SUPREME COURT OF QUEENSLAND

CITATION:	*Gramotnev v Queensland University of Technology* [2019] QCA 108
PARTIES:	**DMITRI GRAMOTNEV** (appellant) **v** **QUEENSLAND UNIVERSITY OF TECHNOLOGY** (respondent)
FILE NO:	Appeal No 3584 of 2018 SC No 6286 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 37 (Flanagan J)
DELIVERED ON:	31 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	3 August 2018
JUDGES:	Fraser JA and Brown and Ryan JJ
ORDERS:	**1. Appeal dismissed.** **2. The appellant is to pay the respondent's costs of the appeal.**
CATCHWORDS:	EMPLOYMENT LAW – TERMINATION AND BREACH OF CONTRACT – TERMINATIONS OR BREACH GENERALLY – where the appellant was employed by the respondent university as a lecturer – where the respondent terminated the appellant's employment in accordance with procedures specified in an EBA on the basis of the type and content of the appellant's emails – where the appellant commenced proceedings alleging breach of his employment contract – where the appellant alleged breaches of termination procedures contained in the EBA and breaches of other policy – whether the primary judge's interpretation of the EBA was correct – whether the appellant failed to establish that the alleged breaches caused loss and damage regardless CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – WHAT AMOUNTS TO REPUDIATION – whether appellant's conduct evidenced his intention to fulfil his employment contract in a manner which was substantially inconsistent with his obligations

– whether appellant had wrongfully repudiated his employment contract

Workplace Health and Safety Act 1995 (Qld), s 174(1)(b)

Barnes v Forty Two International Pty Ltd (2015) 316 ALR 408; [2014] FCAFC 152, cited
Chaplin v Hicks [1911] 2 KB 786, cited
Concut Pty Ltd v Worrell (2001) 75 ALJR 312; [2000] HCA 64, applied
Downer EDI Ltd v Gillies (2012) 92 ACSR 373; [2012] NSWCA 333, cited
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423; [1978] HCA 12, cited
Foran v Wight (1989) 168 CLR 385; [1989] HCA 51, cited
Goldman Sachs JBWere Services Pty Ltd v Nikolich (2007) 163 FCR 62; [2007] FCAFC 120, applied
Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115; [2007] HCA 61, applied
Minion v Graystone Pty Ltd [1990] Qd R 157, cited
Rawson v Hobbs (1961) 107 CLR 466; [1961] HCA 72, cited
Roadshow Entertainment Pty Ltd v (ACN 053 006 269) Pty Ltd (1997) 42 NSWLR 462; [1997] NSWSC 473, cited
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332; [1994] HCA 4, cited
Shepherd v Felt & Textiles of Australia Ltd (1931) 45 CLR 359, cited
Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245; [1988] HCA 11, cited
Zahedpur v Idameneo (No 3) Pty Ltd [2016] QCA 134, cited

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

SOLICITORS: The appellant appeared on his own behalf
Minter Ellison for the respondent

[1] **THE COURT:** The appellant was employed as a lecturer by the respondent, Queensland University of Technology (**QUT**). He worked in QUT's School of Physical and Chemical Sciences. He commenced his employment on 1 January 2000. Difficulties in the employer/employee relationship arose in 2007 and escalated until the appellant's employment was terminated for misconduct in July 2009. He was unsuccessful in a claim for damages for breach of contract at first instance. He has appealed against that decision, raising ten grounds of appeal.

Overview

[2] The appellant's wife was a PhD student at QUT from 2000 until 2005. She was, for about a year thereafter, attached to the appellant's research program as a visiting fellow without remuneration.

[3] After her appointment as a visiting fellow ended, she wished to apply for a certain research grant. QUT did not support her application. The appellant was very

aggrieved that his wife was not supported by QUT in her application. He was also aggrieved about having been overlooked for promotion. He complained about his wife's treatment and other matters in email correspondence, including in correspondence to the Vice Chancellor. The language in some of his correspondence was considered by the respondent to be defamatory. In May 2007, he was cautioned not to inappropriately use "broadcast" or "all staff" emails.

[4] The appellant felt particularly harassed when, in the course of his complaining about his wife's treatment, his own performance review, or otherwise, he was "counselled" about conflicts of interest, or the alleged non-disclosure of conflicts of interest, which arose out of his relationship with his wife. He considered counselling about that issue to be a form of bullying.

[5] In November 2008, the appellant complained to the Chancellor of QUT about bullying by QUT staff, including the Vice Chancellor. His complaint was investigated externally. The investigator found elements of unfairness in the way the appellant had been treated but no misconduct on the part of QUT staff.

[6] At the relevant time, Dr Ayoko was the Acting Head of the School of Physical and Chemical Sciences. The appellant's personal view was that Dr Ayoko did not have the management or leadership capabilities for such a position. The appellant campaigned for a new Head of School in email correspondence which was very critical of Dr Ayoko. His correspondence was sent to the Chancellor, senior administrators and others, including all staff at the School.

[7] The respondent reminded the appellant of its Code of Conduct and sought an undertaking from him to, in effect, stop his email campaigns and to follow a certain communication protocol. He refused to undertake to stop or to follow the protocol.

[8] Ultimately, on 3 July 2009, the respondent terminated the appellant's employment for "Serious Misconduct" based on his sending four particular emails in March 2009. In terminating the appellant's employment, the respondent relied upon a procedure contained in clause 44 of the relevant enterprise bargaining agreement.

Claim at first instance

[9] In his claim for damages for breach of contract at first instance, the appellant alleged four specific breaches, namely –

- two breaches of QUT's enterprise bargaining agreement 2005 – 2008 (Academic Staff) (the **EBA**) in the course of terminating his employment; and
- two breaches of QUT's Manual of Policies and Procedures (**MOPP**), Policy A8.5 "Grievance resolution procedures for discrimination related grievances" in failing to investigate complaints made by him on 1 June 2008 and 3 March 2009 (the **Grievance Policy**).

The employment contract and other documents relevant to the appellant's employment

[10] The employment contract between the appellant and the respondent was in writing, constituted by a letter from QUT to the appellant dated 23 November 1999.

[11] Other documents relevant to his employment were the enterprise bargaining agreement (the EBA) and the Manual of Policies and Procedures (the MOPP).

[12] Clause 44 of the EBA and the Grievance Policy contained in the MOPP were relevant to the breaches of contract alleged by the appellant.

[13] The matter proceeded on the basis that QUT had contractually promised the appellant that an allegation of Misconduct or Serious Misconduct made against him would be dealt with in accordance with the procedures outlined in clause 44 of the EBA. However his Honour found that the Grievance Policy did not include contractual obligations.

[14] Clause 44 of the EBA provided –

> "**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).
>
> 44.2.3 At the time of notifying the staff member in accordance with Clause 44.2.2 if the Vice-Chancellor is of the view that the alleged conduct is such that it would be unreasonable to require the University to continue the staff member's attendance at work pending investigation of the allegation(s) in accordance with the procedure

outlined in this Clause, the Vice-Chancellor may suspend the staff member with or without pay.

Where suspension without pay occurs:

(i) the staff member can draw on any recreation leave or long service leave entitlements for the duration of the suspension without pay;

(ii) the Vice-Chancellor may at any time direct that salary be paid on the grounds of hardship; and

(iii) where the matter is subsequently referred to the Misconduct Investigation Committee, the Committee will determine whether suspension without pay will continue and may amend the nature of the suspension to one with pay from the date on which the suspension took effect.

44.2.4 During any period of suspension, the staff member may be excluded from the University. An exception to this is that the staff member will be permitted reasonable access to the University for the preparation of his/her case and to collect personal property.

44.2.5 If each of the allegation(s) made against the staff member is denied by the staff member, and 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.

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 in 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.

44.2.11 A decision not to impose Disciplinary Action where there has been Misconduct or Serious Misconduct can not be construed as an admission

> that there was no conduct justifying a previous decision to suspend without pay and any payment for lost salary during a period of suspension shall be at the Vice-Chancellor's discretion.
>
> 44.2.12 Where a staff member has been suspended without pay pending the decision of the Vice-Chancellor, then any lost salary will be reimbursed if there was no misconduct or serious misconduct.
>
> 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."

The primary judge's treatment of the history between the parties prior to the breaches

[15] The appellant believed that between 2007 and 2009 he was "repeatedly and systemically subjected to bullying, harassment, workplace mobbing, intimidation, discrimination, impediment and retaliation" by senior staff of the respondent.

[16] The appellant asserted at trial that a determination about whether he was in fact bullied, harassed or discriminated against by QUT, or whether he had reasonable grounds for such a belief, was relevant to the four alleged breaches of his employment contract in that it was relevant to whether the breaches had occurred, and causation.

[17] The primary judge held that, while the events of 2007 to 2009 provided the background to the appellant's dismissal, it was "neither necessary nor appropriate … to make the determination sought by the [appellant]".[1] Nor was the appellant's evidence sufficient for such a finding; nor was his belief that he had been so treated relevant. His Honour said:[2]

> "The [appellant'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 Chancellor, constituted bullying, harassment and/or discrimination. More particularly, the mere fact that the [appellant] 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 [respondent], irrelevant to whether the employment contract was breached as alleged."

Facts, including the history between the appellant and his wife and senior staff at QUT

---

1 [2018] QSC 37, at [9].

2 Ibid.

[18] In his judgment, the primary judge set out the long history of dealings between the appellant and his wife and senior staff at QUT in detail. The following is drawn from his Honour's judgment and the exhibits themselves (the dates in bold are significant).

- The appellant and his wife migrated to Australia in 1995.
- The appellant is a theoretical physicist, with expertise in the field of nanophysics.
- The appellant's wife is a physicist and statistician, with expertise in the fields of environmental science and statistical data analysis.
- The appellant was appointed to the permanent position of Lecturer in Physics at QUT on 23 November 1999.
- The appellant applied for promotion four times. He was never successful.
- The appellant's wife, Galina Gramotnev, was a PhD student at QUT from September 2000 until September 2005. She was awarded her PhD in April 2007. The appellant claimed that his relationship with his wife was common knowledge at QUT since September 2000.
- In November 2005, the appellant proposed that his wife be appointed as a Visiting Fellow, without remuneration, within the Applied Optics Research Program, in which the appellant and his PhD students were involved.
- In response to his proposal, the then Acting Head of School (Associate Professor Thomas) and the Acting Executive Dean of the faculty (Professor Herrington) discussed the potential conflict of interest. On 10 November 2005, Professor Herrington sent the appellant an email agreeing to "support the proposal and to formally inform Human Resources as to the nature of [the appellant's] family relationship with Galina".
- Dr Galina Gramotnev was appointed a visiting fellow, without remuneration, as proposed. Her main activity was to collaborate in research with the appellant and his PhD students. Her appointment expired on 31 December 2006. The appellant applied to extend it, and lodged his application with the Acting Head of School, Dr Ayoko. The appellant received no formal response to his application for the extension.
- In February 2007, Dr Galina Gramotnev submitted to QUT's Office of Research a draft application for a research grant from the Australian Research Council (**ARC**).
- On 21 February 2007, Professor Mengersen (the faculty's Assistant Dean – Research) informed Dr Galina Gramotnev, by email, that –
    - the Dean of the faculty would not allocate any resources to her research;
    - Professor Mengersen could not approve her project;
    - the Office of Research had been instructed to withdraw her application for a grant from the list of QUT's applications; and
    - if she would like to discuss the matter further, she might contact the Dean, Professor Margaret Britz.

- An hour after receiving the email from Professor Mengersen, Dr Galina Gramotnev received an email from Professor Britz, copying in Professor Mengersen and another stating, "I'll expect an instant barrage! Marg".

- On 5 March 2007, the appellant sent an email to QUT's Vice Chancellor, Professor Coaldrake, in which he complained about the "blocking" of his wife's ARC application by Professor Britz; and sought from the faculty the funding his wife sought in her application, and an apology from Professor Britz.

- Professor Coaldrake met with the Deputy Vice Chancellor, Professor Gardiner, on 4 April 2007 to discuss the appellant's complaint, with Professor Gardiner to provide a report to the Vice Chancellor about it. During this meeting, Professor Gardiner raised the appellant's "undisclosed" conflict of interest in relation to Dr Galina Gramotnev, including in relation to her grant application (in which she was the First Chief Investigator and the appellant was an Associate Investigator).

- The appellant emailed Professor Coaldrake the next day, requesting that Professor Gardiner cease his involvement in the consideration of the appellant's complaint about Professor Britz because of an alleged conflict of interest on the part of Professor Gardiner. The conflict of interest alleged included (among other things) Professor Gardiner's treatment of the appellant in his applications for promotion.

- On 27 April 2007, Professor Coaldrake wrote to the appellant, enclosing a "*Report of Preliminary Inquiry into an ARC matter raised with the Vice Chancellor by Dmitri Gramotnev*". Professor Gardiner was the report's author. The report included a finding about possible misconduct on the part of the appellant in relation to the declaration and management of his conflict of interest in relation to his wife.

- The appellant believed that Professor Gardiner did not conduct a fair and open investigation into the appellant's complaint about his wife's ARC application. He claimed that Professor Gardiner "transformed" the investigation of the appellant's complaint into "the recriminating and harassing investigation of the [appellant]" (about his "undeclared conflict of interest"). The appellant viewed certain of the findings as "in the nature of a reprisal".

- Thereafter, a large volume of correspondence was exchanged between the appellant and various QUT staff. A theme that emerged in the appellant's correspondence was that QUT was disingenuous in repeatedly referring to the need for the appellant to "resolve" the situation regarding his "undeclared conflict of interest" with his wife. The appellant's position was that their relationship was well known and regardless her appointment as a visiting fellow (without remuneration) ended on 31 December 2006. The appellant said that he felt harassed by repeated directions that he declare his conflict of interest.

- On 10 May 2007, Professor Gardiner emailed the appellant. In that email, among other things, he counselled and cautioned the appellant about his "inappropriate use of QUT's internet system to send broadcast emails". The

appellant was told that an email he had sent on 2 April 2007 contained defamatory material, including about Professor Britz.

- Dr Ayoko was the appellant's supervisor and responsible for reviewing his performance in the course of the "Performance, Planning and Review – Academic Staff Process" (**PPR-ASP**). The first review meeting between them occurred on 26 July 2007. Dr Ayoko informed the appellant that his academic performance had been "very satisfactory" but he also raised the potential conflict of interest issue. They had two more meetings on 1 August 2007 and 16 August 2007. Dr Ayoko developed a form for declaring conflicts of interest within the school. The appellant completed and returned the form to Dr Ayoko at their third meeting (on 16 August 2007). Dr Ayoko did not complete and sign it until May 2009 – evidence, as the appellant saw it, that the reasonable management of the conflict of interest issue was not the "real goal" of the PPR-ASP. Rather, the real goal was to "intimidate, harass and bully" him because he had made the earlier complaint about Professor Britz.

- Upon the cessation of Dr Galina Gramotnev's appointment as a visiting fellow, "new" arrangements were put in place for her collaborative research with the appellant's PhD students' research projects. The appellant said the arrangements had been fully disclosed on 16 August 2007.

- On 4 January 2008, Dr Ayoko told the appellant 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. The appellant pointed out to Dr Ayoko that his wife had, as a visiting fellow, already made substantial contributions to these projects and wished to continue with voluntary collaborative research.

- On 8 January 2008, the appellant was told by Dr Ayoko, by e-mail, that the best option was for the appellant to avoid the "potential/perceived/actual conflict". The appellant alleged that this email and similar constituted unwanted and harassing advices, and bullying and harassment on the basis of a family relationship.

- On **10 January 2008**, the appellant complained, by email, to Professor Coaldrake about Dr Ayoko's leadership and management abilities, which the appellant considered deficient.

- On 20 March 2008, Dr Ayoko emailed the appellant and told him that, because Dr Galina Gramotnev had no financial or formal association with QUT, he would not further pursue the conflict of interest matter. The appellant told him that he should have been aware that Dr Gramotnev was not financially or formally associated with QUT from July 2007 and alleged that Dr Ayoko's conduct constituted bullying and harassment.

- On **1 June 2008**, the appellant emailed Professor Coaldrake, reiterating his concerns about Dr Ayoko. He described his email of 10 January 2008 as "whistle blowing" and said that, to his deep regret, there had been no response or reaction to it. In this letter, dated 1 June 2008:

    - The appellant complained about there being an acting Head of School for a period of one and a half years, without any apparent attempt to fill the vacancy. This was, he said, "especially worrying" because Dr

Ayoko did not demonstrate an adequate understanding of QUT's management policies and practices. He alleged that Dr Ayoko impeded his (Dr Gramotnev's) research duties by "destroying my invited visit to the University of California Berkeley by attempting to use this visit … as leveraging for my consent with his highly inappropriate, incorrect and implicating statements in my PPR-AS form". He alleged Dr Ayoko's "complete failure and incapacity to reasonably manage staff in the School and their needs", including Dr Gramotnev's minor potential conflict of interest with his wife. He continued:

> "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. This was demonstrated by his highly inappropriate and unjustified direction (again combined with threats of disciplinary actions) to me to attend a useless and untimely meeting about my recreation leave, which he issued in complete disregard of my repeated advices that the proposed time for the meeting was not suitable for me, and requests to withholding this meeting for two weeks until after my return from my other invited visit to Denmark and to a conference in France in April 2008. As a result, I was forced (directed) to attend the meeting one day before my flight to Europe, which has led to wasting of at least half a day of the last day before my trip, resulting in the inadequate preparation for my talks and visit, and loss of my night sleep before the long flight."

- The appellant said that he had heard complaints from other staff about Dr Ayoko's "bureaucratic and inappropriate approaches and actions". He said that he was "impatiently awaiting for a real, properly qualified, independent, and responsible Head of School who will focus the efforts onto the real and urgent needs of staff, rather than wasting months and even years of their time and efforts on fruitless and unreasonable "management" and bureaucratic and hypocritical demonstration of the duty of care".

- He complained about Dr Ayoko's contribution to the promotion process. He urged Professor Coaldrake to replace Dr Ayoko with a suitable acting Head of School; urgently move towards the selection of a Head of School; and develop clear and unambiguous policies and procedures for the replacement and selection of Heads of School.

- He concluded with a complaint about Professor Britz, suggesting that she ignored her "direct responsibilities and duties to ensure the smooth and appropriate functioning of the School … by ensuring the appropriate selection process of a Head of School, and continue[d] [to] [keep] the School staff in uncertain suspense without proper and qualified management and support (for 3 years), which is highly detrimental and unfair for the staff and School well-being, their research and teaching capacity and standing".

- Professor Coaldrake announced Dr Ayoko's appointment as Associate Professor on 5 August 2008, which the appellant claimed demonstrated that Professor Coaldrake supported and accepted Dr Ayoko's "harassing and discriminating conduct".

- On 17 November 2008, the appellant lodged a complaint with the Chancellor of QUT complaining about "misconduct, mismanagement, harassment and bullying" by several QUT administrators, including Professor Coaldrake. That complaint was investigated by Andrew See, a barrister.

- Mr See found no evidence of neglect or misconduct et cetera on the part of the administrators, however he found elements of unfair treatment in the way in which certain QUT staff dealt with the appellant. The matter went no further.

- The appellant alleged that QUT's decision not to pursue the matter further was, among other things, not in accordance with the MOPP procedures and the principles of natural justice, and demonstrated the serious risks of further bullying et cetera.

- On **2 March 2009**, the appellant sent three emails to all staff of the School of Physical and Chemical Sciences, copying in senior administrators of QUT and five members of the QUT Council. The emails contained disparaging comments about, and serious accusations against, Dr Ayoko, and asserted that he ought to be replaced as the acting Head of School. One e-mail included the following passage:

  > "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."

- Professor Kaplan, Dr Ayoko's immediate supervisor, met with the appellant on **4 March 2009**. He wrote to the appellant **the next day**, **5 March 2009** – confirming the outcome of their meeting. In that letter, among other things, Professor Kaplan directed the appellant to comply with QUT's Code of Conduct, in particular its requirement that he not engage in debate or criticism of current affairs, including University affairs, in a defamatory or potentially defamatory manner and to act towards and communicate with his colleagues and others in the University community in a respectful and courteous manner. He told the appellant that all future email and written communications were to be through the normal channels of communication for an academic staff member; and he was requested not to direct emails or written communications to officers of the University who did not have primary responsibility for managing such issues. Professor Kaplan stated:

  > "These are all reasonable expectations of a staff member and reasonable 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 the 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 from the current situation."

- The appellant sent an email to Professor Kaplan on **6 March 2009**, copying in the Chancellor, in which he said (among other things) –
  - There were only two possible ways forward – (1) a comprehensive settlement, which would involve the "simultaneous and fair resolution of all aspects of this complex situation that has only been escalating for the last four years" or (2) "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 conduct, which has unfortunately spread up to the very top of the QUT senior management";
  - He reserved his "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".
- In his reply, Professor Kaplan encouraged the appellant to accept the requirements of his letter dated 5 March 2009.
- The appellant emailed Professor Kaplan on **12 March 2009**. He asserted that Professor Kaplan had no grounds for directing him to comply with the Code of Conduct – he had never breached it. He had always complied with the University's email policy and any direction that he do so was "ungrounded". He said he did not regard the directions as "reasonable management" but rather as attempts to bully, intimidate and confuse him. He concluded his email with:

  > "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."

- By letter dated 24 March 2009, Professor Kaplan told the appellant that were he to independently pursue his grievances and allegations directly against

University employees, particularly having regard to the statements he had made about how he intended to do this, a breach of the University's Code of Conduct was likely. Professor Kaplan also said:

> "In particular, your statement that 'under the circumstances, I will put my life on the line to ensure that Prof. P. Coldrake, 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' 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."

- By email dated **30 March 2009**, the appellant again asserted his right to defend himself against mistreatment and the direct impediment of his essential contractual duties. He said he would exercise such a right "to the fullest possible extent allowed by the law". He accused Professor Kaplan of bullying and threatening him, and cautioned Professor Kaplan against breaching the Code of Conduct.

- The authoring and sending of these emails (dated 2, 6, 12 and 30 March 2009) was the basis for the commencement of disciplinary proceedings against the appellant.

- On **3 April 2009**, the appellant sent a formal complaint to the Chancellor about harassment and discrimination by Professor Kaplan, said to be the "formal addition" to his complaint dated 17 November 2008". He complained to the Chancellor that, after the Chancellor's decision not to discipline those about whom the appellant had complained (including Professor Coaldrake, Professor Gardiner and Dr Ayoko), further "inappropriate actions and misconduct, including bullying, intimidation, discrimination, and impediment of [his] essential contractual research and supervisory duties at QUT" had been committed. He alleged that Professor Kaplan had "attempted a major destruction" of his research and supervisory efforts. He said he could not complain to Professor Coaldrake, because he had a major conflict of interest in the matter. He expressed his "serious concern in relation to, and disagreement with" the Chancellor's decision not to discipline Professor Coaldrake, Professor Gardiner or Dr Ayoko. He said that he regretted to say that the Chancellor was now responsible for their "outrageous actions". He said:

  > "I believe that, in accordance with QUT MOPP, this is one of your major duties as the QUT Chancellor to protect the well-being of staff and this University, especially in the case when senior administrative figures … continue with their major serious misconduct and mistreatment of staff (clearly misusing their empowered positions at this University) in the attempts to cover-up for their earlier serious misconduct.

> 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."

- On 8 May 2009, Professor Bowman, the Acting Deputy Vice Chancellor (Academic) of QUT, who was acting as Professor Coaldrake's nominee in relation to allegations of misconduct concerning the appellant, wrote to the appellant advising him of two allegations and requesting his response within 10 working days. For the purposes of this appeal, this letter is particularly important.[3]

- The letter enclosed relevant correspondence from 2009. That correspondence was designated (a) to (h) as follows (my emphasis):

> "(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."

Professor Bowman said he had "serious concerns" about the correspondence and required the appellant to answer specific allegations about his connection with it.

- The allegations were in these terms. The parts in bold are significant:

> "**Allegations**
>
> Allegation 1 – items (a) – (g)
>
> In relation to items (a) – (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)

---

[3] It is at pages 807 – 813 of the ARB.

> 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 and Chemical Sciences and to other recipients.**"

- The letter continued: "**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.**"

- Professor Bowman then outlined the concerns he had with the correspondence. He sought an undertaking from the appellant that he would not continue with the conduct. In this context he observed that the appellant had stated his intention to continue to send correspondence containing allegations against members of staff, and to continue pursuing the Deputy Vice Chancellor and the Vice Chancellor, until they felt adequate personal responsibility for their misconduct and treatment of staff.

- Professor Bowman continued:

  > "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."

- The following undertakings were requested:

  (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 as 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.

  (c) 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.

- It is important to note the following about the emails dated 2, 6, 12 and 30 March 2009 (the detail of which is set out above):

- the appellant's email sent 2 March 2009 was sent to "all staff" and others. It contained disparaging remarks about Dr Ayoko. The appellant had been previously counselled (on 10 May 2007) against the inappropriate use of QUT's email system to send broadcast emails;
- the appellant's email sent 6 March 2009 indicated his intention to defy the direction given to him by Dr Kaplan on 5 March 2009;
- the appellant's email sent 12 March 2009 indicated that he would not comply with the Code of Conduct; and
- the appellant's email sent 30 March 2009 was similarly defiant.

- Instead of responding to Professor Bowman, the appellant emailed the Chancellor enclosing the letter of 8 May 2009. The appellant told the Chancellor that he would forward his response to Professor Bowman's letter to the Chancellor directly. On 11 May 2009 Professor Bowman told the appellant that his response needed to be provided to Professor Bowman as the Vice Chancellor's nominee under clause 44 of the EBA. He told the appellant that the chancellor had no role in academic staffing matters which were covered by the EBA.

- On 15 May 2009 the appellant again emailed the Chancellor. He attached to the email his "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 formal complaint was the letter dated 14 May 2009.

- The appellant's letter of 14 May 2009 questioned the power of the Vice Chancellor to nominate or delegate his authority to Professor Bowman. His letter referred to Allegation 1 and Allegation 2 as above. As to Allegation 2, the appellant said that the emails were written and sent by his wife. The appellant accepted that, as to Allegation 1, he was the author of the emails dated 2, 6, 12 and 30 March 2009. He 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 appellant'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.

- Also, the appellant's letter was highly critical of the Vice Chancellor. It alleged misconduct and attempts to damage the appellant's career. It stated: "Any attempt 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". The appellant reserved to himself the right to criticise anyone whose actions were detrimental to the school, faculty or university and to pursue anyone for his or her misconduct, bullying et cetera to the fullest extent of the law and lawfully available means and options.

- The appellant emailed the Chancellor on 17 May 2009 complaining about the unacceptable situation relating to his promotion and the unfair actions of Professor Coaldrake.

- On 19 May 2009 Professor Bowman wrote to the appellant, informing him that the Chancellor had forwarded to him the correspondence of 14 and 17 May 2009.

- On 21 May 2009 the appellant 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 confirmed that he authored and sent the emails that constituted Allegation 1. With respect to the undertakings sought, he reserved to himself the right to criticise any university staff member. He cautioned Professor Bowman against any further possible breaches of the Code of Conduct for which Professor Bowman might be held personally responsible.

- Professor Bowman sought guidance from QUT's legal advisers as to how he should approach the task of making a decision in relation to the disciplinary consequences of the appellant's admitted conduct.

- On 16 June 2009, Professor Bowman wrote to the appellant in the following terms (my emphasis):

> "… 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 a response in relation to the proposed disciplinary action before making a final decision.
>
> Accordingly, please provide me, by 5pm 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."

- The letter notes Professor Bowman's conclusion that Allegation 1 was substantiated on the basis that the appellant accepted that he was the author of the relevant emails. The letter then details Professor Bowman's reasons for his preliminary conclusion. They included Professor Bowman's determining that the appellant's action "**in sending the emails is Serious Misconduct, and I am also concerned that, on the basis of your response, you are**

likely to act in a similar way in the future". After further elaborating on the reasons for his conclusions, Professor Bowman said:

> "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."

- The appellant did not respond directly to Professor Bowman's correspondence. He instead wrote to the Chancellor on 22 June 2009 where he made further allegations against the Vice Chancellor and Professor Bowman. He characterised Professor Bowman's request for undertakings as "not just as ordinary threats and bullying but rather a psychological terror and a racket". He 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 appellant demanded:
  - that disciplinary procedures against him should be immediately stopped;
  - adequate compensation;
  - 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"; and
  - the "resignation or dismissal" of Professor Coaldrake and Professor Bowman.

- Professor Bowman wrote to the appellant on 3 July 2009 terminating his employment. In that letter Professor Bowman said (my emphasis):

> "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 the 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 parties' cases at trial

[19] The trial commenced on 8 May 2017.

[20] In his opening, the appellant explained that the first alleged breach was a breach of clause 44.2.2(i) of the EBA in QUT's failing to provide him with an understandable allegation of misconduct. He contended that the correct procedure was not followed, the clause was "manipulated"[4] and that resulted in the "fabricate[d]"[5] termination of his employment. In his amended statement of claim, the appellant asserted that the first breach caused the termination of his employment. It constituted, he asserted, "conscious wrongdoing by [QUT] attempting to fabricate [his] expulsion … from the workplace in contumelious disregard of his rights, career, safety, health and wellbeing".[6]

[21] The second breach alleged was that QUT had not acted on his denial of the allegations of misconduct or Serious Misconduct, in accordance with the EBA, and had not referred the allegations to the Misconduct Investigation Committee under clause 44.2.7 as it should have done. Had QUT done so, the appellant contended, then the committee would have found that he had not engaged in misconduct or Serious Misconduct, and his employment would not have been terminated.

[22] The third breach alleged was a breach of the Grievance Policy in that QUT did not follow it in response to the appellant's letter dated 1 June 2008 about bullying, harassment and discrimination by Dr Ayoko on the basis of his family relationship with Dr Galina Gramotnev. He argued that had his grievance been investigated in accordance with the policy, then he would not have needed to send the four emails in 2009 which led to the termination of his employment because Dr Ayoko's misconduct would have been revealed.

[23] The fourth breach alleged was similar to the third and concerned Dr Gramotnev's letter of 3 April 2009 to the Chancellor.

[24] The appellant acknowledged that his case was not about damages for workplace mobbing or bullying, but said that it was essential for the court to understand the events which occurred between 2007 and 2009, which involved "deliberate campaigns of workplace mobbing and discrimination", to "evaluat[e] … the breaches of my employment contract and the extent of damages associated with [it]".[7] He said, further, that an understanding of the events from 2007 to 2009 was essential to the court's understanding the reasons for his sending the emails in March 2009. He intended to demonstrate that harassment, workplace mobbing and bullying led to the breaches of his employment contract, which caused damage to his career, reputation, financial status and well-being.

[25] He referred to evidence of his being diagnosed, in July 2008, with a form of chronic leukaemia and observed that the stress of the workplace mobbing to which he had been (allegedly) subjected caused his condition to worsen. He explained that he

---

4 ARB 5, 16.
5 ARB 5, 16.
6 Amended statement of claim, paragraph 212, ARB 1743.
7 ARB 10, 42 – 47.

was not trying to prove that his health condition was a consequence of workplace mobbing, but it provided him with good reason to believe that QUT had committed health and safety breaches. It followed, he argued, that his emails were justified under the *Workplace Health and Safety Act* 1995 (Qld). He also argued that the impact of the condition upon his heath affected his claim for damages.

[26] Dr Gramotnev then gave evidence and was cross-examined. The other evidence in his case was that contained in his wife's affidavit. She was not required for cross-examination and the appellant's case was closed at the end of his evidence.

[27] Mr Kelly QC for the respondent then opened the respondent's case. At the end of his opening, the primary judge observed that the respondent had not denied causation in its pleadings – although the breaches were denied. After reflection, Mr Kelly QC applied to amend the defence. The matter was adjourned (on 10 May 2017) to allow that to occur and to allow the appellant to amend his reply. The matter resumed, those amendments having been made, on 30 October 2017.

[28] The respondent's ultimate position on causation was that, even if the first or second breach was established, the breach caused no loss because –[8]

- the appellant's employment contract would have been terminated by reason of his conduct including *inter alia* his renouncing any investigation into his own conduct; his refusing to give the undertakings requested of him or to follow the protocol for communication outlined by Professor Kaplan in his letter of 5 March 2009; his demands for the resignation of senior staff and administrators; and his pursuit of Dr Ayoko;
- the real and effective cause of the termination of the appellant's employment was his conduct, constituted by his correspondence in which he *inter alia* renounced any investigation into his own conduct; refused to give the undertakings requested of him; refused to follow the protocol for communication outlined by Professor Kaplan in his letter of 5 March 2009; demanded the resignation of senior staff and administrators; and pursued Dr Ayoko;
- or
- the appellant repudiated his contract of employment by his conduct, which repudiation was accepted by the respondent by letter on 3 July 2009, thereby terminating the employment contract.

[29] The respondent raised the same arguments as above in respect of causation for the third breach[9] and the fourth breach.[10]

[30] The primary judge found that the appellant failed to demonstrate that his employment contract had been breached as he alleged and even if there had been breaches of it, the appellant failed to demonstrate that the alleged breaches caused his claimed loss and damage.

Grounds of appeal and the respondent's notice of contention

[31] In this appeal, the appellant argued that the primary judge erred in the following ways –

- by not taking into account significant facts and circumstances relevant to the alleged breaches of contract, including (**Ground 1**) –

---

8 Submissions of the defendant, paragraphs [56] – [61].
9 Ibid [82].
10 Ibid [86].

- by failing to determine, and take into account, QUT's conduct towards the appellant which amounted to bullying, harassment, discrimination and "health and safety breaches";
- in concluding that the appellant's perception that he had been bullied, harassed and discriminated against was irrelevant to the alleged contractual breaches;
- by not taking into account the appellant's state of mind – including his major illness which he believed had been caused, or significantly contributed to, by QUT's conduct towards him before he sent the four emails alleged to amount to misconduct [the first being sent on 2 March 2009];
- by concluding, without adequate reasons, that the evidence provided by the appellant and his wife was inadequate evidence upon which to make a determination of QUT's misconduct by its bullying, harassment, discrimination and "health and safety breaches … at the [appellant's] workplace over several years leading to the litigation.

- in his construction of clause 44 of the EBA, and his finding that there had been no breach of it (**Grounds 2 and 3**);
- in finding that, even if there had been a breach of clause 44 of the EBA, the appellant had not established causation (**Ground 4**);
- in finding that section 174(1)(b) of the *Workplace Health and Safety Act* 1995 (Qld) was irrelevant to the appellant's claim and allegations against QUT (**Ground 5**);
- in finding that QUT was entitled to proceed under clause 44.2.6 of the EBA (in the face of his denials, clause 44.2.7 should have been followed) (**Ground 6**);
- in finding that, even if matters should have proceeded in accordance with clause 44.2.7, the appellant failed on causation (**Ground 7**);
- in finding that MOPP Policy A/8.5 "Grievance resolution procedures for discrimination related grievances" was not a part of the employment contract – contrary to *Gramotnev v Queensland University of Technology* [2015] QCA 127 at [120] (**Ground 8**);
- in finding that there had been no breach of that policy (the appellant argued that QUT should have investigated complaints made by him in letters dated 1 June 2008 and 3 April 2009) (**Ground 9**); and
- in finding that the appellant failed on causation in relation to the third and fourth breaches of contract (**Ground 10**).

[32] The respondent filed a notice of contention, arguing that the decision of the primary judge should be affirmed on the basis that the appellant, by his conduct, repudiated the contract of employment and his repudiation was accepted by the respondent which lawfully terminated his employment.

Ground 1: the relevance of the history and the quality of the appellant's evidence

Appellant's arguments

[33] The appellant argued that the primary judge erred –

- in treating the appellant's evidence of his being bullied, harassed and discriminated against by the respondent as irrelevant to the breaches and causation he alleged; and
- in concluding that the evidence of the appellant and his wife was inadequate for the purposes of determining whether QUT had committed misconduct.

[34] The appellant argued that it was necessary and appropriate for the primary judge to have determined his allegations of bullying, harassment and discrimination because, if his Honour found in his favour, then it followed that –

- his emails of March 2009 were legitimate pieces of correspondence under Section 174(1)(b) of the *Workplace Health and Safety Act* 1995;
- an invalid allegation of Misconduct or Serious Misconduct had been made against him;
- the Misconduct Investigation Committee would have vindicated him; and
- the application of the Grievance Policy would have uncovered that pattern of bullying et cetera.

[35] He argued that his and his wife's evidence, when viewed by a reasonable person, was sufficient for a determination that he had been, or had reasonable grounds for believing that he had been, bullied, harassed or discriminated against. And his belief that he had been bullied, harassed and discriminated against was a sufficient basis for a conclusion that his emails were sent under section 174(1)(b) of the *Workplace Health and Safety Act* 1995.

Respondent's arguments

[36] The respondent argued that the finding by the primary judge, that the appellant's evidence provided a wholly inadequate basis for deciding that the conduct of senior staff amounted to bullying, harassment or discrimination, was correct. So was his Honour's finding that the beliefs of the appellant and his wife were not determinative; and his Honour's finding that whether the appellant had been bullied and harassed was not relevant to the breach of contract as alleged.

[37] On the adequacy or otherwise of the appellant's evidence to establish that he had been bullied, harassed and discriminated against, the respondent submitted that on any fair reading of the evidence, the appellant was dealing with the respondent on the following basis:[11]

> "... Firstly, any attempt to investigate the appellant's conduct [including the email sent by the appellant on 2 March 2009, having been counselled previously in 2007 not to send broadcast emails] was being met with immediate resistance and allegations of misconduct by the person attempting to conduct such an investigation. The attempt to provide advice, counselling or guidance to the appellant was being met with allegations of bullying, harassment and official misconduct. At the same time, the appellant was insisting on the resignation – by the time of the termination of

---

[11] Transcript of hearing, 1 – 27, ll 1 – 25.

> the Vice Chancellor, Professor Bowman himself was being asked to resign, and there was a full investigation being asked for in respect of five senior professors at the University.
>
> All the time the [appellant] was saying that he would send whatever communication he deemed necessary to send. And, in our respectful submission, when one looks at the letter sent by Professor Bowman asking for compliance with the undertakings requested by Professor Kaplan and when one looks at Professor Kaplan's previous letter which had clearly outlined why the undertakings were required by reference to the Code of Conduct, it was a patently clear case where Dr Gramotnev was objectively refusing to abide by what … was an entirely reasonable protocol for communication. The University was not saying that if he had complaints he could not take them further. He was given appropriate channels to advance those complaints. But the University was requesting that he not defame people, that he not send broadcast email which, when one reads those emails [were] … on any view … intimidatory, bullying of the people who were mentioned in those emails and destructive of the workplace relationship at the University."

[38] As to the irrelevance to the breaches alleged of the history of bullying or harassment of, or discrimination against, the appellant, the respondent noted that the appellant alleged breaches of procedure by the respondent, that is by its –

- failing to notify the appellant in sufficient detail of that which was alleged against him under the EBA;
- failing to proceed as required by the EBA when the appellant denied that he had committed misconduct or Serious Misconduct;
- failing to investigate the appellant's complaint of 1 June 2008; and
- failing to investigate the appellant's complaint of 3 April 2009.

[39] It argued, in effect, that findings about the history of the appellant's treatment by the respondent had no logical connection to findings that the respondent had not followed the required procedure.

[40] The respondent argued that findings about the appellant having been bullied or harassed or discriminated against were irrelevant to causation also, having regard to the way in which the causation arguments were framed, that is –

- in respect of the first breach: that there was no valid allegation of misconduct and the allegation did not warrant further investigation;
- in respect of the second breach: that had matters proceeded on the basis that the appellant denied the allegations of misconduct or Serious Misconduct, the employment contract would not have been terminated;
- in respect of the third and fourth breaches: that had the Grievance Policy been followed, then the appellant would not have needed to send the four emails.

Conclusion

[41] Whether there had been bullying or harassment of, or discrimination against, the appellant was irrelevant to the question whether the employment contract had been breached in the ways alleged.

[42] The breaches alleged were breaches of procedures which, on the appellant's case, the respondent was contractually obliged to follow. The appellant's treatment in the months and years prior to the alleged breaches was relevant only by way of background. Whether the appellant was bullied or not had no bearing upon, or relevance to, the question whether the respondent had properly followed clause 44 of the EBA or whether it was contractually obliged to follow the Grievance Policy and failed to do so.

[43] His Honour acknowledged the appellant's argument that, if proper processes had been followed, then he would have raised the respondent's (alleged) bullying, harassment and discrimination as justification for his own conduct.[12]

[44] As the appellant framed his case, the chance lost to him, because of the second breach, was the chance that the Misconduct Investigation Committee would have found that his authoring and sending the emails, having regard to their content, was not misconduct because he was, in effect, the wronged party, responding in such a way as to protect or assert himself in the face of the respondent's bullying, harassment and discrimination.

[45] The chance lost to the appellant, as he framed his case, in respect of the third and fourth breach, was the chance that the outcome of the Grievance Policy investigation of his complaints would have established that he had been bullied, harassed or discriminated against.

[46] Those hypothetical findings may have had relevance as mitigating circumstances for the appellant's conduct. However, the onus fell upon the appellant to establish that, because of the breaches, he lost a real or substantial chance of findings in his favour. There was no error in his Honour's finding that the evidence sought to be relied upon by the plaintiff provided a wholly inadequate basis for the Court to make any finding that the conduct of the respondent's staff established that he (or his wife) had been bullied, harassed or discriminated against.

[47] It was open to the primary judge to find that the evidence tendered by the appellant, including the many emails from others that he attached to his email correspondence, and his own belief, established only that the appellant (and his wife) repeatedly *asserted* and *believed* that he had been the victim of bullying, harassment and discrimination – but did not establish that the conduct the appellant characterised as bullying, harassment and discrimination *was in fact* conduct of that character.

[48] Thus, even if relevant to causation, the appellant failed to adequately establish the bullying, harassing and discrimination he alleged. Ground 1 is not made out.

Grounds 2 and 3: His Honour's interpretation of clause 44.2.2 of the EBA

[49] The appellant alleged that his Honour erred in his interpretation of clause 44.2.2(i) of the EBA and, consequently, his Honour's finding that there had been no breach of contract via a breach of clause 44.2.2(i).

---

12 At [9].

[50] At trial, the appellant argued that the letter sent to him dated 8 May 2009 failed to identify any breach by him of the Code of Conduct. The allegation made against him was simply that he had authored and sent four emails. That could not amount to misconduct. Further, the allegation of authoring the emails was accompanied by a prohibition on his responding to anything other than the allegation that he was the author of those emails.

[51] The appellant argued that it was "absurd and illogical" that his sending emails could be construed as Misconduct or Serious Misconduct. He argued that there was "no doubt that clauses 44.2.2 and 44.2.6 [which referred to "allegation/s"] did not mean an allegation of random conduct that [QUT] might astutely, albeit groundlessly, decide to characterise as Misconduct or Serious Misconduct".[13]

[52] Also, the appellant argued that the emails he sent on 2, 6, 12 and 30 March 2009 made a complaint, or raised an issue, "concerning workers' exposure to the risk of illness or injury" for the purposes of section 174(1)(b) of the *Workplace Health and Safety Act* (Qld) 1995. Accordingly, to suggest that sending the emails amounted to misconduct was "invalid" and in breach of 174(1)(b). His Honour's finding that this was not so is the subject of another ground of appeal discussed below.

Decision of primary judge about clause 44

[53] His Honour approached the construction of clause 44 in accordance with the approach both parties considered correct, that is, by considering the ordinary meaning of its words with attention to its context and purpose.[14]

[54] His Honour noted that the EBA was to be applied in the university context and within the "industrial realities" of the university's employer/employee relationship.[15] His Honour considered the objects of the EBA; its clauses which referred to the University's commitment to job security and intellectual and academic freedom; and its clauses which dealt with bullying and grievance procedures and the termination of employment.[16]

[55] His Honour considered clause 44, and in particular clause 44.2.2 which required notification to a staff member of allegations of "Misconduct or Serious Misconduct" made against them, and a response from the staff member to those allegations within 10 working days of their receipt.[17]

[56] The EBA defined "Misconduct" as "conduct that is unsatisfactory but which is not so serious as to justify the possibility of termination of employment".

[57] The EBA defined "Serious Misconduct" as:

> "misconduct of a serious and wilful nature and is normally limited to:
>
> (i) theft …;
>
> (ii) assault …;

---

13 Ibid [110].
14 [2018] QSC 37 at [99].
15 Ibid at [100].
16 Ibid [100] – [103].
17 Ibid [104].

(iii) conduct of a kind which constitutes a serious 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 …;

(v) serious dereliction of the duties requires 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.

[58] His Honour considered the whole of clause 44 and observed that its "central feature" was that the Vice Chancellor could not take disciplinary action against a staff member in respect of an unsubstantiated allegation.[18]

[59] Having analysed the clause, his Honour said:

> "[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 [that is, on the strength of an admission]) or determines that Misconduct or Serious Misconduct has occurred (clause 44.2.10 [that is, having considered the report of the Misconduct Investigation Committee]). 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 the disciplinary action will be."

[60] His Honour outlined the appellant's argument, which was to the effect that the word "allegation" was to be understood as a "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)".

[61] His Honour rejected the appellant's argument. His Honour acknowledged that, at first blush, the introductory words of clause 44.2.2 ("Any allegation of Misconduct or Serious Misconduct" and "such allegations") supported the appellant's construction that, in accordance with clause 44.2.2(i), the staff member must be notified of an allegation of Misconduct or Serious Misconduct not merely conduct. However, in accordance with principle, his Honour construed the clause as a whole and determined that a staff member was to be notified of an allegation of *conduct* not an allegation of Misconduct or Serious Misconduct.

---

18 Ibid [108].

[62] In support of this view, his Honour referred to the facts that a Vice Chancellor may form the view that conduct does not warrant further investigation (clause 44.2.2); if a staff member denies the allegation, the Vice Chancellor may determine to take no further action (clause 44.2.5); and under clause 44.2.6, the Vice Chancellor is to make a determination whether conduct constitutes Misconduct or Serious Misconduct based on the admitted allegations.

[63] His Honour said:

> "[111] …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 of 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 pre-requisites 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 [QUT] which, in my view, is the correct construction."

[64] His Honour found that "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".[19]

[65] In his Honour's view it followed that, in order to comply with clause 44.2.2(i), the letter of 8 May 2009 had to notify the appellant of the alleged conduct in sufficient detail as to enable him to understand the precise nature of it and to properly consider and respond to it.[20]

[66] His Honour then considered whether the letter of 8 May 2009 failed to comply with clause 44.4.4(i) of the EBA and therefore breached it. It may be recalled that the appellant argued that the letter failed to identify allegations of Misconduct or Serious Misconduct – it simply alleged that he had authored and sent four emails.

[67] His Honour held that the letter of 8 May 2009 was not a show cause letter, but rather the notification required by clause 44.2.2 and it contained the detail required by that clause. His Honour said:

> "[118] …
>
> The allegation in the letter than the [appellant] authored and sent the emails of 2, 6, 12 and 30 March 2009 cannot be divorced from the actual contents of those emails. As stated by Professor Bowman in the letter of 8 May 2009, "[t]he

---

19 Ibid [112].
20 Ibid [113].

> 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 … In my view, the 8 May 2009 letter complied with clause 44.4.2.2(i) and gave the [appellant] 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 [appellant's] response letter to Professor Bowman of 21 May 2009 … that the [appellant] confirmed authorship and the sending of the emails that constituted Allegation 1."

[68] His Honour concluded that there had been no breach by QUT of clause 44.2.2(i).

Appellant's arguments

[69] In his notice of appeal, the appellant contended that the primary judge had erred in his interpretation of clause 44 of the EBA. He argued that it was "inconceivable" that his Honour's interpretation had been "intended or contemplated" by the parties to the EBA and that his Honour erred in finding that there was no breach of that clause.

[70] In his written submissions, the appellant argued that there were two constructions of the clause which were consistent with "the industry realities and natural justice" contemplated by the parties to the EBA. These were (stated briefly) –

- that the allegation referred to was one which, of its nature, amounted to misconduct; or
- the person making allegation alleged that the conduct amounted to misconduct.

[71] He submitted that a relevant denial by a staff member might include admitting the conduct, but denying that it was misconduct. If there was such a denial, then the Vice Chancellor was bound to follow 44.2.7, including by way of mandatory referral to the Misconduct Investigation Committee, which was to investigate whether the alleged misconduct occurred and report to the Vice Chancellor.

[72] The appellant argued that his Honour found there had been no breach of clause 44 on the basis of his misconstruction of clause 44. Had the clause been properly construed, his Honour would have appreciated that there had been a breach of 44.2.2(i) because QUT had not identified specific allegations which could reasonably be regarded "as potential Misconduct or Serious Misconduct" or by "not providing sufficient detail to enable the appellant to understand the precise nature of the alleged misconduct" so as to properly consider and respond to it.

[73] He made similar points in his oral submissions. He argued that the primary judge's interpretation of the clause left it open to abuse by the Vice Chancellor, and denied persons the subject of allegations the right to a defence.[21]

[74] During the course of submissions, the appellant contended that it had not been alleged against him that his emails contained threatening or intimidating language. The appellant's attention was drawn to Professor Bowman's letter dated 8 May 2009.

---

[21] Transcript of hearing, 1 – 13, ll 15 – 20.

The letter set out, after the allegations that the appellant and authored and sent the relevant emails, extracts from those e-mails that caused Professor Bowman concern. Those concerns included the concern that the appellant stating that he would "put his life on the line" could be regarded as a threat in breach of the Code of Conduct. The appellant responded that no provision of the Code of Conduct had been identified by Professor Bowman and that he meant that he was putting his life on the line because his opposition to the respondent's bullying culture was, in effect, taking a toll on his health.[22]

Respondent's arguments

[75] The respondent contended that the primary judge correctly interpreted the clause and the two "pre-requisites" to disciplinary action, namely – the substantiation of the allegation via an admission or the acceptance of a finding of the Misconduct Investigation Committed that the allegation had been established on the balance of probabilities; *and* the Vice Chancellor's forming the view that the conduct constituted misconduct or Serious Misconduct.

Conclusion

[76] Clause 44.2.2 was plainly designed to provide to a staff member, against whom an allegation of misconduct or Serious Misconduct is made, an opportunity to meaningfully respond to it.

[77] There are two parts to the definitions of "misconduct" and "Serious Misconduct" in the EBA, namely:

- conduct, in the sense of a physical act;
- of a certain quality or type.

[78] In the case of misconduct, the conduct (that is, the physical act) must be of an "unsatisfactory" quality or type, but not so serious as to justify the possibility of termination of employment.

[79] In the case of Serious Misconduct, the conduct (that is, the physical act) must be of an "unsatisfactory" quality or type as well as "serious and wilful". Further it is –

- "normally limited to" the listed conduct, which includes "conduct of a kind which constitutes a significant impediment to the carrying out of a staff member's duties …"; and
- of a type "which would make it unreasonable to require the University to continue employment of the staff member concerned".

[80] The language of clause 44 is not as clear as it could be. His Honour identified the tension between the reference, in clause 44.2.2, to an allegation of "Misconduct or Serious Misconduct" and the fact that the decision whether the alleged conduct constituted "Misconduct or Serious Misconduct" was a matter for the Vice Chancellor[23] (under clauses 44.2.5, 44.2.6 and 44.2.10).

[81] Construing the clause as a workable whole, the reference in clause 44.2.2 to an "allegation of Misconduct or Serious Misconduct" is to be taken as a reference to an

---

22 Transcript of hearing, 1 – 14 – 1 – 17.

23 In this case it was relevantly a matter for the delegate of the Vice Chancellor.

allegation of *conduct*, of a quality or type which might, at least from the point of view of the accuser, meet the definition of Misconduct or Serious Misconduct.

[82] Clause 44.2.2 provides for a first filtering of an allegation by the Vice Chancellor. Only those allegations which the Vice Chancellor believes warrant investigation go further. That part of the clause is plainly designed to ensure that no time is wasted in the pursuit of frivolous, vexatious or trivial allegations.

[83] A staff member is only notified of those allegations which the Vice Chancellor believes warrant further investigation. But if the Vice Chancellor believes an allegation warrants further investigation, then the Vice Chancellor must notify the staff member of the allegation in accordance with 44.2.2(i) and require from the staff member a response to it, in accordance with clause 44.2.2(ii).

[84] His Honour correctly construed clause 44. The process antecedent to the Vice Chancellor's taking disciplinary action requires, *inter alia* –

> the *making* of an allegation of *conduct* of the quality or type which fulfils the definition of Misconduct or Serious Misconduct; and
>
> the *determination* of the allegation of Misconduct or Serious Misconduct by the Vice Chancellor, in the sense of the Vice Chancellor's *satisfaction* that Misconduct or Serious Misconduct has occurred.

[85] In other words, it is for the accuser, not the Vice Chancellor, to *allege* that conduct of a relevant quality or type has occurred. It is then for the Vice Chancellor to follow the process required by clause 44 to *determine* whether that conduct has occurred and whether it constitutes Misconduct or Serious Misconduct.

[86] His Honour's construction is supported by the definition of Serious Misconduct itself which, in the case of (iii) and (v), is not prescriptive. Until the occurrence of the conduct is substantiated, it cannot be assessed under (iii) or (v).

[87] The appellant's contention that his Honour's construction would permit random conduct to be nominated and arbitrary decisions to be made about it is unpersuasive. His Honour's construction does not contemplate an allegation of "random" conduct, but rather the allegation of conduct of a relevant quality or type – that is conduct which might fulfil the definition of Misconduct or Serious Misconduct. An allegation of "random" conduct would not warrant further investigation.

[88] It must be remembered that the emails constituting the relevant conduct in the present case were "all staff" emails containing derogatory content or emails in which the appellant stated that he intended to defy directions or the Code of Conduct. In his letter dated 8 May 2009, Professor Bowman stated that the email correspondence spoke for itself. Reading the letter reasonably and as a whole, it was alleged that the appellant sent emails of a certain type (that is an "all staff" email) or with certain content (that is, derogatory or defiant content). Having regard to the type and content, the appellant's act of sending those emails was conduct which might fall within the definition of Misconduct or Serious Misconduct – indeed it was objectively likely to.

[89] As his Honour found, "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." Indeed, that conclusion is not inconsistent with the first limb of

the appellant's construction argument that clause 44 contemplated allegations of conduct which, of its nature, amounted to misconduct.

[90] His Honour did not err in his finding that the 8 May 2009 letter complied with clause 44.4.4(i) and gave the plaintiff sufficient detail to enable him to respond to it. Clause 44.2.2(i) was not breached by the Respondent.

[91] Grounds 2 and 3 of the appeal are not made out.

Ground 4: whether causation for a breach of clause 44 was established

[92] The appellant pleaded at trial that, if clause 44.2.2(i) had not been breached, then his contract would not have been terminated and he would not have suffered damage.[24]

[93] The appellant argued, in effect, that, were it not for the breach of clause 44.2.2, he would have been permitted to respond to the substance of the allegations and the Vice Chancellor (or his nominee) would have determined that he had not committed an act of misconduct or Serious Misconduct.[25]

[94] The primary judge correctly stated that the plaintiff's case in respect of causation proceeded on his personal belief that he was justified in sending the emails of 2, 6, 12 and 30 March 2009.[26]

[95] On the basis that it was not possible to divorce the sending of the emails from their content, his Honour was of the view that the appellant's admitted conduct of authoring and sending the four emails could constitute Serious Misconduct as defined in the EBA.[27]

[96] His Honour was satisfied that it was open to the Vice Chancellor, or his nominee, Professor Bowman, to determine that the appellant's authoring and sending the emails, and refusing to undertake not to do so in the future, constituted Serious Misconduct.[28] Their content was threatening and intimidating and reflected the appellant's determination to pursue senior members of staff unreasonably.[29] It was conduct of a kind which constituted a serious impediment to his colleague's carrying out their duties.

The Fair Work Australia proceedings

[97] The appellant had been unsuccessful at first instance and on appeal in a claim for unfair dismissal, which was heard by Fair Work Australia. At first instance and on appeal it was held that the appellant's conduct in authoring and sending the emails amounted to Serious Misconduct and provided a valid reason for the termination of his employment. His Honour observed that those decisions did not support the appellant's case that, had the respondent complied with clause 44, then his employment would not have been terminated. Over objection, his Honour considered the outcome of those proceedings relevant to the question of causation because they demonstrated that the appellant's conduct could be viewed as Serious

---

24 Ibid [120].

25 Ibid [121]. It was clarified at the hearing that the appellant did not plead that his dismissal by the respondent was in breach of the EBA and therefore invalid and a repudiation of the contract, which he accepted. (Transcript of hearing 1– 27, l 30 – 1 – 28, l 10.

26 Ibid [122].

27 Ibid [123].

28 Ibid [124].

29 Ibid [124] – [125].

Misconduct.[30] Also over objection, his Honour relied upon other decisions which showed that the sending of emails in a work environment, depending on their content, may constitute Serious Misconduct.[31]

[98] His Honour concluded that even if he was wrong and there had been a breach of section 44.2.2(i), the appellant's claim would fail on causation.

Appellant's arguments

[99] The appellant asserted that his Honour was not correct in concluding that it was open to the Vice Chancellor or his nominee to determine that he had committed Serious Misconduct (on the assumption that there had been no breach of contract, and the matter had been referred for investigation by the Misconduct Investigation Committee).

[100] The appellant asserted that Professor Bowman was biased and that a reasonable, unbiased person would have found that he had not committed Misconduct or Serious Misconduct. He argued that he had valid reasons for sending the emails and that the undertakings sought were in breach of his civil and legal rights – including his right to freedom of speech and his right to pursue complaints against the respondent and its staff "within the limits of the law" (which is how he framed his intention).

[101] In oral submissions he argued, in effect, that he could not give the undertakings because they were ambiguous:[32]

> "… Those three emails were sent personally to Professor Kaplan and copied to the QUT Chancellor … Two of them were sent in response to Professor Kaplan's letters dated 5th of March 2009 and 24th of May 2009 to me. Was I therefore supposed to undertake not to respond to Professor Kaplan's letters in future? Or was I supposed to undertake not to object to bullying, harassment and discriminating directions of Professor Kaplan in future? Or was I supposed to undertake not to raise health and safety issues and concerns with Professor Kaplan? I don't believe that it was appropriate or reasonable for me to give such undertakings.
>
> I sincerely do not understand and still do not – did not understand and still do not understand now what exactly QUT wanted me to undertake not to and in future, apart probably from – if they wanted to gag me and stop me sending inconvenient, critical information and correspondence or questions of complaints about the misconduct of certain members of the QUT administration and to stop pursuing them before the law. Respectfully, this is clear victimisation and intimidation by the respondent under the direct threat of adverse actions in the form of termination of my employment contract."

[102] He submitted that the primary judge's finding, that his refusal to give the undertakings was part of the misconduct alleged against him, was in error.

---

30 Ibid [128].
31 Ibid [129].
32 Transcript of hearing, 1 – 11, ll 3 – 20.

[103] The appellant contended that the primary judge erred in relying on the decisions of Fair Work Australia to support his conclusion that the appellant would not have been able to establish a causative link between the breach of contract alleged and his loss.

[104] The appellant argued that his reasonable grounds for sending the emails could be found in section 174(1)(b) of the *Work Health and Safety Act* 1995 (Qld).

[105] He also argued that, having breached the EBA, the respondent was not able to terminate his employment, although that was not the case he pleaded.

Respondent's arguments

[106] In reply, the respondent made the point that the appellant had not identified the evidential basis for his allegation of bias against Professor Bowman. Nor had the appellant identified how Professor Bowman's alleged bias affected his Honour's conclusion that sending the emails amounted to Serious Misconduct.

[107] The respondent submitted that the primary judge's conclusion, that the sending of the emails, having regard to their content, could constitute Serious Misconduct, was clearly correct.

Conclusion

[108] The appellant argued that his Honour failed to take into account the "essential fact" that Professor Bowman was "significantly biased"[33] but the appellant failed to identify any basis for this alleged significant bias. The appellant's bald assertion that Professor Bowman was biased is not enough. Nor is his assertion that the decisions made by Professor Bowman could not have been reached unless he was biased. The appellant's complaint about Professor Bowman's bias is without foundation and will not be considered further.

[109] As noted above, Serious Misconduct under the EBA is conduct which is unsatisfactory, serious and wilful and, normally, limited to, *inter alia*, "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" and "of a type which would make it unreasonable to require the University to continue employment of the staff member concerned".

[110] The content of the emails the subject of the allegations provided a sound basis for Professor Bowman's concerns. They were – as the appellant intended them to be – the means by which he campaigned against the respondent's staff. His allegations were serious and, as the recitation of the background above makes clear, without a reasonable factual basis.

[111] The appellant's suggestion that the respondent's staff raising conflict of interest issues with him was bullying, harassing or discriminatory conduct was an exaggerated reaction to the matter. The evidence tendered by the appellant provided no grounds for his suggesting that Dr Ayoko engaged in the mismanagement he alleged. To the contrary, the appellant's own evidence revealed patience on the part of Dr Ayoko in his dealings with the appellant and attempts by him to defuse the

---

[33] Appellant's written outline of submissions, paragraphs [21] and [23].

situation (for example, by deciding not to further pursue conflict of interest issues and by seeking to persuade the appellant to take leave).

[112] The evidence tendered at trial (that is, the voluminous documentary evidence) revealed that the appellant's many complaints about Dr Ayoko, Professor Kaplan, the Vice Chancellor and others were unfounded and full of hyperbole. The evidence revealed that the appellant was threatening, persistent and defiant in the face of reasonable requests to desist from his pursuit of staff in the manner in which he was doing so.

[113] It was reasonably open to his Honour to conclude that the appellant's sending the emails, with their content, and in defiance of reasonable directions not to, was Serious Misconduct.

[114] It was reasonably open to his Honour to conclude that the appellant's email campaign against Dr Ayoko was, at least, distracting for Dr Ayoko personally, or that it created a risk to Dr Ayoko's reputation, or that it made it impossible for Dr Ayoko to supervise the appellant. In those ways, the email campaign might be said to constitute a significant impediment to Dr Aroyo's carrying out his duties. These conclusions were open regardless of the outcome of the Fair Work Australia hearings. His Honour's references to the hearings was in the context of negating the appellant's submission that sending the emails could not ever constitute Serious Misconduct. His Honour made no error. Ground 4 is not made out.

Ground 5: the relevance of s 174(1)(b) of the *Workplace Health and Safety Act* 1995

[115] The appellant argued that section 174(1)(b) of the *Workplace Health and Safety Act* 1995 (Qld) (now repealed) applied and was relevant to the primary judge's conclusion about misconduct.

[116] Section 174(1)(b) provided that 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 "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".

[117] Section 174(2) provided that, if an employer contravened subsection (1) by dismissing a worker, the worker is taken to have been unfairly dismissed under the *Industrial Relations Act* 1999, chapter 3, part 2 and, subject to that part, has the remedies under that part.

[118] The appellant argued at trial that the four emails constituted 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 the section. He argued that any disciplinary action leading to his dismissal for authoring or sending those emails constituted "an invalid allegation of misconduct" in breach of section 174(1)(b).

Decision of the primary judge

[119] His Honour noted that a case involving section 174(1)(b) had not been pleaded. Regardless, in his Honour's view, none of the emails of 2, 6, 12 and 30 March 2009 could be construed as raising a complaint or an issue about workers' exposure to the risk of illness or injury. Although some of the emails referred to health and safety

risks, or the appellant's concerns about the "well-being" of the School, in substance, the emails concerned the appellant's allegations against the respondent's senior staff including allegations of bullying, intimidation and discrimination.[34]

[120] Also, there was no evidence that the respondent's "dominant or substantial reason" for terminating the appellant's employment was because he had made the complaints. Professor Bowman identified his concerns about the emails in his letters of 8 May 2009, 16 June 2009 and 3 July 2009. None of his concerns suggested that the appellant's employment had been terminated because he had raised concerns about workers' exposure to the risk of illness or injury. Nor was such a suggestion put to Professor Bowman at trial.[35]

[121] His Honour also considered section 174 to be irrelevant to the appellant's damages claim arising from alleged breaches of his employment contract. The section contained its own remedies for breach of it. It did not operate to invalidate the allegations raised in the letter of 8 May 2009.

Appellant's arguments

[122] The appellant argued that the primary judge should have concluded, having regard to the pleadings, evidence and submissions, that his emails were directly related to, and raised, health and safety issues. They included references to a health and safety risk and to the well-being of staff. They included complaints about psychological stress. Bullying, harassing and discrimination by Dr Ayoko was a significant health and safety risk. Raising the issue of Dr Ayoko's bullying et cetera constituted raising a health and safety issue under section 174(1)(b). Similarly, the appellant's complaints about bullying et cetera by other senior staff raised health and safety issues.

[123] The appellant asserted that the dominant reason for his sending the four emails was to protect himself and other staff from the health and safety risks of bullying et cetera. The fact that his allegations had not been investigated provided the evidence that the respondent's dominant or substantial reason for terminating his employment was that he had raised health and safety risks in this way.

[124] He said in oral submissions that his concern about significant health and safety risks to himself and others was "the strongest motivation" for his sending the four emails.[36]

[125] He drew the Court's attention to the respondent's Fact Sheet on bullying and made the point that the respondent recognised bullying and harassment as a health and safety issue.[37] He argued that raising issues about bullying and harassment raised a health and safety issue.[38]

[126] He argued that, if his emails were legitimate under section 174(1)(b), then sending them could not amount to misconduct. He also argued that his reasonable

---

34 Ibid [134].
35 Ibid [135].
36 Transcript of hearing 1 – 5; 1- 6, ll 5 – 12.
37 Ibid, 1 – 7.
38 Ibid, 1 – 8.

perception that he was bullied et cetera was enough to raise the risk. His perception was not irrelevant.[39]

Respondent's arguments

[127] The respondent contended that the primary judge's conclusions were correct. The emails did not raise complaints about exposure to the risk of illness or injury. Nor was there evidence led that the dominant or substantial reason why the appellant's employment was terminated was that he had made a complaint about the risk dealt with by section 174(1)(b).

Conclusion

[128] Given the content of the emails, it was clearly correct for his Honour to determine that they did not make complaints concerning a worker's exposure to the risk of illness of injury. By their tone and content, the relevant emails were not, in any genuine sense, a complaint about, nor did they raise an issue about, the exposure of workers to the risk of illness or injury. Rather, they were accusatory and defiant, and focused on the alleged shortcomings of Dr Ayoko.

[129] The email of 2 March 2009 asserted the alleged inadequacies of Dr Ayoko, in terms of his leadership and the provision of administrative support.[40] While it contained a reference to the "well-being" of the school, the email is dominated by the appellant's complaints about Dr Ayoko and the respondent's failure to install "another more suitable and appropriate person" as Head of School. The attachments to the email include correspondence from and to the appellant about Dr Ayoko and his suitability as the acting Head of School. The emails contain the appellant's allegations of bullying, intimidating and threatening behaviour by Dr Ayoko. The attachments also include what the appellant considered to be evidence of that behaviour (that is, e-mails from Dr Ayoko to him). But on no fair reading of the material did Dr Ayoko's conduct come close to the bullying et cetera alleged. For example, the appellant complained that Dr Ayoko gave him "a highly inappropriate and unjustified direction … to attend a useless and untimely meeting about [his] recreational leave" at a time which was unsuitable to the appellant. However, that meeting was prompted by a statement by the appellant that he had not taken recreational leave in ten years. In that context, even if the timing was inconvenient for the appellant, that conduct falls far short of the description the appellant attached to it – either viewed alone, or in the context of other correspondence between them.

[130] The attachments contained the appellant's stated defiance of Dr Ayoko's directions and requests. For example, in an email to Dr Ayoko dated 3 March 2008, he said "As I also clearly explained in my previous emails … there is absolutely no way that I will willingly follow this kind of advice … I refused and continue to refuse to follow it and this clearly is what I have the right to do with any advice, on the basis of the definition of 'advice'". The advice concerned was Dr Ayoko's advice to the appellant that he not involve his wife in the research projects of his PhD students.

[131] The appellant asserted that he regarded Dr Ayoko's advice as clear and repeated bullying, intimidation and harassment. But the appellant's regarding the advice in

---

39 Transcript of hearing 1 – 19, ll 38 – 45.

40 ARB 672*ff*.

that way does not make it so. More to the point, the email and its attachments to do not complain about, or raise an issue about, a risk to workers of illness or injury in any genuine sense. Indeed, as noted above, the tone and content of the appellant's emails to Dr Ayoko caused Dr Ayoko to be concerned about the state of the appellant's health.

[132] The incidental reference to the "well-being" of the School or the exaggerated complaints of bullying or harassment did not convert the email of 2 March 2009 into one which raised an issue concerning workers' exposure to illness or injury as contemplated by section 174(1)(b).

[133] The email of 6 March 2009[41] was sent to Professor Kaplan and copied to the QUT Chancellor. This email was sent after the appellant met with Professor Kaplan on 4 March 2009, as outlined above. It was in this email that the appellant stated that there were only two ways forward – a comprehensive settlement or the appellant's continuing to fight to rid the respondent of its existing culture. In this email, the appellant referred to the major misconduct of senior members of the respondent's staff, and alleged that he been the victim of reprisals. He said that he had "all the rights and even moral responsibilities … to raise [his] 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 the future". He stated that he disagreed with the outcome of Mr See's report.

[134] It was in this email that he stated that he would pursue Dr Aroyo with "all available lawful means and capabilities until the level of disciplinary actions against him by the University is adequate to his Serious Misconduct". He explained his purpose as "fighting for his dignity, self-esteem and [respect]".

[135] In response to Dr Kaplan's direction that he not send any more emails to the Vice Chancellor or Chancellor of QUT, he said, in effect, that he reserved his right to email anyone when he deemed it necessary and appropriate. He reserved his right to make "public interest disclosures" to staff members or another audience. He asserted that he had never violated the Code of Conduct and concluded his email with complaints about Dr Ayoko.

[136] Nothing about this email suggested that its purpose was to complain about, or raise an issue about the risk to workers of, illness or injury in any real sense.

[137] The appellant's email of 12 March 2009[42] responded to Professor Kaplan's letter of 5 March 2009, which confirmed the outcome of their meeting on 4 March 2009.

[138] This email is a lengthy document which is dominated by the appellant's complaints about bullying and intimidation by senior members of staff – Dr Ayoko in particular; and which challenges, in a variety of ways, the directions given to the appellant by Dr Kaplan in the letter of 5 March 2009.

[139] The appellant challenged the direction that he not provide his wife access to QUT's resources, facilities or activities. He asserted his democratic right to debate, publicly, the integrity of any "administrative figure" and the suitability of an acting Head of School. He referred to Professor Kaplan's directions as groundless and unjustified and stated that they caused him major further stress and suffering. The email concluded with the threat that the appellant would "put his life on the line to

---

41 ARB 716*ff*.
42 ARB 722*ff*.

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".

[140] The email mentioned health only incidentally, including by suggesting, in effect, that repeated, unjustified directions might amount to bullying and intimidation, which in turn might lead to major stress or psychological pressure, which might breach government health and safety regulations in the workplace. The appellant also referred to the "well-being" of the School.

[141] The appellant's incidental or hypothetical references to emotional or mental issues (via references to stress or suffering and perhaps the destroying of a life) in the context in which those references are made, is not enough to suggest that the email complained about illness or injury, or raised an issue about workers' exposure to illness or injury, in any real sense.

[142] The e-mail of 30 March 2009 was sent in response to Professor Kaplan's letter of 24 March 2009. [43] It stated that Professor Kaplan's statement (in his letter), that QUT did not permit collaboration by the appellant's wife as the appellant intended, was unclear, and sought "specific and detailed" clarification of it. It suggested that that prohibition on collaboration was discrimination on the basis of a family relationship. It stated that the arrangements in place for the appellant's wife's collaboration would continue in the absence of Professor Kaplan's clarification. The appellant cautioned Professor Kaplan against breaches of the Code of Conduct and stated that he had bullied and intimidated the appellant, directly impeding his essential contractual duties and responsibilities, causing him major stress and suffering.

[143] Although there was a reference to major stress and suffering in the email, reasonably interpreted, and having regard to its purpose, the email was not a complaint about, nor did it raise an issue of the exposure of workers to, illness or injury in any genuine way.

[144] Putting to one side the question of the applicability of the section to the breach of contract argument in any event – the primary judge was correct in concluding that the appellant's emails did not fall into the category of complaint contemplated by section 174(1)(b). On no fair reading of them could they be characterised as complaints about, or raising an issue about the risk to workers of, illness or injury. Nor does the evidence support the contention that the appellant's employment was terminated because his emails were in the nature of complaints about illness or injury.

[145] Moreover the appellant has not identified any matter to demonstrate that his Honour was in error in finding that there was no evidence that the "dominant or substantial reason" for the respondent terminating the appellant's employment was because of the making of such a complaint. That is fatal to the appellant's argument. Ground 5 is not made out.

Ground 6: His Honour's finding that the respondent was entitled to proceed under clause 44.2.6 of the EBA when the appellant denied the allegations

---

43 ARB 731 – 735.

[146] For the reasons already given, the respondent did not fail to comply with clause 44 of the EBA by failing to permit the appellant to respond to the allegations in the way contemplated by the clause. Ground 6 is not made out.

Ground 7: the finding that the appellant failed on causation regardless

[147] By the respondent's breach of contract, the appellant alleged that he lost the chance or opportunity to have the allegations made against him investigated by the Misconduct Investigation Committee. He asserted that that committee would have concluded that he had not committed Misconduct or Serious Misconduct and implicitly asserted that he lost the chance of that result.

[148] Notwithstanding that his Honour found that the respondent had not breached clause 44.2.2, his Honour considered the position as if the respondent was in breach and should have proceeded under clause 44.2.7. His Honour concluded that the appellant would have not been able to establish a causal connection between any such breach and his termination in any event. The appellant contended that the primary judge was wrong in concluding that he would have failed on causation regardless.

[149] As his Honour stated, it was necessary for the appellant to establish that the chance or opportunity lost offered a substantial, and not merely a speculative, prospect of achieving the favourable outcome as pleaded.[44] At first instance, his Honour concluded that there was no reasonable evidential basis upon which the court could find that the Misconduct Investigation Committee would have accepted the appellant's justification for sending the emails. In any event, the final determination was the Vice Chancellor's, having considered the report of the Misconduct Investigation Committee. In other words, the report did not bind the Vice Chancellor. And there was no evidential basis for the conclusion that the Vice Chancellor would have accepted the (hypothetically favourable) report of the Misconduct Investigation Committee.

[150] On appeal, the appellant argued that his Honour failed to consider the first of the two different causation mechanisms pleaded, and failed to take into account the "relevant evidentiary basis for the second mechanism involving the past events and circumstances amounting to bullying, harassment, discrimination and health and safety breached by the [respondent] at the [appellant's] workplace".

[151] The "mechanisms" appeared in the appellant's pleadings at paragraphs [223] – [239] of the second further amended statement of claim.[45] Briefly, the appellant asserted that the respondent had, in breach of contract, proceeded as if he had admitted the misconduct or Serious Misconduct under clause 44.2.6. Had there been no such breach, the allegations would have been referred to the Misconduct Investigation Committee. The membership of the committee would have been determined by a process which avoided any of the conflicts alleged by the appellant involving Professor Coaldrake and Professor Bowman. The members would have been appointed by the Chancellor. The investigation would have afforded the appellant natural justice and procedural fairness. The committee would have considered the e-mails against the background of the history since 2007 which, according to the appellant, included his being bullied and harassed by the respondent's senior staff;

---

44 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 364 (Brennan J).

45 ARB 1744 – 1747.

being forced to exclude his wife from her voluntary research outside QUT; and being severely bullied by Professor Kaplan. The committee would have investigated the attempts to "force the [appellant] to denounce his legal and civil rights". Ultimately, the appellant asserted, the committee would have concluded, among other things, that his emails raised issues concerning exposure of staff members of the School to the risk of illness or injury; that the respondent's disciplinary action against the appellant was "illegitimate": and that the undertakings sought from him breached his legal and workplace rights, including the right to be protected from adverse action.

[152] Alternatively, he asserted, the committee would have recommended the termination of disciplinary action against him because of "major mitigating factors and circumstances". A reasonable person in the place of the Vice Chancellor or his nominee would have accepted the recommendation of the committee and not terminated the appellant's employment contract.

[153] The appellant called no evidence to prove these assertions.

[154] In oral submissions at the appeal hearing the appellant argued that, if the respondent had not followed the "first mechanism" it was not allowed to terminate his employment, yet the primary judge failed to make a determination about this mechanism.[46]

[155] The appellant argued that the primary judge erred in finding that there was no evidential basis for a conclusion favourable to him, because that conclusion was available having regard to the history of dealings between the appellant and the respondent. The appellant argued that the history of dealings revealed that he had been bullied, harassed and discriminated against, which provided a "valid reason" for his sending the four emails and the evidential basis for the unbiased conclusion that he had not committed Misconduct or Serious Misconduct.

[156] There are two questions to consider in evaluating damages based upon an alleged loss of opportunity. The first is whether there has been such a lost opportunity caused by the breach. That is to be determined on the balance of probabilities. The second is the value of that lost opportunity. That is to be decided on the possibility or probabilities of the case.[47] If an opportunity offers a substantial and not merely speculative prospect of acquiring a benefit or avoiding a detriment, then the opportunity can be held to be valuable. In cases involving the loss of a chance, the court is required to estimate the chance that a particular thing would have happened.[48] In the present case, the primary judge found the chance of an outcome favourable to the appellant after the investigation of the allegations made against him to be speculative only.

[157] The appellant insisted that, upon investigation, his conduct in sending the emails with their content, would have been found to be justified because of his treatment in the period from 2007 until 2009. In other words, it would have been found not to amount to Misconduct or Serious Misconduct under the EBA. His Honour found, aside from the fact that the Misconduct Investigation Committee dealt with allegations of conduct, that there was no evidentiary basis that would permit the

---

46 Transcript of hearing, 1 – 18, ll 4 – 11.

47 *Barnes v Forty Two International Pty Ltd* (2015) 316 ALR 408 at [190], referring to *Sellars* at 365-368 and other cases.

48 *Chaplin v Hicks* [1911] 2 KB 786.

Court to make such a finding. This Court has found there was no error by his Honour in that regard. Similarly it has found there was no error in his Honour's finding that there was no breach of s 174(1)(b) of the *Workplace Health and Safety Act*.

[158] As his Honour found, in the absence of evidence which would permit the favourable finding contended for by the appellant, that prospect was nothing more than speculative.

[159] Further, as his Honour found, the question whether there was Misconduct or Serious Misconduct was a matter for the Vice Chancellor or his nominee and not the Misconduct Investigation Committee. Whether the Vice Chancellor would have accepted the recommendation of the Misconduct Investigation Committed is again a matter of pure speculation.

[160] His Honour was correct to conclude that that the prospect of the committee's finding the appellant justified in sending the emails; and the prospect of the Vice Chancellor (or his nominee) accepting any such finding, were speculative.

[161] His Honour did not err in concluding that the appellant failed on causation, regardless of whether or not there had been a breach of clause 44 of the EBA.

[162] Ground 7 is not made out.

Ground 8: whether the grievance resolution procedures for discrimination related grievances were contractual;

Ground 9: whether there was a breach; and

Ground 10(a) and (b): whether a causative link was established

[163] These grounds may be dealt with together.

[164] The third breach of contract alleged by the appellant was the respondent's breach of MOPP Policy A/8.5: Grievance resolution procedures for discrimination related grievances.

[165] The appellant argued at first instance that the respondent was contractually obliged to investigate his complaint of 1 June 2008 that he had been bullied, intimidated and discriminated against by Dr Ayoko. Had such an investigation been conducted, he argued, he would not have sent the 2 March 2009 email and his employment would not have been terminated. He made a similar argument in respect of his letter dated 3 April 2009 to the Chancellor.

[166] His Honour noted the three issues arising out of this aspect of the appellant's case, namely –[49]

1. Did the Grievance Policy form part of the plaintiff's employment contract?
2. Did the defendant breach the Grievance Policy?
3. Was the breach causally linked to the termination of the plaintiff's employment and subsequent loss?

---

[49] [2018] QSC 37 [153]

[167] In answering the first of those questions, his Honour correctly identified that the relevant question was whether the procedures imposed obligations or conferred entitlements. His Honour correctly stated that it was only those statements which were in the nature of promissory obligations which could give rise to contractual entitlements.[50]

[168] After considering the policy, and in particular the three levels of grievance resolution procedures it contained (that is, (i) resolution via an approach to a supervisor; (ii) investigation and further conciliation in accordance with appropriate course of action determined by the Equity Coordinator; and (iii) formal investigation by the Vice Chancellor), his Honour found that the none gave rise to contractual obligations. His Honour said (most footnotes omitted):[51]

> "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 [in *Gramotnev v Queensland University of Technology*],[52] "*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.*" Such "promissory" language should be considered in context. 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 … 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. The procedures or rather access to the procedures, seek to achieve the aspirational goal of the "Policy statement'."

[169] His Honour went on to consider whether, even if the procedures in 8.5.6 were contractual, the respondent had breached them in response to the appellant's letter of 1 June 2008.

[170] His Honour concluded that there had been no breach for the following reasons –

- by his letter dated 1 June 2008, the appellant did not seek to engage the procedures of the Grievance Policy;
- the letter was not, on a fair reading, a complaint concerning discrimination or harassment – it was a letter seeking the removal of Dr Ayoko as Head of School on the basis of his alleged "complete failure and incapacity to reasonably manage staff … and their needs"; and
- the appellant's letter was sent to the Vice Chancellor, who was not obliged to accept a complaint under the third level of grievance procedures unless there had been an attempt to resolve the matter through conciliation via first and second level procedures (as required by the Grievance Policy) and the appellant did not seek to engage the first or second level procedures.

---

50 Ibid [159] referring to *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120.
51 Ibid [165].
52 [2013] QSC 158.

[171] On the issue of causation, his Honour concluded that there was no evidence that an investigation of the appellant's grievances would have led to a favourable result for the appellant. To the contrary, the evidence was that Dr Ayoko enjoyed the support of the Vice Chancellor and indeed, the Vice Chancellor promoted him.[53]

Appellant's arguments on appeal about the contractual nature of the Grievance Policy

[172] On appeal, the appellant argued that his Honour was wrong to conclude that the Grievance Policy created no obligation in the respondent to investigate the appellant's complaint about Dr Ayoko. The respondent was so obligated and breached its obligation. He also argued that his Honour erred in concluding that he could not establish a causative link between the breach and his loss.

[173] The appellant argued that the decision of the Court of Appeal in *Gramotnev v Queensland University of Technology*[54] contained a "unanimous expression of intention to consider the procedure [under the relevant policy]" part of the employment contract. He referred to paragraph [120] of that decision, which was contained in the judgment of Jackson J, with whom McMurdo P and Holmes JA agreed. However, as the primary judge recognised, it was not then alleged by the appellant that a failure to follow the procedures was contractual. Rather, the appellant was then alleging a failure of the respondent's "promise" to prevent bullying or harassment.

[174] In context, Jackson J said (footnotes omitted):

> "**Discrimination Grievance Resolution Procedures**
>
> [116] This policy is identified as "MOPP A/8.5 Grievance resolution procedures for discrimination related grievances". There were two versions of the policy in force during the relevant period.
>
> [117] The first version makes provision, as its title suggests, for the procedures a person with a complaint, including a staff member with a grievance, may follow. It refers to external processes under the Commonwealth or State anti-discrimination laws. It provides for three stages or levels for the respondent's procedures. The first level is a staff member's supervisor. The second level if a dean of faculty or head of division. The third level if a formal investigation by the Vice-Chancellor through the constitution of a panel to advise the Vice-Chancellor. The second version of the policy is in similar terms.
>
> [118] The breach of this policy alleged in para 114i of the ASOC is of ongoing bullying and harassment of the appellant, on the basis of the appellant's family relationship by several high ranking administrators over a period of years. The substance seems to be that disputes that the appellant had with other senior staff members over his wife's role or involvement with the university or the appellant's or appellant's students'

---

53 [2018] QSC 37 [170] – [171].

54 [2015] QCA 127.

> research amount to discrimination on the part of the respondent.
>
> [119] The primary Judge was not persuaded that the whole of the policy is contractual. His Honour held than any promise contained in the policy could not extend to a requirement that the procedures are effective to prevent bullying or harassment. His Honour understood that the complaint made by the appellant was not as to the process but as to the ineffectiveness of the policy.
>
> [120] I agree. The whole of the policy is not contractual. 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."

[175] The primary judge correctly identified as obiter Jackson J's statements about contractual provisions of the policy as to the procedure. Jackson J was not in [120] authoritatively determining the status of the procedural provisions. His Honour correctly identified the contractual or other status of the provisions as to procedure to be a matter which fell for his determination in the matter before him.[55] This aspect of the appellant's argument cannot succeed.

[176] In the alternative, the appellant argued that the primary judge erred in concluding that none of the procedures gave rise to contractual obligations. He further contended that the third level procedural step was the only one open to him and that a reasonable person would understand it to contain "significant promissory statements … of a contractual nature".

Respondent's arguments about the contractual nature of the Grievance Policy

[177] The respondent pointed out that the appellant did not identify those parts of the policy which he characterised as being of a contractual nature. He simply contended that the third level procedure contained "significant promissory statements". He did not otherwise identify error in his Honour's approach.

Conclusion

[178] In concluding that the grievance procedures were not contractual, his Honour relied upon the following considerations, in accordance with *Goldman Sachs JBWere Services Pty Ltd v Nikolich*:[56]

- (a) where the language used in the policy denotes an expression 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 rather than promissory;

---

55 [2018] QSC 37 [156].

56 [2007] FCAFC 120, applied by McMeekin J at first instance in *Gramotnev v Queensland University of Technology* [2013] QSC 158 [79].

- (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 principle. 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 which case it is the hypothetical new employee reading a policy fairly and objectively.

[179] The procedures open with their "Principles" in 8.5.1,[57] referring to the University's "commitment to ensuring a harmonious, fair and just working and learning environment and ensuring access to processes that allow for conflict to be resolved".

[180] That is a statement which combines aspirations and promises. The respondent cannot promise harmony or the resolution of conflicts via procedures, but it can promise access to procedures to allow for conflict to be resolved.

[181] Under clause 8.5.6, it is explained that the three levels of discrimination-related grievance resolution procedures are consistent with the University's grievance resolution policy, designated "A/6.1".[58]

[182] That policy too begins with a statement of the University's commitment to a harmonious, fair and just working and learning environment. It sets out the obligation of managers and supervisors to promote a workplace free of bullying and intimidation. It says grievances are to be dealt with in a supportive environment, without victimisation or intimidation. QUT's approach to grievance resolution emphasises, among other things, natural justice and procedural fairness and the resolution of grievances as early as possible and as close as possible to the source. It continues:

> "Three sets of procedures arise from this policy dealing specifically with grievances relating to workplace, discrimination or student matters. All have a common three-step framework and all are informed by the same principles. Between them, they apply to all staff and students and cover disputes grievances and problems affecting the working and learning environment, such as:
>
> - …
> - bullying, psychological abuse, abuse of power or coercive management practices
> - …
> - harassment and discrimination, for example on racial or sexual grounds
> - …"

---

57 ARB 546.
58 ARB 1574 – 1577.

[183] After setting out the principles which applied to the policy, the policy explained that three procedures arose from it, but were separate to it. One of those procedures was the Grievance Resolution Procedures for Discrimination Related Grievances.

[184] His Honour found none of the procedures gave rise to contractual obligations. His Honour concluded that access to those procedures represented QUT's policy commitment to ensuring a harmonious, fair and just working and learning environment, and in that way, sought to achieve those aspirational goals.

[185] The procedures themselves contain contractual obligations, certainly by the time a grievance has escalated to the second or third level. They prescribe the steps that will be taken by high level staff of the University upon a complainant's reference of a complaint in a particular way.

[186] In the case of the second level procedure, the respondent's obligations arise if the complainant refers their complaint to the relevant executive dean of faculty or head of division. If that occurs:

> "(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 within one week of the supervisor being notified of the grievance. The Equity Coordinator must be notified if the one week period is exceeded."

[187] Of course, there is no promise to resolve a grievance, only to attempt to, and the clauses of the procedure anticipate that the grievance might not be resolved at that stage (or at first level stage).

[188] In the case of a third level grievance, if the complainant lodges a written complaint with the Vice Chancellor, requesting a formal investigation of the grievance, then the Vice Chancellor will constitute a panel to investigate the complaint. The composition of the panel, its role and its processes are prescribed by the policy in mandatory terms. For example:

> "(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."

[189] It is however not necessary to say anything more about this because on no fair reading of the appellant's letters of 1 June 2008 or 3 April 2009 were these procedures engaged. This is discussed further below.

Appellant's arguments about breach of the Grievance Policy

[190] The appellant maintained on appeal that the procedures had been breached. He argued that he was correct to complain first to the Vice Chancellor and the Vice Chancellor was obligated to respond in accordance with the procedures of the policy. The Vice Chancellor's response, dated 16 July 2008, did not do so – instead, it ignored the appellant's complaints.

[191] The appellant argued that his Honour could not rely on Dr Ayoko's promotion by Professor Coaldrake as relevant to the causation issue because Professor Coaldrake was biased and condoned the bullying.

Respondent's arguments about breach of the Grievance Policy

[192] The respondent supported the primary judge's conclusions that the appellant's complaint against Dr Ayoko dated 1 June 2008 was not, on a fair reading of it, a complaint contemplated by the procedures. Rather, it demanded Dr Ayoko's removal.

Conclusion

[193] The letter of 1 June 2008 does not expressly or implicitly seek to engage the Grievance Procedure. Instead, it –

- expresses concerns and regret that no action has been taken against Dr Ayoko, notwithstanding the appellant's earlier complaint about him;
- complains that the School does not have a permanent Head of School;

- discusses the history of the Head of School vacancy;
- expresses an opinion that the situation is a farce;
- complains about Dr Ayoko's (alleged) management deficiencies;
- reiterates a complaint made in earlier correspondence that Dr Ayoko inappropriately secured the appellant's consent to "highly inappropriate, incorrect and implicating statements" in his PPR-AS form;
- reiterates a complaint made in earlier correspondence about Dr Ayoko's management of the appellant's conflict of interest;
- asserts that Dr Ayoko is ready to misuse his position and administrative power, disregarding the real needs and well-being of staff – an assertion that is purportedly supported by the reference to Dr Ayoko requiring the appellant to attend a meeting about his recreational leave;
- attaches recent correspondence said to be evidence of Dr Ayoko's inappropriate actions and lack of management skills;
- asserts that he has heard others make similar complaints;
- states his belief that Dr Ayoko should not be the Acting Head of School;
- explains that he is "impatiently waiting" for his replacement;
- argues that Dr Ayoko should be immediately removed from the position of Acting Head of School because he is involved in potentially inflammatory promotions processes; and
- states that it is unacceptable for Dr Ayoko to occupy the position of Acting Head of School because he does not have the professional or personal qualities for it.

[194] The letter urged Professor Coaldrake to replace Dr Ayoko; select and appoint a new head of school; and develop policies and procedures for such a process. The letter did not engage the Grievance Policy. Its focus was on the removal of Dr Ayoko from the position of Acting Head of School and his replacement.

[195] The letter may be said to have referred to Dr Ayoko's bullying, intimidating and threatening behaviour, but in context, that referred to, and would have been understood by Professor Coaldrake as referring to, Dr Ayoko's discussing with the appellant the conflict of interest arising out of his relationship with his wife. It is artificial to suggest that the appellant was, in that context, the victim of "discrimination" as defined in the Grievance Resolution Procedures for Discrimination Related Grievances. Under the procedures, "discrimination" is defined as "any distinction, exclusion, restriction or preference within QUT's study and work environment which is based upon a person's sex, marital status […other characteristics] or any other factor that is irrelevant to a person's ability to work, or study or access services at QUT".[59] A requirement that the appellant disclose a potential conflict of interest was not discrimination as defined.

---

[59] ARB 547.

[196] Under the procedures, "harassment" is defined as a form of discrimination. "It refers to offensive behaviour and it may be based on one of the grounds referred to above, or may be motivated by other factors". It is intended to encompass offensive, humiliating or distressing behaviour.

[197] Dr Ayoko's requests of the appellant, in the context of discussing the potential conflict of interest, cannot reasonably be said to be offensive, humiliating or distressing behaviour. And regardless, the grievance procedure was not engaged by the letter of 1 June 2008.

[198] Even if the Vice Chancellor was the appropriate person to complain to about discrimination or harassment, and even if the appellant was, contrary to the policy, permitted to go straight to the third level of grievance procedures, the letter did not request a formal investigation into alleged harassment or discrimination of the appellant, which is what is contemplated at that level. Rather, it asserted that certain behaviours of Dr Ayoko towards the appellant reflected his unsuitability for the position he held and attempted to urge or pressure the Vice Chancellor to remove him on the basis of the appellant's assertions. It did not ask the Vice Chancellor to investigate the appellant's complaints about Dr Ayoko. Rather, it mounted an argument for Dr Ayoko's removal on the strength of the accuracy and reliability of the appellant's assertions.

[199] Similar reasoning applies in relation to the letter of 3 April 2009. This was a letter from the appellant to the Chancellor of QUT in which the appellant asserted that he had been the victim of highly inappropriate actions and misconduct including discrimination. The thrust of this letter is to accuse the Chancellor of being responsible for the alleged bullying and other adverse treatment of the appellant by others, particularly Professor Kaplan. Rather than seek to engage the grievance procedures, in it, the appellant refers to the Chancellor's responsibilities under the MOPP, which he asserts include responsibility for ridding QUT of its "existing administrative cancer". Plainly the appellant was not seeking the resolution of a grievance He was seeking the removal of senior administrative staff.

[200] Further, even if the letters engaged the grievance procedures, the appellant failed to prove causation. He failed to prove that the grievance procedures would have resulted in findings in his favour. As was the case in relation to the breaches of the EBA, his assertions or beliefs that he had been wronged are not enough.

Repudiation

[201] By way of a notice of contention, the respondent contended (as it had argued at trial) that the primary judge's decision should be affirmed on grounds other than the grounds relied upon by the Supreme Court, namely, that the appellant by his conduct repudiated the employment contract and that his repudiation was accepted by Professor Bowman on 3 July 2009.

[202] The appellant argued, in effect, that the repudiation claim was made too late – eight years after his employment had been terminated.[60] He argued, in effect, that it would be contrary to the evidence and the interests of justice for this Court to act on the submission.[61] He also disputed that his conduct amounted to repudiating

---

60 Transcript of hearing, 1 – 21, ll 38 – 45.

61 Transcript of hearing, 1 – 22, ll 4 – 11.

conduct. He said that the directions he refused to comply with were those which amounted to bullying et cetera. He did not commit acts of insubordination.[62]

[203] Before discussing these arguments it is appropriate to refer to an apparent flaw in the way in which the appellant framed his case for damages for breach of clause 44 of the EBA. Simplifying that case, it involved these steps:

(a) The respondent did not comply with part of the disciplinary procedure in clause 44.

(b) That non-compliance was a breach of the employment contract for which the appellant was entitled to recover damages.

(c) But for the respondent's non-compliance with that part of the disciplinary procedure in clause 44 it would not have terminated the employment contract.

(d) The appellant was therefore entitled to recover loss he sustained as a result of the respondent's termination of the employment contract as damages for the respondent's non-compliance with that part of the disciplinary procedure in clause 44.

[204] For reasons already given, the appellant's case failed at the first and third steps. But the appellant's case would be problematical even if the appellant established those parts of it. Clause 44.2.1 makes it clear that compliance with the applicable procedural steps in clause 44 is required to justify the contractual right to terminate for Serious Misconduct. The result of a failure by the respondent to comply with a necessary procedural step would appear to be that a purported contractual termination under the clause would be ineffective, not that the appellant would be entitled to recover loss of bargain damages for that non-compliance upon the theory that the respondent's termination was instead effective but would not have occurred but for the non-compliance. As was mentioned in the course of argument at the hearing, if the respondent had failed to comply with a required procedure under clause 44 and its purported termination was ineffective for that reason, the appellant might instead have claimed loss of bargain damages for alleged wrongful repudiation of the employment contract constituted by an allegedly wrongful termination of that contract by the respondent (and perhaps also steps taken by it to implement that termination). However the appellant did not allege that the respondent wrongfully repudiated the employment contract and no such claim was litigated.

[205] Putting aside that apparent flaw in the appellant's case, the respondent's notice of contention in any event provides a complete answer to the appellant's appeal, essentially for the reasons given by the respondent which are summarised in [28] and [201] of these reasons.

[206] The evidence and the primary judge's findings already discussed require acceptance of the respondent's argument that, upon the necessary objective analysis, the appellant's correspondence made it clear that he regarded himself as not being bound to comply with fundamental obligations under the employment contract. In particular, the appellant repeatedly refused to accept the authority of the contractual disciplinary process which, on any view, had been validly commenced under clause 44, and he engaged in conduct, accurately summarised in the following

---

62 Transcript of hearing, 1 – 22, ll 13 – 26.

passage of the respondent's outline, which was seriously inimical to the employment relationship:

> "(d) by his letter dated 21 May 2009, the appellant refused to give the undertakings requested by Professor Bowman's letter dated 8 May 2009 or to follow the protocol for communication outlined by Professor Kaplan in his letter to the appellant dated 5 March 2009. There was nothing unreasonable about Professor Kaplan's suggested protocol. The appellant refused to comply notwithstanding that the Chancellor had expressly requested that any further queries be directed to Professor Kaplan. He refused to comply because he considered that because Chancellor Arnison had refused to investigate his complaint, "he had to know the consequences of that decision". This was vindictive conduct directed at the Chancellor. The 21 May 2009 letter continued to assert the so called "democratic rights" to "criticise anyone whose actions are, in my opinion, detrimental for the School, Faculty and/or this University and to pursue anyone for his/her misconduct, bullying, harassment, reprisals, mistreatment of staff and/or any other unfair actions". By the time of his 22 June 2009 letter to the Chancellor, the appellant was demanding the resignation of Professor Coaldrake and Professor Bowman and at the same time demanding a full investigation into the conduct of Professor Coaldrake, Professor Gardiner, Professor Bowman, Professor Kaplan and A/Professor Ayoko for "their repeated campaigns of psychological terror, reprisal acts, threatening and intimidating behaviour aimed at damaging the career and well-being of a staff member (ie me), severe bullying, harassment, intimidation and impediment of essential contractual duties of staff for the last several years";
>
> (e) the appellant was at all material times intending to pursue A/Professor Ayoko and Professor Coaldrake and other University staff for Serious Misconduct by a means which would have included sending correspondence otherwise than in accordance with the undertakings sought by Professor Bowman's letter dated 8 May 2009 and the protocol for communication outlined by Professor Kaplan in his letter to the appellant dated 5 March 2009."[63]

[207] The appellant's conduct amounted to wrongful repudiation of the employment contract because it evinced his intention to fulfil his contract "only in a manner which is substantially inconsistent with [his] obligations" and so as "to convey to a reasonable person, in the situation of the other party, renunciation … of a fundamental obligation under [the contract]".[64] Accordingly, the respondent was entitled to terminate the employment contract for the appellant's wrongful repudiation of it. That common law remedy may be excluded by contract but the employment contract does not contain those clear words which are required to rebut

---

63 Respondent's outline of submissions, paragraphs 21(d) and (e).

64 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [44] (Gleeson CJ, Gummow, Heydon, and Crennan JJ).

the presumption that the contracting parties do not intend to abandon common law remedies for breach of contract.[65] It follows that, if the respondent did not validly exercise its contractual right to terminate for Serious Misconduct, it was nevertheless entitled to justify its termination of the employment contract by relying upon the appellant's wrongful repudiation; and that is so even though the respondent did not rely upon that repudiation at the time but instead invoked only the contractual right to terminate.[66] Furthermore, even if, contrary to the primary judge's conclusion and these reasons, the respondent was itself in breach of the contract, it was entitled to justify its termination of the contract for the appellant's wrongful repudiation. That is because upon any reasonable view of the evidence and the primary judge's findings, any breach of the employment contract by the respondent was much less serious than the appellant's wrongful repudiation and that repudiation cannot reasonably be regarded as attributable to any such breach by the respondent.[67]

Orders

[208] The court makes the following orders–

1. appeal dismissed;

2. the appellant is to pay the respondent's costs of the appeal.

---

65 *Concut Pty Ltd v Worrell* (2001) 75 ALJR 312 at [23] (Gleeson CJ, Gaudron and Gummow JJ).

66 *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 377 – 378 (Dixon J); *Rawson v Hobbs* (1961) 107 CLR 466 at 482 – 483 (Dixon CJ, Windeyer J agreeing); *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 262 (Mason CJ with whose reasons Deane, Dawson and Toohey JJ agreed); *Foran v Wight* (1989) 168 CLR 385 at 406 (Mason CJ); *Minion v Graystone Pty Ltd* [1990] Qd R 157 at 163 – 165 (McPherson J, Macrossan CJ and Derrington J agreeing); *Downer EDI Ltd v Gillies* (2012) 92 ACSR 373 at [131] (Allsop P, Macfarlan JA agreeing).

67 See *Roadshow Entertainment Pty Ltd v (ACN 053 006 269) Pty Ltd* (1997) 42 NSWLR 462 at 479 –480, which was followed in *Zahedpur v Idameneo (No 3) Pty Ltd* [2016] QCA 134 at [44]. No question arises in this case about the respondent's readiness and willingness to perform the contract upon its proper construction: cf *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 433 (Stephen, Mason and Jacobs JJ); *Foran v Wight* (1989) 168 CLR 385 at 404 – 408 (Mason CJ), 424 – 425 (Brennan J); *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 279 (Gaudron J); *Protector Glass Industries Pty Ltd v Southern Cross Autoglass Pty Ltd* [2015] NSWCA 16 at [7] – [8] (Meagher JA).