FAIR WORK AUSTRALIA

DECISION

Workplace Relations Act 1996
s.170LW - pre-reform Act - Application for settlement of dispute (certified agreement)

Ms S Rametta

v

Deakin University
(C2009/2441); (C2009/2289)

DEAKIN UNIVERSITY ENTERPRISE BARGAINING AGREEMENT 2005-2008
(ODN AG2005/7514) [AG844396]

Educational services

COMMISSIONER CRIBB MELBOURNE, 2 FEBRUARY 2010

Alleged failure to consider the applicants response and recommendations to avoid redundancy and/or mitigate the effects of redundancy; alleged imposition of extensive, prolonged and endless disciplinary action against the applicant.

[1] This decision concerns the applications which were made by Ms S Rametta (the applicant), pursuant to s.170LW of the *Workplace Relations Act 1996* (the Act), with respect to certain actions by Deakin University (the respondent). It is alleged by the applicant that, in taking disciplinary and workplace change/redundancy action against her, the University failed to apply the relevant terms of the *Deakin University Enterprise Bargaining Agreement 2005 - 2008* (the Agreement) to her.

[2] There were three and a half days of hearing and a number of witnesses. The applicant gave oral evidence as well as, on behalf of the respondent, Associate Professor Anne-Marie Toop, Associate Professor of Biology and Director of the Office of Research Integrity and Ms Alison Hadfield, Director of the Research Services Division.

[3] The applicant was represented by Mr M Willoughby-Thomas, solicitor and the respondent by Mr J D'Abaco, of counsel.

CHRONOLOGY

[4] It would be helpful in this matter, to set out a brief chronology of the relevant events as this matter is somewhat complicated with respect to the facts:

- 26 February 2007 - Ms Rametta commenced with the respondent in the position of Executive Officer, Human Research Ethics, Research Services Division. She reported to Ms Hadfield.

- Mid 2007 - Ms Hadfield and Associate Professor Toop discussed the creation of an Office of Research Integrity (ORI).

- 2 July 2007- Associate Professor Toop commenced as Director of Ethics and Bio-Safety and became the applicant's supervisor instead of Ms Hadfield.

- 2 July 2007- Dr Smith commenced employment as the Animal Welfare and Bio-Safety Administrative Officer. His supervisor was Associate Professor Toop.

- 10 July 2007 - The applicant had a mid term probation review with Ms Hadfield. Issues were raised with the applicant regarding her behaviour in the workplace.

- 16 July 2007 - Ms Truter commenced employment as Human Ethics Administrative Officer to provide the applicant with support.

- 23 July 2007 – An incident occurred between Dr Smith and the applicant. Dr Smith telephoned Associate Professor Toop and told her about the incident.

- 10 August 2007 - Final probation performance review conducted with the applicant by Associate Professor Toop who raised concerns with her about her work behaviour.

- 29 August 2007 - Dr Smith had a meeting with Associate Professor Toop regarding the applicant's behaviour.

- 11 October 2007 - Ms Truter raised with Associate Professor Toop issues regarding a plain language statement which the applicant had asked her to proof read and her concerns regarding the applicant's behaviour.

- 12 October 2007 - Ms Truter left the office early with Associate Professor Toop's permission. She did not tell the applicant (her supervisor) that she was going. The applicant became annoyed and took the issue up with Associate Professor Toop. Associate Professor Toop apologised to the applicant for approving Ms Truter's early departure and for not advising the applicant. She also raised Ms Truter's concerns about the plain language statement task she had been allocated by the applicant[1].

- 24 October 2007 - There was a meeting between Mr Owens (Human Resources), Ms Hadfield and the applicant regarding Ms Truter's and Dr Smith's concerns about the applicant's behaviour. The outcome of the meeting was that the applicant would apologise to both Ms Truter and Dr Smith.

[1] Exhibit A17

- 25 October 2007 until early December 2007 – The applicant was away on sick leave.

- 26 October 2007 - Written complaints were lodged by Dr Smith and Ms Truter regarding the applicant.

- 27 October 2007 – Ms Hadfield emailed the applicant to advise her of the two complaints and that she would be re-located away from the complainants and be undertaking project work. The applicant was told not to come into work until the arrangements to re-locate her were in place. Associate Professor Toop telephoned the applicant on 28 October 2007 to make sure she had received the email so that she would not attend at work the next day.

- 3 December 2007 - Ms Fornaro commenced in a casual position in the Human Ethics office, classified as HEW5. She undertook an ethics officer support role with respect to the Faculty of Health which had been previously the applicant's responsibility.

- 17 and 19 December 2007 - The applicant was advised orally and then in writing by Associate Professor Toop that she was not to participate in the day to day running of the Human Ethics Office and was to have no contact with any of the staff at Elgar Road. She was also advised of the project work she is to undertake and that her office would not be with the other staff but in another building.

- 21 December 2007 - The applicant received a letter from Ms Wendy Cooper, Director Human Resources Division, advising her of the two complaints and setting out the process.

- January 2008 - Dr Smith withdrew his complaint and resigned his employment.

- 4 February 2008 to 31 March 2009 – Ms Bates receives another casual contract and is classified as HEW5.

- 4 February 2008 - Ms Fornaro commenced a further casual contract and was upgraded to HEW6.

- 5 February 2008 - Ms Hadfield advised Ms Cooper that an Office of Research Integrity was to be set up.

- 14 February 2008 – Inquiry Panel met regarding Ms Truter's complaint against the applicant.

- Early March 2008 – The Inquiry Panel handed its report to the Vice Chancellor's nominee (Ms Cooper).

- 7 March 2008 – Ms Cooper wrote to the applicant advising her of the Inquiry Panel's findings and setting out the actions to be taken. The letter stated that the complaint was now concluded.

- 7 March 2008 – The applicant received a letter from Ms Cooper cautioning her about any further similar behaviour in line with the actions set out in the previous letter.

- 18 March 2008 - Meeting between the applicant and Associate Professor Toop when the applicant was advised that transitional arrangements were being put in place for a period of six months, to be reviewed at that time.

- 20 March 2008 - Letter to the applicant from Ms Cooper confirming the discussion with Associate Professor Toop about the transitional arrangements. The purpose was said to be to provide all staff with the opportunity to move forward in light of the recent complaints procedure. The arrangements included no supervision or management of support staff, working in an office that was separate from the rest of the Division and no longer having responsibility for the Faculty of Health.

- 31 March 2008 - Ms Emery commenced employment as Senior Consultant Research Integrity.

- 27 June 2008 – The applicant met with Associate Professor Toop and Mr Ross (Human Resources) as part of the mid year Performance Planning and Review (PPR). Associate Professor Toop issued the applicant with a verbal warning regarding her behaviour.

- 2 June 2008 - Ms Fornaro was re-appointed on a fixed term contract and upgraded to HEW8.

- 27 June 2008 – the applicant was given a verbal warning regarding her behaviour at a meeting.

- September to November 2008 – Ms Hadfield and Associate Professor Toop were discussing the possible re-structure of the ORI.

- 10 November 2008 (morning) - The applicant was advised by Associate Professor Toop and Mr Ross that the period between August and November 2008 had been relatively uneventful in terms of her behaviour and that she had met her behavioural objectives. At the same meeting, the proposed re-structure of the office was raised.

- 10 November 2008 (afternoon) – A meeting was held with staff to discuss the proposed re-structure. The applicant did not attend.

- 13 November 2008 - The applicant was advised by email from Associate Professor Toop that she was to continue as per the transitional arrangements until the change management process had been concluded.

- 13 November 2008 – The applicant received an email from Mr Ross confirming that Associate Professor Toop had advised her that her behaviour had been assessed as satisfactory at the meeting on 11 November 2008.

- 13 November 2008 - Associate Professor Toop emailed staff, including the applicant, regarding the proposed changes.

- 19 November 2008 – The applicant wrote to Associate Professor Toop formally activating the Dispute Settlement Procedures under the Agreement.

- 18 December 2008 – The re-structuring was put on hold whilst another process was underway.

- 21 January 2009 – The Disputes Committee met regarding the dispute lodged by the applicant.

- 30 January 2009 – The Disputes Committee issued a proposal to both parties to resolve the dispute.

- 13 February 2009 – The Disputes Committee concluded that, given the responses from the parties, it was unable to resolve the dispute.

- 18 February 2009 – The applicant was advised by letter from Associate Professor Toop that the new organisational structure had been approved and of the new position that was being offered to the applicant. The new structure was to commence on 4 March 2009.

- 4 March 2009 – The applicant was advised that, as she had not accepted the new position she was offered, alternative positions would be sought for her. She was also to continue with special projects work.

- 20 March 2009 – The applicant was advised that she was excess to requirements following the re-structure of the ORI. Two options were offered – a voluntary early separation package or redeployment options. The applicant did not accept a voluntary retrenchment or voluntary early separation.

- March 2009 – Ms Bates was promoted to HEW6 and received a further casual contract.

- 5 June 2009 – The applicant was advised that, as she had been unsuccessful in her application for an alternate position and had not accepted voluntary retrenchment, her employment was terminated, effective immediately.

EVIDENCE

[5] There was much detailed oral evidence given in this matter together with considerable written material.

Applicant

Considerable evidence was given by Ms Rametta. Set out below is a summary of the evidence relevant to the matters requiring determination.

Meeting on 10 July 2007

[6] With respect to the probationary meeting with Ms Hadfield on 10 July 2007, the applicant did not recall being told that a number of staff were uncomfortable working with her or that they found her behaviour difficult to deal with. She remembered being told that she was loud but not that staff were uncomfortable with her raising her voice. Ms Rametta believed that Ms Por had complained - about everyone. Ms Rametta confirmed that Ms Hadfield had told her that staff were uncomfortable about her crying. She said that Ms Hadfield had been concerned about her getting emotional. Ms Rametta confirmed that Ms Hadfield had said that she had received reports about the applicant's behaviour but she did not recall the words, *"emotional behaviour"* being used. The applicant stated that Ms Hadfield had used *"emotion"* but not in conjunction with *"outbursts"*.[2] She could not remember whether Ms Hadfield had said that the applicant had a *"loss of control"*. It was acknowledged by Ms Rametta that she had a loss of control of her emotions.[3]

[7] The applicant had explained to Ms Hadfield that this was the result of the pressure of her work and being harassed by staff without sufficient management support.[4] *"I was upset, yes. I was crying, but there were a lot of things happening and I felt that she (Ms Hadfield) understood all of that."*[5] The applicant said that, as a result of their conversation, she thought that Ms Hadfield understood that her being emotional was due to the bullying and harassment by academic staff.[6]

[8] Ms Rametta confirmed that her probation review report included the words *"operating under stress currently and can be emotional"*.[7] The applicant indicated that she was upset that this had been included in the report as she felt she had been unfairly judged because she had been harassed. This was the reason why she had written her comment on the form.[8] She said that she had also written the comment because she felt she did not have appropriate support from management when being harassed by academics. The harassment was said to be the result of the under resourcing of the ORI.[9]

[9] The applicant confirmed the e-mail of 28 March 2007[10] that said that there were other academics who had been complaining. Ms Rametta indicated that she had not used the terms *"bullying or harassment"* in her discussion with Ms Hadfield. Rather, she had said that she was *"so upset and overworked and staff, academic staff, were constantly complaining…."*[11]

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[2] Ibid PN 576 - 583

[3] Ibid PN 584 - 598

[4] Ibid PN 514 - 527

[5] Ibid PN 528

[6] Ibid PN 676 - 680

[7] Exhibit R3 at attachment AH1

[8] Transcript PN 664 - 675

[9] Ibid PN 662

[10] Exhibit A15

[11] Transcript PN 659

[10] Further, the applicant refuted Ms Hadfield's view that the applicant had not been bullied and harassed by academic staff to get their ethics proposals approved. Ms Rametta described a DUREC meeting regarding such behaviour by one staff member, in particular.[12]

[11] With respect to the applicant's relationships at work, as at August 2007, it was the applicant's evidence that they were very good except for two individuals - Dr Smith and Ms Por. She disagreed that there were four or five persons with whom she had poor working relationships.[13] With respect to the relationship between herself and Ms Bates, the applicant denied that there was low-level bickering between them.[14] However, she felt that Ms Bates had started to question everything and was disrespectful of her and her position.[15]

Concerns about understaffing

[12] With respect to her concerns about understaffing of the office, the applicant confirmed that she had raised her concerns with Associate Professor Toop and Ms Hadfield. Ms Rametta indicated that they had not ignored her concerns but had not acted quickly enough.[16] At the time the applicant commenced employment, it was recalled that there were three part-time casual employees working in the ORI reporting to the applicant. They remained until May 2007 and were said to be approximately equivalent to one full-time position. Ms Truter commenced in a permanent part-time position (.6 EFT) in July 2007. Of the casual employees, only Ms Bates remained after May 2007 and her contract was due to end in December 2007. Ms Bates worked 1.5 days a week in the ORI.[17] The applicant also confirmed that Ms Sova, a casual employee, had been due to finish work at the end of March 2007 but that Ms Hadfield and Associate Professor Toop were able to extend her employment for a further three months.[18]

[13] However, it was the applicant's view that management were "*giving on the one hand and they're trying to take in the other.*"[19] By this, the applicant meant that Ms Bates was only appointed for three months at a time, Ms Sova and Jeremy had left before Ms Truter started and Ms Truter's position was to be full-time but ended up being shared with another area.[20] The applicant then clarified that, in terms of 2007, she had meant that she had received very little support/backup from management – *"... they just weren't giving me the real support I needed and not enough resources."*[21]

[14] It was the applicant's evidence that she needed a minimum of one full-time assistant due to the workload.[22] She said that she had written to Associate Professor Toop regarding

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[12] Ibid PN 498

[13] Ibid PN 520 - 521

[14] Transcript PN 402

[15] Ibid PN 405

[16] Ibid PN 686 - 690

[17] Ibid PN 376-388

[18] Ibid PN 693 - 703

[19] Ibid PN 721

[20] Ibid PN 721, 726

[21] Ibid PN 722

[22] Ibid PN 389

staffing levels within the ORI, on 9 October 2007, and had requested that Ms Bates' contract be renewed for a further 12 months.[23]

Complaint by Ms Truter.

[15] The applicant confirmed that, at the meeting on 24 October 2007, Mr Owens and Ms Hadfield had told her of the concerns raised by Dr Smith and Ms Truter regarding her behaviour. It was stated by the applicant that she was told that there were two complaints but that they were not technically formal. The applicant was then advised, on 27 October 2007, that two formal complaints had been received after the meeting.[24] She said that she only received the complete version of the complaints attached to a letter from Ms Cooper dated 21 December 2007.[25]

[16] She recalled that she had no idea that she had upset Ms Truter and was shocked to hear that. It was the applicant's evidence that the first time she heard about Ms Truter being upset with her was on 24 October 2007. She recalled that, when she had asked Ms Truter to assist her with a task, she had become annoyed and defiant and said that it had been agreed that she would be formally trained in the use of the plain language statement.[26] She felt disappointed with management as she would have thought that someone could have had a word with her about her behaviour rather than making it official with Human Resources. She thought that management should have told her that Ms Truter was feeling stressed by her behaviour and then tried to sort out the issues. The applicant says that she could not acknowledge that the complaints were serious, as all she was told on 24 October 2007 was that Ms Truter was upset with her emotional outbursts.[27] Once she had been provided with the full version of Ms Truter's complaint, she said that she regarded it as serious.

[17] It was confirmed by the applicant that, on Friday 26 October 2007, she had e-mailed Associate Professor Toop with a copy to Ms Truter. The applicant said that it was not her apology, but that she wanted to let Ms Truter know that she was going to be reasonable and would talk to her about the issues. She had not thought that Ms Truter would take offence at her comment that she had wished that she had encouraged Ms Truter to discuss her concerns directly with her.[28] Ms Rametta explained that she was expressing her disappointment as she felt that she had always had an open door policy. She said that she thought that Ms Truter was more a friend and she wished that she (Ms Truter) had had the courage to talk to her. With the benefit of hindsight, the applicant accepted that this comment may have been regarded as offensive by Ms Truter.[29] Ms Rametta explained that she had been surprised and shocked that Ms Truter was upset with her - she had not expected her to be so upset. She said that she could see now, how Ms Truter could be offended - but not at the time. It was confirmed that the applicant's intention, at the time she wrote the e-mail, was to meet with Ms

[23] Exhibit A14

[24] Ibid PN946 - 967

[25] Transcript PN 366 - 371

[26] Ibid PN 483 - 488

[27] Ibid PN 747 - 763

[28] Ibid PN 898 - 920

[29] Ibid PN 921 - 926

Truter and apologise to her. She had not included reference to this in the email because Ms Hadfield had said that she would let Ms Truter know.[30]

Complaint by Dr Smith

[18] The applicant stated that she did not consider Dr Smith's complaint as serious until she was given the full complaint. In terms of the complaint by Dr Smith, the applicant said that she had called him a prick. She indicated that he had described him to other people as a fucking prick. Ms Rametta stated that she was human and that she had slipped up.[31]

[19] Regarding the incident with Dr Smith on 23 July 2007, it was the applicant's evidence that Dr Smith was arrogant and had no respect or regard for her views. She had just returned from sick leave to a heavy workload. The applicant indicated that she had got annoyed with him and that he had reacted badly and stormed out of her office. She had then sent Dr Smith an e-mail explaining that she was stressed and apologising. Dr Smith had not spoken to her since. The applicant had also said that she had made great efforts to restore the relationship with him but that he had completely ignored her.[32] Ms Rametta felt that Associate Professor Toop had seemed very understanding about what had happened.[33]

[20] Ms Rametta recalled that she had agreed to apologise to Ms Truter in person and to apologise to Dr Smith. She said that she had felt very awkward and uncomfortable about apologising to Dr Smith, in person. The applicant stated that she was only asked to apologise to him for her inappropriate language. She denied agreeing to apologise to Dr Smith in person. Ms Rametta stated that she had rung Dr Smith and had left a voice message.[34] She explained that she was not given an opportunity to speak to Dr Smith, in person, because she was "*quarantined*" after 24 October 2007. By "*quarantined*", Ms Rametta meant that she was instructed not to make contact with her colleagues, even though she wanted to apologise to Ms Truter.[35] It was Ms Rametta's evidence that she could not apologise to Ms Truter in person between Wednesday 24 October and Friday 26 October 2007 as she was not at work (either away sick or at a conference) and had been told to apologise in person. On Sunday 28 October 2007, she had been instructed not to come to work.[36]

[21] The applicant recalled the telephone call between Ms Hadfield and herself, on Sunday 28 October 2007, when she was instructed not to come into work and felt that Ms Hadfield had seemed really annoyed and had cut her short. She said that she had not appreciated it and had been upset by it.[37] The applicant stated that she had not raised this with Ms Hadfield as she had been verbally told on 24 October 2007 not to write e-mails.[38] She rejected the proposition that, as she was stressed, she may have misunderstood Ms Hadfield's tone.[39]

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[30] Ibid PN 928 - 936

[31] Ibid PN 1024 - 1027

[32] Ibid PN 816 - 823

[33] Ibid PN 481 - 482

[34] Ibid PN 824 - 839

[35] Ibid PN 840 - 842

[36] Ibid PN 850 - 875

[37] Ibid PN 978-984, 989

[38] Ibid PN 985 - 997

[39] Ibid PN 1012 - 1016

Meeting on 17 December 2007

[22] The applicant confirmed that she was advised by Associate Professor Toop that the University was formally investigating the complaints and that she was not to participate in the day to day running of the ORI and not to contact the other staff. In addition, she was relocated to an office in another area. The applicant confirmed that the various projects that she was to undertake were outlined. She said that she had no option but to accept it.[40] It was the applicant's view that these actions represented an adverse judgement of her and she felt censured. She believed that she should have been made aware of the full complaints at the time and give an opportunity to respond informally. Ms Rametta stated that, although her classification and salary had not changed, she viewed the actions as a demotion. This was said to be because she was no longer operating at executive level.[41] She agreed that she was told that the measures were temporary whilst the investigation was taking place and that they have been advised by Human Resources. The applicant did not accept that the measures were put in place for the safety and welfare of all of the employees concerned, including herself. Rather, she felt she was being punished and humiliated which caused her more distress. The applicant said that it was not necessary for her to be removed from her work area.[42]

Panel Inquiry and report

[23] Ms Rametta indicated that she accepted the findings but did not necessarily agree with all of them. She accepted that Ms Truter felt intimidated but believed that she had not been intimidating. Rather, she had vented her frustrations about her work situation to Ms Truter.[43]

[24] The applicant was also questioned regarding the evidence Mr Mitchie and Mr Bolger gave to the Panel Inquiry regarding her behaviour.[44]

[25] It was the applicant's evidence that, in October 2007, she felt undermined in her position by Associate Professor Toop and Ms Hadfield. This was due to Associate Professor Toop talking to other staff about human ethics issues when she should have spoken to the applicant and when she gave Ms Truter approval to leave early.[45] She said that she *"... felt insecure and I felt that my supervisor wasn't supporting me in my position."*[46] It was acknowledged that, when she raised the issue of Ms Truter leaving early, Associate Professor Toop had apologised. However, it was the applicant's belief that, despite this, she still felt undermined.[47]

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[40] Ibid PN 1035-1048

[41] Ibid PN 1050-1081

[42] Ibid PN 1082 - 1089

[43] Ibid PN 1101 - 1102

[44] Ibid PN 1109 - 1123

[45] Ibid PN 1124 - 1133

[46] Ibid PN 1134

[47] Ibid PN 1150 - 1165

[26] Ms Rametta did not recall any discussions regarding her behaviour with management, between the confirmation of her employment interview (August 2007) and the formal complaints (October 2007).[48]

[27] With respect to the Panel Inquiry finding that her behaviour towards Ms Truter was intimidating, the applicant said that she would have challenged it but thought that she was unable to do so. Until this proceeding, the applicant had only ever received a blacked out version of the Panel Inquiry report, rather than a full copy.[49] She said that she had realised, once she was given the full report, that the letter from Ms Cooper on 7 March 2008 had included all of the Panel Inquiry's findings. Ms Rametta stated that she had decided not to lodge a complaint about a complaint. Also, she did not think that the findings were all that bad. She indicated that she was willing to do what the University wanted - to improve her behaviour. However, after she received the letter of 20 March 2008, when she realised that her job had been taken away, she had then responded.[50]

Letter of 20 March 2008

[28] The applicant agreed that, after she had received the letter from Ms Cooper, dated 20 March 2008, she was relocated back into her old work area but into a different office. The letter set out a number of transitional arrangements which the applicant felt, had removed from her, the central management of the ethical approval process.[51] The applicant stated that she had refused to accept that her responsibilities needed to change as a result of the Panel Inquiry report.[52] It was stated that she had not challenged the arrangements because they were said to be transitional. She recalled that it was her proposed redundancy which had prompted her to make a formal complaint. She believed that it had been unnecessary for Ms Emery to take over her responsibilities and she recalled that Associate Professor Toop had told her that Ms Emery was not going to take over her role. With respect to Ms Fornaro, the applicant said that Ms Fornaro had been given tasks which were to have been given to her (the applicant) in order to develop her skills.[53]

Meeting on 10 November 2008

[29] The applicant had understood that the purpose of the meeting was in relation to the clearance letter from Ms Cooper, dated 7 November 2008 and her PPR.[54] Ms Rametta confirmed that, at the meeting, Associate Professor Toop had told her that there was a restructure and gave her a copy of the proposed organisational structure. She recalled asking what had happened to her position and being told that there was a position in Geelong, classification unknown. At that point, Ms Rametta stated that she realised what was happening - that she was being manoeuvred out of her job - and so she had ended the meeting. She denied that these details had not been included in her witness statement because they had not happened.

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[48] Ibid PN 476 - 479

[49] Ibid PN 1247 - 1255

[50] Ibid PN1260 - 1272

[51] Ibid PN1315 - 1330

[52] Ibid PN 1344

[53] Ibid PN 1388 - 1427

[54] Ibid PN 1381 - 1386

[30] Ms Rametta said that, after the meeting, she had gone home with permission and had not attended the team meeting about the restructure. She had requested that she be provided with the information that was to be distributed at the meeting. It was recalled that she had contacted Associate Professor Toop, straight after the meeting, and had asked whether there was any negotiation regarding the location of the position. She was told by Associate Professor Toop that the location was *"absolutely not, no, no, it is not negotiable."*[55] The applicant said that it was then that she realised that, if there was no negotiation possible about the location, there was probably no negotiation about other aspects of the restructure. This included the other two positions – the HEW8 and HEW10 and their position descriptions.[56] She concluded, therefore, that it was a false consultation process. Ms Rametta stated that she had given her input to Associate Professor Toop about the restructure on 19 November 2008 and that, in order to get her to negotiate, she had activated the dispute settling procedure. She indicated that she had not contacted Associate Professor Toop to obtain any more information after she had received the e-mail dated 13 November 2008.[57]

Disputes Committee.

[31] It was confirmed by the applicant that the Disputes Committee put forward a proposal in an endeavour to resolve the issue. She held the view that the University had agreed to it because it had been Ms Hadfield's proposal in the first place.[58] She said that, after she had lodged a dispute, the location became negotiable. It was conceded that the University had been willing to make a limited compromise.[59] The applicant acknowledged that she was offered the position of Human Research Ethics adviser based in Geelong with maintenance of her salary at her current HEW7 classification.

[32] Ms Rametta was questioned about whether, at the end of the negotiations following the Disputes Committee's proposal, the parties were actually not far apart or were actually poles apart.[60] It was felt by the applicant that the negotiations were part of an elaborate charade. She believed that the University had created the full-time position in Geelong as *"one way to get rid of her"*.[61]

[33] The applicant indicated that she had spoken to Human Resources about redeployment opportunities. She had found a position in the Governance Unit and had applied for it but was unsuccessful.[62] Ms Rametta stated that she did not apply for a voluntary retrenchment package.[63]

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[55] Ibid PN 490 - 491

[56] Ibid PN 1722, 1727 - 1734

[57] Ibid PN 1432 - 1491

[58] Ibid PN 1635

[59] Ibid PN 1740 - 1751

[60] Ibid PN 1789 - 1811

[61] Ibid PN 1834

[62] Ibid PN 1846 - 1851

[63] Ibid PN 1902 - 1932

Meeting on 17 December 2008

[34] It was the applicant's evidence that, during this meeting, Associate Professor Toop had told her that she should consider her options and had asked her about the University's offer of resignation. She recalled that she had been offered the opportunity to resign twice and that she had felt *"insulted"*.[64] Ms Rametta indicated that, during this meeting, and also the one in June 2008, she had told Associate Professor Toop that she wanted to keep her job and to move forward. Associate Professor Toop had agreed.[65]

Removal of responsibilities

[35] The applicant confirmed that Ms Fornaro had commenced employment in December 2007 and that Ms Emery had taken over her executive duties with the applicant becoming the administrator. She said that she (the applicant) was performing Ms Truter's role. Ms Rametta also said that, for the four faculties that had remained her responsibility, she was not performing the full executive officer role.[66] It was stated that she became one of the support staff and that overall responsibility for her duties had gone to Ms Emery or Associate Professor Toop. She acknowledged that, in conjunction with Ms Emery and Ms Fornaro, she was involved in the maintenance and implementation of policies and procedures. However, responsibility for developing policy was removed from her and she was only "*involved"* in the two major initiatives.[67]

[36] Ms Rametta confirmed that the advisory role in relation to the health faculty had been removed from her duties. She recounted that, from 22 July 2008 onwards, she was told by Ms Emery not to provide advice to the other four faculties. She had asked Ms Emery to talk to Associate Professor Toop about this as she felt *"offended"*.[68]

[37] The applicant stated that, during the period of November 2007 to November 2008, she was not told that she was no longer Executive Officer, Human Research Ethics. However, Ms Rametta said that her functions had been taken away and that she *"just became one of the team, I was no longer responsible for any of that."*[69] Further, it was said that *"I no longer had any management or executive responsibility…"*[70] Extensive evidence was given by the applicant regarding the removal of her functions throughout 2008 with reference to her job description.[71]

[38] With respect to the provision of executive support to the Human Research Ethics Committee, the applicant stated that the agenda became a shared responsibility and that her contribution was an administrative one. She said that she was no longer solely responsible for

[64] Ibid PN 1879

[65] Ibid PN 1902 - 1932

[66] Ibid PN 1937 - 1942

[67] Ibid PN 1962 - 1982

[68] Ibid PN 2009

[69] Ibid PN 412

[70] Ibid PN 416

[71] Ibid PN 410 - 468

the minutes. From April 2008, she indicated that she did return to attending the DUREC meetings.[72]

[39] In terms of notifying researchers of the outcomes of the DUREC meetings, Ms Rametta acknowledged that that was still her role, albeit no longer for the Health faculty, which was the largest faculty and where the bulk of the research was undertaken. Therefore, it was said, a considerable amount of responsibility was removed from her.[73]

[40] Ms Rametta confirmed that responsibility for providing advice to the Deputy Vice-Chancellor Research was removed following the Panel Inquiry report. She denied that there was any friction between herself and Professor Stokes.[74]

[41] The applicant acknowledged that she was still responsible for maintaining the official records regarding research proposals but said, again, that it was a shared responsibility. She now only looked after four faculties.[75]

[42] With respect to the provision of advice to senior management, it was the applicant's evidence that this was her responsibility up until April 2008. She conceded that, following the appointment of Associate Professor Toop in July 2007, she had less responsibility in this area.[76]

[43] With regard to responsibility for educational programmes, the applicant said that Ms Emery took the coordinating role away from her. She stated that she had written an annual report which Associate Professor Toop had edited. As well, in May 2008, the applicant recalled that she was given the task of managing the research master project but that Ms Emery had to be involved. Consequently, Ms Rametta said that she never felt that she was given managerial responsibility. It was acknowledged that the project was time critical but, after having been away on bereavement leave for three days, the project was reallocated to Ms Emery. She recalled that she was told that they were dissatisfied with the way she was handling the project.[77]

Associate Professor Toop.

[44] Associate Professor Toop is Associate Professor of Biology and also Director of the Office of Research Integrity. She was appointed Director of Ethics and Bio-safety in July 2007 and had been previously in the bio-safety area with responsibility for animal welfare. It was her understanding that the rationale for her appointment to the Director position was the need to increase the profile of the human ethics and bio-safety group, given the growth in research.[78]

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[72] Ibid PN 1986 - 2037

[73] Ibid PN 2038 - 2043

[74] Ibid PN 2110 - 2119

[75] Ibid PN 2123 - 2128

[76] Ibid PN 2132 - 2139

[77] Ibid PN 2140 - 2174

[78] Ibid PN 2283 - 2289

[45] It was confirmed by Associate Professor Toop that there were discussions in July/August 2007 about amending her appointment as Director of Ethics and Bio-safety with the intention of bringing the entire group under one umbrella.[79]

[46] It was confirmed by Associate Professor Toop that, during the first half of 2007, there was a lot of stress and pressure due to a lack of resources in the ORI. Ms Truter was appointed to help address those concerns but Associate Professor Toop did not recall a conversation with the applicant where she had said that Ms Truter's position would be exclusively for the ORI.[80]

Ms Truter's complaint

[47] Associate Professor Toop confirmed that Ms Truter made two complaints - regarding the incident over the training and also when she had left early. It was pointed out that these complaints came *"against a background of behaviour in the workplace that I believe staff in Elgar Road found unacceptable."*[81] Associate Professor Toop indicated that these staff had not made complaints. It was said that Ms Truter's complaints were against a background of intimidation and fear by Ms Truter that it was only a matter of time before the applicant turned on her as she had turned on others previously.[82]

[48] With respect to the incident on 12 October 2007, Associate Professor Toop agreed that Ms Truter had left work early without getting approval from her supervisor (the applicant) or saying goodbye. She thought that the applicant was entitled to be annoyed. With respect to Ms Truter leaving early, Associate Professor Toop recalled that she had had no problem with Ms Truter leaving early and that she gave her permission to do so. She said that she understood that Ms Rametta was upset and had apologised. When Ms Truter became upset, she conveyed sympathy *"to an employee who was upset"*.[83] It was conceded by Associate Professor Toop that, from what Ms Truter had said in her formal complaint, the matter could have been sorted out.[84] It was stated that she had only read Ms Truter's complaint in the previous week. However, she knew that, in broad terms, Ms Truter felt intimidated by the applicant's behaviour in the workplace, triggered by the events of 11 and 12 October 2007.[85]

Dr Smith's complaint

[49] Associate Professor Toop agreed that, in an email from Dr Smith, dated 21 August 2007 regarding the incident on 23 July 2007, Dr Smith thought that Mr Ritchie also held the view that he did not have enough work to do. She confirmed that Dr Smith did not want her (his supervisor) to think that he did not have enough work to do and that he thought that the issue should be cleared up before his probationary assessment. However, when he had telephoned on 23 July 2007, Associate Professor Toop recalled that he was not concerned about his workload or probation. Rather, it was said that he was extremely upset when he told

[79] Ibid PN 2296 - 2298

[80] Ibid PN 2327 - 2330

[81] Ibid PN 2394

[82] Ibid PN 2401, 2402

[83] Ibid PN 2429

[84] Ibid PN 2458

[85] Ibid PN 2336 - 2352

her about the incident with Ms Rametta. He did not say that he wanted to lodge a formal complaint.[86]

[50] It was confirmed by Associate Professor Toop that, after Dr Smith had complained about the applicant, she had advised him not to be alone with the applicant and to try and avoid her. Her understanding of Dr Smith's complaint was that, apart from the incident on 23 July 2007, the applicant was being extremely personal against him and was undermining him in the workplace. Associate Professor Toop concurred that when, in Dr Smith's e-mail to her of 8 August 2007, he had included the applicant's message to him and had said that it was *"probably best to forget it"*, that should have been the end of the incident.[87] She could not comment as to how, when neither Dr Smith nor the applicant had spoken to each other, Dr Smith had lodged a formal complaint.[88] Associate Professor Toop confirmed that, early in Dr Smith's employment, she had told him that the applicant had derided his position and that she had thought it trivial and easy compared to her own. She felt that it was fair to alert a new employee to the applicant's emotional outbursts and bouts of uncontrollable crying.[89]

[51] Associate Professor Toop indicated that she had been aware of the harassment and discrimination complaints procedure prior to the complaints being lodged. She stated that the applicant had a number of rights under the procedure. With respect to the lack of an informal advice stage, this was said to be because the people involved felt too intimidated to approach Ms Rametta. She had also been asked not to discuss the matter with the applicant, on their behalf, because they thought it would make matters worse. Associate Professor Toop agreed that the first time the applicant knew of the issues was at the meeting at the end of October 2007.[90]

[52] It was explained by Associate Professor Toop that her role was to advise the complainants of the procedure but not to be involved in the formal aspects of the procedure. Human Resources were said to have handled the formal processes and that, as she was not a complainant, she had not been involved. It was indicated that she knew that an external investigator had been appointed but she did not know whether it had been before or after the complaints had been made.[91]

[53] It was Associate Professor Toop's view that she had followed the appropriate procedures by talking to her supervisor and Human Resources about the issue, following their advice and advising the employees concerned, when requested, regarding the policy. She denied encouraging Ms Truter to be defiant towards the applicant and could not recall encouraging Ms Truter to take a stand on the training (plain language statement) issue.[92]

[54] In terms of the communication between Dr Smith, Ms Truter and Ms Hadfield and herself, Associate Professor Toop denied that she was encouraging them to lodge complaints. She recalled that Dr Smith was extremely distressed when he heard what the applicant was

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[86] Ibid PN 2310 - 2326

[87] Ibid PN 2472 - 2473

[88] Ibid PN 2472

[89] Ibid PN 2500 - 2507

[90] Ibid PN 2353 - 2363

[91] Ibid PN 2368 - 2381

[92] Ibid PN 2407 - 2423

saying about him behind his back.[93] Associate Professor Toop stated that she had offered on several occasions to take the matters up with the applicant.

> "They [Ms Truter and Dr Smith] repeatedly asked me not to do this because they considered that it would make the situation much worse and I respected their desire for confidentiality in the matter and I also advised them of what University procedures there were that they could follow."[94]

[55] Associate Professor Toop indicated that she knew that, in September 2007, Ms Truter was keeping notes of her conversations with the applicant. It was denied that Ms Truter was relaying the information to her regularly. She said that she was sent Ms Truter's notes on one occasion.[95]

[56] It was confirmed by Associate Professor Toop that she was aware that the Chair of the Ethics Committee had described the applicant as a *"lunatic and a bunny boiler."*[96] It was her view that, whether calling someone a lunatic or a bunny boiler was worse than being called a fucking prick, depended on how the person being called that takes those remarks.[97]

[57] Associate Professor Toop indicated that there was a meeting between herself and Ms Hadfield and Ms Truter and Dr Smith. She recalled that Ms Truter and Dr Smith were concerned that the applicant could be violent and that she had then told them that she had raised this issue with Human Resources. Associate Professor Toop recalled that she had seen the applicant be very verbally aggressive with a very aggressive posture which gave the impression that the next step was some kind of physical violence.[98] She said that she did not have concerns about Ms Rametta pursuing/threatening her family.[99]

[58] During the meeting on 29 August 2007 with Dr Smith, Associate Professor Toop indicated that she had been advised by Human Resources to let Dr Smith know that, if he was feeling distressed, he could call Human Resources for advice. She denied that she was encouraging him to lodge a complaint. It was recounted that Dr Smith was still very distressed about the events of July 2007 and was feeling that the applicant was undermining him.[100]

[59] It was clarified by Associate Professor Toop that, when she advised Dr Smith not to be alone in the room with the applicant, she was concerned for both of them that there was an independent witness, if any issues arose.[101]

[60] With respect to his interview with the external investigator, Associate Professor Toop said that she had not given Dr Smith any materials for him to use. She thought that what Dr

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[93] Ibid PN 2479 - 2481

[94] Ibid PN 2496

[95] Ibid PN 2486 - 2488

[96] Ibid PN 2510 - 2515

[97] Ibid PN 2516 - 2517

[98] Ibid PN 2571 - 2577

[99] Ibid PN 2593

[100] Ibid PN 2640 - 2651

[101] Ibid PN 2705 - 2708

Smith had been referring to was his concern about whether his statement should include hearsay conversations, albeit relevant to his complaint. Associate Professor Toop recalled that her advice was that he should include all material that was relevant. She denied that she was supporting him in lodging his complaint.[102]

[61] It was confirmed by Associate Professor Toop that, between 11 and 12 October 2007 and when the formal complaints were made, there was a lot of discussion between herself, Ms Truter and Dr Smith. She also said that she was also in close discussion with Human Resources and Ms Hadfield. In terms of her e-mail response to Ms Truter on 12 October 2007, Associate Professor Toop explained that her comments regarding a *"rocky ride on 12 October"* meant that she doubted whether the applicant would be calm in any discussion about the training and the leaving early incidents.[103]

[62] It had been planned that she and Ms Hadfield would talk to the applicant on 19 October 2007. However, Ms Rametta was not at work that day so they spoke to Dr Smith and Ms Truter instead. She also recounted that she was in close contact with Human Resources and had acted as a *"go-between"* between Dr Smith and Ms Truter and Human Resources regarding what their options were etc. Once the formal complaints were made, she felt that it was not her role to be as personally involved.[104]

[63] Associate Professor Toop explained that the reason the meeting did not go ahead on 19 October 2007 was because the applicant was away. She said that she could not reschedule the meeting for the next week as she was then away. It was stated that, although she, Ms Hadfield and Human Resources had decided that it was best if she and Ms Hadfield met with the applicant, in the end, it had to be Mr Owens and Ms Hadfield.[105]

[64] Associate Professor Toop indicated that she had assumed that the letter from Ms Cooper to the applicant, dated 7 March 2008, had concluded the complaint process. She confirmed that, by this time, Ms Truter was no longer working in the ORI.[106]

Ms Hadfield.

[65] Ms Hadfield is the Director of Research Services at Deakin University.

[66] It was Ms Hadfield's evidence that, after March 2008, there was one change to the applicant's responsibilities which was that the Health faculty was assigned to another employee. She confirmed that the applicant was still responsible for the Principal Accountabilities on her position description except in relation to the health faculty. There was one exception - the provision of executive support to the human research ethics committee (preparation of the agenda) - which was shared with Ms Fornaro (health and non-health responsibilities). It was also said that, with respect to the Position Dimension of the job description, Ms Rametta continued those responsibilities except for health.[107] It was stated

[102] Ibid PN 2717 - 2724

[103] Ibid PN 2738 - 2744

[104] Ibid PN 2800 - 2801

[105] Ibid PN 2808 - 2810

[106] Ibid PN 2785 - 2792

[107] Ibid PN 2880 - 2907

that she did not know on a day-to-day basis what duties the applicant was performing as she was not her direct supervisor. Therefore, her evidence regarding the applicant's position description was general and she could not provide specific examples.[108]

[67] However, Ms Hadfield stated that, after March 2008, the applicant no longer trained or supervised administrative support staff. She indicated that Ms Cooper's letter to the applicant of 20 March 2008 formed the basis of her understanding that one of the Panel Inquiry findings was that the applicant no longer supervise administrative staff. In addition, it was recalled that discussions with Human Resources included keeping the applicant physically separated from other staff prior to the Inquiry and not as part of the transitional arrangements.[109]

[68] With respect to the restructure, Ms Hadfield agreed that, effectively, four positions (Ms Emery's position, Ms Fornaro's position, the vacant Administrative Officer position and Ms Rametta's position) replaced the Human Ethics Office. She stated that Ms Emery is the Manager of Research Integrity and confirmed that the Administrative Officer position was ultimately filled by Ms Bates. She said that Ms Bates had been employed for some years but agreed that Ms Fornaro and Ms Emery started in the Office between December 2007 and March 2008.

[69] Ms Hadfield confirmed the employment history of Ms Fornaro and Ms Bates, the position description (Senior Consultant Research Integrity) for Ms Emery when she commenced and the position description (Ethics Officer Medical) for Ms Fornaro.[110] It was confirmed that Ms Bates was performing some of the sort of work that either of the Ethics Officer positions would have done.

[70] It was denied by Ms Hadfield that, prior to the restructure, Ms Emery was performing the role of Manager Research Integrity. She said that Ms Emery was a Special Consultant and not called Manager Research Integrity.[111] Ms Hadfield acknowledged that, at the time of the restructure, Ms Emery was in place within the Office of Research Integrity but not as manager as the position had not yet been created. It was her belief that Ms Emery:

> "…. was not actually employed in the position of Manager Research Integrity at the time of the proposed structure, but that she had been carrying out some functions and perhaps I would say all of the functions that, apart from the line management of the new position of Manager Research Integrity."[112]

[71] Ms Hadfield contended that the Ethics Officer Health position was a new position in that it would be a continuing position rather than a contract one. She indicated that the functions were already being performed prior to the restructure. It was denied that Ms Rametta could not apply for either the Manager Research Integrity position or the ethics officer health position, because they were already filled. Rather, it was because the proposal

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[108] Ibid PN 2962 - 2973

[109] Ibid PN 2976 - 2991

[110] Ibid PN 3022 - 3056

[111] Ibid PN 3072 - 3076

[112] Ibid PN 3094

was not yet in place. Ms Hadfield indicated that one of the positions was advertised on the University website in June 2009 and subsequently filled by Ms Fornaro.[113]

SUBMISSIONS

Applicant

[72] It was submitted on behalf of the applicant that, in addition to the power under s.170LW of the Act, the Tribunal had the power of private arbitration. This was said to arise from the parties' dispute settlement clause in the Agreement (clause 68). It was argued that, once there was a dispute over the application of the agreement, the Tribunal had private arbitration powers to prevent and settle disputes between the parties[114]

[73] The clauses at issue were defined as clauses 18, 19 and 70 and it was alleged that the respondent had not complied with these clauses of the Agreement with respect to Ms Rametta.

[74] It was argued that, although the University denied that disciplinary action was being taken against the applicant (clause 18 of the Agreement), in fact, there was censure, counselling and then demotion of the applicant.

[75] Further, Mr Willoughby-Thomas contended that clauses 18.3, 18.4 and 18.5 involved preliminary actions concerning resolving the problem without resort to the formal process. It was argued that this part of the process had also not been applied to the applicant.

[76] With respect to clause 19 of the Agreement, it was stated that the terms of this clause had not been applied to Ms Rametta. It was argued that the University would not re-visit the Geelong position as a way of avoiding redundancy nor would it convene a disputes committee to address the issue.

[77] In terms of the requirements of clause 70 of the Agreement, Mr Willoughby-Thomas said that the applicant had been the person most affected by the change but was the only person not consulted about the change. Further, it was argued that the applicant had not been consulted prior to the decision being made (clause 73 of the Agreement). Mr Willoughby-Thomas contended that the evidence showed that the decisions had been made by the end of 2007 and were implemented throughout 2008. Ms Rametta had then been told that there was one position left. This was said to be a clear breach of clauses 70 and 74 of the Agreement.

[78] With respect to the evidence, Mr Willoughby-Thomas prepared a written chronology of events[115] and spoke to it during his final submissions. In addition, he argued that, following Ms Rametta's employment, circumstances changed - Ms Emery indicated an interest in returning, Associate Professor Toop and Ms Hadfield discussed the establishment of the Office of Research Integrity with Associate Professor Toop becoming the Director and Ms Fornaro, who was studying for a Masters in Bioethics, commenced employment in December 2007[116].

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[113] Ibid PN 3107 - 3120

[114] Transcript at PN 3291 - 3315

[115] Exhibit A30

[116] Transcript at PN 3448

[79] It was then submitted that there were other people that the Office of Research Integrity wanted to place in the applicant's position. Mr Willoughby-Thomas speculated that, in terms of making that happen it was probably thought that, given that the applicant was an emotional person, if complaints were made against her, she might just give up and go away. To this end, it was argued that Dr Smith and Ms Truter were encouraged and supported to make complains about the applicant.[117] It was said that the complaints had to be dealt with as private complaints as they could not be progressed as misconduct complaints under the Agreement. Mr Willoughby-Thomas contended that there had been no desire on the part of the complainants nor Associate Professor Toop or Ms Hadfield to resolve the issues[118].

[80] Further, it was submitted that, as soon as the complaints were received, the applicant was directed to work from home and various of her functions were removed. The applicant was only provided with a doctored version of the complaints and she was made offers to resign.

[81] Mr Willoughby-Thomas asserted that the applicant did not "*get the message*" to resign.[119] Instead, he said that she wanted to keep her job and to sort things out. The University, it was argued, started to progress the re-structuring with Ms Fornaro commencing on 3 December 2007, Ms Emery being approved for appointment without advertisement on 5 February 2008, Ms Fornaro being promoted to HEW6 on 4 February 2009 and Ms Emery commencing employment on 31 March 2008.

[82] During the Panel Inquiry, it was contended that *"all the managers line up to try and do a job on Sylvia."*[120] However, Mr Willoughby-Thomas said that the applicant *"still doesn't get the message"* so, on 20 March 2008, further sanctions were imposed.

[83] This was said to be:

> "the final push . . . because restructuring is getting close to getting finished by now, they really didn't know what to do to get rid of Silvia and so they had to strip those functions away because they had other people already on board who were doing them".[121]

[84] Mr Willoughby-Thomas submitted that these facts supported the contention that the University had breached clauses 18 and 70 of the Agreement.

[85] In addition to references to the decision of the High Court in *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* [2001] HCA 16, 15 March 2001, the Tribunal was taken to a number of other decisions which were said to also support the contention that the Tribunal had the broader private arbitration power as well as power under s.170LW of the Act. As well, the authorities were stated to support the

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[117] Ibid at PN 3450

[118] Ibid at PN 3451

[119] Ibid at PN 3453

[120] Ibid at PN 3454

[121] Ibid at PN 3454

argument that the Tribunal was able to provide remedies that are incidental to the subject matter of the dispute.

[86] With respect to the technical application of s.170LW, it was submitted that the dispute can be characterised as one relating to the application of the Agreement, namely clauses 18, 19 and 70.[122]

[87] In terms of the amendments to the applicant's outline of submissions[123] it was indicated that neither the claim of negligence nor that penalties be imposed was being sought any longer. Mr Willoughby-Thomas argued that the Tribunal, acting as a private arbitrator, could order the applicant's reinstatement to the position of Executive Officer, Human Research Ethics. The Tribunal was also said to be able to order compensation for all of the loss suffered as a result of the University's failure to adhere to the terms of the Agreement. In addition, it was submitted that the Tribunal could award compensation for breach of contract as it forms part of the dispute.[124]

[88] Mr Willoughby-Thomas contended that the terms of the Agreement were incorporated into the applicant's contract. It was argued that the University's offer of employment gave her the choice of an employment contract based on the Agreement or an Australian Workplace Agreement. This was said to be an express intention to incorporate the Agreement as terms of the contract of employment.[125]

[89] The Tribunal was also urged to consider questions regarding breaches of contract as part of its deliberations. It was contended that there had been a breach of the implied duty of good faith and fidelity.[126]

[90] In assessing the compensation to be awarded to the applicant, Mr Willoughby-Thomas argued that the principle to be applied is that the measure of damages is the amount of money which would place the applicant in the position that she would have been in had the Agreement and the contract not been breached. In this matter, it would be the loss of income resulting from her retrenchment.[127] It was further stated that general damages could be awarded as could damages for loss of chance or opportunity and loss of reputation, distress and injured feeling and aggravated damages.[128]

[91] Orders were sought in the following terms:

- immediate reinstatement of the applicant to her previous position.
- compensation for the applicant's current and future loss of remuneration following her retrenchment on 5 June 2009.
- compensation for humiliation and distress and damage to the applicant's reputation.
- an apology from the University.

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[122] Ibid at PN 3467

[123] Exhibit A31

[124] Ibid at PN 33 -39

[125] Transcript at PN 3488 - 3490

[126] Ibid at PN 3490 -3492

[127] Exhibit A31 at PN 41 and 43

[128] Ibid at PN 42 - 43; 45 - 55

- reimbursement of legal costs.
- aggravated damages.[129]

[92] Finally, in the amended written outline of submissions, Mr Willoughby-Thomas contended that this may be a "*precedent setting case*".[130]

[93] Further, it was indicated that, under clause 68.8 of the Agreement, there was no right of appeal as the decision of the Tribunal was binding on both parties.

[94] It was said to be critical that the Tribunal rule on every contention of fact and law. This was because the applicant has rights in courts for breach of contract. Any subsequent exercise of those rights could result in arguments from the University in relation to ves judicata or issue estoppel.

Respondent

[95] It was contended by Mr D'Abaco, on behalf of the respondent, that the applicant's conspiracy theory was "*errant and abject nonsense*".[131] He stated that none of the allegations had been put to either Associate Professor Toop or Ms Hadfield. Accordingly, the principles of *Browne v Dunn* applied.[132]

[96] With respect to the remedy of reinstatement, it was argued that the applicant could not be reinstated to a position which had ceased to exist in February 2009. Further, Mr D'Abaco contended that it had been evident from the applicant's evidence that she bore hostility and antipathy towards Associate Professor Toop who would be her supervisor. As well, the applicant would be working alongside other colleagues who had also been involved in this alleged conspiracy.

[97] Mr D'Abaco submitted that the essence of this case was the allegation that there had been breaches of clauses 18, 19 and 70 of the Agreement. This was because the Tribunal did not have jurisdiction to deal with alleged breaches of the employment contract as the Agreement had not been incorporated into the applicant's contract of employment, whether expressly or implied. It was said that, even if it had, the Tribunal would then not be dealing with a dispute about the application of the Agreement. Rather it would be a dispute about alleged breaches of the contract of employment. Mr D'Abaco stated that this matter was simply a determination of whether there is a dispute about the application of the Agreement. If so, it was then a determination as to whether there had been a non adherence to the Agreement and if found, the appropriate remedy.[133]

[98] With respect to the complaints made by Dr Smith and Ms Truter, the evidence of Associate Professor Toop was highlighted. Her evidence was said to be that, initially, she sought to talk to the applicant about it but that both complainants asked her not to do that. Associate Professor Toop had respected their wishes. A meeting had then been arranged

[129] Ibid at PN 56

[130] Ibid at PN 57

[131] Transcript at PN 3497

[132] Transcript at PN 3498 and 3590 and Exhibit R4 at PN 15 -17

[133] Transcript at PN 3508 - 3514

between the applicant and Associate Professor Toop and Ms Hadfield for 19 October 2008. However, it did not go ahead as the applicant was not at work that day. It was re-scheduled for 24 October 2007 but Associate Professor Toop was not available on that day. The meeting went ahead with Mr Owens from Human Resources instead. However, what occurred following the meeting resulted in the two employees lodging formal complaints. [134]

[99] It was stated that, once the University received the complaints alleging bullying and harassment, it was obliged to deal with them in accordance with its procedures. With respect to the applicant's conspiracy theory that, shortly after the confirmation of the applicant's employment Associate Professor Toop and Ms Hadfield decided that they would get rid of the applicant, it was stated that a proper analysis of the evidence revealed no basis for the theory.[135]

[100] In terms of the position put by the applicant that, by the time of the announcement, on 10 November 2008, of the proposed restructuring of the Office of Research Integrity, it had already been restructured, it was not acknowledged that, during last 2007/early 2008, new employees commenced in the office. It was said though, that these employees had been appointed on either short term fixed contracts or on a fixed term basis. However, Mr D'Abaco contended that the appointment of additional employees did not mean that the organisation was being restructured, either expressly or covertly. The evidence of both Associate Professor Toop and Ms Hadfield was highlighted where they said that the demands on the office were increasing and becoming more complex. Additional resources had then been employed to address the situation. As well, Associate Professor Toop and Ms Hadfield had looked at the organisation to see if there was a better way of meeting all of the demands. Consequently, a proposal was formulated and circulated to all staff on 10 November 2008.[136]

[101] Further, with respect to the conspiracy theory, it was submitted that Associate Professor Toop, rather than being the ring leader, had given the applicant the heads up about the proposed restructuring as she anticipated that the applicant would be concerned. As well she had apologised to the applicant when she realised that she had given Ms Truter permission to leave early without reference to her direct supervisor. Finally, the Tribunal was referred to the demeanour of Associate Professor Toop and Ms Hadfield in the witness box as "*evidence*" that there had been not conspiracy against the applicant. Their evidence was compared with that of the applicant's.[137]

[102] Mr D'Abaco stated that the applicant had had a propensity to become very emotional during the course of her evidence. This was said to confirm the evidence on behalf of the University about the nature of the applicant's behaviour in the workplace. As additional staff had been engaged to provide the applicant with support, it was said that there was no proper reason or excuse for the behaviour of the applicant which had been complained about.[138]

[103] It was the respondent's contention that, rather than there having been a conspiracy, the situation was that the applicant took her position and title, very seriously. After three or four

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[134] Ibid at PN 3515 - 3517

[135] Ibid at PN 3518 - 3520

[136] Ibid at PN 3521 - 3522 and Exhibit R4 at PN 15 and 24 - 26

[137] Transcript at PN 3523 - 3529

[138] Ibid at PN 3529 - 3521

months of employment, Associate Professor Toop was appointed as Director and was interposed between the applicant and the Human Resources Ethics Committee. It was said that the applicant was so concerned about her authority and status that she sought reassurance from the Chairperson of the Committee that she would still be managing Human Ethics. Mr D'Abaco asserted further that, from mid-June 2007, the "*rot set in*" because the applicant started perceiving that her position was being down graded because she was no longer the sole repository of information, advice and authority within the Human Research Ethics area.[139]

[104] Ms Fornaro and then Ms Emery commenced work and it was stated that the applicant was then required to work with people with higher professional qualifications. The workplace was in a state of flux and the applicant felt aggrieved and disillusioned by these changes and saw plots and conspiracies where none existed. In terms of the alleged removal of the applicant's duties from the end of October 2008, the respondent stated that, after the formal complaints were lodged, the applicant was away for about six weeks. The University had a responsibility to re-allocate her duties and responsibilities as the Office still needed to function. Mr D'Abaco recalled that the University also made the decision, in light of the seriousness of the complaints, to relieve the applicant of her duties, allocate alternative duties and remover her geographically from proximity to the complainants. It was argued that it was prudent and proper for the University to have geographically re-located the applicant.[140]

[105] In light of the Inquiry Panel's findings and conclusions, it was stated that the University took the view that, in addition to accepting the Panel's recommendations, it wished to go one step further and removed the applicant's supervisory responsibilities for six months. It was stated that the University was entitled to do this based on the findings of the Inquiry Panel.

[106] Mr D'Abaco indicated that the complaints process had been concluded with the Inquiry Panel's report. However, it was contended that the University was still entitled to manage its employees and workplace in the way it believed appropriate. The respondent argued that there was nothing in the University's bullying and harassment policy nor the Agreement which prevented the employer exercising its managerial prerogative.[141]

[107] In terms of the alleged removal of the applicant's duties, Mr D'Abaco argued that what really happened was that, rather than exclusively performing the duties, she become part of a team with Ms Fornaro and Ms Emery. In analysing the applicant's evidence on this point, during cross examination, it showed that she continued to exercise almost all of her duties prior to October 2007. What had changed, it was said, was that new employees had joined the office and so the applicant was no longer the sole person responsible - which was perceived as a threat to her position and which it was not intended to be.[142]

Clause 18 of the Agreement

[108] With respect to clause 18 of the Agreement, it was submitted that the temporary removal of aspects of the applicant's duties for six months and her re-location to a different

[139] Ibid at PN 3534 - 3535

[140] Ibid at PN 3551 - 3552

[141] Ibid at PN 3553 - 3588

[142] Ibid at PN 3589

office was to protect the health and welfare of the employees affected. It was said that this had enabled the situation to calm down after an *"emotional very difficult period for all ..."*[143]

[109] It was stated that this was not disciplinary action as defined in clause 18.2 of the Agreement. Mr D'Abaco argued that, even if the Tribunal found that it was disciplinary action, the University had essentially followed the process set out in clause 18.2 of the Agreement. In dealing with the formal complaints, the University was obliged to follow the relevant procedure. It was highlighted that clause 75.3 of the Agreement excluded disputes in relation to the handling of complaints from the dispute resolution procedure in the Agreement.[144]

Clause 19 of the Agreement

[110] It was Mr D'Abaco's observation that there was not much material from the applicant regarding the alleged breach of this clause. The applicant had been paid in accordance with this clause and would suffer no loss until April 2010.[145]

[111] Mr. D'Abaco submitted that the allegations made by, and on behalf of the respondent were extremely serious in that Associate Professor Toop and Ms Hadfield have been accused of *"acts of deception and moral turpitude"* and, to a lesser extent, Professor Astheimer and the Human Resources Department. It was argued that a high degree of proof was required and that the evidence did not achieve that level. The evidence was said to show that Associate Professor Toop and Ms Hadfield did what they could to accommodate the applicant. The applicant had been offered a position in the new structure and the University tried to accommodate the applicant's concerns. It was stated that the applicant chose not to accept the position nor provide feedback on the restructuring process prior to that.[146]

[112] The respondent contended that there had been compliance with the procedural requirements of clauses 19 and 17 which were evidence of the bona fides of the University and of Associate Professor Toop and Ms Hadfield. In addition, there had been no criticism of the applicant by Associate Professor Toop or Ms Hadfield during their evidence.[147]

[113] With respect to the powers of the Tribunal in this matter, Mr D'Abaco submitted that the Tribunal was not acting as a private arbitrator but as an arbitrator exercising the statutory function of resolving disputes regarding the application of the Agreement pursuant to s.170LW of the Act. Further, it was stated that the Tribunal does not have jurisdiction to determine any breaches of contract nor to amend damages. Mr D'Abaco stated that there was no evidence of loss, particularly as the applicant received 10 months salary.[148]

[114] The respondent opposed the reinstatement of the applicant on the grounds that the position in which she had been formerly employed had ceased to exist as at 18 February 2009. Any order which required the University to recreate the position would be unreasonable.

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[143] Ibid at PN 3593

[144] Ibid at PN 3593 - 3599

[145] Ibid at PN 3600

[146] Ibid at PN3602 - 3603

[147] Transcript at PN 3604 and Exhibit R4 at PN 28 - 30

[148] Transcript at PN 3606 - 3610

Secondly, the applicant had made very few attempts to obtain re-deployment within the University and had, in effect pressured the University to be paid her redundancy.[149]

[115] Further, Mr D'Abaco submitted that the working relationship between key individuals in the Office and the applicant had broken down, and irretrievably so. If the applicant was reinstated, she would be working alongside Ms Fornaro and Ms Emery. Given the allegations about their complicity in the conspiracy to oust the applicant, it was said that it would be an intolerable situation if the applicant was returned to the office.[150]

[116] It was submitted that the only other remedy available to the Tribunal was that of compensation. As she has not suffered any financial loss, Mr D'Abaco argued that compensation should not be awarded.[151]

[117] With respect to the *Jones v Dunkel*[152] point made by the applicant, regarding the fact that representatives from Human Resources were not called, the respondent contended that the point was the decisions made and not the advice that had been provided beforehand. Further, Ms Hadfield and Associate Professor Toop had not been cross-examined on this point.[153]

CONCLUSION

[118] The Tribunal has before it two applications which have been made pursuant to s.170LW of the Act. It was common ground between the parties that both the applications deal with the same issues and the same relief is sought in respect of both applications. Accordingly, this decision addresses both applications.

Jurisdiction

[119] Section 170LW of the Act states as follows:

> "170LW Procedures for preventing and settling disputes
>
> Procedures in a certified agreement for preventing and settling disputes between the employer and employees whose employment will be subject to the agreement may, if the Commission so approved, empower the Commission to do either or both of the following:
>
> (a) to settle disputes over the application of the agreement;
>
> (b) to appoint a board of reference as described in section 131 for the purpose of settling such disputes."

[120] The Agreement which applied to the applicant was the *Deakin University Enterprise Bargaining Agreement 2005-2008*. It contains, at clause 68, the following:

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[149] Ibid at PN 3611 - 3612

[150] Ibid at PN 3613

[151] Ibid at PN 3615

[152] [1959] HCA8; (1959) 101 CLR 298

[153] Ibid at PN 3618 - 3626

"68 DISPUTE SETTLING PROCEDURES

68.1 It is agreed that the University and all of its staff members have an interest in the proper application of this Agreement, and in minimising disputes in a timely manner. For the purpose of preventing and settling disputes between the parties to this Agreement, the following procedures have been agreed.

68.2 Where the dispute involves an individual staff member, or a group of staff members, they may first discuss the matter with their supervisor. In accordance with clause 5.7 of this Agreement, the staff member(s) shall have the right to be represented at any time if they so choose.

68.3 Where a dispute is not resolved under clause 68.2, at the request of either party to the dispute a Disputes Committee shall be convened within five working days unless agreed otherwise. The Disputes Committee shall consist of, unless otherwise mutually agreed:

a. two nominees of management; and
b. two members nominated by the Chair of the Staff Liaison Committee from a pool of elected staff members of the University.

68.4 The Disputes Committee shall attempt to resolve the matter within five working days of its first meeting. Any resolution shall be in the form of a written agreement subject, if necessary, to ratification by either party.

68.5 Any staff member involved in the dispute shall be entitled to put their position to the meeting in person, and shall be advised of the outcome of the meeting's deliberations.

68.6 Until the procedures described in clause 68.3 have been exhausted:

a. work shall continue in the normal manner;
b. no industrial action shall be taken by either party to the dispute;
c. management shall not change the work, staffing or the organisation of the work if such is the subject of dispute, nor take any action likely to exacerbate the dispute; and
d. the subject matter of the dispute shall not be taken to the Australian Industrial Relations Committee by the parties to the dispute (except in the case of any matter where the time limit of notification would otherwise expire).

68.7 In the event that the dispute remains unresolved by the process specified in clause 68 the matter may be referred to the Australian Industrial Relations Commission.

68.8 Where the Commission determines that it has jurisdiction to arbitrate, the Commission may resolve the dispute by the process of conciliation and/or arbitration.

> The parties to the dispute agree to be bound by the Commission's resolution of the dispute.
>
> 68.9 Where the Commission determines that it does not have jurisdiction to arbitrate, the parties to the dispute agree to be bound by any recommendation made by the Commission, during conciliation, to resolve the dispute.
>
> 68.10 Nothing in this clause prevents the parties to this dispute from agreeing to refer an unresolved dispute to a person or body other than the Australian Industrial Relations Commission for resolution, in which case the parties to the dispute agree to be bound by any recommendation to resolve the dispute, made by the agreed person or body."

[121] On this basis, I find that the dispute settling procedures in the Agreement empower the Tribunal to resolve disputes by conciliation or arbitration.

[122] It is also necessary to consider whether the disputes in question are disputes over the application of the Agreement. In this matter, it is alleged, on behalf of the applicant, that the respondent has failed to comply with its obligations pursuant to clause 18, 19 and 70 of the Agreement. The parties held the view that the Tribunal had jurisdiction to deal with the disputes relating to clause 19 and clause 70 of the Agreement but were not in agreement with respect to clause 18.

[123] The respondent submitted that the Tribunal did not have jurisdiction to consider the applicant's claims regarding a breach of clause 18 of the Agreement as clause 75.3 of the Agreement expressly excludes disputes regarding to the bullying and harassment procedures from the reach of the dispute resolution procedures of the Agreement (clause 18). It was argued that all of the actions taken with respect to the applicant were in accordance with the bullying and harassment procedures and that there was nothing in these procedures which prevented the respondent exercising its management prerogative and putting into place transitional arrangements as set out in Ms Cooper's letter of 20 March 2008. In the alternative, the University argued that, if the Tribunal found that it was disciplinary action, it had essentially followed the disciplinary processes set out in clause 18 of the Agreement.

[124] For the applicant's part, it was contended that the actions taken against the applicant were in fact, disciplinary actions and that clause 18 of the Agreement had been breached in this respect.

[125] I have considered carefully all of the material before me. I find that the complaint by Ms Truter was made pursuant to the University's harassment and discrimination complaints - procedure and that the process which then followed was that as set out in the procedure. This process was concluded by letter of 7 March 2008 from Ms Cooper which stated that the complaint under this procedure is now *"concluded"*.

[126] However, by a further letter on 20 March 2008, Ms Cooper set out a number of *"transitional arrangements being put in place following the conclusion of the complaint by Janine Truter"*. It is my view that, as matters to do with the complaint had been concluded and, taking into account the nature of the transitional arrangements, these further actions constituted disciplinary action as defined by clause 18.2 of the Agreement. The applicant was

not allowed to return to the office she occupied prior to the complaints being lodged. Secondly, she was not allowed to perform a large proportion of her duties, namely, the supervision and managing of support staff and the training, correspondence and administration of the Faculty of Health, Medicine, Nursing and Behavioural Sciences. It was this Faculty which generated the majority of work in human research ethics due to the nature of the research conducted by the faculty. It is my view that these actions are tantamount to a transfer to another position both with respect to location, and also with respect to applicant's duties and responsibilities.

[127] It was argued on behalf of the respondent that the transitional arrangements were put in place for a period of six months to protect the occupational health and safety of staff including the applicant. It should be noted in this regard that, at this point in time, Dr Smith was no longer working for the respondent and that Ms Truter was no longer working in the ORI.

[128] I therefore find that, as there is a dispute between the parties regarding the transitional arrangements and, as these arrangements constituted disciplinary action, the Tribunal has jurisdiction to deal with the dispute regarding the application of clause 18 of the Agreement.

[129] As the dispute contained in the two applications relates to particular provisions of the Agreement (clauses 18, 19 and 70), I find that the dispute is one over the application of the Agreement. The dispute concerns the re-structure of the Office of Research Integrity (clause 70), the transitional arrangements (clause 18) and the applicant's subsequent redundancy (clause 19 of the Agreement). Accordingly, as the dispute concerns the application of the Agreement, the Tribunal has jurisdiction to deal with the applications.

[130] Mr Willoughby-Thomas raised a possible jurisdictional issue concerning the s.170LW applications being made by an individual employee. No objection was taken, by the respondent, to the applications on this ground. To the extent necessary, it is noted that the applications were made on 18 February 2009 and 5 May 2009 respectively. There were two proceedings before the Tribunal in respect of the first application and both applications were lodged prior to the termination of the applicant's employment. Further, the principles outlined in the majority decision in *ING Administration Pty Ltd v Jajoo* (PR974301, 4 December 2006) are adopted in this matter.

[131] Finally, on behalf of the applicant, relief was sought in relation to alleged breaches of the applicant's employment contract by the respondent. There were differing views put as to whether or not the Agreement was incorporated into the Applicant's contract of employment. This is not a matter for the Tribunal to determine. The Tribunal's role is restricted to dealing with a dispute over the application of the Agreement. In any event, breaches of contract are a matter for the Courts and not the Tribunal.

[132] Having found that I have jurisdiction to deal with the applications, I will now consider the substantive applications.

APPLICATION OF CLAUSES 70, 18 AND 19 OF THE AGREEMENT

Clause 70 of the Agreement– Consultation on Major Workplace Change

[133] Clause 70 of the Agreement states that:

"**70 CONSULTATION ON MAJOR WORKPLACE CHANGE (ALL STAFF)**

70.1 Sound management of workplace change requires the involvement of the people who will be directly affected by that change.

70.2 Where after a preliminary consideration of issues which may lead to major workplace change and is likely to have significant effects of staff, the University shall discuss the issues with staff, or where an affected staff member chooses a nominated representative in accordance with clause 5.7 of this Agreement, and the Staff Liaison Committee, and consider their input as part of the process of forming an intention to adopt any such changes.

70.3 Where the University has formed a clear intention to change its current arrangement, but before a decision has been made to introduce major changes in organisation, structure or technology including the use of flexible delivery that are likely to have significant effects on staff members, the University shall consult the staff who may be affected by the proposed changes, or where the affected staff member chooses a nominated representative in accordance with clause 5.7 of this Agreement, and the Staff Liaison Committee. The consultation process will be undertaken within the timeframes outlined by the University.

70.4 Significant effects may include but are not limited to termination of employment; major changes in the composition, operation or size of the University's workforce or the skills required; the elimination or diminution of job opportunities or promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of staff members to other work locations and the restructuring of jobs; proposals by the University to outsource services or contract out services currently provided by University staff.

70.5 The consultations referred to in clause 70.3 shall provide sufficient opportunity to discuss the change proposal. Written information provided to staff members, or where an affected staff member chooses a nominated representative in accordance with clause 5.7 of this Agreement, and the Staff Liaison Committee shall include, where appropriate, the extent and nature of the change proposal; reasons for making the change; timeframe for change; details of the likely staffing impacts, including possible redundancies and relocations.

70.6 Affected staff, or where an affected staff member chooses a nominated representative in accordance with clause 5.7 of this Agreement, and the Staff Liaison Committee, will be involved in the examination of the change proposal. This will include an opportunity to consider the proposals, providing an opportunity for responses or alternatives.

70.7 The University shall allow a reasonable time for consultation and give prompt consideration to matters raised.

70.8 As early as practicable after a decision has been made to make the changes referred to in clause 70.3, the University shall consult with the staff members affected, or where an affected staff member chooses a nominated representative in accordance with clause 5.7 of this Agreement, and the Staff Liaison Committee, regarding the introduction of the changes, the effects the changes are likely to have on staff members and measures to avert or mitigate the adverse effects of the changes in accordance with clauses 19 and 20.

Contracting Out

70.9 The University shall abide by this clause in cases where the contracting out of services is likely to result in major workplace change and is likely to have significant effects on staff as defined in the abovementioned clause. In addition, the University shall facilitate the development of an 'in-house' bid by affected staff, in the event that a decision is made to proceed with the contracting out proposal and that staff wish to make a bid.

Controlled Entities

70.10 Where the University proposes to outsource a significant business function by creating a new corporate entity controlled by the University, the University shall consult with staff, or where an affected staff member chooses a nominated representative in accordance with clause 5.7 of this Agreement. In particular, the University will consult on the employment conditions of staff of the proposed entity."

[134] It was argued on behalf of the applicant, that the University had engaged in a course of conduct which was designed to push the applicant out of the organisation. As the applicant had *"not got the message"* and left, the respondent had engaged in a restructuring. The restructuring was described as a sham on the grounds that the preferred employees were already in place at the time the proposed re-structure was announced.

[135] On the other hand, the respondent submitted that with an increase in the demands and their complexity on the ORI, Ms Hadfield and Associate Professor Toop had considered other ways of meeting these demands. To this end, a proposal was formulated and circulated to employees on 10 November 2008. This was in accordance with the requirements of clause 70 of the Agreement. Further, the opportunity to provide input or to ask for further information had been accorded to all employees, including the applicant.

[136] Clause 70.2 of the Agreement provides that, when preliminary consideration of the issues may lead to major workplace change with potential significant effects on staff, the University will discuss the issues with staff. On the material before me, it is apparent that there were discussions between Ms Hadfield and Associate Professor Toop regarding ways of better dealing with the demands on the office. However, there does not appear to have been any discussions with staff, including the applicant at this stage.

[137] Clause 70.3 of the Agreement states that, once the University has formed a clear intention to change current arrangements, but before a decision has been made, the University will consult with affected staff. It is in accordance with this provision that the University says it consulted with staff.

[138] To this end, the evidence shows that a meeting took place between Associate Professor Toop and the applicant, on 10 November 2008 regarding the proposed re-structure. This was followed up by an email dated 13 November 2008, which also went out to other staff. The purpose of the meeting was to give the applicant forewarning of the proposed re-structure. A meeting of all staff of the Office to discuss the proposed re-structure was held later on 10 November 2008. The applicant did not attend but requested that she be forwarded any documentation which was duly done. She sought an indication from Associate Professor Toop as to whether the proposed position in Geelong, which was she was being offered, was negotiable in terms of its location. The applicant, in her evidence, said that the answer was a clear *"no*".

[139] Having carefully considered all of the material before me, I have formed the view that clause 70.3 of the Agreement has not been complied with. It is apparent from the evidence before me, particularly that of Ms Hadfield, that, at the time of the consultation about the proposed re-structure (11 November 2008), the new structure which was proposed was, in effect, already in place. She said that the new structure involved, in essence, four positions. It was Ms Hadfield's further evidence that, except for line management responsibilities, Ms Emery was performing all of the duties of the Manager Research Integrity position. In addition, she said that Ms Fornaro was performing all of the duties of the Ethics Officer Health prior to the new structure being formally put in place. She stated that the difference between Ms Fornaro's current position and the proposed new position was that the latter was a continuing position rather than a contract one. This was confirmed by Associate Professor Toop's evidence – that, in June 2008, Ms Fornaro had been appointed to a six month contract as Human Research Ethics Officer (Medical). It is noted that Ms Bates became the new Human Research Ethics Officer and that it was only Ms Fornaro's position in the new structure which was advertised.

[140] The consultation provisions of this Agreement are extensive and provide for consultation on major workplace change with affected staff not only after a definitive decision had been made but also, firstly, after preliminary consideration of issues and then, once a clear intention to change current arrangements has been formed. To have, in effect, the new structure in place prior to any or all of these three consultation steps, is not in accordance with the provisions of the Agreement. Accordingly, it is my view that the University did not follow the requirements of Clause 70 of the Agreement.

Clause 18 of the Agreement– Unsatisfactory Performance or Misconduct – All Staff

[141] Clause 18.1 – 18.18 deals with unsatisfactory performance or misconduct by staff. It provides that:

> "**18 UNSATISFACTORY PERFORMANCE OR MISCONDUCT - ALL STAFF**
>
> 18.1 These procedures have been developed in accordance with the following principles of fair dealing:
>
> a. All issues are investigated thoroughly and justly;

b. The standards of conduct and performance required are clear to the supervisor and the staff member;
c. Except in cases where suspension is warranted for serious misconduct, staff members should be counselled and given every reasonable opportunity to improve their performance and conduct;
d. If in spite of all reasonable efforts by the University the staff member has failed to meet the required standards then Disciplinary Action including termination of employment might occur;
e. The staff member may choose to have representation at any stage of these procedures in accordance with clause 5.7 of this Agreement;
f. Disciplinary Action must take place in accordance with these procedures.

18.2 Disciplinary Action is defined as:

a. formal censure or counselling;
b. demotion to a lower classification and/or transfer to another position;
c. withholding of an increment;
d. suspension with or without pay; or
e. termination of employment.

Provided that in cases involving misconduct, disciplinary action shall be limited to the scope of 18.2 a to c. Preliminary Action

18.3 Where a supervisor is of the view that a staff member's performance or conduct is unsatisfactory, the supervisor shall counsel the staff member in accordance with these procedures.

18.4 The staff member shall be informed that they are being counselled under these procedures, the possible implications of continued unsatisfactory performance or conduct and that they are entitled to bring a representative to any relevant meetings with their supervisor if they so choose.

18.5 The supervisor will provide the staff member with constructive criticism as well as setting appropriate performance standards for the staff member to meet. The supervisor will also establish a timeframe for monitoring the staff member's progress against these performance standards: The staff member will be provided with an opportunity to respond and assistance with specific training and development programs may be provided where the supervisor considers it appropriate.

18.6 If the matter is resolved at this preliminary action stage, no formal written records will be kept. Formal Action

18.7 If after the specified timeframe the supervisor is of the view that the performance or conduct of the staff member is still not satisfactory, formal action shall be initiated. Formal action may also be initiated where the supervisor considers the unsatisfactory performance or conduct of the staff member to be serious enough that it would be inappropriate to attempt resolution in accordance with clauses 18.3 to 18.6 of this Agreement.

18.8 The supervisor shall advise the staff member in writing that formal action is being initiated. In this written notification the supervisor shall include clarification of the required performance or conduct standards and where these standards are not currently being met. The supervisor shall also include a timeframe for monitoring progress against the standards.

18.9 The written notification shall be discussed at a meeting where the staff member will have the opportunity to respond.

18.10 In the case of an academic staff member, the supervisor shall also undertake appropriate consultation with the staff member's colleagues in relation to the unsatisfactory performance or conduct of the staff member.

18.11 If, after the specified timeframe, the supervisor is of the view that the formal action has not produced the desired improvements in performance or conduct, the matter shall be referred in writing by the supervisor to the Head of Budget Centre.

18.12 The Head of Budget Centre must then determine whether he or she considers that the matter has been resolved, whether Disciplinary Action is warranted or whether there are other actions or strategies which can be implemented which do not constitute Disciplinary Action. The staff member will be advised in writing of the decision of the Head of Budget Centre.

18.13 Upon receipt of any response from the staff member the Head of the Budget Centre shall review the matter and may then decide to:

a. take no further action; or
b. refer the matter back to the supervisor to ensure that the steps referred to in clause 18.7 to 18.10 are complied with; or
c. counsel and/or censure the staff member and take no further Disciplinary Action; or
d. refer the matter to a Discipline Review Committee, established in accordance with clause 77 of this Agreement, unless the staff member elects in writing to have the Vice-Chancellor or nominee determine the matter without reference to a Review Committee.

18.14 The Director, Human Resources Services or nominee shall immediately advise the staff member in writing of any decision made in accordance with clause 18.13.

18.15 The role of the Discipline Review Committee is to investigate whether the processes specified under these procedures have been appropriately followed, and to establish the merits or facts of the particular case. The Discipline Review Committee shall provide advice on these matters to the Vice-Chancellor or nominee at the conclusion of the review, including whether Disciplinary Action is appropriate, and if so, what action should be taken.

> 18.16 Where a matter is referred to a Discipline Review Committee under these procedures the Director, Human Resources Services shall convene the Committee within 10 working days.
>
> 18.17 The Vice-Chancellor or nominee shall review the Discipline Review Committee findings and may confirm or vary the recommendation of the Head of Budget Centre made under clause 18.12. The Vice-Chancellor or nominee shall advise the Head of Budget Centre and the staff member in writing of his/her decision.
>
> 18.18 The action of the Vice-Chancellor or nominee under this clause shall be final, except that nothing in the clause shall be construed as excluding the jurisdiction of any external court or tribunal which, but for this clause, would be competent to deal with the matter."

[142] As set out above, the transitional arrangements that were put in place for a period of six months, by the letter of Ms Cooper dated 20 March 2008, have been found to constitute disciplinary action as defined in Clause 18.2 of the Agreement.

[143] The issue to be determined by the Tribunal is whether the application of the transitional arrangements to the applicant was in accordance with Clause 18 of the Agreement.

[144] It was the respondent's alternative submissions that the University had essentially followed the process set out in Clause 18 of the Agreement in its actions with respect to the applicant.

[145] On the other hand, it was the applicant's contention that the disciplinary procedures had not been applied to her even though she had been effectively counselled and then demoted.

[146] Clause 18 of the Agreement sets out a two stage process – preliminary action and formal action. Clause 18.3 requires the supervisor to counsel an employee whose conduct is unsatisfactory, to inform the employee that they are being counselled under the disciplinary procedures and the possible implications of continued unsatisfactory conduct. The supervisor is also to set appropriate standards and also a timeframe for monitoring progress. The employee will be provided with an opportunity to respond and assistance, where appropriate. If the issues are resolved at this stage, no written records will be kept.

[147] If the employee's conduct is still not satisfactory after the specified timeframe, formal action is to be commenced. The employee is to be advised in writing that formal action is being initiated. Clauses 18.9 to 18.18 contain the steps of the formal process.

[148] Issues regarding the applicant's behaviour were first raised with her on 10 July 2007. It was common ground that, during the mid probationary review meeting, between Ms Hadfield and the applicant, issues regarding the applicant's behaviour were discussed. These included concerns regarding Ms Rametta being loud and upset and crying. The applicant recalled Ms Hadfield telling her that she had received reports about her behaviour from other staff. The mid probation review report included the assessment by Ms Hadfield of *"operating under stress currently and can be emotional"*. The applicant noted her response on the report.

[149] The final probationary review meeting took place on 10 August 2007 between Associate Professor Toop and the applicant. The report recorded the applicant's working relationships as *"very good within office and Uni generally"*. Beside this was the comment: "*The position is inherently stressful but is now under control".* Concerns regarding the applicant's behaviour were also discussed at this meeting. It was Associate Professor Toop's recollection that she told the applicant that she had received reports about the applicant's emotional outbursts and loss of control and suggested strategies for dealing with the situation. The applicant gave evidence that she was told that she was loud and emotional and that staff were uncomfortable with her crying.

[150] In applying the requirements of Clause 18 of the Agreement to this matter, it would appear that the applicant's behaviour was raised with her on 10 July 2007 and 10 August 2007 and that she was counselled about it. However, the requirements of Clauses 18.4 and 18.5 (except perhaps for the provision of constructive criticism) have not been met.

[151] The applicant's appointment was confirmed following the final probation review meeting on 10 August 2007. On 7 March 2008, the applicant received a letter from Ms Cooper setting out the findings of the Panel Inquiry and advising as to the actions that were going to be taken. These included a written caution regarding any further continuation of such behaviour, training requirements and behavioural objectives. The letter ended by notifying the applicant of the conclusion of the complaint by Ms Truter and stating that her "*co-operation in this matter*" was appreciated.

[152] However, on 20 March 2008, Ms Cooper wrote to the applicant again advising of transitional arrangements that were to be put in place to allow the Office to move forward following finalisation of the complaint process. As set out above, these arrangements amounted to disciplinary action as defined by clause 18.2 of the Agreement.

[153] Clauses 18.7 to 18.18 set out the process that may result in disciplinary action against an employee. There is nothing in the evidence to suggest that any of these steps were carried out prior to the imposition of the transitional arrangements. On the basis of the University's own documents (and their primary submission), the complaint process which the applicant was subject to was the University's bullying and discrimination complaints procedure and not the disciplinary procedures under the Agreement.

[154] Therefore, I find that, in instituting disciplinary action, in the form of the transitional arrangements, the University did not apply the requirements of Clause 18 of the Agreement to the applicant.

Clause 19 of the Agreement– Redundancy – General Staff

[155] The final alleged breach of the Agreement by the respondent concerns the redundancy clause of the Agreement (Clause 19). Clause 19 of the Agreement is as follows:

> "**19 REDUNDANCY - GENERAL STAFF**
>
> 19.1 Where it appears to the Vice-Chancellor or nominee that a general staff member has become, or is likely to become excess to requirements due to changed

circumstances, including changes in work methods, re-organisation, financial exigency, introduction of new technology, the Vice-Chancellor or nominee shall advise the staff member, or where the affected staff member chooses a nominated representative in accordance with clause 5.7 of this Agreement, at the earliest practicable time and provide the staff member with an opportunity to respond and make recommendations to avoid the redundancy and/or mitigate the effects of the redundancy. Where a suitable vacant position exists, the staff member shall be offered redeployment to this position in which case this clause no longer applies.

19.2 Where a staff member is advised that they are excess to requirements, the staff member may elect to take a Voluntary Early Separation. A staff member who elects to take Voluntary Early Separation shall be entitled to receive a payment of two weeks per completed year of service, up to a maximum payment of 52 weeks plus payment in lieu of accrued annual or long service leave.

19.3 Where an excess staff member has not been redeployed or not accepted a Voluntary Early Separation, the Vice-Chancellor or nominee shall invite the staff member to be retrenched voluntarily, in which case the staff member shall have four weeks in which to accept the offer with immediate effect. Where a staff member accepts an offer of voluntary retrenchment that staff member shall receive:

a. payment in lieu of salary for the unexpired portion of the four week period; and
b. a sum equal to two weeks salary for each completed year of continuous service, plus a pro-rata payment for completed months of service since the last completed year of continuous service, provided that the maximum sum payable shall be 48 week's salary and the minimum sum payable shall be 4 weeks salary.

19.4 If at the expiry of two months from the date of advice issued to the general staff member pursuant to clause 19.1 redeployment to a suitable vacant position has not occurred and the staff member has not taken a Voluntary Early Separation or has no accepted a voluntary retrenchment, then the Vice-Chancellor or nominee may exercise one of the following options:

a. Terminate the general staff member, in which case a general staff member, shall receive the following payments in lieu of salary, less any period which has elapsed since the notice provided under clause 19.1:

i.	Where the staff member is 45 years of age or more or has at least 20 years continuous service	12 months
ii.	Where the staff member is 44 years of age	11 months
iii.	Where the staff member is 43 years of age	10 months
iv.	Where the staff member is 42 years of age	9 months
v.	Where the staff member is 41 years of age	8 months
vi.	Where the staff member is 40 years of age	7 months
vii.	All other staff members	6 months

b. Transfer the staff member to a position of equivalent grade and salary for which the staff member is suitable having regard to their qualifications and experience, in which case this clause no longer applies. Where such a transfer is rejected, the Vice-Chancellor or nominee may terminate the staff member on two week's notice and without payment of any retrenchment benefit;

c. Transfer the staff member to a suitable position of lower grading and maintain that general staff member's former salary level and incremental progression, in which case this clause no longer applies. "Suitable vacant position" means a vacant position:

i. for which a staff member meets the essential requirements; and
ii. which the staff member could perform satisfactorily within a reasonable time; and
iii. which is to be filled at the same time fraction as the staff member was employed in the redundant position (or an alternate fraction if the staff member agrees); or

d. Transfer the staff member to a position of lower grading without ongoing salary maintenance, in which case the general staff member may:

i. elect to remain in the new position and receive salary maintenance for a period calculated in like manner to the period in clause 19.3 b. based on length of service as at the date of transfer; or
ii. within four weeks of the date of transfer elect to terminate their employment with immediate effect in which case the staff member shall receive a payment calculated in accordance with clause 19.3 b.

19.5. When employment is terminated pursuant to clause 19.3 or 19.4, the staff member shall receive payment in lieu of accrued long service leave provided that continuous service is one year or more.

19.6. A staff member who has been informed that they are excess to requirements shall be entitled to reasonable leave with pay to attend employment interviews. Where expenses to attend such interviews are not met by the prospective University the staff member shall be entitled to reimbursement of reasonable travel and incidental expenses incurred in attending such interviews provided that not more than one day's paid leave or expenses shall be granted in respect of each interview.

19.7 This clause shall not apply to casual general staff members.

19.8 In the event of redundancy, a fixed-term staff member will be entitled to severance pay of six months pay."

[156] It was argued on behalf of the applicant that the terms of Clause 19 had not been applied to the applicant as the University would not re-visit the Geelong location as a way of avoiding the applicant's redundancy. The applicant also contended that the respondent would not convene a Disputes Committee to address the issue.

[157] The respondent contended that the applicant had been paid in accordance with the requirements of Clause 19 and that all of the procedural requirements had been met.

[158] There was no dispute between the parties regarding the payments that had been made to the applicant. Rather, the dispute seems to be whether or not the University was prepared to discuss and negotiate about the Geelong location of the position that was offered to the applicant.

[159] Clause 19.1 of the Agreement requires the University to provide the staff member with an opportunity to respond and make recommendations to avoid redundancy and/or mitigate the effects of the redundancy.

[160] As Mr D'Abaco observed about this aspect of this matter, there is not a large amount of evidence before me.

[161] It was the applicant's evidence that, following the meeting with Associate Professor Toop on 10 November 2008, she had contacted her and asked whether there was any negotiation regarding the location of the position. It was said that Associate Professor Toop's response had been "*No*". Associate Professor Toop's recollection of this conversation does not seem to form part of the evidence.

[162] It is a fact that the applicant lodged a dispute and a Disputes Committee was convened. The Disputes Committee made a recommendation to the parties regarding a possible resolution of the matter and there were subsequent negotiations between them. To state the obvious, the matter was not settled.

[163] Given the paucity of material before me regarding the alleged breach, by the University, of Clause 19 of the Agreement, I am unable to reach a conclusion on this aspect of the matter.

[164] Accordingly, for the reasons set out above, I find that the University has failed to apply the terms of clauses 18 and 70 of the Agreement to the applicant.

REMEDY

[165] The applicant seeks an order in the following terms:

- Immediate reinstatement to her previous position;
- Compensation for the applicant's current and future loss of remuneration following her retrenchment on 5 June 2009;
- Compensation for humiliation and distress and damage to the applicant's reputation;
- An apology from the University;
- Reimbursement of legal costs;

- Aggravated damages.

[166] With respect to the applicant's seeking of reinstatement to her previous position, in all of the circumstances of this matter, I am not prepared to order reinstatement. It is my observation after three and a half days of hearing, that it would be inappropriate, as the relationships between the parties have moved beyond being harmonious.

[167] It was said by the respondent, and not challenged by the applicant, that she had received 10 months' pay when she was made redundant in June 2009. Therefore, in terms of current loss, the applicant will not suffer any loss with respect to remuneration until April 2010. With regard to the claim for compensation for future loss of remuneration, the applicant received 10 months pay in accordance with the terms of the Agreement. I do not considerate it appropriate to order compensation for any future loss of remuneration.

[168] The claims for compensation for humiliation, distress and damage to the applicant's reputation are matters for another jurisdiction and not this Tribunal.

[169] However, I am prepared to order that the University apologise to the applicant in writing. My reasons are that the University did not comply with the requirements of the Agreement and further that, based on all of the material before me, there appears to have been, at times, little intent to do so.

[170] I am also prepared to order an amount of compensation in recompense for the failure, by the University, to apply the provisions of the Agreement to the Applicant. It is my view that $30,000 would be an appropriate amount.

[171] Provision of the written apology and payment of compensation of $30,000 are to be undertaken within 28 days of this decision.

[172] An order to this effect is contained in PR993097.

COMMISSIONER

Decision Summary

WORKPLACE AGREEMENTS – dispute over application of agreement – redundancy – disciplinary action – s170LW Workplace Relations Act 1996 (pre-reform) – former employee asserted redundancy contrary to agreement – sought reinstatement, compensation for lost remuneration, compensation for distress and humiliation, reimbursement of legal costs and apology – agreement allows FWA to arbitrate – employer failed to consult with employees regarding restructure as required by agreement – failed to follow disciplinary provisions in agreement – respondent to pay

compensation of $30,000 and provide written apology.

Deakin University Enterprise Bargaining Agreement 2005-2008

C2009/2441 [2010] FWA 193
Cribb C Melbourne 2 February 2010
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