

[2023] FWC 824

The attached document replaces the document previously issued with the above code on 14 April 2023.

The name of the individual who lodged the initiating complaint against the Applicant has been de-identified in the Decision.

Associate to Deputy President Masson.

Dated 15 August 2023



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Aaron Harwood

v

The University of Melbourne
(U2022/9898)

DEPUTY PRESIDENT MASSON

MELBOURNE, 12 APRIL 2023

Application for an unfair dismissal remedy - termination not harsh, unjust, or unreasonable – application dismissed.

[1] On 9 October 2022, Dr Aaron Harwood (the Applicant) made an application to the Fair Work Commission (the Commission) under s.394 of the *Fair Work Act 2009* (Cth) (the Act) for a remedy, alleging he had been unfairly dismissed from his employment with The University of Melbourne (the University) on 20 September 2022 following an investigation conducted by the University which substantiated allegations of inappropriate workplace conduct towards a research assistant and former student in 2016. The Applicant seeks reinstatement and back pay for the of period since dismissal or an order for compensation in the alternative.

[2] Conciliation of the matter before the Commission failed to achieve a resolution and consequently the matter was listed for determination on 22 & 23 February 2023 and after hearing from the parties, I determined to conduct a hearing pursuant to s 399 of the Act.

[3] At the hearing, the Applicant was represented by Mr J Ryan of Counsel who was granted permission to appear pursuant to s 596 of the Act. Mr Ryan called the Applicant to give evidence.

[4] The University was represented by Mr C O’Grady QC of Counsel who was also granted permission to appear pursuant to s 596 of the Act. Mr O’Grady called the following witnesses;

- Jessica Kerr – Director Workplace Investigations University of Melbourne
- Julius Roe – Industrial Relations Consultant
- Martin Bower – Director Workplace Relations University of Melbourne
- Nicola Jane Phillips – Provost at University of Melbourne

Background and evidence

Alleged misconduct

[5] The allegations of misconduct that were investigated by the University, and which led to the Applicant's dismissal related to his interactions with Ms X in 2016. Ms X was an international student who attended the University between 2015 and 2017. In Semester 1 of 2016 Ms X was enrolled in COMP90015 – Distributed Systems (the COMP90015 Course), a course taught by the Applicant. After successfully completing that course, Ms X began working for the Applicant as a casual research assistant during the second semester of 2016 from 1 August – 31 December 2016. According to Mr Bower, Ms X's employment was funded by the Applicant's 'discretionary fund' and she completed her studies at the University in 2017 when she completed her masters in engineering¹.

[6] In dismissing the Applicant, the University investigated and relied on two allegations of misconduct on the part of the Applicant. The first allegation was that the Applicant had pursued an inappropriate relationship with Ms X as evidenced by a series of text messages exchanged in the second half of 2016. The second allegation was that on one occasion the Applicant uninvited, touched Ms X's back and rubbed it in a downward direction. The conduct was found to be substantiated by the University and was held to be in breach of the Appropriate Workplace Behaviour Policy (AWB Policy) and Sexual Misconduct Prevention and Response Policy (SMPR Policy) and constituted serious misconduct.

[7] Turning to the first allegation, it is not contested that the Applicant engaged in a series of WeChat text message exchanges with Ms X in the second half of 2016. While no precise date of the first text message exchange was ascertainable, it was accepted by both the Applicant and the University that it occurred following completion of first semester exams and prior to release of the course results in the COMP90015 Course which the Applicant was teaching, and in which Ms X was enrolled. The exchange occurred in the context of Ms X expressing concern to the Applicant regarding her exam result flowing from which the Applicant offered to reveal her results to her² (the Exam Results Texts). The text exchange was as follows;

Applicant: Well later you can review exam.

Ms X: Cannot afford if the mark goes down...

Applicant: Don't stress too much. If you like you can come this week and see...just don't tell anyone. It's a secret.

At 4.39pm

Ms X: It's like a rabbit hole.

[8] In explaining the Exam Results Text, the Applicant states that Ms X contacted him at the end of the first semester and advised him that she was stressed about her exam results. He states that the exams had all been marked but had not yet been officially released and, in these circumstances, he was happy to show her the mark she had received to assist her manage her stress. He further states that he would be happy to do this with any student who had similarly approached him. He states he asked Ms X not to tell anyone because he did not want an avalanche of similar requests³.

[9] When cross-examined on the Exam Results Texts, the Applicant denied his request for Ms X to keep the potential early release of her test results a “secret” was because of his wish to pursue a personal relationship. He agreed however that the early release of exam results was contrary to University rules but maintained he would have done it for any student in the same circumstances. He further acknowledged his comment in his response to Mr Roe’s investigation where he had conceded that he may have been “lenient” towards Ms X in proposing the early and confidential release of her exam result⁴.

[10] Following the Exam Results Texts sent at the end of the first semester, several other text exchanges then took place between the Applicant and Ms X which the parties were unable to identify the dates of. It was however agreed that they occurred before a final text exchange which took place on 4 November 2016 which is dealt with further below.

[11] An undated text exchange took place between the Applicant and Ms X and while earlier elements of the apparent exchange were not available, the Applicant asked when he would be able to meet Ms X’s cat ‘Kaka’ and then proceeded to ask whether he could ask Ms X an inappropriate question to which Ms X replied with a startled cat emoji⁵ (Inappropriate Question Texts). The exchange was in the following terms;

Applicant: When do I get to meet Kaka in person?

Applicant: Can I ask you a completely inappropriate question?

Ms X: Posts a startled cat emoji.

[12] The Applicant was questioned regarding the Inappropriate Questions Texts. It was put to him that his question to Ms X about when he would get to meet her cat ‘Kaka’ was an attempt by him to develop a level of personal intimacy with Ms X by visiting her at her home. He rejected the proposition and defended his question as just being courteous and trying to be friendly.

[13] A further text message exchange took place between the Applicant and Ms X in which the Applicant pressed Ms X to reveal the craziest thing she had ever done⁶ (the Craziest Thing Texts). The text exchange took the following form;

Ms X: No

Applicant: Be honest.

Applicant: I wont tell anyone.

Ms X: The craziest one might be the road trip with my friend who has no experience driving in Australia to the great ocean road.

Ms X: And she is a girl, we hired a car.

Ms X: I didn’t tell my parents cause they wont let me go.

Applicant: Ahuh

[14] The Applicant explained that his request to Ms X that she disclose the craziest thing she had done arose from the question being popular on social media at the time and that he was just trying to be sociable by asking Ms X the question⁷.

[15] A further exchange took place in which the Applicant pressed Ms X to take a break from her work and accompany him for a coffee⁸ (Coffee Request Texts);

Applicant: I'm about to leave. Take a break from coding and have a coffee with me

Applicant: I have a big umbrella (following which a smiley emoji was used)

Ms X: I'm with my own group members

Ms X: I have my own umbrella too. Just don't want to leave my laptop.

At 4.11pm

Applicant: Just tell your group members there's a new man in your life and you need to spend some quality time with him.

At 5.04pm

Ms X: Oh I don't think they want to know that... We kept a comfortable distance from each other...

Applicant: Call me when you get home.

At 5.12pm

Ms X: For what...?

Applicant: Those things I wanted to discuss but didn't get a chance this week to meet up face to face.

[16] When questioned on the Coffee Request Texts, the Applicant denied that the invitation and reference to his having a big umbrella was an attempt to establish personal intimacy. As to his comment to Ms X that she should tell her friends that she had a new man in her life and wanted to spend some quality time with him, he explained these comments as being an attempt at humour. He also did not accept that Ms X's rejection of his invitation meant that she did not want to spend time with him in the future. Rather, he took her reaction to be that she was busy that day.

[17] A final text exchange took place on 4 November 2016 between the Applicant and Ms X with the first text of that exchange in evidence being sent at approximately 9.25pm⁹ (the 4 November Texts);

At 9.25pm on 4 November 2022

.....

Applicant: No not yet.

Applicant: Feel like going out for an hour or so?

Ms X: Posts an emoji sticker of a cat, over the top of which the words “no no no no no” appear.

Applicant: Lol. You have a new sticker.

Applicant: Stop being so shy X!

At 9.28pm

Applicant: I’m not going to bite you.

Applicant: Could go for a walk and see the city nightlife.

Ms X: Posts an emoji sticker of a cat, over the top of which the words “no no no no no” appear.

At 9.36pm

Applicant: It’s just a couple of people spending some time together.

Ms X: But this is absolutely not allowed by the uni and there must be a reason for it.

Ms X: Am I being too serious?

Applicant: Its not that its not allowed. Its allowed. But the uni would like us to tell them.

Ms X: Tell them about what?

Applicant: Well if we had a personal relationship then I would not be allowed to assess you.

Ms X: I’m not going. I would like both of us to be appropriate as possible.

Applicant: Its only serious if we choose to make it serious.

Applicant: *sigh* if I wasn’t a lecturer and we’d just met somewhere I like to think things would be different.

Ms X: But you are married.

Applicant: That's a completely different discussion altogether.

Applicant: Do you see the new movie "Arrival" coming out Nov 10

At 10.45pm

Applicant: I'd ask you to see it with me but you don't think that is appropriate.

Ms X: A group of us students have said that we are going to watch that movie after finals.

Ms X: Yeah. You got it! Inappropriate!

At 10.47pm

Applicant: I can't imagine the expression on your face right now. Kind of makes me laugh.

[18] The Applicant was cross-examined on the 4 November 2022 texts and denied his persistent attempts to encourage Ms X to come out with him late at night were an attempt on his part to establish a personal relationship. He claimed that the difference between a "personal relationship" and a friendship that he was seeking was not "intuitive" to him and he was confused by Ms X's rejection of his various suggestions for an evening outing given her previous demeanour towards him.

[19] As to his reference in the text exchange to the obligations to disclose a personal relationship to the University, he acknowledged that if such a relationship existed, he would have had to manage any conflicts of interest but rejected that he was seeking a personal relationship with Ms X. When asked to reconcile his request to Ms X to go for a walk at 9.30pm at night with his claim that he was not seeking a personal relationship, the Applicant again claimed that such matters were not "intuitive" to him. He similarly claimed that the power imbalance between himself and Ms X as a student or junior staff member in the context of the text exchange was also not "intuitive" to him.

[20] The Applicant agreed that when Ms X persistently rejected his invitations to come out with him, he was disappointed as evidenced by his use of the term "**sigh*" at one point in the exchange. He further claimed that he was also confused because he says Ms X had previously been happy to spend time with him but in the 4 November Texts, she responded by saying his requests were inappropriate. He also resisted the proposition that his lament that if he were not a lecturer and that they had just met somewhere was a reference to his desiring a personal, sexual, or romantic relationship with Ms X.

[21] When asked how Ms X's rejections of his invitations could have been any more direct, the Applicant stated that he would have understood if Ms X had said she did not want to have any communication with him at all or that she was upset by what he was saying. The Applicant

went on to explain that what he has more recently learned is that he needs to ask people how they feel because he does not pick up the cues any other way or unless things are made explicit.

[22] The Applicant was questioned on why he had persisted with requests for Ms X to go out with him despite her saying “no no no no no” on two occasions and then stating it was inappropriate. He responded by explaining that he persisted because he thought there might have been an activity that she was interested in doing with him. This included his invitation to go to the movies with him despite her earlier rejection of invitations to go out with him. He agreed that it was quite clear she did not want to go the movies at which point he says he did not persist with further invitations.

[23] The Applicant explained the Coffee Request Texts and 4 November Texts as due to his autism disability. He further explained that he had probably misinterpreted Ms X’s intentions and thought she was seeking a personal relationship with him¹⁰.

[24] The Applicant also sought to place the above-referred text messages in a broader context of Ms X’s approaches to him. He explained this by referring in his evidence to several events including;

- Ms X approached him regarding an interest she had in becoming a graphic designer and requested that he send her some portrait pictures so she could make a 3D digital avatar, with which request he complied, explaining that he tried to be supportive of all student’s academic endeavours;
- in July 2016 Ms X indicated to him that she had a religious interest and she invited him to watch a video with him about her religion, following which arrangements were made for them to watch it in his office;
- on 25 July 2016, Ms X sent the Applicant a link to a music video she liked to which the Applicant says he responded to Ms X that he also liked it;
- in August 2016, arrangements were made for Ms X to work on a casual basis as a research assistant for the Applicant, in which role she commenced on 10 August 2016; and
- on 4 November 2016, the Applicant says he provided a supportive reference for a position of employment the Ms X had applied for.¹¹

[25] He stated during cross-examination that he had probably misinterpreted Ms X’s intentions and had thought she was happy to spend time with him. He claimed that knowing the line between a friendship and a personal relationship was not intuitive to him. He did however accept that as an overseas student she could have felt vulnerable and that recognising that vulnerability was not something that he was able to identify because of his autism.

[26] The Applicant also agreed during cross-examination that it was unacceptable to sexually harass a student or junior staff member and agreed that if pursuit of a personal relationship persisted after being rebuffed, that would constitute sexual harassment. To that point, he agreed that the 4 November Texts were preceded by earlier exchanges with Ms X including the Coffee

Invitation Texts but rejected that he was pursuing a personal relationship with Ms X. He reaffirmed that he was just seeking a personal friendship, did not recall texting Ms X after the 4 November Texts and stated that she continued to work for him up until the end of 2016 in the research assistant role.

[27] Turning now to the second misconduct allegation. In her complaint Ms X alleged that around November 2016 the Applicant suggested meeting in a café called “Seven Seeds”. According to the Investigation Report, after having had coffee and brunch Ms X and the Applicant left the café to return to the University campus and while walking back, she claimed that the Applicant touched her back and rubbed down the middle of her back. The Applicant in his evidence stated that he recalled having breakfast with Ms X and discussing research tasks although he could not recall specifics. He further stated that he never deliberately attempted to make physical contact with Ms X, accepted that any physical contact was not invited by Ms X, but if contact did occur it would have been coincidental. He used the examples of bumping into someone while crossing a busy street or ‘ushering’ someone through a busy area with his hand¹².

Applicant’s employment

[28] The Applicant commenced employment with the University in January 2002 and was initially engaged as a lecturer in the Department of Computer Science and Software Engineering. He was promoted to a Senior Lecturer position in 2007 in what then became known as the School of Computing and Information Systems, Melbourne School of Engineering and Technology (the Faculty). The Applicant undertook two sabbaticals during his employment with the University, in 2010 and in 2020, and in 2021 received a promotion to Level D Associate Professor which took effect at the commencement of the 2022 academic year. He was not subject to any performance management or disciplinary action during his employment other than in respect to the matters that led to the termination of his employment¹³. He was covered in his employment by the *University of Melbourne Enterprise Agreement 2018*¹⁴ (the 2018 Agreement) and was in receipt of an annual base salary of \$162,590 plus superannuation at the time of his dismissal.

[29] During his employment, the Applicant raised several complaints with the University. These are set out below.

[30] In November 2019, the Applicant made a complaint regarding a colleague Shanika Karunasekera who was aggrieved at the Applicant’s withdrawal from a project they were working on together. Arising from the complaint which was discussed with the then Head of School Mr Uwe Aickelin in early December 2019, the University agreed according to the Applicant that his teaching structure would change. Specifically, that Semester 1 would be set aside for academic research and that Semester 2 is when he would do his teaching. He states that he was notified in mid-2022 that those agreed arrangements would be altered in 2023 such that he would be required to teach in both Semester 1 & 2, which the Applicant then queried¹⁵.

[31] In 2020 arrangements were made for the Applicant’s psychologist to present at a staff seminar on autism following the Applicant’s diagnosis with that condition. The Applicant was aggrieved at the reference in his supervisor Alistair Moffat’s email to staff on 10 May 2022¹⁶ to Hans Asperger as a Nazi who had tortured children. The Applicant felt the reference in the

email inferred the Applicant's support for Asperger as a result of which he requested an apology be issued by the University to staff that the invite had been sent to. Following only a personal apology being issued to the Applicant, he filed a complaint with the Victorian Equal Opportunity and Human Rights Commission on 6 October 2020. A mediation in the matter was held on 3 May 2021 following which the Applicant withdrew the complaint because he says he could not afford the legal costs in proceeding further and the University would not agree to a school wide apology¹⁷.

[32] In early 2020 on return from his second sabbatical, the Applicant raised with Mr Aickelin the difficulties the Applicant was experiencing with his supervisor Mr Moffat and requested to be assigned a new supervisor. That request was declined. Following a further unsuccessful request to be assigned a new supervisor in mid-2020 he lodged a complaint with Human Resources on 24 November 2020¹⁸ reiterating his request to be assigned a new supervisor. The Applicant claims that in the subsequent "hostile" meeting held with Mr Aickelin to discuss his request, he was accused of being "problematic" and was told he did not know what was in his best interests. His request for a change in supervisor was however agreed to¹⁹.

[33] In May 2021, the Applicant's department moved into a new building arising from which the Applicant moved into a new office which lacked privacy due a large glass wall facing out into an open plan area. The Applicant requested the installation of drapes and then followed that up with a formal infrastructure request²⁰ in July 2022 however that request was ultimately denied²¹.

[34] In May 2021, the Applicant raised with Human Resources the fact that he was concerned that the reason his previous applications for promotion were not approved was due to some of his superiors not liking him. It was, according to the Applicant, agreed that Mr Aickelin would not be involved in the assessment of the Applicant for promotion²².

[35] The Applicant raised the potential that the various bullying and other complaints raised by him with the University may have been a factor in the decision of the University to dismiss him. When cross-examined, the Applicant responded that the bullying impacted on him to such an extent that his career was difficult for him and caused him to focus on matters other than his work. He further claimed he was just seeking somebody to talk with when he was pursuing a friendship with Ms X. He also declined to concede that persons involved in the investigation of his conduct and the decision to dismiss him were either unaware of or did not take his various complaints into account.

[36] When pressed on whether his complaints may have been a motivating factor in his dismissal, he agreed he could not be sure and could put it no higher than they (the complaints) may have influenced the dismissal decision. He agreed however that he had not raised the various complaints with Mr Roe as part of his investigation and nor could he be sure of Mr Roe's level of knowledge of those matters at the time of the investigation.

University Policies and Respect Campaign

[37] Unchallenged evidence was given by Mr Bower that the University has long held concerns about the risks that academic staff pose to students in term of misusing their power by

engaging in sexually harassing behaviour. He went on to state that academic staff self-evidently hold significant power in relation to students as they have direct responsibility for marking and can also influence a student's job opportunities, particularly in the case of post-graduate students. Other factors such as age disparity and vulnerable cohorts such as international students combine to create a clear potential according to Mr Bower, for a power imbalance between academic staff and students²³.

[38] Mr Bower went on to detail several matters that serve to highlight the University's concerns at the risks of academic staff sexually harassing students, including that;

- by the nature of their roles, academic staff have frequent unsupervised contact with students;
- the University has no choice but to place significant trust in its academic staff members to behave appropriately;
- staff members have always had a professional and ethical responsibility to protect the interests of students;
- staff-student relationships are a concern to the University due to the power imbalance;
- the University has received numerous reports of incidents of inappropriate staff-student relationships, sexual harassment and sexual misconduct by University staff members;
- a common theme in reports of inappropriate behaviour by academic staff is that students often feel unable to report such incidents;
- the University has a significant population of international students who can be vulnerable due to lack of support networks in Australia, communication barriers and changes required by relocating to study in Australia;
- international students may also not understand what is considered acceptable behaviour by academic staff in Australia;
- in 2016, international students totalled 20,985 which represented 33.7% of the total student numbers of 61,938 at the University; and
- in 2022, international students totalled 27,755 which represented 38.9% of the total student numbers of 71,361 at the University.²⁴

[39] In 2016 the University had in place several written policies and procedures which referred to staff-student relationships as well as sexual misconduct by staff members. The relevant policies were;

- (a) the Staff-Student Relationships Procedure²⁵;
- (b) the Discrimination, Sexual Harassment and Bullying Procedure²⁶; and

(c) the Responsible Conduct of Staff Policy²⁷.

[40] According to Mr Bower, the Staff-Student Relationships Procedure was in place from 21 August 2012 to 30 November 2016 and provided processes for managing conflicts of interests that arise when a staff member has a sexual or close personal relationship with a student²⁸. The procedure relevantly provided as follows;

“

- 1.1 University staff, both academic and professional, are in a position of trust with students. This position of trust implies a series of responsibilities owed to students. In exercising those responsibilities staff should avoid conflicts of interest, that is, a conflict between a personal relationship and professional responsibilities.
- 1.2 To have a close personal relationship with a student to whom one has a duty of care is likely to involve serious difficulties arising from the power disparity inherent in the staff student relationship. In general, such relationships should be avoided.
- 1.3 An initial sexual approach to a student, or engaging in a sexual relationship with a student, may constitute sexual harassment and can be the subject of complaint under the Discrimination, Sexual Harassment and Bullying Procedure or to an outside body.

.....

- 2.1 In a situation where a staff member is or has been involved in a sexual or other close personal relationship or is a family member of the student, the staff member would have a potential conflict between the personal relationship and their professional responsibilities. The staff member should not be involved in decision-making or other processes which could advantage or disadvantage the student (or could reasonably be perceived as advantaging or disadvantaging the student). Relevant decisions and processes include, but are not limited to: selection for entry into any undergraduate or postgraduate course offered by the University; assessment; selection for any scholarship or prize; honours or postgraduate supervision; preclusion or disciplinary matters; or determining access to resources.
- 2.2 If a staff member's participation in any of these processes cannot be avoided, the conflict of interest must be discussed with the Dean or head of department and alternative arrangements to safeguard the interests of the student, the staff member and the University must be made. Details of the nature of the conflict of interest will be required and the matter must be treated in an absolutely confidential manner.”

[41] Mr Bower states that the Discrimination, Sexual Harassment and Bullying Procedure, was in effect from 4 January 2016 to 30 November 2016 and provides processes for both staff and students to lodge a complaint where they believe they had experienced unlawful discrimination, discriminatory harassment, sexual harassment, bullying or victimisation as well

as processes for investigation and resolution of such complaints²⁹. The procedure which is made under the Equal Opportunity Policy relevantly states as follows;

“SCOPE

This procedure aims to assist the University to meet its obligation to provide a learning and working environment free from unlawful discrimination, sexual harassment and bullying. This procedure applies to all staff and students of the University engaged in activities reasonably connected with the University and its semi-autonomous bodies, excluding the Melbourne Theatre Company. Such activities may extend beyond University premises. For example, this policy applies during field trips organised by the University, staff parties, staff attendance at conferences and student orientation camps. This procedure does not apply to student clubs and residential colleges and halls (apart from International House, Kendall Hall and Medley Hall, which are University residential colleges).

Procedure

1. Complaints procedure

1.1 A staff member or student who believes that they have experienced unlawful discrimination, discriminatory harassment, sexual harassment, bullying and victimisation may make a complaint under this procedure.

1.2 Complaints must be lodged within 12 months of an incident unless there are relevant exceptional circumstances.

1.3 A student or staff member with a concern or complaint about discrimination, sexual harassment, discriminatory harassment, bullying or victimisation against a student or staff member, or a group of students or staff, may:

- seek advice and informal resolution of the complaint without lodging a written complaint (Stage 1 – advice and Informal Resolution)
- lodge a written complaint and request conciliation (Stage 2 - conciliation)
- request investigation by the University (Stage 3 – investigation and determination).

These three stages (collectively ‘Complaints Procedure’) will generally, although not always, be undertaken in sequence.

1.4 A staff member or student who is concerned about a single incident of bullying-style behaviour may raise the issue with a Bullying Prevention Adviser, student centre Adviser, supervisor, local Human Resources Consultant or Health and Safety Representative.

.....”

[42] Mr Bower also states that the Responsible Conduct of Staff Policy was in effect from 21 January 2016 to 30 November 2016 and sets out staff responsibilities and expectations of behaviour. The policy relevantly states as follows;

“.....

1.1 The University seeks to create a safe, rewarding, environmentally sustainable learning and working environment based on principles of justice, equity, harmony, tolerance and the pursuit of excellence while protecting university resources and respect for individuals, the law and University governance.

.....

2.1 Staff will:

- uphold the values of the University set out in section 1.7.3 of Statute 1.7 – University Governance which underpin the standards of conduct and behaviour in this policy
- maintain a high standard of conduct and work performance and demonstrate courtesy, equity and fairness in dealing with staff, students, contractors, visitors and members of the public. At all times the rights, duties and aspirations of others will be respected
- perform their duties professionally with skill, care and diligence using authority fairly
- respect the opinions and beliefs of others and their right to practise their beliefs
- comply with the Discrimination, Sexual Harassment and Bullying Procedure and treat others fairly and equitably, irrespective of race, sex, disability, religion, cultural background, sexual orientation, age and marital status, and will not engage in harassing, bullying or discriminatory behaviour.

.....

2.6. Staff will ensure that relationships with students are professional, trusting and respectful, and will comply with the Staff-Student Relationships Procedure and duty of care obligations as described in the University’s compliance materials.

2.7. Staff will recognise their professional and ethical responsibility to protect the interests of students and to recognise and resolve conflicts of interest, to respect the trust involved in the staff-student relationship and to accept the constraints and obligations inherent in that responsibility.

.....”

[43] Compliance with the above policies was reinforced in the enterprise agreement that covered the Applicant at the time of the alleged misconduct, that agreement being the *University of Melbourne Enterprise Agreement 2013*³⁰ (the 2013 Agreement). The 2013 Agreement stated as follows in respect of policy compliance;

“61. MISCONDUCT AND SERIOUS MISCONDUCT

Application

61.1 The procedures set out in this Part will apply where there is alleged or actual misconduct or serious misconduct.

61.2 This Part does not apply to casual staff members.

Definitions

61.3 ‘Allegations’ refers to all the allegations which have led to the determination of misconduct or serious misconduct.

61.4 Disciplinary action means action by the University to discipline a staff member and is limited to:

- (a) formal censure, warning or counselling;
- (b) withholding of an increment for up to one year;
- (c) demotion to a lower classification or increment and/or transfer to another position;
- (d) suspension with pay; or
- (e) termination of employment, provided it may only occur in the case of serious misconduct

61.5 Fair treatment in relation to the treatment afforded to a staff member means that:

- (a) the staff member has been advised of the allegations made against her or him, including relevant facts, reasoning and documentation;
- (b) the staff member has, been given a reasonable opportunity to respond to the allegations, to produce relevant evidence, to have relevant persons interviewed and to make written submissions in relation to all allegations and to comment on any disciplinary action recommended;
- (c) findings made against the staff member are made on the basis of a reasonable assessment of the evidence; and

- (d) any disciplinary action is proportionate to the staff member’s alleged conduct.

61.6 Misconduct means:

- (a) negligence in the performance of the duties of the position held; or
- (b) misbehaviour (which will include favouritism); or
- (c) conduct in breach of the staff member’s contract or the University.

61.7 Serious misconduct means:

- (a) serious misbehaviour of a kind (or conviction by a Court) which constitutes a serious impediment to the carrying out of a staff member’s duties or to a staff member’s colleagues carrying out their duties; or
- (b) serious dereliction of the duties required of the position. 59
- (c) examples of conduct which may constitute serious misconduct are:
 - (i) theft;
 - (ii) fraud;
 - (iii) assault;
 - (iv) serious or repeated bullying or harassment, including sexual harassment;
 - (v) persistent or repeated instances of misconduct;
 - (vi) acceptance of payment or other forms of inducement to vary the result of a student; and
 - (vii) wilful and gross breach of the staff member’s contract, the University’s policies or regulations, such that it would be unreasonable to continue the staff member’s employment.

.....”

[44] More recently the University initiated the Respect Campaign in 2019 to enhance and enforce its behavioural expectations of staff members in relation to sexual harassment. It was initiated in response to a review conducted by the University into the management of historical claims of sexual assault and sexual harassment as well as the results of the National Student Safety Survey. According to Mr Bower, the University undertook a review of how its policy settings influenced how historical claims of sexual assault and sexual harassment had been

managed³¹. Since the Respect Campaign was initiated, several actions have been taken by the University including;

- a video message delivered by the Vice Chancellor Professor Duncan Maskell (the Vice Chancellor) on 15 February 2019 in relation to the Respect Campaign³²;
- between 2020 and 2022 the Vice Chancellor sent a number of all-staff emails regarding the University's position on sexual assault and sexual harassment³³;
- the Respect Campaign has been supported by Ms Phillips since her commencement with the University in September 2021;
- on 23 March 2022, the University published a video message from Ms Phillips in relation to the University's stance against sexual misconduct and the 2021 National Student Safety Survey results³⁴; and
- on 20 May 2022, the University released the Sexual Misconduct Annual Report 2021³⁵ which set out the rationale and background behind the Respect Campaign and progress with that initiative³⁶.

[45] Mr Bower states that in conjunction with the Respect Campaign the University has reviewed and updated its written policies and procedures to more fully encapsulate the behavioural standards that are applicable to University staff³⁷. The relevant policies now in place are as follows;

- the current version of the AWB Policy³⁸ came into effect on 31 May 2022 and sets out standards, values and expectations for appropriate behaviour by employees of the University;
- on 14 October 2021, the first version of the SMPR Policy came into effect³⁹; and
- on 31 May 2022, the second version of the SMPR Policy⁴⁰ came into effect and was in operation at the time of the Applicant's dismissal.

[46] Mr Bower states that because the AWB Policy and SMPR Policy were in place at the time of the investigation into the Applicant's conduct, the process applied to the investigation and decision to terminate the employment of the Applicant referred to those policies. He further stated his belief that the Applicant's conduct was in any case in breach of the relevant policies in place at the time of the alleged misconduct in 2016⁴¹.

[47] The Applicant was cross-examined in relation to the above-referred policies and the need for the University to protect students and staff from inappropriate conduct. He made several concessions including that;

- pursuit of a personal relationship by a staff member could put a student under pressure;
- students may feel pressured to maintain a relationship with a staff member;

- the University has a right and obligation to protect students;
- staff members also have an obligation towards students;
- junior staff members may also feel pressured to enter into or maintain relationships with more senior staff members;
- accepted that inappropriate conduct towards students or staff went to the core issue of right and wrong;
- a more senior staff member may also be vulnerable if such a personal relationship breaks down;
- if a relationship is not disclosed, the risks can be aggravated;
- the risks to staff and students are reduced if the relationship is disclosed; and
- personal relationships between staff and students or junior staff could also put the University's reputation at risk.

Complaint, investigation and termination of employment

[48] On 13 March 2022, Ms X sent an email⁴² to Anshu Tara, a HR Business Partner for the Faculty, raising concerns regarding the Applicant's behaviour towards her in 2016. The email was redirected to Daniel Donbavand (HR Director) as Ms Tara was no longer employed at the University. Ms Kerr states she first became aware of Ms X when Benjamin Bajonat, Manager Safer Community Program, informed her that Ms X had contacted him regarding a complaint of sexual harassment that occurred in 2016. An email exchange⁴³ then took place between Ms Kerr and Ms X between 16 March and 9 May 2022 in relation to her concerns. Ms X claimed in the email exchange that the Applicant 'groomed her' and provided screenshots of relevant text message exchanges between the Applicant and herself⁴⁴.

[49] According to Ms Kerr, what followed her initial communication with Ms X was a series of communications between her and Ms X during which she says Ms X appeared nervous and scared at the prospect of an investigation proceeding. Ms Kerr says Ms X requested that the University make inquiries as to whether there had been other complaints about the Applicant. Such inquiries were subsequently made however no records of any other complaints made against the Applicant were identified⁴⁵. Ms X was also offered counselling in April 2022 and a time for her and Ms Kerr to meet and discuss her complaint was agreed⁴⁶. Ms Kerr emphasised that the University did not want to do anything that made Ms X feel unsafe. Ms X confirmed in a telephone conversation with Ms Kerr on 5 May 2022 that she wanted to proceed with a formal complaint against the Applicant⁴⁷.

[50] On 6 May 2022, Ms Kerr states she made a preliminary assessment of the complaint and recommended to the Chief Human Resources Officer that it proceed to a formal investigation. Ms Kerr agreed in cross examination that when she made her preliminary assessment, she took into account the AWB Policy and the SMPR Policy that were in place at the time of the investigation in 2022 and not the policies that were in place at the time of alleged

misconduct in 2016. She further agreed that she did not draw to Ms X's attention clause 1.2 of the 2016 Discrimination, Sexual Harassment and Bullying Policy which provided that complaints must be lodged within 12 months of an incident unless there are relevant exceptional circumstances.

[51] Ms Kerr also agreed that at the time of making her preliminary assessment she did not make any recommendations for interim actions such as standing down the Applicant. She rejected the proposition put to her that the complaint raised by Ms X was of a type that was suited to informal resolution as provided by the AWB Policy and disagreed that would have been in the best interest of Ms X.

[52] An external investigator, Mr Julius Roe, was then engaged by the University to undertake the investigation. Ms Kerr agreed that in engaging Mr Roe, he was not provided with a detailed brief because Mr Roe was routinely engaged by the University on industrial relations matters. Ms Kerr subsequently advised Ms X by email⁴⁸ on 11 May 2022 of the initiation of the formal investigation and requested Ms X to advise of her availability to be interviewed by Mr Roe. Ms Kerr met with Mr Roe on 23 May 2022 and received a draft allegations letter from Mr Roe on 30 May 2022 which was also sent to Ms X. Ms Kerr then arranged a Zoom meeting with the Applicant for 31 May 2022⁴⁹.

[53] Ms Kerr states she met with the Applicant on 31 May 2022 and during the meeting sent a copy of the allegations letter to him. She says the Applicant asked her during the meeting if she knew he was autistic in response to which she says she asked the Applicant whether he would like any adjustments or accommodations to the investigation process. Dr Harwood replied that he wanted the University to speak with his psychologist as part of the investigation. Ms Kerr says he did not otherwise request any adjustments to the investigation process. Ms Kerr further states that she advised the Applicant that an external investigator, Mr Roe, had been engaged and the Applicant could raise the involvement of his psychologist with Mr Roe. Ms Kerr says she is aware that Mr Roe subsequently met with the Applicant on 24 June 2022 as part of his investigation but that she had no further involvement in the investigation⁵⁰.

[54] The Applicant agreed that he met with Ms Kerr via Zoom on 31 May 2022 and was advised that Mr Roe had been engaged to undertake the investigation. He also states that he was told by Ms Kerr that the complaint was originally made by Ms X in 2016 by logging it on Campus Safe which he says is the reporting portal for complaints, but that the University had determined not to follow up. He further states he was told by Ms Kerr that Ms X now wanted to pursue the complaint⁵¹. When pressed in cross-examination on the conflict in his evidence with Ms Kerr on when the Applicant lodged her complaint, the Applicant acknowledged that he could not dispute Ms Kerr's evidence but reaffirmed that he came out of their meeting believing the complaint of Ms X was first logged in 2016.

[55] As earlier stated, Mr Roe was engaged by the University to conduct the investigation into the Applicant's alleged misconduct⁵². In doing so, Mr Roe provided a copy of the Allegations to the Applicant in an email on 31 May 2022⁵³ which the Applicant acknowledged he had received⁵⁴ and responded in writing on 17 June 2022⁵⁵. Mr Roe then interviewed the Applicant on 24 June 2022. Some of the issues raised by the Applicant required Mr Roe to seek further information from Ms X which he obtained from her on 25 June 2022. The Applicant agreed that he had said that Mr Roe had been fair to him during the investigation but with

hindsight he believed that meetings with Mr Roe and further meetings with the University would have benefited from direct assistance by his psychologist.⁵⁶

[56] Mr Roe provided an Investigation Report⁵⁷ to Mr Bower on or around 1 July 2022, which Mr Bower says he was required to review, consider and make recommendations to the Chief Human Resources Officer, Dr Sally Eastoe and the Deputy Vice Chancellor, Professor Nicholson. Mr Bower states that the Investigation Report concluded that both allegations against the Applicant were substantiated and that when he reviewed the Investigation Report he agreed with the conclusions⁵⁸. Mr Bower went on to variously state that in reviewing the Investigation Report;

- it was apparent that the Applicant had not denied the allegations;
- it was clear from the screenshots of the text messages that Ms X had communicated she did not want to pursue a personal relationship;
- the Applicant persisted in pursuing a personal relationship despite Ms X communicating she did not wish to pursue a personal relationship;
- he considered the 4 November Texts indicated that the Applicant was aware of the University's position in relation to sexual harassment and staff-student relationships;
- he considered the Applicant's persistence in pursuit of a relationship in circumstances of Ms X's clear rejection to be highly inappropriate;
- he considered that the Applicant's conduct represented a serious and ongoing risk to the University and its students;
- he was aware that the Applicant had raised his diagnosis of autism in the investigation process, that Mr Roe had considered this and found that the Applicant's condition was not relevant to the conduct;
- after reading the Applicant's treating practitioners' reports he agreed with Mr Roe's finding that the Applicant's diagnosis of autism was not a mitigating factor; and
- based on the above he formed the view that the University had a sound basis to conclude that the Applicant had engaged in serious misconduct.⁵⁹

[57] Mr Bower also stated that the Investigation Report noted that the Applicant had invited Ms X to his office to watch a video together on 8 July 2016 and that while doing so the Applicant had locked his office door to avoid being disturbed. The Applicant stated that he offered Ms X the option of watching the video in either the library or his office and that he would not have locked the door if Ms X had objected⁶⁰. He rejected that locking the door was inappropriate. The relevant office at the time had a glass door and wall that were both partially frosted and had a narrow unfrosted one centimetre band at chest height through which it may have been possible to see through into the office. The Applicant claimed in his interview with Mr Roe that it was his normal practice to lock the door to his office when he did not want to be

disturbed⁶¹. The Applicant in commenting on the office said that because there was unfrosted glass at the base of the wall, he did not consider his office to be a private space⁶².

[58] Mr Bower was cross-examined on the policies, his handling of the investigation and the conclusions he drew from the Investigation Report. He variously stated as follows;

- agreed that the current policies are more comprehensive than those that were in place in 2016 and had been improved but he believed the expectations with respect to staff behaviour were the same;
- agreed that the Applicant was asked to respond to contemporary policies, not those that were in place at the time of the alleged misconduct;
- agreed that it was put to the Applicant throughout the investigation that he had breached the current policies;
- agreed that the University followed the processes set out in the AWB Policy and SMPT Policy;
- conceded he had not drawn to Ms Philip's attention the policies that were in place at the time of the Applicant's alleged misconduct in 2016;
- conceded that Ms Phillips could have formed a different view if she had been made aware of the correct policies;
- expressed the view that the Applicant's conduct was in any case in breach of the relevant 2016 policies;
- while agreeing that the 2016 Discrimination, Sexual Harassment and Bullying Procedure required a complaint to be made within 12 months unless exceptional circumstances exist, stated that the University would deal with a complaint outside that timeframe if it were serious, but accepted he had not turned his mind to whether Ms X's complaint was exceptional or not;
- agreed that the 2016 Staff-Student Relationships Procedure did not define the meaning of the term staff-student relationship but felt it's meaning was self-explanatory.
- rejected that he had 'cherry picked' parts of the Investigation Report;
- accepted that some elements of the Investigation Report reflected well on the Applicant;
- maintained his view that the Applicant represented a serious and ongoing risk to the University despite not taking the step to suspend him from his duties;
- acknowledged that the Applicant had not admitted the conduct which was the subject of the second allegation;

- agreed that Applicant expressed contrition and that most of the mitigations of his conduct raised by the Applicant did not relate to his autism condition;
- was not confident that the Applicant would not repeat the conduct even with the right supports around him; and
- rejected that he had not taken into account the mitigating factors raised by the Applicant.

[59] At 12.16 pm on 28 July 2022, Mr Bower sent an email to Dr Eastoe and Professor Nicholson attaching a memorandum, a copy of the Investigation Report and a summary of the Investigation report. Mr Bower included an outline of next steps in the investigation and his view that the Applicant should be advised of the substantiated allegations and be given an opportunity to respond in accordance with clause 1.35.4 of the Agreement⁶³. Dr Eastoe replied at 1.46pm on 28 July 2022 and agreed with Mr Bower's view that the Applicant's conduct constituted serious misconduct⁶⁴. At 3.45pm on 28 July 2022, Mr Bower then sent to Daniel Donbavand, HR Director for the Faculty, his email of earlier that day and Dr Eastoe's response and outlined the process that should be followed in allowing the Applicant an opportunity to respond to the findings⁶⁵.

[60] On 5 August 2022, Mr Donbavand and Dean of the Faculty, Professor Mark Cassidy met with the Applicant in person to advise him of the investigation findings and the University's preliminary views. Following the meeting, Mr Donbavand sent an email to the Applicant at 9.44am to which was attached a letter outlining the investigation outcomes and next steps as well as a copy of the Investigation Report. The Applicant was invited to submit a response if he wished to, by the close of business on Friday 12 August 2022, which could be done in person or in writing⁶⁶.

[61] At 12.46pm on 10 August 2022, the Applicant provided an email⁶⁷ response to Mr Donbavand and Mr Bower. In his response the Applicant acknowledged that he understood;

- he had engaged in conduct considered by the University to constitute sexual harassment;
- his conduct was in breach of the University's expectations;
- his conduct amounted to "serious general misconduct" and
- then raised several points he considered to be mitigating circumstances⁶⁸.

[62] In the Applicant's written response to the allegations that he provided to Mr Bower and Mr Donbavand the Applicant also relevantly stated as follows;

"Insight and Contrition

Aaron understands that:

- he has acted in a way towards the Complainant that constitutes seeking a personal relationship and that his actions lead to an offence considered by the University to constitute sexual harassment;
- pursuing a personal relationship with a student is in breach of the University Appropriate Workplace Behaviour Policy;
- sexual harassment is a breach of the University Sexual Misconduct Prevention and Response Policy;
- his actions represent serious general misconduct; and
- even seeking a platonic relationship with a student would not be acceptable to the University.

.....”

[63] On 12 August 2022, Mr Donbavand and Mr Bower met with the Applicant via video conference. Mr Bower states that during the meeting the Applicant made a number of comments and raised a number of questions which Mr Bower considered to be concerning including;

- the Applicant asked if he could meet with Ms X to explain the reasons for his conduct, and also believed Ms X would withdraw her complaint if she knew he had autism;
- when questioned on his knowledge of the University’s expectations at the time of his conduct in 2016, he said he understood that pursuit of a personal relationship was a breach of the University’s expectations, that he would not have disclosed such a relationship but would have “managed it in the interests of the University”; and
- made a comment to the effect that the University bore some responsibility for his conduct and should have protected him from situations where he would be one-on-one with students⁶⁹.

[64] In addressing the concerns raised by Mr Bower referred to immediately above, the Applicant explained his comments as follows;

- his psychologist had told him that in circumstances where a complaint of the type involved in this case were made, if the complainant knows the other person is autistic they may better understand the context;
- his explanation of how he would have managed a personal relationship was hypothetical and states that at the very least he would have managed it by ensuring he was not involved for example in decision making related to Ms X; and
- had he known he was autistic he would have avoided social contact with students and asked the University to ensure his duties did not include requiring him to socialise with students which he had been asked to do in the past.⁷⁰

[65] As the Applicant felt that he had not been able to cover all the matters he wished to raise in the 12 August 2022 meeting, a further meeting was conducted by video conference on 15 August 2022 involving the same participants. Mr Bower states that he did not believe the Applicant raised any further matters in the meeting that were relevant to the University's consideration. The Applicant asked whether he should provide further medical evidence to the University to which Mr Bower responded that was a matter for him. No further material was submitted beyond a letter of apology which is dealt with below⁷¹.

[66] At 12.32am on 17 August 2022, the Applicant sent an email to Mr Bower and Mr Donbavand in which he included a proposed letter of apology to Ms X. Mr Bower responded and advised that the Applicant should have no contact with the Ms X and asked whether the Applicant wanted the University to receive the proposed apology as part of the Applicant's response. The Applicant replied that he provided it in case the University required it or considered it useful and that if they did not, they should disregard it. The proposed apology relevantly stated as follows;

"Dear Complainant,

I want to express my sincere apologies for causing you to feel deeply offended by my actions.

I did know when we first met that if I pursued a personal relationship with you, then I would be in breach of University policy, and that you would have a right to complain to the University about my actions.

For reasons that are hard for me to explain, and that you could not have known, the short social times that we spent together early on did mean something very special to me, and I remember deciding at that time that I would take full responsibility for my actions, in that, and I say this as sincerely and as heart-felt as I can, at that time in my life I would have accepted risking my career for you.

You were right to respond to my actions in the way that you did, and you had every right to make a complaint to the University.

I want to express to you as much good will as I can in order to make amends. Though it may be hard for you to accept, please do believe me when I say that I bear no ill will towards you, and that I would like you to know that if ever there is a time I can help you in your future career then I will do everything I can in order to do so.

Please accept my sincere and deepest apologies,

Aaron Harwood"⁷²

[67] The Applicant states in his evidence that in proffering the apology, he considered it something personal to Ms X to make amends and that it was not intended to be a "legal statement or an exhaustive statement" of his actual beliefs. He further states that he offered the apology to make amends, also thinking that it may reflect well on him in the investigation⁷³.

[68] The Applicant was pressed in cross-examination to reconcile the terms of the proffered apology with his claims in these proceedings that his conduct did not constitute sexual harassment. He attributed some of the language in the proffered apology to his gender dysmorphia which he said made anything to do with sexual aspects quite confusing for him. He also stated that he did not see the University policy as a statement of particular legal relevance but rather as a 'literary work'. He also sought to downplay his reference in the proffered apology to his acceptance of a risk to his career by pursuing a relationship with Ms X. He also stated that he knew he would have been in breach of University policy if he had gone ahead with a relationship but sought to distinguish a personal (friendly) relationship he was seeking from an intimate relationship.

[69] After considering the responses provided by the Applicant, both in writing and during the meetings on 12 & 15 August 2022, Mr Bower prepared and sent an email⁷⁴ to Ms Phillips at 3.09pm on 6 September 2022. That email, to which was attached a memorandum that provided a summary of the background, also provided a summary of the findings of the Investigation Report, confirmed the allegations against the Applicant were substantiated and provided a recommendation that the University should notify the Applicant of the intended disciplinary action of dismissal and that he be given 24 hours to provide any further written material for final consideration⁷⁵. A copy of the memorandum and accompanying materials were also provided to Dr Eastoe, Professor Nicholson and Professor Cassidy that same day⁷⁶. Mr Bower's proposed course of action was agreed. At 3.00pm on 7 September 2022, Ms Phillips responded to Mr Bower agreeing with the recommendation and proposed penalty of termination of employment.

[70] Ms Phillips who was the decision maker in relation to the Applicant's dismissal was cross-examined on her decision and the time taken by her to consider and respond to the material and recommendation received from Mr Bower on 6 September 2022, that being a period of 24 hours. Ms Phillips rejected that she had not taken the time to thoroughly consider all of the material. She also accepted that the Applicant's alleged misconduct had taken place in 2016 and that the University was viewing the conduct through the prism of the 2022 policies, but she was aware of the 2016 policies and took the expectations of those policies into account. She further stated there was a direct line of continuity between the 2016 and 2022 policies.

[71] On 20 September 2022, a further meeting was held with the Applicant at which Mr Donbavand and Ms Phillips attended on behalf of the University. The purpose of the meeting was to notify the Applicant of the intended disciplinary action of dismissal and to allow the Applicant 24 hours to provide any further material before determination by the University of the final outcome. The Applicant responded by email at 4.53pm to Mr Donbavand that same day providing additional information, including allegations that he had been bullied by other University staff members⁷⁷. Mr Bower states that he formed the view that the bullying allegations were not relevant to the decision the University was making in relation to the substantiated allegations and replied to Mr Donbavand and Ms Phillips at 12.36pm on 21 September 2022 expressing his view that there was no basis for the University to change its intended disciplinary outcome⁷⁸.

[72] Ms Phillips confirmed the decision-making process set out in Mr Bower's evidence and that she was furnished with all relevant information which she states she carefully considered, including the Applicant's response on 20 September 2022. She did not believe the additional

information provided by the Applicant was relevant or mitigated his conduct and concluded that the University should proceed with the termination of the Applicant's employment. Ms Phillips was challenged in cross-examination, and it was put to her that her decision to dismiss the Applicant was ill-considered to which she offered the following response;

"I suggest to you that that was an ill-considered conclusion?---Allow me to outline in a little bit more detail why I arrived at that conclusion. Here we had a clear-cut case of sexual misconduct in the context of a gross power imbalance between one of our mid-career employees, an academic, and a young student. There was never any denial that the misconduct had taken place, but nor was there at any time any real insight into the gravity of that misconduct or insight into its consequence, and that's established throughout all of the materials. It was a view that I formed at the time that I took the decision and it's substantiated with everything that I have seen since then. I took into account the attempt to manipulate the young student into secrecy and into a level of intimacy that clearly is in breach of the university's expectations, and also the intention to conceal this misconduct from the university and to mislead the university as to the relationship that Dr Harwood had in mind with this young student. I also took into account the fact that I could find nothing in the materials which could give the university confidence that this misconduct would not happen again in the future. Even in the recent materials, Dr Harwood himself says that he finds it impossible to predict how he may or may not behave in the future. He indicated to us on more than one occasion at the time of the investigation as well that he should not be coming into contact, one-to-one contact, with students, and I could find no material in the reports from the clinical psychologists or anywhere else in the documentation that could give the university assurance or confidence that this misconduct wouldn't occur again. I have to make a decision on these cases weighing all of those considerations. We have, as I've said very clearly in the witness statement, a duty of care to our staff and students in the university. We have a very large body of students who come to us from all over the country and all over the world, from a huge range of different backgrounds, and we have a legal responsibility but also a moral responsibility to make sure that we are discharging our duty of care towards them. So I have to - my job, on behalf of the university, is to weigh up all of the considerations in any case, but including the duty of care that we have to students and staff, and to make a determination."⁷⁹

[73] At 1.32pm on 21 September 2022, she confirmed her agreement with the view and recommendations of Mr Bower and Mr Donbavand and asked Mr Donbavand to issue the letter of termination to the Applicant. At 2.54pm on 21 September 2022, Mr Donbavand emailed the Applicant a letter from Ms Phillips confirming the University's final decision to terminate his employment (Termination of Employment Letter)⁸⁰. The letter relevantly stated as follows;

".....

Recently you were advised that the University had commenced an investigation based on a formal complaint made against you regarding allegations of inappropriate workplace conduct.

To ensure a fair and non-bias investigation the decision was made to engage Julius Roe as the investigator for this complaint.

Overall, it was found that the allegations had been substantiated.

On the 5th August 2022 you met with Mark Cassidy, Dean Faculty of Engineering & Information Technology and Daniel Donbavand, Human Resources. You were advised that the investigation had concluded that there had been breaches of the Appropriate Workplace Behaviours policy and the Sexual Misconduct Policy, and that the University was of the preliminary view that serious misconduct has occurred.

Sexual misconduct is deemed serious misconduct under cl. 5.29 of the Sexual Misconduct Prevention and Response Policy and the Fair Work Regulations.

At that time, you were given the option to provide either in writing or in person any explanation of the misconduct, including any mitigating factors. You were also advised that if you did not agree with the findings and the University's preliminary view of misconduct, you could request a review. If you did not dispute the findings or the University's preliminary view, you were given the option to still provide a response for the University to consider.

On two occasions you met with Martin Bower, Workplace Relations and Daniel Donbavand, Human Resources – on the 12th August 2022 and again on the 15th August 2022 – to provide a response. Prior to the first meeting you also provided a written response.

Yesterday, the 20th September 2022, in line with clause 1.35.9 of the 2018 Enterprise Agreement, you met with me and were provided 24 hours' notice of the intended outcome. You were advised that after careful consideration of the investigation report and your subsequent responses to the University, I had taken the decision that your employment should be terminated without notice.

Having now considered the additional information you provided following that meeting, I am of the view there is nothing contained therein that would change the intended outcome provided to you yesterday.

I now confirm that your employment with the University of Melbourne will be terminated on the grounds of serious misconduct, effective immediately.

.....”

Applicant's medical condition

[74] The Applicant states that in the period from October 2016 through to August 2017, he consulted Dr Fintan B Harte in respect to gender dysphoria he says he was then experiencing. He further states that he later found out that this was related to his diagnosis of autism which he received in 2019. In 2019 he commenced consultations with Dr Matthew Berry, clinical psychologist who he continues to see on an approximately monthly basis.

[75] The Applicant states he informed his employer in 2019 that he had recently been diagnosed with autism, ASD Level 1. It was in the wake of his supervisor Mr Moffat's reaction to that advice that the Applicant requested he be assigned a new supervisor, which was approved in 2021.

[76] The Applicant further states that in 2020 he commenced consultation with Dr Paul Wendiggensen, a psychiatrist, who prescribed the Applicant medication that he continues to take, the dosage of which is managed by his general practitioner Dr Lisa Doyle. He states he no longer sees Dr Wendiggensen.

[77] The Applicant states that since being diagnosed with autism he has learned that he behaves in certain ways and that this has allowed him to prepare for situations that he previously struggled with. He also states that he now feels much more in control of his emotions and actions which has had a positive impact on his mental health. Notwithstanding those positive changes, he states that his dismissal has resulted in a deterioration in his mental health flowing from which he has started seeing a psychologist Mr Nic Mumford on a monthly basis⁸¹.

[78] The Applicant produced a letter from Dr Berry dated 16 January 2023⁸². In that letter Dr Berry confirmed that the Applicant came to see him because of ongoing difficulties he was experiencing with relationships with colleagues and friends. The result of Dr Berry's assessment was that the Applicant met the criteria for a diagnosis of autism. Dr Berry further states in the letter that the developmental disorder results in a range of difficulties including areas around executive function and social functioning.

[79] Dr Berry was asked by the Applicant to answer the following question; *"is there any basis to Dr Harwood's assertion that in 2016, the fact that he was autistic, contributed in part to him being unable to recognise / misinterpret the social cues and communications from Ms X (X).?"* Dr Berry provided the following response;

"....."

With regards to the matter in question autistic individuals such as Dr Harwood would typically have:

- (1) Difficulty understanding different types of relationships. This includes the diverse or subtle variations in expectations from one type of relationship to another. People with autism often assume there are just a few categories of relationship – e.g. family, romantic, or professional and all relationships must fit one or another category. Where messages do not consistently fit one of the categories the autistic individual may assume that the relationship belongs to another category. Neurotypical individuals are able to recognise that there are many different types of relationship and variations within all these categories.
- (2) Difficulty in communication. correctly reading or understanding indirect and non-verbal communication. This is the second established area of social difficulty for autistic individuals. Autistic individuals usually only clearly understand direct and literal communication, however human communication is rarely direct and literal. Where a series of messages, or the message and the associated non-verbal

communication, may contradict each other, the autistic individual often has difficulty integrating these, as well as having difficulty integrating these messages into the broader context. This can result in the commonplace occurrence of misreading another person's true intent or wishes.

.....”

Has the Applicant been dismissed?

[80] A threshold issue to determine is whether the Applicant has been dismissed from his employment. Section 386(1) of the Act provides that the Applicant has been dismissed if:

- (a) the Applicant's employment with the University has been terminated on the University's initiative; or
- (b) the Applicant has resigned from his employment but was forced to do so because of conduct, or a course of conduct, engaged in by the University.

[81] Section 386(2) of the Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant. There was no dispute and I find that the Applicant's employment with the University terminated at the initiative of the University.

Initial matters

[82] Under section 396 of the Act, the Commission is obliged to decide the following matters before considering the merits of the application:

- (a) whether the application was made within the period required in subsection 394(2);
- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code; and
- (d) whether the dismissal was a case of genuine redundancy.

[83] Relevant to the determination of the preliminary matters, I am satisfied that;

- the Applicant was dismissed on 20 September 2022 and filed his unfair dismissal application on 9 October 2022, that latter date being within 21 days of the date of his dismissal;
- at the time of the Applicant's dismissal the University employed approximately 18,000 employees and is therefore not a small business employer within the meaning of s.23 of the Act;

- the Applicant commenced employment with the University on 21 January 2002 and at the time of his dismissal had been employed for a period of over 20 years, that period being more than the minimum employment period of six months;
- the Applicant was covered in his employment by the *University of Melbourne Enterprise Agreement 2018* and was in receipt of an annual base salary of \$162,590 plus superannuation at the time of his dismissal; and
- the Applicant was not dismissed due to the University no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the University's enterprise.

[84] Having considered each of the initial matters, I am satisfied that the application was made within the required period in subsection 394(2), the Applicant was a person protected from unfair dismissal, the small business fair dismissal code does not apply, and the dismissal was not a genuine redundancy. I am now required to consider the merits of the application.

Was the dismissal harsh, unjust, or unreasonable?

[85] Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust, or unreasonable, the Commission must take into account:

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

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct – s.387(a)?

[86] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”⁸³ and should not be “capricious, fanciful, spiteful or prejudiced”⁸⁴. However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it were in the position of the employer⁸⁵. The question the Commission must address is whether there was a valid reason for the dismissal related to the employee’s capacity or conduct (including its effect on the safety and welfare of other employees).⁸⁶

[87] In cases relating to alleged misconduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.⁸⁷ It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.⁸⁸

[88] The employer bears the evidentiary onus of proving that the conduct on which it relies took place.⁸⁹ In cases such as the present where a serious allegation of misconduct is made, the *Briginshaw* standard applies so that any findings, if made, of the misconduct alleged are not made lightly;

“The standard of proof remains the balance of probabilities but 'the nature of the issue necessarily affects the process by which reasonable satisfaction is attained' and such satisfaction 'should not be produced by inexact proofs, indefinite testimony, or indirect inferences' or 'by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion.’”⁹⁰

[89] Before turning to the alleged misconduct of the Applicant it is necessary to say something about the context in which the conduct occurred. As the unchallenged evidence of Mr Bower confirms, the University has a legitimate and well-founded concern that the significant power imbalance between academic staff and students creates a risk to students of their being subject to unwelcome and inappropriate behaviour from academic staff. That risk is potentially magnified in the case of more vulnerable student cohorts, such as international students for the reasons set out in Mr Bower’s evidence. The concern of academic staff misusing their positions of power applies equally in respect to senior staff misusing their position of power in relation to more junior staff.

[90] It is trite to observe that sexual harassment of students (and staff members) has never been acceptable behaviour with or without detailed policies and procedures being in place. It is however the case that steps taken to deal with sexual harassment and misconduct within institutions such as and including the University have gathered pace and force in more recent years, as it needed to in light of compelling feedback obtained through national student surveys. For its part, the University has more recently reviewed and updated its policies and procedures although I accept that its expectations of staff have over several years remained essentially unchanged.

[91] As set out in Mr Bower’s evidence above at [37]-[41], there were three key policies and procedures in place in 2016 at the time of the Applicant’s alleged misconduct, those being the;

- (a) the Staff-Student Relationships Procedure;

- (b) the Discrimination, Sexual Harassment and Bullying Procedure; and
- (c) the Responsible Conduct of Staff Policy.

[92] Without repeating the details of those procedures and policies earlier set out, most relevant to the present matter appears to be the obligations set out in the Responsible Conduct of Staff Policy where it relevantly states that:

“2.6 Staff will ensure that relationships with students are professional, trusting and respectful, and will comply with the Staff-Student Relationships Procedure and duty of care obligations as described in the University’s compliance materials.”

[93] Supporting the above-referred policy is that of the Staff-Student Relationships Procedure which relevantly provides as follows;

“1.1 University staff, both academic and professional, are in a position of trust with students. This position of trust implies a series of responsibilities owed to students. In exercising those responsibilities staff should avoid conflicts of interest, that is, a conflict between a personal relationship and professional responsibilities.

1.2 To have a close personal relationship with a student to whom one has a duty of care is likely to involve serious difficulties arising from the power disparity inherent in the staff-student relationship. In general, such relationships should be avoided.”

[94] It is plainly apparent that the policies and procedures in place in 2016 made clear that academic staff were in a unique position of trust, consequently owed students a duty of care and were required to avoid a conflict between personal and professional relationships. Putting to one side the policy and procedure framework it should not need to be stated that sexual harassment of staff or students by academic staff is wrong now, was wrong in 2016 and should not be tolerated within any organisation.

[95] It is in the context of the above-referred policy framework and the clear power imbalance between the Applicant and Ms X that the alleged misconduct occurred, noting that Ms X was initially an international student in one of the Applicant’s classes until mid-2016 and then worked as a research assistant until December 2016 reporting directly to the Applicant while she concurrently continued her studies towards completing her masters in engineering.

[96] In dealing with the alleged misconduct of the Applicant it is useful to deal briefly with what was the second allegation of misconduct relied on by the University in dismissing the Applicant, that being the Applicant had on one occasion uninvited, touched Ms X’s back and rubbed it in a downward direction. Mr Roe concluded in the Investigation Report that the alleged conduct, on the balance of probabilities, occurred. Unlike Mr Roe, I did not have the benefit of hearing Ms X’s version of events. As such, I was left with the Applicant’s explanation that he would not have deliberately attempted uninvited physical contact with the Applicant and if any contact had occurred it would have been coincidental, and he used the example of “ushering” someone through a busy area. Absent direct evidence from Ms X, I am not satisfied that the conduct occurred as alleged by the University.

[97] Turning to the first allegation, that of the text message exchanges between the Applicant and Ms X, the dates of the text exchanges apart from the 4 November Texts are unclear. It was agreed that the Exam Results Texts was the first of the text exchanges in evidence and were exchanged shortly after Ms X completed her exam for the COMP90015 course and before commencement of the second semester in 2016. It was also agreed that the Inappropriate Question Texts, the Craziest Thing Texts and Coffee Request Texts were all sent after the Exam Result Texts and prior to the 4 November Texts, although the exact dates of those text messages were unclear. It was not in dispute that the 4 November Texts was the last exchange in the series of text messages in evidence.

[98] The Applicant sought to downplay the significance and intent of the Exam Results Texts which occurred in the context of Ms X contacting him regarding her level of stress over her Semester 1 exam results in the COMP90015 course. The Applicant, while agreeing that the proposed early release of exam results to Ms X was contrary to University rules, stated that it was something he would have done for any student if they were particularly stressed. He denied that his request to Ms X that she not tell anyone and that it was a secret, was because of his wish to pursue a personal relationship with the Applicant. He explained that his entreaty to the Applicant that she not say anything was because he did not want an avalanche of similar requests from other students.

[99] Even if the motivation of the Applicant in urging secrecy on Ms X's part was to avoid similar requests from other students, the Applicant's conduct of offering the early release of exam results to Ms X was inappropriate in circumstances where it was conceded by him to be contrary to University rules. Even Ms X recognised it was inappropriate by her comment in response to the Applicant's offer when she replied, *"Its like a rabbit hole"*. The Applicant's claim that the offer of early exam results release was innocent is also undermined by his concession during the investigation interview with Mr Roe that because it was Ms X who made the request he may have been "lenient" towards her in making the offer.

[100] I also find the Applicant's explanation of the request for secrecy to be unconvincing in the context of the feelings the Applicant disclosed he felt for Ms X in the apology he proffered on 17 August 2022. The Exam Results Texts was not an isolated text message exchange but needs to be viewed in the broader context of the series of text messages exchanged between the Applicant and Ms X with which I will shortly deal. Seen in that broader context I am inclined to the view that the Applicant was seeking to establish a closer personal relationship. I am satisfied that the text message was quite inappropriate, constituted an attempt on the Applicant's part to cultivate a closer personal relationship with Ms X and forms part of a broader pattern of behaviour of the Applicant directed to the pursuit of a personal relationship with Ms X.

[101] Turning to the Inappropriate Question Texts, a significant element of the brief exchange is that of the Applicant's question to Ms X as to when he would get to meet *"Kaka in person"*, Kaka being Ms X's cat. According to the Applicant, Ms X's cat had been the subject of previous discussion and exchanges between the two and he stated that he was just being courteous and friendly. An inference that may be drawn from the direct question posed by the Applicant to Ms X is that the Applicant was seeking an invitation to Ms X's residence as meeting the cat would seem unlikely other than in those circumstances. The Applicant rejected that inference and suggested implausibly that perhaps he could have met the cat elsewhere given that some cat owners walk their cats.

[102] I accept that the full text message exchange between the Applicant and Ms X was not in evidence which might have shed some light on the context of the exchange. However, the question posed by the Applicant was clear and direct and could not in my view be simply attributed to being courteous and friendly. He then followed that question up when no response was received with a further question as to whether he could ask Ms X an inappropriate question to which she replied with a startled cat emoji, the significance of which is unclear and on which I draw no conclusions. In my view, the tone and content of the Applicant's messages to Ms X goes well beyond that expected in a staff-student or professional working relationship and seeks to establish a level of personal intimacy between the Applicant and Ms X that was inappropriate in the circumstances.

[103] The pattern of the Applicant's behaviour in seeking a personal relationship with Ms X is further seen in the Applicant pressing Ms X to disclose private, perhaps sensitive personal information, in the Craziest Thing Texts. There is strong encouragement by the Applicant to Ms X to disclose personal information when he states, "*be honest*". He then goes on to provide an assurance of secrecy which again appears aimed at eliciting personal disclosure by Ms X and encourage a level of intimacy that is inappropriate in the circumstances of the power imbalance between the Applicant and Ms X. I do not accept the Applicant's explanation of the question being popular on social media at the time and him just being sociable. The explanation is unconvincing in the context of the broader text message exchanges and the disclosure of his feelings for Ms X in the proffered apology.

[104] In the Coffee Request Text, the Applicant is seen to invite the Applicant out for a coffee, offers to share his "*big umbrella*" and encourages the Applicant to explain to her friends that she needs to spend some quality time with a new man in her life when she shows reluctance to join him for a coffee. While described as an attempt at humour on his part by the Applicant, the invitation and comments made by the Applicant were apt in my view to make Ms X uncomfortable in the circumstances of their professional relationship and given Ms X was a post graduate student at the time. The reference to them sharing a "*big umbrella*" with the accompanying use of a smiley emoji followed by his encouragement to the Applicant to excuse herself from her friends by referring to the "*new man in her life*" were not comments that ought to have been made in the context of either a professional working or staff-student relationship. The comments were consistent with the attempts by the Applicant to cultivate a close personal relationship with Ms X, on which it is evident by her response she was uncomfortable with. That she did not directly confront the inappropriate comments in explicit terms is unsurprising given her subordinate relationship to the Applicant.

[105] Turning to the 4 November Texts, the Applicant made repeated attempts to encourage Ms X to join him for an evening out. Those invitations were explicitly rebuffed by Ms X. There are a number of aspects of the Applicant's messages that were highly inappropriate in my view.

[106] Firstly, the messages were sent after 9.00pm at night and continued until almost 11.00pm. While the exchanging of messages at that time of the evening between a supervisor and a subordinate may be necessary in circumstances of urgent work priorities, that was not the case of the messages sent by the Applicant in the 4 November Texts exchange. The messages were clearly of a personal nature.

[107] Secondly, Ms X was unreasonably pressured to accept the invitation by the Applicant in various statements made by him. See for example his messages where he states “*Stop being so shy X*”, “*I’m not going to bite you*”, “*Its just a couple of people spending some time together*” and “*Its only serious if we choose to make it serious*”.

[108] Thirdly, the Applicant failed to heed a number of explicit rejections by Ms X of his invitations to go out with him, persisted in his requests and at best downplayed the significance of the University policies and at worst misrepresented those policies on staff-student relationships when Ms X expressed concern at his requests.

[109] Fourthly, despite the earlier clear rejections by Ms X of the Applicant’s invitation to join him for an evening out, the Applicant then raises the prospect of going to the movies together, which Ms X again rejects in unequivocal terms by replying “*Yeah. You got it! Inappropriate!*”

[110] Fifthly, despite claiming during his evidence that he was not seeking a personal or intimate relationship with Ms X, the content of the communication in the 4 November Texts contradicts that evidence in my view. For example, see his statement in the messages that if he and Ms X had a personal relationship, he would not have been allowed to assess her. See also where the Applicant holds out the prospect of their relationship being “*serious if we choose to make it serious*”. He further expresses regret that had he not been a lecturer and just met Ms X somewhere, he hopes things would have been different. I am satisfied that the only inference that can be reasonably drawn from these comments is that he was expressing disappointment that his attempts to establish a personal relationship with Ms X had been rebuffed. The Applicant’s claim that he was just seeking to be friendly with Ms X is consequently rejected.

[111] It follows from the foregoing consideration of the text message exchanges, and I am satisfied, that the conduct of the Applicant was consistent with the pursuit of a personal relationship with Ms X. However, the Applicant contends that his conduct of sending various text messages to Ms X, which he concedes in hindsight may have been harassing, were not sexual in nature and do not establish a valid reason for his dismissal. He advances various grounds in support of that submission including that;

- the policies relied on by the University during the investigation and in terminating the Applicant’s employment were not in place or binding on the Applicant at the time of the conduct in 2016;
- the relevant 2016 policies either didn’t apply or were only aspirational in nature;
- the conduct was confined to a short period of time, were isolated incidents and were not repeated;
- the conduct was not crude or of a serious nature;
- the conduct can be attributed to miscommunication and misunderstanding on the Applicant’s part;

- the Applicant was seeking friendship with Ms X and not a close personal or intimate relationship.

[112] The Applicant contends that the dismissal was flawed in circumstances where the relevant policies in place in 2016 were not put to him during the investigation and the subsequent disciplinary process. It was also contended by the Applicant that the investigation that flowed from Ms X's complaint was a 'nullity' as clause 1.2 of the Discrimination, Sexual Harassment and Bullying Procedure that was in place in 2016 required a complaint to be made within twelve months unless there were exceptional circumstances, a point on which University witnesses properly concede they did not turn their minds to during the investigation.

[113] Dealing with the last point first, the fact that the 2016 Sexual Harassment and Bullying Procedure required a complaint to be made within twelve months absent exceptional circumstances, is no barrier to my consideration of whether the Applicant's conduct was in breach of the relevant policies and procedures. Further, I reject the argument that the investigation was a 'nullity' by reason of the University not having turned its mind to whether the complaint was exceptional. While that was an oversight it would be a travesty for Ms X to have been barred from pursuing a complaint by reason of an oversight on the part of the University as occurred in the case at hand. For the sake of completeness, a complaint of the type raised by Ms X going to the conduct of a senior academic staff member of the University, would in my view fall into the category of exceptional and would have warranted formal investigation.

[114] Turning to the acknowledged failure of the University to put to the Applicant the alleged breaches of the policies and procedures that were in place in 2016, it is necessary for me to consider whether the Applicant's conduct did in fact breach the relevant policies that were in place in 2016. The Applicant contends that the Staff - Student Relationship Procedure has no application to the conduct as that procedure was directed to avoiding conflicts of interest and in any case Ms X's relationship with the Applicant was in the capacity of a staff member at the time of the overwhelming majority of the Applicant's conduct and as such the procedure had no application. According to the Applicant, the Responsible Code of Conduct Policy was largely aspirational.

[115] The Applicant's contentions regarding the 2016 policies and procedures reveals an attempt by the Applicant to downplay the significance of his conduct, it appears to ignore the clear power imbalance between himself and Ms X and must be rejected. True it is that Ms X was working as a research assistant at the time of most of the conduct. She did however remain a student, albeit she was not undertaking a subject of study under the supervision of the Applicant during the second half of 2016. She remained in a position of obvious vulnerability, both in the sense of her being a junior staff member reporting to the Applicant and as a continuing student. The Applicant's focus on the avoidance of conflicts of interest in the procedure at clauses 2.1 & 2.2 also ignores the clear statements in the procedure regarding the duty of care owed by staff to students and the power disparity. Notwithstanding the Applicant's arguments, I am satisfied that Ms X remained a student at the time of the Applicant's conduct in the second half of 2016 and as such the procedure extended to interactions between the Applicant and Ms X.

[116] As to the Applicant's contention that the Responsible Code of Conduct Policy was largely aspirational, I disagree. Clauses 2.6 & 2.7 set out in detail the Universities expectations of staff which relevantly includes that staff will ensure their relationships with students are *"professional, trusting and respectful"* and that staff will recognise their *"professional and ethical responsibility to protect the interest of students...and to accept the constraints and obligations inherent in that responsibility"*. While the 2016 policy may lack the detailed prescription found in the 2022 AWB Policy and SMPR Policy, it cannot be said in my view that expectations of staff were unclear in 2016. Reinforcing my conclusion on this point, the Applicant readily conceded during cross-examination his understanding of the risks associated with pursuing and/or establishing personal relationships with students and agreed that inappropriate conduct towards students went to the core of right and wrong.

[117] Dealing with the Applicant's contention that his conduct was not crude or of a serious nature, I agree that his conduct was not overtly crude or sexual. I disagree however that the conduct was not serious. The conduct of the Applicant as a senior academic pursuing a personal relationship with Ms X placed her in an uncomfortable position, was repeated and was clearly unwelcome as evidenced by Ms X's responses. The Applicant himself concedes in hindsight that the conduct could be viewed as harassment.

[118] Turning to the Applicant's contention that the conduct was confined to a short period of time, was isolated and was not repeated, I am not persuaded by that submission for the reasons that follow. As I have earlier set out and found above, the conduct was sustained over a series of text message exchanges that commenced with the Exam Results Texts in mid-2016 and culminated in the 4 November texts exchange. In between those two exchanges were other text message exchanges that were inappropriate and which Ms X was clearly uncomfortable with. See for example in the Coffee Request Texts her response to his invitation to have coffee together and share his *"big umbrella"* where she politely declines the invitation and maintains her resistance to joining him or use the excuse suggested by the Applicant of telling her friends that she needed to spend *"quality time"* with the new man in her life.

[119] As regards the 4 November Texts exchange, it might have been argued that it was an isolated incident if the Applicant had ceased pressing Ms X to join him after the first request. It was not however a single request that was declined by Ms X. The Applicant persisted despite an explicit rejection of the initial and subsequent invitations. During the course of that exchange, Ms X makes clear that his invitations were unwelcome on at least six occasions. This can be seen by the following;

- when initially invited to go out for an hour by the Applicant, Ms X sends a response saying *"no, no, no, no, no"*;
- when the Applicant persists that they could go out for an hour, see the city nightlife, and spend some time together, Ms X replies *"no, no, no, no, no"*;
- in response to the Applicant's description of them going out as just two people spending some time together Ms X further states *"But this is absolutely not allowed by the uni and there must be a reason"*;

- when the Applicant attempted to rationalise his invitation in terms of University policy requirements, Ms X responds *“I’m not going out. I would like both of us to be appropriate as possible”*;
- when the Applicant expresses disappointment at Ms X’s response, she then raises his marital status; and
- while somewhat deterred by Ms X’s previous responses, the Applicant still raises the prospect of going to the movies together to which Ms X finally responds *“Yeah. You got it! Inappropriate!”*

[120] Dealing with the Applicant’s claim that he was merely seeking a friendship with Ms X and was not pursuing a personal relationship I also reject that contention. The efforts of the Applicant to establish a level of trust and secrecy between himself and Ms X (the Exam Text Results and Craziest Thing Texts) was accompanied by his pursuit of an invitation to her home (the Inappropriate Questions Texts), requests that Ms X excuse herself from her friends to spend time with him (the Coffee Request Texts) and his persistence in spite of Ms X’s rebuffing of his invitations to go out with him (the 4 November Texts) are actions consistent with the pursuit of a personal relationship.

[121] Any doubt of the Applicant’s motives is removed by the content of the proffered apology in which he explained that he knew when he first met Ms X that pursuit of a personal relationship would be in breach of University policies but that he would have *“risked his career”* for Ms X. See also his expression of disappointment in the 4 November Texts that had he met Ms X under different circumstances, a different outcome might have arisen. What different outcome could he have hoped for but for a close personal relationship with Ms X is unclear. I reject the Applicant’s contention that he was merely seeking a friendship with Ms X.

[122] Finally, the Applicant claims that his conduct could be explained by miscommunication and misunderstanding on his part of Ms X’s wishes. He says he believed that Ms X by her conduct was interested in spending time with him. He refers to various interactions he had with Ms X including their watching a video together in his office. Put at its highest, the Applicant’s evidence appears to indicate that Ms X may have been happy to spend time with him at a point and that he had misunderstood that friendliness as a willingness or interest on her part in developing a personal relationship. There is however no compelling evidence before me that indicates that Ms X was desirous of pursuing a personal relationship with the Applicant. Even if it were the case that Ms X had an interest in pursuing a relationship, the Applicant cannot escape the duty of care he owed to Ms X and his obligations under the relevant policies. In simple terms, the Applicant bore a greater responsibility by dint of his position as a senior academic within the University and was bound to respect the professional boundaries between himself and Ms X both as a student and junior staff member. In short, whether the Applicant misunderstood Ms X’s motives is irrelevant to whether his conduct breached his obligations as an employee of the University, on which I have made findings above.

[123] I am satisfied that the Applicant’s conduct of pursuing a personal relationship with the Applicant was repeated, unwelcome, inappropriate and constituted sexual harassment. Furthermore, that conduct was in breach of the Responsible Code of Conduct Policy and the Staff - Student Relationship Procedure that were in place in 2016 and as such constituted

misconduct. Independently of the policy and procedure breaches to which I have referred, I am also satisfied that the Applicant's conduct constitutes serious misconduct within the meaning of Reg 1.07 of the Fair Work Regulations 2009. The sexual harassment posed a "*serious and imminent risk*" to Ms X's health and safety and to the reputation of the University. That latter point has been starkly revealed by greater attention and resources now being directed by tertiary institutions including the University, to combating the scourge of sexual harassment of students by academic staff. The public attention to this issue has rightly demanded a strong response from tertiary institutions and from businesses more generally.

[124] I have found that the Applicant's behaviour constitutes serious misconduct thus establishing a valid reason for his dismissal. This weighs in favour of a finding that the dismissal was not unfair.

Notification of the valid reason – s.387(b)

[125] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,⁹¹ and in explicit⁹², plain and clear terms⁹³.

[126] The Applicant contends that the University put to him during the investigation and in the reasons for his dismissal that it relied on the Applicant's breaches of the AWB Policy and the SMPR Policy, those policies not having been in place in 2016 at the time of the alleged misconduct. Rather, the policies in place at the time in 2016 and the alleged breaches of those policies were not raised with the Applicant prior to his dismissal. This according to the Applicant means that he was denied procedural fairness.

[127] As I have found above, the valid reason for the Applicant's dismissal was that of the Applicant's engagement in sexual harassment of Ms X, that conduct being in breach of the relevant 2016 policies, those being the Responsible Code of Conduct Policy and the Staff - Student Relationship Procedure. The valid reason for the Applicant's dismissal that I have found above was not put to the Applicant prior to the University's decision to dismiss him. That is because the University failed to identify or apply the correct policy in conducting the investigation or in carrying out the disciplinary action.

[128] Notwithstanding the above deficiency in process followed, the University did put to the Applicant in explicit and clear terms the nature of the alleged misconduct in respect of the first and second allegations. In relation to the first allegation, the Applicant clearly understood that the University regarded his text message exchanges with Ms X to be highly inappropriate, with which assessment he agreed during the University's investigation. Nor did the Applicant argue in these proceedings that his conduct was not inappropriate although he did contend the 2016 policies were either not relevant or aspirational, an argument I have rejected above.

[129] It follows from the above that while I am unable to identify the particular prejudice the Applicant has suffered by reason of the University's failure to put the correct policies to him that supported the reason for his dismissal, it does nonetheless mean that the Applicant was not notified of the valid reason for his dismissal prior to the decision being made. While in the circumstances I do not place significant weight on the matter, it nonetheless weighs in favour of a finding that the dismissal was unfair.

Opportunity to respond to any reason related to capacity or conduct – s.387(c)

[130] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.⁹⁴

[131] The opportunity to respond does not require formality and the factor is to be applied in a common-sense way to ensure the employee is treated fairly.⁹⁵ Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to the concern, this is enough to satisfy the requirements.⁹⁶

[132] It is abundantly clear from the investigation and disciplinary process set out in detail in the evidence above at [48]-[74] that the Applicant was given a number of opportunities to respond to the reasons for his dismissal related to his conduct. This included being interviewed by Mr Roe as part of the investigation. He also participated in meetings held with University representatives on 5 August, 12 August and 20 September 2022 in relation to the investigation findings and proposed disciplinary action. The Applicant was also afforded the opportunity to provide various written responses and material during the course of the investigation and disciplinary process, which opportunities he took advantage of.

[133] While I have highlighted the error of the University in failing to identify and apply the relevant policies that were in place in 2016 during the course of the investigation, I am not satisfied that those errors prejudiced the Applicant in the circumstances of this case. He concedes his conduct of sending inappropriate text messages to Ms X was wrong in hindsight. He further acknowledged during cross-examination the risks to and vulnerability of students to pressure from staff to enter into personal relationships as well as the dangers posed to those staff and the University by such conduct. While the specifics of the relevant policies were not put to him when his response to the allegations was sought, he was in no doubt that the University regarded his conduct as highly inappropriate, and he was given ample opportunities to respond to their concerns regarding his conduct.

[134] I am satisfied that the Applicant was provided with an opportunity to respond to the reasons relied on for his dismissal related to his conduct. This weighs in favour of a finding that the dismissal was not unfair.

Support person – s.387(d)

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

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

“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer

unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.”⁹⁷

[137] The Applicant concedes that he was not unreasonably refused a support person in discussions held in relation to the investigation of the alleged misconduct and disciplinary taken. This weighs in favour of a finding that the dismissal was not unfair.

Warnings regarding unsatisfactory performance – s.387(e)

[138] The dismissal did not relate to unsatisfactory performance. This factor is therefore not relevant in the circumstances.

Impact of the size of the University on procedures followed – s.387(f)

[139] The University’s Form F3 indicates that at the time of the Applicant’s dismissal the University employed approximately 18,000 employees. There is no evidence before me, and nor did either party contend, that the University’s size impacted on the procedures followed by it in dismissing the Applicant. This factor weighs neutrally in my consideration.

Impact of absence of dedicated human resources management specialist/expertise on procedures followed – s.387(g)

[140] The evidence in this matter indicates that the University had access to the services of in-house human resources specialists. This factor weighs neutrally in my consideration.

Other relevant matters – s.387(h)

[141] The Applicant raises a number of mitigating factors which he contends renders the dismissal unfair. The matters raised are as follows;

- the Applicant’s length of service and unblemished employment record;
- the passage of time between the alleged misconduct and investigation;
- the Applicant’s mental health;
- Ms X’s conduct;
- conduct of the University; and
- other matters the Applicant “hopes played no part” in his dismissal.

[142] Turning firstly to the Applicant’s length of service and employment record. It is uncontroversial that the Applicant was employed by the University for over twenty years and that he was not subject to performance management or disciplinary action during his employment apart from the matters that led to his dismissal. I also note that the Applicant received a promotion in 2021 to Level D Associate Professor which took effect at the

commencement of the 2022 academic year. I am satisfied that the Applicant's long service with the University and his employment record are matters that ought to be taken into account and weigh in favour of a finding of harshness.

[143] The Applicant also contends that the length of time that elapsed between the alleged conduct in 2016 and the investigation of that conduct was procedurally unfair, thereby rendering his dismissal unfair. I accept that the failure of an employer to promptly investigate suspected misconduct may tell against a finding that a subsequent investigation and dismissal was procedurally fair. I also accept that where there has been a long period of time elapse between the alleged misconduct of an employee and investigation of that conduct, such delay may prejudice either or both the employee and the employer. However, I am not satisfied for the reasons that follow that the long period of time between the alleged misconduct of the Applicant and investigation of that conduct prejudiced the Applicant or rendered the dismissal procedurally unfair.

[144] Firstly, contrary to the belief of the Applicant, I am satisfied that the University was not notified of Ms X's concerns about the Applicant's behaviour until 13 March 2022 when Ms X sent an email to Anshu Tara. Ms X's complaint was then formalised when she advised Ms Kerr in a telephone conversation on 5 May 2022 that she wanted to proceed with a formal complaint. I am further satisfied that the University promptly initiated an investigation following the formal complaint being made and I also agree with the University's submission that it cannot be said that it acquiesced to the conduct.

[145] Secondly, the Applicant while denying his actions were motivated by a desire to pursue an intimate relationship with Ms X, admits the text message exchanges with Ms X, acknowledges that conduct was wrong and agrees that the conduct was inconsistent with relevant policies. Given the Applicant's admissions, I do not accept that the time that elapsed between the alleged conduct and the investigation prejudiced the Applicant, deprived him of an opportunity to respond or adversely impacted on the procedural fairness accorded to him.

[146] Turning now to the Applicant's mental health, it is not in dispute that the Applicant was diagnosed in 2019 with autism as stated by Dr Berry in his report produced in evidence in these proceedings. The Applicant submits that he was suffering from an undiagnosed disorder in 2016 when the alleged misconduct occurred which he submits meant he failed to distinguish between the desire for typical social interaction and the desire for personal relationships. He further submits that this in turn impeded his ability to appropriately interpret social cues and that he would therefore interact with people in ways that may not have been reciprocated.

[147] Dr Berry opined in his report in a generalised manner as to how persons such as the Applicant who had been diagnosed with autism would have trouble in both understanding different types of relationships and in communication through an inability to correctly read or understand indirect and non-verbal communication. Dr Berry was not called to give evidence and his report is unhelpful as it failed to address the specific factual circumstances of the present matter. Critically, the report fails to engage with the specific conduct of the Applicant in sending text messages to Ms X and how that conduct, having regard to his medical condition, can be reconciled with the Applicant's understanding and acceptance of the University's policies and Ms X's firm rejection of the Applicant's overtures within those text message exchanges. There

is simply no medical evidence before me that would allow me to conclude that the Applicant's medical conditions stands in mitigation of the conduct of which I have earlier made findings.

[148] Ms X's conduct was also relied on by the Applicant in mitigating his own conduct. He specifically refers to Ms X initiating contact with the Applicant and seeking what he understood to be a friendship. He referred to various instances of Ms X initiating contact with him including by approaching him because she was unable to access her exam results because of a 'glitch', sending him examples of her design work, inviting him to join her in watching a video related to her religious beliefs and sharing music with the Applicant that she enjoyed. It is submitted by the Applicant that his autism played a part in him misinterpreting Ms X's conduct as being that of desiring a personal relationship with him.

[149] The Applicant's attempts to mitigate his own conduct by referring to Ms X's behaviour must also be rejected. First and foremost, the Applicant was in a position of power relative to Ms X, both as her lecturer initially and then as her immediate supervisor. Even if she had been seeking to establish a friendly relationship with the Applicant, that ought not have been regarded as an invitation or signal to the Applicant to pursue a personal relationship with Ms X. The pursuit of a personal relationship by the Applicant was in acknowledged conflict with the relevant policies and was explicitly rejected by Ms X on several occasions. For the Applicant to persist with the argument that the differences between a friendship and an intimate relationship were not intuitive to him are simply not credible having regard to the evidence of the explicit rejections by Ms X of his overtures.

[150] The Applicant also claims the conduct of the University has "*professionally ostracised and isolated the Applicant and is irrefutably harsh*". The conduct referred to by the Applicant includes a 25 November 2022 Herald Sun article⁹⁸ detailing the alleged misconduct engaged in by the Applicant along with a photograph of him. Accompanying the article was the release of a video⁹⁹ by the University which details the commitment of the University to eliminate sexual misconduct following an independent review of its previous policy. The article was said by the Applicant to have been "*sanctioned*" and "*spearheaded*" by the University, not only named but included a photo of the Applicant and focussed on sexual assault which is far more serious misconduct than the conduct engaged in by the Applicant. The University's alleged conduct along with the subsequent social media speculation has and will, according to the Applicant, impede his ability to gain any meaningful employment in the future.

[151] Despite the submissions of the Applicant, I am unable to conclude that the University "*spearheaded*" or "*sanctioned*" the Herald Sun article although it certainly contributed to it by way of comment and the release of a video at or about the same time of the article. The originator of the article was not established. As to the subsequent social media speculation, there is insufficient material before me to conclude there was a campaign undertaken by the University to discredit the Applicant. In any case, the media reporting and social media speculation occurred some months after the dismissal of the Applicant and is not in my view relevant to my consideration of whether the dismissal was unfair.

[152] Finally, the Applicant seeks an inference be drawn that the decision to dismiss him was driven in part by various complaints he had raised in the 2019-2021 period, and which are summarised above at [30]-[36]. That submission is rejected as there is simply no evidentiary basis to conclude that those various complaints raised by the Applicant played any part in the

University's decision to dismiss him. The inherent unlikelihood that those matters played any part in the dismissal decision is highlighted by the fact that despite the various complaints raised by the Applicant with the University, he was advised of his promotion in 2021 which took effect at the start of the 2022 academic year.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust, or unreasonable?

[153] I have made findings in relation to each matter specified in s 387 of the Act as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust, or unreasonable¹⁰⁰.

[154] As set out above, I am satisfied that a valid reason for the Applicant's dismissal related to his conduct of sexual harassment of Ms X has been established and that the dismissal process followed by the Respondent was procedurally fair, save for the failure of the University to identify and apply the correct policies and procedures for the purpose of the investigation and disciplinary action. That omission negatively impacted on the University's notification of a valid reason for the Applicant's dismissal. The dismissal was not related to the Applicant's performance and the size and capacity of the Respondent did not impact on the procedures that it followed and as such these matters weigh neutrally in my consideration of whether the dismissal was unfair. The only other matter that I have identified that weighs in favour of a finding that the dismissal was unfair is that of the Applicant's length of service of over twenty years and his employment record.

[155] While the University's failure to identify and apply the correct policies meant it failed to notify the Applicant of a valid reason for his dismissal, I am not satisfied that omission in the circumstances of this case is sufficient to displace the weight to be accorded to the valid reason for the Applicant's dismissal. Nor am I persuaded that the Applicant's long service is of sufficient weight such as to render the dismissal unfair. That is because of the gravity of the misconduct which the Applicant appeared not to appreciate despite admissions he readily made during the proceedings.

[156] It follows from the above that having considered each of the matters specified in s 387 of the Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust, or unreasonable because there was a valid reason for the dismissal and the other factors weighing in favour of a finding that the dismissal was unfair were not sufficient to displace the weight I accord to other s 387 criteria and in particular the valid reason for dismissal.

Conclusion

[157] Not being satisfied that the dismissal was harsh, unjust, or unreasonable, I am not satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the Act.

[158] The application is dismissed. An Order will be separately issued giving effect to my decision.



DEPUTY PRESIDENT

Appearances:

J Ryan for the Applicant.

C O'Grady QC for the Respondent.

Hearing details:

2023.

Melbourne:

February 22, 23.

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¹ Exhibit R3, Witness Statement of Martin Bower, dated 8 February 2023, at [57]-[61]

² Court Book at p67, Exam Results Texts

³ Exhibit A1, Witness Statement of Aaron Harwood, dated 16 January 2023, at [33(i)]

⁴ Exhibit R1, Witness Statement of Julius Roe, dated 8 February 2023, Attachment JR-1 Investigation Report, at Court Book p352

⁵ Court Book at p68. Inappropriate Question Texts

⁶ Court Book at p69, Craziest Thing Texts

⁷ Exhibit A1 at [33(j)]

⁸ Court Book at pp70-72

⁹ Court Book at pp 61-66, 4 November Text Exchange

¹⁰ Exhibit A1 at [33(h)]

¹¹ Exhibit A1 at [33(a)-(f)]

¹² Ibid at [33(k)-(l)]

¹³ Exhibit A1, at [6]-[12]

¹⁴ AE502413

¹⁵ Exhibit A1 at [23]-[25]

¹⁶ Ibid, Attachment AH-2, Email to staff re autism seminar

¹⁷ Exhibit A1 at [21]-[22]

¹⁸ Ibid, Attachment AH-4, Email dated 24 November 2020 re change of supervisor request

¹⁹ Exhibit A1 at [26]

²⁰ Ibid, Attachment AH-5, Email dated 13 July 2022 re "Drapes in office"

²¹ Exhibit A1 at [27]-[28]

²² Ibid at [29], Attachment AH-6, Email dated 2 June 2021 re "Promotion Application submission to HOS"

²³ Exhibit R3 at [9]-[10]

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- ²⁴ Ibid at [11]-[20]
- ²⁵ Ibid, Attachment MB-2 Staff-Student Relationship Procedure, effective from 4 January 2016
- ²⁶ Exhibit R3, Attachment MB-3, Discrimination, Sexual Harassment and Bullying Procedure, effective from 4 January 2016
- ²⁷ Exhibit R3, Attachment MB-4, Responsible Conduct of Staff Policy, effective from 21 January 2016
- ²⁸ Exhibit R3 at [23]
- ²⁹ Ibid at [26]
- ³⁰ AE406763
- ³¹ Exhibit R3 at [31]-[32]
- ³² Ibid
- ³³ Ibid at [35]
- ³⁴ Ibid at [37]
- ³⁵ Ibid, Attachment MB-7, Sexual Misconduct Annual Report 2021 re-issued 20 May 2022
- ³⁶ Exhibit R3 at [39]
- ³⁷ Ibid at [41]
- ³⁸ Ibid, Attachment MB-8, Appropriate Workplace Behaviour Policy, effective from 31 May 2022
- ³⁹ Exhibit R3 at [43]
- ⁴⁰ Ibid Attachment MB-9, Sexual Misconduct Prevention and Response Policy, effective from 31 May 2022
- ⁴¹ Exhibit R3 at [45]
- ⁴² Exhibit R2, Witness Statement of Jessica Kerr, dated 8 February 2023, Attachment JK-1, Email from Ms X
- ⁴³ Exhibit R2, Attachment JK-2, Email Exchange between Jessica Kerr and Ms X, dated 16 March – 9 May 2022
- ⁴⁴ Exhibit R2 at [11]-[14]
- ⁴⁵ Ibid, Attachment JK-3, Advice re complaints against Applicant, dated 22 March 2022
- ⁴⁶ Exhibit R2, Attachment JK-4, Email exchange between Jessica Kerr and Ms X, dated 4-20 April 2022 re setting up a meeting time
- ⁴⁷ Exhibit R2 at [16]-[34]
- ⁴⁸ Ibid, Attachment JK-5, Email from Jessica Kerr to Ms X, dated 11 May 2022, re ‘Investigation’
- ⁴⁹ Exhibit R2, at [35]-[40], Attachment JK-6, Zoom meeting invite for 31 May 2022 meeting
- ⁵⁰ Exhibit R2 at [41]-[49]
- ⁵¹ Exhibit A1, at [30]
- ⁵² Exhibit R1, at [3]
- ⁵³ Ibid, Attachment JR-1, Investigation Report dated 24 June 2022 Attachment A - Allegations
- ⁵⁴ Exhibit A1 at [31]
- ⁵⁵ Exhibit R1, Attachment JR-1 Investigation Report, Attachment B Response of Aaron Harwood
- ⁵⁶ Exhibit A2, Second Witness Statement of Aaron Harwood dated 16 February 2023, at [3(j)]
- ⁵⁷ Exhibit R1, JR-1
- ⁵⁸ Exhibit R3 at [64]-[67]
- ⁵⁹ Ibid at [67]-[75]
- ⁶⁰ Exhibit A2, at [3(b)]
- ⁶¹ Exhibit R3 at [76]-[79]
- ⁶² Exhibit A2 at [3(c)]
- ⁶³ Exhibit R3 at [82]-[83], Attachment MB-11, Email from Martin Bower dated 28 July 2022, titled ‘Memo re allegations of sexual misconduct: Harwood FEIT’
- ⁶⁴ Exhibit R3 at [84]
- ⁶⁵ Ibid, Attachment MB-11
- ⁶⁶ Exhibit R3, Attachment MB-12, Email from Daniel Donbavand to Applicant dated 5 August 2022, titled ‘Documents’

⁶⁷ Exhibit R3, Attachment MB-13

⁶⁸ Ibid at Court Book p 611

⁶⁹ Exhibit R3 at [91]-[98]

⁷⁰ Exhibit A2 at [3(f)-(g)]

⁷¹ Exhibit R3 at [100]-[103]

⁷² Ibid, MB-14, Email exchange between Applicant and Martin Bower, dated 17 August 2022, titled ‘Revised letter/statement of apology’

⁷³ Exhibit A2 at [3(k)]

⁷⁴ Exhibit R3, Attachment MB-17, Email from Martin Bower dated 6 September 2022, titled ‘Memo: outcome of investigation into allegations of serious misconduct (sexual harassment)’

⁷⁵ Exhibit R3, Attachment MB-15, Memorandum to Nicola Phillips, titled ‘FEIT Investigation – Harwood for Decision’

⁷⁶ Exhibit R3, Attachment MB-16, Email from Martin Bower dated 31 August 2022, titled ‘Memo of discussion: outcome of investigation into allegations of serious misconduct’

⁷⁷ Exhibit R3, Attachment MB-18, Email from Aaron Harwood, dated 20 September 2022, titled ‘FW: Follow On From Meeting’

⁷⁸ Exhibit R3 at [123]-[125]

⁷⁹ Transcript for 22 February 2023 at PN1384

⁸⁰ Exhibit R3, Attachment MB-19, Email from Daniel Donbavand to Applicant dated 21 September 2022, titled ‘Final Outcome of Investigation into Allegations of Serious Misconduct’

⁸¹ Exhibit A1 at [14]-[20]

⁸² Ibid, Attachment AH-13, Letter dated 16 January 2023 titled “Re: Dr Aaron Harwood”

⁸³ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

⁸⁴ Ibid.

⁸⁵ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

⁸⁶ Ibid.

⁸⁷ *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213 [24].

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ *Briginshaw v Briginshaw* (1938) 60 CLR 336, [1938] HCA 34.

⁹¹ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

⁹² *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

⁹³ Ibid.

⁹⁴ *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRC, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

⁹⁵ *RMIT v Asher* (2010) 194 IR 1, 14-15.

⁹⁶ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

⁹⁷ Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].

⁹⁸ Exhibit A1, Attachment AH-14, Herald Sun article, dated 25 November 2022

⁹⁹ Exhibit A1, Attachment AH-15, Video

¹⁰⁰ *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]– [7].