SUPREME COURT OF QUEENSLAND

CITATION:	*Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158
PARTIES:	**DMITRI GRAMOTNEV** Plaintiff **And** **QUEENSLAND UNIVERSITY OF TECHNOLOGY** Defendant
FILE NO/S:	S6286/2010
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Brisbane
DELIVERED ON:	19 June 2013
DELIVERED AT:	Supreme Court Rockhampton
HEARING DATE:	26-27 March 2013
JUDGE:	McMeekin J
ORDER:	1. My answer to each of the separate questions is "no"; 2. I direct that the defendant make any such submission as it may be advised as to any further order that it seeks on or before 4pm on 26 June 2013. I direct that the plaintiff make any such submission as he may be advised as to any further order that he seeks on or before 4pm on 3 July 2013.
CATCHWORDS:	CONTRACT – BREACH OF CONTRACT - EXPRESS AND IMPLIED TERMS –whether the provisions of the defendant's enterprise bargaining agreements and/or manual of policies and procedures and/or the defendant's statutes and policies constituted a term or terms of the employment contract - whether the employment contract contained the additional terms which are alleged to have been implied by law *Crime and Misconduct Act 2001* (Qld)

International Covenant on Civil and Political Rights adopted by General Assembly resolution 2200A (XXI) of 16 December 1966

Uniform Civil Procedure Rules 1999

Whistleblowers Protection Act 1994 (Qld)

Workers' Compensation and Rehabilitation Act 2003

Workplace Health and Safety Act 1995 (Qld)

Workplace Relations Act 1996 (Cth)

ABC v Lenah Game Meats (2001) 208 CLR 199

ACTEW Corp Ltd v Pangallo (2002) 127 FCR 1

Addis v Gramaphone Co [1909] AC 488

Australasian Meat Industry Employees' Union v Frugalis Pty Ltd (1987) 14 FCR 535

Australian Industry Group v Fair Work Australia [2012] FCAFC 108

AWU v BHP Iron Ore [2001] FCA 3

Baltic Shippping Co v Dillon (1993) 156 CLR 344

Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301

Barker v Commonwealth Bank of Australia [2012] FCA 942

Blyth Chemicals Ltd v Bushnell (1933) 49 CLR 66

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266

Burazin v Blacktown City Guardian (1996) 142 ALR 144

Byrne & Frew v Australian Airlines (1995) 185 CLR 410

Concut Pty Ltd v Worrell [2000] HCA 64

Construction, Forestry, Mining and Energy Union v Gordonstone Coal Management Pty Ltd (1997) 78 FCR 347

Deatons Pty Ltd v Flew (1949) 79 CLR 370

Dye v Commonwealth Securities Ltd [2012] FCA 242

Eastwood v Magnox Electric plc [2005] 1 AC 503

Goldman Sachs JB Were Services Pty Ltd v Nikolich [2007] FCAFC 120

Grosse v Purvis [2003] QDC 151

Hamling v Australia Meat Holdings Pty Ltd [2005] QCA 415

Hawkins v Clayton (1988) 164 CLR 539

Koehler v Cerebos (Aust) Ltd (2005) 222 CLR 44

Lau v WorkCover Queensland [2003] 2 Qd R 53

McCormick v Riverwood International (Australia) Pty Ltd (1999) 167 ALR 689

McDonald v Parnell Laboratories (Aust) Pty Ltd (2007) 168 IR 375

Moama Bowling Club Ltd v Armstrong (No 1) (1995) 64 IR 238

Nelson v BHP Coal Pty Ltd [2000] QCA 505

New South Wales v Lepore (2003) 212 CLR 511

Perkins v Grace Worldwide (Aust) Pty Ltd (1997) 72 IR 186

Riverwood International Australia Pty Ltd v McCormick [2000] FCA 889

Russell v Trustees of the Roman Catholic Church Arch Diocese of Sydney (2008) 72 NSWLR 559

Schiliro v Peppercorn Childcare Centres Pty Ltd (No 2) [2001] Qd R 518

Shepherd v Felt and Textiles of Australia Ltd (1931) 45 CLR 359

Soliman v University of Technology, Sydney [2008] FCA 1512

South Australia v McDonald (2009) 104 SASR 344

Taske v Occupational and Medical Innovations Ltd [2007] QSC 147

Thomson v Orica Australia Pty Ltd (2002) 116 IR 186

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

Transport Workers' Union of Australia v K&S Freighters Pty Ltd (2010) FCA 1225

Van Efferen v CMA Corporation Ltd [2009] FCA 597

Vozza v Tooth & Co Ltd (1964) 112 CLR 316

Walker v Citigroup Global Markets Australia Pty Ltd (2006) 233 ALR 687

Wattyl Ltd and Others v Australian Liquor, Hospitality and Miscellaneous Workers Union (1995) 134 ALR 203

Wright v Groves [2011] QSC 66

Wylie v ANI Corporation Ltd [2002] 1 Qd R 320

Yousif v Commonwealth Bank of Australia (2010) 193 IR 212

COUNSEL: Dr D Gramotnev is self-represented as plaintiff

D Kelly SC and D de Jersey for the Defendant

SOLICITORS: Minter Ellison Lawyers for the Defendant

[1] **McMeekin J:** These proceedings involve the determination of separate questions under Chapter 12 Part 5 of the *Uniform Civil Procedure Rules* 1999 concerning the terms of an employment contract between the plaintiff and the defendant.

Background

[2] In late November 1999 the plaintiff, Dr Dmitri Gramotnev, was appointed to the position of lecturer of physics in the school of physical sciences, faculty of sciences at the Queensland University of Technology. He took up his employment on 1 January 2000. There was a period of employment prior to this which is irrelevant for present purposes. His employment was terminated for serious misconduct on 3 July 2009.

[3] By these proceedings Dr Gramotnev claims that the University breached his employment contract. There are 11 breaches particularized. The damages claimed vary with the breach asserted but in some instances is in excess of $2.5M.

[4] Dr Gramotnev's complaint in the first five breaches pleaded relates essentially to an alleged failure to follow the procedures laid down by the University in his several applications for promotion and appeals therefrom. Dr Gramotnev complains that he

has suffered loss as a result. The six remaining breaches allege more general complaints. They include allegations of impeding Dr Gramotnev's career, bullying, harassment, intimidation, psychological abuse and abuse of power, coercive management practices, and the like. There is a great deal more in the 53 pages of his statement of claim, 16 pages of reply and 102 pages of particulars. Where necessary I will detail his allegations. While I did not discern a direct complaint in the Amended Statement of Claim concerning the termination of his employment, such a complaint appears in the particulars at paragraphs 376-378.

[5] The University's response to the claimed breaches of contract is to assert that the terms allegedly breached are not terms of the employment contract at all.

[6] Dr Gramotnev was not legally represented and appeared in person.

The Separate Questions

[7] On 7 December 2012 Peter Lyons J ordered that the following questions be set down for separate determination to be heard before the trial of the proceedings:

a) Whether the provisions of the defendant's enterprise bargaining agreements and/or manual of policies and procedures and/or the defendant's statutes and policies constituted a term or terms of the employment contract between the plaintiff and the defendant entered on or about 23 November 1999 ("the employment contract");

b) Whether the employment contract contained the additional terms which are alleged to have been implied by law in paragraph 7 of the amended statement of claim.

[8] Paragraph 7 of the amended statement of claim provides that the following terms were implied by law into the employment contract:

a) A duty of good faith owed by the defendant to the plaintiff that obliged the defendant to exercise honest (*sic*), fairness, prudence, caution and diligence in the performance contract ("the term of good faith");
b) A duty that the defendant would not without proper and reasonable cause act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the plaintiff and the defendant ("the term of trust and confidence")
c) A duty that the defendant would create, maintain and not breach healthy (*sic*) and safe workplace environment for the plaintiff ("the term of health and safety");
d) A duty that the defendant would not breach the plaintiff's civil and legal rights, including by a reprisal, retaliation and or recrimination conduct (*sic*) ("the term of civil and legal rights").

[9] The University contends the answer to each question is "no". Dr Gramotnev submits to the contrary.

[10] In relation to each question the parties are agreed that the determination of the question is not affected by any extraneous circumstance – there is no need for any further oral evidence beyond the documents placed before me.

[11] The approach that I am required to take with respect to the determination of the questions is not contentious. Black CJ in *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120 at [23] explained the relevant principles:

> "It is well established that if a reasonable person in the position of a promisee would conclude that a promisor intended to be contractually bound by a particular statement, then the promisor will be so bound. This objective theory of contract has been repeatedly affirmed as representing Australian law by the High Court. Thus, in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179, the Court said:
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> > 'It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.'"

The Letter of Appointment

[12] The starting point for any consideration is the plaintiff's letter of appointment dated 23 November 1999. The letter:

- confirms an offer of appointment;
- states that the appointment "will be on an ongoing, full time basis" pursuant to the provisions of the *Higher Education Contract of Employment Award* 1998;
- identifies the plaintiff's supervisor;
- identifies the effective date of appointment and sets out the salary, the salary being in accordance with the QUT Enterprise Bargaining Agreement (Academic Staff) 1997-1999;
- indicates that confirmation of the employment is subject to a probationary period;
- identifies that "as a condition of employment" the University would provide superannuation coverage and identifies the available schemes; and
- concludes with a reference to a method of acceptance of "this offer of employment": According to its terms the offer contained in the letter could be accepted by the signing and return of an enclosed copy. Upon acceptance "this letter will also become the instrument of appointment advising you of your conditions of employment for the purpose of clause 3 of the *Higher Education Contract of Employment Award* 1998."

[13] Significantly the letter also includes the following:

> **"Terms and conditions of appointment"**
>
> "The terms and conditions of your appointment are prescribed by the relevant enterprise bargaining agreements applicable to the University. In addition, the University has developed a Manual of Policies and Procedures (MOPP) and makes Statutes and Policies from time to time. Your employment conditions include the provisions of the MOPP and relevant University Statutes and Policies as current from time to time. Current copies of these can be viewed at the Human Resources Department, or are available to staff through QUT's home page on the World Wide Web (www.qut.edu.au). Should a variation to terms of your employment be necessary, such variation will be confirmed in writing by the Human Resources Director and shall not be binding until it is so confirmed. (This requirement for written advice shall not apply to variations arising from changes through enterprise bargaining, changes to the MOPP, or the making of new Statutes and Policies.)"

The Submissions

[14] While Dr Gramotnev's written submissions occupied 92 pages, his supplementary submissions 5 pages and his arguments took a full day to develop, in essence he submits the letter of appointment could not be clearer. "Terms and conditions of appointment" means precisely that - the express inclusion in his "employment conditions" of the terms of the enterprise bargaining agreement, the Manual of Policies and Procedures and University Statutes and Policies as current from time to time. The result he submits is that that agreement, the manual and those statutes and policies have contractual force.

[15] The University's response is that none of the agreement, the manual nor the statutes and policies current from time to time has any contractual force. While the manual, statutes and policies might inform an employee of various matters, such as the approach the University might take in particular situations covered by those documents, the terms were not contractually binding or in many instances even capable of being contractually binding.

[16] The distinction that the University draws is between terms of the employment contract for breach of which an employee can claim damages and terms and conditions that govern the employment relationship but are not contractual in nature and so do not permit a damages claim.

[17] That such a distinction might exist is clear. Awards (*Byrne & Frew v Australian Airlines*[1]), enterprises bargaining agreements (*Australian Industry Group v Fair Work Australia*[2]), certified agreements under the *Workplace Relations Act* 1996 (Cth) (*ACTEW Corp Ltd v Pangallo*[3]) and university statutes and policies (*Soliman v University of Technology, Sydney*[4]) have each been held to fall outside the contract of employment but to govern the employment relationship.

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1 (1995) 185 CLR 410
2 [2012] FCAFC 108
3 (2002) 127 FCR 1
4 [2008] FCA 1512

The Issues

[18] In relation to each document – whether it be the enterprise bargaining agreement, the Manual of Policies and Procedures or the University's Statutes and Policies – Dr Gramotnev argued that the document referred to was expressly incorporated into the contract by reference, or if not, that it, or the terms of those documents, should be implied as terms of the contract. The implication it was said could be by application of the presumed or imputed intention of the parties, by law or by custom.

[19] While I will consider each nominated document separately I am conscious of the need to construe the letter of appointment as a whole.

The Enterprise Bargaining Agreement

[20] Dr Gramotnev submits there is nothing in the reasoning in *Byrne*, the principal authority on which the University relies, to preclude the enterprise bargaining agreement ("EBA") being expressly incorporated into the contract. That is so. The question is whether that express incorporation has occurred here.

[21] There are three references to the EBA in the letter of appointment. The first appears under the heading "Classification and Remuneration" that makes express reference to the "QUT Enterprise Bargaining Agreement (Academic Staff) 1997-1999".[5]

[22] The second appears in the paragraph that I have quoted in full under the heading "Terms and Conditions of Appointment". The relevant sentence reads:

> "The terms and conditions of your appointment *are prescribed by* the relevant enterprise bargaining agreements applicable to the university." (my italics)

[23] The third again appears in that same paragraph in its statement of the manner of the alteration of the terms. The letter provides that no variation to the terms of employment would be binding until confirmed in writing by the Human Resources Director save that the requirement for written advice "shall not apply to variations arising from changes through enterprise bargaining ….".

[24] Dr Gramotnev makes, or could make, the following arguments:

(a) The letter of appointment is couched in the language of offer and acceptance and so suggestive of contract – on its face an objective reader would reasonably think that it should detail the terms of the contract in question;

(b) The heading "Terms and Conditions" and the reference to "employment conditions" and "terms of employment" is the language of contract and prima facie carry the connotation of the detailing of the terms of the contract;

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[5] The first in time of the EBAs provided to me in the papers came into force on 13 October 2000 (ie after the commencement of the contract) and by its terms replaced and rescinded the agreement referred to in the letter of appointment (see clause 5.1). It was in turn replaced by a later agreement with the same effect. They are the agreements allegedly breached, on the plaintiff's case. Presumably the parties are content that the 1997 EBA was to no different relevant effect to the two agreements provided.

(c) If the University wished to assert in a letter of appointment that the "terms and conditions" set out were not contractual in nature it was a very simple thing to say and it did not;

(d) The University is a well funded institution in receipt of the highest quality legal advice and, unlike Dr Gramotnev, presumably aware of the subtleties in this area of industrial law, yet it chose not to alert him to any claim that the "terms and conditions" identified were not contractual in nature; and

(e) No decided case that the University can identify has a factual context as strong as this one for the adoption by reference of the EBA as a part of the contract.

[25] In my view these arguments have considerable force. As Dr Gramotnev pointed out, in determining the objective meaning of the letter of appointment "it is a reasonable person or a reasonable business person – not a lawyer with the special knowledge of specific cases like *Soliman* an/or (*sic*) *AWU v BHP Iron Ore* – that should be perceived to evaluate and interpret the wording of the employment contract".[6] I agree with that submission. Why the University should leave the important question of whether contractual remedies were available to its staff to be determined by argument and close analysis when the issue could so very easily have been made plain is inexplicable.

[26] However whilst acknowledging the force of the arguments I have come to the opinion, albeit not with overwhelming confidence, that the better view is that the letter should not have the effect Dr Gramotnev argues for.

[27] First, Dr Gramotnev's primary submission was that the words themselves, objectively read and without more, required the incorporation of the terms of the EBA as terms of his contract of employment. In my view that submission must be rejected. That is so because the relevant words used – "*are prescribed by*…" – are insufficiently explicit to have the effect contended for.

[28] The same formula was used in *AWU v BHP Iron Ore*[7] and the enterprise agreement there was held not to have been incorporated into the employment contract. Findings of fact in another case are not of course determinative of the issue here. What the case illustrates is that an objective reading of the formula used is capable of bearing the interpretation the University seeks to be put on it. Context is all important but the context there was very similar to that here.

[29] Dr Gramotnev submits that the letter of appointment here does not contain the generalities present in *AWU v BHP Iron Ore*. There the document equivalent to the letter of appointment in this case was headed "Information for New Employees at Newman" and under the heading "Conditions of Employment" stated that those conditions "are *in general* ….. as prescribed in the ….. Award and …. and the [EBA]…." (my italics).

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6 See para 22 of Dr Gramotnev's primary written submission and cf. the comment of Jessup J in *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120 at [290]: "I cannot think that the hypothetical new employee reading the provision for the first time — and without an antenna keenly tuned to signals emitted by cases decided by the Federal Court…"

7 [2001] FCA 3 at [247]

[30] I accept the submission that the heading ("Information for New Employees at Newman") and the preliminary words ("in general") made the argument for express incorporation more tenuous in *AWU* than here. I note however that Kenny J in *AWU* did not refer, at least expressly, to either the heading of the document or the words "in general" in her analysis[8]. Her Honour did say that the words were construed "in context". Her Honour's view was that the words were "explanatory or descriptive of the instruments that are applicable to [the worker's] employment. What the letter of offer did was to inform him that the Award applied to him, and that his employment relationship with the company was to be governed by it and the agreements to which the letter referred." That meaning is at least open here.

[31] By way of contrast, an example of an express incorporation of an award in a contract of employment can be found in *Moama Bowling Club Ltd v Armstrong (No 1)*[9] where the Industrial Court of New South Wales so held by virtue of a clause in the contract that provided:

> "This Agreement shall be *deemed to incorporate* the whole of the provisions of the Award as the Award stands at the date of this Agreement together with all future variations of the Award and the provisions of any Award made in substitution thereof and the provisions of this Agreement shall be read and interpreted so as to be subject to the provisions of the Award or any Award made in substitution therefore."[10] (my italics)

[32] One can hardly have more express words than "deemed to incorporate" on a question of whether the parties intended to incorporate the provisions of a nominated document into a contract.

[33] The language used here is plainly well short of that in *Moama Bowling Club* and much closer to that in *AWU* and, given the issue to be resolved, not determinative.

[34] Secondly, in reading the letter the reasonable, objective person would consider whether the offeror – the University – would intend to make available to the prospective employee a range of contractual remedies over and above the remedies provided by the EBA or provided as a result of the statutory framework in which the EBA exists.

[35] One of the relevant surrounding circumstances known to the parties, and the most significant one, was that the EBA was an agreement certified under the *Workplace Relations Act* 1996 (Cth) ("WRA"). Once certified, the EBA binds both the employer and "all persons whose employment is, at any time when the Agreement is in operation, subject to the Agreement" (see s170M (1) WRA). The EBA prevails over an existing award to the extent of any inconsistency (s 170LY(1)(a)). The EBA could be varied only by the employer on approval of the Commission (s 170MD(2)) but only if "a valid majority of the employees whose employment is subject to the agreement at the time genuinely approve the variation" (s170MD(3)(a)). The EBA is enforceable under the WRA (s 178). Penalties can be recovered even by the affected employee (s 178(5A)(b)). An employee has a right to sue for wages provided for in the EBA (s 179). The EBA, in short, exists within a statutory framework and has statutory force.

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8 See at p 552 para 252

9 (1995) 64 IR 238

10 At pp 239-240

[36] The reasonable person would be presumed to be aware of the existence of those remedies. While there would be some benefit to the employee in introducing contractual damages for any breach, the possible benefits to the University are much more tenuous.

[37] It was presumably well understood by both parties that there would have been compromises on both sides to reach the agreement embodied in the EBA. The careful balancing of interests that the process requires suggests that the introduction of a new and additional set of remedies was not contemplated.

[38] If it is relevant, and I do not think it is, I observe that the WRA was replaced by the *Fair Work Act* 2009 (Cth) which came into force towards the end of the relevant employment period. But there has been no relevant alteration to the effect of such agreements: *Australian Industry Group v Fair Work Australia* where the Full Federal Court held: "The Agreement has statutory force. It is neither a contract, arrangement or understanding within the meaning of the [*Competition and Consumer Act* 2010 (Cth)], but a creature of statute."[11]

[39] Thirdly, identification of the purpose and object of the transaction between the parties does not assist Dr Gramotnev. It was, of course, to enable the parties to enter into an employment relationship on identified terms, enforceable by each. But it is not necessary that the EBA be incorporated into the employment contract to bring that about. The provisions of the WRA and the certification of the EBA had that effect.

[40] Thus there was no need for express incorporation in the contract of employment for the terms of the EBA to be both identifiable and enforceable. As Brennan CJ, Dawson and Toohey JJ observed in *Byrne*: "Neither from the point of view of the employer nor the employee is there any need to convert those statutory rights and obligations to contractual rights and obligations".[12]

[41] In *Byrne* the Court was concerned with an industrial award but the same reasoning has been consistently held to apply to certified agreements: *Australasian Meat Industry Employees' Union v Frugalis Pty Ltd* (1987) 14 FCR 535; *Wattyl Ltd and Others v Australian Liquor, Hospitality and Miscellaneous Workers Union* (1995) 134 ALR 203; *Construction, Forestry, Mining and Energy Union v Gordonstone Coal Management Pty Ltd* (1997) 149 ALR 296; and *ACTEW Corporation Ltd v Pangallo* [2002] FCAFC 325 [28]-[35] per Whitlam and Gyles JJ and particularly at [33] where after identifying that changes to the relevant statutes "reflect a movement to more consensual industrial arrangements" the reasons continued: "A certified agreement now may be rather more like an award was at the time of [*Byrne*] than it might be now. However, the trend towards consensual arrangements has not resulted in any fundamental change to the nature and effect of a certified agreement. The submission for the appellant that a certified agreement is solely a creature of statute having force by virtue of the statute remains correct. In a sense, the term 'agreement' is a misnomer because it will bind individuals whether or not they authorise it or are in favour of it. There is no scope for private law concepts of contract or equity in such circumstances."

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11 [2012] FCAFC 108 at [72]

12 (1995) 185 CLR 410 at 420, 421.

[42] Consistently with that reasoning, upon acceptance of employment the EBA bound Dr Gramotnev whether he approved and agreed with it or not. There was no discussion in the letter as to whether the prospective employee was satisfied with the bargain that the representatives had struck and a majority of his prospective colleagues had accepted. A contract struck as a result of individual bargaining would be a much more natural vehicle for the imposition of the usual contractual remedies.

[43] Fourthly, the textual considerations Dr Gramotnev argued for are at best neutral.

[44] Dr Gramotnev submits that the heading to the relevant paragraph – "Terms and conditions of appointment" - is indicative of an intention to incorporate the EBA. While I agree, the force of that submission is weakened considerably when one considers that the paragraph goes on to include within its ambit statutes and policies which, as will be seen, I consider to include matters that are merely exhortatory, aspirational, undefined or, in some instances, incapable of amounting to contractual promises.

[45] The two other references in the letter of appointment do not assist Dr Gramotnev's submission. The reference to the setting of the salary, if anything, is against his submission. That is so because the express statement of an amount of salary, in context, can amount to a promise to pay that salary. As the University contends the express reference is precisely the language that permits a finding of express incorporation. Absent such language, and it is absent in respect of every other clause of the EBA, the contention points the other way.

[46] The reference to the lack of any need for written notification of changes brought about by enterprise bargaining tends against express incorporation. Generally terms of a contract are negotiated between the parties and cannot be varied save through mutual agreement.

[47] As Dr Gramotnev rightly points out this last point is not conclusive – a power to unilaterally alter from time to time does not mean that the University did not intend to be bound, and him to be bound, by the terms of the document in whatever form it existed during the currency of his employment. And capricious and unfair alterations might be avoided by the adoption of an implied term as suggested by Mansfield J in *Riverwood International Australia Pty Ltd v McCormick*.[13] But Dr Gramotnev's case is not advanced by the lack of a need for notification of changes.

[48] In my view there is no express incorporation of the EBA into the employment contract.

Implication of a Term?

[49] Nor can there be any implication of a term that the EBA be given contractual force. Given the applicability of the reasoning in *Byrne* to certified agreements there is no scope for the implication of the terms of the EBA into the employment contract unless some different circumstance be identified. None was. Precisely the same considerations apply and the question was settled by the decision of the High Court.

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13 [2000] FCA 889; 177 ALR 193 at [152]

[50] As in *Byrne* no custom has been proved, there is no principle of law that requires the implication, and Dr Gramotnev cannot demonstrate the need for such implication to give business efficacy to the contract – one of the essential pre-requisites: see *Byrne* at 422 and 441 citing *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*.[14]

[51] On that latter point the principal difficulty is that the enterprise agreements in place during his employment included dispute resolution clauses. There was both an internal[15] and an external procedure.[16] Those procedures applied in the event of a dispute about interpretation or implementation of the agreements.

[52] As in *Byrne* the statutory framework within which the EBA was made explicitly provided for mechanisms through which the obligations imposed by the EBA, said by Dr Gramotnev to be relevant, could be enforced and breaches remedied.[17] The relevant clauses of the EBAs[18] are:

(i) The Queensland University of Technology Enterprise Bargaining Agreement (Academic Staff) 2000 – 2003:
   (a) Clause 7 – objective of agreement;
   (a) Clause 43 – equal employment opportunity issues; and
   (b) Clause 45 – code of conduct.

(ii) Queensland University of Technology Enterprise Bargaining Agreement (Academic Staff) 2005 – 2008:
   (a) Clause 7 – objectives of agreement;
   (b) Clause 17.3 – statement of aspiration that academic staff will have adequate and appropriate opportunities to perform their roles;
   (c) Clause 29.5 – statement that committees investigating unsatisfactory performance and misconduct allegations are to determine their own procedures which must be consistent with principles of natural justice and procedural fairness;
   (d) Clause 31 – performance planning and review of academic staff;
   (e) Clause 37.1 – statement that rights of academic freedom will be recognised and protected;
   (f) Clause 37.2 – statement that any alleged limitation of rights of academic freedom are to be dealt with under the grievance resolution procedures for workplace related grievances in the MOPP;
   (g) Clause 37.3 – statement that academic staff have the right to express unpopular or controversial views, but that this does not mean that they have a right to harass, vilify, defame of intimidate;
   (h) Clause 39 – code of conduct;
   (i) Clause 40 – workplace bullying and grievance procedures;
   (j) Clause 44.2.1 – statement that the Vice-Chancellor must take the steps set out in clause 44 prior to taking disciplinary action

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14 (1977) 180 CLR 266 at 283

15 See for example cl 13.1 – 13.2 of each agreement

16 See cl 13.4 of each agreement

17 (1995) 185 CLR 410 at 423 and see [36] above

18 See the defendant's summary at paras 28 and 29 (which I have adopted) of its written submission and the plaintiff's summary at paras 31 and 32 of his primary submission to much the same effect

against an academic staff member for misconduct or serious misconduct;

(k) Clause 44.2.2 – statement that the Vice-Chancellor will provide sufficient details of alleged misconduct or serious misconduct to allow an affected academic staff member to respond; and

(l) Clause 44.2.7 – statement of what the Vice-Chancellor may do if an allegation of misconduct or serious misconduct is wholly or partly denied or not responded to.

[53] Dr Gramotnev submitted that assuming there was no incorporation of the EBA by reference then implication of the terms of the EBA was necessary to give business efficacy to the contract. He exemplified his argument by reference to cl 44.2 of the EBA:

> "If the procedure for a disciplinary action and resulting termination of an employment contract (including the procedure set out in Section 44.2 of EBA2005) were not in the employment contract, the contract would have been incomplete and would have not been able to function self-consistently and efficaciously, because it would have been possible to implement a disciplinary action and/or terminate the employment contract through an outside interference breaching the express terms of the contract.
>
> For example, had the disciplinary and termination procedure set out in Section 44.2 of EBA2005 been not part of the Plaintiff's employment contract, the termination of his employment by the Defendant on the basis of this procedure (being outside the contract) would have caused a conflict/contradiction with the express contractual term that the Plaintiff's appointment must have been on an ongoing and full-time basis: '*Under the provisions of the Higher Education Contract of Employment Award 1998, your appointment will be on an ongoing, full-time basis*'"[19]

[54] With respect, it is not right to assert that absent incorporation of the EBA "the contract would have been incomplete and would have not been able to function self-consistently and efficaciously". Whether the mechanism that the parties provide for their disciplinary and termination procedure is within or without the contract seems immaterial. The important point is that provision is made. There is no consequent contradiction with the express reference in the letter of appointment to the *Higher Education Contract of Employment Award* 1998.

[55] McHugh and Gummow JJ best summarised the position that applies here, when they remarked in *Byrne*: "The contract of employment is not, from the viewpoint of the employee, rendered nugatory if the existing provisions thereof remain, as a matter of contract, to operate concurrently with the regime established by the award and deriving its authority from statute"[20] - substituting for present purposes "agreement" for "award".

The University Statutes

[56] Dr Gramotnev submitted[21], inter alia:

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19 See paras 39c and d of Dr Gramotnev's primary submission

20 (1995) 185 CLR 410 at 453

21 Para 63(f) – (h) of Dr Gramotnev's primary submission

a. The Appointment Letter expressly stated the MOPP and relevant University Statutes and Policies as documents whose provisions form conditions of Plaintiff's employment.

b. By definition, the term '*employment conditions*' includes the conditions that must be created by the Defendant for the efficacious operation of the employment contract. Thus, the Defendant contractually promised these conditions to the Plaintiff, and is contractually obliged to create and maintain these conditions for the Plaintiff. Failure to do so on behalf of the Defendant constitutes a breach of the employment contract.

c. In consequence, the parts of MOPP and relevant University Statutes and Policies, which were relevant to the Plaintiff's appointment and regulated the working relationships between the Plaintiff and the Defendant, constituted parts of the Plaintiff's employment contract either as:

i. express term(s), or

ii. terms incorporated by express reference, or

iii. inferred term(s) based on actual intention, or

iv. implied term(s) based on presumed intention.

[57] The relevant terms used in the letter of appointment are: "Your *employment conditions include* the provisions of the … relevant University Statutes … as current from time to time. Current copies of these can be viewed at the Human Resources Department, or are available to staff through QUT's home page on the World Wide Web (www.qut.edu.au)" (my italics).

[58] Again the language used ("employment conditions include") is supportive of Dr Gramotnev's submission but not determinative.

[59] Several circumstances tend against express incorporation. They include the fact that nominated documents are legislative instruments capable of alteration from time to time without any involvement of the applicant; the express reference to the lack of any need for written notification of changes to the statutes; and the failure to provide, or even identify with precision, the statutes in question.[22]

[60] It is difficult to accept that in these circumstances "a reasonable person in the position of the other party" could believe the University intended to represent any obligations in the undisclosed statutes as contractually binding.

[61] The University submits that support for the contention they press for can be found in the decision of Jagot J in *Soliman v University of Technology, Sydney*[23] where his Honour did not accept the statutes in consideration there were incorporated in the contract. There the statutes in question were expressly identified and if anything the language of the inclusion stronger than here – there the relevant term in the employment contract read: "The appointment will be *subject to and governed by* the relevant provisions (as in force from time to time)" (my italics).

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22 Cf. *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120 at [127]; [283]; [293]

23 [2008] FCA 1512

[62] Dr Gramotnev points out that there were considerations present in *Soliman* which are not present here. That is true but not relevantly so. His submissions have some force in relation to the approach taken to the incorporation of the enterprise agreement in *Soliman* but not on this point.

[63] Dr Gramotnev submitted that the statutes referred to in *Soliman* were "documents [that] were not directly relevant to the applicant's employment" and so supported the view that they were referred to merely by way of "additional information". With respect, it was not demonstrated that the statutes in *Soliman* were any more or less "directly relevant" to the employment there than here.

[64] I stress that the factual determination in one case, such as *Soliman*, can only be of limited utility in this case. But the relevant circumstances are much the same and do provide the support the University claims.

[65] Again my conclusion is that there was no express incorporation and there is no necessity requiring implication to give business efficacy to the contract.

The Manual of Policies and Procedures

[66] Dr Gramotnev's primary submissions are as set out above in [56].

[67] Some of the considerations relevant to the University statutes are relevant here. Again the language used (again "employment conditions include") is supportive but not determinative. The fact that the Manual is available on the internet is also supportive. Dr Gramotnev argues that its ready availability combined with the wording of the letter is sufficiently unambiguous not to require any further examination but, taking the terms of the document as a whole, I cannot agree. These submissions are repeated by Dr Gramotnev in relation to virtually every policy and my response is the same.

[68] The letter provides that the Manual of Policies and Procedures ("the Manual") is capable of alteration from time to time without any involvement of the applicant; there is an express reference to the lack of any need for written notification of changes to the Manual; and there is a failure to provide any particular policies but, unlike the Statutes, the Manual is identified. That latter circumstance makes for a stronger case for inclusion of the Manual as incorporated in the contract but these circumstances generally again tend against express incorporation. But they are not determinative of the issue.

[69] The Manual incorporates policies covering a diverse range of matters. The University submitted, and Dr Gramotnev denied, that the authorities suggest that unless the language used in the letter of appointment is determinative for or against incorporation, it is necessary to consider each policy in turn to determine whether the parties should be taken to have intended to incorporate the policy in the contract – a broad brush approach is wrong.

[70] In support of this submission the University relied on the approach taken in *Goldman Sachs*[24] to the "Working With Us" document in issue there. Jessup J said in that case that there was "little to be gained …. by further wrestling with the

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[24] [2007] FCAFC 120

question whether "Working With Us" should be regarded either as wholly contractual or as wholly non-contractual" because:

> "… the terms of "Working With Us" are heterogeneous - both in content and in style - to such an extent as to render any attempt to classify them either as wholly contractual or as wholly non-contractual highly artificial. … The appropriate course, in my view, is to consider each of the particular obligations [allegedly] … imposed upon the appellant by "Working With Us" …"[25]

[71] Dr Gramotnev urged that the "Working With Us" document was presented differently to the employee in *Goldman Sachs* than the Manual was to him and was quite distinct from the Manual so justifying a different approach. His submissions were[26]:

(a) The WWU in *Goldman Sachs* did not represent a document dedicated to accumulating and coherently presenting the essential workplace policies and procedures (rules of engagement between the employer and employees), whereas the QUT MOPP and relevant University Statutes and Policies were exactly this kind of documents. (*sic*)

(b) Unlike the WWU in *Goldman Sachs*, the sole or at least the major dominating purpose of the MOPP and relevant University Statutes and Policies was to instruct in writing the staff members about the existing policies, statutes and procedures at the Defendant – rules of engagement between the Defendant and its staff members – and the mutual contractual obligations (including, if relevant, consequences for non-compliance) of the staff members and the Defendant in relation to these policies, statutes and procedures.

(c) Unlike the WWU in *Goldman Sachs*, the MOPP and relevant University Statutes and Policies were expressly stated in the Plaintiff's Appointment Letter as the documents including employment conditions of the Plaintiff.

[72] These submissions are to an extent simply wrong and, in any case, unpersuasive. The "WWU" was a document "dedicated to accumulating and coherently presenting the essential workplace policies and procedures" of the employer organisation. A significant purpose of it "was to instruct in writing the staff members about the existing policies … and procedures" of the employer. As to the point in (c), if anything, the manner in which the WWU was presented to the employee in *Goldman Sachs* was significantly more compelling than here - the document was delivered with the letter of appointment and parts of it collected and counter signed by the employee.

[73] Dr Gramotnev argues that the Manual states "in unambiguously contractual language – the contractual responsibility of all the Defendant's staff to comply with the institutional policies, statutes and rules" and quotes from the Manual:

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25 At [292]

26 Para 70 (d) – (f) of Dr Gramotnev's primary submission

> "The authority of QUT statutes and rules (see MOPP Appendix 1(b) and Appendix 1(c)) is derived from the QUT Act, and consequently, University officers *are expected to comply* with any *applicable requirements*.
>
> Officers must also comply with the institutional policies published in the Manual of Policies and Procedures which derive their authority from decisions or delegations of QUT's governing body, Council"[27] (Dr Gramotnev's underlining, my italics added).

[74] Dr Gramotnev then submits that "[t]his statement alone leaves no doubts (*sic*) in any reasonable person's mind that the Defendant intended to include the MOPP as a whole document into the employment contracts of all staff (including the Plaintiff's employment contract)".[28] Again this submission is repeated in relation to nearly every policy and again I deal with it here.

[75] First, I note that the quote is from a 2005 version of the Manual. The previous policy was very different in its wording. Had Dr Gramotnev gone to the Manual in 2003[29] he would have found in the section on which he now places great emphasis – Section 8.1.4 – a statement of exhortation under the heading "Diligence": "This obligation requires the University and its staff to seek to achieve high standards of public education and administration and carry out their duties in a professional and conscientious manner." There is more along the same lines. If the words relied on by Dr Gramotnev have the connotation he asserts then their absence at the time of contract tends to strengthen the University's point. Certainly the words in place in 2003 are not promissory but aspirational, impose no sanction or possibility of sanction for non compliance, and would never be taken by a reasonable and objective reader as contractual.

[76] Secondly, with respect, the submission tends to overstate the natural meaning of the words "expected to comply" by elevating them to contractually binding effect and overlooks the qualification on the requirements to which the expectation applies – "any applicable requirements". What may or may not be "applicable" is at least part of the question under consideration here. The command that Dr Gramotnev emphasises ("must also comply") needs to be read in the light of what has gone immediately before.

[77] The policies covered by the arguments in this case – they are the only aspects of the Manual that I have – include promotion, procedures, codes of conduct, Mission, "vision, goals and organisational values", equal opportunity, compliance, disclosure of interests, governance guidelines, grievance procedures, whistleblower protection, performance planning, email policy, health and safety policy and bullying. Their diverse nature and manifestly differing purposes require that they be considered one by one to determine the essential question – would a reasonable employee reading

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27 Dr Gramotnev provides this source: "QUT MOPP Policy B/8.1 'Code of Conduct', Section B/8.1.4 'Respect for the law and system of government'". The quote is taken from the policy in place from February 2005.

28 Para 73-74 of Dr Gramotnev's primary submission

29 The earliest version I have is dated 3 September 2003. I do not know whether that version reflects the version in place in late 1999 when Dr Gramotnev was advised by his letter of appointment of the existence of the Manual. Relevantly, there is no evidence that the 1999 version contained the words Dr Gramotnev relies on, words which are not there in 2003.

these policies objectively and in context consider that they contain contractually binding obligations?

[78] The University submitted that "[o]nly promissory obligations are capable of being contractually binding. In other words, 'only those [statements] which impose obligations or confer entitlement [can] form part of the contract'"[30] but that "not all promissory obligations give rise to contractual entitlements".[31] In approaching the question I earlier identified as the essential one I accept that submission. This distinction did not inform Dr Gramotnev's approach. Thus many of the policies that Dr Gramotnev puts in issue contain statements that are capable of being promissory in effect, as he contends, but the crucial issue is whether because of subject matter, context or effect they give rise to contractual entitlements.

[79] As the University submits there are several comments in the reasons in *Goldman Sachs* which are apposite to any consideration of the Manual (with the University's citations):

(a) Where the language used in the policy denotes an expectation or aspiration that something will or will not occur, absent compelling words, it is unlikely to be a contractual promise that something will or will not occur;[32]

(b) Words which describe a policy's "aims" or "guiding principles" are more likely to be descriptive than promissory.[33]

(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;[34]

(d) Where the document recognises that regrettable conduct might occur from time to time and accordingly provides a means through which such behaviour can be addressed there is less likely to be found a contractual promise. [35] This can be contrasted with a provision which may be read as an implicit promise that certain conduct would not occur under any circumstances. In each case it is the hypothetical new employee reading a policy fairly and objectively.

[80] I observe that in relation to many of the policies the arguments on each side did not rise above mere assertion as to the outcome. That was not helpful.

[81] The University argued on a number of occasions that it was not in a position to control the activities of its staff. As Dr Gramotnev argues that submission is not relevant where what is in issue is whether the University had a contractual obligation to do or refrain from doing some activity. I agree. The University can only act through its staff members and if it has promised to do something or refrain from doing something then it has accepted responsibility for the acts or omissions of staff. The submission is only relevant to the extent that an inability to control would inform the reasonable prospective employee when reading the policy in question.

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30 Citing *Goldman Sachs* [2007] FCAFC 120 at [133] per Marshall J; [310] per Jessup J

31 See the discussion by Jessup J in *Goldman Sachs* (supra) at [309] -[311]

32 [2007] FCAFC 120 at [37].

33 [2007] FCAFC 120 at [38].

34 [2007] FCAFC 120 at [298].

35 [2007] FCAFC 120 at [301].

[82] Before turning to the individual policies I note that the University submits that all the policies are essentially procedural, informative or aspirational and incapable of amounting in any sensible way to contractual terms. As to that, all depends on the wording and context but, generally speaking, the fact the statements in issue appear in a manual of *policies* is relevant. "Policies" are not by their very nature statements of contractual intent. They are statements of principle or of proposed courses of action.

[83] Finally I note that Dr Gramotnev argues at various points that "the consideration of 'entitlement to contractual damages' is beyond the terms of reference for the separate trial" or that regard should not be had to his pleading of the term allegedly breached. I cannot agree. The separate questions are not to be determined in a vacuum. It is not simply whether a policy can possibly be contractual in nature that is in issue but whether the policy gives rise to the precise contractual obligation on which Dr Gramotnev relies to advance his claim for damages. If it might be possible to construe a policy as imposing an obligation but an obligation different in kind to the one he advances or breach of which cannot sound in damages then that is irrelevant to the proceedings and the conclusion must be that the policy does not result in a relevant contractual obligation.

[84] I turn now to the policies in issue. My general approach has been to consider whether or not the language used in the policy under consideration involves the use of words having promissory effect. Absent that I consider then whether the claimed obligation, if I can identify it, meets the test for the implication of a term. I could not see that there was any evidence of custom on which I could act, nor that any claimed term was implied by operation of law. *Byrne*[36] is authority for the proposition that, in order to imply the term into an employment contract on the basis of the parties' presumed or imputed intention, Dr Gramotnev must satisfy each of the following factors set down in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[37]:

(a) the implication must be reasonable and equitable;
(b) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
(c) it must be so obvious that *'it goes without saying'*;
(d) it must be capable of clear expression; and
(e) it must not contradict any express term of the contract.

MOPP B/10.1 'Promotions for Academic Staff' (Promotions Policy)

[85] Dr Gramotnev pleads breaches of the Promotion Policy B/10.1 and specifically:

a. section B/10.1.6 'Faculty Promotion Committee' from the MOPP dated 2 June 2004; and

b. sections B/10.1.10 and B/10.1.7 both entitled 'Promotion process' from the MOPP dated 2 June 2004 and MOPP dated 23 March 2006, respectively; and

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36 (1995) 185 CLR 410 at 422 and 441.
37 (1977) 180 CLR 266 at 283.

c. sections B/10.1.14(iii) and B/10.1.11(iii) both entitled 'Promotion Committee procedures' from the MOPP dated 2 June 2004 and MOPP dated 23 March 2006, respectively; and

d. section B/10.1.14(vi) 'Appeals' from the MOPP dated 2 June 2004.

[86] The question is whether these provisions of the Promotion Policy are incorporated into Dr Gramotnev's contract of employment.

[87] Section B/10.1.6 details primarily the purpose and composition of the promotions committee. Sections B/10.1.10 (2 June 2004 version) and B/10.1.7 (23 March 2006 version) set out the process for making an application for promotion and how applications are scored. Sections B/10.1.14(iii) (2 June 2004 version) and B/10.1.11(iii) (23 March 2006 version) set out the procedures for the Promotions Committee. The "Appeals" section B/10.1.14(vi) outlines the process by which an appeal about a promotion application is lodged and then states that an Appeals Committee will review the process that was followed in the promotion application process. The parties have not suggested that any variation in wording between the various versions of the policy is relevant one way or the other.

[88] The University submits that these provisions are not capable of creating contractual obligations as:

(a) there is nothing in the Promotions Policy which can be construed as promissory to any employee;
(b) No obligations are imposed on the University; and
(c) employees are not provided with any sort of entitlement which would sound in damages.

[89] Dr Gramotnev argues[38]:

(a) The policy promised and enabled fair, transparent and equitable procedures for the adequate recognition of achievements, and progression, of academic careers of the University staff – without the policy the employee has no guarantee of fairness of process;

(b) A reasonable person would have expected the Defendant to provide its diligent staff members with proper recognition and promotion;

(c) Without that recognition and opportunity for promotion the employees would not enjoy the benefits of their contracts;

(d) An object of any contract is "*at least potential mutual benefit by due performance*"[39] - absent the policy the employment contract would lack essential procedures for career development and so not be efficacious in the academic context in fostering that mutual benefit.

[90] Dr Gramotnev's submissions that each side to the contract would expect there to be a fair, equitable and transparent promotions procedure and that such a procedure

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38 Paraphrasing paras 86-88 of Dr Gramotnev's primary submission somewhat

39 *Soliman v University of Technology, Sydney* (2008) FCA 1512 at [64]; *McCormick v Riverwood International (Australia) Pty Ltd* (1999) 167 ALR 689; [1999] FCA 1640 at [70] to [78]; *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193; [2000] FCA 889

would be to the mutual benefit of both parties can be accepted. The relevant point that can be made is that incorporation of the policy into the contract would not be illogical or contrary to any policy imperative. But that is only the starting point. The issue is whether the language used, in context, suggests a contractual promise that the process is to be implemented or, if the language is ambiguous, there is other good reason shown to tip the scales in favour of a contractual obligation.

[91] I have reached the view above that the language of the letter of appointment is sufficiently supportive, but not conclusive, of the policies in the Manual having contractual force so as to justify the study of the policy in question. The policy itself here does not advance the argument in terms of the language used. Parts of the policy, for example the policy statement in cl 10.1.1, seem entirely aspirational and the balance largely descriptive.

[92] As the University contends the policy does not promise that any particular staff member will be promoted, only that a procedure is in place for that to be considered. It is clear that the whole process results in a recommendation, and only a recommendation, to the Vice Chancellor: see cl. 10.1.4 and the "terms of reference" in cl 10.1.6. There is thus no promise to an employee of a favourable outcome and no obligation on the University to provide one.

[93] The real issue is how a member of staff can enforce the procedures if he or she feels the procedure was not followed. Dr Gramotnev's answer is that the remedy must be contractual. If there were no procedures laid down for resolution of any dispute then Dr Gramotnev's point would have great force as the laying down of the elaborate procedure would be mere hypocrisy.

[94] But it is apparent that the parties have expressly provided for a mechanism for resolving disputes. It is evident that the EBA and the Manual were intended to be read together. Clause 10.1.1 of the promotions policy under discussion here provides inter alia: "Academic staff are guided and assisted in career development and opportunities for promotion through the University's Performance Planning and Review for Academic Staff (PPR-AS)". Reference is then made to "see B9.2", presumably a reference to a part of the Manual. Clause 10.1.9 of the policy discusses the role of the "PPR-AS Supervisor".

[95] Clause 38 (October 2000) and cl. 31 (November 2005) of the Enterprise Bargaining Agreements deal with "Performance Planning and Review for Academic Staff" – the same term used in the policy under consideration. Clause 31 provides that "the management of performance will be in accordance with University's policy on Performance Planning and Review for Academic Staff (PPR-AS)" and then outlines nine principles of that policy. Clause 38 in the earlier EBA provided to similar effect - that the parties were committed to "the management of performance in accordance with University's policy on Performance Planning and Review for Academic Staff". The final principle in each case deals with the situation where there is disagreement and provides for referral to the Head of School or Dean of Faculty, and then makes reference to the Manual and its dispute resolution procedures.

[96] This cross referencing seems to me to be of some significance. Where the parties have agreed expressly on the procedures to be followed if there is a dispute about an internal matter such as the procedure for promotions it is difficult to accept that a

reasonable objective reading of the policy would lead to a view that the parties intended there to be an adding of an extra layer of contractual remedies, remedies which largely, if not entirely, go one way – to the employee. A breach of the protocol in the policy was expressly intended to be dealt with internally and, if not dealt with in the manner provided for, could result in the application of the remedies consequent upon a breach of the EBA.

[97] Consideration of the "Appeal" process provided for in the policy adds to the force of that analysis. A staff member can only appeal on the grounds of process and the decision is left to an Appeals Committee. A successful appeal results in a recommendation to the Chair of the relevant promotion committee to address the breach process. There is no further promise. As the University submits the only obligation seems to be that the appellant will be advised of the outcome of the appeal process.

[98] Neither the language nor purpose of the policy requires the incorporation of the policy in the contract, nor does consideration of the respective interests of the parties suggest such a result was intended. The contract is perfectly effective without construing the policy as forming part of it.

MOPP B/10.2 'Faculty Promotion Committee'

[99] This policy defines the composition of faculty promotion committees albeit in fairly general terms. It details their terms of reference, their accountability, tenure and frequency of meetings.

[100] Dr Gramotnev contends the policy has contractual force. Many of the arguments dealt with earlier are repeated here. In addition he submits:

(a) This policy is essential for the efficacious operation of staff employment contracts. Absent the policy there would be no guarantee of "fair promotion, career development, increased pay, and recognition of the due performance during operation of the contract";

(b) The promised composition was an important promise to create fairly a group of people who would be responsible for, on a "fair and unbiased foundation free from unmanaged conflicts of interest", access to fair promotion;

(c) Breach of the promise to form the Faculty of Science Promotion Committee in accordance with the established and publicly declared procedures opens the window for a sequential breach of the Defendant's promise of fair promotion in accordance with the purpose and major principles of his employment contract;

[101] Essentially the same arguments apply as previously and the argument founders on the same point as previously. It is true, as Dr Garmotenv contends, that this policy and that set out in B/10.1 "Promotions for Academic Staff" are interlinked but that has the effect that so are the remedies for breach.

MOPP B/8.1 Code of Conduct

[102] Dr Gramotnev submits that the "Code of Conduct" set out in section B/8.1 of the Manual forms part of his contract of employment.

[103] The 2003 version of the code commences with the heading "Guidelines for Ethical Conduct". It then sets out aspirational values:

> "Each member of the university has a responsibility to ensure the values we encourage and the reputation of the University as influenced by these values are of the very highest standard. The University undertakes to create an ethos and environment in which ethical conduct is expected, encouraged and supported. This code aims to support staff and officers of the University in the pursuit of this goal and assist them to identify and resolve ethical issue which arise in the performance of their duties."[40]

[104] A little further on the code reads "While the code's purpose is educative, it also regulates staff behaviour and staff whose conduct falls below the standards outlined in the code will be counselled in accordance with the appropriate procedures for misconduct or serious misconduct, the grievance resolution processes or, where appropriate, the University's performance management process." There then follows a reference to the EBA for performance management and misconduct processes, a reference to various policies including the relevant policy for grievance resolution processes.

[105] Clause 8.1.1 is headed "Respect for the law and system of government" and there is then a reference to an assumption that the system is based "on the principles of responsible parliamentary government and the rule of law". There is a requirement that the University and its staff acknowledge the laws of the State and Commonwealth.

[106] Clause 8.1.2 is headed "Respect for Persons." There follows admonitions to treat other members of the University community fairly, to treat all persons justly, to avoid patronage or favouritism, to deal with differing opinions by rational debate rather than "vilification, coercion, bullying or any form of intimidatory behaviour", and be "responsive, courteous and prompt" with requests.

[107] Clause 8.1.3 is headed "Integrity". Parts of it are expressly pleaded by Dr Gramotnev as having been breached and thereby giving rise to a contractual remedy in damages. Those parts include:

> "A conflict of interests exists when either:
> - relevant facts are such that the staff member's private interests are within the scope and ambit of the duties of the staff member; or
> - a reasonable person, in possession of the relevant facts, would conclude that the staff member's private interests are likely to interfere with the proper performance of their official duties.
>
> ...
>
> a) Many staff may be in a position of power over other staff and students and should use their official powers or position properly and honestly.
>
> ...

[40] Volume 1 Tab 11 p 220 of the Bundle of Material for Separate Trial

> Staff should observe procedural fairness ("natural justice") in all decision making.
>
> ...
>
> In dealing with staff and students actual or perceived bias should be avoided in all transactions"

[108] Clause 8.1.4 is headed "Diligence", clause 8.1.5 "Economy and Efficiency", and clause 8.1.6 "Moral Rights". They contain further exhortations within the areas the headings suggest.

[109] Each of these statements, particularly when read in context, plainly set out the expectations that the University has for its staff. Indeed the very title "Code of Conduct" suggests that.[41]

[110] As the University submits there are several comments in the reasons in *Goldman Sachs* which are apposite here:

(a) Where the language used in the policy denotes an expectation or aspiration that something will or will not occur, absent compelling words, it is unlikely to be a contractual promise that something will or will not occur;[42]

(b) Words which describe a policy's "aims" or "guiding principles" are more likely to be descriptive than promissory.[43]

(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;[44]

(d) Would a new employee have a reasonable basis for reading into a policy an implicit promise that certain conduct would not occur under any circumstances or is it more likely that, when read fairly and objectively, the document recognises that regrettable conduct might occur from time to time and accordingly provides a means through which such behaviour can be addressed.[45] The latter is less likely to give rise to a contractual promise.

[111] In my view there would need to be very compelling words used to impose on an employer of many hundreds, if not thousands, of people a liability in damages to an individual employee under their employment contract for the possible misbehaviour of any one of their employees particularly in areas of propriety, honesty and diligence. I cannot accept that there are the necessary words here.

[112] In my view the University's submission which follows succinctly sets out the true effect of these various sections:

> "Though the University has certain expectations of its staff, no reasonable person would read the above provisions of the Code of Conduct as a

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41 Cf. *Goldman Sachs* at [298] per Jessup J

42 [2007] FCAFC 120 at [37].

43 [2007] FCAFC 120 at [38].

44 [2007] FCAFC 120 at [298].

45 [2007] FCAFC 120 at [301].

promise that breaches of the Code would not occur or that, if they did, aggrieved employees would have recourse in contract to sue for damages. So much is clear from the wording of the Code which states that staff are *'expected to'* and *'should'* behave in a certain way. This is unsurprising as the University, like any employer, cannot guarantee that its employees will or will not act in a particular way.

The fact that the University cannot guarantee that its employees will or will not act in a particular way is highlighted by reference to comments in the Code of Conduct that where staff behave in ways which fall below the standard outlined in the Code, they will be counselled in accordance with the processes outlined in the MOPP and the EBA. There is no contractual promise that University employees will not breach the Code of Conduct in any respect. It anticipates that breaches may happen and, if they do, that counselling of the party alleged to have breached the Code (not an entitlement to contractual damages to a third party) will follow."[46]

[113] Dr Gramotnev submits that "the code of conduct uses unambiguously contractual and promissory language to clearly identify itself as part of an employment contact of any staff member" and he then proffers the following as "characteristic examples" (with Dr Gramotnev's underlining and citations)[47]:

a. "The QUT Code of Conduct applies to members of the University community …

Additionally, individuals who are associated with QUT related entities or who have been granted access to QUT property, services or infrastructure are expected to comply with any applicable provisions of this code, as are consultants and independent contractors undertaking services for QUT.

Where the provisions of this code apply to all members of the University community, the general term "officer" is used. Officers are bound by this code …";[48]

b. "The code of conduct regulates the behaviour of University officers, and forms part of each staff member's conditions of employment.

A staff member whose conduct falls below the standards outlined in the code will be dealt with in accordance with relevant University procedures. An alleged breach of this code by a staff member may be dealt with under the processes outlined … for managing misconduct or serious misconduct (see MOPP B/8.5 and the relevant enterprise bargaining agreement clause, – QUT Enterprise Bargaining Agreement (Academic Staff), clause 44 …)";[49]

c. "The authority of QUT statutes and rules … is derived from the QUT Act, and consequently, University officers are expected to comply with any applicable requirements.

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46 Para 68 -69 of the University's written submission

47 Para 105 of Dr Gramotnev's primary submission

48 QUT MOPP Policy B/8.1 'Code of Conduct', Section B/8.1.1 'Application'

49 QUT MOPP Policy B/8.1 'Code of Conduct', Section B/8.1.3 'Consequences for non-compliance with this code'

Officers must also comply with the institutional policies published in the Manual of Policies and Procedures which derive their authority from decisions or delegations of QUT's governing body, Council."[50]

d. "… officers are expected to treat others fairly, honestly and responsively, and with proper regard for their rights and obligations."[51]

e. "University officers must treat all persons with whom they come in contact equitably and fairly. …

University officers must not engage in behaviours which may be unwelcome or which may be distressing, offensive or humiliating to others, as such behaviour may amount to harassment.

The University's equity policies (MOPP A/8) provide a framework of expectations for equitable treatment of others."[52]

f. "University staff or committee members should observe procedural fairness ("natural justice") in their decision-making by:

- giving an affected individual (whether a staff member or a student) the opportunity to understand the "case to be met" if a decision may be made which will adversely affect their interests, and to respond to it before a decision is made;
- making decisions which are unbiased or uninfluenced by patronage or favouritism (see also section B/8.1.6 on conflicts of interest);
- making decisions which take into account relevant considerations, not irrelevant ones."[53]

g. "University officers should deal with differing opinion by rational debate, rather than by vilification, coercion, bullying or any form of intimidatory, offensive or humiliating behaviour.

University officers should give fair consideration to the views and contributions of others irrespective of their status or position within the University.

Grievances or disputes … must not result in victimisation or intimidation."[54]

h. "A staff member with supervisory responsibilities has an important role in creating a fair and just working environment, and supervisors have a particular onus to maintain the standards of respect for others. Supervisors need to:

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50 QUT MOPP Policy B/8.1 'Code of Conduct', Section B/8.1.4 'Respect for the law and system of government', Sub-section (b) 'Complying with QUT statutes, rules, policies and decisions'

51 QUT MOPP Policy B/8.1 'Code of Conduct', Section B/8.1.5 'Respect for person'

52 QUT MOPP Policy B/8.1 'Code of Conduct', Section B/8.1.5 'Respect for person', Sub-section (b) 'Avoiding discriminatory or harassing treatment of others'

53 QUT MOPP Policy B/8.1 'Code of Conduct', Section B/8.1.5 'Respect for person', Sub-section (d) 'Making fair decisions'

54 QUT MOPP Policy B/8.1 'Code of Conduct', Section B/8.1.5 'Respect for person', Sub-section (e) 'Respecting the opinions of others'

- act equitably and consistently in their dealings with all of their subordinate staff;

…

- avoid interactions which may reasonably be perceived as bullying of subordinate staff;
- ensure workplace health and safety obligations are met, so that their staff work in a safe environment;
- provide equitable access to appropriate development opportunities;

…"[55]

i. "It is important that staff and the University are able to recognise, declare and manage conflicts of interest and situations where there is a potential or perceived conflict of interest. …

University officers must ensure that there is no actual or perceived conflict between their personal interests and their University duties or responsibilities. The expectation is that officers must recognise, declare and manage conflicts of interest. …

It is important that conflict of interest situations, once recognised, are declared and resolved in a way which promotes propriety and integrity. …

Merely declaring the conflict situation without taking further steps to resolve the situation will almost always be insufficient. It may be necessary to remove the staff member from any involvement in the matter giving rise to the conflict situation."[56]

j. "A position of power must not be abused and staff must use their official position properly and honestly."[57]

k. "All staff have an obligation to follow safe work practices, to avoid actions which may harm themselves or others and to report hazards in the work environment (for greater detail on health and safety requirements, see the University's health and safety policies at MOPP A/9). In addition, managers and supervisors are responsible, within the limits of their authority, for ensuring that activities within their area are undertaken with the exercise of proper diligence for the health and safety of staff, students and others."[58]

[114] Contrary to Dr Gramotnev's submission the language throughout is not "unambiguously contractual". Dr Gramotnev rightly stresses the two passages that he has underlined – in paragraphs (b) and (c) above. The express statement that the

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55 QUT MOPP Policy B/8.1 'Code of Conduct', Section B/8.1.5 'Respect for person', Sub-section (f) 'Supervisory behaviour'

56 QUT MOPP Policy B/8.1 'Code of Conduct', Section B/8.1.6 'Integrity', Sub-section (a) 'Identifying and managing conflicts of interest'

57 QUT MOPP Policy B/8.1 'Code of Conduct', Section B/8.1.6 'Integrity', Sub-section (b) 'Avoiding improper use of position'

58 QUT MOPP Policy B/8.1 'Code of Conduct', Section B/8.1.7 'Diligence', Sub-section (c) 'Creating a safe working environment'

code of conduct "forms part of each staff member's conditions of employment", which is the stronger statement of the two, is quite capable of resulting in a contractual commitment but the difficulty is the context.

[115] The statements immediately before and after suggest strongly that the code is not a contractually enforceable one. The statement immediately preceding is that "University officers are *expected to comply* with any applicable requirements…". That is very far from a promise to other employees that officers will comply. And the statement of remedies that the University contemplates will be available that immediately follows is also against a contractual commitment:

> "A staff member whose conduct falls below the standards outlined in the code will be dealt with in accordance with relevant University procedures. An alleged breach of this code by a staff member may be dealt with under the processes outlined … for managing misconduct or serious misconduct (see MOPP B/8.5 and the relevant enterprise bargaining agreement clause, – QUT Enterprise Bargaining Agreement (Academic Staff), clause 44 …)".

[116] There is no suggestion here of any contractual remedies being available. In context the evident meaning is to the contrary. The internal procedures and the EBA are engaged.

[117] When it is recognised that the debate is whether, on the one hand, the code governs the employment relationship or whether, on the other, it forms a term of the employment contract the remedies allowed for support the former characterisation. Resolution of that question is not assisted by pointing out, as Dr Gramotnev does, that there are words of compulsion used - '*must not*', '*need to*', '*have an obligation to follow*', '*must ensure*', '*must recognise, declare and manage*', '*must treat*', '*must not engage*'. Their use is consistent with either argument.

[118] Nowhere in the code is there a promise by the University to its employees that no employee will breach this code, or that if any employee does breach the code another employee will obtain a right in damages against the University, nor is there a statement by the University that it will take any step to enforce the code other than by the application of the stated procedures. Nor is this commitment toothless. The EBA, as I have discussed earlier, provides for its own enforcement mechanisms.

[119] Reference to other decided cases on different facts is not really of much assistance. None are so similar as to command the same result. As the University points out the lack of a promissory commitment here can be contrasted with the situation in *Goldman Sachs*, where the employer was held to have bound itself contractually to each employee when it used the phrase *"JB Were will take every practicable step to provide and maintain a safe and healthy work environment for all people"*.[59] Obviously there the introduction of the *practicability* of remedial measures significantly moderates the obligation and provides some standard against which performance can be judged. Here there is no promise and, if there was, there is no moderating standard – on Dr Gramotnev's argument absolute liability is introduced for any breach of the code, by any employee, any time.

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[59] [2007] FCAFC 120 at [24] per Black CJ.

[120] The approach taken in *Transport Workers' Union of Australia v K&S Freighters Pty Ltd* [60] by Cowdroy J of the Federal Court is called in aid by Dr Gramotnev. There his Honour found that the following words appearing in clause 4 of the handbook provided to the employee:

> *"The following policies and procedures are a condition of employment for all employees and adherence to them <u>is expected</u>"*[61] (underlining added by Dr Gramotnev)

resulted in a contract binding the employee to a stated "Vehicle Policy". He argued that the words here are as compelling.

[121] What the submission overlooks is that what followed in sub clause 4.20 was held not to be contractual because of context, wording and effect. So here, context, wording and effect are all important.

[122] The question in issue in *K&S Freighters* was whether the employer could summarily terminate an employee's employment contract for breach of a claimed clause of the contract. While in one sense the question here is the same – does a stipulation in a document couched in certain words have contractual effect – the promise in issue is very different. There the question was whether the employee was contractually obliged to abide the vehicle policy and, if so, the consequences of breaching it. Here the question is not whether Dr Gramotnev agreed to abide the policy but whether the University promised Dr Gramotnev that no employee would breach their policy and that if they did could he claim damages. Words that might be held to incorporate one form of promise are not necessarily efficacious in importing a very different promise.

[123] Dr Gramotnev's submission acknowledges[62] that "[t]he Code of Conduct and other University policies and statutes exist not to guarantee that no staff member will ever behave in a way contrary to the Code – the Code of Conduct and other University policies, statutes, procedures and rules of engagement exist as a tool for prompt and adequate rectification of any occasional substandard conduct, behaviour, or procedural breaches." That is obviously correct. But Dr Gramotnev then goes one step further and, with respect, draws a distinction the practical effect of which eludes me when he argues[63]:

> "This is a contractual obligation of the Defendant as an employer to ensure that its Code of Conduct and other University policies, statutes, procedures and rules of engagement are complied with by enforcing them, and this is essential for making the employment contracts complete, workable and efficacious"

[124] The distinction between the University not being liable for an employee's breach of the code but being liable for failing to successfully enforce the code is a subtle one. There is nothing in the words used to suggest that the parties turned their minds to the issue or that the contractual promises alleged were made.

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60 (2010) FCA 1225

61 *Transport Workers' Union of Australia v K&S Freighters Pty Ltd*, (2010) FCA 1225 at [26]

62 Para 111c of Dr Gramotnev's primary submission

63 Para 111d of Dr Gramotnev's primary submission

[125] In my view the Code of Conduct set out in section B/8.1 of the Manual does not form part of the contract of employment.

MOPP A/2.1 'QUT's vision, goals and organizational values'

[126] As the heading of the policy suggests the policy details the aspirations of the University.

[127] The 2003 version of the policy includes:

- Section 2.1.1 which sets out the University's mission – "to bring to the community the benefits of teaching, research, technology and service."
- Section 2.1.2 which describes its organisational values with a reference to providing "a consultative communication framework which will respect academic freedom and will facilitate informed decision making, effective planning and full accountability…".
- Section 2.1.3 which informs the reader of the University's three goals the achievement of which "will ensure that QUT plays a leading role in the intellectual, economic, social and cultural development of Queensland and Australia…."

[128] No objective reader could assume that the statements are anything more than aspirational. There is nothing at all that suggests a contractual promise to employees to achieve the stated aims, no matter how much the University administrators desire their achievement.

[129] Dr Gramotnev submits that the University promises its employees the publicly declared organisational values of:

a. "social justice and equal opportunity in education and employment;

b. a safe, supportive and healthy working environment … ;

c. honesty, integrity and ethical behaviour and practices".

[130] The quote is taken from the policy introduced in September 2006. If the precise wording is important to the argument then there is the difficulty that the words were not present earlier.

[131] But I do not decide the issue on that point. The quoted words are introduced by the words "QUT values…" and there follows seven ideals. Dr Gramotnev extracts three of those ideals, or at least part of them, but he, with respect, ignores the significant point - there is no statement of any promise but rather a statement of the ideals that the University "values". To promote such statements to a level of contractual obligation is not to stretch the language used but to ignore it.

[132] Dr Gramotnev relies on the terms of the letter of appointment and the code of conduct and its statement that "Officers must also comply with the institutional

policies published in the Manual of Policies and Procedures".[64] In my view that inverts the process. The effect of giving this policy contractual force adds weight to the arguments against the letter and the code of conduct having the effect Dr Gramotnev contends for.[65]

[133] The policy does not form part of the employment contract.

MOPP A/8.4 'Equal Opportunity and diversity policy'

[134] In the 2001 version the policy commences at section 8.4.1 with the heading "Strategies" and provides that "QUT Council is committed to a policy of equal opportunity and freedom from all forms of discrimination…". There then follows a set of "aims" and the statement that "QUT expects all staff … to act in accordance with this policy".

[135] This version is not addressed in Dr Gramotnev's submissions. It is not contractual in its language or effect.

[136] Dr Gramotnev refers to the November 2007 version and submits that the document "uses contractual language to clearly identify itself as part of an employment contact of any staff member".[66] He quotes:

a. "All students and staff have individual rights

- to be treated fairly by the University and by each other; and
- to study and work in an environment free from discrimination and harassment";[67]

b. "To respect and protect these rights, QUT will … administer grievance resolution procedures";[68]

[137] There is much more contained in the policy of a plainly aspirational nature.

[138] Again there is the problem of the introduction of words to the policy, apparently crucial to the argument, years after the commencement of the employment contract. The notion that the policy was not contractual in 2001 but became so in 2007 is an unattractive and impractical one.

[139] But putting that issue to one side the argument ignores what the University promised to do – "administer grievance procedures". Whatever the verb "administer" might mean it is difficult to see how it can amount to a contractual promise enforceable by a Court. Its primary meaning is "to manage" and "be responsible for the running of". Contained in a document concerned with aspirational values I see no reason why an objective reader would think that there is

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64 Policy B/8.1 'Code of Conduct', Section B/8.1.4 'Respect for the law and system of government'

65 See [44] above

66 Para 126 of Dr Gramotnev's primary submission

67 QUT MOPP Policy A/8.4 'Equal opportunity and diversity policy', Section A/8.4.2 'Rights and responsibilities'

68 QUT MOPP Policy A/8.4 'Equal opportunity and diversity policy', Section A/8.4.2 'Rights and responsibilities'

a contractual obligation set out for breach of which the University would answer in damages.

[140] This conclusion is reinforced by the context in which the commitment relied on appears. Immediately preceding the one quoted there are two commitments - a commitment to "educate and inform" and to "review and reform University practices"[69], commitments that are plainly too vague and uncertain to have contractual force. No reasonable reader would think for a moment that a contractually enforceable obligation was then being introduced.

[141] Dr Gramotnev argues in the alternative that this policy "should also be implied into the Plaintiff's employment contract by law, and/or in fact, and/or by custom or usage".[70]

[142] Conditions (b) (business efficacy) and (c) ("it goes without saying") of the *BP Refinery* tests, at least, are not met. Arguably neither is (a) – where a matter is the subject of treatment in one way by the parties to a contract, a way that does not impose contractual obligations, then there is at least a prima facie view that it is not "reasonable and equitable" to treat it another way by presumed intention.

[143] As for an implication by law, as previously discussed, Dr Gramotnev must show that his contract would be rendered "nugatory, worthless, or, perhaps, be seriously undermined"[71] if the term he contends for is not implied as claimed. There is no demonstration of such a necessity.

[144] There is no evidence of any custom or usage that such terms are implied into the contracts of employment of University professors.

[145] Finally there is a reference to "the existing international and national legal and customary standards" as justifying the importation of the policy into the contract. Dr Gramotnev refers to "Australian and international legal and social principles and customs of employment" and the *International Covenant of Economic, Social and Cultural Rights*, adopted by the General Assembly resolution 2200A (XXI) of 16 December 1966, which he points out "is a global standard of justice and fairness expressly recognised by [the University]" in its Manual:

> "*Informed by global standards of justice and fairness (eg UN/ILO Conventions), the University's pursuit of social justice is underpinned by a commitment to equal opportunity and diversity.*
>
> *Thus, QUT aims to:*
>
> *respect and protect the rights of its students and staff;*
>
> *promote a fair and inclusive … work environment*"[72].

[146] The quote is from the 2007 version. It does not appear in the earlier version. There is no promise contained in the language used – it is purely aspirational. No attempt

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69 Volume 1 Tab 17 p 259 of the Bundle of Material for Separate Trial

70 Para 128 of Dr Gramotnev's primary submission

71 *Byrne* (1995) 185 CLR 410 at 450 per McHugh and Gummow JJ

72 QUT MOPP Policy A/8.4 'Equal opportunity and diversity policy', Section A/8.4.1 'Policy principles'

is made to demonstrate that the tests for the implication of contractual terms are met. I cannot see that those tests are satisfied.

[147] The policy does not form part of the contract of employment.

Article 7 of the International Covenant on Economic, Social and Cultural Rights (Article 7)

[148] Dr Gramotnev pleads that Article 7 of the *International Covenant on Economic, Social and Cultural Rights* was incorporated into his contract either by reference in Policy A/8.4 or by implication. Article 7 provides:

> *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:*
>
> *(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence*

[149] The reference to Policy A/8.4 is a reference to the passage of the Equal Opportunity policy quoted above in paragraph [136].

[150] Dr Gramotnev asserts that "Article 7" "easily satisfies the *BP Refinery* test" and submits[73]:

a. Article 7 declares the equal opportunity principle …and as such, it is reasonable and equitable;

b. Without the principle of equal opportunity declared by Article 7, an employment contract would be inefficacious and incomplete as the lack of this principle in an employment contract has a major potential to destroy the workplace relationship, significantly impede the implementation of contractual duties and operation of the contract, and breach the principle of at least potential mutual benefit from the contract (including through inadequate promotion and recognition);

c. In the modern workplace environment and national and international workplace customs and legislations, the principle of equal opportunity declared by Article 7 is so obvious that *'it goes without saying'*;

d. It is obviously capable of clear expression as formulated by the presented citation from Article 7…;

e. It does not contradict any express term of the contract, but is rather consistent and follows from the express terms of the contract – for example, from QUT MOPP Policy A/8.4 'Equal Opportunity and Diversity Policy' dated 29 November 2007.

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73 Para 137 of Dr Gramotnev's primary submission

[151] These submissions tend to miss the point. The issue is not whether an article of a convention meets the various criteria but rather whether the implication of Article 7 into the contract meets the criteria.

[152] One question therefore is whether it goes without saying *as between these parties to this contract* that Article 7 becomes a term of the contract, breach of which results in a right to damages. That must be judged in the context that the Article was not referred to by them, does not form part of the law of the land save to the extent it has been adopted by statute, and that the subject is dealt with by domestic legislation and that legislation provides its own remedies for any breach. Given that the closest there is to a reference to the Article is to the "UN/ILO Conventions" in the equal opportunity policy, but then only in the context of the University informing itself of "global standards of justice and fairness" by reference to them and not adopting them, it is far from clear that "it goes without saying" that the parties intended the Article to form part of their contract. The implication, if any, is to the contrary.

[153] The Article is not implied into the contract

MOPP A/1.3 'Compliance policy'

[154] Dr Gramotnev argues[74] that the Compliance Policy uses contractual language to expressly identify the University's responsibilities "before, and obligations to, any staff member" and quotes from the Policy:

> "*As a public entity, QUT has a responsibility to identify and comply with all relevant obligations. Compliance means 'adhering to the requirements of laws, industry and organisational standards and codes, principles of good governance and accepted community and ethical standards' (Australian Standard AS 3806-2006)*".[75]

[155] The quote is from the version introduced in July 2007 and does not appear in the earlier version provided of November 2004. There, under the heading "Policy", the document provides: "QUT is committed to complying with all relevant legislation and obligations." There then follows considerable detail about how the University proposes to facilitate its compliance. None of this could be construed as a contractual commitment to succeed in ensuring compliance.

[156] In the 2007 version relied on, immediately following the paragraph quoted above the policy reads "QUT's commitment to compliance is demonstrated by" and there follows a list of three matters evidencing the University's efforts. This too is not the language of contract.

[157] Dr Gramotnev's submission reads[76]: "A reasonable perspective (*sic*[77]) employee would take the Compliance Policy as promising:

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74 Para 139 of Dr Gramotnev's primary submission

75 QUT MOPP Policy A/8.4 'Equal opportunity and diversity policy', Section A/8.4.2 'Rights and responsibilities' - see Volume 1 Tab 19 p 265 of the Bundle of Material for Separate Trial

76 Para 144 of Dr Gramotnev's primary submission

77 Perhaps "prospective", perhaps "perceptive"

a. adequate enforcement by the Defendant of its policies, statutes, procedures and rules; and

b. proper protection against, and rectification of, any breach of the Defendant's policies, statutes, procedures and rules; and

c. in conformance with the Australian Standard AS 3806-2006; and

d. that failure to provide such adequate enforcement of the Defendant's policies, statutes, procedures and rules, and/or failure to properly rectify *any* breaches of the Defendant's policies, statutes, procedures and rules amount to a breach of the Compliance Policy and the employment contract.

[158] Apart from assertion there is no demonstration of why a reasonable employee would think any of the matters mentioned. The words of the policy are informative, aspirational and advisory. Nowhere does there appear any promise, let alone a promise to provide "proper protection against, and rectification of, any breach of the [University's] policies, statutes, procedures and rules".

[159] Further, the policy does expressly deal with complaints about non compliance. They are to be dealt with "at the operational management level, through existing grievance procedures … or Whistleblowers legislation."[78] That reinforces the point that the while the University appreciated that its employees might be perceived as falling below the high standards set it did not contemplate the introduction of contractual terms with associated contractual remedies to meet those situations.

[160] Finally, Dr Gramotnev argues that the policy should be implied into the employment contract "by law, and/or in fact, and/or by custom (e.g., on the basis of the existing Australian Standard AS 3806-2006)". No attempt is made to show that the requisite tests are satisfied for implication of the term proposed.

[161] The University describes the claim that by this policy the University has contracted to be liable for *any* breach of any of its policies, statutes, procedures and rules as "fanciful".[79] I agree.

QUT Register of Disclosed Interests – Procedure for Disclosure of Interests

[162] The University maintains a register of disclosed interests. The document provided entitled *"QUT Register of Disclosed Interests – Procedure for Disclosure of Interests"* ("the Procedure")[80] defines the obligations of employees to make disclosure of interests, the effect of having such interests, and the procedures that are to be followed in managing and monitoring conflicts.

[163] Apparently the Procedure does not itself form part of the Manual. Dr Gramotnev points out that there have been references to the Register in various versions of the Manual. The earliest reference given is to Policy A/1.2 'QUT Corporate Governance Guidelines' dated 30 May 2001 which required disclosure of relevant interests and avoidance of conflict of interest. The code of conduct of 23 February 2005 provided:

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78 See Volume 1 Tab 19 p 267 of the Bundle of Material for Separate Trial

79 Para 84 of the University's primary submission

80 See Volume 1 Tab 20 pp 268 -275 of the Bundle of Material for Separate Trial

> "*University officers are expected to place entries on the appropriate conflict of interest register as required by relevant University policies and procedures (see MOPP A/1.2.3 for the register of disclosed interests …*" (underlining added by Dr Gramotnev).[81]

[164] Dr Gramotnev submits that "the *QUT Register of Disclosed Interests – Procedure for Disclosure of Interests* is a policy, and/or a statute, and/or a procedure, and/or engagement rule created by the Defendant." It certainly seems to be a long established policy of the University that staff make relevant disclosures.

[165] Dr Gramotnev argues[82] that the Procedure "gives – by virtue of its intended role and express contractual language (including amongst other relevant words: "*The QUT Code of Conduct and the QUT Corporate Governance Guidelines require members of the University community to formally declare and manage any conflicts of interest*") – a contractual promise to the Plaintiff that the Defendant will:

a. undertake adequate measures to recognise, register, eliminate, or appropriately manage all conflicts of interest (actual and potential) that have become know (*sic*) to it; and

b. actively and adequately enforce its policies and procedures including the Procedure for Disclosure of Interests; and

c. provide proper protection against, and rectification of, any breach of the Defendant's policies and procedures including the Procedure for Disclosure of Interests; and

d. be in breach of its contractual obligations under the Plaintiff's employment contract, should the Defendant failed (*sic*) to:

   i. recognise, register, eliminate, or appropriately manage all conflicts of interest (actual and potential) that have become know (*sic*) to it; and/or

   ii. provide adequate enforcement of the Procedure for Disclosure of Interests; and/or

   iii. properly rectify any breaches of the Defendant's policies, statutes, procedures and rules."

[166] Nowhere in the Procedure do any of these claimed promises appear.

[167] Significantly the Procedure does not promise prospective employees that all potential conflicts of interest will be disclosed. That seems to be at the heart of the matter. As Dr Gramotnev recognises in his submission[83] the University could never promise that.

[168] I am at a loss to understand why placing an obligation on employees to disclose conflicts of interest, an obligation that, by its nature, the University cannot prospectively ensure compliance with, and putting in place a mechanism or

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81 Para 151 of Dr Gramotnev's primary submission

82 Para 157 of Dr Gramotnev's primary submission – emphasis as in the original

83 Para 156 of Dr Gramotnev's primary submission

procedure to enable that to happen, results in the imposition on the University of the several obligations mentioned. The effect of them is to require the University to ensure that there will be no failure or that if there is a failure to accept responsibility for it, a responsibility that sounds in damages. Neither the language, disclosed intent or apparent purpose justifies such a result. As the University points out the obligation is not even expressed to apply to the University at all but rather to "members of the University community".

[169] Again Dr Gramotnev calls in aid the express reference to the Manual in the letter of appointment and again it seems to me that this Procedure merely provides further reason not to construe the letter as he urges.

[170] The Procedure does not have the effect for which Dr Gramotnev contends.

MOPP A/6.1 'Grievance Resolution Policy'

[171] Dr Gramotnev submits[84] that the Grievance Resolution Policy "uses clear contractual language to expressly identify the Defendant's responsibilities before, and obligations and promises to, any staff member" and then quotes from the policy:

a. "*All managers and supervisors <u>have an obligation and responsibility</u> to proactively promote a workplace free of workplace bullying and intimidation whether this is between supervisors and staff, between staff members or between staff and students. All grievances <u>will be dealt with</u> in a supportive environment without victimisation or intimidation of anyone connected with the grievance either during or subsequent to a grievance resolution procedure.*

QUT's approach to grievance resolution emphasises:

- *fairness and impartiality*
- *conciliation*
- *the principles of natural justice and procedural fairness*
- *resolution of grievances as early as possible and as close as possible to the source*
- *the role of supervisors in seeking to prevent and resolve grievances.*"[85]

b. "*(c) <u>It is the primary responsibility</u> of supervisors to take all reasonable steps to prevent and resolve grievances in their work units. … Supervisors should not wait until someone makes a complaint before taking action. If a complaint is made, <u>it is the supervisor's responsibility</u> to seek to resolve the issue.*

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84 Para 162 of Dr Gramotnev's primary submission – with Dr Gramotnev's underlining and citations

85 QUT MOPP Policy A/6.1 'Grievance resolution policy', Section A/6.1.1 'Policy statement'

(d) The parties involved in the grievance must participate in the grievance resolution process in good faith.

…

(g) The procedures will be applied fairly with integrity and flexibility.

(h) All persons are to be treated with respect and impartiality, and provided with support at all stages of the process.

(i) The principles of natural justice and procedural fairness will be observed. These principles include:

- *the person who is the subject of concern must be informed of all the allegations in relation to his/her behaviour*
- *he/she must have a full opportunity to put his/her case*
- *all parties to the complaint must have the right to be heard*
- *all relevant submissions and evidence must be considered*
- *irrelevant matters must not be taken into account*
- *the decision-maker must be impartial, fair and just.*"[86]

[172] Dr Gramotnev then argues[87] that:

i) The University is "fully responsible for its working environment and enforcement of its policies, procedures and rules";

ii) the University has "full and unconditional responsibility and obligations to control its 'managers and supervisors', ensuring that they act in accordance with the Defendant's policies, statutes, procedures and rules";

iii) "*All managers and supervisors*" expressly referred to in these statements constitute the University as they are acting on the University's behalf and represent the University; and

iv) "A reasonable prospective employee would have been bound to take these statements as clear contractual promises and contractual obligations" of the University as an employer; and

[173] An assumption of responsibility, assuming without deciding that there was such assumption, referred to in (i) is not a statement of acceptance of contractual responsibility if things go awry – it might be seen as a necessary but not a sufficient condition. The statements in (ii) above might be doubted as accurately stating the University's position in law. Certainly the law of tort does not make an employer liable for the criminal acts of its employees unless authorised.[88] All bodies corporate

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86 QUT MOPP Policy A/6.1 'Grievance resolution policy', Section A/6.1.2 'Policy principles'

87 Para 163 - 164 of Dr Gramotnev's primary submission

88 *New South Wales v Lepore* (2003) 212 CLR 511; *Deatons Pty Ltd v Flew* (1949) 79 CLR 370

must perforce act through its servants but that does not have the effect as asserted in (iii) that those servants become the corporate entity or that the corporate entity becomes responsible for all that they do. The statement in (iv) is the conclusion sought to be reached. The assertion does not supply the answer to the problem.

[174] So the arguments advanced are not persuasive. A further difficulty with Dr Gramotnev's approach is that he does not identify, with precision, what the promise is that he relies on. One thing is certain and that is that the University did not promise that there would be "*a workplace free of workplace bullying and intimidation"*. The point of the policy is that it recognises that inappropriate behaviour might occur or might be perceived to have occurred. Nor could the University promise that every employee would "*participate in the grievance resolution process in good faith*". How could it guarantee such a thing? Both phrases appear in the policy but no reasonable person could think that the University intended to make either promise.

[175] The University responds that there is no contractual promise contained in the policy and that read in context it is no more than a statement by the University that "grievances will be dealt with in a supportive environment and without victimisation". Such a statement, it is submitted, cannot be treated as a promise intended to have contractual effect; it is merely a statement of fact which describes a policy: cf. *Goldman Sachs*.[89] I agree. A commitment to supplying a "supportive environment" is not one susceptible to precise definition – see Jessup J's discussion of this same problem in *Goldman Sachs* at [313] – [318].

[176] The University's submission is supported by the opening words of the policy that immediately precede Dr Gramotnev's quote above: "QUT is committed to ensuring a harmonious, fair and just working and learning environment by ensuring staff and students have access to processes that allow for grievance, disputes, problems and complaints to be resolved." Those words are not the words of contractual promises but of aspiration and of a statement of intent. As Jessup J observed in *Goldman Sachs* "the notion of a non promissory commitment is quite familiar in everyday language"[90].

[177] As the University points out nowhere does the policy state that the University will assume liability for any failures by their staff to comply with the policy.

[178] In my view the Grievance Policy is not contractual in nature and does not form a term of Dr Gramotnev's employment contract.

MOPP A/8.5 'Grievance resolution procedures for discrimination related grievances' (Discrimination Grievance Procedures)

[179] Dr Gramotnev submits that the Discrimination Grievance Procedures use "clear contractual language to expressly identify the Defendant's responsibilities and obligations and outline the Defendant's express promises of the described due procedures in the event of any discrimination or harassment related grievance" and then quotes from the Policy:

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89 [2007] FCAFC 120 at [41]; [309].

90 [2007] FCAFC 120 at [311]

a. "*(a) These procedures apply to discrimination and harassment which can occur in … employer / employee relationships …;*

(d) Where the behaviour which gave rise to the grievance might constitute misconduct or serious misconduct, refer to Clause 6.1.2 (k) in QUT's grievance resolution policy (A/6.1)";[91]

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

(iv) The panel shall consist of:

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

…

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

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

- *interview the complainant;*
- *interview the respondent;*
- *interview all relevant witnesses;*

  …

- *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*

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91 QUT MOPP Policy A/8.5 'Grievance resolution procedures for discrimination related grievances', Section A/8.5.2 'Application'

circumstances."[92]

[180] Again I have the difficulty of identifying precisely what Dr Gramotnev alleges is the contractual promise he asserts is made. The University points out that his pleading is that the University "failed to stop ongoing years of bullying and harassment of [him] by several high ranking administrators". Dr Gramotnev objects to the reference as irrelevant at this stage, but without the context of the dispute it is impossible to judge what promise is asserted and so allegedly breached.

[181] The Policy sets out the procedures to be followed, determined by the nature of the grievance asserted. The complaint seems to be that the procedures were ineffective to prevent bullying and harassment. But there is no promise by the University that the procedures laid down will succeed. And the use of words such as **"**will constitute" or the "panel should" do some action or other is not, without more, necessarily promissory in effect.[93] What is absent from the Policy is any statement of entitlement directed to the employee.

[182] As the University submits "there is nothing in the Discrimination Grievance Procedure which a reasonable prospective employee would have understood as a promise that bullying and harassment would not occur or that if they did, the employee would be entitled to contractual damages if they were aggrieved by such conduct".[94]

[183] If the promise alleged is one that should a grievance be brought to the attention of the appropriate officer of the University then it would be dealt with in accordance with the procedures laid down then it may be that a reasonable prospective employee would have considered so much was promised. There remains the difficulty of the need for an exercise of discretion as to how the matter should be dealt with – the seriousness of any complaint might, like beauty, lie in the eye of the beholder. And the requirements to "consider the complaint in the context of QUT policy and relevant legislation" and "seek advice from any person it deems appropriate" are not susceptible of enforcement.

[184] I am not persuaded that the policy as a whole is contractual in nature. Parts of it clearly are not. To the extent that my attention has been drawn to the relevant nature of the dispute I cannot accept that there is any contractual commitment capable of founding an action.

MOPP B/10.1 'Grievance resolution procedures for workplace related grievances and bullying' (Bullying Grievance Procedures)

[185] Dr Gramotnev submits[95] that the "Bullying Grievance Procedures use contractual language to identify the Defendant's responsibilities, contractual promises and obligations including the Defendant's express promises of application of the described due procedures in the event of any grievances related to workplace bullying" and then quotes from the policy:

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92 QUT MOPP Policy A/8.5 'Grievance resolution procedures for discrimination related grievances', Section A/8.5.6 'Procedures', sub-section (f) 'Third level – Formal investigation by the Vice-Chancellor'

93 Cf. *Goldman Sachs* at [280] per Jessup J

94 Para 103 of the University's primary submission

95 Para 184 of Dr Gramotnev's primary submission – with Dr Gramotnev's citations

a. "*These procedures deal with workplace related grievances in accordance with QUT's Grievance Resolution Policy (A/6.1). The procedures provide a mechanism for handling workplace related grievances in an unbiased and fair manner through a process of conciliation or investigation where appropriate. They are underpinned by the principles of natural justice and procedural fairness and emphasise the resolution of the grievance as early as possible and as close as possible to the source*";[96]

b. "*The procedures described in this document apply to staff and are designed for the resolution of grievances; complaints, disputes or problems related to internal workplace matters affecting staff*";[97]

c. "*Where a grievance arises under these procedures the University shall where possible suspend activities relating to the grievance during the operation of these procedures. The status quo of the complainant shall where possible remain unchanged in all other respects*";[98]

d. "*Where the grievance concerns allegations of workplace bullying (as defined by the University's* ***Grievance Resolution Policy)*** *the procedures outlined below in (b) Workplace Bullying shall apply.*"[99]

[186] The arguments advanced by the parties are the same as for the previous policy.

[187] Once again a difficulty is in identifying the precise promise said to have been made.

[188] I note that under the heading "Application"[100] the procedures set out in the policy are expressly said not to apply to "personal promotion". I have received no submission as to whether that impacts on the matter.

[189] Again, if the promise alleged is one that should a grievance be brought to the attention of the appropriate officer of the University by an employee then it would be dealt with in accordance with the procedures laid down then it may be that a reasonable prospective employee would have considered so much was enforceable – it would depend on the promise alleged. But that promise could not extend to a requirement that any complaint be resolved in a certain way or support a claim for damages that a certain result was not achieved.

[190] Nor does it seem to me that a complaint can be made about the manner of the investigation. There are three levels – the first two involve "informal discussion and conciliation" and a direction that the relevant officer investigating the matter "may" carry out certain discussions, and "may" seek assistance and other officers "may" assist. There is no promise in those directions. A failure of an officer to do what is plainly left to his or her discretion is not susceptible of complaint.

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96 QUT MOPP Policy B/10.1 'Grievance resolution procedures for workplace related grievances and bullying'

97 QUT MOPP Policy B/10.1 'Grievance resolution procedures for workplace related grievances and bullying', Section B/10.1.1 'Application'

98 QUT MOPP Policy B/10.1 'Grievance resolution procedures for workplace related grievances and bullying', Section B/10.1.2 'Directives'

99 QUT MOPP Policy B/10.1 'Grievance resolution procedures for workplace related grievances and bullying', Section B/10.1.6 'Third Level – Investigation'

100 In section 13.1.1 (see Volume 1 Tab 26 p 302 of the Bundle of Material for Separate Trial) and section 10.1.1 (see Volume 1 Tab 27 p 306 of the Bundle of Material for Separate Trial)

[191] Thus again I am not persuaded that the whole of the policy is contractual.

[192] My understanding of the breach alleged is not a complaint about process but of result. There is no relevant contractual commitment to support such a complaint.

MOPP B/8.3 'Whistleblowers protection management policy' (Whistleblowers Policy)

[193] Dr Gramotnev submits that "the Whistleblowers Policy uses the contractual language to identify this policy as of contractual nature, including the Defendant's responsibilities, contractual promises and obligations" and quotes from the Policy:

a. "*As a public sector entity established by an Act of the Queensland Parliament, QUT is subject to the Whistleblowers Protection Act and all University employees are public officers for the purposes of the legislation. The University, therefore, has obligations placed on it related to receiving public interest disclosures, and to ensure that persons making such disclosures are protected from reprisals.*"; [101]

b. "*Where a person making a disclosure has an honest and reasonable belief about the inappropriate conduct or activity disclosed, that person is protected under the Whistleblowers Protection Act from any civil, criminal or administrative action that results from making a public interest disclosure.*"; [102]

c. "*The Whistleblowers Protection Act provides that a person must not cause, or attempt to conspire to cause, detriment to another person because, or in the belief that, anybody has made, or may make, a public interest disclosure. Such conduct is called a reprisal. Reprisals are not condoned or tolerated by the University.*

…

A person suffering a reprisal has legal protection under Part 5 of the Whistleblowers Protection Act. Any information about reprisals at the University should immediately be referred to the Registrar. Any such information is a public interest disclosure and will be to be treated in accordance with this policy." [103]

[194] Again it is not clear what contractual promise Dr Gramotnev seeks to assert has been made.

[195] The Policy informs the reader of the existence and effect of *Whistleblowers Protection Act 1994* (Qld).[104] It sets out procedures that the University proposed for making and investigating a disclosure. It explains the protections that the legislation provides for. There is no statement that the University promises that no reprisals by

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101 QUT MOPP Policy B/8.3 'Whistleblowers protection management policy', Section B/8.3.1 'Object of the policy'

102 QUT MOPP Policy B/8.3 'Whistleblowers protection management policy', Section B/8.3.3 'Making a disclosure'

103 QUT MOPP Policy B/8.3 'Whistleblowers protection management policy', Section B/8.3.10 'Reprisals'

104 Which has since been repealed and replaced by the *Public Interest Disclosure Act 2010* (Qld).

University staff will ever occur – in fact to the contrary as the Policy sets out how the University will endeavour to ensure there is protection for the person making a public interest disclosure. It thus anticipates that there is the chance of attempted reprisals.

[196] The legislation provides remedies for its breach. Dr Gramotnev is at liberty to call those provisions in aid if he seeks to rely on them. The legislation applies to him irrespective of contract. There is no suggestion in the document that the University intends to provide any further remedy or to do anything more than state its intent to honour its obligations under the legislation and how it will go about doing so.

[197] I agree with the University submission that the Whistleblower Policy is not contractual in nature and does not form a term of Dr Gramotnev's employment contract.

MOPP B/9.2 'Performance planning and review for academic staff' (PPR-AS Policy)

[198] The submission here is as in the previous policies – an assertion that the language is contractual but without precise identification of the resulting promise. The quoted sections of the policy are[105]:

a. "*The implementation of this process is part of the University's commitment to providing an environment in which staff can expect to receive feedback in relation to performance and be encouraged to discuss future plans and self-development with their supervisor. The PPR-AS process also requires supervisors to provide support, counselling and guidance to staff, and provides a forum in which duties and staff development activities are discussed*";[106]

b. "*This policy applies to academic staff employed by QUT for more than one year on a full-time or part-time basis, either on-going or fixed-term*"; [107]

c. "*The PPR-AS cycle occurs over a 12 month period.*" [108]

d. "*The supervisor is required to:*

- *initiate and maintain PPR-AS for the relevant staff;*

  …

- *facilitate staff development and career development opportunities in accordance with the activity statement …*";[109]

e. Section B/9.2.6 provides the full details of the obligatory PPR-AS procedures and the related responsibilities of the Defendant, including such

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105 Para 191 of Dr Gramotnev's primary submission – with Dr Gramotnev's citations

106 QUT MOPP Policy B/9.2 'Performance planning and review for academic staff'

107 QUT MOPP Policy B/9.2 'Performance planning and review for academic staff', Section B/9.2.1 'Application'

108 QUT MOPP Policy B/9.2 'Performance planning and review for academic staff', Section B/9.2.3 'Timing'

109 QUT MOPP Policy B/9.2 'Performance planning and review for academic staff', Section B/9.2.5 'Roles and responsibilities'

clear and contractually promissory statement as: "*Reviews will occur at least annually.*";

f. "*PPR-AS will inform decisions and/or recommendations relating to ... (d) Recognition and reward Programs ... (f) Promotion ... (g) Professional Development Program ...*"[110]

[199] Dr Gramotnev pleads that the Performance Review Policy was breached including through a "failure to conduct proper performance planning and [a] review ... for nearly 3 years".

[200] The university argues[111] that there was no intention for the Performance Review Policy to be contractually binding by reason of the following matters:

(a) statements referring to *'commitments'* rather than *'obligations'*;
(b) the statement that the success of the performance review process 'relies on a strong commitment to its implementation by both supervisors and staff'; and
(c) the fact that the Performance Review Policy expressly contemplates that disputes regarding its implementation be dealt with by a complaint to University Management or via the dispute resolution procedures, rather than any sort of contractually-based proceeding.[112]

[201] Dr Gramotnev's pleading focuses on the timing of reviews. Under the heading "Timing" one passage he points to appear – "The PPR-AS occurs over a 12 month period". Under the heading "PPR-AS Cycle" in section 9.2.6(b) the policy reads "Reviews will occur at least annually". That the intent was to have each staff member reviewed each 12 months seems clear. The issue is whether the University promised that would occur as opposed to it being an aspiration towards which each staff member should work.

[202] I have come to the view that the latter is the preferred meaning. There are several indications that suggest that is so.

[203] As the University points out many aspects of the policy are plainly not contractual. For example in the first paragraph quoted the University speaks of its "commitment". That is a statement of aspiration or present intent – it is not contractual.

[204] Under the heading "Principles" the policy is described as being concerned "with contributing to the achievement of individual, faculty/school and organisational excellence by facilitating the following" and there follows seven aims – including by way of example "encouraging high level of performance". Again this is not the language of contract and cannot amount to contractual promises.

[205] The onus is plainly placed on the staff member to be proactive in bringing about a useful review process. So much is clear from Section 9.2.5(a) of the policy and the division of responsibility detailed in section 9.2.6 of the policy. In the former section the PPR-AS is described as "a participative process" and it "requires that the

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110 QUT MOPP Policy B/9.2 'Performance planning and review for academic staff', Section B/9.2.7 'Subsequent Action'

111 Para 113 of the University's primary submission

112 See clause 9.2.10.

staff member actively participate" in various essential ways. In the latter section the responsibilities of the participating parties are described. The only matters for which the supervisor has sole responsibility are to "prepare" for an initial discussion, obtain relevant documents, and then "provide copies of these documents to staff member *upon request*". Absent a request there is no process. From there the responsibilities are those of the staff member – importantly to prepare a draft activity statement – and then joint ones.

[206] The very significant role that employees had to play, employees over whom the University had no relevant control, to bring about a successful review strongly militates against the notion that the University intended the policy to be contractually binding.

[207] Further, the activities mentioned in the policy are not ones that are amenable to review by the courts – to "discuss", to "outline plans", to "review" plans, to "inform decisions".

[208] Section 9.2.10 provides that if there is a dispute about the process it is to be handled by the internal dispute resolution procedures. The express acknowledgment that there may be disputes about the process and how disputes are to be handled is a strong indicator that contractual remedies were not intended.

[209] Finally, staff members are offered no certainty of outcome from the process.

[210] On balance I have come to the view that the Performance Review Policy is not contractual in nature and does not form a term of Dr Gramotnev's employment contract.

[211] I should add that I have studied the pleadings relevant to this issue (paragraph 114(k) of the Amended Statement of Claim - particularised breaches at paragraphs 171 to 191 of Particulars 1; paragraphs 36(b)(iv) and 37(c)(xi) of Particulars 2) to determine whether I could discern the contractual promise relied on. I was not successful. But I add that I cannot see that there is any attempt to co-relate the alleged failures of the University to comply with the policy with the policy itself. There is a reference to a PPR-AS meeting with a Dr Ayoko on 26 July 2007[113] but no subsequent allegation of any request from Dr Gramotnev to initiate the annual review or a failure by any supervisor to proceed in accordance with the policy.

MOPP B/8.5 'Disciplinary action for misconduct and serious misconduct – senior staff' (Senior Staff Disciplinary Policy)

[212] Dr Gramotnev submits that the "Senior Staff Disciplinary Policy uses contractual language to identify its contractual nature including the Defendant's responsibilities, contractual promises and obligations" and then quotes the following from the policy[114]:

a. "*This policy outlines the procedures <u>to be used</u> in cases where an allegation(s) of misconduct/serious misconduct is made against a senior staff member*";[115]

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113 Para 173 of Particulars 1

114 Para 199 of Dr Gramotnev's primary submission – with Dr Gramotnev's underlining and citations

115 QUT MOPP Policy B/8.5 'Disciplinary action for misconduct and serious misconduct – senior staff'

b. "*This policy, and the associated procedures, applies to senior staff members employed on an ongoing or fixed term appointment at classification levels SSG1 to SSG6 inclusive*";[116]

c. "*The principles which underlie this policy are as follows:*

(a) Senior staff have a responsibility to ensure their conduct is of the highest ethical standard, consistent with the University's Code of Conduct, Statutes and policies.

(b) The University has a responsibility to support the conduct referred to in paragraph (a) …

…

(d) Procedures for dealing with allegations of misconduct/serious misconduct should be fair, observe principles of natural justice …"[117]

[213] Dr Gramotnev argues that the foregoing results in a "contractual obligation to comply and follow [the University's] own policies and procedures …where allegations of bullying and harassment have been made."[118] He goes further and submits that "[i]f the procedure was followed but the Defendant failed to identify, acknowledge, and adequately act upon the alleged acts of bullying by senior staff, while bullying had in fact occurred, the Defendant is still in breach of the Plaintiff's employment contract."[119]

[214] There are no words identified, or that I can identify, in the policy that could support the latter obligation. There are certainly no express words to that effect and so the argument must be that they are to be implied.

[215] Three aspects of the policy need to be highlighted. One is that the policy speaks in aspirational terms – "the policy aims to provide a fair and just process".

[216] Secondly, by its terms the Policy outlines procedures that are to be followed where allegations are made. No promises at all are made about outcomes.

[217] Thirdly, the policy plainly leaves the decision on whether misconduct or serious misconduct has occurred, and if so what action to take, with the Vice-Chancellor.[120] The policy concludes: "All actions of the Vice-Chancellor under these procedures will be final" whilst preserving the jurisdiction of competent tribunals.[121] That statement is a clear statement of intent that contractual remedies are not contemplated.

[218] As the University points out Dr Gramotnev's submission is effectively that if he makes an allegation of bullying and harassment and the University does not agree,

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116 QUT MOPP Policy B/8.5 'Disciplinary action for misconduct and serious misconduct – senior staff', Section B/8.5.1 'Application'

117 QUT MOPP Policy B/8.5 'Disciplinary action for misconduct and serious misconduct – senior staff', Section B/8.5.3 'Principles'

118 Para 200 of Dr Gramotnev's primary submission

119 Para 202 of Dr Gramotnev's primary submission

120 Section 8.5.5 of the Policy - Volume 1 Tab 30 p 328 of the Bundle of Material for Separate Trial

121 Section 8.5.9(e) of the Policy - Volume 1 Tab 30 p 331 of the Bundle of Material for Separate Trial

or does not deal with it as he would want, then the University is in breach of its own Disciplinary Policy and liable in damages – and this to be implied in the contract.

[219] In my view none of the *BP Refinery* tests are satisfied. Suffice to say that it is not obvious that it would be "reasonable and equitable" or "go without saying" that such enquiries be transferred from the internal procedures contemplated by the policy to the Courts, or that the University would intend that the transfer depend upon the level of satisfaction enjoyed by the complainant. In fact the policy expressly says the opposite – the Vice-Chancellor's decision is to be final.

[220] Dr Gramotnev argues that the Policy should be read as a contractual commitment to *the complainant* that another staff member's conduct will be investigated and their employment subjected to possible suspension or termination. As I follow Dr Gramotnev's particulars his complaints about the termination of his own employment do not relate to any failure to follow the procedures laid down. Rather he alleges the termination was the result of prior "unfair disciplinary action".[122] So the relevant issue is not whether a reasonable prospective employee would read the policy as a commitment that the procedures set out would be followed. That is a very different matter to the context here. In the context relevant here the policy is aspirational. The policy speaks of the senior staff having a responsibility to ensure that their conduct "is of the highest ethical standard" and the University having a responsibility to support that conduct and to "assist staff in identifying and resolving ethical issues" and it being "reasonable" for the University to investigate allegations.

[221] Further the policy expressly leaves it to the Vice-Chancellor to decide whether misconduct has occurred at all and as I have said his decision is expressly said to be final. In these circumstances no reasonable prospective employee would read the policy as a contractual commitment that any particular process would be followed or any particular outcome would be reached or that he or she could claim damages if the desired outcome was not achieved.

[222] The Disciplinary Policy is not contractual in nature and does not form a term of Dr Gramotnev's employment contract.

MOPP F/1.5 'Email policy'

[223] Dr Gramotnev submits that the "Email Policy" "uses prescriptive/obligatory language which demonstrates its contractual nature including the Defendant's responsibilities, contractual promises and obligations with some examples as follows (underline added):

> a. "*All staff using email as a means of communication <u>have a responsibility</u> to capture and retain messages so that they are accessible as records to meet business and evidential needs over time.*
>
> …

[122] Paras 376-378 of Particulars 1

"*Given QUT's obligation to retain records under relevant legislation and standards (see F/8.1), periodic deletion of email messages irrespective of their content or the business activity they support is inappropriate.*"; [123]

b. "*Staff email accounts remain active for 30 days after the staff member's resignation date.*

…

It is the responsibility of the head of department or school to ensure that email records of a staff member who has resigned remain accessible and are retained for the period of time required by the QUT General Records Disposal Schedule".[124]"

[224] Contrary to the submission the use of words such as "responsibility" and indications that some activities are "inappropriate" is against, not for, the notion that contractual obligations are under contemplation. To the extent that Dr Gramotnev seeks to assert that the whole of the policy has contractual force then I cannot agree. That it could give rise to particular obligations is possible but I have the difficulty of identifying which obligation Dr Gramotnev wishes to assert.

[225] The University submits[125] that "[t]here is nothing in the Email Policy which amounts to a promise by the University not to 'damage management of [an employee's account] after [their] termination'" and references the Amended Statement of Claim at [118].

[226] Dr Gramotnev has not identified any words in the policy that have the effect of imposing an obligation not to "damage management". What he does do is point to the passage quoted above - "Staff email accounts remain active for 30 days after the staff member's resignation date".

[227] If the promise contended for is that the policy provides a contractual commitment to permit staff access to their email account for 30 days after "resignation" then I think it is certainly arguable. While the words "remain active" have a certain ambiguity to them it is difficult to see what other meaning the words can have in their context save that an employee can access their account for 30 days after resignation. The immediately preceding paragraph of the policy deals with student email accounts and expressly provides that "student access to email ceases 30 days after their notified graduation ceremony date." That strongly suggests that the topic under consideration is staff access in the next paragraph. As the policy goes on to identify when an account is "deactivated" and when it is "removed" at subsequent dates there seems little point to keeping an account "active" save for the purpose of access by staff.

[228] The aspect that gives rise to the promissory nature of the commitment is not so much the words used – which in my view are only potentially capable of being construed as an enforceable promise - but the context. Emails can contain personal information of potential importance and value to the staff member. The policy expressly acknowledges that while an email account is "to be used for University

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123 QUT MOPP Policy F/1.5 'Email Policy', Section F/1.5.4 'Staff email as official records'

124 QUT MOPP Policy F/1.5 'Email Policy', Section F/1.5.8 'Decommissioning of email accounts'

125 Para 120 of the University's primary submission

purposes" email may be used for "incidental personal purposes".[126] So if the contention was that the reasonable prospective employee would consider that he had an enforceable right to access his or her email account for 30 days after resignation, at least for the purpose of accessing and responding to personal emails then I would accede to it.

[229] There remain two difficulties however for Dr Gramotnev's argument.

[230] The first is that Dr Gramotnev did not resign but rather his employment was terminated for serious misconduct. The policy does not deal with that situation. Thus there is no express promise at all for an employee in his position. And I would not accept that the same promise would be implied for employees whose employment has ended in those circumstances. It certainly does not "go without saying" that the same policy would apply. There may be very good reason why the University would not permit access to an email account to an employee who is terminated for serious misconduct. Prior misuse of the email account is one obvious example.

[231] The second difficulty is that there is a distinction between permitting access and "not damaging management". As the University points out the policy expressly provides that ownership of all emails sent or received "in the performance of their duties" by staff using the University email system, rests with the University.[127] That the University might access, remove or quarantine messages and have the right to do so is entirely consistent with that ownership.

[232] Consideration of the particulars supplied[128] indicates that Dr Gramotnev seeks to argue a term very much more extensive than that he be entitled to access his email account for 30 days.

[233] I am not persuaded that a contractual promise was made that supports Dr Gramotnev's pleaded term.

MOPP A/9.1 'Health and safety policy' and MOPP A/9.2 'Health and safety management'

[234] Dr Gramotnev submits that the Health and Safety Policy and Health and Safety Management policy "use contractual prescriptive/obligatory language to identify their contractual nature including the Defendant's responsibilities, contractual promises and obligations with some examples as follows (underline added by Dr Gramotnev):

a. "*QUT <u>will meet</u> its legislative obligations <u>and exceed</u> them where feasible. This <u>will be</u> a risk management approach <u>to include</u> the provision of:*

- *Safe systems of work and work environment, both on and off campus*

  …

- *Appropriate supervision and enforcement of policies and procedures*

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126 Section 1.5.2 Volume 1 Tab 31 p 333 of the Bundle of Material for Separate Trial

127 See clause 1.5.4.

128 See paras 426 – 439 of the first set of particulars

to ensure safe work practices

…

Staff, students and others have an obligation to follow safe work practices, not to act in a manner so as to cause harm to people or property, to report hazards, and not to misuse anything provided in the interests of safety." [129]

b. "*Under common law, employers have a duty of care to take all reasonable measures to protect their employees from foreseeable risks arising from their employment. This duty of care embraces provision of the following*

…

- *a safe system or method of work*
- *a safe work environment*

…

- *adequate training, instruction and supervision*

The Queensland Workplace Health and Safety Act 1995 and other Acts (see http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/W/WorkplHSaA95_006_R.pdf) create a statutory obligation for employers to ensure the health and safety of employees and other persons at work. The onus of proof of meeting this duty rests with the employer or, at QUT, those delegated as such. …

The major elements of the employer's obligations are to ensure a safe workplace for all through identifying hazards, assessing the risk, eliminating the risk or minimising the potential harmful consequences of the hazard.

Employees also have an obligation under the Act to maintain healthy and safe workplace conduct. An employee or anyone else at a workplace has the following obligations under Section 36 of the Act: … not to wilfully place at risk the health and safety of any person at the workplace; [130]

c. "*In accordance with QUT's health and safety policy (see A/9.1), managers are responsible, within the limits of their authority, for ensuring that activities within their area are undertaken with the exercise of proper diligence for the health and safety of staff, students and others. …*

Staff members in a supervisory role are responsible, within the limits of their authority, for ensuring that activities under their control are undertaken with the exercise of proper diligence for the health and safety of

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129 QUT MOPP Policy A/9.1 'Health and safety policy', Section A/9.1.1 'Health and safety policy'

130 QUT MOPP Policy A/9.1 'Health and safety policy', Section A/9.1.2 'Legislative framework'

staff, students and others."[131]

[235] Dr Gramotnev submits[132] that these paragraphs have the result that:

> "Any reasonable prospective employee would have taken with certainty that both Policies A/9.1 and A/9.2 are both presented in unambiguously contractual language, expressly provide contractual promises, and thus form part(s) of the Plaintiff's employment contract."

[236] The difficulty, as is so often the case, is in identifying what contractual promise Dr Gramotnev asserts results. Without accepting that there is any contractual promise, the University complains that "[t]o the extent that Dr Gramotnev's pleadings suggest that a breach of *any* policy or procedure amounts to a breach of the H&S Policy, such argument should be rejected. The obligation to enforce policies and procedures only applies to those policies and procedures which relate to *safe work practices*."[133]

[237] I agree. To take a hypothetical example, the notion that a failure to permit an employee to access their email account for 30 days after resignation but for only 28 days results in a breach of a workplace health and safety policy would be nonsensical. It has nothing to do with health and safety.

[238] If there is a contractual promise then it cannot extend beyond the provision of "safe systems of work and work environment" and perhaps not that far and a necessary condition of showing breach is an allegation of a consequential adverse effect on health.

[239] The University's position is that there are legislative and common law obligations that sit outside what makes up Dr Gramotnev's employment contract. The University submits that this section of the policy: "… outlines how managers are to apply the University's health and safety policies, not a promise that they will create risk free environment" and contends that "[n]one of the policies and procedures on which Dr Gramotnev relies deal with how work at the University is to be carried out in a safe manner."[134]

[240] Unfortunately the University does not reference the Amended Statement of Claim to enable me to readily check the assertion. Paragraph 132 of the Amended Statement of Claim pleads a breach of a duty to "create, maintain and not breach healthy and safe workplace environment for the plaintiff" which I take to be a reference to the implied duty which I will deal with later, not the claimed express duty contained in the Manual. If the intended reference is to that paragraph then I agree with the contention. The particulars of the breach are said to be at paragraphs 95(a)-(o) of the pleading and those alleged have nothing, or largely nothing, to do with what might be considered safe work practices. To take one instance it is alleged that the University breached the term by failing to "properly, equitably and fairly" consider

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131 QUT MOPP Policy A/9.2 'Health and safety management', Section A/9.2.1 'Responsibilities of managers'

132 Para 212 of Dr Gramotnev's primary submission

133 Para 127 of the University's primary submission

134 *Ibid*

and assess Dr Gramotnev's several applications for promotion.[135] Even if true that would not reflect on the safety of work practices or the environment.

[241] Paragraph 117c of the Amended Statement of Claim makes express reference to the policies under consideration here. However it is not at all clear what breach is alleged. There is a reference back to paragraph 95(m) and (n) of the pleading where it is asserted that the University "failed to manage the Plaintiff's work environment in a reasonable and responsible way" and "failed to provide the plaintiff with a safe work environment". Such a pleading fails to provide any relevant information to inform the reader of the claimed breach. Paragraph 117 concludes with a reference to the particulars – on my count 128 paragraphs of them. In general terms those particulars characterise the conduct of various individuals, carried out in the course of investigating certain activities or alleged activities of Dr Gramotnev and corresponding or otherwise dealing with him, as amounting to bullying, harassment and intimidation. The particulars include allegations of how Dr Gramotnev's wife was treated and complaints concerning the termination of his employment. There are allegations of Dr Gramotnev suffering a blood disease and a potentially fatal condition as a consequence.

[242] If that is the scope of the complaint, and I am by no means sure that it is, then the claimed promise might be that the policy has the effect of imposing on the University a contractual obligation not to so conduct its investigations authorised under its various policies in a way likely to damage the health of an employee of normal fortitude. If an argument of that type had been advanced then it would provide some boundary to the debate and allow for rational analysis of wording and context to determine an answer. But the debate between the parties was not informed by such precision.

[243] Dr Gramotnev insists that at this stage the only question for determination is whether the policy conveys a contractual promise that the policy will be complied with in its entirety, but a promise otherwise without content. My answer to that question is no.

[244] That is so because quite evidently aspects of the policy are not contractual at all. The statement that the University "will meet its legislative obligations and exceed them where feasible" is not a promise but a statement of intent. The statement quoted in (b) above is purely informational. It appears under a heading "Legislative framework". It describes the University's obligations at common law and under statute, and the obligations imposed on staff, and nothing more. The statement quoted:

> "Staff, students and others have an obligation to follow safe work practices, not to act in a manner so as to cause harm to people or property, to report hazards, and not to misuse anything provided in the interests of safety…"

is not a promise by the University to do anything but a reminder to employees of their obligations to each other. It is not and cannot be construed as a promise by the University that any employee will do as requested or reminded or that the University will be liable in damages if they fail to do as requested or reminded. The statement in (c) above describes who has responsibility for ensuring that the University's

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135 Para 95(a) of the Amended Statement of Claim

undoubted legal obligations, independent of any express term in the contract, are met.

[245] Dr Gramotnev relies on the *Goldman Sachs* decision and the context of the relevant phrase in the 'Working With Us" document in that case to say that the submissions of the University are an exercise in hypocrisy. The relevant phrase that was held to contractually bind the employer in that case was: *"JB Were will take every practicable step to provide and maintain a safe and healthy work environment for all people"*. The Court stressed that context was all important. Assuming that the context is the same in the two cases, and it is not, an equivalent phrase simply does not appear in the University policy.

[246] The closest phrase that appears is the opening words of the policy where the University said that it was "committed to providing a workplace which is as safe as is practicable". That statement is a statement of aspiration or intent. It is not in terms a promise. JB Were's statement was, in terms, a promise. The argument there was whether its promissory aspect should be read down to one merely of aspiration or intent. Here the argument is the converse. Dr Gramotnev seeks to elevate what, on its face, is no more than a statement of aspiration or intent into a promise. Given the context of an express discussion of the common law and legislative obligations that the University had, and the description of roles that I have discussed, it is not at all clear that the University was promising anything. The only statement that went further was the one quoted above - "will meet its legislative obligations and exceed them where feasible" – and the imprecision of that statement tends strongly against a contractual stipulation.

[247] Dr Gramotnev argues that "because the Health and Safety Policy and Health and Safety Management are part of, or derived from, the broader health and safety legislation, they must also be implied into the Plaintiff's employment contract by law, and/or in fact, and/or by custom".[136] In my view the converse is so – because there are statutory obligations imposed irrespective of contract there is no necessity to imply a term to the like effect. The BP refinery tests are not satisfied. There is no necessity to imply the alleged term to make the contract workable.[137]

[248] Finally, I should point out that there are other practical difficulties with the pleaded cause of action.

[249] In respect of many of the alleged breaches of contract, a claim is made for an injurious affect on Dr Gramotnev's health and Dr Gramotnev's particulars indicate that his claim is for damages for personal injury.[138] Dr Gramotnev's admitted failure to comply with the pre litigation requirements of the *Workers Compensation & Rehabilitation Act* 2003 (Qld) has the effect that even if the term he seeks to assert formed part of the contract and was breached he could not claim damages for that breach to the extent the damages were for personal injury. As the University has pointed out it is an essential pre-requisite that Dr Gramotnev show that he is a person mentioned in s237(1) of the *Workers' Compensation and Rehabilitation Act* 2003 as, if he is not, the legislation expressly provides that he is not entitled to seek damages for an injury sustained in the course of his employment: s237(5) *Workers'*

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136 Para 221 of Dr Gramotnev's primary submission

137 See *Byrne* (1995) 185 CLR 410 at 450 per McHugh and Gummow JJ

138 See paras 380; 395-401; 405; 408 of Dr Gramotnev's particulars delivered 22.09.11

Compensation and Rehabilitation Act 2003. And see *Lau v WorkCover Queensland*;[139] *Hamling v Australia Meat Holdings Pty Ltd*.[140]

[250] Dr Gramotnev argues that consideration of the pre litigation requirements of the *Workers Compensation & Rehabilitation Act* 2003 is irrelevant at this stage being "beyond the terms of reference for the separate trial whose mandate is only to determine whether the term of health and safety is implied into the Plaintiff's employment contract."[141] The submission overlooks that there is no point to establishing a right to a term of the contract that cannot be the subject of the claim in these proceedings. Rule 5 of the *Uniform Civil Procedure Rules* 1999 suggests a determination at this point is appropriate. It might save costs if Dr Gramotnev understands that he presently faces an insuperable legal obstacle to his pursuit of damages for injury to his health.

[251] Dr Gramotnev pleads in various places damages for "severe and continuing distress, suffering and disappointment"[142] and claims damages in the sum of $200,000 for "distress and disappointment".[143] I point out that there is substantial authority for the view that damages are not available for injured feelings, distress or disappointment resulting from a breach of contract: *Addis v Gramaphone Co* [1909] AC 488; *Burazin v Blacktown City Guardian* (1996) 142 ALR 144 at 151; save in the limited circumstances identified in *Baltic Shippping Co v Dillon* (1993) 156 CLR 344 at 362, 369, 396.

[252] In my opinion a reasonable person would have understood the statements contained in these policies as a general policy aim, rather than a firm contractual commitment.

Did Dr Gramotnev's employment contract contain terms of good faith or trust and confidence?

[253] By his amended Statement of Claim Dr Gramotnev alleges that there were implied in his contract of employment terms of good faith and mutual trust and confidence.

[254] Dr Gramotnev pleads, and argues, that the terms of good faith and mutual trust and confidence are distinct and should be considered separately. I see no present purpose in doing so.

[255] By his pleading of breach Dr Gramotnev draws no distinction between the two terms. He pleads that the term of good faith was breached "for one or more of the reasons set out at paragraph 95(a) to 95(o)" of his Amended Statement of Claim.[144] He makes precisely the same pleading in respect of breach of the alleged implied term of trust and confidence.[145]

[256] Reference to paragraph 95 of the Amended Statement of Claim does not assist greatly as it is largely uninformative. Paragraph 95(a) provides the clearest statement of an identifiable issue where Dr Gramotnev pleads the University's

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139 [2003] 2 Qd R 53; [2002] QCA 244 at [32] per Byrne J, McPherson JA agreeing; at [8] per Williams JA

140 [2005] QCA 415

141 Para 308d of Dr Gramotnev's primary submission

142 For example paras 110d, 121d, 126d, 131d, 136d, 142d of the Amended Statement of Claim

143 Para 144c

144 Para 122 of the Amended Statement of Claim

145 Para 127 of the Amended Statement of Claim

alleged failure "to consider and assess the plaintiff's several applications for promotion…… properly, equitably and fairly". Thereafter the pleading details in the most general way the complaints that Dr Gramotnev has. It complains that the University "impeded the development and progression of the plaintiffs academic career…". It alleges that the University "failed to treat the plaintiff fairly" over a five year period. There are complaints that the defendant "bullied", "harassed" and "intimidated" the plaintiff but without particulars. There is more, in each case the plaintiff characterising the defendant's conduct with a pejorative description or epithet but at no time pleading concisely what conduct of the University it is that merits the description or epithet. Save for subparagraph (a), in each sub paragraph the complaint is followed by the following words: "…including by (amongst other events and circumstances) the events and circumstances associated with, and during, and prior to, and as a result of the plaintiff's dismissal from his tenure (*sic*) academic position at the Defendant on 3 July 2009". There is a minor variation in subparagraph (k) but the words used mean the same.

[257] Particulars were sought but those particulars supplied do not assist in clarifying the issues. They contain objections to the defendant's pleadings, statements that the defendant's pleadings are incorrect, allegations of fact and sometimes argument. Only occasionally does the document provide what would normally be thought to be particulars.

[258] Dr Gramotnev then pleads in the Amended Statement of Claim in relation to each alleged breach, whether it be the term of good faith[146] or the term of trust and confidence[147], that the "events and circumstances" of how the term was breached is particularised by reference to identified paragraphs of the two sets of particulars that he has supplied – the same in relation to each claimed implied term. Of the 443 particulars supplied in the first set of particulars, Dr Gramotnev excludes only the paragraphs numbered one to six and paragraph 443. The seven excluded paragraphs have nothing to do with the way in which Dr Gramotnev alleges he was treated by the University.

[259] There are two relevant points. The first is that there is no distinction between the cases presented by Dr Gramotnev in respect of the two alleged implied terms so I propose to deal with them together, as the University urges. Apart from the pragmatism of that approach it has the authority of Basten JA (see *Russell v Trustees of the Roman Catholic Church Arch Diocese of Sydney*[148]) and Lord Nicholls of Birkenhead (*Eastwood v Magnox Electric plc*[149]). It seems convenient to adopt it.

[260] The second is that the pleading and particulars do not identify with any precision what it is that Dr Gramotnev seeks to argue.

[261] The University submitted that the present state of the law was "ambiguous" and "unsettled". To a degree that is right. Dr Gramotnev can call in aid for the implication of the general terms he proposes the views of four justices of the High Court in *Koehler v Cerebos (Aust) Ltd*[150] who assumed that such terms were implied

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146 Para 123 of the Amended Statement of Claim

147 Para 128 of the Amended Statement of Claim

148 (2008) 72 NSWLR 559 at [33]

149 [2005] 1 AC 503 at [11]

150 (2005) 222 CLR 44 at 54–55 [24] per McHugh, Gummow, Hayne and Heydon JJ

in contracts of employment generally and the comment by three justices of the High Court in *Concut Pty Ltd v Worrell* implicitly accepting the implication of such a term[151] and one expressly so.[152] The earlier decisions of that Court in *Shepherd v Felt and Textiles of Australia Ltd*[153] and *Blyth Chemicals Ltd v Bushnell*[154] are consistent with those assumptions or comments.

[262] That is a formidable level of support albeit that none of the judges endeavoured to explore the jurisprudential underpinnings of the implied terms or their necessary scope and content.

[263] Nonetheless the general view has been that there is no definitive statement by the High Court on the issue. On several occasions appellate courts have not needed to decide the issue: the Court of Appeal in New South Wales in *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2008) 72 NSWLR 559 at 567 [32]–[37]; the Full Court of South Australia in *South Australia v McDonald* (2009) 104 SASR 344 at [206]-[237]; the Full Court of the Federal Court in *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687 at 708 [86]; *Yousif v Commonwealth Bank of Australia* (2010) 193 IR 212 at 238 [105]. Nor did the Industrial Court of Australia in *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 – noting that in *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 that Court accepted that such a term was implied. *Burazin* is of interest in that the Court denied the availability of a remedy in damages for breach of the term albeit "during the currency of the employment relationship". That impediment does not exist here.

[264] The most comprehensive and it has been said, accurately with respect, "perceptive analysis of the origins and legal foundations"[155] of the implication into employment contracts of the term proposed by Dr Gramotnev was carried out by the Full Court of South Australia (Doyle CJ, White and Kelly JJ) in *State of South Australia v McDonald.*[156] There Mr McDonald was an officer in the State's teaching service employed under a statute. The Court declined to determine whether the term of mutual trust and confidence was implied generally in contracts of employment but held that it was not implied in Mr McDonald's contract. That was so because of the "statutory and regulatory context in which Mr McDonald's contract of employment operated".[157] Many of the considerations relevant to that determination are relevant here. I will return to that point.

[265] At the level of single judges there has been a mixed response. As the reasons in *McDonald* pointed out there have been numerous decisions at trial level where "[t]he implication of a term of mutual trust and confidence has been either endorsed or acknowledged".[158] Relevant to my jurisdiction those decisions include that of Moynihan J in *Taske v Occupational and Medical Innovations Ltd*[159] where his Honour relied on the first instance decision in *Russell v Trustees of the Roman*

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151 [2000] HCA 64; 75 ALJR 312 at [25]-[26]Gleeson CJ, Gaudron and Gummow JJ
152 [2000] HCA 64; 75 ALJR 312 at [57](c) per Kirby J
153 (1931) 45 CLR 359
154 (1933) 49 CLR 66
155 *Dye v Commonwealth Securities Ltd* [2012] FCA 242 at [606]-[607] per Buchanan J
156 (2009) 104 SASR 344; [2009] SASC 219
157 *Ibid* at [270] - special leave to appeal the decision in *McDonald* was refused: [2010] HCA Trans 25.
158 At [223]
159 [2007] QSC 147

Catholic Church, Archdiocese of Sydney[160] of Rothman J whose reasoning on this point was not, in the final result, examined on appeal: (2008) 72 NSWLR 559 at 567 [1] per Giles JA, [32]–[37] per Basten JA, [73] per Campbell JA.

[266] More recently Peter Lyons J has grappled with the problem concluding that the law is "unsettled" and finding that if there was such a term implied it had not been breached: *Wright v Groves* .[161]

[267] On the other hand, Buchanan J has expressed reservations about whether there is an implied term of mutual trust and confidence: *McDonald v Parnell Laboratories (Aust) Pty Ltd* (2007) 168 IR 375; *Dye v Commonwealth Securities Ltd* [2012] FCA 242. So has Tracey J in *Van Efferen v CMA Corporation Ltd* [2009] FCA 597. Kenny J has found that no such term is implied: *Walker v Citigroup Global Markets Pty Ltd* (2005) 226 ALR 114 at 156–157 where her Honour held that, in Australia, a term of good faith "does not apply to employment contracts." As mentioned on appeal the Full Court did not need to express a view on her Honour's finding: see *Walker* (2006) 233 ALR 687 at 708 [86].

[268] I share the concerns expressed. However given the views expressed in the High Court, the absence of any appellate authority definitively stating that the terms of trust and confidence and good faith are not implied in contracts of employment, and the decision in *McDonald* where special leave was refused I take the correct position to be that arrived at in *McDonald*.

[269] I perceive that position to be that while a term of good faith or mutual trust and confidence may be implied by law in contracts of employment it will not be implied where there is no necessity to do so to enable the contract to work effectively. In *McDonald* relevant matters were said to include the applicable statutory and regulatory context. Here the equivalent matters are the applicable certified EBA and its statutory context.

[270] The University isolates four reasons why the Court in *McDonald* refused to imply the term of mutual trust and confidence:

(a) the duty of good faith, trust and confidence which Mr McDonald sought to imply would essentially duplicate remedies available to him under statute (for example, unfair dismissal remedies);

(b) Mr McDonald's employment was heavily regulated by statute, regulation and binding industrial instruments;

(c) formal rights of appeal existed for Mr McDonald to challenge matters of which he was aggrieved; and

(d) Mr McDonald's employment was subject to well developed dispute resolution and grievance procedures.

[271] The University argues that precisely the same situation applies here. That is not completely accurate. In *McDonald* the matters that rendered the implication of the term unnecessary were the employment conditions, conditions that were not contractual but set out in statutes and which could not be varied by the employer.

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160 [2007] NSWSC 104

161 [2011] QSC 66 at [53].

The equivalent matters here do not have quite that status. I have found that the EBA, which contains extensive dispute resolution clauses, and the policies setting out the University's internal appeal and grievance procedures are not terms of the contract. Changes to the EBA were not at the whim of the University but the policies could be varied unilaterally by the University and they were varied.

[272] While that is relevant I have come to the view that it is not a significant point of distinction.

[273] While the policies on my findings do not have contractual force they did provide for dispute resolution and in some cases appeals.

[274] More significantly, as mentioned earlier, the EBA exists within a statutory framework and is enforceable at the instigation of the employee. Penalties can be recovered. Dispute resolution is provided for. The EBA reflects the presumably careful balancing out of various factors of significance to both sides. If disputes were not able to be resolved, either party could refer matters to the Australian Industrial Relations Commission (and after 1 July 2009 to Fair Work Australia); an employee had standing to bring proceedings for alleged breaches of terms of the applicable enterprise agreements under the *Workplace Relations Act 1996* (Cth).

[275] Quite apart from the certified agreement regime the University was subject to the *Whistleblowers Protection Act 1994* (Qld) as a public sector employer; complaints were able to be made to the Queensland Ombudsman about conduct at the University; and the University was subject to the *Crime and Misconduct Act 2001* (Qld). In short the University is in a very different position to a private sector employer.

[276] In this context the need for the implication of the term is not so apparent. While the case is not as strong as the situation in *McDonald* the essential point is the same. The employee has access to a wide range of remedies that are enforceable against the employer without the need for the implication of the terms proposed. In these circumstances concern that the University would be able to take unfair advantage of an employee without the implication of such a term or terms is very much reduced. That does not preclude the possibility that in defined circumstances the need for the implication might become apparent. But the state of the pleadings makes it impossible to find any such need here.

[277] The effect of the pleadings is that Dr Gramotnev wishes to argue every complaint that he has over the length of his employment under the guise of a breach of an all encompassing duty.

[278] For present purposes the concluding remarks of the Court in *McDonald* on the issue of implied terms of this type are pertinent:

> "[275] We add the following. The Judge's finding that the Minister owed a duty not to act so as to impair mutual trust and confidence led the Judge to examine in considerable detail a series of matters which occurred in the course of Mr McDonald's employment at Brighton. That, in turn, led the Judge to consider whether certain events along the way, and certain courses of conduct, amounted to unfair or harsh treatment of Mr McDonald, or amounted to poor management by the School Managers. We consider that this highlights the unsatisfactory consequence of giving a wide scope to a

> term requiring the maintenance of mutual trust and confidence, if such a term is to be implied. It leads to the court becoming the forum for a detailed review of routine management decisions. There is no ready way of putting a limit to the range of matters which can be brought within the scope of the implied term and be said to be suitable for examination by a court."

[279] That "wide scope" is precisely what Dr Gramotnev argues for here. He wants this Court to become "the forum for a detailed review of routine management decisions". Neither Dr Gramotnev's pleadings nor submissions address the crucial issue of the scope and practical content of the general term he seeks to have implied into the contract. In *Dye v Commonwealth Securities Ltd* [2012] FCA 242 Buchanan J dismissed the claims for damages based on breach of the same alleged implied terms there with this comment:

> "…with respect to the allegations of breach of an implied term of trust and confidence, that material facts were not pleaded and proved such as could be satisfactorily linked with sufficiently identified content of such a term (thus generally expressed) if it exists. The same may be said of the alleged breach of a suggested implied term of "good faith and mutual co-operation".[162]

[280] While Dr Gramotnev is yet to supply his proofs there is a necessary antecedent step and that is to plead material facts "such as could be satisfactorily linked with sufficiently identified content of such a term".

[281] Thus the proposition that Dr Gramotnev is seeking to advance by his present pleadings is that a general term of trust and confidence and good faith ought to be implied into his employment contract, undefined in scope and content, but giving a right to claim damages for breach.

[282] I do not accept that the law allows that.

[283] The University argues that if there were to be such a term implied and whatever its content the only breaches that could sound in damages would be those that satisfied the test postulated by Besanko J in *Barker v Commonwealth Bank of Australia* [2012] FCA 942 at [330], that is actions "where a party does not have reasonable and proper cause for his or her conduct and the conduct is likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." His Honour was there dealing with a policy of the Bank that was expressed not to be a contractual promise – the situation that seems to apply here. I say "seems" as I am not sure what Dr Gramotnev seeks to argue. To the extent that he relies on a breach of policy then he is in that same position.

[284] Allsop J (as his Honour then was) in *Thomson v Orica Australia Pty Ltd*[163] commented that there was "ample authority" for the proposition that Besanko J later advanced in *Barker* and on which the University relies. That is so. The University's submission is right – if there is a term of the kind that Dr Gramotnev seeks to imply then breach of it can only sound in damages in the limited circumstances identified.

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162 At [600]

163 (2002) 116 IR 186 at [141]

[285] At the present time the state of the pleadings makes it impossible to know whether Dr Gramotnev can identify a breach that can arguably have that characterisation.

[286] Dr Gramotnev argues that the present proceedings are an unsuitable vehicle for the determination of the question of whether the terms he proposes are implied into his contract of employment. Certainly the state of his pleadings makes any rational examination of the issue extremely difficult. But it is entirely unsatisfactory that the parties be forced to go to trial to canvas every decision taken over several years and about which Dr Gramotnev complains on the basis of pleading that fails to define with precision what actions are characterised as being taken in bad faith or in breach of a term of trust and confidence and without providing particulars of relevant facts which, if established, would show the breach alleged.

[287] My conclusion is that I am not prepared to hold that there is implied in the employment contract terms of good faith and trust and confidence having the character and effect alleged by Dr Gramotnev – that is, terms so broad in their width that they permit the examination of every decision about which he complains.

Did Dr Gramotnev's employment contract contain a term that the University would provide a healthy and safe workplace?

[288] The term pleaded is that the University was under a duty to "create, maintain and not breach healthy and safe workplace environment for the plaintiff" (*sic*). I have already mentioned the University's objection that whatever be the contract the alleged breaches have nothing to do with safe work practices and my acceptance of that complaint.[164] Those observations are equally relevant here.

[289] The University responds that so far as its contractual obligations went it was under a well recognised obligation, implied in Dr Gramotnev's employment contract as in every employment contract, which does not correspond with the term pleaded. There are no facts shown here which would justify the implication of some term different to that ordinarily implied into every employment contract. Further, the University points out that Dr Gramotnev seeks damages for a breach of this implied term which include damages for personal injury. As mentioned[165] he is precluded from pursuing those damages as he has not complied with the legislative pre-requisites permitting him to pursue such damages against an employer: see Chapter 5 of the *Workers Compensation & Rehabilitation Act* 2003 (Qld).

[290] In my view these arguments are unanswerable.

[291] Dr Gramotnev misunderstands the University's submission. He assumes that the University's concession that there is a well recognised term implied into every employment contract[166] is a concession that the term he asserts is accepted. The provision of a "healthy and safe workplace environment" is far more onerous than the contractual obligation acknowledged in numerous cases to be imposed on an employer, namely *to take reasonable care* for the safety of employees.[167] The duty has been described in various ways but what is clear is that it is not one of strict

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164 See [236] above

165 Paras [249]-[250] above

166 *Nelson v BHP Coal Pty Ltd* [2000] QCA 505 at [6]

167 See for example *Wylie v ANI Corporation Ltd* [2002] 1 Qd R 320 at [19] and [50]

liability for any lack of safety or for adverse effects on health.[168] No doubt many workplaces are unhealthy and unsafe to some degree and to the extent that they are the employer's duty under the recognised implied term is to not "unreasonably [fail to] take measures or adopt means, reasonably open to him in all the circumstances, which would have protected the [worker] from the dangers of his task without unduly impeding its accomplishment": *Vozza v Tooth & Co Ltd*.[169]

[292] Thus Dr Gramotnev by his pleading, and perhaps inadvertently, seeks to go beyond the accepted term and claims that the term he asserts should be implied as a matter of law. To do so he must demonstrate "necessity" as explained by McHugh and Gummow JJ in *Byrne*, that is, that without the term "the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined."[170]

[293] Dr Gramotnev did not demonstrate that his contract would be rendered "nugatory, worthless, or, perhaps, be seriously undermined" if the term he contends for is not implied as claimed. His submission that the term he argues for is implied by law into the employment contract is not supported by principle or authority. It must be rejected.

[294] Apart from contract, the University had obligations imposed on it at the relevant time by the *Workplace Health and Safety Act* 1995 (Qld) (now repealed).

[295] Dr Gramotnev's Claim and Statement of Claim make no reference to seeking damages for a breach of the statutory obligations imposed on the University. In every instance the claim made is for damages for breach of contract.

[296] Dr Gramotnev submits: "…the Plaintiff's pleadings made express references to the University's obligations and breaches of those obligations under the Workplace Health and Safety Act 1995 – see paragraphs 382, 383, 387, 390 to 393, 408, 411, 412 and 414 of Particulars 1 containing the express references the Workplace Health and Safety Act 1995".[171] The particulars do make reference to the provisions of the *Workplace Health and Safety Act* 1995, but without any antecedent pleading of a breach of statutory duty then the particulars are simply irrelevant to the issues.

[297] If Dr Gramotnev wishes to assert a breach of a statutory duty then it is necessary that the duty be specifically pleaded, the relevant provision of the statute said to give rise to the duty identified, and the facts amounting to breach also identified. That then provides the opportunity for the University to respond, if it is so advised, by asserting a defence, for example under s 26 or s 37 of the *Workplace Health and Safety Act* 1995. But even if the action be pleaded and any defence overcome, that still does not result in an entitlement to contractual damages in the event of any breach by the University of those statutory health and safety obligations. Any right to damages derives from the statute not the contract.[172] And there is no necessity to import the statutory obligations in to the contract to enable a party aggrieved by a breach to obtain a remedy.

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168 See *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at [10] per Mason, Wilson and Dawson JJ

169 (1964) 112 CLR 316 at 319 per Windeyer J

170 (1995) 185 CLR 410 at 450

171 Para 300 of Dr Gramotnev's primary submission

172 *Schiliro v Peppercorn Childcare Centres Pty Ltd (No 2)* [2001] Qd R 518

[298] Finally the observations made earlier about the impact of the failure to comply with the pre litigation requirements of the *Workers Compensation & Rehabilitation Act* 2003 (Qld) are relevant. The same result would follow, and for the same reason, even if Dr Gramotnev were to amend his pleading to assert a breach of the well recognised implied term to take reasonable care of the safety of employees, or to appropriately plead a breach of the statute.

[299] The term as pleaded does not form part of the contract.

Did Dr Gramotnev's employment contract contain a term that the University would not breach his civil and legal rights?

[300] Dr Gramotnev pleads that a term was implied by law into his employment agreement that the University would not breach his "civil and legal rights, including by a reprisal, retaliation and/or recrimination conduct (sic)".

[301] The University submits: "This pleading is misconceived; no such term is implied into employment contracts by law. The term is devoid of content as to what 'civil and legal rights' are referred to. In any event, if Dr Gramotnev did have any such 'rights' they would by definition be enforceable as such. The term also cannot pass the *BP Refinery* test for implication on the basis of some presumed or imputed intention of the particular parties."[173]

[302] Dr Gramotnev responds that "paragraphs 339 to 360 of Particulars 1 provide the detailed description of the alleged breaches of specific rights of the Plaintiff by the conduct and actions of the Defendant".[174] The "civil and legal rights" that Dr Gramotnev contends for, he submits, are set out in Articles 14, 16, 17 and 19 of the *International Covenant on Civil and Political Rights* (**ICCPR**), adopted by the General Assembly resolution 2200A (XXI) of 16 December 1966.

[303] Article 14 deals, inter alia, with equality before the law, the right to a fair and public hearing "by a competent, independent and impartial tribunal", the presumption of innocence, minimum safeguards surrounding the determination of criminal charges, and the double jeopardy rule.

[304] Article 16 provides: "Everyone shall have the right to recognition everywhere as a person before the law".

[305] Article 17 provides: "1. No one shall be subjected to arbitrary or unlawful interference with is privacy, family, home, or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attack."

[306] Article 19 provides:

> "1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all

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173 Para 189 of the University's primary submission

174 Para 310a of Dr Gramotnev's primary submission

> kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

[307] No submission was made that the law implies into employment contracts generally, or those applicable to university lecturers in particular, such terms. Dr Gramotnev argues for implication on the basis of the parties' presumed or imputed intention. He must therefore satisfy the *BP Refinery* tests or show, assuming the contract to be an informal one incomplete on its face, that "the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case": *Hawkins v Clayton*.[175]

[308] Dr Gramotnev argues that the civil rights he contends for are "reasonable, equitable, and reflecting the widely accepted legal principles and norms in Australia and overseas".[176] Assuming that to be so – and to a large extent the submission is plainly right - then the fact that they are widely accepted is the difficulty. To the extent these rights exist in this country they are capable of enforcement by Dr Gramotnev – should they be breached - irrespective of contract. Every citizen, whether they be employee or not, has these rights. Hence there is no need for their implication.

[309] By way of example Dr Gramotnev is exercising his right to be heard by "a competent, independent and impartial tribunal" without any prior need to establish an implied term in his contract. The minimum safeguards surrounding criminal trials provided for in Article 14 are irrelevant to this case. Article 16 is likewise irrelevant. To an extent the rights spoken of in Article 17 – "arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honour and reputation" – are protected by causes of action available in tort or equity. Actions for trespass, defamation, breach of confidence, and, perhaps more controversially, invasion of privacy,[177] are available. The rights dealt with in Article 19 are available in this country except to the extent the law limits the exercise of those rights, much to the effect of paragraph 3 of the article and its reminder of the responsibilities that accompany the exercise of "rights".

[310] Conversely if the rights do not exist in this country then Dr Gramotnev has the insuperable difficulty of establishing that although unspoken by the parties they must be taken to have intended that rights unrecognised in this country should form part of the contract of employment between a University and a lecturer. There is the improbability of the University even contemplating importing rights into a contract that the community does not recognise. And there is no demonstrated need for the

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175 (1988) 164 CLR 539 at 573 per Deane J

176 Para 311a of Dr Gramotnev's primary submission

177 *Grosse v Purvis* [2003] QDC 151; *ABC v Lenah Game Meats* (2001) 208 CLR 199 at 255 per Gummow and Hayne JJ

implication of the terms for the reasonable or effective operation of this contract. The only apparent need is that Dr Gramotnev wishes to seek damages for their alleged breach. That is, of course, not the test: *Byrne* at p 423.

[311] There is no demonstrated need for the implication of the term pleaded.

Conclusion

[312] My answer to each of the separate questions is "no".

[313] I direct that the defendant make any such submission as it may be advised as to any further order that it seeks on or before 4pm on 26 June 2013. I direct that the plaintiff make any such submission as he may be advised as to any further order that he seeks on or before 4pm on 3 July 2013.