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Antoinette Lattouf
Applicant

Australian Broadcasting Corporation
Respondent

OUTLINE OF SUBMISSIONS FOR THE APPLICANT

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A. Overview

1. The applicant Antoinette Lattouf was employed by the respondent (the **ABC**) to present its “*Mornings*” radio show from 18–22 December 2023. Ms Lattouf’s presentation of *Mornings* on 18–20 December 2023 was exemplary. She was told she was “sounding great” and was praised for her work.
2. Shortly after Ms Lattouf appeared on air on 18 December 2023, however, the ABC was deluged with vituperative complaints from pro-Israeli lobbyists who protested Ms Lattouf’s employment and demanded her removal. The complaints explicitly objected to Ms Lattouf’s opinions on the Israeli/Palestinian conflict, expressed before her employment by the ABC. Senior executives of the ABC were sympathetic to the complaints and, having become aware of Ms Lattouf’s opinions, sought to be rid of her.
3. On the afternoon of 20 December 2023, without notice or forewarning, Ms Lattouf was told that she would not be presenting her final two shows and that she was to pack up her desk and bag and leave the ABC studios.

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4. It is now admitted by the ABC that Ms Lattouf, at the point of her dismissal, had not breached any ABC policy, procedure or guideline. It also appears to be accepted by the ABC that she had not breached any direction.
5. Ms Lattouf was terminated by the ABC for a reason or reasons that included her political opinion and/or her race, national extraction or social origin and contrary to s 772(1)(f) of the *Fair Work Act 2009* (Cth) (**FW Act**).
6. The circumstances in which Ms Lattouf was dismissed were a procedural travesty. She was sacked without notice or warning and given no opportunity to defend herself. The dismissal offended any notion of procedural or substantive fairness, and flagrantly contravened multiple provisions of the *ABC Enterprise Agreement 2022–2025*.
7. The Court should uphold Ms Lattouf’s claims, make declarations recording the ABC’s contraventions and award Ms Lattouf compensation for her loss including non-economic loss for hurt, humiliation, pain and suffering and the exacerbation of a psychiatric illness. The matter should thereafter be programmed for penalty and consideration of the other forms of relief sought by Ms Lattouf.

B. Summary of key facts

Background

8. Antoinette Lattouf is a freelance journalist, presenter and commentator. She is of Arab descent. Her parents were born in Lebanon and came to Australia as refugees before she was born.
9. Ms Lattouf has been for many years a vocal public supporter of the human rights of Palestinians. She believes that the Israeli occupation of Palestine is unlawful and is the root cause of the Israeli-Palestinian conflict. She has consistently opposed the Israeli military campaign against Gaza which commenced following the 7 October 2023 attacks on Israel by Hamas. She has condemned the Israeli military campaign in Gaza, noting for instance that 70% of those killed by the Israeli Defence Forces in Gaza Strip were women and children. Ms Lattouf argued, prior to her employment with the ABC, that Israel had committed war crimes in Gaza and called for an immediate ceasefire.
10. Ms Lattouf is a defender of press freedom and journalistic integrity, and believes that media organisations should report on the Israeli/Palestinian conflict accurately and impartially. She considers that Australian journalists who report critically on Israel’s conduct in Gaza are the subject of intimidation. In November 2023 Ms Lattouf signed an open letter to Australian media outlets calling for ethical reporting on Israel and Palestine.
11. The ABC is the national broadcaster. It is governed by a board, which has a statutory duty to maintain its independence and integrity, and its impartiality in its gathering and presentation of

news and information. In December 2023, the members of its board included Ita Buttrose, chairperson, and David Anderson, managing director. Mr Anderson remains the ABC's managing director and the person with statutory responsibility for management of the organisation. The ABC's senior leadership team in December 2023, and now, includes its Chief Content Officer Christopher Oliver-Taylor.

12. The ABC is party to the *ABC Enterprise Agreement 2022–2025*. Clause 55 of the Agreement deals with employee misconduct, codifying and expanding on the usual requirements of procedural fairness. It prescribes particular procedures for the investigation of misconduct and identifies the sanctions available in respect of misconduct.

Engagement and dismissal of Ms Lattouf

13. Ms Lattouf was from time to time a host on ABC radio between 2021 onward. In November 2023 Ms Lattouf was engaged to present a program known as “*Mornings*” for the week beginning Monday 18 December 2023. Ms Lattouf hosted the program on Monday 18 December and Tuesday 19 December. She received positive feedback. On Wednesday 20 December 2023 Ms Lattouf completed her shift on-air and attended an all staff meeting, during which her performance was praised.
14. Shortly thereafter, and as Ms Lattouf was planning the show for the rest of the week with her producers, she was then called to a meeting and dismissed on the spot. She was told that she was being removed because she had on 19 December shared a post by Human Rights Watch with the caption “*HRW reporting starvation as a tool of war*”. There was no attempt by the ABC to comply with the requirements of the Agreement. The decision was delivered as a *fait accompli*, and Ms Lattouf was not invited or permitted to defend herself.
15. Ms Lattouf was told to gather her belongings and leave the ABC building. By the time she reached her home, The Australian newspaper had reported her dismissal.

The context of the dismissal

16. Unbeknownst to Ms Lattouf, she was from 18 December 2023 the subject of a campaign of vituperative complaints. The campaign had the object of persuading the ABC to take Ms Lattouf off air because of her political views on Israel, the Israeli war on Gaza and the Israeli-Palestinian conflict. Among other things, the complainants objected to Ms Lattouf's publication of an article scrutinising the *bona fides* of footage of a demonstration at the Opera House, which some complainants compared to Holocaust denial.
17. A group known as “*Lawyers for Israel*” appears to have co-ordinated the complaints, which articulated similar themes and, in most cases, recited identical or near identical objections.

18. The complaints were sent to Ms Buttrose and Mr Anderson and were in due course forwarded to Mr Oliver-Taylor. They received a sympathetic response. Contemporaneous materials demonstrate that each of Ms Buttrose, Mr Anderson and Mr Oliver-Taylor adopted a hostile attitude toward Ms Lattouf as soon as they became aware of her opinions. Ms Buttrose was inclined to immediately remove Ms Lattouf from air under any pretext: “*Why can't she come down with flu? Or Covid. Or a stomach upset?*”. Mr Anderson’s view was that that “*...I think we have an Antoinette issue. Her socials are full of ant-Semitic [sic] hatred... I'm 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*”. He conveyed this opinion to Mr Oliver-Taylor, who agreed. Mr Oliver-Taylor’s own view was that Ms Lattouf ought never have been hired by the ABC, for two reasons: “*Her position on the Gaza/Israel war*” and the fact that “*she signed the recent petition*” (that is the open letter calling for ethical reporting on Israel and Palestine).
19. They were, however, confronted by the reality that the advice they obtained from subject matter experts was that Ms Lattouf had not breached the ABC’s editorial guidelines or any other relevant rule, and that there was no proper basis to dismiss her. Contemporaneous exchanges show that the desire of Mr Anderson and Mr Oliver-Taylor to be rid of Ms Lattouf was counter-balanced by a concern that her immediate removal would lead to criticism, given that she had done nothing wrong: “*The blow back will be phenomenal. I recommend we hold until Friday. No comment on the war, it's not related, no breach of our own editorial policies or the act*”.
20. On the evening of 19 December, Ms Lattouf shared a post by Human Rights Watch with the caption “*HRW reporting starvation as a tool of war*”. Human Rights Watch is an organisation which is frequently quoted by the ABC on a range of topics, and which reported on 18 December 2023 that the Israeli government was using starvation of civilians as a method of warfare in the Gaza Strip.
21. At the time of Ms Lattouf’s dismissal, the ABC website featured two articles on the relevant report. One posted on 18 December 2024, featured the headline “*Israel-Gaza war: Human Rights Watch says starvation is being used as 'a weapon of war' by the Israeli government*”. The second, a video posted on the day of her dismissal, had the headline “*Human Rights Watch accuses Israel of weaponising starvation in Gaza*” and a video caption “*Deliberate starvation*”.
22. It is common ground that Ms Lattouf in sharing the post did not breach any ABC policy or guideline. It also appears to be conceded by the ABC that Ms Lattouf did not breach any direction. Even so, Mr Oliver-Taylor in consultation with Mr Anderson determined that Ms Lattouf should be removed immediately because she had engaged in conduct which he variously characterised as a breach of “*editorial guidelines*”, a breach of “*impartiality around*

social media” and a breach of a direction “*not to post anything about the Israel Gaza war during the rest of the week of her engagement*”. Ms Lattouf was removed immediately thereafter.

C. The pleaded cases

23. Ms Lattouf contends that the ABC dismissed her for reasons which included her political opinion, or her race and political opinion, in breach of s 772(1)(1) of the FW Act. She identifies the relevant opinions as being (i) her opposition to the Israeli military campaign in Gaza; (ii) her support of Palestinians’ human rights; (iii) her questioning of the authenticity of footage of demonstrators chanting antisemitic chants at the Sydney Opera House; and (iv) that media organisations should report about the conflict between Israel and Palestinians accurately and impartially.
24. Ms Lattouf further contends that the ABC breached s 50 of the FW Act and clause 55 of the Agreement by its failure to comply with the requirements of clause 55 in dealing with Ms Lattouf’s alleged misconduct.
25. The ABC denies that it contravened s 771(1)(f) of the FW Act. It admits that Ms Lattouf is of Lebanese, Arab and Middle Eastern descent and that these constitute the attributes of “*race*”, “*national extraction*” or “*social origin*”, and admits that Ms Lattouf’s opposition to the Israeli military campaign in Gaza was capable of constituting a “*political opinion*”. However it denies that Ms Lattouf’s opinions were otherwise political opinions, and denies that it dismissed her.
26. The ABC further denies that its reasons for its conduct vis-à-vis Ms Lattouf included her political opinions or race. Rather, it contends, that its reasons for acting as it did were the reasons of Mr Oliver-Taylor, which it identifies as follows:
 - (a) his belief that Ms Lattouf’s activity on her Instagram account on or about 19 December 2023 meant that Ms Lattouf may have breached the ABC’s policies or guidelines;
 - (b) his belief that Ms Lattouf had not complied with a direction given to her in relation to her use of social media; and
 - (c) his “*loss of trust and confidence*” in Ms Lattouf to present live radio in accordance with directions issued to her.¹
27. The ABC’s pleading does not identify the policies or guidelines which Mr Oliver-Taylor believed Ms Lattouf may have breached, nor does it identify the direction which he believed her to have contravened. The ABC’s evidence is ambiguous, but appears to characterise the

¹ Defence 45B.

relevant policy as the ABC's "*Personal Use of Social Media Guidelines*" and the relevant direction as being "*a direction not to post anything about the Israel-Gaza war*".²

28. The ABC accepts that Ms Lattouf was not in fact given any such direction, and that she did not in fact breach the "*Personal Use of Social Media Guidelines*" policy. The effect of its pleading appears to be that Ms Lattouf was sacked not because of her political opinion, but because its senior executives made a series of compounding errors.
29. In relation to the breach of Agreement claim, the ABC admits that it did not follow the process prescribed by clause 55 but contends that it was not obliged to do so. This is seemingly on the basis that it did not allege that Ms Lattouf had engaged in misconduct.³ It remains to be seen how the ABC explains the apparent inconsistency between its defence to the s 772(1) claim (that it removed Ms Lattouf because it believed that she had breached a policy and/or direction) and the s 50 claim (that it never alleged misconduct by Ms Lattouf).

D. Dismissal contrary to s771(1)(f): consideration

30. In relation to the s 772 claims Ms Lattouf submits as follows.

Political opinion

31. The ABC denies that Ms Lattouf's support for Palestinian human rights, questioning of the authenticity of the footage of antisemitic chants at the Opera House protest on 9 October 2023 and view that media organisations should report the conflict between Israel and Palestinians accurately and impartially are "*political opinions*". It also cavils with the notion that questioning the integrity of the footage of antisemitic chants is an opinion.
32. The noun "*opinion*" means a "*personal view, attitude or estimation*".⁴ The prefatory adjective "*political*" means,⁵ relevantly, "*of or relating to the governing of a nation, state, municipality etcetera*", "*affecting or involving the state of government*",⁶ "*Of, belonging, or pertaining to the state or body of citizens, its government and policy*", "*Relating to, or concerned or dealing with politics or the science of government*" and "*Belonging to or taking a side in politics or in connection with the party system or government*".⁷
33. The opinions pleaded are each "*political*" in the sense that they relate to or affect the governing of a nation or state, or affect or involve the state of government. They involved taking a side in relation to political matters and questions and are, perforce "*political opinions*".

² Oliver-Taylor [113].

³ Defence [26]–[29].

⁴ Macquarie Dictionary, Online Edition.

⁵ See also *Nestle v Equal Opportunity Board* [1990] VR 805 at 813-814 (Vincent J).

⁶ *Ibid.*

⁷ Oxford Dictionary, Online Edition.

Dismissal

34. Ms Lattouf contends that her employment relationship with the ABC was terminated at the ABC's initiative at the meeting on 20 December 2023 when she was told she would not be performing any further work at or service for the ABC, and after which she was not allocated any work and was told to leave the ABC's premises. The ABC initially admitted that it had terminated Ms Lattouf's employment.⁸
35. At some later point the ABC apparently discovered that it had not dismissed Ms Lattouf after all. It changed tack and alleged that Ms Lattouf's application was for that reason incompetent.
36. In March 2024 the Fair Work Commission determined that jurisdictional objection by deciding that Ms Lattouf had been dismissed: *Lattouf v Australian Broadcasting Corporation* [2024] FWC 1441; 332 IR 127, and issued a certificate under s 776(3) that it was satisfied that all reasonable attempts to resolve the dispute have been or were likely to be unsuccessful. The ABC did not appeal the decision or seek judicial review.
37. It is unclear whether the ABC will seek to submit to the Court that it did not terminate Ms Lattouf's employment. Such a submission should not be entertained. To allow the ABC to re-litigate the question decided by the Commission would be an abuse of process. The re-litigation would expose Ms Lattouf to unreasonable vexation and expense, "*run contrary to principle of finality, would create the possibility of inconsistent judgments on the same issue and be an inefficient use of the Court's resources. All of these matters would tend to bring the administration of justice into disrepute.*"⁹
38. The ABC is, further, estopped from asserting that it did not dismiss Ms Lattouf. An issue estoppel operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in an earlier proceeding.¹⁰ The doctrine extends to any final decision pronounced by a "*judicial tribunal*", which for present purposes would comprehend the Commission.¹¹ In the present matter, the Commission was obliged to 'deal with' the dispute under s 776 if and only if a valid application had been made under s 773. In order to 'deal with the dispute' it was required to determine whether Ms Lattouf had been terminated at the ABC's initiative. Only after having made that

⁸ FASOC at [21B], admitted in the Defence at [21B].

⁹ *Patial v Kailash Lawyers Pty Ltd* [2023] FCAFC 155 at [14], [20]–[32].

¹⁰ *Blair v Curran* (1939) 62 CLR 464 at 531-533 (Dixon J); *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [22] (French CJ, Gageler and Keane JJ).

¹¹ *The Administration of the Territory of Papua New Guinea v Daera Guba* (1973) 130 CLR 353 at 453 (Gibbs J) citing Lord Guest in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 933; *Kazal v Thunder Studios Inc (California)* [2023] FCAFC 174 at [399] (Wheelahan J).

determination could it have issued a certificate under s 776(3). Had the question been determined adversely to Ms Lattouf, the proceeding would have been dismissed.

39. Unlike the circumstances considered *Miller v University of NSW* [2003] FCAFC 180; 132 FCR 147, the issue of Ms Lattouf’s dismissal was the “*central and determinative issue*” in the Commission proceeding. The Commission’s determination of that question was a necessary step along the way to its exercise of power under s 776 and the issue of a certificate which was a condition precedent to an application being made to this Court. The determination of that question was made by a judicial tribunal and was final as between the parties. The ABC is estopped from denying with it.
40. In any event, and for the reasons articulated by the Commission, Ms Lattouf’s employment was terminated at the meeting on 20 December 2023. Ms Lattouf was told she would not be performing any further work at or service for the ABC, and was in fact not allocated any work. She was told to leave the ABC’s premises immediately and her access card was revoked. At the point of her dismissal there was no suggestion that she would be paid for her remaining shifts. Any reasonable person in her position who had knowledge of the background facts and dealings between the parties would have understood that their employment was terminated.
41. It is plain, as the ABC initially conceded, that Ms Lattouf was dismissed.

Determination: political opinion

42. Section 783 of the FW Act creates a reverse onus of proof. It is to be presumed, unless proven to the contrary, that Ms Lattouf’s employment was terminated for one or other of the pleaded proscribed reasons. Ms Lattouf will succeed unless the ABC, on the whole of the evidence, establishes on the preponderance of probabilities that the proscribed reasons were not substantial and operative ones.¹² In other words, unless the Court is affirmatively satisfied that none of the substantial and operative reasons for Ms Lattouf’s dismissal were the proscribed ones alleged, Ms Lattouf will succeed.¹³
43. The Court would not be so satisfied for at least the following reasons.
44. **First**, the ABC evidence denying proscribed reasons is implausible and would not be accepted. It is sufficient for present purposes to note that:
- (a) No relevant direction was given to Ms Lattouf, and Mr Oliver-Taylor had no sensible basis to think any such direction had been given. Mr Oliver-Taylor’s claims that he assumed that a relevant direction was given are implausible, bordering on incredulous.

¹² *Axon v Axon* (1937) 59 CLR 395 at 403 (Dixon J); *Jones v Dunkel* (1959) 101 CLR 298 at 305 (Dixon CJ).

¹³ *TWU v Qantas Airways Limited* (2021) 308 IR 873 at [302] (Lee J).

- (b) It is similarly implausible, bordering on the incredulous, that Mr Oliver-Taylor in fact considered Ms Lattouf’s 19 December post—indistinguishable from the ABC’s own reporting on the subject—to have contravened any ABC rule.
 - (c) The contemporaneous written exchanges demonstrate with uncommon clarity that the catalyst for the actions the relevant ABC personnel was that Ms Lattouf held an opinion on the Gaza conflict, and indeed that she had a particular opinion critical of the conduct of the State of Israel. Those materials make clear that their entire course of action of Mr Oliver-Taylor and Mr Anderson in particular—beginning with close scrutiny of her conduct and culminating in her dismissal—was motivated by that fact.
 - (d) Accepting the ABC’s innocent explanations would require the Court to find that Mr Oliver-Taylor did not understand the ABC’s own policies, ignored the ABC’s obligations under its enterprise agreement, habitually made unjustified and irrational assumptions and treated his employees in a grossly unfair way. Given that Mr Oliver-Taylor is a highly successful senior executive, this is *prima facie* unlikely.
 - (e) The factual narratives articulated (at great length) in the ABC affidavits, have every appearance of being carefully crafted with the assistance of lawyers with a view to minimising liability and explaining away the damning contemporaneous communications. The affidavits filed in this case highlight the cogency of the frequent observations by the Courts that contemporaneous or near contemporaneous documents are a sounder basis for fact finding than the alleged recollections of persons with an interest in the outcome of the litigation.
45. Simply put, the overwhelming effect of the contemporaneous material is that Mr Anderson and Ms Buttrose wished to be rid of Ms Lattouf as soon as they became aware of her opinions on the Gaza conflict; and that Mr Oliver-Taylor shared their attitude; that in the face of advice that Ms Lattouf had done nothing wrong and a fear of public opprobrium, Messrs Oliver-Taylor and Anderson hesitated for a short time before contriving a concern about Ms Lattouf’s 19 December post and using that as an excuse to be rid of her.
46. The ABC’s evidence, and in particular the evidence of Mr Oliver-Taylor and Mr Anderson, would be rejected. In that case, and having regard to the whole of the evidence, the Court would conclude that the ABC has not met its onus of proof.
47. **Second**, even if Mr Oliver-Taylor’s account—that he believed that Ms Lattouf had been directed “*not to post anything about the Israel-Gaza war*”, to make any post relevant to Gaza, and that he dismissed her because he believed she had breached that direction—the case against the ABC would in any event be made out.

48. There is nothing in the ABC’s evidence to suggest any ABC employee other than Ms Lattouf was given any comparable direction. Mr Oliver-Taylor’s own evidence makes clear that the only possible reason for the alleged direction was Ms Lattouf’s previous expressions of her views about the Israeli-Palestinian conflict and related issues.
49. It is no defence to Ms Lattouf’s claim for the ABC to demonstrate that it imposed on her, because of her political opinions, a bespoke and peculiarly demanding rule and then sacked her for breaching that bespoke rule. To impose an idiosyncratic standard on an employee for a prohibited reason, and then dismiss them for breach of that idiosyncratic standard, is to dismiss them for a prohibited reason.
50. **Third**, it is apparent on the ABC’s own evidence that Ms Lattouf was sacked for reasons which included the pressure exerted by the “*Lawyers for Israel*” campaign. Without that campaign there was no reason for the ABC’s two most senior executives to have minutely scrutinised Ms Lattouf’s conduct as they in fact did, no likelihood that she would have been subject to any bespoke direction, and no likelihood that she would have been dismissed on 20 December 2023.
51. It is equally plain that the participants in the “*Lawyers for Israel*” campaign objected to Ms Lattouf’s opinions in relation to the Gaza conflict.
52. That being the case, the reasons for Ms Lattouf’s dismissal included her political opinions. The “*Lawyers for Israel*” campaign targeted Ms Lattouf because of her political opinion. A dismissal which capitulated to, and thereby vindicated, that campaign was a dismissal for reasons which included Ms Lattouf’s political opinions.
53. Where action is taken by a corporate entity, “*it will in all cases be 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...*”¹⁴ The decision of the person who effected the adverse action may be “*affected or infected*” even by an undisclosed prohibited reason of a contributor to the action.¹⁵
54. Although the particular circumstances of this dismissal are unusual, they are analogous to the cases which have considered group decision making in more conventional fact scenarios.¹⁶ It is immaterial that the persons who caused the corporation to take the action were not employees or officers of the corporation itself, and had no legal power to effect the dismissal.¹⁷

¹⁴ *Wong v National Australia Bank Ltd* [2022] FCAFC 155; 318 IR 148 at [25].

¹⁵ *Elliott v Kodak Australasia Pty Ltd* [2001] FCA 1804; 129 IR 251 at [37].

¹⁶ See by way of example only *Elliott v Kodak Australasia Pty Ltd* [2001] FCA 1804; 129 IR 251; *NTEU v Royal Melbourne Institute of Technology* [2013] FCA 451; 234 IR 139; *CFMEU v Clermont Coal Pty Ltd* [2015] FCA 1014; 253 IR 166; *Leahey v CSG Business Solutions (Aus) Pty Ltd* [2017] FCA 1098; *Qantas Airways Ltd v TWU* [2022] FCAFC 71; 292 FCR 34 at [201]; *TWU v Qantas Airways Ltd* [2021] FCA 873; 308 IR 244 at [223]-[233]; *Wong v National Australia Bank Ltd* [2022] FCAFC 155; 318 IR 148 at [31].

¹⁷ *Wong v National Australia Bank Ltd* [2022] FCAFC 155; 318 IR 148 at [26].

55. The unusual feature of this case by comparison to the conventional scenario of decision makers acting on the advice of more junior employees is that the participants in the “*Lawyers for Israel*” campaign were explicit in demanding Ms Lattouf’s dismissal for a prohibited purpose. The reasoning in *Kodak* and the many decisions following it applies *a fortiori* in that circumstance.
56. Put simply, the ABC acted on the urging of a lobby group who insisted that Ms Lattouf be removed because of her political opinion; in doing so it acted for reasons which included those political opinions.
57. **Fourth**, the ABC evidence suggests (albeit ambivalently) that the reasons for its conduct vis-à-vis Ms Lattouf included the concern held by Ms Buttrose, Mr Anderson and Mr Oliver-Taylor about her “*impartiality*”. This is an effective admission that the reasons for its conduct included her political opinions. To say that Ms Lattouf was “*partial*” on the question of Israel’s conduct in Gaza is to say that she held an opinion on the topic. Dismissal for reasons of impartiality constitute a dismissal for reasons which include political opinion.
58. **Fifth**, Ms Lattouf’s race was a matter of which the relevant ABC executives were aware, and which they treated as apparently relevant to their consideration of her conduct.
59. **Sixth**, it is apparent that additional to Mr Oliver-Taylor and Mr Anderson, other employees of the ABC were materially involved in the decision-making which resulted in Ms Lattouf’s dismissal, including Steve Ahern, Mr Latimer, Mr Melkman, who allegedly engaged with Mr Oliver-Taylor and recommended and endorsed the course of action to terminate Ms Lattouf. Ms Buttrose’s view that the ABC ought to be rid of Ms Lattouf and her conduct in robustly promoting that view via her position as chair entails that she was also materially involved. The ABC must demonstrate that the conscious reasoning processes of these individuals was free of the alleged prohibited reason(s). For various reasons, including those canvassed above, the Court should not accept that it has done so.

Conclusion on s772(1)(f) claim

60. For these reasons, the Court would conclude that the ABC has not discharged its onus of proving that Ms Lattouf’s political opinions and her race were not reasons for the termination of her employment.

E. Breach of the Agreement: consideration

Contraventions of terms of clause 55.2

61. The contraventions of the various obligations imposed on the ABC by clause 55.2 of the Agreement alleged by Ms Lattouf are not contingent on Ms Lattouf having been terminated.¹⁸

¹⁸ See FASOC [29]-[30].

62. The action taken against Ms Lattouf by the ABC on 20 December 2023 which resulted in her not presenting Mornings on 21 and 22 December 2023 and which was announced to the media that afternoon was a procedural shambles that was grossly unfair and, importantly for present purposes, contrary to the terms of the Agreement.
63. An allegation of misconduct was made against Ms Lattouf by the ABC, viz., that she had posted the HRW post on her social media in defiance of the direction and/or that she had breached the ABC's social media policy. This was 'misconduct' for the purposes of clause 55.1.1 of the Agreement.
64. The process detailed in clause 55.2 was triggered. The ABC conspicuously failed to comply with that process. Relevantly, it contravened clause 55.2.1 by not:
- (a) advising Ms Lattouf in writing of the alleged misconduct in accordance with clause 55.2.1(a);
 - (b) advising Ms Lattouf that she could choose to be accompanied or represented by a person of her choice in accordance with clause 55.2.1(b);
 - (c) advising Ms Lattouf of the process to be undertaken by the ABC to determine whether the alleged misconduct was substantiated in accordance with clause 55.2.1(c);
- and
- (d) giving Ms Lattouf an opportunity to respond and/or explain her actions and any mitigating factors she sought to be taken into consideration in accordance with clause 55.2.1(f).
65. It is also clear that ABC considered the alleged misconduct was serious misconduct. The ABC failed to comply with clause 55.2.2 by not advising Ms Lattouf of this at the earliest opportunity.
66. The ABC contravened four distinct obligations imposed by clause 55.2 and therefore six terms of the Agreement.¹⁹ In the result, the ABC committed 4 contraventions of s 50 of the FW Act.

Imposition of an impermissible sanction on Ms Lattouf

67. The contravention of clause 55.4 of the Agreement alleged by Ms Lattouf is not contingent on Ms Lattouf having been terminated.²⁰
68. Clause 55.4 set out the universe of disciplinary actions the ABC was able to take against an employee where misconduct or serious misconduct was substantiated.

¹⁹ *Gibbs v The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223 (Gray J).

²⁰ See FASOC [43]-[44].

69. The ABC could, relevantly, have reprimanded Ms Lattouf or issued a written warning to her in the event that she had engaged in misconduct. It could also have counselled her and recorded this counselling on her employment file.
70. In the event she had engaged in serious misconduct, it could have done one or other of the things detailed in clause 55.4.1(c)-(g).
71. What it was not permitted to do was remove her from presenting Mornings, tell her to pack up her desk and bag and leave forthwith, and then fail to allocate her any work.
72. In the result, the ABC contravened clause 55.4 of the Agreement.

Termination of Ms Lattouf's employment contrary to the Agreement

73. Clause 57.1.1 set out the circumstances in which the ABC could terminate an employee's employment. Under clause 57.1.1(a), it could summarily terminate the employee if the employee was guilty of serious misconduct.
74. The ABC purported to summarily dismiss Ms Lattouf on 20 December 2023.²¹ It was, however, only permitted to do so if she was guilty of serious misconduct. Ms Lattouf was not guilty of serious misconduct (or any misconduct at all). Her summary termination was, therefore, in breach of clause 57.1.1(a) and therefore s 50 of the FW Act.

Conclusion

75. The ABC flagrantly contravened important protective provisions of the Agreement. The contraventions involved the most senior officers of the ABC, whose attention had been drawn to their obligations. They had devastating consequences for Ms Lattouf. The ABC has not admitted the contraventions but seeks to defend the indefensible.
76. If Ms Lattouf's contentions on this issue are accepted, she will submit in due course that the contravention is a serious contravention within the meaning of s 557A of the FW Act which calls for a very substantial penalty.

F. Remedy

77. Section 545(1) confers power on the Court to make any order it considers appropriate if satisfied that a person has contravened a civil remedy provision. Sub-sections 545(2)(a)-(c) set out, non-exhaustively, the kinds of orders the Court may make under s 545(1), but do not otherwise limit the power under s 545(1).²² An aspect of the general power under s 545(1) is provided in s 545(2)(b) to be to award compensation for loss a person has suffered *because of* a contravention

²¹ FASOC [32]-[35].

²² *ABCC v CFMEU* (2018) 262 CLR 157 at [104]; *ALAEA v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526 at [421].

of the FW Act. It is sufficient basis for compensation that contravening conduct is *a* cause of the loss.²³ It is beside the point that other factors may also have contributed to a loss, unless they entail that the loss was not causally related to the contravening,²⁴ and it is not necessary to show that the contravention was the sole cause of the loss and damage alleged. Rather, it is enough to demonstrate that the contravention of a relevant provision of the Act was *a cause* of the loss and damage sustained.²⁵

78. The power under s 545(1) to make appropriate remedial orders extends to an award of compensation for non-economic loss, including for disappointment, hurt, distress, humiliation, or other emotional harm that arises because of a contravention.²⁶ The provision authorises the Court to award compensation unconnected to any personal injury suffered by a person affected by a contravention, and may include a component for shock, distress, hurt or humiliation.²⁷

Non-economic loss

79. Ms Lattouf experienced feelings of shock and humiliation in the immediate aftermath of 20 December 2023.²⁸ This is unsurprising given the peremptory manner in which she was dismissed, the asserted reasons for her dismissal and the immediate reporting of her sacking. The circumstances in which she ceased to perform work at the ABC and present Mornings on 21 and 22 December 2023 were widely publicised. This included that she had engaged in editorial misconduct and breached a management directive. Ms Lattouf felt, unsurprisingly, that her journalistic integrity and reputation had been grossly impugned, which caused her significant emotional distress.²⁹
80. Ms Lattouf experienced low mood, was anxious, felt paranoid and cried regularly. Her paranoid ideation led to her engaging two private security companies to give her home and technology security advice. She experienced trouble sleeping and had to take sedatives. Her appetite waned and she had trouble eating and experienced panic attacks. She consumed greater amounts of alcohol to seek to deal with the negative feelings and distress afflicting her.³⁰
81. Dr Strauss explains that Ms Lattouf is an individual who has a history of psychiatric illness, including a persistent depressive disorder.³¹ Until the events of 20 December 2023, Ms Lattouf

²³ *Ibid.*, at [27].

²⁴ *Ibid.*, at [28].

²⁵ *Patrick Stevedores Holdings v CFMMEU (No 3)* at [37] and [43]; *Henville v Walker* at [106] and [163]-[164].

²⁶ *ALAEA v International Aviation Service* at [443] and [447]-[450]; *Fair Work Ombudsman v MUA (No 2)* (2015) 252 IR 101 at [65]; and *TWU v No Fuss Liquid Waste Pty Limited* [2011] FCA 982 at [23], [41].

²⁷ *James Cook University v Ridd* (2020) 298 IR 50 at [155] and [157].

²⁸ Lattouf affidavit at [75].

²⁹ Lattouf affidavit at [75].

³⁰ Lattouf affidavit at [76]-[86].

³¹ Strauss report at 8.

was coping adequately.³² The events of 20 December 2023, Dr Strauss opines, exacerbated her pre-existing depressive disorder.³³

82. Caution should be exercised in seeking to establish a ‘range’ or ‘fixed limit’ of appropriate awards for non-economic loss, given the inherently individualistic nature of the assessment and the distinct factual and statutory context of each case.³⁴ The Court does not assess general damages by performing arithmetic adjustments to prior determinations.³⁵ Nonetheless, *some* assistance may be gleaned from cases where amounts of non-economic loss have been awarded in the context of contraventions of Part 3-1 of the FW Act, in the anti-discrimination context under s 46PO(4)(d) of the *Australian Human Rights Commission Act 1986* (Cth).
83. In cases where psychological or mental conditions have been shown to be caused or exacerbated by contravening conduct, the following amounts have been awarded:
- (a) in *Gutierrez v MUR Shipping Australia Pty Limited*,³⁶ Burley J overturned an award of general damages to the appellant of \$20,000 and awarded \$90,000. Mr Gutierrez had been diagnosed as suffering from adjustment disorder with depression and anxiety.³⁷ He had also experienced a considerable loss of amenity in life, was unable to work and had lost the enjoyment of social aspects of his life.³⁸ His Honour accepted that the age discrimination Mr Gutierrez was subject to was at least *a* cause of these matters and, in fact, a material cause of them;
 - (b) in *Richardson v Oracle*, ten years ago, the Full Court overturned an award of \$18,000 for general damages as being manifestly inadequate and awarded Ms Richardson \$100,000. The contravening conduct had caused Ms Richardson to suffer a chronic adjustment disorder with mixed features of anxiety and depression. There had been a distinct change in Ms Richardson’s demeanour and she had also experienced physical symptoms, including injury to her sexual relationship with her partner. No conclusion was reached that Ms Richardson’s adjustment disorder was ‘severe’;
 - (c) in *Taylor v August and Pemberton*, Katzmann J awarded general damages of \$140,000 to the applicant for sexual harassment she had suffered and \$40,000 for victimisation. The applicant had developed a chronic psychiatric disorder (being an adjustment disorder) which was caused by the contravening conduct and resulted in her experiencing depression and anxiety and associated symptoms. Her condition had

³² Strauss report at 9.

³³ Strauss report at 10.

³⁴ *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82; 223 FCR 334 at [90] (Kenny J).

³⁵ *Hughes v Hill* at [48] (Perram J).

³⁶ *Gutierrez v Mur Shipping Australia Pty Limited* [2023] FCA 399; 179 ALD 353; 324 IR 58.

³⁷ At [79].

³⁸ At [89].

improved and her Honour concluded would continue to improve with ongoing psychological care;³⁹ and

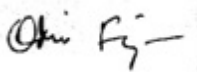
(d) in *TWU v Qantas Airways Limited (Compensation Claim)*,⁴⁰ Lee J awarded an unlawfully terminated employee who had developed a major psychiatric illness as a result of the respondent's contravening conduct was awarded \$100,000⁴¹

84. In the result, an amount of between \$100,000-150,000 should be awarded to Ms Lattouf for non-economic loss.

G. Conclusion

85. The Court should make declarations of contraventions by the ABC of both ss 50 and 772 of the FW Act. Ms Lattouf should be awarded between \$100,000-150,000 for non-economic loss. The proceedings should be programmed for penalty and for consideration of the other forms of relief sought in Ms Lattouf's originating application.

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³⁹ At [521]-[522].

⁴⁰ [2024] FCA 1216.

⁴¹ At [210] and [215](3).