



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Jean-Claude Attieh**

v

**Australian Catholic University**  
(U2022/10904)

DEPUTY PRESIDENT CROSS

SYDNEY, 5 JULY 2023

*Application for an unfair dismissal remedy - Absence of Valid reasons – Dismissal Harsh, Unjust or Unreasonable – Compensation Ordered*

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## **Introduction**

[1] An application was filed on 14 November 2022 (the Application), by Mr Jean-Claude Attieh (the Applicant), pursuant to s.394 of the *Fair Work Act 2009* (Cth) (the Act), following his dismissal on 4 November 2022, by the Australian Catholic University (ACU or the Respondent). The Applicant had commenced employment with ACU as a Campus Pastoral Associate on 17 June 2019.

[2] On 6 February 2023, directions were issued to program the manner in which the Application was to proceed to hearing (the Directions). Pursuant to the Directions, the parties filed the following documents:

- (a) On 24 February 2023, the Applicant filed an Outline of Submissions, together with
  - (i) A Statement of the Applicant dated 23 February 2023; and
  - (ii) A Statement of Martyn Poyitt, a Campus Ministry Assistant of the Respondent from February 2022 to 2 November 2022, dated 24 February 2023.
- (b) On 10 March 2023, the Respondent filed an Outline of Submissions, together with:
  - (i) A Statement of Brother Michael Callinan dated 10 March 2023;
  - (ii) A Statement of Ms Catherine Le Mottee dated 7 March 2023;
  - (iii) A Statement of Father Mirko Integlia dated 8 March 2023; and

- (iv) A Statement of Mr Robert Tonkli dated 7 March 2023.
- (c) On 19 March 2023, the Applicant filed:
  - (i) A Reply Statement of the Applicant dated 19 March 2023; and
  - (ii) A Statement of Mr Samir Zeitouni a Facilities Officer of ACU, dated 19 March 2023.

[3] The matter was heard on 29 March and 29 April 2023 (the Hearing). All witnesses were required for cross-examination. Thereafter the parties filed the following written submissions:

- (a) The Applicant's Written Submissions dated 5 May 2023 (the Applicant's Submission); and
- (b) The Respondent's Written Submissions dated 12 May 2023 (the Respondent's Submission).

### **Background**

[4] This matter involved several allegations made, and mostly found by the Respondent to be substantiated, regarding the performance of the Applicant. In understanding how those allegations were made and considered, it is necessary to understand the roles of the various witnesses of the Respondent. They were:

**(a) Father Mirko Integlia**

[5] Father Mirko was employed by the ACU as the Strathfield Campus Chaplain in February 2022. Father Mirko was the person with whom the Applicant had the most, and seemingly almost daily, interactions. It was Father Mirko who in April 2022 raised concerns regarding the performance of the Applicant that eventually resulted in his dismissal.

**(b) Brother Michael Callinan**

[6] Brother Michael was employed by ACU as Campus Ministry Manager from 22 May 2017 to 31 December 2022. He had direct supervision of all Campus Pastoral Associates, including the Applicant, although he described his supervision of the Applicant as “remote” as he was located at North Sydney and the Applicant was located at Strathfield.

[7] Brother Michael dealt with issues regarding the Applicant’s performance throughout the Applicant’s employment, and in around April 2022, provided Mr Tonkli with a report titled “*Jean-Claude Attieh - Performance Improvement Plan 2 Formal Review Report*” (the Callinan Report).

**(c) Robert Tonkli**

[8] Mr Tonkli was originally employed by ACU as the Senior Advisor, Policy and Projects in the Office of the Vice President in North Sydney. From December 2021 to January 2023, he acted in the role of Associate Director, Identity and Mission, and was the direct supervisor of Brother Michael.

[9] In that acting role Mr Tonkli became aware of alleged performance issues with the Applicant in January 2022. After receiving the Callinan Report he provided it to the Applicant for his response. After receiving the Applicant’s response on 10 June 2022, Mr Tonkli sought a further response from the Applicant on 7 July 2022. The Applicant provided his further response on 14 July 2022.

[10] After receiving the Applicant’s further response Mr Tonkli arranged a meeting on 2 August 2022, with Brother Michael, Father Mirko, Mr McCosh from Employment Relations, the Applicant, and his support person Mr Zeitouni. After that meeting, Mr Tonkli wrote to Father Anthony Casamento recommending continuing with disciplinary steps against the Applicant. After further responses, Father Casamento recommended termination of employment to the Vice Chancellor.

**(d) Catherine Le Mottee**

[11] Ms LeMottee was an Administrative Officer of ACU. Ms Le Mottee was only involved in the issue of the hire of a bus in late May 2022.

### **Factual Background Arising from Documentary Evidence**

[12] The Applicant was employed on 17 June 2019, as a Campus Pastoral Associate for Students. In that position he was responsible for pastoral support for all students within the University. His nominated Supervisor was the Campus Ministry Manager.

[13] On 24 August 2020, the Applicant was advised by Mark Lysaght (the Campus Ministry's National Manager at the time) and Brother Michael that he would be given a Performance Improvement Plan (the First PIP). The issues outlined in the First PIP were:

- *SMA submitted the 'Sunset Theatre' event in ACU Life, with large financial projection (over \$1,000) and inadequate/incomplete details about collaboration with other portfolios.*
- *2019 End of Academic Year Mass was inappropriately resourced, without a booklet and briefing sheets.*
- *Inadequate spell checking of the 'Relics' Event program and substandard branding/printing.*
- *2020 Campus Feast Day Mass lacked timely communication with the Campus Dean and work to appropriately populate liturgical roles broadly.*
- *Not at work by 9am on Friday 1 November 2019(text sent to announce lateness at 9am).*
- *Attendance at team prayer on three occasions from a vehicle whilst driving (because of lateness).*

- *Late to work on Wednesday 5 August 2020 (a phone call at 9 .30am revealed Jean-Claude was still at home).*
- *Staff (including Management) and students have at times struggled to locate Jean-Claude, either in-person or by phone or email.*
- *A request was made in May 2020 (during PRP) to place a “where am I” type sign on the Campus Ministry office door or window.*
- *Email communication requesting a priest’s details which was sent to the Office of the Vice President on Saturday 5 October 2019.*
- *Website update requests late (Wednesday 27 May 2020).*
- *OrgSync reports late on at least one occasion 4 June 2020).*
- *Visiting priests register not sent to the Office of the Vice President in a timely manner (2 July 2020).*
- *Text request for annual leave the following day on the evening of Sunday 9 August 2020.*
- *Sporadic promptness at all manner of online meetings.*
- *Sometimes apologies are given in a timely manner, at other times not.*
- *Among the lowest social media presence of any campus. Inconsistency of Campus Ministry branding.*
- *Insufficiently forward- planning approach to scheduling and events.*

- *Even though Covid-19 has made planning difficult, Jean-Claude's event presence (online included) has been lower than other metropolitan campuses and not as agile in response as it might have been.*

[14] The Applicant was given ten weeks to address the issues raised in the First PIP. At the conclusion of that period the Applicant was advised that, while there were no outstanding issues from the First PIP, ongoing concerns existed. Brother Michael wrote to the Applicant on 16 November 2020, as follows:

*Dear Jean-Claude,*

*Many thanks for meeting with me in person on Friday 30 October to discuss your progress in the two- month Performance Improvement Plan which was established on Monday 24 August as a result of some work practices which I judged needed improvement. You will remember that we met in person on Thursday 20 August and I raised my concerns with you, and you had an opportunity to respond verbally to those concerns. I offered you the possibility of a support person present, but you said you preferred not to take that opportunity. We also met virtually on Friday 25 September, half way through the Performance Improvement Plan.*

*Whilst I am satisfied you have addressed all areas of the Performance Improvement Plan to a satisfactory level, I have ongoing concerns because of several things which have happened in the two weeks that followed.*

*Unfortunately an incident regarding your visit to a theology tutorial came to my attention just before the Performance Improvement Plan was due to finish, so I was not able to get enough detail about it before our 30 October meeting, hence the reason it is being dealt with separately.*

*Also, I know you were late to work on Wednesday 11 November (just 15 minutes or so), but it was an important day of collaboration which required all hands on deck to ensure the smooth running of the Remembrance Day service and the welcome to country and*

*smoking ceremony before hand. Ann O'Connor reported her low confidence in your collaborative efforts within Campus Minsitry to Mark Lysaght, so obviously this is of concern to me given that the performance improvement plan had only concluded a week before this.*

*It is important for you to maintain the momentum of improved professional behaviour in your role, so I ask that you continue to address the following areas, at this stage without a further Performance Imporment Plan:*

- *punctuality for work*
- *collegial standpoint and collaborative effort, within and beyond Campus Ministry*
- *following instructions*
- *responding within acceptable timeframes to administrative task requests, and following up tasks assigned or projects you have begun*
- *being prepared for meetings and collaborative tasks*
- *ensuring the whole work day is active and your presence is visible*

*As stipulated in the University's Managing Unsatisfactory Performance Policy (6.6.1), I will forward a copy of this communication to Human Resources to be placed on your file.*

*Regards, Michael.*

[Emphasis added. Original text]

**[15]** On 5 March 2021, a further complaint was received from Associate Professor Miriam Tanti, the Campus Dean, in relation to what was described as the Applicants unsatisfactory communications. That related to an email sent by the Applicant to the Campus Dean on 3 March 2021, that included the following:

*Just a reminder that I am not on my desk all the time at work, I spent it around the quad and chatting to students. Playing catch up on emails is done often.  
Thank you once again for today.*



**[16]** In April 2021, the Respondent decided to obtain the services of a mentor to attempt to assist the Applicant to improve his work performance. Ms Sarah Rose, Senior Manager, Student Transition and Retention, was engaged as that mentor.

**[17]** On 14 April 2021, a further complaint was received in relation to the Applicant's unsatisfactory work performance, though there was no evidence regarding what Brother Michael did with that complaint. Mr Peter Freeman, Senior International Student Advisor emailed Brother Michael in relation to the organisation of Foodbank hampers, and stated:

*I have attempted to raise these issues with Jean Clause directly and he always apologises and reiterates how important this program is however I still feel that he is not 100% committed.*

**[18]** On 2 June 2021, the Applicant had provided advice that he was present on campus when this assertion was not supported by an eyewitness who observed him driving onto campus at a time he claimed to be at work. The Applicant subsequently conceded that he had lied about his presence that day.

**[19]** On 8 June 2021, the Applicant sent an email to Brother Michael and Mark Lysaght, and circulated that email to Campus Pastoral Associate's. That email was described by Brother Michael as "*pitt(ing) the policy of the university and the formation of the ALLY Network as being against the Catholic Church in relation to treatment of and ministry to LGBTQI staff*". While Brother Michael described the email as such, he records no action being taken against the Applicant at that time for sending the email. The email was referred to in an email dated 21 February 2022, and mentioned in the Callinan Report some ten months later.

**[20]** On 9 June 2021, the Applicant made the Respondent aware that he had been medically diagnosed with sleep apnoea. The Respondent determined that no further performance improvement plans or reviews would occur until there was medical evidence available that proved there was no correlation between the sleep apnoea condition and his performance at work. That evidence was provided in a report dated 6 September 2021 from a Doctor Freiberg.

[21] In the second half of 2021, due to the Covid pandemic, the ACU experienced shutdowns and staff working from home. On 15 December 2021 the Applicant was able to return to campus. By February 2022, Brother Michael believed that ongoing poor work performance of the Applicant warranted a second PIP, and he met with the Applicant on 18 February 2022 to discuss the necessity for a second PIP to be actioned.

[22] On 21 February 2022, the Applicant was placed on a Second Performance Improvement Plan (the Second PIP). In the Second PIP, eight factors were highlighted for improvement, and the Applicant was given five weeks to address the issues raised. At the conclusion of that period, seven of the issues were deemed successfully improved. The issue that was deemed unsatisfactorily completed related to the Applicant's working relationship with the Ministry Team members, which essentially involved the Applicant improving his relationship with Father Mirko.

[23] The issues outlined in the Second PIP were:

*Relationship with previous chaplain became fragmented, some fine detail (working hours/payroll) aspects of Student Ministry Assistant were overlooked or needed management reminder.*

*Professional supervision has taken quite some time to become embedded in regular practice, although improvement has been noted.*

*Patchy event details in ACULife and some last minute efforts to advertise/promote events.*

*Late reports in ACU Life software (monthly reports, national/major events, liturgy survey). Improvement has been noted.*

*Previous occasions of incompletely prepared liturgical events.*

*Untruthful claim about campus presence which eroded trust. Last minute requests for time off in lieu, tardy management of TOIL document (improvement noted).*

*Campus poster advertising has been hit and miss at times. Social media presence has been sporadic at times, with inconsistency of Campus Ministry branding.*

*At times, insufficiently forward-planning approach to scheduling and events. Even though Covid-19 has made planning difficult, Jean-Claude's local campus events (online included) have been lower than other metropolitan campuses and not as agile in response as it might have been.*

[24] On 8 April 2022, at the request of Brother Michael, Father Mirko sent the following email to Brother Michael (the 8 April Email):

***Subject: Very Confidential***

*Hello Michael,*

*I wish to let you know that I am finding it very hard to speed up campus ministry activities.*

*JC is not very cooperative. I cannot honestly say if he is just lazy or has personal problems or if he's stonewalling (that is intentionally ignoring what I say and I propose).*

*I find hard to figure out the real reason.  
I give you just a few examples.*

*(1) I sent to him the email below last Sunday. This email has never been answered. A negative replay would have been much appreciated too.*

*(2) We both agreed that in case of bad weather, we would have changed the program of the day trip. Then I saw an email sent to all students that the*

*program was changed and the weather that day was really nice. Several students pulled out because of the change.*

*(3) I kindly asked him to buy a light to point towards the monstrance during the adoration. The light never came! This was at the beginning of March.*

*(4) We both agreed to have a moment of “inclusive” worship on the quad on Holy Wednesday. Evangelical campus ministry should have been involved as well. Organisation of it has never started or taken seriously.*

*(5) I asked him several times to meet the guys that have asked to become Catholics. No way!*

*(6) He is always “busy” doing something else...I have to admit that I find it very hard to imagine what he’s busy with, due to we aren’t doing very much on campus and raining days less than nothing. My guessing - just a guessing - is that he’s very busy with his community such as spiritual direction for Lebanese students.*

*Finally, let me warn you that I have good reasons to believe that he records sensitive conversations!*

*Best regards  
Mirko*

[25] Around April 2022, Brother Michael provided Mr Tonkli with a report that dealt with issues regarding the Applicant’s performance throughout the Applicant’s employment titled “*Jean-Claude Attieh - Performance Improvement Plan 2 Formal Review Report*” (the Callinan Report). The Callinan Report outlined the history of the Applicant’s employment and the First and Second PIP’s, and outlined the following conclusion:

**Assessment of Performance**

*Following the meeting held 1 April 2022 between the supervisor and Mr Attieh to discuss his performance against stated objectives he was provided written feedback on 11 April 2022. Mr Attieh was advised that he had attempted to broadly address sections 2 - 8 of the performance improvement plan, however the content in section 1 had not been achieved to a satisfactory level (Attachment 6).*

**Further examples of unsatisfactory performance**

*Following the verbal and written feedback provided to Mr Attieh's performance against expected standards and outcomes, the supervisor in discussion with Fr Mirko Integlia, the Strathfield chaplain was made aware of the following further examples of poor performance by Mr Attieh:*

- Uncooperative attitude displayed on numerous occasions from Jean-Claude towards Fr Mirko*
- Campus Ministry kayak trip last-minute change of plan by Jean-Claude without appropriate joint decision-making (although initial agreement was reached about a bad weather alternative)*
- Jean-Claude not buying a resource in a timely manner*
- Holy Week- no planning/response by Jean-Claude to Fr Mirko's suggestions about opening up the Holy Week experience to a broader group of Christians - even though Jean-Claude said he would*
- Jean-Claude not open to students broadly (which is part of the Campus Ministry role)*
- No weekly Monday meeting schedule established (after prayer on Mondays) Jean-Claude agreed with Fr Mirko to do this.*

- *6 proposals for doing different types of ministry activities from Fr Mirko in the last month ... only one 'accepted' by Jean-Claude (the kayak trip)*
- *Jean-Claude goes 'AWOL' from about 2.30/3pm on many days, reporting when questioned that he is doing 'spiritual direction' of students (in a location Fr Mirko is not sure about, and he also believes Jean-Claude is devoting large amounts of time to students from one/limited cultural backgrounds)*
- *On Thursday 5 May 2022, Jean-Claude made a strange comment to Fr Mirko with students present, something to the effect that Fr Mirko was a 'waiter' now. Fr Mirko was carrying a tray of cakes which a parishioner had provided for his 'Ask a Priest' activity. Whilst the comment may have been intended as comedy, it was not interpreted as such, not only by Fr Mirko apparently.*
- *Jean-Claude established a WhatsApp group for student communication (reasonably usual practice in Campus Ministry). He called the group 'Discipuli Jean-Claudio'. This is strange hybrid use of Italian/English, and was interpreted as strange/offensive since Fr Mirko is Italian by heritage. Also, naming a group like this seems to suggest Jean-Claude sees himself as the leader of a 'sect', which is very far from the ideals or hopes of Campus Ministry within the structure of ACU.*

## **7. Conclusion**

*Mr Attieh has been in his position for over 34 months and continues to require significant guidance and support from the supervisor, the previous Associate Director, Identity and Mission, (Mark Lysaght), other identified mentors, and colleagues to perform his duties. However, even when provided with high levels of guidance and support, Mr Attieh has not consistently achieved expected outcomes and standards of work and reliable punctuality. He has not demonstrated an ability to adequately perform the essential responsibilities of the position of Campus Pastoral Associate (Students) in the Campus Ministry.*

*It is acknowledged that Mr Attieh has made efforts to meet the requirements of his two- performance improvement plans however he has failed to demonstrate the required level of improvement on a consistent basis. The further examples of performance concerns reported by Fr Mirko after the completion of the second performance plan substantiate why the required performance level will not be achieved and maintained.*

*As a HEW6, Mr Attieh should be able to satisfactorily perform his duties with routine supervision to general direction. The performance improvement plans have confirmed that it is reasonable to expect Mr Attieh to be able to perform the inherent requirements of his position to an expected level of competence and that it is not practicable or reasonable for the level of support that has been provided to continue.*

*It has been concluded that Mr Attieh has not achieved the required level of competence and performance for the position of Campus Pastoral Associate (Students) and that following significant opportunity since August 2020, his performance continues to be proven unsatisfactory.*

[26] After receiving the Callinan Report, Mr Tonkli provided it to the Applicant for his response (the Response). The Applicant provided the Response on 10 June 2022, in which he responded in detail to the alleged “*further examples of poor performance*”. In particular, regarding his relationship with Father Mirko, the Applicant stated:

***Further Examples of Unsatisfactory Performance***

*Under this title, Br Michael appears to raise numerous issues concerning my relationship with Fr Mirko. They are wholly untrue, misguided, and unfair. I have an excellent relationship with Fr Mirko who I understand holds me in high regard. Building a working relationship with any staff member takes time let alone within the first 4 weeks of semester 3 times a week.*

*Therefore, it is not sufficient and potentially an abuse of authority, for Br Michael to allege on Fr Mirko's behalf whether my performance was unsatisfactory without any collaborative evidence of consultation or confirmation from Fr Mirko. If that were to happen, I am assured that Fr Mirko would refute the allegations in the strongest possible way.*

[27] After receiving the Response Mr Tonkli sought a further response from the Applicant on 7 July 2022. In that correspondence Mr Tonkli outlined the following:

***Further examples of unsatisfactory performance***

*Your characterisation of your professional working relationship with Fr Mirko Integlia is untrue. Fr Mirko has given feedback to your supervisor that he has found you to be uncooperative, unprofessional, and unreliable. Fr Mirko has reported that you have failed to carry out agreed actions, not communicated appropriately, and not carry out appropriate planning. Examples include:*

- a) not replying to emails;*
- b) changing the agreed date of a student day trip without consultation;*
- c) not purchasing a light for the chapel which he requested;*
- d) not progressing an inclusive worship activity with the Evangelical group on campus, even though you agreed to do so; and*
- e) not meeting with some students who have asked to become Catholics, despite Fr Mirko's repeated requests that you do so.*

*It is very concerning that Fr Mirko, who is experienced in university chaplaincy, has contacted your supervisor on his own initiative to question your capacity and ability to perform the role, within weeks of commencing his employment at ACU. Would you like to provide further comment?*

*In regards to the last minute change to the Kayak trip, you claim the allegation that there was no joint decision making to be false. However, the timing of when the decision was*



*made and whether or not it was collaborative is what is disputed, and not whether Fr Mirko had suggested a possible bad weather alternative. Would you like to comment further?*

*The situation where you are not open to all students has been particularly questioned in recent months, including feedback on this point from Fr Mirko (as stated above), as we move back into pandemic normal operations. Would you like to comment further, particularly in light of Fr Mirko's comments?*

*By your response to the changes made to the weekly Monday meeting schedule it would appear it seems that this meeting has been established on a different day to include others, along with Fr Mirko. Did you seek and obtain approval from your supervisor for these changes?*

*In relation to the concern that you fail to accept Campus Ministry activities, I would refer you to Fr Mirko's comments above and invite you to provide further comment.*

*The AWOL issue with your performance is not a matter of managing your work for a 30 minute period in the afternoons, but a concern about your attendance at work for your rostered hours, and your honesty. For example, there was an incident on 5 August 2020 (the day of the explosion in Beirut), when Br Michael called to see how you were doing about the news, and you admitted you were not at work, but had not communicated this to him prior to your absence from work.*

*There was another, more serious incident on 2 June 2021, when Br Michael called you on your office phone, on Teams and your mobile at 9.30 am and you didn't pick up. When you returned Br Michael's call shortly after, you said you were in a meeting with a student. Br Michael contacted Ann O'Connor to verify if you were on campus, and she confirmed you were not on campus, and that neither was your car in the carpark. At around 10.30am, Br Michael confirmed with Ann O'Connor that she had seen you arrive and park in the university carpark moments before. Br Michael called you at around 10-45am to ask how the meeting with the student went and if you had been on campus all*

*morning. You replied that you had been on campus all morning. Br Michael put it to you that you had only arrived on campus around 10.30am. You then admitted you had lied to Br Michael. Would you like to comment further about these issues and your record of being AWOL from work in general?*

*In relation to the 'Waiter incident' you claim to have a positive work relationship with Fr Mirko. This is not the perception that Fr Mirko has of the incident and I would guide you to the above comments provided by Fr Mirko and ask you if you would like to make further comment.*

*It would appear that greater administrative controls should be employed on the WhatsApp group. When you became aware that the name of the WhatsApp group was changed, you didn't act to change it back. Leaving the group name as "Discipuli Jean-Claudio" was inappropriate and unprofessional. Reliance on the suggestion that group chat has contributed positively to the university is irrelevant when weighed against your actions or inactions in this area. Would you like to provide further comment?*

*There is a further concern that has come to hand since you were provided the original performance review report on 20 May 2022 that I would invite you to comment on. On Tuesday 24 May 2022, you had a conversation with Catherine (Cathy) Le Mottee (Administration Officer) whereby you were advised by Cathy that it was appropriate for you to source a transport vehicle (for a field trip) from a university approved supplier. Cathy originally suggested FCM Travel. When a suitable vehicle could not be provided by that supplier, Cathy provided you with an email on the Tuesday evening that Sydney Wide Rentals (which you had used once before, with approval) would be a suitable alternative for procurement of the van. This was a preferred university supplier and had the approval of senior management.*

*Despite this communication and direction, you sought to obtain a van from your neighbour. This act was not authorised and placed the university at great risk as there was no information about the acceptability and roadworthiness of the vehicle nor was there information about insurance or liability. There has also been no invoice presented*

*for payment nor credit card charge as of the date of this letter. I would ask you to comment on why you deviated from the direction to procure the vehicle from a preferred university supplier and place the university at significant risk.*

[28] The Applicant provided his further response on 14 July 2022 (the Further Response). The Further Response provided the following regarding the “*further examples of poor performance*”.

***Further Examples of Unsatisfactory Performance***

9. *It seems that your characterisation of Fr Mirko is substantially different to my experiences and conversations with him. Accordingly, rather than engage in continuous letters about what Fr Mirko has to say about my performance, I request that this matter be set for a private and confidential conference between Fr Mirko, Brother Michael, and myself to hear and understand Fr Mirko’s position in-person, rather than relying on written correspondence. It is not appropriate or good practice for either of us to be making comments on his behalf which should otherwise be said by him directly. Accordingly, I will not make any further comment regarding the incidents involving him and refer you to my responses and attachments in my previous report. I hope we have the opportunity to have the conference to properly understand and comprehend Fr Mirko’s responses to the allegations.*

10. *In respect of going AWOL, I accept that my honesty was impaired from the incidents on 2 June 2021 and have taken steps to rectify and regain Br Michael’s trust. We had multiple meetings about where this incident was raised, and I explained that it came from a place of anxiety and stress at the time. I also promised to work on rebuilding a relationship with Br Michael to which he was willing to achieve. Mark Lysaght played a role in this too, often affirming that my presence at ACU is of great value and witness on many levels. And that working towards furthering Campus Ministry’s vision together with Brother Michael would be a catalyst for healing. I took those words as great motivation in semester 1 2022 to excel.*

11. *Regarding the WhatsApp chat, It is ironic that greater administrative controls are being called for when Fr Mirko is in the chat and has not raised an issue in respect of the management of the chat. In fact, he is the most active on it. He is also capable of administering the chat “who is experienced in university chaplaincy”. It’s also disappointing that you have not conceded that Br Michael’s facts were incorrect about me changing/naming the group chat. Instead, the allegation has moved from changing the title, to failing to manage the chat.*

12.. *Finally, in relation to the van on 24 May 2022, I had a informal casual conversation with you and Cathy on campus which confirmed that I had access to a van which would be free of charge. This is why there is no invoice. The approved suppliers (FCM) did not have suitable vans available. In terms of the roadworthiness of the van, I note that I exercise my due diligence to ensure that I am not endangering the students. Yet since my employment began, I have been taking students in my personal car to university events and activities on several occasions; and was encouraged to do so when possible. This is known to you and Br Michael. Why hasn’t the same questions of insurance, liability or road worthiness been raised about this? Why have I been allowed to do it for several other events? I completely accept that there may be an element of risk for the University, yet there was no scrutiny when it applied to my personal vehicle. Why has the approach not been consistent?*

### **Conclusion**

*It is abundantly clear that your response has not fully considered the facts and evidence presented in my previous report. Whilst I have made the appropriate concessions where necessary, you have doubled down on each response or shifted the allegation when you have realised that you misrepresented the facts in the initial report. You continuously refer to matters being ‘escalated’ to show that they are serious, yet in my view, it seems that all of my actions, big or small, are being escalated. Some of these matters go back to 2020 and were dealt with by the implementation of the performance plans, yet they are being raised again. Therefore, having the matters escalated is of little relevance when they did not lead to disciplinary action or tarnishing staff-student relationships. Any*

*action can be escalated, though it does not necessarily mean that it was valid or warranted.*

*In summary, the combination and isolation of certain events are being used to hold me to account in an attempt to find grounds for my dismissal. I have been frank in my responses to the allegations and consider that this action being taken by the university to be deliberate, targeted, and purposeful.*

*My actions or inactions may not have been perfect, and I do not expect them to be, though I am certain that the allegations represent a storm in a teacup, when comparing with the outcomes achieved and success during my employment. It is hugely disappointing that this has not been acknowledged and your response has chosen to be aggressive, rather than conciliatory.*

*I will continue to defend my conduct where it is merited in the hope that my employment is safeguarded.*

*Kind Regards,*

[29] After receiving the Further Response Mr Tonkli arranged a meeting on 2 August 2022, with Brother Michael, Father Mirko, Mr McCosh from Employment Relations, the Applicant, and his support person Mr Zeitouni. There was some dispute regarding what was said in that meeting, the resolution of which was not assisted in the Hearing by Mr Tonkli being the only one of the three attendees at that meeting on the part of the Respondent to give any substantial detail regarding what was said at that meeting in their statements. Arising from my below findings of witness credit, and consideration of the oral evidence in the Hearing, I prefer the evidence of the Applicant, that at the 2 August 2022 meeting words to the following effect passed between the parties:

*Mr Tonkli: You called this meeting to address the allegations in the Report regarding Fr Mirko. Fr Mirko will be joining this meeting and then we will continue to speak of the matters of the performance plans. We reiterate our claims laid out in the Report. We have observed a pattern in your performance since 2020.*

*Applicant: I cannot deny that there were shortfalls in my performance, which were laid out in the First Performance Improvement Plan. However, improvements and progress were made.*

*Br Michael: Well, we saw your behaviour improve really well during the Performance Improvement Plans and then we see a plateau. How many more chances can we give?*

*Mr Tonkli: And what about your use of heavy language in your response to the Report? Will this affect your continuing work with Br Michael?*

*Applicant: I responded to what was in front of me in the way it was written. My initial reaction was shock and fear. I feel strongly about how I wrote but nonetheless, I would be willing to move forward and continue building a relationship with Br Michael – one that has a healthy level of scrutiny. What would a healthy level of scrutiny look like going forward?*

*Br Michael: I prefer to not respond to that question.*

*Applicant: [to Fr Mirko] In terms of the allegation that I didn't follow directions to purchase a light for the chapel, I purchased the light on the same date you sent me a text asking me to, on 15 March 2022. The next day, I told you I had purchased it and also handed you a retractable key chain I thought would be good for you as a small gift.*

*Fr Mirko: Okay, That may be the case but to this day, I have not received the light.*

*Applicant: The light was difficult to operate with the digital buttons provided, and there were no useful instructions on the box, so I believed that giving it to you wouldn't have solved the problem. In fact, Fr Mirko, you saw it in my office. I even had one of the facility staff check the light. You can cross check the purchase date with the internal credit card statements on FlexiPurchase too.*

*Fr Mirko: And what about the kayaking trip? You never confirmed with me that you were changing the plan from kayaking to morning tea with Bishop Umbers.*

*Applicant: Father, it was your idea that we organise a morning tea visit to Bishop Umbers. You mentioned the idea to Bishop Umbers and called his assistant with the idea, gave me her number, and offered that a trip to the Bishop's house be a Plan B to the kayaking trip.*

*Two days before the kayaking trip, I received a text from the kayaking centre saying the booking had been cancelled due to the rain. Then I organised the visit to the Bishop's house as a Plan B, as per your suggestion.*

*Fr Mirko: It was then and there you didn't confirm with me, you just went ahead and told me you were going to do it.*

**[30]** After the 2 August 2022 meeting, Mr Tonkli wrote to Father Anthony Casamento recommending continuing with disciplinary steps against the Applicant.

**[31]** After further responses, Father Casamento recommended termination of employment to the Vice Chancellor. On 18 October 2022, the Vice-Chancellor and President of the Respondent wrote to that Applicant as follows:

*Dear Mr Attieh,*

***Re Termination of Employment with Australian Catholic University***

*I have been provided with a recommendation from Father Anthony Casamento, Vice President, to take disciplinary action against you in relation to unsatisfactory performance. I have read all the material that has been shared with you for consideration and comment. I am of the view that the process accorded to you to improve your performance has been extensive and fair.*

*I am satisfied that this matter has been dealt with properly and in accordance with the provisions of the Australian Catholic University Staff Enterprise Agreement 2017-2021 (the Agreement). I note that in your letter to Father Anthony dated 30 August 2022 you also stated your agreement that procedural fairness has been afforded to you during the process and that the steps outlined in clause 4.9 – Managing Unsatisfactory Staff Performance of the Agreement have been satisfied.*

*In accordance with clause 4.9.3.6 of the Agreement I have considered all the reports provided to me together with your responses to those reports and have formed the view that your employment with ACU should be terminated on the grounds of unsatisfactory performance.*

*Whilst I have formed this view, I am aware that you are entitled to put to me any matter you may believe appropriate for my consideration. This must be done within 5 days from the date of this letter and your response may be addressed to Vice Chancellery, MacKillop Campus, PO Box 968 North Sydney, NSW 2059.*

*Failing advice to the contrary, I intend to provide you with a notice period of 3 weeks in accordance with clause 4.9.3.8 of the Agreement, which means that your final day of employment with the university will be Friday 4 November 2022.*

*I understand that this must be a very difficult time for you. I encourage you to make use of the University's Employee Assistance Program which is free of charge and is available to all employees and their immediate families. The Free call number is 1800 806 376.*

*Please contact Mr Kevin McCosh or Mr Robert Tonkli in the first instance if you wish to discuss any matter raised in this letter.*

[32] After the Callinan Report and during the period of responses, an issue arose regarding the hiring of a bus for an excursion. The Applicant sent Ms Le Mottee a message stating:



*Br Michael mentioned that we have a contract with a hire vehicle company we need to use. Is there a way I can get on top of this asap.) would you have those details?*

[33] The Applicant had obtained a quote from a bus hiring company called Sydney Wide Rentals (SWR). Ms Le Mottee requested that the Applicant send through the quote he had received from SWR so that a comparison could be made against ACU preferred suppliers. She advised the Applicant that the University used a company called FCM for travel bookings, including vehicle hire, and that she would undertake a comparison with that company.

[34] Ms Le Mottee established that FCM could not supply a bus to carry 12 people. She understood that SWR were offering insurance and roadside assistance for the price that was quoted to the Applicant. She emailed the Applicant as follows

*Hi Jean-Claude,*

*How many people does this carry? For \$179.00 it would be best to go with them. The best we could do through FCM is a Kia Carnival which only holds 8 so you will have to get a few.*

*Are there any other changes to consider? Ease of dropping off and picking up is important to consider.*

*Kind regards*

[35] The Applicant responded advising that he would make contact with SWR the following morning and confirmed insurance was included. The following day Ms Le Mottee advised the Applicant that she would confirm management approval for the event and to use of SWR for the vehicle hire. While Ms Le Mottee considered she had told the Applicant to use SWR, the Applicant's evidence was that between 24 and 30 May 2022, Ms Le Mottee had said:

*Finance hasn't got back to me in time. Just do what you think is best with the bus.*

[36] On Tuesday 31 May 2022, Mr Tonkli and Ms Le Mottee were having a conversation with the Applicant. Ms Le Mottee asked the Applicant was everything okay with obtaining a bus from SWR. He responded with words to the effect:

*Oh no, I didn't use them. I obtained a bus from a friend [his neighbour], at no cost to the university.*

### **Witness Credibility**

#### **(a) The Applicant**

[37] The Applicant presented as a person who aimed to be clear and concise in his evidence. He readily made concessions that he understood would not advance his case including conceding he was given opportunities to respond to allegations,<sup>1</sup> and readily conceding he lied about his presence on campus on 2 June 2021.<sup>2</sup> Overall, the Applicant's evidence was not subject to significant challenge.

#### **(b) Father Mirko**

[38] The importance of the evidence of Father Mirko was in fact highlighted in the written evidence of Mr Tonkli, where he observed:

*After the discussion with Brother Michael and Father Mirko, I became very concerned with the unacceptable work performance of the Applicant. My concern was heightened by the fact that Fr Mirko, who had more than ten years' experience as a university Chaplain in Rome, was raising concerns about the Applicants performance and non-cooperative behaviour within a few weeks of commencing his role as the ACU Strathfield Campus Chaplain.*

[39] Father Mirko presented as a witness to whom English was not his first language. That fact could not, however, explain the deficiencies in, and unacceptability of, his evidence.

[40] The first concerning incident in Father Mirko's evidence occurred at the commencement of his evidence in the Hearing when he sought to amend paragraph [8] of his statement, that originally read (with the underlined "not" sought to be omitted by amendment in the Hearing):

*I note in clause 11 of the Applicants statement that he claims that one factor that was deemed unsatisfactory was the expectation to improve his relationship with me. I say that I did not have a personal relationship with the Applicant, and I certainly did not have a working relationship with him at all. Any working relationship, I say was non-existent.*

[41] While it is not unusual for a witness to seek to amend their written evidence, the above amendment was made after the reply statement of the Applicant had annexed 70 pages of SMS messages, with at least ten messages per page (the Text Messages), between the Applicant and Farther Mirko that clearly disclosed friendly, and work like, communications. Father Mirko's evidence regarding the Text Messages included:<sup>3</sup>

*So, do you maintain that the 70 pages of text messages were sent in a merely personal capacity? Is that your evidence? -Yes. When I say working skills, I don't mean to celebrate a mass or to have dinner with the students. That's not for me working skills. When I say working skills, I mean what I said at the beginning, and I repeat to have the ability to sit around a table and to plan the semester.*

And:<sup>4</sup>

*And that's the sole reason you sent these messages because he works with you, correct? -Yes.*

*So, then, you had a working relationship with him, didn't you? -Yes, but my point - - -*

[42] I further note that, while Father Mirko was the subject of most robust questioning, he inappropriately resorted to threatening his questioner in the following exchange:

*Thank you. You've been caught out in a lie about not having a relationship with Mr Attieh? -Yes. Yes.*

*Isn't that correct, Father Mirko? -Yes. Well, about this I think you are – you are repeating the defamatory claim of your client. We will meet again on this point.*

*Are you threatening me Father Mirko? -Yes. We will meet again.*

[43] Father Mirko sought to tailor his evidence to a narrative that he thought would best suit the Respondent's case, rather than directly and clearly answering the questions asked of him. Where there exists any difference with the evidence of the Applicant, I prefer the Applicant's evidence.

**(c) Brother Michael**

[44] Brother Michael was an unsatisfactory witness because, notwithstanding making extremely reluctant, but entirely appropriate, concessions regarding the correctness of what Father Mirko may have told him, he simply refused to accept what was unarguable, being that Father Mirko may have been wrong or misleading about other material matters. His evidence included the following:<sup>5</sup>

*That's right. But now that you've seen the text messages, do you concede that what Father Mirko told you was incorrect? -I do.*

*Thank you. So now that you can see that Father Mirko has not always been the most reliable witness, do you concede that there is a possibility that many of the conclusions that you drew about Mr Attieh were also incorrect? -No, I don't.*

*How do you reconcile that with the fact that there was no issue with Mr Attieh and the kayaking trip, but yet you've continued to cite that as a justification for why you believe he'd failed in his role? How do you reconcile that, Brother Michael? -Well, I see that*

*there's one example here where there was accurate communication between the two, but the other issues that Father Mirko raised, they were things that did need attention.*

*But hang on, all the way through the process of the second performance improvement plan and the various letters that were written and, in fact, the recommendation to the university to terminate the employment, the kayaking trip was continued to be raised, by the university, as a basis for Mr Attieh's failure as an employee. Do you concede that? -It was part of it.*

*It was part of it. But yet you've now conceded that it was incorrect, correct? -From what I've seen here, yes.*

*Right. So do you concede that there's a possibility that not everything that Father Mirko told you, about Mr Attieh, was accurate? -No, I don't.*

*You don't? You don't concede that anything else he told you could have been incorrect? -No.*

[45] After further evidence of error regarding the change of name of the Whats App group, Brother Michael's evidence was:<sup>6</sup>

*Right. Now, we've got two errors that Father Mirko has made. We've now got an error about the kayak trip and we've now got an error about the WhatsApp group. Are you still not willing to concede that Father Mirko may have misled you about other matters? -No, I won't concede that.*

*Because you can't concede anything, can you Brother Michael? You refuse to concede that you had already made the decision to fire Mr Attieh, no matter what happened, correct? -Not true.*

*That's why you stand here today and you refuse to accept the patently obvious facts, when they're presented to you? -Not true.*

[46] The role of a witness is not to blindly and baselessly defend their evidence and the case that their side advances. Their role is to consider the questions asked of them and responsively answer those questions. I do not consider Brother Michael discharged that role, and where his evidence differs from the Applicant, I prefer the evidence of the Applicant.

**(d) Robert Tonkli**

[47] The evidence of Mr Tonkli is affected by the accuracy of the evidence of Father Mirko and Brother Michael. Insofar as he relied on their evidence he may have, and did, adopt their errors. In particular, his evidence was:<sup>7</sup>

*How did you satisfy yourself that those were legitimate complaints? -I took it on Father Mirko's word. He's a chaplain with a lot of experience in that area who had started soon before who was speaking to me in the catchups that we'd had about his difficulties working with the applicant.*

[48] Mr Tonkli readily conceded the following:

*Sorry. Mr Tonkli, the reality is again, isn't it, you took no steps to satisfied yourself that any of these allegations were true? You went entirely on what you were told by other employees. Correct? -Correct.*

**Submissions**

**(a) Applicant's Submissions**

[49] The Applicant noted that the relevant test is not whether the employer believed on reasonable grounds, after sufficient inquiry, that the employee was guilty of the conduct. Rather, the Commission must make a finding as to whether the conduct occurred based on the evidence before it.

[50] While the Respondent alleges that the dismissal was for underperformance, comprised of a series of concerns, both ongoing and of specific incidences, that led to their decision to terminate, the Applicant submitted that the ongoing concerns and specific incidences were trivial, capricious, fanciful, spiteful and/or vexatious, and did not satisfy valid reasons for termination.

[51] The Applicant submitted the Respondent's case rests on a combination of allegations of poor performance and of misconduct (although not serious misconduct), constituted by many small matters that the Respondent alleges collectively led to the Applicant's dismissal. As a whole, the conduct had been largely unproven.

[52] Further, the decision to terminate was made by the Vice President of the University, Father Casamento, who was not directly involved with the Applicant's employment and gave no evidence in the proceedings. It appears that the sole basis for the termination by him was the report provided to him by Robert Tonkli, which was a report unsubstantiated by any further investigation and was informed by false accusations against the Applicant.

[53] Regarding the Applicant's First PIP, by the Respondent's own evidence, all issues were resolved to a satisfactory level. Mr Tonkli wrote to the Applicant on 20 May 2022 stating that he had addressed all aspects of the First PIP to a satisfactory level. Nonetheless, Mr Tonkli wrote to Father Casamento on 19 August 2022 as follows:

*At the completion of a 10-week review period, a further meeting was held with Mr Attieh on 30 October 2020. At this meeting, Mr Attieh was advised that his performance had improved in some areas, but there were still areas of performance that were not meeting the required standard.*

[54] The Applicant submitted that it is open to the Commission to conclude that, save for the untruthful and misleading statement made by Mr Tonkli to Father Casamento on 19 August 2022, the Applicant's employment would not have been terminated, as Father Casamento was provided with no other reason to believe that Mr Attieh's performance was consistently deficient.

**[55]** The Applicant submitted that the Second PIP, which commenced on 21 February 2022, was the sole basis upon which the Respondent makes allegations against the Applicant that led to termination. At best, the Respondent's witnesses either never witnessed the conduct themselves (Mr Tonkli) or gave vague generalisations about the Applicant's abilities (Father Mirko). When Mr Tonkli was presented with an alternative version of events by the Applicant in his written responses, he conceded he conducted no further investigation to determine whether the conduct occurred beyond trusting the word of Father Mirko and Brother Michael. Despite acknowledging that he didn't have great knowledge of the details of the First PIP and relied on Brother Michael's instructions without proper knowledge of the allegations, Mr Tonkli authored the report recommending termination to the Vice President. Mr Tonkli's own evidence is that once he received Mr Attieh's reply on 14 July 2022, he was convinced that Mr Attieh was never going to change and had to be terminated.

**[56]** The Applicant submitted the failure by Mr Tonkli to do anything at all to satisfy himself that the allegations raised against the Applicant had any merit, demonstrated his predetermined intention to dismiss the Applicant, and Mr Tonkli's actions also make the nature of the dismissal inherently prejudiced and/or capricious.

**[57]** The Applicant submitted that Father Mirko's evidence under cross-examination provided no insight into the Applicant's alleged poor performance or misconduct. Father Mirko's evidence failed to substantiate any of the accusations levelled against the Applicant. At most, Fr Mirko's evidence demonstrated his own impatience, inconsistencies in his evidence, and his threatening demeanour.

**[58]** The Applicant submitted that even if the Commission was satisfied that the conduct occurred, the mitigating circumstances of the context of that conduct that was deliberately not mentioned in the Respondent's evidence, spoke to the trivial nature of the reasons for dismissal and rendered the dismissal harsh, unreasonable, and unjust. While there were several allegations against the Applicant outlined in Mr Tonkli's various correspondences to the Applicant, the only evidence the Respondent provided to the Commission to support its conclusions is essentially related solely to the following complaints:



- (i) A poor relationship between the Applicant and Fr Mirko;
- (ii) Failing to abide by university policy in hiring a van;
- (iii) Failing to follow through on directions from his supervisors in purchasing a chapel light, organising a kayak trip, and changing a WhatsApp group name; and
- (iv) Various other miscellaneous complaints are outlined by Mr Tonkli in his letters to the Applicant, but the Respondent led no evidence to sustain each complaint.

**(i) Relationship with Father Mirko**

**[59]** The Applicant made clear in his evidence that he was entirely unaware of any animosity, hostility, or negativity in his dealings with Father Mirko. The Applicant has maintained that this direction was a shock to him, as he perceived there to be a strong and trusting friendship between himself and Father Mirko. The Applicant's shock was allayed by Father Mirko, who reviewed the directions alongside the Applicant, when he laughed at the content, assured the Applicant that he had no problem with their relationship, and assured the Applicant that he [Fr Mirko] did not make any complaints to the University.

**[60]** Mr Zeitouni attested to comments by Father Mirko that rather than criticising the Applicant's performance, he told the 2 August 2022 meeting that the Applicant was a good performer.

**[61]** The Applicant noted that Father Mirko conceded under cross-examination that despite his claims that he made repeated complaints to the University about the Applicant, he could not give an example of a time when he spoke to the Applicant about his complaints. Father Mirko conceded there was nothing in the Text Messages with the Applicant about his work performance. The Applicant submitted that it can be inferred from the fact that Father Mirko never brought any complaints to the Applicant that there were in fact no complaints to be made about the Applicant's work performance.

[62] The Applicant submitted that part of the Respondent's allegation of the poor working relationship between Father Mirko and the Applicant was Brother Michael's contention that the Applicant didn't regularly meet with Father Mirko. However, Brother Michael conceded that he never told the Applicant he should be meeting with Father Mirko regularly. Furthermore, Brother Michael never raised an issue with the Applicant's statement that they did meet regularly.

[63] Finally, the Applicant's representative submitted that the idea that the Applicant could have improved a relationship that he had no knowledge was problematic was ludicrous. The fact that the Applicant's dismissal was partially attributed to that issue as undoubtedly harsh, unjust and unreasonable, as well as vexatious, capricious, and prejudiced.

**(ii) Van Hire**

[64] The Applicant was directed to hire a van for a university field trip in May 2022. When encountering difficulties in securing a van from the University's preferred supplier, the Applicant made a judgment call to borrow a vehicle from his neighbour.

[65] The Applicant submitted it was clear from the email correspondence that no explicit direction was given by Ms Le Mottee to the Applicant with respect to the vehicle hire. Nonetheless, Mr Tonkli concluded that she had given such direction. Mr Tonkli could not supply a copy of the University's policy about bus hire and did not know whether the bus used by the Applicant complied with the University's policy in any event (as he never enquired), and Ms Le Mottee conceded she was never asked to make any enquiries of the Applicant or the neighbour as to the status of the bus.

[66] The Applicant submitted that therefore, there was absolutely no evidence before the Commission that would enable a conclusion that this allegation was sustained.

**(iii) Chapel Light/Kayak Trip/WhatsApp**

[67] The Applicant was directed by Father Mirko to purchase a light for the University chapel. The Applicant purchased the light as directed, and in attempting to install it, faced problems fitting it. At the meeting of 2 August 2022, the Respondent accused the Applicant of failing to purchase the light when requested. The Applicant then told Father Mirko that he had purchased the light when asked and had a receipt.

[68] The Applicant submitted that despite the Applicant's credible explanation this issue was still raised against the Applicant by the Respondent as an example of failing to cooperate and follow directions. Not only was the issue raised in the Respondent's reasons for dismissal, but it was raised as a failure to purchase the light at all, which Mr Tonkli knew was not the case. Mr Tonkli simply accepted what Brother Michael had told him.

[69] The Applicant submitted that this allegation against the Applicant was irrefutably spiteful, capricious, fanciful, prejudiced, and vexatious, and most definitely harsh, unjust and unreasonable.

[70] The accusation regarding the Kayak trip was that the Applicant changed the plans for a university field trip at the last minute, and was another example provided by the Respondent of the Applicant's failure to follow directions.

[71] The Applicant submitted that it was clear from the evidence that he was not responsible for the postponement of the trip, and Brother Michael conceded under cross examination that he could not fault the Applicant for the kayak trip issue, and Father Mirko's assertion to him about the Applicant's failures in this respect were incorrect.

[72] The accusation regarding the WhatsApp Group was that the Applicant was responsible, or at the very least, complicit in the renaming of a chaplaincy WhatsApp group to the name '*Discipuli Jean-Claudio*'.

[73] The Applicant submitted, however, that it was clear from the evidence that:

- (a) The name was changed by Mr Poyitt on or about 4 May 2022;

- (b) Any member of the group could change its name, including to change it back;
- (c) Father Mirko was a member of the group;
- (d) Father Mirko did not change the name back; and
- (e) Mr Poyitt's employment was not terminated for this incident.

[74] Notwithstanding the above, Brother Michael admitted that he still stated the Applicant was responsible for changing the Whats App name in the report to the Vice Chancellor, which informed the decision to terminate the Applicant.

### **Procedural Fairness**

[75] The Applicant conceded that he:

- (a) Was notified of the reasons for dismissal (s.387(b));
- (b) Was given the opportunity to respond to any allegations (s.387(c)); and
- (c) Was allowed to have a support person present at all relevant times (s.387(d)).

[76] The Applicant submitted that the Respondent is a relatively large enterprise, with dedicated human resource management and expertise. There was no reason why the Respondent couldn't have followed appropriate and fair procedures in effecting the dismissal.

[77] Nevertheless, the Applicant submitted that the Respondent had decided to dismiss him and was simply '*going through the motions*' of procedural fairness. This was demonstrated by the Respondent's repeated failure to adequately address any of the responses prepared by the Applicant, or to conduct any further investigation into any of the disputed issues raised by the Applicant.

[78] Finally, the Applicant submitted that the University produced documents in evidence, critical of the Applicant's performance, which were never put to the Applicant. Such an oversight was not accidental. The Applicant was not being given a fair go.

### **Remedy**

[79] The Applicant submitted that, having regard to s.390(3)(b), an order for compensation is appropriate in all circumstances of the case. There is no reason for the Commission to believe that the Applicant would not have remained employed by the Respondent, save for the effect of the termination. He therefore would have received \$43,968.50 in remuneration between 28 October 2022 and the date of the Appellant's Submissions.

[80] The Applicant noted he had attempted to mitigate his losses by applying for several jobs since termination, but had been unable to secure any work, save for some casual Uber driving. The Respondent did not challenge the evidence regarding mitigation.

[81] As the Applicant had earned \$16,783 in income since the date of termination, he had lost \$27,185 by reason of the termination.

### **Respondent's Submissions**

[82] The Respondent submitted that the Applicant's contract of employment contained an express term relating to the ongoing employment being subject to the performance of all duties of the position to a satisfactory standard in the following terms:

*Your ongoing employment is subject to your performing all of the duties of your position to a satisfactory standard. This will be evaluated through the probation and performance management procedures implemented by the University from time to time.*

[83] The Applicant's inability to achieve and maintain the required standard of work performance required by his role as a Campus Pastoral Associate meant that he failed to meet

the terms of his contract of employment. This was substantiated by his inability to meet the evaluation requirements of the performance management procedures even when provided with the assistance of written and verbal feedback on performance, guidance and support which also included a university-initiated mentoring arrangement.

**[84]** The Respondent referred to the decision of the Full Bench in *B, C and D v Australia Postal Corporation T/A Australia Post*,<sup>8</sup> which found:

*Subject to that, as indicated by Northrop J in Selvachandran, “valid reason” is assessed from the perspective of the employer and by reference to the acts or omissions that constitute the alleged misconduct on which the employer relied, considered in isolation from the broader context in which they occurred. It is the reason of the employer, assessed from the perspective of the employer, that must be a “valid reason” where “valid” has its ordinary meaning of “sound, defensible or well founded”. As Northrop J noted, the requirement for a valid reason “should not impose a severe barrier to the right of an employer to dismiss an employee”.*

**[85]** The Respondent submitted the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer. The question the Commission must address is whether there was a valid reason for the dismissal related to the employee’s capacity or conduct (including its effect on the safety and welfare of other employees). The appropriate test for capacity is not whether the employee was working to their personal best, but whether the work was performed satisfactorily when looked at objectively.

**[86]** Regarding evidence of poor performance as a valid reason, the Respondent noted that the Applicant’s poor work performance issues were raised from a number of different sources, being:

- (a) The original concerns of Brother Michael, who experienced difficulty with the Applicants non responsiveness to email communication and his regular unaccountable

absences, attending the workplace late, and not attending for work at all without providing prior notifications.

(b) Complaints were raised by the Campus Dean, Ms Miriam Tanti, that related to poor work performance involving project work and unsatisfactory communications.

(c) Complaints were received from Ms Ann O'Connor detailing how an unexpected visit by the Applicant to a tutorial not only raised the ire of the Tutor who thought it was an act of surveillance, but it also alarmed and unsettled the students and raised the concern of the Executive Dean

(d) Complaints were received from Peter Freeman from Foodbank who stated that he found the Applicants commitment was less than 100%.

(e) Issues of unsatisfactory performance were formally raised by Father Mirko in relation to the Applicant's refusal to address project work and a variety of work performance conveyed to Brother Michael.

(f) The refusal to accept lawful instructions on where to obtain a bus to carry students and staff, opting instead to borrow his neighbours' vehicle.

**[87]** The Respondent's submission was that the number, consistency and gravity of these performance complaints dispelled the notion advanced by the Applicant that it was a pattern of trivial and prejudiced criticism levelled at him.

**[88]** The Respondent also noted that the Applicants tardiness with email correspondence and general poor communication style was observed by numerous witnesses and featured in both the First and Second PIP's. In particular, the Respondent noted that on 2 June 2021, when the Applicant was again not present for work and was asked about his absence by Mark Lysaght and Brother Michael, he lied to his employer. The Respondent submitted this was a breach of the Applicant's duty of fidelity to the Respondent.<sup>9</sup>

**[89]** While the Respondent noted that it was broadly accepted that the Applicant was successful in addressing all the elements of the First PIP, two further performance issues that came to light during that PIP process. Further, the Respondent submitted that unlike the First PIP, elements of the Second PIP could not be satisfied by the Applicant. Brother Michael was required to advise the Applicant in writing to continue focusing on improving areas of his work performance. The areas cited by Brother Michael included:

- a) Punctuality for work.
- b) Collegial standpoint and collaborative effort, within and beyond Campus Ministry.
- c) Following instructions.
- d) Responding within acceptable timeframes to administrative tasks requests and following up on tasks assigned or projects and collaborative tasks.
- e) Ensuring the whole workday is active and presence is visible.

**[90]** The Respondent identified the bus issue as a failure to follow lawful directives, and submitted that it was clear on the evidence that Ms Le Mottee provided a clear and lawful written instruction to the Applicant to procure a bus from Sydney Wide Rentals.

**[91]** The Respondent submitted that the failure of the Applicant to follow lawful and reasonable directions, particularity with respect to the procurement of a bus to transport students and staff should be found to be a sound and defensible reason for his dismissal. The Applicant's failure to follow lawful directives recklessly placed people at risk of their safety if the bus obtained from the Applicant's neighbour was unroadworthy and deficient of insurance cover.

**[92]** The Respondent submitted that the Applicant had a responsibility to provide an oversight role with respect to university social media groups. When the WhatsApp group had a name change and the Applicant became aware of it, it was within his remit to address the situation. He didn't. The Respondent submitted that this provided a further example of how the Applicant abrogated his duties and responsibilities.

**[93]** The Respondent submitted that an inherent requirement of the position held by the Applicant was to plan, develop and execute projects and events, and the evidence demonstrated



that the Applicant's performance in this area was very poor or non-existent. Evidence also suggested that the Applicant totally abrogated his responsibility in this area when it came to Father Mirko's repeated requests for projects and events.

[94] The Respondent noted that the Applicant was provided with the opportunity of a mentor, Ms Sarah Rose. The mentoring arrangement was in existence for about six to eight months, but it failed to achieve the desired results.

[95] The Respondent submitted that Mr Tonkli entered the meeting held on 2 August 2022 with an open mind towards the Applicant's propensity to improve his unsatisfactory performance. However, he found the Applicant's defensive responses and dismissive attitude convinced him that *'he wasn't going to change and that any further efforts to help him improve his performance would be unbeneficial'*. Father Mirko also expressed the view that ... *'By about July 2022 I had given up on the Applicant realizing that he was not going to change'*.

[96] The Respondent submitted that the Applicant was provided with considerable notification of the reason for termination of employment (s.387(b)). The Applicant was made aware on numerous occasions that the termination of his employment was a consequence of him not being able to perform work at a satisfactory standard.

[97] The Respondent submitted that the Applicant was provided with considerable opportunity to respond to the reasons for proposed termination of employment (s.387(c)). The Applicant was made aware on numerous occasions that the termination of his employment was a consequence of him not being able to perform work at a satisfactory standard.

[98] The Respondent noted that at no time was the Applicant unreasonably prevented from being accompanied by a support person (s.387(d)).

[99] Regarding s.387(e) of the Act, the Respondent submitted that the Applicant attended eight meetings with the Respondent to discuss aspects of his unsatisfactory work performance. At a number of meetings, particularly attended with Brother Michael, he was provided with

copies of the *ACU – Managing Unsatisfactory Performance Policy* and informed of the consequences of not improving his work performance to a required level appropriate for his role.

[100] The Respondent submitted that the Respondent is a large organisation with appropriate procedures in place to effect termination of employment that include clause 4.9 of the Agreement, and the *ACU - Managing Unsatisfactory Performance Policy*. The Respondent submitted that all criteria of clause 4.9 of the Agreement were satisfied.

[101] Regarding any other matter considered relevant (s.387(h)), the Respondent noted the submission of the Applicant that there was a considerable period between the First and Second PIP's and there was no concern with the Applicant's performance during that period. The Respondent submitted that was an incorrect assessment, and noted it was decided to suspend performance management of the Applicant due to his reported sleep apnoea and the impacts of the Covid pandemic.

[102] The Respondent submitted that the evidence demonstrated that the Applicant had been afforded a 'fair go all round' with respect to his dismissal. There was a valid reason for the termination of the Applicant's employment due to unsatisfactory performance. All elements of s.387 of the Act had been satisfied by the Respondent, and the Respondent urged the Commission to dismiss the Application.

## **Consideration**

### **(a) *Preliminary findings***

[103] I am satisfied that:

- (a) The Applicant's unfair dismissal application was lodged within the 21-day statutory time limitation found at s 394(2) of the Act;
- (b) The Applicant is a person protected from unfair dismissal in that:

- (i) he had completed the minimum employment period set out in ss 382 and 383 of the Act; and
  - (ii) an agreement, the *Australian Catholic University Staff Enterprise Agreement 2017 - 2021*, applied to his employment (s 382(3)(b)(i)); and
- (c) His dismissal was not a case involving the Small Business Fair Dismissal Code (s 385(c)); and
- (d) the Applicant was dismissed at the initiative of the employer (ss 385(a) and 386(1)(a)).

**(b) Was the Dismissal Harsh, Unjust or Unreasonable?**

**[104]** I must consider the question of whether the Applicant's dismissal was '*harsh, unjust or unreasonable*' and therefore an unfair dismissal, pursuant to the considerations outlined in s.387 of the Act.

**[105]** Section 387 of the Act states:

**387** *Criteria for considering harshness etc.*

*In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:*

- (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.*

**(c) Valid Reason**

**[106]** In *Sydney Trains v Gary Hilder*<sup>10</sup> (“Hilder”) the Full Bench summarised the well-established principles for determining such matters<sup>11</sup>:

*“The principles applicable to the consideration required under s 387(a) are well established, but they require reiteration here:*

*(1) A valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced.*

*(2) When the reason for termination is based on the misconduct of the employee the*

*Commission must, if it is in issue in the proceedings, determine whether the conduct occurred and what it involved.*

*(3) A reason would be valid because the conduct occurred and it justified termination. There would not be a valid reason for termination because the conduct did not occur or it did occur but did not justify termination (because, for example, it involved a trivial misdemeanour).*

*(4) For the purposes of s 387(a) it is not necessary to demonstrate misconduct sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee's dismissal (although established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).*

*(5) Whether an employee's conduct amounted to misconduct serious enough to give rise to the right to summary dismissal under the terms of the employee's contract of employment is not relevant to the determination of whether there was a valid reason for dismissal pursuant to s 387(a).*

*(6) The existence of a valid reason to dismiss is not assessed by reference to a legal right to terminate a contract of employment.*

*(7) The criterion for a valid reason is not whether serious misconduct as defined in reg 1.07 has occurred, since reg 1.07 has no application to s 387(a).*

*(8) An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal for the purposes of s 387(a) will be a relevant matter under s 387(h). In that context the issue is whether dismissal was a proportionate response to the conduct in question.*

*(9) Matters raised in mitigation of misconduct which has been found to have occurred are not to be brought into account in relation to the specific consideration of valid reason*

*under s 387(a) but rather under s 387(h) as part of the overall consideration of whether the dismissal is harsh, unjust or unreasonable.”*

**(i) Identification of Reasons**

**[107]** It was difficult to discern a definitive list of the reasons for the dismissal, in order to then allow an assessment of validity. In the Form F3 Employer’s Response, the reasons for the dismissal were outlined as follows in response to Question 3.1 “*What were the reasons for the dismissal?*”:

1. *The Applicant’s employment was terminated for unsatisfactory performance relevant to his role.*
2. *The dismissal occurred after the satisfaction of the requirements of clause 4.9 - ‘Managing Unsatisfactory Staff Performance’ of the Australian Catholic University Staff Enterprise Agreement 2017-2021.*
3. *The Applicant was provided with opportunity to respond to the findings of unsatisfactory performance and the recommendation for termination.*
4. *On 18 October 2022 the Applicant was provided with written notification of termination of employment (Attachment 3). The effective date of termination was amended to 28 October 2022 by payment of one week’s pay in lieu of notice.*

**[108]** The reference above to the Termination Letter did not assist. That correspondence stated:

*I have been provided with a recommendation from Father Anthony Casamento, Vice President, to take disciplinary action against you in relation to unsatisfactory performance. I have read all the material that has been shared with you for consideration and comment. I am of the view that the process accorded to you to improve your performance has been extensive and fair.*

[109] It would seem tolerably clear that the reference to “*all the material that has been shared with you for consideration and comment*” in the Termination Letter was to the Callinan Report that formed the parameters of enquiry in the disciplinary process and outlined the subjects that formed sub-headings in the Response and the Further Response. The Callinan Report traversed the entirety of the Applicant’s employment and stated reliance on matters that predated the termination of employment by a matter of years.

**(ii) Reliance on Earlier Instances of Misconduct**

[110] One potent example of such dated reliance was the reliance on the deficiencies that were said to ground the First PIP. Contemporaneously, those deficiencies were completely resolved within ten weeks of 24 August 2020, yet they were relied upon in the Callinan Report as examples of misconduct or performance deficiencies, notwithstanding such resolution.

[111] While it is correct to observe that the Applicant made various concessions regarding alleged deficiencies identified in the First PIP, in the absence of such concessions I would not be prepared to accept the alleged deficiencies identified in the First PIP as established due to the absence of evidence establishing such deficiencies, and my reluctance to accept the evidence of Brother Michael.

[112] However, over and above the absence of evidence, I consider it extremely unfair to rely on such dated and completely resolved issues as constituting valid reasons for the termination, as opposed to whether those earlier instances of misconduct or performance deficiencies may be relevant to the question of whether there was a valid reason for dismissal because they may increase the gravity of later misconduct, over two years later. At most the deficiencies identified in the First PIP provide unverified allegations as to historical performance. Similarly, the incident of 2 June 2021, where the Applicant subsequently conceded he lied about his presence that day, was dated and dealt with.

[113] I consider a similar approach is appropriate regarding seven of the eight alleged deficiencies identified in the Second PIP that were subsequently found to be resolved five weeks

later. While not as dated as the First PIP allegations, being made on 21 February 2022, the Second PIP deficiencies on three occasions recorded “*improvement noted*” at the time those allegations were made, and the balance but for one alleged deficiency were promptly addressed.

[114] In *Mr Paul Conicella v Phillip W Hill & Associates Pty Ltd T/A Hunter Legal & Conveyancing*,<sup>12</sup> Commissioner Saunders, as he then was, concisely distilled the authorities and principles regarding reliance by an employer on earlier instances of misconduct on the part of an employee when making a later decision to dismiss the employee. He observed and found:

[29] In *Toll Holdings Ltd t/a Toll Transport v Johnpulle*, a Full Bench of the Commission considered (at [15]) the question of reliance by an employer on earlier conduct on the part of an employee when making a later decision to dismiss the employee (references omitted):

“It may be accepted that, under the general law, an employer is disentitled to summarily dismiss an employee for an earlier instance of misconduct on the part of that employee where the employer with full knowledge of the misconduct had decided to retain the employee in employment. It would be difficult to conclude for the purpose of s.387(a) of the FW Act that an employer who had condoned misconduct by an employee in this way and had thus lost the right of summary dismissal at law nonetheless had a valid reason for dismissing that employee. The Commissioner therefore did not err in declining to find that the instances of misconduct described in the second, third and fourth allegations against Mr Johnpulle constituted valid reasons for his dismissal. It may also be accepted that, for the purpose of s.387(h), the Commissioner was entitled to treat as relevant that Toll had previously elected not to dismiss Mr Johnpulle for his earlier instances of inappropriate behaviour towards Mr Karzi. However the fact that Mr Johnpulle had (as the Commissioner found) engaged in the earlier instances of inappropriate behaviour did not thereby become otherwise irrelevant in the consideration of whether his dismissal was harsh, unjust or unreasonable. The Commissioner’s own findings supported the conclusion, stated in Toll’s dismissal letter, that Mr Johnpulle had engaged in a “pattern of



unacceptable behaviour” towards Mr Karzi and had persisted in that behaviour notwithstanding that he had been told by the Team Leader to cease such behaviour and he had agreed to do so. That was necessarily a highly material consideration which, while not necessarily being determinative, was adverse to the conclusion that the dismissal was harsh, unjust or unreasonable. It was also relevant to the issue of reinstatement, since it went to the degree of risk that Mr Johnpulle might repeat such behaviour in future if reinstated.”

[30] The relevance of instances of prior misconduct by an employee to a finding of “valid reason” under s.387(a) was also recently considered by a Full Bench of the *Commission in Diaz v Anzpac Services (Australia) Pty Limited* [\[2016\] FWC 7204](#) at [12]-[16] (references omitted):

“[12] It is correct, as submitted on behalf of Mr Diaz, that there is some division in the authorities concerning whether mitigating factors relevant to whether dismissal was a proportionate sanction for any misconduct on the part of the relevant employee should be considered under s.387(a) or under s.387(h), although we note that in the recent decision of *Sayers v CUB Pty Ltd*, the Full Bench said that the “balance of authority under the FW Act” was in favour of such mitigating factors being considered under s.387(h). However, we consider that the authorities are clear that s.387(a) requires consideration, in a case where misconduct is the reason for dismissal, first as to whether the relevant conduct occurred, and second, if the conduct did occur, whether it was of sufficient seriousness or gravity to constitute a valid reason for dismissal. In this respect we endorse the analysis in *Bista v Glad Commercial Cleaning* at paragraphs [34]-[42] in relation to the consideration required by s.387(a).

[13] As was made clear in *Bista*, assessing whether a particular instance of misconduct is of sufficient gravity to constitute a valid reason for dismissal is not the same thing as considering whether dismissal was a disproportionate penalty for the misconduct. The former is “concerned with whether the conduct in question, considered in isolation, was intrinsically capable of constituting a

valid reason for dismissal”. The latter involves taking into account a range of potential mitigating factors, which may include matters such as the employee’s length of service and disciplinary record, and weighing them against the gravity of the misconduct in order to determine whether dismissal was too harsh a penalty.

[14] In respect of the former task, it is not correct, as Mr Diaz submits, that the specific acts or omissions which constitute the relevant misconduct can be divorced from contextual matters relevant to the seriousness of that conduct. In *Sayers v CUB Pty Ltd*, the Full Bench made it clear that the “conventional position” in considering the valid reason issue is to take into account contextual matters bearing upon the degree of culpability on the part of the employee. The majority judgment in *B, C and D v Australia Post* might be read as standing for the proposition that contextual matters which operate to diminish the culpability of the employee should be taken into account under s.387(h) rather than s.387(a). However that does not assist Mr Diaz, because the majority also made it clear that the following matters, which concern the employee’s misconduct assessed from the employer’s perspective, arise for consideration in relation to the valid reason issue under s.387(a) (emphasis added):

“The acts or omissions that constitute the alleged misconduct on which the employer relied (*together with the employee’s disciplinary history and any warnings, if relied upon by the employer at the time of dismissal*) but otherwise considered in isolation from the broader context in which those acts or omissions occurred.”

[15] It is clearly the case that the gravity of an employee’s misconduct is increased in circumstances where the employee has previously engaged in conduct of the same or a similar conduct and has been warned not to repeat it. To put this another way, the employee’s defiance of the earlier warning(s) is an intrinsic aspect of his or her misconduct, and necessarily forms part of the assessment of the gravity of the misconduct. We do not consider that it is in any

way controversial for such circumstances to be taken into account in determining whether there is a valid reason for dismissal under s.387(a). We therefore do not consider that Mr Diaz has demonstrated any arguable case of error in respect of the approach taken by the Senior Deputy President under s.387(a). Nor do we consider that Mr Diaz has identified any question of general application or any disconformity in the authorities in this respect.

[16] We would add that Mr Diaz’s submission that the outcome of his case might change depending upon the paragraph of s.387 under which his prior disciplinary record was considered is both artificial and counter-intuitive. That prior disciplinary record was, as the Decision makes clear, the critical factor which caused the Senior Deputy President to conclude that the dismissal was not unfair. It seems to us to be logically inexplicable that the dismissal could become unfair merely because that same disciplinary record was considered under s.387(h) rather than s.387(a), since in either case the degree of relevance of that disciplinary record and the weight to be assigned to it in assessing the fairness of the dismissal should be the same. Section 387 does not require any greater or lesser weight to be assigned to paragraph (a) as compared to paragraph (h); provided each specified matter in s.387 is properly taken into account, the weight to be assigned to them is a matter for the Commission member in the exercise of his or her discretion.”

**(iii) Outstanding Valid Reasons**

[115] The only outstanding issue from the Second PIP arose from the stated concern that:

*Relationship with previous chaplain became fragmented, some fine detail (working hours/payroll) aspects of Student Ministry Assistant were overlooked or needed management reminder.*

[116] There was no evidence as to the particulars of concern with the previous chaplain, who remained unidentified. The expected outcome was that the Applicant was required to achieve a

*'positive, vibrant attitude'* with Father Mirko according to the Second PIP. Prior to the Second PIP, I accept that the Applicant had no knowledge that Father Mirko, or apparently the previous chaplain, had any concerns as to their relationship.

[117] It was around the outstanding issue from the Second PIP that what seemed to be the actual reasons for termination developed. Father Mirko was asked by Brother Michael to provide an email regarding the Applicant, and he sent the 8 April Email. In that email he outlined what became the issues regarding the Kayak trip, the Light purchase, as well as general complaints regarding the Applicant's performance. Around a month after the 8 April Email, the Van issue and the Whats App group name issue also arose.

[118] It was from the time of the 8 April Email that errors in the investigation and establishment of the developing reasons for termination occurred due to the unreliable foundations of Father Mirko's email and complaints. Those errors occurred because:

- (a) Father Mirko's complaints were accepted unreservedly and adopted by Brother Michael in the Callinan Report;
- (b) Mr Tonkli accepted the contents of the Callinan Report and disregarded contents of the Response and Further Response that reasonably questioned its contents; and
- (c) Father Cassamento unreservedly accepted Mr Tolkli's recommendation, as did the Vice Chancellor.

**(A) The Relationship with Father Mirko**

[119] One of the more curious aspects of the relationship between the Applicant and Father Mirko was that it had subsisted for no more than two months before the 8 April Email was sent by Father Mirko, at the request of Brother Michael.<sup>13</sup> When asked three times how he had outlined performance problems with the Applicant, Father Mirko said he sent the 8 April Email, though it was clear that email was not sent to the Applicant. Father Mirko finally gave the following evidence:

*Okay. So, again, when did you bring those complaints directly to Mr Attieh? -April.*

*No, but - -? -No, no. I didn't.*

*You didn't? -No, no. I didn't. Well, I was always repeating him, 'What are we doing? Are we sitting together? Are we planning together?', but nothing happened. Also, you must understand that even for me, where the first month of the ACO. So, I was just looking around me trying to understand how the situation was.*

*Yes? -It would be, you know, unfair, you know, to take any action when I didn't have the situation clear. So, in that case, I wasn't looking for an advice.*

*But why didn't you just ask him? Why didn't you say to him, 'Hey, we need to get together and have a meeting'? -Because I know that there were already problems.*

*How do you know there's already problems? -Well, Jean-Claude told me at the right – at the beginning when we spoke the first very day that he had already been in trouble and already had to be – had the risk to be fired. Okay. It was the first day, I believe, in my office. Then Brother Michael told me that there were problems. So, I just try to be, you know, gentle. There was no reason to be too harsh.*

**[120]** I accept that the Applicant was entirely unaware of any alleged animosity, hostility, or negativity in his dealings with Father Mirko, and that he perceived there to be a strong and trusting friendship between himself and Father Mirko. The Text Messages give contemporaneous and clear evidence of a healthy relationship between the Applicant and Father Mirko, with both professional, and more personal, interactions. Father Mirko accepted that there was nothing in the Text Messages regarding the Applicant's performance.<sup>14</sup>

**[121]** The height of Father Mirko's evidence that he raised performance issues with the Applicant was in his assertions that he had meetings with the Applicant where, as was described in evidence:<sup>15</sup>

*And you took it upon yourself to inform Mr Attieh of those problems? -Yes. I told him many times he can – he can have a word, if he want. I told him many times, ‘Jean-Claude, you have two options. Two options. You do your own business. You make your own business, or you bow your head’. He never bowed his head.*

[122] I do not accept the above evidence constituted Father Mirko raising performance issues. Firstly, I do not understand how the Applicant being instructed to “*bow his head*”, which was not a throw away line because Father Mirko used it three times in his oral testimony as well as in his statement,<sup>16</sup> could be interpreted as notification of performance issues. Secondly, Father Mirko could not say when the meetings were said to occur.<sup>17</sup> Finally, Father Mirko did not have notes or SMS messages regarding such conversations because he alleged, extraordinarily, that he deletes SMS messages the minute he receives them.<sup>18</sup>

[123] Even after the Applicant became aware Father Mirko’s involvement in the allegations against him by the provision of the Callinan Report, I accept the Applicant’s evidence that when they discussed those allegations, Father Mirko laughed at their contents. It was only after Brother Michael advised the Applicant in early June 2022 that the allegations arose from the 8 April Email that the Applicant understood the allegations emanated from Father Mirko.

[124] Quite clearly there was no material or discernible difficulty in any part of the Applicant’s relationship with Father Mirko that would have made apparent to the Applicant a need to tend to such difficulty. There is no validity in a reason based on this ground.

**(B) Failing to Abide by University Policy in hiring a Van**

[125] The Applicant was directed to hire a van for a university field trip in May 2022. It is important to note that no part of the evidence in this matter outlines any “*University Policy*” that the Applicant was required to abide by. The highest any university practice can be stated is that, while they usually used the company TCM, Ms Le Mottee would undertake a comparison between that company and SWR, the company from whom the Applicant obtained a quote.

[126] Ms Le Mottee advised the Applicant that she would confirm management approval for the event and to use of SWR for the vehicle hire. Importantly, the Applicant emailed Ms Le Mottee on 24 May 2022, as follows:

*Hi Cathy,*

*My drivers license allows me to drive their 12 seater bus. It is a great price point especially with insurance included.*

*I'll make contact with them first thing tomorrow. Thank you for checking with Carmel and FCM.*

*Regards,*

*JCA.*

[127] It was reasonable for Ms Le Mottee to consider the vehicle would come from SWR, notwithstanding that no explicit direction was given by Ms Le Mottee to the Applicant. That the vehicle didn't come from SWR was a fact freely admitted by the Applicant to Mr Tonkli and Ms Le Mottee.

[128] While the Respondent directed focus on issues of insurance, it took no steps to ascertain the insurance status of the bus actually used. It may well have been the fact that the bus used would have been entirely satisfactory to the Respondent. No enquiries were made, and the Respondent was content to assume fault on the part of the Applicant.

[129] While I understand that there may have been insurance concerns, in light of the reason alleged, and the absence of any such policy, I find this reason is not established.

**(C) Chapel light /Kayak Trip/ WhatsApp Group Name; and**

[130] Regarding the Chapel Light, in the Response the Applicant could not address this issue as the Callinan Report only referred to “...not buying a resource in a timely manner”. In Mr Tonkli’s further correspondence of 7 July 2022, further detail of “...not purchasing a light for the chapel which he requested”, was provided. Thereafter the Applicant requested a meeting with Father Mirko to address his concerns. In that meeting of 2 August 2022, the Applicant made clear the light had been purchased the day it was asked for (15 March 2022) and Father Mirko had seen it in the office.

[131] The above factual assertions of the Applicant were not challenged, however the allegation regarding the light purchase was maintained against the Applicant in proceedings until Brother Michael, after being pressed as to the veracity of this allegation volunteered that “I don’t think the light forms the basis of the termination”.<sup>19</sup> It would appear this is abandoned as a reason for dismissal.

[132] In the Response, the Applicant provided the following explanation for the Kayak trip issue:

8. *Kayak Trip*

*The “last minute change of plan” of the Kayak trip was due to the ongoing flooding that tormented the region. I received a telephone call from the kayak business on the Thursday before the Saturday (48 hours) we were meant to attend. Accordingly, Fr Mirko and I coordinated for Campus Ministry to visit Bishop Umbers for morning tea instead. This was because Fr Mirko also had a meeting with him on Tuesday night and floated the idea of a potential future student visit. To state this was done by me “without appropriate joint decision-making” astonishes me. In fact, it was Fr. Mirko’s idea to arrange it as plan B. I am attaching text messages from Bundeena Kayaks (Attachment 5) and with Fr Mirko sending me the details of Kathy Campbell; who is the secretary to Bishop Umbers (Attachment 5.1. 5.2 and 5.3). I called her and confirmed our attendance on Thursday night.*

*Therefore, and again, the allegation is false.*



[133] The above explanation of the circumstances of the change regarding the Kayak trip was entirely correct, and supported by emails, however the Applicant's explanation was inexplicably never believed by the Respondent. Even Brother Michael conceded under cross examination that he could not fault the Applicant for the kayak trip issue, and that Father Mirko's assertion to him about the Applicant's failures in this respect were incorrect.

[134] The allegation that the Applicant changed the plans for the Kayak trip at the last minute, and so failed to follow directions, was without substance.

[135] Finally, regarding the WhatsApp group name, the allegation was that the Applicant was responsible, or at the very least, complicit in the renaming of a chaplaincy WhatsApp group to the name '*Discipuli Jean-Claudio*'. The Applicant again, and with abundant clarity and evidence, advised the Respondent in the Response:

15. *Discipul Jean-Claudio*

*In my view, this allegation in particular gives the decision maker the clearest example that the claims put against me are falsified and overexaggerated. I did not title the WhatsApp group "Discipuli Jean-Claudio". I named the group "Campus Ministry Stratty", however, some of my students at a cinema night, who are of Italian descent, re-named the group then another student. I am attaching screenshots to prove this. Attachments 10, 10.1 and 10.2.*

*The group chat contains 36 people and is a community for students to share ideas. It is an open and free platform that is relied upon by many students to express themselves. This group chat has contributed immensely to the success of this semester and creating a vibrant inclusive community on campus with Campus Ministry.*

[136] The above explanation of the circumstances of the change in name was entirely correct, and supported by evidence, however the Applicant's explanation was inexplicably never believed by the Respondent.

**(D) Other Miscellaneous Reasons**

[137] In addition to the above outlined reasons, the Respondent also advanced a more broad ranging critique of the Applicant's performance that was best summarised in a document created for the proceedings and attached to Brother Michael's statement, wherein it was described as "*a table demonstrating how [the Applicant] was unable to meet the requirements of his position, due to his unsatisfactory work performance*". The document tabulated the Applicant's job description and alleged deficiencies in performing identified duties.

[138] The testing of the entries in that summary document disclosed they related to dated issues, issues not raised with the Applicant, or issues raised by Father Mirko that were never formally raised with the Applicant as they were "*part of the performance improvement process*",<sup>20</sup> and so were without substance. A salient example was as follows:

*Go to the last line of page 273. Again, this is your assessment, the 'Key responsibility' is:*

In collaboration with campus ministry manager facilitate a liturgical calendar in relation to major campus events, such as orientation, graduation and the feast related to the campus charism.

? -Yes.

*You've concluded:*

Liturgical calendar was not implemented consistently or with appropriate animation in support of liturgical norms. There have been several instances of poor pastoral execution with high level complaint from the campus dean and both Chaplains with whom Jean-Claude Attieh worked.

*So what formed the basis of your conclusion there, Brother Michael? -It would have been being greeted at the door of the chapel by an exasperated campus dean saying that things were not adequately organised.*

*When did that happen? -The last time I remember that would have been pre COVID days, so that would have been - - -*

*2019? -2019.*

*2019, yet you're aware, aren't you, Brother Michael, that Mr Attieh went through a first performance improvement plan, which the university told him he passed successfully, okay, so why would you say that that remains an ongoing issue in 2022, when the only evidence you just gave me is an event in 2019? -I think there were, if I quote another example, the Relics issue would be one.*

*We've already been over that, you don't attest to it anywhere. So is there any other example? -I can't recall the exact occasion, whether it was - whether it was the occasion of the death of a number of students, when we had to run a combined faith memorial service, which I had to take the lead in, because we didn't have a Chaplain, and there was the issue of the campus dean once again, and to be completely fair to Jean-Claude, it was asking about what work he had done to make sure that there was decent support for that event, for the students. I agree, that's a difficult - - -*

*There's no complaint there, is there? Okay. So there's really nothing supporting that, apart from a complaint you say happened in 2019? -That's the last solid example of it.*

**(iv) Conclusion Regarding Valid Reasons**

[139] I cannot conclude on the evidence before me that any of the conduct said to constitute valid reasons for dismissal occurred. The Respondent accepted without question whatever Father Mirko put to them, no matter how cogent evidence to the contrary was put by the Applicant. An example of that reliance arose in the Hearing when Brother Michael was being

asked how he determined the truth of the state of the relationship between the Applicant and Father Mirko, and whether regular meetings occurred. The evidence was:<sup>21</sup>

*And yet you still - your evidence is, the only thing you did to satisfy yourself about the truth of the allegations was to ask Father Mirko about them, and you still maintain, do you not, that Father Mirko could not have possibly misled you about any of this? -Well, when you say all those allegations, those things about Jean-Claude being said that he wasn't running appropriate meetings, buying the light, doing the liturgical things, we talked about those things verbally.*

*But you would have known, by asking Martyn Poyitt if the meetings were happening on Tuesdays, would you? -Yes.*

*Did you ask Martyn Poyitt if they were happening on Tuesdays? -No.*

*No. Why? -I didn't need to because I knew they weren't happening.*

*How do you know they're not happening if you don't ask? -But I don't need to ask Martyn Poyitt.*

*Why? -Because I would ask Jean-Claude and Father Mirko.*

*And you say Jean-Claude told you that he wasn't meeting him on Tuesdays, is that your evidence? -No. Father Mirko is the one who told me.*

*Yes. So who else did you ask? -I didn't think I needed to ask anyone else.*

**[140]** The Respondent's failure to establish the existence of conduct allowing for the finding of any valid reasons for dismissal weighs heavily in favour of finding the dismissal was unfair.

**(b) Notification (s.387(b))/ Opportunity to Respond (s.387(c))**

[141] The Respondent notified the Applicant of the reason for dismissal (s.387(b)).

[142] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made, in plain and clear terms. In *Crozier v Palazzo Corporation Pty Ltd* the Full Bench of the Australian Industrial Relations Commission dealing with similar provision of the *Workplace Relations Act 1996* stated the following:<sup>22</sup>

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

[143] I find that the Respondent adequately provided the Applicant with a reasonable opportunity to respond to the allegations against him. I am consequently satisfied in the circumstances that the Applicant had a full opportunity to respond to the reasons relied by the Respondent in dismissing him.

**(c) Support Person (s.387(d))**

[144] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[145] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

*“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an*

*employee the opportunity to have a support person present when they are considering dismissing them.”*

[146] The Applicant was given the opportunity, and did have, support persons present at the relevant times.

**(d) Warnings**

[147] The Respondent submitted:

*The Respondent submits that the Applicant attended eight meetings with the Respondent to discuss aspects of his unsatisfactory work performance. At a number of meetings, particularly attended with Brother Michael Callinan he was provided with copies of the ACU – Managing Unsatisfactory Performance Policy and informed of the consequences of not improving his work performance to a required level appropriate for his role. The Respondent also relies on the evidence of Robert Tonkli to demonstrate how the Applicant was warned at the meeting held 2 August 2022.*

[148] While it is correct that the meetings referred to by the Respondent occurred, it is also relevant that in those meetings previously resolved matters were again put against the Applicant and the Applicant’s entirely correct explanations regarding certain issues were dismissed out of hand. The highest this factor may be put is that the Applicant was warned of the issues upon which the Respondent sought to rely.

**(e) Size of the business/human resources**

[149] The Respondent is a large organisation with appropriate procedures in place to effect termination of employment. This factor weighs neutrally in my consideration.

**(f) Other relevant matters**

[150] I have noted and taken account of the submissions of both parties on other relevant factors but consider that no issues relevant to my consideration arise under this factor.

### **Conclusion as to Whether the Dismissal was Harsh, Unjust or Unreasonable**

[151] In all of the circumstances and having taken account of each of the factors in section 387 and my findings thereon, particularly the absence of valid reasons, I have determined that the termination of the Applicant's employment was harsh, unjust and unreasonable. It follows from this that the Applicant's dismissal was unfair.

### **Remedy**

[152] The circumstances as to when the Commission may order remedy for an unfair dismissal are set out in s.390 of the Act.

[153] Section 390 is in the following terms:

#### ***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.*

**[154]** In respect to s.390(1)(a), it is not in dispute that the Applicant was protected from unfair dismissal. In respect to s.390(1)(b), for the reasons set out above, I am satisfied that the Applicant has been unfairly dismissed, and the Applicant has made an application satisfying s.390(2).

**[155]** Having regard to the matters in s.390(3)(a), while the Applicant originally sought reinstatement, in submissions only compensation was sought. I am nonetheless satisfied that reinstatement is inappropriate.

**[156]** The matters to be taken into account in making an order for compensation are set out in s.392 of the Act as follows:

### **392 Remedy—compensation**

#### *Compensation*

*(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.*

#### *Criteria for deciding amounts*

*(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:*

- (a) the effect of the order on the viability of the employer's enterprise; and*
- (b) the length of the person's service with the employer; and*



- (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and*
- (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and*
- (e) 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 compensation; and*
- (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and*
- (g) any other matter that the FWC considers relevant.*

*Misconduct reduces amount*

- (3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.*

*Shock, distress etc. disregarded*

- (4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.*

*Compensation cap*

- (5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:*
  - (a) the amount worked out under subsection (6); and*
  - (b) half the amount of the high income threshold immediately before the dismissal.*

- (6) The amount is the total of the following amounts:*

- (a) *the total amount of remuneration:*
  - (i) *received by the person; or*
  - (ii) *to which the person was entitled; (whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and*
- (b) *if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.*

[157] As noted by the Full Bench in *Double N Equipment Hire Pty Ltd t/a AI Distributions v Humphries*,<sup>23</sup> the well-established approach to the assessment of compensation under s.392 of the Act is to apply the “*Sprigg formula*” derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul’s Licensed Festival Supermarket* (Sprigg).<sup>24</sup> This approach was articulated in the context of the Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*.<sup>25</sup>

***The effect of the order on the validity of the employer’s enterprise – s.392(2)(a)***

[158] There was no submission that there would be any effect of the order on the viability of the employer’s enterprise.

***The length of the person’s service with the employer – s.392(2)(b)***

[159] The Applicant’s period of employment was not significant, but at over three years it was not insubstantial. The Applicant’s length of service weighs neutrally in the amount of compensation ordered.

***The remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed – s.392(2)(c)***

[160] The assessment of the length of continued employment is a discretionary decision. It is clear that by the time of the Applicant's dismissal the relationship between the Applicant and Respondent had deteriorated, however, as is clear from this decision regarding valid reasons, there are not apparent justifiable reasons for the conduct that resulted in that deterioration.

[161] I do not consider, for example, that the fact that the Respondent sought to continue to rely on the contents of the First PIP, notwithstanding that they were completely resolved in ten weeks, should be able to be rationally relied upon to submit that the Applicant's employment would not have continued for any significant period.

[162] In those circumstances, I consider that reasonably considered the Applicant's employment would have continued without termination. I estimate that the Applicant's employment would have continued for at least a further six months.

***Mitigation/Remuneration Earned/Likely to be Earned– s.392(2)(d), (e) and (f)***

[163] The unchallenged evidence of the Applicant was that he earned \$16,783 in income since the date of his termination. That evidence was filed on about 29 April 2022, being almost 6 months after the termination on 4 November 2022.

***Other Matters Relevant – 392(2)(g)***

[164] For the period from the date of the termination of employment until this decision, the economic effect of the termination of employment is known and has been capable of calculation. I consider that any discount for contingencies should only be applied in respect to an anticipated period of employment that is not actually known, being a period that is prospective to the date of the decision. No amount to be ordered relates to that period, and accordingly there is no discount for contingencies.

***Misconduct reduces amount – 392(3)***

[165] Section 392(3) of the Act provides:

*(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.*

**[166]** In *Butterfly Systems Pty Ltd v Sergeev*,<sup>26</sup>(Sergeev) the Full Bench of the Commission found:<sup>27</sup>

*Two relevant considerations arise from the terms of the provision. Firstly, the specific use of the term "misconduct", as opposed to "serious misconduct", indicates that conduct of less severity than that encompassed in the definition of serious misconduct in Regulation 1.07 of the Fair Work Regulations 2009, is within the purview of the provision. Secondly, the provision requires the Commission to reduce the amount of compensation it would otherwise order by an appropriate amount, on account of misconduct, if satisfied that the misconduct contributed to the employer's decision to dismiss.*

**[167]** The Applicant did not engage in misconduct.

#### **Compensation cap (s.392(5))**

**[168]** The amount of six months' pay is less than the compensation cap in s.392(5) of the Act for the Applicant.

#### **Conclusion as to Remedy**

**[169]** I am satisfied an order for the payment of compensation of six months' pay, less mitigation, by the Respondent to the Applicant in lieu of reinstatement is appropriate in all the circumstances of the case. It accords a fair go all round to both the Respondent and to the Applicant.

[170] The relevant calculation is six months' pay \$43,968.50 (being half the income amount referred to in the Employer's Response), less the amount the Applicant has earned (\$16,783) in income since the date of termination, being \$27,185.50, being an amount subject to the deduction of taxation.

### *Conclusion*

[171] For the aforementioned reasons, I am satisfied that the dismissal of the Applicant by the Respondent was 'harsh, unjust and unreasonable,' within the meaning of s 387 of the Act.

[172] Section 381(2) 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.*

[173] In this case, I am satisfied compensation in an amount of \$27,185.50 is appropriate with regard to all the circumstances of this case. The amount so ordered will be with any deductions of appropriate taxation according to law. I am satisfied that the remedy I have determined will ensure a 'fair go all round' is accorded to both the Applicant and the Respondent. The amount of compensation is to be paid to the Applicant within 21 days of this decision.

[174] An order giving effect to this decision is issued separately in conjunction with its publication.



DEPUTY PRESIDENT

*Appearances:*

Applicant Representative: Kyle Kutasi (*Solicitor*) Solve Legal

Respondent: McCosh, C (*Senior Employment Relations Consultant*) ACU.

*Hearing details:*

Sydney, Wednesday 29 March 2023 at 10:00AM.

Sydney, Wednesday 19 April 2023 at 10:00AM.

*Final written submissions:*

Applicant Final Submissions filed on 5 May 2023.

Respondent Final Submissions filed on 12 May 2023.

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<sup>1</sup> Transcript PN152, 196, 197 and 200.

<sup>2</sup> Transcript PN 360.

<sup>3</sup> Transcript PN 1332.

<sup>4</sup> Transcript PN 1345 and 1346.

<sup>5</sup> Transcript PN 2203 to 2209.

<sup>6</sup> Transcript PN 2359 to 2361.

<sup>7</sup> Transcript PN 857.

<sup>8</sup> [\[2013\] FWCFB 6191](#), at [35].

<sup>9</sup> *Diane Wiburd v Grandbridge Limited* [\[2018\] FWC 1900](#), at [81].

<sup>10</sup> [\[2020\] FWCFB 1373](#).

<sup>11</sup> *Ibid* at [26]

<sup>12</sup> [\[2016\] FWC 7906](#).

<sup>13</sup> Transcript PN 1296.

<sup>14</sup> Transcript PN 1378 to 1380.

<sup>15</sup> Transcript 1349.

<sup>16</sup> Transcript PN 1349, 1372 and 1465.

<sup>17</sup> Transcript PN 1350 to 1357.

<sup>18</sup> Transcript PN 1360 to 1368.

<sup>19</sup> Transcript PN 2098.

<sup>20</sup> Transcript PN 1853, 1979

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<sup>21</sup> Transcript PN 2293 to 2300.

<sup>22</sup> (2000) 98 IR 137, at [73].

<sup>23</sup> [\[2016\] FWCFB 7206](#), at [16].

<sup>24</sup> (1998) 88 IR 21.

<sup>25</sup> [\[2013\] FWCFB 431](#).

<sup>26</sup> [2021] FWCFB 18.

<sup>27</sup> *Ibid* at [35].