



DECISION

Fair Work Act 2009

s.789FC - Application for an order to stop bullying

Dr Maxwell Winchester

v

Rechelle Martinez, Prof Andrew Smallridge, Victoria University

(SO2022/497)

DEPUTY PRESIDENT GOSTENCNIK

MELBOURNE, 2 NOVEMBER 2023

Application for an FWC order to stop bullying – bullying conduct not found – application dismissed

[1] The applicant, Associate Professor Maxwell Winchester, is employed by Victoria University (VU), the first respondent in its First Year College (FYC). The applicant has been employed by VU since 2011 and he was appointed to work in the FYC in late 2017 commencing in the role from 1 January 2018.¹

[2] The applicant complains that he has been bullied at work by Professor Andrew Smallridge, the FYC Dean, and the FYC Head of Operations, Rechelle Martinez (referred to collectively with VU as the respondents), by being coerced and directed to work hours well exceeding the maximum hours under the *Victoria University Enterprise Agreement 2019* (Agreement). In furtherance of his complaint, the applicant has applied for an order pursuant to s 789FC of the *Fair Work Act 2009* (Cth) (Act) directed to VU, Professor Smallridge and Ms Martinez to stop bullying. Specifically, the applicant seeks orders that the respondents:

- stop the bullying/ unreasonable behaviour;
- be regularly monitored to ensure they are not further engaging in unreasonable behaviours toward the applicant;
- comply with VU’s anti-bullying policy; and
- only make reasonable, requests of the applicant in allocating future work to him with verifiable and properly documented workload hours being presented to the applicant in advance of such a request.²

[3] Before considering the facts underpinning the complaint of bullying conduct, it is convenient to say some things about the statutory scheme under which this application is commenced. The Commission’s power to make a stop bullying order is enlivened if the circumstances in s 789FF of the Act exist. That section sets out three conditions which must be satisfied before the discretion to make an order may be exercised. *First*, a “worker” must have made an application under s 789FC of the Act. *Second*, the Commission must be satisfied that the worker has been bullied at work by an individual or a group of individuals. *Third*, the

Commission must be satisfied that there is a risk that the worker will continue to be bullied at work by the individual or group.³

[4] Where power is enlivened, the Commission may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.

[5] A “worker” for the purposes of Part 6-4B has the same meaning as ascribed to it in the *Work Health and Safety Act 2011* (WHS Act) but it does not include a member of the Defence Force.⁴ Section 7 of the WHS Act defines a “worker”, relevantly as follows:

- (1) A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:
 - (a) an employee; or
 - (b) a contractor or subcontractor; or
 - (c) an employee of a contractor or subcontractor; or
 - (d) an employee of a labour hire company who has been assigned to work in the person’s business or undertaking; or
 - (e) an outworker; or
 - (f) an apprentice or trainee; or
 - (g) a student gaining work experience; or
 - (h) a volunteer; or
 - (i) a person of a prescribed class.

[6] An application under s 789FC may only be made by a “worker” who “reasonably believes that he or she has been bullied at work”. “Reasonable belief”, “reasonably believes” and similar expressions are used in many statutory contexts and in the common law. Generally, the requirement that a person “reasonably believes” that a state of affairs exists or has occurred has two elements. The person must actually and genuinely hold the belief, and the belief held must be reasonable in the objective sense – there must be some objectively ascertainable fact or facts to support the belief or some other rational basis for the holding of the belief. A person will not hold a reasonable belief if the belief held is irrational or absurd.⁵

[7] The meaning of “bullied at work” is set out in s 789FD of the Act as follows:

789FD When is a worker bullied at work or sexually harassed at work?

- (1) A worker is *bullied at work* if:
 - (a) while the worker is at work in a constitutionally-covered business:
 - (i) an individual; or
 - (ii) a group of individuals;repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
 - (b) that behaviour creates a risk to health and safety.
- (2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

(2A) A worker is *sexually harassed at work* if, while the worker is at work in a constitutionally-covered business, one or more individuals sexually harasses the worker.

(3) If a person conducts a business or undertaking (within the meaning of the *Work Health and Safety Act 2011*) and either:

(a) the person is:

(i) a constitutional corporation; or

(ii) the Commonwealth; or

(iii) a Commonwealth authority; or

(iv) a body corporate incorporated in a Territory; or

(b) the business or undertaking is conducted principally in a Territory or Commonwealth place;

then the business or undertaking is a *constitutionally-covered business*.

[8] As should be evident, the bullying behaviour about which a worker complains must occur while the worker is “at work in a constitutionally-covered business”. The expression “constitutionally-covered business” is explained in s 789FD(3) of the Act, reproduced above, and requires, *inter alia*, that a “person conducts a business or undertaking” within the meaning of the WHS Act. Also required, to satisfy the definition of “constitutionally-covered business”, is that the person conducting the business or undertaking be of one of the types set out in s 789FD(3)(a), or that the business be conducted principally in any of the types of locations specified in s 789FD(3)(b). The issue of when a worker is “at work” in a constitutionally-covered business was considered in *Bowker v DP World Melbourne Limited & Ors*⁶ in which a Full Bench concluded:

[48] . . . that the legal meaning of the expression ‘while the worker is at work’ certainly encompasses the circumstance in which the alleged bullying conduct (ie the repeated unreasonable behaviour) occurs at a time when the worker is ‘performing work’. Further, being ‘at work’ is not limited to the confines of a physical workplace. A worker will be ‘at work’ at any time the worker performs work, regardless of his or her location or the time of day. As we have mentioned, the focal point of the definition is on the worker (ie the applicant). The individual(s) who engage in the unreasonable behaviour towards the worker need not be ‘at work’ at the time they engage in that behaviour.

[49] While a worker performing work will be ‘at work’ that is not an exhaustive exposition of the circumstances in which a worker may be held to be at work within the meaning of s.789FD(1)(a). For example, it was common ground at the hearing of this matter that a worker will be ‘at work’ while on an authorised meal break at the workplace and we agree with that proposition. But while a worker is on such a meal break he or she is not performing work. Indeed by definition they are on a break from the performance of work. It is unnecessary for us to determine whether the provisions apply in circumstances where a meal break is taken outside the workplace.

[50] In our view an approach which equates the meaning of ‘at work’ to the performance of work is inapt to encompass the range of circumstances in which a worker may be said to be ‘at work’.

[51] It seems to us that the concept of being ‘at work’ encompasses both the performance of work (at any time or location) and when the worker is engaged in some other activity which is authorised or permitted by their employer, or in the case of a contractor their principal (such as being on a meal break or accessing social media while performing work).

...

[53] In most instances the practical application of the definition of ‘bullied at work’ in s.789FD will present little difficulty. But there will undoubtedly be cases which will be more complex, some of which were canvassed during the course of oral argument. For example, a worker receives a phone call from their supervisor about work related matters, while at home and outside their usual working hours. Is the worker ‘at work’ when he or she engages in such a conversation? In most cases the answer will be yes, but it will depend on the context, including custom and practice, and the nature of the worker’s contract.⁷

[9] A worker at work in a constitutionally-covered business is bullied if an individual or a group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member. An “individual” and by extension “a group of individuals” when used in an enactment refers to a natural person, not a body politic or corporate, unless a contrary intention is indicated.⁸ There is nothing in s 789FD or in any provision of Part 6-4B which suggests a contrary intention such that bullying at work is something which can be engaged in by a juristic person such as a corporation. Consequently, the bullying behaviour with which Part 6-4B is concerned, is confined to behaviour by a natural person or a group of such persons. An individual or group of individuals engaging in the unreasonable behaviour need not themselves be workers. They may, for example, be customers of the business or undertaking in which the worker bullied works. The statutory provisions do not contain any requirement for the individual or group of individuals to be ‘at work’ at the time the individual engages, or group of individuals engage in the unreasonable behaviour which the worker contends is bullying.⁹

[10] Part 6-4B of the Act is relevantly concerned with repeated unreasonable behaviour, not a singular instance of it. The requirement to establish that an individual, or group of individuals, “repeatedly behaves” unreasonably suggests the existence of persistent unreasonable behaviour but might refer to a range of behaviours over time.¹⁰ As the word “repeatedly” makes clear, there must be more than one instance of unreasonable behaviour. Beyond that however, there is no requirement that a specific number of instances of unreasonable behaviour be shown, nor that the behaviour which is said to be unreasonable be the same behaviour in each instance.¹¹ Unreasonable behaviour is behaviour that a reasonable person, having regard to the circumstances, would consider to be unreasonable.¹² The assessment is an objective one.

[11] The expression “repeatedly behaves unreasonably” is found in s 789FD(1)(a) of the Act, which is a definition provision, and its function is not to enact substantive law, but to aid in construing the statute. The expression is not to be interpreted in isolation by giving a meaning which negates the evident policy or purpose of a substantive enactment in Part 6-4B.¹³ As Hatcher VP pointed out in *Mac v Bank of Queensland Limited and Others*¹⁴:

... Part 6-4B has the evident purpose of establishing a mechanism by which the bullying of workers at work may be stopped. In interpreting, and applying, the expression “repeatedly behaves unreasonably” as it appears in s.789FD(1)(a), the concept of repeated unreasonable behaviour is not to be approached in a manner which divorces it from that purpose. The subject matter is bullying at work, and that must be borne steadily in mind in any consideration as to whether particular behaviours are unreasonable for the purpose of s.789FD(1)(a). A consideration of unreasonable behaviour which loses sight of the objective and subject matter of Part 6-4B may lead to the provisions not achieving their intended purposes, or being used for a purpose that was not intended.¹⁵

[12] In *Mac*, the Vice President also made some useful observations about the word “unreasonable” and its use in Part 6-4B, which I gratefully adopt, as follows:

[90] The second observation is that unreasonableness and its converse, reasonableness, are familiar legal concepts applicable in a range of diverse contexts. In *Giris Pty Ltd v Federal Commissioner of Taxation* Windeyer J said: “It is, of course, true that, as a measure in fact of time, space, quantity and conduct, reasonableness is a concept deeply rooted in the common law...”. Where, in an anti-bullying case such as this one, the requisite repeated unreasonable behaviour towards the workers is said to be constituted by or include unreasonable discretionary managerial decisions directed to that worker, some useful guidance may be obtained in assessing whether the definitional standard in s.789FD(1)(a) is met from decisions concerning judicial review of administrative discretionary decision-making. In *Minister for Immigration and Citizenship v Li* the High Court considered the standard of unreasonableness applicable to such decision-making. The plurality (Hayne, Kiefel and Bell JJ), in considering the well-known formulation of unreasonableness stated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, said that the legal standard of unreasonableness “should not be considered as limited to what is in effect an irrational, if not bizarre, decision - which is to say one that is so unreasonable that no reasonable person could have arrived at it”. They concluded their analysis by saying: “Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification”. That formulation provides a useful yardstick for the application of the provision in a case such as this one.

[91] The third observation is that in order for conduct to be reasonable, it does not have to be the best or the preferable course of action. In *Bropho v Human Rights & Equal Opportunity Commission*, in interpreting the word “reasonably” as it appeared in s.18D of the *Racial Discrimination Act 1975* (Cth), French J (as he then was) said:

“[79] ... It imports an objective judgment. In this context that means a judgment independent of that which the actor thinks is reasonable. It does allow the possibility that there may be more than one way of doing things ‘reasonably’. The judgment required in applying the section, is whether the thing done was done ‘reasonably’ not whether it could have been done more reasonably or in a different way more acceptable to the court.”¹⁶ [Footnotes omitted]

[13] The behaviour which a worker contends is unreasonable must be established. That is, the Commission must be satisfied that the behaviour alleged occurred. Then it must assess whether the behaviour as established was objectively unreasonable having regard to the subject matter and object of Part 6-4B of the Act. The instances of established unreasonable behaviour, must, as I have earlier indicated, be repeated but the precise character or form of the behaviour need not.

[14] Once this is established, it is next necessary to consider whether the unreasonable behaviour “creates a risk to health and safety”. Self-evidently there must be established a causal link between the behaviour and the risk to health and safety, but the behaviour need not be the sole cause of the risk, merely a substantial cause.¹⁷ A risk to health and safety connotes the possibility of danger to health and safety – the exposure to the chance of injury or loss but one which is real and not merely conceptual.¹⁸ Actual harm, illness, injury or detriment need not be shown.¹⁹

[15] Finally, reasonable management action, such as reasonable performance management, disciplinary action, allocation of work, restructuring of the workplace or employer directions, each carried out in a reasonable manner cannot be bullying conduct as self-evidently if the action taken is both reasonable and carried out in a reasonable manner it will not be “unreasonable behaviour”. In any event, for the avoidance of doubt s 789FD(2) says as much.

[16] Returning to the issues raised by this application, there is no dispute that the Commission has jurisdiction to deal with this application as the applicant is a worker for the purposes of s 789FC(2) of the Act in that he is an employee of VU, which is a constitutionally-covered business within the meaning of s 789FD.

[17] The applicant makes several allegations of unreasonable behaviour. These concern *first*, that he was coerced and directed to work excessive hours well in excess of the maximum hours identified in the Agreement. *Second*, that on 9 September 2022, Ms Martinez engaged in unreasonable behaviour towards him during their meeting about work allocation. The *third*, concerns the content of an email sent by Ms Martinez to Ms Maria De Sensi, which the latter sent to the Applicant on 26 September 2022, and about which the applicant lodged an occupational health and safety (OHS) incident report.²⁰ The email concerns work allocation. The *fourth* concerns a direction said to have been given in September 2022, whereby the applicant was directed by Professor Smallridge and Ms Martinez to undertake the unit convening duties for ‘Introduction to Marketing’ which is said to have exceeded his available hours.²¹ The *fifth* concerns the conduct of Professor Smallridge towards the applicant during an interaction occurring on or about 27 September 2022. The *sixth* concerns Professor Smallridge’s conduct in relation to the applicant’s application to take marketing students on a study tour of Malaysia.

Coerced and directed to work excessive hours

[18] According to the applicant, the dispute in question (about excessive hours allocation) began over a disagreement about his allocated hours for service, administrative and planning tasks²² for 2022. In his employment with VU the Agreement applies. Clause 35 of the Agreement is concerned with managing academic duties and commences with a proposition (at

clause 35.1) that VU will manage the allocation of academic duties in accordance with the following principles and objectives:

- An annual allocation of duties to academic staff will be structured to ensure that staff within Colleges are student-focussed and that students are provided with high quality learning opportunities and outcomes that lead to enhanced student experience and satisfaction.
- Duties will be allocated in a fair, equitable and transparent manner.
- The allocation of duties will be consistent with the classification level and the skills, knowledge and attributes required of the academic staff member's classification and position.

[19] Clause 35.3 sets out various defined terms for the purposes of clause 35, and relevantly provides that:

- “Academic teaching” includes face-to-face teaching and any duties directly related to such teaching, including preparation, assessment, concurrent student contact, unit maintenance and quality assurance.
- “Allocated service, administration and planning” (SAP) includes duties associated with unit convening, course chairing, course design and development, and unit design and development.
- “Block” and “block mode teaching” refer to the sequential intensive delivery and assessment of single units of study, normally comprising 33 hours of face-to-face teaching (or such other duration as required for the purposes of professional or industry accreditation), to be contrasted with traditional parallel delivery and assessment of units of study over two or more semesters of study in any year.
- “Dean’s Nominee” means the staff member nominated by the relevant College Dean to have primary responsibility for allocating work to an academic staff member under this clause.
- “Face-to-face teaching” refers to the formal delivery of teaching to students during a timetabled class and includes equivalent teaching conducted in a blended learning environment or via technology. Face-to-face teaching is a component of academic teaching.
- “Research, scholarship and professional contributions” (RSPC) includes duties associated with maintaining the academic staff member’s discipline currency (including maintenance of discipline knowledge, continuing review of relevant books and literature, and regular review of learning and teaching methods), professional engagement in community and industry, development of the academic staff member’s research profile (as distinguished from a VU Research Fellowship), contributions to academic governance and other aligned activities.

[20] Pursuant to clause 35.4, every academic staff member is to have an annual work plan that is based on the teaching and operational requirements of the College. As earlier noted, the applicant works in the FYC. By clause 35.4(b) the annual work plan will have regard to, and take account of:

- VU’s duty of care to the academic’s health, safety and welfare;

- the need for work to be allocated in a transparent, equitable, flexible and accountable manner;
- a staff member’s personal circumstances, including any family responsibilities.

[21] By clause 35.4(f), the allocation of time for any given piece of academic work, other than academic teaching, should have regard to the relative experience and seniority of the academic staff member, insofar as an early years academic staff member will normally receive a greater allocation of time to perform particular academic work commensurate with their skills and experience, and an experienced academic staff member will ordinarily receive a lesser allocation of time for the same piece of academic work.

[22] By clause 35.5(a) a full-time academic staff member will be allocated 1710 hours of academic duties per year, exclusive of annual leave and University holidays. The allocation of 1710 hours per academic year clearly operates as a time-based ceiling on the allocation of academic duties, and it is surprising that Ms Martinez, as the Dean’s Nominee, did not seem to comprehend that this was the effect of clause 35.5(a).²³

[23] The applicant is a teaching and research academic and the allocation of academic work to him is as follows:

| Teaching and Research Academic | | | | | |
|--------------------------------|--------------|-------------------------------------|----------------------|--|--|
| Availability to College (EFT) | Fixed Blocks | Fixed face-to-face Teaching (hours) | TEACHING (% OF 1710) | Allocated service, administration and planning (% of 1710) | Research, scholarship & professional contributions (% of 1710) |
| 1.0 | 10 | 330 | 50% | 20%-30% | 20%-30% |

[24] By clause 35.5(c) the percentages and bands outlined above are a normative guide for the allocation of academic work, noting always that:

- 1 hour of face-to-face teaching will be counted as 2.6 hours of academic teaching time to reflect the range of activities described in 35.3(a);
- a Teaching and Research Academic staff member will be allocated 10 fixed blocks of academic teaching;
- a Teaching Focussed Academic will be allocated 14 fixed blocks of academic teaching;
- the allocation of academic teaching to an academic staff member will be made in complete blocks and rounded to the nearest block; and
- an academic staff member may be allocated a proportionate amount of academic work associated with the facilitation or delivery of a practical activity in lieu of some or all of the full fixed allocation of face-to-face teaching. In such a case, one hour of facilitating or delivering a practical activity will be counted as one hour of academic teaching time (or equivalent to 0.4 hours of face-to-face teaching, having regard to the multiplier that applies to face-to-face teaching).

[25] The work allocation process is said to ensure that SAP tasks do not exceed the percentages and bands set out in the applicable tables over the course of the academic year (clause 35.5(d)).

[26] As is clear from the table above, the allocation of some duties is fixed at a maximum, whilst others tolerate a range. Thus, under the Agreement no more than 855 hours of teaching may be allocated of which 330 hours will be face to face teaching in an academic year. The remainder of the maximum hours (comprising 50% or 855 hours of duties allocation) is spread between allocated SAP and RSPC.

[27] Allocated SAP is determined by the Dean's Nominee. As already noted, Ms Martinez is relevantly the Dean's Nominee for the purposes of allocating work to academic staff members under the Agreement at FYC.²⁴ As part of her role as Head of Operations of the FYC, Ms Martinez allocates the "teaching and unit convening plan" for each of the FYC's academic staff and she also monitors teaching and unit convening responsibilities throughout the academic year.²⁵

[28] The applicant's complaint about excessive workload is not made in a vacuum. It follows a history of stress, depressive and anxiety related illness dating back to the first half of 2018, which the applicant attributes to excessive workload.²⁶ I say "attributes" not in a dismissive way but rather as a factual statement to counter the applicant's evidence certain events were "due to an excessive workload",²⁷ that chronic stress he experienced was "caused by unmanageable workload",²⁸ - that stress he suffered was due to or related to excessive workloads. The medical evidence does not go so far as to suggest that during the period 2018 to the end of the 2021 academic year, that excessive workload caused the applicant's stress, depression or anxiety. Necessarily the opinions formed by the various medical practitioners mentioned in the evidence are based on the applicant's reporting – for example, "He said the problem at work was excessive workload, which he documented in materials sent to me prior to the examination" and that his condition "apparently evolved in response to workload issues in 2020".²⁹ This is hardly surprising since a medical practitioner treating a patient's stress, anxiety and depressive illness is not usually in a position to objectively assess whether a particular workload was excessive. The practitioner relies on the subjective history provided by the patient and the patient's perception that a workload is excessive.

[29] Before turning to the substance of the excessive workload allegations, it is necessary to deal with the evidence of Dr John Kenny. Dr Kenny is adjunct Associate Professor at the University of Tasmania and is retired from full time work. Dr Kenny was retained by the applicant's solicitors to give evidence as an expert witness on academic workload. Together with his research colleague, Associate Professor Andrew Fluck, Dr Kenny developed the Academic Workload Estimation Tool (AWET) - an outcome of over 8 years of research.³⁰ Specifically, Dr Kenny was engaged to provide:

... assistance in establishing that [the applicant] has been given an excessive workload from 2018 to 2022. Both from the perspective of your Academic Workload Estimation Tool, but also from the perspective of the [Agreement], which we understand you have already provided [the applicant] a less than favourable report on.³¹

[30] Dr Kenny was asked during cross-examination whether he understood the purpose for which he was engaged to give evidence was to establish that VU had given the applicant an excessive workload from 2018 to 2022. He responded as follows:

No, I was - I was hired by Dr Winchester to assess his workload, and in relation to the research that I've been doing and how the two compare, and it's on that basis, the comparative basis, that I've put forward my statement.³²

[31] Dr Kenny was then taken to the passage of the letter of engagement set out above and he was asked whether he accepted that that was the basis of his engagement. He responded as follows:

Well, yes and no, because I was engaged - I'm an independent witness and I took on this while I was - I wasn't in any position to make any judgment on that until I did the analysis of the workload using both models, and it's on the basis of what I concluded that my evidence has been put forward.³³

[32] The substance of Dr Kenny's evidence is that the workload allocation process under clause 35 of the Agreement does not comprehend the "essence of academic work".³⁴ He said that:

. . . Clause 35 of the [Agreement] seems to have been structured to maximise teaching demands on academic staff while limiting academic autonomy, particularly in regard to scholarly and professional activities. Required activities, more aptly linked to quality teaching, have been categorised, in an unspecified way, as Allocated Service and the In-class Academics teaching the units are allocated teaching loads not commensurate with levels of professionalism and quality assurance espoused in the 'VU Learning and Teaching Quality Standards'.

Further, there is little autonomy for academic staff evident in professional or scholarly aspects of their role. They operate under a work planning process that must be approved by the Dean and where scholarship is limited to teaching in the block mode.

In its current form, I conclude the VU Workload Allocation Process does not meet the principles outlined in clause 35.1(b), that "*duties will be allocated in a fair, equitable and transparent manner.*" Many of the activities that [the applicant] is required to do under the VU learning and teaching policy framework, his teaching, and, allocated service, have either no indications of the time they are likely to take, or the times provided seriously underestimate the work demands on him.

To a large extent, this also results from the block teaching model which conflates numerous activities linked to quality teaching yet separates out others in an unspecified way. To begin to redress these shortcomings with the VU Workload Allocation Process, if the block teaching model is to continue, the 2.6 multiplier needs to be replaced by multipliers more closely resembling those indicated in Table 1, in order to more genuinely reflect the work demands and QA expectations on the In-Class Academics and Key Academics.³⁵

[33] “Table 1” is set out earlier in Dr Kenny’s witness statement which is said to compare the allocated teaching allowances in the VU model with the equivalent allowances if the AWET was applied for a standard on campus block teaching unit with 30 students.³⁶ As to the 2.6 multiplier which Dr Kenny advocates should be replaced, he said:

Under “Academic Teaching”, the VU Workload Allocation Process applies a multiplier of 2.6 to each hour of contact time in a block. This is meant to cover a range of activities “directly related” to teaching including preparation of materials, consultation, assessment, and “unit maintenance” and quality assurance (QA). In effect, applying the multiplier means, for a given block, with 33 hours of contact, an academic teaching into the unit receives a workload allocation of $2.6 \times 33 = 85.8$ hours to fulfil all of these requirements.

There is no explanation or justification in the policy documentation of how the 2.6 multiplier was determined. There is no way to determine what bearing these separate activities have on an individual’s workload. This means the estimation for this component lacks transparency, a key principle in estimating academic work . . .³⁷

[34] And later Dr Kenny sets out how and why he considers the VU workload allocation process embedded in the Agreement is deficient in assessing time requirements associated with academic teaching and with research, scholarship, and professional contributions and why the AWET he codeveloped is better suited to the assessment.³⁸ Dr Kenny also compared the applicant’s workload in each of the years 2018 to 2022 according to both the AWET and the VU Workload Allocation Process which was based on information provided about the applicant’s situation.³⁹ On the basis of the analysis which was the product of information provided by the applicant, Dr Kenny concluded that:

- under both the VU workload allocation process and the AWET, over the years 2018 - 2022 the applicant’s workload was consistently more than 100%;
- where his actual work time was reduced due to leave or illness, the VU workload allocation process seemed unable to deal with the situation very well and adjust his duties proportionately;
- clause 35.5 of the Agreement, concerned with the allocation of academic duties, and the Table on Research Fellowship make reference to a full workload of 1710 hours for various duties, irrespective of the actual time the academic is available;
- the AWET on the other hand, determines an individual’s workload in reference to the actual hours the academic is available;
- a key point of difference between the approaches to workload allocation between the models is that many of the activities in the applicant’s workplan while specified under the AWET, are not specified under the VU workload allocation model;
- the lack of specification of some duties seems to be a shortcoming of the VU workload allocation process, which in combination with the inadequate multiplier applied to determine block teaching allocations has the result that the VU workload allocation approach has consistently under-estimated the applicant’s workload over the period 2018 2022;
- given the identified shortcomings with the teaching allocations under the block teaching model and the failure of the VU workload allocation process to clearly

document work associated with some activities and duties, such as course and unit development, work planning and other roles, it is likely the estimates in the AWET are much closer to the applicant's actual workload than what is indicated by the VU workload allocation process.

- the level of discretion given to the “Dean’s representative” in the allocation of these tasks reduces transparency and credibility of the VU workload allocation process. And due to the power imbalances when negotiating with individual staff about their workload, it opens-up the possibility of nepotism, bullying and discrimination against individuals, which can further damage the credibility of the VU workload allocation process;
- there is little specific connection between the VU policy expectations of academic staff and the actual workload allocated to much of the applicant’s work plan; - the applicant’s roles as Key Academic, Unit Coordinator, participation in committees and other professional activities are not explicitly considered; and
- this is typical of workload allocation clauses in university enterprise agreements, allowing policies to be developed without due consideration of the workload implications resulting from their implementation..⁴⁰

[35] Several things may be observed about Dr Kenny’s evidence.

[36] *First*, although Dr Kenny was engaged to give evidence to assist in establishing that the applicant has been given an excessive workload from 2018 to 2022,⁴¹ nowhere in his evidence does Dr Kenny identify what is meant by “an excessive workload” or how his preferred tool (or clause 35 of the Agreement) identifies an “excessive workload”. Much less does Dr Kenny conclude that the applicant’s workload during the reviewed periods was excessive or that it was ‘given’ to him. At its highest, Dr Kenny’s evidence was that based on his analysis “under both the VU workload allocation process and the AWET, over the years 2018 to 2022 the applicant’s workload was consistently more than 100%”.⁴² It is of limited assistance in assessing whether the applicant’s workload was, during the relevant periods, excessive.

[37] *Second*, I agree with the respondent’s assessment that Dr Kenny presented as an advocate for broad reform of university enterprise agreements and the methodology by which agreements calculate or estimate academic availability and workload. For example, he said that university work allocation models “often ignore or underestimate the complexity of developing high-quality teaching materials and often disregard much of the professional service and scholarly work academics have to do”⁴³ and that this “is typical of workload allocation clauses in University EBA’s”⁴⁴ and enables “university policy developers “*to set champagne expectations on a beer budget*””.⁴⁵ Dr Kenny is a proponent of the AWET, and advocates for it to be embedded in university enterprise agreements.⁴⁶ His evidence is not “independent”. He has a stake in the game. He wants AWET, which he codeveloped, to be adopted. For this reason his evidence needs to be treated cautiously.

[38] *Third*, Dr Kenny’s criticism of the work allocation method for which the Agreement provides is that it underestimates the number of hours he (through the AWET) estimates an academic would take to perform a range of academic duties.⁴⁷ From this he concludes that it is likely that the estimates in the AWET are much closer to the applicant’s actual workload than what is indicated by the VU workload allocation process. The problem with this analysis is that:

- the AWET is an estimate of academic work.⁴⁸ Self-evidently it is not a measure of work that was actually undertaken;
- the analysis in the tables showing a comparison of workload as between the Agreement and the AWET was based on the applicant giving Dr Kenny “sort of a rough - well, an indication of what [the applicant] was doing within his responsibilities in each year and then [Dr Kenny] used [his] understanding of the VU workload allocation process and the AWET to come up with those tables based on that information.”⁴⁹
- academic work is largely self-directed and difficult to quantify;⁵⁰
- the AWET incorporates work that is both allocated and self-directed and does not distinguish between them;⁵¹
- individual reports by academics as to the amount of time taken to perform work vary greatly;⁵²
- the AWET figures set out in the tables were not adjusted to take account of the applicant’s capabilities, background, expertise or experience;⁵³
- the analysis was undertaken without Dr Kenny speaking to or seeking input from anyone at VU beyond the applicant, for example from Professor Smallridge or Ms Martinez.

[39] There is nothing in the analysis that speaks to the applicant’s actual workload and whether the actual workload was excessive. Dr Kenny’s critique of the work allocation method for which the Agreement provides was undertaken without consulting any other person at VU, and his opinions about the operation of the Agreement and his conclusions about whether the Agreement’s work allocation method is consistent with or meets the principles outlined in clause 35.1(b), that “duties will be allocated in a fair, equitable and transparent manner” travel well outside his area of expertise. He has no disclosed experience in the interpretation and analysis of enterprise agreements and no disclosed legal qualification or industrial experience. His lack of expertise in analysing and applying an enterprise agreement is perhaps best illustrated by the fact that Dr Kenny purported to assess the applicant’s workload for the academic years 2018 and 2019 by reference to the Agreement, when the Agreement did not commence operation until the end of 2019 (28 November 2019).⁵⁴ The Agreements workload model did not apply to the applicant’s workload in academic years 2018 and 2019.

[40] Overall Dr Kenny’s evidence is of little assistance to any matter that I need to determine.

[41] In any event the applicant makes no allegation – for the academic years 2018 – 2021 – that he was coerced and directed to work excessive hours in relation to the workload described in Dr Kenny’s analysis and that noted in annexure MW11 of the applicant’s first statement.⁵⁵ The workload history is provided as context against which the complaints of bullying in 2022 are to be examined. This is clear from the application⁵⁶ and the summary of bullying allegations made therein, paragraphs [5]-[20] of his outline of submissions⁵⁷ and [6]-[21] of his first witness statement.⁵⁸ I note that the applicant contends in his outline, in a generalised way, that he “has been forced to take on excessive hours, hours well above his maximum hours, as prescribed by the [Agreement], for the years 2018, 2019, 2020, 2021, and 2022”.⁵⁹ However, save for the year 2022 (which is really about the allocation in September 2022), the applicant provides no basis in his evidence for the allegation that he had “been forced” to take on excessive hours. As the respondents have correctly pointed out, a significant amount of an academic’s work is self-

directed.⁶⁰ The applicant's research work is largely self-directed.⁶¹ The applicant's publication rate was in 2019 more than 200 percent of the average for an academic of his then level.⁶² And he conceded that his rate of publication would have exceeded VU's expectations.⁶³ None of this speaks to being "forced" to work excessive hours and his generalised allegation to the contrary for the period before September 2022 is not supported by the evidence.

[42] Moreover, the generalised allegations in the outline pertaining to the academic years 2018 and 2019 cannot be made out by reference to that which was prescribed in the Agreement as contended, since the Agreement did not commence to operate until 28 November 2019.⁶⁴

[43] As the applicant acknowledges, the issues about which he complains in his application began when he received an email from Ms Martinez, on 7 September 2022, requesting that he take on additional duties relating to unit convening for the unit 'Introduction to Marketing'.⁶⁵

9 September 2022, Ms Martinez incident

[44] The applicant alleges that on 9 September 2022, during a scheduled meeting with Ms Martinez, she engaged in unreasonable behaviour directed towards him. On 6 September 2022, the applicant returned to work after a period of leave.⁶⁶ The next day the applicant received an email from Ms Martinez, which relevantly provided:

Just writing to request that you take over unit convenor responsibilities for BHO1171 for 2B2 and the remainder of Sem 2 please.⁶⁷

[45] Shortly afterwards, Ms Martinez sent the applicant a further email in which she wrote:

Sorry Max

Forgot to mention that you also need to convene for VU Sydney and Sunway.⁶⁸

[46] Sunway is in Malaysia.⁶⁹ A meeting to discuss the request was subsequently arranged for after 11:00am on 9 September 2023 and later changed to 9:00 am.⁷⁰ It is common ground that during the meeting there was disagreement about the applicant's available hours to perform the unit convening duties, with Ms Martinez maintaining the applicant had capacity, while the applicant maintained that he did not have capacity.⁷¹

[47] The applicant's evidence was that after purporting to set out his 2022 workload allocation Ms Martinez's demeanour changed quite dramatically, she seemed infuriated and claimed his calculated availability of 0.28 (0.246) was incorrect and that it was 0.34 (0.37).⁷² That the applicant said he wanted to negotiate is not in dispute.⁷³ The applicant's evidence was that thereafter, Ms Martinez verbally abused him; said in a very unpleasant tone "I'm not negotiating anything with you! Are you telling me you're not doing it!"; behaved in an aggressive and dismissive manner towards him; and yelled at him to "get out" of her office.⁷⁴ It is common ground that Ms Martinez told the applicant during the meeting that if he wanted to negotiate, he would need to do so with the Dean.⁷⁵

[48] Ms Martinez's evidence was that she did not verbally abuse the applicant, nor speak to him in an aggressive tone, nor behave in an aggressive or dismissive manner, nor "order" the applicant out of her office.⁷⁶

[49] The applicant said that as Ms Martinez yelled at him during their meeting, he would be surprised if Ms Monica De Melo Freire and Ms Yildaz Djelal, who both work near Ms Martinez's office and were present at their workstations during the applicant's meeting with Ms Martinez, had not heard Ms Martinez yelling at him.⁷⁷

[50] Ms De Melo Freire is the Appointment Officer of the FYC. She was at work on 9 September 2023. She sits directly across the corridor from Ms Martinez and her evidence was that she was able to hear the discussion between Ms Martinez and the applicant clearly and that Ms Martinez's office door was open during the meeting.⁷⁸

[51] Ms De Melo Freire said that prior to the meeting, Ms Martinez had told her that she was meeting with the applicant to discuss his workload and asked Ms De Melo Freire to "keep an ear out".⁷⁹ Ms De Melo Freire said that she was present at her desk for the entire meeting, that she did not take any phone calls or speak to other people during the meeting.⁸⁰ Ms De Melo Freire said she could hear the discussion clearly, and that neither the applicant nor Ms Martinez spoke in a raised voice or in an aggressive or unpleasant tone.⁸¹ Ms De Melo Freire said that if a conversation between Ms Martinez and another was to be of a delicate nature then she would often listen in and had previously been asked to do so by Ms Martinez.⁸²

[52] Ms Djelal is the Operations Coordinator of FYC. Ms Djelal gave evidence that on the morning of 9 September 2022, Ms Martinez told her about the meeting arranged with the applicant and that it was about his workload allocation. She said that Ms Martinez told her that because of the nature of the discussion Ms Martinez was worried the meeting may be "difficult".⁸³ Ms Djelal said Ms Martinez told her that she (Ms Martinez) would leave her office door open during the meeting because of her concerns. Ms Djelal's evidence was that Ms Martinez regularly conducts meetings with her office door open, that office is about three metres from Ms Djelal's office and that she can hear her clearly when Ms Martinez's office door and her office door are open.⁸⁴ Ms Djelal said that she did not hear either the applicant or Ms Martinez raise their voice during the meeting.⁸⁵ She said that she could hear the conversation and could tell the tone and she could hear Ms Martinez's tone.⁸⁶ Ms Djelal's evidence was that whilst she may have been performing other work, she listened to the conversation which she could hear clearly.⁸⁷

[53] The applicant's evidence was that he met with the Dean, Professor Smallridge, at approximately 10:00am, shortly after the meeting with Ms Martinez on 9 September 2022. He said the meeting was quite cordial, and they chatted generally for around 15 minutes just catching up. He said that he reached an agreement with Professor Smallridge that regardless of the disagreement about his workload, he would take over unit convening for the current block (finishing 23 September 2022) and agreed that during the mid-semester break they would negotiate a solution. The applicant said that he mentioned to Professor Smallridge that he thought Ms Martinez's reaction to him during their earlier meeting had been completely inappropriate and that he would appreciate Professor Smallridge addressing Ms Martinez's outburst with her directly. He said he was so concerned with Ms Martinez's inappropriate

manner that he contacted Mr Garry Ryan, Industrial Officer with the NTEU, to discuss the issue and seek further guidance from him.⁸⁸ Mr Ryan was not called to give evidence.

[54] Professor Smallridge’s evidence was that on the morning of 9 September 2022 the applicant:

- attended his office at about 10.00am;
- said that he had just met with Ms Martinez who had told him that VU required him to perform unit convenor duties for ‘Introduction to Marketing’ for the rest of the calendar year;
- said that Ms Martinez had refused to negotiate with him about taking on unit convenor duties; and
- did not say that he had been yelled at by Ms Martinez, that she had “ordered [the applicant] out of her office”, or that the applicant had otherwise been bullied.⁸⁹

[55] Professor Smallridge’s evidence was that his office is adjacent to Ms Martinez’s (no further than five metres), and he did not hear any raised voices between Ms Martinez and the applicant prior to his meeting with the applicant. He said that he recalled during his meeting with the applicant, that the applicant was disgruntled about being allocated the unit convenor duties for ‘Introduction to Marketing’ by Ms Martinez, but the applicant did not appear shaken or visibly upset. Professor Smallridge said he did not recall the applicant asking him to address Ms Martinez’s outburst with her directly. Professor Smallridge said that after the applicant left his office, he made a file note of the meeting and he observes that the contents of the note suggest the meeting was unremarkable which is consistent, he said, with his recollection.⁹⁰

[56] The applicant said that on 26 September 2022, he lodged an incident report relating to Ms Martinez and an email she sent to another employee which the applicant considered was bullying behaviour toward him.⁹¹ On 27 September 2022 the applicant sent an email to Ms Martinez and others (responding all to an earlier email chain) in which he said:

. . . when I indicated it was over workload (and you agreed), you verbally abused me and kicked me out of your office? I don’t believe this qualifies as “being consulted”.⁹²

[57] The allegations in the incident report⁹³ and the 27 September 2022 email were the subject of an internal investigation which records that the allegations were not substantiated.⁹⁴

[58] The applicant also gave evidence that the “Incident Report has not been discussed with [him] by management or HR at VU”⁹⁵ but this cannot be accepted since Mr Michael Haritou, VU’s Senior Manager, Workplace Relations wrote to the applicant after the investigation report was concluded in the following terms:

Please find attached decision and summary relating to the Incident Report lodged on 26 September 2022 (Incident Report) in the Elumina OHS incident report system, and the email (Email) from you to Ms. Rachele Martinez dated 27 September 2022.

I understand this may be a difficult time for you and I wish to offer you the opportunity to access VU’s Employee Assistance Program (EAP). EAP supports those who are experiencing difficulties both personally and professionally. A counsellor is available

on 1300 327 288. There is no cost to you for this service and all discussions with the counsellor are confidential.⁹⁶

[59] But it is common ground that the person assigned to conduct the internal investigation did not interview the applicant.⁹⁷ During cross-examination Professor Smallridge was asked whether he agreed that the failure to interview the applicant was a serious flaw in the investigation process. He said that he did not think he could comment on how the process took place but could accept that the applicant did not have an opportunity to meet face to face with the investigator.⁹⁸ Let me then help out Professor Smallridge – an investigation process which does not involve interviewing the complainant or giving the complainant an opportunity to comment on the responses to the complaint is by any measure a flawed process. Little can be made of the conclusions in the circumstances.

[60] Both Professor Smallridge and Ms Martinez gave evidence they were unaware of the applicant’s allegations until receiving the 27 September 2022 email from the applicant raising the allegations.⁹⁹

[61] It must be accepted, and I do accept, that although Ms Martinez’s email of 9 September 2022 was expressed in the language of a request it was not a request. The second email Ms Martinez sent to the applicant on 7 September 2022 confirms as much,¹⁰⁰ as does her evidence that during the meeting of 9 September 2022 after the applicant said that he had come to negotiate, she did not know what there was to negotiate, given the applicant had only been allocated three classes for the entire year, even though his expected load was closer to 3.5 and that she said “if you need to negotiate anything, you will need to meet with Andrew [Smallridge].”¹⁰¹ But the preponderance of the available evidence suggests that the applicant’s version of events surrounding his meeting with Ms Martinez on 9 September 2022 cannot be accepted given:

- the proximity of Ms Djelal and Ms De Melo Freire to Ms Martinez’s office;
- the door to Ms Martinez’s office was open during the meeting;
- both Ms Djelal and Ms De Melo Freire had been alerted to the fact that a meeting with the applicant would take place and had been asked to listen in on the meeting;
- both Ms Djelal and Ms De Melo Freire could clearly hear the conversation and its tone;
- neither Ms Djelal nor Ms De Melo Freire heard any raised voices;
- that Professor Smallridge was working in close proximity (some 5 metres away) and did not hear any raised voices;
- that Professor Smallridge did not recall that during his meeting with the applicant only a short while after the applicant’s meeting with Ms Martinez, being asked to address Ms Martinez’s outburst with her directly;
- that Professor Smallridge said that whilst the applicant was disgruntled about Ms Martinez’s allocation of work, he did not appear shaken or visibly upset; and
- that Professor Smallridge made a file note of the meeting after the applicant left in which he noted that “[the applicant] stated that [Ms Martinez] would not negotiate” but did not note any other matter which is remotely consistent with the allegations made by the applicant and the content of the note is otherwise unremarkable.

[62] The applicant’s version of events is not corroborated and cannot be accepted in light of Ms Martinez’s denial and the corroboration of her version of events by others in close proximity who would have been in a position to hear (as the applicant conceded) raised voices and abuse if that occurred. But none of Professor Smallridge, Ms Djelal or Ms De Melo Freire heard anything of the kind. In the circumstances I accept Ms Martinez’s evidence together with that of Professor Smallridge, Ms Djelal and Ms De Melo Freire in so far as it pertains to the applicant’s allegations concerning the meeting with Ms Martinez on 9 September 2022. It follows that I do not accept that the conduct alleged by the applicant occurred and so provides no foundation for any conclusion that the applicant was bullied at work. I also accept Professor Smallridge’s evidence that no complaint about Ms Martinez’s conduct was made by the applicant at their meeting on 9 September 2022 and that he first learned of the allegation during the subsequent email exchanges on 27 September 2022, which are discussed further below.

[63] Before moving to the next allegation, I should record the fact that Ms Martinez asked Ms Djelal and Ms De Melo Freire to listen in on the conversation she was to have with the applicant, has an unsavoury flavour. Ms Martinez did not advise the applicant that she had done so, and the applicant was entitled to regard the conversation in Ms Martinez’s office as relatively private. The fact that the door was open is beside the point. The applicant was not, nor could he have been aware that Ms Djelal and Ms De Melo Freire had been asked to listen in on the conversation. There is an obvious difference between the possibility of being overheard because an office door is open and leaving an office door open so that others could listen in to the conversation as they had been instructed to do. The latter is tantamount to secretly recording the conversation, a matter that involves a gross breach of trust. If Ms Martinez wanted a witness, she ought to have asked either of Ms Djelal or Ms De Melo Freire to attend the meeting in that capacity and put the applicant on notice that she intended to do so. And although Ms Martinez did not agree, the approach she took was quite underhanded.¹⁰²

Email sent by Ms Martinez to Ms De Sensi - later sent to the Applicant on 26 September 2022

[64] On 26 September 2022, in response to several emails about “BHO1171” (the unit code for ‘Introduction to Marketing’) the applicant sent an email to Alec McWilliams and Rosa Rios with a cc to Ms Maria De Sensi, a Senior Academic at VU Sydney, in which he said:

... As far as I know there is not anyone convening any BHO1171 for the remainder of the year. I was meant to have a discussion with Andrew Smallridge about this this week but am yet to be asked to see him about it. Will update if I hear anything, but I would have assumed a contract to convene Melbourne/Sydney would have come from the FYC office, not Maria. She may be able to confirm this.¹⁰³

[65] Ms De Sensi, sent an email replying to the applicant and others, and she cc’d Ms Martinez and others, in which she asked “@Rechelle - has FYC appointed a UC for BH01171 for 2HB3?”¹⁰⁴ Ms Martinez responded but only to Ms De Sensi with “Max Winchester is convening BH01171 for 2B3”.¹⁰⁵ A phone conversation then ensued between Ms De Sensi and Ms Martinez, after which Ms De Sensi replied to Ms Martinez adding other recipients, including the applicant in which she wrote:

Dear Rechelle
As per our phone conversation –

- Max Winchester will coordinate FP & CF
- Rosa Rios will coordinate VUS.¹⁰⁶

[66] The applicant emailed responding to all saying:

Dear Maria

This is incorrect. I have not been consulted on this and will be unable to do this as it is over and above my workload for the year.¹⁰⁷

[67] Ms Martinez follows up also replying to all:

Max

You have been consulted. It was discussed with you when you met with us last week. It is not over your workload¹⁰⁸

[68] The applicant responds again replying all on 27 September 2022:

Hi Rechelle

In spite of repeated requests to actually supply me with my workload, you have not complied with my request. By being consulted, I assume you mean the meeting we had where you told me I was to take on all BHO1171 duties and when I indicated it was over workload (and you agreed), you verbally abused me and kicked me out of your office? I don't believe this qualifies as "being consulted".

Please note that I do not report to you and academic workloads are to be discussed with academic staff by academic supervisors, not professional staff (please refer to Section 2.2. of the Managing Academic Duties Guidelines), please ask either of my line managers to discuss this with me in future.¹⁰⁹

[69] Ms Martinez sent an email of complaint to Mr Haritou with a cc to Professor Smallridge on 27 September 2022 in which she wrote:

I have just received this email from one of our academic staff.

Not only is this inappropriate and disrespectful, it is totally incorrect. He is accusing me of verbal abuse and throwing him out of his office. I actually have two staff who overheard the whole conversation and can attest to the inaccuracy of his accusations.

I am extremely concerned and dismayed by this email and would like to put in a complaint immediately. Can you advise what I need to do in order to formalise this please?¹¹⁰

[70] Separately, Ms Martinez also forwarded the applicant's email to Professor Smallridge in which she simply stated: "This is not acceptable".¹¹¹

[71] Earlier the applicant had lodged an incident report in which he stated:

... Today I received an email from Maria De Sensi, in which Rechelle had sent her an email (not including me) telling Maria I would be doing the work. Maria sent me an email confirming I would be doing the work, while cc'ing in several colleagues in both the First Year College and College of Business. I replied pointing out that I would not be taking on these duties because it was over and above the maximum allowable hours for the year.

I have found this bullying very stressful and will probably be discussing this incident with both the Worksafe investigations team and my GP.¹¹²

[72] There is some context to these exchanges which should be addressed. As between the applicant and Professor Smallridge, there are differing recollections about the additional duties that were allocated to the applicant and the period over which he was expected to undertake the duties.

[73] The applicant gave evidence that shortly after his meeting with Ms Martinez on 9 September 2022, he met with Professor Smallridge which, as earlier noted, he described as "quite cordial".¹¹³ He did not suggest that he had any concerns with Professor Smallridge's conduct during that meeting.¹¹⁴ The applicant said that during the meeting he and Professor Smallridge "reached an agreement that regardless of [their] disagreement on [his] workload, [he] would take over unit convening for the current block (finishing 23 September 2022) which would see [them] through to the mid-semester break. [They] agreed that during the mid-semester break [they] would negotiate a solution, the break being the period of 26 September 2022 to 30 September 2022."¹¹⁵

[74] Professor Smallridge said the agreement was that the applicant would undertake unit convening duties for 'Introduction to Marketing' for the remainder of that semester and trans-national education (TNE) unit convening duties until the end of the current "block" (being 23 September 2022).¹¹⁶ But Professor Smallridge said that the TNE duties were subsequently not required and so he did not discuss the TNE duties further with the applicant.¹¹⁷ Professor Smallridge also said that the applicant had stated that he may need to undergo surgery later in the year, and Professor Smallridge said that he would re-consider the allocation of the local unit convening duties if necessary.¹¹⁸

[75] The earlier mentioned file note of the meeting made by Professor Smallridge records the following:

Friday 9/9/22

Max re unit convening.

Max stated that Rechelle would not negotiate and I agreed and stated we needed Max to convene BHO1171.

Max possible personal leave and I made it clear if that occurred we would renegotiate.

For TNE convening we are still negotiating teaching relief – any will carry over into 2023.

Max to convene BHO1171.¹¹⁹

[76] Professor Smallridge was questioned during cross-examination about the content of VU’s employer response (Form F73) filed in response to the applicant’s application for an order to stop bullying and it was put to him that that response was inconsistent with his evidence set out in his witness statement and at hearing.¹²⁰ The response contained the following statement:

On 9 September 2022 Professor Smallridge met with the Applicant. It was agreed with the Applicant that he would undertake unit convening duties for 2B2, for local and TNE (Trans-National Education – Malaysia) delivery. Any agreement regarding further convening for TNE delivery would be discussed with the Applicant as consultation was still underway between FYC and TNE office staff regarding allocations for TNE convening. Professor Smallridge advised the Applicant that any TNE convening that resulted in a reduction of teaching duties would be carried over to 2023. The Applicant advised Professor Smallridge that he may have to undergo surgery later in the Semester. It was agreed that if this occurred, they would re-visit his unit convening of the local delivery of the unit and remove him from this duty due to personal leave. At this stage no timeline had been provided regarding this surgery.¹²¹

[77] The relevant cross-examination is extracted from the transcript below:

PN400 And the agreement was confined to that period for 2B2, block 2, semester 2 which finished 23 September 2022. Correct?---No. The agreement for 2B2 was for local and TNE education. And we said any TNE would be subject to further consultation. The local delivery was for the semester. And as I said, if we had to revisit the unit convening of the local delivery, if he had to have the surgery. And as the surgery could be at any point in time following that, it wasn’t going to be prior to 23 September, then I said then we would revisit the local delivery of that unit. So the agreement for 2B2 was for local and TNE.

PN401 Yes?---Yes.

PN402 And the period that 2B2 goes to is 23 September 2022. Correct?---Correct. And no further TNE requests were put in beyond that, and so we didn’t have another meeting with Dr Winchester.

PN403 And the only agreement he made with you was to agree to the period of 2B2?--
-For TNE and local. But for local it was the semester.

PN404 Where do you say that?---Well, it’s implied in – it was agreed if this occurred, they would revisit his unit convening of the local delivery of the unit. Which is for the later half of the year, beyond that period of time. Because that was going to keep going through block 3 and block 4. And so when the surgery was coming up, we would revisit it at that point in time.

PN405 It was accurate to say the agreement for local was confined to 2B2?---No, it's not. No, that's not correct.

PN406 Well, that's what you've got here, Professor?---No. What I have here is that for local and TNE. For both of them it was confined to 2B2. And if we required TNE beyond that period of time, we would revisit it.

PN407 Yes?---Yes. But we didn't require that. The local would continue on. That was for the semester.

PN408 Well, you don't say anything about the local would continue on, do you? In that response?---Specifically? No, but it is implied and I took it to be implied where I said, 'If he has to have surgery later in the semester'. I mean, we wouldn't be talking about removing him from unit convening duties later in the semester if he wasn't going to be doing unit convening duties later in the semester.

PN409 Later in the semester is about his surgery period?---Correct. At which point in time we would revisit his unit convening locally. So, when he was due for the surgery later in the semester, we would then revisit his local delivery later in the semester beyond block 2.

PN410 Professor Smallridge, you're manipulating the words that you've actually written which were considered when you put in this response. That's right, isn't it?---No, I don't believe so.¹²²

[78] The employer response was responding to the following statement in the application:

We came to an agreement that regardless of our disagreement on my workload, I would take over the unit convening for the current block (finishing 23rd September) which would see us to the mid semester break and then during the mid semester break we would negotiation a solution (26th – 30th September).¹²³

[79] The respondents contend that the evidence reflects a misunderstanding by the applicant of the duties he was requested to perform. The applicant disagrees and contends that he was very focussed on reaching a negotiated outcome at the meeting with Professor Smallridge on 9 September 2022 and the applicant reasonably believed a negotiated outcome was achieved. He contends that if there was any misunderstanding on what was agreed, this would only be reasonably possible if Professor Smallridge specifically intended for the applicant to believe there had been a negotiated outcome requiring less of the applicant than was originally sought. This last proposition cannot be accepted as it was not put to Professor Smallridge.

[80] I consider that the evidence reflects a misunderstanding of that which was agreed and that perhaps there was no agreement at all because there was no meeting of minds. Both the applicant and Professor Smallridge have different recollections, but Professor Smallridge's note made contemporaneously supports his recollection and his version of the outcome of the discussion. Also consistent with Professor Smallridge's recollection is Ms Martinez's evidence that later on 9 September 2022 she spoke with Professor Smallridge and asked him how the meeting with the applicant had gone. Her evidence was that Professor Smallridge told her that

the applicant had agreed to be the unit convenor for –‘Introduction to Marketing’ but would let VU know if his availability changed due to a surgery which he was expecting to have.¹²⁴ The applicant made no note, nor did he follow up his meeting with any email to Professor Smallridge confirming his understanding. I accept the applicant genuinely holds a different recollection as to the outcome of the 9 September 2022 meeting, but it does not follow that his recollection constituted the agreement. In any event, that which is clear is that VU wanted and expected the applicant to undertake the convening duties for BHO1171 for semester two.

[81] As to the correspondence about which complaint is made, it is clear from the emails earlier extracted, that the applicant and Ms Martinez are both dissatisfied and perhaps offended by emails authored by the other during 26 and 27 September 2022. The emails were informed by the different understandings the applicant and Ms Martinez had about that which had been agreed and the differing views about the applicant’s capacity to undertake the convening duties for BHO1171. Perhaps it would have been prudent for Ms Martinez to have checked with Professor Smallridge and the applicant before sending her email, just as it would have been prudent for the applicant to have called Ms Martinez rather than widely circulating his email of 27 September 2022. Both emails reflect a level of misjudgement, perhaps also frustration, and certainly a level of tension. Ms Martinez’s emails were direct, but given her understanding of that which was agreed with Professor Smallridge I do not consider the emails about which the applicant complains as amounting to Ms Martinez behaving unreasonably towards the applicant.

Applicant’s workload allocation in September 2022

[82] The applicant complains that he was directed by Professor Smallridge and Ms Martinez to undertake the unit convening duties for ‘Introduction to Marketing’ in September 2022, which exceeded his available hours. Putting to one side the controversy about that which was agreed between the applicant and Professor Smallridge on 9 September 2022, it is uncontroversial that VU wanted and expected the applicant to undertake the convening duties. This is clear from the combination of events on 9 September 2022 during meetings between the applicant, Ms Martinez and later Professor Smallridge and in subsequent emails passing between the parties on 26 and 27 September 2022.

[83] The requirement to undertake the convening duties arose in circumstances where the person who was to undertake the duties took a period of unexpected leave, travelling overseas, and so was unable to perform those duties.¹²⁵ Ms Martinez considered that since the applicant was familiar with ‘Introduction to Marketing’, it was appropriate to ask him to take on unit convenor duties, particularly as he had (or she believed he had) availability (based on the information in the spreadsheet saved on VU’s computer system).¹²⁶ But as the extract from the transcript below demonstrates, Ms Martinez was not in a position to know precisely what, if any, availability the applicant had.

PN297 THE DEPUTY PRESIDENT: Ms Martinez, can I just – so that I understand how it is you came to assess that Dr Winchester had capacity to undertake the coordination functions – you formed the view that he didn’t have a full teaching load?---Correct.

PN298 But you didn't have any information about how much time he had spent and would likely spend undertaking the service administration and planning activities?--- That's the same with for any academic, correct, yes.

PN299 Yes, so how did you form the view that he had capacity?---Well, that was what the meeting was for. I was under the assumption that he – well, my records indicated that he had 3.5 - - -

PN300 Teaching, yes?--- - - - or 3.6 of teaching, yes, and so because we had rounded it down to 3 for the year he had the 0.5 or 0.6 left which he could use as convening.

PN301 Yes, but you don't know whether he's convening – sorry, the service administration planning activities were 30 per cent, 40 per cent of his – of his workload?--I cannot know that, no.¹²⁷

[84] After Ms Martinez forwarded to Professor Smallridge the applicant's email of 27 September 2022, Professor Smallridge sent an email to the applicant as follows:

Dear Max,

I received the below email from Rechelle. Not only is this a totally inappropriate email to send but it is also factually incorrect.

As you are well aware in the FYC, Rechelle is tasked with the allocation of teaching and associated duties for all academic staff, you should consider that a request from Rechelle is a request from me.

In addition, I met with you after your meeting with Rechelle and confirmed the request that you convene BHO1171. We did agree that should your circumstances change (due to personal leave) we would revisit this allocation. Unit convening is part of the Allocated Service, Administration and Planning which can be allocated by me as Dean or the Dean's nominee (EA Clause 35.5 (e) (i) and 35.6 (a) & (b)), which is Rechelle.

The appropriate response is to request a review of your workload as per EA Clause 35.6(c) which states "Such a request for review will be made to the College Dean in writing", not to send an inappropriate email to Rechelle and copy in other staff.¹²⁸

[85] The applicant responded as follows:

Dear Andrew

Please note I did not cc everyone else in the string of emails. It was Rechelle who started this. It was also Rechelle who did not copy me in on the email telling Maria that I was going to be doing the UC tasks for BHO1171.

We did meet after the meeting I had with Rechelle, where I agreed to only cover the UC for BHO1171 for H2B2, acknowledging it was over and above my workload. I did not agree to do the task for the remainder of the year unless there was a negotiation of some

sort (we had discussed teaching relief in 2023) but we agreed we would discuss it over the teaching break, which we are yet to do.

You may have met with Rechelle and instructed her to order me to work over and above my allocated workload but I was not consulted in this discussion, and clearly should have been. I agree that UC duties are part of Service, Administration and Planning ((35.5 (e) (i) and 35.6 (a) & (b)), but such duties are reduced in line with a staff member's availability.

Given your failure to correctly recollect the discussion of our meeting I would ask that future meetings to discuss my workload include a representative from the NTEU.¹²⁹

[86] Ms Martinez wrote to the applicant by email (cc to Professor Smallridge) on 28 September 2022 stating that “you are asked to convene BHO1171 for Melbourne in 2B3”.¹³⁰ The applicant responded on 30 September 2022 with the following:

I have taken advice from the NTEU on this and as the workplan kept by the FYC does not account for S&A hours, my calculations are that I'm already well over my hours for S&A for 2023. As the EB outlines a hard maximum of 1710 hours, and in my case around 0.3 availability to FYC this year (due to research buyout and leave this year, confirmed by only 3 teaching blocks being allocated), there are no hours left for me to complete the task being assigned within my workload.¹³¹

[87] This was followed by an email exchange between Professor Smallridge and the applicant as follows:

Dear Max,

Thank you for your email.

We do not agree with your assessment and believe that it is appropriate to allocate you to unit convening BHO1171 as part of your Allocated Service, Administration and Planning. We note that the Unit convening of BHO1171 in semester 2 is the only Unit convening you have been allocated for the year and therefore the only Allocated Service you have been allocated for the year. As has already been explained to you, you can request a work review through a Peer Review Panel.

Until such time as circumstances change, our expectation is that you will undertake this convening role. As classes start on Monday please ensure that the VU Collaborate space is ready for them as a matter of urgency.¹³²

...

Dear Andrew

As per your email below, you imply that the only unit convening I've been allocated for the year was for BHO1171 in S2B2. Please note that I was also Unit Convenor for BHO1171 for S1B4. Jackie Hammill, who had originally been allocated all Unit

Convening duties was unavailable as she needed to go back to Canada to be with her ageing mother.

You also note in your email that the only Service, Administration and Planning activities required of an academic are those of Unit Convening, which I am surprised at. When I checked the VU 2019 EB, there is no specificity of the types of tasks that come under this category of work allocation. Given its lack of detail, I have referred elsewhere to what SA&P tasks that any academic could be expected to undertake, as well as included tasks that are allocated outside of teaching:

1. Unit convening
2. Unit review, redesign and/or enhancement
3. Teaching preparation for a not previously taught unit
4. Reading & responding to emails
5. Attending Meetings
6. SPDP
7. Reading and understanding University Policies
8. Travel between campuses
9. Completing mandatory training
10. Leadership Roles

we do not have clear hours allocated for tasks in the VU2019 EB, I have used Kenny & Fluck (2017) to estimate hours for academic tasks. They suggest that unit convening requires 25 hours per offering. With regards to tasks 2 and 3 outlined above, I have been required to do the following:

- I have key academic for BHO1171 for the entire year (this was allocated to me). The duties for this have included rewriting the unit from being online to a unit that could be both taught online and F2F (task allocated by John Weldon in an email 23/03/2022).
 - o Kenny & Fluck (2017) suggest that an update of a unit for on-campus delivery is between 20-50 hours
- Prepared for BPD1100, a new unit I've never taught before. You did not list this as an allocated activity, even though it was clearly part of my workload allocation for 2022 (evidenced by an email from Rechelle Martinez 22/12/2021.)
 - o Kenny & Fluck (2017) suggest that the preparation time of a new unit for on-campus delivery is between 5-8 hours per teaching hour. Therefore, for our 33-hour blocks, it would be between 165-264 hours

Between these two tasks, plus the unit convening duties allocated for S2B2 and S1B4, I have been allocated and worked between 235 and 364 hours in SA&P. With regards to tasks 4 through to 9 I have not broken down the number of hours these tasks take, though it could be assumed that they do take up at least a few hours per week.

An academic allocated 100% to FYC would normally have 428 SA&P hours for the year. The teaching planning workload document I was referred to in a previous email

has my availability to the FYC at 0.3 for 2022. The reasons for this you and I have discussed, so there's no reason to repeat them here. Given we both accept an availability of 0.3, my total hours for the year to the FYC are 513, rather than the 1710 FTE. We are also in agreement that I had met 3 blocks of teaching required under Section 35.5 of VU 2019 EB as this was listed the same spreadsheet on the FYC Y Drive. If we further follow Section 35.5 of VU 2019 EB for someone with an availability of 0.3, the following can be calculated:

- 266 Hours available for teaching
- 133 Hours available for SA&P duties
- 133 Hours available for Research, Scholarship & Professional Contributions

While there is not a clear definition of S&AP (sic) tasks, Section 35.5 of the VU 2019 EB is clear that as an academic's availability is reduced overall, their availability for SA&P activities is also reduced. As you can see in the points above, although I only had 133 hours available for SA&P duties, I have been allocated at least 235 hours, and that's before I bring other activities such as checking emails, attending meetings and other activities highlighted earlier that fall into this category of academic duties.

Given I have been allocated over the 133 hours I have, I do not think it is incorrect to say I have met the requirement for this part of my workload for the year.¹³³

[88] On 3 October 2022, Professor Smallridge responded with:

Thank you Max,

One minor clarification, I did not state "...that the only Service, Administration and Planning activities required of an academic are those of Unit Convening..." if you read my email I said "...the only Unit convening you have been allocated for the year and therefore the only Allocated Service you have been allocated for the year." I did not mention other Administration and Planning activities you may have undertaken. I also acknowledge that I missed the convening of BHO1174 in 1B4.

As I also stated I believe you have the capacity to undertake the unit convening for 2B3 and expect you to do so.

As I have stated on a number of occasions you are welcome to take your calculations etc to a Peer Review Panel as described in the EA Clause 35.6(c). Until such time as this occurs, or other circumstances change, our expectation is that you will convene this unit and that you have it all ready for the students when they start classes today.¹³⁴

[89] As is evident from the exchanges above, the applicant maintains that the SAP duties, as defined in the Agreement, do not identify with an appropriate level of detail the tasks involved and applying the "Kenny and Fluck" estimates. And he maintains the time taken to perform SAP duties exceeds the time allocated by the Agreement. Professor Smallridge said in evidenced that the Agreement provides for the range of hours to be allocated to SAP and that while VU does not "keep track of how many hours or how many minutes a staff member spends answering emails",¹³⁵ allocation of SAP hours appropriately accounts for the hours taken by academics to perform unit convening and other administrative tasks. It is evident that Professor Smallridge disagrees with the applicant's estimate, and he said that the "Kenny and Fluck" estimates do not accurately reflect the VU block model of academic work.¹³⁶ Professor

Smallridge said that on his calculations as of 27 September 2022, the applicant's available workload for that academic year was 0.37, resulting in 635 hours.¹³⁷ He said the Agreement provides that the allocation of academic teaching is to be made in complete blocks, rounded to the nearest block, resulting in an available workload of 0.4 or 684 hours.

[90] During cross-examination Professor Smallridge was asked why he disagreed with the applicant's workload calculations, and he said: "Well, two things: one is his availability was higher than he had calculated, so it was 3.7, not just under 3, and also the number of calculations, the calculations he'd used, were not calculations that are – bear a relationship to the current enterprise agreement so the calculations were different to the way in which calculations are conducted under the agreement."¹³⁸

[91] As earlier noted, in Professor Smallridge's 3 October 2022 email he invited the applicant "to take [his] calculations etc to a Peer Review Panel as described in the [Agreement] Clause 35.6(c)" and said that until "such time as this occurs, or other circumstances change, our expectation is that you will convene this unit and that you have it all ready for the students when they start classes today."¹³⁹ The applicant took personal leave at various times between October and December 2022 which reduced his available workload averaged over the year and so did not perform any further unit convening duties in that period.¹⁴⁰ Professor Smallridge said that the applicant had not applied for additional personal leave when he confirmed on 3 October 2022 that the applicant was to perform the unit convenor duties, the application for personal leave having been made by email the following day. Professor Smallridge said he did not know, and had no way of knowing, the applicant was going to take that personal leave at the time he asked the applicant to perform the duties.¹⁴¹

[92] After the applicant's bullying application was dealt with in an initial conference in the Commission, the applicant sent an email to Professor Smallridge on 10 November 2022 as follows:

Dear Andrew

Further to our disagreements on my 2022 workload, my previous email to the FYC Workload Panel members in September, and our Fair Work Australia conference this morning, I am writing to you to request that a panel is convened to review my workload as soon as possible as outlined in clause 35.6 of the VU 2019 EB.

As you are aware, the dispute is over what duties I should have to complete as part of my Service, Administration and Planning (SA&P) as outlined in Clause 35.5(e) in the VU 2019 Enterprise Agreement. My request is that:

1. The panel review my available hours (of which my calculations are attached in evidence files) given that I am available to FYC 0.3 for 2022
2. The panel consider my request for not just a teaching workload, but also time allocated for all duties and associated hours in the SA&P category of my workload.
3. The panel consider whether the request by both you and Rechelle as reasonable extra work given the hours available and tasks already needing to be completed within the available SA&P workload hours

I have attached relevant evidence for the panel's consideration (the same evidence that has been presented to The Fair Work Commission) and would be more than happy to present my case in person to them.¹⁴²

[93] On 14 November 2022, the applicant forwarded that email together with a statement and several documents to Mr Haritou, as part of his "request for college Peer Panel Review". Subsequently a Peer Review Panel comprising a nominee of Professor Smallridge, a nominee of the NTEU and a chair agreed between the NTEU and Professor Smallridge was convened, and it determined that:

FYC was reasonable in its work allocation and that the duties in question could be accommodated within the SA&P. The allocation is commensurate with allocations found in FYC and when compared to colleges that use more detailed allocation metrics. In addition to this, the panel also notes that perceptions of unfair allocation of coordination should be assessed in the context of a teaching allocation of 3 blocks against an availability of 3.7 blocks.¹⁴³

[94] The applicant says that the Panel's conclusion that the "FYC was reasonable in its work allocation and the duties in question could be accommodated within the SA&P" was based on incorrect information about his availability. He said that the FYC claimed to be 0.37 when it was in fact only 0.246 and it appeared that the Panel had only considered leave between January 2022 and the first week of September 2022 and failed to take into account further leave taken after that time. The applicant maintained that his unconsidered leave period amounts to 213.80 hours of additional leave that was taken in 2022 and that period included, amongst other things, an extended period of leave for surgery and recovery.¹⁴⁴

[95] It appears that the Panel's assessment was conducted by assessing whether the allocation of unit convening on 26 or 27 September 2022 was reasonable having regard to the information then known.¹⁴⁵ Professor Smallridge did not take the applicant's leave after 3 October 2022 into account when allocating the duties in September 2022 because the leave was not certain and he told the applicant that he would revisit the workload allocated if that occurred.¹⁴⁶ The applicant's own calculations as to workload, prepared in September 2022, allocated zero hours as a contingency for the leave (due to surgical requirements) that might be taken later in 2022,¹⁴⁷ and the applicant does not mention the likely leave in his email of 30 September 2022 earlier set out.

[96] There is room for debate about whether the panel ought to have considered the leave taken post September 2022 when it considered the applicant's request for a review, but it is a moot point since by that time the applicant was taking leave and was not performing, nor was he then being required to perform, the contentious unit coordinating duties. The more relevant question the panel had to determine was whether, when the duties were allocated in September 2022, the allocation was unreasonable. The applicant's request that the "[P]anel consider whether the request by both [Professor Smallridge] and [Ms Marinez] as reasonable extra work given the hours available and tasks already needing to be completed within the available SA&P workload hours"¹⁴⁸ was open to consideration based on the information known to the allocators when the allocation was made in September 2022. This is particularly so since Professor Smallridge made clear in early September 2022, the allocation would be reviewed if the applicant's circumstances changed later in the semester.

[97] VU's allocation of unit convening duties to the applicant in September 2022 was on the basis that it considered he had availability, based on its calculations in applying the terms of the Agreement. The applicant had a different view. There is plainly a divergence of views as to the number of hours the applicant had available to perform his duties in the 2022 academic year, and the amount of time it would take to perform those duties. It is clear, beyond the general percentage of SAP duties as a proportion of the 1710 hours cap in the Agreement, that no record is kept of actual or likely hours required. Disputation about whether the proportion has or will be exceeded in these circumstances is not only understandable but inevitable. However, that does not mean the conduct complained of was unreasonable behaviour. Parties may reasonably take disparate views about that which is required or permitted under an enterprise agreement. VU (through Professor Smallridge and Ms Martinez) had one view, the applicant another. They were in dispute. But in maintaining that the applicant had capacity in September 2022 to undertake unit coordinating duties for the remainder of that semester and then requiring the applicant to undertake the duties, neither Ms Martinez nor Professor Smallridge acted unreasonably in the circumstances.

[98] The allocation was not arbitrary but was made based on VU's (through Professor Smallridge and Ms Martinez) reasonably held view of the applicant's capacity, taking into account the applicant's seniority and extensive experience in designing, teaching and coordinating 'Introduction to Marketing' and an estimate as to the time that would be required to undertake the duties.¹⁴⁹ And as Professor Smallridge recounted in his evidence, the applicant told him during their meeting on 9 September 2022 that he may have to undergo surgery later that year but did not know when. Professor Smallridge told the applicant that he would reconsider the allocation of the local delivery of the unit convening duties and remove him from this duty due to personal leave if necessary, in that eventuality¹⁵⁰ and this is reflected in the contemporaneous note made by Professor Smallridge after his meeting with the applicant.¹⁵¹

[99] I do not consider the allocation of unit convening duties to the applicant in September 2022 was unreasonable behaviour. As I have said, the allocation appears to have been on reasonable grounds bearing in mind that the parties are at odds about the operation and effect of the Agreement. The applicant's contention of availability based on the AWET developed by Kenny and Fluck does not make VU's position (or that of Professor Smallridge or Ms Martinez) unreasonable, the AWET does not operate on the Agreement and had not been developed when the Agreement was made and commenced operation. This is a dispute about the applicant's workload in the context of the workload allocation model in clause 35 of the Agreement. The Agreement has a dispute settlement term (clause 65) with which the applicant could and perhaps should engage. A disputed allocation of work in that context does not sound in unreasonable behaviour.

Professor Smallridge's conduct on 27 September 2022

[100] The substance of the applicant's complaint about Professor Smallridge's conduct on 27 September 2022 at around 9.30 am, is the applicant perceived that the Professor's "manner and body language was clearly furious".¹⁵² The applicant says that Professor Smallridge refused to speak with him, other than to say, "I have nothing to say to you!" and that he found the interaction with Professor Smallridge to be very distressing, so the applicant took half a day off to calm himself later that day.¹⁵³

[101] Professor Smallridge's evidence was that on 27 September 2022, he was at a research forum which he had organised and was about to start. He said he was chatting to a number of other people who were there as part of his role for setting it up, and the applicant approached him and said, 'Can I speak to you?', to which Professor Smallridge responded with 'not now'. Professor Smallridge said he was clearly busy at the time.¹⁵⁴ Professor Smallridge said that he was not furious, but that he was possibly stressed because it was an important forum.¹⁵⁵

[102] I accept Professor Smallridge's evidence. His response was curt and direct but not unreasonable behaviour in the circumstances.

[103] Relatedly, the applicant complains about a postponing of a 29 September 2022 meeting to discuss a study tour proposed by him, notice of which was given early on the morning of 27 September 2022. The suggestion was that the postponement was "a spiteful act" by Professor Smallridge towards the applicant in response to the allegations raised by Ms Martinez regarding the applicant's email which is earlier set out.¹⁵⁶ The applicant also says that part of Professor Smallridge's explanation for postponing the meeting – that the applicant had submitted a half day of personal leave for 27 September 2022 due to workplace stress¹⁵⁷ - cannot be accepted since that was not known to him when he sent an email postponing the meeting.¹⁵⁸ This is not necessarily correct since there is no evidence about the precise time the meeting was postponed as the transcript extract below reveals:

PN930 You were saying that you sent him the email of 27 September 2022 that we've just gone through in response to him submitting for a half-day of personal leave on 27 September 2022. But he hadn't even submitted that request for half a day at the time that you sent the email.

PN931 THE DEPUTY PRESIDENT: Ms Serpell, I think we might be at cross purposes. I understand Professor Smallridge's evidence. He's suggesting that the email to which you have taken him at 521 is not the email of the 27th advising of a cancellation of the meeting. Did I understand that correctly? Because it doesn't on its face say anything about the meeting?---Yes – no, that's correct. I mean, I don't know exactly when the meeting was changed but - - -

PN932 When you say at 85, 'On 27' – sorry, of your statement – 'On 27 September 2022 I emailed Associate Professor Winchester and advised him of this', that is postponement of the meeting. That's not this email on – at 521. There must be another email. Is that right?---The one – it's certainly not the one at 803.

PN933 Yes?---The email postponement would probably have come through my EA. She does the meetings organise – so I don't know exactly - - -

PN934 Would it be a cancellation on the calendar?---Yes, it would have been a – it just would have been a cancellation on the calendar, that's right, and, you know – I mean, we didn't reschedule it in the immediate future - - -

PN935 Self-evidently this email says nothing about the meeting?---No, that meeting doesn't, no.

PN936 Can I ask you this: your email at 803 is responsive to Dr Winchester's email of 19 September, which is on the next page?---Yes.

PN937 And you'll see that email in the second sentence Dr Winchester says: 'Please let me know if I need to make any changes'?---Yes.

PN938 Can I ask you why you thought the appropriate course was to send an email to Mr Ross and not simply reply to Mr – to Dr Winchester advising him why it is that the documents that he had given you were not up to standard?---Look, I'm not exactly sure but I – I think that I received an email from Andrew Ross asking me where it was at, as he looks after the funding and organising things like that. And so I think there was an additional email from Andrew Ross and so it was part of this, I then replied to Andrew and to Max regarding that.

PN939 All right, well, that email doesn't appear to be in the materials but in any event
- - -

PN940 MS SERPELL: There's an email, Professor, of 29 September where the – where Associate Professor Winchester is advised that the meeting of 29 September is cancelled. It was on the same day. So the only email that you're referring to could be this one of yours dated 27 September where you say at the end, 'I will let you know when and if I'm able to approve the proposed tour'?---Yes, that was the information that I provided to – to Max. I said I hadn't approved it at that point in time, which I hadn't, because there were concerns that had been raised and discussed with OHS team.¹⁵⁹

[104] At the hearing, Professor Smallridge denied that postponement of the meeting was a spiteful act and he explained that “there's an occupational health and safety component, and I have to ensure the safety of staff and students, and the assessment, the budget, was incomplete, the itinerary was not up to the standard of other itineraries that had been submitted for this study abroad tour, and the risk assessment was lacking in other items, and so no. It was nothing to do with any other aspect of this, it was to do with the study tour and ensuring the health and safety of staff and students who went on that tour.”¹⁶⁰

[105] Professor Smallridge's evidence was that he postponed the meeting because he “had received the incident report which clearly indicated that [the applicant] was under considerable stress again. He had included the allegations of bullying regarding [Ms Martinez], and...[Professor Smallridge] spoke [to] People And Culture and to occupational health and safety, and [they] decided that [they] were going to prioritise things, and clearly, given the study tour was a long way away, [they] took the sensible approach...not to add additional stress into [the applicant's] life at that point in time, and to deal with one matter at a time.”¹⁶¹

[106] I accept Professor Smallridge's evidence and, in the circumstances described, the postponement of the meeting was not unreasonable behaviour.

Malaysia study tour

[107] The applicant explained that he had applied for and received a grant to take marketing students on a study tour of Malaysia. He contends that VU (through Professor Smallridge)

engaged in unreasonable behaviour as Professor Smallridge did not approve his application for the study tour because of his 26 September incident report and allegations he had made about Ms Martinez. He also contends Professor Smallridge engaged in unreasonable conduct because the Professor did not provide any further correspondence identifying concerns held about the study tour initially outlined in the Professor's email dated 27 September 2022 until 16 February 2023 and through VU's request that he provide medical reports confirming his fitness for duty in relation to the study tour.

[108] Professor Smallridge advised the applicant by email on 13 September 2022 that he would not approve the study tour until he had seen and approved a risk assessment. In terms the email provided:

As I have stated previously, I will not approve this until I have seen a risk assessment and have approved that.

Then we can talk about the budget and other arrangements.¹⁶²

[109] This was sent before the applicant lodged his OHS incident report on 26 September 2022 and before Professor Smallridge was aware of any allegations about Ms Martinez's conduct having regard to my earlier finding. Professor Smallridge's evidence was that the itinerary, budget and risk assessment prepared by the applicant in relation to the study tour were insufficient to enable him to assess the necessary arrangements to ensure the health and safety of the staff and students undertaking the proposed tour.¹⁶³

[110] Professor Smallridge also said that as the applicant had commenced a period of personal leave on 3 October 2022, progression of the approval of the study tour was postponed pending the applicant's return to work. He said that on 24 January 2023 the applicant re-submitted the study tour application with additional and revised material. Professor Smallridge said that he considered the revised application in line with the VU's standard processes and requirements and determined there was still further work to be undertaken with the itinerary and risk assessment. He said VU also had concerns about the applicant's capacity to safely undertake the duties required of him during the study tour given his recent diagnoses of work-related stress and previous medical history, which relates directly to the work environment and travel.¹⁶⁴

[111] Professor Smallridge wrote to the applicant by letter dated 16 February 2023, in which he relevantly advised the applicant that:

. . . in order to provide approval for the Study Tour, you are required to submit a Risk Assessment and Itinerary.

I confirm that on 24 January 2023 you provided me with an updated Risk Assessment and Itinerary in relation to the Study Tour. I have reviewed these documents and consider that they do not include the level of detail required to ensure the University is able to meet its duty of care to students and ensure a positive and worthwhile student experience. In particular:

- the Risk Assessment does not cover the required spectrum of issues nor the appropriate control measures to manage any likely risk, including those for travel and student supervision. It is not clear how you will manage the students during the trip and how student safety will be assured via the identified control

measures. These measures require more than just briefing students. Close supervision will be required at all times. It also does not address issues associated with underage persons the students may come into contact with, either at Sunway or during home stay.

- the Itinerary does not set out the level of detail required, in relation to transportation (including flights and travel to and from the airport and whilst at Sunway), accommodation (such as suggested areas and/or hotels for accommodation and the nature of home stays), sites that will be visited and the detail of off-campus trips and how students will be supervised on these trips, as well as how their safety and wellbeing will be managed during their ‘free’ days.

In order to assist you with the completion of these documents, I enclose with this letter an example of a Risk Assessment and Itinerary completed for an approved study tour of a similar nature, which demonstrates the level of detail required.

I invite you to revise these documents and resubmit your application to me for further consideration. I confirm I am happy to provide further guidance in relation to what is required if necessary.¹⁶⁵

[112] Also by letter dated 16 February 2023, Professor Smallridge wrote to the applicant’s treating practitioner as follows:

As you may be aware, Associate Professor (A/Prof) Winchester is employed at Victoria University (University) as an Associate Professor and teaches at the University campus in Melbourne.

The University is currently considering an application by A/Prof Winchester to undertake an overseas study tour for students at Sunway College in Malaysia in or around June 2023 (Study Tour). The Study Tour will involve A/Prof Winchester, as a representative of the University, accompanying 20 students travelling and studying overseas for a period of 4 weeks.

It is an inherent requirement of A/Prof Winchester’s position as the University representative on the Study Tour to ensure the health, safety and wellbeing of students in the University’s care at all times throughout the duration of the Study Tour.

Further, the University has obligations under the Occupational Health and Safety Act 2004 (Vic) to ensure its workers are able to perform the requirements of their role without risk to their health and safety.

A/Prof Winchester has previously disclosed the following medical condition:

- a Certificate of Capacity dated 18 October 2022 advising that he suffers from stress related to work and excessive workloads and is keen to avoid work situations that trigger stress / panic attacks.

A/Prof Winchester provided the University with medical certificates following work related travel:

- in March 2020, advising that he had suffered cervical, thoracic and lumbar back pain following discomfort experienced on a flight
- in February 2016, advising that he had suffered an injury to his neck and shoulder due to whiplash associated with concussion following turbulence experienced on a flight.

To assist Victoria University in better understanding and considering A/Prof Winchester's capacity to undertake his duties and ability to safely perform the inherent requirements of his role throughout the duration of the Study Tour, we request that you prepare and return to A/Prof Winchester the attached report.

To assist, the duties of Mr Winchester's position while undertaking the Study Tour are set out in the attached Draft Statement of Staff Duties. The University will meet any reasonable costs associated with your medical report on provision of your invoice to me via email to Andrew.smallridge@vu.edu.au¹⁶⁶

[113] On 20 February 2023 the applicant provided VU with a medical report which stated that he is fit and able to safely carry out the inherent requirements of his role, including all the duties required throughout the duration of the study tour.¹⁶⁷ According to Professor Smallridge the report did not address any of the applicant's previous medical history which relates directly to the work environment and travel.¹⁶⁸ On 17 March 2023 Ms Simone Wright, Chief Human Resources Officer wrote to the applicant requesting a further medical report as follows:

We refer to the university's letter to you dated 16 February 2023 regarding your current application to undertake an overseas study tour at Sunway College in Malaysia (Study Tour).

As outlined in our letter, the University has obligations under the Occupational Health and Safety Act 2004 (Vic) to ensure its workers are able to perform the requirements of their role without risk to their health and safety and to protect the health, safety and welfare of other staff and students in its care.

We confirm that you have recently provided the University with a medical report dated 20 February 2023. This report states that based on your current condition and medical history, you are fit and able to safely carry out the inherent requirements of your role, including all the duties required of you throughout the duration of the proposed Study Tour.

The University considers that the report is not clear as to how, if at all, the previous injuries you have suffered which relate directly to the work environment and travel, may impact on your capacity to safely undertake the Study Tour.

The University continues to consider that it is unable to guarantee your health, safety and welfare, based on the information that has been provided.

Therefore, you are again directed to provide a further medical report which gives the University sufficient clarity regarding the nature of your current capacity and your relevant previous medical conditions.

Please provide your treating practitioner with the enclosed letter and request that they complete the questions. We seek this information, which we will treat in confidence, by 31 April 2023. We consider this is a reasonable and lawful request so that the University can better understand your capacity to safely perform the requirements of your role during the Study Tour.

The University will meet the reasonable costs associated with producing the medical report.¹⁶⁹

[114] A report responding to these issues dated 13 April 2023 was subsequently provided to VU.¹⁷⁰

[115] I do not accept that the evidence discloses any unreasonable conduct by Professor Smallridge or VU in relation to the study tour. The steps taken by Professor Smallridge to obtain a thorough risk assessment and itinerary together with the medical information sought were all reasonable in circumstances where VU has an obligation to ensure the health and safety of FYC students, staff and the applicant while travelling abroad. The delay complained of is explicable by the applicant's absence towards the end of the 2022 academic year and the break which followed. And the concerns raised by Professor Smallridge were evident before the 26 September 2022 incident report and before he became aware of any complaint the applicant had made about Ms Martinez. It was also reasonable in my view, given the applicant's medical history, for Professor Smallridge and VU to seek medical advice from the applicant's treating physician about his fitness and capacity to accompany FYC students on the study tour.

Conclusion

[116] For the reasons set out above, none of the behaviour or conduct about which the applicant complains amounts to an instance of unreasonable behaviour or conduct. Consequently, although I accept that the applicant was genuinely aggrieved about his workload and had a different view to VU about his capacity, the applicant has not been bullied at work by any of the respondents.

[117] Since the conduct complained of is not bullying conduct, no orders can, nor need be made. The application is dismissed.

Order

[118] The application is dismissed.



DEPUTY PRESIDENT

Appearances:

C Serpell of counsel for Mr Winchester

A Crocker of counsel for Victoria University and others

Hearing details:

17, 19 and 20 April 2023
23 June 2023
Melbourne

Written submissions:

Applicant: 3 March, 23 May and 23 June 2023

Respondents: 31 March and 19 June 2023

Printed by authority of the Commonwealth Government Printer

<PR767679>

¹ Exhibit 1, at [2]-[4], attachments MW1 and MW2

² Court Book (CB) 162

³ *Mac v Bank of Queensland Limited and Others* [2015] FWC 774 at [75]

⁴ *Fair Work Act 2009*, s 789FC(2)

⁵ *Mac v Bank of Queensland Limited and Others* [2015] FWC 774 at [79]

⁶ [2014] FWCFB 9227

⁷ *Ibid* [49]-[54]

⁸ *Acts Interpretation Act 1901*, s 22 (as in force on 25 June 2009; see *Fair Work Act 2009*, s 40); the current iteration of the *Acts Interpretation Act 1901* is to the same effect; see s 2B

⁹ *Bowker v DP World Melbourne Limited & Ors* [2014] FWCFB 9227 at [31]

¹⁰ *Re SB* [2014] FWC 2104 at [41]; *Mac v Bank of Queensland Limited and Others* [2015] FWC 774 at [88]-[89]

¹¹ *Ibid*

¹² *Re SB* [\[2014\] FWC 2104](#) at [43]; *Mac v Bank of Queensland Limited and Others* [\[2015\] FWC 774](#) at [88]-[89]

¹³ *Mac v Bank of Queensland Limited and Others* [\[2015\] FWC 774](#) at [89]; *Kelly v R* (2004) 218 CLR 216 at [84] and [103]
¹⁴ [\[2015\] FWC 774](#)

¹⁵ *Ibid* at [89]

¹⁶ *Ibid* at [90]-[91]

¹⁷ *Re SB* [\[2014\] FWC 2104](#) at [44]; *Mac v Bank of Queensland Limited and Others* [\[2015\] FWC 774](#) at [93]

¹⁸ *Re SB* [\[2014\] FWC 2104](#) at [45]; *Mac v Bank of Queensland Limited and Others* [\[2015\] FWC 774](#) at [93]

¹⁹ *Mac v Bank of Queensland Limited and Others* [\[2015\] FWC 774](#) at [94]

²⁰ Exhibit 1, attachment MW10

²¹ *Ibid* at [71]-[74]

²² *Ibid* at [31]

²³ Transcript (20 April 2023) PN141-PN146

²⁴ Exhibit 13 at [7]

²⁵ *Ibid*

²⁶ Exhibit 1 at [6]-[18]

²⁷ *Ibid* at [6]

²⁸ *Ibid* at [11]

²⁹ *Ibid*, attachment MW15

³⁰ Exhibit 7 at [5]

³¹ *Ibid*, attachment JK1

³² Transcript (17 April 2023) PN571

³³ *Ibid* PN578

³⁴ Exhibit 7 at [76]

³⁵ *Ibid* at [76]-[79]

³⁶ *Ibid* at [32]

³⁷ *Ibid* at [31]-[32]

³⁸ *Ibid* at [33]-[56]

³⁹ *Ibid* at [57]-[66]

⁴⁰ *Ibid* at [67]-[75]

⁴¹ *Ibid* attachment JK1

⁴² *Ibid* at [67]

⁴³ *Ibid* at [15]

⁴⁴ *Ibid* at [75]

⁴⁵ *Ibid*

⁴⁶ Transcript (17 April 2023) PN599-PN602

⁴⁷ Exhibit 7 for example at [32], [46], [54], [70] and [76]

⁴⁸ Transcript (17 April 2023) PN582; See also PN403-PN406

⁴⁹ *Ibid* PN628-PN631

⁵⁰ *Ibid* PN608-PN609

⁵¹ *Ibid* PN610-PN612

⁵² *Ibid* PN614

⁵³ *Ibid* PN627-PN632

⁵⁴ [\[2019\] FWCA 2942](#) at [4]

⁵⁵ Exhibit 1 at [12]

-
- ⁵⁶ CB21
- ⁵⁷ CB162-164
- ⁵⁸ CB169-171
- ⁵⁹ CB165
- ⁶⁰ Transcript (17 April 2023) PN609
- ⁶¹ Ibid PN183
- ⁶² Ibid PN128
- ⁶³ Ibid PN129
- ⁶⁴ [\[2019\] FWCA 2942](#) at [4]
- ⁶⁵ CB162 at [4]; Exhibit 1 at [22], [42], [48]
- ⁶⁶ Exhibit 1 at [48]
- ⁶⁷ Ibid, MW39
- ⁶⁸ Exhibit 9; Transcript (20 April 2023) PN88
- ⁶⁹ Transcript (20 April 2023) PN91
- ⁷⁰ Ibid PN84; Exhibit 13 at [23]-[24]
- ⁷¹ Exhibit 1 at [50]; Exhibit 13 at [31]
- ⁷² Ibid at [52] and see [44]-[45]
- ⁷³ Exhibit 13 at [36]; Exhibit 1 at [53]
- ⁷⁴ Exhibit 1 at [54], Transcript (17 April 2023) PN277-PN284
- ⁷⁵ Exhibit 1 at [54]; Exhibit 13 at [36]
- ⁷⁶ Exhibit 13 at [38]
- ⁷⁷ Transcript (17 April 2023) PN274-PN275
- ⁷⁸ Exhibit 14 at [6]-[8],
- ⁷⁹ Ibid at [6], Transcript (20 April 2023) PN488
- ⁸⁰ Transcript (20 April 2023) PN532, PN537, PN570, PN572, PN575, PN576-PN577
- ⁸¹ Exhibit 14 at [11]; Transcript (20 April 2023) PN581
- ⁸² Transcript (20 April 2023) PN593-PN596
- ⁸³ Exhibit 15 at [7]
- ⁸⁴ Ibid at [5]-[8]
- ⁸⁵ Ibid at [10]
- ⁸⁶ Transcript (20 April 2023) PN711
- ⁸⁷ Ibid PN702, Exhibit 15 at [9]
- ⁸⁸ Exhibit 1 at [56]-[59]
- ⁸⁹ Exhibit 8 at [31]-[40]
- ⁹⁰ Ibid at [41]-[43], annexure AS-4
- ⁹¹ Exhibit 1 at [69]; MW10
- ⁹² CB121. The emails is attached to various statements. Conveniently it is also part of an email chain that is exhibit 10
- ⁹³ Exhibit 1, MW10
- ⁹⁴ Exhibit 8, AS-7
- ⁹⁵ Exhibit 1 at [69]
- ⁹⁶ Exhibit 8, AS-7
- ⁹⁷ Transcript (19 April 2023) at PN689
- ⁹⁸ Ibid at PN690-PN692
- ⁹⁹ Exhibit 8 at [45], Exhibit 13 at [41] and [48]

- ¹⁰⁰ See also Transcript (20 April 2023) PN89
- ¹⁰¹ Exhibit 13 at [36]
- ¹⁰² Transcript (20 April 2023) PN212
- ¹⁰³ Exhibit 10
- ¹⁰⁴ Ibid.
- ¹⁰⁵ Ibid
- ¹⁰⁶ Ibid
- ¹⁰⁷ Ibid
- ¹⁰⁸ Ibid
- ¹⁰⁹ Ibid
- ¹¹⁰ Exhibit 13. Annexure RM-2
- ¹¹¹ Exhibit 10; Exhibit 8, annexure AS-8
- ¹¹² Exhibit 1, MW10
- ¹¹³ Ibid at [56]
- ¹¹⁴ Ibid; Transcript (17 April 2023), PN287 – PN288
- ¹¹⁵ Exhibit 1 at [57]
- ¹¹⁶ Exhibit 8 at [36]-[37]
- ¹¹⁷ Ibid at [38]; Transcript (19 April 2023) PN400
- ¹¹⁸ Exhibit 8 at [38]
- ¹¹⁹ Ibid, annexure AS-4
- ¹²⁰ Transcript (19 April 2023) PN384-PN410
- ¹²¹ CB1122-1123
- ¹²² Transcript (19 April 2023) PN400-PN410
- ¹²³ CB22
- ¹²⁴ Exhibit 13 at [42]
- ¹²⁵ Ibid at [13]-[17]
- ¹²⁶ Ibid at [20]
- ¹²⁷ Transcript (20 April 2023) PN297-PN301
- ¹²⁸ Exhibit 8, annexure AS-8; Exhibit 10
- ¹²⁹ Ibid
- ¹³⁰ Exhibit 8, annexure AS-9
- ¹³¹ Ibid
- ¹³² Ibid
- ¹³³ Ibid
- ¹³⁴ Ibid
- ¹³⁵ Transcript (20 April 2023) PN148
- ¹³⁶ Exhibit 8 at [58]
- ¹³⁷ Ibid at [61] – [64], and Attachment AS-12
- ¹³⁸ Transcript (19 April 2023), PN487
- ¹³⁹ Exhibit 8, annexure AS-9
- ¹⁴⁰ Ibid at [67]
- ¹⁴¹ Ibid at [68], and Attachment AS-14
- ¹⁴² Ibid, annexure AS-11
- ¹⁴³ Ibid, annexure AS-15; Exhibit 1, MW37

¹⁴⁴ Exhibit 1 at [45]-[47]

¹⁴⁵ Transcript (19 April 2023) PN775

¹⁴⁶ Exhibit 8 [38] and Annexure AS-4

¹⁴⁷ Transcript (17 April 2023) PN239-PN244

¹⁴⁸ Exhibit 8, annexure AS-11

¹⁴⁹ Exhibit 8 at [34]

¹⁵⁰ Ibid at [38]

¹⁵¹ Ibid, annexure AS-4

¹⁵² Exhibit 2 at [51]

¹⁵³ Ibid at [51]

¹⁵⁴ Transcript (17 April 2023) PN707

¹⁵⁵ Ibid PN905

¹⁵⁶ Ibid PN918

¹⁵⁷ Exhibit 8 at [85]

¹⁵⁸ Exhibit 2 at [51]

¹⁵⁹ Transcript (19 April 2023) PN930-PN940

¹⁶⁰ Transcript (19 April 2023) PN918

¹⁶¹ Ibid PN926

¹⁶² Exhibit 1, attachment MW47

¹⁶³ Exhibit 8 at [82]

¹⁶⁴ Ibid at [86]-[87]

¹⁶⁵ Ibid, attachment AS-21

¹⁶⁶ Ibid

¹⁶⁷ Ibid, annexure AS-22

¹⁶⁸ Ibid at [89]

¹⁶⁹ Ibid at [91], annexure AS-23

¹⁷⁰ Exhibit 12