DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

University of Melbourne
v
Stephan Matthai
(C2025/7086)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT GRAYSON

SYDNEY, 19 FEBRUARY 2026

Appeal against decision [2025] FWC 1938 of Deputy President Colman at Melbourne on 7 July 2025 in matter number U2024/15632 – Academic dismissed as a result of breaches of University's Appropriate Workplace Behaviour Policy alleged to have taken place 7 years earlier – Deputy President found that dismissal was harsh and ordered reinstatement – Whether the Deputy President erred in finding dismissal was harsh as a result of delay between misconduct and termination – Whether the Deputy President failed to consider seriousness of conduct, importance of the University's policy and reasons for delay – Whether significant errors of fact – Whether the Deputy President erred in finding that the University's loss of trust and confidence was not soundly and rationally based – Permission to appeal granted – Appeal dismissed.

Introduction

[1] Dr Stephen Matthai was a professor and Chair of Reservoir Engineering in the Department of Infrastructure Engineering at the University of Melbourne (the **University**) until December 2024. Prior to holding that position, Dr Matthai was a professor and institute director at the Montanuniversität Leoben in Austria and a Senior Lecturer at Imperial College, London.

[2] Dr Matthai was dismissed on 17 December 2024. His dismissal arose from allegations that he had contravened the University's Appropriate Workplace Behaviour Policy (the **AWB Policy**) by being involved in a series of personal and inappropriate email and text message communications with a PhD student he was supervising. The communications occurred in May and June 2017. Later in 2017, the student informed another professor that she was concerned about Dr Matthai's supervision of her PhD and his behaviour. The student raised concerns about the appropriateness of Dr Matthai's behaviour with the University's human resources department. The student was subsequently assigned to a different supervisor. No further action was taken in relation to the student's concerns at that time.

[3] In January 2024, the student sent an email to the University alleging that Dr Matthai had sexually harassed her in 2017. The University commenced an investigation of the allegations in February 2024, appointing an independent investigator, Karen Wise. On 12 December 2024,

following the investigation, the University advised Dr Matthai that it proposed to terminate his employment based on findings of serious misconduct arising from the allegations and allowed him to provide a written response. On 17 December 2024, Dr Matthai's employment was terminated.

[4] On 24 December 2024, Dr Matthai made an application for an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009* (Cth) (the **Act**). On 7 July 2025, Deputy President Colman found that, while Dr Matthai's conduct constituted serious misconduct and a valid reason for his dismissal, the time which had elapsed between the serious misconduct and the dismissal and Dr Matthai's unblemished disciplinary record during this period resulted in the dismissal being harsh and therefore unfair. The Deputy President made an order for Dr Matthai to be reinstated and that a payment of $28,098.12 (less taxation) be made to Dr Matthai for lost remuneration. The University seeks permission to appeal and to appeal the decision of the Deputy President under s 604(1) of the Act.

Factual background

[5] Dr Matthai was engaged to supervise a PhD student in 2017 who had, at that time, recently entered Australia. In his decision, the Deputy President anonymised references to the student, referring to her as AB and we will continue to refer to the student as AB. Throughout May and June 2017, Dr Matthai and AB exchanged text messages, emails and facetime calls and met socially outside of the university including when Dr Matthai invited AB to his birthday party. On 8 May 2017, in response to an email sent by AB, Dr Matthai stated: 'I have moved to my private email – also addressing you on yours because this is more appropriate for the conversations we are having. Nothing to be seen by UOM internet security people. It is our very own private conversation!'. Dr Matthai then engaged in a series of communications with AB throughout May and June of 2017 which the Deputy President found were highly personal, intimate and romantic in nature and entirely inappropriate and unprofessional on the part of Dr Matthai. The communications which became the subject of disciplinary allegations are set out in the decision of the Deputy President and need not be repeated in this decision.

[6] From mid-2017, AB notified various faculty members of the University of issues she was having with Dr Matthai and conveyed that she was uncomfortable with Dr Matthai continuing to supervise her PhD. At first instance, the University put on evidence from Professor Andrew Western, Professor Abbas Rajabifard, Lauren Richards (Senior HR Business Partner for the University) and Anshu Tara (Human Resources Business Partner for the Faculty of Engineering and Information Technology), all of whom had discussions with AB about her concerns regarding Dr Matthai. It appears that at least Professor Western and Professor Rajabifard became aware of the concerns of AB in relation to the behaviour of Dr Matthai in mid-2017. Later in 2017, Professor Western became a co-supervisor of AB. Professor Western eventually reported AB's concerns to human resources in May 2018 and AB attended an interview with human resources representatives on 16 May 2018 in which she conveyed that she did not want Dr Matthai to continue supervising her PhD but that she was concerned about making a formal complaint as she felt this would endanger her ability to complete her PhD.

[7] In August 2018, AB discontinued her original PhD and commenced a new PhD with Professor Western becoming her primary supervisor. Professor Western continued to supervise AB until she completed her PhD in 2023. On 2 January 2024, shortly after completing her PhD,

AB made a formal complaint addressed to Professor Western, Professor Matthew Harding and Mark Cassidy (Deputy Vice Chancellor (Research)) in which she expressed that Dr Matthai had asked her to have a sexual relationship, 'until he [could] find someone adequate for himself'. AB subsequently provided the University with copies of email and text message communications between herself and Dr Matthai. On 19 January 2024, AB made a further formal complaint addressed to the University's workplace investigations team in which she detailed the timeline of events and Dr Matthai's conduct towards her during 2017.

[8] As outlined above, the University commenced an investigation into AB's allegations in February 2024, appointing an independent investigator, Ms Wise. On 5 June 2024, Dr Matthai was provided with a letter which detailed the allegations against him and invited him to provide a written response. On 8 June 2024, Dr Matthai provided a written response to the allegations, stating that he sought to 'put the allegations and supporting particulars (email and iphone citations) into their appropriate context'.

[9] On 25 June 2024, the report prepared by the investigator was provided to the University. The report found that, on the balance of probabilities and based on the information available to the investigator, Dr Matthai had breached the AWB Policy. On 2 October 2024, the University informed Dr Matthai at a meeting, and by way of a letter, of its provisional view that Dr Matthai had contravened the AWB policy and that the contravention constituted a breach of the *University of Melbourne Enterprise Agreement* (the **Enterprise Agreement**) and amounted to serious misconduct. The letter provided for Dr Matthai to respond to this preliminary view in writing.

[10] On 7 October 2024, Dr Matthai provided a response letter which set out that Dr Matthai agreed with the outcome of the investigation. In this correspondence, among other things, Dr Matthai said:

> Thank you very much for providing me with the opportunity to respond to the outcome of the investigation that documented my serious misconduct in terms of the Appropriate Workplace Behaviour Policy, during my supervision of PhD student [AB] in May 2017.
>
> Having read the "summary of investigation findings report", I agree with the general outcome of the investigation: my behaviour has been highly inappropriate, and - at times – willfully [sic] contravening our workplace policy; policy paragraphs (e) and (f) in particular. I deeply regret my behaviour that ultimately corrupted the professional relationship [AB] and I enjoyed in the leadup to her arrival at Melbourne University and our joint preparation of her first research proposal.

[11] Dr Matthai explained that his personal life had fallen apart and his partner had left him at that time and he regretted his conduct. Dr Matthai said in relation to his communications with AB:

> This behaviour was insensitive, not being able to reframe what was happening from [AB]'s point of view. I deeply regret having acted this way and am terribly sorry that I hurt her this much. As I was to discover in the following months, what happened made it impossible for me to re-establish a professional, positive working relationship with her. While i tried very hard it was too late and [AB] needed another supervisor. I am very grateful to Andrew Western who stepped in at this time. And I am very happy that [AB] eventually managed to get her PhD. I genuinely wanted her to succeed irrespective of the specific research topic.

[12] On 12 December 2024, a meeting was conducted with Dr Matthai at which he was informed the University had concluded that Dr Matthai's conduct amounted to serious misconduct and that the University proposed to terminate his employment. Correspondence to that effect was sent to Dr Matthai later that day. On 17 December 2024, Dr Matthai's employment with the University was terminated without notice on grounds of serious misconduct.

Decision of the Deputy President

[13] The Deputy President initially set out the background to the proceedings and identified the evidence before the Commission before considering whether Dr Matthai's dismissal was unfair, by reference to the matters set out in s 387(a) to (h). Turning first to s 387(a), the Deputy President accepted that Dr Matthai's conduct towards AB in 2017 amounted to a valid reason for dismissal. The Deputy President rejected Dr Matthai's submission that the conduct was 'out of hours' and in the private domain. In doing so, Deputy President Colman considered the distinct relationship between a PhD candidate and their supervisor as follows:

> **[40]** I consider that the workplace of an academic supervisor is present during any interaction with a PHD student. Contrary to Dr Matthai's contention before the Commission, the AWB Policy was not disengaged when he went on holiday to Queensland in May 2017, just as it was not disengaged when he walked off campus on Friday evenings. All interactions between Dr Matthai and AB, including personal ones took place in the context of an ever-present academic relationship.

[14] The Deputy President found that Dr Matthai was aware of the standards expected of him by the University as set out in the terms of the AWB Policy. It was found that Dr Matthai acknowledged he was responsible for monitoring the boundaries between himself and students and that he had wilfully contravened the AWB policy.

[15] The Deputy President rejected Dr Matthai's submission that his dismissal was unfair because AB's complaint had alleged that Dr Matthai had sexually harassed her, but that the findings of the University and the reason for Dr Matthai's dismissal was not based on a finding of abuse or sexual harassment. The Deputy President found that the findings made by the University were within the scope of its legitimate concerns and that the investigation had uncovered the messages exchanged in 2017 which demonstrated Dr Matthai had contravened the AWB policy, being the reason for his termination.

[16] The Deputy President further accepted that the knowledge of faculty members of the University about AB's complaints prior to 2024, and the choice made not to investigate, was not unreasonable in circumstances where the University gave weight to AB's desire not to make a formal complaint. The Deputy President found that the messages which constituted serious misconduct remained a valid reason for dismissal in 2024.

[17] In considering other relevant considerations for the purposes of s 387(h) of the Act, the Deputy President took into account the 'historical' nature of the conduct and the impact of this on a finding of whether the dismissal was harsh, unjust or unreasonable. The Deputy President found that, where seven years had elapsed between the conduct and dismissal, Dr Matthai had been deprived of the opportunity to seek further employment at the age of 55, rather than at 62.

Additionally, where Dr Matthai's employment had continued, Deputy President Colman expressed the view at paragraph [59] that 'the University effectively gave him an opportunity to demonstrate that his misconduct was isolated and would not recur'. In circumstances in which, as the Deputy President found, Dr Matthai did not engage in further misconduct during this period, the dismissal for 'historical' conduct was harsh.

[18] The Deputy President then turned to a consideration of Dr Matthai's insight into his conduct. It was accepted that Dr Matthai had made statements during the proceedings which indicated he lacked insight into the impact of his conduct on AB. The Deputy President found as follows:

> **[61]** … As noted earlier in his response to the University's allegations Dr Matthai fully accepted that he contravened that AWB Policy, however, before the Commission he argued wrongly, that his conduct was in the private domain. It is relevant to consider whether this contention in the appeal reflects a lack of insight into the misconduct. On one level, Dr Matthai's contention in the appeal reflects a forensic choice as to how best to prosecute his unfair dismissal claim.

[19] The Deputy President later referred to comments made by Dr Matthai in cross-examination and said:

> … Dr Matthai remarked in respect of his acknowledgement to the University that his conduct had been highly inappropriate, that 'if you have to bow, you bow low.' This arguably suggested that Dr Matthai does not acknowledge that his conduct was highly inappropriate and that he only told the University what he thought it wanted to hear. In his written submissions, Dr Matthai referred to his messages to AB as 'rather innocuous emails'. In cross-examination, he said that in France his conduct would have been viewed differently.

[20] The Deputy President appeared to accept that the lack of insight demonstrated by Dr Matthai throughout the proceedings may have been a result of arguments advanced by his representative. The Deputy President indicated at paragraph [62] that his 'impression is that Dr Matthai may have assimilated the erroneous 'out of hours' argument advanced by his representative' and that this 'may have caused him to be indignant about his treatment by the University'. Despite this, the Deputy President went on to accept that he must proceed on the basis that the submissions put by Dr Matthai's representative were made on instructions. Notwithstanding the approach adopted in the proceedings, and the evidence he gave in cross-examination, the Deputy President concluded at paragraph [63] that Dr Matthai accepted that what he did was wrong and is genuinely sorry for his misconduct in 2017.

[21] The Deputy President found that, to the extent that Dr Matthai advanced contentions and expressed opinions in evidence to the effect that his communications were in the private domain and questioned the operation of the AWB Policy, Dr Matthai was amenable to instruction and expressed confidence that he had clearly explained the application and effect of the policy in his decision. The Deputy President concluded as follows:

> **[65]** Even if Dr Matthai did lack insight into his misconduct, my decision in this matter has now enlightened him. I do not hold any concern that Dr Matthai will breach the AWB policy again. He has now seen and felt the consequences of such behaviour. I am fortified in my conclusion by the fact that for the 7 long years that followed his misconduct, Dr Matthai maintained an unblemished disciplinary record.

[22] The Deputy President thereafter concluded that Dr Matthai's dismissal for 'historical' serious misconduct was harsh and therefore unfair. Based in part upon the above findings made as to Dr Matthai's insight and likely future conduct, in addition to the Deputy President's finding that the University's assertion it had lost trust and confidence in Dr Matthai was 'not soundly and rationally based', the Deputy President considered reinstatement an appropriate remedy.

Permission to appeal

[23] There is no right to an appeal in this matter, and an appeal may only be made with the permission of the Commission pursuant to s 604(1) of the Act. The Full Bench must grant permission to appeal if it is satisfied that it is in the public interest to do so. The Full Bench otherwise has a broad discretion as to whether to grant permission to appeal. The discretion of the Full Bench is confined in circumstances where an appeal is sought from a decision relating to an unfair dismissal proceeding under Part 3-2 of the Act. In relation to an appeal relating to unfair dismissal proceedings, s 400 provides:

> (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
>
> (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

[24] We are satisfied that it is in the public interest to grant permission to appeal. The appeal raises issues of general importance in relation to a frequently utilised aspect of the Commission's jurisdiction. The appeal deals with the findings made by the Deputy President that Dr Matthai's dismissal was harsh and as to the appropriateness of reinstatement where serious misconduct had occurred, in circumstances where a complaint has been made about an employee's conduct towards an individual for whom they have a responsibility to maintain appropriate boundaries and where that complaint has been made after a significant delay. Given the nature of the misconduct engaged in by Dr Matthai, we accept that it is of public interest to grant permission to appeal to permit the Full Bench to examine the errors the University alleges exist in the decision of the Deputy President.

Grounds of appeal

[25] The University of Melbourne relies on a notice of appeal which contains the following grounds:

> **Harshness and delay**
> 1. The Deputy President erred in finding (at [66]) that the termination of Dr Matthai's employment was harsh, and therefore unfair, based on the delay between his serious misconduct and the termination of his employment.
> 2. In considering matters relevant to harshness pursuant to s 387 of the *Fair Work Act 2009* (Cth) (**FW Act**), particularly in relation to sub-section (h), the Deputy President:
>
> a. failed to take into account material considerations;
> b. acted on wrong principle by failing to consider and weigh relevant

circumstances (or give them due consideration and weight); and / or

c. failed to give full effect to findings on all the relevant circumstances which were made by way of background and with respect to s 387(a);

including:

d. the degree of seriousness of misconduct, including by reference to the findings on s 387(a) relating to:
    i. Dr Matthai's conduct constituting serious misconduct ([48] and [52]);
    ii. the wilfulness of Dr Matthai's serious misconduct, particularly in light of the steps he took to avoid detection ([48] and [52]);
e. the importance of the standards set out in the UoM's Appropriate Workplace Behaviour Policy (**AWB Policy**), including by reference to the findings by way of background and on s 387(a) relating to:
    i. the significant power imbalance between an academic supervisor and a PhD candidate arising from a PhD student's reliance on an academic supervisor:
        1. to develop and successfully obtain a PhD;
        2. for work opportunities during their studies;
        3. to develop relationships with people in their chosen field for their future working life;
        4. as a referee ([37]);
    ii. the vulnerability of all PhD students vis-à-vis their academic supervisors ([50]);
    iii. the 'acute' capacity of interpersonal complications to adversely affect the work of the PhD student ([38]);
    iv. the corruption, in this instance, of Dr Matthai's relationship with the complainant, who was assigned a new PhD supervisor ([1] and [46]);
    v. the risk to student welfare if proper boundaries are not observed by academic supervisors ([37]);
f. the explanations for the delay, including by reference to the findings by way of background and on s 387(a) relating to:
    i. the impediments to PhD students in raising concerns about an academic supervisor as a result of the significant power imbalance ([37]);
    ii. the reason for the complainant's delay in making a complaint, being her concern of jeopardising her PhD before its completion ([13]);
    iii. the prompt action of the UoM once it became aware of the serious misconduct for which Dr Matthai was dismissed from his employment ([56]);
g. the need for the UoM to implement the AWB Policy to ensure employees comply with necessary standards of behaviour, including by reference to the Deputy President's findings on s 387(a) relating to:
    i. the important responsibility of the UoM to ensure that academic staff conduct themselves appropriately and not misuse their significant positions of power over students ([41]);
    ii. the essentiality of academic supervisors scrupulously maintaining proper professional boundaries between

themselves and their students at all times ([41]);

iii. the UoM's legitimate concern in maintaining the standards set out in the AWB Policy ([41]).

3. The Deputy President erred (at [58] – [60] and [66]) in relying on the delay between Dr Matthai's serious misconduct and the termination of his employment to find that Dr Matthai's termination was harsh where:
    a. the Deputy President relied (at [60]) on the decision of *Owczarek v The University of Melbourne* [2024] FWC 1368 to conclude that delay can manifest unfairness where, in *Owczarek v The University of Melbourne* [2024] FWC 1368, DP Bell held that the delay was not sound or defensible where the employer was on notice of the conduct (at [305]);
    b. the delay in this proceeding arose because of the complainant's delay in making a complaint because of her concern of jeopardising her PhD before its completion ([13]);
    c. the Deputy President found this was not a case where the employer knew about the relevant serious misconduct and failed to act (at [56]); and / or
    d. the Deputy President denied the UoM procedural fairness, and an opportunity to be heard, by taking into account and making findings on the matters in [58], which were not raised at hearing by the parties or the Deputy President. This included a finding that the delay was unfair because it deprived Dr Matthai of the opportunity of seeking new employment at 55 rather than 62, despite the Deputy President concluding (at [75]) that it was unlikely that Dr Matthai could have found alternative work, with best endeavours, for 6 weeks only.
4. The finding of the Deputy President (at [66]) that the termination of Dr Matthai was harsh pursuant to s 387 of the FW Act was unreasonable or plainly unjust.

Insight and future conduct – Significant errors of fact

5. The Deputy President erred in finding (at [61] – [65]) that Dr Matthai had insight into his serious misconduct or, alternatively, that the Decision would enlighten him.
6. In finding (at [61] – [65]) that Dr Matthai had insight into his serious misconduct, or alternatively that he would be enlightened by reason of the Decision, the Deputy President acted contrary to the incontrovertible facts and / or Dr Matthai's uncontested testimony including Dr Matthai's evidence and / or written submissions that:
    a. his conduct was not subject to the AWB Policy, for reasons including that his conduct was private and the AWB Policy did not apply to personal discussions with students;
    b. his conduct was not inconsistent with the AWB Policy;
    c. his conduct was not inappropriate and / or serious;
    d. he disagreed with the AWB Policy; and / or
    e. he had only told the UoM that he accepted that he had breached the AWB Policy because he thought that was what it wanted to hear.
7. The finding of the Deputy President (at [70]) that Dr Matthai would comply with the AWB Policy based on the Decision was contrary to the incontrovertible facts and / or Dr Matthai's uncontested testimony referred to in [6] above.

Reinstatement

8. The Deputy President erred in finding that:
    a. the UoM's loss of trust and confidence in Dr Matthai was not soundly or rationally based (at [69] – [70]); and
    b. reinstatement was an appropriate remedy for this reason (at [71]).

9. In finding (at [70]) that the UoM's loss of trust and confidence in Dr Matthai was not soundly or rationally based, the Deputy President failed to take into account, acted on wrong principle by failing to consider (or give due consideration to) and / or failed to give full effect to:
    a. the Deputy President's findings, in the context of s 387(a), about the seriousness of the misconduct, the importance of the standards set out in the AWB Policy and the necessity for the UoM to implement the AWB Policy to ensure employees comply with its standards of behaviour (referred to in [2(d)(i) and (ii), (e)(i), (ii), (iii), (v), (g)(i), (ii) and (iii)] above); and / or
    b. the evidence of Dr Matthai's lack of insight or remorse (referred to in [5] – [7] above).
10. In considering whether reinstatement was inappropriate under s 390 of the FW Act, the Deputy President failed to take into account and / or acted on wrong principle by failing to consider (or give due consideration to):
    a. the seriousness of Dr Matthai's misconduct; and / or
    b. the adverse impact of reinstatement in undermining the AWB Policy, which is designed to protect those to whom the UoM owes a duty of care, on the UoM and its students.
11. The finding of the Deputy President (at [71]) that it was appropriate to make an order of reinstatement pursuant to s 391 of the FW Act was unreasonable or plainly unjust.
12. By reason of the errors in [1] to [11] above, the Deputy President erred in making orders for lost pay under s 391(3) of the FW Act (at [74] – [76]) and to maintain continuity of employment and service under s 391(2)(a) and (b) of the FW Act (at [77]).

Approach on appeal

[26] An appeal under s 604(1) of the Act is by way of rehearing. Ordinarily, if there has been no further evidence admitted and there has been no relevant change in the law, an appellate bench entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker.[1] A distinct question then arises as to the standard of appellate review applicable to the particular decision under consideration.[2] Under the correctness standard, the appellate bench determines for itself the correct outcome while making due allowance for such advantages as may have been enjoyed by the primary decision-maker. In case of a discretionary decision, the approach in *House v The King* dictates that intervention on appeal is limited to circumstances in which the decision-maker at first instance acted upon a wrong principle, or allowed extraneous or irrelevant matters to affect the decision, mistook the facts, failed to take into account some material consideration or made a decision that was unreasonable or plainly unjust.[3]

[27] In dealing with Dr Matthai's unfair dismissal application, the Deputy President was required to make a number of determinations. First, the Deputy President was required to consider whether he was satisfied that Dr Matthai's dismissal was harsh, unjust or unreasonable for the purposes of s 385(b) of the Act. Second, if the Deputy President found that Dr Matthai's dismissal was harsh, unjust or unreasonable, he was required to consider whether to order reinstatement under s 390(1), including whether he was satisfied that reinstatement was 'inappropriate' for the purposes of s 390(3)(a). Both findings are properly characterised as involving an exercise of a discretion such that determinations of the Deputy President can only be overturned on appeal by identification of error in the decision-making process in the sense discussed in *House v The King*. A finding that a dismissal was harsh, unjust or unreasonable

involves the exercise of a discretion in the broad sense in that it involved the Deputy President reaching a state of satisfaction as to a matter involving a significant degree of subjectivity.[4] The decision as to what remedy should be ordered arising from a finding that a dismissal was harsh, unjust or unreasonable is even more classically discretionary in nature.[5]

[28] The consequence is that a relevant error must be identified in the decision of the Deputy President. It is not sufficient, to intervene on appeal, that members of the Full Bench might have come to a different conclusion to the Deputy President. Some error must be identified in the decision-making process such as that the Deputy President acted upon a wrong principle, failed to take into account a material consideration or took into account irrelevant matters, mistook the facts or made a decision that was unreasonable or plainly unjust. This appears to be recognised by the University in its grounds of appeal. The grounds of appeal relied upon by the University seek to identify errors of a type referred to in *House v The King*.

[29] Grounds 1 to 5 attack the Deputy President's finding that Dr Matthai's dismissal was harsh, unjust or unreasonable by reference to an allegation that the Deputy President failed to take into account or properly consider and weigh relevant considerations (ground 2), by relying on delay in finding that the dismissal was harsh (ground 3) or that the finding was unreasonable or plainly unjust (ground 4). Ground 3d also contains an allegation of a failure to afford procedural fairness. Grounds 8 to 11 allege error in the Deputy President's finding that reinstatement was appropriate on grounds that the Deputy President failed to take into account, acted on a wrong principle or failed to give full effect to the importance of the AWB Policy and evidence of Dr Matthai's lack of insight or remorse (ground 9), failed to take into account or give due consideration to the seriousness of Dr Matthai's misconduct and the adverse impact of reinstatement in undermining the AWB Policy (ground 10) and that the finding that reinstatement was appropriate was unreasonable or plainly unjust (ground 11). Ground 12 challenges the orders made with respect to lost pay and continuity of employment purely on the basis that the Deputy President erred in the manner set out in grounds 1 to 11.

[30] Grounds 5 to 7 fall into a different category. Those grounds allege that the Deputy President made an error of fact in finding that Dr Matthai had insight into his misconduct or, alternatively, that the Deputy President's decision would enlighten him. Two observations can be made in relation to those grounds. The first observation is that, to the extent that an error of fact is alleged, an appeal from a decision arising from an application for an unfair dismissal remedy may only be made on the ground that the decision at first instance contained a 'significant error of fact'. The 'significance' of the fact is to be assessed by reference to its importance to the decision being made, relevantly, whether reinstatement was an appropriate remedy.[6] We accept that the error alleged by the University in relation to the findings concerning Dr Matthai's insight into his conduct, if established, would constitute a 'significant error of fact' for the purposes of s 400(2).

[31] The second observation is that, although the Full Bench must conduct a 'real review' of the decision, some deference is appropriate with respect to factual findings made at first instance to acknowledge the advantage enjoyed by the decision-maker who conducted the proceedings. At least in relation to findings which are likely to have been affected by impressions formed by seeing and hearing the evidence being given, findings of fact will not be upset unless they are demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or because they are 'glaringly improbable' or 'contrary to compelling inferences'.[7]

A finding of this nature would generally only be overturned on appeal if the Full Bench is 'satisfied that any advantage enjoyed by the member below as a result of hearing the relevant evidence was not sufficient to justify the findings made'.[8]

Grounds 1 to 4 – Finding of harshness

[32] Grounds 1 to 4 allege that the Deputy President erred in finding that Dr Matthai's dismissal was harsh. Ground 1 is a summary ground elaborated upon by grounds 2 to 4. In ground 2, the University contends that, in reaching that conclusion, the Deputy President failed to have regard to the seriousness of Dr Matthai's misconduct, the importance of the standards set out in the AWB Policy, the explanation for the delay in taking action with respect to Dr Matthai's misconduct and the need for the University to implement the AWB Policy.

[33] Section 385(b) of the Act requires that, in an unfair dismissal case, the Commission must determine whether it is satisfied that the dismissal was 'harsh, unjust or unreasonable'. Obviously enough, this involves a broad and value-laden assessment which requires consideration of all relevant circumstances, including each of the considerations identified in s 387. In cases in which the dismissed employee has been found to have engaged in misconduct, the nature and seriousness of the misconduct of the employee and circumstances in which it occurred will be of significance. The University referred to the decision of the Full Bench in *B v Australian Postal Corporation* [2013] FWCFB 6191; 238 IR 1 in which Lawler VP and Cribb C said:

> **[58]** Reaching an overall determination of whether a given dismissal was "harsh, unjust or unreasonable" notwithstanding the existence of a "valid reason" involves a weighing process. The Commission is required to consider all of the circumstances of the case, having particular regard to the matters specified in s 387, and then weigh:
>
> (i) the gravity of the misconduct and other circumstances weighing in favour of the dismissal not being harsh, unjust or unreasonable;
>
> against:
>
> (ii) the mitigating circumstances and other relevant matters that may properly be brought to account as weighing against a finding that dismissal was a fair and proportionate response to the particular misconduct.
>
> **[59]** It is in that weighing that the Commission gives effect to a "fair go all round".

[34] For our part, we do not consider the assessment required by s 385(b) necessarily involves weighing some considerations *against* others. It is correct, however, to say that, in a case in which misconduct is established, it is essential that the decision-maker consider the seriousness of the conduct of the employee, and its consequences, in the context of all other relevant circumstances for the purposes of assessing whether the dismissal was harsh, unjust or unreasonable. To put it another way, the degree of seriousness of misconduct which has been found to constitute a valid reason for dismissal for the purposes of s 387(a) is a relevant matter to be taken into account in the overall assessment together with other matters the Commission considers relevant under s 387(h).[9]

[35] For example, in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, McHugh and Gummow JJ endorsed the observations of Sheppard and Heerey JJ in *Bostik (Aust) Pty Ltd v Gorgevski (No 1)* (1992) 36 FCR 20 at 28 in relation to the phrase 'harsh, unjust or unreasonable':[10]

> These are ordinary non-technical words which are intended to apply to an infinite variety of situations where employment is terminated. We do not think any redefinition or paraphrase of the expression is desirable. We agree with the learned trial judge's view that a court must decide whether the decision of the employer to dismiss was, viewed objectively, harsh, unjust or unreasonable. Relevant to this are the circumstances which led to the decision to dismiss and also the effect of that decision on the employer. Any harsh effect on the individual employee is clearly relevant but of course not conclusive. Other matters have to be considered such as the gravity of the employee's misconduct

[36] The University submits that the Deputy President made various findings in determining that there was a valid reason for dismissal that were relevant to the gravity of the misconduct and other circumstances that weighed in favour of a finding that the dismissal was fair and proportionate. However, the University submits that, when it came to the consideration of 'other matters' for the purposes of s 387(h) and the ultimate conclusion of harshness, the Deputy President did not take those circumstances into account.

[37] In assessing whether a matter has been overlooked or not considered, the reasons of a decision-maker are to be read fairly and as a whole and not with an eye attuned to the detection of error.[11] An inference that a matter has been overlooked should not too readily be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point.[12] However, although the reasons of a decision-maker are to be read fairly, eyes should not be so blinkered as to avoid discerning an absence of reasons or reasons devoid of any consideration of a submission central to a party's case[13] and an appellate bench must not 'fill in gaps in the path of reasoning'.[14]

[38] We accept that it was necessary for the Deputy President to consider the seriousness of Dr Matthai's misconduct, the importance of the AWB Policy and the need for the University to implement the AWB Policy and the reasons for the delay in the University taking disciplinary action with respect to Dr Matthai's conduct. However, we do not accept that the Deputy President failed to consider those matters in undertaking the overall assessment of whether the dismissal was harsh. The difficulty with the University's submissions in relation to these grounds is that the Deputy President made detailed findings about the matters it submits were not taken into account in the overall assessment as to whether the dismissal was harsh, unjust or unreasonable. We do not think that it is a reasonable inference to be drawn from a fair reading of the decision, when considered as a whole, that the Deputy President then overlooked those findings when assessing harshness.

[39] With respect to ground 2d, the Deputy President considered in some detail whether Dr Matthai's conduct involved a contravention of the AWB Policy from paragraphs [46] to [52] of the decision. In paragraphs [46] and [47], the Deputy President found that Dr Matthai was aware of the general standards that were expected of him pursuant to the terms of the AWB Policy and that, by sending messages to AB, he failed to observe the requirements of the AWB Policy. In paragraph [48], the Deputy President found that Dr Matthai's contravention of the AWB Policy was wilful, including because Dr Matthai made a deliberate decision to take his

discussions with AB off the University's email system and continue them on a private channel. At paragraph [50], the Deputy President accepted that one dimension of the seriousness of the conduct arose from the vulnerable position of AB as a PhD student being supervised by Dr Matthai. In paragraph [52], the Deputy President found that Dr Matthai's conduct was wilful and deliberate, and the contravention of the policy was serious and involved serious misconduct.

[40] With respect to ground 2e and 2g, the Deputy President considered the basis for, and importance of, the AWB Policy for the University and the need for the University to implement the AWB Policy in responding to a submission advanced by Dr Matthai that his conduct involved 'out of hours' conduct in the private domain. The Deputy President also recognised the importance of the policy in other parts of the decision. At paragraphs [37] to [39], the Deputy President acknowledged that an academic supervisor holds a position of significant power over a PhD candidate and that there is a risk to student welfare if proper boundaries are not maintained, that the relationship between an academic supervisor and a PhD student is an intense one that requires much time to be spent together, that it is expected that students and supervisors will establish a good rapport with one another and that PhD research is research which takes place largely outside of lecture halls and tutorial rooms and that the interactions between supervisors and students will commonly take place remotely and at any time and place that is convenient to them. At paragraph [50], the Deputy President accepted that all PhD students are vulnerable vis-à-vis their supervisors and that '[t]his underscores the rationale for having a policy such as the AWB Policy, and its importance'. It is readily apparent that the Deputy President accepted the importance of the AWB Policy for the University generally and identified specifically why compliance with the policy was significant in the context of the relationship between an academic supervisor and a PhD student.

[41] In relation to ground 2f, we accept that there will frequently be barriers to a university student making a complaint of inappropriate conduct on the part of an academic which will explain a delay in making a complaint in relation to the conduct. The University referred to a number of authorities which have canvassed the difficulties faced by victim survivors of sexual assault or sexual harassment in coming forward to articulate a complaint in relation to that conduct. For example, in *Taylor v August and Pemberton Pty Ltd* [2023] FCA 1313; (2023) 328 IR 1, Katzmann J dealt with proceedings involving a complaint of sexual harassment. In relation to a submission concerning the absence of contemporaneous complaint, her Honour observed:[15]

> Now, it is well recognised that people may not complain about a sexual assault for a host of reasons. And this knowledge has contributed to legislative changes. Currently, in New South Wales, for example, judges are required to instruct juries in prescribed sexual assault cases that a delay in complaining or a failure to complain does not necessarily indicate that the allegation is false as there may be good reason why a victim of a sexual assault may hesitate to complain or refrain from complaining. Judges are prohibited from directing juries that delay in complaining is relevant to a complainant's credibility unless there is sufficient evidence to justify such a direction. See *Criminal Procedure Act*, s 294.
>
> Furthermore, sexual harassment is notoriously under-reported. In January 2019 Professors Paula McDonald and Sara Charlesworth, of the Queensland University of Technology and RMIT University respectively, explained in a submission made to the National Inquiry into Sexual Harassment in Australian Workplaces conducted by the AHRC and admitted into evidence without objection:

> Those who experience workplace sexual harassment are often caught in a bind when deciding on the timing of making a complaint to their employer. When they report the behaviour immediately, observers perceive them as more credible and the harasser as more responsible. Yet for an individual to reach a point where they are ready to make a complaint, they must first process what has happened to them, weigh up the available options open to them, and determine the possible detriments that may result from making a complaint. Consequently, there can be a significant, yet legitimate delay between experiencing sexual harassment and reporting it, if indeed it ever gets reported. (Footnotes omitted.)
>
> 333 In her report to this Court, Prof Charlesworth noted that the 2018 Sexual Harassment Prevalence survey conducted by the AHRC showed that fewer than one in five (17%) of survey respondents who had experienced sexual harassment made a formal report or complaint.

[42] As is well known, *Lehrmann v Network Ten Pty Ltd (Trial Judgment)* [2024] FCA 369 concerned a defamation claim arising from an alleged sexual assault at Parliament House in Canberra. Lee J referred to academic studies which suggest that common reasons for delay in complaint by victims survivors of sexual assault include confusion, guilt or shock about the assault, fear of the perpetrator and the consequences of reporting, fear that they will not be believed and rape myth acceptance, where victims do not recognise they have experienced sexual assault or blame themselves for what has occurred.[16]

[43] The University made clear that it did not allege this was a case of sexual harassment. Nonetheless, the Deputy President found in paragraphs [44] and [45] of the decision that Dr Matthai communicated with AB in 'intimate and inappropriate terms', in a manner that was 'personal, intimate and romantic' and used 'mawkish, romantic language and discussed 'intimate topics' in a way that was 'highly inappropriate'. The evidence suggested that AB was concerned about reporting the conduct of Dr Matthai when it occurred in 2017. The University emphasised that Professor Western, to whom AB reported her concerns about being supervised by Dr Matthai, gave evidence that AB was an international student on a student visa and that he believed 'she was concerned that something would go wrong if she chose to report it at the time, that it would jeopardise her stay in Australia'. The notes of the interview which occurred on 16 May 2018 with a human resources employee, Anshu Tara, recorded that AB was '[w]orried about telling you the details as will have impacts for me'.

[44] AB did not give evidence in the proceedings. Nonetheless, we readily accept that AB was placed in an extremely difficult situation by the conduct of Dr Matthai. Those circumstances are likely to have caused AB to be reluctant to make a formal complaint, including that she was an international student, Dr Matthai was her supervisor and she was likely to have feared that the events may cause difficulties for her academic career and she may have been embarrassed or distressed by having to discuss the conduct. The evidence established that AB was concerned about making a formal complaint while she continued to study for her PhD.

[45] As the University accepted, the Deputy President was not critical of AB in any respect. The Deputy President noted that the University knew enough in 2017 and 2018 to conduct a more detailed investigation into Dr Matthai's conduct. However, the Deputy President elsewhere acknowledged, in paragraph [37] of the decision, that a student in the position of AB would have difficulties raising concerns about 'the personal aspect of the relationship'. In

dealing with the question of delay, the Deputy President accepted that the University acted reasonably in dealing with the matter. The Deputy President's conclusions included:

> **[56]** Nevertheless, it was understandable that the University give weight to the fact that AB did not want to make a formal complaint. While the University could have chosen to investigate Dr Matthai's conduct despite this, I consider that the approach that it took to the matter in 2018 was not unreasonable. When the messages were uncovered in 2024, the University was right to be concerned about them. This is not a case where the employer knew about the relevant misconduct and did nothing, only to revisit the matter at a later time and dismiss the employee for that conduct. In my view, the misconduct constituted by the inappropriate communications in 2017 was a valid reason for dismissal in 2024. I note that on one view, even though the messages were only discovered in 2024, the very fact that the misconduct occurred so long ago is a matter that affects the consideration of whether the reason for dismissal was a valid one.

[46] This passage indicates, in our view, that the Deputy President accepted that there were legitimate reasons for the delay in consideration being given to disciplinary action against Dr Matthai arising from the concerns held by AB about pursuing a formal complaint. The Deputy President accepted that the conduct of Dr Matthai in 2017 gave rise to a valid reason for his dismissal in 2024 notwithstanding the delay in dealing with the matter.

[47] The submission of the University in relation to ground 2 is that we should infer from the structure of the decision that, although the seriousness of the misconduct, the justifications for the AWB Policy and the reasons for delay were acknowledged in dealing with the question of valid reason, the Deputy President failed to weigh those matters against the matters dealt with under the heading 'Section 387(h)' in considering whether the dismissal was harsh. We do not accept that is an appropriate reading of the decision. The Deputy President addressed the question of valid reason first, and in detail, from paragraph [35] to [56]. From paragraph [58], the Deputy President then dealt with s 387(h) which requires consideration of 'other matters that the FWC considers relevant'. We do not accept that the inference to be drawn from the consideration of 'other matters' is that the Deputy President disregarded the matters he addressed under the heading 'valid reason' when undertaking the overall assessment of whether the dismissal was harsh, unjust or unreasonable.

[48] A natural and fair reading of the decision suggests that the Deputy President considered and weighed all of the matters to which he referred in the decision to determine whether the dismissal was harsh, unjust or unreasonable. For example, the Deputy President was not required to repeat in full his discussion of the seriousness of Dr Matthai's conduct or the importance of the AWB Policy under the heading 'Section 387(h)' to demonstrate that he had considered those matters. When expressing his conclusion on the merits of the application in paragraph [66] of the decision, the Deputy President expressly referred to those findings in the following terms:

> **[66]** Dr Matthai's communications with AB in 2017 contravened the AWB Policy and constituted serious misconduct for the purposes of the 2024 Agreement. The University was right to be concerned about this. However, because the misconduct had occurred over 7 years earlier, and Dr Matthai had maintained an unblemished record over this time, I consider that the dismissal of Dr Matthai in December 2024 was harsh, and therefore unfair.

[49] Contrary to the submission of the University, this paragraph confirms what we otherwise consider flows from a reading of the decision as a whole. The Deputy President considered and

weighed the seriousness of Dr Matthai's conduct, and the justifiable concerns held by the University in relation to that conduct, in deciding that his dismissal was harsh. We also do not accept that the Deputy President disregarded, or failed to weigh, the explanation provided for the delay in pursuing disciplinary action with respect to Dr Matthai given the detailed consideration of that matter in the decision. For these reasons, ground 2 is rejected.

[50] In ground 3, the University contends that the Deputy President erred in relying on the delay between Dr Matthai's serious misconduct and termination of his employment to find the dismissal was harsh. In particular, the University submits that the Deputy President erred in his assessment of the implications of delay for Dr Matthai by relying on the decision in *Owczarek v The University of Melbourne* [2024] FWC 1368 (***Owczarek***), notes that the delay arose because of the complainant's delay in making a complaint and that the Deputy President found, in paragraph [56] of the decision, that this was not a case in which the employer knew about the relevant serious misconduct and failed to act.

[51] The ground is somewhat difficult to follow. The University confirmed in its oral submissions that it did not submit that the delay was irrelevant to whether Dr Matthai's dismissal was harsh, unjust or unreasonable.[17] In those circumstances, the complaint can only be that the Deputy President gave greater weight to the question of delay than the University submits he should have done. In oral submissions, the complaint was said to be that delay was 'the primary focus in the Deputy President's reasoning'. Such a submission would not, even if accepted, give rise to error of a type referred to in *House v The King*.

[52] In any event, we do not accept that any relevant error has been demonstrated in the Deputy President's reference to the decision in *Owczarek* or otherwise in his treatment of the question of delay. The facts in *Owczarek* differ somewhat from Dr Matthai's case, particularly in that the University was on notice of the allegations against Dr Owczarek and had acted upon the allegations at the time. At paragraph [60] of the decision, the Deputy President acknowledged that *Owczarek* differed from the present matter and that '[c]ases of dismissal for misconduct that occurred long ago will turn on their own facts'. The Deputy President elsewhere acknowledged that the delay arose from AB's reluctance to make a formal complaint and that the University acted reasonably. As the University acknowledged, those facts do not mean the delay was irrelevant to the Deputy President's decision. We do not consider that the Deputy President referred to *Owczarek* other than as an example of a case in which delay was considered relevant. There was no error in doing so.

[53] In ground 3d, the University makes a distinct complaint. The University alleges that it was denied procedural fairness by reason of the Deputy President taking into account and making findings, in paragraph [58] of the decision, in relation to matters which were not raised at hearing by the parties or the Deputy President. This included finding that delay in acting on allegations of misconduct could cause unfairness because it may cause an employee to invest time and labour in the employer's enterprise, not knowing that they are on borrowed time, and in the case of Dr Matthai that the delay deprived him of the opportunity of seeking new employment at the age of 55 rather than at 62 years of age.

[54] We do not accept that there was a denial of procedural fairness. Procedural fairness does not generally require a decision-maker to give a running commentary upon what they think about the evidence that is given or the issues which arise in the proceedings.[18] The question of

the delay in the University considering disciplinary action against Dr Matthai was plainly an issue at first instance. In written submissions dated 1 April 2025, Dr Matthai made submissions in relation to the question of delay from paragraph 45 to 65. The University dealt with that issue at some length in its closing submissions dated 25 June 2025 from paragraph 28 to 35.

[55] What procedural fairness requires will vary depending on the circumstances of the case. In the circumstances of this matter, the question of delay and the consequences of the delay in consideration being given to disciplinary action against Dr Matthai was at issue and the University had an opportunity to make such submissions as it wished to make in relation to that question. We do not consider that procedural fairness required, in the circumstances of this matter, that the Deputy President telegraph his thinking in relation to the question of delay or each possible permutation as to the consequences of the delay for Dr Matthai.

[56] In ground 4, the University contends that the finding of the Deputy President that the termination of Dr Matthai was harsh was 'unreasonable or plainly unjust'. The ground relies upon the final limb identified in *House v The King*. There is room for debate as to whether this basis for establishing appealable error in a discretionary decision is available only where the reasons do not disclose why the impugned orders were made. In *DP World Sydney Ltd v Witherden* [2025] FWCFB 133; (2025) 342 IR 253, the Full Bench noted that this is not the approach which has been generally adopted.[19] Differing views have been expressed in relation to that question in other contexts.[20] It is unnecessary to resolve that debate in the present appeal. Assuming the ground is available, we do not accept that the decision of the Deputy President is unreasonable or plainly unjust.

[57] Mere disagreement with the outcome is insufficient to justify appellate intervention on this ground. It is necessary for the decision to be outside the range of reasonable discretionary decisions.[21] A different decision-maker may have come to a different conclusion as to whether, in all the circumstances, the dismissal of Dr Matthai was harsh and therefore unfair. That is a natural consequence of jurisdiction being conferred on a tribunal to make a broad and value-laden assessment as to whether a dismissal was harsh, unjust or unreasonable. Two decision-makers may, quite legitimately, make different decisions in relation to the same facts.

[58] As the Deputy President acknowledged, the misconduct was serious, particularly having regard to the nature of the relationship between a senior academic and a PhD student, and at least aspects of his conduct were 'highly inappropriate'. However, the Deputy President identified reasons why he regarded the dismissal to be harsh. In particular, the Deputy President concluded that it was harsh to dismiss Dr Matthai for misconduct that had occurred so long ago, in circumstances where he had maintained an unblemished record over the following 7 years of his employment. In all of the circumstances, we do not believe that the decision is outside the range of reasonable discretionary decisions.

Grounds 5 to 7 – Findings in relation to insight

[59] In grounds 5 to 7 in the notice of appeal, the University contends that the Deputy President erred in finding that Dr Matthai had insight into his misconduct or, alternatively, that the decision would enlighten him. The University contends that this finding was contrary to incontrovertible facts and/or uncontested testimony, including Dr Matthai's own evidence and submissions to the effect that his conduct was not subject to the AWB Policy, was not

inconsistent with the AWB Policy or otherwise inappropriate or serious, that he disagreed with the AWB Policy and that he only told the University that he accepted he had breached the AWB Policy because he thought that was what it wanted to hear.

[60] To address these grounds, it is appropriate to set out the reasons of the Deputy President for accepting that Dr Matthai had insight into his misconduct or, at least, would be enlightened by the decision. The relevant part of the Deputy President's decision is as follows:

> **[61]** Another relevant consideration under s 387(h) is Dr Matthai's attitude to the AWB Policy and whether he has insight into his misconduct, and appreciates that his behaviour was inappropriate. As noted earlier, in his response to the University's allegations Dr Matthai fully accepted that he had contravened that AWB Policy, however before the Commission he argued, wrongly, that his conduct was in the private domain. It is relevant to consider whether this contention is indicative of a lack of insight into the misconduct. On one level, Dr Matthai's contention in the appeal reflects a forensic choice as to how best to prosecute his unfair dismissal claim. In my view it was a poor choice, not just because the argument was wrong, but because of its potential detriment to Dr Matthai's case in connection with the question of his insight. But a party is bound by the arguments of their representative and Dr Matthai did not seek to disavow them. Further, Dr Matthai's evidence in cross-examination was in line with his contention that the conduct was private and not subject to the AWB Policy. During his evidence, Dr Matthai stated that the policy did not apply to personal discussions with students; that its terms were vague; that what is appropriate depends on judgment and that 'appropriate' is not a useful term; and that while he still accepted that he breached the AWB Policy, how much of a breach there had been was debateable. Further, Dr Matthai remarked, in respect of his acknowledgment to the University that his conduct had been highly inappropriate, that 'if you have to bow, you bow low.' This arguably suggested that Dr Matthai does not acknowledge that his conduct was highly inappropriate and that he only told the University what he thought it wanted to hear. In his written submissions, Dr Matthai referred to his messages to AB as 'rather innocuous emails'. In cross-examination, he said that in France his conduct would have been viewed differently.
>
> **[62]** Dr Matthai did himself a disservice by saying these things. The appropriate response to the allegations was the one that he spontaneously gave to the University when the allegations were put to him: he accepted that he had contravened the policy and unreservedly apologised. My impression is that Dr Matthai may have assimilated the erroneous 'out of hours' argument advanced by his representative, and that this may have caused him to be indignant about his treatment by the University. Dr Matthai was apparently beguiled by another unmeritorious legal contention: in his evidence Dr Matthai said that he now understood (evidently, from his representative) that the University had breached his right to privacy by using his private messages to AB against him. It will not be necessary to address this specious argument, other than to record that it is erroneous for various reasons, one of which is that there was nothing remotely unlawful or arbitrary about the University's use of the messages, which Professor Matthai freely gave to the University during the investigation (see s 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)).
>
> **[63]** However, I proceed on the basis that the submissions of Dr Matthai's representative were made on instructions, and that Dr Matthai's statements in cross-examination about the application and effect of the policy reflect his own views. It is difficult to reconcile Dr Matthai's complete acceptance of his wrongdoing to the University prior to his dismissal with some of the contentions and statements referred to above. I have considered whether these contentions and statements are indicative of a lack of insight by Dr Matthai into his misconduct, and perhaps also of an absence of real remorse. I have concluded that this is not the case. I find that Dr Matthai accepts that what he did was wrong and is genuinely sorry for his misconduct in 2017.

> His letter to the University of 7 October 2024 was in my opinion sincere and insightful. And other aspects of Dr Matthai's evidence to the Commission made clear that he maintains his acceptance that his behaviour was wrong, including his acknowledgement that it was his responsibility to set and maintain proper boundaries, and that he breached the AWB Policy. I note that Dr Matthai also said that he believed that he had set proper boundaries, but I find that he was talking here about his efforts to divert AB's interest in a romantic relationship.
>
> **[64]** In any event however, I find that, to the extent that Dr Matthai advanced contentions and expressed opinions in evidence to the effect that his communications with AB were in the private domain, or questioned the extent to which he had contravened the AWB Policy, these were the views of a layperson about the interpretation of a document in the context of a legal question concerning his employer's right to regulate his conduct. They are simply wrong. But Dr Matthai is an intelligent person. He is amendable to instruction, and I have clearly explained the application and effect of the policy in this decision. It is entirely clear that a supervisor must not do or say anything that could encourage a student to pursue an intimate relationship, or to perceive that the supervisor wishes to have such a relationship with them. Supervisors must maintain professional, arms-length relationships at all times. There must be a conspicuous awareness of proper boundaries.
>
> **[65]** Even if Dr Matthai did lack insight into his misconduct, my decision in this matter has now enlightened him. I do not hold any concern that Dr Matthai will breach the AWB Policy again. He has seen and felt the consequences of such behaviour. I am fortified in my conclusion by the fact that for the 7 long years that followed his misconduct, Dr Matthai maintained an unblemished disciplinary record.

[61] Grounds 6 and 7 are framed by reference to the standard to be met before an appellate bench would overturn factual findings which are likely to have been influenced by the advantage of the primary decision-maker having seen and heard the evidence being given. As we have observed above, findings which are likely to have been affected by impressions formed by seeing and hearing the evidence being given will generally not be upset unless they are demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or because they are 'glaringly improbable' or 'contrary to compelling inferences'.

[62] In oral submissions, the University indicated that its primary submission in this regard was that the findings made by the Deputy President in relation to insight and future compliance with the AWB Policy were not of that type. In the alternative, the University submitted that the standard was met. We consider that the findings made by the Deputy President as to Dr Matthai's insight in his conduct and the confidence that the Deputy President had in Dr Matthai complying with the AWB Policy in the future are matters that are likely to have been influenced by seeing and hearing him give evidence. Those findings are also not simple findings of fact about a past event. The conclusions of the Deputy President involve findings that are necessarily conjectural and involve to a significant degree an assessment about what is likely to happen in the future and concerning Dr Matthai's present psychological state.

[63] Unfair dismissal proceedings commonly require members of the Commission to assess the character of an individual applicant at least in the context of their employment. Dr Matthai gave evidence before the Deputy President and was cross-examined at some length. In our view, the assessment of Dr Matthai made by the Deputy President must have been affected by having seen him give evidence. That conclusion does not depend upon the Deputy President having identified aspects of Dr Matthai's demeanour in the decision itself. It is apparent from the nature

of the decision to be made, and the reasons given by the Deputy President. In any event, the Deputy President did refer, particularly in paragraph [62], to his 'impression' of Dr Matthai. As such, the University must show that the findings are demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or because they are 'glaringly improbable' or 'contrary to compelling inferences'.

[64] In support of its submissions, the University provided the Full Bench with an aide memoire setting out extracts from the oral evidence given by Dr Matthai and the written submissions advanced on his behalf which it says demonstrate a lack of insight into his conduct and refusal to accept the reasonableness of the AWB Policy. It is not practicable to set out each of those references in this decision. We have carefully considered each aspect of the evidence relied upon by the University individually and taken together. Many of those aspects of the evidence suggest that Dr Matthai sought to downplay the seriousness of his conduct and to dispute the appropriateness of the University seeking to regulate his interactions with students. It should be emphasised that many of the pieces of evidence referred to by the University were averted to by the Deputy President in his decision.

[65] It is appropriate, however, to set out some examples. When cross-examined about his suggestion to AB that they communicate outside of the systems of the University, Dr Matthai gave evidence which included:

> PN434 So back to my initial proposition, the nature of this email, what you said to the complainant in it, it's not appropriate for a PhD supervisor to be expressing these things to their student, is it?---Well, for me, it is, yes.
>
> PN435 The sentiments aren't professional or appropriate, though, are they?---I mean - - -
>
> PN436 As between a PhD supervisor and their student?---Well, at this - I think at this point this conversation had nothing to do with my role as a PhD supervisor and her role as a student. I mean, this was a conversation between two adults about life.
>
> PN437 And is that because you had moved the emails to your personal email?---Well, I mean, this was not just because of that, because, I mean, [AB] sent me this first message on her personal account, so it was already a personal conversation, from her point of view, and she was seeking this conversation. It had been a wholesome, positive conversation for her and I felt it was not a conversation for the university but it was a conversation that we were having as two consenting adults.

[66] In relation to his acknowledgement prior to his dismissal that he had breached the AWB Policy and engaged in conduct that was 'highly inappropriate', Dr Matthai gave the following evidence in his witness statement tendered at first instance:

> I quickly wrote up a one-page response (attachment SM14). I felt that I had no option but to accept the finding of a breach of a policy the wording of which was like a blanket statement. I stressed how my personal life had fallen apart at the point of the interactions with the complainant. I was hoping that some lesser penalty would apply because of this.

[67] When cross-examined in relation to his response during the disciplinary process, Dr Matthai gave the following evidence:

> PN1403 You also say in this response that you agreed with the outcome of the investigation?---Yeah, I mean because the outcome of the investigation was that I violated the workplace policy. But I did not understand why it was serious misconduct or extremely serious misconduct.
>
> PN1404 But you said you agreed with the outcome of the investigation, didn't you?---Yeah.
>
> PN1405 And you advised that your behaviour had been highly inappropriate?---Nah, I said it had been inappropriate.
>
> PN1406 'I agree with the general outcome of the investigation. My behaviour has been highly inappropriate'?---Yeah, well, if you bow low you have to bow low.
>
> PN1407 Sorry?---If you have to bow, you bow low. Yeah.

[68] In the written submissions made on behalf of Dr Matthai at first instance, the exchanges between Dr Matthai and AB are described as a 'rather innocuous email exchange' and Dr Matthai denied that there had been any breach of the AWB Policy or that his conduct involved misconduct or serious misconduct.

[69] Aspects of this evidence, and the submissions made on Dr Matthai's behalf, are profoundly troubling. The evidence given by Dr Matthai and the submissions made by his representative could suggest that he had disingenuously accepted the inappropriateness of his conduct, and that he had contravened the AWB Policy, prior to dismissal only in an attempt to avoid disciplinary sanction. Parts of the evidence indicate that Dr Matthai considered that he could have personal interactions with a PhD student who he was supervising outside of their professional relationship which could not be supervised or regulated by the University. In his evidence to the Commission, Dr Matthai asserted on a number of occasions that he did not believe he had contravened the AWB Policy because of what he regarded as the personal nature of the interactions with AB and sought to downplay the seriousness of the conduct.

[70] The Deputy President quite properly recognised the critical importance of appropriate standards of conduct being maintained in the interactions between an academic and students, particularly a student under supervision by the academic. Students are in an almost uniquely vulnerable position vis-à-vis an academic by whom they are being supervised. The student will frequently feel themselves to be reliant on the academic for guidance and support, achieving satisfactory academic results and to facilitate their professional progression and work opportunities. Those circumstances are likely to make it difficult for a student to respond to or report inappropriate conduct by an academic. Those circumstances underscore the importance of universities being able to supervise inappropriate conduct by employees and take disciplinary action to address such conduct where it is necessary to do so.

[71] The question raised by grounds 5 to 7 is whether there is a sufficient basis to overturn the findings made by the Deputy President that Dr Matthai had insight into the inappropriateness of his conduct and would comply with the AWB Policy in the future. The Deputy President's analysis of this question in paragraphs [61] to [65] of the decision is detailed and multifaceted. The Deputy President acknowledged that aspects of the evidence given by Dr Matthai supported a conclusion that he did not have insight into his conduct and did not accept he had behaved inappropriately. It could not be suggested that the Deputy President ignored, or failed to appreciate, the parts of the evidence referred to by the University in this regard or the

manner in which Dr Matthai's case was conducted which might support a conclusion that he did not have insight into his conduct.

[72] Having considered that evidence in the context of Dr Matthai's conduct as a whole and having seen the evidence being given, the Deputy President formed the view that Dr Matthai had likely assimilated the 'erroneous', 'unmeritorious' and 'specious' arguments advanced by his representative and concluded that Dr Matthai's acceptance of his wrongdoing prior to the dismissal was genuine and reflected his true views. In any event, the Deputy President believed Dr Matthai to be an 'intelligent person' who is 'amenable to instruction' and was confident that he would be enlightened by the decision of the Commission even if he did lack insight. In circumstances in which he had seen and felt the consequences of his breach of the AWB Policy, the Deputy President stated that he did not hold any concern that Dr Matthai would breach the policy again.

[73] These findings were intensely personal assessments of Dr Matthai as an individual arrived at by an experienced member of the Commission following lengthy oral evidence given by Dr Matthai and, we consider, with a full appreciation of the seriousness of Dr Matthai's conduct and the importance of the maintenance of proper standards of conduct by an academic. We can understand why the University strongly submits to us that the Deputy President should not have made those findings. However, we do not have the advantages enjoyed by the Deputy President. It is not possible for the Full Bench to make the same kind of assessment as the Deputy President made. Having considered the evidence available to us, we do not consider that the findings made by the Deputy President have been demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or that they are 'glaringly improbable' or 'contrary to compelling inferences'. Grounds 5 to 7 must also be rejected.

Grounds 8 to 11 – Appropriateness of reinstatement

[74] Grounds 8 to 11 deal with the Deputy President's decision to order reinstatement. Ground 8 is a summary ground elaborated upon in grounds 9 and 10. Ground 11 is a distinct ground alleging the Deputy President finding is unreasonable and plainly unjust.

[75] In ground 9, the University alleges error in the finding of the Deputy President that the University's loss of trust and confidence in Dr Matthai was not soundly or rationally based. It may be accepted that whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate, but it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement. Furthermore, an allegation that there has been a loss of trust and confidence must be soundly and rationally based and the Commission must carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee.[22] We accept that whether trust and confidence can be restored is to be assessed objectively on the basis of all the relevant circumstances.[23]

[76] The University submits that, in finding that the University's asserted loss of trust and confidence was not soundly or rationally based, the Deputy President failed to take into account or acted on a wrong principle by failing to consider or give full effect to the seriousness of the misconduct, the importance of the AWB Policy, the necessity for the University to implement the AWB Policy and the evidence of Dr Matthai's lack of insight or remorse. We do not consider the submission can be accepted. The submission urges us to infer that the Deputy

President ignored the detailed findings set out earlier in the decision in relation to the seriousness of the conduct and the importance of the AWB Policy when considering the question of remedy simply because the Deputy President did not recite those matters in the same detail again at that point of the consideration. The Deputy President's decision should not be approached in this way.

[77] In any event, it is sufficiently apparent from the Deputy President's reasons in relation to the question of reinstatement that he did consider those matters. The relevant part of the decision runs from paragraph [67] to [71]. In paragraph [68], the Deputy President noted the submission of the University that reinstatement was inappropriate because Dr Matthai's misconduct 'was serious and wilful'. In the same paragraph, the Deputy President summarised the evidence given by Professor Nicola Phillips, Provost of the University, in relation to the importance to the University of maintaining proper standards of conduct for academics and having complete confidence in the conduct of academic staff. The Deputy President considered those concerns in detail in paragraph [69]. In paragraph [70], the Deputy President expressly referred to his consideration as to whether Dr Matthai had insight into his conduct in addressing the University's assertion that it has lost trust and confidence in Dr Matthai. We do not accept that the Deputy President failed to consider the matters identified in ground 9.

[78] In ground 10, the University contends that, in considering whether reinstatement was inappropriate, the Deputy President failed to take into account or acted on a wrong principle by failing to consider or give full effect to the seriousness of the misconduct, and the adverse impact of reinstatement in undermining the AWB Policy generally. For the reasons we have given with respect to ground 9, the assertion that the Deputy President failed to consider his earlier findings as to the seriousness of the misconduct cannot be accepted. As to the suggestion that the Deputy President failed to consider the adverse impact reinstatement would have in undermining the AWB Policy generally, a discrete submission to that effect does not appear to have been made at first instance. In any event, given the findings he made in relation to the importance of the AWB Policy, we consider the Deputy President was cognisant of that matter when considering whether reinstatement was an appropriate remedy.

[79] Finally, ground 11 contends that the conclusion that reinstatement was an appropriate remedy was unreasonable or plainly unjust. Assuming that this ground of error is available notwithstanding the detailed reasons provided by the Deputy President, we are unable to accept that error of that kind has been established. As is the case with the finding of unfairness, a different decision-maker may have come to a different conclusion as to the appropriateness of reinstatement. However, the Deputy President expressed his reasons for concluding that reinstatement was appropriate in some detail. Having considered all of the material that was before the Deputy President, we do not consider that his decision in that respect was outside the range of reasonable discretionary decisions.

[80] It follows from our reasoning that grounds 8 to 11 must fail.

Ground 12 – Lost remuneration and continuity of employment

[81] As we have observed, ground 12 challenges the orders made by the Deputy President with respect to lost pay and continuity of employment purely on the basis that the Deputy President erred in the manner set out in grounds 1 to 11. No distinct error is alleged in the

findings made with respect to lost remuneration or the maintenance of the continuity of Dr Matthai's employment.

Conclusion and disposition

[82] For these reasons, permission to appeal should be granted, but the appeal must be dismissed. The University has not demonstrated that the decision of the Deputy President was attended by error which would permit intervention on appeal.

[83] The Full Bench makes the following orders:

(a) Permission to appeal is granted; and
(b) The appeal is dismissed.

VICE PRESIDENT

Appearances:

J Firkin SC and *S Cheligoy*, of counsel, instructed by Landers & Rogers for the University of Melbourne.
G Dircks, agent, for Dr Stephan Matthai.

Hearing details:

10 September 2025.
Melbourne (in person).

Printed by authority of the Commonwealth Government Printer

<PR796930>

---

[1] *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [14] and [17] (Gleeson CJ, Gaudron and Hayne JJ).

[2] *Helensburgh Coal v Bartley* [2025] HCA 29; (2025) 99 ALJR 1185 at [54] (Gageler CJ, Gordon and Beech-Jones JJ) and [141] (Steward J).

[3] *Moore (a pseudonym) v The King* [2024] HCA 30; (2024) 98 ALJR 1119 at [14] (Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ); *DP World Sydney Pty Ltd v Witherden* [2025] FWCFB 133 at [16].

[4] *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [20] (Gleeson CJ, Gaudron and Hayne JJ); *DP World Sydney Pty Ltd v Witherden* [2025] FWCFB 133 at [30].

[5] *Toms v Harbour City Ferries Pty Ltd* [2015] FCAFC 35; (2015) 229 FCR 537 at [86] (Buchanan J).

[6] *BP Refinery (Kwinana) Pty Ltd v Tracey* [2020] FCAFC 89; (2020) 276 FCR 9 at [22] (Besanko, Perram and Jagot JJ); *DP World Sydney Pty Ltd v Witherden* [2025] FWCFB 133 at [35].

[7] *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at [20]-[31]; *Robinson Helicopter v McDermott* [2016] HCA 22; (2016) 90 ALJR 679 at [43]; *Lee v Lee* [2019] HCA 28; (2019) 266 CLR 129 at [55]; *Australian International Islamic College Ltd v Brownson* [2025] FWCFB 187; (2025) 343 IR 224 at [36].

[8] *Curtis v Darwin City Council* [2012] FWAFB 8021; (2012) 224 IR 174 at [83].

[9] *Sharp v BCS Infrastructure Support Pty Ltd* [2015] FWCFB 1033 at [34].

[10] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 467 (McHugh and Gummow JJ).

[11] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291; *Technical and Further Education Commission (t/as TAFE NSW) v Pykett* [2014] FWCFB 714; (2014) 240 IR 130 at [45]; *Shop, Distributive and Allied Employees' Association v Lokrum Pty Ltd* [2025] FWCFB 125 at [26](d).

[12] *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; (2003) 236 FCR 593 at [47] (French, Sackville and Hely JJ); *Jabari v Minister for Immigration, Citizenship, Migrant Services and Multicultural* [2023] FCAFC 98; (2023) 298 FCR 431 at [55](5) (Katzmann, Jackson and McEvoy JJ); *Ulan Coal Mines Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* [2025] FCAFC 127; (2025) 311 FCR 352 at [43] (Collier, Snaden and Raper JJ).

[13] *Soliman v University of Technology, Sydney* [2012] FCAFC 146; (2012) 207 FCR 277 at [57] (Flick J).

[14] *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCAFC 64; (2023) 297 FCR 1 at [61] (Markovic, Thomas and Button JJ); *Ulan Coal Mines Pty Ltd and Others v Association of Professional Engineers, Scientists and Managers, Australia* [2025] FCAFC 127; (2025) 311 FCR 352 at [44] (Collier, Snaden and Raper JJ).

[15] *Taylor v August and Pemberton Pty Ltd* [2023] FCA 1313; (2023) 328 IR 1 at [331]-[332] (Katzmann J).

[16] *Lehrmann v Network Ten Pty Ltd (Trial Judgment)* [2024] FCA 369 at [690] (Lee J).

[17] We note that there is an error in the transcript of the appeal hearing at PN273 where it is recorded that Ms Firkin said: 'I submit its [the delay] irrelevant'. A review of the recording of the hearing indicates that Ms Firkin said: 'We don't submit it [the delay] is irrelevant'. See also the exchange at PN286-287.

[18] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 512 at [48] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ) referring to comments by Diplock LJ in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369.

[19] By reference to *Lambley v DP World Sydney Ltd* [2013] FCA 4 at [43]-[48] (Katzmann J)

[20] See, particularly, *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419, [2019] NSWCA 61 at [8]-[11] (Bathurst CJ and Leeming JA) and discussion in *Australian Workers' Union v Skout Solutions Pty Ltd* [2026] FWCFB 14 at [56].

[21] See, in a different context, *Australian Building and Construction Commissioner v Australian Workers' Union* [2022] FCAFC 143; (2022) 406 ALR 20 at [74] (Moshinsky and O'Callaghan JJ).

[22] *Nguyen v Vietnamese Community in Australia* [2014] FWCFB 7198 at [27]; *Tenterfield Care Centre Limited v Wait* [2018] FWCFB 3844 at [15].

[23] *Mt Arthur Coal Pty Ltd v Goodall* [2016] FWCFB 5492; (2016) 260 IR 391 at [76] (Hatcher VP and Wells DP).