



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Martin Bajelis

v

Reserve Bank of Australia
(U2019/14365)

DEPUTY PRESIDENT CROSS

SYDNEY, 16 JULY 2020

Application for unfair dismissal remedy - alleged racist comments on WhatsApp platform – work related conduct - employer investigation - misconduct - allegations not substantiated - whether valid reasons for dismissal - procedural unfairness - reinstatement not inappropriate - lost remuneration ordered - associated orders.

Introduction

[1] On 20 December 2019, Mr Martin Bajelis (the “Applicant”) lodged an application in the Fair Work Commission (FWC) pursuant to s.394 of the *Fair Work Act 2009* (Cth) (the “Act”) (the “Application”). The Applicant had been employed by the Reserve Bank of Australia (the “Respondent”). The Applicant commenced his employment with the Respondent as a Senior Network Engineer on 24 March 2014. The Applicant was dismissed by the Respondent on 6 December 2019.

[2] In the hearing of the matter Mr D Mahendra appeared for the Applicant, and Mr S Prince SC and Mr T Wong appeared for the Respondent. No objection was taken for either party to be legally represented, and permission was granted for each party to be legally represented, pursuant to s.596 of the Act.

[3] The matter involved a number of text messages sent on 6 November 2019, by the Applicant using an application known as WhatsApp to a group of people who happen to be employed by the Respondent in the Respondent’s Network Services Department (the “NS Department”) (the “NS Work Chat Group”). There is no issue in the proceedings that the text messages were intended for the Applicant’s wife, and that they were mistakenly sent to the NS Work Chat Group by the Applicant.

[4] The text messages that were sent to the NS Work Chat Group on 6 November 2019 were as follows:

- (a) At 8:18 am, as the Applicant was walking his children to school, he sent the following message:

“As I was watching Henry with his cube I realised the difference between Asians and Anglos. Asians have no interest in understanding, they are content to just learn the formulas or routines and it doesn’t matter if they understand them.”

(b) One minute later, at 8:19 am, the Applicant sent the following message:

“That’s why they can’t solve problems.”

[5] Hereafter in this decision the above two messages will be referred to as the “Initial Messages”. The Initial Messages were only visible for approximately 3 minutes before the Applicant became aware of his mistake and deleted them.

[6] At 8:21 am, Mr Damien Paget, a Network Engineer and a member of the NS Work Chat Group, sent a message responding to the Applicant as follows:

“I don’t feel that this is a very appropriate thing to say or very polite.”

[7] At 8.21am, the Applicant sent the following messages to the NS Work Chat Group:

“fucking hell”; and

“apologies”.

[8] At 8:22 am, the Applicant sent the following messages to the NS Work Chat Group:

“Obviously wrong chat”;

“Context is everything”; and

“I’m sorry to anyone who was offended”.

[9] Hereafter in this decision the above messages sent by the Applicant at 8.21 and 8.22am will be referred to as the “Secondary Messages”.

[10] The Applicant was terminated by letter dated 6 December 2019 (the “Termination Letter”). The material parts of that letter regarding reasons for dismissal were as follows:

“I refer to the meeting you had with Mr Scott Sherman, Manager -Employee Relations on the afternoon of Wednesday 20 November 2019. At this meeting you were given details of an allegation that was made against you. Specifically, this allegation was that on 6 November 2019, at 8.18am you posted a message on the ‘NS -Work Chat’ WhatsApp group stating:

‘I realised the difference between Asians and Anglos. Asians have no interest in understanding, they are content to just learn the formulas or routines and it doesn’t matter if they understand them’.

- You then additionally posted, at 8.19am ‘That’s why they can’t solve problems’.
- At 8.21am you then posted ‘Fucking hell’, and ‘Apologies’
- These messages were subsequently deleted.

It was stated that a number of employees found these comments offensive.

Also during that meeting you were informed that the allegations are very serious -and if found to be substantiated could lead to disciplinary action, including the termination of your employment. More specifically, you were informed that if the allegations are found to be accurate, your behaviour is likely to constitute a breach of the Bank’s Code of Conduct, a breach of the Bank’s Workplace Behaviour Policy, but also that this kind of behaviour may also be unlawful.

You were also told that, as of yet, no decision has yet been made about these matters, but that this was your chance to respond to these allegations. In responding to these allegations, you openly admitted to posting this message, as detailed above, but also stated that this was a message intended for your wife, and you did not intend to post this to the work group. You also admitted that this was inappropriate, and deleted these messages within minutes. You reiterated that this was a genuine error, and felt genuine remorse for having sent it.

While we accept that the 8.18am and 8.19am messages were sent to the WhatsApp group in error, the effect of those messages was to convey a deeply offensive message to 23 of the colleagues you are required to work closely with. This has had a serious impact on a number of these colleagues, and has fundamentally undermined your ability to have an ongoing working relationship with some of these employees.

Each employee of the bank has an obligation to conduct themselves in a way which meets the standards of behaviour set out in the Bank’s policies including the Code of Conduct and the Workplace Behaviour Policy. By sending the 8.18am and 8.19am messages, your conduct fell below the standard that is required.

As foreshadowed in the meeting on 20 November, your actions were inconsistent with:

- the Value of Respect as set out in section 1.1. of the Code of Conduct, which describes this Value as “We treat one another with respect and courtesy. We value one another’s views and contributions”);
- the requirement to deal with others in the course of work for the Bank with respect and courtesy (section 3.2 of the Code of Conduct, and section 4.1 of the Workplace Behaviour Policy);
- the requirement not to use abusive language (including racially offensive material) in the workplace (section 3.5 of the Code of Conduct); and

- your obligation not the (sic) make derogatory comments -by doing so, you have engaged in conduct with may amount to harassment (section 4.1 and 6.1 of the Workplace Behaviour Policy).

The fact that the message were sent to this group in error is a factor that the Bank should consider in determining its response to this situation. Equally, the impact that the conduct has had on other employees of the Bank must be considered. This impact includes the offence and humiliation that these messages caused as well as the serious damage caused to your ability to maintain an effective working relationship with others in the Network Services group. This impact on your working relationships is compounded by the fact that there has been previous interactions with your colleagues which resulted in you being spoken to about your conduct at work.

Termination of Employment

Having regard to all of these factors, the Bank has determined that it is appropriate to terminate your employment.

This decision will take effect immediately. You will be paid up until today's date in accordance with your employment contract. You will also be paid four weeks' pay in lieu of notice and any accrued but untaken annual leave, less applicable tax.

We appreciate that this may be a difficult time for you and remind you of the Bank's Employee Assistance program should you wish to obtain counselling assistance. They can be contacted on 1800 808 374 (24 hours).

Please contact me if you have any questions about this matter."

[11] The Applicant, in the Application, and the Respondent in its Form 3 Employer Response to Unfair Dismissal Application (the "Response") both provided significant detail. In particular, in the Response the Respondent provided the following summary statement of the reasons for the Applicant's dismissal:

"Introduction

The Respondent's reasons for terminating the Applicant's employment are set out below in 6 key propositions as follows:

a. Proposition 1:

The Applicant engaged in unacceptable racist behaviour by making anti-Asian comments in a WhatsApp post to his immediate work group on 6 November 2019.

b. Proposition 2:

The Applicant has indicated clearly that he continues to hold the racist views expressed in those posts, as confirmed both in material provided by the Applicant to the Respondent and in the Application.

c. Proposition 3:

The WhatsApp posts had a serious and unavoidably lasting impact on the other employees of the Respondent and their ability to work with the Applicant.

d. Proposition 4:

Employees who were interviewed as part of the Respondent's investigation of the allegations made by the Applicant reported concerns that the Applicant has previously made racist statements at work, and that this reinforced their view that they could not work with him in the future.

e. Proposition 5:

The Applicant has previously been counselled in relation to combative and abrupt interactions with other employees.

Proposition 6:

The Respondent concluded (after carefully considering and weighing up all the factors) that the conduct engaged in by the Applicant both:

- i. was so serious as to justify the termination of his employment; and
- ii. had such a serious impact on his colleagues as to render it impossible
 1. for him to maintain effective working relationships with them; and
 2. for the Bank to provide a safe environment for those colleagues; especially having regard to the fact that he would (if not dismissed) continue to be required to work with his colleagues in the Network Services Department and with others who are of Asian descent.”

Evidence

[12] The following persons provided written statements in the proceedings, and all were cross-examined:

(a) For the Applicant:

- Mr Bajelis;
- Mr Natalie Shaw

(b) For the Respondent:

- Mr Scott Sherman
- Ms Elaine Cheong
- Mr Sukanta Biswas
- Ms Susan Woods
- Professor Yin Paradies
- Mr Erin McKee

Martin Bajelis/The Applicant

(a) **First Statement**

[13] Mr Bajelis is 46 years old and is married with two young children. In his statement he stated that he does not hold any tertiary qualifications. He commenced his employment with the Respondent as a Senior Network Engineer on 24 March 2014, in the NS Department. The NS Department consists of a team of approximately 24 people and is situated within the

Information and Technology Department of the Respondent (the “IT Department”), which is made up of approximately 300 employees.

[14] At the time of his dismissal, the Applicant’s base wage was \$122,473 per annum. He also received a health fund allowance of around \$8,200 per annum, and was also a member of a defined benefit superannuation scheme.

[15] In or around September 2019, the Applicant’s role and location in the Respondent’s office was moved to the Workplace Department (the “WP Department”) on a full time basis to work on an internal project referred to as the “Head Office Workplace Project” (the “HOW Project Role”). The HOW Project Role was entirely funded and owned by the WP Department, and while it originally accounted for about 70 percent of the Applicant’s role, later in 2019, it became 100 percent of his role. The HOW Project Role was projected to run for an estimated minimum of 5 years.

[16] In order to perform the HOW Project Role the Applicant relocated from the IT Department, which is situated on level 6 of the Respondent, to the WP Department, which is situated on level 11, and performed the HOW Project Role from there. The Applicant stated that he was totally isolated from the NS Department, and was “nested in a new team”.

[17] Upon moving to the WP Department, the Applicant stated that he very rarely thereafter interacted with the NS Department. He did continue to attend the IT Department’s weekly team meetings; however his attendance at those meetings was not necessary or required in order to perform the duties of the HOW Project Role. Apart from his attendance at meetings, attendance at one-on-one meetings with Mr McKee and some minor residual tasks left over from his time in the NS Department, the Applicant stated that he was not required to, and did not, interact with anyone in the NS Department.

[18] The Applicant noted that since about March 2015, employees of the NS Department had informally communicated with each other using WhatsApp. Since about November 2015, the NS Department has had three ‘group conversations’ (collectively, the “Group Chats”), including:

- (a) ‘NS -We do/n’t love Durian’, which consisted of past and present NS Department employees (“Group Chat One”);
- (b) ‘NS - Your Other Family’, which consisted of current NS Department employees (“Group Chat Two”); and
- (c) ‘NS - Work Chat’, which consisted of current NS Department employees (“Group Chat Three”).

[19] The Applicant noted that the Group Chats were autonomously set up by NS Department employees, and were not monitored or endorsed by the Respondent. The conversations that took place within the Group Chats were informal and frequently not

about work related matters. Work communications occurred via email, Microsoft Skype for Business, or in person.

[20] The Applicant stated that on or around 2 February 2019, he removed himself from Group Chat One, and on or around 29 July 2019, he removed himself from Group Chat Two. He stated that the removals were because he was regularly referred to as a 'Token White Guy' and he did not like that. When the Applicant moved to the WP Department, he muted Group Chat Three, which resulted in notifications in respect of that chat being turned off.

[21] Regarding the morning of 6 November 2019, prior to sending the Initial Messages, the Applicant sent an image of his two children and his car with the message "outside number 40" to Group Chat Three. The intended recipient was the Applicant's wife, as every morning he used WhatsApp to send a message to his wife with a similar image to let her know where their car was parked following school drop off. Eight and nine minutes later he sent the Initial Messages.

[22] Upon receiving the message from Mr Paget referred to in paragraph [6] above, the Applicant realised he had sent the Initial Messages to Group Chat Three instead of his wife. In his statement, the Applicant provided the following explanation regarding the Initial Messages:

“27. The Messages were not directed at, nor intended for, the participants in Group Chat Three. The Messages were direct (sic) at, and intended for, my wife only. My son is named Henry and it is my son, Henry, whom the Messages refer to. The Messages were clearly mistakenly sent to the wrong conversation as there is no employee in the NS Department with the name Henry.

28. I was immediately mortified that the Messages would be misinterpreted and cause offence without context. I felt sick by what had occurred. I did not intended (sic.) to send the Messages to my former colleagues.

29. By way of context, my son has been struggling academically. This has been incredibly stressful for my wife and me. Our son is constantly outperformed by his peers because they have a completely different learning style to him. The Messages were intended to be a general observation to my wife, in a private conversation, regarding how our son's learning style was different to many of his peers who happen to be of Chinese descent. By different I do not mean that the learning style of his peers is inferior.

30. The Messages were not the expression of an opinion or view about the learning or working style of my former colleagues. I did not intended (sic.) to send the Messages to my former colleagues.

31. I felt incredibly anxious and suffered a panic attack upon discovering my mistake.”

[23] The Applicant stated that amidst his panic attack he sent the Secondary Messages.

[24] Two weeks later, on 20 November 2019, the Applicant noted that he received a telephone call from Mr Sherman, the Respondent's Manager of Employee Relations to arrange a meeting. The Applicant stated he was unable to arrange a support person to attend the meeting with him, though I note the meeting (the "Disciplinary Meeting") occurred six hours after the telephone call.

[25] At the Disciplinary Meeting, the Applicant stated that Mr Sherman advised him that the allegations against him were as follows:

- (a) a number of employees had made complaints about him;
- (b) the Applicant had made racist and offensive comments and sworn in Group Chat Three;
- (c) he had deleted the First Messages; and
- (d) he "had a history of this type of thing".

[26] In the Disciplinary Meeting, the Applicant explained the following:

- (a) He had sworn because he was in the middle of a panic attack following the receipt of Mr Paget's message.
- (b) He had deleted the Initial Messages because he wanted to minimise any harm or offense that the Initial Messages without context could cause.
- (c) He appreciated that the Messages could be interpreted as being racist, however, that was not his intention.
- (d) The Initial Messages were intended for his wife and he believed that the Initial Messages were sent to their private WhatsApp group conversation.
- (e) His nine year old son had been struggling academically and the Initial Messages were intended to be a general observation to his wife about how their son's learning style was different to many of his peers who were of Chinese descent. He showed Mr Sherman articles on that topic.
- (f) He did not intend to cause any offence and was mortified that he had upset anyone.
- (g) He had been incredibly stressed and anxious after sending the Initial Messages.

(h) The NS Department had an existing culture of racial discrimination, and that he had repeatedly been bullied and excluded for being a 'token white guy' or 'TWG' by colleagues in the NS Department. The Applicant provided Mr Sherman with screenshots of previous conversations in the Group Chats where he had been referred to as the 'token white guy' and where members of the NS Department had made disparaging comments in the Group Chats about "Asians" and "Chinese."

(i) He had been teased at school because of his heritage, and the thought of causing such hurt to anyone was deeply upsetting to him.

[27] At the conclusion of the Disciplinary meeting the Applicant was directed by Mr Sherman to go home and no longer attend work. The following day Mr Sherman confirmed with the Applicant that there would be an investigation of the issue he had raised in the First Disciplinary Meeting. Later on 21 November 2019, the Applicant received another telephone call from Mr Sherman, during which Mr Sherman advised the Applicant that a meeting proposed for 22 November 2019 was not going ahead and that he could expect a call on Monday, 25 November 2019, to arrange a meeting for that day. The Applicant was not contacted on 25 November 2019.

[28] On 26 November 2019, the Applicant received a telephone call from Mr David Laragy, Head of Employee Relations, during which a conversation took place which the Applicant stated was to the following effect:

“Mr Laragy: It has come to my attention that you have been in contact with colleagues in relation to what is happening. This is completely inappropriate.

Me: I have been told that I cannot contact people at work. I had just asked my direct manager to follow up with Human Resources regarding what was happening. I had been told by Scott that a call and meeting would be arranged for yesterday and this has not occurred.

Mr Laragy: This is not your concern. I was away sick yesterday and now I have to figure out how to deal with people who are terribly distressed by the comments you made and you should allow me to do my job. Due to the issues you have raised, this is taking longer than expected.

Me: I was raising those things to provide context.”

[29] The Applicant stated that the next contact from the Respondent was on 29 November 2019, when the Applicant received a telephone call from Mr Laragy stating that the investigation was ongoing, and he could expect a call on 2 December 2019, to arrange a meeting.

[30] On 2 December 2019, at approximately 2.50pm, the Applicant received a call from Mr Sherman, who stated that the issues the Applicant had raised were being investigated and

a meeting would be scheduled for the following day. The Applicant, however, did not hear from the Respondent on 3 December 2019.

[31] On 4 December 2019, the Applicant received a telephone call from Mr Sherman stating that the Respondent had finally “reached a way forward” and that the Respondent would like the Applicant to attend a meeting on Friday, 6 December 2019. The Applicant states that he was not offered the opportunity to bring a support person to this meeting.

[32] On 6 December 2019, the Applicant attended a meeting with Mr Sherman and Mr Laragy (the “Termination Meeting”). Mr Sherman took notes and Mr Laragy read from a document marked ‘confidential’. Mr Laragy confirmed that:

- (a) the Initial and Secondary Messages were considered serious misconduct;
- (b) the Applicant had breached the Respondent’s Code of Conduct and Workplace Behaviour Policy;
- (c) the Respondent believed that the Applicant was genuinely remorseful; and
- (d) the Applicant’s comments had caused serious distress to employees of the Respondent.

[33] The Applicant stated that in the Termination Meeting, he had a conversation with Mr Laragy in which was to the following effect:

“Mr Laragy: We believe that the posts were made in error and not intended to cause harm. We had to take this into account when making our decision and of course we have. 24 people saw your posts. A number of members of the team found your posts to be humiliating, insulting and distressing. One individual was so affected they had been in tears. This has also been taken into account.

Me: Only 9 people had seen the Messages before they were deleted and someone has taken a “screen shot” of the Messages and forwarded them to other members of the NS Department.

Mr Laragy: We have come to the same conclusion regarding how many people had seen the post before you deleted them and it was likely shared by someone within the team. But, regardless, how people came to see the posts or hear of them, it was your responsibility. People will talk.

Due to the racist nature of the posts and, specifically, the impact and injury this has caused to others, we have reached the conclusion that termination is the only viable option. This is primarily because the people affected felt that they can no longer maintain a constructive working relationship with you.

This is not helped by the fact that the posts in question, despite being made in error, were at the extreme end of the racism scale.

You are terminated will be paid up until today and 4 weeks' in lieu of notice. You will also be paid any outstanding accrued leave and entitlements.

Me: I was already working on the HOWP project and therefore I have minimal contact with anyone in the NS Department beyond my manager and team leader for check-in and reporting purposes, so contact with anyone affected will be minimal.

Mr Laragy: We feel you will probably have to work with them in the future.

Me: This is unfair. There has not been an attempt to mediate or discuss this issue between the affected parties and myself. I have not been told who has made the complaints against me, however, it is possible that these complaints may have in part been made by someone who has a history of ostracising and bullying me. Ms Elaine Chong has a history of bullying me.

Mr Laragy: We are still investigating your complaints and we consider these to be very serious.”

[34] The Applicant states that he was then, in the Termination Meeting, handed the Termination Letter.

[35] The Applicant asserted that his dismissal was harsh because he had exhibited immediate remorse and contrition upon becoming aware of his mistake. He had taken immediate action to limit any potential impact by deleting the First Messages and apologising to his former colleagues in the NS Work Chat.

[36] The Applicant stated that he was extremely cooperative during the Respondent's investigation, and that he was genuinely remorseful, and truly sorry for any offence or hurt that he caused.

[37] The Applicant claimed that he had received a severe and disproportionate punishment for his unintentional error, and that he was terminated for a one-off mistake that was not work related, when the Grievance Handling Procedure listed many less severe forms of disciplinary action. The Applicant noted that other employees were found to have engaged in the same policy breaches but did not lose their jobs.

[38] The Applicant stated that he was extremely disappointed not to be afforded an opportunity to attend a mediation with the complainants and any of his former colleagues who were offended by the First Messages. Had such a mediation occurred, the Applicant would have taken the opportunity to apologise again.

[39] The Applicant strongly disputed any suggestion that irreparable damage to his working relationships with former colleagues had been caused by the Initial Messages, and

stated that if he were reinstated, he would be isolated from, and have no cause or reason to interact with the NS Department in the performance of the HOW Project Role.

[40] The Applicant noted the significant effect on his financial position and that of his family. Prior to termination he and his wife were spending 100% of their combined income. Since termination there was an ongoing shortfall of income after expenses of \$6,000.00 per month.

[41] The Applicant noted that the impact of the dismissal on his superannuation would be quite extreme. His defined benefit payment on retirement that would have been based on approximately 25 years of service, would now be based on 5 years instead. The Applicant stated that in practical terms, what would have been a lifetime pension in retirement has been essentially wiped out. He noted that defined benefit superannuation schemes are virtually non-existent, and that he was among the last group of employees of the Respondent to obtain this benefit.

(b) Reply Statement

[42] The Applicant also filed a Statement in Reply to the Respondent's witness statements.

[43] In response to Mr Sherman's annexure of a part of a WhatsApp exchange with his wife after sending the Initial Messages and the Secondary Messages, in which the Applicant stated "Honestly. Its mine,..I'll own it. It's how I feel anyway", the Applicant explained that comment as follows:

"The conversation with my wife has been grossly misinterpreted. By stating, Honestly. It's mine. I'll own it. It's how I feel anyway', I was referring back to the message Damien Paget had sent about the Messages not being polite. By stating, 'It's how I feel anyway', I was seeking to convey that I felt the same way as Damien, being that the Messages were not polite. I meant that I would 'own' the fact that the Messages were not polite and would 'own' my mistake. I always own my mistakes. I deny any suggestion that I was 'owning' or standing by racist views. I voluntarily provided this conversation to Sherman at the First Disciplinary Meeting. There is no way I would have volunteered this personal conversation with my wife, as part of a disciplinary process, if the intended meaning was to reaffirm or 'own' a racist comment."

[44] In relation to Mr Biswas' statement, the Applicant addressed his use of the various WhatsApp group platforms, and whether any offense had arisen from such use. As to Mr Biswas' claims of unease with the Applicant, he noted that on 8 November 2019, he went to the Lindt Cafe with Mr Ajay Sharma, Mr Dorotea Baljevic, Mr Anna Zurek, Mr David Ervin and Mr Biswas, for an informal catch up among colleagues to farewell Mr Baljevic. Mr Biswas sat next to the Applicant and they engaged in general discussion. The Applicant noted that Mr Biswas was friendly and open towards him. He stated that there was no indication that Mr Biswas felt uncomfortable interacting with him.

[45] In relation to the statements of Ms Cheong and Mr McKee, the Applicant responded by clarifying certain issues of alleged previous problematic interactions, and provided further detail regarding the TWG comments.

[46] Regarding Ms Woods' statement, the Applicant stated that Ms Woods had taken his comments of 6 November 2019, completely out of context in order to assert that his comments were directed at his colleagues or about Asians more broadly. He noted that he had provided to Mr Sherman, in their meeting of 20 November 2019, message exchanges with Mr William Chang and Mr Coby Smith which confirmed the context in which the messages were sent. In the exchange with Mr Chang he refers to "Kumon" coached" 9 year olds, and noted that Kumon is an intensive after-school academic coaching franchise used for general maths and English coaching and specific preparation for certain tests, such as NAPLAN.

(c) Cross-Examination

[47] Based upon my observation of the Applicant in giving evidence, I found him to be an honest, considered and responsive witness. Notwithstanding obvious anxiety, he carefully tried to understand and answer the questions he was asked, and would readily make concessions against his own apparent interests where appropriate¹.

[48] The Applicant was taken to observations recorded in previous performance appraisals as establishing an alleged preponderance to say things he believes to be true, and it was put to him that he could not stop himself saying such things in the workplace.

[49] The Applicant was questioned about who he had suspected had made complaints about the Initial Messages. He identified Ms Cheong.

[50] Regarding the Initial Messages, it was put to the Applicant that he believed his statements to be true. The Applicant consistently clarified the context to be nine year old Asian children who are seeking entry to selective school by training with Kumon. He did not assert that, once that context was known, his colleagues should not be offended². He asserted that once the context was explained, his colleagues would realise his comments were not directed at them, yet he readily conceded that even limited to the context of nine year old Asian children, his comments "could be deeply offensive to Asian people working at the RBA"³. The Applicant was also challenged about his use of the words "honestly it's mine, I'll own it, it's how I feel anyway".

[51] The Applicant was questioned about an exchange with Mr McKee on 6 December 2019, and he confirmed he believed that people who wanted to get rid of him were behind complaints. He accepted, however, that the complaints had validity⁴.

¹ For example: PN 187, 219, 220, 409, 410, 520.

² Transcript PN 389.

³ Transcript PN 410.

⁴ Transcript PN 603.

[52] The Applicant was questioned regarding the comments made about him by Mr Fernando, Mr Biswas and Ms Cheong. The Applicant stated simply his side of the identified interactions. The Applicant was also questioned about the work related nature of the NS Work Chat Group.

[53] Finally, the Applicant was questioned about matters pertaining to the practicability of reinstatement. That largely involved being taken to the statement of Mr McKee. The Applicant gave considered answers, largely confirming those passages of Mr McKee's evidence to which his attention was drawn.

Natalie Shaw

(a) First Statement

[54] Ms Shaw was an employee of the Respondent from around September 2016 to around February 2020, at which point in time she chose to resign. Ms Shaw worked for the Respondent as an IT Lead and was responsible for managing the IT components of Workplace Department infrastructure projects. During her employment with the Respondent, Ms Shaw worked on numerous projects with the Applicant, including the refit of the Canberra and Melbourne offices.

[55] Whilst on a work trip with the Applicant in October 2019, Ms Shaw detailed that the Applicant disclosed to her that he was unhappy working on level 6 in the NS Department. Subsequently, upon return from Canberra, Ms Shaw requested that the Applicant relocate on a full time basis to level 11 within the Workplace Department. This was organised and the Applicant worked on a full time basis on the refurbishment of the Head Office building ([15] and [16] above). In this role, Ms Shaw describes herself as "like a manager" to the Applicant.

[56] In her statement, Ms Shaw identified the Applicant as very capable and well liked amongst the Workplace Department:

"26. I worked with Martin across a number of projects over a number of years. I would always ask that Martin be allocated as the NS Department representative to any infrastructure project I was assigned to because he was very capable. From my interactions and observations, I know the Workplace Department really like him, and his commitment to project work. They had full confidence in him as the network services subject expert (SME) and as such, they preferred to work with him."

[57] The Applicant was described by Ms Shaw as someone who worked well with clients, receiving calls from them directly, which was out of the ordinary and demonstrated positive rapport. Ms Shaw also outlined positive feedback that the Applicant received at the completion of a project with the Workplace Department and Economic Department. Notably, the Assistant Governor of Corporate Service Group for the Bank wrote a thank you note to the Applicant in recognition of his work on the Melbourne Office Project.

[58] In respect of the Applicant's behaviour at work around his colleagues, Ms Shaw identified that the Applicant's colleagues on the infrastructure projects were of "diverse backgrounds, including of Asian heritage" and claimed she had never experienced any behaviour that was racist:

"32. I was shocked when I found out that he was stood down and being investigated for serious misconduct because I do not believe Martin holds any racist beliefs....I have never seen any evidence of him being racist. I never observed him make any racist comments or to have any racist interactions with members of staff who were of Asian or any other background."

[59] Ms Shaw identified herself as the person who would be the recipient of complaints should they arise and noted that she never received a complaint about the Applicant being racist, rude or offensive. Additionally, Ms Shaw noted that the Applicant's two best friends at work are of Asian heritage.

[60] During the two weeks the Applicant was suspended from work, Ms Shaw was in regular contact with him. Ms Shaw noted that despite her manager like position in relation to the Applicant, she was not contacted by Human Resources, and understood from her interactions with the Applicant that he also was not contacted by Human Resources to provide information.

[61] Under the heading of 'reinstatement', Ms Shaw noted the following:

"37. I have no doubt that the Workplace Department would welcome Martin back immediately.

38. Losing Martin was a massive loss to the Bank. He was one of its most competent IT employees."

[62] Ms Shaw asserted that the Applicant could step back into his role in the Workplace Department and not have to interact with any colleagues from the NS Department during his day-to-day work, except on the odd occasion.

(b) Reply Statement

[63] In her reply statement, Ms Shaw focussed on responding to the Statement of Mr McKee, and in particular regarding what interaction the Applicant would have with the NS Department if reinstated. Ms Shaw stated that when Mr McKee agreed to the Applicant's allocation to the Workplace Department, it was expected the Applicant would remain with the Workplace Department for the duration of the Head Office Workplace Project, and it would be highly unlikely that the Applicant would be removed prior to the completion of the project. As such, the only time the Applicant would have cause to interact with members of the NS Department in the performance of his work for the Workplace Department would be if an employee of the NS Department was allocated to work on a Workplace Department project.

(c) Cross-Examination

[64] Ms Shaw confirmed her limited knowledge of the NS Department, and that even though the Applicant had moved to the WP Department he still reported to Mr McKee. Having left the Respondent in February 2019, she did not know the current arrangements between the WP Group and the NS Group.

[65] Ms Shaw confirmed she had not seen the Initial Messages. The Initial Messages were shown to her in her cross-examination. She considered the Initial Messages to be not racist, but more of a generalisation, though she stated that she thought "...it could be construed or someone could be upset by that for sure".

Scott Sherman

(a) Statement

[66] Mr Sherman is currently employed as an Employee Relations Manager and carries out tasks including managing and dealing with any employee issues, grievances or complaints, conducting investigations and providing employee relations advice to the Respondent. Bearing in mind that Mr Sherman was one of the two investigators of the Applicant's actions and, in the absence of Mr Laragy the only one called to give evidence, his statement can only be described as extraordinarily brief, referring to key events in the investigation in the barest detail, and omitting other events altogether.

[67] On or around 13 November 2019, Mr Sherman became aware, after viewing a screenshot, of WhatsApp messages sent by the Applicant which were "of a racist nature".

[68] Some time later, around 18 November 2019, Mr Sherman received an email from Ms Leppala containing a link to a file note prepared by her of an interview held between herself and Mr Sukanta Biswas regarding the WhatsApp messages sent by the Applicant. A copy of the file note was annexed to Mr Sherman's statement.

[69] A few days later, a decision was made to interview the Applicant in relation to the Initial and Secondary Messages and put the allegation to him that he had offended other employees of the Respondent. That interview, being the Disciplinary Meeting, was conducted by Mr Sherman and Ms Leppala on 20 November 2019 with the Applicant.

[70] During the Disciplinary Meeting, Mr Sherman noted that the Applicant raised an allegation that he had, on numerous occasions, been referred to as a "TWG" (meaning 'token white guy') by his colleagues. An investigation was commenced as a result of the allegation and a number of colleagues were interviewed.

[71] Mr Sherman described in his statement that a meeting was held on 4 December 2019 in relation to the Applicant's employment. A number of senior decision-making employees of the Respondent were present at the meeting, including Mr Laragy and Ms Woods. This was the meeting at which the decision was made to terminate the Applicant's employment.

[72] On 4 December 2019, Mr Sherman phoned the Applicant and informed him that he would be required to attend a meeting on 6 December 2019, so that the Respondent could provide the Applicant with an outcome of the investigation. During the telephone call, Mr Sherman advised the Applicant that he could bring a support person to the meeting on 6 December 2019.

[73] On 6 December 2019, Mr Sherman and Mr Laragy attended the meeting with the Applicant and provided the Applicant with a termination letter at the conclusion of the meeting.

(b) Cross-Examination

[74] Mr Sherman confirmed he was not aware of any employees other than Mr Fernando and Mr Biswas complaining about the Initial and Secondary Messages.

[75] Mr Sherman confirmed that the purpose of the investigation, after the Disciplinary Meeting on 20 November 2019, was to look into the TWG allegation, and not the Initial or Secondary Messages. He conceded that the questions asked in the investigation were much broader than the TWG issue.

[76] Mr Sherman interviewed Ms Cheong, but did not advise her the Applicant did not want to escalate the issue, or that the Applicant had provided context to the Initial and Secondary Messages. Mr Sherman agreed he never put the issues raised by Ms Cheong regarding the Applicant's conduct to the Applicant. Mr Sherman also agreed Ms Cheong did not mention the Initial or Secondary Messages, or that she was offended by them, during the investigation meeting. Mr Sherman also agreed that none of the allegations raised by Mr Sharma, Mr McKee and Mr Smith were ever put to the Applicant for his comment.

[77] The bare nature of Mr Sherman's written evidence was compounded by the deliberate vagueness of some of his oral evidence. His handwritten notes of the meeting of 21 November 2019 (not referred to in his statement), with Ms Woods, Mr Laragy and Mr Anderson clearly record as grouped in a "recommendation" four specific points of "1. First/Final. 2. Apology written. 3. Mgr Action. 4. Group training". Notwithstanding, he sought to maintain they were "just an option"⁵ when no alternative courses of action were recorded.

[78] Similarly, regarding the meeting of 3 December 2019 (also not referred to in his statement), Mr Sherman claimed "termination" was "...again is an option we are considering", notwithstanding that he agreed that no other options were listed.⁶

[79] Mr Sherman agreed that as the decision maker, Ms Woods, did not attend the Termination Meeting on 6 December 2019, the only way that anything the Applicant said

⁵ Transcript PN 2108, also PN 2112.

⁶ Transcript PN 2238 and 2239.

could lead to a change to the decision to dismiss was if he or Mr Laragy referred it back to Ms Woods.

Elaine Cheong

(a) Statement

[80] Ms Cheong works for the Respondent in the position of Payment Settlements Network Tech Lead, and is a member of the NS Department.

[81] Ms Cheong stated that since around August 2017, she did not work with or consult the Applicant in relation to work. Ms Cheong noted she would interact with the Applicant when she saw him around the office and when they attended NS Department team meetings on a weekly basis.

[82] As a result of working directly with the Applicant, Ms Cheong observed the Applicant would become agitated and aggressive when communicating with his colleagues. Offering an example of such behaviour, Ms Cheong described that following a suggestion from a colleague to draft a check list for telephone calls, the Applicant said “it will never work”.

[83] Ms Cheong also included that her impression of the Applicant was that he “always liked to be right” and was described as someone not willing to acknowledge another person’s viewpoint.

[84] The Initial and Secondary Messages that were sent by the Applicant on 6 November 2019, were viewed by Ms Cheong when she returned from annual leave on 11 November 2019. Ms Cheong viewed a screenshot. Ms Cheong expressed that she was offended by these messages and they were impolite.

[85] In respect of the “TWG” allegations, Ms Cheong noted she initially understood “TWG” to mean Technical Working Group. The meaning changed over time to mean “token white guy”. The Applicant was noted as someone who used the phrase “TWG” when posting messages about himself in the group chat.

[86] Ms Cheong identified that because of the complaint made by the Applicant against her in relation to the use of the phrase “TWG”, she was anxious about any future dealings that she may have with the Applicant.

[87] Ms Cheong stated she would not be able to work with the Applicant should he be reinstated and would actively avoid interacting with him in the workplace.

(b) Cross-Examination

[88] Ms Cheong confirmed that she did not see the Initial and Secondary Messages when they were posted, but was subsequently provided with screenshots of them by Mr Stephanie

Tran. She also confirmed she did not make a complaint to Human Resources about the messages.

[89] Unfortunately, the first time Ms Cheong saw the Applicant's first statement was the night before giving evidence. When taken to the context of the Initial and Secondary Messages as relating to Kumon coached nine year old children, Ms Cheong stated that while not offensive, the messages were impolite.

[90] Ms Cheong confirmed that while she had stated that she would be uncomfortable with the Applicant returning to work at the Respondent, her unease was because the Applicant had made the TWG allegations against her, and not because of the Initial and Secondary Messages. Ms Cheong's cross-examination concluded with the following exchange⁷:

“Your reluctance or your desire to avoid interacting or communicating with Mr Bajelis in the workplace is entirely based on your understanding that he had made a complaint about you. Correct?---Partially.

The - - - ?--- - - - yes.

Sorry?---In essence, yes.

In essence, yes. That's really the reason why you don't want him to return to work, is that you think he made a complaint about you. Correct?---Yes.

It's nothing to do with the 6 November text messages. Correct?---That's right.”

Sukanta Biswas

(a) Statement

[91] Mr Biswas worked as a Senior Network Engineer for the Respondent and has been employed by the Respondent since 2015. Mr Biswas worked alongside the Applicant in his role.

[92] In his statement, Mr Biswas stated a number of grievances in relation to the Applicant. He described that he tried to stay out of the Applicant's way and not ask him questions because he did not feel comfortable in his presence.

[93] Mr Biswas asserted the Applicant was stubborn in not accepting mistakes he had made and would deny responsibility. By way of example, Mr Biswas described the following situation:

⁷ Transcript PN 1510 to 1514.

“31. Sometime in several weeks before the TCE and on the day it was conducted, my colleague Mr Ben Jun-Wu and I approached Mr Bajelis. I said words to the following effect to Mr Bajelis: “Can you please spend some time with us to show how the phone system works when we isolate the site”. Mr Bajelis spent a few minutes explaining how the system works when both sites are running, the critical servers that are required for this and so on. Mr Bajelis concluded by saying words to the effect of: “Everything you need is in the build doco, just follow the build doco”. The “build doco” which is a reference to the “as built” documents show a plan of the system as provided to the Bank by the vendor of the system. These document showed that there were two servers that we would have to isolate, but it turned out that those servers were not used at all and the “as built” documents were out of date This waster a lot of time, but ultimately I was able to work out that the “As built” document that Mr Bajelis has (sic) directed me to were not correct or updated. This would have been known to Mr Bajelis because he was very experienced with this system.”

[94] Mr Biswas saw the Initial and Secondary Messages sent by the Applicant to the WhatsApp group on the morning of 6 November 2019. He noted that he felt shocked and upset and that they were inappropriate, insulting and racist. Mr Biswas distilled his interpretation of the messages in his statement:

“52. I feel that the Messages express Mr Bajelis’ honest opinion that all migrants and permanent residents who have come to Australia are dumb. I interpret the Messages to mean: “Asian’s are dumbasses and Anglo’s are great” and that he held this view regardless of their ages.”

[95] Mr Bajelis’ messages of “Apologies”, “Context is everything” and “Obviously wrong chat” were viewed by Mr Biswas and he noted that it seemed to him that Mr Bajelis was frustrated at having sent the Messages to the wrong chat.

[96] The impact of the Applicant’s messages on Mr Biswas were described at length in Mr Biswas’ statement. Mr Biswas described himself as “so hurt even though those Messages were not directed at me personally.”

[97] Mr Biswas also described the impact of the Messages on the NS Team:

“62. I tried to speak to a couple of my colleagues about it. I would bring it up in conversation, for example with Mr Damien Paget, Network Engineer, Mr David Ervin, Senior Network Engineer, and Mr Nayan Patel, Network Engineer saying words to the effect, “Have you seen the Messages?” and, to Mr Paget, I said “Why would he say this type of thing?” because it was Mr Paget who first responded to the Messages. But no one wanted to talk about it. From my experience, we are a team that talks about everything. Something like this would absolutely be talked about if it was just a normal message. I could sense that the team was tense and upset about what had happened.”

[98] Some time later, after a period of deliberation, Mr Biswas contacted Ms Leppala of Human Resources and requested a meeting to discuss the messages. On 15 November 2019, Mr Biwas attended a meeting with Ms Leppala and Mr Rand and reported the messages sent by the Applicant, including how he was impacted personally and how he felt the Initial and Secondary Messages had impacted the NS Department.

[99] Mr Biswas stated that the Applicant had not apologised to anyone in the NS Department for sending the messages and had not attempted to retract his opinions. Mr Biswas concluded that if the Applicant were to be reinstated, their working relationship would not be the same as it was prior to the messages being sent.

(b) Cross-Examination

[100] Mr Biswas was questioned about his failure to express to the Applicant any offence after receipt of the Initial and Secondary Messages, even having lunch with the Applicant and others two days later. It was noted Mr Biswas made no complaint about the Initial and Secondary Messages for one week, until prompted by Mr Fernando.

[101] Mr Biswas confirmed that when he received the Initial and Secondary Messages he understood they were not intended for the NS Work Group Chat. Unfortunately, the first time Mr Biswas saw the Applicant's first statement, and so became aware of the context of the Initial and Secondary Messages as relating to Kumon coached nine year old children, was during cross-examination. Understanding that context, Mr Biswas said during cross-examination that he would "probably not" be offended by the Initial and Secondary Messages⁸, however in re-examination he stated "I think it still is offensive" and explained his answer as follows⁹:

"Because it's more of the reason I got offended is because for this one, regardless of the age, Asians are more of - whether it's a child or- nine years or a adult, I found it is a way more of trying to practice to memorising the formulas rather than understanding how it works. From that context I think it still is offensive."

Susan Woods

(a) Statement

[102] Ms Woods commenced employment with the Respondent on 19 March 2018 in her current role as the Assistant Governor, Corporate Services. In this role, Ms Woods identified that she is responsible for the Information Technology and Workplace Departments, and the Enterprise Data Office. Notably, Ms Woods is responsible for the Respondent's Network Services Team (NS Team).

⁸ Transcript PN 1281.

⁹ Transcript PN 1325.

[103] Ms Woods identified the Respondent's diversity and inclusion statutory responsibilities:

“12. The Respondent takes diversity and inclusion very seriously. The Respondent is required by s.6 of the Equal Employment Opportunity (Commonwealth Authorities) Act 1987 (Cth) (“EEO Act”) to implement a program that, inter alia, identifies any policies, practices or patterns that discriminate or otherwise negatively impact upon equality of opportunity upon women or persons in “designated groups” and to take action against any such discriminatory systems or conduct. The Respondent is further required by s.6 of the EEO Act to monitor its achievement of its objectives of diversity and inclusion and to collect and record statistics on the number of women and persons in “designated groups” in its workforce.”

[104] In relation to the Applicant's training and induction on the Respondent's Code of Conduct and Workplace Behaviour, Ms Woods noted the Applicant completed such training in 2014.

[105] Regarding her involvement in the decision-making process in relation to the termination of the Applicant's employment, Ms Woods noted she had very little to do with the Applicant prior to being notified of the text messages:

“18. On 8 November 2019, I was informed via an email from Caroline Lepalla, HR Business Partner for the IT Department, that according to the Exit Interview with another employee, Mr Chamara Fernando, Mr Bajelis had posted inappropriate and racist messages in a WhatsApp group chat used by employees in the NS team on 6 November 2019. The substance of the comments was relayed in this email which is annexed hereto and marked “SW-2”.”

[106] Ms Leppala summarised Mr Chamara's comments in her email:

“Martin Bajelis creates an unhealthy work environment. The team have two WhatsApp (sic) groups -Social and Work. There were two instances that Chamara was upset by:

Martin spoke poorly to him in the WhatsApp Work group.

Martin made a racist remarks on the WhatsApp Social site. This was quickly removed and couldn't take a screenshot because he was driving. He said he couldn't really read the text but others have commented that it was offensive to Asians (screenshots attached show where message had been deleted. Apparently the deleted messages contained an inappropriate and racist comment).”

[107] On 11 November 2019, Stephen Smith showed Ms Woods copies of the Initial and Secondary Messages.

[108] In her statement, Ms Woods noted she was responsible for the Respondent's Information Technology Department, and that she was in the position to make the final determination in relation to the Applicant's employment.

[109] On 21 November 2019, Ms Woods attended a meeting with Mr Laragy, Mr Sherman and Mr Michael Andersen, Head of Human Resources. Ms Woods noted that she didn't remember everything said at the meeting, and highlighted the salient points that guided her decision-making:

“26. I do not recall everything that was said in the meeting but I do remember that information was conveyed to me about the conversations that Mr Laragy and Mr Sherman had had with different people about the matter. I remember either that conversations were recorded in notebooks and then read out to me but I cannot remember exactly by whom. I specifically remember that I was told about the screenshots pertaining to the exchange Mr Bajelis had with his wife to the effect that ‘Honestly. Its mine, I’ll own it. It’s how I feel anyway?’”. I remember this because, to me, that was a key turning point in my decision making process. It was of critical importance to me.

27. I remember thinking, “Not only did Mr Bajelis express the offensive remark but in addition to that, he then went on to own it”. He didn't try to take back the comments, he didn't say, “That was silly, I didn't mean that”. In my view, when he “owned” the comment, it was as if he was expressing “It is what I think and I'm glad I said it.”

[110] Three options were discussed by Ms Woods to deal with the Applicant and included:

- “(i) issuing a first and final warning;
- (ii) seeking resignation and agreeing to separate on mutually acceptable terms;
- (iii) termination of employment;”

[111] Ms Woods reiterated in her statement the importance of reaching a timely decision and noted she did her best to “progress the matter as quickly as practicable.” Ms Woods conceded that she did not meet with the Applicant and instead relied on the HR team to deal with such interviews.

[112] Ms Woods acknowledged the Applicant erroneously sent the Initial Messages to his colleagues instead of his wife. Her evidence was:

“I did consider that Mr Bajelis had sent that text in error to his colleagues instead of his wife. I felt very sorry for him because everyone makes mistakes. But I had read his messages and so had his colleagues. I did not think that this was a mistake that I (or the organisation) could walk by. To do so is to imply that it was okay. I did not want anyone else in the organisation thinking it was okay or that the Respondent considered it okay. I was also concerned that he could not work respectfully with Asian people after this and that it would be difficult for some employees of Asian ethnicity to work with him.”

[113] Between 21 November and 5 December 2019, Ms Woods received verbal updates summarising information obtained in interviews conducted with Ms Elaine Cheong, Mr Ajay Sharma, Mr Coby Smith, and Mr Erin McKee. Arising from what she was told, Ms Woods explained what she divined from the information she conveyed. That was as follows:

“I do not remember in detail what I was told specifically about each employee’s feedback; but, in general, the following issues were raised several times by Mr Bajelis’ colleagues and they made an impression on me that this was not the first time that Mr Bajelis’ behaviour and attitude were wanting and that Mr McKee had advised him on several occasions that he needed to change his behaviour if he wanted to be more effective and integrate better with the team. This feedback reinforced my views that it was going to be difficult for Mr Bajelis to come back into the team and be effective. He would have to work as a team player, where everyone is respected, everyone has a voice and is entitled to express it in a constructive and professional manner, and everyone works together to achieve a common outcome -it seemed to me that Mr Bajelis could not do this.”

[114] In a meeting on 5 December 2019, Ms Woods met with Mr Laragy, Mr Sherman, Mr Peter Jones, Deputy General Counsel of the Respondent, Mr Karlee Hughes, Head of Business Engagement, Human Resources of the Respondent, and Mr Gayan Benedict, Chief Information Officer of the Respondent. Ms Woods stated she thoroughly discussed, considered, weighed up and balanced 22 different factors before forming the view that the Applicant’s continued employment with the Respondent was untenable and that his employment should be terminated.

(b) Cross-Examination

[115] Ms Woods accepted that the Respondent’s Code of Conduct and Workplace Behaviour Policy are limited to conduct in the workplace. She added that ‘workplace’ had a broad definition.

[116] Ms Woods confirmed she did not interview the Applicant herself, and relied upon Mr Sherman and Mr Laragy to keep her informed of what was occurring in relation to the Applicant’s employment.

[117] Ms Woods stated that she understood the context of the Initial and Secondary Messages related to an intention by the Applicant to compare his son to Chinese students his son went to school with, who were heavily coached in the Kumon method of teaching, but stated:

“I do understand that’s the context in which his text messages and his comments were made, but I also understand that that’s his view and I don’t think it matters whether you hold those views about nine year old children or middle aged men and women; they apply equally.”

[118] Ms Woods stated it was not determined to terminate the Applicant's employment in the meeting of 21 November 2019, because the Respondent wanted to be fair to all parties involved and discuss what had transpired with other people who might have been involved. That included the Applicant's line manager and people impacted by the messages.

[119] Ms Woods agreed that issues regarding the Applicant's general behaviour were only raised with the Applicant in his termination meeting on 6 December 2019, after the decision to terminate his employment was made. Ms Woods gave the following evidence regarding whether such issues were raised with the Applicant:¹⁰

“You accept you didn't put any of those issues to Mr Bajelis before he was dismissed?--
-I didn't talk to him about them, but I have no reason to - I don't know either way whether or not HR spoke to him about it. I'm imagining that they did.

You expect that they would, correct?---Well, I expect that they would have provided feedback to the effect that there seemed to be a pattern of behaviour here.

So you would have expected HR to go to Martin and say look there's a pattern of behaviour here; there are all these issues that have arisen during the course of this investigation; what's your response?---Yes.”

[120] In response to a suggestion that it was important to provide the Applicant with an opportunity to respond to alleged behavioural issues prior to making any decision to terminate the Applicant's employment, Ms Woods replied, unresponsively, but tellingly¹¹:

“There were multiple factors that contributed to the decision to terminate, but first and foremost, was the fact that Martin posted offensive comments, highly offensive comments that offended a large proportion of the IT workforce and had the potential to offend them. He expressed little or not contrition for what he'd done and when I - breached our code of conduct on multiple - sorry, multiple components of our code of conduct by making those comments. Then on top of that, there's a pattern of behaviour here. The situation was untenable. I'm confident that there was discussion both in the first meeting that was had with him by HR and again in the second, where he could have, you know, I guess rebutted, for want of a better word, those things, which I understand he did. There was a discussion about why this was happening. He had an opportunity to respond and we proceeded in the way we did.”

[121] Ms Woods agreed that the only person who made a complaint about the Initial and Secondary Messages was Mr Biswas. When it was put to Ms Woods that Mr Biswas was the only basis for the assertion in her statement that employees may have felt less worthy,

¹⁰ Transcript PN 1647 to 1649.

¹¹ Transcript PN 1652.

Ms Woods responded:¹², “Well, that was certainly the sentiment in the interviews that were conducted post the 21 November”.

Professor Yin Paradies

(a) Statement

[122] Professor Paradies holds qualifications including a PhD in Social Epidemiology and a Master’s Degree in Public Health and has held various professional roles in Indigenous Statistics at the Australian Bureau of Statistics. Professor Paradies currently holds the position of Professor and Chair in Race Relations at Deakin University. In this role, Professor Paradies conducts research into health, social and economic effects of racism as well as anti-racism theory, policy and practices. Professor Paradies has authored several published journal articles on the topic of racial diversity in the workplace and race-based discrimination in the workplace.

[123] For the purposes of these proceedings, and at the request of the Respondent, Professor Paradies prepared a report dated April 2020. The Applicant objected to the receipt of the report into evidence on the basis of relevance. The Applicant submitted that the Professor failed to consider the context of the Initial and Secondary Messages, and that¹³:

“The report itself speculates as to the potential damage that may occur when really the test that the Commission needs to apply is whether there is in fact evidence of any adverse effect on the conduct of work.”

[124] I rejected the Applicant’s objection and allowed the admission of the report.

[125] Professor Paradies established from the outset of the report that racist conduct can result in both acute and chronic emotional and psychological impacts for targets/victims. The impact of racist conduct occurs through stress, fear, anxiety and other negative emotional states which have a detrimental effect on emotional and psychological health.

[126] Regarding the impact of the Initial Messages, Professor Paradies noted that shame, self-hatred, humiliation, anxiety, distress, among other negative emotions are experienced as potential impacts on individuals of Asian or South Asian ethnicity.

[127] Professor Paradies explained that vicarious racism may also result in similar psychological impacts for other individuals who saw the message.

[128] In relation to the impact of the messages on the Applicant’s ability to work with colleagues of Asian and South Asian ethnicity, Professor Paradies included the following:

¹² Transcript PN 1752

¹³ Transcript PN 1351.

“As such, it follows that Mr Bajelis ability to work will potentially be impacted by ongoing expectations, interactions (or lack thereof), as well as implicit and explicit communication styles that are characterised by unfair and discriminatory behaviour towards colleagues, employees and supervisors of Asian and South Asian ethnicity.”

(b) Cross-Examination

[129] Professor Paradies agreed that the context in which the alleged racist conduct occurs is important, that individuals will take different levels of offence to certain conduct, and that there may be conduct that’s perceived to be racist by one person but not perceived to be racist by another person.

[130] Professor Paradies confirmed that he had never spoken to any of the employees of the Respondent who received the Initial Messages, or the Applicant.

[131] In the report, Professor Paradies had stated that “Mr Bajelis genuinely believes, affirms and endorses negative stereotypes about the abilities and performance of Asians and South Asians”, and he was cross-examined in detail about this basis of that statement. Professor Paradies’ evidence was that this statement was based equally on the Applicant’s message that “It’s mine. I’ll own it. It’s how I feel anyway”, and his answer to the question, “Do you agree the comment was racist?”, which was, “100 per cent.”

[132] Professor Paradies’ cross-examination concluded with the following evidence¹⁴:

“Whenever there is an incident in the workplace involving racism and an opportunity for parties to explain themselves, you accept, don’t you, that the emotional and physical impact of that conduct can be limited or removed by an explanation or apology; you accept that, don’t you?---That is likely to have an effect on the impact going forward, yes.

Do you accept that if Mr Bajelis was able to explain the context in which statements were made to the people who received them, that would have reduced the impact or the effects caused by those messages?---It depends how you explain the context.

If it was explained in the manner set out in these statements?---Well, I suppose if the people who witnessed the statements or heard about them believed that it wasn’t about them specifically, that would have an impact - that could have an impact on how the statement’s received, yes.

Looking at the top of the page at page 376 where you say, “It follows that Mr Bajelis’ ability to work with potentially the impacted by ongoing expectations”, et cetera, you accept, don’t you, that his ability to work with these people would also be impacted by if he was able to explain the context as set out in the statements?---I agree that it is

¹⁴ Transcript PN 2507 to 2510.

possible for him to explain context in the way that would change the working relationship, yes.”

Erin McKee

(a) Statement

[133] Mr McKee has been employed by the Respondent since 1993, as a Trainee, and noted he commenced working in the IT industry in 1997. He was most recently employed in the position of Network Services Manager, in the NS Department.

[134] Relevantly, Mr McKee identified that he was accountable for, and represented, all employees within the NS Department, and he managed performance.

[135] Within the NS Team, Mr McKee noted that, prior to 6 December 2019, there were 24 employees in the NS Department, approximately one third of whom are of Asian ethnicity, one third European ethnicity and one third South Asian ethnicity.

[136] Mr McKee detailed his experiences working with the Applicant in the IT Department, as a colleague and in a management capacity.

[137] Mr McKee recalled that the Applicant was loud and would often voice his opinion about how he preferred tasks to be done. During his tenure as the Applicant’s manager, Mr McKee noticed the Applicant’s abrupt style of communication caused tension.

[138] In or around August 2016, Mr McKee was informed, during a handover meeting, that the Applicant was not meeting the ideals and expectations of a Senior Network Engineer and that it would be necessary for Mr McKee to actively manage him.

[139] Mr McKee described instances of the Applicant speaking critically:

“Mr Bajelis said: The cabling on level 13 was an utter disgrace and should never have completed in that fashion.

I said: There were reasons for that and they acknowledged from the word go that it wasn’t great. The timelines were tight and there was 2 days to get everything done.

Mr Bajelis said: The state of the network at NBS is riddled with mistakes and needs to be redesigned from scratch.

Mr Ervin said: Hang on I will stick up for that one, that project was poorly run and requirements were coming through haphazardly. That wasn’t their fault and they were operating under tight deadlines.”

[140] In his role, Mr McKee prepared performance review reports for the Applicant. In doing so, Mr McKee felt that the Applicant was improving at each review, and that the last review indicated the Applicant had good long-term prospects.

[141] On 6 November 2019, Mr McKee, being on annual leave, did not view the WhatsApp messages sent by the Applicant. He later noticed that some 7 or 8 messages had been deleted. Mr McKee received a WhatsApp message from the Applicant on 20 November 2019 and subsequently realised the deleted messages were under investigation by the Respondent:

“Mr Bajelis: Oh well. Wish me luck. I have a formal disciplinary process with HR this afternoon. I might not be here when you get back.”

[142] Upon returning to the office, Mr McKee noted a decrease of team morale, and general feelings of quietness, with employees unsure of how to respond. He noted that the social team environment had dissipated.

[143] Mr McKee stated that he thought it would be extraordinarily difficult to manage a return of the Applicant to the Respondent. He claimed some employees would refuse to work with him and others would not be comfortable in front of him. If the Applicant were to be reinstated, Mr McKee stated it was likely that several employees in the NS Department would resign. Mr McKee disputed the Applicant could work separately to the NS Department.

(b) Cross-Examination

[144] Mr McKee confirmed he never had occasion to counsel or warn the Applicant. Mr McKee was taken in detail to notes recorded in performance appraisal document of the Applicant, and agreed with the contents of the 30 June 2019, review which recorded:

“Martin has performed well during the current review period, delivering on all his goals, and going beyond in many aspects.”

[145] Mr McKee confirmed that the anger towards the Applicant expressed by some employees related not to the Initial or Secondary Messages, but to their understanding that the Applicant had made a complaint about Mr Ms Cheong. That was particularly confirmed in relation to Mr Paget and Ms Cheong, whose “major gripe was the counter-allegations”.

Factual Findings

[146] On the basis of the material before me the following findings may be made about the relevant facts in this matter.

(a) The NS Work Chat Group was a virtual workspace shared by employees and management. It was created specifically so the employees and management of the Respondent could carry out duties in the virtual reality of WhatsApp rather than the physical reality of the Respondent’s premises. In the Disciplinary Meeting the Applicant acknowledged the work related nature of the WhatsApp communications. In

that meeting he stated “The official channel for comms is WhatsApp. I’ve muted this so I don’t get updates. I’ve been told that I can’t remove myself from the work chat because it’s the general comms channel. This was stated several times”.

(b) The Respondent is required by s.6 of the Equal Employment Opportunity (Commonwealth Authorities) Act 1987 (Cth) (“EEO Act”) to implement a program that identifies any policies, practices or patterns that discriminate or otherwise negatively impact upon equality of opportunity upon women or persons in designated groups and to take action against any such discriminatory systems or conduct. The Respondent is further required by s.6 of the EEO Act to monitor its achievement of its objectives of diversity and inclusion and to collect and record statistics on the number of women and persons in designated groups in its workforce.

(c) The Respondent has implemented a Code of Conduct that outlines obligations of respect and courtesy set out in s. 1.1 (the Value of Respect) and 3.2 (Respect and Courtesy), and the obligation not to use abusive (including racially offensive) language in the workplace (section 3.5 (Obscene or Abusive Language, Materials or Messages)). The Respondent has also implemented a Workplace Behaviour Policy that outlines the obligation to not make derogatory comments about others (ss. 4.1 and 6.1).

(d) In August 2018, an “RBA Performance Document, Manager Evaluation” was completed in relation to the Applicant by his Manager, Mr Ajay Sharma. On its face that evaluation was positive in its assessment of the Applicant. The least positive part of that evaluation included the following comment by Mr Sharma:

“Martin’s passion for network tasks can be witnessed in his delivery of services mentioned above and also in the telephony space. This can also be to Martin’s detriment and cause Martin to speak before he thinks and this is reflected in his Oral Communication skills ranking. I would like to see Martin try to address concerns in one-on-one meetings or escalate as an alternative.”

(e) On 30 January 2019, the Applicant’s manager Mr McKee completed a Mid-Term Review in relation to the Applicant’s performance for the period 1 July 2018 to 30 June 2019. Mr McKee made the following comments in that review:

“Martin however does have to watch his verbal responses when in pressure situations and be able to let go even when incorrect decisions are being made. It is often noted that his direction was correct despite being over-ruled. Martin should avoid combative responses where possible.”

(f) On 29 April 2019, Mr McKee recommended to Ms Woods that the Applicant be appointed to an open-ended contract. Part of that recommendation included Mr McKee stating:

“Martin’s mentoring skills for junior staff are a credit to him, guiding them in the RBA processes, internal design principles, communication and general networking skills.”

(g) On 15 August 2019, Mr McKee completed a Manager Evaluation in relation to the Applicant’s performance for the period 1 July 2018 to 30 June 2019. Mr McKee made the following comments in the Manager Evaluation:

“Martin has performed well during the current review period, delivering on all his goals, and going beyond in many aspects. This has been recognised by senior management and executive, and in his overall rating of exceeds. Martin continues to be an excellent mentor for junior/new staff.”

and

“I would encourage Martin to reach out to his team lead or manager when he has concerns within the team. Martin has improved in this space though he still does seem to internalise and cause frustration within himself”.

(h) On 6 November 2019, the Applicant sent the Initial Messages and the Secondary Messages. Those messages were clearly not intended to be sent to the Applicant’s work colleagues. Those messages were a general observation to the Applicant’s wife, in a private conversation, regarding how their son’s learning style was different to many of his peers who happened to be of Chinese descent and used the Kumon method of learning. The Initial Messages and the Secondary Messages were deleted by the Applicant within approximately three minutes. I specifically find that such deletion was not undertaken by the Applicant to hide his actions, but occurred because the Applicant realised his error and wanted to minimise any offence caused. That is clear because the Applicant contemporaneously apologised, twice.

(i) On 8 November 2019, the Applicant went to the Lindt Cafe with Mr Ajay Sharma, Mr Dorotea Baljevic, Mr Anna Zurek, Mr David Ervin and Mr Sukanta Biswas. Mr Biswas sat next to the Applicant.

(j) On 8 November 2019, the Respondent conducted an exit interview with Mr Chamara Fernando. Amongst a number of complaints regarding a number of persons, the minutes of that meeting record the following regarding the Applicant:

“**Inappropriate behaviour** - Chamara alleged that Martin Bajelis creates an unhealthy work environment. The team have two WhatsApp groups -Social and Work. There were two instances that Chamara was upset by:

- Martin spoke poorly to him in the WhatsApp Work group.
- Martin made a racist remarks on the WhatsApp Social site. This was quickly removed and couldn’t take a screenshot because he was driving. He said he couldn’t really read the text but others have commented that it was offensive to Asians

(screenshots attached show where message had been deleted. Apparently the deleted messages contained an inappropriate and racist comment).”

(k) On 13 November 2019, Mr Biswas emailed Ms Caroline Leppala of the Respondent’s Human Resources Department. He stated:

“I believe that one of my colleague “Chamara” had an exit interview and he mentioned you (sic) about one of our other colleague who made an inappropriate comment in work chat about Asians

Chamara asked me to inform you about this”

(l) Arising from the email of 13 November 2019, Mr Biswas met with Ms Leppala and Mr Barnaby Rands on 15 November 2019. The minutes of that meeting included the following:

“Sukanta started talking before all sat down saying ‘about those screenshots, I was mentally shocked after reading them’.

He continued stating that he usually starts work around 7:30am. That he keeps WhatsApp open to monitor any work messages that come through. At the time there were two other people on the floor. He saw the messages pop up on WhatsApp and saw the picture of Martin’s son. Sukanta pointed to the picture on the screenshot stating that the boy in the picture was Martin’s son, Henry (they had met him before). Sukanta advised, in past conversations, Martin has stated his son was good at Maths.

Sukanta explained that after a few minutes, the other message came through. He said he saw the message and he felt this was totally inappropriate. He then said ‘are we dumb? We came to Australia, are we not providing support to the Economy? He said he felt that Martin was saying this about all ethnics. Sukanta continued, ‘I understand if this was a joke, but this is purely not a joke. This is totally an insult’.

...

Sukanta said that the Network Services team are like a family and [people] shouldn’t treat people differently based on ethnicity. He said, ‘we all make jokes in the team from time to time, but this was not appropriate’. Sukanta felt the comment in WhatsApp may have been made by accident. He then said ‘or he deliberately wanted to say it then retract to show how he was really feeling’. That the ‘truth from his mind came out’. However, he wanted to believe Martin made this comment in the wrong chat.

...

At this point, Sukanta became visibly upset and started crying. He said that he believes this is truly racism [the statement in the WhatsApp chat]. He said ‘if

nothing happens at manager level, what's the point of raising?' 'I wonder how he [Martin] would feel if I said this about whites?'

(m) At 9.30am on 20 November 2019, Mr Sherman emailed the Applicant to invite him to attend the Disciplinary Meeting at 3.30pm that day to discuss "racist remarks on a 'What's App' group, which has offended other employees of the Bank". The Applicant was invited to bring a support person.

(n) Minutes were taken at the Disciplinary Meeting, and I accept that those minutes are a relatively accurate record of what was said at that meeting. Mr Sherman outlined the alleged breaches of the Code of Conduct, the Workplace Behaviour Policy and the Applicant's contract of employment, and then outlined the Initial Messages and the Secondary Messages. I find that the Applicant was open and candid in the responses he provided in this meeting, and that he showed genuine remorse. He agreed the messages were inconsistent with the policies of the Respondent, and that they were "100% racist". In evidence before the Commission the Applicant stated he actually said "I understand how it could be interpreted as racist, one hundred percent."¹⁵ Some of the exchanges in that meeting, with "SS" being Mr Sherman, and "MB" being the Applicant, were as follows:

"SS: We understand that this group included a significant number of employees of the Bank. We have received complaints from a number of employees who have indicated that they were offended by the comments. Numerous people have made complaints and are offended.

MB: That's completely understandable.

SS: We also understand that you have also been spoken to about your need to 'think before you speak', and how you interacted with team members, including 'avoiding combative responses where possible'.

MB: More recently, my performance reviews have been exceptional. That's no excuse. That said, I took on-board coaching and never refuted this.

SS: I need to take this on-board. However, it was noted in previous performance reviews."

and

"MB: I can see who read this. It was only seen by about 8 people not all of Network Services. I felt it wasn't polite either [meaning his comment]. That's how I feel anyway. I felt it was inappropriate."

¹⁵ Transcript PN 519.

and

“MB: Yes. I deleted [the messages] to avoid hurt to people not to cover my tracks. I made a horrible mistake. I was also thinking do I make a public apology.

SS: That’s it in a nutshell, you made a mistake.

MB: Not overtly racist. I was talking about a 9yo in a school context. I’m a child of a refugee. I know the hurt. I tried to explain to Coby. He said, ‘I know you made a mistake’. I wondered if I should make a public apology but decided not to. I would have preferred it if they approached me directly. There are clicks and divisions [in the team], but I’m not going into that.”

(o) In the Disciplinary Meeting the Applicant provided four bundles of WhatsApp screenshots to Mr Sherman. Those bundles of screenshots were produced at the Applicant’s volition. Those bundles of screenshots were:

(1) Between the Applicant and his wife on 6 November 2019, in which the Applicant explained what had occurred. Early in that exchange the Applicant wrote “So, I’m probably going to lose my job now.” However, the part of the exchange that was prominent in the proceedings was the following comments by the Applicant:

“That’s the subsequent “oops” message, so assume same audience
Honestly. Its mine, I’ll own it. It’s how I feel anyway.”

(2) Between the Applicant and a colleague, Mr William Chang, that occurred half an hour before the Disciplinary Meeting on 20 November 2020. The Applicant explained what he had written in the Initial Messages, and their context of “Kumon coached 9 year olds”, and then asked Mr Chang “how would [he] take that?” Mr Chang responded:

“Sadly a truth and I cannot agree more, but formally complaining it is a bit far without trying to talk it out first.”

The balance of the exchange related to “talking it out” in a “moderation forum”, and understanding who the complainants were.

(3) Between the Applicant and a managerial employee of the Respondent, Mr Coby Smith, that around 1.30pm on 6 November 2019. The full exchange was as follows:

“Mr Smith: Dude, please be careful where and what you are posting, jokes can be taken the wrong way.

The Applicant: It wasn't a joke. It was a conversation between myself and my wife that related to a specific circumstance and context. When it was brought to my attention I immediately deleted the message and apologised.

It was quite obviously posted on the wrong group.
Not sure what else I can really offer....

Mr Smith: I know it was an accident

The Applicant: We are dealing with an 8 year old child who is a member of Mensa yet is struggling to perform academically. It is incredibly stressful.

He is constantly outperformed by other kids because they operate with a completely different learning style. It's hard when people are literally waiting for you to fuck up too. But whatever, I generally keep my problems to myself. While I am genuine remorseful if anyone was hurt, I also know that people make genuine mistakes.

I have overlooked many slights and in my time here on that basis.

Mr Smith: Gotcha"

(4) Numerous historical WhatsApp messages between the Applicant and colleagues, in which on numerous occasions photographs of the Applicant are captioned with the acronym "TWG" meaning "Token White Guy".

(p) The Respondent submitted in relation to the first two of the above WhatsApp exchange bundles the following¹⁶:

"The Applicant's late attempt to reconstruct his words "Honestly. It's mine. I'll own it. It's how I feel anyway" in his WhatsApp message to his wife at CB309 should not be accepted. The explanation is an unrealistic and self-serving reconstruction of the contemporaneous evidence in the Applicant's WhatsApp message to his wife and to Mr William Chang.

The Applicant conflates two statements of the Applicant at two distinct points in time to create the fiction that the Applicant was "owning" the view expressed by a colleague, Mr Damien Paget, that the Applicant's WhatsApp message was impolite. In fact, the Applicant only "owns" his view once and that is in his conversation with his wife where he is expressing his view about Asians. The Applicant later agrees in the meeting on 20 November 2019 that his comments were not polite or appropriate but he does not "own" the view that his comments were not polite or appropriate."

¹⁶ Respondent's Closing Submissions at [101] and [102].

I reject that submission. Each of the WhatsApp exchanges between the Applicant and his wife, Mr Chang and also Mr Smith, contemporaneously record the Applicant at two times on 6 November, and once on 20 November, consistently urging an understanding of the context of the Initial Messages, and an understanding that they were mistakenly sent. I accept that the statement “Honestly. It’s mine. I’ll own it. It’s how I feel anyway...” was a reference to owning the fact that the message was not a polite thing to say. There is certainly no contextual basis to assert that the Applicant’s statement is evidence of the Applicant’s intransigence as to his racist views, however the Respondent must maintain that position as it will be seen that the Applicant’s termination resulted partially from the Respondent so misconstruing the statement “Honestly. It’s mine. I’ll own it. It’s how I feel anyway...”.

(q) As noted in the fourth bundle of WhatsApp exchanges provided by the Applicant in the Disciplinary Meeting, the NS Department had an existing culture whereby the Applicant was referred to as a “Token White Guy” by colleagues in the NS Department. The Applicant provided Mr Sherman with screenshots of previous conversations in the WhatsApp Group Chats where he had been referred to as the “Token White Guy” or “TWG” and at that time stated “I don’t want to escalate”. At the conclusion of the Disciplinary meeting the Applicant was directed by Mr Sherman to go home and no longer attend work.

(r) A meeting was convened by the Respondent on 21 November 2019, to discuss the Applicant (the “First Decision Meeting”). It was attended by Ms Woods, Mr Laragy, Mr Sherman and Mr Michael Anderson, the head of Human Resources at the Respondent. Curiously, while Ms Woods gave detailed evidence about this meeting in her statement, Mr Sherman did not mention it in his statement at all. Mr Sherman’s notes taken at this meeting were tendered into evidence by the Applicant in his reply statement.

Ms Woods in her statement noted the following regarding that meeting¹⁷:

“I do not recall everything that was said in the meeting but I do remember that information was conveyed to me about the conversations that Mr Laragy and Mr Sherman had had with different people about the matter. I remember either that conversations were recorded in notebooks and then read out to me but I cannot remember exactly by whom. I specifically remember that I was told about the screenshots pertaining to the exchange Mr Bajelis had with his wife to the effect that “Honestly. Its mine, I’ll own it. It’s how I feel anyway?”. I remember this because, to me, that was a key turning point in my decision making process. It was of critical importance to me.

¹⁷ Statement of Susan Woods at [26] to [28].

I remember thinking, “Not only did Mr Bajelis express the offensive remark but in addition to that, he then went on to own it”. He didn’t try to take back the comments, he didn’t say, “That was silly, I didn’t mean that”. In my view, when he “owned” the comment, it was as if he was expressing “It is what I think and I’m glad I said it.” It went right to the heart of his employment with the Respondent. Knowing that he held those views and that they were so incompatible with the values of the Bank, I formed the preliminary view that Mr Bajelis was not a suitable person for the Respondent to employ.”

Notwithstanding the above evidence, Mr Sherman’s notes of the meeting record as a “Recommendation” four bullet points, being “1. First/Final, 2. Apology Written, 3. Mgr Action?, and 4. Group Training”. In cross-examination Mr Sherman, remarkably, could not explain why he had written “Recommendation”, and asserted that it was one of the options being considered¹⁸. Ms Woods also, notwithstanding the firm preliminary view expressed in her evidence stated that the “Recommendation” was simply an alternative option¹⁹.

(s) On 21 November 2019, Mr Sherman and Mr Laragy decided to conduct an investigation into the allegation raised by the Applicant that he had been referred to as a “TWG”. The decision was made to interview, as part of that investigation, Ms Cheong, Mr Sharma, Mr Smith and Mr McKee. On 22 November 2019, Mr Sherman interviewed Ms Cheong, Mr Sharma and Mr Smith. Mr McKee was interviewed on 3 December 2019. For an investigation into the “TWG” allegation, the investigation took the unusual course of asking 25 or 26 pro forma questions of each interviewee, the last, or second last, of which questions was “Do you recall anyone using the term TWG?” or “Have you heard of TWG?”. Earlier questions did not mention “TWG” and made general, and consistent, enquiries. For example, the first five questions were ordinarily:

“1. How long have you been with the RBA for? Network Services?

2. What is the culture of the Network Services team like?

3. Is this consistent across Infrastructure Services?

4. Have you ever witnessed any inappropriate interactions between team members, such as any inappropriate behaviour?

5. Has any employee ever raised concerns with you about interactions with team members, such as any inappropriate behaviour?”

¹⁸ Transcript PN 2112.

¹⁹ Transcript PN 1615.

Unsurprisingly, the Initial Messages were mentioned by some interviewees. For most of the interviewees, the Initial Messages had occurred sixteen days before the interviews, and their context had not been explained. But for the Second Messages, the Applicant had not been able to formally apologise. Other observations, such as the Applicant being passive aggressive, were also made. Not one of the alleged issues or incidents raised by interviewees was ever put to the Applicant for his response prior to his termination. Not all critical observations were about the Applicant, and certain comments should have been cause for concern regarding the unquestioned acceptance of such criticism. For example, but in particular, Mr McKee observed:

“Elaine [Ms Cheong] and Martin have high friction. She leads the HP team. Martin and Elaine generally avoid each other. Martin will make himself available if she needs his help. Generally, it is peaceful. Their work doesn’t cross-over.”

(t) On 3 December 2019, a meeting regarding the Applicant occurred between Mr Sherman, Mr Laragy, Mr Lepala and Mr Carly Hughes. Again, Mr Sherman did not mention this meeting in his statement at all. Mr Sherman’s notes taken at this meeting were tendered into evidence by the Applicant in his reply statement. Mr Sherman was taken to his notes of this meeting in cross-examination and gave the following evidence²⁰:

“Between 21 November - and I took you to that file note before with the words “Recommendation” written down?---Yes.

And 3 December, you hadn’t met with Mr Bajelis again, had you?---No.

All that had occurred was an investigation into TWG violence, correct?---Yes.

That Mr Bajelis said he did not want to escalate, correct?---That’s what he said, yes.

Having gone through the investigation in relation to the TWG comments, then decided termination was appropriate in respect of Mr Bajelis, correct?---No, the decision to terminate wasn’t made until 4 December.

Well what does “termination” mean in the context of this discussion then?---Again as - this was - this again is an option that we were considering. These are all options.

What’s the other option that’s listed apart from termination then?---There is no other listed.”

²⁰ Transcript PN 2233 to 2239.

Quite clearly, the Respondent had determined to terminate the Applicant by this time, and this meeting of 3 December 2019, was, as Mr Sherman described it, “was more to get people in HR on-board with what the next steps may be”²¹.

(u) A further meeting was convened by the Respondent on either 4 or 5 December 2019, to discuss Mr Bajelis (the “Second Decision Meeting”) (Mr Sherman in his statement and his hand written minutes records the date as 4 December, but Ms Woods in her statement records the meeting occurring on 5 December 2019.) It was attended by Ms Woods, Mr Laragy, Mr Sherman, Mr Peter Jones, Mr Karlee Hughes and Mr Gayan Benedict. Curiously, while Ms Woods gave detailed evidence about this meeting in her statement, Mr Sherman’s only comment regarding what occurred in this meeting in his statement was “It was during this meeting that a decision was made to terminate Mr Bajelis’ employment. I understand that Ms Woods ultimately made the decision to terminate Mr Bajelis’ employment”. Mr Sherman’s notes taken at this meeting were tendered into evidence by the Applicant in his reply statement.

(v) Ms Woods in her statement gave a vastly more detailed account of what was said to have been discussed and decided at the Second Decision Meeting. Her evidence was as follows:

“46. The following factors were thoroughly discussed and considered during the 5 December Meeting and I came to the following views:

- (a) that Mr Bajelis was a reliable and capable employee;
- (b) that until 6 November 2019, to the knowledge of the people participating in the 5 December Meeting, nobody had reported Mr Bajelis for indicating or voicing his opinions about people of Asian ethnicity as conveyed in the WhatsApp messages that he sent to the ‘NS - Work Chat’ WhatsApp group on 6 November 2019 (although, as I depose above at paragraph 19, on 8 November 2019, I became aware that Mr Chamara alleged that Mr Bajelis’ behaviour had been present but unreported in the NS team for some time);
- (c) that the Information Technology Department is a diverse group, in terms of racial origin, religion and gender, and this diversity contributes to the effectiveness of the Department;
- (d) that a large proportion of employees in the Information Technology Department (which I am ultimately responsible for) are of Asian ethnicity.
- (e) that the Respondent would not under any circumstances ignore Mr Bajelis’ conduct in sending the WhatsApp messages in the ‘NS - Work Chat’ WhatsApp group on 6 November 2019;

²¹ Transcript PN 2246.

- (f) that the information obtained during interviews conducted with Mr Sukanta Biswas, Mr Chamara Fernando, Ms Elaine Cheong, Mr Ajay Sharma, Mr Coby Smith and Mr Erin McKee revealed that Mr Bajelis' WhatsApp messages had significant personal effects on employees, as well as on morale within the NS team;
- (g) that the fact that Mr Bajelis had been called "TWG" in the "NS-Work Chat" WhatsApp group was not comparable and did not excuse his comments about Asian people which were far more pointed and unambiguously revealed that he thought that people of Asian ethnicity were of lesser intellect than persons of "Anglo" ethnicity. Still, I directed that the Respondent should give warnings to the other employees who had used the term "TWG" because I wanted everyone to know that the Respondent takes diversity and inclusion seriously and that it was not appropriate for employees to engage in any of that kind of banter in the workplace
- (h) that there was significant concern about the impact caused by the messages that Mr Bajelis sent on 6 November 2019 on other employees of the Respondent, particularly those employees of Asian background (including South Asian background);
- (i) that it was necessary for the Respondent to take action in relation to Mr Bajelis' conduct on 6 November 2019, due to the detrimental impacts that Mr Bajelis' messages caused to the Respondent's ;
- (j) that the WhatsApp messages sent by Mr Bajelis on 6 November 2019 conveyed his opinion that people of Asian ethnicity are inferior to "Anglos", and that Mr Bajelis' WhatsApp messages had the effect of making other employees of the Respondent (who are of Asian or South Asian background) feel less worthy because of their race;
- (k) that by expressing his racist opinions about people of Asian ethnicity in the WhatsApp messages posted on 6 November 2019, Mr Bajelis' conduct was:
 - (i) completely inconsistent with the Respondent's value of 'Respect' as set out in section 1.1 of the Respondent's Code of Conduct;
 - (ii) completely inconsistent with the requirement to deal with others in the course of work with respect and courtesy, as outlined in section 3.2 of the Respondent's Code of Conduct and section 4.1 of the Respondent's Workplace Behaviour Policy;
 - (iii) completely inconsistent with the requirement not to use abusive language (including racially offensive material) in the workplace as outlined in section 3.5 of the Respondent's Code of Conduct; and

- (iv) completely inconsistent with the obligation on employees not to make derogatory comments which may amount to harassment, as outlined in sections 4.1 and 6.1 of the Respondent's Workplace Behaviour Policy;
- (l) that Mr Bajelis racist opinions about people of Asian ethnicity as expressed in the WhatsApp messages that he posted on 6 November 2019, are not reflective of the opinions held by the majority of employees working for the Respondent, and there is no place in the Respondent's organisation for employees who do hold such racist opinions;
- (m) that a person who holds racist opinions about people of other ethnicities is not the type of person that the Respondent would employ;
- (n) the fact that Mr Bajelis posted his messages on 6 November 2019 mistakenly in the 'NS - Work Chat' WhatsApp group does not change the fact that the messages he sent represent his racist opinions about people of Asian ethnicity which he genuinely holds as evidenced by subsequent messages sent to his wife on immediately after the incident on 6 November - where he states: "Honestly. It's mine. I'll own it. It's how I feel anyway";
- (o) the fact that Mr Bajelis posted his messages on 6 November 2019 mistakenly in the 'NS - Work Chat' WhatsApp does not change the detrimental impact that the messages caused to the employees who received the WhatsApp messages, as well as other employees who were personally affected by the WhatsApp messages;
- (p) that it is critical that employees in the NS team and broader Information Technology Department are able to trust and rely on their colleagues when they are working together to make important (often time-critical) decisions both when dealing with technology incidents, and when they are working on projects and other business-as-usual activity. Furthermore in the interests of effective decision-making it is important that all members of the team feel able to contribute their ideas and opinions without fear of penalty or belittlement by other members of the team. Based on advice from Mr Laragy and Mr Sherman regarding feedback provided by other members of staff through the interview process it was evident that prior to this event some team members actively avoided Mr Bajelis because of his behaviour (belittling others, superior attitude, asking inappropriate questions, saying what he thinks without any consideration of its impact on others and how a message might be more appropriately delivered, passive aggressive approach);
- (q) By sending the messages in the 'NS - Work Chat' WhatsApp group on 6 November 2019, that situation has been further exacerbated to the point that I am of the view that Mr Bajelis has lost the trust of his colleagues in the NS

team, the broader Information Technology Department and other employees in the Respondent's enterprise who were aware of the messages that he sent;

- (r) that due to this breakdown of trust and in turn Mr Bajelis' working relationship with his colleagues in the NS team and broader Information Technology Department, employees in the Respondent's enterprise would not be able to work effectively with Mr Bajelis in different scenarios if they were called to do so;
- (s) that if Mr Bajelis was required to work with an employee who was of Asian ethnicity, there was a real possibility that that employee would be concerned that Mr Bajelis would view them as a person of Asian ethnicity, rather than as a colleague and therefore Mr Bajelis would have difficulty considering their ideas / opinions, or acting on their advice or instructions, and the employee may be hesitant to share their ideas / opinions or provide advice or instructions;
- (t) that, given Mr Bajelis' history of poor behaviour and the unproductive environment which results, and the fact that his views are now known amongst the NS team and the fact that he "owned" those views, there was a real possibility that he would act upon those views in the future to the detriment to the working relationship between himself and his colleagues,;
- (u) that Mr Bajelis' view that people of Asian background are of lesser intellect would be problematic in the Respondent's enterprise where there is both a command and control environment in dealing with systems issues that require urgent responses and a requirement for a diversity of ideas and opinions and an open and constructive debate to deliver innovative solutions to often complex problems; and
- (v) that if Mr Bajelis was to continue to be employed by the Respondent, then the Respondent would be seen to be conveying to its employees of Asian origin that the Respondent at best accepts the behaviour of Mr Bajelis and at worst condones the racist opinions held by Mr Bajelis. Not only is this inconsistent with the Respondent's values but it would also undermine the effectiveness of the Respondent's business processes and quality of solutions and could see employees of Asian origin offended and humiliated to the point that they would resign from their employment and the Respondent would lose other reliable and capable staff."

(w) I consider the above evidence of Ms Woods involved considerable exaggeration. As an example, Ms Woods was questioned regarding paragraph [46(f)] as follows²²:

²² Transcript PN 1670 to 1678.

“Can I go to, and in particular, paragraph 46(f)?---Yes.

That’s what you’re referring to now insofar as the information that was obtained during the interviews. Those are the individuals you’re talking about, correct?---Yes, I am.

Now, you understand Mr Fernando hadn’t seen the WhatsApp chat?---Correct.

And he, in his exit interview had simply said he understands Mr Bajelis had made an offensive - I’m paraphrasing of course, but had sent an inappropriate text?---I think he was much more explicit than that - offensive to Asians.

You understand Ms Elaine Chong never made a complaint about Mr Bajelis - sorry about the 6 November texts?---That’s correct.

You understand Mr Ajay Sharma did not make a complaint about the 6 November texts?---Correct.

You understand Mr Coby Smith did not make a complaint about the 6 November texts?---Correct.

And Mr Erin McKee did not make a complaint about the 6 November texts?---Correct.

So, the only person who did in fact make a complaint was Mr Biswas?---That’s correct.”

Similarly, regarding paragraph [46(j)] Ms Woods evidence was as follows²³:

“You don’t have any direct evidence that anyone felt less worthy because of the tests, apart from Mr Biswas. Correct?---Well, that was certainly the sentiment in the interviews that were conducted post the 21 November.”

(x) After many postponements, on 4 December 2019, the Applicant received a telephone call from Mr Sherman stating that the Respondent had finally “reached a way forward” and that the Respondent would like the Applicant to attend a meeting on Friday, 6 December 2019. This was the first contact with the Applicant of any substance since 20 November 2019.

(y) On 6 December 2019, the Applicant attended the Termination Meeting. Mr Sherman took notes and Mr Laragy read from a document marked ‘confidential’. Mr Laragy confirmed that:

(a) the Messages were considered serious misconduct;

²³ Transcript PN 1752.

- (b) the Applicant had breached the Respondent's Code of Conduct and Workplace Behaviour Policy;
- (c) the Respondent believed that the Applicant was genuinely remorseful; and
- (d) the Applicant's comments had caused serious distress to employees of the Respondent.

(z) I accept that in the Termination Meeting, words to the following effect were said:

“Mr Laragy: We believe that the posts were made in error and not intended to cause harm. We had to take this into account when making our decision and of course we have. 24 people saw your posts. A number of members of the team found your posts to be humiliating, insulting and distressing. One individual was so affected they had been in tears. This has also been taken into account.

Me: Only 9 people had seen the Messages before they were deleted and someone has taken a “screen shot” of the messages and forwarded them to other members of the NS Department.

Mr Laragy: We have come to the same conclusion regarding how many people had seen the post before you deleted them and it was likely shared by someone within the team. But, regardless, how people came to see the posts or hear of them, it was your responsibility. People will talk. Due to the racist nature of the posts and, specifically, the impact and injury this has caused to others, we have reached the conclusion that termination is the only viable option. This is primarily because the people affected felt that they can no longer maintain a constructive working relationship with you. This is not helped by the fact that the posts in question, despite being made in error, were at the extreme end of the racism scale. You are terminated will be paid up until today and 4 weeks' in lieu of notice. You will also be paid any outstanding accrued leave and entitlements.

Me: I was already working on the HOWP project and therefore I have minimal contact with anyone in the NS Department beyond my manager and team leader for check-in and reporting purposes, so contact with anyone affected will be minimal.

Mr Laragy: We feel you will probably have to work with them in the future.

Me: This is unfair. There has not been an attempt to mediate or discuss this issue between the affected parties and myself. I have not been told who has made the complaints against me, however, it is possible that these complaints may have in part been made by someone who has a history of ostracising and bullying me. Ms Elaine Chong has a history of bullying me.

Mr Laragy: We are still investigating your complaints and we consider these to be very serious.”

(aa) The Applicant was then handed the Termination Letter.

(bb) In the afternoon of 20 December 2019, the Respondent held separate meetings with Ms Cheong and Mr Sharma, at which each received a warning for making “TWG” comments regarding the Applicant.

CONSIDERATION

[147] Both the Applicant and the Respondent provided detailed written submissions, and made further oral submissions. Those submissions contained detailed references to the evidence in the matter, including transcript. I have considered all of those submissions in arriving at my decision below.

Preliminary findings

[148] There are no jurisdictional objections to the Applicant’s application being determined by the Commission. Specifically, I am satisfied that:

- (a) the Applicant was dismissed at the initiative of the employer (ss 385(a) 386(1)(a));
- (b) his unfair dismissal application was lodged within the 21 day statutory time limitation found at s 394(2) of the Act;
- (c) the Applicant is a person protected from unfair dismissal in that:
 - i. he had completed the minimum employment period set out in ss 382 and 383 of the Act; and
 - ii. an enterprise agreement, the Reserve Bank of Australia Workplace Agreement 2017, applied to his employment (s 382(3)(b)(ii));
- (d) his dismissal was not a case of genuine redundancy (s 385(d)); and
- (e) his dismissal was not a case involving the Small Business Fair Dismissal Code, as the respondent employed 1359 employees as at 6 December 2019 (s 385(c)).

[149] As I have just concluded that three of the above criteria have been satisfied ((a)(c) and (d)), this leaves only the question of whether the Applicant’s dismissal was ‘harsh, unjust or unreasonable’, and therefore an unfair dismissal. To this end, one must direct attention to s.387 of the Act, dealing with the matters to be taken into account by the Commission in determining whether the dismissal was unfair. It is trite to observe that each of the matters must be considered and a finding made on each of them, including whether they are relevant or not; for example, whether a person was refused an opportunity to have a support person present may be irrelevant, if the request was not made, or the employee declined to take up the offer.

[150] Section 387 of the Act identifies the matters that the FWC must take into account in deciding whether a dismissal was “harsh, unjust or unreasonable”:

- a) Whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
- b) Whether the person was notified of that reason; and
- c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- d) Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- e) If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- f) The degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- g) The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- h) Any other matters that the FWC considers relevant.

Preliminary Issue of Whether Work Related Conduct

[151] The parties agreed that the principles applicable to the consideration of whether out of hours conduct had a sufficient connection with work were those outlined by Vice President Ross (as he then was) in *Rose v Telstra*²⁴ (“Rose”). His Honour formulated a summary of principle that has since been applied on a number of occasions:

“It is clear that in certain circumstances an employee’s employment may be validly terminated because of out of hours conduct. But such circumstances are limited:

- the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or
- the conduct damages the employer’s interests; or

²⁴ Print Q9292, [1998] AIRC 1592.

- the conduct is incompatible with the employee's duty as an employee.

In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.”

[152] I consider that the sending of the Initial Messages and the Secondary Messages was work related conduct. That conclusion does not result from the application of the Rose principles, but from the fact that the Initial Messages and the Second Messages were sent, albeit unintentionally, on a work related platform. Nonetheless, issues of gravity and importance of the Applicant's conduct also arise in the consideration of valid reason.

[153] The NS Work Chat Group was a virtual workspace shared by employees and management. It was created specifically so that the employees and management of the Respondent could carry out duties in the virtual reality of WhatsApp rather than the physical reality of the Respondent's premises. The Applicant acknowledged the work related nature of the WhatsApp communications.

[154] I make the following findings regarding the assessment of the relevant criteria under s. 387 of the Act.

(a) Valid reason

[155] Notwithstanding that the Applicant received four weeks' pay in lieu of notice, he was dismissed for misconduct. Not only does the Applicant say that his dismissal was 'harsh, unreasonable and unjust', but he also denies having committed misconduct. With this in view, the onus is on the Respondent to prove to the FWC's satisfaction, on the balance of probabilities, that the misconduct occurred; See: *Pastrycooks Union v Gartrell White* (No. 3)²⁵ and *Yew v ACI Glass Packaging Pty Ltd*²⁶.

[156] While decided in a different statutory context, the comments of Moore J in *Edwards v Giudice*²⁷ at paragraphs [4] and [7] are apposite:

“In the present case the Full Bench concluded that Commissioner Tolley had failed to determine whether Mr Edwards was guilty of misconduct in the way alleged by Telstra Corporation Ltd and that the Commissioner should have done so as part of ascertaining whether her termination had been harsh, unjust or unreasonable. The approach of the Full Bench was, in my opinion, unexceptionable. When the reason for a termination is based on the misconduct of the employee, the Commission must, if it is an issue in proceedings challenging the termination, determine whether the conduct occurred. The obligation to make such a determination flows from s 170CG(3)(a). That is, the

²⁵ [1990] 35 IR 70, at Pp. 83 to 84.

²⁶ (1996) 71 IR 201

²⁷ (1999) 94 FCR 561.

Commission must determine whether the alleged conduct took place and what it involved.

...

The reason would be valid because the conduct occurred and justified termination. The reason might not be valid because the conduct did not occur or it did occur but did not justify termination. An employee may concede in an arbitration that the conduct took place because, for example, it involved a trivial misdemeanour. In those circumstances the employee might elect to contest the termination in the arbitration on the basis that the conduct took place but the conduct did not provide a valid reason and perhaps also by relying on the other grounds in paras (b) to (e). However an employee may not concede or admit, for the purposes of the arbitration, that the conduct occurred or may not be prepared to accept that the Commission could assume the conduct occurred. In either situation the employee would be putting in issue whether the conduct occurred. In my opinion the Commission must, in these circumstances, determine whether the conduct occurred as a step in resolving whether there was a valid reason. I do not see how the Commission can move straight to a consideration of whether termination was justified by assuming the conduct did occur. First the Commission would have failed to resolve an issue raised by and relied on by the employee, namely whether the conduct occurred at all. Second the Commission would have failed to make findings by reference to which a Full Bench might have to determine an appeal where the Commission had concluded the termination was harsh unjust or unreasonable on assumed facts and not facts found.”

(Emphasis added)

[157] In *King v Freshmore*²⁸, a Full Bench of the Australian Industrial Relations Commission said at paras [24], [26], [28] and [29]:

“[24] The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.

...

[26] As we have noted above, s.170CG(3)(a) obliges the Commission to make a finding as to whether there was a valid reason for the termination of employment. In circumstances where a reason for termination is based on the conduct of the employee the Commission must also determine whether the alleged conduct took place and what it involved.

[28] It is apparent from the above extract that his Honour answered the question of whether the alleged misconduct took place on the basis of whether it was reasonably

²⁸ [2000] AIRC 1019.

open to the employer to conclude that the employee was guilty of the misconduct which resulted in termination. This is not the correct approach. The Commission's obligation is to determine, for itself and on the basis of the evidence in the proceedings before it, whether the alleged misconduct took place and what it involved.

[29] In our view the Senior Deputy President failed to determine for himself whether Mr King was guilty of misconduct in the way alleged by Freshmore and he should have done so as part of determining whether the termination had been harsh, unjust or unreasonable. When the reason for a termination is based on the misconduct of the employee the Commission must, if it is an issue in the proceedings challenging the termination, determine whether the conduct occurred. The absence of such a finding leads us to conclude that the member below failed to properly determine whether there was a valid reason for the termination of Mr King's employment."

(Emphasis added)

[158] The meaning of "valid reason" in s.387(a) is drawn from the judgment of Northrop J in *Selvachandran v Peterson Plastics Pty Ltd*²⁹. This meaning, which has been applied by members of this Commission and its predecessors for many years, was stated as follows:

"In its context in s 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1). At the same time the reasons must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that the employer and employee are treated fairly."

[159] The reasons for the Applicant's dismissal were outlined in the Termination Letter that is set out in full at paragraph [10] above. Insofar as it outlined the reasons for dismissal, the Termination Letter asserted:

- (a) that a number of employees had found the Initial Messages offensive;
- (b) that the Initial and Secondary Messages had a serious impact on a number of the Applicant's colleagues and had fundamentally undermined his ability to have an ongoing working relationship with some of these employees;

²⁹ (1995) 62 IR 371.

(c) that the Applicant's conduct in sending the Initial Messages was inconsistent with the Respondent's Code of Conduct and Workplace Behaviour Policy, in particular:

- i. the Value of Respect set out in section 1.1 of the Code;
- ii. the requirement to deal with others in the course of work for the Bank with respect and courtesy (section 3.2 of the Code and section 4.1 of the Policy);
- iii. the requirement not to use abusive language (including racially offensive material) in the workplace (section 3.5 of the Code of Conduct);
- iv. sections 4.1 and 6.1 of the Policy; and

(d) that the impact on the Applicant's working relationships was compounded by the fact that there had been previous interactions with the Applicant's colleagues which resulted in him being spoken to about his conduct at work.

[160] Further, and to a degree expanded, reasons for the dismissal were outlined in the Response the Respondent filed, as outlined in paragraph [11] above. The effect of the expansion in reasons in the Response resulted in the following additional assertions regarding reasons for dismissal being made:

- (a) That the Applicant had indicated clearly that he continued to hold the racist views expressed in the Initial Messages.
- (b) That employees who were interviewed as part of the Respondent's investigation reported concerns that the Applicant has previously made racist statements at work, and that this reinforced their view that they could not work with him in the future.
- (c) The allegation of being spoken to about previous interactions with colleagues was expanded to having "been counselled in relation to combative and abrupt interactions with other employees".

[161] It would appear, therefore, that the reasons for dismissal were:

- (a) The Applicant continues to hold racist views;
- (b) The Initial and Secondary Messages had a serious impact on a number of the Applicant's colleagues;
- (c) The Initial and Secondary Messages undermined the Applicant's on-going working relationship with his colleagues;

(d) The Applicant had been previously warned/counselled about his Conduct; and

(e) The Applicant's conduct breached the Code of Conduct and Workplace Behaviour Policy.

[162] The Macquarie Dictionary defines racism as:

- “1. the belief that one race of people is better than any other.
2. unpleasant or violent behaviour towards people of a particular race.”

[163] The Initial Messages were racist. They expressed the view that “Anglos” were superior problem solvers to “Asians”, and that Asians have no interest in understanding and are content to learn formulas or routines. They were also racist because having been expressed, albeit inadvertently, on a Work WhatsApp group, they constituted unpleasant behaviour towards people of a particular race. The Applicant agreed without reservation that they were “100% racist”.

[164] When the Initial Messages were posted at 8.18am and 8.19am on 6 November 2019, I consider a reasonable person viewing those messages would have considered them as racist, and would have considered that the Applicant held such racist views. The objective seriousness of the Initial Messages was at the mid-range of the scale of seriousness of misconduct.

[165] When the Secondary Messages were posted minutes later at 8.21am and 8.22am on 6 November 2019, a reasonable person viewing those further messages would have had cause to doubt whether the Applicant held such racist views. The Applicant apologised twice, referred to context, and stated “Obviously wrong chat”. Further, the removal of the Initial Messages within minutes of their posting would have indicated to a reasonable person that the contents of the posts in the Initial Messages were retracted. The Secondary Messages and the retraction of the Initial Messages had an almost immediate effect in reducing the objective seriousness of the Initial Messages and the scale of seriousness of misconduct.

[166] It is important to note that the time for considering the validity of reasons given for dismissal is the termination date of 6 December 2019, and not the date and time of the Initial Messages. By 6 December 2019, the Applicant had clearly outlined the context within which the Initial Messages were made, and the anticipated recipient.

(i) Does the Applicant Continue to Hold Racist Views

[167] The views held by the Applicant, even within context, were essentially racist because they expressed that one race of people was/is better than another. They expressed the view that “Anglo” nine year old school children were superior problem solvers to “Asian” nine year old school children due to the latter's reliance on rote learning through the Kumon method of tutoring. They were also racist because they constituted unpleasant behaviour towards people of a particular race. However, within this context, I consider a reasonable

person viewing the Initial Messages would find them at the mid range of the scale of seriousness.

[168] The Respondent submitted as follows on this issue:

“As demonstrated in cross-examination, the Applicant still believes that it is not racist to say, “I have realised the difference between Asians and Anglos. Asians have no interest in understanding, they are content to just learn the formulas or routines and it doesn’t matter if they understand them. That’s why they can’t solve problems” as long as he is talking about nine-year-old Asian children who attend Kumon coaching (and who he has assumed attend Kumon coaching):

Q: I realised the difference between Asians and Anglos. Asians have no interest in understanding. They are content to just learn the formulas or routines and it doesn’t matter if they understand them.

Q: When you said that, that was something that you believed to be true, wasn’t it?---I made the statement that is in that document, yes.

Q: You believed the statement to be a true statement, that is, “Asians have no interest in understanding; they are content to just learn the formulas or routines and it doesn’t matter if they understand them”?---I made that statement and believing in the context of that conversation to be true, yes.”

[169] The attempts by the Respondent to attach a broader racist view to the Applicant are not supported by the evidence. The exchange relied upon above by the Respondent was immediately followed by the following evidence³⁰:

“You said that’s why they can’t solve problems, and you believed that to be true as well?---Again, can you clarify what group you’re referring to?

Well, I’m reading the words of your message, Mr Bajelis, you see that?---I understand that, yes.

“That’s why they can’t solve problems”. It immediately follows the section that I’ve just read. Do you see that?---Yes, I made that statement.

And that, the “they” in that statement, is the Asians to whom you have referred in the earlier statement, is that not true?---It is to the Asians I referred to in the earlier statement, correct.

Right, and you say the context is that the Asians that you refer to in that statement are the nine year old Asian children who are seeking to get into selective school by Kumon training, is that right?---Yes, that is what I’ve stated.

³⁰ Transcript PN 381 to 391.

So it's only limited in terms of its scope to those nine year old Asian children, is that right?---Yes, it is.

It's not a statement about the Asians who work at the RBA, that's your proposition about context, is it not?---That's correct.

And so in those circumstances, you believe that the Asians who are working at the RBA should not be insulted or upset about that comment?---I'm sorry, you've asked two different questions. Can you clarify.

Is it your proposition, is it your evidence to this Commission that because your comments are limited to nine year old Asian children who do Kumon training, that that means that the Asian people who work in the Reserve Bank should not be offended by that statement?---I do not agree that they cannot be offended.

Is it your evidence that if they truly understood the context, that is that you're dealing with nine year old Asian children, that they should not be offended?---I believe that to be the case, yes.

Yes, that your observations about nine year old Asian children should not rationally offend an Asian person working at a Reserve Bank with you. Is that your proposition?--It's a very limited context, yes."

[170] The above "view" of the Applicant is, however, on the evidence and on my observation of the Applicant, the extent of any racist views ever held by the Applicant. It may be that the Applicant still holds that view about the lack of problem solving ability of "Asian" nine year old school children resulting from the Kumon method of tutoring, but I have no doubt he would not express it in the future because of his immediate apology in the Secondary Messages, and that he immediately deleted the messages and further apologised. Holding a view without expressing it in a matter outside of work about a non work related matter is not a valid reason for dismissal.

[171] Regarding the Applicant's WhatsApp message to his wife on 6 November 2019, where he said "Honestly. It's mine. I'll own it. It's how I feel anyway..." I note I have found that quote to be a reference to owning the fact that the message was not a polite thing to say. There was no contextual basis to assert that statement is evidence of the Applicant's intransigence as to his racist views.

(ii) Did the Messages have a Serious Impact on a Number of Colleagues?

[172] In the Respondent's final Written Submission, the Respondent proposed an additional consideration, being whether in fact actual offence is required in order for the Respondent can succeed in its case. The Respondent submitted:

"The Applicant's proposed test [of actual offence] runs contrary to established law in the Commission about offensive conduct and its effects on the workplace in which the

Commission has looked to the objective seriousness of conduct and the response of a reasonable viewer to such conduct. Equally, the Applicant's proposed test runs contrary to settled law in cases involving the Race Discrimination Act 1975 (Cth) which demonstrate that the test is "necessarily objective" (*Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [12])."

[173] While the above submission is undoubtedly correct as it relates to assessing the establishment of proscribed conduct, and the objective seriousness of such conduct, it disregards that one of the reasons for the dismissal was the issue of actual offence caused to a number of colleagues. Being such a reason, it was incumbent on the Respondent to prove the validity of the reason.

[174] The Respondent in this matter was in the unenviable position of having the names of the eight or nine employees who received the Initial Messages before they were deleted, and a list of the 23 employees in the WhatsApp Chat Group. Such a level of definite identification of possible victims is unusual in matters where broadcast of offensive material, often on social media, is being considered. That the Respondent then took the course of investigating not the Initial Messages and their impact, particularly on identified recipients, but instead embarked upon an investigation of the use of the acronym "TWG", and by way of 25 or 26 pro forma questions, is simply inexplicable.

[175] The evidence was clear. There were two offended employees. They were Mr Biswas and Ms Cheong.

[176] Mr Biswas was clearly offended. In his statement Mr Biswas clearly expressed his feelings as:

"I feel that the Messages express Mr Bajelis' honest opinion that all migrants and permanent residents who have come to Australia are dumb. I interpret the Messages to mean: "Asian's are dumbasses and Anglo's are great" and that he held this view regardless of their ages."

[177] However, the reason for dismissal was serious impact on colleagues. Mr Biswas did not express to the Applicant any offence, and even had lunch with the Applicant and others two days after the messages. He made no complaint for one week, until prompted by Mr Fernando. While Mr Biswas was undoubtedly offended, I am unable to find that he was seriously impacted.

[178] Ms Cheong was not even at work on 6 November 2019, and did not return to work until 11 November 2019. She viewed the Initial Messages not because the Applicant sent them to her, but because someone else showed her a screenshot. Once tested, Ms Cheong's evidence did not rise above the proposition that the messages were impolite.

[179] In the absence of direct evidence regarding offence and impact from the readily identifiable cohort of employees who received the messages, I place little weight on the

“potential emotional impacts” or “potential psychological impacts” identified by Professor Paradies in his report dated 8 April 2020, four months after the termination of the Applicant. Professor Paradies never spoke to any of the employees of the Respondent who received the Initial Messages, or the Applicant.

[180] The Applicant was terminated because, inter alia, the messages had a serious impact on a number of colleagues. That assessment was made between 4 and 6 December 2019. At that time, but for Mr Biswas’ genuinely held feelings of offence, there was no evidence to support such a conclusion. No further evidence to support such a conclusion has arisen since the Applicant’s termination.

(iii) Did the Messages Undermine the Applicant’s Ability to Have an On-going Working Relationship with Colleagues?

[181] Quite obviously, it would have been preferable that the Initial Messages were not sent. However, I do not consider that the sending of the Initial Messages has precluded an ongoing work relationship.

[182] Ms Cheong in her statement had stated that she would be uncomfortable with the Applicant returning to work at the Respondent. However, she confirmed in cross-examination that unease was because the Applicant had made the TWG allegations against her, and not because of the Initial and Secondary Messages.

[183] Mr Biswas’ evidence in his statement regarding reinstatement of the Applicant is telling. He stated:

“Apart from that message at 8:21am on 6 November 2019, I understand that to date, Mr Bajelis has not apologised to anyone in the NS Department (either face to face, via email or via WhatsApp) for sending the Messages. In my view, Mr Bajelis has not shown any concern for me or to my knowledge anyone else who was affected by the Messages he sent.”

[184] Mr Biswas is incorrect because the Applicant apologised twice in the Secondary Messages, and has harboured a desire to further explain why he sent the messages and apologise. Indeed, a half hour before the Disciplinary Meeting on 20 November 2020, the Applicant in messages with a colleague Mr Chang referred to “talking it out” in a “moderation forum”.

[185] There is no evidence supporting a conclusion that the Applicant’s ability to have an ongoing working relationship with colleagues has been compromised.

(iv) Previous Warning/Counselling about Conduct

[186] The Respondent submitted that another part of the Respondent’s reason for terminating the Applicant lay in his history of problematic interactions with his colleagues.

Those alleged problematic interactions were said to be evidenced primarily by comments made by the Applicant, or his Managers, in performance appraisal documentation.

[187] While as noted below the Applicant was denied any opportunity to respond to the conduct issues relied upon before his termination, the selective reliance on those conduct issues fell well short of establishing either warning or counselling of the Applicant. The evidence was clear that the Respondent had rigid processes regarding performance management and conduct management at work. Mr McKee confirmed that he never had occasion to counsel or warn the Applicant. Mr McKee agreed with the contents of the 30 June 2019 performance review that recorded:

“Martin has performed well during the current review period, delivering on all his goals, and going beyond in many aspects.”

[188] Further, on 15 August 2019, Mr McKee completed a Manager Evaluation in relation to the Applicant’s performance for the period 1 July 2018 to 30 June 2019. Mr McKee made the following comments in the Manager Evaluation:

“Martin has performed well during the current review period, delivering on all his goals, and going beyond in many aspects. This has been recognised by senior management and executive, and in his overall rating of exceeds. Martin continues to be an excellent mentor for junior/new staff.”

[189] Apart from the complete failure to allow the Applicant to respond to the alleged conduct issues addressed below, there is a complete absence of evidence regarding the Applicant being counselled or warned, as those terms are used within the Respondent, about conduct issues. There is no substance to this reason for dismissal.

(v) Did the Conduct Breach the Code of Conduct and Workplace Behaviour Policy?

[190] In the Respondent’s final written submission, it put the following:

“The sending of Text Message 1 and Text Message 2, and the adherence to the views expressed in those messages despite their racist and offensive content (even if seen within the asserted context) were each both separately and jointly fundamentally inconsistent with:

- (a) the obligations of respect and courtesy set out in section 1.1 (the Value of Respect) and 3.2 (Respect and Courtesy) of the Code of Conduct;
- (b) the obligation not to use abusive (including racially offensive) language in the workplace (section 3.5 (Obscene or Abusive Language, Materials or Messages)); and
- (c) the obligation not to make derogatory comments about others (sections 4.1 and 6.1 of the Workplace Behaviour Policy).”

[191] As I have found above, the Applicant has not expressed adherence to racist views. His statement that “Honestly. It’s mine. I’ll own it. It’s how I feel anyway” was only a reference

to owning the fact that the message was not a polite thing to say. The sending of the Initial Messages did, however, constitute a technical, and clearly unintentional, breach of the Code of Conduct and the Workplace Behaviour Policy as specified by the Respondent.

[192] The Full Bench majority in *B, C and D v Australian Postal Corporation*³¹, observed that while “a substantial and wilful breach of a policy will often, if not usually, constitute a ‘valid reason’ for dismissal”, nevertheless “[a]ny notion that a clear and knowing breach of policy will always provide a valid reason for a dismissal that will not be harsh, unjust or unreasonable, no matter the employee’s length of service and other circumstances, is inconsistent with basic principle. Every case must be assessed by reference to its particular circumstances.”

[193] The Applicant’s breach, being inadvertent, was far from wilful, clear and/or knowing. While technical breach of the Code of Conduct and the Workplace Behaviour Policy occurred, it did not on its own, or in combination with other reasons, justify dismissal.

(b) to (e) Notification/ Opportunity to Respond/ Support Person/ Warnings

[194] Subsections (b)-(e) of s.387 of the Act might be broadly characterised as issues relevant to whether a dismissed employee was afforded procedural fairness. Even if there was a valid reason for an employee’s dismissal, the dismissal may still be held to be unfair, if the employee was not afforded procedural fairness. On the other hand, any issue or issues of procedural unfairness may not be of such significance as to outweigh the substantive reason/s for an employee’s dismissal, particularly in cases of misconduct where the proven misconduct is of such gravity as to outweigh any other considerations such as age, length of service, contrition and issues of procedural unfairness generally.

[195] In *Crozier v Palazzo Corporation Pty Limited t/as Noble Storage and Transport*³² (“Crozier v Palazzo”), a Full Bench of the AIRC, said at paragraph [73]:

“As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment.” (Emphasis added)

[196] In *Wadey v YMCA Canberra*³³, Moore J made clear that an employer cannot merely pay lip service to giving an employee an opportunity to respond to allegations concerning the employee’s conduct. His Honour said:

³¹ (2013) 238 IR 1 at [36], [48] to [51].

³² (2000) 98 IR 137.

³³ (1996) IRCA 568.

“In my opinion the obligation imposed on an employer by that section has, for present purposes, two relevant aspects. The first is that the employee must be made aware of allegations concerning the employee’s conduct so as to be able to respond to them. The second is that the employee must be given an opportunity to defend himself or herself. The second aspect, the opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That, in my opinion, does not constitute an opportunity to defend.”

[197] The Applicant was given the opportunity to have a support person at each of the meetings he attended. The Applicant only alleges failure in relation to the Disciplinary Meeting, however as I have found, at 9.30am on 20 November 2019, Mr Sherman emailed the Applicant to invite him to attend the Disciplinary Meeting at 3.30pm that day, and the Applicant was invited to bring a support person. That was ample opportunity for the Applicant to arrange a support person.

[198] The Applicant was not notified of the reasons for his termination or given an opportunity to respond. The Respondent submitted that the Applicant was aware that the Respondent was investigating allegations that he made racist remarks on a WhatsApp group which had offended other employees of the Bank, by the email of 20 November 2019, from Mr Sherman, and that he was also aware that the Respondent was considering, as part of its investigation, his previous problematic conduct as set out in his performance reviews with Mr Erin McKee and Mr Ajay Sharma which were referred to in the Disciplinary Meeting. I reject that submission.

[199] Arising from the Disciplinary Meeting, the Applicant was only aware that certain things were being considered and certain enquiries were possibly going to be made. By way of example, all that was recorded in the minutes as being put in relation to previous performance reviews was the following:

“SS: We also understand that you have also been spoken to about your need to ‘think before you speak’, and how you interacted with team members, including ‘avoiding combative responses where possible’.

MB: More recently, my performance reviews have been exceptional. That’s no excuse. That said, I took on-board coaching and never refuted this.

SS: I need to take this on-board. However, it was noted in previous performance reviews.”

[200] Arising from the above exchange, the Applicant would have had no idea that it would eventually be put as a valid reason for his dismissal that he had been previously warned/counselled about his conduct. He had in fact not been warned or counselled so he

could not have even contemplated such a reason. Had the reason have been put to him before his termination, and an opportunity to explain been given, he could have corrected the Respondent's error on that reason, and also explained the other reasons that I have found lacked any substance. He was given no such opportunity and the dismissal was procedurally unfair to a significant degree.

[201] The next time the Applicant met with the Respondent after the Disciplinary Meeting, or had any meaningful discussion about the matters raised in the Disciplinary Meeting, was the Termination Meeting, where Mr Laragy simply read from a script before handing the Applicant the termination letter. There were no responses sought to the conclusions expressed in the script that effectively paraphrased the termination letter.

[202] The Respondent submitted that "...the gravity of the Applicant's conduct was such that any failure in relation to matters of procedural fairness was not material to the outcome". I have clearly come to a different view as to the existence of valid reasons for the Applicant's termination and the gravity of the Applicant's conduct. As such the additional procedural unfairness found will be material to the outcome of the matter.

(f/g) Size of the business/human resources

[203] This factor is ordinarily applied to explain poor procedures followed in effecting dismissal by reference to the small size of a business and the absence of dedicated human resource management specialists or expertise. That was not a relevant circumstance in this matter.

[204] To the contrary, no fewer than four dedicated Human Resources professionals had exposure to the investigation and termination of the Applicant. In those circumstances, it is simply inexplicable how such a flawed and procedurally unfair dismissal could have occurred. Nonetheless, this is not a factor to which I have applied any weight in my overall consideration.

(h) Other relevant matters

[205] I consider that the following matters lead to a conclusion that the dismissal of the Applicant was harsh:

- (a) The circumstances surrounding the posting of the Initial Messages, including their inadvertent nature, the short period of their posting, their context, and that they were only initially at the mid-range of the scale of seriousness;
- (b) That the Applicant almost immediately apologised twice for the Initial Messages and stated "Obviously wrong chat". The removal of the Initial Messages within minutes of their posting clearly indicated that the contents of the posts in the

Initial Messages were retracted. The Applicant was immediately and completely contrite. He immediately accepted that the Initial Messages were unacceptable³⁴; and

(c) That the dismissal had personal economic consequences for the Applicant and his family. That related to ongoing expenses, which since termination had exceeded family income by \$6,000.00 per month, and to Superannuation, where the Applicant lost access to a defined benefit superannuation scheme.

[206] The Applicant noted that the impact of the dismissal on his superannuation will be quite extreme. His defined benefit payment on retirement that would have been based on approximately 25 years of service, will now be based on 5 years instead. The Applicant stated that in practical terms, what would have been a lifetime pension in retirement has been essentially wiped out. He noted that defined benefit superannuation schemes are virtually non-existent, and that he was among the last group of employees of the Respondent to obtain this benefit.

Conclusion Regarding s. 387

[207] After consideration of the relevant matters outlined in s.387 of the Act, I am satisfied, for the reasons outlined above, that the Applicant's dismissal was 'harsh, unjust and unreasonable' within the meaning of s.387 of the Act. His dismissal was substantively and procedurally unfair.

Remedy

[208] The Applicant seeks reinstatement to his former position without loss of continuity of service, and with back pay. Reinstatement is strongly opposed by the Respondent. Determining a remedy for unfair dismissal is governed by the provisions of Ch 3, Part 3-2, Div 4 of the Act, which provides as follows in relation to reinstatement:

'Division 4—Remedies for unfair dismissal

390 When the FWC may order remedy for unfair dismissal

- (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
 - (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
 - (b) the person has been unfairly dismissed (see Division 3).
- (2) The FWC may make the order only if the person has made an application under section 394.
- (3) The FWC must not order the payment of compensation to the person unless:
 - (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
 - (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

³⁴ *Hartnell v Esso Australia Pty Ltd* [2019] FWCFB 2895, at [11], [20] and [28].

391 Remedy—reinstatement etc.

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:

(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or

(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

[209] It will be immediately apparent that determining a remedy for an unfairly dismissed employee essentially involves a preliminary finding by the Commission as to whether it is satisfied that reinstatement is inappropriate. It is only upon a finding that reinstatement is

inappropriate that the Commission can move on to consider compensation as the alternative to reinstatement³⁵.

[210] The Respondent's Submissions in relation to reinstatement were as follows:

“167. For the reasons above, the Applicant has demonstrated a lack of insight into the incompatibility of his racist views with the values held by the Bank and required of its employees. He has deflected responsibility for those views and the Bank should not be required to reinstate a person who maintains racist views as to the ability of Asian people to understand and solve problems to work in a highly ethnically diverse organisation. It could not be expected that those views would not ultimately manifest themselves through the way that the Applicant is likely to treat the level of understanding and problem solving skills of employees of the Bank with Asian ethnicity and his views have no place amongst employees of the Bank.

168. Importantly, the Bank is now in a position where it is fully seized of the Applicant's racist views, which he has publicised and continues to hold. In these circumstances, its trust and confidence in him cannot be restored.

169. It is irrelevant that the Applicant does not currently work on the same floor as his colleagues (who remain his colleagues regardless of which floor he works on) because it is now clear to the Bank that the Applicant is dismissive of his Asian colleagues' achievements and that he cannot respect their professional and intellectual capacity because of their race or ethnicity.

170. Further, the Applicant remains part of the NS Department and subject to movement by the NS Department even whilst he works physically on a different floor. He is required to interact with the NS Department from time to time and there is no guarantee that he will be permitted to work outside of the NS Department for five years or otherwise. He is a human resource within the NS Department who may be moved from team to team according to the needs of the Bank. In this context, it is no answer to the problem of reinstatement that the Applicant is currently working in a separate area.

171. The Bank submits that reinstatement is not an appropriate remedy because:

- (a) The Applicant has made racist statements which were sent to 23 members of the NS Department by means of the WhatsApp posts on 6 November 2019;
- (b) These racist statements have been seen by an unknown number of people within the NS Department and more broadly by other employees within the Bank;

³⁵ See: *Holcim (Australia) Pty Ltd v Serafini* [2011] FWAFB 7794

- (c) These statements should properly be regarded as racist both on their face, and even allowing for the context in which the Applicant says they should be understood.
- (d) The test for the Commission is whether these messages are objectively racist in all of the circumstances.
- (e) The Applicant has accepted that the statements are racist, or may reasonably be regarded as such regardless of “context” (PN526 - Q: Do you think the comment in a racist comment? --- A: I agree that it’s a racist comment. PN409 Q: ...An attack on a nine year old Asian, could reasonably be perceived as an attack on all Asians. Do you agree or disagree with that proposition? --- A: I agree with it as you’ve put it to me, yes. PN410 Q: Do you now see that your comments could be deeply offensive to Asian people working at the RBA, regardless of whether they are limited in scope to nine year old Asian children, doing Kumon training? --- I see how that could be the case, yes.)
- (f) The Applicant continues to adhere to and believe the views expressed in those messages as true. He has steadfastly maintained that view, in particular, by asserting that the messages have a different and acceptable character if viewed in the context in which he says they were made (despite acknowledging that the comments could be objectively considered offensive - see para 85 above).
- (g) The Applicant admitted that he has a history of expressing views that he believes to be correct even if they might offend others in the workplace;
- (h) The Applicant would be required to work with the colleagues in the NS Department to whom the 6 November messages were initially sent (see para 165(c) above).
- (i) The Applicant has asserted that any concerns of employees could be addressed by means of a mediation in which he would explain the true context of his comments, and that this would result in other employees realising that his comments were not truly directed at them. The Applicant is not contrite about his views. He does not have insight into their racist and offensive nature but instead has “owned” his statements and his views about Asian people. The evidence of Professor Paradies does not support the contention that a mediation would allow the Applicant to return to the workplace “cheek-by-jowl” with his colleagues.
- (j) The Applicant does not accept that his views are incompatible with the values and policies of the Bank, or that there is any need for him to amend or apologise for those views.

- (k) Ms Cheong has given evidence that she thinks she would try to find work somewhere else if the Applicant was to return to work at the Bank (Statement of Elaine Cheong, para 37)
- (l) It is reasonable to infer that other employees of the Bank would feel the same way, based on the evidence of Professor Paradies referred to in paragraphs (see paragraphs 140 - 142 above)
- (m) The maintenance of appropriate discipline within the Bank is crucial because the Bank is statutorily obliged to ensure a safe workplace and to seek to achieve objectives of diversity and inclusion for its staff, many of whom come from an Asian background, and to ensure that all staff understand that the Bank's core values are a matter of serious import.
- (n) The return of the Applicant to the workforce would result in real and significant detrimental consequences for the morale of his colleagues who read his WhatsApp messages and any other Asian colleagues who worked with the Applicant in future who look to the Bank for leadership and the rejection of racist values in the workplace.

172. The Respondent submits that, in view of all of the matters set out above, reinstatement is an entirely inappropriate remedy. The Applicant is asking the Commission to ignore his own admissions as to the nature and impact of his conduct, to ignore the weight of the evidence about the impact of racism in the workplace and the effect his racist messages have already had on the workplace. The Applicant is asking the Commission to accept that the Bank can, in good conscience, permit him to return to work even though to do so would be to implicitly condone his racist views.”

[211] As will be clearly apparent from my conclusions regarding valid reasons, I have concluded that the Applicant does not hold the “racist views” as asserted by the Respondent. Absent that cornerstone of the Respondent’s case, the Respondent’s submissions fall away.

[212] Immediately upon realising that he sent the Initial Messages, the Applicant apologised, deleted the Initial Messages, and apologised again. As noted at paragraph [205(b)] above, the Applicant has expressed undoubted and unreserved contrition and remorse for his conduct in post the Initial Messages. He clearly regrets any offence he caused by sending the Initial Messages, and is willing to maintain an effective working relationship with his colleagues. The Respondent has a key part to play in the establishment and maintenance of that working relationship.

[213] The Respondent’s direct evidence that existing employees may leave if the Applicant is reinstated is limited to Ms Cheong, and her evidence in cross-examination was that her real concern was not the Initial Messages, but her belief that the Applicant made counter-allegations regarding the TWG comments. That was the conduct that caused her to question whether she would remain employed if the Applicant were to be reinstated.

[214] I disagree that it is reasonable to infer that other employees of the Bank would “feel the same way”, based on the evidence of Professor Paradies. The Professor’s evidence did not go to employee retention, but to possible or probable threats and impacts on employees of the Initial Messages. I further see no reason to resort to inferences where the actual eight or nine recipients, and possible 23 recipients, of the Initial Messages are clearly identifiable. The inference that is clearly available is that none of those identifiable employees, other than Ms Cheong and Mr Biswas, were affected.

[215] I further note the Applicant was co-located in the WP Department at the time of his dismissal and that placement was intended to continue for a five year period. As such, I accept there would be very limited interaction between him and Ms Cheong and Mr Biswas if the Applicant were to be reinstated to that position.

Conclusion Regarding Remedy

[216] In balancing all the relevant factors in this case, I find that reinstatement of the Applicant is not inappropriate. I order that the Applicant be reinstated.

[217] I will also make an order that the Respondent pay to the Applicant lost remuneration for the period from his dismissal to the date of his reinstatement, less the four weeks notice paid on termination. Reinstatement of the Applicant shall be effected within 14 days of the date of this Decision or such earlier time as may be agreed by the parties.

[218] Further, I propose to make orders pursuant to s. 391(2) of the Act to maintain the continuity of the Applicant’s employment, as if his dismissal had not occurred on 6 December 2019. That order should not be seen to preclude the Respondent warning or counselling the Applicant regarding the Initial Messages as part of the Applicant’s reinstatement.

[219] Orders giving effect to my conclusions will be issued contemporaneously with this decision.



DEPUTY PRESIDENT

Appearances:

Mr D Mahendra of Counsel and Ms M Pantechis, Solicitor (Maurice Blackburn), for the Applicant

Mr S Prince and Ms T Wong of Counsel and Mr T Frost, Solicitor (HWL Ebsworth Lawyers),
for the Respondent.

Hearing details:

2020

Sydney

27 - 29 May and 12 June

Printed by authority of the Commonwealth Government Printer

<PR721042>