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Antoinette Lattouf
Applicant

Australian Broadcasting Corporation
Respondent

WRITTEN SUBMISSIONS FOR THE APPLICANT

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A. Introduction

1. The applicant Antoinette Lattouf was employed by the respondent (ABC) to present its “Mornings” radio show from 18 to 22 December 2023. Ms Lattouf’s presentation of Mornings on 18–20 December 2023 was exemplary. Her managers thought she was “*sounding great*”. Many listeners wrote to the ABC complementing her work.
2. Shortly after Ms Lattouf appeared on air on 18 December 2023, however, the ABC was deluged with vituperative complaints from pro-Israeli lobbyists who protested Ms Lattouf’s employment and demanded her removal. The complaints explicitly objected to Ms Lattouf’s opinions on the Israeli/Palestinian conflict.
3. The most senior executives of the ABC, including its managing director and chair of its board, were sympathetic to the complaints. Once alerted to Ms Lattouf’s opinions, they determined that she ought never have been employed by the ABC and sought to be rid of her. Their efforts to do so were temporarily stymied by internal advice that there was no proper basis to take Ms Lattouf off air. They continued to express their deep unhappiness at her continued employment, and in due course they achieved their objective of removing her from air.
4. On the afternoon of 20 December 2023, without notice or forewarning, Ms Lattouf was told that she would not be presenting her final two shows and that she was to pack up her desk, notify her producers she’d been taken off air, get her bag and leave the ABC studios.
5. The stated bases for her removal were that she had breached a direction, and breached ABC policy on the use of social media. It is now admitted by the ABC that Ms Lattouf, at the point of her dismissal, had not breached any ABC policy, procedure or guideline. And the ABC’s own evidence makes clear that she was not given, and did not breach, any direction, and that the senior managers who dismissed her were told that she had been given no such direction.

6. Ms Lattouf was terminated by the ABC for a reason or reasons that included her political opinion and/or her race, national extraction or social origin and contrary to s 772(1)(f) of the *Fair Work Act 2009* (Cth) (**FW Act**).
7. The circumstances in which Ms Lattouf was dismissed were a procedural travesty. She was sacked without notice or warning and given no opportunity to defend herself. The dismissal offended any notion of procedural or substantive fairness, and flagrantly contravened multiple provisions of the *ABC Enterprise Agreement 2022–2025*.
8. The Court should uphold Ms Lattouf’s claims, make declarations recording the ABC’s contraventions and award Ms Lattouf compensation for non-economic loss for hurt, humiliation, pain and suffering and the exacerbation of a psychiatric illness. The matter should thereafter be programmed for penalty and consideration of the other forms of relief sought by Ms Lattouf.

B. The ABC’s “impartiality” argument is self-defeating

9. Ms Lattouf holds and expresses opinions which are critical of the conduct of the state of Israel, which are sympathetic to the human rights of Palestinians, and which are critical of the approach of the media to the coverage of the conflict between Israel and the Palestinians.
10. The ABC in these proceedings impugns Ms Lattouf’s opinions as “*contentious*” or “*controversial*”. It labels Ms Lattouf as an “*advocate*” or “*activist*”, and says that she was not “*impartial*”. As a result, it says, Ms Lattouf’s employment by the ABC jeopardised the organisation’s reputation for independence and threatened its need to appear impartial (but it has not contended that “*impartiality*” was an inherent requirement of Ms Lattouf’s position).
11. These contentions proceed from highly contestable premises and reflect a highly contestable normative outlook. It is readily arguable that the ABC’s pejorative labels, and its associated contentions, are facile and its reductive appeals to a broadcaster’s “*impartiality*” are sophomoric. It might well be argued that every decision a broadcaster makes about what news it reports upon, what voices it amplifies, what language it adopts and what framing it applies to an issue involves choices. The fact that the choices are unacknowledged does not render them impartial. Similarly, it can readily be argued that criticising illegal occupation, and genocide, and mourning the deaths of tens of thousands of children ought not be contentious or controversial; and that a critique of media coverage and of the hegemony of one perspective is not inherently contentious or controversial, but rather is a basic integer of a liberal society.
12. This being the case, the application of the pejorative labels is itself a function of an unstated *a priori* opinion or perspective. To label Ms Lattouf as an “*advocate*” or “*activist*” on an issue is itself to take a position on the relevant issue. To impugn Ms Lattouf’s opinions as “*contentious*”

or “*controversial*” is similarly to take a partisan position. To label Ms Lattouf an “*activist*” who holds “*controversial*” positions—without applying those labels to the range of other ABC employees who hold and express opinions on contestable subject matter—is an expression of a view hostile to Ms Lattouf’s views. Similarly, to treat Ms Lattouf’s one-week stint on the anodyne *Mornings* program as a threat to the ABC’s standing, while confidently presenting Laura Tingle and Patricia Karvelas as the permanent faces of high-profile programs dealing exclusively in news, politics and current affairs, is a choice which reflects a deeply held judgment on the merits of the opinions held by each of those journalists.

13. The outcome of these proceedings, however, does not depend on a finding as to whether Ms Lattouf’s views were “*contentious*” or whether she was “*impartial*”, and the Court is not called upon to determine any such question. It is not necessary to decide whether Ms Lattouf is to be described as a multi-award winning journalist who reports on matters of public interest, or as an “*activist*”. That is because s772(1)(f) of the FW Act protects employees from dismissal because of any political opinion—not only those political opinions which are endorsed by their employer or anyone else.
14. The protection of s772(1)(f) does not operate by reference to the popularity of the opinion, or the extent to which it is embraced by the employer or the community. Nor is it dependent on the employer’s own attitude toward the relevant opinion. The fact that the ABC’s managing director regards the statement that “*Australia is racist*” as an impartial statement of fact, but the reference to illegal occupation of Palestine as “*anti-Semitic*”, is irrelevant. Both opinions are protected by s 772(1)(f).
15. Once this is understood, the basic flaw in the ABC’s case becomes clear. It is no defence to a claim under s772(1)(f) to assert that the political opinion as “*controversial*”, or claim that the nature of the opinion is such as to render its holder partial, or an advocate or activist. Nor is it a defence to say that the ABC was concerned that the fact of the opinion might alienate a portion of the community, or might threaten the ABC’s reputation in some unexplained way. To the contrary, to say that the ABC acted because of a concern about controversy or advocacy or impartiality is to accept that it acted because of Ms Lattouf’s political opinion.
16. The only limit on the s772(1)(f) protection is in s772(2)(a), which authorises otherwise unlawful conduct where the conduct is taken because of an inherent requirement of a job. The ABC does not suggest that exception operates in this case. That being so, its appeal to alleged concerns about the contentiousness or otherwise of Ms Lattouf’s opinions, or her impartiality, are a distraction.

C. The pleaded cases

17. Ms Lattouf contends that the ABC dismissed her for reasons which included her political opinion, or her race and political opinion, in breach of s 772(1)(1) of the FW Act. She identifies the relevant opinions as being (i) her opposition to the Israeli military campaign in Gaza; (ii) her support of Palestinians' human rights; (iii) her questioning of the authenticity of footage of demonstrators chanting antisemitic chants at the Sydney Opera House; and (iv) that media organisations should report about the conflict between Israel and Palestinians accurately and impartially.
18. Ms Lattouf further contends that the ABC breached s 50 of the FW Act and clause 55 of the Agreement by its failure to comply with the requirements of clause 55 in dealing with Ms Lattouf's alleged misconduct.
19. The ABC denies that it contravened s 771(1)(f) of the FW Act. It now admits that Ms Lattouf is of Lebanese, Arab and Middle Eastern descent and that these constitute the attributes of "race" or "*national extraction*", and admits that Ms Lattouf's opposition to the Israeli military campaign in Gaza was capable of constituting a "*political opinion*". However it denies that Ms Lattouf's opinions were otherwise political opinions, and denies that it dismissed her. This latter denial is maintained in the face of contemporaneous internal communications and communications to members of the public that Ms Lattouf had been "dismissed" or "was no longer employed" by the ABC or "no longer works at the ABC".¹
20. The ABC further denies that its reasons for its conduct vis-à-vis Ms Lattouf included her political opinions or race. Rather, it contends, that its reasons for acting as it did were the reasons of Mr Oliver-Taylor, which it identifies as:
 - (a) his belief that Ms Lattouf's activity on her Instagram account on or about 19 December 2023 meant that Ms Lattouf may have breached the ABC's policies or guidelines;
 - (b) his belief that Ms Lattouf had not complied with a direction given to her in relation to her use of social media; and
 - (c) his "*loss of trust and confidence*" in Ms Lattouf to present live radio in accordance with directions issued to her.²
21. Significantly, the ABC's pleading does not identify the policies or guidelines which Mr Oliver-Taylor believed Ms Lattouf may have breached, nor does it identify the direction which he believed her to have contravened. The ABC's evidence on these issues is ambiguous and convoluted, but appears to characterise the relevant policy as the ABC's "*Personal Use of*

¹ Buttrose email to Oliver-Taylor, 5:48PM 20/12/2023, Buttrose Tab 14, CB1147-1163. See also Exhibits 12-13.

² Defence 45B.

Social Media Guidelines” and the relevant direction as being “a direction not to post anything about the Israel-Gaza war”.³

22. The ABC accepts that Ms Lattouf was not in fact given any such direction, and that she did not in fact breach the “*Personal Use of Social Media Guidelines*” policy—that is, that Mr Oliver-Taylor’s alleged beliefs were wrong. The effect of its pleading is that Ms Lattouf was sacked not because of her political opinion, but because its senior executives made a series of compounding errors.
23. In relation to the breach of Agreement claim, the ABC admits that it did not follow the process prescribed by clause 55, but contends that it was not obliged to do so. This is seemingly on the basis that it did not allege that Ms Lattouf had engaged in misconduct.⁴ It remains to be seen how the ABC explains the seemingly irreconcilable inconsistency between its defence to the s 772(1) claim (that it removed Ms Lattouf because it believed that she had breached a lawful and reasonable direction) and the s 50 claim (that it never alleged misconduct by Ms Lattouf).

D. Ms Lattouf’s case in short summary

Section 772(1)(f)

24. Ms Lattouf contends that she was dismissed for reasons which included her political opinions, or her political opinions and her race. The ABC bears the onus of proving that the reasons for her dismissal did not include her political opinions, or her political opinions and race.
25. The ABC seeks to meet that onus of proof by leading evidence that
 - (a) the person who made the relevant decision was Mr Oliver-Taylor;
 - (b) Mr Oliver-Taylor’s only reasons for his decision were his beliefs that Ms Lattouf had breached a direction not to post to social media on particular subject matter, and that she may have breached ABC policy on the use of social media;
 - (c) Mr Oliver-Taylor’s concern, and the concern of the ABC more broadly, was at all times that Ms Lattouf might be seen by the public as being impartial in relation to a matter of public controversy, being the Israel-Gaza conflict.
26. Ms Lattouf’s contentions in short summary are as follows.
27. **First**, the relevant decision makers were Mr Anderson, Mr Oliver-Taylor, Ms Buttrose and Mr Latimer. Mr Anderson and Mr Oliver-Taylor were decision makers in the sense that they had an exercised authority to dismiss Ms Lattouf, and Ms Buttrose and Mr Latimer were decision

³ Oliver-Taylor [113]; but the nature and ambit of the asserted direction shifted and changed during the course of the evidence of Oliver-Taylor, Latimer, Ahern and Melkman.

⁴ Defence [26]–[29].

makers in the sense that she materially influenced the decision to dismiss Ms Lattouf. Alternatively, Anderson, Latimer and Buttrose were materially involved in Oliver-Taylor's decision-making and their reasons are therefore material.

28. **Second**, the evidence of the alleged decision makers—that is Buttrose, Anderson, Oliver-Taylor and Latimer—would not be accepted. The stated reasons for Ms Lattouf's removal are at first glance unlikely and on closer scrutiny are wholly implausible. The Court would find that no direction was given, no policy was breached, and that none of the relevant persons in fact believed that a direction had been given or a policy breached.
29. The ABC's evidence regarding the reasons for dismissal cannot be squared with the objective facts, the contemporaneous documents or the "*inherent probabilities*" of the case. The objective facts, the contemporaneous documents and indeed the witnesses' evidence in cross-examination all demonstrate that the ABC, and particularly its most senior leadership, was hostile to Ms Lattouf's opinions and that it was this hostility which led to her removal. Even if the stated reasons were reasons for her dismissal, they were not the only reasons.
30. If the ABC's evidence identifying its alleged reasons for dismissal, and disclaiming any other reasons, is not affirmatively accepted the ABC will not (having regard to the whole of the evidence) have discharged its onus and Ms Lattouf's claim must be upheld.⁵
31. **Third**, even if that evidence were accepted, Ms Lattouf's case would nonetheless succeed. The direction Ms Lattouf was thought to have breached was bespoke to her. She was given the direction because she held, and expressed, political opinions.⁶
32. It is no defence to Ms Lattouf's claim for the ABC to demonstrate that it imposed on her, because of her political opinions, a bespoke and peculiarly demanding rule and then sacked her for breach of that bespoke rule. To impose an idiosyncratic standard on an employee for a prohibited reason, and then dismiss them for breach of that idiosyncratic standard, is to dismiss them for a prohibited reason.
33. Similarly, the post which the ABC considered may have breached its policy involved, in the ABC's view, an expression of a view or opinion on the Israel Gaza conflict. To the extent the post was a reason for her dismissal, her dismissal was for reasons which included a political opinion. The alleged fact that the post breached an alleged policy is irrelevant; an employer cannot by policy seek to legitimise a protected attribute. That a policy prohibited the expression of a political opinion did not render dismissal because of that opinion lawful, any

⁵ See *TWUA v Qantas Airways Limited* (2021) 308 IR 244 at [284], [287]–[288] and [302] (Lee J).

⁶ See in this regard Mortimer J's analysis in *Sayed v CFMEU* [2015] FCA 27; 327 ALR 460 at [235].

more than a policy prohibiting homosexuality, or Catholicism, or union membership would render dismissal for any of those reasons lawful.

34. **Fourth**, it is the ABC’s case that it acted for reasons which included its concern that Ms Lattouf was not impartial. To say that a person is partial is to say they hold an opinion. “*Opinionated*” and “*partial*” are different labels for one and the same thing. Lattouf’s partiality was political.
35. Dismissal for partiality, at least in the circumstances of this case, is dismissal for holding an opinion—albeit an opinion which was allegedly controversial, or unpopular, or at least unpopular with the ABC’s leadership.
36. **Fifth**, it is plain on the evidence that the “*Lawyers for Israel*” campaign was a reason for Ms Lattouf’s dismissal. It is equally plain that the complainants were exercised by and hostile to Ms Lattouf’s political opinions.
37. Even if (which is denied) the ABC decision makers were personally agnostic as to Ms Lattouf’s opinions, they acted at the behest of persons who were deeply hostile to those opinions. Each step taken by the ABC—its close scrutiny of her past social media activity; its monitoring of her social media accounts; the continuing involvement of very senior executives; the (alleged) giving of the direction; were all functions of the lobbyists’ campaign and the ABC’s senior executives were at all times anxious to mollify those lobbyists.
38. In this case, like many previous decisions considering decisions to which many persons contribute, it is necessary to consider the state of mind of the persons “*who (alone or together) caused the corporation to take the action that it did...*”⁷ The ABC’s decision making was, on any view of the matter, “*affected or infected*”⁸ by the prohibited reasons of the lobbyists. Indeed, the principal difference between this case and the many others considered by the Courts is that the lobbyists’ prohibited reasons were openly disclosed.
39. Put simply, the ABC acted on the urging of a lobby group who insisted that Ms Lattouf be removed because of her political opinions; in doing so it acted for reasons which included those political opinions.

Breach of agreement

40. In short summary, Ms Lattouf’s case on breach of the Agreement three-pronged.
41. **First**, in the events which occurred on 20 December 2023, the ABC was alleging that Ms Lattouf had failed to comply with a direction (and in some aspects of its evidence to have breached a policy). These were allegations of misconduct. The procedural provisions of the Agreement regulated how allegations of misconduct were to be dealt with and were enlivened.

⁷ *Wong v National Australia Bank Ltd* [2022] FCAFC 155; 318 IR 148 at [25].

⁸ *Elliott v Kodak Australasia Pty Ltd* [2001] FCA 1804; 129 IR 251 at [37].

They operate as a code for dealing with allegations of misconduct. They were not followed and the ABC contravened s50 in multiple respects. This claim does not depend upon Ms Lattouf's argument that her employment was terminated being accepted.

42. **Second**, the sanction imposed on Ms Lattouf was not permitted by the Agreement and the ABC contravened s50. This claim also does not depend upon Ms Lattouf's argument that her employment was terminated being accepted.
43. **Third**, if Ms Lattouf's contention that her employment was terminated is accepted, the ABC unlawfully terminated her employment summarily in circumstances where she was not guilty of any misconduct, let alone serious misconduct and in a manner not permitted by the Agreement resulting in a further contravention of s50.

E. The facts

Antoinette Lattouf

44. Antoinette Lattouf is a freelance journalist, presenter and commentator.⁹ She works across a range of projects and styles, all public facing—that is, on air for television, radio or podcasts, or in front of a live or online audience.¹⁰ She has in the past appeared on a variety of television and radio programs including Studio10 (alongside Ita Buttrose),¹¹ Q&A, Insiders, Sky News, Catalyst, the Drum and local radio.¹²
45. Public exposure is essential to her success in her career.¹³ Similarly important is her reputation as a professional who can comply with the procedures, directions and expectations of the various organisations who might employ her.¹⁴
46. She is of Arab descent. Her parents were born in Lebanon and migrated to Australia before she was born.¹⁵
47. Ms Lattouf has been for many years a vocal public supporter of the human rights of Palestinians. She believes that the Israeli occupation of Palestine is unlawful and is the root cause of the Israeli-Palestinian conflict. She has consistently opposed the Israeli military campaign against Gaza which commenced following the 7 October 2023 attacks on Israel by Hamas. She has condemned the Israeli military campaign in Gaza, noting for instance that 70% of those killed by the Israeli Defence Forces in Gaza Strip were women and children. Ms Lattouf argued, prior

⁹ Lattouf [3]–[6].

¹⁰ Lattouf [7].

¹¹ Exhibit 3.

¹² Lattouf [7]–[8].

¹³ Lattouf [9].

¹⁴ PN 145, T40–44.

¹⁵ Lattouf [2].

to her employment with the ABC, that Israel had committed war crimes in Gaza and called for an immediate ceasefire.¹⁶

48. Ms Lattouf is a defender of press freedom and journalistic integrity, and believes that media organisations should report on the Israeli/Palestinian conflict accurately and impartially.¹⁷ She considers that journalists who report critically on Israel’s conduct in Gaza are the subject of intimidation. In November 2023 Ms Lattouf signed an open letter to Australian media outlets calling for ethical reporting on Israel and Palestine.
49. On 13 December 2023 Ms Lattouf published an article in the independent news outlet Crikey regarding abhorrent chants alleged to have been made during a protest in Sydney in October. The article was later described by various ABC personnel as being “*fact based, research based*”¹⁸ “*clearly journalistic work... rather than commentary or opinion*”¹⁹ and “*balanced and journalistically sound*”.²⁰

The ABC

50. The ABC is the national broadcaster. It is governed by a board, which has a statutory duty to maintain its independence and integrity, and its impartiality in its gathering and presentation of news and information.²¹
51. The ABC maintains a series of policies and procedures, including a set of Editorial Policies, a Code of Practice and a Code of Conduct. There is a distinction between policies which are editorial—that is related to the content the ABC creates and broadcasts—and those which are not.²² The Editorial Policies, and Editorial Guidelines which explain them, are in the first category. The Code of Conduct, and ancillary personal conduct policies such as the Personal Use of Social Media policy, are in the second. The distinction is clear, and indeed elementary in journalism.²³
52. The ABC employs an editorial team the role of which is to advise about the Editorial Policies and other policies.²⁴ The editorial team is headed by an Editorial Director.
53. The Agreement²⁵ covers and applies to the ABC. Clause 55 of the Agreement deals with employee misconduct, codifying and expanding on the usual requirements of procedural

¹⁶ Lattouf [10]–[14]; AL–1 to AL–4; Exhibit 1.

¹⁷ Lattouf [10]–[14]; AL–1 to AL–4; Exhibit 1.

¹⁸ DB Tab 110 (Oliver-Taylor filenote, 21 December 2023).

¹⁹ DB Tab 15 (Melkman email to various at 2:53pm on 18 December 2023).

²⁰ DB Tab 16 (Ahern email to various at 3:32pm on 18 December 2023).

²¹ *Australian Broadcasting Corporation Act 1983* (Cth), (**ABC Act**) s8.

²² P200.27–31 (Anderson XXN).

²³ P207.31–38.

²⁴ P607.22–25.

²⁵ Exhibit #3.

fairness. It prescribes particular procedures for the investigation of misconduct and identifies the sanctions available in respect of misconduct.

54. In December 2023, the members of the ABC board included Ita Buttrose, chairperson, and David Anderson, managing director. Mr Anderson remains the ABC’s managing director and the person with statutory responsibility for management of the affairs of the organisation subject to any directions from the board.²⁶ The ABC’s senior leadership team in December 2023, and now, includes its Chief Content Officer Christopher Oliver-Taylor.
55. There were four levels of management between Ms Lattouf and Mr Oliver-Taylor: Ms Lattouf reported to Ms Elizabeth Green, Content Director of ABC Radio Sydney; Ms Green reported to Mr Mark Spurway, Acting Manager of ABC Radio Sydney; Mr Spurway reported to Mr Stephen Ahern, Acting Head of ABC Capital City Networks; Mr Ahern reported to Mr Ben Latimer, Head of Audio Content; Mr Latimer reported to Mr Oliver-Taylor. Mr Simon Melkman was at the time the ABC’s Acting Editorial Director.

Engagement and dismissal of Ms Lattouf

56. Ms Lattouf was from time to time a host on ABC radio from 2022 onward, including stints as host of a digital radio program, host of “*Sydney Afternoons*” and “*Evenings*”.²⁷ Despite these appearances and her other media work, her profile appears to have been only moderately high with ABC executives; neither Mr Anderson or Mr Latimer knew Ms Lattouf before December 2023, and Mr Oliver-Taylor and Ms Buttrose indicated that had only a passing acquaintance.
57. In November 2023 Ms Lattouf was engaged to present a program known as “*Mornings*” for the week beginning Monday 18 December 2023. The role has been described as “*one of the ABC’s most coveted radio spots*”.²⁸
58. The program adopts a “*light bright presentation style*”²⁹ which is “*intended to reflect Sydney in the first week of the school holidays*”³⁰ and is “*significantly watered down in content in the lead up to Christmas*”.³¹
59. Ms Lattouf hosted the program on Monday 18 December and Tuesday 19 December. She received positive feedback. Her managers told her that “*you are sounding good*”; “*you’re doing a great job*”³² and she was “*getting a lot of positive feedback from listeners*”.³³

²⁶ ABC Act, s10(1), 10(2).

²⁷ Lattouf [16]–[19].

²⁸ Exhibit #18 (The Australian article dated 20 December 2023).

²⁹ DB Tab 16 (Ahern email to various at 3:32pm on 18 December 2023).

³⁰ DB Tab 16 (Ahern email to various at 3:32pm on 18 December 2023).

³¹ DB Tab 110 (Oliver-Taylor filenote, 21 December 2023).

³² Spurway [14].

³³ DB Tab 52.

60. On Wednesday 20 December 2023 Ms Lattouf completed her shift on-air and attended an all staff meeting, during which her performance was praised.
61. Ms Lattouf was then called to a meeting, and dismissed on the spot by Stephen Ahern. Mr Ahern said “*as a result of a specific social media post which you have shared on Instagram, we have made the decision that you will not be returning to complete your last two shifts on air*”. After showing Ms Lattouf the relevant post, he said “*...you were asked not to post and now you have breached the social media policy by posting the Human Rights Watch post*”.³⁴
62. There was no attempt by the ABC to comply with the requirements of the Agreement. The decision was delivered as a *fait accompli*, and Ms Lattouf was not invited or permitted to defend herself.
63. Ms Lattouf was told to gather her belongings and leave the ABC building. By the time she reached her home, The Australian newspaper had reported her dismissal.

The campaign

64. Ms Lattouf was, 18 December 2023 onward, the subject of a campaign of vituperative complaints. The campaign had the object of persuading the ABC to take Ms Lattouf off air because of her political views on Israel, the Israeli war on Gaza and the Israeli-Palestinian conflict. Among other things, the complainants objected to Ms Lattouf’s publication of an article scrutinising the *bona fides* of footage of a demonstration at the Opera House, which some complainants compared to Holocaust denial.
65. The complaints were made by a group of persons which the ABC identified as a “*pro Israeli lobby*”.³⁵ The co-ordinating group has been identified in media reports as “*Lawyers for Israel*”³⁶ and was described by Mr Anderson as “*the Whatsapp group*”.³⁷ Whatever the case might be, it was obvious on the face of them that they were carefully choreographed. Made primarily by email, they articulated similar themes and, in most cases, recited identical or near identical objections. As Mr Anderson put it, the wording was the same in each email but it was “*top-and-tailed slightly differently*” and “*it looked like a copy and paste coming through*”.³⁸

³⁴ Lattouf [40]–[42]. Mr Ahern has sworn an affidavit, but he does not contradict Ms Lattouf’s account of his words.

³⁵ DB Tab 110.

³⁶ P267.35–37.

³⁷ DB Tab 63 (Anderson email to Buttrose, 20 December 2023 10:58am).

³⁸ P267.39–43.

66. It is apparent from many of the complaints that many and perhaps most of the complainants were not part of *Mornings*' audience; and indeed several had no idea what Ms Lattouf was employed to do at the ABC.³⁹
67. Mr Ahern observed at the time that "*The criticism is largely about the choice of presenter, not about the content within the program*".⁴⁰ This was incorrect: the criticism was not "largely" about the choice of presenter as opposed to content; it was wholly about the presenter and was not at all related to the content of the program. Indeed it is not apparent on the face of the emails which if any of the complainants had heard the program presented that morning by Ms Lattouf.
68. ABC management immediately, and correctly, characterised the complaints being complaints "*about Antoinette Lattouf and her position on the Israel/Gaza war*".⁴¹ As Mr Anderson accepted, any person reading even a single complaint "*would have immediately appreciated that the complaint was about views that Ms Lattouf had expressed in relation to Israel*";⁴² as Ms Green immediately understood, there was a "*perceived public position gather that pro-Gaza*".⁴³

The ABC response

69. The complaints were sent directly to Mr Anderson and Ms Buttrose among others. At 1:35pm on 18 December Mr Anderson forwarded one of the complaints to Mr Stevens (head of News), Mr Oliver-Taylor and Mr Melkman and invited them to look into it.⁴⁴ Mr Oliver-Taylor volunteered to deal with the issue⁴⁵ and wrote to Mr Ahern (copied to Latimer, Melkman and Sashka Koloff) at 1:49pm saying:⁴⁶

I have been forwarded a number of complaints this morning from the MD's office about Antoinette Lattouf and her position on the Israel Gaza war. You may need to seek Simon Melkman or Sashka's advice here, but can we ensure that Antoinette is not and has not been posting anything that would suggest she is not impartial, I am concerned her public views may mean she is in conflict with our own editorial policies, but Simon and Sashka would be able to advise. Can we also advise why we selected Antoinette as stand in host?

I am not suggesting we make any changes at this time, but the perceived or actual lack of impartiality of her views are concerning.

70. Three observations may be made about this email. First, Mr Oliver-Taylor did not at this point provide copies of any complaints. Second, Mr Oliver-Taylor had immediately and correctly

³⁹ "*I would like to understand how Ms Lattouf is the correspond[ent] for the ABC for reporting on the Middle East*": DB Tab 4.

⁴⁰ DB Tab 16.

⁴¹ DB Tab 8 (Oliver Taylor email dated 18 December 2023, 1:49pm).

⁴² PN268.24–26.

⁴³ Tab 14 (Green speaking note).

⁴⁴ DB Tab 1.

⁴⁵ DB Tab 7.

⁴⁶ DB Tab 8.

identified that the complaints were “*about Antoinette Lattouf and her position on the Israel Gaza war*”. Third, to the extent there is any objective evidence that any direction was given apropos Ms Lattouf’s social media accounts, it is in the sentence “*can we ensure that Antoinette is not and has not been posting anything that would suggest she is not impartial*”.

71. At 1:52pm Mr Ahern wrote to Ms Green asking her to “*give me some feedback on the item in question*”.⁴⁷ It is telling that Mr Ahern had assumed the complaints to relate to an on-air item, rather than a host’s opinions expressed before her employment.
72. At 1:57pm and in response to Ms Koloff’s request Mr Oliver-Taylor forwarded copies of complaints.⁴⁸
73. At 2:07pm Ms Green sent Mr Ahern a link to Ms Lattouf’s Crikey article.⁴⁹
74. At 2:53pm Mr Melkman provided his initial views.⁵⁰ Among other things he said:

In terms of how we apply the personal use of social media guidelines, it’s important to consider the person’s role and the extent to which their personal social media activity can affect the ABC’s reputation for impartiality.

Presenting the Mornings program on ABC Sydney is a high-profile role of course, but if she’s only doing it on a temporary basis (for a week) it wouldn’t be reasonable to expect that all of her previous social media activity would necessarily adhere to our guidelines. I’m not suggesting she’s breached those guidelines – I haven’t pored through her social media accounts – but just making the point that we ought to take a reasonable approach based on the fact that she’s only in this role for a week.

75. Mr Melkman asked whether “*Antoinette likely to cover this subject (not the specific issue of the ‘gas the Jews’ chant at the Opera House, but the Israel-Gaza conflict more broadly) on Mornings this week?*”.
76. At 3:32pm Mr Ahern provided what was in effect a briefing note on Ms Lattouf.⁵¹ The email bears reading in full, but *inter alia* noted that Ms Lattouf was of Lebanese Christian background and a child of Lebanese immigrants, that she had previously presented without incident, and her presenting stint was for one week.
77. Under a heading “*Views on the Israel-Gaza War*” the email said:
- She has expressed views about being a child of migrants and views on discrimination, but has not, as far as we know, expressed personal views that would position her as biased in the current conflict. She has, however, recently reported on the Opera House protest.
 - She has done reporting that the chants of ‘gas the Jews’ were unverified. She has investigated that position in an article for Crikey, which could be perceived as taking a

⁴⁷ DB Tab 10.

⁴⁸ DB Tab 12.

⁴⁹ DB Tab 13.

⁵⁰ DB Tab 15.

⁵¹ DB Tab 16.

position, but, when read in full, it appears balanced and journalistically sound. Police, fact-checkers can't verify viral 'gas the Jews' footage (crikey.com.au) [crikey.com.au]

- She also posted a similar commentary on Instagram on the 'gas the Jews' chants Grab a cuppa and join me as I ask a lot of powerful people questions about a horrendously offensive video that went viral. Nobody can... | Instagram [instagram.com]
- Some of the criticism relates to the reporting in these articles/posts

78. The note went on to explain that the program that day did not contain any content about Israel-Gaza and provided a full rundown, and indicated that the show “*followed the brief, to reflect Sydney in the first week of the school holidays, which is what she did very well last year in a light bright presentation style*”.

79. Ms Koloff responded at 3:43pm and said:⁵²

I looked at the complaints and have also reviewed her reporting for Crikey, which on the face of it seems sound.

I think we can feel confident having Antoinette host this week, particularly given Steve's assurances and ongoing support.

80. At 3:45pm Mr Ahern thanked Mr Melkman for noting that Ms Lattouf had signed the open letter to media outlets, and said that she had been booked before signing the letter. Mr Ahern then answered Mr Melkman's question about the content of the program by saying:

Confirming that she will not be covering the Israel-Gaza conflict and it is not within the program brief to talk about this topic.

81. At 3:59pm a “*Planning Coordinator*” sent Ms Green a copy of Ms Lattouf's contract “*Copy-pasted into the word doc attached for searchability*” and observed “*Nothing specifically about social media. External Work & Conflict of Interest might be most relevant clause*”.⁵³

82. At 3:54pm Mr Oliver-Taylor wrote to the group, agreed with Mr Melkman's statement that Mr Ahern's report “*sounds reasonable*” and indicated that he would “*respond to the MDO now and explain that we have reviewed and expect her to continue on air this week and finish on Friday*”.⁵⁴ At 4:07pm he sent an adapted version of Mr Ahern's report to Mr Anderson.⁵⁵

Monday conversation

83. At 3:42pm Ms Lattouf and Ms Green spoke by telephone. There are some differences in their recollection, but the differences are largely immaterial. On Green's account—that is the account most favourable to the ABC—the discussion included the following:⁵⁶

Green: Obviously as an ABC presenter, you need to be impartial, that includes on social media. I wouldn't give anyone any ammunition for complaints, so would be best if

⁵² DB Tab 17.

⁵³ DB Tab 20.

⁵⁴ DB Tab 21.

⁵⁵ DB Tab 22.

⁵⁶ Green [48] (CB 982–984).

you don't post anything related to the Israel/Palestine situation on social media whilst you're with us.

Lattouf: I think it's a bit unfair to ask me not to tweet or post at all. What if I stick to completely factual information from reputable sources, like an Amnesty International Report? If another journalist dies, I can't just say nothing. I would share something from the committee to protect journalists. Of course I will be fair and balanced.

Green: I understand. If something is fact based and from a verified source I am sure it would be fine, but best not to post anything that would be considered controversial while you're with us.

84. Ms Lattouf's account is that:⁵⁷

Green: We have received heaps of complaints from pro-Israel lobbyists who are not happy that we have put you on air.

Me: Have I done or said anything wrong?

Green: No, the show was excellent. Your journalistic integrity is excellent. I back you.

Me: If I say the sky is blue, they are going to have a problem with it.

Green: Yes, I agree. I just wanted to give you a heads up. And be honest with you. It really angers me that we even have to have this conversation, it's unfair.

Me: Thank you for your honesty.

Green: It's probably best that you keep a low profile on Twitter and maybe don't tweet anything.

Me: I think it's a bit unfair to ask me not to tweet or post at all. What if I stick to completely factual information from reputable sources, like an Amnesty International Report? If another journalist dies, I can't just say nothing. I would share something from the committee to protect journalists. Of course, I am not going to rely on conjecture and spread misinformation.

Green: Yes, ok I understand. That's fine, facts and reputable organisations.

85. Little would appear to turn on the difference between the two accounts, save that Ms Green's account includes a reference to the "impartiality" slogan which permeates the affidavit evidence (but not the contemporaneous documents). To the extent anything turns on the difference, there are three relatively contemporaneous documents which tend to support Ms Lattouf's account.

86. That evening Ms Lattouf emailed Ms Green and said among other things:⁵⁸

Firstly, many thanks for the open and honest discussion this afternoon. I appreciate the difficult position lobby groups are putting you in, but in particular your transparency and support...

...I will continue to be mindful to ensure accuracy and professionalism in my engagements across all of my channels.

⁵⁷ Lattouf [27] (CB 226–227).

⁵⁸ DB Tab 33.

87. Ms Green says that she made a diary note which sketched out the things she intended to discuss with Ms Lattouf:⁵⁹

Public position gather that pro-Gaza

Ammunition – don't give ammunition

Best not to post while here

88. On 21 December 2023 Ms Green wrote an email in which she said:⁶⁰

Hi Vanessa, I had a phone conversation with Antoinette at 3.44pm on Monday (18th December).

I told her that the ABC had received some complaints about her being on-air in relation to her perceived stance on the Israel/ Palestine conflict based on her social media posts. With that in mind, and that clearly the ABC has strict editorial guidelines, I advised that she should avoid posting anything related to the Israel/Palestine situation whilst she was with us for the week. Antoinette's response was a question about what she could post, using the example of a death of journalist or other fact based events. I said providing it was fact based or a verified source that was ok, however it might be better not to post anything that could be perceived as unbalanced whilst she was working with us.

My recollection is that we had another conversation in person in my office on Tuesday 19th December about her presentation and content in relation to radio craft and a part of that conversation was that we spoke again about balance.

Mr Anderson's investigation and views

89. Later that evening, and despite the assurances from a group of his most senior executives, Mr Anderson decided to conduct his own investigation and review of Ms Lattouf's social media.

90. At 8:44pm on 18 December he sent several text messages to Mr Oliver-Taylor. His first said:⁶¹

I think we have an Antoinette issue. Her socials are full of ant-Semitic [sic] hatred. I'll send you a link.

I'm not sure we can have someone on air that suggests that Hamas should return to their ethnic cleansing in Gaza and move onto the West Bank.

91. Mr Anderson then sent a screenshot of what was obviously a satirical response by Ms Lattouf to a comment on her Instagram page. Mr Oliver-Taylor responded saying

Copy. We'll check socials now. And agree

92. Mr Anderson then sent a screenshot of a link to her Crikey article:⁶²

⁵⁹ DB Tab 14.

⁶⁰ DB Tab 109.

⁶¹ DB Tab 24.

⁶² DB Tab 24, page 89.



93. Mr Anderson wrote in relation to the screenshot “*I was to have a staff member do the same – what would you do?*” Mr Oliver replied “*I think this is hugely problematic*”.
94. It would be recalled that Mr Anderson and Mr Oliver-Taylor had by this stage been advised by ABC’s experts that the article was “*clearly journalistic work... rather than commentary or opinion*”⁶³ and “*balanced and journalistically sound*”.⁶⁴ Even so, Mr Anderson appeared disturbed by the article and said “*It’s a reputational issue...*”.⁶⁵
95. Mr Oliver-Taylor responded saying “*Agree. I’ve just spoken to Steve again, Simon had [sic] are reviewing her socials asap. Likely on air tomorrow but I presume she gets pulled off air after tomorrow’s shift*”.⁶⁶
96. At 8:51pm Mr Oliver-Taylor wrote to Msrs Ahern, Latimer and Melkman saying “*Team, MDO just sent me this. I think we have a problem*” and provided the first screenshot sent by Mr Anderson.⁶⁷ Mr Ahern replied saying “*Does she need to come off air? If so, it can be done, but may be disruptive if done tomorrow.*”⁶⁸ Oliver-Taylor replied saying:⁶⁹

Not tomorrow. Can you work with Simon and assess what is going on? Suspect very hard for her to stay on air to the end of this week if her tweets are correct. But let’s cautiously review.

⁶³ DB Tab 15 (Melkman email to various at 2:53pm on 18 December 2023).

⁶⁴ DB Tab 16 (Ahern email to various at 3:32pm on 18 December 2023).

⁶⁵ DB Tab 24.

⁶⁶ DB Tab 24.

⁶⁷ DB Tab 25.

⁶⁸ DB Tab 26.

⁶⁹ DB Tab 27.

97. At 9:49pm Ms Lattouf wrote to Ms Green.⁷⁰ She said:

Firstly, many thanks for the open and honest discussion this afternoon. I appreciate the difficult position lobby groups are putting you in, but in particular your transparency and support.

98. The email then identified that Ms Lattouf had contributed to an article dealing with the persecution of women in the media and supplied the questions put to her and her answers. She then said:

Per our discussion today, I hope you can appreciate my responses to these questions. I will continue to be mindful to ensure accuracy and professionalism in my engagements across all of my channels.

99. Ms Green forwarded that email to Mr Ahern at 10:12pm,⁷¹ who responded at 10:30pm saying:⁷²

Difficult but not in itself a reason for Antoinette not to be on air. However there is a post from what appears to be from her social media account that goes too far.

Attached.

Tomorrow after she comes off air, could you ask her for an explanation about it please.

100. It is not clear what Mr Ahern regarded as “*difficult*”. Mr Ahern did not comment on Ms Lattouf’s observation about being mindful to ensure accuracy and professionalism in her engagements, notwithstanding that it was quite incompatible with the notion that Ms Lattouf had by this time been given a direction not to post on social media.

101. At 11pm Mr Melkman replied to Mr Oliver-Taylor’s “*I think we have a problem*” email.⁷³ The email again bears reading in full but includes the following:

At this stage I’d advise caution. A single screenshot taken out of the context of the full post (and even that post, taken out of the context of her full account) can be easily misconstrued. The full post (from November 12) is here: [*link appeared*]. It’s a series of nine screenshots of Antoinette’s responses to abhorrent, abusive or stupid comments people had made on some of her other posts. She titled it ‘RESPONDING TO FAN MAIL ABOUT GAZA’. From seeing the full post it’s reasonably apparent that she was sharing tongue-in-cheek / humorous retorts – i.e. she’s collated what she regards as her ‘best comebacks’ to the sort of trolls or nonsense comments she evidently receives. I’ve put the post into one image so you can see it in full:

102. Mr Melkman, unlike Mr Anderson, could see that the posts were obviously satirical. He said:

While it’s not the sort of thing I would want a prominent current/ongoing presenter to post – because it treats such a serious subject with levity, and has the potential to be misunderstood – it doesn’t strike me as egregious enough to warrant pulling her off air. It’s consistent with her outspoken but humorous approach on Instagram – her fans/followers would have understood the comments weren’t meant to be taken seriously. I’m also mindful that this is such a short-term engagement (which limits the extent to which listeners would regard her as a representative of the ABC, especially in social media activity predating her week on air) and this is a post from more than five weeks ago, well before her on-air role began.

⁷⁰ DB Tab 30.

⁷¹ DB Tab 30.

⁷² DB Tab 31.

⁷³ DB Tab 32.

103. It would be observed that Mr Melkman considered that Ms Lattouf was not in the category of a prominent presenter, and thought it relevant that she was not a “*prominent current/ongoing presenter*”. He then went on to identify the risks of taking Ms Lattouf off air and urge caution:

The other factor to consider is the risk of jumping the gun or overreacting to this. Given that Antoinette is quite outspoken (e.g. via her work with Media Diversity Australia), and clearly has strong views on the current conflict and the Australian media’s coverage of it (hence her decision to sign the open letter), I think there’s a high chance that if the ABC was to cut her presenting role short because of this Instagram post – a post which she would presumably argue was entirely defensible, and not reflective of offensive views etc. – she would make it a very big (and very public) issue. I’m not suggesting our decisions as to how to manage people’s personal social media activity should be driven by fear of them criticising any disciplinary action we might take, but I do think it’s worth treading carefully in a case like this, on an issue like this, and being mindful of how things might play out.

104. Finally, he observed that:

One last point – in the event that you’re inclined to pursue disciplinary action and cut her contract short (which, for the reasons mentioned above, I don’t think would be warranted), it would be worth looping in P&C. There’s an established process for this, which involves formally investigating and giving the person procedural fairness etc. (to be honest I’m not sure how much of that process is needed when someone is on such a short-term contract, but P&C can advise).

105. That is to say, it was clear to Mr Melkman that the action which had been foreshadowed by Oliver-Taylor and Ahern was “*disciplinary action*”.
106. Mr Oliver-Taylor responded saying “*Thanks Simon, as ever, thoughtful and considerate advice. Let’s carefully think things through Steve. I just need to ensure the MD is across our thinking tomorrow.*”⁷⁴

Tuesday 19 December 2023

107. At 6:51am on the following day, 19 December, Mr Ahern wrote to Ms Green saying “*This is the full context of that post I sent. It is satirical, understandable in context. Seeking further advice. No need to talk to her about that post yet*”.⁷⁵
108. Various emails passed back and forth between Melkman, Ahern and Latimer that morning regarding a meeting. Mr Latimer asked if “P&C” (People & Culture) needed to join the call.⁷⁶ They did not.
109. Melkman, Ahern and Latimer met by Teams at 10:48am for 19 minutes.⁷⁷ Immediately thereafter at 11:10am Mr Melkman wrote to Oliver-Taylor, copying Ahern and Latimer, providing an effective summary of the discussion.⁷⁸ Mr Melkman indicated that he had not

⁷⁴ DB Tab 33.

⁷⁵ DB Tab 35.

⁷⁶ DB Tab 40.

⁷⁷ DB Tab 41.

⁷⁸ DB Tab 43.

identified any breaches of the personal use of social media guidelines, and explained the reasoning for that view. He then suggested a couple of steps, including asking Ms Lattouf to keep a low profile on social media, and asking her to switch her profiles to private/protected for the rest of the week—albeit he did not think that was warranted.

110. It would be borne in mind that Mr Oliver-Taylor and Mr Latimer assert that they believed, at this point, that Ms Lattouf had been directed not to post on social media (albeit it is impossible to understand what direction they believed had been given). Neither of them responded to this email explaining that it was not necessary to ask Ms Lattouf to “*keep a low profile*” because she had already been directed not to post anything at all to her accounts.

111. Mr Oliver-Taylor replied at 11:15am saying:⁷⁹

Thanks all, I think this makes sense to me. Steve, will leave it with you to take whatever proactive action you and the Sydney team think appropriate to manage and assist Antoinette. I will pass on this note, copy Simon to the MD as our position at this time. He may well hold a different view and we will need to pivot. But I think the advice provided below is sage and appropriate.

112. At 11:19am Mr Oliver-Taylor provided Mr Melkman’s email to Mr Anderson, and explained that.⁸⁰

...our view is that as Antoinette’s contract finishes on Friday, we do not believe we should pull her off air at this time, mainly as she has not breached the personal use of social media guidelines that we are aware of, she has three shifts remaining and the link to the ABC is nascent due to her casual employment.

113. The email included the two steps which Mr Oliver-Taylor said Mr Anderson “*could consider taking*”, including asking Ms Lattouf to keep a low profile—again, at a point where Mr Oliver-Taylor and Mr Latimer say they understood a direction had been given. Nowhere in this email updating the managing director is there any reference to a direction.

114. At 1:16pm Mr Ahern wrote to Oliver-Taylor, Melkman and Latimer saying:⁸¹

You asked for dot points from me, but Simon's excellent analysis covers everything we talked about, so there's nothing else to add.

I can confirm that our Content Director Elizabeth has reiterated to Antoinette the importance of not talking about Israel-Gaza in her shows this week. She has also suggested that Antoinette may be wise not to post anything on her socials this week.

Elizabeth has also spoken to the production team to be particularly vigilant about using the dump button if needed.

115. Mr Oliver-Taylor’s affidavit indicated that when he read the sentence “*She has also suggested that Antoinette may be wise not to post anything on her socials this week*” he was confirmed in

⁷⁹ DB Tab 44.

⁸⁰ DB Tab 45.

⁸¹ DB Tab 47.

his view that Ms Lattouf had been directed not to post anything that would suggest she was not impartial in relation to the Israel/Gaza war.⁸² In cross-examination he further explained that he regarded a direction not to post anything that would suggest she was not impartial in relation to the Israel/Gaza war, and a direction not to post anything in relation to Israel and Gaza at all, as being indistinguishable.⁸³

116. There is serious difficulty in discerning when, precisely, Mr Oliver-Taylor claims to have thought a direction had been given. It is clear however that on Mr Oliver-Taylor's account, he thought the direction had been given at some point before 1:16pm on 19 December.

117. At 1:47pm Mr Ahern forwarded to Mr Latimer some of the many complementary messages received from listeners about Ms Lattouf and said:⁸⁴

This is only small in the bigger scheme of things, but just to let you know that Antoinette is getting a lot of positive feedback from listeners. A small sample of texts from today:

[messages set out]

That may give balance to the impression that there is a lot of negative feedback.

118. At 3:28pm the Executive Assistant to the Chair began sending copies of complaints to Mr Oliver-Taylor.⁸⁵

119. At 3:45pm Mr Oliver-Taylor forwarded the complaints to Melkman and Latimer saying that the complaints alleged a breach of clause 4 of the ABC Code of Practice, suggesting the issue was hugely complex.⁸⁶ At 3:57pm Mr Melkman responded pointing out that references to a breach of the Code of Practice were seriously misguided.⁸⁷ Mr Melkman also referred to the Women's Agenda article to which Ms Lattouf had contributed and again warned of the potential repercussions in removing Ms Lattouf from air.

120. Oliver-Taylor, Melkman and Latimer then spoke via Teams at 4:34pm for 20 minutes.⁸⁸ Immediately thereafter Mr Melkman prepared a pro forma response to the complainants which among other things asserted that "*Antoinette is an excellent broadcaster*".⁸⁹

121. By late Tuesday afternoon, Mr Oliver-Taylor was "*under the pump*"; so much so that Mr Latimer spoke with him about the pressure that he was under because of the Lattouf issue:⁹⁰

All right. Now, you had a discussion with Mr Oliver-Taylor on the afternoon of Tuesday 19 December. Is that right? When you were out walking your dog?---Yes.

⁸² Oliver-Taylor [60].

⁸³ P375.05–09.

⁸⁴ DB Tab 52.

⁸⁵ DB Tab 55.

⁸⁶ DB Tab 56.

⁸⁷ DB Tab 57.

⁸⁸ DB Tab 59.

⁸⁹ DB Tab 60.

⁹⁰ P577.01–18.

And you discussed some work-related stress, did you?---Yes.

What was the source of the stress?---Look, Mr Oliver-Taylor was having a tough week. There was pressure. So it was a welfare check, really, from me, and it's not uncommon for me to call my colleagues and check in. So I was just seeing if he was okay.

You felt the need to check in with him, because he was having a tough week?---Correct.

Because of the Lattouf issue?---That's right.

He was under the pump from the chair and the MD, wasn't he?---Look, I – I knew he was under the pump. I didn't have a lot of detail there, but I just knew he was having a tough week.

122. The pressure continued to build thereafter.

123. At 8:49pm Ms Buttrose wrote to Mr Anderson saying:⁹¹

Has Antoinette been replaced. I am over getting emails about her.

124. Mr Anderson forwarded the email to Mr Oliver-Taylor shortly thereafter.⁹²

125. At 9:26pm Mr Anderson wrote to Ms Buttrose saying:⁹³

Antoinette will finish up on Friday. It's a managed exit given the situation. I can explain more tomorrow.

I plan to respond to all those that have emailed on Friday afternoon.

126. He forwarded this response to Mr Oliver-Taylor immediately thereafter at 9:27pm.⁹⁴

127. Mr Anderson in his affidavit says of the phrase “*managed exit*”:⁹⁵

When I wrote ‘managed exit’, I was referring to the need for mitigants that had been addressed in the email referred to in paragraph [57] and the conversation referred to in paragraph [63].

128. At 9:34pm the Executive Assistant to Mr Anderson sent a group of further complaints to Mr Oliver-Taylor.⁹⁶

129. At 9:59pm Ms Buttrose wrote in response to Mr Anderson's email telling her that Ms Lattouf would be staying until Friday:⁹⁷

I have a whole clutch more of complaints . Why can't she come down with flu? Or Covid. Or a stomach upset? We owe her nothing, we are copping criticism because she wasn't honest when she was appointed.

Managed exit. Really.

I don't like emailing you late but I am wrapping present.

We should be in damage control not managed exits David.

⁹¹ DB Tab 64.

⁹² DB Tab 64.

⁹³ DB Tab 66.

⁹⁴ DB Tab 67.

⁹⁵ Anderson [70].

⁹⁶ DB Tab 69.

⁹⁷ DB Tab 71.

130. The notion that Ms Buttrose, having been told in pellucidly clear terms by Mr Anderson that Ms Lattouf would be staying until Friday was beneficently proposing “*face saving*” measures to permit Ms Lattouf to exit gracefully, is belied by the terms of the emails.

131. Mr Anderson again immediately forwarded this email to Mr Oliver-Taylor.⁹⁸ Mr Oliver-Taylor replied:⁹⁹

The blow back will be phenomenal. I recommend we hold until Friday. No comment on the war, it's not related, no breach of our own editorial protocols or the act. It is not perfect, but it's the right course of action at this point.

132. It is unclear why Mr Oliver-Taylor thought that course was “*not perfect*” in circumstances where the common view of every person, bar Anderson and Buttrose, was that there had been no breach of ABC policy and there existed no reason to take Ms Lattouf off air.

133. Mr Anderson replied saying “*I know that - hold the position, just sharing the pain*”.¹⁰⁰ Mr Oliver-Taylor replied, apologising.¹⁰¹ It is not clear why Mr Oliver-Taylor should have apologised.

20 December 2023

134. The following morning Mr Anderson replied to Ms Buttrose’s “*Managed exit. Really*” email:¹⁰²

We are absolutely in damage control.

Local Radio management, specifically Steve Ahern, has put us in an unacceptable position. Mr Ahern made a negligent, error of judgement by employing Ms Lattouf without assessing her prior media and social media activity. I am taking action through Chris Oliver-Taylor alleging serious misconduct resulting in reputational damage to the ABC as a result of his actions.

135. Mr Anderson did not explain why the ABC was in “*an unacceptable position*” or what precisely Mr Ahern had done which constituted serious misconduct.

136. He continued, saying:

We have weighed up the consequences of prematurely pulling Antoinette Lattouf off air, versus managing this until Friday as per her contract. We have concluded that the best possible outcome from here is to manage this such that Ms Lattouf does not editorially engage in the Middle East conflict while on air for the remainder of her contract.

137. It would be noted that the options as Mr Anderson perceived them were “*prematurely pulling Antoinette Lattouf off air*” or “*managing this until Friday as per her contract*”; that is to say, he correctly perceived that taking Ms Lattouf off air was not consistent with her contract.

138. He went on to say:

⁹⁸ DB Tab 71.

⁹⁹ DB Tab 72.

¹⁰⁰ DB Tab 73.

¹⁰¹ DB Tab 74.

¹⁰² DB Tab 75.

This protects the ABC (and out staff) from the consequence of removing her, without her having breached any of our standards this week, when her position on the matter was known by Mr Ahern when Ms Lattouf was engaged. If we do remove her, there will be claims of doing so without cause given her position on the Middle East was widely known prior to her engagement, we have caved to pro-Israeli lobbying, and she hasn't actually breached impartiality this week. Again, we have been placed in an untenable position.

139. Mr Anderson did not explain why the ABC was in an “*untenable position*” given there had been no breach of any ABC standard.

140. Mr Anderson then described the protections in place to avoid any risk of on-air complications:

We have directed Ms Lattouf and the producers that the topic of the Middle East conflict is off limits, there is a lengthy off-air delay in place, and we will use the dump button if that direction is disobeyed. We have also instructed producers not to allow callers through who wish to discuss that topic. To date, that direction has been followed.

141. He concluded saying:

There is without doubt already damage caused by her engagement. I expect the WhatsApp group email campaign where we are receiving emails regarding her ‘appointment’ to continue until we reveal on Friday that Ms Lattouf will not be returning next week.

142. Mr Anderson did not feel any need to explain what “WhatsApp group” he was referring to, and Ms Buttrose did not ask. In cross-examination Mr Anderson suggested that he did not know of any particular WhatsApp group that coordinated this campaign, but had been told some time earlier that there existed a WhatsApp group to coordinate campaigns against the ABC generally (“*I was just advised that there was a WhatsApp group set up to coordinate campaigns.*”).¹⁰³

143. At 11:07am Mr Anderson wrote to Mr Oliver-Taylor making clear his deep unhappiness with the position:¹⁰⁴

FYI below sent to Ita just now. I will be writing to you later this week regarding the consequences of all of this. There are two elements.

Firstly, I will be alleging serious misconduct by Steve Ahern, given your first response to me this week indicating he was editorially responsible and the delegate for choosing Antionette Lattouf as a presenter this week.

Secondly, I will be asking you to provide assurance that your team have steps have been taken to ensure that a situation like this never arises again.

I will write to you regarding that on Friday once Ms Lattouf's engagement has ceased.

144. At 11:14am Mr Oliver-Taylor again abjectly apologised to Mr Anderson,¹⁰⁵ and at 11:15am apologised to Ms Buttrose that she was receiving the correspondence and saying that it is not acceptable.¹⁰⁶ Ms Buttrose responded at 11:25am saying:¹⁰⁷

¹⁰³ PN266.06–267.05.

¹⁰⁴ DB Tab 77.

¹⁰⁵ DB Tab 79.

¹⁰⁶ DB Tab 80.

¹⁰⁷ DB Tab 85.

It goes with the job Chris.....I think we will keep getting these complaints until Antoinette leaves.

145. Mr Oliver-Taylor agreed with that view, and apologised yet again.¹⁰⁸

I agree. We have been left in an untenable position as to how to resolve and are working to find the best solution to this predicament. Again I apologise to you, David and the Board for putting you in this position.

146. It is again unclear why the position was untenable, or why there was a need for a “solution”. It should be borne in mind that the fact that complaints were being made, even in the form of an organised campaign, was unremarkable and a fact of life at the ABC.¹⁰⁹

And this was not the first time the ABC was subject of an email campaign?---That is correct.

So much so that you have a process for managing the email so that they don’t interfere with your daily conduct of your responsibilities as - - -?---That is correct.

All right. Now, it’s not unusual for people to get upset by something the ABC has done?---Also correct.

Of course, the fact that people are upset or that feathers have been ruffled is not, per se, unusual?---I would agree.

Nor does it cause the ABCs position to be untenable?---No.

147. It has never been explained what put this scenario in a different category.

148. Ms Buttrose’s office forwarded tranches of complaints to Mr Oliver-Taylor at 11:13,¹¹⁰ 11:19am,¹¹¹ 11:24,¹¹² 11:27pm,¹¹³ and 11:32am.¹¹⁴ In each case Ms Buttrose had replied to the complainant saying that she had forwarded the email to Mr Oliver-Taylor, who she said was dealing with the matter.

149. It appears that Ms Buttrose’s practice is to include informative subject lines in emails which in this case included “*More complaints Antoinette 702*”, “*The complaints keep coming Antoinette 702*” and eventually “*This is the lot for now Chris*”.

150. At 11:24am that day The Australian newspaper wrote to the ABC posting a series of questions regarding Ms Lattouf, and which made it clear that the paper was privy to the complaint campaign.¹¹⁵ The email was forwarded to Mr Oliver-Taylor and Mr Latimer at 12:42.¹¹⁶

151. At 11:31am Mr Oliver-Taylor wrote to Ahern.¹¹⁷

¹⁰⁸ Tab 86 (email from Oliver-Taylor to Buttrose at 11:26am).

¹⁰⁹ PN 265.24–265.36 (Anderson XXN).

¹¹⁰ Tab 78.

¹¹¹ DB Tab 81.

¹¹² DB Tab 83

¹¹³ DB Tab 87.

¹¹⁴ DB Tab 89.

¹¹⁵ Exhibit 6 (Email from Sophie Elsworth to Nick Leys and Sally Jackson dated 20 December 2023, 11:24am).

¹¹⁶ Exhibit 6.

¹¹⁷ DB Tab 88.

The decision to place Antoinette Latouff on air as a guest presenter looks ill-informed.

Can we please find out the process of how she was selected, approached and approved to fill in for this week. It appears on face value that background checks were not completed to a sufficient degree, if they were at least two issues would have come to light.

1. Her position on the Gaza/Israel war, which at the very best means she comes with a perception of bias to Local Radio
2. She signed the recent petition, something that the ABC has clearly asked its staff not to do, yet we engaged someone who had, again compromising their impartiality.

Can I also request every guest presenter line up across Christmas and seek assurances that the team have completed the right checks on all potential candidates to ensure they meet the highest standards of perceived and actual impartiality.

152. By this point, Mr Oliver-Taylor considered himself to be in a very difficult position. As he put it, he was “*between a rock and a hard place*”,¹¹⁸ “*the pressure was building, the concerns were rising*” and holding the position was becoming harder and harder.¹¹⁹ This was not because of anything that Ms Lattouf had done; it was because the complaints continued to arrive, and the chair was forwarding them to him directly.¹²⁰

Discovery of social media posts

153. At 12:05pm Ms Koloff sent Mr Latimer a screenshot of Ms Lattouf’s post of the Women’s Agenda article which Ms Lattouf had previously discussed with Ms Green (who had in turn raised it with Mr Ahern).¹²¹ The screenshot included pictures of Ms Lattouf and Patricia Karvelas, a high profile ABC personality.

154. At 12:19pm Mr Latimer wrote to Mr Ahern Melkman and Oliver-Taylor saying:¹²²

I have just seen Insta story posts by Antoinette regarding Israel-Gaza posted 18-hours ago.

The clear instructions were to direct Antoinette not to post to socials for the rest of this week.

Simon, Chris, Steve – can you please review the Insta stories and then let’s chat as soon as possible this afternoon?

155. This is the first occasion on which there is any suggestion in the documentary record that Ms Lattouf was subject of any direction.

156. It appears that Mr Latimer and Mr Oliver-Taylor spoke, and at 12:23pm Mr Oliver-Taylor wrote to Mr Latimer, saying:¹²³

As per chat Ben, please send screenshot. Then let’s review asap

¹¹⁸ P388.25.

¹¹⁹ P389.14–19.

¹²⁰ P389.21–26.

¹²¹ DB Tab 91.

¹²² DB Tab 92.

¹²³ DB Tab 92.

157. At 12:29pm Mr Oliver-Taylor wrote to Mr Anderson saying:¹²⁴

Looks like she has breached editorial impartiality. We are clarifying now and I will call you with a response. If correct she will be stood down.

158. At 12:43pm Mr Oliver-Taylor wrote to Mr Leys saying:¹²⁵

It looks like AL has now breached abc editorial guidelines. Ben reviewing, but if she has we will have to stand her down. If we do that we should do it before the story runs.

The Wednesday Teams meeting: 12:43pm to 12:58pm

159. There then followed a Teams meeting. The meeting commenced at 12:43pm.¹²⁶ The meeting was created by Latimer, who added Mr Melkman and Mr Ahern, then later Ms Green, then later Mr Oliver-Taylor.

160. Ms Green explains her recollection of the meeting as follows:¹²⁷

- (a) Mr Latimer, Mr Ahern and Mr Melkman were talking amongst themselves and Mr Melkman said that I had given Ms Lattouf a ‘direction’ or ‘directive’ not to post on social media (I cannot now recall whether Mr Melkman used the term ‘direction’ or ‘directive’);
- (b) I told the group that I had not given any ‘directive’ to Ms Lattouf. I explained that I had had ‘spoken with’ or ‘had a word with’ Ms Lattouf and advised her against posting on social media while she was presenting Mornings, but that I did not consider my conversation with Ms Lattouf about posting on social media to have been a ‘direction’.

161. Ms Green’s recollection on this issue is supported by a document not included in the ABC’s evidence but obtained in discovery. Ms Green kept a running file note on her iPad which included the following entry:¹²⁸

Conference call by Ben Latimer on 21/12 at 1236 with Steve and Simon M (didn’t know who he was but found out later his title). Lasted about 5 mins, was toldt hat COT was joining so told that I could leave. I asked what Antoinette posted that was the problem, he replied that it was her Insta story which I later checked and it had the Human Right[] Watch post... Simon talked about me giving directive for Antoinette not to post, I said I hadn’t directed her, only advised her to be careful about what she posted and that she might be best not to post anything whilst with us.

162. The evidence is not contradicted by Melkman, Ahern or Latimer. Mr Latimer said in his affidavit and in cross-examination that he could not recall Ms Green attending at all.¹²⁹ Mr Ahern in his evidence to the Fair Work Commission could not recall attending the meeting at all, but apparently recovered his memory sufficiently to give a detailed account of it in his affidavit prepared months later. Mr Melkman’s affidavit set out a detailed account of the

¹²⁴ DB Tab 95.

¹²⁵ DB Tab 97.

¹²⁶ Exhibit 5, Exhibit 16.

¹²⁷ Green [67] (CB 987). See also Green T542.32-44 and Exhibit 14, which is a screenshot detailing her attendance at the Teams meeting.

¹²⁸ Exhibit 15.

¹²⁹ P561.01–12.

meeting, including his recollection that “*either Mr Latimer or Mr Ahern, although I cannot now recall who, asked Ms Green to confirm the nature of what she had told Ms Lattouf about posting on social media*”—but does not say how Ms Green replied. He confirmed in his oral evidence that he can recall the discussion before and after the question was asked, but for some reason is unable to recall Ms Green’s answer to this (obviously critical) question.¹³⁰

163. The balance of the evidence of Mr Oliver-Taylor, Mr Latimer and Mr Melkman as to the content of the meeting is equally unsatisfactory. Mr Melkman’s evidence is that the group was uncertain precisely what direction had been given to Ms Lattouf (although it was certain that there had been a direction) and that it believed that Ms Lattouf had potentially breached the personal use of social media guidelines.

164. Mr Latimer’s affidavit said nothing about any breach of policy,¹³¹ but he explained in oral evidence that he had never formed a view on whether Ms Lattouf had breached any ABC policy or procedure.¹³²

165. Mr Oliver-Taylor’s affidavit, conversely, asserted that he had decided that Ms Lattouf breached the PUSM:

[103] Early in the Teams Meeting, there was discussion about whether the making of the Instagram story posts referred to in paragraph [94] gave rise to a breach by Ms Lattouf of the ABC’s policies in relation to impartiality. As to this question, I formed a view that Ms Lattouf’s conduct had breached the Personal Use of Social Media Guidelines. My recollection is that there was not a consensus about this question in the Teams Meeting.

166. Mr Oliver-Taylor then goes on to say that his considerations in deciding to remove Ms Lattouf from air included that “*my view was that she had contravened the Personal Use of Social Media Guidelines*”.¹³³

167. However, in cross-examination, Mr Oliver-Taylor denied he has ever suggested that Ms Lattouf breached the PUSM.¹³⁴

As at 20 December 2023, what reasoning process did you have in mind which led you to the conclusion that Ms Lattouf had breached the personal use of social media guidelines?---I don’t think I ever said that she did breach those guidelines. That was one of the considerations the group were considering.

Is this the position: that you never reached a view as to whether Ms Lattouf’s posts breached the ABC’s personal use of social media guidelines?---I thought it could have. I thought depending on how you read them, her role at the ABC and a direct link to what was going on with the war at that time.

¹³⁰ P623.10–38.

¹³¹ Latimer [35] – [37] (CB 773–774).

¹³² P587.25.

¹³³ Oliver-Taylor [113] (CB 432).

¹³⁴ P416.04–12.

168. Mr Oliver-Taylor's evidence to the Fair Work Commission was similarly that he was unsure whether there had been a breach:¹³⁵

Your text message doesn't refer to a 'potential' breach, you say that your view was that she had breached?---Yes. That was - there was a conversation. I am still not sure whether there's a breach or not, if I'm being honest, sir.

169. For completeness, it would be noted that there is no evidence to suggest that anyone ever suggested (in this meeting or otherwise) that Ms Lattouf had breached Editorial Policies or Editorial Guidelines.

170. As to a direction, Mr Oliver-Taylor's evidence was that:

[104] The discussion then turned to the question of whether Ms Lattouf's conduct in making the posts referred to in paragraph [94] involved a breach of a direction given to her by the ABC. In this regard, my view was that Ms Lattouf had been directed not to post anything in relation to the Israel-Gaza war during the week of her engagement.

[105] As to this, I said words to the effect of, 'In my view, Antoinette was directed not to post anything about the Israel-Gaza war this week, and she has clearly breached that direction'.

[106] I asked each person in the Teams Meeting whether they agreed with my view, and each person said that they did so.

171. This may be contrasted with Mr Melkman's evidence, which described confusion as to whether the alleged direction was that Ms Lattouf not post anything related to Israel/Gaza, or not post anything "*controversial*".¹³⁶

172. In any case, by the end of the meeting Mr Oliver-Taylor had decided to remove Ms Lattouf.

After the meeting

173. The meeting concluded at 12:58pm.¹³⁷

174. Mr Anderson and Ms Buttrose were at lunch. Mr Anderson says that he had the following exchange with Ms Buttrose:¹³⁸

Buttrose: David, let's get this out of the way. I read your email and we are just going to have to agree to disagree on the position you've taken in relation to Antoinette Lattouf.

Anderson: Yes, that's the best way forward. I know you are unhappy with it, but that is what we are doing for the rest of the week.

175. Mr Oliver-Taylor tried to call Mr Anderson and then at 1pm sent him a text message:¹³⁹

D, confirming my view is that she has breached our editorial policies whilst in our employment. She has also failed to follow a direction from her producer not to post anything whilst working

¹³⁵ T398.4-44.

¹³⁶ P622.27-33.

¹³⁷ Exhibit 5.

¹³⁸ Anderson [87] (CB 913).

¹³⁹ DB Tab 95.

with the ABC. As a result of this, I have no option but to stand her down. Call me if you can, but if not possible, I will action within the hour.

176. At 1:04pm Mr Oliver-Taylor emailed Mr Leys to say:¹⁴⁰

Nick, I am trying to reach the MD, on review of overnight posts, the view from Local Sydney Radio management is that AL has breached ABC editorial policy by posting commentary on the Gaza/Israel war. I am expecting the recommendation to be that we will not continue with her remaining two shifts as a result of this breach. We may need to put out a statement in due course.

177. At 1:17pm Mr Oliver-Taylor messaged Mr Anderson to say:¹⁴¹

Aus are going to run a yarn. I'm going to action this now and try to beat the story.

178. At 1:18pm Mr Anderson returned Mr Oliver-Taylor's call. He says that during the call Mr Oliver-Taylor told him that "*We have decided we need to take her off air. She has put something up on social media despite being directed not to*".¹⁴² Mr Oliver-Taylor says that "*I explained to Mr Anderson that Ms Lattouf had posted on social media about the Israel-Gaza war, even though she had been told not to. Mr Anderson responded by saying 'okay' or 'alright'.*"¹⁴³

179. Mr Anderson says he was surprised by the decision, which was to him unexpected.¹⁴⁴ He thought the matter of the alleged breach of a direction "*warranted investigating*".¹⁴⁵ But he did not ask what the social media post was. He did not ask what direction had been given. He did not point out to Mr Oliver-Taylor that wilful breach of a direction was misconduct, and that the enterprise agreement required that misconduct be investigated. He did not ask if Mr Oliver-Taylor had sought advice from the ABC's legal or P&C teams. He did not suggest that Mr Oliver-Taylor should hear from Ms Lattouf before removing her. He did not interrogate the proposition that a social media post constituted a breach of Editorial Policies.¹⁴⁶

180. Also at 1:18pm, Leys wrote to Oliver-Taylor and Latimer saying:¹⁴⁷

Do we have the tweets or posts?

Is it an edpols issue or SM guidelines?

181. Leys was the ABC's media liaison, not an editorial expert. Even so, he obviously appreciated the distinction between the Editorial Policies and the PUSM, and was immediately confused by the reference to a breach of Editorial Policies by means of a social media post.

182. The email was never answered.

¹⁴⁰ Exhibit 7 (email to Mr Leys on 20 December at 1:04pm).

¹⁴¹ DB Tab 95.

¹⁴² Anderson [92] (CB 914).

¹⁴³ Oliver-Taylor [120] (CB 434).

¹⁴⁴ P289.15–29.

¹⁴⁵ P287.35–36.

¹⁴⁶ P285.44–289.29.

¹⁴⁷ Exhibit 6.

183. At 1:28pm Leys wrote to the group saying “*We need to see the posts.*”¹⁴⁸ This email was also never answered.
184. Mr Oliver-Taylor spoke to Mr Latimer and directed him to arrange for Ms Lattouf to be taken off air.
185. At or about this time, Mr Latimer called Mr Ahern whilst Mr Ahern was meeting with Mr Spurway and Ms Green and, potentially, Ms O’Shea.¹⁴⁹ The announcement of the decision came out of the blue so far as Mr Spurway and Ms Green were concerned.¹⁵⁰ Ms Green expressed disagreement with the decision to take Ms Lattouf off air, including by pointing out that the Human Rights Watch story had been on the ABC and BBC that morning and she did not see what was wrong with it.¹⁵¹ Mr Spurway concurred.¹⁵² The decision had, however, been made and was to be actioned forthwith by Mr Ahern.¹⁵³
186. Before retrieving Ms Lattouf, Mr Ahern composed notes which he said reflected his contemporaneous thinking and the reasons Ms Lattouf was to be taken off air.¹⁵⁴ He explained that the notes which appear at CB1549¹⁵⁵ read as follows:
1. Eliz backgrounded you on perception of biased stance on Is-Gaz
 2. Eliz advised you not to post anything perceived as contro
⇒ You understood
 3. 20 hrs ago you shared a post that could be considered not balanced
 4. In context of other posts this is considered a breach of ABC policies and it is not in the interests of the ABC to keep you on air.
187. The Court should reject Mr Ahern’s evidence that he prepared these notes at the meeting¹⁵⁶ with Ms Green’s assistance and input. Ms Green’s evidence was to the contrary¹⁵⁷ and, in light of the more general problems with Mr Ahern’s evidence which are canvassed below, Ms Green’s evidence should be preferred.
188. Mr Ahern then told Ms Lattouf to attend the office where Ms Green, Mr Spurway and he had been meeting for a “quick chat”.¹⁵⁸

¹⁴⁸ Exhibit 6.

¹⁴⁹ Green at [72].

¹⁵⁰ Spurway T310.31-44 and 311.4-5.

¹⁵¹ Green at [72]. Mr Ahern accepted that it was “possible” Ms Green had disagreed with the decision: T480.34-36. He otherwise accepted the conversation as attested to by Ms Green at T480.39-47.

¹⁵² Green at [72]. Mr Spurway did not recall saying this: Ahern:

¹⁵³ Spurway, T312.7-14. Ahern, T480.31-32 and 481.16-21.

¹⁵⁴ Ahern T482.5-9, T485.14-18.

¹⁵⁵ Ahern, Tab 42 and T483.6-25 and 41-46; T484.1-5.

¹⁵⁶ Ahern T483.31-38.

¹⁵⁷ CB 989, Green at [73]. Green T551.16-30.

¹⁵⁸ CB228, Lattouf at [37]. Ahern T485.28-31.

189. Subsequent to the meeting, Mr Ahern made amendments to his notes to the effect that the words in point 4 above were “not said” but instead what was said was that “so we won’t need you on air for the Thurs and Fri shift”.¹⁵⁹
190. Ms Lattouf’s account of the meeting, which was largely accepted by Mr Ahern¹⁶⁰ and Mr Spurway¹⁶¹ and not materially challenged in Ms Lattouf’s cross-examination, was as follows:
- Ahern: Unfortunately, as a result of a specific social media post which you have shared on Instagram, we have made the decision that you will not be returning to complete your last two shifts on air.
- Lattouf: No, but I asked Elizabeth. She told me I could post if it was from a reputable source, we talked about examples like Amnesty International and the Committee to Protect Journalists.
- Green: Yes, I’ve told them that I said that.
- Ahern: You were asked not to post, and now you have breached the social media policy by posting the Human Rights Watch post.
- Lattouf: How does it breach the policy? We’re not even covering Gaza at all on the show.
- Ahern: It calls into question the ABC’s impartiality. You can return to your desk, get your bag and leave.
191. Ms Green denied that she contributed to the conversation by stating that she had told “them” that she had communicated to Ms Lattouf that she could post from a reputable source and that they had talked about the examples Ms Lattouf identified.¹⁶² Ms Green’s denial should not be accepted. Mr Ahern accepted she had said such a thing. Mr Spurway said it was probable this was said.¹⁶³ Ms Lattouf’s evidence is also consistent with the fact that Ms Green *had* in fact told “them” (being Mr Latimer, Mr Melkman and Mr Oliver-Taylor) “that” in the Teams meeting.
192. There was also a dispute between the evidence of the witnesses about whether Mr Ahern had his iPhone with the Human Rights Watch post on the table and showed this to Ms Lattouf.¹⁶⁴ This is inconsequential.

¹⁵⁹ Ahern T484.1-28 and 32-36.

¹⁶⁰ Ahern T485.37-47, 486.12-46, 487, 488.1-20 and 389.1-6.

¹⁶¹ T312.44-47 and 314.27-39 (see also T313.10-26 and 39-46 where Mr Spurway said he could not recall aspects of the conversation). Mr Spurway said that the reason identified by Mr Ahern for taking Ms Lattouf off air was because of a breach of editorial guidelines: T311.43-4 and 312.1-2 or for a breach of social media policy: T312.25-26.

¹⁶² Lattouf at CB229 at [41]. Cf Green T552.21-23.

¹⁶³ Spurway, T313.19-20.

¹⁶⁴ Ms Green did not recall this: T551.45-46 and 552.1-2. Mr Ahern said it may have happened but he did not recall: T486.1-6.

193. At the conclusion of the meeting, Ms Green and Mr Spurway said they were sorry to Ms Lattouf.¹⁶⁵ Mr Ahern did not.¹⁶⁶ Ms Lattouf was in a state of distress and upset and was in tears.¹⁶⁷

194. At 1:43pm Mr Ahern wrote to Mr Anderson saying that:¹⁶⁸

‘Actioned. Statement going out. I have requested a full review as to how she was hired in the first place. Apologies again.’

Events following dismissal

195. At 1:43pm Mr Melkman wrote to Mr Oliver-Taylor saying:¹⁶⁹

I reckon she’ll come out swinging, and she’ll get a sympathetic run in the Guardian or Nine. She’ll say we’ve buckled to pressure from the lobby and she did nothing wrong – she’s being silenced/censored, she was only sharing what reputable organisations like Human Rights Watch are saying, etc. Expect questions like: who conducted the review, what activity was deemed in breach of guidelines, why was it deemed problematic if she wasn’t covering the conflict on- air, etc.

196. It would readily be inferred that Mr Melkman anticipated that these questions would be asked, because they were obvious questions.

197. Mr Oliver-Taylor replied a few minutes later saying “*Copy. I think we are in a hard place regardless and ultimately she was asked not to post.*”.¹⁷⁰ Again, the reference to being in a “hard place” is difficult to understand.

198. At 2:57pm Mr Ahern wrote to Mr Oliver-Taylor and others describing the conversation (emphasis added):¹⁷¹

In that conversation I made the following points:

1. Elizabeth backgrounded you earlier this week on a perception of bias on the Israel-Gaza situation
2. **Elizabeth advised you not to post anything that could be perceived as controversial on your socials, while you are on air with us this week.** You acknowledged that you understood.
3. 20 hours ago you shared a post that could be considered controversial and was about Israel-Gaza.
4. In the context of your other posts, this is considered a breach of ABC policies and so you will not be required to present the last two programs you have been booked to present tomorrow and Friday.

¹⁶⁵ Spurway, T314.41-45 and 315.1-5.

¹⁶⁶ Ahern T489.10-14.

¹⁶⁷ Green T552.41-47.

¹⁶⁸ DB Tab 95.

¹⁶⁹ Exhibit 7 (Email dated 20 December 2023 at 1:43pm).

¹⁷⁰ Exhibit 7 (Email dated 20 December 2023 at 1:46pm).

¹⁷¹ DB Tab 99.

199. The email was broadly consistent with speaking notes which Mr Ahern says he prepared before the termination meeting.¹⁷²
200. Although the statement that Ms Green had advised Ms Lattouf not to post anything that could be perceived as controversial was flatly inconsistent with the alleged understanding of Mr Oliver-Taylor and Latimer regarding the direction, neither of them replied to the email or asked any question.
201. By the time Ms Lattouf reached home, The Australian had published an article titled “*ABC presenter Antoinette Lattouf sacked after anti-Israel social media posts*”.¹⁷³ The article was updated over the course of the day. By 8:31pm the headline was “*ABC summer host Antoinette Lattouf sacked over anti-Israel activism that enraged Ita Buttrose*”, and included a series of specific details about the events of the preceding three days which would only have been shared by one of the handful of people directly involved in the events.¹⁷⁴ There is no evidence that the ABC took any steps to correct the record or deny that Ms Lattouf had been sacked. Nor is there any evidence that the ABC ever took any steps to investigate the leak or discipline the person or persons involved—despite the obvious implications of the leaking for the ABC’s reputation.¹⁷⁵
202. By 3:21pm one of the complainants had written to Ms Buttrose thanking her for “*making the right decision to fire Ms Lattouf*”. Ms Buttrose forwarded the email to Mr Anderson saying “*It’s nice to get congratulatory emails*”.¹⁷⁶
203. At 4:38pm Mr Ahern wrote to Mr Oliver-Taylor taking responsibility for the “*mistaken decision*” to hire Ms Lattouf, and agreeing that Mr Oliver-Taylor’s two concerns—Ms Lattouf’s position on the Israel-Gaza war and her signature on the open letter calling for ethical reporting—were reasons why she should not have been hired.¹⁷⁷
204. At 5:23pm Ms Lattouf wrote to Mr Ahern and Ms Green.¹⁷⁸ Mr Ahern forwarded the email to Mr Latimer and Mr Oliver-Taylor shortly thereafter.¹⁷⁹ In her email, and among other things Ms Lattouf:
- (a) asked for an explanation of how she had breached the PUSM;

¹⁷² DB Tab 98.

¹⁷³ DB Tab 102.

¹⁷⁴ Exhibit 18.

¹⁷⁵ P596.15–25 (Latimer XXN).

¹⁷⁶ Exhibit 12.

¹⁷⁷ DB Tab 105.

¹⁷⁸ DB Tab 106.

¹⁷⁹ DB Tab 107.

- (b) explained that she had discussed use of social media with Ms Green, who had given her a “heads up to be mindful on social media” and expressly agreed that a post from reputable sources was not problematic; and
 - (c) asked why she had been summarily dismissed.
205. Ms Lattouf was, as the ABC would have it, an ABC employee at the time of this email. As Mr Oliver-Taylor readily accepted, basic courtesy and respect to an ABC employee would have demanded that her questions be answered;¹⁸⁰ but they were not. Nor did Mr Ahern, Mr Oliver-Taylor, Mr Latimer or any other person take steps to clarify whether her account—which was flatly incompatible with the existence of any alleged direction—was correct or to determine whether they had made a terrible mistake.
206. During the afternoon and evening of 20 December Ms Buttrose replied to a series of the earlier complaints between 5:33pm and 5:46pm saying “*You are probably unaware that Ms Lattouf no longer works at the ABC.*”¹⁸¹ Each email was signed off by her as “Chair – ABC”. She forwarded these emails to Mr Oliver-Taylor at 5:48pm with the subject line “*These people have been advised Antoinette no longer works at the ABC Chris. Ita*”.¹⁸²
207. On 21 December 2023 Ms Green sent an email to a Ms Macbean. In her email she effectively confirmed Ms Lattouf’s account, explaining that.¹⁸³
- Hi Vanessa, I had a phone conversation with Antoinette at 3.44pm on Monday (18th December). I told her that the ABC had received some complaints about her being on-air in relation to her perceived stance on the Israel/ Palestine conflict based on her social media posts. With that in mind, and that clearly the ABC has strict editorial guidelines, I advised that she should avoid posting anything related to the Israel/Palestine situation whilst she was with us for the week. Antoinette’s response was a question about what she could post, using the example of a death of journalist or other fact based events. I said providing it was fact based or a verified source that was ok, however it might be better not to post anything that could be perceived as unbalanced whilst she was working with us.
- My recollection is that we had another conversation in person in my office on Tuesday 19th December about her presentation and content in relation to radio craft and a part of that conversation was that we spoke again about balance.
208. This account, again flatly incompatible with the existence of any alleged direction, did not precipitate any inquiry into the matter or any reconsideration of the decision.

¹⁸⁰ P420.05–07.

¹⁸¹ CB 1148, 1149, 1151, 1154, 1157, 1160, 1162, 1163, 1165.

¹⁸² CB 1147.

¹⁸³ DB Tab 109.

209. On 21 December 2023 Mr Oliver-Taylor sent himself an email headed “File Note COT December 2023”.¹⁸⁴ This was apparently a document which Mr Oliver-Taylor had created and added to over a period of time.¹⁸⁵ The file note relevantly recorded that:

But she has not breached any ABC Editorial policies

...

Her work is not related to anything on Gaza/Israel war. This week is significantly watered down content in the lead up to Christmas

Screened producers/bolstered approach to phone calls

...

Highest potential controversy is us pulling her off air and the story is that there is unjustifiable complaints from a pro Israel lobby that has led to her sacking

...

These complaints were forwarded to myself – in turn discussed them with Ben and Simon, advice and decision was that she has not breached any ABC social media guidelines nor clause 4 of The Act

A/Cap City Manager was asked to ensure that AF did not post anything controversial about the War whilst on air, and ideally refrain from posting anything at all. Meeting held by Content Director on Tuesday afternoon. She “understood”

I briefed the MD as he had been receiving the complaints and explained that our recommendation was that she had not breached and therefore should stay on air. The show makes no mention of the war, there is a heightened focus on talkback management and that the “dump” button will be used if required. The MD agreed.

On Wednesday. She presented her third shift. At around 1130am Ben informed Steve, Simon and myself that she has posted a couple of things to social media. One was a comment about diversity of voices and the other was a repost of how Israel is using starvation tactics in the War. On review, and in discussion with this group, it was agreed that she has breached the trust of the program by not following a request and she has also breached impartiality around personal use of social media.

Simultaneously The Australian were chasing me and the ABC for comment as they had a story about this.

210. As can be seen, the file note:

- (a) identifies the relevant social media posts as “*a comment about diversity of voices and the other was a repost of] how Israel is using starvation tactics in the War*”; and
- (b) does not refer to any direction having been given or breached, but rather suggests that Ms Lattouf had “*breached the trust of the program by not following a request*”.

211. Over the course of 20 and 21 December Ms Buttrose received and responded to a series of emails complaining about Ms Lattouf’s dismissal. She did not deny that Ms Lattouf had been sacked but rather indicated that “*Employment of staff and terminations are an operational*

¹⁸⁴ DB Tab 110.

¹⁸⁵ P406.08–09.

matter and the responsibility of the ABC's Managing Director".¹⁸⁶ Ms Buttrose forwarded these emails to Mr Anderson at 5:15pm on 21 December 2023 with the subject line "*Acknowledged complaints about the dismissal of Antoinette FYI – Ita*".¹⁸⁷ No inquiry or investigation was instigated about the circumstances of Ms Lattouf's dismissal notwithstanding the complaints.

F. General observations about the evidence

The utility of the affidavit evidence

212. As the above chronology of evidence illustrates, the relevant facts occurred over a short period of time—little more than 48 hours—and were to a large extent contemporaneously recorded or referred to in emails and text messages.

213. Even so, the ABC has produced very lengthy affidavits. In the affidavits the ABC's witnesses give remarkably detailed accounts of the relevant events, and explain at great length their internal reasoning processes at each stage.

214. That affidavit evidence is frequently incompatible with the objective record. One example serves to illustrate the point. As noted above, on 19 December 2023 at 1:16pm Mr Ahern wrote to Oliver-Taylor, Melkman and Latimer saying:¹⁸⁸

I can confirm that our Content Director Elizabeth has reiterated to Antoinette the importance of not talking about Israel-Gaza in her shows this week. She has also suggested that Antoinette may be wise not to post anything on her socials this week.

215. Both Mr Oliver-Taylor and Mr Latimer say that they believed, at the time of their receipt of this email, that Ms Lattouf had been given a direction not to post on social media (either at all, or in some particular respect). They each in their affidavits say that this email confirmed them in those views. Indeed they each say that they understood that what had been "*reiterated*" was the direction—notwithstanding that the email clearly states that "*that our Content Director Elizabeth has reiterated to Antoinette **the importance of not talking about Israel-Gaza in her shows this week***" and that Ms Green merely "*suggested that Antoinette may be wise not to post anything on her socials this week*".

216. Mr Ahern's email was plainly incompatible with any notion that Ms Lattouf had been directed not to post on social media. It beggars belief that any person of ordinary comprehension would have read Mr Ahern's email as *confirming* that a direction had been given. Even so, that is the affidavit evidence of both Mr Oliver-Taylor and Mr Ahern.

217. Many other similar examples could be given.

¹⁸⁶ Exhibit 13.

¹⁸⁷ Exhibit 13.

¹⁸⁸ DB Tab 47.

218. The affidavits on their face have an air of unreality insofar as they set out, in precise detail, what was running through the heads of each of the relevant witnesses at precisely the time they sent or received email communications. Their artificiality became more pronounced during the trial, as the oral evidence of the witnesses stood in vivid contrast to the complete and orderly recollections set out in their affidavits.

219. The Courts have frequently commented on the challenges associated with witness statements and affidavit evidence. Leggatt J explained in frequently cited comments in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited* [2013] EWHC 3560:¹⁸⁹

[19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

220. Leggatt J went on to say:

[20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does or does not say.

221. In comments cited with approval by Nettle and Gordon JJ in *Queensland v Masson* [2020] HCA 28; 94 ALJR 785 at [112], Lee J has said that:¹⁹⁰

Witness statements have ceased to be the authentic account of the lay witness; instead they have become an elaborate, costly branch of legal drafting.

And:

As unfortunately is often the case, it appears the affidavit of Mr Ryan is less a reflection of the unassisted recollection of the witness, but a closely drafted position paper put together by solicitors after pouring over the contemporaneous documents with the assistance of the witness. These types of documents, served regularly in commercial litigation, are largely exercises in reconstruction and serve to do little more than fashion a narrative to suit perceived forensic exigencies of the case being advanced by the party calling the witness.

222. This case represents an extreme example of that phenomenon. The description of “*closely drafted position paper put together by solicitors*” which is “*largely exercises in reconstruction and serve to do little more than fashion a narrative to suit perceived forensic exigencies of the case*” is apt to describe the ABC affidavits.

¹⁸⁹ See also *The Nominal Defendant v Cordin* [2017] NSWCA 6; 79 MVR 210 at [165] where Davies J collected some of the authorities, including the comments of Leggatt J quoted here.

¹⁹⁰ *Lloyd v Belconnen Lakeview Pty Ltd* [2019] FCA 2177; 377 ALR 234 (at 269 [110]–[113]).

223. The factual narratives articulated in the ABC affidavits, have every appearance of being carefully crafted with the assistance of lawyers with a view to minimising liability and explaining away the damning contemporaneous communications. The affidavits filed in this case highlight the cogency of the frequent observations by the Courts that contemporaneous or near contemporaneous documents are a sounder basis for fact finding than the alleged recollections of persons with an interest in the outcome of the litigation.
224. That being the case, the fact finding process should proceed principally if not exclusively by reference to the contemporaneous documents. The Court should reject post facto representations about what was in a person’s mind or what they said when the relevant state of mind or action is contra-indicated by facts otherwise established by contemporaneous materials or in circumstances which make it unreliable. The approach adopted in *Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 369 is appropriate in this case:

[763] This is an unusual case where there is a very comprehensive contemporaneous documentary record, including text and other messages and lengthy audio records. We know what people were saying (and can infer what people were thinking) by reference to real time records. I do not propose to accept representations, made at a high level of generality, about what was in a person’s mind or what they said when the relevant state of mind or action is contradicted by facts otherwise established by the contemporaneous material, or particular circumstances in that reliable material point to its rejection: *Precision Plastics Pty Limited v Demir* (1975) 132 CLR 362 (at 370–371 per Gibbs J, with whom Stephen J agreed, and Murphy J generally agreed); *Ashby v Slipper* (at 347 [77] per Mansfield and Gilmour JJ).

[764] Although I do refer below to some aspects of the affidavit material, irrespective as to challenge by cross-examination, for affidavit evidence to be accepted, it must be persuasive in the sense that it does not jar with candid contemporaneous representations.

225. In considering the contemporaneous documents, it is appropriate to bear in mind that the communications were made by sophisticated corporate executives who should be assumed to have had some instinct for self-preservation, and who certainly knew (if only from Mr Melkman’s repeated warnings) that the matter was likely to become contentious. That being so, there is cause for some caution in regarding those communications as entirely frank; and particularly in relation to documents prepared with an eye to disputation such as Mr Oliver-Taylor’s 21 December 2023 file note.¹⁹¹ Even so, those materials are far more reliable than any part of the witness affidavits and the Court can and should infer what the relevant individuals were thinking by reference to the real time record not their carefully crafted post facto representations which frequently “*jar with contemporaneous records*”.

Witness credit

226. Each of the key witnesses for the ABC—Oliver-Taylor, Anderson, Buttrose, Latimer and Melkman—was unsatisfactory. In each case their evidence should be treated with caution, and

¹⁹¹ DB Tab 110.

accepted only where contrary to the ABC's interests or clearly corroborated by other objective evidence.

227. The following observations may be made about each witness.

Witness credit: Anderson

228. The essential thrust of Mr Anderson's evidence was that:

- (a) he was personally agnostic as to Ms Lattouf's opinions;
- (b) his only concern was with the ABC's integrity; and
- (c) once advised that there was no basis to remove Ms Lattouf from air, he retreated from dealing with the matter and left it in Mr Oliver-Taylor's hands.

229. Each of the three propositions should be rejected.

230. The contemporaneous evidence makes it clear that Mr Anderson was personally hostile to Ms Lattouf's opinions. Indeed Mr Anderson embraced the two key thrusts of the lobbyists' campaign: that any criticism of Israel was anti-Semitic; and that journalistic inquiry which questioned a dominant narrative was anti-Semitic.

231. It is sufficient to point to Mr Anderson's own words in this respect: "*Her socials are full of anti-Semitic hatred*". The "*anti-Semitic hatred*" to which he referred was simply support for the Palestinian cause and criticism of Israel. Indeed Mr Anderson did not seriously deny that he regarded Ms Lattouf's criticism of Israel as being racist and anti-Semitic:

Your view was that Ms Lattouf's criticisms of Israel were anti-Semitic?---To be honest, it is difficult to recall whether her specific criticisms were or were not. I have a recollection of her criticisms being – or challenging the existence of Israel, which I do believe to be anti-Semitic, but certainly her social feeds had anti-Semitic messages based within them. And what I can't tell you is specifically what I remember, but I remember, whether it was Ms Lattouf or whether it was other people posting beyond Ms Lattouf or her replies, etcetera, that that, to me, added up to anti-Semitism that was sitting on her social feeds.¹⁹²

232. When it was put to him that nothing in Ms Lattouf's social media involved any denial of Israel's right to exist, he said that he "*saw something that related to the unlawful occupation of Palestine or something similar to that is my memory*", which he regarded as potentially anti-Semitic.¹⁹³

233. This is telling. That Palestine is occupied, and that the occupation is lawful, are matters of legal fact—as the ABC's own guidance to its staff confirms:¹⁹⁴

The ICJ on the legality of the occupation

¹⁹² P269.19–26.

¹⁹³ P294.29–32.

¹⁹⁴ Exhibit 20.

The UN General Assembly asked the International Court of Justice (ICJ) for an opinion on the legal consequences of Israel's occupation and control of Palestinian territory. The ICJ responded on 19 July 2024.

“The sustained abuse by Israel of its position as an occupying Power, through annexation and an assertion of permanent control over the Occupied Palestinian Territory and continued frustration of the right of the Palestinian people to self-determination, violates fundamental principles of international law and renders Israel's presence in the Occupied Palestinian Territory unlawful.”

234. The fact that the managing director of the ABC regards a reference to “*the unlawful occupation of Palestine*”—which is the position asserted by the International Court of Justice in its advice to the United Nations General Assembly—as anti-Semitic is cogent proof of his partisan position on the issue.
235. Equally concerning is Mr Anderson's view (and Mr Oliver-Taylor's concurrence) that the Crikey article was in some way offensive or problematic. The article was, as the ABC's internal experts put it, balanced and journalistically sound. The fact that Mr Anderson saw it as a reason to doubt whether Ms Lattouf should be employed by the ABC is another marker of his deeply partisan position (and perhaps a matter of concern beyond the boundaries of this case).
236. Mr Anderson's attempt to recharacterise his concerns as being solely about the ABC's reputation, or about something Ms Lattouf might do on air, simply cannot be reconciled with his contemporaneous statements and his actions. His messages object first and foremost to the content of the opinions, and the nature of his objections reveals pro-Israeli and anti-Palestinian sympathies. His evidence that he was unconcerned by the content of the opinions and that his only concern was the ABC's integrity must be rejected.
237. Similarly, the proposition that Mr Anderson placed the matter in Mr Oliver-Taylor's hands and moved on cannot be accepted. As the chronology above shows, he was deeply involved in the ABC's dealings with Ms Lattouf over the relevant period, and continued throughout to convey his deep displeasure with the fact that Ms Lattouf had been hired and that she remained on air. He openly threatened the employment of Mr Ahern who he thought responsible for the hiring, stating he would be “alleging serious misconduct”. He was, right up to the point Ms Lattouf was removed, describing an “*untenable position*” and “*unacceptable position*” and extracting grovelling apologies from Mr Oliver-Taylor. His evidence that he put the matter to one side must be rejected.
238. There are various other respects in which Mr Anderson's evidence was unsatisfactory. By way of example rather than catalogue:
- (a) He first accepted that the ABC's obligation for impartiality was sourced in its statutory obligation to gather and present news impartially. As the implications of that fact

became clear, he resiled from that view, contradicting material extracted in his own affidavit and contradicting the Editorial Policies.

- (b) He insisted that the conduct of an ABC employee which might reasonably be perceived not to be impartial undermined the ABC's independence and integrity. However that conduct—i.e. conduct which undermined the ABC's independence and integrity—might or might not be sanctioned by the ABC depending on the circumstances of the case.
- (c) Mr Anderson was driven to this eccentric position after it was demonstrated that there are many instances of ABC employees engaging in conduct "*which might reasonably be perceived not to be impartial*" without attracting sanction.
- (d) Mr Anderson claimed that he thought the Crikey article was anti-Semitic because he "saw 'Gas the Jews' as a headline".¹⁹⁵ That claim is utterly implausible: no rational person could have seen the screenshot which he sent¹⁹⁶ and believed that it was an article with a headline of "*Gas the Jews*". Nor is it even remotely plausible that Mr Anderson thought Ms Lattouf had authored an article titled "*Gas the Jews*" but failed to mention that fact at any point.
- (e) Mr Anderson's evidence regarding his reference to the "Whatsapp group email campaign"—that he assumed the complaints were coordinated by a Whatsapp group because he had been told there was a Whatsapp group which coordinated complaints against the ABC¹⁹⁷—was ludicrous.
- (f) He said that he was not personally offended by anti-Semitic hatred because he is not Jewish and it had no personal effect on him.¹⁹⁸
- (g) His explanations for his failure to interrogate at all the decision to remove Ms Lattouf (including his failure to ask what Ms Lattouf had posted, or whether Mr Oliver-Taylor had conducted an investigation) were that he had left the matter in Mr Oliver-Taylor's hands and moved on. That was, for reasons already described, untrue.

Witness credit: Oliver-Taylor

239. Mr Oliver-Taylor's evidence was replete with implausibilities, inconsistencies and internal contradictions. Some examples include the following:

¹⁹⁵ Transcript 277.25 (Day 4, Anderson XXN).

¹⁹⁶ The screenshot appears at CB 933.

¹⁹⁷ Transcript 267

¹⁹⁸ P 272.39–44 (Anderson XXN).

- (a) Mr Oliver-Taylor claimed that he was unaware of Ms Lattouf's race. This was simply false. He had been told that Ms Lattouf was of Lebanese Christian background and told the managing director the same thing.
 - (b) Mr Oliver-Taylor attempted to explain this lie away by asserting that he had not read either email carefully. This should also be treated as false. The notion Mr Oliver-Taylor would not have read the email sent to him by Mr Ahern containing this information or paid no attention to it when forwarding it onto the Managing Director was risible.
 - (c) Mr Oliver-Taylor went on to suggest that various errors and his inability to recall various matters was explained by the fact that the relevant week was a "busy one". He suggested that he was not wholly attentive to the Lattouf issue. This evidence should be treated as false. The chronology of emails shows that the "*Antoinette issue*" was being given the highest priority by all concerned and particularly by Mr Oliver-Taylor.
 - (d) Mr Oliver-Taylor gave sworn (or perhaps affirmed) affidavit evidence that he had determined that Ms Lattouf's post breached the PUSM. When questioned on the issue he denied having ever claimed to have reached a firm view on the issue one way or another.
 - (e) Mr Oliver-Taylor insisted that he did not know, up to and including the time of hearing, what Ms Lattouf's stance was in relation to the Israel-Gaza conflict—notwithstanding that this matter was immediately obvious to every other person involved in the matter. This should be treated as false evidence.
 - (f) Mr Oliver-Taylor claimed to be the sole decision maker, but then resiled from that view when confronted with various inconvenient facts, and emphasised the involvement of others and characterised the key decision as a group decision.
 - (g) He incredulously denied that he himself was managing the complaints about Ms Lattouf's social media and insisted that her line manager Ms Green was doing so.
 - (h) He insisted that there was no difference between a direction not to post anything at all, a direction not to post anything controversial in relation to Israel/Gaza and a direction not to post anything in relation to Israel/Gaza.
240. Other examples could be given.
241. Mr Oliver-Taylor was a discreditable witness. His evidence should be accepted only to the extent that it is contrary to the ABC's interests.

Witness credit: Latimer

242. Mr Latimer's evidence gave the impression of a person who had no remaining recollection of the relevant events and who was adamantly reciting a pre-prepared position. The following exchange is a useful example:¹⁹⁹

You remember reading the words: Elizabeth advised you not to post anything that could be perceived as controversial.

Do you remember reading those words?---Yes.

Well, then you must have said to yourself, "There has been a terrible mistake. That's not a matter of being advised not to post anything controversial. That's not the direction that I wanted given." Was that your reaction when you read this email?---No.

Having read these words that – you didn't have any cause to doubt whether the direction which you had in mind had been conveyed?---No. I was very confident that it had been conveyed.

Okay. Having seen - - -

HIS HONOUR: Sorry, Mr Latimer, why were you confident that it had been conveyed?---I was confident because when I spoke to Steve, and the communication back from Steve, I felt very confident that it had been conveyed to most of the team.

But I asked you why you were confident it had been conveyed?---I just felt like the instruction had been carried out. Having dealt with Mr Ahern before, I had no reason to doubt that it hadn't been, so I just – I felt confident that it had been.

So you were confident that it had been carried out because you felt it had been carried out? Have I understood that correctly?---Yes. Sorry, I haven't worded that very well, but with my dealings with Mr Ahern, I believe that he had listened to my words, and my words were very clear.

243. Mr Latimer's evidence is of no utility and should be rejected.

Witness credit: Buttrose

244. Ms Buttrose was an unsatisfactory witness.
245. Ms Buttrose's evidence about her state of mind on the evening of 19 December 2023 was squarely at odds with the contemporaneous email correspondence and unbelievable. At numerous times during the cross-examination she presented as a witness who anticipated lines of cross-examination about problematic email exchanges she had engaged in with Mr Anderson, and sought to head them off with explanations at odds with what she had written. The Court should not accept her evidence about controversial matters.
246. The Court should find that Ms Buttrose viewed Ms Lattouf's political opinions critical of the State of Israel as problematical and considered her to be a political "activist". She determined to involve herself in dealing with the complaints about Ms Lattouf and the management of Ms Lattouf's position for the purpose of pressuring Mr Anderson and Mr Oliver-Taylor to sack Ms Lattouf. She determined to do so because she was antagonistic towards Ms Lattouf and her

¹⁹⁹ P573.45–574.28.

political opinions. Insofar as she sought to place pressure on Mr Oliver-Taylor, she succeeded and was thus materially involved in his decision to take Ms Lattouf off air. In assessing Ms Buttrose's denials of being motivated by the proscribed reasons alleged, the Court should take into account that:

- (a) Ms Buttrose said that complaints about presenters were a daily occurrence at the ABC;²⁰⁰
- (b) Ms Buttrose as Chair was not involved in the day-to-day operations of the ABC, with all such operational matters being left to Mr Anderson and the managers who worked for him.²⁰¹ Rather, she agreed that her role was limited to providing general guidance and counsel to Mr Anderson at a level of policy and strategic direction and about matters of strategy.²⁰² It was not to manage or involve herself in questions of personnel.

247. What was unusual and different about this case was that the complaints were about Ms Lattouf's political opinions and Ms Buttrose was antagonistic towards both Ms Lattouf and her "activist" views on Israel and was moved involve herself in operational matters.

248. The following aspects of Ms Buttrose's evidence were problematic.

249. *First*, Ms Buttrose said during her examination-in-chief that she was a journalist.²⁰³ She agreed that as a journalist she was trained not to take things put to her about people or events at face value but rather to investigate and interrogate such matters.²⁰⁴ Despite this, she took at face value the complaints levelled against Ms Lattouf. This was notwithstanding that a number of the complainants were completely wrong about Ms Lattouf's role at the ABC and the work she was doing, as Ms Buttrose herself acknowledged.²⁰⁵

250. Ms Buttrose made no inquiries or investigations about whether the scathing and censorious assertions about Ms Lattouf by the complainants were true.²⁰⁶ She caused no inquiries or investigations to be made. She asserted that the complaints would be "investigated" by Mr Anderson,²⁰⁷ yet there was no evidence that Mr Anderson and Ms Buttrose ever discussed "investigating" the complaints or that Ms Buttrose was interested in investigating the substance of the assertions made against Ms Lattouf.²⁰⁸ She was unusually un-inquisitive about the

²⁰⁰ P500.39-45 and 501.1-2.

²⁰¹ P499.1-22.

²⁰² P499.24-25.

²⁰³ P497.47.

²⁰⁴ P498.47-48 and 499.1-2.

²⁰⁵ P504.1-23 and 38-47, 505.1.

²⁰⁶ P506.7-11 and 506.22-24.

²⁰⁷ See also P507.10-11.

²⁰⁸ See CB1048, Buttrose at [21] and CB904, Anderson at [56].

complaints, not bothering to open any of the links the complainants had embedded in their complaints to Ms Lattouf’s Instagram or to read the Crikey article.²⁰⁹

251. It is plain that Ms Buttrose simply accepted as fact the complainant’s views that Ms Lattouf was anti-Israeli and pro-Palestinian and an “activist”.²¹⁰ She accepted she had drawn this conclusion from reading the complaints.²¹¹ She then asserted that she had also drawn that conclusion as a “general observer of life”. When asked to expand upon how she drew that conclusion as a “general observer of life”, she said that that novel concept was “The ABC life”.²¹² How being a general observer of life or the ABC life was at all relevant in ascertaining Ms Lattouf’s views on the Israel-Palestinian conflict is not readily discernible.
252. Tellingly, Ms Buttrose initially avoided acknowledging that she inferred from the complaints that Ms Lattouf was perceived as a pro-Palestinian activist, dismissing the matter as irrelevant and stating (without prompting) that “Ms Lattouf’s views didn’t really enter my equation”.²¹³ However, when asked what was not impartial about Ms Lattouf’s point of view, Ms Buttrose volunteered that she was an “activist” so far as the Israel-Gaza conflict was concerned.²¹⁴ Ultimately, she said that Ms Lattouf’s view was one that was “critical of Israel”.²¹⁵ When asked about what this meant, she answered un-responsively that that was not her concern but that her concern was a lack of impartiality.²¹⁶
253. *Second*, her evidence that she kept an “open mind” about whether Ms Lattouf was a pro-Palestinian activist was false.²¹⁷ That evidence was contradicted by her clear evidence that she had drawn the conclusion which she described as being “quite apparent” that Ms Lattouf was an activist on the Gaza/Israel conflict.²¹⁸
254. *Third*, she denied that she had forwarded the complaint on to Mr Anderson at 8:49PM on a Tuesday evening to make clear to him that she was dissatisfied with Ms Lattouf remaining on air.²¹⁹ That was despite the email stating “Has Antoinette been replaced. I am over getting emails about her”. Her assertion that she did not want Ms Lattouf replaced and this blunt email was but a request for an update should be rejected.²²⁰ The notion that this email was an “update question” is belied by its terms.

²⁰⁹ C506.26-44.

²¹⁰ P508.34-37.

²¹¹ P508.39-40.

²¹² P508.39-43.

²¹³ P502.30-39.

²¹⁴ P503.8-9.

²¹⁵ P503.22-23.

²¹⁶ P503.11-13.

²¹⁷ P507.4-8.

²¹⁸ C508.34-37.

²¹⁹ P510.29-30.

²²⁰ C510.35-45.

255. That email needs also to be viewed in the context of Ms Buttrose’s description of her role as Chair as described above. The employment of a casual presenter on a short term basis to present a radio program during the holiday period did not fall within the ambit of her description of her role and was a purely operational matter. However, Ms Buttrose was intensely interested in Ms Lattouf’s ongoing employment with the ABC and so desirous to be rid of her that she was forwarding complaints to Mr Anderson at 8:49PM on a Tuesday night and making her views clear about being “over” getting complaints about the pro-Palestinian “activist” the ABC had hired. That was neither policy nor strategic advice.
256. The notion Ms Buttrose did not want Ms Lattouf replaced is further belied by her evidence that she was “over getting emails about Ms Lattouf if *we weren’t going to resolve the issue*”. When pressed, she identified the “issue” as whether Ms Lattouf was going to remain on the show.²²¹ That issue would plainly only be “resolved” and the complaints cease if Ms Lattouf was replaced, as Ms Buttrose appeared to accept.²²²
257. *Fourth*, Ms Buttrose was evasive and argumentative at times, particularly when confronted with emails that she must have known were problematic. When taken to the email she forwarded to Mr Anderson at 8:49PM on the evening of 19 December 2023²²³ she answered “So” and complained that she did not see “the point of the question”.²²⁴
258. She also accused the cross-examiner of trying make an inference that the ABC had caved into pro-Israeli lobbying.²²⁵ That evidence, which appeared to be a reference to cross-examination conducted earlier in the proceedings, conveyed that Ms Buttrose had some knowledge or understanding of what was occurring during the proceedings and was seeking to critique counsel. She pivoted, nonsensically, to stating that the inference was about an inference about pro-Palestinian lobbying.²²⁶ This exchange was an example of Ms Buttrose adopting a partisan role and reflected poorly on her.
259. *Fifth*, Ms Buttrose’s evidence that her email to Mr Anderson asking why Ms Lattouf could not come down with the flu, Covid-19 or a stomach upset was a mere “suggestion” was unbelievable.²²⁷ The following matters bear noting about that evidence:

²²¹ P511.38-43.

²²² P512.1-2.

²²³ CB1103.

²²⁴ P510.1-7.

²²⁵ P518.35-37.

²²⁶ P519.3-4.

²²⁷ P512.31-47 and 513.1-3.

- (a) Ms Buttrose avoided answering a question about her practice in 2023 to wish ABC employees would come down with respiratory illnesses by leaping ahead to give an explanation about her problematical email to Mr Anderson;²²⁸
 - (b) the notion that this was a benevolent suggestion at “face saving”²²⁹ is nonsensical and unavailable on the text of the email;
 - (c) Ms Buttrose’s evidence that the idea that Ms Lattouf would (or should) be given an “easy exit” was nonsensical when considered in light of Mr Anderson’s email where he had told Ms Buttrose in crystal clear terms that Ms Lattouf would finish up on Friday. Mr Anderson had made clear to Ms Buttrose that Ms Lattouf would not be replaced (as Ms Buttrose clearly desired). Rather, he had determined to retain her until Friday. Ms Buttrose was plainly unimpressed by this decision and was wishing that Ms Lattouf would fall ill as the ABC owed her nothing and inferring that Ms Lattouf was to blame for the criticism the ABC was experiencing because was not honest when she was appointed;
 - (d) when asked why Ms Lattouf needed to save face, Ms Buttrose said that “it looked like she was going to lose her job” and that Ms Buttrose could see that that was the way the wind was blowing.²³⁰ That evidence was preposterous in circumstances where Mr Anderson had told Ms Buttrose that Ms Lattouf was to remain on air until Friday. Ms Buttrose cannot seriously have thought Ms Lattouf’s prospects of remaining employed were not very good²³¹ in circumstances where she had been told by Mr Anderson that Ms Lattouf would remain on air until Friday.
260. Ms Buttrose went on to say when asked about the aspect of her email asserting (wrongly) that Ms Lattouf was not honest when she was appointed that Ms Lattouf:²³²
- (a) had not told Mr Ahern or whoever she saw that she was an activist;
 - (b) was an activist; and
 - (c) should have told whoever she saw that she was an activist.
261. That evidence was a further indication of Ms Buttrose’s animus towards Ms Lattouf’s political opinion and to Ms Lattouf remaining employed at the ABC.
262. *Sixth*, Ms Buttrose’s assertion that she did not know what the WhatsApp group email campaign referred to by Mr Anderson in his 20 December 2023 email was and assumed he was talking

²²⁸ P512.31-33

²²⁹ See also P513.14-20.

²³⁰ P513.42-46.

²³¹ P514.9-10.

²³² P514.14-24.

about complaints coming in on WhatsApp was nonsensical.²³³ It is plain that she had some knowledge that the campaign to oust Ms Lattouf was being coordinated and, as Mr Anderson implied, was being coordinated via a WhatsApp group.

263. *Seventh*, Ms Buttrose took it upon herself on the morning of 20 December 2023 to send Mr Oliver-Taylor complaints sent to the ABC, which she had personally responded to. She took it upon herself as Chair to do this rather than allocating the task to her assistant, Ms Stokes, who had forwarded the complaints to Mr Oliver-Taylor the previous day.²³⁴ The subject lines she used emphasise her irritation at Ms Lattouf remaining on air and the Court should find that they were geared to making that discontent clear to Mr Oliver-Taylor. Relevantly, Ms Buttrose:

- (a) at 11:05AM sent an email with subject line “More complaints Antoinette 702”.²³⁵ These were 12 complaints which she had responded to personally, telling the complainants that Mr Oliver-Taylor had been sent their complaint and was dealing with the matter. She signed off as “Chair – ABC”;
- (b) a 11:19AM sent an email with the subject line “More complaints Antoinette 702”,²³⁶ forwarding 5 more complaints each of which she had responded to personally, telling the complainants again that Mr Oliver-Taylor had been sent their complaint and was dealing with the matter and signing off in the same fashion;
- (c) at 11:24AM sent an email with subject line “The complaints keep coming Antoinette 702”, forwarding 3 more complaints which she had personally responded to in the same terms;²³⁷
- (d) at 11:25AM, she responded to an email from Mr Oliver-Taylor apologising to Ms Buttrose that she was receiving correspondence and stating that this was not acceptable saying “I think we will keep getting these complaints until Antionette leaves”;²³⁸
- (e) at 11:27AM, she forwarded another complaint to Mr Oliver-Taylor which she had missed and which she had responded to in the same terms;²³⁹ and
- (f) at 11:32AM, she forwarded two more complaints to Mr Oliver-Taylor with the subject line “This is the lot for now Chris... Ita”.²⁴⁰

²³³ P517.14-47 and 518.1-3.

²³⁴ CB1064. See CB1105.

²³⁵ CB1105-1112.

²³⁶ CB1125-1132.

²³⁷ CB1133-1136.

²³⁸ CB1138

²³⁹ CB1140-1141

²⁴⁰ CB1142-1145.

264. *Eighth*, Ms Buttrose’s evidence that Mr Anderson had asked her to send the complaints to Mr Oliver-Taylor so he would learn the “folly of not checking the references of somebody that we hired” was false.²⁴¹ Mr Anderson gave no such evidence. His evidence was, in fact, to the contrary: it was Ms Buttrose who said she was going to send all the complaints to Mr Oliver-Taylor.²⁴² Ms Buttrose rejected Mr Anderson’s preference that he would prefer that the complaints be sent to him rather than Mr Oliver-Taylor. Ms Buttrose’s response was that she was going to send them to Mr Oliver-Taylor so he understood what “we are fielding here and he can draft a response for them all”. The Court can infer that Ms Buttrose wanted to directly send complaints to Mr Oliver-Taylor for the purposes of pressuring him.”. Ms Buttrose’s evidence that she wrote to Mr Oliver-Taylor “at the instruction” of Mr Anderson was should be rejected.²⁴³

265. *Ninth*, to the extent there can be any doubt about Ms Buttrose’s antagonism towards Ms Lattouf it is dispelled by her forwarding an email to Mr Anderson in the afternoon of 20 December 2023 thanking Ms Buttrose for “making the right decision to fire Ms Lattouf”. The terms of the email, which was sent to Ms Buttrose alone, were as follows:²⁴⁴

I wanted to write again and thank you and the ceo and the rest of the board for taking these concerns seriously and making the right decision to fire Ms Lattouf from our national broadcaster

266. Ms Buttrose was clearly pleased by this email. So much so, she decided to forward it to Mr Anderson with a covering email stating that “It’s nice to get congratulatory emails”. This email is a clear window into Ms Buttrose’s views and position concerning Ms Lattouf. She was not only happy to be rid of her, but happy to be congratulated for getting rid of her.

267. The Court should affirmatively find that Ms Buttrose was motivated by Ms Lattouf’s political opinions to seek to influence and pressure both Mr Anderson and Mr Oliver-Taylor. She went out of her way to involve herself in the matter to make clear her distaste for having a pro-Palestinian activist who should never have been employed on air and to exert pressure to have her replaced. Her denials that she was not motivated by the political opinions pleaded should not be accepted.

Witness credit: Ahern

268. Mr Ahern’s evidence was partisan and unsatisfactory in several respects. It jarred with the contemporaneous documents and had the hallmarks of post facto reconstruction with an eye to

²⁴¹ P505.5-8 and 509.18-29. See also CB1048, Buttrose [21](d).

²⁴² CB907, Anderson at [59].

²⁴³ P533.12-13 and 535.31-32.

²⁴⁴ Exhibit 12.

assisting the ABC's case. The Court should not accept his evidence about any controversial matters.

269. First, Mr Ahern's evidence that he had spoken to Ms Green during either of their calls at 2:36PM or 3:35PM and *instructed her* to speak to Ms Lattouf about not posting anything about the Israel-Gaza war that week and that Ms Green had said she had already had that conversation with her and that Ms Lattouf would not post anything controversial,²⁴⁵ was untrue:

- (a) Mr Ahern gave evidence in the Fair Work Commission proceedings that his compliance with Mr Oliver-Taylor's "instruction" on 18 December 2023 was to ask Ms Green whether Ms Lattouf was "aware of her obligations" and Ms Green had replied by saying she had already had a conversation with her about that. He agreed that he had had such a conversation with her during cross-examination.²⁴⁶ The evidence he gave about the conversation in the Commission proceedings involved nothing about not posting;²⁴⁷
- (b) Mr Ahern mentioned no such instruction being given to Ms Green in any of the contemporaneous correspondence on 18 and 19 December 2023. It is implausible that he would have been silent about giving such an instruction in his emails to his superiors;
- (c) Ms Green had not spoken to Ms Lattouf until 3:44PM about social media posting.²⁴⁸ It was impossible for the conversation asserted at [48] to Mr Ahern's affidavit to have occurred as alleged;²⁴⁹
- (d) It is inconsistent with Mr Ahern's notes which he prepared prior to the meeting with Ms Lattouf on 20 December 2023. Those notes make no reference to any direction or instruction not to post on Israel-Gaza. Rather, they seek to rationalise the action being taken against Ms Lattouf as premised on Ms Green "*asking*" Ms Lattouf "*not to post anything perceived as controversial*" and that the Human Rights Watch Post was not a breach of any direction or instruction but "*a breach of ABC policies*";²⁵⁰
- (e) Mr Ahern's evidence about what Mr Oliver-Taylor had indicated was contradictory, as exposed under questioning from the Court.²⁵¹ Mr Ahern accepted that Mr Oliver-Taylor's email at 1:49PM on 18 December 2023²⁵² did not suggest that Ms Lattouf ought not post anything.²⁵³ Mr Ahern then agreed that his evidence had been that Ms

²⁴⁵ CB1398, Ahern at [47].

²⁴⁶ P458.30-40 and 459.2-43

²⁴⁷ Exhibit 10, PN952-959. See P460.1-14 and also P452.19-47 and P454.45-46.

²⁴⁸ CB982, Green at [48].

²⁴⁹ See P458.8-12.

²⁵⁰ CB1549

²⁵¹ P491.37-46 and 492.1-23.

²⁵² CB1418.

²⁵³ P491.37-39.

Lattouf was asked not to post anything *controversial* about Israel-Gaza.²⁵⁴ Mr Ahern then suggested, unbelievably, that the instructions had the same meaning.²⁵⁵ He then said that Mr Oliver-Taylor had instructed that Ms Lattouf not post anything that would suggest she was not impartial and that any instruction he may have given to Ms Green was that she not post anything controversial on Israel-Gaza²⁵⁶ (rather than to not post anything at all on Israel-Gaza).

- (f) Mr Ahern ultimately accepted in cross-examination that he had not phrased his communication to Ms Green about Ms Lattouf as a direction. His evidence was as follows:²⁵⁷

You agreed with me a moment ago that there is a world of difference between a suggestion and a direction. You never gave, can I suggest to you, Ms Green a direction to tell Ms Lattouf not to post on socials?---I don't think I phrased it as a direction, because it was clear from Chris Oliver-Taylor's first email what was – what was involved.

So your evidence now is you didn't phrase it as a direction?---Yes, that's true.

You phrased it, what, as a - - -?---I don't think I used the word "directed" – "I direct you to tell her not to post."

...

Just to be clear, I'm asking about what you told Ms Green to tell Ms Lattouf. You

did not tell Ms Green to tell Ms Lattouf, "Ms Lattouf, you are directed not to post on social media"?---I don't think I used those words.

You used, can I suggest, these words:

Please have a word to Antoinette about her social media. She should keep a low profile and not post anything controversial.

?---Yes, something like that.

That's what you told Ms Green to communicate?---Yes.

And that's, as you understood it, what she did?---Yes.

270. The Court should reject Mr Ahern's evidence at [47] of his affidavit and prefer the evidence of Ms Green at [35](i) of her affidavit about the extent of the request Mr Ahern made of her to speak to Ms Lattouf about Ms Lattouf's use of social media.²⁵⁸ Mr Ahern never instructed or directed Ms Green to tell Ms Lattouf to not post anything about the Israel-Gaza that week and well knew he knew he had never given any instruction²⁵⁹.

271. *Second*, Mr Ahern invented in cross-examination that he had spoken to Mr Oliver-Taylor on 18 December 2023 and told him that Ms Lattouf had been or was to be told about her obligations

²⁵⁴ P401.41-46.

²⁵⁵ P492.1-4.

²⁵⁶ P492.15-23. See also P494.5-11.

²⁵⁷ P466.40-46 and 467.1-17.

²⁵⁸ CB980.

²⁵⁹ See also P470.42-44.

on social media.²⁶⁰ There was no reference to any such discussion in his affidavit. After being confronted with this,²⁶¹ Mr Ahern shifted his position from being adamant about such a conversation occurring with Mr Oliver-Taylor to being unsure about it.²⁶²

272. *Third*, Mr Ahern’s evidence that he was “concerned” after reviewing Ms Lattouf’s social media posts in the afternoon of 18 December 2023 about a perception of bias or an absence of impartiality was not credible.²⁶³ His email report to Mr Oliver-Taylor at 3:32PM is inconsistent with him actually having had such a view. In that report, he said (emphasis added):²⁶⁴

She has expressed views about being a child of migrants and views on discrimination, **but has not, as far as we know, expressed personal views that would position her as biased in the current conflict**. She has, however, recently reported on the Opera House protest.

She has done reporting that the chant of ‘gas the Jews’ were unverified. She has investigation that position in an article for Crikey, which could be perceived as taking a position, but, when read in full, it appears balanced and journalistically sound...

273. *Fourth*, Mr Ahern’s evidence in his affidavit at [44]²⁶⁵ that at some unspecified time or times during the afternoon of 18 December 2023, he had “had discussions” with Mr Latimer and Mr Melkman about the complaints and expressed the position that Ms Lattouf should “be reminded of her obligations” and asked not to post anything that would suggest she was not impartial” and that the upshot of these discussions was an agreement between the three of them that this should occur, was untrue:

- (a) the evidence is not supported by any contemporaneous email or other document. Rather, the contemporaneous documentation makes clear that no such conversation(s) occurred and no such agreement was reached. There is no reference to any agreement, which would have been a most material matter to mention in the context of the discussions about Ms Lattouf on 18-19 December 2023, in:
 - (i) Mr Ahern’s email to Mr Oliver-Taylor, Mr Latimer, Mr Melkman and Ms Koloff at 3:32PM²⁶⁶ or his further emails at 3:45PM and 3:48PM;²⁶⁷
 - (ii) Mr Ahern’s emails to Mr Oliver-Taylor, Mr Latimer and Mr Melkman during the evening of 18 December 2023 after Mr Anderson’s investigation into Ms

²⁶⁰ P455.36-47, P456.10-12 and 22-24.

²⁶¹ P456.26-46 and 457.1-10.

²⁶² P456.12-13.

²⁶³ CB1396, Ahern at [41].

²⁶⁴ Cb1445-1446. See P447.21-44 and 448.18-39.

²⁶⁵ CB1397.

²⁶⁶ CB1445-1446.

²⁶⁷ CB1448 and CB1451.

Lattouf's social media.²⁶⁸ Nor is there reference to it in his email early in the morning of 19 December 2023;²⁶⁹

(iii) Mr Ahern's email to Ms Green on the evening of 18 December 2023 or in the morning of 19 December 2023;²⁷⁰ and

(iv) Mr Melkman's comprehensive summary of the meeting between Mr Ahern, Mr Latimer and himself in the morning of 19 December 2023, which Mr Ahern extolled as an "excellent analysis" which "covers everything we talked about, so there's nothing else to add".²⁷¹

(b) The notion there had been some agreement is wholly inconsistent with Mr Melkman recording that Mr Latimer, Mr Ahern and himself had discussed the two steps that might be considered taking in relation to Ms Lattouf at the 19 December 2023 meeting.²⁷²

A couple of steps you could consider taking: (1) you can ask Antoinette to keep a low profile on social media this week (for her own protection as much as anything else, given the campaign against her which appears to be growing – there were 8 complaints logged yesterday, and another 15 today), and (2) if you think it's warranted (personally I don't), you could ask her to switch her profiles to private/protected for the rest of the week. (These two options would also potentially worth considering for other fill-in presenters, depending on the issues they're dealing with and the nature of their social media activity.)

(c) neither Mr Latimer nor Mr Melkman give evidence of any such conversations having occurred or of speaking to Mr Ahern **at all** on 18 December 2023.²⁷³ Their evidence is that they communicated with Mr Ahern only by email;

274. Mr Ahern's attempt to rationalise the evidence at [44] in his affidavit with Mr Melkman's email was unimpressive and untenable.²⁷⁴

275. *Fifth*, Mr Ahern's evidence under cross-examination that Mr Oliver-Taylor had told him to instruct Ms Green to instruct Ms Lattouf not to post anything Israel-Gaza related on 19 December 2023 was false.²⁷⁵ There was no reference to any such discussion in his affidavit, with [74] to his affidavit referring only to emails.²⁷⁶

276. *Sixth*, Mr Ahern's explanation about his firm and unequivocal denials about attending a Teams meeting with Mr Latimer, Mr Melkman and Mr Oliver-Taylor in his sworn evidence in the Fair

²⁶⁸ CB1459 and 1461

²⁶⁹ CB1478.

²⁷⁰ CB1465 and 1482

²⁷¹ CB1505 and CB1511.

²⁷² CB1505-1506.

²⁷³ CB767-769, Latimer at [15]; CB1175-1179, Melkman at [34]-[49].

²⁷⁴ P463.9-35.

²⁷⁵ P464.18-45.

²⁷⁶ CB1402, Ahern at [74]. See P465.1-15.

Work Commission proceedings was incongruous.²⁷⁷ Mr Ahern stated that he had answered questions in the Commission truthfully and did not tell any lies.²⁷⁸ In his affidavit, Mr Ahern stated that having read and reflected on emails he was satisfied that the evidence he gave before the Commission was incorrect and that “I did attend the Teams Meeting, and that it took place shortly after shortly [sic original] Mr Latimer’s email”.²⁷⁹ Mr Ahern’s affidavit represented that his recollection now was that he had in fact attended the Teams Meeting. He said nothing at all about thinking that he had attended the Teams Meeting at some earlier point in time on 20 December 2023 and prior to the all staff meeting at 11:30AM that day. That, however, was the untenable and unbelievable explanation given for the first time in cross-examination.²⁸⁰

277. The explanation was flawed and should be rejected:

- (a) Mr Ahern was not aware of the Human Rights Watch post until sometime after 12:19PM when he received Mr Melkman’s email and logged onto Ms Lattouf’s Instagram. The idea that he thought he had participated in a discussion about a post he had no knowledge of hours before becoming aware of the post is incredulous;
- (b) Mr Ahern was specifically taken by senior counsel for Ms Lattouf in the Commission proceedings to the 12:19PM email and Mr Oliver-Taylor’s 12:23PM response.²⁸¹ The notion he was confused as to time is not plausible; and
- (c) Mr Ahern gave evidence in the Commission that he did not know anything and had made no recommendations about Ms Lattouf being kept on or taken off air for the remainder of the week.²⁸² However, his evidence was that at the conclusion of the Teams meeting, Mr Oliver-Taylor had said that the ABC would need to take Ms Lattouf off air and that he had concurred with the view that Ms Lattouf could not be trusted to not do something on air that could undermine the ABC’s “impartiality”.²⁸³

278. Mr Ahern’s assertion under cross-examination that he was mistaken about the timing of the Teams meeting was false. It reflects particularly poorly on his credibility, given the importance of the information conveyed by Ms Green during the Teams meeting about Ms Lattouf not being given a direction.

²⁷⁷ Exhibit 10.

²⁷⁸ P451.18-20.

²⁷⁹ CB1404, Ahern at [94].

²⁸⁰ P472.1-3 and 12-19. Mr Ahern was asked about his evidence in the Commission proceedings on this matter commencing at P471.5-47.

²⁸¹ P472.23-47 and 473.1-8. See Exhibit 10 PN993-1012.

²⁸² Exhibit 10, PN1035-1038.

²⁸³ CB1406, Ahern [95](d)(ii).

279. *Seventh*, Mr Ahern wrote Ms Green out of his account of the 20 December 2023 Teams meeting.²⁸⁴ That omission was telling in circumstances where Ms Green’s unchallenged evidence was that she had told Mr Latimer, Mr Melkman and Mr Ahern that she had not given a direction or directive to Ms Lattouf but, rather, had spoken with or had a word to her and advised her against posting on social media.²⁸⁵
280. When confronted with this important elision in cross-examination, Mr Ahern dissembled. He asserted that he had not included Ms Green in his account because he did not think there was anything relevant to note down and that he was, instead, focusing on his role.²⁸⁶ That evidence should be rejected. Mr Ahern recounted what occurred during the meeting and attributed particular words and actions to Mr Oliver-Taylor.²⁸⁷
281. Mr Ahern also accepted that Ms Green participated in the Teams meeting.²⁸⁸ He accepted (consistently with Ms Green’s evidence) that after Ms Green joined, Mr Melkman was saying that Ms Green had given Ms Lattouf a direction or directive not to post on social media.²⁸⁹ He then denied that Ms Green said she had given such a directive.²⁹⁰ However, he accepted Ms Green had said that she had spoken with and had a word to Ms Lattouf and *advised her* against posting.²⁹¹ He then went from denying Ms Green had said she had not given a directive²⁹² to not remembering that she had said such a thing.²⁹³ Next, he asserted that Ms Green had explained what she had said to Ms Lattouf and that this seemed to him to be “very clear *guidance* not to post on social media and not to say anything partial”.²⁹⁴ There is a universe of difference between *guidance* and a directive.
282. The Court should reject Mr Ahern’s denials²⁹⁵ that Ms Green did not tell Mr Latimer, Mr Melkman and himself that she had not given Ms Lattouf a directive to not post on social media during the Teams meeting. It should find that she did so and conclude that this would have been communicated to Mr Oliver-Taylor when he joined to meeting, as Mr Ahern accepted it would have been if it was said.²⁹⁶

²⁸⁴ CB1405, Ahern at [94]-[96].

²⁸⁵ CB987, Green at [67](b).

²⁸⁶ P477.33-37.

²⁸⁷ CB1406-1407, Ahern at [95](d)(ii).

²⁸⁸ P477.4-12.

²⁸⁹ P477.18-19.

²⁹⁰ P477.21-22 and 42-44.

²⁹¹ P477.46, 488.1 and 488.6-9.

²⁹² P477.21-22.

²⁹³ P478.3-4 and 11-14.

²⁹⁴ P478.29-33.

²⁹⁵ P479.36-45.

²⁹⁶ P479.14-17.

283. *Eighth*, Mr Ahern omitted any reference to Ms Green and Mr Spurway’s expression of disagreement with the decision to take Ms Lattouf off air after Mr Latimer gave him that instruction whilst they were in their strategy/planning meeting.²⁹⁷ There was no rational reason for him to omit this conversation. His explanation that he was only recounting what he had said and done should be rejected.²⁹⁸ The omission is a further instance of Mr Ahern crafting an account with an eye to assisting the ABC’s case. In a similar vein was his failure to say anything about the comments made by Mr Spurway, which he agreed with, during the all-staff meeting after Mr Lattouf had finished her shift on 20 December 2023 where he concurred with Mr Spurway’s observation that Ms Lattouf was sounding great on air.²⁹⁹
284. *Ninth*, Mr Ahern’s evidence that Ms Green participated in the compilation of his notes prior to the meeting with Ms Lattouf on 20 December 2023 was false. Ms Green’s evidence should be preferred.³⁰⁰ Mr Ahern’s evidence on this appeared geared towards conveying that Ms Green supported or otherwise endorsed what was being scrawled by Ms Ahern when the truth was the contrary: Ms Green opposed taking Ms Lattouf off air and had communicated her view that there was nothing wrong with her Human Rights Watch post.

G. Findings

Findings: the direction

285. It is plain that no direction was given to Ms Lattouf. It is sufficient in that respect to refer to Ms Green’s evidence. The only question is whether the Court should accept the evidence of Mr Oliver-Taylor to the effect that he believed, wrongly, that Ms Lattouf had been directed not to post on social media about Israel and Gaza.
286. The Court would not so find, for at least the following reasons.
287. **First**, the ABC had no entitlement to give any such direction. The ABC has no right to dictate to Ms Lattouf her conduct in her private time in relation to social media or otherwise. It had no right to dictate what subject matter she might post about, let alone impose a blanket ban on any social media activity at all.
288. It should be steadily borne in mind that the post which is alleged to have contravened the direction was unobjectionable. It simply stated the fact that a respected human rights organisation (“*a veritable source*”, in Ms Green’s words) had alleged a war crime. It did not

²⁹⁷ CB1407-1408, Ahern at [97]-[103]. Mr Ahern accepted that Ms Green and Mr Spurway had disagreed and that Ms Green had pointed out that the Human Rights Watch story had been on the ABC and BBC that morning and she did not see anything wrong with it: P480.37-47.

²⁹⁸ P481.1-3.

²⁹⁹ P469.23-33.

³⁰⁰ Mr Ahern’s denials at P483.31-40 should be rejected.

breach any ABC policy. The ABC itself had reported on the matter in terms which are distinguishable only in the sense that they are slightly more emotive.

289. It is impossible to discern any basis on which the ABC was entitled to direct Ms Lattouf not to make the Human Rights Watch post. It would be inferred that the ABC does not ordinarily give, or purport to give, directions which it has no right to give. It would also be inferred that ABC managers do not ordinarily assume that they are entitled to direct employees as to their private conduct.
290. **Second**, there is no objective evidence to suggest that any instruction to give a relevant direction was given. The only possible evidence in that category was Mr Oliver-Taylor's email of 18 December 2023, which vaguely invited Mr Ahern to "*ensure that Antoinette is not and has not been posting anything that would suggest she is not impartial*".³⁰¹ This was hardly an instruction to give a direction of the kind identified by Mr Oliver-Taylor.
291. **Third**, Ms Green explicitly told Messrs Melkman, Ahern and Latimer during the 20 December 2023 Teams meeting that she had not given any direction. That evidence is (as explained above) corroborated *inter alia* by her near-contemporaneous account emailed to Ms MacBean the following day.³⁰² The evidence is not contradicted by Messrs Melkman, Ahern or Latimer, and it should be accepted.
292. If accepted, the evidence is conclusive of the issue. It is not within the realms of the possible that Ms Green told Messrs Melkman, Ahern and Latimer that no direction had been given, but that they neglected to advise Mr Oliver-Taylor of that fact. Rather the Court would find that each of Messrs Oliver-Taylor, Latimer, Ahern and Melkman knew that no direction had been given, and that any evidence they have given to the contrary is false.
293. **Fourth**, the contemporaneous communications are incompatible with the alleged belief that Mr Oliver-Taylor or any other person believed, at the time Ms Lattouf was removed from air, that a direction had been given and breached. That material includes the following:
- (a) Mr Ahern's email of 18 December which stated expressly that Ms Green "*suggested that Antoinette may be wise not to post anything on her socials this week*";
 - (b) Mr Ahern's email of 20 December, which similarly indicated that he said "*Elizabeth advised you not to post anything that could be perceived as controversial on your socials, while you are on air with us this week*",³⁰³

³⁰¹ DB Tab 8.

³⁰² DB Tab 109.

³⁰³ DB Tab 99.

- (c) Mr Oliver-Taylor’s email of 20 December, in which he said that Ms Lattouf “*was asked not to post*”;³⁰⁴ and
- (d) Mr Oliver-Taylor’s file note of 21 December 2023, which recorded that the group “*agreed that she has breached the trust of the program by not following a request*”;³⁰⁵
294. It strains credulity that any person with ordinary comprehension would have regarded Mr Ahern’s emails as consistent with Ms Lattouf having been given a direction. It is similarly incredulous that Mr Oliver-Taylor believed a direction had been given but characterised the matter as one of a request rather than a command in his emails and file note.
295. The only contemporaneous reference to any direction prior to Ms Lattouf’s dismissal is Mr Latimer’s email which suggested that “*The clear instructions were to direct Antoinette not to post to socials for the rest of this week*”.³⁰⁶ But it is plain that there were no “*clear instructions*” and certainly no “*clear instructions*” to direct Ms Lattouf not to post to social media at all; Mr Latimer’s view appears to be his and his alone.
296. The evidence of Mr Oliver-Taylor and Mr Latimer that they did not perceive a difference between a direction, a request, advice or a suggestion should be rejected. Rather the Court would find that the position is as Mr Anderson described it: that all ABC managers would understand the difference between a direction a request and advice.³⁰⁷
- And can we take it then that the phrase “lawful and reasonable direction” is one that you would expect both employees and managers to understand?---Yes.
- And what about the word direction?---Yes, you should understand what a direction
- You should. Managers as well as staff or just managers?---Yes, they should.
- Okay. You don’t regard that as being a word that’s sort of pregnant with ambiguity?---No.
- You understand, of course, the difference between a direction and, for example, a suggestion?--Yes.
- And anyone would. This is - - -?---Yes.
- The is elementary?---Yes.
- And the difference between a direction and a request?---Yes.
- Difference between a direction and advice?---Yes.
297. **Fifth**, it is relevant that neither Mr Oliver-Taylor, Mr Latimer or any other person was able to identify with any precision the direction which was thought to have been given. Rather an array of formulations were proffered ranging from a blanket ban on any use of social media, a ban on posting related to Israel and Gaza, a ban on posting anything controversial relation to Israel

³⁰⁴ Exhibit 7.

³⁰⁵ DB Tab 110.

³⁰⁶ DB Tab 92.

³⁰⁷ P197.44–P198.18.

and Gaza, and a ban on posting anything that would suggest Ms Lattouf was not impartial in relation to Israel and Gaza. Each of the relevant managers appears to have had a different understanding, and Mr Oliver-Taylor in particular has characterised the direction in a variety of ways in his evidence.³⁰⁸

298. Mr Oliver-Taylor and Mr Latimer both sought to explain away this phenomenon by suggesting that there is no material difference between the different formulations. That is not a suggestion to be taken seriously, and weighs against their credit.
299. It is inherently improbable, in the ordinary course of things, that a senior executive would take action against an employee for breach of a direction without having a clear concept of what the direction was. The total lack of clarity in this case is a matter which renders improbable the ABC's narrative generally and the evidence of Mr Oliver-Taylor and Mr Latimer specifically.
300. The Court would find that neither Mr Oliver-Taylor, Mr Latimer, Mr Melkman, Mr Ahern or any other person believed that Ms Lattouf had been given a direction.

Findings: breach of policy

301. The state of confusion regarding the direction equally characterised the evidence regarding a breach of policy. Mr Oliver-Taylor's affidavit, and the ABC's pleading, refer to the PUSM. However Mr Oliver-Taylor's contemporaneous communications include no reference at all to the PUSM:
- (a) "*it looks like AL has now breached editorial guidelines*";³⁰⁹
 - (b) "*looks like she has breached editorial impartiality*";³¹⁰
 - (c) "*confirming my view is that she has breached our editorial policies while in our employment*";³¹¹ and
 - (d) "*the view from Local Sydney Radio management is that AL has breached ABC editorial policy by posting commentary on the Gaza/Israel war*".³¹²
302. It is now common ground that Ms Lattouf did not breach "*editorial guidelines*" or "*editorial policies*" or "*editorial impartiality*". It must have been clear to any person with even a passing familiarity with the ABC's regulation that there was no "*editorial*" issue at all.
303. The second remarkable aspect of the case is that Mr Oliver-Taylor's affidavit evidence indicated that he was satisfied that Ms Lattouf had breached the PUSM, and that he took that

³⁰⁸ See also Spurway [13] and Ahern [44].

³⁰⁹ DB Tab 97 (Oliver-Taylor email to Leys and others on 20 December at 12:43pm).

³¹⁰ DB Tab 95 (Oliver-Taylor text message to Anderson on 20 December at 12:29pm).

³¹¹ DB Tab 95 (Oliver-Taylor text message to Anderson on 20 December at 1:00pm).

³¹² Exhibit 7 (Oliver-Taylor email to Leys and others on 20 December at 1:04pm).

into account when deciding to remove her. However Mr Oliver-Taylor twice in cross-examination denied having reached any firm view on the subject matter, and that now appears to be the effect of his evidence; and in his evidence he was quite unable to explain how, in his own mind, Ms Lattouf's conduct may have breached the PUSM.

304. It would be inferred that ABC decision makers do not ordinarily sanction employees for *potential* breaches of policy. It would also readily be inferred that ABC decision makers who sanction employees for breach of policy do so on the basis of a clear and unequivocal idea of what policy was breached, and how. It follows that it is inherently improbable that Mr Oliver-Taylor sanctioned Ms Lattouf on the basis of a *potential* breach of a policy and in circumstances where he was uncertain what policy was breached and how it was breached.
305. The Court would find that Mr Oliver-Taylor did not believe that Ms Lattouf had breached, or had potentially breached, the PUSM.

Findings: decision makers

306. The ABC pleads that Mr Oliver-Taylor, and Mr Oliver-Taylor alone, was the relevant decision maker. This should be rejected.
307. As the factual chronology above indicates, both Mr Anderson and Ms Buttrose heavily influenced the course of events. It is readily apparent that they fall within the categories of persons whose reasons are material to the determination of an application of this kind, whether that be characterised as “*those who had an influence on the ultimate decision*”, “*those who had made an “indispensable contribution” to the decision*” or those who had a “*a material effect on the ultimate outcome*”.³¹³ At a minimum they heavily encouraged the removal of Ms Lattouf by heaping pressure on Mr Oliver-Taylor to act. He experienced real stress as a result of their conduct;³¹⁴ he was “*between a rock and a hard place*”;³¹⁵ “*the pressure was now building, the concerns were rising... the position was becoming harder and harder*”³¹⁶ because, although he “*thought the issue was benign at this point*” Ms Buttrose was writing directly to him.³¹⁷
308. In Mr Anderson's case the position is more straightforward. His contribution was not simply a matter of influence; rather he had exercised the authority to dismiss. Mr Anderson ultimately accepted that he had an effective right of veto³¹⁸—that is to say, he is the person who ultimately authorised the dismissal; but in truth he was more influential than that. Mr Oliver-Taylor

³¹³ See the authorities collected in *Laing O'Rourke Australia Management Services Pty Ltd v Haley* [2024] FCA 1323 at [294].

³¹⁴ PN380.32.

³¹⁵ P388.25.

³¹⁶ P389.21–26 (Oliver-Taylor XXN).

³¹⁷ P389.28–35 (Oliver-Taylor XXN).

³¹⁸ 285.36–40.

consulted with Mr Anderson at every step, and consistently characterised his views as recommendations (necessarily, recommendations to the ultimately decision maker):

- (a) *“I will pass on this note, copy Simon to the MD as our position at this time. He may well hold a different view and we will need to pivot”*³¹⁹
- (b) *“A couple of steps you could consider taking”*³²⁰
- (c) *“I recommend we hold until Friday”*³²¹
- (d) *“I briefed the MD as he had been receiving the complaints and explained that our recommendation was that she had not breached and therefore should stay on air.”*³²²
- (e) *“I am expecting the recommendation to be that we will not continue with her remaining two shifts as a result of this breach.”*³²³

309. Mr Oliver-Taylor’s email sent at 1:04pm which is quoted in (e) above is telling on the question of Mr Anderson’s material involvement. What is also telling is the chronology of events. The “*decision*” could not be actioned and was not actioned until Mr Oliver-Taylor had sought and obtained Mr Anderson’s recommendation or approval.

310. The Court would be comfortably satisfied that Mr Anderson was a decision maker in the relevant sense, as was Ms Buttrose.

Findings: purported reasons for dismissal

311. There is only one sensible explanation for the seemingly shambolic state of affairs revealed in the evidence; for the abject confusion about the alleged direction; for the failure to clarify the fact of the direction; for the abject confusion about the alleged policy breach, and the failure to ever reach a concluded view about breach; for the failure to provide Ms Lattouf a modicum of procedural fairness; for the failure to follow the requirements of the enterprise agreement; for the failure to react to the various indications that no direction had been given; for the failure to take any steps to clarify whether the account Ms Lattouf had given in her post-removal email was correct; for the deep theoretical concern about the ABC’s integrity when it came to Ms Lattouf contrasted with the failure to investigate the extensive leaks to The Australian—an example of an *actual* lack of integrity and misconduct by an unidentified ABC officer.

312. The explanation is this. Mr Oliver-Taylor was not truly concerned to know whether Ms Lattouf had breached a policy, or direction. He regarded those matters as simply providing a

³¹⁹ DB Tab 44.

³²⁰ DB Tab 45.

³²¹ DB Tab 71.

³²² DB Tab 110.

³²³ Exhibit 6.

justification or pretext for the outcome which he, and those directing him, wished to achieve: Ms Lattouf's removal. In that context, it was unnecessary, and counter-productive, to know whether Ms Lattouf had been given a direction. It was unnecessary, and counter-productive, to determine whether she had breached a policy. It was unnecessary, and counter-productive, to allow Ms Lattouf to be heard in her defence. It was unnecessary, and counter-productive, to follow the requirements of the enterprise agreement. It was unnecessary, and indeed counter-productive, to respond to her queries or investigate them. The same explanation obtains in respect of Mr Anderson's inexplicable failures to do what would be expected of him.

313. The Court would reject the evidence of Mr Oliver-Taylor to the effect that the reasons for Ms Lattouf's removal were his belief that she had breached a direction and had breached the PUSM. The Court would also reject Mr Anderson, Mr Latimer and Ms Buttrose's evidence denying that Ms Lattouf's opinions influenced their conduct.

Findings: hostility to Ms Lattouf's opinions

314. It is not necessary for Ms Lattouf to go further and persuade the Court that the ABC was hostile toward her because of her opinions. The ABC bears the onus, and the rejection of its evidence as to the reasons for dismissal, having regard to the evidence overall, has the result that Ms Lattouf must succeed. Likewise, if the Court (contrary to the foregoing) does not reject the evidence of Mr Oliver-Taylor, Mr Anderson and/or Ms Buttrose but is not affirmatively satisfied by it that the proscribed reasons alleged were not substantial and operative ones, Ms Lattouf must succeed.
315. It is however open to the Court to find that the ABC, and its most senior executives, were in fact hostile to Ms Lattouf's opinions.
316. In the case of Mr Anderson, it is sufficient to refer to his messages to Mr Oliver-Taylor. In the case of Mr Oliver-Taylor, it is sufficient to refer to his response ("*agree*"; "*this is hugely problematic*"). In the case of Ms Buttrose, the hostility is patent, as was her glee when her desire to see her sacked was satisfied. Ms Buttrose on her account knew nothing about Ms Lattouf other than what the complainants had said about her; she had no reason to be hostile to Ms Lattouf other than her opinions.³²⁴
317. There is a further basis to conclude that the ABC was hostile to Ms Lattouf's opinions.
318. A remarkable feature of this case is that the ABC's most senior executives openly admit that they consider that Ms Lattouf should not have been hired because of her opinions on the Israel-Gaza war. Mr Oliver-Taylor's email to Ahern openly stated that a proper inquiry would have avoided Ms Lattouf's hire because it would have identified "*Her position on the Gaza/Israel*

³²⁴ Buttrose [10]–[11] (CB 1046).

war” and the fact that she had signed the open letter calling for ethical reporting.³²⁵ Mr Anderson openly acknowledged that Ms Lattouf’s opinions should have been a barrier, or at least a factor weighing against, her hiring.

319. These proceedings are concerned with the reasons for Ms Lattouf’s dismissal. But the fact that each of Mr Anderson, Mr Oliver-Taylor and Ms Buttrose openly acknowledge that they would have discriminated against Ms Lattouf in hiring because of her political opinions is a matter which weighs heavily in favour of a finding that the ABC was hostile toward Ms Lattouf and her opinions.

H. Dismissal contrary to s771(1)(f): consideration

320. In relation to the s 772 claims Ms Lattouf submits as follows.

Political opinion

321. The ABC admits that Ms Lattouf’s opposition to the Israeli military campaign in Gaza was capable of constituting a “*political opinion*”. It denies that Ms Lattouf’s support for Palestinian human rights, questioning of the authenticity of the footage of antisemitic chants at the Opera House protest on 9 October 2023 and view that media organisations should report the conflict between Israel and Palestinians accurately and impartially are “*political opinions*”. It also cavils with the notion that questioning the integrity of the footage of antisemitic chants is an opinion.
322. Given the ABC’s admission regarding Ms Lattouf’s opposition to the Israeli military campaign in Gaza, it is not strictly necessary to determine whether her other opinions are political opinions in the relevant sense; but it is reasonably clear that they are.
323. The noun “*opinion*” means a “*personal view, attitude or estimation*”.³²⁶ The prefatory adjective “*political*” means,³²⁷ relevantly, “*of or relating to the governing of a nation, state, municipality etcetera*”, “*affecting or involving the state of government*”,³²⁸ “*Of, belonging, or pertaining to the state or body of citizens, its government and policy*”, “*Relating to, or concerned or dealing with politics or the science of government*” and “*Belonging to or taking a side in politics or in connection with the party system or government*”.³²⁹
324. The opinions pleaded are each “*political*” in the sense that they relate to or affect the governing of a nation or state, or affect or involve the state of government. They involved taking a side in relation to political matters and questions and are, perforce “*political opinions*”.

³²⁵ DB Tab 88.

³²⁶ Macquarie Dictionary, Online Edition.

³²⁷ See also *Nestle v Equal Opportunity Board* [1990] VR 805 at 813-814 (Vincent J).

³²⁸ Ibid.

³²⁹ Oxford Dictionary, Online Edition.

Dismissal

325. Ms Lattouf contends that her employment relationship with the ABC was terminated at the ABC's initiative at the meeting on 20 December 2023 when she was told she would not be performing any further work at or service for the ABC, and after which she was not allocated any work and was told to leave the ABC's premises. The ABC initially admitted that it had terminated Ms Lattouf's employment.³³⁰
326. At some later point the ABC apparently discovered that it had not dismissed Ms Lattouf after all. It changed tack and alleged that Ms Lattouf's application was for that reason incompetent.
327. In March 2024 the Fair Work Commission determined that jurisdictional objection by deciding that Ms Lattouf had been dismissed: *Lattouf v Australian Broadcasting Corporation* [2024] FWC 1441; 332 IR 127, and issued a certificate under s 776(3) that it was satisfied that all reasonable attempts to resolve the dispute have been or were likely to be unsuccessful. The ABC did not appeal the decision or seek judicial review.
328. Any submission that the ABC did not terminate Ms Lattouf's employment should not, in these circumstances, be entertained. To allow the ABC to re-litigate the question decided by the Commission would be an abuse of process. The re-litigation would expose Ms Lattouf to unreasonable vexation and expense, "*run contrary to principle of finality, would create the possibility of inconsistent judgments on the same issue and be an inefficient use of the Court's resources. All of these matters would tend to bring the administration of justice into disrepute.*"³³¹
329. The ABC is, further, estopped from asserting that it did not dismiss Ms Lattouf. An issue estoppel operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in an earlier proceeding.³³² The doctrine extends to any final decision pronounced by a "*judicial tribunal*", which for present purposes would comprehend the Commission.³³³ In the present matter, the Commission was obliged to 'deal with' the dispute under s 776 if and only if a valid application had been made under s 773. In order to 'deal with the dispute' it was required to determine whether Ms Lattouf had been terminated at the ABC's initiative. Only after having made that

³³⁰ FASOC at [21B], admitted in the Defence at [21B].

³³¹ *Patial v Kailash Lawyers Pty Ltd* [2023] FCAFC 155 at [14], [20]–[32].

³³² *Blair v Curran* (1939) 62 CLR 464 at 531–533 (Dixon J); *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [22] (French CJ, Gageler and Keane JJ).

³³³ *The Administration of the Territory of Papua New Guinea v Daera Guba* (1973) 130 CLR 353 at 453 (Gibbs J) citing Lord Guest in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 933; *Kazal v Thunder Studios Inc (California)* [2023] FCAFC 174 at [399] (Wheelahan J).

determination could it have issued a certificate under s 776(3). Had the question been determined adversely to Ms Lattouf, the proceeding would have been dismissed.

330. Unlike the circumstances considered *Miller v University of NSW* [2003] FCAFC 180; 132 FCR 147, the issue of Ms Lattouf’s dismissal was the “*central and determinative issue*” in the Commission proceeding. The Commission’s determination of that question was a necessary step along the way to its exercise of power under s 776 and the issue of a certificate which was a condition precedent to an application being made to this Court. The determination of that question was made by a judicial tribunal and was final as between the parties. The ABC is estopped from denying with it.
331. In any event, and for the reasons articulated by the Commission, Ms Lattouf’s employment was terminated at the meeting on 20 December 2023. Ms Lattouf was told she would not be performing any further work at or service for the ABC, and was in fact not allocated any work. She was told to leave the ABC’s premises immediately and her access card was revoked. At the point of her dismissal there was no suggestion that she would be paid for her remaining shifts. Any reasonable person in her position who had knowledge of the background facts and dealings between the parties would have understood that their employment was terminated.
332. This was an express termination of the employment relationship at the ABC’s initiative on any view of the matter.³³⁴ Any reference to the contractual position is a distraction, given that the focus of s 772(1) is the employment relationship not the employment contract. The words “dismissed”, “sacked” or “terminated” need not be used. What is required is an objective analysis of what has occurred with a focus on what a reasonable person in the position of the parties with knowledge of the background nature of the relationship would have understood. On any view, Ms Lattouf’s employment relationship was terminated by the ABC at the meeting on 20 December 2023. That there is the prospect of further work being offered at some future point is not determinative or particularly relevant.
333. That position is bolstered when the following matters are considered.
334. *First*, as Ms Lattouf explained prior to the meeting, she had been planning with her producers her next two shows when she was pulled off air by Mr Ahern and told to leave the building.³³⁵
335. *Second*, as Mr Ahern accepted, he was tasked with taking Ms Lattouf off air and sending her, with Ms Lattouf not to do any more work and would not be coming back.³³⁶

³³⁴ *Broadlex Services Pty Ltd v United Workers’ Union* (2020) 296 IR 425 at [91].

³³⁵ P110.9-16. See also P109.31-36.

³³⁶ P481.16-27.

336. *Third*, the following conduct of the ABC (which can and should be considered as admissions against interest) makes clear that Ms Lattouf had been terminated. In this regard:

- (a) Ms Buttrose gave evidence that Mr Oliver-Taylor had *dismissed* Ms Lattouf;³³⁷
- (b) Ms Buttrose did not cavil with the characterisation of what had happened to Ms Lattouf from the complainant whose congratulations she was pleased to receive as the ABC having “fired” Ms Lattouf.³³⁸ Rather, she forwarded this “nice” email to Mr Anderson;
- (c) Ms Buttrose corresponded with complainants between 5:33PM and 5:48PM on 20 December 2023 informing them that “Ms Lattouf no longer works at the ABC”;³³⁹
- (d) Ms Buttrose forwarded these complaints to Mr Oliver-Taylor with the subject line “*These people have been advised Antoinette no longer works at the ABC*”;³⁴⁰
- (e) at no point did the ABC deny or otherwise cavil with the assertion in *The Australian* article that Ms Lattouf had been sacked;³⁴¹
- (f) at no point did the ABC reply to Ms Lattouf’s email sent at 5:23PM. Rather, it ignored her.³⁴² This is significant in a number of respects. *First*, it did not tell her she was not dismissed. *Second*, had she in fact remained employed, it would have been both natural and normal for her employer to respond;
- (g) Ms Buttrose responded to members of the public who were concerned about Ms Lattouf’s sacking by telling them that “employment of staff and terminations are an operational matter” and that their correspondence would be referred to the Managing Director. She did not cavil with the proposition that Ms Lattouf had been sacked or fired and otherwise implied that she had been terminated;³⁴³ and
- (h) in forwarding on these complaints to Mr Anderson, Ms Buttrose entitled her email “Acknowledged complaints about the dismissal of Antoinette FYI – Ita”.³⁴⁴

337. It is plain, as the ABC initially conceded, that Ms Lattouf was terminated.

Determination

338. Section 783 of the FW Act creates a reverse onus of proof. It is to be presumed, unless proven to the contrary, that Ms Lattouf’s employment was terminated for one or other of the pleaded

³³⁷ P522.9-11 and 531.10-11

³³⁸ Exhibit 12.

³³⁹ CB1148-1163.

³⁴⁰ CB1147.

³⁴¹ Exhibit 18.

³⁴² P111.1-2.

³⁴³ Exhibit 13.

³⁴⁴ Exhibit 13.

proscribed reasons. Ms Lattouf will succeed unless the ABC, on the whole of the evidence, establishes on the preponderance of probabilities that the proscribed reasons were not substantial and operative ones.³⁴⁵ In other words, unless the Court is affirmatively satisfied that none of the substantial and operative reasons for Ms Lattouf's dismissal were the proscribed ones alleged, Ms Lattouf will succeed.³⁴⁶

339. The Court would not be so satisfied for at least the following reasons.

340. **First**, and for the reasons already given, the ABC evidence denying proscribed reasons is implausible and would not be accepted. In summary:

- (a) No relevant direction was given to Ms Lattouf, and Mr Oliver-Taylor had no sensible basis to think any such direction had been given. Mr Oliver-Taylor's claims that he assumed that a relevant direction was given are implausible, bordering on incredulous.
- (b) It is similarly implausible, bordering on the incredulous, that Mr Oliver-Taylor in fact considered Ms Lattouf's 19 December post—indistinguishable from the ABC's own reporting on the subject—to have contravened any ABC rule; and in any case, Mr Oliver-Taylor now disclaims any such view.
- (c) The contemporaneous written exchanges demonstrate with uncommon clarity that the catalyst for the actions the relevant ABC personnel was that Ms Lattouf held an opinion on the Gaza conflict, and indeed that she had a particular opinion critical of the conduct of the State of Israel. Those materials make clear that their entire course of action of Mr Oliver-Taylor and Mr Anderson in particular—beginning with close scrutiny of her conduct and culminating in her dismissal—was motivated by that fact.
- (d) Accepting the ABC's innocent explanations would require the Court to find that Mr Oliver-Taylor did not understand the ABC's own policies, ignored the ABC's obligations under its enterprise agreement, habitually made unjustified and irrational assumptions and treated his employees in a grossly unfair way. Given that Mr Oliver-Taylor is a highly successful senior executive, this is not only *prima facie* unlikely but simply cannot have been the case.
- (e) The conduct of the ABC and its senior executives was inexplicable, except as a product of animus toward Ms Lattouf. The repeated departures from usual practice, the failure to provide a modicum of procedural fairness, the unwillingness to interrogate any of the many obvious questions which should have been asked before and after her removal

³⁴⁵ *Axon v Axon* (1937) 59 CLR 395 at 403 (Dixon J); *Jones v Dunkel* (1959) 101 CLR 298 at 305 (Dixon CJ).

³⁴⁶ *TWU v Qantas Airways Limited* (2021) 308 IR 873 at [302] (Lee J).

are otherwise unaccountable. The overall irrationality of the ABC's conduct, on its account of the facts, belies the truth of that account.

341. Simply put, the overwhelming effect of the contemporaneous material is that Mr Anderson and Ms Buttrose wished to be rid of Ms Lattouf as soon as they became aware of her opinions on the Gaza conflict; and that Mr Oliver-Taylor shared their attitude; that in the face of advice that Ms Lattouf had done nothing wrong and a fear of public opprobrium, Mssrs Oliver-Taylor and Anderson hesitated for a short time before contriving a concern (including with Mr Latimer) about Ms Lattouf's 19 December post and using that as an excuse to be rid of her.
342. The ABC's evidence, and in particular the evidence of Mr Oliver-Taylor and Mr Anderson, would be rejected. In that case, and having regard to the whole of the evidence, the Court would conclude that the ABC has not met its onus of proof.
343. That is not quite the end of the matter. Rejection of the evidence of the decision maker does not *necessarily* mean that the ABC has met its onus. It is necessary to consider the question by reference to all of the evidence, because it is conceivable that other evidence might persuade the Court that the prohibited reasons were not reasons for the dismissal.³⁴⁷ But this case is not in that category. Having rejected the evidence of Mr Oliver-Taylor, Anderson, Latimer and Buttrose, and having considered the evidence as a whole, the Court would not be satisfied that the ABC has excluded Ms Lattouf's political opinions and race as reasons for her dismissal. To the contrary, the Court would be positively satisfied that those were the reasons for her dismissal. That is particularly so in Mr Oliver-Taylor's case given his lie about having any awareness of Ms Lattouf's Lebanese race or national origin.
344. **Second**, even if Mr Oliver-Taylor's account—that he believed that Ms Lattouf had been directed “*not to post anything about the Israel-Gaza war*”, to make any post relevant to Gaza, and that he dismissed her because he believed she had breached that direction—the case against the ABC would in any event be made out.
345. No ABC employee other than Ms Lattouf was given any comparable direction. The ABC's evidence makes clear that the only possible reason for the alleged direction was Ms Lattouf's previous expressions of her views about the Israeli-Palestinian conflict and related issues.
346. It is no defence to Ms Lattouf's claim for the ABC to demonstrate that it imposed on her, because of her political opinions, a bespoke and peculiarly demanding rule and then sacked her for breaching that bespoke rule. To impose an idiosyncratic standard on an employee for a

³⁴⁷ *Laing O'Rourke Australia Management Services Pty Ltd v Haley* [2024] FCA 1323 at [437] and the cases there cited.

prohibited reason, and then dismiss them for breach of that idiosyncratic standard, is to dismiss them for a prohibited reason.

347. **Third**, the ABC evidence suggests (albeit ambivalently) that the reasons for its conduct vis-à-vis Ms Lattouf included the concern held by Ms Buttrose, Mr Anderson and Mr Oliver-Taylor about her “*impartiality*”. For the reasons already given, this is an effective admission that the reasons for its conduct included her political opinions. To say that Ms Lattouf was “*partial*” on the question of Israel’s conduct in Gaza is to say that she held an opinion on the topic. Dismissal for reasons of impartiality constitute a dismissal for reasons which include political opinion.
348. Further and to the extent it may be contended that Ms Lattouf was sanctioned by reference to some impartiality requirement, standard or rule, three additional observations may be made:
- (a) The ABC could have, but did not, plead that “*impartiality*” was an inherent requirement of Ms Lattouf’s role. It did not do so (and it could not have made good such a defence).
 - (b) There is no such impartiality rule. It is not to be found anywhere in the ABC’s voluminous policies and procedures. There is no basis for such a rule in the ABC Act; the ABC’s statutory obligation is to protect the impartiality of the news and information which it broadcasts. It would be extraordinary if the ABC, in service of that goal, promulgated a rule that no employee may “*engage in conduct which might reasonably be perceived not to be impartial*”. It is in any case plain that ABC employees habitually engage in conduct which might reasonable be perceived not to be impartial.
 - (c) Even on the ABC’s view of things, this rule is not applied uniformly but rather (as the ABC’s counsel put it) “*it is contextual*” and “*it depends on the circumstances*”. That is to say, there is some criterion other than the mere fact of “*partiality*” which determines whether a sanction is applied. That being so, it would be no answer to a claim of this kind to advert to the rule; it would be necessary to explain what “*context*” or “*circumstances*” came to bear and to exclude the possibility that the relevant “*context*” or “*circumstances*” include Ms Lattouf’s political opinions.
349. As to the latter point, the evidence of several ABC witnesses positively demonstrated that the “*context*” and “*circumstances*” which led to a sanction in Ms Lattouf’s case were her political opinions. Mr Oliver-Taylor in cross examination said:³⁴⁸

I think that due diligence should have been taken with Ms Lattouf and Ms Lattouf would make an excellent presenter on the ABC in other times, but **the published views** meant that it was a very difficult decision that my colleagues had made...

³⁴⁸ T389.35-40.

350. Similarly, Mr Anderson accepted that a key consideration in his mind apropos the impartiality requirement was Ms Lattouf's political opinions:³⁴⁹

for anyone who had taken on – particularly Israel/Gaza war and anyone who had taken a particular position on this and publicly stated it otherwise, before coming on and hosting open talkback, yes, I think anyone is not appropriate to be doing that two months after – or within two months of that particular conflict starting and while division was certainly in the community at that particular point in time.

351. Mr Melkman, the policy expert who was involved in the alleged debate which led to the decision to remove Ms Lattouf, expressly conceded that her position on the war in Gaza was one of the factors that was being considered in how the “impartiality rule” was applied:

“MR FAGIR: See, Mr Melkman, isn't this the case. If any other ABC employee had reposted that Human Rights Watch post, there would have been no sanction whatever?---I truly cannot say that. Those would be very different circumstances.

Different because Ms Lattouf had expressed particular views previously?---**That's – that is one of the** factors. There are many factors that, as we've just discussed.”³⁵⁰

MR FAGIR: Mr Melkman, in terms of your attitude towards Ms Lattouf, your thinking. You saw her as being in a different category, for reasons which included her views sympathetic to the Palestinian people; correct?---Are you asking me about the – my state of mind in assessing the post against the social media guidelines, or with respect to the – with respect to the direction? I would like to answer as precisely as I can. I think this is very crucial.

Why is it crucial?---Because it is absolutely relevant to an assessment of any content against the personal use of social media guidelines – sorry, any social media activity against the personal use of social media guidelines. It is absolutely relevant to consider the context of that social media activity, which includes previous social media activity. Whereas the question of whether or not Ms Lattouf breached a direction, questions around her previous activity have no bearing on my view, or anyone else's view, as to whether she breached a direction.

Okay. Well, let me take that step-by-step. Firstly, dealing with the personal use of social media guidelines, a factor that you took into account in considering whether there had been a potential breach was her views in relation to the conduct of State of Israel. Correct?---Her previous activity, which included the public presentation of views, yes?

Views critical of the conduct of the State of Israel. Correct?---Yes, those were some of the views, yes.

And views sympathetic to the Palestinian people. Correct?---Yes, as I explained before.³⁵¹

352. The ABC has not explained why its alleged impartiality requirement led in Ms Lattouf's case to removal from air, but in others led to no sanction or mild sanction; and to the extent the evidence supplies an answer to that question, it positively indicates that the particular content of Ms Lattouf's opinions were the key distinguishing feature. The ABC has not therefore discharged its onus.

³⁴⁹ T280.15-20.

³⁵⁰ T626 – 627 35-20.

³⁵¹ T627.1-26.

353. **Fourth**, any reference to a breach of a direction, or breach ABC policies, and *a fortiori* a of breach of some unwritten and nebulous impartiality expectation or preference, is ultimately irrelevant. It is no defence to a claim under s772(1)(f) to say that the employee by having or exercising the protected attribute breached some policy, or contradicted some employer's preference. The protection of s772(1)(f) does not operate subject to an employer's direction, or policy, or unwritten desire to protect its reputation or other preference. Nor does it permit conduct which is based on an assumption or expectation about the way that a protected attribute might be publicly perceived, or responded to.
354. An employer might genuinely be concerned that union presence at a workplace would limit its managerial prerogative and impact on the efficiency and profitability of its operation. If such an employer sacked an employee who joined a union because it was so concerned, it would not defend the claim by saying that it was not concerned about union membership *per se*, but about the implications of union membership for its profitability.
355. An employer might be concerned that its customers, or some portion of them, would disapprove of an openly gay employee. The employer might genuinely be concerned that having an openly gay employee might reduce its profitability or reputation. If such an employer dismissed an employee who was openly gay, it could not defend a claim by saying that it was not concerned about their sexuality *per se*, but about the implications of the employee's sexuality for business.
356. An employer might promulgate a policy precluding women from being employed in a section of its business. If that employer then dismissed a woman from that section, it could not defend a s772(1)(f) claim on the basis that the employment of the employee breached its policy.
357. An employer might direct an employee not to attend Church. If that employer then dismissed a Catholic employee on the ground that the employee attended Church, it could not defend a s772(1)(f) claim on the ground that the employee had breached a direction.
358. In each case, the employee would have been dismissed because of a protected attribute. Similarly, if (which is denied) Ms Lattouf was dismissed because it was thought she had in expressing an opinion breached a policy or a direction, she was dismissed because of her opinions. Likewise, if she was dismissed because of a concern about the audience's reaction to her as a person with particular political opinions, she was dismissed because of her opinions.
359. **Fifth**, and to the extent that the ABC contends that it acted because of a fear that Ms Lattouf, given that she held the opinions she did, might while on air suddenly go off-piste and announce them, that would be rejected as a matter of fact. But again, it would not in any case avail the ABC. As Mortimer J explained in *Sayed*, action based on an assumption about the propensity of a person with a protected attribute to act in a particular way is action because of the protected attribute:

[193] The respondent’s submissions also sought to separate out Mr Vickers’ apprehensions that the Socialist Alliance might undermine or infiltrate the respondent from the holding of a political opinion as a member of the Socialist Alliance. It was, the respondent submitted, akin to the offensive sign held up during an industrial protest in the BHP Coal case — the reason for the adverse action was the offensiveness of the sign, not the industrial activity. Here, at least, if the remainder of the respondent’s submissions were rejected, the respondent submitted that the reason for the adverse action was the apprehension of undermining and infiltration, not the political beliefs of the Socialist Alliance.

[194] As I set out below, on the facts I reject this submission. I doubt, in any event, at a level of premise or principle, that such a distinction can be drawn. The respondent seeks to separate a protected attribute from characteristics either associated with it, or perceived by the decision-maker to be associated with it. In the days before pregnancy became a distinctly protected attribute in anti-discrimination law, becoming pregnant was seen as a characteristic associated with women, or perceived to be associated with women. An employer might say: I refused to give the female applicant the job because she might become pregnant, not because she was a woman. As it has been found, that is still sex discrimination: see, eg, *Wardley v Ansett Transport Industries (Operations) Pty Ltd* (1984) EOC 92-002. This approach was not the subject of appeal. Ansett’s appeal of that decision to the Supreme Court of Victoria had a constitutional focus: namely an asserted inconsistency between a Commonwealth instrument and the relevant state anti-discrimination law, pursuant to s 109 of the Commonwealth Constitution. This argument was rejected by the High Court: see *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237; 28 ALR 449.

[195] At base, distinctions between protected attributes and real or perceived characteristics associated with those attributes permits the kind of stereotyping which anti-discrimination laws are designed to prevent. **If there is an apprehension about what an individual might do, or how she or he might act, because of views or behaviour attributed to people with the protected attribute of that individual, acting on such an apprehension is just as discriminatory as treatment because of what the individual has done, or how the individual has acted.**

360. **Sixth**, it is apparent on the ABC’s own evidence that Ms Lattouf was sacked for reasons which included the pressure exerted by the “*Lawyers for Israel*” campaign. Without that campaign there was no reason for the ABC’s two most senior executives to have minutely scrutinised Ms Lattouf’s conduct as they in fact did, no likelihood that she would have been subject to any bespoke direction, and no likelihood that she would have been dismissed on 20 December 2023. It was the fact of the complaints that caused the managing director and chair to consider the position as “*untenable*”, to rail against Ms Lattouf’s presence, and to heap the pressure on Mr Oliver-Taylor until he delivered their preferred result.
361. It is equally plain that the participants in the “*Lawyers for Israel*” campaign objected to Ms Lattouf’s opinions in relation to the Gaza conflict.
362. That being the case, the reasons for Ms Lattouf’s dismissal included her political opinions. The “*Lawyers for Israel*” campaign targeted Ms Lattouf because of her political opinion. A dismissal which capitulated to, and thereby vindicated, that campaign was a dismissal for reasons which included Ms Lattouf’s political opinions.

363. Where action is taken by a corporate entity, “it will in all cases be necessary to examine the state of mind of the human actor or actors who (alone or together) caused the corporation to take the action that it did...”.³⁵² The decision of the person who effected the adverse action may be “affected or infected” even by an undisclosed prohibited reason of a contributor the action.³⁵³
364. Although the particular circumstances of this dismissal are unusual, they are analogous to the cases which have considered group decision making in more conventional fact scenarios.³⁵⁴ It is immaterial that the persons who caused the corporation to take the action were not employees or officers of the corporation itself, and had no legal power to effect the dismissal.³⁵⁵
365. The unusual feature of this case by comparison to the conventional scenario of decision makers acting on the advice of more junior employees is that the participants in the “*Lawyers for Israel*” campaign were explicit in demanding Ms Lattouf’s dismissal for a prohibited purpose. The reasoning in *Kodak* and the many decisions following it applies *a fortiori* in that circumstance.
366. Put simply, the ABC acted on the urging of a lobby group who insisted that Ms Lattouf be removed because of her political opinion; in doing so it acted for reasons which included those political opinions.

Conclusion on s772(1)(f) claim

367. For these reasons, the Court would conclude by reference to the whole of the evidence that the ABC has not discharged its onus of proving that Ms Lattouf’s political opinions and/or her political opinions and her race were not reasons for the termination of her employment.

I. Breach of Agreement: consideration

368. The contraventions of the various obligations imposed on the ABC by clause 55.2 of the Agreement alleged by Ms Lattouf do not depend on Ms Lattouf having been terminated.³⁵⁶
369. The action taken against Ms Lattouf by the ABC on 20 December 2023 which resulted in her not presenting Mornings on 21 and 22 December 2023 and which was announced to the media that afternoon was contrary to the terms of the Agreement.
370. An allegation of misconduct was made against Ms Lattouf by the ABC, viz., that she had posted the HRW post on her social media in defiance of the direction and/or on the basis that she had

³⁵² *Wong v National Australia Bank Ltd* [2022] FCAFC 155; 318 IR 148 at [25].

³⁵³ *Elliott v Kodak Australasia Pty Ltd* [2001] FCA 1804; 129 IR 251 at [37].

³⁵⁴ See by way of example only *Elliot v Kodak Australasia Pty Ltd* [2001] FCA 1804; 129 IR 251; *NTEU v Royal Melbourne Institute of Technology* [2013] FCA 451; 234 IR 139; *CFMEU v Clermont Coal Pty Ltd* [2015] FCA 1014; 253 IR 166; *Leahey v CSG Business Solutions (Aus) Pty Ltd* [2017] FCA 1098; *Qantas Airways Ltd v TWU* [2022] FCAFC 71; 292 FCR 34 at [201]; *TWU v Qantas Airways Ltd* [2021] FCA 873; 308 IR 244 at [223]-[233]; *Wong v National Australia Bank Ltd* [2022] FCAFC 155; 318 IR 148 at [31].

³⁵⁵ *Wong v National Australia Bank Ltd* [2022] FCAFC 155; 318 IR 148 at [26].

³⁵⁶ See FASOC [29]-[30].

breached the ABC's social media policy. This was an assertion of a breach of a lawful and reasonable direction and therefore 'misconduct' for the purposes of clause 55.1.1 of the Agreement.³⁵⁷ The ABC's witnesses variously described the asserted breach as follows:

- (a) Mr Oliver-Taylor said that Ms Lattouf had breached a direction;³⁵⁸
- (b) Mr Latimer said that Mr Oliver-Taylor and himself discussed, after the discovery of the HRM post, what they should do now that Ms Lattouf had not followed the direction given to her.³⁵⁹ During the Teams meeting, Mr Latimer asserted that they discussed Ms Lattouf failing to follow a direction given to her and his asserted reason for concurring with Ms Lattouf being taken off air was because she had breached a direction that he thought had been given to her in accordance with his instructions;³⁶⁰
- (c) Mr Ahern gave evidence that Ms Lattouf had breached a direction;³⁶¹
- (d) Mr Melkman said that he understood Ms Lattouf had been given a direction which she had not followed.³⁶²

371. The process detailed in clause 55.2 was triggered on the ABC's evidence. The ABC did not comply with salient aspects of that process. Relevantly, it contravened clause 55.2.1 by not:

- (a) advising Ms Lattouf in writing of the alleged misconduct in accordance with clause 55.2.1(a);
- (b) advising Ms Lattouf that she could choose to be accompanied or represented by a person of her choice in accordance with clause 55.2.1(b);
- (c) advising Ms Lattouf of the process to be undertaken by the ABC to determine whether the alleged misconduct was substantiated in accordance with clause 55.2.1(c);
- (d) providing Ms Lattouf with a right of access to any material reasonably necessary for her to respond to the allegation in accordance with clause 55.2.1(e); and
- (e) giving Ms Lattouf an opportunity to respond and/or explain her actions and any mitigating factors she sought to be taken into consideration in accordance with clause 55.2.1(f).

372. Mr Anderson accepted that so far as he was aware that requirements of the Agreement were not complied with (at least insofar as putting allegations to Ms Lattouf were concerned).³⁶³

³⁵⁷ See Anderson P252.22-32 and 44-45 and 257.1-17.

³⁵⁸ CB432, Oliver-Taylor at [107] and [113].

³⁵⁹ CB772-773, Latimer at [31].

³⁶⁰ CB774, Latimer at [35](d) and [37].

³⁶¹ CB1406, Ahern at [95].

³⁶² CB1189, Melkman at [81].

³⁶³ P258.1-36.

373. It is also clear that ABC considered the alleged misconduct was serious misconduct. The ABC failed to comply with clause 55.2.2 by not advising Ms Lattouf of this at the earliest opportunity.

374. The ABC contravened 6 distinct obligations imposed by clause 55.2 and therefore 6 terms of the Agreement.³⁶⁴ In the result, the ABC committed 6 contraventions of s 50 of the FW Act.

Imposition of an impermissible sanction on Ms Lattouf

375. The contravention of clause 55.4 of the Agreement alleged by Ms Lattouf is not contingent on Ms Lattouf having been terminated.³⁶⁵

376. Clause 55.4 set out the universe of disciplinary actions the ABC was able to take against an employee where misconduct or serious misconduct was substantiated.

377. The ABC could, relevantly, have reprimanded Ms Lattouf or issued a written warning to her in the event that she had engaged in misconduct. It could also have counselled her and recorded this counselling on her employment file.

378. In the event she had engaged in serious misconduct, it could have done one or other of the things detailed in clause 55.4.1(c)-(g).

379. What it was not permitted to do was remove her from presenting Mornings, tell her to pack up her desk and bag and leave forthwith, and then fail to allocate her any work.

380. In the result, the ABC contravened clause 55.4 of the Agreement.

Termination of Ms Lattouf's employment contrary to the Agreement

381. Clause 57.1.1 set out the circumstances in which the ABC could terminate an employee's employment. Under clause 57.1.1(a), it could summarily terminate the employee if the employee was guilty of serious misconduct.

382. The ABC purported to summarily dismiss Ms Lattouf on 20 December 2023.³⁶⁶ It was, however, only permitted to do so if she was guilty of serious misconduct. Ms Lattouf was not guilty of serious misconduct (or any misconduct at all as the ABC now appears to accept). Her summary termination was, therefore, in breach of clause 57.1.1(a) and therefore s 50 of the FW Act.

Conclusion

383. The ABC contravened important protective provisions of the Agreement. Indeed the circumstances of the case highlight the value of those provisions: had the provisions been

³⁶⁴ *Gibbs v The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223 (Gray J).

³⁶⁵ See ASOC [43]-[44].

³⁶⁶ FASOC [32]-[35].

followed (or had a modicum of procedural fairness been observed) the entire debacle subject of this litigation would not have occurred.

J. Remedy

The principled approach to statutory compensation

384. The power to grant remedial relief under s 545(1) falls to be exercised in circumstances where a contravention of the FW Act has been established. Thus the power should be exercised in a manner that assists in upholding and vindicating the statutory policies and norms of conduct prescribed by the FW Act. In the present case, these are that:

- (a) contraventions of s50, which prohibits contraventions by persons bound by enterprise agreements of their terms; and
- (b) contraventions s772(1)(f), which proscribes terminations of employment for a reason or reasons including the protected attributes of political opinion and/or political opinion and race or national extraction,
- (c) should not occur and that when they do occur appropriate orders should be made to remedy such contraventions.³⁶⁷

385. The protective purpose of both ss50 and 772(1)(f), and the norms of conduct they prescribe which the ABC contravened on 20 December 2020, are important matters in assessing statutory compensation.³⁶⁸

386. Gleeson CJ explained in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*, in the context of an award of statutory compensation under s 82 of the former *Trade Practices Act 1974* (Cth), that the Court is not engaged merely in assessing an amount of loss and damage in a factual or historical exercise of calculating the financial consequences of a sequence of events of which the contravening forms part.³⁶⁹ Rather:

... [it] is attributing legal responsibility; blame. This is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are not determined by a visceral response on the part of the judge assessing damages, but by the judge's concept of principle and of the statutory purpose.

387. It is well-settled that, in the context of statutory compensation including compensation under s 545(1) and 545(2)(b) of the FW Act, it is unnecessary to prove that the contravening conduct was the sole cause or even the dominant cause of loss and damage sustained by a victim of the

³⁶⁷ *ALAEA v International Aviation Service* (2011) 193 FCR 526 at [443] (Barker J).

³⁶⁸ *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 (Mason CJ and Gaudron J); *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334 at [130] (Besanko and Perram JJ); *Hughes v Hill* (2020) 277 FCR 511 at [52] (Perram J).

³⁶⁹ (2002) 210 CLR 109 at [26].

contravening.³⁷⁰ Causation will be established if it is shown that *a* cause of the loss and damage was the contravening.³⁷¹

388. Causation is assessed by not examining what did happen but by engaging in a counterfactual analysis of what would or might have occurred but for the contravening conduct.³⁷² The issue in the present case then is to assess what would or might have occurred had the ABC not peremptorily dismissed Ms Lattouf on the afternoon of 20 December 2023.

389. These principles were encapsulated by McHugh J in *Henville v Walker* in the context of statutory compensation under s 82 of the *Trade Practices Act 1974* (Cth):³⁷³

... If the defendant's breach has "materially contributed" to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage...

390. To similar effect, Hayne J outlined in *Henville v Walker* that:³⁷⁴

... what the Act directs attention to is whether the contravening conduct was a cause. It does not require, or permit, the attribution of some qualification such as "solely" or "principally" to the word "by".

... it is necessary to recognise that, on its face, the section permits recovery of the whole of the loss sustained by a person who demonstrates that a contravention of Pt V of the Act was a cause of that loss. Neither the words of s 82(1) nor anything in the intended scope and context of the Act suggest some narrower conclusion.

391. Hayne J went on to explain that the carelessness of a person who suffers loss or damage as a result of a contravention should not be taken into account in determining an award of compensation.³⁷⁵ Notions of contributory fault or responsibility for the loss are irrelevant and it is consonant with the statutory purpose that where a cause of loss was the conduct of the defendant, that the plaintiff be awarded an amount equivalent to the whole of the loss.

392. In *I & L Securities v HTW Valuers*, Gaudron, Gummow and Hayne JJ reiterated Hayne J's analysis in the context of s 87 of the former *Trade Practices Act* (which was in equivalent terms to s 545(1) of the FW Act).³⁷⁶ Their Honours said:³⁷⁷

... Nothing in the words of ss 82 or 87 requires or permits a court to make orders which will compensate a person who has suffered loss or damage by conduct in contravention of a relevant provision of the Act for only part of the loss or damage which has been suffered by that person

³⁷⁰ at [75]-[76] (Lee J).

³⁷¹ *Patrick Stevedores Holdings Pty Limited v CFMMEU (No 4)* [2021] FCA 1481 at [27] (Lee J).

³⁷² *MUA v FWO* [2015] FCAFC 120 at [28].

³⁷³ (2001) 206 CLR 459 at [106]

³⁷⁴ At [163]-[164].

³⁷⁵ At [165].

³⁷⁶ At [50] and [56]-[57]. See also McHugh J at [104] and [118].

³⁷⁷ At [61].

by that conduct and which will not be, or has not been, remedied by the making of some other order under s 87...

393. That analysis is germane to the analogously framed s545(1) of the FW Act.
394. Whilst it is open under s 545(1) for the Court to award less than full compensation, if a loss has been shown to be caused by a contravention it is difficult to apprehend why a commensurate award for compensation for the loss would not be appropriate.³⁷⁸ That is particularly so given the statutory purpose of both ss50 and 772(1)(f) and the imperative to vindicate that purpose by ensuring that the ABC as wrongdoer bears the entire loss for which its contravening is a cause.

Ms Lattouf and Dr Strauss' uncontested evidence

395. In light of these basal principles, the forensic purpose of the ABC's cross-examination of both Ms Lattouf post the termination and of Dr Strauss was not readily discernible.
396. None of the evidence Ms Lattouf gave in her affidavit about suffering distress, anxiety and a deterioration in her physiological and physical well-being as a result of and following the events of the afternoon of 20 December 2023 was challenged by the ABC. Critically, it was not put to Ms Lattouf that her suffering was not caused, at least in part, by the events the subject of the contravening.
397. The ABC did not challenge Ms Lattouf's evidence in cross-examination that:
- (a) as a result of the termination, she immediately felt shock and humiliation;
 - (b) the ABC's (erroneous) assertion that she had engaged in editorial wrongdoing and breached a direction was widely publicised and this caused her great distress. In this regard, the representations contained in the article in *The Australian* included that Ms Lattouf had been "sacked" for "a slew of anti-Israel posts" and that she had been "sacked just hours after finishing her program for the day"³⁷⁹ were never denied or controverted publicly by the ABC. The ABC did not even deign to explain to Ms Lattouf how the information in that article and news of her "sacking" had been publicised in the national media before she had arrived home from the ABC's Ultimo studios that day;
 - (c) she experienced dips in her mood, including finding herself increasingly anxious and that she cried frequently;³⁸⁰
 - (d) she experienced paranoia and threats;³⁸¹

³⁷⁸ *TWU v Qantas Compensation* at [78], citing *RFFWUI v Tantex Holdings Pty Ltd* [2020] FCA 1258 at [162].

³⁷⁹ Exhibit 18.

³⁸⁰ CB235, Lattouf at [75].

³⁸¹ CB235-236, Lattouf at [76]-[80].

- (e) she had trouble sleeping, had a suppressed appetite and experienced panic attacks;³⁸²
 - (f) she drank alcohol to calm her anxiety and used sedatives to sleep;³⁸³
 - (g) she saw a psychologist regularly;³⁸⁴ and
 - (h) her personal relationships, including those with her children were adversely impacted.³⁸⁵
398. Ms Lattouf also gave evidence that she felt, unsurprisingly, that her journalistic integrity and reputation had been grossly impugned, which caused her significant emotional distress.³⁸⁶
399. It was never suggested to Ms Lattouf her evidence of experiencing distress, low mood and physical and psychological suffering was wrong or that these experiences were not connected with or otherwise causally related to the termination. Rather, time was spent cross-examining her about awards she had received,³⁸⁷ whether what she had told Dr Strauss as recorded in his report was correct,³⁸⁸ and her activity on social media.³⁸⁹
400. An attempt was made to critique her description of herself as a “poster girl for justice or humanity”.³⁹⁰ The purpose of this particular aspect of Ms Lattouf’s cross-examination was unclear. It went nowhere, other than to underscore the life changing impact of the ABC’s contravening on Ms Lattouf. As Ms Lattouf explained under cross-examination:³⁹¹
- ... If my memory is correct, it was a social media post of me being really upset. I never wanted to be this. I just wanted to be able to do my job and exist safely. I didn’t come out to be this – like, I’m – I just – I was on air talking about cats and Christmas pudding. I didn’t want any of this. I have values, but I didn’t – didn’t want to be the face of this when there’s – it comes at such a cost. So I think that’s what you’re quoting – I think that’s what you’re quoting me from.
- And being the face of all of this, what’s “all of this”?---Ongoing litigation, continually lied about, defamed, derided by the new chair of the ABC at the National Press Club – Press Club, had the most horrible mischaracterisations about me in Murdoch press. I don’t want any of this. I shared a Human Rights Watch post.
401. The effect of the ABC’s conduct in both terminating Ms Lattouf and contending that it was because she had breached a direction was also attested to by Ms Lattouf in her oral evidence. She explained that:

³⁸² CB236, Lattouf at [81].

³⁸³ CB236, Lattouf at [82].

³⁸⁴ CB236, Lattouf at [84].

³⁸⁵ CB236-237, Lattouf at [85]-[86].

³⁸⁶ CB235, Lattouf at [75].

³⁸⁷ P115.13-116.30 and P 118.1-22.

³⁸⁸ P119-123.

³⁸⁹ P124.21-44 and 125.1-34.

³⁹⁰ P125.43-44.

³⁹¹ P125.46-47 and 126.1-9. See also Ms Lattouf’s evidence at P129.10-11.

- (a) being painted as insubordinate (as she had been by the ABC) and responsible for policy breaches pretty much rendered her unemployable;³⁹²
 - (b) her former agent had informed her she was pretty much unemployable as a result of the circumstances of the termination.³⁹³ She explained that she had lost considerable work that being accused of misconduct by the ABC, being the most credible media organisation in the country, had rendered her unemployable;³⁹⁴
 - (c) the death threats she had experienced and the hatred that had been directed to her had flowed, in part, from the assault on her reputation and integrity following her dismissal;³⁹⁵ and
 - (d) the current chair of the ABC, Kim Williams, had spoken derisively about her at the National Press Club.³⁹⁶
402. Ms Lattouf's evidence on her distress, anxiety and adversely impacted health was unchallenged and should be accepted.³⁹⁷ It would now be manifestly unfair for the ABC to now suggest that such evidence was false or to seek to impugn that evidence, given that the ABC failed to suggest this in cross-examination and had filed no evidence countering Ms Lattouf's evidence on these matters.³⁹⁸
403. Ms Lattouf's evidence about her immediate distress was supported by Ms Green.³⁹⁹ It was also palpable when she was cross-examined about her conversation with Ms Green after Mr Ahern had told her she was to return to her desk, get her bag and leave, with Ms Lattouf crying when cross-examined about her discussion with Ms Green post the dismissal.⁴⁰⁰
404. The Court can and should accept that Ms Lattouf suffered significant pain, hurt, humiliation and distress as a result of the egregious treatment meted out to her by the ABC. Not only was she sacked without notice or forewarning and for a spurious reason, but distress was compounded by the very public nature of her sacking. In this regard, her reputation was sullied

³⁹² P129.16-24. In re-examination, Ms Lattouf outlined that she had been punished and lost work as a result of the dismissal: P135.34. See also her evidence at P135.40-45 and 136.16-40 where she explained the deleterious impact that being accused of breaching a direction had had on her in the context of her being a freelance journalist.

³⁹³ P129.24-31. This manifested in the loss of work with speaking gigs (amongst other things) being cancelled: P137.30-34.

³⁹⁴ P139.32.40.

³⁹⁵ P130.22-25 and 39-47.

³⁹⁶ P140.1-6.

³⁹⁷ *Ashby v Slipper* (2014) 219 FCR 322 [77] (Mansfield and Gilmour JJ); *Precision Plastics Pty Limited v Demir* (1975) 132 CLR 362 at 370-1 (Gibbs J).

³⁹⁸ See generally *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1988) 156 ALR 169 at 217.

³⁹⁹ Green P552.45-47 and 553.1-6.

⁴⁰⁰ Lattouf P111.14-23.

by *The Australian* article which was the result, in part, of a leak from the ABC which the ABC was entirely incurious about and failed to investigate.⁴⁰¹

405. Likewise, the evidence of Dr Strauss that Ms Lattouf’s dismissal by the ABC aggravated a pre-existing psychiatric condition was not challenged.⁴⁰² In particular, Dr Strauss’ opinion that the premature ending of Ms Lattouf’s job her distress and anger and resulted in a deterioration of her pre-existing psychiatric condition that had been reasonably well-controlled until that time was not challenged in any way.⁴⁰³ It was never suggested to Dr Strauss that his opinions were erroneous or that the contravening conduct was not a cause of the exacerbation of Ms Lattouf’s psychiatric illness which, until the ABC’s contravening, was well-managed and under control. Rather, the cross-examiner explored other factors which may have contributed to Ms Lattouf’s mental health but failed to challenge the gravamen of Dr Strauss’ opinion. The cross-examination was seemingly an exemplar of a cross-examiner being, to use Alexander Pope’s epistle, “willing to wound and yet afraid to strike”.⁴⁰⁴ Further, aspects of the cross-examination, including that Ms Lattouf was self-medicating with alcohol (which Dr Strauss said conveyed that Ms Lattouf’s condition had in fact worsened), emphasised and bolstered the opinions reached by Dr Strauss.⁴⁰⁵
406. Dr Strauss was asked whether Ms Lattouf had any personality disorders or vulnerabilities. The precise basis on which Ms Lattouf may have had a “personality disorder” is not clear. In any event, Dr Strauss made clear that when the events occurred at the ABC, Ms Lattouf was a most vulnerable person and her perceptions of her dismissal by the ABC were influential in her psychological state.⁴⁰⁶
407. Any attempt by the ABC to advance an “egg shell skull” style argument will go nowhere. A contravener takes the victim of their contravening as they find them with all their “weaknesses, beliefs and other reactions as well as [their] capacities and attributes, physical, social and economic”.⁴⁰⁷ Ms Lattouf’s vulnerabilities do not in any way supply a basis for awarding her anything less than full compensation for loss and damage caused as a result of the ABC’s contravening.

⁴⁰¹ See for instance Latimer T596.15-25.

⁴⁰² CB192, Strauss report 13/6/2024 at question 4.

⁴⁰³ CB216-217, Strauss supplementary report 5/9/2024.

⁴⁰⁴ *Reid v Kerr* (1974) 9 SASR 367 at 374 (Wells J).

⁴⁰⁵ P151.24-28.

⁴⁰⁶ P156.32-45 and 157.1-9.

⁴⁰⁷ *Nader v Urban Transit Authority of New South Wales* (1985) 2 NSWLR 501 at 537 (McHugh JA) and *Taylor v August and Pemberton Pty Ltd* (2023) 328 IR 1 at [497] (Katzmann J).

Assessment of non-economic loss

408. The power under s 545(1) to make appropriate remedial orders extends to an award of compensation for non-economic loss, including for disappointment, hurt, distress, humiliation, or other emotional harm that arises because of a contravention.⁴⁰⁸ The provision authorises the Court to award compensation unconnected to any personal injury suffered by a person affected by a contravention, and may include a component for shock, distress, hurt or humiliation.⁴⁰⁹
409. Assessment of compensation for hurt, distress, humiliation or emotional harm more generally is evaluative and inherently imprecise.⁴¹⁰ This is because the Court is placing a monetary value on something that is not susceptible to being financially quantified.⁴¹¹ That being so, as Barwick CJ, Kitto and Taylor JJ said in *O'Brien v Dunsdon*, the Court should attempt to assess a reasonable sum remembering that it is not possible by payment of an amount of compensation to achieve *restitutio in integrum* and having regard to general standards prevailing in the community. Kenny J noted in *Richardson v Oracle* that it was reasonable to believe that such standards now accord a higher value to compensation for pain and suffering and loss of enjoyment of life than previously.⁴¹²
410. Caution should be exercised in seeking to establish a 'range' or 'fixed limit' of appropriate awards for non-economic loss, given the inherently individualistic nature of the assessment and the distinct factual and statutory context of each case.⁴¹³ As Perram J noted in *Hughes v Hill*, the Court does not assess general damages by performing arithmetic adjustments to prior determinations.⁴¹⁴ Nonetheless, *some* assistance may be gleaned from cases where amounts of non-economic loss have been awarded in the context of contraventions of Part 3-1 of the FW Act, in the anti-discrimination context under s 46PO(4)(d) of the *Australian Human Rights Commission Act 1986* (Cth) and in the personal injury context.
411. In cases where psychological or mental conditions have been shown to be caused or exacerbated by contravening conduct, the following amounts have been awarded:
- (a) in *Gutierrez v MUR Shipping Australia Pty Limited*,⁴¹⁵ Burley J overturned an award of general damages to the appellant of \$20,000 and awarded \$90,000. Mr Gutierrez had

⁴⁰⁸ *ALAEA v International Aviation Service* at [443] and [447]-[450] (Barker J); *Fair Work Ombudsman v Maritime Union of Australia (No 2)* (2015) 252 IR 101 at [65] (Siopis J); and *TWU v No Fuss Liquid Waste Pty Limited* [2011] FCA 982 at [23] and [41] (Flick J).

⁴⁰⁹ *James Cook University v Ridd* (2020) 298 IR 50 at [155] and [157].

⁴¹⁰ *FWO v MUA* (2014) 243 IR 312 at [68] (Siopis J).

⁴¹¹ *Richardson v Oracle* at [94]; *O'Brien v Dunsdon* (1965) 39 ALJR 78 at 78 Barwick CJ, Kitto and Taylor JJ); *Hughes v Hill* at [47] (Perram J)

⁴¹² At [96] citing *Amaca Pty Ltd v King* (2011) 35 VR 280 at [177]; *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329 at [324]-[330]; and *Willett v Victoria* (2013) 42 VR 571 at [79]-[80].

⁴¹³ *Richardson v Oracle* at [90] (Kenny J).

⁴¹⁴ At [48].

⁴¹⁵ *Gutierrez v Mur Shipping Australia Pty Limited* [2023] FCA 399; 179 ALD 353; 324 IR 58.

been diagnosed as suffering from adjustment disorder with depression and anxiety.⁴¹⁶ He had also experienced a considerable loss of amenity in life, was unable to work and had lost the enjoyment of social aspects of his life.⁴¹⁷ His Honour accepted that the age discrimination Mr Gutierrez was subject to was at least *a* cause of these matters and, in fact, a material cause of them;

- (b) in *Richardson v Oracle*, ten years ago, the Full Court overturned an award of \$18,000 for general damages as being manifestly inadequate and awarded Ms Richardson \$100,000. The contravening conduct had caused Ms Richardson to suffer a chronic adjustment disorder with mixed features of anxiety and depression. There had been a distinct change in Ms Richardson's demeanour and she had also experienced physical symptoms, including injury to her sexual relationship with her partner. No conclusion was reached that Ms Richardson's adjustment disorder was 'severe';
- (c) in *Taylor v August and Pemberton*, Katzmann J awarded general damages of \$140,000 to the applicant for sexual harassment she had suffered and \$40,000 for victimisation. The applicant had developed a chronic psychiatric disorder (being an adjustment disorder) which was caused by the contravening conduct and resulted in her experiencing depression and anxiety and associated symptoms. Her condition had improved and her Honour concluded would continue to improve with ongoing psychological care;⁴¹⁸ and
- (d) in *TWU v Qantas Airways Limited (Compensation Claim)*,⁴¹⁹ Lee J awarded an unlawfully terminated employee who had developed a major psychiatric illness as a result of the respondent's contravening conduct was awarded \$100,000⁴²⁰

412. In the circumstances and have regard to the extent of the pain, hurt, humiliation and distress experienced by Ms Lattouf, as well as the fact the contravening caused an exacerbation in a pre-existing psychiatric condition, an amount of between \$100,000-150,000 should be awarded for non-economic loss.

K. Conclusion

413. The Court should make declarations of contraventions by the ABC of both ss 50 and 772 of the FW Act. Ms Lattouf should be awarded between \$100,000-150,000 for non-economic loss. The

⁴¹⁶ At [79].

⁴¹⁷ At [89].

⁴¹⁸ At [521]-[522].

⁴¹⁹ [2024] FCA 1216.

⁴²⁰ At [210] and [215](3).

proceedings should be programmed for penalty and for consideration of the other forms of relief sought in Ms Lattouf's originating application.

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