf's case makes much of the assertion that the ABC has 'walked back' on a claim that she had "breached ABC policy on the use of social media".

[112] In fact, no such claim was ever made. The ABC's Defence pleads that Mr Oliver-Taylor's reasons for making the Decision included that she "*may* have breached the ABC's policies or guidelines" (emphasis added).[125]

[113] In his affidavit, Mr Oliver-Taylor deposed to having formed a "view" in the Teams Meeting that Ms Lattouf "had contravened the Personal Use of Social Media Guidelines"[126], although he acknowledged a recollection that there had not been a "consensus" about that question in the Teams Meeting.[127]

[114] Cross-examined, Mr Oliver-Taylor confirmed that he had formed the view to which he had deposed.[128] Asked for the basis of that view, he answered, "Impartiality and bias."[129]

[115] He also confirmed that other participants in the Teams Meeting may not have shared his view.[130]

[116] Although nothing relevantly turns on it, Mr Oliver-Taylor's view that Ms Lattouf had breached the PUSM Guidelines was a reasonable one: see below at paragraph [265] of these Submissions.

[124] T.417.19-20 and 27-28.
[125] Paragraph 45B(d)(i)(1).
[126] Oliver-Taylor, [113], CB Tab 11 p 432.
[127] Oliver-Taylor, [103], CB Tab 11 p 431.
[128] T416.44-47.
[129] T417.04.
[130] T416.36-42.

[117] Mr Oliver-Taylor's evidence as to his reasons is supported by the contemporaneous business records[131], which show that Mr Oliver-Taylor:

a. Had readily accepted Mr Melkman's advice, on Monday and Tuesday (18 and 19 December 2023) that Ms Lattouf had not done anything wrong, and that there was no basis to take her off the air;[132]

b. Had formed a view, along with Mr Anderson, as at Tuesday night and Wednesday morning, that Ms Lattouf should and will remain on air until the conclusion of her contract, on Friday;[133]

c. Had identified that there would be "blowback" if she was removed off air;[134] and

d. Had made his Decision only after Ms Lattouf's 19 December 2023 post came to his attention, and after he had discussed that post with Mr Melkman, Mr Latimer and Mr Ahern – with the group reaching a consensus that she ought to be taken off air.[135]

[118] Mr Oliver-Taylor's evidence as to his reasons expressly excludes any inference of any prohibited reason of "political opinion" or any of the other pleaded protected attributes.[136] 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".[137] A person can display impartiality irrespective of what (if any) political opinions the person holds.

Applicant's attack on Mr Oliver-Taylor's reasons

[119] The attack on Mr Oliver-Taylor's evidence appears to be that:

a. he could not reasonably have formed the view that Ms Lattouf was given a direction not to post about the Israel-Gaza war;

b. Ms Lattouf was not issued a direction and/or did not breach any direction; and

c. he could not reasonably have formed the view and/or did not form the view that Ms Lattouf breached the social medial policy (PUSM Guidelines).

[120] Each of the above can be readily rejected by reference to other (uncontested) evidence before the Court.

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131 cf *Bendigo* at [45]; see also *Fox v Percy* (2023) 214 CLR 118 at [31].
132 N [62], [120].
133 N [165], [177].
134 N [165].
135 N [217]-[219].
136 Oliver-Taylor, [114], CB Tab 11, p 433.
137 AS [9]-[16]; Applicant's Outline, [57]. AS

[121] ***First***, Mr Oliver-Taylor clearly did in fact believe (rightly or wrongly) and reasonably so, that Ms Lattouf was given a direction: see Appendix A. This is because:

a. On 18 December 2023, at 1:49 pm, Mr Oliver-Taylor sent an email to Mr Ahern, copy to Mr Latimer, Mr Melkman and Ms Koloff which stated, among other things, "can we ensure that Antoinette is not and has not been posting anything that would suggest she is not impartial".[138] The email also demonstrates that his concern was with perception of lack of partiality – not the substance of any opinion. This email was forwarded by Mr Ahern to Ms Green, and formed the basis of Mr Ahern's instruction to Ms Green to speak to Ms Lattouf about her prospective social media activity.[139] In those circumstances, Mr Oliver-Taylor's email operated an instruction to take steps to ensure that Ms Lattouf would not post anything on social media that would suggest she was not impartial in relation to the conflict between Israel and Gaza.

b. On 19 December 2023, at 1:16 pm, Mr Oliver-Taylor was copied on an email from Mr Ahern, which stated, among other things:[140]

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

c. Mr Latimer had told Mr Oliver-Taylor that he had instructed Mr Ahern to issue Ms Lattouf a direction;[141]

d. On 20 December 2023, at 12.19 pm, Mr Oliver-Taylor received an email from Mr Latimer which stated, among other things, "The clear instructions were to direct Antoinette not to post to socials for the rest of this week."[142]

e. Mr Oliver-Taylor was not present on the Teams Meeting on 20 December 2023 while Ms Green was present.[143] To the extent that anything she said put into doubt whether a direction was given (which is unclear in circumstances where no one else on that call recalls her raising doubt as to whether the direction was given at all), Mr Oliver-Taylor was not privy to those concerns;

f. Once Mr Oliver-Taylor did join the call, the collective view of the attendees (being Mr Latimer, Mr Melkman and Mr Ahern) was that Ms Lattouf had breached the direction given to her. Implicit in that is a belief that she was actually given a direction.

[122] ***Second***, whether Mr Lattouf was actually issued a direction, or whether she actually breached a direction is not relevant to the inquiry as to the state of mind of the decision-maker. In any event,

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[138] N [28].
[139] See Appendix A.
[140] N [131].
[141] T.598.4-13.
[142] N [195].
[143] N [201]; Exs 5, 14, 16.

the Court would be satisfied that she was given a direction. There is no doubt that the word 'direction' was not used, nor that the direction was communicated using more passive language than perhaps had been intended by Mr Oliver-Taylor. It is clear that Ms Lattouf, in her own language, understood that what was being conveyed to her was that the ABC had an *expectation* that she "stop posting altogether".[144]

[123] The qualification she sought from Ms Green – that she could still post matters that were purely factual and from a verified source[145] – was a qualification that was never communicated to Mr Ahern, Mr Latimer, Mr Melkman nor Mr Oliver-Taylor. It was not even suggested to those witnesses, under cross-examination, that they were aware of such a qualification.

[124] ***Third***, at all times during that week, questions as to breaches of the PUSM Guidelines (and editorial policies) were deferred to Mr Melkman – as the subject matter expert. The objective contemporaneous evidence is that Mr Oliver-Taylor accepted Mr Melkman's opinion on those matters.

[125] Mr Melkman's view, unchallenged in cross-examination, was that Ms Lattouf's 19 December 2023 posts potentially breached the PUSM Guidelines, and that he had conveyed his views to the group on the Teams Meeting on 20 December 2023.[146]

[126] The fact that Mr Oliver-Taylor, in text messages and emails erroneously referred to the "editorial policies" is immaterial. Given the obvious overlap between the PUSM Guidelines and the editorial policies on the subject matter of impartiality, the mistake is an understandable one: see paragraphs [47] to [64] above.

Other purported decision-makers

[127] Ms Lattouf asserts that, in addition to Mr Oliver-Taylor, the Decision to take her off air was also made by (in the statutory sense) Ms Buttrose, Mr Anderson and Mr Latimer. The ABC's position is that:

a. first, none of those individuals were decision-makers – in the sense that they did not have 'a material effect *on the ultimate outcome'* or make an 'indispensable contribution' *to the outcome*; and

b. second, in the event that the Court finds that any one of those individuals was a decision-maker, the Court would be satisfied on the evidence that none of them were motivated by unlawful reasons.

[128] On the first of those propositions, the unchallenged evidence before the Court discloses that:

a. Ms Buttrose did not know about Ms Lattouf's Instagram posts, the deliberations about her possible removal off air, nor the Decision to remove Ms Lattouf off air, until after the Decision

[144] Lattouf, Annexure AL-11, CB Tab 10 p 321; T82.38-T103.27.
[145] N [55].
[146] N [212].

had been made.[147] As a result, she could not possibly have made an indispensable contribution to the outcome or Decision;

b. Mr Anderson was told of the Decision by Mr Oliver-Taylor on the telephone, immediately before the Decision was actioned.[148] He had not seen the relevant posts nor was he aware of, or involved in, any deliberations about the posts.[149] Whilst, theoretically, he could have intervened and directed Mr Oliver-Taylor not to action the Decision – such an intervention would have been, on Mr Anderson's unchallenged evidence, highly unusual.[150] In any event, the failure to contribute to a decision cannot sensibly be regarded as indispensable contribution to the outcome or Decision; and

c. Mr Latimer's contribution was no different to Mr Ahern's and Mr Melkman's contributions. Namely, Mr Oliver-Taylor had consulted the group to ascertain their views as to the conduct and the possible action to be taken, and the group came to a consensus as to those matters. [151] That is, none of them, including Mr Latimer, objected to the course of action proposed by Mr Oliver-Taylor – namely to remove Mr Lattouf off air. It is difficult to see how he could possibly have made an indispensable contribution to the outcome or Decision – particularly as no such submission is made with respect to Mr Ahern and Mr Melkman. The AS does not illuminate this issue.

[129] Central to Ms Lattouf's case theory is that Mr Oliver-Taylor was "pressured" by Ms Buttrose, or Mr Anderson, or both, to take action in relation to Ms Lattouf.[152]

[130] So far as Ms Buttrose is concerned, the alleged mechanism of that pressure is said to be the emails that she sent to Mr Oliver-Taylor on Tuesday, 19 December 2023 and Wednesday, 20 December 2023.

[131] It may be accepted that Mr Oliver-Taylor felt "real stress"[153] and "significant"[154] "pressure from above".[155]

[132] That fact, by itself, goes nowhere. Section 772 does not make it unlawful to terminate an employee's employment (assuming that to have occurred) for the reason of stress or significant pressure from above.

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[147] N [231]-[232].
[148] N [228].
[149] Anderson, [92]-[93], CB Tab 15 p 914-915.
[150] Anderson, [93], CB Tab 15 p915; T287.16-26.
[151] N [209], [211]-[213], [215]-[217],
[152] AS [267], [307].
[153] T380.32-33.
[154] T410.01-04.
[155] T389.41-43.

[133] However, if Ms Buttrose was motivated to exert the pressure by an unlawful reason, that might infect the Decision. That focuses attention on Ms Buttrose's reasons for emailing Mr Oliver-Taylor on Tuesday, 19 December 2023 and Wednesday, 20 December 2023.

[134] The ABC submits that it should be found that the immediate reason for Ms Buttrose's emails was so that Mr Oliver-Taylor could respond to the complaints. That is what Ms Buttrose and Mr Anderson had agreed would be Mr Oliver-Taylor's role in relation to the complaints.[156] That is the task that Mr Oliver-Taylor had been equipped to do.[157] It is the only reason disclosed by the text of Ms Buttrose's emails to Mr Oliver-Taylor.[158]

[135] The mechanism by which he is said to have exerted pressure on Mr Oliver-Taylor is obscure. Ms Lattouf's case in this regard seems to focus on the emails in which Mr Anderson expressed his dissatisfaction with the decision to engage Ms Lattouf in the first place.[159]

[136] Importantly, each of Ms Buttrose, Mr Anderson and Mr Latimer gave detailed evidence as to their motivations for everything they thought or did in relation to Ms Lattouf, and denying that they were in any way motivated by an alleged prohibited reason.

[137] The ABC submits that the Court would accept the evidence of those witnesses.

[138] Appendix D is an *aide memoire* that collects the evidence of the ABC's witnesses as to their reasons for everything they thought or did in relation to Ms Lattouf.

The imagined antipathy to Ms Lattouf's opinions

[139] Ms Lattouf's case theory that Ms Buttrose, Mr Anderson, Mr Oliver-Taylor or anyone else at the ABC had an "antipathy" to her political opinions is a construct, and should be rejected. It was never specifically put to Ms Buttrose.[160] It was put to Mr Anderson[161] and Mr Oliver-Taylor[162] and flatly denied by them. There is no trace of it in any contemporaneous document, or in any conversation recounted by Ms Lattouf. In fact, contemporaneous internal communications between management at the ABC refer to a desire to "protect" Ms Lattouf from criticism attracted by her social media activity.[163] It was never suggested to any of the ABC's witnesses that these expressions of solicitous concern for Ms Lattouf were fabricated; indeed, the idea that management at the ABC would falsely seed their internal communications in that way is absurd.

[140] The proposition that "the ABC, and particularly its most senior leadership", was hostile to the content of Ms Lattouf's opinions" is essential to the case theory constructed by Ms Lattouf. The

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156 N [115], [117], [145].
157 N [27].
158 N [145],[176], [179], [181], [185].
159 N [175].
160 cf T513.26-37
161 T272.13-18; T272.33-T273.18; T275.13-18; T294.34-45.
162 T409.26-31.
163 Melkman, Ex SM-01 Tab 18, CB Tab 18 p 1275; Oliver-Taylor, Ex COT-01 Tab 29, CB Tab 11 p 526; see also T370.12-13, T389.16-19, and T417.24-25.

asserted hostility is specifically alleged to be the direct cause of the Decision.[164] The reason for this is that the asserted hostility is the glue that holds the stray elements of Ms Lattouf's case theory together; without it, the theory falls apart.

[141] Mr Anderson denied having any hostility to the content of Ms Lattouf's opinions.[165] His denial should be accepted, because:

a. The only basis for the allegation that he was hostile to the content of Ms Lattouf's opinions is his reference on the evening of Monday, 18 December 2023 to Ms Lattouf's "socials" being "full of anti-Semetic hatred".[166] This is too slender a reed on which to construct such an elaborate edifice. Mr Anderson's statement was made specifically in connection with a post by Ms Lattouf in which she said, obviously of Israelis, "They should finish off the ethnic cleansing job they started. Then move on the West Bank. Kill and annex. Then same with Lebanon and Jordan."[167] It is all very well for Ms Lattouf to blithely say that this statement was "obviously…satirical".[168] Indeed, so it appeared to Mr Melkman, when he had had time to consider the post in a wider context.[169] But, when one puts oneself in Mr Anderson's place, coming upon a statement that, on its face, accuses Israel of "ethnic cleansing", and following a policy of "Kill and annex", then to characterise the statement as being anti-Semitic is to state an objectively reasonable conclusion of fact. Even Mr Melkman's more considered view was that Ms Lattouf's statement had "the potential to be misunderstood".[170]

b. There is no objective evidence of any hostility on the part of Mr Anderson to any of Ms Lattouf's opinions.

c. Mr Anderson's conduct after Monday, 18 December 2023 is flatly inconsistent with him being hostile the content of Ms Lattouf's opinions, or with any such hostility being a motive for wanting to have her "removed". On Tuesday, 19 December 2023, and Wednesday, 20 December 2023, he agreed with, supported, and defended the decision that Ms Lattouf should remain on air until the end of the week.

[142] The only basis upon which it appears to be suggested that Mr Oliver-Taylor is antipathetic to Ms Lattouf's opinions was that he expressed agreement with Mr Anderson's text messages on the evening of Monday, 18 December 2023. When Mr Oliver-Taylor's responses to those text messages are read in context, it will readily be seen that this is a hopeless proposition.

[143] The contention that Ms Buttrose was antipathetic to Ms Lattouf's opinions seemingly rests on the email that Ms Buttrose sent to Mr Anderson, on 20 December 2023, after having received a 'thank

[164] AS [29].
[165] T272.39-44.
[166] N [70].
[167] N [72].
[168] AS, [91].
[169] [96].
[170] [96].

you' email.[171] The email did no more than observe that a 'thank you' email, in the sea of complaints the ABC receives in the usual course, was novel. No adverse credibility findings could flow from such an email, which in context was objectively clearly 'tongue in cheek'.

Credibility

[144] The Applicant invites the Court to make broad sweeping adverse credibility findings with respect to Mr Anderson, Mr Oliver-Taylor, Ms Buttrose, Mr Latimer and Mr Ahern.[172] It is submitted by the Applicant that, "In each case their evidence should be treated with caution, and accepted only where contrary to the ABC's interests or clearly corroborated by other objective evidence."[173]

[145] It is submitted that this approach ought be rejected by the Court. As observed by the Full Court in *Ashby v Slipper* (2014) 219 FCR 322, at [77], "as a general proposition, evidence, which is not inherently incredible and which is unchallenged, ought to be accepted.", citing *Precision Plastics Pty Limited v Demir* (1975) 132 CLR 362 at 370-371. Significant portions of the evidence of Mr Anderson, Mr Oliver-Taylor, Ms Buttrose, Mr Latimer and Mr Ahern was not subject to any challenge and ought to be accepted.

[146] It is a feature of this case that not all of the evidence of each of the ABC's witnesses perfectly aligns with that of other witnesses. That is a sign of a case that has not been constructed. It reflects the ordinary fallibilities of human memory. In this case, none of the misalignments are material, particularly given that the salient events, and the reasoning of the people involved in them, are reflected in contemporaneous documents.

[147] Another feature of this case is that the Applicant complains in AS [212]-[225] about what she submits to be the inherent unreliability of affidavit evidence. That complaint rings hollow. At the Applicant's request, and with the unstinting acquiescence of the ABC, interlocutory orders were made for contentious evidence to be given orally. Then, almost at the eve of the hearing, the Applicant withdrew her request for evidence to be given orally, and allowed it to be given by affidavit. She cannot now complain of a circumstance of which she was the author. It is not surprising that the affidavits address the legal issues posed by the Applicant's claims, and in particular the requirements of s. 783.

[148] To the extent that submissions are made with respect to the above individuals, they are addressed in turn below.

[171] AS [265]-[266].
[172] AS [226]-[284].
[173] AS [226].

Mr Anderson

[149] The attack on Mr Anderson' credibility appears to be largely derived from a text message Mr Anderson sends Mr Oliver-Taylor, in the evening of Monday, 18 December 2023. The full text message reads:[174]

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

[150] The screen shot that followed the comment was as follows:

[151] The Applicant appears to take particular umbrage at the suggestion she is anti-Semitic. Mr Anderson's comment to that effect needs to be considered in its context. That context includes the fact that Mr Oliver-Taylor directed that further inquiries be made. Mr Melkman undertook a review and (correctly) observed that the above comment was made as part of a satirical post, and prior to her engagement with the ABC.

[152] Mr Oliver-Taylor and Mr Anderson accept that advice and steadfastly resolve that the Applicant will remain on air until the end of her engagement on Friday.

[153] Attempts to elevate Mr Anderson's post to "proof of his partisan position on the issue"[175] or as proof of Mr Anderson being "personally hostile to Ms Lattouf's opinions"[176] are misguided.

[154] Submissions by the Applicant that Mr Anderson, after Monday, 18 December 2023, "continued throughout to convey his deep displeasure with the fact that Ms Lattouf had been hired and that she remained on air"[177] are made without any evidentiary basis and, tellingly, no evidence is cited in support of the proposition.

[155] As the Respondent's Narrative of Salient Facts makes plain, by Tuesday, 19 December 2023, Mr Anderson and Mr Oliver-Taylor resolved to keep the Applicant on air until Friday. They did so

[174] N [70].
[175] AS [234].
[176] AS [230].
[177] AS [237].

notwithstanding further complaints and notwithstanding enquiries being made by Ms Buttrose.[178] There is simply no evidence that Mr Anderson showed any displeasure that the Applicant remained on air, or would remain on air until Friday.

[156] The Applicant also identifies what she described as 'unsatisfactory' aspects of Mr Anderson's evidence.[179] One such example is Mr Anderson's evidence about his knowledge of the existence of a 'WhatsApp group' – which is described by the Applicant as "ludicrous" without any explanation at all.[180] There is of course nothing ludicrous about Mr Anderson's evidence. Media reporting of alleged WhatsApp complaints and groups targeting the Applicant did not surface until January 2024 – well after the Applicant's employment at the ABC ended. Mr Anderson's knowledge of the activities of any WhatsApp group, on 20 December 2023, was limited and speculative.

[157] None of the matters identified by the Applicant would lead the Court to find that Mr Anderson was not a credible witness. Indeed, the Court ought to find that his evidence was cogent and credible.

Mr Oliver-Taylor

[158] Inexplicably, the Applicant places significant emphasis on Mr Oliver-Taylor's evidence that he was unsure of the Applicant's race at the relevant time as an attack on his credit.[181] The criticism is entirely misplaced.

[159] Mr Oliver-Taylor acknowledged that Mr Ahern advised him of the Applicant's race, in an email which he ultimately forwarded on to Mr Anderson. Mr Oliver-Taylor does not shy away from that fact. He attaches the correspondence to his affidavit.

[160] Mr Oliver-Taylor's evidence is straightforward – he has no recollection of registering that item in the email. Why would he? The Applicant's race did not come up once, in any conversation. The Applicant's race was entirely irrelevant to any decision or contemplation engaged in by Mr Oliver-Taylor.

[161] In any event, the entire line of cross-examination is irrelevant. The claim that the Applicant's employment was terminated because of her race has been all but abandoned. Not even a single paragraph of the 86 pages of submissions filed by the Applicant is devoted to the claim. National extraction is not substantively mentioned at all.

[162] The Applicant neither referred to, nor tendered, any evidence consistent with the hypothesis that her race or national extraction had anything to do with the making of the Decision. The only witness to whom it was put that Ms Lattouf was taken off air because of her Lebanese race was Mr Oliver-Taylor.[182] Race as an alleged motivation was never put to any other witness. National

[178] N [144]-[172A].
[179] AS [238].
[180] AS [238(e)].
[181] AS [239(a)-(c)].
[182] T429.15

extraction as an alleged motivation was never put to any witness. In her closing submissions, the Applicant says nothing to substantiate her claims that the Decision was taken for reasons that included her race and national extraction.[183] The only available inference is that the Applicant's claims that the Decision was taken for reasons that included her race and national extraction were made without any genuine belief that they were maintainable and without any genuine forensic purpose.

[163] The other criticisms of Mr Oliver-Taylor's evidence are equally misplaced.

[164] Mr Oliver-Taylor's views as to the possible breach of the PUSM Guidelines[184] entirely aligns with Mr Melkman's views, the accepted subject-matter expert.

[165] Mr Oliver-Taylor never resiled from the position that he was the decision-maker.[185] His emphasis as to the involvement of others is entirely factually accurate. That is, he sought to consult with Mr Melkman, Mr Latimer and Mr Ahern, and queried their position. It was only upon the group being in consensus as to the appropriate course that he made the Decision to take Ms Lattouf off air. No one raised any objections or concerns with Mr Oliver-Taylor. His reliance on this uncontested fact is well-placed.

[166] None of the matters identified by the Applicant would lead the Court to find that Mr Oliver-Taylor was not a credible witness. Indeed, the Court ought to find that his evidence was cogent and credible, particularly as it relates to his motivations to take Ms Lattouf off air for her shifts on 21 and 22 December 2023, to which there is no serious challenge.

Mr Latimer

[167] The attack on Mr Latimer's credit comes down to an exchange in cross-examination.[186] The submission is entirely undeveloped. Having regard to the whole of Mr Latimer's cross-examination, and the contemporaneous documents that he authored and received, blithe submissions that he has "no remaining recollection of the relevant events", or that his evidence is of "no utility", are forensically meaningless.[187]

Ms Buttrose

[168] The Applicant's submissions, as they relate to Ms Buttrose's credibility, are also misplaced.

[169] Far from having to make the finding that Ms Buttrose considered Ms Lattouf to be a political activist,[188] the Court only needs to turn to Ms Buttrose's affidavit, in which she plainly states, at [18(c)], "The issue for me was not whether Ms Lattouf was pro-Palestinian or pro-Israeli. Rather,

[183] cf AS [343].
[184] See AS [239(d)].
[185] Cf AS [239(f)].
[186] AS [242].
[187] AS [243].
[188] AS [245].

the issue was that Ms Lattouf appeared to be an activist in relation to the Israel-Gaza conflict…". Ms Buttrose's oral evidence is entirely consistent with her sworn affidavit.

[170] As noted above at paragraphs [139] and [143] of these Submissions, there is simply no basis on which the Court can find that Ms Buttrose was "antagonistic towards Ms Lattouf and her political opinion.", or that she found Ms Lattouf's actual opinions problematic.[189]

[171] The criticisms of Ms Buttrose's (lack of) investigation into the complaints is misguided.[190] As the Chair of the ABC Board, it cannot seriously be suggested that she ought to take it upon herself to investigate complaints made to the ABC. Ironically, the fact that Mr Anderson did undertake some of his own review of her social media accounts on 18 December 2023 had led to the same criticisms being levelled against him.

[172] The fact of Ms Buttrose sending emails to Mr Oliver-Taylor, attaching new complaints, on 20 December 2023 cannot sensibly lead to adverse credibility findings.[191] Although there was an inconsistency between her evidence and the evidence of Mr Anderson as to whose idea it was to forward complaints directly to Mr Oliver-Taylor, that matter is ultimately one that the Court does not need to resolve. It is clear that the two had discussed the matter and that, at the conclusion of the discussion, it was understood that the complaints would be forwarded to Mr Oliver-Taylor.

[173] Nothing on the face of those emails suggests that Ms Buttrose was pressing Mr Oliver-Taylor to take any particular course. Rather, the complaints were being forwarded, consistently with the email sent to the complainants by Ms Buttrose, identifying Mr Oliver-Taylor as the executive dealing with the issue.

[174] The Court would resist any finding that Ms Buttrose was not a witness of truth, to the extent that Ms Buttrose's evidence is relevant to the present matters (which the ABC contends that it is not).

Mr Ahern

[175] Significant paragraphs of the Applicant's submissions are dedicated to asserting that Mr Ahern was an unsatisfactory witness. This is notwithstanding the fact that Mr Ahern is not being put forward as a decision-maker, nor are any conversations he had with Ms Lattouf in serious contest.

[176] His evidence about the communication of the direction to Ms Lattouf, and then the report of that communication back to Mr Oliver-Taylor, is well supported by the evidence of the other witnesses and the documents: see Appendix A.

[177] The errors made by Mr Ahern during his evidence in the Fair Work Commission are of no significance.[192] He was clearly mistaken about the Teams Meeting. He readily accepts that and has provided an explanation as to why he can now recall the timing of that discussion.

[189] AS [246].
[190] AS [249]-[251].
[191] AS [263]-[264].
[192] Cf AS [276]-[278].

[178] No significant finding of fact turns on the evidence of Mr Ahern. Critically:

a. his evidence as to the Teams Meeting is consistent with the other witnesses that were called by the ABC; and

b. his evidence as to the communication of the Decision to Ms Lattouf is consistent with the other witnesses that were called by the ABC, and does not differ significantly to the evidence of Ms Lattouf.

[179] There is no occasion on which the Court would be required to make adverse credibility findings regarding Mr Ahern.

The Applicant was not unlawfully terminated

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

H. ENTERPRISE AGREEMENT CLAIM

[181] There has been significant consideration by the courts as to the approach to be taken in interpreting industrial instruments.

[182] The general approach to the construction of industrial instruments is set out in the judgment of French J, as his Honour then was, in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426 at 438:

> [53] The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to "… the entire document of which it is a part or to other documents with which there is an association". It may also include "… ideas that gave rise to an expression in a document from which it has been taken" – *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518 (Burchett J); *Australian Municipal, Clerical and Services Union v Treasurer of the Commonwealth of Australia* (1998) 80 IR 345 (Marshall J).

[183] Further, Madgwick J in *Kucks v CSR Limited* (1966) 66 IR 182 at 184 observed that a narrow pedantic approach to interpretation should be avoided, a search of the evident purpose is permissible, and "meanings which avoid inconvenience or injustice may reasonably be strained for", but:

> the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.

[184] As French J observed in *Wanneroo* at 440:

> [57] It is of course necessary, in the construction of an award, to remember, as a contextual consideration, that it is an award under consideration. Its words must not be interpreted in a

> vacuum divorced from industrial realities – *City of Wanneroo v Holmes* (1989) 30 IR 362 at 378–379 and cases there cited. There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned – see eg *George A Bond and Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503–504 (Street J). It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies. But while fractured and illogical prose may be met by a generous and liberal approach to construction, I repeat what I said in *City of Wanneroo v Holmes* (at 380):
>
> "Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties."

[185] The relevant principles were also recently summarised by the Full Court of the Federal Court in *James Cook University v Ridd* (2020) 382 ALR 8 at [65].

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

[186] 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.

[187] 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).

[188] 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[193]; instead, it identifies the disciplinary actions for which a prescribed process is mandatory.

[189] 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.

[190] 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.

[191] 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. In this regard, Mr Oliver-Taylor's evidence, at [113], was that:

> In making that decision, I had the following six considerations in mind, and was motivated only by those considerations. First, the view that Ms Lattouf had not complied with a direction not to post anything about the Israel-Gaza war. Second, as a consequence of the view that she had failed to comply with that direction, **I did not have confidence that Ms Lattouf would not say something on air that could reasonably be perceived as not being impartial in relation to the Israel-Gaza war**. Third, my view was that she had contravened the Personal Use of Social Media Guidelines. Fourth, **my concern that Mr Ahern did not have control of the situation, which exacerbated my lack of confidence in Ms Lattouf**. Fifth, my consciousness that, at that time, issues pertaining to the Israel-Gaza war were highly contentious. Sixth, I considered that **the ABC was not obliged to put anyone on air; in other words, my view was it was always within the discretion of the ABC to decide that a presenter or programme would not be aired**. I considered that the first five considerations that I have identified in this paragraph justified the exercise of that discretion in this case. (emphasis added)

[192] 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. Mr Oliver-Taylor, and indeed the other witnesses called by the ABC who took part in the Teams Meeting on 20 December, did not act on the basis that Ms Lattouf misconducted herself. None of the witnesses considered that Ms Lattouf misconducted herself. 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.

[193] AS [376].

[193] 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

[194] Ms Lattouf alleges that the ABC breached cl 57.1.1 of the Enterprise Agreement by summarily dismissing her. It is not clear whether Ms Lattouf presses her foreshadowed alternative contention that the ABC repudiated her contract. For the reasons set out below, the ABC did neither of these things.

The Applicant was not summarily dismissed

[195] 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.[194]

[196] For the reasons set out above in paragraphs [74] to [87] of these Submissions, the ABC did not dismiss Ms Lattouf (summarily or otherwise) on 20 December 2023, or at all.

[197] In the event that the Court finds, contrary to the above, that the ABC did terminate Ms Lattouf's employment on 20 December 2023, it does not follow that it breached cl 57.1.1 of the Enterprise Agreement. That is because the contract itself contemplates the ABC, "at any time… during the period of engagement" advising Ms Lattouf of changes to the details of the engagement, including "the duration of the engagement". It follows that the contract permitted the ABC to bring the engagement to an end sooner. To do the very thing permitted by the contract cannot amount to termination for the purposes of cl 57.1.1 of the Enterprise Agreement.

The Applicant was not terminated by repudiatory conduct

[198] If it is still contended by Ms Lattouf that the ABC breached cl 57.1.1 of the Enterprise Agreement by repudiating her contract, being a means of termination not provided for in cl 57.1.1 of the Enterprise Agreement, then the ABC denies that it did so, for the reasons set out below.[195]

[199] 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.[196] 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.

[200] 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.

[194] FCASOC at para 32.
[195] FCASOC at para 41.
[196] FCASOC at para 37.

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

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

[202] 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.

[203] 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,[197] replaced all prior or contemporaneous agreements, letters, understandings and representations regarding employment (cf FCASOC, paragraph 5(a) and (b)).

[204] 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.

[205] 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.

[206] 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].

[197] Affidavit, Vagg, 11.10.24, Ann MV-3.

[207] 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[198] and actors[199]; producers[200]; comic artists[201]; and television presenters.[202]

[208] 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".[203] 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.

[209] 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".

[210] 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".

[211] 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[204]), nor in any of the surrounding 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.

[212] *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**).

[213] 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

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[198] *Marbe v George Edwardes (Daly's Theatre) Ltd* [1928] 1 KB 269.
[199] *Herbert Clayton and Jack Waller Ltd v Oliver* (1930) AC 209.
[200] *White v Australian & New Zealand Theatres Ltd* (1943) 67 CLR 266.
[201] *Associated Newspaper Ltd v Bancks* (1951) 83 CLR 322.
[202] *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337.
[203] *Collier v Sunday Referee Publishing Co* [1940] 2 KB 647.
[204] FCASOC at para 5(c).

obligation on the part of the ABC to provide Ms Lattouf a particular kind of work on each day of her engagement.

[214] 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).

[215] *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. As noted above, that engagement could be varied, including by changing the duration of the engagement, or the duties performed during the engagement. 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.

[216] *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.

[217] *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.

[218] *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.

[219] *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.

[220] 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 2023, or to provide any work to Ms Lattouf.

The ABC did not repudiate the contract

[221] 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.[205] 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[206] – that is, a renunciation of a fundamental obligation under the contract[207]; 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.[208]

[222] Repudiation of either type is not lightly to be found.[209] Neither exists in this case.

Conclusion

[223] 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.

[224] 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.

The ABC did not contravene clause 57.1.1 of the Enterprise Agreement

[225] 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

[226] 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.

[227] 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 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. Indeed, it is suggested that asking her to

[205] *English and Australian Copper Co Ltd v Johnson* (1911) 13 CLR 490 at 497.
[206] *Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)* [2017] FCAFC 102 at [70].
[207] *Gramotnev v Queensland University of Technology* [2019] QCA 108 at [207].
[208] *Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)* [2017] FCAFC 102 at [70].
[209] *Gunnedah Shire Council v Grout* (1995) 62 IR 150 at 159.

gather her things and leave in her own time was also impermissible under the Enterprise Agreement.[210]

[228] 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.

[229] 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.

[230] 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.

[231] 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.

I. COMPENSATION

[232] For the reasons set out above, Ms Lattouf is not entitled to any of the relief she seeks.

[233] 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.

The salient principles

[234] Section 545 of the *Fair Work Act* relevantly provides (notes omitted):

> (1) The Federal Court… may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.
>
> (2) Without limiting subsection (1), orders the Federal Court … may make include the following:
>
> …
>
> (b) an order awarding compensation for loss that a person has suffered because of the contravention; …

[235] In *Dafallah v Fair Work Commission* (2014) 225 FCR 559, Mortimer J (as her Honour then was) observed (at [148]):

> [148] The language of s 545 is broad, allowing the Court to provide remedies which meet the circumstances of any given contravention, taking into account the range of parties who may have brought proceedings in relation to the contravention, and the actions which might in any given

[210] AS [379].

circumstance be required to remedy the contravention, or to ensure it does not occur again. Awarding compensation for loss is but one example and may not be appropriate, depending on what other action has been taken in respect of any losses. Each case will turn on its facts in that sense.

[236] Her Honour continued (at [157]–[158], emphasis added):

> [157] Further, the width of the power conferred by s 545(1) also allows for compensation which may not fully compensate a person for the loss **suffered**: see *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 at [94] per French and Jacobson JJ, where their Honours were considering similar statutory compensation provisions under s 46PO(4) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). In my opinion, that approach is available under s 545(1) because, as their Honours pointed out in *Gama* at [94], an award of compensation is discretionary. **In s 545(1), the governing consideration is what the Court considers "appropriate", and this in my opinion leaves room for a Court to find in a given case that less than full compensation might be appropriate.**
>
> [158] While by no means operating as a mandatory approach to a discretion such as that conferred by s 545(1), with respect I adopt the remarks of Lee J in *Aitken v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia — Western Australian Branch* (1995) 63 IR 1, considering factors relevant to an award of compensation under s 170EE of the then *Industrial Relations Act 1988* (Cth). His Honour said (at 9), that the Court will
>
> > have regard to **what is reasonable in the circumstances and will look at what would have been likely to occur had the Act not been contravened** … The Court will consider the detriment occasioned to the employee by the employer's contravention of the Act, and the extent to which it is reasonable to compensate the employee for such consequences.

[237] While s. 545 contains the word "may", which often connotes discretion, in *Retail and Fast Food Workers Union Inc v Tantex Holdings Pty Ltd* (2020) 299 IR 56 Logan J, having cited *Defallah*, observed:

> [161] … There is, however, an alternative construction of "may" where it appears in both s 545(1) and s 545(2) …, which is that it is empowering, not productive of a discretion. The relevant point was made in *Finance Facilities Pty Ltd v Commissioner of Taxation (Cth)* (1971) 127 CLR 106, at 134–135, by Windeyer J:
>
> > This [question] does not depend on the abstract meaning of the word "may" but [on] whether the particular context of words and circumstance make it not only an empowering word but indicate circumstances in which the power is to be exercised — so that in those events the "may" becomes a "must" …
>
> [162] It seems to me that "may" as used in s 545(1) is empowering but the exercise of the power is tempered by what the Court "considers appropriate". This, in my respectful view, is the point made about s 545 in the joint judgment in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157, at [103]. The tempering is not to the end of authorising whimsical or idiosyncratic relief (or absence thereof) but rather the making of an order that is just — considered judicially to be appropriate — in the circumstances of a given case. ...

[238] With respect to s. 545(2)(b), in *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (the Hutchison Ports Appeal)* [2019] FCAFC 69, Ross J (with whom Rangiah J agreed) observed at [132] (emphasis added):

> Further, as is clear from s 545(2)(b) **a necessary condition for the making of an Order for compensation is that loss is suffered because of the contravention**. As Barker J put it in *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526 at [423] (the *Australian Aircraft Case*), "this requires an appropriate causal connection

between the contravention and the loss claimed". (Also see *Maritime Union of Australia v Fair Work Ombudsman and Skilled Offshore (Australia) Pty Ltd* [2015] FCAFC 120 at [20]). It necessarily follows that any order for compensation is an order directed to compensating a person for such a loss. As Katzmann J observed in *Shizas v Commissioner of Police* ([2017] FCA 61 at [209]) **the focus of such an order is "in a loose sense, the restoration of those affected by a contravention to the positions they would have occupied but for its occurrence"**.)

[239] His Honour further observed at [136] (emphasis added):

> Section 545 contains no positive indication of the considerations upon which the Court is to determine whether a compensation order is to be made. Consistent with principle, **the power is to be exercised judicially, that is to say not arbitrarily, capriciously or so as to frustrate the legislative intent**. But, subject to such considerations the discretion conferred is unconfined except insofar as "the subject matter and the scope and purpose" of the legislation may enable an appellate Court to pronounce the reasons given by the primary Judge to be "definitely extraneous to any objects the legislature could have in view": *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [22] per Gaudron and Gummow JJ.

[240] His Honour continued at [139] (emphasis added).

> Plainly, the matters to be considered in relation to s 545 must bear some relationship to the power being exercised. But I see **no warrant in the subject matter and scope of the provision and purpose of the Act which would preclude the Court from considering a range of contextual matters, including the conduct of the person who suffered the loss and whether that person's position with respect to compensation is known, and if so, what that position is**. Such considerations may well be relevant and accorded weight depending on the circumstances of the case.

[241] In *Patrick Stevedores Holdings Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union (No 4)* [2021] FCA 1481, Lee J observed at [27] (emphasis added):

> As I have explained above, the connexion may be satisfied if the contravening conduct is "a cause": see, eg, *Henville v Walker* (2001) 206 CLR 459 (at 469 [14]–[15] per Gleeson CJ; at 490 [97] per McHugh J; and at 509 [163]–[164] per Hayne J). However, when one comes to the attribution of legal responsibility, this is not the end of the matter. In the context of some types of statutory compensation, beyond the "not negligible" threshold, the strength of the requisite connexion is immaterial: see, eg, *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* (2004) ATPR 42-014 (at [195] per Kiefel J). Yet, **this does not mean in the present context, that an order for recovery of a non-negligible but indirect loss would be appropriate**.

[242] On the question of quantification, in *Maritime Union of Australia v Fair Work Ombudsman* [2015] FCAFC 120, the Full Court (Allsop CJ, Mansfield and Siopis JJ) set out the following principles (at [28], emphasis added):

> The task of the primary judge, having found the relevant contraventions, was to assess the compensation, if any, that was causally related to those contraventions. That involved not an examination of what did happen, but an assessment of what would or might have occurred, but which could no longer occur (because of the contraventions). Subject to any statutory requirement to the contrary, questions of the future or hypothetical effects of a wrong in determining compensation or damages are not to be decided on the balance of probability that they would or would not have happened. Rather, the assessment is by way of the degree of probability of the effects — the probabilities and the possibilities: *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 625 at 642–643; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 352–356. The above proposition must be qualified by the recognition that, **where the fact of injury or loss is part of the cause of**

action or wrong, it must be proved on the balance of probability. Compensation is generally awarded for loss or damage actually caused or incurred, not potential or likely damage: *Tabet v Gett* (2010) 240 CLR 537; *Sellars* at 348; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 526; that is equally so here under ss 807(1)(b) and 545(2)(b).

[243] What can be distilled from the above authorities is that, before an order for compensation can be made pursuant to s. 545(2)(b), 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

[244] 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.

[245] Ms Lattouf's wholly uncorroborated evidence as to her "unemployability" (see AS [401]) appears to be entirely irrelevant in circumstances where Ms Lattouf has, belatedly, dropped her claim for economic loss. As Ms Lattouf no longer claims that she has suffered economic loss by reason of the ABC's conduct, the Court can readily infer that no such loss (by reason of unemployability or otherwise) was in fact suffered.

[246] 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. The inference must be that there are none.

[247] 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

[248] Even in the event that the Court finds that Ms Lattouf's employment was terminated by the ABC, the expert evidence relied on by Ms Lattouf does not support a substantial amount of compensation. Her expert psychiatrist, Dr Strauss, in his report 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.

[249] However, under cross-examination, Dr Strauss readily accepted that:

a. He made his diagnosis retrospectively.[211]

b. A more reliable assessment of causation could be made of Ms Lattouf's condition had observations been carried out over a period of time (which did not occur).[212]

c. His diagnosis was based entirely on the history given by Ms Lattouf – that is her subjective account.[213]

d. His opinion as to causation was based entirely on the history given by Ms Lattouf – that is her subjective account.[214]

e. The subject matter of these proceedings is just *one* of a number of factors that has exacerbated her underlying (and pre-existing) condition.[215] Contrary to his report, which simply stated that the "dismissal has aggravated a pre-existing condition".

[250] Dr Strauss does not attempt, nor could he, identify the extent to which the subject matter of these proceedings exacerbated her pre-existing condition, when compared to the myriad of other matters. It is simply unknown, unknowable and unquantifiable.

[251] Dr Strauss's opinion, given its singular and wholesale reliance on Ms Lattouf's subjective account in order to opine as to diagnosis and causation, ought be given little weight in circumstances where Ms Lattouf is not reliably capable of:

a. measuring the alteration to her symptomology; and

b. assigning causation as to any such alternation. This is perhaps best illustrated by:

i. the video Ms Lattouf posted on her Instagram on 2 June 2024, in which she became very emotional after an encounter in the park.[216] In that video, Ms Lattouf conflates and intermixes the reasons or bases for her emotional state. She attributes her state, seemingly, to the events over the "last eight months" – a reference point to the start

[211] T.146.4-6.
[212] T.146.35-45.
[213] T.147.21-22.
[214] T.148.36-39.
[215] T.154.24-T.157.21.
[216] Ex 21, pg 106. Video to be tendered at the hearing.

of the conflict in Israel and Gaza, various images of the war, and being put forward as a "poster girl for justice or humanity or a free and fair press", "death threats from bots and randoms" and fears for her career and what that might look like; and

ii. Ms Lattouf sought to attribute hate and death threats she has received to, in part, the conduct of the ABC because of the "absolute assault on [her] reputation and integrity following [her] sacking".[217] However, the content of the police report she made in October 2024, in response to a death threat she received via email, demonstrates that the threat cannot objectively or in any discernible way be tied to any conduct engaged in by the ABC. The difficulty in Ms Lattouf actively and proactively building a public profile where she expresses views on the conflict in Israel and Gaza which portrays Israel as villainous, is that any negative attention she receives, including by way of death threats, are irresistibly more easily attributed to that public activity, as opposed to anything the ABC did.

[252] Indeed, and on the above bases, the opinion of Dr Strauss rises no higher, and has no greater evidentiary value, than Ms Lattouf's evidence as to those matters.

[253] Further, and as touched upon above, there is no evidence that the events that are attributed to Ms Lattouf's paranoia are in any way related to the subject matter of these proceedings. There is no proper basis for the Court to infer that the traumatic events the subject of Ms Lattouf's paranoia or the death threats she has received had any causal connection to the conduct of the ABC. Any award of compensation must be targeted to the loss caused by the conduct the subject matter of these proceedings – and not broader harm occasioned by Ms Lattouf.

[254] There is no evidence to support the suggestion that Ms Lattouf "suffered significant pain, hurt, humiliation and distress" as a result of ABC's conduct.[218] There is also no evidence that Ms Lattouf's "reputation was sullied" by the article in *The Australian*, let alone any conduct which can readily be attributed to the ABC. It is important to note that Ms Lattouf belatedly withdrew claims in these proceedings that the ABC's conduct caused her reputational harm. The withdrawal of that claim means that the Court can readily infer that no such harm was caused. There is certainly no evidence of any such harm. The Court should not entertain the submissions advanced in AS [404] in circumstances where the ABC was denied the opportunity to test these assertions through discovery – which was abandoned upon Ms Lattouf's amendment to her claim to remove the suggestion that the ABC's conduct led to reputational harm.

[255] Even accepting Dr Strauss's evidence at its highest, there is no evidentiary basis to award Ms Lattouf (in the event the Court finds that the ABC terminated her employment) anything more than modest compensation. The quantum of damages award in the decisions cited at AS [411] all

[217] T.130.22-25.
[218] AS [404].

concerned significant, major and/or chronic psychiatric disorders. Mr Strauss's evidence, even taken at its highest, is not analogous.

Other relief

[256] Ms Lattouf's submissions, in the event that some part of her claim is successful, invite the Court to programme the matter for penalty and "consideration of other forms of relief sought in Ms Lattouf's originating application".[219]

[257] In the event that some part of Ms Lattouf's claim succeeds, the ABC accepts that the Court ought to programme the matter for a hearing on penalty. However, the Court ought not to entertain any revisiting of the question of relief. There has been no order for a split hearing. There is no explanation as to why "other forms of relief" could not have been and were not agitated during the nine days of hearing ultimately allocated to liability. The ABC opposes any indulgence being granted to Ms Lattouf to agitate "other forms of relief" not dealt with in her submissions.

J. SOME PARTICULAR ASPECTS OF THE AS

[258] In this section, the ABC responds to aspects of the AS that have not otherwise been addressed, or that otherwise require particular attention.

[259] *Paragraph 10, 1st sentence:* The ABC does not, and has never, "impugned" any of the opinions that Ms Lattouf holds. All of the submissions that flow from paragraph 10 of the AS are straw men.

[260] *Paragraph 10, last sentence; paragraph 16; paragraph 348(a):* The proposition underlying these paragraphs is another red herring, and proceeds from a misunderstanding of s. 772(2). That subsection provides "subsection (1) [which sets out the prohibited reasons] does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating a person's employment if (a) the reason is based on the inherent requirements of the particular position concerned". "Political opinion" is mentioned as one of the prohibited reasons in s.772(1)(f), but "impartiality" is not. Moreover: (a) The ABC does not say that it is an inherent requirement of employment with the ABC that employees not hold any, or any particular, political opinion. (b) In this case, the Decision was not taken because of the content of any of Ms Lattouf's political opinions.

[261] *Paragraphs 12 and 352:* The submissions in this paragraph have no connection with any case pleaded by Ms Lattouf. Ms Lattouf's case seeks, here and elsewhere in the AS, to compare the ABC's response to her social media activity with the ways in which the ABC responded to public statements made by other journalists and presenters. Putting to one side a question about how any such comparison might be relevant to a case under s. 772 – as opposed to, for example, an unpleaded discrimination case - the difficulty is that any comparison can only be useful if the relevant circumstances are equivalent - that is, if it a comparison of like with like, all other things being equal. Ms Lattouf had the evidentiary onus on that issue. Her case did not demonstrate the

[219] AS [413].

necessary equivalence. For example, none of the journalists or presenters fixed upon by Ms Lattouf were shown to have so conducted themselves as to have been so indelibly associated with one perspective of a controversial issue as was Ms Lattouf; instead, Ms Lattouf's case on this point isolated particular statements without context or history. Nor was it demonstrated that any of the issues on which those journalists and presenters pronounced had, at the time they made their statements, anything like the same heat that the conflict in Isreal and Gaza were notoriously attracting in December 2023. Importantly, there is no evidence that any of the journalists or presenters had been directed not to do what they had apparently done.

[262] *Paragraph 13, 1st sentence:* The ABC agrees that "[t]he outcome of these proceedings…does not depend on a finding as to whether Ms Lattouf's views were "contentious" or whether she was "impartial", and the Court is not called upon to determine any such question." The submissions leading up to paragraph 13 are colourful, but entirely irrelevant.

[263] *Paragraph 14, 1st sentence, and paragraph 15, "It is no defence…the community":* These are more straw men. The ABC has never said anything to this effect.

[264] *Paragraph 15, "or might threaten the ABC's reputation"; paragraph 33, 3rd and 4th sentences; and paragraph 347:* The argument adverted to in these aspects of the AS reflects a misunderstanding of the principles discussed in [102] and [103] above. This fundamental error infects the whole of Ms Lattouf's case under s. 772.

[265] *Paragraph 22, 1st sentence:* The ABC's Defence relevantly pleads that Mr Oliver-Taylor's reasons for the Decision included that Ms Lattouf had "not complied with a direction given to her in relation to her use of social media". The ABC maintains that plea, for the reasons set out in these Submissions. It is not correct to say that the ABC 'accepts' that Ms Lattouf did not breach the PUSM Guidelines. To the extent that the ABC, in its Defence at [15A](a) admitted that the "repost" pleaded at FASOC [14] did not contravene the PUSM Guidelines, that admission is limited to the imprecise nature of the "repost" as pleaded at [14] of the FASOC. As explained by Mr Melkman, whose views the ABC adopts, the Human Rights Watch Story cannot be viewed in isolation. The potential breach of the PUSM Guidelines, in Mr Melkman's view, arose from the series of posts made by Ms Lattouf on her Instagram stories on the evening of 19 December 2023, in the context of her previous social media activity.[220]

[266] *Paragraph 23:* This submission is another straw man, which runs through the AS: see, for example AS[311] and [312].

Ms Lattouf's case makes much of what Mr Anderson called "potentially a step missing". It is accepted that Ms Lattouf was not given an opportunity to address the proposition that she had

[220] Melkman, [86]-[87], CB Tab 18, p 1189.

acted contrary to a direction about her social media activity before that proposition was adopted and acted on by Mr Oliver-Taylor.

Central to the resolution of Ms Lattouf's claim under s.50 is the question of whether the Enterprise Agreement required that step to be taken.

However, so far as the case under s 772 is concerned, it is not apparent what significance attaches to the "step missing". It is not pleaded that the step was missed for a prohibited reason. Nor was it suggested to any of the ABC's witnesses that they were influenced by a prohibited reason to miss the step.

On the evidence, the only available finding is that the step was missed because, it was thought that it was not required or necessary.

On Monday, 18 December 2023, Mr Melkman specifically proposed that the People & Culture Division of the ABC be involved, and advised that a formal process of investigation would be required if "disciplinary action" was to be pursued.[221] On the following morning, Mr Melkman was party to correspondence between him, Mr Latimer and Mr Ahern in which Mr Latimer asked whether People & Culture should be involved, to which Mr Ahern replied, "At this stage I don't think so."[222] Mr Melkman made no objection. No witness was cross-examined about this. Mr Ahern's unchallenged evidence was that he thought that People & Culture would normally be involved only if there was a disciplinary action or some kind of staff counselling or dismissal process" and, in his mind, and based on his understanding of what was under consideration, "none of those things were being considered." [223] The only available inference is that Mr Melkman by then agreed.

Mr Oliver-Taylor's unchallenged affidavit was that, during the Teams Meeting, he asked Mr Ahern "whether he had 'checked the contract', and…he said that he had done so."[224] Mr Latimer, Mr Ahern, and Mr Melkman, "[H]ave we checked everything? Have we done everything? Have we followed every possible requirement? To which the answer was yes."[225]

Later on Wednesday, 20 December 2023, consistent with the view that no disciplinary action had been visited on Ms Lattouf, Mr Ahern advised Mr Oliver-Tayor and Mr Latimer that Ms Lattouf had "not been technically 'dismissed' because she is a casual. She is still being paid as a casual until the end of week, but is not required to present the shift."[226]

[267] *Paragraph 27:* There is no explanation in the AS of how Mr Anderson is said to have "exercised authority" in relation to the Decision. There is no explanation in the AS of how Mr Latimer is said

[221] N [96].
[222] N [107A].
[223] Ahern, [71], CB Tab 19 p 1401.
[224] Oliver-Taylor, [111], Tab 11 p 432.
[225] N [217].
[226] N [257].

to have "materially influenced" the Decision. There is no explanation in the AS of the mechanisms by which Mr Anderson or Mr Latimer are said to have been "materially involved" in the making of the Decision.

[268] *Paragraphs 31 and 33:* The proposition articulated in these paragraphs is (a) not pleaded, (b) not related to s. 772, and (c) is a claim of unlawful discrimination, which is neither available nor pleaded.

[269] *Paragraph 66:* The submission that it is apparent from "many of the complaint [email]s" that "many or perhaps most" of the persons writing the emails were not part of the *Mornings* audience assumes that the reader of the complaint emails is applying a particularly critical lens to whether the persons writing the emails, about the presenter of the *Mornings* program, had in fact listened to the *Mornings* program.

[270] *Paragraph 110, 2nd sentence:* This is one of many places where Ms Lattouf asks the Court to draw some inference from an absence of a reply to email correspondence. It may stand for all the rest. The inference depends on the unreal premises that every person who receives an email parses it minutely, and invariably takes the time and trouble to correct everything with which they do not agree.

The suggestion that Mr Oliver-Taylor and Mr Latimer did not respond to Mr Melkman's email of 11.10 am on Tuesday 19 December 2023 "explaining that it was not necessary to ask Ms Lattouf to "keep a low profile" because she had already been directed not to post anything at all to her accounts", ignores the first line of Mr Melkman's email where he introduces the body of his email with the words "as discussed", indicating that the following paragraphs were matters that were discussed during the meeting, rather than something that Mr Melkman was recommending as an original idea at the time of the 11.10 am email. Mr Melkman deposed "my object in writing the email was to accurately summarise what we had discussed in our meeting. It accurately reflects the recollection that I then had of what had been discussed in the meeting, and my own state of mind in relation to its subject matters at that time".[227] He was not cross-examined about this email.

[271] *Paragraph 133:* Ms Lattouf submits that "it is not clear why Mr Oliver-Taylor should have apologised" despite Mr Oliver-Taylor deposing what he intended by his words "sorry boss",[228] and answering questions under cross-examination about why he subjectively felt he should (and did) apologise.[229]

[272] *Paragraph 135:* This assertion is incorrect. It is belied by the contents of Mr Anderson's email, which is reproduced in N[172].

[273] *Paragraph 139:* Contrary to this submission, Mr Anderson explained his thinking at T294.04-45.

[274] *Paragraph 147:* Contrary to this submission, Mr Oliver-Taylor gave an explanation at T388.

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[227] Melkman, [60], CB Tab 18 p 1180-1.
[228] Oliver-Taylor, [85], CB Tab 11 p 427.
[229] T384.9-29.

[275] *Paragraph 162, 3rd sentence:* The submission that Mr Ahern "apparently recovered his memory sufficiently to give a detailed account" of a meeting that he previously could not recall is unfair. Mr Ahern explained firstly in his affidavit evidence,[230] and repeatedly under cross-examination that his lack of recollection of the Teams Meeting during his evidence given to the Fair Work Commission in the related proceedings was because he "got the time wrong".[231]

[276] *Paragraph 162, last sentence:* See T623.

[277] *Paragraph 179:* The submissions in this paragraph are premised on an unreal appreciation of how a large and complex organisation such as the ABC actually works. The Managing Director of such an organisation does not ordinarily do the things listed in this paragraph. Mr Anderson gave evidence that he did not interrogate the proposition that social media post constituted a breach of Editorial Policies, because he did not have any information to suggest that any social media post (which he had not seen) and any breach of editorial policies were one and the same thing.[232] Mr Anderson gave evidence that it was "not [his] practice [sic] to constantly remind people to be compliant with rules. [His] expectation is, particularly of people in very senior roles, is to know and understand and discharge their duties with that compliance."[233]

[278] *Paragraph 225:* The submissions made in this paragraph are not available. No suggestion to the effect that any contemporaneous document was not "entirely frank" was ever put to any witness. It is a serious allegation, amounting to fraud. It has no basis.

[279] *Paragraph 237, "extracting grovelling apologies":* This submission is not available. It was never put to Mr Anderson or Mr Oliver-Taylor. It is not reflected in a fair reading of the emails in question.

[280] *Paragraph 287:* Ms Lattouf wrongly questions the ABC's entitlement to give her directions about her social media use during the period of her employment. The correct position is that, at common law, an employer is lawfully entitled to give directions within the scope of the employment: *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601 at 621-622; see also *Commissioner for Government Transport v Royall* (1966) 116 CLR 314 at 324. That can include directions regulating the private conduct of employees, in order to protect the employer's interests, including in "the effective conduct of the employer's business": *McManus v Scott-Charlton* (1996) 70 FCR 16 at 23G-24A, 28E; see also *Rose v Telstra Corporation Ltd* (1998) 45 AILR 3-966, *Farquharson v Qantas Airways Ltd* (2006) 155 IR 22 at [18]-[20], and *New South Wales Attorney-General's Department v Miller* (2007) 160 IR 185 at [51]-[56]. Here, the effective conduct of the ABC's business authorised the giving of directions about employee's private use of social media where that use was reasonably judged to be capable of adversely affecting perceptions of the ABC's impartiality: see paragraph [58] of these Submissions.

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[230] Ahern, [94], CB Tab 19 p 1405.
[231] T471.46-T473.17; T475.1-74.
[232] T285.1-22; T285.44-22.
[233] T288.7-9.

[281] *Paragraph 288*: Ms Lattouf's case asserts that the Human Rights Watch Story was "unobjectionable" and seeks to give significance to the fact that the ABC had itself reported on the same Human Rights Watch claim that had been the subject of Ms Lattouf's Human Rights Watch Story. However, Ms Lattouf's case takes both the Human Rights Watch Story and the ABC's report in isolation and out of context. First, a news report by the ABC is materially different to an Instagram story. The ABC has an obligation to report the news, whereas someone like Ms Lattouf is reasonably taken to have made choices about what to post. Second, the headline of the ABC's report is 'Israel-Gaza war: Human Rights Watch says starvation is being used as 'a weapon of war' by the Israeli Government' (emphasis added). 'Says' connotes the making of a claim. The same caution is reflected in the use of the expression "according to" in the body of the report. By contrast, Ms Lattouf's Human Rights Watch Story is heading 'HRW reporting starvation as a tool of war', and the first screenshot contains the text: 'The Israeli government is using starvation of civilians as a weapon of war in Gaza' (emphasis added). The words 'reporting' and 'is' are indicative of an established fact. Third, in the ABC's report, discussion of Human Rights Watch is followed by a sub-heading: "Here's what else is going on', after which follows four reports, one of which was favourable to an Israeli perspective ("Israel says it has found the largest Hamas tunnel yet"). By contrast, Ms Lattouf's social media activity did not contain anything of substance that could reasonably be considered to reflect an Israeli perspective on the conflict. The Human Rights Watch Story was immediately preceded by a story quoting Ms Lattouf talking critically of the Israeli Defence Force.

[282] *Paragraph 319, 2nd sentence:* The proposition in this sentence is illogical.

[283] *Paragraphs 348 to 351:* These paragraphs are striking instances of an error that infects the case made by Ms Lattouf: the failure to distinguish between the content of any political opinions held by Ms Lattouf, and the perceptions of an absence of impartiality that might reasonably be created by the way in which she expressed those opinions. The evidence of every ABC witness focused exclusively on the latter, to which s. 772(1)(f) does not apply.

K. CONCLUSION

[284] It is submitted that the Court ought to dismiss Ms Lattouf's application.

[285] The ABC reserves its position on costs.

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APPENDIX A: THE DIRECTION

Introduction

[1] The ABC's case is that:

a. Ms Lattouf was told that she was not required to present on 21 and 22 December 2023 because she had not complied with a direction about her prospective social media activity – that is, her social media activity during the week when she was to be presenting *Mornings*.

b. That direction was given to Ms Lattouf by Ms Green in a conversation during the afternoon of Monday, 18 December 2023 (**Monday Conversation**).

[2] Ms Lattouf's answer involves two contentions: *first*, she denies having been given a direction with which she did not comply, and, *second*, she asserts that no reasonable person in the positions of Mr Oliver-Taylor and Mr Latimer could reasonably have thought that she had been given such a direction.

[3] The ABC takes issue with both of these contentions.

Seven propositions that frame the correct approach to the issue of the direction

[4] *First*, it is sufficient to discharge the ABC's onus that the decision-maker (on the ABC's case, Mr Oliver-Taylor, and on Ms Lattouf's case including Mr Oliver-Taylor and Mr Latimer) believed that Ms Lattouf had been given a direction about her prospective social media activity with which she did not comply.

[5] *Second*, a finding that the decision-maker believed that Ms Lattouf had been given a direction about her prospective social media activity with which she did not comply does not depend on a finding that she had in fact been given such a direction.

[6] *Third*, the only relevance of the question about whether Ms Lattouf was in fact given a direction about her prospective social media activity with which she did not comply is that, if she had been given such a direction, then that fact may bolster the plausibility of the decision-maker's evidence that he (or, on Ms Lattouf's case, they) believed that to have been so.

[7] *Fourth*, as to the content of what Ms Lattouf was told not to do:

a. When the ABC's witnesses spoke or wrote about Ms Lattouf being told not post "anything", or words to that effect, they must sensibly be understood to be referring only to content about the conflict in Israel and Gaza. That was explicitly the whole and sole context of everything that was being said.

b. For every practical purpose, there was and is no meaningful difference between expressions such as "anything" about the conflict in Israel and Gaza, "anything that would suggest that [Ms Lattouf] was not impartial", "controversial", and "unbalanced".

c. In her affidavit, Ms Green said:

> I considered that, in context, the words 'unbalanced' and 'controversial' are to the same effect. That is, given that Ms Lattouf had previously publicly expressed partial views on the Israel-Gaza conflict, if Ms Lattouf was to post anything about the Israel-Gaza conflict at all while she was with us, any content that Ms Lattouf posted about that matter could be perceived as unbalanced. That would be controversial because of the standards of impartiality that apply to the ABC and its employees.[234]

d. Cross-examined about whether, in the Teams Meeting, there had been a consensus about whether Ms Lattouf had been directed not to post anything about the conflict in Israel and Gaza, or anything controversial, Mr Melkman saw no difference between them.[235]

e. Mr Ahern thought that "not posting anything about the Israel/Gaza war" and not positing "anything controversial about Israel/Gaza", were, to him, the same, "[b]ecause Israel/Gaza conflict was certainly controversial."[236]

[8] *Fifth*, Ms Lattouf's case questions whether what Ms Green said to Ms Lattouf in the Monday Conversation had the legal character of a direction sufficient that non-compliance would constitute misconduct. That is a red herring. The evidence is that everyone who was involved in the process by which the Decision was made thought that what Ms Green had said to Ms Lattouf was a "direction". But, there is no evidence that any of them thought that their analysis of Ms Lattouf's conduct depended on the legal character of what she had been told by Ms Green. All that any of them were relevantly concerned about was that Ms Lattouf had done what they believed she had clearly been told not to do. That is why, on the evidence, none of them turned their minds to whether Ms Lattouf had misconducted herself, and why none of them thought that the Decision had a disciplinary or punitive quality.

[9] *Sixth*, expressions such "it would be best that", "perhaps", or "maybe" are not determinative of the gist or substance of what Ms Green said to Ms Lattouf. They are merely reflective of ordinary polite speech between colleagues who know and respect one another's professionalism.

[10] *Seventh,* conclusory and subjective *post facto* characterisations of what was said - embodied in words like "direction", "suggestion", "advice", or "ask" - are also not determinative of the seventh issue. In her cross-examination, Ms Lattouf accepted that Ms Green was speaking to her, not in the context of their personal relation, but on behalf of the ABC, who at the time was Ms Lattouf's employer.[237] However much generational and social attitudes may have changed, it is still the case that the relationship of employment inevitably involves an element of subordination[238]; an

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[234] Green, [52], CB Tab 16 p 984.
[235] T625.09-17.
[236] T491.41-T492.04.
[237] N [55(g)].
[238] *R v Darling Island Stevedoring & Lighterage Co Ltd; ex p Halliday and Sullivan* (1938) 60 CLR 601 at 621.

employee who is told by their employer that it would be best if they did not do something, must objectively be taken to understand that that is what their employer expects them to do. That is particularly so where the identified context and purpose of the employer's communication was what the employee was to do in order to address an issue of significance to the employer; here, the complaints that had been received.

[11] Mr Ahern captured the fifth, sixth and seventh points when, cross-examined about his use of the word 'suggested' in his email of 1.16 pm on Tuesday 19 December,[239] he gave the following evidence:

> You used the word suggestion, because that is in fact what Ms Green had done, as you understood it; correct?---I – I wasn't exactly sure of what Elizabeth had said because I wasn't in the meeting, but I accepted that she had communicated what had been asked, which was not to talk about Israel/Gaza on the show and not to post about it.
>
> There is a world of difference between being directed not to post, and it being suggested that it may be wise not to post, isn't there?---Absolutely.
>
> And all you were communicating here was that Ms Green, to your knowledge, had simply suggested to Ms Lattouf it might be wise for her not to post anything on socials that week?---That's true. And I was comfortable about that, because any journalist, any ABC staff member who has gone through all the training, would understand the significance of that. So whatever is the word, the understanding would be clear.[240]

The evidence

Monday, 18 December 2023: Before the Monday Conversation

[12] Mr Oliver-Taylor was the original author of the direction. At 1.49 pm on Monday 18 December 2023, Mr Oliver-Taylor sent an email to Mr Ahern, with a copy to Mr Latimer, in which he said, "…can we ensure that Antoinette is not and has not been posting anything that would suggest she is not impartial".[241] As submitted above, when understood in context, the reference to "anything" must seasonably be understood to have been a reference to "anything in relation to the conflict in Israel and Gaza." That was all anyone was ever talking about.

[13] Mr Ahern forwarded Mr Oliver-Taylor's email to Ms Green at 1.52 pm, saying to Ms Green, "we will need to talk to Antoinette urgently about what she says about Gaza."

[14] Mr Ahern and Ms Green had a telephone call at 2.03pm on Monday, 18 December 2023. Ms Green's evidence was that during that conversation, Mr Ahern "suggested that it would be best if Ms Lattouf limited her use of social media whilst with us for the week so as not to give any ammunition for further complaints" and asked Ms Green to "please have a word with Antoinette

[239] N [131].
[240] T466.24-38.
[241] N [28].

about her social media" and tell Ms Lattouf to "keep a low profile and not to post anything controversial."[242]

[15] In his affidavit Mr Ahern deposed to having discussed Mr Oliver-Taylor's email of 1.49 pm with Ms Green, that being the email in which Mr Oliver-Taylor had asked Mr Ahern to ensure that Ms Lattouf "is not and has not been posting anything that would suggest she is not impartial."

[16] Cross-examined, Mr Ahern was confident that Ms Green had been asked to communicate to Ms Lattouf that she was "not to talk about Israel/Gaza on the show and not to post about it."[243]

[17] The ABC submits that it should be found that it was in this conversation that, expressly by reference to Mr Oliver-Taylor's email of 1.49 pm[244] Mr Ahern instructed Ms Green to tell Ms Lattouf that she was not to post anything that would suggest she was not impartial in relation to the conflict in Israel and Gaza.

[18] Ms Green and Mr Ahern had two further telephone conversations on Monday afternoon: at 2.36pm and 3.35pm. Ms Green's unchallenged evidence that in each of these conversations, she sought further clarification from Mr Ahern about what she should say to Ms Lattouf. During one of these conversations, Ms Green made handwritten notes of the words that Mr Ahern used in the discussion, for the purpose of using the note to guide her discussion with Ms Lattouf:

> Perceived public position, gather pro-Gaza
>
> Ammunition – don't give ammunition best not to post whilst here[245]

<u>Monday, 18 December 2023: The Monday Conversation</u>

[19] Call records show that Ms Lattouf initiated a telephone conversation with Ms Green at 3.44 pm on Monday, 18 December 2023 that lasted for five minutes. This was the Monday Conversation.

[20] It is agreed that Ms Green opened the Monday Conversation by referring to complaints that had been received by the ABC about Ms Lattouf being on air "because of a perceived stance on the Israel/Palestine conflict based on your social media posts."

[21] The *first* issue of substance about the Monday Conversation is whether, as Ms Lattouf would have it, Ms Green had identified "pro-Isreal lobbyists" as being the source of those complaints[246], or

[242] N [34(a)].
[243] T466.26-28.
[244] T466.40-44.
[245] N [46].
[246] N [55(d)].

whether, as Ms Green attested, she had instead said that she had not seen the complaints, but "imagined" that they were from lobbyists, without identifying them as being "pro-Israel".[247]

[22] The ABC's submission is that Ms Green's evidence as to the first issue should be preferred to that of Ms Lattouf, because:

a. The unchallenged evidence is that Mr Ahern, when directing Ms Green to speak with Ms Lattouf about her social media activity, had not shown her the complaints, or given her any information about the identity or opinions of the complainants, other than to say, in general terms, that they related to Ms Lattouf's stance on the Israel/Gaza conflict.[248]

b. Ms Green's evidence as to the first issue is consistent with the note that she prepared a few days later, on Thursday, 21 December 2023.[249]

[23] The *second* issue about the Monday Conversation has its source in Ms Green's evidence that she referred to the ABC's "strict editorial guidelines".[250] Ms Lattouf denied that she had done so, but then said, when cross-examined, that she was familiar with the ABC's social media policies, knew that Ms Green was talking about how Ms Lattouf should conduct her social media, with the result that "it was understood in the conversation. Well, I believe it to have been understood, what we were talking about."[251] In light of this evidence, the ABC's submission is that it is not necessary to resolve the second issue, as both Ms Green and Ms Lattouf understood that their conversation was being conducted in the context of the ABC's social media policies.

[24] The *third* issue about the Monday Conversation is whether, as Ms Green attested, she said, "So you just need to be mindful about what you're posting. It's all about a perception of bias."[252] Ms Lattouf's affidavit did include words to that effect[253], and when cross-examined, she said that she did not remember them being spoken by Ms Green.[254]

[25] The ABC's submission is that Ms Green's evidence as to the third issue should be preferred, because:

a. The note that Ms Green prepared for, and used in, the conversation expressly mentioned the concept of perceptions.[255]

[247] N [55](a) and (c)]
[248] N [34].
[249] N [56].
[250] N [55(a) and (c)].
[251] N [55(g)].
[252] N [55(a)].
[253] N [55](d)].
[254] N [55(g)].
[255] N [46].

b. In an email that Ms Lattouf wrote on Wednesday, 20 December 2023 included in the account of the Monday Conversation, "Elizabeth…gave me a heads up to be mindful on social media."

[26] Cross-examined about this email, Ms Lattouf said "I agree that that was the sentiment of what she was expressing to me…She's asking me to be mindful in terms of how active I am on social media…".[256]

[27] It is agreed that Ms Green assured Ms Lattouf that there was no issue about whether Ms Lattouf had been balanced while on air.

[28] The *fourth* issue about the Monday Conversation concerns Ms Green's evidence is that she then said, "I wanted to talk to you because these complaints have apparently happened so we need to address it."[257] According to Ms Lattouf, Ms Green did not say anything to that effect, but was instead a reluctant interlocutor. Ms Lattouf went so far as to say that Ms Green had said, "It really angers me that we even have to have this conversation, it's unfair."[258]

[29] The ABC's submission is that Ms Green's evidence as to the fourth issue should be preferred to that of Ms Lattouf, because:

a. Ms Green specifically denied being angry, or having a sense of unfairness.[259]

b. There is no other evidence consistent with the proposition that Ms Green in fact felt angry, or that she thought that her conversation with Ms Lattouf involved any unfairness.

c. The picture of Ms Green sought to be painted by Ms Lattouf's evidence is not consistent with the way in which Ms Green presented when she gave evidence. Her presentation was of a matter-of-fact subordinate with a phlegmatic disposition, who would do as she was asked. It is submitted that Ms Green would be believed when she said under cross-examination, "Obviously, I was doing what I was instructed to do, which was to tell her to keep a low profile on social media."[260] Ms Green's purpose was to tell Ms Lattouf how she should conduct herself on social media in order to address the issues posed by the complaints. It is likely that she said something to make that purpose explicit.

d. Ms Green's evidence as to the first issue is consistent with the note that she prepared on Thursday, 21 December 2023; in particular, the words "[w]ith that in mind", which link the "advice" that she records herself as having given Ms Lattouf with the complaints.[261]

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[256] N [55(g)].
[257] N [55(a)].
[258] N [55(d)].
[259] N [55(c)].
[260] N [55(c)].
[261] N [56].

[30] The *fifth* issue about the Monday Conversation has its source in Ms Green's evidence that she said, "Obviously as an ABC presenter, you need to be impartial, that includes on social media."[262] On Ms Lattouf's version, nothing to that effect was said; in fact, Ms Lattouf's version of the conversation as a whole would not make sense if the words that Ms Green recalled were in fact said.[263]

[31] The ABC's submission is that Ms Green's evidence as to the fifth issue should be preferred, because:

a. It is consistent with Ms Green's purpose of telling Ms Lattouf how she should conduct herself on social media in order to address the issues posed by the complaints.

b. Ms Green's evidence that she linked the concepts of impartiality with balance is inherently plausible.[264]

[32] The *sixth* issue about the Monday Conversation, related to the fourth, is whether Ms Green said, as she attested, "I wouldn't give anyone any ammunition for complaints".[265] Ms Lattouf denied that words to that effect were said.[266]

[33] The ABC's submission is that Ms Green's evidence as to the sixth issue should be preferred, because:

a. The word "ammunition" was included in the contemporaneous note that she prepared during her conversation with Mr Ahern[267], which she had in front of her when she spoke with Ms Lattouf.[268]

b. It is consistent with Ms Green's purpose, which was to tell Ms Lattouf how she should conduct herself on social media in order to address the issues posed by the complaints.

[34] The importance of the fourth and sixth issues is that, if Ms Green's evidence is preferred, as the ABC submits it should, then the whole conversation had a more directory quality than Ms Lattouf wishes to indicate.

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[262] N [55(a) and (c)].
[263] N [55(d)].
[264] N [55](c)].
[265] N [55](c)].
[266] N [55(g)].
[267] N [46].
[268] N [55](a)].

[35] The *seventh* issue about the Monday Conversation concerns the content of what Ms Green told Ms Lattouf about how Ms Lattouf should conduct herself on social media during the week when she was presenting on the ABC. The ABC's submission is that:

a. The best evidence of the gist or substance of the message that Ms Green objectively communicated to Ms Lattouf is in Ms Lattouf's email of 20 December 2023, where she recorded herself as having "responded" to what she had been told by Ms Green, "I don't think its fair to expect me to stop posting all together (sic)". That response makes sense only if Ms Lattouf had effectively just been told by Ms Green to stop posting altogether.

b. The position described in the previous subparagraph is consistent with what both Ms Green and Ms Lattouf agree then followed, which was that Ms Lattouf had "pushed back" against what Ms Green had said, by negotiating what Ms Lattouf "parameters" concerning what she could post.[269] The concepts of "pushing back" and "parameters" only make sense if they refer to qualifications of an absolute position earlier articulated by Ms Green.

c. There is no issue as to the parameters that were negotiated. There were three: Ms Lattouf could only post "information"; the information had be, not just factual, but "completely factual"; and it had to come from "reputable sources". The example given by Ms Lattouf, and accepted by Ms Green, was the report of the death of a journalist. The ABC's case is that the parameters would reasonably be understood not to include opinions, including reports of opinions.

Monday, 18 December 2023: After the Monday Conversation

[36] Mr Ahern's evidence was that in one of his 2.36pm and 3.35pm telephone conversations with Ms Green, he "again instructed Ms Green to speak to Ms Lattouf about not posting anything about the Israel-Gaza war during that week."[270] He said that she replied. "Don't worry. I've already had that conversation with her. She won't post anything controversial."[271] It was not put to Mr Ahern that his evidence about the content of this conversation was incorrect.

[37] However, this conversation could not have taken place at either of those times, because (as is accepted) the Monday Conversation did not begin until 3.44 pm on Monday, 18 December 2023[272]; Ms Green could not have told Mr Ahern that she had "already had [the] conversation" with Ms Lattouf until after the Monday Conversation had taken place and concluded. Accordingly, the only available conclusion is that Ms Green had given a report to Mr Ahern about the fact and outcome

[269] N [55(g)].
[270] N [41(d)].
[271] N [41(d)].
[272] N [55].

of the Monday Conversation at some time between the conclusion of the Monday Conversation and 1.16 pm on Tuesday, 19 December 2023.

[38] Ms Lattouf's case about the content of the conversations between Mr Ahern and Ms Green on Monday, 18 December 2023 is incoherent. On the one hand, it was put to Mr Ahern that he had never had a conversation with Ms Green in which he told her to tell Ms Lattouf "not to post on socials". On the other hand, it was not put to Ms Green that her evidence about her conversations with Mr Ahern was incorrect. Nothing is said about the conversation in Ms Lattouf's closing submissions.

Tuesday, 19 December 2023: The Tuesday Morning Teams Meeting

[39] At or about 10.48 am on Tuesday, 19 December 2023, Mr Latimer, Mr Melkman, and Mr Ahern had a meeting on Microsoft Teams (**Tuesday Morning Teams Meeting**).

[40] It is clear that one topic that was discussed in the Tuesday Morning Teams Meeting was a direction in relation to Ms Lattouf's prospective social media activity.[273]

[41] One issue relating to the Tuesday Morning Teams Meeting is whether the meeting was told that Ms Green had by then given a direction to Ms Lattouf. Mr Ahern's evidence in cross-examination was that he had given that information to the Tuesday Morning Teams Meeting.[274] Neither Mr Latimer nor Mr Melkman give evidence that this information was provided to the Tuesday Morning Teams Meeting. Although Mr Melkman's email, purporting to record what had been discussed, is ambiguous, it is arguable that it is more consistent with the Tuesday Morning Teams Meeting not having been told that Ms Green had by then given a direction to Ms Lattouf.

[42] A second issue relating to the Tuesday Morning Teams Meeting is whether Mr Latimer instructed Mr Ahern in relation to Ms Lattouf's prospective social media activity. Mr Latimer's evidence was that on Tuesday, 19 December 2023 before 11.15am, he had a discussion with Mr Ahern during which "[he] instructed him to direct Ms Lattouf that she should not post anything on social media while she was engaged by the ABC that week."[275] Mr Latimer attested that he "distinctly recall[ed]" saying the words, "You are to direct Antoinette Lattouf not to post anything on social media."[276] Mr Latimer thought that he had done so in the Tuesday Morning Teams Meeting with Mr Ahern and Mr Melkman earlier that morning, but accepted in cross-examination that it may have been after the meeting.

[273] N [108], [109], and [111].
[274] N [108(d)].
[275] N [108(e)].
[276] N [108(e)].

[43] Mr Latimer's explanation for why he gave the direction is at T562.24-33.

Tuesday, 19 December 2023: After the Tuesday Morning Teams Meeting

[44] Mr Ahern's evidence was that after the Tuesday Morning Teams Meeting he had a further telephone conversation with Ms Green. Mr Ahern's evidence is that he again instructed Ms Green "to speak to Ms Lattouf about making comments on the Israel-Gaza conflict on social media during her engagement with the ABC."[277] Mr Ahern accepted that he may have used the word "controversial" in this discussion.

[45] Ms Green's affidavit evidence was that a short time after 12pm on Tuesday, 19 December 2023, she returned a call from Ms Lattouf that she had missed. In that telephone conversation, Ms Green said that she reminded Ms Lattouf to, "remember our conversation from yesterday, it would be a good idea to keep a low profile, best not to post anything."[278] Ms Green recounted that Ms Lattouf said to her, "Are you saying that I cannot post if another journalist dies?" and she replied, "I think it would be okay if you reposted form a verified source, but I think it would be better if you held off whilst you're with us."[279] Ms Lattouf denied that there was a second conversation in which she and Ms Green discussed her social media activity. It is accepted that in her oral evidence Ms Green did not repeat the words set out in the second sentence of this paragraph.

[46] At 1:16pm on Tuesday, 19 December 2023, Mr Ahern sent an email to Mr Latimer and Mr Melkman, with a copy to Mr Oliver-Taylor. In that email, Mr Ahern stated, "I can confirm that our Content Director Elizabeth has reiterated to Antoinette the importance of not talking about Israel-Gaza in her shows this week. She has also suggested that Antoinette may be wise not to post anything on her socials this week."[280] It was not suggested to Mr Ahern that the content of this email, insofar as it "confirmed" that Ms Green had spoken to Ms Lattouf, was incorrect. It follows that, by then at least, Mr Ahern had received a report from Ms Green.

[47] Mr Latimer's evidence in cross-examination was that when he read Mr Ahern's email of 1:16 pm on Tuesday, 19 December 2023, he was satisfied that Ms Lattouf had been given a direction in accordance with his instructions. He explained his thought processes in paragraph [24][281] and at T574.17-28.

[277] N [118(e)].
[278] N [127(b)].
[279] N [127(c)].
[280] N [131].
[281] CB Tab 14, p 771.

Tuesday, 19 December 2023: The Tuesday Afternoon Teams Meeting[282]

[48] At 4:34 pm on Tuesday, 19 December 2023, Mr Oliver-Taylor, Mr Latimer and Mr Melkman were invited to another Microsoft Teams meeting (**Tuesday Afternoon Teams Meeting**).

[49] One issue relating to the Tuesday Afternoon Teams Meeting is whether Mr Latimer was present. Mr Oliver-Taylor's evidence placed Mr Latimer in the Tuesday Afternoon Teams Meeting. Mr Melkman could not remember whether Mr Latimer was present. Mr Latimer did not mention a meeting on Teams, but remembered a telephone conversation with Mr Oliver-Taylor that afternoon.

[50] Mr Oliver-Taylor's evidence was that during the Tuesday Afternoon Teams Meeting there was discussion about "a direction to Ms Lattouf not to post anything about the Israel Gaza war during the rest of the week of her engagement, and that Mr Latimer was to do something about that". Mr Oliver-Taylor also deposed that he could not recall whether the direction to Mr Latimer was that he would take steps to ensure Ms Lattouf had been given such a direction, or whether he was asked to ensure that she be given such a direction.[283] However, in cross-examination Mr Oliver-Taylor agreed that, by this point, it was clear in his mind that Ms Lattouf had already been given a direction not to post.[284] He had an idea that there may have been a thought at that time that a "stronger direction" was needed, but was not certain about that.[285]

[51] Mr Latimer's evidence was that during his telephone conversation with Mr Oliver-Taylor on Tuesday afternoon they "we were firm in our view that Ms Lattouf should remain on-air for her scheduled shifts that week. My view about that was that the risks associated with her remaining on air were being managed by her having been told not to post anything on social media (as I had instructed)."[286] He was not cross-examined about whether, during that conversation with Mr Oliver-Taylor, they discussed the direction that had been given to Ms Lattouf.

[282] N [151].
[283] N [151(a)].
[284] N [151(b)].
[285] T379.30-46.
[286] N [151(d)].

Wednesday, 20 December 2023: Before the Teams Meeting

[52] At 12.19 pm Mr Latimer sent an email to Mr Ahern, Mr Melkman and Mr Oliver-Taylor, that relevantly stated:

> Steve,
>
> I have just seen Insta story posts by Antoinette regarding Israel-Gaza posted 18-hours ago.
>
> The clear instructions were to direct Antoinette not to post to socials for the rest of this week.[287]

[53] Mr Latimer's unchallenged evidence was that the content of this email accurately reflected his state of mind in relation to its subject matter at the time.[288] It was never put to Mr Latimer that this email was a fraud, or that it did not accurately record his then state of mind.

Wednesday, 20 December 2023: The Teams Meeting

[54] Mr Latimer recalls that during the Teams meeting, "Mr Ahern confirmed that Ms Lattouf had been told not to post anything on social media."[289]

[55] Mr Melkman's evidence was that, "there was some discussion about the content of the direction that had been given to Ms Lattouf. However, I understood that it was either a direction not to post on this particular issue (the Israel-Gaza war) or a direction not to post on any "controversial" matters during the week she was on air."[290]

[56] Mr Ahern's evidence was that although he could not remember the exact words used, during this meeting:

> There was discussion about the direction that Ms Lattouf had been given in relation to posting on social media. I cannot remember the precise content of the discussion about that direction. In particular, I cannot remember with precision what was said about the content of the direction. However, I am confident in my recollection that neither I nor anyone else said anything that differed from how Mr Latimer described the direction in the email [from Mr Latimer at 12.19 pm].[291]

[287] N [195].
[288] N [195A].
[289] N [209].
[290] N [211].
[291] N [213].

[57] Mr Oliver-Taylor joined the Teams meeting after Ms Green had disconnected. His evidence was that he said words to the effect of, "In my view, Antoinette was directed not to post anything about the Israel-Gaza war this week, and she has clearly breached that direction".[292]

[58] This was the direction that he understood Ms Lattouf to have breached at the time he made the decision that Ms Lattouf should not present *Mornings* for the remaining two days of that week.

Wednesday, 20 December 2023: After the Teams Meeting

[59] Mr Oliver-Taylor sent a text message to Mr Anderson at 1.00 pm on Wednesday, 20 December 2023, in which he advised Mr Anderson "She also failed to follow a direction from her producer not to post anything whilst working with the ABC."[293] Mr Anderson received this text message while he was at lunch with Ms Buttrose, and deposed that he did not read it immediately. This was the first time Mr Anderson was appraised of the direction given to Ms Lattouf not to post anything on social media related to the Israel Gaza conflict.

[60] Shortly thereafter, at 1.18 pm Mr Oliver-Taylor had a short telephone conversation with Mr Anderson. Mr Oliver-Taylor's evidence was that he told Mr Anderson, "Ms Lattouf had posted on social media about the Israel-Gaza war, even though she had been told not to."[294] Mr Anderson deposed that Mr Oliver-Taylor said words to the effect of, "She has put something up on social media despite being directed not to."[295]

[292] N [215].
[293] N [224].
[294] N [228(c)].
[295] N [228(a)].

APPENDIX B: EVIDENCE OF IMPARTIALITY AND THE ABC

(a) The ABC's obligations of impartiality

Evidence about witnesses' understanding of, or identification of, the source(s) of the obligation on the ABC as an organisation to be impartial:

Witness	Evidence references
OLIVER-TAYLOR	Oliver-Taylor, [22(b)], CB Tab 11 p 409 Oliver-Taylor, Ex COT-01 at Tab 33, CB Tab 11 p 579
ANDERSON	Anderson, [15]-[24], CB Tab 15 p 895-97 T199.4-6, Anderson XXN T201.6-T204.38, Anderson XXN T209.44–T210.14, Anderson XXN T247.16–T248.14, Anderson XXN T276.34-38, Anderson XXN
BUTTROSE	Buttrose, [8], CB Tab 17 p 1045 T498.20-29, Buttrose XXN
MELKMAN	T609.47-610.45, Melkman XXN

(b) The need for the ABC to be perceived to be impartial

Evidence about witnesses understanding of the relevant policies and the need for ABC employees to be perceived as impartial (without necessarily identifying the foundational principal or identifying the source of the obligation on the ABC as an organisation – see (a)):

Witness	Evidence references
OLIVER-TAYLOR	Oliver-Taylor, [22(b)], CB Tab 11 p 409 T342.21-31, Oliver-Taylor XXN T349.10-20, Oliver-Taylor XXN
ANDERSON	Anderson, [24], CB Tab 15 p 897

Witness	Evidence references
	Anderson, [26], CB Tab 15 p 897 Anderson, [33], CB Tab 15 p 898 Anderson, [47], CB Tab 15 p 903 T208.11–T211.28, Anderson XXN T222.19-41, Anderson XXN T223.23-28, Anderson XXN T224.12-27, Anderson XXN T248.25-T249.27, Anderson XXN T270.24-25, Anderson XXN T302.16-T303.3, Anderson XXN
BUTTROSE	Buttrose, [8], CB Tab 17 p 1045 Buttrose, [18], CB Tab 17 p 1047 T499.41-T500.8, Buttrose XXN T508.34-47, Buttrose XXN
LATIMER	T579.24-T580.14, Latimer XXN T583.26-T584.5, Latimer XXN T585.12-13, Latimer XXN T590.42-T591.11, Latimer XXN
MELKMAN	Melkman, [26], CB Tab 18 p 1172-73 T611.1-T614.5, Melkman XXN T632.38-633.16, Melkman RXN
AHERN	Ahern, [41], CB Tab 19 p 1396 Ahern, [45]-[46], CB Tab 19 p 1397 Ahern, [96], CB Tab 19 p 1406

Witness	Evidence references
	T442.20-T443.15, Ahern XXN T478.44-T479.2, Ahern XXN
GREEN	Green, [52], CB Tab 16 p 984

(c) Impartiality, or a perception of impartiality, as a factor in their thinking

Evidence that impartiality, or a perception of impartiality, played a factor the witnesses' thinking or decision-making regarding the Applicant:

Witness	Evidence references
OLIVER-TAYLOR	Oliver-Taylor, [22(b)], CB Tab 11 p 409 Oliver-Taylor, [22(d)], CB Tab 11 p 410 Oliver-Taylor, [22(e)], CB Tab 11 p 410 Oliver-Taylor, [40], CB Tab 11 p 415-16 Oliver-Taylor, [57], CB Tab 11 p 419 Oliver-Taylor, [60], CB Tab 11 p 421 Oliver-Taylor, [87], CB Tab 11 p 428 Oliver-Taylor, [103], CB Tab 11 p 431 Oliver-Taylor, [113], CB Tab 11 p 432-3 Oliver-Taylor, Ex COT-01 Tab 5, CB Tab 11 p 449 Oliver-Taylor, Ex COT-01 Tab 29, CB Tab 11 p 526 Oliver-Taylor, Ex COT-01 Tab 33, CB Tab 11 p 579 Oliver-Taylor, Ex COT-01 Tab 64, CB Tab 11 p 697 Oliver-Taylor, Ex COT-01 Tab 68 (points 9, 12), CB Tab 11 p 706 T337.2-4, Oliver-Taylor XXN T344.28-31, Oliver-Taylor XXN

Witness	Evidence references
	T347.2-8, Oliver-Taylor XXN T347.43-44, Oliver-Taylor XXN T349.10-30, Oliver-Taylor XXN T355.7-8, Oliver-Taylor XXN T356.44-T357.2, Oliver-Taylor XXN T358.36-38, Oliver-Taylor XXN T360.39-43, Oliver-Taylor XXN T363.8-33, Oliver-Taylor XXN T364.21-23, Oliver-Taylor XXN T370.9-13, Oliver-Taylor XXN T370.39-40, Oliver-Taylor XXN T375.5-26, Oliver-Taylor XXN T380.38-47, Oliver-Taylor XXN T388.28-41, Oliver-Taylor XXN T389.2-33 Oliver-Taylor XXN T406.36-39, Oliver-Taylor XXN T410.36-T411.46, Oliver-Taylor XXN T412.10-30, Oliver-Taylor XXN T415.46-T416.2, Oliver-Taylor XXN T417.4-17, Oliver-Taylor XXN
ANDERSON	Anderson, [39], CB Tab 15 p 899 Anderson, [47], CB Tab 15 p 903 Anderson, [100], CB Tab 15 p 916

Witness	Evidence references
	Anderson, Ex DA-01 at Tab 6, CB Tab 15 p 935 Anderson, Ex DA-01 at Tab 20, CB Tab 15 p 959 T268.14-40, Anderson XXN T269.8-13, Anderson XXN T270.12-26, Anderson XXN T275.1-4, Anderson XXN T275.35-43, Anderson XXN T276.21-38, Anderson XXN T279.32-47, Anderson XXN T296.9-14, Anderson XXN
BUTTROSE	Buttrose, [15], CB Tab 17 p 1046 Buttrose, [18], CB Tab 17 p 1047 T502.15-T503.20, Buttrose XXN T517.5-7, Buttrose XXN
LATIMER	Latimer, [15(i)], CB Tab 14 p 768-9 Latimer, [35(c)], CB Tab 14 p 774 T562.44-T563.2, Latimer XXN T563.16-19, Latimer XXN
MELKMAN	Melkman, [55]-[59], CB Tab 18 p 1180 Melkman, [68], CB Tab 18 p 1184 Melkman, Ex SM-01 Tab 5, CB Tab 18 p 1232 Melkman, Ex SM-01 Tab 18, CB Tab 18 p 1275 Melkman, Ex SM-01 Tab 23, CB Tab 18 p 1333 T618.31-T619.13, Melkman XXN

Witness	Evidence references
	T625.19-T626.12, Melkman XXN
AHERN	Ahern, [41]-[47], CB Tab 19 p 1396-98 Ahern, [58], CB Tab 19 p 1399 Ahern, [66], CB Tab 19 p 1400 Ahern, [75], CB Tab 19 p 1402 Ahern, [96], CB Tab 19 p 1406-7 T454.16-21, Ahern XXN T456.9-T456.18, Ahern XXN T478.19-T479.7, Ahern XXN T491.7-39, Ahern XXN T492.6-8, Ahern XXN T493.4-T494.11, Ahern XXN
GREEN	Green, [35(a)], CB Tab 16 p 979 Green, [48], CB Tab 16 p 982-3 Green, [52], CB Tab 16 p 984

APPENDIX C: THE TEAMS MEETING

[1] The evidence about the Teams Meeting is collected in [200]-[216] of the Respondent's Narrative of Salient Facts.

[2] The ABC's case is that the evidence supports five salient findings.

[3] *First*, while Mr Oliver-Taylor was understandably anxious to emphasise that the Decision had been taken after consultation with, and the agreement of, Mr Latimer, Mr Ahern, and Mr Melkman[296], it is clear that, as "the senior person in [the] room"[297], the Decision was taken by Mr Oliver-Taylor. That is consistent with text messages that he sent shortly before his participation in the Teams Meeting to Mr Anderson[298] and Mr Leys[299], and the text messages that he sent to Mr Anderson after the Teams Meeting: in particular, "*I* have no option but to stand her down", and "*I* will action within the hour"[300], and "*I'm* going to action this now".[301]

[4] *Second,* it is not possible to find that Ms Green communicated to any other participant in the Teams Meeting her view that she had not given a "direction" to Ms Lattouf. That is because none of the other participants recall that she said anything to that effect, notwithstanding that Mr Ahern and Mr Melkman accepted that, if they had heard or registered a statement by Ms Green to that effect, they would have regarded it as being significant. Acceptance of this submission does not require an adverse credit finding against Ms Green. It is possible that she wrongly, but honestly, believed that she had made such a statement. It is also possible that she made the statement, but that each of the other participants failed to hear or register what she said. It is a striking feature of Ms Green's evidence that she does not give evidence that any other participant did or said anything in response to her asserted statement. She was not cross-examined about that.

[5] In these circumstances, the ABC's submission is that the only available finding is that each of Mr Latimer, Mr Ahern, and Mr Melkman spoke with Mr Oliver-Taylor when he joined the Teams Meeting without being conscious that Ms Green believed that she had not given a "direction" to Ms Lattouf.

[6] If (contrary to the foregoing submissions) the evidence of Ms Green should be preferred to other participants in the Teams Meeting, to such an extent that a positive finding should be made that she had communicated to the other participants that she had not given a "direction" to Ms Lattouf, then it would be necessary to find that all or some of the other participants had deliberately concealed that fact from other participants and from the Court, and that they had colluded for that

[296] N [215], and T402.14-18.
[297] T402.18.
[298] N [202].
[299] N [205].
[300] N [224].
[301] N [226].

purpose. There is no evidence, whether of motive or mechanism, that would support so unlikely a finding, and fraudulent collusion was never put to any of the other participants.

[7] *Third*, every witness is agreed that the "parameters" discussed between Ms Green and Ms Lattouf were never communicated to anyone. Mr Latimer, Mr Ahern, Mr Melkman, and Mr Oliver-Taylor were all ignorant of the existence or content of those parameters.

[8] *Fourth*, the content of the discussion about the Direction is dealt with in Appendix A.

[9] *Fifth*, see paragraph [265] of these Submissions.

APPENDIX D: EVIDENCE OF REASONS

Respondent's Narrative of Salient Facts	Brief description of event or action	Evidence of reasons
Monday 18 December 2023		
N [25]	Emails from Mr Anderson to Mr Oliver-Taylor, Mr Stevens and Mr Melkman - Monday, 18 December 2023, 1.35 pm and 1.36 pm	Anderson, [37], CB Tab 15 p 899
N [31]	Email from Mr Ahern to Ms Green 'we will need to talk to Antoinette urgently about what she says about Gaza' – Monday, 18 December 2023, 1.52 pm	Ahern, [34], CB Tab 19 p 1395
N [34]	Conversation between Mr Ahern and Ms Green about Ms Lattouf – afternoon of Monday, 18 December 2023	Ahern, [38], CB Tab 19 p 1395
N [38]	Mr Ahern steps to look into Ms Lattouf recent work and social media activity – afternoon of Monday, 18 December 2023	Ahern, [39], CB Tab 19 p 1396
N [39]	Discussions between Mr Ahern, Mr Latimer and Mr Melkman – afternoon of Monday, 18 December 2023	Ahern, [45], CB Tab 19 p 1397
N [41]	Mr Ahern instruction to Ms Green to speak to Ms Lattouf about not posting anything about the Israel-Gaza war during that week – afternoon of Monday, 18 December 2023	Ahern, [47], CB Tab 19 p 1398
N [55]	Monday conversation between Ms Green and Ms Lattouf – afternoon of Monday, 18 December 2023	Ms Green, [49], CB Tab 16 p 984
N [69]-[72]	Mr Anderson review of Ms Lattouf social media – evening of Monday, 18 December 2023	T269.43-TT270.31, Anderson XXN T271.12-T272.44, Anderson XXN
N [76], [81]	Mr Oliver-Taylor emails to Mr Ahern, Mr Melkman and Mr Latimer – Monday, 18 December 2023, 8.51 pm and 9.01 pm	Oliver-Taylor, [40], CB Tab 11 p 415-416 T362.30-T364.23, Oliver-Taylor XXN Oliver-Taylor, [44]-[45], CB Tab 11 p 417

Respondent's Narrative of Salient Facts	Brief description of event or action	Evidence of reasons
N [80]	Mr Ahern response to Mr Oliver-Taylor – Monday, 18 December 2023, 8.57 pm	Ahern, [58], CB Tab 19 p 1399
Tuesday, 19 December 2023		
N [108]	Mr Latimer direction to Mr Ahern 'you are to direct Antoinette Lattouf not to post anything on social media' – morning of Tuesday, 19 December 2023	T562.24-563.2, Latimer XXN T592.28-T5933.14
N [111]	Mr Melkman email – Tuesday, 19 December 2023, 11.10 am	Melkman, [62], CB Tab 18 p 1182
N [115]-[116]	Chair's office forwards complaints to Mr Oliver-Taylor –Tuesday, 19 December 2023	Buttrose, [22], CB Tab 17 p 1048 T509.18-29, Buttrose XXN
N [155]	Ms Buttrose emails to Mr Anderson on evening of Tuesday, 19 December 2023	Buttrose, [26], CB Tab 17 p 1049 Buttrose, [31], CB Tab 17 p 1050 T509.39-T513.46, Buttrose XXN T516.41-T517.12, Buttrose XXN
N [156]	Mr Anderson forwards Ms Buttrose's emails to Mr Oliver-Taylor – evening of Tuesday, 19 December 2023	Anderson, [67], CB Tab 15 p 908 Anderson, [71], CB Tab 15 p 909 Anderson, [76], CB Tab 15 p 910
N [158]	Mr Anderson reference to 'managed exit' in email to Ms Buttrose on evening of Tuesday, 19 December 2023	T281.4-8, Anderson XXN
Wednesday, 20 December 2023		
N[176], [179], [181], [185], [186]	Ms Buttrose sending complaints directly to Mr Oliver-Taylor – Wednesday, 20 December 2023	Buttrose, [39], CB Tab 17 p 1053 T519.33-39, Buttrose XXN T521.10-22, Buttrose XXN T535.10-33, Buttrose XXN
N [184]	Mr Oliver-Taylor replying to Ms Buttrose 'I agree, we have been left in an untenable position as to how to resolve and are working to find the best solution to this	T387.16-43, Oliver-Taylor XXN T389.2-33 Oliver-Taylor XXN

Respondent's Narrative of Salient Facts	Brief description of event or action	Evidence of reasons
	predicament' – Wednesday, 20 December 2023, 11.26 am	
N [219]	Microsoft Teams meeting and the "Decision" – Wednesday, 18 December 2023	Oliver-Taylor, [113]-[114], CB Tab 11 p 432-433 T347.2-8, Oliver-Taylor XXN T401.41-T402.16 Oliver-Taylor XXN T407.16-21, Oliver-Taylor XXN T409.26-T410.28, Oliver-Taylor XXN T415.25-29, Oliver-Taylor XXN T415.46-T418.39 Oliver-Taylor XXN T422.14-35, Oliver-Taylor XXN T425.29-T429.21, Oliver-Taylor XXN
		Latimer, [37], CB Tab 14 p 774 T593.16-25
		Melkman, [81], CB Tab 18 p 1188-89 T627.1-26, Melkman XXN T630.37-632.26, Melkman XXN
		Ahern, [96], CB Tab 19 p 1406-1407
N [223], [224], [225], [226]	Mr Oliver-Taylor texts and calls to Mr Anderson Wednesday, 18 December 2023, around 1.00 pm	Oliver-Taylor, [117], CB Tab 11 p 433 T413.22-33, Oliver-Taylor XXN
N [242], [242C], [243]	Subsequent discussion in the boardroom	Ms Green, [77], CB Tab 16 p 989
Overarching considerations		
	Overarching considerations	Oliver-Taylor, [22(b)], CB Tab 11 p 409 Oliver-Taylor, [22(c)], CB Tab 11 p 409 T370.45-T371.5, Oliver-Taylor
	Overarching considerations	Latimer, [46], CB Tab 14 p 777
	Overarching considerations	Anderson, [24]-[25], CB Tab 15 p 897 Anderson, [102]-[104], CB Tab 15 p 916-917

Respondent's Narrative of Salient Facts	Brief description of event or action	Evidence of reasons
		T272.9-18, Anderson XXN T275.29-43, Anderson XXN T276.21-38, Anderson XXN T279.32-47, Anderson XXN
	Overarching considerations	Buttrose, [18], CB Tab 17 p 1046-47 Buttrose, [51]-[52], CB Tab 17 p 1056 T505.45-T506.5, Buttrose XXN T533.2-13, Buttrose XXN T534.42-T535.8, Buttrose XXN
	Overarching considerations	Ms Green, [88], CB Tab 16 p 991
	Overarching considerations	Melkman, [91], CB Tab 18 p 1191
	Overarching considerations	Ahern, [119], CB Tab 19 p 1410-11