SUPREME COURT OF QUEENSLAND

CITATION:	*Gramotnev v Queensland University of Technology* [2018] QSC 37
PARTIES:	**DMITRI GRAMOTNEV** (plaintiff) **v** **QUEENSLAND UNIVERSITY OF TECHNOLOGY** (defendant)
FILE NO/S:	No 6286 of 2010
DIVISION:	Trial
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 March 2018
DELIVERED AT:	Brisbane
HEARING DATES:	8 and 10 May, 30 – 31 October and 6 – 7 November 2017
JUDGE:	Flanagan J
ORDERS:	**1. The plaintiff's claim is dismissed.** **2. I will hear the parties as to costs.**
CATCHWORDS:	EMPLOYMENT LAW – TERMINATION AND BREACH OF CONTRACT – TERMINATION OR BREACH – where the plaintiff was employed by the defendant university as a lecturer – where the defendant terminated the plaintiff's employment on grounds of 'serious misconduct' – where a prior proceeding in the Queensland Court of Appeal had determined that clause 44 of the defendant's enterprise bargaining agreement constituted a term of the plaintiff's employment contract – where the plaintiff brought proceedings alleging breaches of that term – whether the proper construction of the term required the defendant to notify the plaintiff of an allegation of misconduct, rather than simply conduct – whether the defendant breached the term by insufficiently notifying the plaintiff of allegations of misconduct, as opposed to conduct – whether the plaintiff's conduct in sending a number of emails was incapable of amounting to 'serious misconduct', such that the plaintiff's employment would not have been terminated had he received proper notification from the defendant of the allegations – whether the defendant further breached the term by failing to refer allegations to a Misconduct Investigation Committee –

whether any finding by a Misconduct Investigation Committee in the plaintiff's favour would have been binding on the defendant such that the plaintiff's employment would not have been terminated

EMPLOYMENT LAW – TERMINATION AND BREACH OF CONTRACT – TERMINATION OR BREACH – where the plaintiff further alleged that the three-tiered procedures set out in the defendant's policy on discrimination-related grievances formed part of his employment contract – where the plaintiff also alleged that the defendant's failure to engage those procedures constituted a breach of his employment contract – whether the procedures could be accurately characterised as promissory obligations giving rise to contractual entitlements – whether, if the procedures were contractual, the defendant was required to act to engage the procedures in response to emails it received from the plaintiff – whether, if the defendant had followed the procedures, the plaintiff's employment would not have been terminated

INDUSTRIAL LAW – WORK HEALTH AND SAFETY – DUTIES AND LIABILITIES – EXTENT OF DUTY AND GENERALLY – where the plaintiff further alleged that the defendant's termination of his employment was a breach of the defendant's duties under s 174(1)(b) *Workplace Health and Safety Act* 1995 (Qld) – whether the emails forming the basis of the plaintiff's dismissal contained a complaint or raised an issue concerning workers' exposure to risk of illness or injury for the purposes s 174(1)(b) – whether, for the purposes of the section, the defendant's dominant or substantial reason for terminating the plaintiff's employment was the plaintiff's making of such a complaint or raising of such an issue – whether the remedies available under the section have relevance to any damages available for breach of contract

Workplace Health and Safety Act 1995 (Qld) (Repealed), s 174

City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union (2006) 153 IR 426; [2006] FCA 813, applied
City of Wanneroo v Holmes (1989) 30 IR 362, applied
Geo A Bond & Co Ltd (in liq) v McKenzie [1929] AR (NSW) 498, 503, applied
Goldman Sachs JBWere Services Pty Ltd v Nikolich 163 FCR 62; [2007] FCAFC 120, applied
Gramotnev v Queensland University of Technology [2010] FWA 6237, considered
Gramotnev v Queensland University of Technology [2011] FWAFB 2306, considered

Gramotnev v Queensland University of Technology [2013] QSC 158, considered
Gramotnev v Queensland University of Technology (No 2) [2015] QCA 178, applied
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332; [1994] HCA 4, applied

COUNSEL: The plaintiff appeared on his own behalf
D Kelly QC, with D de Jersey, for the defendant

SOLICITORS: The plaintiff appeared on his own behalf
Minter Ellison Lawyers for the defendant

[1] The plaintiff, Dr Dmitri Gramotnev, was employed as a Lecturer in Physics by the defendant, Queensland University of Technology (QUT). The plaintiff commenced this appointment on 1 January 2000. The defendant terminated the plaintiff's employment for 'serious misconduct' on 3 July 2009.

[2] The plaintiff seeks damages for breach of contract. He alleges four specific breaches of his employment contract; two breaches of QUT's Enterprise Bargaining Agreement 2005 – 2008 (Academic Staff) (the **EBA**) and two breaches of QUT's Manual of Policies and Procedures 2005 (the **MOPP**) Policy A/8.5 "Grievance resolution procedures for discrimination related grievances" (the **Grievance Policy**).[1]

The employment contract

[3] The employment contract between the plaintiff and the defendant was in writing, constituted by a letter from the defendant to the plaintiff dated 23 November 1999.[2]

[4] In earlier proceedings, the Queensland Court of Appeal has determined that, under MOPP Policy B/8.4 "Academic and Professional Staff Misconduct", the defendant contractually promised the plaintiff that an allegation of misconduct or serious misconduct against him would be dealt with by the procedures outlined by clause 44 of the EBA.[3] There is therefore no dispute between the parties that clause 44 of the EBA constitutes a term of the employment contract.[4]

[5] There is, however, a dispute as to whether the procedures set down by the Grievance Policy are contractual.[5]

Conduct of the trial

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1 Second Further Amended Statement of Claim, [16].
2 Second Further Amended Statement of Claim, [13]; Amended Defence, [6].
3 *Gramotnev v Queensland University of Technology (No 2)* [2015] QCA 178.
4 Second Further Amended Statement of Claim, [14]; Amended Defence, [6].
5 Second Further Amended Statement of Claim, [15]; Amended Defence, [7].

[6] The plaintiff was self-represented. He relied on three affidavits affirmed by him on 19 October 2016, 7 December 2016 and 30 August 2017 together with an affidavit of his wife, Dr Galina Gramotnev.[6]

[7] The defendant relied on the affidavit of Professor Kenneth Bowman. The plaintiff and Professor Bowman were cross-examined. Both parties made submissions regarding the credit of the plaintiff and Professor Bowman.[7] This is not a case which is resolved by findings of credit but rather by reference to the extensive contemporaneous documents and upon a proper construction of the employment contract.

[8] What informs the plaintiff's case, however, is his belief that from 2007 to 2009 he was "repeatedly and systematically subjected to bullying, harassment, workplace mobbing, intimidation, discrimination, impediment and retaliation" by the defendant.[8] This belief is also held by Dr Galina Gramotnev.[9] These allegations have been directed by the plaintiff to senior staff of the defendant including:

(a) the Deputy Vice Chancellor (Academic), Professor David Gardiner (2007);

(b) the Executive Dean of the Faculty of Science and Technology, Professor Margaret Britz (2007);

(c) the Acting Head of the School of Physical and Chemical Sciences, Associate Professor Godwin Ayoko (2007-2008);

(d) the Executive Dean of the Faculty of Science and Technology, Professor Simon Kaplan; and

(e) the Vice Chancellor, Professor Peter Coaldrake.

The plaintiff asserts that a determination of whether he was bullied, harassed and/or discriminated by the defendant or whether he had reasonable grounds to believe so, is relevant to all four breaches of the plaintiff's employment contract.[10] As submitted by the plaintiff:

> "… the determination of these questions is relevant to the determination of whether or not the contractual breaches occurred and what would have been the likely outcomes and the events, had the contractual breaches not eventuated."[11]

[9] On the basis that the defendant did not challenge at trial the plaintiff's allegations of bullying, harassment and discrimination, the plaintiff seeks a determination by this Court that he was bullied, harassed and/or discriminated by the defendant or he had reasonable grounds to believe so. While the events of 2007 to 2009 provide background leading to the plaintiff's dismissal it is neither necessary nor appropriate for this Court to make the determination sought by the plaintiff. The plaintiff's evidence and that of his wife constitutes a wholly inadequate basis for the Court to make any determination as to whether the conduct of senior staff of the defendant, including the Vice-

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6 Affidavit of Galina Gramotnev sworn 19 October 2016.
7 Plaintiff's Written Submissions, [168]-[180]; Defendant's Written Submissions, [100]-[101].
8 See Plaintiff's Written Submissions, [15]; Second Further Amended Statement of Claim, [45]-[153].
9 Affidavit of Galina Gramotnev sworn 19 October 2016, [169]-[170].
10 Plaintiff's Written Submissions, [26]-[55].
11 Plaintiff's Written Submissions, [27].

Chancellor, constituted bullying, harassment and/or discrimination. More particularly, the mere fact that the plaintiff held this belief and repeatedly made this allegation in the contemporaneous correspondence does not constitute a proper basis for such a determination. Further, the plaintiff's belief that he was subjected to bullying, harassment and/or discrimination is, as submitted by the defendant, irrelevant to whether the employment contract was breached as alleged.[12] As the plaintiff however relies on the allegations of bullying, harassment and/or discrimination as being relevant to the four breaches, it is necessary to set out some of the history of dealings between the plaintiff and his wife and senior staff of the defendant.

The plaintiff's personal history

[10] The plaintiff was born on 18 November 1957 in Kapustin Yar, Astrakhan Region, Russia. He has been married to Dr Galina Gramotnev for 37 years. They migrated from Russia to Australia with their two children in 1995. He became an Australian citizen in 1997.[13]

[11] The plaintiff is a theoretical physicist with developed expertise in the field of nanophysics, specifically in 'nano-optics' and 'physics of nanoparticles'.[14]

[12] The plaintiff was awarded a PhD in 1989 from the Moscow Institute of Electronic Technology.[15] Prior to emigrating from Russia, he was employed as a Senior Research Fellow at the Research Institute of Physical Problems, Zelenograd in Moscow.[16]

[13] The plaintiff's wife, Dr Galina Gramotnev, is also a physicist and statistician, with expertise in the fields generally known as 'environmental sciences' and 'statistical data analysis'.[17]

Dr Gramotnev's employment at QUT

[14] The plaintiff commenced casual and part-time employment with QUT in February 1996 in the School of Physical and Chemical Sciences (formerly, the School of Physical Sciences) ('the School'). The plaintiff was offered and accepted appointment to the position of Lecturer in Physics by letter dated 23 November 1999. He commenced that appointment on 1 January 2000. That position was permanent, subject to a three-year probationary period.[18]

[15] Under the EBA, the plaintiff was classified as an 'Academic Level B' from his commencement on 1 January 2000. There are three levels of classification higher than Academic Level B identified in the EBA: Senior Lecturer (Level C), Associate Professor (Level D) and Professor (Level E). The plaintiff applied for promotion four times during the course of his employment with the School. He was never promoted

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12 T5-10, lines 35-44.
13 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [1]-[12].
14 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [15]-[19].
15 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [24].
16 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [25].
17 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [20].
18 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [41]-[47], Exhibit 3.

beyond the position of Academic Level B and remained so until the cessation of his employment. [19]

Dr Galina Gramotnev's connection to QUT

[16] Between September 2000 and September 2005, Dr Galina Gramotnev was enrolled as a PhD student in the international Laboratory for Air Quality and Health in the School.[20]

[17] Dr Galina Gramotnev was awarded her PhD by QUT in April 2007.[21]

[18] The plaintiff claims that the relationship between himself and his wife was common knowledge in the School at least from September 2000.[22]

[19] In November 2005, the plaintiff proposed that Dr Galina Gramotnev be appointed as a Visiting Fellow without remuneration within the Applied Optics Research Program in the School. After receiving the plaintiff's proposal, the Acting Head of the School (Associate Professor Thomas) and the Acting Executive Dean of the Faculty (Professor Herrington) discussed the potential conflict of interest arising with the plaintiff and his wife.[23]

[20] Professor Herrington sent an email to the plaintiff on 10 November 2005 agreeing to "*support the proposal and to formally inform Human Resources as to the nature of [the plaintiff's] family relationship with Galina*."[24] The plaintiff claims that this email constitutes the defendant's acceptance of the potential conflict of interest.[25]

[21] By way of letter dated 24 November 2005, QUT's Human Resources Director, Mr Graham MacAulay, invited Dr Galina Gramotnev to be a Visiting Fellow without remuneration for the term from 31 October 2005 to 31 December 2006.[26] The plaintiff was approved as her supervisor, conditional on the Head of the School playing an oversight role in respect of the supervision.[27] Dr Galina Gramotnev accepted this invitation. Her main activity was to collaborate in research with the plaintiff and his PhD students.[28]

[22] Her appointment expired on 31 December 2006. The plaintiff applied to extend his wife's Visiting Fellowship in January 2007. The plaintiff lodged that proposal with the Acting Head of the School, Dr Ayoko.[29] The plaintiff did not receive a formal response regarding his request for an extension.[30]

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19 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [27]-[28], [52]-[54].
20 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [59].
21 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [60].
22 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [61].
23 Second Further Amended Statement of Claim, [33]; Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [62]-[65].
24 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [66].
25 Second Further Amended Statement of Claim, [35].
26 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [67].
27 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [68].
28 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [71] and [73].
29 Second Further Amended Statement of Claim, [43].
30 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [83].

[23] In February 2007, Dr Galina Gramotnev submitted a proposed draft application for a research grant to QUT's Office of Research. Her application was for a research grant to be requested from the Australian Research Council (ARC). That application was put though the Applied Optics Research Program in collaboration with the plaintiff and two other universities.

[24] Dr Galina Gramotnev was the First Chief Investigator on the application, with the plaintiff as an Associate Investigator.

[25] On 21 February 2007, two days before the application deadline, Dr Galina Gramotnev received an email from the Faculty Assistant Dean (Research), Professor Mengersen, informing her that:

> "I have been instructed by the Dean that the Faculty will not allocate any resources to your research. Therefore, I regret to inform you that I cannot approve your project and have instructed the Office of Research to withdraw it from the list of QUT ARC DP applications to be submitted to the ARC. You are free, of course, submit (sic) your proposal through another university.
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> If you would like to discuss this further, please contact the Dean, Professor Margaret Britz."[31]

[26] One hour after receiving the email from Professor Mengersen, Dr Galina Gramotnev received an email from Professor Britz stating:

> "I'll expect an instant barrage!
>
> Marg"

Professor Britz's email copied in Professor Mengersen and the Director of the Office of Research, Mr McArdle.[32]

[27] The plaintiff's belief was that his wife's application had been "blocked".[33] Dr Galina Gramotnev viewed Professor Britz's email as "offensive, bullying and intimidating".[34]

The events in 2007

[28] On 5 March 2007, the plaintiff sent an email to the QUT Vice-Chancellor, Professor Coaldrake, in which he:

(a) complained that Professor Britz's conduct in blocking Dr Galina Gramotnev's proposed ARC application was, amongst other things, "unexpected", "unfair", "bullying" and "humiliating";

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[31] Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [104], Exhibit 11.
[32] Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [106]; Second Further Amended Statement of Claim, [54]-[55].
[33] T 1-46, line 15.
[34] Affidavit of Galina Gramotnev sworn 19 October 2016 [51(a)].

(b) sought that the Faculty fund the research equipment that was sought to be funded by the ARC Application (in the amount of $143,534.00);[35] and

(c) sought an apology from Professor Britz (the **5 March 2007 complaint**).

Professor Coaldrake responded to the plaintiff on 23 March 2007 informing him that the Deputy Vice-Chancellor, Professor Gardiner, would "*look into the matter…in the first instance"*.[36]

[29] The plaintiff met with Professor Gardiner on 4 April 2007 to discuss the complaints raised in his email to Professor Coaldrake. During this meeting, Professor Gardiner raised the 'undisclosed' conflict of interest of the plaintiff in relation to Dr Galina Gramotnev, including in relation to the blocked ARC grant application.[37] The plaintiff subsequently emailed Professor Coaldrake on 5 April 2007 requesting Professor Gardiner cease being involved in consideration of the plaintiff's complaint about Professor Britz on the basis of Professor Gardiner's conflict of interest in the matter. In that email, the plaintiff complains that:

(a) Professor Gardiner had been directly involved in alleged breaches of the Faculty of Science and QUT promotion procedures in 2004 – 2006 and "on numerous occasions, he clearly expressed his consistently negative/dismissive attitude to my concerns and complaints";[38]

(b) Professor Gardiner was not involved in the submission and preparation of ARC Grant applications; and

(c) Professor Gardiner was not involved in the introduction of the new mandatory peer review system for ARC applications at QUT.

The plaintiff requested, based on his complaints, that Professor Gardiner "be excluded from any further investigation and/or consideration of the above-mentioned issues".[39]

[30] On 27 April 2007, the plaintiff received a letter from Professor Coaldrake.[40] That letter enclosed a 'Report on Preliminary Inquiry into an ARC matter raised with the Vice-Chancellor by Dmitri Gramotnev' (the **2007 Report**) dated 12 April 2007. In that letter, Professor Coaldrake informed the plaintiff that he was aware of the plaintiff's views regarding Professor Gardiner's inability to assess these matters, however Professor Coaldrake did "*not consider it justified that senior officers of the university should be removed from the conduct of their duties on the basis of the personal perceptions of complainants or on the grounds of their involvement with previous unsubstantiated complaints*". The 2007 Report included a finding about possible misconduct on behalf of the plaintiff in relation to the "*declaration and management of conflict of interest in relation to his spouse"*.[41] That report was authored by Professor Gardiner.

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35 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 16.
36 Second Further Amended Statement of Claim, [56]-[57].
37 Second Further Amended Statement of Claim, [59].
38 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 14.
39 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 14.
40 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 15.
41 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 16; Second Further Amended Statement of Claim, [66].

[31] The plaintiff's belief is that Professor Gardiner did not conduct a fair and open investigation of the matters raised in the plaintiff's complaint regarding the blocking of Dr Galina Gramotnev's ARC application. The plaintiff also claims that Professor Gardiner *"transformed the investigation of the Plaintiff's 5 March 2007 complaint into the recriminating and harassing investigation of the Plaintiff*".[42] The plaintiff viewed certain findings of the report as being "*in the nature of a reprisal against myself and Galina and were recriminatory*".[43]

[32] Following the receipt by the plaintiff of the 2007 Report, a large volume of correspondence was exchanged between the plaintiff and various employees of the defendant. The key events are discussed below.

[33] The primary complaints of the plaintiff related to his claimed disclosure of the relationship between himself and his wife and the fact that the investigation of his complaint was conducted by Professor Gardiner. The plaintiff also claimed that the 2007 Report's discussion of the conflict of interest between the plaintiff and his wife was "*designed to intimidate, bully and harass the Plaintiff because of his complaint"*. The plaintiff claimed that the further emails received from Professor Britz had the same effect as the 2007 Report, as *"Professor Britz referred to the findings of Professor Gardiner and furthered the harassment of the Plaintiff by repeatedly directing and requiring him to declare his conflict of interest in relation to his wife Galina."*[44]

[34] On 8 May 2007, the plaintiff again emailed Professor Coaldrake objecting to Professor Gardiner's 2007 report. In this email the plaintiff:

(a) "fully dismissed" the 2007 Report as its author Professor Gardiner was conflicted;

(b) stated that he would continue to complain about Professor Britz's email dated 21 February 2007 and the "blocking" of his wife's ARC application;

(c) demanded that Professor Britz provide full compensation for the equipment requested from ARC in the blocked application (in the amount of $143,534) and consumables and rental costs ($5,000 per year for three years); and

(d) demanded a written apology from Professor Britz for "inappropriate blocking" of the ARC application.[45]

[35] Professor Gardiner emailed the plaintiff on 10 May 2007. Professor Gardiner copied in, amongst others, Professor Coaldrake and Professor Britz. Professor Gardiner requested that the plaintiff take appropriate steps to declare and resolve the situation regarding the "*undeclared conflict of interest*" regarding his wife.[46] Dr Galina Gramotnev's prior nomination for Visiting Fellow without remuneration had ceased by 31 December 2006.

[36] Professor Gardiner further counselled and cautioned the plaintiff in respect of "*inappropriate use of QUT's internet system to send broadcast e-mails*". Professor Gardiner informed the plaintiff that his email of 2 April 2007 contained "*defamatory material, including with respect to the Executive Dean and her legitimate*

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42 Second Further Amended Statement of Claim, [66].
43 Affidavit of Dmitri Gramotnev affirmed 19 October 2016 [121(d)].
44 Second Further Amended Statement of Claim, [71]-[72].
45 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 17.
46 Second Further Amended Statement of Claim, [68].

responsibilities".[47] Professor Gardiner also requested that the plaintiff's supervisor counsel him in relation to policy and practice in relation to resource and budget decisions and responsibilities and research grant practices.

[37] The plaintiff responded to Professor Gardiner's email of 10 May 2007 in an email to Professor Coaldrake dated 11 May 2007. In this email the plaintiff repeated his objections to Professor Gardiner from having any further involvement in relation to the 5 March 2007 complaint. The plaintiff reiterated that he had "dismissed" the 2007 Report. The email relevantly concludes:

> "Therefore, I am not prepared to accept, act, or get involved into further discussions based on further emails and/or advices from Prof. D. Gardiner … related to my current complaints."[48]

Professor Coaldrake responded to this email by letter dated 7 June 2007.[49] In this letter the Vice-Chancellor relevantly states:

> "I do not accept your reasons for dismissing the findings of Professor Gardiner and I expect you to comply with my final decision to accept the findings of the Report which I attach herewith once again for your information and careful attention.
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> I also attach for your information the web link to policy B/8.1 Code of Conduct … As you are aware, staff are expected to comply with the Code including 8.1.4(a) Respect for the law and system of government, and (b) Complying with QUT statutes, rules, policies and decisions. Staff who breach the Code may face consequences including disciplinary action for misconduct.
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> It is my understanding that you will be offered counselling and guidance, which I expect you to accept, in relation to the matters raised in the Report, including ARC grant application and resource and budget matters, peer review of research applications, conflict of interest, academic freedom and appropriate use of the email system.
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> With regard to the promotion matter, I am informed that you have received correspondence from the Queensland Ombudsman and that this matter is closed.
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> As my decision to accept the Report is final, no further correspondence will therefore be entered into on either of these matters."

[38] On 14 and 25 May 2007, the plaintiff received two emails from Professor Britz. Those emails referred to the findings of Professor Gardiner. The plaintiff responded by emails dated 15 and 29 May 2007. The plaintiff claimed that he explained his family relationship with Dr Galina Gramotnev and any conflict of interest "*had been properly declared and discussed with the Defendant on numerous occasions*".[50] The plaintiff

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47 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 18.
48 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 19.
49 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 23.
50 Second Further Amended Statement of Claim, [73].

stated that he felt further harassed by this repeated "*directing and requiring him to declare his conflict of interest in relation to his wife*".[51]

[39] By email dated 5 December 2007 to Professor Coaldrake, Dr Galina Gramotnev made a formal complaint alleging discrimination by the Executive Dean of the Faculty, Professor Britz. Professor Coaldrake responded to this email on 21 December 2007 stating that he would investigate the complaint and respond as early as possible in 2008.[52]

Performance, Planning and Review – Academic Staff Process in 2007

[40] The Performance, Planning and Review – Academic Staff (the **PPR-AS**) was a process conducted by QUT annually to assess the level of performance of academic staff members. This process was conducted by Dr Ayoko, who was the plaintiff's PPR-AS supervisor.[53] Dr Ayoko was also the Acting Head of the School.

[41] On 19 July 2007, the plaintiff emailed Dr Ayoko requesting to complete his PPR-AS that year. The plaintiff's first PPR-AS meeting occurred on 26 July 2007. Dr Ayoko informed the plaintiff during that meeting that his performance in three areas of academic activity (research, teaching and service) had been *"very satisfactory"*.[54] During the meeting, Dr Ayoko "*decided to raise issues that had been highlighted for 'counselling and guidance' in the QUT's 7 June 2007 letter"*.[55] This is a reference to Professor Coaldrake's letter to the plaintiff dated 7 June 2007.

[42] The plaintiff objected to Dr Ayoko's conduct regarding the PPR-AS process on the basis that Dr Ayoko raised the potential issue of a conflict arising from the plaintiff's relationship with his wife.[56] This was a topic specifically identified by Professor Coaldrake in respect of which the plaintiff was to be offered counselling and guidance. Two more subsequent meetings between Dr Ayoko and the plaintiff occurred on 1 and 16 August 2007 to discuss issues raised at the first meeting and in the PPR-AS form. The plaintiff alleges that during the conducted PPR-AS evaluation, Dr Ayoko "*designed a form for declaring conflicts of interest within the School*".[57] The plaintiff completed and returned the form to Dr Ayoko on the date of the third meeting. Dr Ayoko did not complete and sign the form until May 2009. The plaintiff alleges that the delay shows that "*reasonable management of the Plaintiff's potential conflict of interest was not the real goal of the Defendant during the PPR-AS process in 2007*". He alleges that the real goal of the PPR-AS process for the defendant was to "*intimidate, harass and bully the Plaintiff on the basis of his family relationship for his earlier complaint about the conduct of Professor Britz*".[58] QUT denies that allegation.[59]

The events in 2008

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51 Second Further Amended Statement of Claim, [72].
52 Second Further Amended Statement of Claim, [85].
53 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [136] and [139].
54 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [144].
55 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [145].
56 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 25.
57 Second Further Amended Statement of Claim, [81].
58 Second Further Amended Statement of Claim, [83].
59 Amended Defence of the Defendant, [56(a)].

[43] On 4 January 2008, the plaintiff received an email from Dr Ayoko. Dr Ayoko advised the plaintiff not to involve his wife in the research projects of his postgraduate students on the grounds of the family relationship and a potential conflict of interest.[60]

[44] The plaintiff claims that he had provided full disclosure of the 'new arrangements' regarding his wife's voluntary collaborative research with the plaintiff and his postgraduate students on 16 August 2007, and that Dr Ayoko did not object to that arrangement until Dr Ayoko's email of 4 January 2008.[61]

[45] The plaintiff responded to Dr Ayoko stating that his advice to not involve Dr Galina Gramotnev in the research projects of his post-graduate students did not seem appropriate and/or reasonable because:

(a) his wife's previous appointment as a Visiting Fellow involved her in several research projects of the Applied Optics Program, to which she had already made substantial contributions;

(b) as the plaintiff had provided full disclosure about the new arrangements and involvement of his wife, it would be "*grossly unfair and highly inappropriate"* for the plaintiff to now exclude her from being involved in the plaintiff's research projects;

(c) the plaintiff could not see any grounds to not involve his wife in the voluntary collaborative research.

The plaintiff then sought clarification from Dr Ayoko about whether he was advising or directing him to not involve his wife.[62]

[46] Dr Ayoko sent an email on 8 January 2008 providing the clarification sought by the plaintiff. Dr Ayoko informed the plaintiff that he believed "*that the best option for managing the disclosed interest is to* ***'avoid'*** *the potential/perceived/actual conflict"*.[63]

[47] The plaintiff claims that the email sent by Dr Ayoko on 4 January 2008 was caused by Dr Galina Gramotnev's complaint regarding Professor Britz, sent on 5 December 2007.[64] The plaintiff claims that the email from Dr Ayoko dated 4 January 2008 *"constituted an attempt by the Defendant to significantly impede in a discriminatory way the Plaintiff's contractual research, supervisory duties and activities."*[65]

[48] The plaintiff claims that the emails of Dr Ayoko of 4 and 8 January 2008 and further emails of a similar nature sent on 22 February and 14 March 2008 were *"repeated unwanted and harassing advices"* and *"constituted a pattern of repeated less favourable treatment in the form of bullying and discrimination of the Plaintiff on the basis of his family relationship."*[66]

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60 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 36.
61 Second Further Amended Statement of Claim, [87].
62 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 37.
63 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 38.
64 Second Further Amended Statement of Claim, [89].
65 Second Further Amended Statement of Claim, [90].
66 Second Further Amended Statement of Claim, [94].

[49] The defendant denies that this correspondence constituted a harassing advice, threats, bullying or discrimination.[67]

[50] The plaintiff received an additional email from Dr Ayoko on 20 March 2008. That email stated that given there was no financial or formal association with QUT, Dr Ayoko would "*not further pursue the conflict of interest matter"* regarding Dr Galina Gramotnev while she remained neither formally affiliated nor employed by QUT.[68] The plaintiff responded to that email on 24 March 2008 informing Dr Ayoko that he:

(a) should have already been aware that Dr Galina Gramotnev was not financially or formally associated with QUT from July 2007; and

(b) had acted in a way that was inconsistent with the QUT Code of Conduct and constituted bulling, harassment and impeded on the contractual duties owed to the plaintiff by the defendant.[69]

[51] Previously on 10 January 2008, the plaintiff had emailed Professor Coaldrake to draw the Vice-Chancellor's attention to the plaintiff's concern "*regarding the current administrative situation in the School of Physical and Chemical Sciences in the Faculty of Science*…".[70] The email relevantly states:

> "As you probably know, the former Head of the School of Physical and Chemical Sciences, Prof. J. M. Pope, retired in June 2005. This means that for more than 2.5 years, the School has been without an actual Head. May be I am wrong, but as far as I know, there are no attempts at the current moment to fill in this power vacuum. For example, at the moment, there is no event an advertisement for the position of the Head of School, though the staff has been informed on numerous occasions (at least since the middle of 2007) that this position would be re-advertised.
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> …
>
> This is especially worrying for me, because, in my personal view, the current Acting Head of School, Dr. G. Ayoko, does not seem to demonstrate sufficient leadership and management abilities. It is possible that I am misjudging this, but to my sincere regret, some of the actions of Dr. G. Ayoko do not seem to demonstrate adequate understanding of the management policies and practices at QUT. In particular, my concerns are based upon my own experiences and facts outlined in my previous email to you dated 18 August 2007. These concerns have unfortunately been significantly reinforced by the further developments within the last several days, which are related to my earlier (on 29 June 2007) declaration of my potential conflict of interest with my wife, Dr. Galina Gramotnev, under the changed circumstances with her formal association with QUT…
>
> I also believe that the responsibility for such a inadequate situation lies with the Executive Dean of the Faculty of Science, Prof. M. Britz, who is directly

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67 Amended Defence of the Defendant, [67].

68 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 48; Second Further Amended Statement of Claim, [95].

69 Second Further Amended Statement of Claim, [97].

70 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 40.

> responsible for ensuring smooth and effective functioning of all the Schools in the Faculty, including the due and timely selection of a long awaited new Head of the School of Physical and Chemical Sciences."[71]

The plaintiff requested that Professor Coaldrake begin the process of selecting a new Head of the School.

[52] The plaintiff emailed Professor Coaldrake on 1 June 2008 reiterating his *"very serious concerns in relation to the current administrative situation in the School of Physical and Chemical Sciences"*. The plaintiff referred to the similar email he had sent on 10 January 2008. The plaintiff, in large part, repeated the points he raised in his email of 10 January 2008. The plaintiff informed Professor Coaldrake that to his "*deep regret*" his "*whistle blowing email*" of 10 January 2008 had "*been left with no response and/or any visible reaction*".[72] Those concerns were that:

(a) since the retirement of Professor Pope, the School had been without a permanent Head of School;

(b) the Acting Head of School (Dr Ayoko) was "continuing to act as a Head of School without any proper selection process";

(c) Dr Ayoko did not demonstrate sufficient leadership and management abilities, nor adequate understanding of the management policies and practices of QUT; and

(d) Dr Ayoko had misused his position and disregarded the needs and well-being of staff members.

[53] The plaintiff requested Professor Coaldrake to replace Dr Ayoko with a suitable Acting Head of School, to urgently move to appoint a new Head of School and to develop clear and unambiguous policies and procedures at QUT for the replacement and selection of Heads of School.[73]

[54] The plaintiff's email of 1 June 2008 was copied to the QUT Chancellor, Retired Major General Peter Arnison AC and the QUT Registrar, Dr Carol Dickenson.

[55] It is the defendant's failure to investigate the matters in the plaintiff's letter of 1 June 2008 that is pleaded as constituting the third alleged breach, being a breach of the Grievance Policy. According to the plaintiff the Grievance Policy applies to the resolution of grievances associated with discrimination and harassment. As the plaintiff's letter of 1 June 2008 was a complaint relating to bullying, intimidation and discrimination of the plaintiff by Dr Ayoko, it should have been dealt with in accordance with the Grievance Policy. The plaintiff pleads that had the 1 June 2008 complaint been investigated in accordance with the Grievance Policy, there would have been no need for him to send the 2 March 2009 emails which in part led to the termination of his employment contract.[74]

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71 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 40.
72 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 56.
73 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 56.
74 Second Further Amended Statement of Claim, [261]-[262].

[56] Professor Coaldrake responded to the plaintiff on 16 July 2008. Professor Coaldrake acknowledged the plaintiff's previous emails and disagreed with the Plaintiff's concerns about Dr Ayoko's performance as Head of School.[75]

[57] On 5 August 2008, Professor Coaldrake announced that Dr Ayoko had been appointed to Associate Professor. The plaintiff claims that this appointment demonstrated Professor Coaldrake's "*full support and acceptance of the harassing and discriminating conduct of A/Professor Ayoko*".[76]

[58] The next complaint lodged by the plaintiff was by him and his wife on 17 November 2008 "*about the misconduct, mismanagement, harassment and bulling by several QUT administrators including Professor Coaldrake*."[77] This complaint was lodged with the Chancellor and was the subject of an investigation and report by an external advisor, Mr Andrew See (a Barrister).[78]

The events in 2009

[59] Mr See's completed report was received by the plaintiff and his wife on 25 February 2009. In summary, Mr See was of the opinion that:

(a) there was no evidence of persistent or gross neglect in the discharge of the Vice-Chancellor's duties, nor misconduct on the part of the Vice-Chancellor;

(b) there was no information in the documentation provided that warranted any further investigation of misconduct against any other officers of QUT; and

(c) there was no evidence of reprisal conduct arising from any complaints being made, nor evidence of unlawful conduct on behalf of QUT staff members.

[60] Mr See's report concludes as follows:

> "While I have concluded that I do believe that there are aspects of the way in which these administrative issues have been dealt with by the University, that indicate elements of unfair treatment, there is no sign of misconduct or any weightier charge, that emerges from out of the conduct of the University staff."[79]

[61] The plaintiff alleges that QUT's decision not to pursue the matter further after receipt of Mr See's report:

(a) disregarded all of the plaintiff's concerns and complaints prior to February 2009;

(b) meant that the plaintiff's concerns and complaints were not investigated in accordance with the MOPP procedures and principles of natural justice; and

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[75] Second Further Amended Statement of Claim, [107].
[76] Second Further Amended Statement of Claim, [109].
[77] Second Further Amended Statement of Claim, [110].
[78] Second Further Amended Statement of Claim, [114].
[79] Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 62.

(c) demonstrated the serious risks of further recurrences of similar bullying, harassing and discriminative management with regard to other staff members.[80]

[62] On 2 March 2009, the plaintiff sent an email to 'spcs@qut.edu.au' copying in, amongst others, Chancellor Arnison, Professor Bowman and Professor Kaplan **(2 March 2009 email)**. That email reads:

> "Dear Staff Members,
>
> You may remember that at the staff meeting in June 2008 I raised a question about the inadequate leadership in the School of Physical and Chemical Sciences, caused by the absence of a properly appointed permanent Head of School who would be able to provide adequate administrative support and leadership to the School, its staff and major ongoing efforts and activities.
>
> Unfortunately, I am of a view that the current leadership by A/Prof. G. Ayoko is damaging for the School, the well-being of its staff and students, and their ability to perform the essential contractual duties and responsibilities.
>
> …
>
> At the same time, the reaction of the QUT administration and senior management to my concerns about the well-being of the School has so far been the disregard or denial of my complaints and whistleblowing disclosures.
>
> My repeated requests (and then demands) to replace A/Prof. G. Ayoko by another more suitable and appropriate person in the position of the Acting Head and urgently proceed to properly filling this vital management position (which has already been vacant for almost 4 years (!) since the retirement of Prof. J. Pope in the middle of 2005) have been left with no reaction from the Faculty and University administrations.
>
> Last Thursday (26 February 2009), I received a letter from the QUT Chancellor, Major General P. Arnison, in which he wrote that, based on an advice from an 'independent external advisor', he does not 'intend to take any further action under the relevant Council procedure or University policy for misconduct and serious misconduct'. In particular, as far as I have understood from this letter, no any actions will thus be undertaken against the current Acting Head of School, A/Prof. G. Ayoko, who (as far as I understand) will thus continue to lead this School for at least an unspecified period of time into the future.
>
> … As a result, I have to conclude that my continuous efforts for more than a year (since January 2008) to ensure that the School of Physical and Chemical Science is not disadvantaged in any way by the continuing absence of proper, independent, responsible leadership and administrative support have so far failed …
>
> Under these circumstances, this is my direct responsibility as an academic staff member at this University and in this School to inform you about my

[80] Second Further Amended Statement of Claim, [121].

> major concerns in relation to the well-being of the School. I also believe that this is my essential duty as a human being to ensure that what has happened to me and what I have endured and suffered during the recent years will never be repeated with anyone else in the School, especially under the continuing (so far) leadership of A/Prof. G. Ayoko.
>
> Therefore, I forward you the supporting evidence and further information in the form of my email correspondence with the Acting Head of School, A/Prof. G. Ayoko, and the QUT senior management. The first set of these emails is appended below to this message. The other two sets will be forwarded immediately.
>
> In conclusion, I would like to repeat that I strongly believe that the Acting Head of School, A/Prof. G. Ayoko, should be replaced by another person, and urgent steps should be undertaken to finally and properly fill in the long-existing vacancy of the Head of School of Physical and Chemical Sciences.
>
> Thank you very much.
>
> Best regards,
>
> Dmitri Gramotnev."[81]

[63] This email was one of three emails sent by the plaintiff on 2 March 2009. The first email contained the text set out above and attached the plaintiff's 1 June 2008 complaint.[82] The other two emails forwarded the plaintiff's emails of 18 August 2007[83] and 10 January 2008[84] to Professor Coaldrake.[85] These three emails were sent to all the staff members of the School (around 45 academic staff) and around 18 technical and administrative staff and copied to senior executives of QUT and five members of the QUT Council.[86] The authoring and sending of the 2 March 2009 emails, and subsequent emails dated 6, 12 and 30 March 2009 constituted the basis for the commencement of disciplinary proceedings against the plaintiff.

[64] According to the defendant, the 2 March 2009 emails made serious and arguably defamatory allegations about Associate Professor Ayoko. On their face, the emails sought Associate Professor Ayoko's removal as the Acting Head of the School.

[65] The defendant highlights the following specific comments and accusations contained in these emails:[87]

(a) "the current leadership of A/Prof G. Ayoko is damaging for the School, the well-being of its staff and students and their ability to perform the essential contractual duties and responsibilities";

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81 Affidavit of Kenneth Bowman affirmed 9 November 2016, Exhibit 14.
82 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 56.
83 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 32.
84 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 40.
85 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [279]-[281], Exhibit 66.
86 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [279], [282] and [283], Exhibit 66.
87 Defendant's Written Submissions, [38].

(b) "since January 2008, the School has been disadvantaged by 'the continuing absence of proper, independent responsible leadership'";

(c) "I strongly believe that the current Acting Head of School, A/Prof G. Ayoko should be replaced by another person";

(d) "Dr G. Ayoko has demonstrated his complete failure and incapacity to reasonably manage staff in the school and their needs";

(e) "Dr G. Ayoko has demonstrated his readiness to misuse his position and administrative power of direction and disregard to the real needs and well-being of staff members";

(f) "Dr G. Ayoko had issued 'highly inappropriate and unjustified' directions";

(g) "I accuse you of continuously and repeatedly bullying, intimidating and even threatening me, manipulating facts and my statements, wasting my time … and repeatedly attempting impediment of my research and supervisory duties";

(h) "Who will take responsibility for terrorising, intimidating, bullying and even threatening me by you for more than half a year?"

(i) "Do you think that after what you have been doing to me for more than half a year, you will be able to quietly walk away from this? To my sincere regret I cannot say that I would be able to stop pursuing you for your serious misconduct, misuse of your position, intimidation, bullying and impediment of my research and supervisory duties at QUT."

[66] Professor Simon Kaplan was the Executive Dean of Science and Technology and was Associate Professor Ayoko's immediate supervisor. As part of the process for managing the outcomes of Andrew Sees' Report, Professor Kaplan met with the plaintiff to discuss matters.

[67] According to the plaintiff, at a meeting on 4 March 2009 Professor Kaplan:

(a) attempted to convince the plaintiff to accept QUT's decision not to take any further actions with regard to his complaints;

(b) threatened the plaintiff by saying that "the University has teeth" to deal with him if he continued to pursue his complaints and grievances;

(c) repeatedly stated that Acting Professor Ayoko had Professor Kaplan's full support and the support of QUT;

(d) directed the plaintiff to comply with the Code of Conduct. This was in circumstances where according to the plaintiff he had never breached the Code and had no intention to breach it in the future;

(e) expressly admitted and stated that Dr Galina Gramotnev had been unfairly treated by the University;

(f) admitted and agreed that almost four years without a permanent Head of the School had been "an absolutely unacceptable situation".[88]

[68] The defendant did not call Professor Kaplan nor was the plaintiff challenged as to his recollection of what was discussed at the meeting with Professor Kaplan on 4 March 2009. The substance of the plaintiff's recollection is, in any event, supported by Professor Kaplan's subsequent letter to the plaintiff dated 5 March 2009.[89] In this letter Professor Kaplan confirms the following:

(a) that all future email and written communications from the plaintiff should be directed through the normal channels of communication for an academic staff member.

(b) the plaintiff was requested not to direct emails or written communications to officers of the University who did not have primary responsibility for managing such issues.

(c) the plaintiff was directed to comply with the University's Code of Conduct, in particular the requirement (section 8.1.4(a)) to not engage in debate or criticism of current affairs (including University affairs) in a defamatory or potentially defamatory manner and the requirement in section 8.1.5(a) to act towards and communicate with the plaintiff's colleagues and others in the University community in a respectful and courteous manner.

(d) it was agreed that the plaintiff's supervisor for PPR purposes would be Professor Chris Langton rather than Associate Professor Ayoko.

Relevantly Professor Kaplan states in the letter:

> "These are all reasonable expectations of a staff member and reasonable management directions. I wish to advise you that failure to follow them will result in formal processes being initiated by the University with potential consequences for you.
>
> I wish to confirm that I believe that the email sent by you on Monday 2 March 2009 to all staff of the School of Physical and Chemical Sciences and to internal QUT Council members making allegations regarding the leadership of Associate Professor Ayoko and calling for steps to be taken to remove him from this role is unacceptable conduct, is potentially a breach of the Code of Conduct and should not be repeated.
>
> Associate Professor Ayoko has my full support in the role of Acting Head of School and I will not tolerate public attacks of this nature on the leadership and integrity of any Head of School within this Faculty.
>
> Finally, I wish to thank you for the positive spirit in which you engaged in the meeting with me. We value your contributions as a teacher and researcher, and I sincerely hope that you will choose to engage with me to find an alternate path forward for the current situation."

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88 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [290].
89 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 68.

[69] On 6 March 2009, the plaintiff sent an email to Professor Kaplan, copying in the Chancellor **(6 March 2009 email)**. That email reads:

> "Dear Simon,
>
> This is further to our meeting on Wednesday, 4 March 2009, initiated in accordance with the letter to me from the QUT Chancellor, Major General P. Arnison, of 25 February 2009.
>
> …
>
> In the beginning of our meeting, you indicated that you wanted to have the majority of the discussion at our meeting to be about how to move forward from here. I explained to you that there are only two possible ways forward from the current unacceptable situation created entirely due to the repeated and anfair (sic) actions and misconduct of some of the representatives of the University administration.
>
> First is a comprehensive settlement between myself and the University administration. Such a settlement should necessarily involve simultaneous and fair resolution of all the aspects of this complex situation that has only been escalating for the last four years. The second of the two possible ways is to continue to fight with all available lawful means in order to rid this University of the existing culture of bullying, harassment, intimidation, and administrative misconduct, which has unfortunately spread up to the very top of the QUT senior management.
>
> …
>
> I also reminded you about the major misconduct of the former Executive Dean of the Faculty of Science, Prof. M. Britz, including her unjustified and unfair actions in blocking our efforts to bring in external funding for our research and vital equipment that would have been highly beneficial for my several postgraduate students. Following my complaint to the Vice-Chancellor, Prof. P. Coaldrake, instead a fair investigation of my complaint and disciplining the Executive Dean for her major misconduct, the Deputy Vice-Chancellor (Academic), Prof. D. Gardiner, attempted to create a non-existent issue of an 'undeclared conflict of interests' with my wife, and inappropriate use of the email system (despite his own admitted in writing conflict of interests in this matter).
>
> …
>
> In the process of our conversation, you stated that if I continue with my actions against the University administration (to ensure their responsibility for their misconduct and mistreatment of staff in breach of the existing policies, regulations, and the principle of administrative fairness), including emails to staff members, the University has teeth to deal with me. I have to say that I take this statement as a suggestion of possibility of further reprisal actions from the University against me, and further intimidation for attempting to make legitimate public disclosures and undertake legitimate and justified actions (for the benefit of QUT) against the administrative misconduct and the existing culture of bullying, harassment and intimidation of staff. I have all the rights and even moral responsibilities as

> an academic staff member at this University to raise my voice and disclose the acts of administrative bullying and harassment to other members of staff in order to protect them from similar repeated actions in future.
>
> …
>
> You told me that you had been asked to tell me not to send any more emails to the Chancellor and Vice-Chancellor, and indicated that they will no longer respond to me. In this regard, I reserve my natural right to send emails to any administrative person at the University or outside whenever I deem necessary and appropriate, including the Chancellor and Vice-Chancellor, and I will continue doing so in future. I also reserve my full rights to send appropriate true information and make public interest disclosures to staff members or any other audience, especially when the administration neglect their direct duties and responsibilities.
>
> …
>
> …I would also like to indicate, that continuing keeping (and clearly supporting) A/Prof. G. Ayoko in the position of the Acting Head of School in the meantime also means for you taking responsibilities for his (A/Prof. Ayoko's) wilful serious misconduct, bullying, harassment, intimidation of staff, impediment of their essential contractual duties and responsibilities, and misuse of his empowered position…"[90]

[70] Professor Kaplan relied to this email on 12 March 2009.[91] In this email Professor Kaplan states:

> "1. The University does not seek to prevent or limit your ability to make legitimate public interest disclosures. However for a disclosure to be legitimate, it needs to be made in the appropriate way to an appropriate recipient, and as I indicated in my 5th March letter, it is our view that some of your communications, for example those in relation to A/Prof Ayoko, are not so.
>
> 2. You can of course continue to raise any issues of genuine concern with me.
>
> 3. I wish to clarify that it was not my intention to threaten you in any way. However, it is part of my duty as Executive Dean to point out to you that continued breach of the Code of Conduct could have disciplinary consequences for you. As I indicated in the meeting, it would be better for all concerned if we did not find ourselves in the position where such actions become necessary.
>
> 4. I therefore encourage you to accept the requirements of my letter dated 5 March 2009."

[71] On 12 March 2009, the plaintiff sent another email to Professor Kaplan, copying in the Chancellor (**12 March 2009 email**). That email relevantly reads:

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[90] Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 67.

[91] Affidavit of Kenneth John Bowman affirmed 9 November 2016, Exhibit KB-14, page 233.

"Dear Simon,

…

Unfortunately, the somewhat different tone and spirit of your letter dated 5 March 2009, compared to the meeting on 4 March 2009, have suggested to me that the University and Faculty administrations have decided to step up the direct threats of further reprisals, as well as bullying and intimidation with respect to me and my legitimate efforts related to my major concerns about the well-being of QUT and riddling of the existing culture of bullying, harassment, intimidation, and impediment of the essential contractual duties of staff at this University (see also my previous email of 6 March 2009).

…

2. You have directed me *'to comply with the University Code of Conduct (B/8.1 of the Manual of Policies and Procedures) in all respects'* (your underline)….I have never breached the University Code of Conduct in any way or in any respect for the duration of my career at QUT. No one has ever been able to demonstrate, justify, and/or prove that I have ever breached any aspects of the Code. I have never had any intentions of breaching the QUT Code of Conduct in any way, and no one has any grounds for assuming otherwise. Therefore, there are absolutely no any grounds for you to issue me such a direction *'to comply with the University Code of Conduct ... in all respects'* (your underline), apart from if you wish to further intimidate and bully me.

…

As I indicated above, I have never violated any of these or other clauses and conditions of the Code of Conduct, and intend to follow this Code in the future.

To my deepest regret, these are the senior management figures, including A/Prof. G. Ayoko, Prof. D. Gardiner, and Prof. P. Coaldrake, who have committed (unlike me) numerous and most serious breaches of all of these Code clauses.

…

3. You have also decided to direct me to comply with the University's Email policy presenting two specific bullet points from this policy. Similar to the above-discussed direction to comply with the Code, this second direction is completely unjustified and ungrounded, because I have always complied and will continue to comply with the University's Email policy. I have never infringed any conditions of my employment through my completely adequate and appropriate use of the University's Email system.

…

Based on the above arguments, I do not regard your directions as reasonable management, but rather further attempts to bully, intimidate and confuse me, which results in further major stress and suffering for me. This includes your direct threats of completely unjustified disciplinary actions against me

> in the form of 'formal process being initiated by the University with potential consequences'.
>
> I repeat again that my email send on 2 March 2009 was absolutely appropriate and certainly complied with the Code of Conduct, regulations for the use of email system, and the law. This is the direct responsibility of the Faculty and University administrations, including the Executive Deans and the Vice-Chancellor, Prof. P. Coaldrake, that the problem with the obvious lack of adequate leadership in the School of Physical and Chemical Sciences had not been fixed ages ago, and A/Prof. G. Ayoko continued with his repeated acts of bullying, intimidation and impediment of staff's duties in 2007 – 2008, despite the full information provided to the Vice-Chancellor, Prof. P. Coaldrake. I strongly believe that the Vice-Chancellor will have to feel his own responsibility for not fixing this problem and allowing it to flourish and escalate to this current extent.
>
> …
>
> In conclusion, I completely reject any kind of allegations and/or implications of breaches of the QUT Code of Conduct related to my email of 2 March 2009, or to any other my emails, letters, statements, and/or actions.
>
> …
>
> Please excuse me, but I would sincerely like to caution you against any further breaches of the QUT Code of Conduct and committing any further unfair actions and breaches of the principles of procedural fairness and good governance (see MOPP sections B/8.1.3 and B/8.5).
>
> Under the circumstances, I will put my life on the line to ensure that Prof. P. Coaldrake, Prof. D. Gardiner and newly promoted A/Prof. G. Ayoko will not be able to destroy another single life or career neither at QUT nor elsewhere."[92]

In this email the plaintiff also rejected Professor Kaplan's suggested communication protocol.

[72] The defendant highlights the following statements from the plaintiff's emails of 6 and 12 March 2009:[93]

(a) There is a reference to the "major misconduct" of Professor Britz;

(b) "… I will pursue A/Prof G. Ayoko with all available lawful means and capacities until the level of disciplinary actions against him by the University is adequate to his serious misconduct";

(c) "Similarly I will continue pursuing the Deputy Vice-Chancellor (Academic) Prof D Gardiner and the Vice-Chancellor Prof P Coaldrake until they feel the adequate personal responsibility for their misconduct and mistreatment of staff and until the current unacceptable situation is adequately rectified";

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92 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 69.

93 Defendant's Written Submissions, [40(a)-(h)].

(d) "I want my life back and I will get it back whatever it takes";

(e) "… I reserve my natural right to send emails to any administrative person at the University or outside whenever I deem necessary and appropriate, including the Chancellor and Vice-Chancellor and I will continue doing so in the future";

(f) by keeping Prof Ayoko in his position, Professor Kaplan was "taking responsibilities for his (A/Prof Ayoko's) wilful serious misconduct, bullying, harassment, intimidation of staff, impediment of their essential contractual duties and responsibilities and misuse of his empowered position";

(g) "I repeat again that my email sent on 2 March 2009 was absolutely appropriate and certainly complied with the Code of Conduct, regulations for the use of email system and the law";

(h) "Under the circumstances I will put my life on the line to ensure that Prof P Coaldrake, Prof D Gardiner and newly promoted A/Prof G Ayoko will not be able to destroy another single life or career neither at QUT nor elsewhere".

[73] Professor Kaplan responded to the plaintiff's six page email of 12 March 2009 by letter dated 24 March 2009. In this letter Professor Kaplan sought to clarify some particular matters:

> "1. The University has completed its investigation into the allegations made by you against senior University employees. The University regards those matters as concluded.
>
> 2. Should you independently pursue your grievances and allegations directly against University employees, particularly having regard to statements you have made in relation to how you intend to do this, breach of the University's Code of Conduct would be likely.
>
> 3. The principle of academic freedom does not justify any action by you which would otherwise be a breach of the Code of Conduct.
>
> 4. In particular, your statement that '*under the circumstances, I will put my life on the line to ensure that Prof. P. Coaldrake, Prof. D. Gardner and newly promoted A/Prof. G. Ayoko will not be able to destroy another single life or career neither at QUT nor elsewhere'* could be regarded as a threat against those individuals which, in my view, would be in breach of the Code of Conduct and a serious matter. I would regard any action by you, directed at an individual university employee, which was designed to intimidate or threaten them, or damage them professionally or personally, as a clear breach of the Code of Conduct which would likely to result in disciplinary action."[94]

[74] On 30 March 2009, the plaintiff sent another email to Professor Kaplan, copying in the Chancellor **(30 March 2009 email)**. Relevant parts of that email are reproduced below:

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[94] Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 70.

"My statement *'I will put my life on the line to ensure that Prof. P. Coaldrake, Prof. D. Gardiner and newly promoted A/Prof. G. Ayoko will not be able to destroy another single life or career neither at QUT nor elsewhere'* is not a threat – it is a statement (and I fully stand by it).

…

Do you disagree with my statement that it is my direct duty as a human being to do my best to *'ensure that Prof. P. Coaldrake, Prof. D. Gardiner and newly promoted A/Prof. G. Ayoko will not be able to destroy another single life or career neither at QUT nor elsewhere'?* Or would, in your opinion, destroying lives and careers be something that should be allowed to do?

These are outrageous actions of Prof. P. Coaldrake, Prof. D. Gardiner and newly promoted A/Prof. G. Ayoko, which were clearly designed to intimidate, threaten and victimise me (for daring to raise my voice against the procedural irregularities and administrative misconduct in this Faculty and at this University), destroy my career, and damage me professionally and personally within the last four years. According to your letters and emails, you do not seem to think that this is a clear breach of the Code of Conduct which should have already resulted in serious disciplinary actions against the mentioned persons. Do you think that I do not have the right to defend myself against such mistreatment, bullying, harassment, intimidation and the direct impediment of my essential contractual duties? Let me reassure you that I strongly believe that I do not have such a right, and will be exercising it to the fullest possible extent allowed by the law.

…

I would also like to note that, despite my serious and sincere cautioning to you not to get involved in further serious breaches of the QUT Code of Conduct, procedural fairness and the law, you have continued not only with your clearly bullying and intimidating attempts and direct threats in relation to me (which you yourself call *'a clear breach of the Code of Conduct which would likely to result in disciplinary action'*), but you have even made further steps towards the direct and severe impediment of my essential contractual research and supervisor duties at this University. I, therefore, once again most seriously and sincerely caution you against any further breaches of the QUT Code of Conduct and the law, for which you will be held responsible, and once again refer you to sections B/8.1.3 and especially B/8.5 of QUT MOPP.

In conclusion, I would also like to state once again that your *'reasonable management'* that clearly constitutes bullying, intimidation and, currently, the direct impediment of my essential contractual duties and responsibilities at this University are causing major stress and suffering for me. This is something that you will also be held responsible for, especially in the event of continuation of your breaches of the QUT Code of Conduct and the law."[95]

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[95] Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 71.

[75] As correctly submitted by the defendant, this email did not resile from, but rather affirmed, all previous statements of the plaintiff and added that Professor Kaplan was himself now guilty of bullying, intimidation and the direct impediment of the plaintiff being able to carry out his contractual duties and responsibilities at the University.[96]

[76] By letter dated 3 April 2009 the plaintiff sent a formal complaint to the Chancellor about harassment and discrimination by Professor Kaplan. This letter is relevant to the plaintiff's fourth alleged breach. The plaintiff pleads that as the 3 April 2009 letter complained of bullying, intimidation and discrimination, it should have been investigated in accordance with the Grievance Policy. Had the complaint been investigated in accordance with the Grievance Policy, it would have been demonstrated that the plaintiff's four emails of 2, 6, 12 and 30 March 2009 were justified and his employment would not have been terminated.[97]

[77] No response was received in relation to that complaint.[98] As no response was received Dr Galina Gramotnev, by way of three successive emails dated 11 April 2009, sent from her husband's email address, "made a public interest disclosure to the academic staff members of the Faculty".[99]

The Commencement of the disciplinary process

[78] In 2009 Professor Bowman was the Acting Deputy Vice-Chancellor (Academic) of QUT having held that role since August 2008. He ceased in that role on 2 March 2012. In his role as Deputy Vice-Chancellor (Academic) he was the Chair of the University Academic Board and a member of the University Council. Processor Bowman was aware of grievances raised by the plaintiff against University employees.[100]

[79] By letter dated 6 May 2009, Professor Coaldrake, as Vice-Chancellor, delegated Professor Bowman to act as the Vice-Chancellor's nominee in relation to any allegations of misconduct concerning the plaintiff.[101] Throughout the process, Professor Bowman took advice from time to time from Dr Carol Dickenson, the Registrar of QUT, and Ms Jane Banney from QUT's Human Resources Department.

[80] According to Professor Bowman, the aspects of Dr Gramotnev's conduct which potentially justified disciplinary action were his action in sending the correspondence of 2 March 2009 to all of the staff at the School (as well as Council members), and also his subsequent correspondence with Professor Kaplan in which the plaintiff made, what Professor Bowman regarded, as threatening statements in relation to senior members of QUT staff.[102]

[81] On 8 May 2009, Professor Bowman wrote to the plaintiff advising of two allegations and requesting the plaintiff to respond within ten (10) working days. The letter relevantly states:

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96 Defendant's Written Submissions, [41].
97 Second Further Amended Statement of Claim, [279]-[285].
98 Affidavit of Dmitri Gramotnev affirmed 19 October 2016, [309]-[311], Exhibit 74; affidavit of Galina Gramotnev sworn 19 October 2016, [167].
99 Affidavit of Galina Gramotnev sworn 19 October 2016, [172], Exhibit 22.
100 Affidavit of Kenneth John Bowman affirmed 9 November 2006, [16].
101 Affidavit of Kenneth John Bowman affirmed 9 November 2016, Exhibit KB-12, page 194.
102 Affidavit of Kenneth John Bowman affirmed 9 November 2006, [40].

"Dear Dr Gramotnev,

Your Employment

As you may be aware, it is the Vice-Chancellor's role pursuant to the *Enterprise Bargaining Agreement (Academic Staff) 2005-2008* (**Academic Staff EBA**) to determine, in relation to members of academic staff, whether they have engaged in conduct amounting to misconduct or serious misconduct and, if satisfied in this regard, any disciplinary action which is appropriate.

The relevant provision of the Academic Staff EBA (clause 44) is enclosed for your information.

Under the Academic Staff EBA, the Vice-Chancellor may nominate another person to carry out this role. In accordance with this authority, the Vice-Chancellor has nominated me, as his nominee pursuant to the Academic Staff EBA, to consider an allegation of conduct on your behalf which potentially may amount to misconduct or serious misconduct.

….

I enclose copies of the relevant correspondence as follows:

(a) an email from you to all staff of the School of Physical and Chemical Sciences and to internal QUT Council members dated 2 March 2009;

(b) a letter from Professor Simon Kaplan to you dated 5 March 2009;

(c) an email from you to Professor Simon Kaplan dated 6 March 2009;

(d) an email from Professor Simon Kaplan to you dated 12 March 2009;

(e) an email from you to Professor Simon Kaplan dated 12 March 2009;

(f) a letter from Professor Simon Kaplan to you dated 24 March 2009;

(g) an email from you to Professor Simon Kaplan dated 30 March 2009;

(h) an email dated 11 April 2009 addressed to 'Dear Academic staff members', which purports to be from Dr Galina Gramotnev, but has been sent from an email address which appears as if it may have been owned by you.

I have serious concerns about this correspondence and, in my capacity described above, I require you to answer specific allegations about your connection with the correspondence set out below.

Allegations

Allegation 1 – items (a)-(g)

In relation to items (a) to (g) of the correspondence, I am proceeding on the basis that you were the author of the emails and you caused the emails to be sent. Please let me know if you contest this conclusion.

Allegation 2 – item (h)

The email which is item (h) appears to have been sent by your wife, Dr Galina Gramotnev, however it was sent from an email address which appears to be associated with you … and also contains extracts from some of the above correspondence from you to Professor Kaplan and others.

Would you please advise whether the email referred to in item (h) was authored by you (in whole or in part), or whether you were involved in causing the correspondence to be sent to the recipients within the School of Physical Chemical Sciences and to other recipients.

I only require a response in relation to the specific presumptions and allegations about the authorship and sending of the emails. The correspondence speaks for itself.

…

My Concerns in relation to the Correspondence

It is appropriate for me to explain the nature of my concerns so that you can understand in particular why I am seeking undertakings from you that you will not continue with the conduct.

In summary, my concerns are:

(a) The correspondence suggests that you have embarked on a deliberate, public campaign against the leadership of Associate Professor Ayoko, Professor Simon Kaplan, Deputy Vice-Chancellor (Academic) Professor Gardiner and the Vice-Chancellor, Professor Coaldrake.

(b) In pursuance of this campaign, you have sent, and you have stated that you will continue to send, correspondence containing serious allegations against these members of staff to a wide range of university recipients, including within the School of Physical and Chemical Sciences and beyond.

(c) You have indicated an intention to continue with this course of action against Associate Professor Ayoko until Associate Professor Ayoko has received disciplinary action from the university which you regard as adequate for his serious misconduct.

(d) You have indicated an intention to continue pursuing the Deputy Vice-Chancellor (Academic) and the Vice-Chancellor until they feel adequate personal responsibility for their misconduct and treatment of staff and until the current situation is adequately rectified.

Assuming the correspondence was in fact authored and sent by you (which I will assume unless advised otherwise that it is not contested in relation to items (a) – (g)), then unless I receive an undertaking from you that the correspondence will not be repeated and the foreshadowed campaigns will not be pursued, I would have to consider whether your employment should be continued.

…

I am also aware that you are not satisfied with the outcome of a recent investigation into allegations made by you concerning senior members of

university staff, and that the correspondence may be prompted in part by that disappointment. However, as advised to you, the university regards those allegations as having been appropriately and independently investigated. The university has also been advised by the Crime and Misconduct Commission that it has no further requirements of the university concerning the matter, and I understand that you have also been advised accordingly.

Undertakings

The undertakings requested are as follows:

(a) To the extent you have concerns about matters relating to your employment or the university (which I accept you have the right to have and to raise) you will adopt the communication protocol required in paragraph 1 of Professor Kaplan's letter to you dated 5 March 2009.

(b) You will otherwise refrain from any further correspondence, particularly of a broadcast nature, which is critical of any member of academic staff.

You will take no action of any kind which is in the nature of a 'pursuit' of any member of QUT staff, including Associate Professor Ayoko, Professor Kaplan, the Deputy Vice-Chancellor (Academic) and the Vice-Chancellor, and you will take no action with the intention or likely to have the effect of threatening or vilifying them or damaging their careers."[103]

[82] The letter drew the plaintiff's attention to particular extracts from his emails of 2, 6 and 12 March 2009.

[83] Instead of responding to Professor Bowman the plaintiff emailed the Chancellor enclosing the letter of 8 May 2009. The plaintiff informed the Chancellor that as the matter was related to the actions of the Vice-Chancellor and in light of his previous complaint to the Chancellor dated 17 November 2008 the plaintiff would forward any response to Professor Bowman's letter to the Chancellor directly.[104]

[84] On 11 May 2009 Professor Bowman wrote to the plaintiff advising that his response to the correspondence of 8 May 2009 needed to be provided to Professor Bowman as the Vice-Chancellor's nominee under clause 44 of the EBA. Professor Bowman informed the plaintiff that the Chancellor did not have a role in academic staffing matters which were covered by the EBA.[105]

[85] On 15 May 2009 the plaintiff again emailed the Chancellor directly.[106] Attached to this email was the plaintiff's "formal complaint about further misconduct, bullying and reprisal actions of the QUT Vice-Chancellor, Prof P Coaldrake, and the Acting Deputy Vice-Chancellor (Academic), Prof. K. Bowman". The email also attached a copy of the letter from Professor Bowman dated 11 May 2009. The attached "formal complaint" is a letter dated 14 May 2009. The letter stated that it was not the plaintiff's formal

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[103] Affidavit of Kenneth Bowman affirmed 9 November 2016, Exhibit KB-14.
[104] Affidavit of Kenneth John Bowman affirmed 9 November 2016, Exhibit KB-15.
[105] Affidavit of Kenneth John Bowman affirmed 9 November 2016, Exhibit KB-16.
[106] Affidavit of Kenneth John Bowman affirmed 9 November 2016, Exhibit KB-17.

response to Professor Bowman's letter of 8 May 2009 but was rather a "formal complaint". The plaintiff's letter of 14 May 2009 is seven pages. In it he questions the power of the Vice-Chancellor to nominate or delegate his authority to Professor Bowman. Whilst this was an initial issue at trial, it may be accepted that the definition of "Vice-Chancellor" in clause 6.25 of the EBA includes anyone acting in that role on a temporary basis or any nominee of the Vice-Chancellor. Professor Bowman was the Vice-Chancellor's nominee for the purposes of the conduct of disciplinary proceedings in respect of the plaintiff.[107] The 14 May 2009 letter referred to both Allegation 1 and Allegation 2 in Professor Bowman's letter dated 8 May 2009. As to Allegation 2 which concerned the emails of 11 April 2009, the plaintiff stated that these emails were written and sent by his wife. The plaintiff accepted as "an obvious fact" that as to Allegation 1 he was the author of the emails dated 2, 6, 12 and 30 March 2009. The plaintiff asserted that being an author of some emails could not constitute an allegation of misconduct. Accordingly, the making of the allegations by Professor Bowman could, in the plaintiff's view, "*only be regarded ... as further major bullying, intimidation, harassment, major direct threats of unjustified disciplinary actions, and clear attempts to damage [him] personally, [his] career and well-being*" by the Vice-Chancellor and Professor Bowman. The letter is highly critical of the Vice-Chancellor. It makes allegations of misconduct and attempts to damage the plaintiff's career. The letter relevantly states:

> "Any attempts by Prof P Coaldrake to breach the Code of Conduct, principles of procedural fairness and fair administration, and misuse his empowered position for a personal revenge will be met with adequate and proportional actions and measures within the limits of the law."

[86] The plaintiff reserved to himself the right "*to criticise anyone whose actions are in my opinion, detrimental for the School, Faculty and/or the University, and to pursue anyone for his/her misconduct, bullying, harassment, mistreatment of staff, and/or any other unfair actions to the fullest extent of the law and lawfully available means and options*." The plaintiff was also critical of the Chancellor identifying a number of alleged failures and concluding:

> "As a result, unfortunately, I have to say that in the event of any further breaches of the QUT Code of Conduct and procedural fairness by the QUT Vice-Chancellor Prof P Coaldrake, or any of his subordinates (including Prof S Kaplan and Prof K Bowman), and continuing reprisal and bullying actions against me in relation to this matter, I will be left with no choice other than to regard you personally responsible for any such actions and breaches."

[87] The plaintiff again emailed the Chancellor on 17 May 2009. This email attached a letter from the plaintiff "*about the unacceptable situation in relation to my personal promotion created by the unfair actions of the QUT Vice-Chancellor, Prof P Coaldrake*". The subject of the email was "*my personal promotion in 2004-2009*".

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[107] Affidavit of Kenneth John Bowman affirmed 9 November 2016, [34]-[36]; Exhibit KB-12.

[88] On 19 May 2009 Professor Bowman wrote to the plaintiff informing him that the Chancellor had forwarded to him the correspondence of 14 and 17 May 2009.[108]

[89] The plaintiff responded to Professor Bowman's letter of 8 May 2009 by letter attached to an email dated 21 May 2009.[109] The plaintiff reiterated that he did not accept Professor Bowman's authority and he refused to participate any further in the "illegitimate investigation" of his conduct. He did however confirm that he authored and sent the emails that constituted Allegation 1. The plaintiff also stated his position in respect to the undertaking sought by Professor Bowman by reserving to himself the right to criticise any University staff member. The plaintiff also cautioned Professor Bowman "against any further possible breaches of the Code of Conduct for which you might be held personally responsible".

[90] Having received the plaintiff's response Professor Bowman sought guidance from QUT's legal advisers in relation to how he should approach the task of making a decision in relation to the disciplinary consequences of the plaintiff's admitted conduct.[110]

[91] On 16 June 2009 Professor Bowman wrote to the plaintiff in the following terms:

> "… The purpose of this letter is to advise you of my conclusion in relation to the allegations of misconduct or serious misconduct set out in my letter, and to advise you of my preliminary decision in relation to disciplinary action.
>
> In summary, on the basis of your response, I am satisfied that Allegation 1 in my letter of 8 May 2009 is established. My preliminary view in relation to disciplinary action is that, in light of your response to the allegations and to my request for undertakings about future conduct, termination of your employment is the appropriate response by the University.
>
> Although no further step is strictly required by the Academic Staff EBA before I make a final decision about the nature of any disciplinary action, I have decided that I should seek your response in relation to the proposed disciplinary action before making a final decision.
>
> Accordingly, please provide me, by 5.00 pm on Tuesday, 23 June 2009 with any response you have to this correspondence and to my preliminary view that your employment should be terminated. I will then make a final decision in relation to disciplinary action as soon as possible."

[92] The letter notes Professor Bowman's conclusion that Allegation 1 was substantiated on the basis that the plaintiff accepted that he was the author of the relevant emails. The letter then details Professor Bowman's reasons for his preliminary conclusion:

> "You have stated that you do not regard the allegations as specific allegations which comply with the requirements of clause 44 of the Academic Staff EBA. However, my conclusion is that your action in sending the emails is serious misconduct, and I am also concerned that, on

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[108] Affidavit of Kenneth John Bowman affirmed 9 November 2016, Exhibit KB-18.
[109] Affidavit of Kenneth John Bowman affirmed 9 November 2016, Exhibit KB-19.
[110] Affidavit of Kenneth John Bowman affirmed 9 November 2016, [58].

the basis of your response, you are likely to act in a similar way in the future.

In this regard, I draw your attention to the particular concerns described in my letter of 8 May 2009. I can also provide the following additional explanation of my conclusions:

(a) Threatening behaviour can itself amount to serious misconduct, and I have concluded that there are threats in your correspondence which are in this category.

(b) In particular, the correspondence contains threats of adverse action by you against senior University executives, including Associate Professor Ayoko, Professor Kaplan, Deputy Vice-Chancellor (Academic) Professor Gardiner and the Vice-Chancellor, Professor Coaldrake. These threats include threats of conduct amounting to a public campaign and other unspecified actions designed to challenge the leadership of these senior executives.

(c) The email sent by you on 2 March 2009 (described in item (a) of my letter) is an example of a specific action by you in pursuance of your stated campaign against the individuals named in that email.

(d) You have stated on a number of occasions that your actions will be carried out within the law. That is relevant, however actions which are deliberately threatening of other employees, or which are likely to be intimidating of other employees is unacceptable and inconsistent with the University Standards of Conduct, irrespective of whether it is also unlawful.

The University has an obligation to protect all its employees from unacceptable action by other employees, and given that you are not prepared to accept the University's direction not to continue to act in this way, I currently see no way to meet this obligation except through the termination of your employment."[111]

[93] The plaintiff did not respond directly to Professor Bowman's correspondence. The plaintiff did however write to the Chancellor on 22 June 2009, where he made further allegations against both the Vice-Chancellor and Professor Bowman. He characterised Professor Bowman's request for undertakings "not just as ordinary threats and bullying but rather as psychological terror and racket." The plaintiff also accused Professor Coaldrake and Professor Bowman of having "unleashed a campaign of psychological terror, reprisals, intimidations, direct and uncovered threats, bullying and harassment against me, as a staff member of this University, for daring to raise my voice against the existing culture of administrative misconduct, bullying and harassment." The plaintiff demanded:

(a) disciplinary procedures against him should be immediately stopped;

(b) adequate compensation;

[111] Affidavit of Kenneth John Bowman affirmed 9 November 2016, Exhibit KB-21.

(c) a "full and comprehensive investigation" of the actions of Professor Coaldrake, Professor Gardiner, Professor Kaplan, Associate Professor Ayoko and Professor Bowman for what he described as their "repeated campaigns of psychological terror, reprisal acts, threatening and intimidating behaviour aimed at damaging career and well-being of a staff member";

(d) the "resignation or dismissal" of Professor Coaldrake and Professor Bowman.[112]

[94] Professor Bowman wrote to the plaintiff on 3 July 2009 terminating his employment. This letter relevantly states:

> "I refer to my correspondence to you of 16 June 2009. As you know, I sought to meet with you today about this matter, but you declined to attend this meeting.
>
> …
>
> I provided you with the reasons for my preliminary conclusion and asked you to respond to the correspondence by 5 pm 23 June 2009.
>
> I have not received a response from you directly. However, I have received copies of your correspondence to the University Chancellor, Major General Peter Arnison dated 23 June 2009, as well as your letter to QUT Council members dated 24 June 2009. This correspondence is to an extent responsive to the issues in my letter. I have now considered all of this correspondence.
>
> Having considered this correspondence, as well as other relevant correspondence, my decision is to terminate your employment.
>
> I am greatly saddened to make this decision, which I appreciate has very significant consequences for you. It is a most unfortunate conclusion to your career with the University.
>
> However, in circumstances where you accept that you authored and sent the emails referred to in my original letter to you, and you do not accept my request that you agree not to send similar correspondence in the future, and to cease your 'pursuit' of senior members of University Staff, I believe I have no other option but to terminate your employment.
>
> … As stated in my letter of 16 June, however the University has an obligation to protect all its employees from unacceptable action by other employees. What is of concern to me, and has led to my decision, is the threatening and intimidating language concerned in your correspondence, your stated determination to pursue senior members of staff in a manner which I believe is unreasonable, and your refusal, despite what I regard as a reasonable opportunity, to agree not to send further correspondence, and not to act in accordance with these threats, in the future."

The first alleged breach

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[112] Affidavit of Kenneth John Bowman affirmed 9 November 2016, [85]–[92].

[95] The first alleged breach of the employment contract by the defendant is of clause 44.2.2(i) of the EBA. The plaintiff's pleaded case is as follows:

(a) Clause 44.2.2(i) required the defendant "to notify the staff member … in sufficient detail to enable the staff member to understand the precise nature of the allegation (s) and to properly consider and respond to them".

(b) In its show cause letter dated 8 May 2009, the defendant failed to claim or allege or identify any breach of the Code of Conduct by the plaintiff.

(c) The allegation presented to the plaintiff by the defendant in Professor Bowman's 8 May 2009 letter was simply an allegation of authoring and sending of the four emails.

(d) Sending and/or authorising emails cannot be an allegation of misconduct or serious misconduct, in the same way as, for example, going shopping cannot be an allegation of shoplifting.

(e) The defendant failed to identify and present to the plaintiff any reasonable allegation of an act of misconduct. More so, the allegation of authoring the emails was accompanied with the express prohibition to the plaintiff to respond to anything but the authorship of the emails: "I only require a response in relation to the specific presumptions and allegations about the authorship and sending of the emails."[113]

[96] Although not pleaded, the plaintiff in his written and oral submissions sought to advance a further argument based on section 174(1)(b) of the *Workplace Health and Safety Act* 1995 (Qld).[114] Section 174 relevantly provides:

> "**174 Discrimination or Victimisation**
>
> (1) An employer must not dismiss a worker, or otherwise act to the detriment of a worker in the worker's employment, for the dominant or substantial reason that the worker –
>
> (a) is, or has performed a function as, a workplace health and safety representative, a workplace health and safety officer or a member of a workplace health and safety committee; or
>
> (b) has made a complaint about an issue, or in any other way has raised an issue, concerning workers' exposure to the risk of illness or injury; or
>
> (c) has contracted or given help to an authorised representative or an inspector.
>
> Maximum penalty – 40 penalty units.
>
> (2) If an employer contravenes subsection (1) by dismissing a worker, the worker is taken to have been unfairly dismissed under the Industrial

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[113] Second Further Amended Statement of Claim, [201]-[205].

[114] Reprint No 7D; Reprinted as in force on 1 January 2008; as later repealed by the *Work Health and Safety Act 2011* (Qld), s 277.

> Relations Act 1999, chapter 3 part 2, and subject to that part, has the remedies under that part."

[97] The plaintiff's case based on section 174(1)(b) is that the 2, 6, 12 and 30 March 2009 emails referred to in Professor Bowman's letter of 8 May 2009 constitute the making of a complaint or the raising of an issue "concerning workers' exposure to the risk of illness or injury" for the purpose of section 174(1)(b). Accordingly, any disciplinary action leading to his dismissal arising from the authoring or sending of these emails constitutes "an invalid allegation of misconduct" which was in breach of section 174(1)(b).[115]

[98] The plaintiff's pleaded first alleged breach raises for consideration the proper construction of clause 44 of the EBA.

(a) Proper construction of clause 44

[99] Clause 44 constitutes a clause in an enterprise bargaining agreement. The parties concur as to the proper approach to the construction of industrial instruments such as an enterprise bargaining agreement.[116] The starting point is a consideration of the ordinary meaning of the words of the agreement with attention being given to the context and purpose of the provision or expression being construed. This context includes that it is an award under consideration and "its words must not be interpreted in a vacuum from industrial realities".[117] Further, as observed by French J (as his Honour then was) in *City of Wanneroo v Holmes*:[118]

> "One must always be careful to avoid a too literal adherence to the strict technical meanings of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole of the award."

[100] As to the present EBA, by clause 3 it has application to QUT. As such it was an agreement having application in a university context and, as submitted by the defendant, "within the industrial realities of [the] University's employer/employee relationship."[119] The agreement outlines negotiated terms and conditions of employment for academic staff employed at QUT.[120] One of the objects of the EBA is to "foster the development of a positive, safe and productive workplace culture underpinned by cooperative and consultative approaches to work".[121] Clause 9 specifically deals with job security and provides in 9.1:

> "The University is committed, wherever possible, to retaining the services of, and offering ongoing opportunities to current staff members. The

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115 Plaintiff's Written Submissions, [38]-[42]; T6-10, lines 19-26.
116 Defendant's Written Submissions, [12]-[16]; Plaintiff's Written Submissions, [63]-[64].
117 *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426, 440 [57] (French J).
118 (1989) 30 IR 362, 379, quoting *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498, 503 (Street J).
119 Defendant's Written Submissions, [25].
120 Clause 5.3.
121 Clause 7.

University is committed to ensuring that staff have job security and will seek to avoid job losses."

[101] Clause 37 deals with intellectual and academic freedom:

"37.1 Guarantees of intellectual and academic freedom are essential to the proper functioning of a University culture. The rights of academic freedom that will be recognised and protected, include the rights to:

- pursue critical and open inquiry;
- participate in public debates and express opinions about issues and ideas related to their field of expertise;
- participate in established decision making structures and processes within the University; and
- participate in professional and representative bodies, including trade unions.

37.2 In the first instance any alleged limitation of these rights will be dealt with under the Grievance Resolution Procedures for Workplace Related Grievances and Bullying in the Manual of Policies and Procedures.

37.3 Academic staff members have the right to express unpopular or controversial views, but this does not mean that they have a right to harass, vilify, defame or intimidate."

[102] Clause 40 deals with workplace bullying and grievance procedures and provides:

"Workplace bullying is defined as the repeated less favourable treatment of a person by others, which may be considered unreasonable and inappropriate. It includes behaviour that intimidates, offends, degrades or humiliates a person, possibly in front of colleagues or clients.

Grievances, disputes and complaints about workplace bullying will be dealt with in accordance with the Grievance Resolution procedures for Workplace Related Grievances and Bullying.

It is agreed that the Grievance Resolution procedures for Workplace Related Grievances and Bullying will not be amended without prior consultation with the Academic Consultative Committee."

[103] Clause 42.1 limits the circumstances of termination by the University to the following:

- Voluntary and involuntary redundancy;
- Instances of termination of employment as a result of disciplinary action for either unsatisfactory performance or serious misconduct;
- Termination on medical grounds; and
- Termination during or at the end of the period of probation.

[104] Clause 44 of the EBA provides:

"44 DISCIPLINARY ACTION FOR MISCONDUCT AND SERIOUS MISCONDUCT

44.1 Application

This Clause applies to all on-going and fixed-term staff members engaged for six (6) months or more.

44.2 Procedures

44.2.1 Before the Vice-Chancellor takes Disciplinary Action against a staff member for conduct amounting to Misconduct or Serious Misconduct, the Vice-Chancellor must take the steps in this Clause, except that, where a matter which may involve Misconduct or Serious Misconduct has been dealt with in good faith as if it were a case of unsatisfactory performance under Clause 43 the procedures in this clause are not required.

44.2.2 Any allegation of Misconduct or Serious Misconduct will be considered by the Vice-Chancellor. If he/she believes such allegation(s) warrant further investigation, the Vice-Chancellor will:

(i) notify the staff member in writing and in sufficient detail to enable the staff member to understand the precise nature of the allegation(s) and to properly consider and respond to them; and

(ii) require the staff member to submit a written response to the allegation(s) within ten (10) working days of the date of receipt of the written allegation(s).

…

44.2.5 If each of the allegation(s) made against the staff member is denied by the staff member, the Vice-Chancellor is of the view that there has been no Misconduct or Serious Misconduct, he/she will immediately advise the staff member in writing and may, at the request of the staff member, publish the advice in an appropriate manner.

44.2.6 If one or more of the allegation(s) are admitted by the staff member and the Vice-Chancellor is of the view that the conduct constitutes Misconduct or Serious Misconduct, the Vice-Chancellor will advise the staff member in writing of the decision and the operative date and details of the Disciplinary Action to be taken.

44.2.7 If each of the allegation(s) is wholly or partly denied, or if the staff member has not responded to the allegation(s), the Vice-Chancellor may:

(i) decide to take no further action; or

(ii) counsel or censure the staff member in relation to the conduct in question and take no further action; or

(iii) refer the matter to the Misconduct Investigation Committee.[122]

44.2.8 Where a matter is referred to the Misconduct Investigation Committee:

(i) the Committee shall be provided with a copy of the written allegation(s) and a copy of any written reply to the allegation(s) by the staff member;

(ii) the Committee shall operate in accordance with clause 29 and shall, unless otherwise agreed with the Vice-Chancellor, complete its role as expeditiously as possible and within thirty (30) days of the Committee being established; and

(iii) the staff member and the University are entitled, where they so choose, to be represented in proceedings before the Review Committee by a relevant Representative as defined in subclauses 6.19(i) and 6.24.

44.2.9 The Misconduct Investigation Committee will provide the Vice-Chancellor and staff member with a written report containing a finding including whether any mitigating circumstances are evident, as to whether or not, in the Committee's view, the allegation(s) have been established on the balance of probabilities (Where the view of the Committee is not unanimous, the minority view holder shall include the report to the Vice-Chancellor the reasons for his/her view).

44.2.10 Following consideration of the report from the Misconduct Investigation Committee (which will not be binding on the Vice-Chancellor), if the Vice-Chancellor determines that misconduct or serious misconduct has occurred, the Vice-Chancellor shall determine whether or not to impose Disciplinary Action and, if so, what that Disciplinary Action will be. The Vice-Chancellor shall advise the staff member in writing of this decision. Where the decision is that the misconduct or serious misconduct has not occurred the Vice-Chancellor may, at the request of the staff member, publish the decision in an appropriate manner.

…

44.2.13 All actions of the Vice-Chancellor under this Clause will be final, except that nothing in this Clause will be construed as excluding the jurisdiction of any court or tribunal which, but for this Clause, would be competent to deal with the matter."

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[122] Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 4 [6.12].

[105] There are a number of terms in clause 44 which are defined in the EBA, such as "Disciplinary Action", "Misconduct" and "Serious Misconduct". "Disciplinary Action" means action by the University to discipline a staff member and is defined as:

> "formal censure or counselling; withholding of an increment; demotion; suspension with, or without pay; reallocation of duties; and termination of employment with four (4) months notice or payment in lieu thereof or in the case of serious misconduct, termination or employment without notice."[123]

Clause 6.12 defines "Misconduct" to mean conduct that is unsatisfactory but which is not so serious as to justify the possibility of termination of employment. Clause 6.16 defines "Serious Misconduct" as:

> "misconduct of a serious and wilful nature and is normally limited to:
>
> (i) theft from the University, or from staff or students;
>
> (ii) assault involving another staff member, or student, or which is occasioned on campus or at a work related function or activity;
>
> (iii) conduct of a kind which constitutes a significant impediment to the carrying out of a staff member's duties or to the staff member's colleagues carrying out their duties;
>
> (iv) conviction by a court of an offence or judgement entered in a court or tribunal which constitutes a serious impediment of the kind referred to in (iii); or
>
> (v) serious dereliction of the duties required of the academic office.
>
> and is conduct of a type that would make it unreasonable to require the University to continue employment of the staff member concerned".

[106] Clause 44.2.8(ii) refers to the Misconduct Investigation Committee operating in accordance with clause 29. The Misconduct Investigation Committee undertakes to perform its duties with regard to the principles of natural justice and procedural fairness.[124] Whilst the Committee determines its own procedures it must take into account all information which it considers relevant to the case, including any response by the staff member.[125]

[107] The EBA seeks to protect job security for academic staff by limiting QUT's right to terminate the employment of a staff member to specific circumstances.[126] One such circumstance is termination as a result of disciplinary action for serious misconduct, a defined term. Disciplinary action for serious misconduct may result in termination of employment without notice.[127] Termination arising from disciplinary action for serious misconduct is therefore a weighty step with significant consequences for the relevant staff member. Clause 44 recognises this by mandating a procedure that is to be followed. It is the Vice-Chancellor (or the Vice-Chancellor's nominee) who is tasked

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[123] Clause 6.7.
[124] Clause 29.2.
[125] Clause 29.5.
[126] Clause 42.1.1.
[127] Clause 6.7.

with following this procedure and who must consider any allegation of misconduct or serious misconduct.

[108] When read as a whole, a central feature of clause 44 is that the Vice-Chancellor cannot take disciplinary action against a staff member in respect of an unsubstantiated allegation. This is ensured by a number of procedures under clause 44.2. First, as is evident from the introductory words to clause 44.2.2, "*If he/she believes such allegation(s) warrant further investigation*", the Vice-Chancellor is not required to investigate every allegation. It is only those allegations which the Vice-Chancellor believes warrant further investigation that initiate the procedure under clause 44.2.2. The Vice-Chancellor, for example, may form the view that a vexatious or fanciful allegation which could not conceivably amount to misconduct or serious misconduct does not warrant further investigation. Secondly, clauses 44.2.2(i) and (ii) require the Vice-Chancellor to notify the staff member of the allegation and to seek a response. The notification must be in writing and give sufficient detail of the allegation to enable the staff member to understand the precise nature of the allegation and to properly consider and respond to it. Thirdly, clause 44.2 envisages the varying ways in which a staff member may respond to the allegation. If, for example, the allegation is admitted by the staff member and the Vice-Chancellor is of the view that the conduct constitutes misconduct or serious misconduct, disciplinary action may be taken and notified.[128] Disciplinary action therefore proceeds on the basis that the allegation is admitted and the Vice-Chancellor is of the view that the conduct constitutes misconduct or serious misconduct. Where the allegation is however wholly or partly denied or the staff member has not responded to the allegation, clause 44.2.7 provides that the Vice-Chancellor may take one of three courses, including referring the matter to the Misconduct Investigation Committee. The Committee is then provided with a copy of the written allegation and any written reply to the allegation by the staff member. The Committee then provides a report to the Vice-Chancellor and staff member containing a finding as to whether or not, in the Committee's view, the allegation has been established on the balance of probabilities. By clause 44.2.10 if, after having considered the report from the Committee, the Vice-Chancellor determines that misconduct or serious misconduct has occurred, the Vice-Chancellor is to determine whether or not to impose disciplinary action and, if so, what that disciplinary action will be.

[109] It is therefore apparent that there are two prerequisites to the Vice-Chancellor determining whether or not to impose disciplinary action. The first is that the allegation has been substantiated either by the relevant staff member admitting the allegation or the Vice-Chancellor accepting the finding of the Misconduct Investigation Committee that the allegation has been established on the balance of probabilities. Secondly, the Vice-Chancellor either forms the view that the conduct constitutes misconduct or serious misconduct (clause 44.2.6) or determines that misconduct or serious misconduct has occurred (clause 44.2.10). Once the allegation is substantiated it is the Vice-Chancellor alone who determines whether the conduct the subject of the allegation constitutes misconduct or serious misconduct. Further, it is the Vice-Chancellor alone who determines whether or not to impose disciplinary action and if so what that disciplinary action will be.

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[128] Clause 44.2.6.

[110] The plaintiff submits that the term "allegation" in clauses 44.2.2 and 44.2.6 must be interpreted as "valid, reasonable and understandable allegation of an act of misconduct (as opposed to an act that does not by its nature represent misconduct and is commonly performed by a number of people)".[129] According to the plaintiff:

> "It would be completely absurd and illogical for the term 'allegation' in clauses 44.2.2 and 44.2.6 to be construed as an allegation of conduct or action which, by its nature, does not constitute misconduct or serious misconduct – for example, like sending emails, which is a type of action regularly committed by the majority of the defendant's employees. Had such a construction been allowed or contemplated by the parties to EBA, this would have led to a possibility of presenting an employee with an absurd allegation – like drinking water or breathing air – causing the whole procedure to be thrown into absurdity and illogicality. This would also have opened the door for arbitrary abuse of the procedure, which could not have been contemplated or intended by the parties to EBA and would have a destructive effect on the existing industrial reality. There is no doubt that clauses 44.2.2 and 44.2.6 did not mean an allegation of random conduct that the defendant might astutely, albeit groundlessly, decide to characterise as misconduct or serious misconduct."[130]

[111] I do not accept these submissions. From the above discussion of clause 44.2, including clauses 44.2.2 and 44.2.6, the procedure contemplates a two stage process. First, substantiation of the allegation either by admission by the staff member or finding of the Misconduct Investigation Committee which is accepted by the Vice-Chancellor and secondly, the forming of a view by the Vice-Chancellor that the relevant conduct the subject of the allegation constitutes misconduct or serious misconduct. These are the essential prerequisites constituting the mandatory procedure that must be followed before the Vice-Chancellor can take disciplinary action against a staff member. Conduct the subject of an allegation does not amount to misconduct or serious misconduct until the Vice-Chancellor forms that view or makes that determination. It is only after that step that the Vice-Chancellor takes disciplinary action against the relevant staff member for misconduct or serious misconduct. This is the construction of clause 44.2.2 and 44.2.6 advanced by the defendant which, in my view, is the correct construction.[131]

[112] The procedure in clause 44.2.2 ensures that the relevant staff member is properly informed of the allegation, which is an allegation of conduct not of misconduct or serious misconduct. The EBA specifically makes it the realm of the Vice-Chancellor to determine whether the conduct is either misconduct or serious misconduct. At first blush it may be thought that clause 44.2.2, by use of the introductory words "Any allegation of Misconduct or Serious Misconduct" and "such allegations" supports the plaintiff's construction that the staff member must, pursuant to clause 44.2.2(i), be notified of an allegation of misconduct or serious misconduct, not merely conduct. Clause 44.2 must however, be construed as a whole. When read as a whole it is apparent that what is notified to the staff member is an allegation of conduct. First, the introductory words to clause 44.2.2 simply identify that it is the Vice-Chancellor who

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[129] Plaintiff's Written Submissions, [66].
[130] Plaintiff's Written Submissions, [65].
[131] Defendant's Written Submissions, [22].

considers any allegation of misconduct or serious misconduct. Clause 44.2.2 further contemplates that in some instances an allegation will not warrant further investigation. Clause 44.2.5 also contemplates no disciplinary action where the staff member denies the allegation and the Vice-Chancellor is of the view that there has been no misconduct or serious misconduct. Clause 44.2.6 identifies that where the staff member admits one or more of the allegations, what the Vice-Chancellor considers is whether the admitted "conduct" of the staff member constitutes misconduct or serious misconduct. Similarly, the role of the Misconduct Investigation Committee under clause 44.2.9 is, in part, limited to reporting whether an allegation has been established on the balance of probabilities. Given that it is the Vice-Chancellor who pursuant to clause 44.2.10 determines whether misconduct or serious misconduct has occurred, the reference to "allegation" in clauses 44.2.7, 44.2.8 and 44.2.9 may only be read as a reference to an allegation of conduct.

[113] It follows that in order to comply with clause 44.2.2(i) Professor Bowman's letter of 8 May 2009 had to notify the plaintiff of the alleged conduct in sufficient detail to enable the plaintiff both to understand the precise nature of the alleged conduct and to properly consider and respond to the alleged conduct.

[114] The next issue is whether Professor Bowman's letter failed to comply with clause 44.2.2(i) and therefore breached the EBA.

(b) Was clause 44.2.2(i) of the EBA breached?

[115] In his written submissions the plaintiff refers to Professor Bowman's letter of 8 May 2009 as a "show-cause letter" which should have explained "any reasons for the initiated disciplinary procedure and any valid and understandable allegations of misconduct to which the plaintiff would have been able to respond".[132] The plaintiff, by reference to Professor Bowman's affidavit and oral testimony, identifies a number of matters that Professor Bowman considered in determining whether the plaintiff's conduct constituted misconduct or serious misconduct. These include the following:

- relevant clauses of the Code of Conduct;
- whether the conduct of the plaintiff significantly impeded the duties of other staff members;
- whether the conduct of the plaintiff was affecting the health of other staff members; and
- whether the plaintiff's conduct was "threatening and intimidating" for relevant staff members.[133]

The plaintiff submits that Professor Bowman, by failing to reference any of these matters in his letter of 8 May 2009, failed to identify any allegations of misconduct or serious misconduct. Further, by the letter of 8 May 2009 Professor Bowman simply

[132] Plaintiff's Written Submissions, [68].
[133] Plaintiff's Written Submissions, [70]-[82].

presented the plaintiff with an allegation or authoring and sending four emails which could not constitute an allegation of misconduct or serious misconduct.[134]

[116] The plaintiff's submission is best understood by reference to paragraph 3 of the plaintiff's letter dated 21 May 2009 which responded to the letter of 8 May 2009:

> "Being an author of some emails is not an allegation. Unfortunately, you have failed to specify and explain in any reasonable way your allegations with respect to my conduct in relation to those emails. Therefore, "Allegation 1" in your letter dated 8 May 2009 does not contain any specific allegations which would have explained any specific alleged misconduct that I could have been accused of and thus could have been able to respond to."[135]

[117] The letter of 8 May 2009 was not a show-cause letter, but rather the written notification required by clause 44.2.2. The text of the 8 May 2009 letter is set out in [81] above. The letter sought a response from the plaintiff within 10 working days, which is the requirement identified in clause 44.2.2(ii). I have already determined that, upon a proper construction of clause 44.2.2, the allegation to be notified to the plaintiff is an allegation of conduct. The question is whether the letter of 8 May 2009 notified the plaintiff in sufficient detail to enable the plaintiff to understand the precise nature of the allegation and to properly consider and respond to it.

[118] In my view, the letter of 8 May 2009 complied with the procedural requirements of clause 44.2.2. As submitted by the defendant, Professor Bowman's 8 May 2009 letter to the plaintiff materially:

(a) stated that Professor Bowman has been appointed as the Vice-Chancellor's nominee to consider an allegation of conduct by the plaintiff which potentially amounted to misconduct or serious misconduct;

(b) enclosed numerous pieces of correspondence apparently written and sent by the plaintiff;

(c) stated that he (Professor Bowman) "had serious concerns about this correspondence and … I require you to answer specific allegations about your connection with the correspondence";

(d) requested the plaintiff to respond to Professor Bowman's belief that the plaintiff had authored and sent the emails in question;

(e) set out Professor Bowman's concerns with the correspondence, including extracts from various emails; and

(f) requested certain undertakings from the plaintiff to cease certain conduct which were reflective of Professor Kaplan's requested undertakings;

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[134] Plaintiff's Written Submissions, [69] and [88].
[135] Affidavit of Kenneth John Bowman, Exhibit KB-19, page 292.

(g) incorporated Professor Kaplan's correspondence to the plaintiff dated 5, 12 and 24 March 2009 which had itself referred with specificity to the Code of Conduct.[136]

The allegation in the letter that the plaintiff authored and sent the emails of 2, 6, 12 and 30 March 2009 cannot be divorced from the actual content of these emails. As stated by Professor Bowman in the letter of 8 May 2009, "[t]he correspondence speaks for itself". Professor Bowman went further in the letter of 8 May 2009 by setting out his concerns in respect of the correspondence, including extracts from the various emails. In my view, the 8 May 2009 letter complied with clause 44.2.2(i) and gave the plaintiff sufficient detail to enable him to understand the precise nature of the allegation and to properly consider and respond to it. It is evident from the content of the plaintiff's response letter to Professor Bowman of 21 May 2009 referred to in [89] above that the plaintiff confirmed authorship and the sending of the emails that constituted Allegation 1.

[119] The plaintiff has failed to establish any breach by the defendant of clause 44.2.2(i) of the EBA.

(c) Causation

[120] The plaintiff pleads that had the defendant complied with clause 44.2.2(i) his employment contract would not have been terminated and he would not have suffered damages.[137] The plaintiff's case is that the defendant, in terminating his employment, impermissibly relied on Allegation 1 (which was not an allegation of misconduct but merely an allegation of sending emails) because the defendant did not have a valid allegation of misconduct against the plaintiff.[138]

[121] In paragraph 209 and 210 of the second further amended statement of claim the plaintiff pleads:

> "209. Because the Defendant did not have valid allegations of misconduct against the Plaintiff, compliance with the procedural step set down by Clause 42.2.2(i) must have been the decision to terminate the disciplinary action against the Plaintiff on the basis that Allegation 1 did not warrant further investigation (which is one of the options allowed by clause 44.2.2 of the EBA).
>
> 210. Accordingly, in the event of the Defendant's compliance with Clause 44.2.2(i), the employment contract would not have been terminated."

The plaintiff seeks to establish the relevant causal link by alleging that had the defendant sought to notify the plaintiff of an allegation of misconduct or serious misconduct, the defendant would or should have realised that there was no allegation of misconduct or serious misconduct which could be made against the plaintiff. Accordingly, Professor Bowman, as the nominee of the Vice-Chancellor, would have formed the belief that the matter did not warrant further investigation.

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[136] Defendant's Written Submissions, [44].
[137] Second Further Amended Statement of Claim, [207(d)] and [211].
[138] Second Further Amended Statement of Claim, [208].

[122] The difficulty with the plaintiff's case in respect of causation is that it proceeds on his personal belief that he was entirely justified in sending the emails of 2, 6, 12 and 30 March 2009. It was Professor Bowman and not the plaintiff, however, who had to form the belief whether any allegation warranted further investigation. The 8 May 2009 and 16 June 2009 letters of Professor Bowman evidence his belief that not only did the allegation of sending the four emails warrant further investigation, but also that such conduct could constitute serious misconduct.[139]

[123] On any objective view, the plaintiff's admitted conduct of authoring and sending the four emails could constitute "Serious Misconduct" as defined in clause 6.16 of the EBA. "Serious Misconduct" has two operative elements. It is misconduct "of a serious and wilful nature" and "is conduct of a type that would make it unreasonable to require the University to continue employment of the staff member concerned". The definition also provides that "Serious Misconduct" is normally limited to those matters identified in clause 6.16(i) to (v). Those examples reflect normal instances of such misconduct including theft, assault, criminal conviction and serious dereliction of the duties required of the academic office. Another example is conduct of a kind which constitutes a significant impediment to the staff member's colleagues carrying out their duties. Whilst these examples constitute normal instances of misconduct, they are not exhaustive or restrictive.[140]

[124] It was, in my view, open to the Vice-Chancellor or the Vice-Chancellor's nominee to determine that the conduct of the plaintiff, in authoring and sending the four emails and refusing to undertake not to do so in the future, constituted serious misconduct. As stated by Professor Bowman in his letter of 3 July 2009:

> "… However, in circumstances where you accept that you authored and sent the emails referred to in my original letter to you, and you do not accept my request that you agree not to send similar correspondence in the future, and to cease your 'pursuit' of senior members of University Staff, I believe I have no other option but to terminate your employment.
>
> … As stated in my letter of 16 June, however the University has an obligation to protect all its employees from unacceptable action by other employees. What is of concern to me, and has led to my decision, is the threatening and intimidating language concerned in your correspondence, your stated determination to pursue senior members of staff in a manner which I believe is unreasonable, and your refusal, despite what I regard as a reasonable opportunity, to agree not to send further correspondence, and not to act in accordance with these threats, in the future."[141]

[125] I do not accept the plaintiff's submission that the mere sending of four emails could not ever constitute serious misconduct. The sending and authoring of the emails cannot be divorced from their content. As to the allegation that his emails contained threatening and intimidating language, the plaintiff relies on the fact that he stated in correspondence on a number of occasions that his actions would be carried out "within

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[139] See [81], [91] and [92] above which set out the contents of Professor Bowman's letters of 8 May 2009 and 16 June 2009.

[140] Defendant's Written Submissions, [30].

[141] See [94] above. Which sets out the contents of Professor Bowman's letter of 3 July 2009.

the law". This was a matter specifically considered by Professor Bowman in his letter of 16 June 2009 where he wrote:

> "You have stated on a number of occasions that your actions will be carried out within the law. That is relevant, however actions which are deliberately threatening of other employees, or which are likely to be intimidating of other employees is unacceptable and inconsistent with the University Standards of Conduct, irrespective of whether it is also unlawful."

[126] After the plaintiff's employment was terminated he brought an unfair dismissal claim in Fair Work Australia (as it was then known). The plaintiff was unsuccessful at first instance before Commissioner Spencer. The plaintiff appealed to the Full Bench. The Full Bench agreed with Commissioner Spencer's finding that the plaintiff's conduct in authoring and sending the four emails, amounted to serious misconduct and was a valid reason for termination (in the context of the *Fair Work Act* 2009 (Cth)).[142] The Full Bench observed that there was evidence on which Commissioner Spencer could properly conclude that the plaintiff's conduct amounted to serious misconduct under the EBA.[143] These decisions do not support Dr Gramotnev's pleaded case that had the defendant complied with clause 42.2.2(i) the Vice-Chancellor or the Vice-Chancellor's nominee would have formed the belief that the plaintiff's conduct did not warrant further investigation.

[127] The plaintiff objects to the defendant making any reference to the Fair Work Australia proceedings.[144] The objection is based on Fair Work Australia not having the jurisdiction to determine:

(a) misconduct on behalf of the defendant;

(b) allegations of breaches of the employment contract; and

(c) health and safety risks.

[128] The defendant's reference to the plaintiff's unfair dismissal proceedings is, in my view, relevant to the plaintiff's pleaded case in respect of causation. The decisions demonstrate that the plaintiff's conduct could be viewed as "Serious Misconduct".

[129] The defendant also refers to a number of authorities which have held that the sending of abusive and offensive emails constitutes serious misconduct.[145] The plaintiff submits that the content of the emails sent in those cases are readily distinguishable[146] from the four emails he sent. The cases are however relevant for showing that the sending of emails in a work environment, depending on their content, may constitute serious misconduct.

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[142] *Gramotnev v Queensland University of Technology* [2010] FWA 6237, [97] and [104]; *Gramotnev v Queensland University of Technology* [2011] FWAFB 2306, [33]-[35].

[143] Defendant's Written Submissions, [32].

[144] Plaintiff's Written Submissions, [101]; Amended Reply, [7] and [14].

[145] Defendant's Written Submissions, [33]-[34] citing *Hayes v Murdoch University* [2017] FWC 2174, [106]-[120]; *Harvey v Egis Road Operation Australia Pty Ltd* [2015] FWC 2306, [4], [59]-[61] and [113]-[129] and *Theoctistou v Austaron Pty Ltd* [2010] FWA 1695, [44]-[45].

[146] Plaintiff's Written Submissions, [102]-[106].

[130] It follows that even if I am wrong as to the proper construction of clause 44.2 and my finding that the defendant did not breach clause 44.2.2(i), the plaintiff's claim still fails on causation.

(d) Repudiation

[131] As a further alternative argument the defendant submits that the plaintiff, by his conduct, repudiated the contract of employment. The defendant accepted this repudiation by Professor Bowman's letter of 3 July 2009 and elected to terminate the employment contract. The repudiatory conduct of the plaintiff identified by the defendant is the plaintiff's refusal to accept the authority of the disciplinary process which had been commenced under clause 44 of the EBA. The plaintiff characterised the disciplinary process as a campaign of further reprisal actions and bullying. He refused to participate in the disciplinary process, which he described as "the illegitimate investigation of my conduct in relation to this matter". The plaintiff also cautioned Professor Bowman that he would regard any further attempts to investigate his conduct as a further form of bullying, intimidation, witch-hunt and reprisal action against him.[147] The plaintiff denies that by his conduct he repudiated the employment contract.

[132] In light of my findings in respect of breach and causation, it is unnecessary to further consider whether the plaintiff by his conduct repudiated the employment contract.

(e) The plaintiff's reliance on section 174(1)(b) of the Workplace Health and Safety Act 1995 (Qld)

[133] I have set out the terms of section 174 and the plaintiff's case based on this section in [96] and [97] above. Quite apart from the fact that this case is not pleaded,[148] it has other difficulties and must fail.

[134] The first difficulty is that it requires the plaintiff's emails of 2, 6, 12 and 30 March 2009 to be construed as the plaintiff making a complaint concerning workers' exposure to the risk of illness or injury or raising this as an issue.[149] I have set out the substance of these emails above.[150] None of these emails, in my view, may be construed as the plaintiff raising a complaint or an issue concerning workers' exposure to the risk of illness or injury. Whilst some of the emails use the language of "health and safety risk" or the plaintiff holding "concerns in relation to the wellbeing of the School", the substance of the emails concerned the plaintiff making allegations against senior staff members of the defendant, including allegations of bullying, intimidation and discrimination.

[135] The second difficulty is that even if the emails could be construed as containing either a complaint or the raising of an issue concerning workers' exposure to the risk of illness or injury, there is simply no evidence that the "dominant or substantial reason" for the defendant terminating the plaintiff's employment was because of the making of such a

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147 Defendant's Written Submissions, [53(a)-(d)], [57] and [58].

148 The plaintiff's argument in relation to section 174(1)(b) is a footnote to [234(e)] of the Second Further Amended Statement of Claim which only deals with causation in respect of the second alleged breach.

149 Section 174(1)(b) *Workplace Health and Safety Act* 1995 (Qld).

150 [62], [69], [71] and [74].

complaint.[151] To the contrary, Professor Bowman's letters of 8 May 2009, 16 June 2009 and 3 July 2009 identified the concerns and the basis for the termination of the plaintiff's employment, namely serious misconduct. There is no reference in any of Professor Bowman's letters to the plaintiff being dismissed for raising issues concerning workers' exposure to the risk of illness or injury, nor was such a suggestion put to Professor Bowman in cross-examination.

[136] Finally, section 174 is irrelevant to the plaintiff's claim for damages arising from alleged breaches of the employment contract. Section 174 contains its own remedies in circumstances where an employer breaches section 174(1)(b). By reference to a maximum penalty of 40 penalty units, section 174 creates an offence. Further, section 174(2) provides that if an employer contravenes subsection (1) by dismissing a worker, the worker is taken to have been unfairly dismissed under the *Industrial Relations Act* 1999 (Qld) chapter 3, part 2 and, subject to that part, has the remedies under that part. These are separate and distinct remedies from the damages the plaintiff seeks for breach of contract. Section 174 does not operate (as the plaintiff submits) to "invalidate" the allegation raised in Professor Bowman's letter dated 8 May 2009.[152]

The second alleged breach

[137] The second alleged breach is of clause 44.2.7 of the EBA which applies where a staff member either wholly or partly denies the allegation or has not responded to the allegation.

[138] The plaintiff's case is that while he admitted authoring and sending the four emails he "wholly denied" any misconduct.[153] In these circumstances the Vice-Chancellor or the Vice-Chancellor's nominee had three options:

> "(i) decide to take no further action; or
>
> (ii) counsel or censure the staff member in relation to the conduct in question and take no further action; or
>
> (iii) refer the matter to the Misconduct Investigation Committee."[154]

[139] On the plaintiff's case, the defendant breached clause 44.2.7 by terminating the plaintiff's employment for serious misconduct without the matter being first referred to the Misconduct Investigation Committee. To put it another way, the defendant could not rely on the plaintiff's admission to authoring and sending the emails for the purposes of proceeding under clause 44.2.6 rather than under clause 44.2.7 of the EBA.

(a) Was clause 44.2.7 of the EBA breached?

[140] I have already considered the proper construction of clause 44.2 in [99]-[113] above. I have concluded that the reference in clauses 44.2.2(i), 44.2.6 and 44.2.7 to "the allegation" is an allegation of conduct, not of misconduct or serious misconduct. By

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[151] See the introductory words to section 174(1).
[152] Plaintiff's Written Submissions, [41].
[153] Second Further Amended Statement of Claim, [216].
[154] Clause 44.2.7 of the EBA.

admitting Allegation 1 identified in the letter from Professor Bowman dated 8 May 2009, the plaintiff admitted the relevant conduct. Professor Bowman was therefore entitled to proceed under clause 44.2.6 and was not required to proceed under clause 44.2.7. As correctly submitted by the defendant, there is nothing in clause 44.2 to support a staff member having a right to pre-empt how admitted conduct should be characterised and thereby force the convening of the Misconduct Investigation Committee:

> "Where any such conduct was admitted, it cannot have been the objective intention of the parties to have then required the University to convene an MIC merely because the staff member denied that the admitted conduct was 'Misconduct' or 'Serious Misconduct' or because the employee gave reasons for why the admitted conduct occurred. In this regard, it is important to bear in mind that the role of the MIC would have been to form a view as to 'whether the allegation has been established on the balance of probabilities', it remaining at all times up to the Vice-Chancellor or his nominee to decide whether the Misconduct or Serious Misconduct had occurred and what should be the Disciplinary Action."[155]

[141] The plaintiff has failed to establish the second alleged breach.

(b) Causation

[142] Even if the plaintiff had been able to establish a breach of clause 44.2.7 he has otherwise failed to establish a causal connection between such a breach and the termination of his employment. The plaintiff's pleaded case in respect of causation for the second alleged breach is found in [223]-[239] of the second further amended statement of claim. The plaintiff's pleaded counterfactual is that the Misconduct Investigation Committee would have investigated the relevant events from 2007 to 2009, including the plaintiff's allegations of bullying, harassment and discrimination. The Committee would also have considered the basis for the commencement of disciplinary proceedings. Having considered these matters, the Committee would have recommended terminating the disciplinary action either because there was no evidence of misconduct or because of major mitigating factors and circumstances. These circumstances included "the inappropriate conduct of the defendant and numerous breaches of its policies and procedures, the principles of procedural fairness and good management practices."[156]

[143] There are, however, numerous difficulties in the plaintiff's pleaded case.

[144] In essence, the plaintiff's case is that had the allegation been referred to the Misconduct Investigation Committee, it would have recommended to the Vice-Chancellor or his nominee that no further action should be taken. The defendant's failure to refer the allegation to the Misconduct Investigation Committee resulted in the plaintiff losing an opportunity for a favourable outcome which would not have resulted in termination and loss.

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[155] Defendant's Written Submissions, [25] and [27].
[156] Second Further Amended Statement of Claim, [235].

[145] It is necessary for the plaintiff to establish that this loss of opportunity offered a substantial, and not merely a speculative, prospect of achieving the favourable outcome as pleaded.[157]

[146] First, the plaintiff's causation plea proceeds on an erroneous premise, namely that the Misconduct Investigation Committee investigates allegations of misconduct rather than allegations of conduct. Secondly, such a favourable outcome would have required the Committee to accept the plaintiff's justification for his actions, including sending the emails referred to in Allegation 1. There is no evidentiary basis that would permit this Court to make such a finding. The prospect of the pleaded favourable outcome is merely speculative on any objective view of the plaintiff's admitted conduct.[158] Thirdly, the report and findings of the Misconduct Investigation Committee are not binding on the Vice-Chancellor or his nominee.[159] It is the Vice-Chancellor or his nominee who determines whether misconduct or serious misconduct has occurred. The plaintiff seeks to overcome this difficulty by merely asserting that the Vice-Chancellor's nominee, acting reasonably, would have accepted the recommendation of the Committee.[160] Again there is no evidentiary basis for such a finding.

[147] It follows that even if the plaintiff had been able to establish the second alleged breach, he fails on causation.

[148] In light of the above findings in relation to the second alleged breach, it is unnecessary to consider the defendant's further alternative argument that the plaintiff, by his conduct, repudiated the employment contract.

The third alleged breach

[149] The third alleged breach is of the Grievance Policy which deals with grievance resolution procedures for discrimination-related grievances. The Grievance Policy is one of three policies arising from MOPP Policy A/1.6.[161] The "Policy statement" of Policy A/6.1 commences with the statement that QUT is committed to ensuring a harmonious, fair and just working and learning environment. This commitment is sought to be achieved "by ensuring that staff and students have access to processes that allow for grievances, disputes, problems and complaints to be resolved".[162]

[150] Clause 6.1.2 of Policy A/6.1 identifies "Policy principles" which include the encouragement of informal and early resolution of grievances and that the grievance resolution process will be conducted as expeditiously as possible and in accordance with the agreed timeframe specified within each procedure. Clause 6.1.3 provides that before initiating any action under the grievance resolution procedures a complainant is advised to seek support from a number of sectors including from a Discrimination Contact Officer.

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[157] *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 364 (Brennan J).
[158] See [123] to [128] above.
[159] Clause 44.2.10 of the EBA.
[160] Second Further Amended Statement of Claim, [239].
[161] Agreed Bundle, Tab 1.
[162] Clause 6.1.1 of Policy A/6.1

[151] Each of the three policies arising from Policy A/1.6 have common procedures, being the three-level grievances resolution process:

- Level 1 – Early conciliation
- Level 2 – Further conciliation and/or investigation
- Level 3 – Investigation.[163]

The Grievance Policy in clause 8.5.6 sets out these three levels.

[152] As outlined in [55] above, the plaintiff's case is that his letter dated 1 June 2008 to the Vice-Chancellor was a complaint relating to bullying, intimidation and discrimination of the plaintiff by Dr Ayoko. The grievance or complaint should have been investigated in accordance with the procedure in clause 8.5.6 of the Grievance Policy. The defendant did not undertake any such investigation which it was contractually bound to do so. According to the plaintiff, had such an investigation been conducted at the time he would not have taken a number of future steps, including sending the 2 March 2009 email. Had these future steps not been taken the plaintiff would not have been subject to disciplinary action and his employment would not have been terminated.[164]

[153] There are three issues that arise in respect of the third alleged breach:

(a) Did the Grievance Policy form part of the plaintiff's employment contract?

(b) Did the defendant breach the Grievance Policy?

(c) Was the breach causally linked to the termination of the plaintiff's employment and subsequent loss?

(a) Did the Grievance Policy form part of the employment contract?

[154] The issue of whether Policy A/6.1 and the Grievance Policy are contractual has been previously considered both by McMeekin J at first instance[165] and by the Court of Appeal.[166] Both McMeekin J and Jackson J (with whom Margaret McMurdo P and Holmes JA agreed) concluded that Policy A/6.1 is not contractual in nature and does not form a term of the plaintiff's employment contract. As to the Grievance Policy, both McMeekin J and the Court of Appeal concluded that the whole of the policy is not contractual. That conclusion must be understood in the context that, at that stage of the proceedings, the breach alleged by the plaintiff was that the defendant failed to stop ongoing years of bullying and harassment of the plaintiff on the basis of his family relationship, by several high-ranking administrators.[167] McMeekin J, in finding that the Grievance Policy as a whole was not contractual, observed:

> "[181] The Policy sets out the procedures to be followed, determined by the nature of the grievance asserted. The complaint seems to be that the procedures were ineffective to prevent bullying and harassment. But there is

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[163] Clause 6.1.3 of Policy A/6.1.
[164] Second Further Amended Statement of Claim, [242]-[263].
[165] *Gramotnev v Queensland University of Technology* [2013] QSC 158, [171]-[184].
[166] *Gramotnev v Queensland University of Technology* [2015] QCA 127, [110]-[120].
[167] [2013] QSC 158 at [180]; [2015] QCA 127 at [118].

> no promise by the University that the procedures laid down will succeed. And the use of words such as 'will constitute' or the 'panel should' do some action or other is not, without more, necessarily promissory in effect. What is absent from the Policy is any statement of entitlement directed to the employee.
>
> [182] As the University submits 'there is nothing in the Discrimination Grievance Procedure which a reasonable prospective employee would have understood as a promise that bullying and harassment would not occur or that if they did, the employee would be entitled to contractual damages if they were aggrieved by such conduct'.
>
> [183] If the promise alleged is one that should a grievance be brought to the attention of the appropriate officer of the University then it would be dealt with in accordance with the procedures laid down then it may be that a reasonable prospective employee would have considered so much was promised. There remains the difficulty of the need for an exercise of discretion as to how the matter should be dealt with – the seriousness of any complaint might, like beauty, lie in the eye of the beholder. And the requirements to 'consider the complaint in the context of QUT policy and relevant legislation' and 'seek advice from any person it deems appropriate' are not susceptible of enforcement.
>
> [184] I am not persuaded that the policy as a whole is contractual in nature. Parts of it clearly are not. To the extent that my attention has been drawn to the relevant nature of the dispute I cannot accept that there is any contractual commitment capable of founding an action."

[155] Jackson J in agreeing with McMeekin J's analysis and his conclusion that the whole of the Grievance Policy is not contractual stated:

> "No particular part of the policy is identified as containing the promise alleged to have been breached. The allegation of breach alleges bullying or harassment, not a failure to comply with a contractual provision of the policy as to the procedure to be followed."[168]

[156] By reference to this statement of Jackson J the plaintiff submits that the Court of Appeal considered that the procedures set down in the Grievance Policy constituted part of the plaintiff's employment contract.[169] This is not correct. Jackson J's reference to "the contractual provisions of the policy as to the procedure to be followed" is obiter. Neither McMeekin J nor the Court of Appeal was required to determine whether the procedures described in the Grievance Policy constitute contractual promises. The issue therefore falls to be determined.

[157] The plaintiff does not identify in his pleadings any specific procedure in the Grievance Policy that was allegedly breached. His allegation is that none of the procedural steps required by any of the three levels of discrimination-related grievance resolution procedures were undertaken by the defendant in response to the plaintiff's letter of 1

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[168] [2015] QCA 127, [120].
[169] Plaintiff's Closing Submissions, [127].

June 2008.[170] This was a letter to the Vice-Chancellor and copied to the Chancellor and Dr Dickinson.

[158] As to whether any of the procedures under the Grievance Policy are contractual, it is first necessary to identify those statements in the procedures which impose obligations or confer entitlement. It is only those types of statements in the nature of promissory obligations which may give rise to contractual entitlements.[171]

[159] In *Gramotnev v Queensland University of Technology,*[172] McMeekin J, by reference to *Goldman Sachs JBWere Services Pty Ltd v Nikolich,*[173] listed the following considerations in determining whether a statement is contractually binding:

> "(a) where the language used in the policy denotes an expectation or aspiration that something will or will not occur, absent compelling words, it is unlikely to be a contractual promise that something will or will not occur;
>
> (b) words which describe a policy's 'aims' or 'guiding principles' are more likely to be descriptive than promissory;
>
> (c) where a policy specifies the conduct expected of employees it is unlikely to be given contractual force unless the words used are in the nature of promises to employees about the behaviour of other employees;
>
> (d) where the document recognises that regrettable conduct might occur from time to time and accordingly provides a means through which such behaviour can be addressed there is less likely to be found a contractual promise. This can be contrasted with a provision which may be read as an implicit promise that certain conduct would not occur under any circumstances. In each case it is the hypothetical new employee reading a policy fairly and objectively."

[160] Clause 8.5.4 of the Grievance Policy provides a number of options for a person who believes they have been discriminated against or harassed. Those options are:

(a) discuss the matter with the person they feel is discriminating against or harassing them in an attempt to resolve it constructively, although there is no onus on staff or students to do this before using these procedures; or

(b) resolve the grievances using these procedures (as outlined in section 8.5.6); or

(c) lodge a complaint with the Queensland Anti-Discrimination Commission or Human Rights and Equal Opportunity Commission, in which case the University will cooperate with the relevant Commission in having the matter resolved; or

(d) pursue a complaint through the relevant union or the QUT Student Guild.

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[170] Second Further Amended Statement of Claim, [258].
[171] *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120, [310] (Jessup J).
[172] [2013] QSC 158, [79].
[173] [2007] FCAFC 120.

[161] Clause 8.5.6 of the Grievance Policy explains that there are three levels to the discrimination-related grievance resolution procedures. It relevantly states:

> "**(a) Requirement to participate at each level**
>
> Staff or students involved in the grievance must participate in good faith at each level of these procedures. The Vice-Chancellor will not accept a complaint under the third level of these procedures unless those in conflict have attempted to resolve the matter through conciliation, as outlined at the first and second levels. Conciliation processes at levels one and two will take account of the needs of the persons involved, and will seek to minimise any stress or anxiety for participants (see (d)(ii) below).
>
> …
>
> **(d) First level – Approaching the supervisor for early conciliation**
>
> (i) Staff or students with grievances should raise the matter with an appropriate supervisor or request a Discrimination Contact Officer to do this on their behalf. Students should approach their head of school. Staff members should approach either their supervisor or the supervisor of the other person involved in the grievance.
>
> (ii) The supervisor may use a range of strategies to conciliate the grievance including:
>
> - seeking the assistance of another appropriate supervisor in resolving the grievance;
> - seeking advice and assistance from the Equity Coordinator or a Discrimination Contact Officer or involving them in conciliation meetings;
> - requesting the Equity Coordinator to assign a support person to assist in clarifying the grievance and/or to assist in conciliation;
> - conducting separate interviews with the persons involved in the grievance and conveying information from one party to the other;
> - where appropriate, conducting a joint meeting with the persons involved in the grievance, taking into account the needs and wishes of the persons involved.
>
> (iii) This level must be completed with one week of the supervisor being notified of the grievance. The Equity Coordinator must be notified if the one week period is exceeded.
>
> (iv) If the grievance is resolved at this stage, the supervisor will follow up two months later, and at other times if necessary, with the complainant to ensure that there has been no further conflict.
>
> **(e) Second level – Investigation and further conciliation**

(i) Where the conflict has not been resolved at the first level, the complainant may refer (or ask the Discrimination Contact Officer to refer) the matter to the relevant executive dean of faculty or head of division.

(ii) The executive dean of faculty or head of division will immediately notify the Equity Coordinator of the details of the grievance and who is involved. The executive dean of faculty or head of division will discuss the matter with the Equity Coordinator who will give formal advice about an appropriate course of action.

(iii) After consulting with the Equity Coordinator, the executive dean of faculty or head of division may do any of the following to resolve the grievance:

- consider all relevant matters including other complaints;
- make further enquiries;
- request the Equity Coordinator to assign a support person to assist in clarifying the nature of the grievance and/or to assist in conciliation, for example an Indigenous person;
- where appropriate, delegate the matter to a lower level manager in the faculty or division;
- appoint a trained person to conduct conciliation through separate interviews or a joint meeting with the persons involved. The Equity Coordinator will advise the executive dean of faculty or head of division on an appropriate conciliator. This person may be a University officer or an external conciliator, depending on the circumstances of the case;
- conduct an investigation, or appoint a trained person to do so on their behalf, on advice of the Equity Coordinator. Any investigation must be consistent with the principles outlined in section 6.1.2 of the University's grievance resolution policy (A/6.1).
- assess the validity of information;
- with the agreement of the persons involved in the grievance, implement action to resolve the grievance;
- make findings and take decisions within his/her delegated authority;
- refer the matter to the Vice-Chancellor.

(iv) This level should be completed within two weeks. The executive dean of faculty or head of division must immediately notify the Equity Coordinator of the outcome.

(v) If the grievance is resolved at this stage, the executive dean of faculty or head of division will follow up two months later, or at other times if necessary, with the complainant to ensure that there has been no further conflict.

(f) Third level – Formal investigation by the Vice-Chancellor

(i) If the grievance is not resolved at the second level, the complainant may lodge a written complaint with the Vice-Chancellor requesting a formal investigation.

(ii) Except in special circumstances, as determined by the Vice-Chancellor with advice from the Equity Coordinator, a complaint will not be accepted if more than nine months have elapsed since the last alleged incident of discrimination or harassment.

(iii) On receiving a written complaint, the Vice-Chancellor will constitute a panel, on advice from the Registrar, to investigate the complaint.

(iv) The panel shall consist of:

- an independent chair (external to the University and the governing body);
- two persons from the University staff or student body, nominated by the Vice-Chancellor in consultation with the relevant union/s or QUT Student Guild.

(v) The panel will include at least one woman and one man. Where necessary, the Vice-Chancellor may co-opt a specialist adviser to assist the panel, such as someone with knowledge of Aboriginal or Torres Strait Islander cultures, cultural diversity, sexuality or disability issues.

(vi) The role of the panel is to conduct a thorough investigation into the complaint to provide advice to the Vice-Chancellor on whether or not the complaint is substantiated. Any investigation will be consistent with natural justice and procedural fairness as outlined in the University's grievance resolution policy (see A/6.1).

(vii) In carrying out its task, the panel should:

- interview the complainant;
- interview the respondent;
- interview all relevant witnesses;
- interview any other University officer involved at levels one and two;
- respect the fact that support persons such as the Discrimination Contact Officers and the Equity

Coordinator or Equity staff will not be able to reveal confidential information without the permission of the person they are supporting;

- request a report from the executive dean of faculty or head of division about any investigations conducted at level two;
- review any other relevant documents;
- consider the complaint in the context of QUT policy and relevant legislation;
- seek advice from any person it deems appropriate;
- give the complainant and the respondent an opportunity to respond to all relevant information gathered;
- make a finding, on the balance of probabilities, on whether the complaint is substantiated, and whether there are any mitigating circumstances.

(viii) The panel will report its findings to the Vice-Chancellor who will determine appropriate action. With respect to these procedures, the Vice-Chancellor's determination will be final.

(ix) The third level must be completed within one month of the lodgement of a written complaint to the Vice-Chancellor."

[162] As to the first level the only "obligation" that may be identified is in clause 8.5.6(d)(iii) which requires the first level to be completed within one week of the supervisor being notified of the grievance. At the first level, however, any approach to an appropriate supervisor by a staff member or student with a grievance is for the purposes of "early conciliation". How the grievance is to be conciliated is at the discretion of the appropriate supervisor.[174] For the Second level, the only obligation created is that where a complainant refers the matter to the relevant executive dean of faculty or head of division, that person must immediately notify the Equity Coordinator of the details of the grievance and who was involved.[175] After consulting with the Equity Coordinator, the relevant executive dean or head of division has a discretion as to how to resolve the grievance. Unlike the first level, the second level does not have a specific time requirement within which the second level must be completed. Clause 8.5.6(e)(iv) simply provides that the second level "should be completed within two weeks".

[163] There are a number of "obligations" in the third level:

"(i) upon receiving a written complaint requesting a formal investigation, the Vice-Chancellor will constitute a panel to investigate the complaint;

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[174] Clause 8.5.6(d)(ii).
[175] Clause 8.5.6(e)(ii).

(ii) the panel "should" do a number of things to carry out the task of investigating the complaint to provide advice to the Vice-Chancellor as to whether or not the complaint is substantiated;

(iii) the panel is to report its finding to the Vice-Chancellor who determines appropriate action; and

(iv) the level must be completed within one month of a written complaint to the Vice-Chancellor."[176]

[164] As to the third obligation identified above, there are no express limitations on how the Vice-Chancellor is to determine "appropriate action". Given that any determination of the Vice-Chancellor is final, the Vice-Chancellor has a wide discretion in determining appropriate action.

[165] In my view, none of the procedures in the first, second or third levels of clause 8.5.6 give rise to contractual obligations. As noted by McMeekin J, "*the use of words such as 'will constitute' or the 'panel should' do some action or other is not, without more, necessarily promissory in effect*."[177] Such "promissory" language should be considered in context.[178] The relevant context for the procedures stated in clause 8.5.6 stems from the "Policy statement" in clause 6.1.1 of Policy A/6.1 quoted in [149] above. QUT's commitment "to ensuring a harmonious, fair and just working and learning environment" is sought to be achieved by ensuring that staff and students have access to these procedures. That is, access to the procedures reflects QUT's commitment. The "commitment" identified in clause 6.1.1 of Policy A/6.1 is expressed to be a "Policy statement". This is the language of "aims" and "guiding principles", not of absolutes or guarantees.[179] The procedures or rather access to the procedures, seek to achieve the aspirational goal of the "Policy statement".

(b) Did the defendant breach the Grievance Policy?

[166] Even if it was thought that the procedures in clause 8.5.6 were contractual, the plaintiff has failed to establish any breach.

[167] The evidence does not demonstrate that by his letter dated 1 June 2008, the plaintiff sought to engage the procedures under clause 8.5.6 of the Grievance Policy. The letter of 1 June 2008 on a fair reading, cannot be construed as a complaint concerning discrimination or harassment. By this letter, the plaintiff sought to have Dr Ayoko replaced as the Acting Head of the School. The letter only refers to "bullying" conduct in the context of the plaintiff alleging that Dr Ayoko "has demonstrated his complete failure and incapacity to reasonably manage staff in the school and their needs". The plaintiff's letter requested the Vice-Chancellor to take "decisive and prompt actions" directed to three matters all concerning the Head of School. Nowhere in the letter is found a request for "a formal investigation".[180] The letter makes no reference at all to the Grievance Policy.

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[176] Defendant's Written Submissions, [68(c)].
[177] *Gramotnev v Queensland University of Technology* [2013] QSC 158 at [181].
[178] *Goldman Sachs* [2007] FCAFC 120, [280] (Jessup J).
[179] *Goldman Sachs* [2007] FCAFC 120 per Marshall J at [161].
[180] Clause 8.5.6(f)(i).

[168] The letter of 1 June 2008 was sent by the plaintiff directly to the Vice-Chancellor. There is no suggestion that the plaintiff sought to engage either the first or second level procedures in clause 8.5.6. The plaintiff alleges that the appropriate supervisor for the purpose of his complaint was the Vice-Chancellor.[181] This was because the plaintiff's grievances were with his immediate supervisor, Dr Ayoko. Dr Ayoko's supervisor was Professor Britz who, according to the plaintiff, had a direct conflict of interest. Professor Britz's supervisor was Professor Gardiner who, according to the plaintiff, also had a conflict of interest preventing his involvement in the consideration of the plaintiff's complaint. There are a number of difficulties with this allegation. First, if the plaintiff was seeking to engage the procedures under clause 8.5.6, and believed that there was no supervisor with whom he could raise his grievance apart from the Vice-Chancellor, there is no suggestion of this in his letter of 1 June 2008. Secondly, at no stage did he request the assistance of a Discrimination Contact Officer to raise his grievances.[182] Thirdly, even if one accepts the plaintiff's allegation that the Vice-Chancellor was his only appropriate supervisor, the approach by the plaintiff to the Vice-Chancellor should be viewed as a first level approach to a supervisor for early conciliation. There is no requirement under the first level for the Vice-Chancellor to constitute a panel to investigate the complaint. The Vice-Chancellor responded to the plaintiff by letter dated 16 July 2008 in which he acknowledged the plaintiff's previous emails and disagreed with the plaintiff's concerns about Dr Ayoko's performance as Head of School. As correctly submitted by the defendant, the only "breach" would be that the plaintiff was not advised of this within the timeframe stipulated in clause 8.5.6(d)(iii).[183]

[169] There is no evidence that the plaintiff sought to engage either the first or second level of the procedures under clause 8.5.6. Accordingly, the Vice-Chancellor was not required to accept a complaint under the third level as the grievance had not been attempted to be resolved through conciliation as outlined at the first and second levels.[184]

(c) Was the third alleged breach causally linked to the termination of the plaintiff's employment?

[170] The plaintiff's case is that had his complaint been investigated he would not have made a further complaint on 17 November 2008 about the "misconduct, mismanagement and negligence" by both the Vice-Chancellor and Associate Professor Ayoko nor would he have sent the 2 March 2009 email. As a result of not taking these steps, his employment would not have been terminated. The central flaw in the plaintiff's case is that it necessarily proceeds on the basis that any investigation would have substantiated his complaint resulting in the Vice-Chancellor taking "appropriate action"[185] which would have relieved the plaintiff from further pursuing his grievances. There is no evidence that an investigation of the plaintiff's grievances would have resulted in a favourable outcome for the plaintiff. To the contrary, the contemporaneous evidence is that the subject of the plaintiff's complaint, Dr Ayoko, enjoyed the support of the Vice-Chancellor. Not only did the Vice-Chancellor in his reply dated 16 July 2008 disagree with the plaintiff's concerns about Dr Ayoko's performance as Acting Head of

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[181] Second Further Amended Statement of Claim, [252].
[182] Clause 8.5.6(d)(i).
[183] Defendant's Written Submissions, [78].
[184] Clause 8.5.6(a).
[185] Clause 8.5.6(f)(viii).

School, the Vice-Chancellor subsequently, on 5 August 2008, announced Dr Ayoko's promotion to Associate Professor.

[171] The plaintiff has failed to establish any causal connection between the third alleged breach and the termination of his employment and subsequent loss.

The fourth alleged breach

[172] The plaintiff alleges that the defendant failed to follow clause 8.5.6 of the Grievance Policy in respect of a complaint made by him to the Chancellor on 3 April 2009. The substance of this complaint and the events leading to it are set out in [73]-[77] above.

(a) Did the defendant breach the Grievance Policy?

[173] I have already found that the procedures in clause 8.5.6 of the Grievance Policy are not contractual. Even if these procedures were contractual, the evidence does not establish that the plaintiff sought to engage these procedures in his complaint of 3 April 2009 to the Chancellor. This letter commences with the sentence: "*This is the formal addition to my previous formal complaint to you dated 17 November 2008 about the serious misconduct of the senior management figures at QUT, including the QUT Vice-Chancellor, Professor P Coaldrake, the Deputy Vice Chancellor (Academic), Professor D Gardiner, and the Acting Head of School of Physical and Chemical Sciences, A/Prof. G Ayoko."* The letter of 17 November 2008[186] was the plaintiff's *"formal complaint about serious misconduct*". The letter of 17 November 2008 made the following request of the Chancellor:

> "Therefore, I request you to undertake adequate measures to reinstate and guarantee the rule of law and respect to persons at this University, including radical and adequate rectification and compensation for the major inflicted damage to any staff members that might have suffered loss and damages as a result of the major mismanagement and misconduct by the QUT administration including the Vice-Chancellor. I strongly believe that any resolution of this situation should also involve the full-scale personal responsibility of the involved members of the QUT administration, including the Vice-Chancellor, Prof. P Coaldrake."

[174] In a similar vein the plaintiff's letter of 3 April 2009 expressed "strong disagreement" with the Chancellor's previous decision "*not to undertake any disciplinary actions against the QUT Vice-Chancellor, Prof. P. Coaldrake, the Deputy Vice-Chancellor (Academic), Prof. D. Gardiner, and the Acting Head of School of Physical and Chemical Sciences, A/Prof. G. Ayoko, for their most serious misconduct and mistreatment of staff*".[187] The letter of 3 April 2009 concludes:

> "I strongly believe that your immediate actions should be aimed at ridding QUT once and for all of the existing administrative cancer that continues to destroy the very basic fabric of the academic culture, freedom, and traditions at this University."

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[186] Affidavit of Dmitri Gramotnev affirmed 19 October 2016, Exhibit 58.
[187] Affidavit of Dmitri Gramotnev, tab 74.

[175] As is evident from these extracts, the plaintiff's letter of 3 April 2009 was not seeking to engage the procedures under the Grievance Policy. Rather, the complaint was one of alleged serious misconduct by senior University staff made directly to the Chancellor. Further, no part of the procedures under clause 8.5.6 of the Grievance Policy involves the Chancellor.

(b) Was the fourth alleged breach causally linked to the termination of the plaintiff's employment?

[176] As to causation, the plaintiff alleges that had the complaint dated 3 April 2009 been investigated in accordance with clause 8.5.6 of the Grievance Policy, his employment would not have been terminated and he would not have suffered damages. The causation issues are different from the third alleged breach because the 3 April 2009 complaint was made to the Chancellor after the plaintiff had already sent the emails of 2, 6, 12 and 30 March 2009. The plaintiff alleges that had his complaint of 3 April 2009 been investigated in accordance with the Grievance Policy any investigation would have been demonstrated:

(a) that Professor Kaplan's conduct was inappropriate in his attempts to harass, discriminate and impede the plaintiff;

(b) that there were reasonable grounds and fair justification for the plaintiff to have sent the March emails; and

(c) alternatively that there were significant mitigating factors "in the form of major and deliberate bullying, harassing and discriminating campaigns conducted against the plaintiff by the defendant over several years, including by Professor Kaplan in 2009".[188]

There is no evidence that an investigation by a panel under the third level procedures of clause 8.5.6 would have resulted in any of the findings alleged by the plaintiff.

[177] Under clause 8.5.6(f)(viii) the panel reports its findings to the Vice-Chancellor who determines appropriate action. As at 3 April 2009, the plaintiff had already sent the March emails. The authoring and sending of these emails constituted the allegation of misconduct or serious misconduct which ultimately led to the termination of the plaintiff's employment. In these circumstances it is unlikely that any panel would have made any of the findings alleged by the plaintiff. Any loss of opportunity to have his complaints investigated in accordance with the Grievance Policy had a merely speculative as opposed to substantial prospect of producing the benefits contended for by the plaintiff.

[178] The plaintiff's claim in respect of the fourth alleged breach fails.

Damages

[179] In light of my findings that the plaintiff has failed to establish any of the four alleged breaches and has also failed to establish any causal connection between the alleged

[188] Second Further Amended Statement of Claim, [280]-[282].

breaches and the termination of his employment and subsequent loss, there is no point in assessing damages.

Disposition

[180] The plaintiff's claim is dismissed. I will hear the parties as to costs.