FEDERAL CIRCUIT COURT OF AUSTRALIA

RIDD v JAMES COOK UNIVERSITY (No.2) *[2019] FCCA 2489*

Catchwords:
INDUSTRIAL LAW – Assessment of compensation – past economic loss – future economic loss – vicissitudes – general damages – post judgment behaviour – assessment of pecuniary penalties.

Legislation:
Fair Work Act 2009 (Cth), ss.50. 545(2)(b), 557

Cases cited:
Construction, Forestry, Mining and Energy Union (CFMEU) v Hail Creek Coal Pty Ltd [2016] FCA 1032
Goldburg v Shell Oil Co of Australia Ltd (1990) 95 ALR 711
Regional Development Australia Murraylands and Riverland Inc v Smith (2015) 251 IR 317
Bryant v Defence Housing Authority [2002] ACTSC 43
Ridd v James Cook University & Ors [2018] FCCA 3080
Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82 or *Hill v Hughes* [2019] FCCA 1267
Rogers v Nationwide News Pty Ltd [2003] HCA 52
Alexander v Home Office [1988] 1 WLR 968
O'Brien v Dunsdon (1965) 39 ALJR 78
Commonwealth of Australia v Director, Fair Work Building Industry Assessment [2015] HCA 46
Mason & Harrington Corporation Pty Ltd t/as Pangea Restaurant & Bar [2007] FMCA 7
Sayed v Construction, Forestry, Mining and Energy Union [2016] FCAFC 4

Applicant:	PETER VINCENT RIDD
Respondent:	JAMES COOK UNIVERSITY
File Number:	BRG 1148 of 2017
Judgment of:	Judge Vasta
Hearing date:	18 and 19 July 2019
Date of Last Submission:	12 August 2019

Delivered at:	Perth
Delivered on:	6 September 2019

REPRESENTATION

Counsel for the Applicant:	Mr B. Kidston
Solicitors for the Applicant:	Mahoneys
Counsel for the Respondent:	Mr Y. Shariff assisted by Ms V. Bulut
Solicitors for the Respondent:	Clayton Utz

ORDERS

(1) It is declared that the Respondent contravened section 50 of the *Fair Work Act 2009* (Cth) by doing each of the following in contravention of clause 14 of the *James Cook University Enterprise Agreement 2013 - 2016*:

(a) making the findings the subject of the formal censure dated 29 April 2016 against the Applicant;

(b) issuing the formal censure dated 29 April 2016 to the Applicant;

(c) directing the Applicant on 29 April 2016 that "[i]n future it is expected that in maintaining your right to make public comment in a professional, expert or individual capacity in an academic field in which you are recognised, it must be in a collegial manner that upholds the University and individual respect.";

(d) making the findings, and each of them, the subject of the final censure dated 21 November 2017 against the Applicant;

(e) directing the Applicant on 24 August 2017 that he was required to keep the disciplinary process confidential;

(f) directing the Applicant on 27 August 2017 that he was required to keep the disciplinary process confidential;

(g) directing the Applicant on 19 September 2017 that he was required "to keep the details of the allegations [the subject of the disciplinary proceeding], and all matters relating thereto (including, but not limited to, the formal censure you received on 29 April 2016), strictly confidential.";

(h) directing the Applicant on 21 November 2017 that he was required to keep the disciplinary process and the final censure dated 21 November 2017 confidential;

(i) directing the Applicant on 8 February 2018 that he was required to "keep all matters relating to this disciplinary process strictly confidential, including the existence of the disciplinary process, details of the allegations, this letter, your response and any further

correspondence between yourself and the University in relation to this matter.";

(j) directing the Applicant on 21 November 2017 that he was required to "[refrain] from criticising other persons or organisations in a manner that is inconsistent with the collegial and academic spirit of the search for knowledge, understanding and truth";

(k) directing the Applicant on 21 November 2017 that he was required to refrain from "make[ing] any comment or engag[ing] in any conduct that directly or indirectly trivialises, satires or parodies the University taking disciplinary action against [him].";

(l) making the findings, and each of them, the subject of its decision dated 13 April 2018 against the Applicant; and

(m) terminating the Applicant's employment on 2 May 2018.

(2) That the Respondent pay to the Applicant the sum of $1,094,214.47 as compensation for loss that the Applicant has suffered because of the contraventions.

(3) That the Respondent pay the sum of $125,000 by way of pecuniary penalty to the Applicant.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE

BRG 1148 of 2017

PETER VINCENT RIDD
Applicant

And

JAMES COOK UNIVERSITY
Respondent

REASONS FOR JUDGMENT

Introduction

1. On 16 April 2019, I made rulings that actions of the Respondent, James Cook University (JCU), were unlawful. The result of those rulings means that the Court has found that the Respondent has contravened the *Fair Work Act 2009* (Cth) ("the FW Act"). I must now determine the financial consequences of those contraventions.

2. The Applicant had originally asked this Court to order his reinstatement. He has now abandoned that claim and asks only that this Court, pursuant to s.545(2)(b) of the FW Act, grant an "*an order awarding compensation for loss that the applicant has suffered because of the contravention*".

3. The claim for compensation largely falls into three categories; past economic loss, future economic loss and general compensation.

4. The Applicant has also sought that pecuniary penalties be imposed upon the Respondent and be paid to him.

Contraventions

5. I had not made Declarations in my earlier decision because the parties asked that I not do so.

6. Section 50 of the FW Act legislates that "*a person must not contravene a term of an enterprise agreement*". All of the rulings that I made demonstrate a contravention of the relevant enterprise agreement and, as such, a breach of s.50 of the FW Act.

7. Because of these rulings, I am of the view that it is appropriate for me to make declarations that follow those rulings.

8. Counsel have agreed that it is appropriate to make declarations for 13 specific contraventions of s50 of the FW Act (which are contraventions of clause 14 of the EA).

9. These contraventions are:

   (a) making the findings the subject of the formal censure dated 29 April 2016 against the Applicant;

   (b) issuing the formal censure dated 29 April 2016 to the Applicant;

   (c) directing the Applicant on 29 April 2016 that "[i]n future it is expected that in maintaining your right to make public comment in a professional, expert or individual capacity in an academic field in which you are recognised, it must be in a collegial manner that upholds the University and individual respect.";

   (d) making the findings, and each of them, the subject of the final censure dated 21 November 2017 against the Applicant;

   (e) directing the Applicant on 24 August 2017 that he was required to keep the disciplinary process confidential;

   (f) directing the Applicant on 27 August 2017 that he was required to keep the disciplinary process confidential;

   (g) directing the Applicant on 19 September 2017 that he was required "to keep the details of the allegations [the subject of the disciplinary proceeding], and all matters relating thereto

(including, but not limited to, the formal censure you received on 29 April 2016), strictly confidential.";

(h) directing the Applicant on 21 November 2017 that he was required to keep the disciplinary process and the final censure dated 21 November 2017 confidential;

(i) directing the Applicant on 8 February 2018 that he was required to "keep all matters relating to this disciplinary process strictly confidential, including the existence of the disciplinary process, details of the allegations, this letter, your response and any further correspondence between yourself and the University in relation to this matter.";

(j) directing the Applicant on 21 November 2017 that he was required to "[refrain] from criticising other persons or organisations in a manner that is inconsistent with the collegial and academic spirit of the search for knowledge, understanding and truth";

(k) directing the Applicant on 21 November 2017 that he was required to refrain from "make[ing] any comment or engag[ing] in any conduct that directly or indirectly trivialises, satires or parodies the University taking disciplinary action against [him].";

(l) making the findings, and each of them, the subject of its decision dated 13 April 2018 against the Applicant; and

(m) terminating the Applicant's employment on 2 May 2018.

Actions post Delivery of Judgement

10. It is appropriate that I comment on some of the conduct on the part of both JCU and Professor Ridd following the delivery of my decision on 16 April 2019. This conduct will assume some importance later in these reasons.

11. In the early afternoon of 16 April 2019, I gave my decision in Court with both parties appearing by telephone. The decision was emailed to both parties and was also provided to the Court's judgments team. Within hours (and before the judgement was available to the public),

the Vice Chancellor of JCU sent out a group email to all persons on the JCU email list.

12. The contents of that email were also reproduced in the media release under the hand of Professor Cocklin. There was also a link to that statement on the Twitter feed of JCU.

13. This email was reproduced in annexures to the affidavit of Professor Ridd sworn 31 May 2019. It reads:

> *Dear Colleagues,*
>
> ***Dr Peter Ridd***
>
> *The Federal Circuit Court today delivered a judgment in favour of Dr Ridd, finding that any action taken by the University, dating back to 2016, was not within the enterprise agreement.*
>
> *Although the matter was about the enterprise agreement interpretation, the judgment does not refer to any case law, nor any authority in Australia to support its position.*
>
> *We disagree with the judgement and we maintain we have not taken issue with Dr Ridd's nor any other employee's rights to academic freedom.*
>
> *Much has been published about Dr Ridd being disciplined for his views on climate change and quality assurance. We do not agree that the media has accurately reflected the facts in this case.*
>
> *The University determined that Dr Ridd engaged in serious misconduct, including denigrating the University and its employees and breaching confidentiality directions regarding the disciplinary processes. That conduct was a serious breach of the Code of Conduct and that is why the University dismissed him as an employee.*
>
> *Dr Ridd was not sacked because of his scientific views. Peter Ridd was never gagged or silenced about his scientific views, a matter which was admitted during the court hearing.*
>
> *Dr Ridd at all times continued to engage publicly to promote his academic views and was never prevented by the University from doing so. His academic freedom was not at issue while he was an employee of the University. What was in issue, was how he communicated about others, how he denigrated others and how*

he breached confidentiality which impacted not only on him, but on others.

We are a University. Within our very DNA is the importance of promoting academic views and collegiate debate.

Dr Ridd was disciplined for repeated breaches of the same directions given to him over a course of almost 2 years. Dr Ridd was invited to remove confidential information he placed publicly online, and he refused to do so. In court he admitted that he knew it was wrong, but did it anyway.

This included information which identified his work colleagues and publicly promoted the very matters again, for which he had been censured. To protect the individuals, the University asked Dr Ridd to de-identify the references publicly, he again did not do so.

In fact, during the Court trial, for the first time under oath, Dr Ridd admitted to giving The Australian newspaper confidential material, something he sought to conceal from the University until the hearing. This is not how most employees would conduct themselves. Nor would employees threaten their supervisors that they were "poison fruit" and that [the University] could eat them but if they did, "it would hurt" and the employee would make sure it hurt.

Threatening your employer and making public confidential matters the subject of disciplinary proceedings is not how most employees would engage with their employer.

While you may have different views about Dr Ridd's conduct, the University does not condone any employee publicly denigrating or humiliating their colleagues. Nor does the University condone providing information to the press or soliciting persons to interfere with a disciplinary process. An employer and employee are expected to engage in disciplinary processes, with respect to the rights of each other, and with respect to other persons affected by the process. That is the point of confidentiality directions.

We disagree with the Judge's comments, and are also troubled by the fact that he fails to refer to any legal precedent or case law in Australia to support his interpretation of our enterprise agreement, or academic freedom in Australian employment law. The judgement reflects views, which are not supported in any way by any case law or legal precedent. The Judge has not attempted

to do so in his judgement in preferring an interpretation that disregards the Code of Conduct or confidentiality obligations which exist both in the enterprise agreement and also at law. It received little press last year when Dr Ridd was unsuccessful in his interim reinstatement application. Justice Jarrett of the Federal Circuit on 18 June 2018 found that Dr Ridd had a very weak case and made clear that he understood it was not what Dr Ridd was saying, but the manner of how he said it.

However, significantly, Justice Jarrett also outlined when refusing relief to Dr Ridd at the time, that the University was being taken to court, and had at all times acted reasonably.

While the University is considering its options on this matter, I would like to leave you with a quote from Justice Jarrett's decision last year which reflects the extent to which JCU has gone to attempt to be conciliatory and support proper interpretation and process, rather than publication of matters in the press. Dr Ridd refused these options, as reflected by the Judge in rejecting his interim reinstatement application:

> *The applicant would have maintained his employment; the University would have maintained what it saw as the integrity of its disciplinary processes, pending a determination about those issues from the Court. However, the applicant declined to enter into those undertakings and there was no alternative suggestion. The offer of the undertakings was repeated on 14 March, 2018 but, again, the applicant declined to give them.*
>
> *Those matters are significant, in my view, because there was an opportunity for the applicant to avoid the very prejudice that he now says he is subjected by reason of the University's conduct. He was given the opportunity, in a reasonable way in my view, to have the relevant matters adjudicated upon and, in the meantime, the status quo preserved.*

Regards

Sandra

14. I need to mention, at this point, the manner in which the Court views that email, press release and Twitter feed. While it has been said that such a response from a litigant is "unprecedented", I have been at pains to ensure that the Court does not "punish" JCU for publishing the

statement. Any issue of repercussions upon JCU by a Court or other authority, because of this publication, are not issues that have arisen in my assessment of this matter. However, as will be detailed in these reasons, the email, press release and tweet are not insignificant matters when the assessment of compensation and pecuniary penalties are considered.

15. JCU also points out that Professor Ridd has also failed to remain silent after the decision. Although the articles are not in evidence before me, in the Affidavit of Geoff Rogers, filed 21 June 2019, there is an unchallenged statement that Professor Ridd had said that "*the Vice Chancellor needs to face action*" and that "*there is a big cloud over senior JCU administrators*". The first assertion is said to have been reported in the *Townsville Bulletin* on 18 April 2019. The second assertion is said to have been reported in *The Australian* on the same day.

16. It is, of course, unfortunate that matters before the Court were the subject of public comment before a final decision had been made by the Court. Nonetheless, this is a fact of life that in world in which we now live. It is nigh impossible (and, indeed, undesirable) to stifle public debate on what are believed to be important issues. Nevertheless, as will be discussed below, the nature of the public comments made after the ruling of the Court (and their impact on Professor Ridd in particular) are an aspect that must be and has been taken into account by me.

Past Economic Loss

17. Before a Court can make an award either for past or future economic loss, an applicant must prove that there has been such a loss (see *Construction, Forestry, Mining and Energy Union (CFMEU) v Hail Creek Coal Pty Ltd* [2016] FCA 1032 and *Goldburg v Shell Oil Co of Australia Ltd* (1990) 95 ALR 711).

18. In this case, Professor Ridd was terminated on 2 May 2018. He was paid six months' salary in lieu of notice. On my calculations, his period of past economic loss should then commence on 2 November 2018.

19. On the uncontradicted evidence before me, Professor Ridd has not worked for money since his termination, other than in relation to a brief consulting contract for which he was paid $3000.

20. I accept Professor Ridd's evidence that he has suffered a loss of income since his termination. I accept his evidence that he has been actively seeking employment and I will speak of this later in these reasons.

21. JCU has raised the issue of undertakings and has submitted that a refusal to enter into such undertakings has been a failure to mitigate any loss. I will deal with this issue when I discuss future economic loss.

22. I am of the view that Professor should be paid the gross salary and superannuation that he would have paid had he not been terminated. I fix the dates of his past economic loss as being between 2 November 2018 and 2 September 2019, which is a period of 10 months.

23. From my reading of the current EA, the full-time salary for this period is $172,527.66. Superannuation at 17% totals $29,329.70. My rough calculations are that Professor Ridd is entitled to 5/6 of this amount (as the period of 10 months is 5/6 of a year). That equates to $143,773.05 as salary and $24,441.42 as superannuation.

24. The methodology that I have used to calculate past economic loss is clear. I was asked by Counsel to allow the parties to be given leave to make submissions on this aspect. I will allow them to do so.

Future Economic Loss

25. This aspect of the compensation claim is probably the most vexing of all of the issues that I must consider. Having considered all of the authorities to which the parties have drawn my attention, in conjunction with their submissions, I have decided that there are a number of steps that must be taken before I can arrive at any figure for future economic loss.

26. Those steps are:-

a) Decide the period that should be covered by future economic loss; that is, decide how long Professor Ridd would have continued working and what he would have earned.

b) Decide what Professor Ridd would actually earn during this period.

c) Subtract the latter sum from the former.

d) Consider the vicissitudes and apply an appropriate discount.

e) Look at the question of mitigation and what, if any, discounts should be applied because of any failure to mitigate the loss.

f) Finally, settle upon a figure that is just, fair and reasonable in all the circumstances.

The Period

27. Professor Ridd was born on 25 December 1960. In the proceedings before me, Professor Ridd gave evidence that, all things being equal, he would have continued working until he was 65. He did say that he would have worked part-time for some of that period so as to allow the University to have some proper succession planning.

28. It was put to Professor Ridd that he planned to retire completely at age 60. He refuted this suggestion and there has been no evidence put before me that would in any way show that this suggestion had any merit.

29. It was put to Professor Ridd that he caused to have filed an amended statement of claim on 5 November 2018. At paragraph 54D of that statement of claim, it pleads that he "*would have continued working… on a full-time basis until age 60; following (this) he would have continued working on a part-time basis (66%) until age 63*".

30. Professor Ridd explained that the position in the amended statement of claim is the position he would have been prepared to settle for after having gone through the rigours of the two disciplinary processes. However, if there had not been any disciplinary processes, he would have worked until he reached the age of 65.

31. I accept that Professor Ridd was being truthful when he gave this evidence. I can certainly understand how the trials and tribulations of the treatment to which he had been subjected would have caused him to "lower his sights".

32. However, he had pleaded that he would work until age 60 on a full-time basis and then until age 63 on a part-time basis, although, on my reading of the tables compiled in paragraph 54D, what is actually pleaded is that he would have worked full-time until his 61st birthday and part-time until his 64th birthday.

33. I am of the view that Professor Ridd is estopped from claiming any period other than that which he has specifically pleaded. To allow Professor Ridd to "change the goalposts" at this late stage, would be procedurally unfair to JCU.

34. In light of the above, I assess the period that Professor Ridd would have worked full-time as being from 2 September 2019 until 24 December 2021. I assess the period that Professor Ridd would have worked part-time (at 66%) as being from 25 December 2021 until 24 December 2024.

Earnings

35. I am of the view that superannuation is a significant part of the earnings that Professor Ridd had and would have received. The figure of 17% is almost double the mandatory employer contribution. As Professor Ridd now has an accumulation account, superannuation contributions significantly enhance that balance.

36. JCU has submitted that superannuation contributions are in respect of ordinary time earnings of an employee. I accept that submission as a matter of interpretation of the legislation governing such payments. I accept that any lump sum payment made to an employee on the termination of his or her employment is excluded from the definition of "ordinary time earnings".

37. JCU submits that I should make no allowance for any superannuation aspect of past economic loss.

38. I accept that this submission would have strength if this were a claim for unpaid wages or an unpaid entitlement under an award.

39. However, my task is to compensate Professor Ridd for the loss suffered as a result of the contravention. The loss that he suffered includes the very generous employer contribution to the superannuation. This is an integral part of what he has lost because of the termination of his employment. To my mind, he must be compensated for the superannuation to which he was lawfully entitled.

40. The base salary at the start of the "future economic loss period" is $172,527.66. There was to be a 1.6% increase on 30 September 2019, a 2% increase on 30 September 2020 and again on 30 September 2021 (according to the EA). I have assumed that there would be salary increases of a similar nature on 30 September 2022 and 30 September 2023.

41. Using basic calculations, I have arrived at the following gross salary amounts:-

    a) 2 September 2019 to 29 September 2019 - $14,377.31

    b) 30 September 2019 to 29 September 2020 - $175,115.58

    c) 30 September 2020 to 29 September 2021 - $178,617.89

    d) 30 September 2021 to 24 December 2021 - $45,500 (approx. - three months gross of $182,190.25)

    e) 25 December 2021 to 29 September 2022 - $90,000 (approx. - nine months gross of $182,190.25 x 66%)

    f) 30 September 2022 to 29 September 2023 - $122,650.48 (66% of $185,834.06)

    g) 30 September 2023 to 29 September 2024 - $125,103.49 (66% of $189,550.74)

    h) 30 September 2024 to 24 December 2024 - $31,900 (approx. - three months gross of $193,341.76 x 66%)

42. The total gross amount for the "future economic loss period" is $783,264.75, which I will round down to $780,000.

43. Added to this amount is the sum of $132,600 by way of superannuation (which is 17% of $780,000).

What could Professor Ridd have earned during this period?

44. This is a question that is very difficult to answer because there does not seem to be any immediate source of employment for Professor Ridd.

45. I accept the evidence of Professor Ridd that he has diligently searched for work since he was terminated. His affidavit contains the numerous employment searches he has conducted to try and find work. So far, that search has only succeeded in his earning $3000. Given his quite impressive qualifications and work history, his lack of success in this regard says a great deal about his options going forward.

46. Exhibit 2 in these proceedings was a bundle of documents that detailed the contact that Professor Ridd has had with a number of people regarding possible projects and/or employment. From the tenor of these documents, the prospects of Professor Ridd securing some form of paid employment would at first seem to be strong.

47. However, the reality is that none of the communications have actually amounted to anything approaching a source of steady income for Professor Ridd. Indeed, the only income he has received since termination is $3000.

48. The position is well summarised in four questions posed by counsel for JCU and the responses of Professor Ridd at page 46 of the transcript:

> *And you would tell his Honour, wouldn't you, that notwithstanding that you have a particular form of expertise, you're a person of considerable prowess, academically, you have good researching skills and you know you're going to be sought out, don't you, Dr Ridd, by people who will be offering you paid work?---I would certainly hope I would be but I don't know whether I know I will be.*
>
> *Could I suggest you're being far too pessimistic because emails of this type are showing how well regarded you are; would you*

accept that, Dr Ridd?---Well, they're fairly few and far between and none of them have actually come to anything.

All right. And is that because you're hoping the dust settles with this litigation so you can move on with a clean break? That's a fair assessment, isn't it?---I certainly hope that my name will be restored from this litigation, yes.

*Well, can I suggest to you that, in an ironic kind of way, your name has, in fact, not needed to be restored, your name has actually been promoted widely as being a person worthy of good repute; would you agree with that?---No, quite the opposite. In terms of the companies that want to hire scientists, all the fame and being on the Australian or on the IPA doesn't help one iota. I think it's bad. I mean, maybe that will produce a different career outcome but, in terms of these sort of things, most big institutions don't want a bar of somebody who has been through my sort of controversy. (*My underlining*)*

49. The unfortunate fact is that the sentiment expressed by Professor Ridd (in the underlined portion of the transcript) is all too true. Most companies that have any dealings that are associated with the Great Barrier Reef wish to align themselves with entities such as GBRMPA or AIMS. As those entities are connected to JCU. It is difficult to see how Professor Ridd can continue to work in this industry, despite his considerable expertise.

50. This is especially so when one considers that the public statement issued by JCU in May 2018 and the press statement of Professor Cocklin issued in April 2019 are still on the JCU website (according to the affidavit of Professor Ridd and not contradicted by JCU). Both statements are extremely critical of Professor Ridd.

51. It is a fact of life that many employers will now perform "background' checks on any prospective employee and that these checks consist of internet or social media searches. If a search of this sort is done on Professor Ridd, there is no doubt that the statements that now appear on the JCU website will be easily discovered and negatively interpreted.

52. In the course of cross examination, it was pointed out that Professor Ridd has spoken at conferences, seminars and on television. Whilst this conduct might raise Professor Ridd's profile, it is unlikely to

translate into any employment for him. It certainly hasn't helped him thus far. As noted in his evidence, Professor Ridd rarely even has his expenses met while he is on the "speaking circuit".

53. I also accept Professor Ridd's evidence that he could not set up a private consulting business. He explained that if he were to do so, he would have to expend a lot of capital to purchase proper equipment. As he only has around five years of work left in him (as per my findings on the period of future economic loss), an investment of this sort is not financially viable.

54. Whilst there is an artificiality in the process of assessing future economic loss, and even more in assessing possible future earnings, all the Court can do is look at the probabilities as they stand at this point.

55. At this point, I can only foresee Professor Ridd earning about $30,000 over the next five years – or, more properly, until 24 December 2024. I would add to that a figure of $2600 to represent superannuation payments.

56. I have to subtract those sums from the amounts calculated as being what Professor Ridd would have earned at JCU. This would leave a sum for future economic loss of $750,000 and a figure of $130,000 in lost superannuation.

Vicissitudes

57. Nothing in life is certain. I have arrived at the figures I have calculated above on the basis that Professor Ridd remained healthy and worked full-time up until the day before his 61st birthday and, from then on, worked part-time until the day before his 64th birthday.

58. But these figures must be discounted to take into account the vicissitudes of life.

59. As Professor Ridd bluntly put it during his cross examination, he could be hit by a bus tomorrow and never have the chance to work until the day before his 64th birthday.

60. Apart from such an occurrence, the Court has to look at what other contingencies could have caused Professor Ridd not to reach those milestones.

61. It has been contended by JCU that, in an employment relationship, an employee may resign or an employer may terminate the employment for lawful reasons.

62. For many of the same reasons that I have already explored in looking at the question of "what could Professor Ridd have earned during the period", I am not of the view that Professor Ridd would have resigned his employment at the University where he has been employed for the last 30 years.

63. JCU submits that Professor Ridd could have been dismissed from his employment because he had misled the University. The basis of this submission is that, in correspondence between solicitors, the solicitors for Professor Ridd told the solicitors for JCU that Professor Ridd had not spoken to the press.

64. On 8 February 2018, JCU wrote to Professor Ridd alleging that he had breached confidentiality agreements by speaking to journalists from *The Australian*. In reply, solicitors for Professor Ridd wrote to the solicitors for JCU on 23 February 2018. In that correspondence, the solicitors note that the information in the article published in *The Australian* on 22 November 2017 was in the public domain from 11:52 AM on 20 November 2017.

65. The solicitors for Professor Ridd added this information (which is reproduced at the top of page 33 of the affidavit of Mr Rogers):

> *Our client did not disclose matters you have complained about to The Australian prior to the entry into public domain time. Any disclosures that may have been made thereafter, if there be any, are irrelevant.*

66. During cross examination, Professor Ridd admitted that he had spoken to a journalist at *The Australian* before 20 November 2017; that is, before the "entry into public domain time". He conceded that he had sent some material to the journalist and had conversed with him before there was "entry into public domain time".

67. This concession, under oath, is at odds with what the solicitors for Professor Ridd had written to the solicitors for JCU. What is submitted to me by JCU is that Professor Ridd had instructed his solicitors to lie to the solicitors for JCU. In other words, the submission is that Professor Ridd had lied to his employer.

68. In effect, JCU submits that telling such a lie to an employer would constitute serious misconduct and be lawful grounds for dismissal. In effect, JCU says it has grounds (other than the unlawful grounds relied upon), to justify dismissing Professor Ridd. If this is correct, the discount for "vicissitudes" could be 100%. At the very least, JCU submits that the discount should be in the order of 25%.

69. I have trouble with the submission that there were other grounds for dismissal. To justify the dismissal on the basis of dishonesty, JCU would have to prove that there was, in fact, dishonesty.

70. This contention is predicated upon a clear inference that Professor Ridd instructed his solicitors to specifically write what they did on 23 February 2018. However, that inference is far from clear.

71. There is no evidence as to what Professor Ridd told his solicitors. There is no evidence that the author of the letter actually confirmed with Professor Ridd that the contents of the letter were factually correct. That part of the letter itself can be categorised as "misleading" but there is insufficient material to ever categorise that part of the letter as "deliberately misleading", let alone a "lie".

72. In these circumstances, it is extremely difficult for the Court to accept that there were any likely scenarios in which the employment agreement between Professor Ridd and JCU would have ended before 24 December 2024.

73. Professor Ridd had been employed for over 30 years with JCU and there had never been, before these occurrences, any suggestion that Professor Ridd was anything other than a model employee. When assessing the whole of the evidence, it seems to me that a very low discount should be given to take into account the vicissitudes of life.

74. I calculate that discount at 5%.

Mitigation

75. I have found that Professor Ridd has proven that he has suffered an actual loss. I have found that, if Professor Ridd had not been terminated, he would have worked full-time until the day before his 61st birthday and part-time from then until the day before his 64th birthday (as he pleaded). I have found that he will not be earning more than $30,000 over the next five years and that the vicissitudes of life do not discount his loss by more than a nominal amount.

76. JCU submit that Professor Ridd has not mitigated his loss. Whether Professor Ridd has failed to mitigate his loss is a matter for JCU to prove.

77. The submission seems to be that if Professor Ridd cannot obtain employment in his chosen field, he must then lower his sights.

78. In *Regional Development Australia Murraylands and Riverland Inc v Smith* (2015) 251 IR 317, the Court found that an employee had failed to mitigate his loss because he had not sought alternative employment at a lower salary and of a lower status. The Court said that the question of when it would become unreasonable for the employee to refuse to lower his sights and be prepared to accept alternative employment needs to be assessed within the context of the employment prospects facing the employee.

79. In *Bryant v Defence Housing Authority* [2002] ACTSC 43, the Court said that a plaintiff was bound to mitigate his loss by taking reasonable steps to find a remunerative way of occupying the time he had been put at his disposal by his dismissal; in other words, he was bound to look for, accept and stay in suitable employment or income earning activity.

80. It is trite to say that these principles have to be applied to the particular facts. For example, if a person was dismissed from the position of chief executive officer (CEO), it would be expected that such a person should try to find work at a level commensurate with their skills. But if that person cannot find such work, it is reasonable to expect that they would look at other positions such as chief operating officer, chief financial officer or general manager so as to mitigate their loss.

81. In their submissions, JCU does not point to any position upon which Professor Ridd could avail himself. Instead, the suggestion is made that, because Professor Ridd is an intelligent man, then surely there are other positions for which Professor Ridd can reasonably be expected to find employment.

82. One would think that a university as prestigious as JCU, and with the breadth of contacts that such a university would have, would know exactly what sort of position there could be that would be reasonable for a senior academic like Professor Ridd. The fact that there has been nothing suggested by JCU only reinforces the point made by Professor Ridd that most big institutions wouldn't want to "have a bar" of someone who had been through what he has gone through.

83. I accept the evidence of Professor Ridd when he, in effect, said that he does not want to remain idle and is going to be actively seeking work. Despite his best endeavours, however, it is difficult to shake the feeling that because of this litigation, Professor Ridd will be seen as "damaged goods" and will continue to pay a heavy price for that stereotype.

84. In this regard, JCU has certainly "poisoned the well". The fact that JCU has not removed either of their press statements (despite my judgement) is almost tantamount to an attempt to ensure that Professor Ridd does not obtain employment in this field.

85. JCU's attitude to Professor Ridd is plainly illustrated in the email that was sent to everyone on the JCU mailing list. Given that any work that in any way involves the Great Barrier Reef will, either directly or indirectly, lead to interaction with JCU, it is difficult to see how Professor Ridd could ever mitigate his losses.

86. It would seem that the only way in which Professor Ridd could potentially mitigate his loss is if there were a changing of the guard at the University and Professor Harding and Professor Cocklin were no longer in their positions. There is no evidence this will happen any time soon.

Undertakings

87. In the course of cross-examination, Professor Ridd agreed that it would have been very pleasing if he and the University could have come to

some agreement on a form of undertaking that would have preserved the status quo until the Court made its decision.

88. JCU submits that another aspect of Professor Ridd failing to mitigate his loss is that he, and his solicitors, failed to enter into reasonable undertakings.

89. The undertakings would have meant that Professor Ridd was prohibited from publicly discussing his situation. He would also have had to remove from the Internet and social media any material relating to the proceedings that he had posted.

90. JCU relies upon the interlocutory judgement given by His Honour Judge Jarrett (*Ridd v James Cook University & Ors* [2018] FCCA 3080). In paragraphs 47 to 51, His Honour said:

> *47. However, prior to it deciding to do so, the University, cognisant of these proceedings no doubt, because it said so in its response filed on 23 February, 2018, suggested that the University provide an undertaking that it would not by its servants, officers or agents, purport to determine any of the allegations the subject of the then applicant's statement of claim, until the determination of these proceedings or there was some agreement in writing between the parties or there was another order of the Court.*
>
> *48. Subsequently, on 28 February, 2018 and before the termination decision, the University's solicitors indicated that the University was prepared to offer mutual undertakings which, apparently, if accepted, meant that the disciplinary process that was then underway would be suspended until the conclusion of these proceedings. They would require the applicant to remove the information that the University was suggesting had been improperly disclosed by him and which the University considered derogatory and misleading. That was material that the applicant had published on a WordPress blog site that he had established and what is described in the material as a "Go Fund Me page".*

> *49. The undertakings would also have had the effect of requiring the applicant to cease making public commentary on these proceedings or the current disciplinary process, including any asserted effect that they had on his academic freedoms.*
>
> *50. One might have thought that the offer of such undertakings was reasonable in the circumstances because it would allow for an adjudication of the rights of the parties in an appropriate way without there being prejudice to either party. The applicant would have maintained his employment; the University would have maintained what it saw as the integrity of its disciplinary processes, pending a determination about those issues from the Court. However, the applicant declined to enter into those undertakings and there was no alternative suggestion. The offer of the undertakings was repeated on 14 March, 2018 but, again, the applicant declined to give them.*
>
> *51. Those matters are significant, in my view, because there was an opportunity for the applicant to avoid the very prejudice that he now says he is subjected by reason of the University's conduct. He was given the opportunity, in a reasonable way in my view, to have the relevant matters adjudicated upon and, in the meantime, the status quo preserved.*

91. On the information that was before His Honour, His Honour has made proper observations. However, His Honour did not have all of the information that was available to me as the trial judge.

92. Professor Ridd explained that he needed to finance his legal challenge. When he first filed the application, the issue was confined to the first censure and to the allegations that led to the second censure. At that stage, Professor Ridd was trying to raise $95,000 to fund the legal challenge.

93. To do this, he made public all of the documentation that had been filed so as to give any potential donor all the information necessary to make a decision as to whether they would contribute money to fund his cause.

94. He had met that $95,000 target in February or March 2018. However, by that time, he had been given the final censure and had been given another list of allegations that eventually led to his termination. He revised the target needed to finance his legal challenge to $260,000.

95. JCU argues that, because Professor Ridd had reached his $95,000 target by the time the University had offered its undertakings, it was unreasonable for Professor Ridd not to negotiate some acceptable form of undertaking.

96. Professor Ridd explained that if he had to refrain from talking about his situation and remove his postings, he would not have been able to raise the money required for his legal battle which had been changed.

97. It must be noted that JCU was not proposing that the new set of allegations would not be pursued after any court action but, rather, that they would be "suspended" and then reactivated upon the completion of court proceedings.

98. The situation before me is quite different to the one that was before His Honour Judge Jarrett. There has now been a complete examination of the confidentiality directions and I have ruled them to be unlawful. It cannot be said that Professor Ridd was unreasonable in failing to accept undertakings that would reinforce unlawful directions that had been given to him and, at the same time, also depriving him of the resources needed to fund his legal battle.

99. Professor Ridd also explained that he did not trust JCU to keep up its end of the bargain. This might seem like an extraordinary allegation to make against a prestigious university. However, JCU's behaviour, including the subsequent email distribution, public statement and Twitter message, shows that Professor Ridd's misgivings were certainly not misplaced or over-stated.

100. I have come to the conclusion that JCU has failed to prove that Professor Ridd has not mitigated his loss.

101. In light of that finding, the amounts that I would award for future economic loss are $712,500 for wages and $123,500 in lost superannuation.

102. There are tax implications with regard to the awards for past economic loss and future economic loss. I have accepted the submission of JCU that I should simply make the award and let Professor Ridd and the Australian Taxation Office sort out what sum needs to be paid in tax having regard to these reasons.

General Compensation

103. This aspect of the compensation is far more inchoate than a calculation for past or future economic loss. This is because it is far more difficult to quantify in monetary terms what compensation can be given for hurt and humiliation as well as loss of reputation.

104. While Professor Ridd has not suffered a psychiatric injury as had happened to the plaintiffs in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 or *Hill v Hughes* [2019] FCCA 1267, that does not mean that his suffering is any the less real or palpable.

105. Those two cases involved breaches of the *Sex Discrimination Act*. As such, the compensation needed to be viewed in the context of the objects of that Act. In this matter, where JCU has contravened a civil remedy provision of the FW Act, the Court must consider the objects of this Act.

106. The relevant parts of section 3(e) of the FW Act are:

> *The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*
>
> > *enabling fairness…at work and the prevention of discrimination by recognising the right to freedom of association…(and)… protecting against unfair treatment…*

107. It seems to me that the assessment of general compensation must be done in the context of the need to protect an employee against unfair treatment.

How the contravention affected Professor Ridd

108. Professor Ridd began his involvement with JCU in 1978 when he began studying a Bachelor's course in Science. In 1982 he commenced a PhD and was a full-time member of the academic staff from 1989. He became a Professor in 2009 and was Head of Physics from 2009 to 2016. He was Head of the Marine Geophysical Laboratory for about 15 years.

109. Even though the information about the reputation of Professor Ridd comes from his own affidavits, such information has not been truly challenged. Professor Ridd received a number of awards for his teaching. He was a popular supervisor for PhD students.

110. Further, Professor Ridd claims to have published over 100 articles in international journals.

111. In an affidavit read in the previous proceedings, Professor Cocklin used a different definition of "publishing articles". In that affidavit, Professor Cocklin said that Professor Ridd had only published 83 articles.

112. Professor Ridd claimed that he has been ranked by ResearchGate as being within the top 5% of researchers globally. This was not disputed by the University.

113. Professor Ridd claims that, between 2015 and 2017, he was told by Professor White that he (Professor Ridd) was "off the scale in terms of how well he was doing". Neither the University nor Professor White refuted this claim.

114. When Professor Ridd became the Head of Physics this was done because he had "sustained outstanding achievement and leadership across the broad spectrum of academic activities". This was not disputed by the University.

115. From April 2016 until May 2018, the relationship between management at the University and Professor Ridd was strained, to say the least. This was caused *completely* by the unlawful conduct of the University.

116. Professor Ridd claims that the actions of the University had caused him stress, anxiety and humiliation. The effect of the unlawful

confidentiality directions was to isolate Professor Ridd from his wife, his colleagues and any outside person who could help him "blow the whistle" on the unlawful conduct perpetrated by JCU.

117. As noted, Professor Ridd was something of a fixture at JCU. He lived near the main campus and his identity within the community was that of a person who was an intrinsic part of JCU. More importantly, JCU was seen as an intrinsic part of Professor Ridd.

118. I accept the evidence of Professor Ridd that the first censure upset him. To use his words, he had "tried to blow the whistle on a scientific issue of public importance". I accept that Professor Ridd was shocked to be censured in this way. I accept that he subsequently felt much more uncertain about work and "what his limits" were. More importantly, I accept that he was embarrassed about being labelled as someone who had engaged in "misconduct".

119. I accept that Professor Ridd was even more humiliated in the aftermath of his interview on the Sky News channel. Again, he was trying to engage in proper intellectual debate on a serious topic which was done during the exercise of his intellectual freedom. To be told that he was being investigated for "serious misconduct" must have felt like persecution.

120. To be given the confidentiality directions meant that he could not continue to exercise his intellectual freedom. I accept the evidence of Professor Ridd that JCU's actions made him feel "isolated". The anguish that he describes is both relatable and understandable. The unfairness of JCU's conduct speaks for itself.

121. Professor Ridd was even more humiliated when JCU decided to trawl through all of the emails that he had both sent and received on his university email account. There was simply no call for such draconian action. There was no evidence that JCU routinely did this form of audit on all persons who have JCU email accounts. To do so here borders on paranoia and hysteria fuelled by systemic vindictiveness.

122. At that point there was no evidence to suggest that there had been any improper use of the email account by Professor Ridd. To be targeted in this way was bad enough, but to know that the only reason that this was

being conducted was that there had been an exercise of the workplace right to intellectual freedom, must have been particularly devastating for Professor Ridd.

123. I also believe Professor Ridd when he says that being investigated for "serious misconduct" gives rise to rumours and speculation as to sexual misconduct. Unless the "serious misconduct" is explained, such rumours will abound. I believe Professor Ridd when he says that such rumours had already started. Mud sticks. It should not have been thrown in the first place.

124. When JCU terminated Professor Ridd's employment, it had a devastating impact.

125. Firstly, Professor Ridd had the embarrassing task of having to "clean out his office".

126. I also accept that Professor Ridd felt that he had somehow let down his students.

127. Further, the termination put any plans for retirement into limbo and, because he had tenure, caused him to worry about his future for the first time in his working life.

128. To add insult to injury, JCU made a public statement that stridently told the world that Professor Ridd had engaged in serious misconduct and breached the Code of Conduct. That public statement, issued in May 2018, is, according to the affidavit of Professor Ridd, still on the JCU website -- despite my reasons being published in April 2019.

The email, press release and Twitter feed

129. At the outset, Professor Ridd did not plead that the actions of JCU warranted aggravated damages. However, this is because he could not have contemplated that JCU would behave in such an appalling manner after the Court published its reasons. Professor Ridd's conciliatory attitude is illustrated in the fact that he, through his legal team, asked

that I not make declarations so that he and JCU might be able to settle the matter without the need for further litigation

130. Nevertheless, JCU's actions after the Court delivered its reasons and its refusal to remove damaging materials from the JCU web page, do go to the question of general damages. This is because those actions and behaviour stem from the contravention of the FW Act and the loss suffered by Professor Ridd is because of the contravention.

131. That email further damaged the reputation of Professor Ridd and added to the hurt and humiliation that he felt. Professor Ridd was entitled to say that he had been vindicated by the Court. But before he even had chance to do so, JCU "cut him off at the pass".

132. The email again criticised Professor Ridd for doing an act, or acts, that were an exercise of his rights under the EA. The email states, as a fact, that "*that conduct was a serious breach of the Code of Conduct*" even though JCU knew that the Court had ruled that there was no breach of the Code of Conduct, let alone a "serious breach".

133. The email criticised Professor Ridd for breaching directions that the Court had held were unlawful. It said that "*in court, he admitted that he knew it was wrong, but did it anyway*". Such a statement is a blatant untruth. Frankly, for an institution that strives to graduate tomorrow's leaders to engage in conduct of this sort is remarkable. It is a bad look and one that cannot be justified.

134. Another untruth in the email was a statement that Professor Ridd "*was never gagged or silenced about his scientific views, a matter which was admitted during the court hearing*". This was never admitted by Professor Ridd or his Counsel at trial.

135. JCU attempted to undermine the force of the Court's decision by comparing my findings with those of His Honour Judge Jarrett. But there was no explanation about the difference between the tasks of the two Courts. Such an explanation would have clearly shown that there was no conflict between our respective decisions. The intent here was to ensure that Professor Ridd could not enjoy the "fruits of his victory".

136. That intent is also clear in relation to the mischievous claim that JCU was "*troubled by the fact that there was a failure to refer to any legal*

precedent or case law in Australia to support the interpretation of the EA…". The fact is that the Court did refer to relevant legal principles and jurisprudence at paragraph 240 of the reasons provided. It was common ground between both parties that there was no more specific authority that was "on point".

137. The email was a blatant attempt to undermine this Court's decision and sow doubts about findings that had both vindicated the position taken by Professor Ridd and restored his reputation. I have already spoken about the effect of such an email upon the prospects of Professor Ridd's future employment.

Assessment of general damages

138. Since the decision in *Oracle*, there has been an awareness by the Court of the change in community attitudes as to the quantum of compensatory damages for non-pecuniary loss.

139. As Justice Hayne said in *Rogers v Nationwide News Pty Ltd* [2003] HCA 52 at paragraph 66:

> *Damage to reputation is not a commodity having a market value. Reputation and money are, in that sense, incommensurable.*

140. In *Alexander v Home Office* [1988] 1 WLR 968, May LJ said, at 122:

> *As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution. Where the discrimination has caused actual pecuniary loss, such as the refusal of a job, then the damages referrable to this can be readily calculated. For the injury to feelings however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.*

141. In *O'Brien v Dunsdon* (1965) 39 ALJR 78 at 78, Barwick CJ, Kitto and Taylor JJ said:

> *Each case must be considered in the light of its own facts and an assessment made of the amount which can fairly be regarded as reasonable compensation for the injuries and disabilities which a plaintiff has sustained. It is true, as has been observed on other occasions, that it is impossible precisely to translate pain and suffering and the loss of enjoyment of life into money values. But, nevertheless, some attempt must be made to assess a reasonable sum, remembering, whilst attempting to do so, that it is not possible by payment of an amount of compensation to effect a* restitutio in integrum *and that the assessment should be made having regard, as far as possible, to the general standards prevailing in the community.*

142. In this case, Professor Ridd has endured over three years of unfair treatment by JCU – an academic institution that failed to respect the rights to intellectual freedom that Professor Ridd had as per clause 14 of the EA.

143. Professor Ridd has given evidence before me on two occasions. I have found him to be scrupulously honest. He is a person who does not make statements lightly and there is genuine conviction in what he says. The passion he has for his work and for the Great Barrier Reef is plain for all to see.

144. There is no malice or vindictiveness in Professor Ridd's manner. He has sought to debate matters of public significance via a legitimate true scientific process where ideas are matched against each other in the search for truth. This is at the heart of intellectual freedom. That freedom is all that Professor Ridd has ever sought to exercise. He would have continued to do so but for the myopic and unjustified actions of his lifelong employer.

145. Professor Ridd has been painted as "non-collegiate", "recalcitrant" and even "dishonest". None of these are attributes that can be seen in this man. He has been ostracized from the academic community and accused of "serious misconduct" and was deliberately made to feel isolated via the making of unlawful directions as to confidentiality.

146. Then, when he took these matters to Court (as he was, in fact, challenged to do by JCU in their press release of May 2018) and was successful, the University did what it could to undermine the decision of the Court and deprive Professor Ridd of "the fruits of his victory". It then further attempted to blacken his name.

147. Looking through the lens of prevailing community attitudes, the award for general damages cannot be minimal but neither can it be excessive. The award must have regard to all that has happened to Professor Ridd over the last three years, focusing on JCU's contraventions.

148. Those contraventions constitute a blatant failure to respect Professor Ridd's rights to intellectual freedom via unlawful directions and sanctions which have affected him in the ways that I have found earlier in these reasons.

149. Finally, the award I make for general damages must be consistent with the objects of the FW Act which, in this case, are to protect an employee from unfair treatment by his employer.

150. I acknowledge that Professor Ridd has no psychiatric injury or any lasting or significant medical condition that can be attributed to the actions of JCU. I also acknowledge that there must be some relativity as between the award that I make and awards that have been given in proceedings that some may argue are not dissimilar to the present.

151. However, there is nothing to be gained by making detailed comparisons of awards given in defamation or sexual harassment cases. Each case must be taken on its own and the award must have regard to the general standards prevailing in the community.

152. Taking all of these matters into account, I assess general damages at $90,000.

Pecuniary Penalties

153. The facts of this case and the contraventions found do not need to be repeated. In assessing pecuniary penalties, I must look at the groupings pursuant to section 557 of the FW Act.

154. This section allows for two or more contraventions of a civil remedy provision to be taken to constitute a single contravention if the contraventions arose out of a course of conduct.

155. JCU submits that each of the contraventions arose because of a misinterpretation as to the effect of clause 14 of the EA. The submission continues that, because of this fact, the contraventions could then be seen as arising out of a single course of conduct. The submission is that the Court should then treat all of the contraventions as if they were a single contravention.

156. That submission mis-characterises what a "course of conduct" actually is. A course of conduct is not founded upon the underlying reason for the conduct. A course of conduct is founded upon the behaviour that constitutes the conduct, rather than the reason for the conduct.

157. For example, over the course of the year, an employer may pay an employee $20 an hour where the award rate is $21 an hour. That employer may have the belief that they can pay a flat rate if the employee agrees. In such a situation, there may be many contraventions of the FW Act, including failure to pay award rate, failure to pay Saturday loading, failure to pay Sunday loading and failure to pay public holiday loading.

158. If JCU's submission were correct, those contraventions should just be treated as one contravention because the underlying reason for the contraventions was a mistaken belief as to how the employer could pay the employee. However, in this example, the employer's behaviour was to deny the employee the right to the award rate. But it was also to deny the employee the right to the Saturday loading, the Sunday loading and the public holiday loading. In such a situation, there may be over 150 separate contraventions of the FW Act. Section 557 allows those contraventions to be grouped as four single contraventions by grouping the behaviour; that is, not paying the award rate, not paying the Saturday loading, not paying the Sunday loading and not paying the public holiday loading.

159. In relation to Professor Ridd, the JCU's behaviour falls into distinct courses of conduct.

160. Firstly, there is the behaviour that stems from the making of the first censure. Secondly, there is the behaviour that stems from the making of the final censure. Thirdly, there is the behaviour that stems from the making of the confidentiality and other similar directions. And finally, there is the behaviour that stems from the termination of Professor Ridd's employment.

161. Those groupings align with the following declarations/contraventions:

- declarations (a), (b) and (c)
- declaration (d)
- declarations (e), (f), (g), (h), (i), (j) and (k)
- declarations (l) and (m)

162. On 1 July 2017, the value of a penalty unit increased from $180 to $210. This means that for the first grouping of contraventions, the maximum penalty is $54,000 whereas for the remaining three contraventions, the maximum penalty is $63,000.

Assessment of pecuniary penalties

163. The purpose of pecuniary penalties was discussed by the High Court in *Commonwealth of Australia v Director, Fair Work Building Industry Assessment* [2015] HCA 46. At paragraph 55 of that judgment, the Court said:

> *No less importantly, whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in Trade Practices Commission v CSR Ltd, is primarily if not wholly protective in promoting the public interest in compliance:*
>
> *'Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act]. ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter*

repetition by the contravenor and by others who might be tempted to contravene the Act.

164. In *Mason & Harrington Corporation Pty Ltd t/as Pangea Restaurant & Bar* [2007] FMCA 7, ("the Pangea case"), the Court set down a list of a number of matters that the Court ought take into account in the assessment of civil penalties.

165. I have had regard to all the matters on that list. However, I have not slavishly followed it as if it were a checklist or some form of mathematical calculation of an appropriate penalty.

166. It has been submitted that because there is a new EA in existence, the circumstances which allowed this behaviour to occur will never happen again. That may be so (in that there is no equivalent clause 13 in the new EA and clause 14 has been replaced by a new clause 10).

167. However attractive that submission may be, the deterrence aspect is still very much alive; that is, the need for JCU to respect the rights of their employees to intellectual freedom under the EA and not attempt to restrict or encumber those rights by reference to any other instrument not within the EA.

168. During the course of submissions, I put an example to Counsel for JCU as to what would happen if an academic employee of JCU exercised their right to intellectual freedom but did so in a "non-collegiate way". I asked whether the rectification undergone by the University would allow that employee to act in this way without fear of retribution.

169. The answer from Counsel for JCU was that the University had rectified its processes so that it would embark on a correct interpretation of clause 14 read with clause 13. It was submitted that, as those clauses now no longer exist, because of the new EA, there was both nothing for the University to rectify and nothing for which the Court had to impose a penalty to deter the University from such action.

170. With all due respect to Counsel for the University, such a submission ignores the objects of the FW Act which, in these circumstances, is to ensure that an employer is not unfair to an employee. To suggest that such unfairness has been rectified by a change in the EA is illustrative of a somewhat condescending attitude on the part of JCU.

171. There has been no acknowledgement whatsoever that the behaviour of JCU has been unlawful. There has been no acknowledgement by JCU that the treatment of Professor Ridd has been unfair.

172. This is why deterrence looms large in the assessment of the appropriate pecuniary penalties.

173. During the first censure, there were no persons from outside the University that were able to tell JCU that what they were doing contravened the FW Act.

174. Subsequently, however, JCU was told by solicitors for Professor Ridd that what they were doing was unlawful. The university was told that the confidentiality directions were unlawful. The university was told that Professor Ridd was exercising his rights pursuant to clause 14 of the EA.

175. Despite being told these things, JCU deliberately set out on a course of conduct that was unfair to an employee of that University. That unfairness is illustrated by the fact that, with regard to the first censure, no disciplinary action was taken against Professor Hughes even though Professor Hughes used the same "non-collegiate" language to describe Professor Ridd as Professor Ridd had used to describe Professor Hughes.

176. Notwithstanding that JCU was advised by solicitors that it was acting correctly, the decisions were not made by JCU's legal representatives but rather by persons at the highest end of the management chain; namely, Professor Cocklin and Professor Harding.

177. I have taken into account that JCU is a very large institution and that the majority of its funding comes from the taxpayer. I have also taken into account that there has been no similar previous conduct by the University.

178. While it can be said that there has been no contrition or corrective action taken by the University, this does not aggravate the appropriate penalty. Rather, it means that a matter to be considered in mitigation of the appropriate penalty cannot be considered in this case.

The penalties

179. The first contravention is serious. Professor Ridd was entitled to write what he wrote without fear of retribution because he was acting in

accordance with his rights. The maximum penalty is $54,000. In all of the circumstances, I am of the view that a pecuniary penalty of $15,000 is appropriate.

180. The second contravention is more serious. Professor Ridd was entitled to say what he said without fear of retribution. The manner in which JCU trawled through his emails, to try and find some more evidence of breaches of the Code of Conduct, was reprehensibly unfair to Professor Ridd, especially since he was entitled to write everything that he wrote.

181. The maximum penalty for this contravention is $63,000. In all of the circumstances, I am of the view that a pecuniary penalty of $30,000 is appropriate.

182. The third contravention is extremely serious. The directions to Professor Ridd were unlawful and trampled over his rights. This was a contravention that was repeated a number of times despite JCU being told, in no uncertain terms, of the unlawfulness of their conduct in making such directions.

183. This represents an egregious abuse of the power an employer has over an employee. It is well understandable that Professor Ridd believed that he was being gagged by the University. Objectively, there is no other reason for the making of directions of the sort made here.

184. The maximum penalty for this contravention is $63,000. In all the circumstances, I am of the view that a pecuniary penalty of $35,000 is appropriate.

185. The final contravention is the most serious of all the contraventions. There was no justification for the termination of Professor Ridd. To terminate a long-standing and productive employee because he was exercising his workplace rights is the most serious breach that an employer can make under the current industrial relations regime.

186. This course of action deserves condign "punishment" that will deter both this University and any other employer from dismissing an employee for exercising basic workplace rights.

187. In all of the circumstances I am of the view that a pecuniary penalty of $45,000 is appropriate.

188. The total of the pecuniary penalties is, therefore, $125,000.

189. I have a discretion as to whom the penalties should be paid. Normally, I would exercise that discretion so that the penalties would be paid to the Commonwealth. However, in *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4, the Full Court of the Federal Court traversed the history of the making of pecuniary penalties and the factors that a Court needs to take into consideration when exercising the discretion as to whom the penalty should be paid.

190. Without going into each of those principles, I find that the discretion should be exercised in favour of the pecuniary penalties being paid to Professor Ridd.

Summary

191. I will make an order for the payment of compensation to Professor Ridd. However, that sum will be provisional because I will accede to the parties' request to allow them to make any submissions about the quantum of the sum for past economic loss.

192. The totals are:

- $143,773.05 for past economic loss - wages
- $24,441.42 for past economic loss – superannuation
- $712,500 for future economic loss – wages
- $123,500 for future economic loss – superannuation
- $90,000 for general damages

193. That gives a total of $1,094,214.47 as compensation.

194. The sum of $125,000 in pecuniary penalties will also be paid to Professor Ridd.

I certify that the preceding one hundred and ninety-four (194) paragraphs are a true copy of the reasons for judgment of Judge Vasta

Date:6 September 2019