



DECISION

Fair Work Act 2009
s 394 - Application for unfair dismissal remedy

Dr Ruoyun (Lucy) Zhao

v

University of Technology Sydney
(U2019/10216)

DEPUTY PRESIDENT SAMS

SYDNEY, 11 MARCH 2020

Application for an unfair dismissal remedy – University lecturer – failure to publish in A or A ranked journals – teaching performance – Performance Improvement Plan (‘PIP’) – assistance and support – PIP extended – improvement in teaching performance – dismissed for unsatisfactory research performance – failure to meet Benchmarks – whether dismissal harsh, unjust or unreasonable – applicant seeks reinstatement – insufficient weight or no weight given to relevant matters – dismissal for poor performance unreasonable – effect of dismissal harsh – reinstatement not impractical – reinstatement ordered with associated orders for lost remuneration and continuity of service.*

[1] Dr Ruoyun (Lucy) Zhao was employed as a Lecturer (Level B – Academic Staff) by the University of Technology Sydney (‘UTS’ or the ‘University’) in the UTS Business School. She commenced employment on 3 February 2005 and was dismissed on 21 August 2019 for reasons of alleged unsatisfactory performance. Dr Zhao was employed under the terms and conditions of the *University of Technology, Sydney Academic Staff Enterprise Agreement 2018* (the ‘Agreement’), with a salary at the time of her dismissal of \$118,985 gross per annum.

[2] The reasons for Dr Zhao’s dismissal were set out in general terms in a ‘show cause’ letter, dated 10 June 2019, from Professor Andrew Parfitt, Provost and Senior Vice President, which reads as follows:

‘Dear Dr Zhao,

Re: Termination of employment for unsatisfactory performance

On 7 May 2019 I wrote to you informing you that I was proposing to terminate your employment for unsatisfactory performance. You were given an opportunity to provide, in writing, any matters in mitigation you wished me to take into account before making a final decision. I received your written response on 14 May 2019. This process was undertaken in accordance with the Academic Staff Agreement 2018.

Determination

In making my decision, I have considered all of the matters you raised in mitigation and in your response of 30 April 2019. I have also taken into account the reports and material provided by your supervisor, Professor Michayluk and the Dean of the Business School, Professor Earley. I am satisfied, that despite the support and assistance provided to you by the Business School over a period of close to two years, **you have failed to reach the required performance standards in research expected of an academic at your level and with your years of experience as an academic.** I have therefore decided to terminate your employment on the grounds of unsatisfactory performance.

The University has a reasonable expectation that academic staff understand the need to ensure their performance is aligned to the goals and objectives of the Faculty, and thus the University. Staff who are engaged in research, are therefore expected to achieve and maintain high quality research in line with the University's strategic aim of delivering excellent research with impact.

Given your length of service at UTS, you are entitled to a notice period of four weeks. The University will provide you with payment equivalent to 4 weeks (sic) salary in lieu of notice, in addition to any outstanding entitlements. Your termination of employment will take effect on 4 July 2019.

Finally, you are instructed to return all property owned by the University which is in your possession to the UTS Business School at a suitable time.

I remind you that this letter and this process are to remain confidential, and must not be discussed with others outside the process, other than your nominated support person or adviser.

I understand that this may be a difficult situation. Please remember that a confidential counselling service is available through the University's Employee Assistance Program (EAP) by calling [*phone number provided*].

Yours sincerely,

Professor Andrew Parfitt
Provost and Senior Vice President' (*my emphasis*)

[3] The reference to Dr Zhao's failure 'to reach the required performance standards in research', in essence, related to her failure to have at least one research article published in an

A* or A ranked journal over a two-year period, after having been placed on an extended Performance Improvement Plan ('PIP').

[4] On 11 September 2019, Dr Zhao, through her Union, the National Tertiary Education Union ('NTEU'), filed an application, pursuant to s 394 of the *Fair Work Act 2009* (the 'Act'), for an unfair dismissal remedy; namely: reinstatement, orders for lost remuneration and other associated orders. In accordance with my usual practice, I convened an in-person conciliation conference on 6 November 2019, after the application was remitted to me following an unsuccessful conciliation before a Commission Conciliator. The matter remained unresolved, primarily because Dr Zhao sought the primary remedy of reinstatement, which was resisted by the University. Directions were issued for the filing and service of witness statements, other documentary material and outlines of submission, with a hearing listed for 2 days on 17-18 December 2019.

[5] Ms K *Howe*, an Industrial Officer of the Union, appeared for Dr Zhao and Ms B *Rance*, Workplace Relations Consultant, Australian Higher Education Industrial Association, with Ms F *Howell*, HR Manager – UTS, appeared for the University.

THE EVIDENCE

[6] Statement evidence was tendered from:

- Dr Zhao – the applicant;
- Dr Trish Luker – Senior Lecturer, UTS Faculty of Law;
- Dr Sarah Attfield – Lecturer, UTS Faculty of Arts and Social Sciences;
- Mr Vince Caughley – UTS Digital Project Manager/Information Technology Division;
- Associate Professor Sarah Kaine, UTS Management Discipline Group, Business School;
- Professor David Michayluk – School Head, UTS Business School, Finance Discipline; and
- Professor Carl Rhodes – Deputy Dean, UTS Business School.

[7] Drs Luker and Attfield were not required for cross examination. As much of the evidence was uncontroversial, the cross examination of the other witnesses was relatively benign and limited. I am grateful to the parties' representatives, Ms *Howe* and Ms *Rance*, for adopting a sensible and practical approach to the witness evidence, which significantly reduced the hearing time of this matter. I also note Ms *Howe*'s submission that Dr Zhao does not raise any procedural unfairness issues going directly to the process leading to her dismissal.

Statement evidence

Dr Lucy Zhao

[8] Dr Zhao said that when she first commenced employment with the UTS in February 2005, there was no minimum requirement for publication in A* or A journals as part of an academic's performance agreement. In 2007, she met the requirements for her teaching and research performance. When the UTS achieved accreditation with the Association to Advance Collegiate Schools of Business International (the 'AACSB') in 2006, the AACSB requirements were taken into account as a staff performance measure in the UTS Business School Academic Staff Workload Guidelines (the 'Workplace Guidelines'). These guidelines are weighted according to a range of combinations depending on the skills and achievements of individual staff. Dr Zhao had a normal academic load of 40% research, 40% teaching and 20% service. Academic staff are divided into four categories, and Dr Zhao was in the 'Scholarly Academics' category. This category requires a minimum of three peer-reviewed journal articles over five years, in addition to scholarship requirements and related activities, such as grants and other publications.

[9] Dr Zhao said that these requirements were the major performance measures from 2006 to 2016. There was a points system for benchmarking teaching and research performance and for 10 years between 2005 and 2015, she had met all of the UTS' performance expectations. Dr Zhao said that during this time, A* ranked journals required the same number of points as B or C ranked journals.

[10] Dr Zhao had co-authored an A* ranked journal article in 2009, an A ranked journal article in 2010, a B ranked journal article in 2012 and co-authored an A ranked journal article

in 2013. She believed that between 2012-2013, the UTS assessed performance on the points ranking attributed on the ABDC ('Australian Business Deans Council') scholarly peer review list, and not necessarily on the ranking level of the journal. Between 2014 and 2018, Dr Zhao had published numerous papers ranked on the ABDC list at mostly B and C ranked levels.

[11] Dr Zhao claimed that a reason which affected her publication quality was budget cuts to the Finance Discipline Group ('FDG') after 2010, which did not provide sufficient research support, such as journal submission fees, conference travel and funding for a research assistant. Other reasons included a shorter turnaround time for publication in B and C ranked journals compared to A* and A ranked journals, and limited peer feedback to improve papers. As her main two co-authors left Australia, she had limited opportunities to develop new research collaborations.

[12] Dr Zhao said that in February 2014, a document – Managing for Performance Academic Benchmarks – was circulated. She claimed that this document did not make clear that a new requirement for A* or A ranked journal publications would be enforced by a PIP or dismissal. She referred to the following reference:

'It is critical that implementation of the benchmarks ... are a basis for discussion and review – they are not intended to provide a simplistic scoring mechanism against which performance is measured, nor are they intended to be treated as a simplistic pass/fail determinant.'

[13] Dr Zhao believed that there were conflicting and confusing requirements which included a statement from the Dean in 2017, that the new benchmarks would not come into full effect until 2021. In February 2017, Dr Zhao was assessed for 2016 as 'partially meeting expectations' in relation to teaching, and 'meeting expectations' in relation to research. She said, however, that Professor Michayluk placed her on an informal Performance Development Plan ('PDP') for both teaching and research. Although believing this to be unfair, given her research publications in the previous five-year rolling period, she decided to cooperate with the PDP. Her teaching performance improved in 2017 with a Student Feedback Score recording above/close to Level 4 (out of 5).

[14] Professor Michayluk commented in February 2018 that her teaching had almost met expectations and she had been focusing on her research quality by publishing a C ranked

journal article, but still needed to improve. Dr Zhao did not agree with this assessment, as she had considerably improved her teaching and had published 3 papers in 2017 (in one 'B' and two 'C' ranked journals), and over 14 years had published 13 papers including one A*, two A, three B and six C, all of which were on the ABDC list.

[15] Dr Zhao claimed she was shocked and disappointed when Professor Michayluk placed her on a formal Performance Improvement Plan ('PIP') on 23 February 2018 for both teaching and research for that year. After considering her objections, given her teaching improvement, Professor Michayluk decided on 26 February 2018, that the PIP focus would be on research only, and she would be required to publish two A* or A journal articles in 2018. He confirmed she had been counselled and censured regularly, under Cl 50 of the Agreement, regarding her unsatisfactory performance. Again, despite disagreeing with the Professor's assessment, she agreed to cooperate in improving her performance. She trusted her Supervisor and the University were not going to terminate her employment, but rather, provide her with support in improving her performance.

[16] Dr Zhao claimed it was unfair to judge her performance as unsatisfactory and commence disciplinary action in February 2018, within two years of the new benchmarks being provisionally circulated to staff. She and the Union believed that two A* or A publications would be difficult to achieve in 10 months, as such quality papers often take 12-24 months, or even longer, to be approved. A suggested topic for one of the papers was:

'Does Stock Liquidity have Impact on Finance Capital Structure' (or an alternative paper) in an A or A* listed journal, by 18 December 2018.

Dr Zhao was required to demonstrate a 'pipeline' for the paper before 18 December 2018, for publication in an A* or A journal in 2018. Dr Zhao said that the above topic was only a research area in February 2018, but she was required to complete, revise and resubmit it by July 2018 and achieve publication by December 2018.

[17] Dr Zhao said she had felt pressured to accept the PIP targets, despite her reservations that the timeframe was unreasonable. She was not told she could seek a renegotiation of the targets, if they appeared unachievable or unworkable. In hindsight, despite being very stressed, and her wellbeing having been negatively impacted, she reluctantly signed the PIP.

She also decided to cooperate in good faith, believing a PIP was a support mechanism and could be extended, if the targets were unreasonable. There were six weekly PIP meetings from 22 February 2018 to 26 March 2019 involving Professor Michayluk, Mr Joel Arnett (Human Resources, UTS) and her NTEU representative.

[18] Dr Zhao claimed she was encouraged to ‘aim high’ and she submitted articles to two A* and two high level A ranked journals, which had much lower acceptance rates than lower end A ranked journals. She believed she could have avoided termination if she had met the PIP targets by focusing on the lower end A ranked journals. She further claimed that she was not informed that the PIP deadlines were hard deadlines, and would not be extended. She was told that if she failed to meet the December 2018 deadline, the outcome might be an extension of the PIP and a shift to an informal PDP or termination (although unlikely).

[19] Dr Zhao described her research activities and performance during 2018 and her research collaborations with Professor Ashan Habib, Associate Professor Mostafa Hasan, Dr Helen Spiropoulos and Professor Nguyen, all of whom had extensive research and publication experience in A* and A ranked journals. In 2019, in collaboration with Professor Habib and Associate Professor Hasan, she developed a paper which was submitted to an A ranked journal. It was currently under review at the time of the hearing. In light of her belief she had a good chance of meeting her PIP targets in 2019, explaining her revision of two papers and with three research projects in the pipeline for A* and A level publications, at her final PIP review meeting on 26 March 2019, Dr Zhao asked for an extension of the PIP. Professor Michayluk agreed to consider her request and decide whether to grant an extension, or take the next step in the Managing Unsatisfactory Performance process of preparing a report for the Dean.

[20] On 11 April 2019, Professor Michayluk rejected her extension request, and wrote a report to the Dean recommending the termination of her employment due to concerns with her unsatisfactory research performance.

[21] Dr Zhao responded to Professor Michayluk’s report outlining her concerns, and identifying a number of inaccuracies in his report. However, she believed the decision to terminate her employment was made within 30 minutes after she had sent her response. She was formally advised of her dismissal on 7 May 2019. On 14 May 2019, Dr Zhao raised a

number of matters in mitigation, but had no opportunity to meet Professor Earley or Professor Parfitt to discuss her concerns. She believed these matters were not properly considered. On 12 June 2019, Deputy Dean, Carl Rhodes, met her and provided her with a letter from Professor Parfitt, dated 10 June 2019, terminating her employment for unsatisfactory performance, effective 4 July 2019.

[22] Dr Zhao sought a review of the process in accordance with Cl 54 of the 2018 Agreement. However, on 21 August 2019, she received a letter from Professor Parfitt informing her of her dismissal. She was also provided a copy of the report from the Process Review Committee, dated the day before. She believed that her performance was measured against the Workload Guidelines, but Professor Michayluk had considered her performance as unsatisfactory against the Academic Benchmarks, and she had understood he had told the Committee that the Benchmarks did not apply in her case.

[23] Dr Zhao raised a number of criticisms of the assessment of staff performance across UTS. These included:

- Assessments were inconsistent across the faculties. The Law, Science and FASS faculties do not require publication in A* or A ranked journals, when assessing research performance.
- Benchmarks are different across the faculties.
- Performance standards are much higher than required under the 2014 and 2018 Agreements. This issue had been raised, but ultimately rejected as being outside the Committee's terms of reference.
- The PIP requirements are of a higher standard than is generally required of staff in the UTS Business Faculty. As a result, her targets were unreasonable.
- Performance requirements are not applied fairly or consistently across all staff of the faculty. She had made inquiries and discovered at least six staff in the Finance Discipline Group ('FDG') and at least six staff in the Business Faculty failed to meet the benchmarks, but were not targeted for termination or other disciplinary action.
- While neither of the two articles submitted were published, feedback from the journals was that they may be published once reviewed and revised.

- One of the papers submitted was to the *Journal of Financial Research*. This journal has an acceptance rate of 13.8% and takes ~one month from submission to acceptance.
- Another paper was submitted to the *Journal of Banking and Finance*. This journal has an acceptance rate of 13.1% and takes 12-21 months from submission to acceptance.
- Dr Zhao's AACSB accreditation remained until 2021.
- Her teaching achievements ('Outstanding') in 2018 and 2019 were ignored and she achieved a ranking in the top 8 of Faculty postgraduate subjects in the Spring semester of 2018.
- There was a shortage of full-time staff for postgraduate classes.
- Her contribution to course development and subject coordination were ignored. Her coordination in one subject saw an increase in student enrolment from Autumn 2018 to Autumn 2019 from 140 to 220 students.
- Her contribution to the supervision of research students was ignored. Two students, who were under her supervision, successfully completed their Honours theses in 2009 and 2013.

[24] Dr Zhao maintained that the decision to terminate her employment was harsh and the University failed to take alternative disciplinary outcomes such as:

- (a) changing her workload focus from 40% research; 40% teaching 20% service; or
- (b) reducing her classification, position grade or pay in accordance with the Agreement.

These options were not considered or discussed; particularly, given she had no previous instance of unsatisfactory performance. Since her dismissal, she has lost access to the UTS email, library and research database, affecting her capacity to pursue ongoing research.

[25] Dr Zhao believed that given the dismissal occurred in the mid-Spring 2019 teaching session, it was unlikely she would find alternative employment prior to Autumn 2020. Dr Zhao claimed she had never taken sick leave or personal leave. She is suffering financial

hardship as the sole carer for her elderly parents who live with her in a mortgaged apartment, which is solely her responsibility.

[26] In a **reply statement** to Professor Michayluk's statement, Dr Zhao put the following:

- (a) the paper 'Stock Liquidity and Cash Holdings' was not commenced until March 2018. The PIP required the research idea be developed into a paper by 2018, feedback and revision by July 2018 and acceptance in an A* or A ranked journal by December 2018. Dr Zhao had revised the paper after rejection in 2018 and resubmitted it to the Journal of Corporate Finance in 2019.
- (b) She had made significant developments to two subjects, including updating lecture/tutorial materials, new case and reading studies and assessment.
- (c) Dr Zhao introduced online quiz questions to the International Finance Management subject, and had improved student learning experiences. This was reflected in positive student feedback.
- (d) Her former supervisor, Professor Tony Hall, had assisted her in one of three papers for her PhD thesis. She showed Professor Michayluk this paper who expressed interest and told her it was a potential A level journal entry. She had offered to co-author the paper with Dr Hall.
- (e) Neither Professor Hall, nor Professor Michayluk had performance concerns with her research from 2005-2011. She had an article published in an A* ranked journal in 2009.
- (f) While Professor Hall's field was with qualitative finance, he had been impressed with her published papers in 2016/2017. She had told Professor Michayluk she would appreciate senior level support in corporate finance.
- (g) Dr Zhao did not ignore comments from discussion at the National FIRN conference. The comments were incorporated into the paper.
- (h) Dr Zhao said she had taught in 5 different undergraduate and postgraduate subjects while working on various research projects and publishing 13 papers in ABDC ranked journals. She did not agree that her ability to manage an increased teaching load would exceed the available preparation time each week.
- (i) Dr Zhao rejected Professor Michayluk's comment that the feedback from the journal's rejection was not promising. She quoted from the review comments:

‘The study examines the relation between corporate cash holdings and liquidity. The paper is well written and easy to read and the models are adequately explained and seemingly well executed...In summary I cannot fault the analysis in the paper’, “The paper does a good job developing predictions for cash holdings, but the part on value of cash needs to be more carefully written. Since the part on value of cash has not been done in the literature, I would suggest the authors to dig further. For example, how does corporate governance interact with stock liquidity to influence the value of cash? What is the additional effect of financial constraints?’

Dr Trish Luker

[27] As a member of the UTS/NTEU Cases Committee, Dr Luker provides advice and support to Union members in relation to workplace issues. Dr Luker was made aware of Dr Zhao’s formal PIP and provided support and assistance to her, including attending six weekly meetings between February and December 2018. Dr Luker described the concerns expressed by Professor Michayluk in the meeting of 23 February 2018, about Dr Zhao’s teaching Student Feedback Score (‘SFS’), notwithstanding she had maintained a score of over 4 out of 5 throughout 2017. It was also raised that since 2014 she had not published a paper in an A* or A ranked journal and the paper published in 2017 was in a C ranked journal. Dr Luker corroborated Dr Zhao’s explanations and confirmed the specifics of the 2018 PIP; see: [15] above. While Dr Zhao expressed concern at the timeframe for publication, Dr Michayluk agreed that if the A*/A ranked journal article was still being reviewed at the end of 2018, he would consider extending the PIP. This had eventuated and the PIP was revised, particularly by:

- (a) Acceptance for publication of paper: ‘Does Stock Liquidity Have Impact on Firm’s Capital Structure’ (or an alternative paper) in an Australian Business Deans Council (ABDC) Journal-listed A or A* Field of Research (FoR) 1502 Finance Journal by 18 December 2018 (Paper 1).
- (b) Acceptance or revise and resubmit decision for paper: ‘Stock liquidity and cash holding’ (which was working paper idea as of 21 February 2018) in an ABDC Journal-listed A or A* FoR 1502 journal by 18 December 2018 (Paper 2).
- (c) To demonstrate a ‘pipeline’ of further research by commencing work on a new working paper by 18 December 2018 with the intention of achieving publication of paper in an ABDC A*/A FoR 1502 Finance journal by 1 December 2019 (Paper 3).

[28] Dr Luker said she was aware Dr Zhao had submitted the paper in (a) above on 22 February 2018, and she was reviewing the referee's comments in rejecting the paper with a view to strengthening the paper for resubmission. By April 2018, Dr Zhao had reported having completed data collection for the second paper ((b) above) for drafting and submission to an A* or A ranked journal by 26 July 2018, co-authored with Dr Spiropoulos. Dr Luker stated that Dr Zhao had reported at the 22 November 2018 meeting as follows:

- '(a) Paper 1 had been revised and submitted to the Journal of Financial Research in November and was currently under review.
- (b) Paper 2 was being finalised and that the authors would aim to submit the paper to the Journal of Banking and Finance by the end of November 2018.
- (c) Paper 3: the revised writing up of the paper was sent to the supervisor for review before the PIP meeting.'

[29] Dr Luker commenced leave soon after this meeting and ceased attending the PIP meetings as Dr Zhao's support person.

Ms Sarah Attfield

[30] Ms Attfield is the Vice President of the NTEU/UTS Branch Committee and attended the two PIP meetings on 18 December 2018 and 14 February 2019 with Dr Zhao, Professor Michayluk and HR Partner, Mr Joel Arnett. Ms Attfield believed that Professor Michayluk expected Dr Zhao to 'aim high' and gain publication in an A* or A ranked journal. She agreed the PIP was extended by three months to allow time for responses from journals to which Dr Zhao had submitted papers.

[31] It was Ms Attfield's view that during the PIP Dr Zhao had 'worked hard' to achieve A* or A ranked publications for the two submitted papers. She achieved publication in a B ranked journal in 2018, and in 2019 was working on three new research projects, with the intention to publish in A* or A ranked journals.

Mr Vince Caughley

[32] As NTEU Branch President, Mr Caughley's evidence dealt with the introduction of academic benchmarks in 2014 and the Union's concerns as to the short consultation period with staff during a busy time of the year in late 2014. He said similar consultation periods for benchmarking across most faculties occurred in 2015, followed by the announcement of an academic Voluntary Exit Program ('VEP') for which 190 staff were eligible. The Union expressed opposition to the benchmarks being used to target staff for VEP. Mr Caughley said that in 2016, the Union was inundated with complaints from members who were now subject to performance management against the new benchmarks. Consequently, the Vice Chancellor, Professor Attila Brungs, assured the Union in writing, and in a meeting on 18 September 2016, that staff performance was to be judged against work plans, not benchmarks.

[33] In November 2016, Mr Caughley wrote specifically about benchmark targets being used in Dr Zhao's faculty and the Union continued to raise concerns throughout 2017. Following further feedback from members, Mr Caughley wrote to the University outlining an inconsistent application of benchmarks across the University. He pointed out that in some areas, benchmarks were said to be aspirational, in others the aspiration was across a discipline, rather than as uniform expectations for individuals. As a result, the Union did not accept that benchmarks be imposed as performance indicators in work planning.

[34] In **cross examination**, Mr Caughley conceded he was not involved in Dr Zhao's PIP process and was unaware of what the benchmarks were and how they were applied in her case.

Associate Professor Sarah Kaine

[35] Associate Professor Kaine has been employed by the UTS since January 2010. She is an Associate Professor in the Management Disciplinary Group in the Business School. She was an NTEU nominated representative on the Workload Policy Review Committee between 2015-2018. That Committee's role was to review and approve Faculty Workload Guidelines to ensure consistency with the 2014 Agreement. Associate Professor Kaine said academic benchmarks were not considered by the Committee, so consistency of benchmarks was not considered.

[36] Associate Professor Kaine has an extensive research background, which includes publication in A* and A ranked journals. It was her evidence that there is no predictable formula for whether a submitted paper will be published. Factors which may influence whether a paper is published include:

- ‘a. The number of other papers submitted at the time;
- b. The topic of other papers submitted at the time; and
- c. Impact of the journal (this does not necessarily relate to ranking, i.e. a B journal might have a higher impact than a higher ranked journal’

[37] Accordingly, Associate Professor Kaine said she would never commit her workplan to publish in a particular journal, or at what rank, as it is beyond her control. The expectation would only be to have submitted a paper. As a relatively senior academic, she gave examples of the time taken to achieve publication for some of her work; research required for a 2018 published paper in an A* ranked journal had commenced in 2014. She currently has a paper under review with an A* journal that had been first submitted in 2015 and rejected from 3 other journals.

[38] Associate Professor Kaine did not consider it reasonable to expect two A* or A level publications from a Lecturer (Level B) in less than 12 months. In her role of supervising four more junior academics, she would suggest a Level B Lecturer include their intent to submit quality publications, and a plan be developed for mentoring and co-authoring from senior staff with a strong track record of publishing in A* and A ranked journals.

[39] Associate Professor Kaine claimed that when academic benchmarks were implemented, it was her understanding that they were aspirational and designed to ensure the faculty achieved rankings in the top three of Business Schools in Australia. Associate Professor Kaine does not use benchmarks in workplan discussions with staff and she has not been asked to justify her work output in relation to benchmarks. This only arose for discussion if someone is being performance managed or applying for a promotion.

[40] Associate Professor Kaine said the 2016 benchmarks are currently under review. As a Faculty Board member, these draft revised benchmarks have been sent to the Provost for approval. They include a requirement for a Level B scholarly publication as a minimum of two articles every three years in ‘quality’ journals, as defined.

[41] In **cross examination**, Associate Professor Kaine acknowledged that she was not involved in the performance management process for Dr Zhao and was not aware if benchmarks were, or were not to be used, in respect to her employment with the University.

For the University

Professor Michayluk

[42] Professor David Michayluk has held the position of Head of the Finance Discipline Group ('FDG') since February 2017. He has been employed at the UTS since 2005. He holds various finance and commerce qualifications from universities in the United States and Canada. In his role as Head of FDG, Professor Michayluk is responsible for developing strategies for the long-term success of the Department, as defined by research and teaching performance. He manages 30 full-time faculty staff and 50 casual teachers. He is responsible for supporting faculty members to improve their research.

[43] Professor Michayluk has known Dr Zhao since he first commenced at UTS and they have a shared *alma mater* – the University of Toronto. Early on in his time at the UTS, the Head of School asked him to work with Dr Zhao to help improve her research quality. In 2010 they co-authored a published paper in the Financial Review, a recognised quality journal.

[44] Professor Michayluk described how the Australian Business Deans Council ('ABDC') prepared a list of journals rated for their quality against criteria, such as impact factor and rejection rates. The list was established as a clear and objective list, not open to manipulation. Sometimes journals move between rankings. A* and A ranked journals are objectively rated as being of the highest quality. Academics are required to publish in them for their own reputation and that of their institution. This is important for an institutions' assessment in the Excellence in Research in Australia ('ERA') assessment by the Australian Research Council ('ARC').

[45] Professor Michayluk agreed that the length of time for publishing papers varies. Referee reports take weeks or many months. A typical turnaround is 60-90 days from a

referee, with some papers having 2 referees. The top journal in finance, the *Journal of Finance*, has a turnaround time, from submission to decision, on average of 51 days, with a median of 49 days. From Professor Michayluk's experience the shortest turnaround for an accepted paper in a ranked journal is about 25 days and the longest was 1 ½ years (due to a fraud investigation).

[46] It was Professor Michayluk's evidence that the benchmarks are being phased in across the UTS Business School over five years. They are not yet in place, and staff are not yet held accountable for meeting standards in the benchmarks. However, as the benchmarks are intended to increase the quality of research, they 'influence' the quality journals in the ABDC list. The focus on A* and A ranked journals is similar to many other Australian universities and are below the level of the UTS' direct competitors, the University of New South Wales (the 'UNSW') and the University of Melbourne.

[47] Professor Michayluk was not able to directly compare other faculties in the UTS, other than to note different expectations, for example, mathematics publications are often very short, whereas finance articles tend to be of greater length and may have many co-authors. The workload model of benchmarking the Business School is based on its own level of expectations and minimum targets.

[48] Professor Michayluk said he was first aware of performance concerns with Dr Zhao in 2008. He had further concerns when he became head of the Finance Department in 2017, after reviewing Dr Zhao's performance evaluation by the previous Head of Department. The two concerns related to teaching and research targets. This resulted in the commencement of the PDP. The PDP involved regular 6-8-week meetings, the assignment of a Senior Professor to read and comment on Dr Zhao's research and Dr Zhao being invited to witness different teachers in action. Professor Michayluk said that the benchmarks were not used in the PDP. He noted that Dr Zhao did not raise any concerns regarding the requirements of the PDP.

[49] Professor Michayluk said that at the end of the PDP in early 2018, a formal PIP process was commenced for Dr Zhao. The PIP was similar to the requirements of the PDP, including regular meetings with Dr Zhao and her support person. The benchmarks were not used for the PIP. Professor Michayluk set out the research schedule referred to earlier and said he extended the PIP on two occasions from 22 February 2018 to 18 December 2018 in order

to wait for the journals' decisions on publication. Professor Michayluk removed the teaching component of the PIP, as Dr Zhao's teaching performance improved noticeably from the PDP and was very close to the minimum SFS requirement. This also allowed her to concentrate on research.

[50] It was Professor Michayluk who had decided not to extend the PIP again because the feedback from journals was not promising; the research questions were not well-developed and were not interesting to a quality journal. The feedback disclosed major concerns from three different referees. Professor Michayluk claimed that if the feedback had been promising from either of the two completed papers, he would have extended the PIP. He had never told Dr Zhao that even if she published in a low-end A ranked journal, it would not change his decision. He believed this was a misunderstanding about a shift in rankings for two A ranked journals.

[51] Professor Michayluk provided details of other Level B Academics who had been placed on PDPs or PIPs. Two persons met expectations on a PDP; six (including Dr Zhao) were put on PIPs. Two met the PIP, one person resigned and another transitioned to retirement. Four Level B Academics had achieved a publication in an A* or A ranked journal in the last year; one where the process was three months.

[52] Professor Michayluk said his decision to terminate Dr Zhao's employment was because he did not see any improvement on the quality of her research, despite guidance, support and feedback, including Dr Zhao attending a National conference to present her paper. Further, she then ignored feedback from the conference.

[53] Professor Michayluk did not consider Dr Zhao would be able to perform a teaching only or teaching focused role, despite her good teaching evaluations. These good results came at the expense of her research time. It would be unlikely she could cope with a full-time teaching focused role as the preparation time would exceed the available time each week. Such a role would involve development and leadership. Dr Zhao did not update materials or take on any development role. Professor Michayluk claimed that after she left, the UTS found slides made five years ago by a previous employee, which had never been corrected.

Professor Carl Rhodes

[54] Professor Rhodes has been employed as the Deputy Dean of the UTS Business School since 1 June 2018. He is responsible for the day to day management support of the Business School's academic units and for providing strategic advice to the Dean. He works with the Executive to establish overall research performance and has expertise in research performance measurement and academic journal ratings.

[55] Professor Rhodes described the ABDC journal quality rankings of A* and A ranked journals as follows:

‘A* is the highest quality category, and indicatively represents approximately the top 5-7% of the journals assigned to the given primary field of research.

A is the second highest quality category, and indicatively represents approximately the next 15-25% of the journals assigned to the given primary field of research.’

[56] He said that journal rankings are an indicator of the quality of the journal and, by proxy, the quality of the published papers. He said it was more generally expected by major Australian Business Schools that a Lecturer Level B could publish in A* and A ranked journals.

[57] Professor Rhodes said that the Workload Guidelines inform the proportion of time individual academics are expected to spend on different activities and they work alongside the benchmarks document, Managing for Performance Academic Benchmarks. This document is used to:

- provide a basis for ensuring a shared expectation among academics and their managers of the measures set and used at UTS Business School for establishing performance;
- provide guidance on the level of achievement required for career development conversations;
- provide managers with objective measures to guide performance discussions and decisions; and
- underpin appropriate strategic resource allocation and salary levels.

The oral testimony

[58] In oral evidence, Dr **Zhao** reiterated she had published 3 papers in A* and A ranked journals in 2009, 2010 and 2013, and from 2016 she had published in B and C ranked journals. She accepted she had been on a PDP in 2017 for the usual one year and a PIP for 10 months in 2018. This was extended until February 2019, then extended until May 2019 to allow the journal to respond to the submitted papers.

[59] Dr Zhao acknowledged that she was provided funding for a research assistant in 2018, but not during the period of the PDP in 2017. She had paid for research support herself. Nor was funding available for her to attend conferences.

[60] Dr Zhao said she had reluctantly agreed to the PIP, despite its expectations escalating from the PDP to 2 publications in 10 months. She did not accept that a paper being published in an A* or A ranked journal can be completed and published over two years. She accepted the paper had been worked on for over two years, but then rejected. However, she had no control over the publication process.

[61] Dr Zhao had made three applications for alternative employment at educational institutions, but had not even received a response. She had no alternative source of income in the four months since dismissal and has been living on her accrued entitlements.

[62] In **cross examination**, Professor **Michayluk** confirmed that the benchmarks are to be phased in by 2021. While working towards the benchmarks, the phase in period increases quality gradually and it would be unfair to improve benchmarks (without a phase in). He maintained that benchmarks were not relevant to the PIP. Dr Zhao was required to publish in an A* or A ranked journal over time, as they had done together in 2010. He had not offered to co-author a paper with her since then.

[63] Professor Michayluk said that the aim of the University was to move gradually from quantity to quality. He insisted he had raised concerns with Dr Zhao's research questions in the PDP and the PIP. As to her teaching improvement, he was very pleased she had achieved a top 20 rating during the PDP, and accordingly, the teaching aspect was removed from the

PIP. However, he was concerned that the disproportionate teaching focus, had been at the expense of Dr Zhao's research time.

[64] Professor Michayluk said his role as supervisor is to provide a report to the Dean advising of poor performance, attempts to remedy performance and recommendations as to disciplinary action for unsatisfactory performance. He did not actually make the decision to terminate Dr Zhao's employment. In preparing his report, Professor Michayluk considered all the material and feedback from referees. While there were some positive comments such as '*it's a good paper but it's just not at contribution level*', his concerns remained as to the level of quality. Professor Michayluk understood that Dr Zhao published in a B or C ranked journal during the PDP, but he could not be sure, without referring to the records.

[65] In questions from me, Professor Michayluk explained the ERA rankings for the Business School itself. Developed through the ARC, the Finance Department is rated in the top five in Australia, and shared this ranking with the UNSW, University of Melbourne and a fourth university. He understood this ranking is well above international standards. Professor Michayluk argued the ranking is achieved due to the collective quality of research undertaken by academic staff. The research is submitted every two years and after starting at Level three, then four, the Department hit five in the latest rankings.

[66] When asked about equitable treatment of all staff against the benchmarks, Professor **Rhodes** said in **cross examination** that it is a single performance management system in which individual managers are responsible for performance rating persons who report to them. He monitors the process and reviews samples to ensure equity across different units. The tracking against benchmarks is conducted through the annual performance review process. He could not say if all staff who did not meet benchmarks were placed on performance management, as this was not tracked centrally.

[67] Professor Rhodes said the process for benchmarks involves consultation with staff and approval by University management, being the Dean, Deputy Dean and Provost. The benchmarks were implemented in 2015 and have not been reviewed since. However, when shown the documents, Professor Rhodes agreed the Workload Guidelines were approved in March 2015 and the current benchmarks commenced in January 2016.

[68] In answer to a question from me, Professor Rhodes said that he was not directly involved in the performance management of Dr Zhao and relied on Professor Michayluk's recommendations. He had only given Dr Zhao her termination letter, because her direct manager was unavailable.

SUBMISSIONS

For Dr Zhao

[69] In written submissions, Ms *Howe* submitted that:

- (a) there was no valid reason for Dr Zhao's dismissal, as her performance was not unsatisfactory;
- (b) the dismissal was based upon an alleged failure to meet the research benchmarks that do not form part of the employment contract, are not referenced in the Agreement and the requirements set out in them are over and above the requirements for a Lecturer Level B in the 2018 Agreement; and
- (c) in all of the circumstances, the dismissal was also 'harsh' on various grounds, including that she could have been moved to a 'teaching-focussed' workload as an alternative, and the dismissal had significant personal and professional consequences for her.

[70] Ms *Howe* referred to a number of relevant sections in the documents covering Dr Zhao's employment, namely the 2018 Agreement and its predecessor, the *University of Technology Sydney Academic Staff Agreement 2014* (the '2014 Agreement'). The relevant sections of the 2014 Agreement include:

- (a) Clause 33 – Supervision and Performance and Development;
- (b) Clause 38 – Academic Workload Allocation;
- (c) Clause 51 – Managing Unsatisfactory Performance; and
- (d) Schedule 3 – Minimum Standards for Academic Levels ('MSALs').

The relevant sections from the 2018 Agreement include:

- (a) Clause 51 – Managing Unsatisfactory Performance
- (b) Clause 53 – Discipline;
- (c) Clause 54 – Process Review Committee; and
- (d) Schedule 3 – MSALs.

[71] In 2015, Dr Zhao was provided with two documents relating to performance standards, namely the Definitions for Association to Advance Collegiate Schools of Business (‘AACSB’) Categories, outlining the requirement for a Scholarly Academic to have published in three peer reviewed journals over the last five years, and the AACSB Workload Calculator, which gives the same rating to peer reviewed journal articles, regardless of their A*, A, B or C ranking.

[72] Ms *Howe* noted that a table in the Managing for Performance Benchmarks, introduced in 2016, indicates that for a Lecturer, 3 ‘points’ of ABDC publications were required within a 5-year period, with A* publications equalling 2.5 points per publication and A publications equalling 1 point per publication. However:

- staff were advised on 14 June 2019, that the benchmarks were under review;
- such requirements are not consistent with other UTS faculties and amounts to ‘differential treatment’, when comparing lecturers of a similar level to her; and
- there is inconsistency between the benchmarks (requiring publication in A* or A ranked journals), the Academic Workload Guidelines (requiring the maintenance of AACSB SA status) and the MSALs (requiring independent research).

[73] Ms *Howe* said it was agreed that as a result of the PDP, Dr Zhao’s teaching performance increased significantly. However, at its conclusion. Professor Michayluk noted that ‘*improvement in all performance areas were met, however achieving publication of quality research remained unmet*’. Due to this, Professor Michayluk initiated formal performance, management, pursuant to Cl 50.5 of the 2014 Agreement. This clause states:

‘50.5 Where a supervisor forms a view that the performance of a staff member is unsatisfactory, the supervisor will:

- (a) counsel and censure the staff member on the nature of the improvement required and the time **within which reasonable improvement is expected**;

- (b) make a record of the counselling and/or censure given and provide a copy to the staff member and place a copy on the staff member's file; and
- (c) inform the staff member that if the required improvement in performance is not achieved in the timeframe specified, action will be taken in accordance with this Clause.' (*my emphasis*)

Although this clause only requires 'reasonable improvement', on 5 March 2018, the PIP agreed between Professor Michayluk and Dr Zhao, required her to:

- (a) achieve acceptance for publication of the paper 'Does Stock Liquidity Have Impact on Firm's Capital Structure' (or an alternative paper) in the ABDC Journal-listed A* or A Field of Research 1502 Finance Journal by 18 December 2018;
- (b) achieve paper acceptance and/or revise and resubmit decision for the paper 'Stock liquidity and cash holding' (which was a working paper as at 21 February 2018) in an ABDC Journal-listed A* or A Field of Research 1502 Finance Journal by 18 December 2018; and
- (c) demonstrate a pipeline of further research by commencing work on a new working paper by 18 December 2018 with the intention of achieving publication in an ABDC A* or A Field of Research 1502 Finance Journal by 1 December 2019.

As a result, the PIP far exceeded the Workplace Guidelines, which only requires publication in two A* or A ranked journals within a five-year period.

[74] Following Professor Michayluk's report recommending Dr Zhao's termination (see: [20] above), and Dr Zhao's response to this recommendation on 30 April 2019, it took a period of five working days for:

- (a) Professor Earley to review Professor Michayluk's report and supporting documentation, as well as Dr Zhao's response and supporting documentation;
- (b) the matter to be referred to Professor Parfitt for disciplinary action;
- (c) Professor Parfitt to review Professor Michayluk's report and supporting documentation, as well as Dr Zhao's response and supporting documentation; and

- (d) Professor Parfitt to write to Dr Zhao informing her that disciplinary action may be taken, including a termination of employment.

[75] Despite Dr Zhao putting forward a number of matters in mitigation, pursuant to Cl 53.6 of the Agreement, the termination letter of 10 June 2019 (see: [2] above) does not particularise any of these matters, including, but not limited to, Dr Zhao's request to become a teaching-focused academic. Further to this, Dr Zhao submitted that in a newsletter of February 2019, it was reported that the FDG was 'under-staffed' due to 10 full-time FDG staff leaving the University in the preceding 6 years, which had resulted in 40% of postgraduate finance classes being dropped in the preceding 2 years.

[76] In considering each criterion of s 387 of the Act, Ms *Howe* submitted that Dr Zhao's dismissal was '*harsh, unjust and unreasonable*' for factors including:

- (a) Assessment of underperformance was made using a performance standard that was much higher than that required by the 2018 Agreement.
- (b) The decision was determined on criteria that was over and above the criteria for considering the performance of other academics employed by the University; depended on achieving targets that were outside Dr Zhao's control; and did not take into consideration Dr Zhao's improvement and achievements during the PIP period.
- (c) There were other disciplinary actions available to the respondent if it determined that the research component of Dr Zhao's employment did not meet the required standard. Dr Zhao had a workload allocation of 40% teaching, 40% research and 20% engagement. The University could have changed Dr Zhao's workload allocation to a teaching focussed role (60% teaching; 20% research; 20% service, or 80% teaching; 20% service) or, in accordance with the 2018 Agreement, taken disciplinary action of alternatives to dismissal (which may be a reduction in classification, position, grade or pay).
- (d) The decision failed to take into consideration the matters raised in mitigation by Dr Zhao in her letter to Professor Parfitt on 14 May 2019.
- (e) Given the nature of academic work and appointments, the decision to terminate Dr Zhao's employment during the mid-Spring 2019 teaching session means it is unlikely she will find employment in any capacity prior to the Autumn 2020

teaching session. As a result of the termination, Dr Zhao's access to the University email, library and research database resources was withdrawn. This was 'harsh', as it negatively impacts on Dr Zhao's ongoing research contribution and ability to participate in research collaborations, that would assist her to find new employment.

- (f) As raised in her matters of mitigation letter to Professor Parfitt, termination of her employment created financial hardship not only for herself, but for her elderly parents who she has sole caring and financial responsibility for, and who reside with her in an apartment, which is subject to an outstanding mortgage, for which she is solely responsible.

[77] Ms *Howe* confirmed in her written submissions that Dr Zhao sought the primary remedy of reinstatement to her former position with the University.

For the University

[78] The University submitted that both the 2014 and 2018 Agreements provide for academic workloads to be assigned in accordance with the respective Agreement, having regard to the Faculty's Workload Guidelines (in this case, the UTS Business School) (the 'Guidelines'). The Guidelines were initially approved in December 2009. Although they were the subject of some amendments, the Guidelines did not change during the performance management period of Dr Zhao.

[79] The University referred to section 1 of the Guidelines, which recognises that:

'each academic unit has expectations of workload allocations appropriate to its discipline, such as threshold research, teaching and learning, and contributions to service and engagement expectations'.

Section 1 also recognises that:

'academic units, in formulating workload procedures, will need to be informed by Faculty Performance Management benchmarks that "ensure transparency and clarity to assist academic staff to more clearly understand what they should [be] aiming for and delivering in order to have successful academic careers.'" (*emphasis in submissions*)

The University also referred to section 4.1.2 of the Guidelines which state that:

‘Recognised Academic Unit workload allocation procedures should take account of the impact and **quality** of research outputs as well as the quantity – for example, consideration of the ABDC journal rankings and the status of a grant awarding body’.
(*emphasis in submissions*)

[80] Regarding the benchmarks, the University did not contend the requirements of a Level B academic are to achieve 3 points within a 5-year period, with publication in an A level journal worth 1 point and publication in an A* journal worth 2.5 points. However, Dr Zhao’s 2016 Workplan, 2017 PDP and 2018 PIP only required Dr Zhao to achieve 1 publication in an A* or A ranked journal, not a certain number of points. This meant that she had a lesser expectation of performance than that set out in the benchmarks.

[81] The University referred to the requirements to commence an unsatisfactory performance process in the 2014 Agreement. This is also contained in the 2018 Agreement at clause 51.4 which states:

‘51.4 Where a supervisor forms the view a staff member’s performance is unsatisfactory, the supervisor will inform the staff member in writing:

- a. of the improvement required;
- b. the time period in which a reasonable improvement is expected, and
- c. if there is no improvement that disciplinary action will be taken.’

[82] Dr Zhao’s supervisor, Professor Gerhard Van de Venter, reviewed her 2016 Workplan and determined that her performance was unsatisfactory, and commenced a 12-month informal PDP. The PDP was in place from 4 April 2017 until 31 December 2017. Dr Zhao agreed that the same requirement from the 2016 Workplan would continue, being publication in one A* or A ranked journal. Although during this period Dr Zhao was able to produce two papers for publication, she did not reach the target of publishing one of these papers in an A* or A ranked journal.

[83] The University said that Dr Zhao met with Professor Michayluk around five to six times throughout the PIP process. The standard Dr Zhao was held to, was the same as the other Academic staff members within the Finance Discipline. These standards, pursuant to the

2016 Workplan, the PDP and the PIP were all lower than the expectations required by the benchmarks. Although Dr Zhao ranked in the top 20 teachers in the school, this was only based on student feedback.

[84] Further, when Dr Zhao received feedback for the two articles submitted for publication in A* or A ranked journals, the feedback received was that an ‘*almost complete re-write*’ of each of the articles was required. As a result, it was determined that disciplinary action should follow and the PIP process should end, as Dr Zhao had demonstrated an inability to meet the inherent requirements of her position.

In reply

[85] Ms *Howe*’s submissions emphasised that the benchmarks were ‘currently under development’. Further, the minimum requirement in the Guidelines included ‘authorship of high-quality peer-reviewed journal publications’, but did not specify what ranking/s this may include.

[86] Despite having 13 publications in ABDC journals, this was not taken into account when the University terminated Dr Zhao’s employment. Further, the University’s assertion that Dr Zhao was required to publish in one A* or A ranked journal pursuant to the 2016 Workplan, 2017 PDP and 2018 PIP was incorrect. Rather:

- the 2016 Workplan only required Dr Zhao to ‘aim’ to publish the ‘Does Stock Liquidity Have Impact on Firm’s Capital Structure?’ in an A level journal, and a revision of the ‘Dividend Signalling: What can we learn from corporate Bond Responses?’ in a B level journal;
- the 2017 PDP required revision and resubmission of articles if rejected, presentation of the papers internally and submission to conferences; and
- the 2018 PIP required acceptance in an A* or A ranked journal for two of Dr Zhao’s articles by 18 December 2018.

It is therefore incorrect for the University to assert that Dr Zhao was given 2.5 years to improve her performance. Regarding the PIP, Dr Zhao had raised concerns as to its

requirements, as evidenced by her and Dr Luker's witness statements at paragraphs 51 and 12 respectively. The University was also incorrect that the submitted journal articles required a 'complete rewrite'; see: [26] above.

[87] Finally, Ms *Howe* referred to the limited scope of the Process Review Committee in reviewing the alleged unsatisfactory performance process, noting their concerns that:

- determining a view of unsatisfactory performance can only be formed on the basis of the agreed performance standards, which should be based on the Workload Guidelines;
- Dr Zhao's failure to meet the benchmarks at a time when the benchmarks were in the process of development, with the correct instrument being the Workload Guidelines;
- there was no firm indication that the benchmarks may have disciplinary ramifications if not adhered to; and
- the standards incorporated in the PIP are of a higher standard than generally required from UTS Business School staff.

[88] If given an appropriate period of time, it was submitted that Dr Zhao reasonably believes she could meet the requirements, as she had previously done during her employment with UTS.

Closing submissions

For Dr Zhao

[89] Ms *Howe*'s closing submissions reaffirmed that the dismissal was 'unreasonable' and 'harsh', and that there was no valid reason for dismissal, as the standards that Dr Zhao were held to were vastly different to the MSALs and the Workload Guidelines. The Union asserted that the University had the ability to demote Dr Zhao to a Level A (Associate Lecturer) academic position, which, under the benchmarks, would not require a research output. It could have changed her role to a teaching-focused position. The decision to terminate her employment was 'harsh' as the University did not have concerns for 60% of her workload.

Further, the acceptance rates of the A* and A ranked journals which Dr Zhao submitted her articles to, had acceptance rates of 13.8% and 13.1% respectively. In any event, failure to achieve publication in this regard was out of Dr Zhao's control.

[90] Ms *Howe* confirmed that Dr Zhao seeks reinstatement to her former position, with the maintenance of continuity of service and an order for lost wages. At the time of filing the closing submissions, Dr Zhao had not found alternative employment, and had received no income since her dismissal on 21 August 2019.

For the University

[91] In its closing submissions, the University reaffirmed that the expectations set for Dr Zhao were in accordance with the Guidelines, MSAs, and the two Enterprise Agreements which covered Dr Zhao's employment. It could not be said that achieving one publication in an A* or A ranked journal (reduced from two) within nine months by an academic at Dr Zhao's level, was onerous or unreasonable. Rather, this is a 'generous' amount of time, particularly factoring in that Dr Zhao had a co-author on the paper she was expected to publish, and with the approval for the funding of a research assistant.

[92] The University put submissions in response to questions from me during the hearing regarding the rating process for business schools in the ERA ratings. It explained that the ERA compares research in higher education institutions within the Fields of Research for each Business School. The Finance division of the UTS Business School holds a top ERA rating of 5. To obtain this rating, the ERA considers the top 30% of all submitted publications to determine the rating, none of which could be attributed to Dr Zhao.

[93] Regarding the remedy sought, the University submitted that as research comprises 40% of Dr Zhao's role, and given her failings in being unable to publish one paper at the requisite level, it would be inappropriate to reinstate Dr Zhao to her former position with the University. At all times, Dr Zhao was afforded procedural fairness, she was given 'ample' opportunity to respond to, and request review of the process, and had over two years to improve her performance. Accordingly, her dismissal was not '*harsh, unjust or unreasonable*'.

In reply

[94] Ms *Howe* referred to Dr Zhao's cross examination, in which she disagreed that it would be reasonable that someone of a Level B Academic classification to publish an A* or A ranked journal within the period of a year. Although she had achieved publication in A* and A ranked journals in the past, it had taken a period of around two to three years to fully prepare, submit and be accepted for publication. She referred to the lack of a guarantee that a paper will ever be accepted, particularly in the space of a year, and the fact that it is the journal editor/s who will make the discretionary decision whether to accept a paper or not.

[95] Ms *Howe* submitted that Dr Zhao's individual performance had no negative impact on the ERA ratings of the Finance Discipline of the UTS Business School. As only the top 30% of publications are used to determine the rating (as referred to in the University's closing submissions), 70% are not. Given Dr Zhao's relative junior level as a Level B Academic, the expectation would be that it is likely that more senior academics would comprise the majority of contributions in the top 30%. Further, Professor Michayluk conceded that Dr Zhao's performance had no negative impact on the overall rating.

[96] Finally, Ms *Howe* submitted that reinstatement would not be inappropriate, as there has been no loss of trust or confidence between Dr Zhao and the University. The 2018 Agreement provides flexibility as to the ratio of workload allocations, meaning that if she were to be reinstated, a more teaching focused arrangement may be more appropriate, particularly as Dr Zhao had achieved a top 20 ranking for her teaching performance.

CONSIDERATION

Statutory provisions and relevant authorities

[97] Before determining the merits of an unfair dismissal application, s 396 of the Act requires the Commission to determine a number of preliminary matters; namely, whether:

- (a) Dr Zhao's unfair dismissal application was filed within the statutory time limit;
- (b) Dr Zhao was a person protected from unfair dismissal;

- (c) Dr Zhao's dismissal was consistent with the Small Business Fair Dismissal Code; and
- (d) Dr Zhao's dismissal was a case of genuine redundancy.

[98] Section 396 is to be read together with s 385 of the Act which defines an unfair dismissal based on four criteria; all of which must be satisfied before the Commission considers what remedy, if any, should be ordered following a finding of unfairness. The section reads:

385. What is an unfair dismissal

A person has been unfairly dismissed if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

[99] Accordingly, I make the following preliminary findings:

- (a) Dr Zhao's unfair dismissal application was filed within the 21-day statutory time limit set out in s 394(2) of the Act;
- (b) Dr Zhao was a person protected from unfair dismissal in that:
 - (i) she had certainly completed the minimum employment period, as required by ss 382 and 383 of the Act;
 - (ii) Dr Zhao's remuneration was below the high income threshold (s 382(2)(iii) of the Act) and in any event, her employment was covered by the terms and conditions of the *University of Technology Sydney Academic Staff Enterprise Agreement 2014* and subsequently the *University of Technology Sydney Academic Staff Enterprise Agreement 2018*;
- (c) consistency with the Small Business Fair Dismissal Code (s 385(c)) is irrelevant as plainly the University has many thousands of employees;
- (d) similarly, this case is not a case of genuine redundancy (s 385(d)).

[100] In respect to s 385 of the Act, Dr Zhao was dismissed by the University on 21 August 2019 (sub-s (a)). Subsections (c) and (d) do not apply, leaving the question of whether Dr Zhao’s dismissal was ‘*harsh, unjust or unreasonable*’ and therefore, an unfair dismissal. This leads inevitably to s 387 of the Act, which requires the Commission to take into account, and make findings on the following matters:

- (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.

[101] I shall come back to these matters in due course. However, I add at this juncture that the meaning of the expression ‘*harsh, unjust or unreasonable*’ in the context of a dismissal, was explained in the oft-quoted extract from *Byrne and Frew v Australian Airlines Ltd* (1995) 185 CLR 410 of *McHugh and Gummow JJ*, as follows:

‘128. Clause 11(b) is aimed at the situation where the termination of employment brought about by the dismissal, rather than the steps leading up to the dismissal, or lack of them, is harsh, unjust or unreasonable. A dismissal with notice may be harsh, unjust or unreasonable because it is based on a ground defined as such by cl 11(b). This refers to such matters as termination "on the ground of" race, colour, sex and marital status. It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, **may be unreasonable because it was decided upon inferences which could**

not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.’ (my emphasis)

I turn now to consider whether the dismissal of Dr Zhao for poor research performance was a valid reason for dismissal.

[102] The meaning of ‘*valid reason*’ in s 387(a) of the Act is drawn from the judgement of North J in *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 (‘*Selvachandran*’). This meaning has been considered and applied by members of the Commission and its predecessors for many years. For example, in *Rode v Burwood Mitsubishi Print R4471*, a Full Bench of the then Australian Industrial Relations Commission (‘AIRC’) discussed the meaning of valid reason in the context of the relevant provisions of the *Workplace Relations Act 1996*, and by citing *Selvachandran*. The following is an extract from the Full Bench’s decision at [17]-[19]:

[17] In relation to the meaning of “valid reason” the following remarks of Northrop J in *Selvachandran v [Peterson] Plastics Pty Ltd* are relevant:

“Section 170DE(1) refers to a ‘valid reason, or valid reasons’, but the Act does not give a meaning to those phrases or the adjective ‘valid’. A reference to dictionaries shows that the word ‘valid’ has a number of different meanings depending on the context in which it is used. In The Shorter Oxford Dictionary, the relevant meaning given is: ‘2. Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value.’ In The Macquarie Dictionary the relevant meaning is ‘sound, just or wellfounded; a valid reason’.

In its context in s 170DE(1), the adjective ‘valid’ should be given the meaning of sound, defensible or wellfounded. 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 reason 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 each treated fairly, see what was said by Wilcox CJ in *Gibson v Bosmac Pty Ltd*, when considering the construction and application of a s 170DC.”

[18] While *Selvachandran* was decided under the former statutory scheme the above observations remain relevant in the context of s.170CG(3)(a). A valid reason is one which is sound, defensible or well founded. A reason for termination which is capricious, fanciful, spiteful or prejudiced is not a valid reason for the purpose of s.170CG(3)(a).

[19] We agree with the appellant's submission that in order to constitute a valid reason within the meaning of s.170CG(3)(a) the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason.'

See also: *Nettleford v Kym Smoker Pty Ltd* (1996) 69 IR 370.

[103] For the reasons which follow, I have come to the view that the reasons for Dr Zhao's dismissal were not 'soundly based' or 'well founded'. Accordingly, the dismissal was not for a valid reason and when all the relevant matters are properly taken into account, her dismissal attracts the epithet of '*unreasonable*', within the meaning of s 387 of the Act. I shall return to these matters shortly.

General observations

[104] It is generally accepted that most modern universities in Australia and internationally, serve a twofold focus and purpose; namely, to provide an excellent and inquisitive tertiary teaching environment for students and to provide a collegiate centre for the pursuit and achievement of high-level academic research in particular fields of endeavour. Views might differ as to what focus is more important and therefore, afforded the most priority. However, in my humble opinion, the teaching of future generations of tertiary qualified students of all ages is the primary purpose of a first-class university. Of course, it is also notorious that many universities have a singular reputation for excellence in a specific discipline or academic pursuit.

[105] That said (and as is sometimes cynically observed), universities can become ruthlessly competitive, if not obsessed, with achieving the top research rankings and reputation in order to attract students ('code' for income) which, to my mind, may tend to distract from the focus of providing a quality learning experience for students.

[106] I also consider it is self-evident that an academic, like all of us, will have different interests, perspectives, strengths and weaknesses. A university, of all of society's institutions, should have the flexibility to accommodate an academic's personal and professional qualities and attributes, and maximise a particular individual's interests and talents to enhance the best outcomes for the common good. I turn now to the particular features of this case.

[107] There was some attempt by Professor Michayluk to differentiate the benchmarks from the PIP with the Professor stating that the benchmarks were not used for Dr Zhao's PDP or the PIP. However, it seems to me that the setting of a Lecturer Level B's performance target of publication in an A* or A ranked journal is intrinsically linked to the Faculty's Workload Guidelines and the benchmarks. It was certainly how the University's evidence was expressed and developed. Professor Rhodes' evidence was that the Workload Guidelines work alongside the benchmarks document – Managing for Performance Academic Benchmarks. I note the seeming overlapping and confusion between the PIP and the Workplace Guidelines requiring publication in two A* or A ranked journals over five years. In my view, it is somewhat unrealistic and artificial to suggest that the benchmarks were not used in Dr Zhao's PIP, when that is exactly what she was measured against and said to not have been met.

[108] This distinction demonstrates the propensity for university jargon and many multidimensional policies and procedures, to confuse and deflect from the reality of what was actually going on here. There was even confusion in the evidence of the University's witnesses as to when certain policies commenced, their duration and current review status. There was no contradiction that the benchmarks would not come into full effect until 2021, yet the applicant was measured against them. Moreover, the link is clear when the uncontested evidence of Associate Professor Kaine was that the revised benchmarks have been drafted and sent to the Provost for approval. They reflect a requirement for a Lecturer Level B to publish a minimum of two papers every three years in quality journals.

[109] I note the evidence that the benchmarks are said to be 'aspirational', meaning 'lofty' or 'ambitious', most certainly not 'definitive' or 'prescriptive' (see: Macquarie Concise Dictionary) and are intended to assist the faculty in obtaining and retaining the top ranking in the Australian Universities Business School research rankings, which the UTS has recently achieved alongside three other Australian universities. I further observe that this top ranking does not appear to have been adversely impacted in any way by Dr Zhao's alleged poor

research performance over 2018/19; nor do I suspect a single individual's performance would ever so impact.

Findings as to valid reason

[110] In my opinion, the University did not give weight or sufficient weight to a number of matters, which when viewed objectively, renders Dr Zhao's dismissal for unsatisfactory/poor performance as unreasonable. This includes, but is not limited to, the University's own raw workload allocations of 40% teaching, 40% research and 20% service. Dr Zhao had effectively met and exceeded her teaching performance (40%) and there was no evidence that the 20% for service was not satisfactory. This means Dr Zhao's alleged poor performance (assuming poor performance captured the entire 40% research rating – which is not realistic), still left her at 60% of achieved performance. It is difficult to conceptually and rationally conclude that a 60% performance rating equated to poor or unsatisfactory performance overall.

[111] Further, there appears to be a contradiction in that the performance measurements expected of Dr Zhao were claimed to be higher than those required by either the 2014 or 2018 Agreements. At best, there may be a disconnect between the Agreement requirements and the University's expectations; see: [112](h) below.

[112] That said, in my view, appropriate weight was not given to:

- (a) Dr Zhao's markedly improved teaching performance;
- (b) recognising that journal publications are entirely at the whim of the editor/s and involve a range of factors outside a contributor's control, as explained by Associate Professor Kaine;
- (c) appreciating that Dr Zhao was doing her best, she had prepared the paper required by the PIP and had received feedback, which was not as critical as Professor Michayluk contended. While criticised for not expressing any issues with the PIP, this is not a matter telling against her; rather, she had cooperated because of her willingness to engage and strive to improve her performance;
- (d) Dr Zhao's cooperation and engagement with the PDP and the PIP. She was not obstructive, uncooperative or belligerent;

- (e) the publication of a paper in an A* or A ranked journal has notoriously low acceptance rates. It is well accepted that the process can be long and drawn out and may involve many reviews (by different reviewers) and resubmissions;
- (f) the fact that Dr Zhao had published in a range of ranked journals over many years, including in three A* or A ranked journals. There was a failure to recognise that she was capable of publication in high quality journals, subject to appropriate peer and other support being provided;
- (g) not recognising the loss of her two mentors overseas;
- (h) not appreciating that the Review Committee expressed reservations about the process when it stated that:

‘Our concern is that the strategic objectives have not yet resulted in the implementation of the Academic Benchmarks and there is no reference in the Agreement to the Benchmarks, yet the standards incorporated in the PIP are of a higher standard than is currently required of staff generally in the Business School. We question whether the performance target set for Dr Zhao was appropriate.’

- (i) considering flexible work allocations based on Dr Zhao’s very good teaching performance by insisting on a rigid 40:40:20 formula. I note Professor Michayluk was somewhat dismissive that her teaching performance was based on student surveys. There was no other basis propounded as being relevant for such an assessment. It seemed to be uncontroversially accepted as the means of judging an academic’s teaching performance. No other basis for assessment was suggested by Professor Michayluk or anyone else; and
- (j) consideration of other disciplinary outcomes under the 2018 Agreement, rather than the most draconian, such as demotion, loss of grade or pay.

For these reasons, I am not satisfied that the University had a valid reason for Dr Zhao’s dismissal.

Other matters under s 387 of the Act

[113] The Commission is required to take account other matters set out in sub-s 387(b)-(h). Subsections (b)-(e) of s 387 are generally classed under the rubric of matters going to procedural fairness, or as sometimes otherwise characterised as offering a person natural

justice. I set out below each of my findings on these subsections, by noting that claims of procedural unfairness did not feature largely, or not much at all, in this case.

Whether the person was notified of that reason (s 387(b))

[114] Dr Zhao was notified of Professor Michayluk's recommendation of dismissal to the Dean, Professor Earley, on 11 April 2019. She outlined some inaccuracies in his report. She was subsequently informed the recommendation was accepted on 7 May 2019 and she was dismissed on 21 August 2019. There can be no doubt Dr Zhao was properly notified of her dismissal. This is a neutral factor in this case.

Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person (s 387(c))

[115] Similarly, this factor is not in contention. Dr Zhao was given an opportunity to respond to the proposal to terminate her employment and she afforded herself of that opportunity on 30 April 2019. On 12 June 2019, she met with Professor Rhodes who provided her with a letter terminating her employment. She sought a review of the process in accordance with Cl 54 of the Agreement. However, she was unsuccessful, and was dismissed on 21 August 2019. I am satisfied Dr Zhao had a number of opportunities to respond to the reason for her dismissal and she took the University up on these opportunities. This factor is a neutral consideration in this case.

Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal (s 387(d))

[116] At all relevant times, Dr Zhao was assisted and supported by her Union, including during the formal PIP process. This is also a neutral factor in this case.

If the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal (s 387(e))

[117] There is no doubt Dr Zhao was warned of her unsatisfactory performance, and it was specifically addressed by a requirement to meet the publication in an A* or A ranked journal. However, I accept her evidence that it was not made sufficiently clear that if she failed to strictly meet the PIP in achieving publication within the timeframe, termination of her employment was inevitable. This is particularly so, given her request for an extension of the PIP to revise and resubmit the paper in circumstances where the journal itself would be unaware of the consequences of a delay in doing so. This factor tells slightly in favour of a finding of unfairness, consistent with my conclusions on valid reason.

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 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 (ss 387(f) and (g))

[118] The University is obviously a large and well-resourced employer in terms of human resources and employment relations advice. The disciplinary processes are underpinned by the terms of the Agreement and a suite of policies and procedures going to performance, workload guidelines, benchmarks, work allocations and disciplinary processes. These are neutral factors in this case.

Any other matters the Commission considers relevant (s 387(h))

[119] Although I have found Dr Zhao's dismissal was 'unreasonable', I am also satisfied that her dismissal was 'harsh', given the personal and economic consequences of her dismissal. These include, *inter alia*, the following:

1. Dismissal of an academic for poor performance is, self-evidently, a blot on that person's career and their professional and academic reputation. Unless properly understood in context, such a dismissal is likely to very much serve as an impediment to securing alternative employment in one's chosen profession.
2. Dr Zhao had over 14 years of otherwise unblemished service with the University.

3. Dr Zhao's background, training and experience means she has very few alternatives for obtaining other commensurate employment in her profession, or outside of it.
4. Dr Zhao has sole caring responsibility for her elderly parents and is carrying a mortgage for the apartment they live in together.
5. Despite her best endeavours, and the difficulties of securing alternative employment at an unlikely point in the academic year, Dr Zhao has made unsuccessful efforts to secure alternative employment.

[120] For all the above reasons, I am satisfied that Dr Zhao's dismissal on 21 August 2019 was '*harsh and unreasonable*', within the meaning of s 387 of the Act. I turn then to consider the appropriate remedy.

Appropriate remedy

[121] The remedies for an unfair dismissal are set out at ss 390 and 391 of the Act as follows:

'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.

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.’

[122] One of the objects of Part 3-2 of Ch 3, dealing with unfair dismissal, states:

‘(c) to provide remedies if a dismissal is found to be unfair, **with an emphasis on reinstatement.**’ (*my emphasis*)

From a plain reading of s 381(c) – Object of this Part – it is clear the legislature intended to give primacy to reinstatement in circumstances where an employee has been unfairly dismissed and the Commission is required to exercise a discretion as to any orders in respect to remedy.

[123] In this respect, I refer to what was said by the Full Bench of the Commission in *Colson v Barwon Health* [2014] FWCFB 1949, where at [29], it was said:

‘[29] The passages from which the sentences relied on by the Appellant are extracted clearly indicate that the Deputy President understood and applied the statutory requirements in respect of reinstatement, as does the broader context of his decision. The Deputy President noted the primacy of reinstatement as a remedy for an unfair dismissal. His observations about primacy did no more than state that consideration of reinstatement against the test of whether it is inappropriate was required (and a finding that it is inappropriate is required) before compensation in lieu could be ordered and does not provide licence to search for a reason to order an employee’s reinstatement when that is not appropriate. The requirement to find that reinstatement is inappropriate before considering compensation in s.390 of the Act gives effect to the emphasis on reinstatement in s.390(1)(c) of the Act’. (*footnote omitted*)

[124] In *Nguyen and Le v Vietnamese Community in Australia* [2014] FWCFB 7198, the Full Bench of the Commission discussed the meaning of ‘inappropriate’ in the context of s 390 and helpfully summarised the relevant case law as to a loss of trust and confidence telling against an unfairly dismissed employee’s reinstatement. At [20]-[21], the Full Bench said:

[20] The most common argument advanced in support of the proposition that reinstatement is inappropriate is the proposition, variously expressed, that there has been a loss of trust and confidence such that it would not be feasible to re-establish the employment relationship.

[21] In *Perkins v Grace Worldwide (Aust) Pty Ltd* the Full Court of the Industrial Relations Court considered the effect of a loss of trust and confidence on the question of the “practicability” of a reinstatement remedy and said:

“Trust and confidence is a necessary ingredient in any employment relationship... So we accept that the question whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based.

At the same time, it must be recognised that, where an employer, or a senior officer of an employer, accuses an employee of wrongdoing justifying the summary termination of the employee’s employment, the accuser will often be reluctant to shift from the view that such wrongdoing has occurred, irrespective of the Court’s finding on that question in the resolution of an application under Division 3 of Part VIA of the Act.

If the Court were to adopt a general attitude that such a reluctance destroyed the relationship of trust and confidence between employer and employee, and so made reinstatement impracticable, an employee who was terminated after an accusation of wrongdoing but later succeeded in an application under the Division would be denied access to the primary remedy provided by the legislation. Compensation, which is subject to a statutory limit, would be the only available remedy. Consequently, it is important that the Court carefully scrutinise any claim by an employer that reinstatement is impracticable because of a loss of confidence in the employee.

Each case must be decided on its own merits. There may be cases where any ripple on the surface of the employment relationship will destroy its viability. For example the life of the employer, or some other person or persons, might depend on the reliability of the terminated employee, and the employer has a reasonable doubt about that reliability. There may be a case where there is a question about the discretion of an employee who is required to handle highly confidential information. But those are relatively uncommon situations. **In most cases, the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree.** It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party.

It may be difficult or embarrassing for an employer to be required to re-employ a person the employer believed to have been guilty of wrongdoing. The

requirement may cause inconvenience to the employer. But if there is such a requirement, it will be because the employee's employment was earlier terminated without a valid reason or without extending procedural fairness to the employee. The problems will be of the employer's own making. If the employer is of even average fair-mindedness, they are likely to prove short-lived. Problems such as this do not necessarily indicate such a loss of confidence as to make the restoration of the employment relationship impracticable.”

[125] The Full Bench continued at [27]:

[27] The following propositions concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate may be distilled from the decided cases:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.
- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.

[28] Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party' (*footnotes omitted*)

[126] In *Regional Express Holdings Limited t/a REX Airlines v Richards* [2010] FWAFB 8753 (*'Regional Express'*), the Full Bench made the following observations regarding loss of trust and confidence at [26]:

[26] Whenever an employer dismisses an employee for misconduct, assuming the employer is acting honestly, there is an implied loss of trust and confidence in the employee. If it is subsequently found that the termination was harsh, unjust or unreasonable it is appropriate to consider whether the relationship can be restored if the employee is reinstated. **That question cannot be answered solely by reference to the views of management witnesses. All of the circumstances should be taken into account.** *(my emphasis)*

[127] There was little evidence, or even persuasive opinion, from the University's witnesses that the employment relationship between Dr Zhao and the University is irretrievably broken, or so untenable as to serve as an impediment to her reinstatement. Indeed, I would go further and state that I consider Dr Zhao will continue to make a significant and positive contribution to the UTS Business School, particularly in its teaching focus. There was no evidence that Dr Zhao's reinstatement would damage, or adversely impact on the University's reputation, or on its Australian and international rankings.

[128] There is no evidence that Dr Zhao was an uncooperative or belligerent employee. Nor was there any evidence that she was anything but a dedicated, hard-working team player who had good and positive relationships with her supervisors and colleagues. It is appropriate that she be reinstated, and I intend to do so.

[129] Section 391(2) of the Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order that it considers appropriate to maintain:

‘(a) the continuity of the person's employment; [and]

(b) the period of the person's continuous service with the employer...’

[130] In all the circumstances, I consider it appropriate to make an order to maintain Ms Zhao's continuity of employment and the period of her continuous service with the UTS; see: *Kenley v JB Hi Fi Print S7235*.

[131] Section 391(3) of the Act provides that if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order

to cause the employer to pay to the applicant an amount for the remuneration lost, or likely to have been lost by the applicant because of the dismissal.

[132] Section 391(4) of the Act provides that, in determining an amount for the purposes of such an order, the Commission 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.’

[133] An order to restore lost pay does not necessarily follow an order for reinstatement. The Commission ‘**may** make any order that it considers appropriate’ (*my emphasis*); thus, it is a discretionary exercise to be undertaken by the Commission. However, where an employee has engaged in misconduct, the Commission may refuse to make any order to restore lost pay or make an order for part payment of lost remuneration.

[134] In all the circumstances of this matter, I consider an order for the payment of lost remuneration is appropriate in this case. Of course, although under present advisement Dr Zhao has been without income since 21 August 2019, should she have earned any income since and up to her reinstatement, this amount should be deducted from the lost remuneration amount.

[135] Finally, s 381 of the Act is a significant and overarching object of Part 3-2. It is expressed in these terms:

‘381 Object of this Part

(1) The object of this Part is:

- (a) to establish a framework for dealing with unfair dismissal that balances:
 - (i) the needs of business (including small business); and
 - (ii) the needs of employees; and
- (b) to establish procedures for dealing with unfair dismissal that:

(i) are quick, flexible and informal; and

(ii) address the needs of employers and employees; and

(c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a “fair go all round” is accorded to both the employer and employee concerned.

Note: The expression “fair go all round” was used by *Sheldon J* in *in re Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95.’

[136] I am satisfied that the outcome and orders I make in this matter ensure a ‘fair go all round’ is accorded to both Dr Zhao and the University.

ORDERS

[137] Pursuant to s 391 of the *Fair Work Act 2009*, the Fair Work Commission orders that:

1. Dr Lucy Zhao shall be reinstated to her former position as Lecturer Level B at the University of Technology Sydney (‘UTS’), within 21 days of today, or such other date as may be agreed between the parties.
2. Dr Lucy Zhao’s continuity of service shall not be taken to have been broken by her dismissal.
3. The UTS shall pay to Dr Lucy Zhao an amount of lost remuneration equivalent to the remuneration she would have otherwise received from the date of dismissal to reinstatement, less any remuneration earned during this period.
4. Any disagreement about the implementation of the above orders may be referred to the Commission for determination.
5. These proceedings are otherwise concluded.



DEPUTY PRESIDENT

Appearances:

Ms K *Howe*, Industrial Officer, National Tertiary Education Union – NSW, for the applicant.

Ms B *Rance*, Workplace Relations Consultant, Australian Higher Education Industrial Association, for the respondent.

Hearing details:

2019.

Sydney:

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