SUPREME COURT OF QUEENSLAND

CITATION:	*Gramotnev v Queensland University of Technology* [2015] QCA 127
PARTIES:	**DMITRI GRAMOTNEV** (appellant) **v** **QUEENSLAND UNIVERSITY OF TECHNOLOGY** (respondent)
FILE NO/S:	Appeal No 6545 of 2013 Appeal No 7198 of 2013 SC No 6286 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2013] QSC 158
DELIVERED ON:	10 July 2015
DELIVERED AT:	Brisbane
HEARING DATE:	19 February 2015
JUDGES:	Margaret McMurdo P and Holmes JA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Order that the appeals are allowed, in part.** **2. Set aside the order made on 19 June 2014 as to the answer to the first question.** **3. In lieu thereof answer the first question as follows:** **Whether the provisions of the defendant's Enterprise Bargaining Agreements and/or Manual of Policies and Procedures and/or the defendant's statutes and policies constituted a term or terms of the employment contract between the plaintiff and the defendant entered (sic) on or about 23 November 1999 ("the employment contract")?** **Answer: No, except that that under the Senior Staff Disciplinary Policy the respondent contractually promised the appellant that an allegation of misconduct or serious misconduct against him would be dealt with by the procedures of the policy.** **4. Set aside the judgment dismissing the proceeding.** **5. Direct that the parties make submissions on costs in writing not to exceed two pages in length within seven days.**

CATCHWORDS: EMPLOYMENT LAW – TERMINATION AND BREACH OF CONTRACT – TERMINATION OR BREACH – GENERALLY – where the appellant was previously employed by the respondent university as a lecturer – where the respondent terminated the appellant's employment – where the appellant commenced proceedings alleging breach of his employment contract – where the appellant alleged that the respondent's enterprise bargaining agreements, policies and procedures constituted terms of his employment contract – where the appellant also alleged that there were additional implied terms of mutual trust and confidence, good faith and health and safety in the contract – whether any of the enterprise bargaining agreements, policies and procedures and alleged implied terms constituted a term or terms of the contract

Public Interest Disclosure Act 2010 (Qld), s 72
Whistleblowers Protection Act 1994 (Qld) (Repealed)
Workers Compensation and Rehabilitation Act 2003 (Qld)
Work Health and Safety Act 2011 (Qld), s 277
Workplace Health and Safety Act 1995 (Qld) (Repealed)

Australian Workers' Union v BHP Iron-Ore Pty Ltd (2001) 106 FCR 482; [2001] FCA 3, considered
Bau v State of Victoria [2009] VSCA 107, cited
BHP Iron-Ore Pty Ltd v Australian Workers' Union (2000) 102 FCR 97; (2000) 171 ALR 680; [2000] FCA 430, cited
Burger King Corporation v Hungry Jack's Pty Ltd (2001) 69 NSWLR 558; [2001] NSWCA 187, cited
Byrne v Australian Airlines Ltd (1995) 185 CLR 410; [1995] HCA 24, considered
CGU Workers Compensation (NSW) Ltd v Garcia (2007) 69 NSWLR 680; [2007] NSWCA 193, referred to
Cliffe v Hoescht Australia Ltd [1996] IRCA 531, cited
Commonwealth Bank of Australia v Barker (2014) 88 ALJR 814; (2014) 312 ALR 356; [2014] HCA 32, considered
Davie v New Merton Board Mills Ltd [1959] AC 604, referred to
Dietrich v The Queen (1992) 177 CLR 292; [1992] HCA 57, referred to
Dmitri Gramotnev v Queensland University of Technology [2013] QSC 158, related
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7, applied
Goldman Sachs JB Were Services Pty Ltd v Nikolich (2007) 163 FCR 62; [2007] FCAFC 120, considered
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, considered
Intico (Vic) Pty Ltd v Walmsley [2004] VSCA 90, referred to
Laurelmont Pty Ltd v Stockdale & Leggo (Qld) Pty Ltd [2001] QCA 212, referred to
McCormick v Riverwood International (Australia) Pty Ltd (1999) 167 ALR 689; [1999] FCA 1640, cited
Moama Bowling Club Ltd v Armstrong (No 1) (1995) 64 IR 238, referred to

Morton v Transport Appeal Board (No 1) (2007) 168 IR 403; [2007] NSWSC 1454, cited
Riverwood International Australia Pty Ltd v McCormick (2000) 177 ALR 193; [2000] FCA 889, cited
Romero v Farstad Shipping (Indian Pacific) Pty Ltd (2014) 315 ALR 243; [2014] FCAFC 177, cited
Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney (2007) 69 NSWLR 198; [2007] NSWSC 104, considered
Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney (2008) 72 NSWLR 559; [2008] NSWCA 217, considered
Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2) [1972] 2 QB 455, cited
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332; [1994] HCA 4, followed
Soliman v University of Technology, Sydney (2012) 207 FCR 277; (2008) 176 IR 183; [2012] FCAFC 146, considered
State of New South Wales v Shaw [2015] NSWCA 97, considered
Tajjour v New South Wales (2014) 88 ALJR 860; (2014) 313 ALR 221; [2014] HCA 35, followed
Tame v New South Wales (2002) 211 CLR 317; [2002] HCA 35, applied
Transport Workers' Union of Australia v K & S Freighters Pty Ltd (2010) 205 IR 137; [2010] FCA 1225, cited
United Group Rail Services Ltd v Rail Corporation (NSW) (2009) 74 NSWLR 618; [2009] NSWCA 177, referred to
Wylie v The ANI Corporation Ltd [2002] 1 Qd R 320; [2000] QCA 314, referred to
Yousif v Commonwealth Bank of Australia (No 2) (2009) 185 IR 414; [2009] FCA 656, referred to
Zafiriou v Saint-Gobain Administration Pty Ltd [2014] VSCA 331, cited

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

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

[1] **MARGARET McMURDO P:** I agree with Jackson J's reasons for allowing these appeals in part and with his Honour's proposed orders.

[2] **HOLMES JA:** I agree with the reasons of Jackson J and the orders he proposes.

[3] **JACKSON J:** The question at the heart of these appeals is whether a contract of employment was made on terms incorporated from industrial instruments to which the respondent was a party or policy documents issued by the respondent. The appellant started a proceeding claiming damages for breach of contract on the basis that it was.

[4] On 19 June 2013, the primary Judge ordered that two separate questions be answered as follows:

(a) Whether the provisions of the defendant's Enterprise Bargaining Agreements and/or Manual of Policies and Procedures and/or the defendant's statutes and policies constituted a term or terms of the employment contract between the plaintiff and the defendant entered (*sic*) on or about 23 November 1999 ("the employment contract")?

Answer: No

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

Answer: No[1]

[5] On 19 July 2013, consequent upon the answers to the separate questions, the primary Judge ordered that the proceeding be dismissed.

[6] On 16 September 2013, the primary Judge ordered that the plaintiff pay the defendant's costs, other than the defendant's costs of and incidental to the application for the determination of the separate questions heard on 26 and 27 March 2013, to be assessed on the standard basis up until 2 December 2011 and on the indemnity basis thereafter.

[7] On 17 July 2013, the plaintiff appealed against the order answering the separate questions. On 6 August 2013, the plaintiff appealed against the order dismissing the proceeding. The plaintiff did not start a separate appeal over the order for costs, but if the other orders are set aside the basis of the order for costs would be undermined.

[8] The appellant is self-represented. His grounds of appeal and arguments in support of them are lengthy, convoluted and highly repetitive. In some areas, they display a lack of knowledge of elementary propositions of law. Perhaps that is to be expected. But it makes it impossible to deal with his arguments in the way in which they were presented. The problem does not rest there. The amended statement of claim ("ASOC") is affected by similar weaknesses. Nevertheless, as will appear, the appeal is not hopeless. The problem is that the appellant's best point or points are submerged in the morass of material.

[9] The hearing of the separate questions proceeded without either party calling oral evidence. A number of documents were tendered as exhibits. The documents consisted of letters of appointment from the respondent to the appellant, enterprise bargaining agreements made in 2000 and 2005, and a number of manual of policies and procedures documents issued by the respondent at relevant times. The primary Judge finally determined the separate questions against the basis of these documents.

[10] Given that it was a final determination, the form of the first separate question is an unsettling feature of the case. It inquires as to the terms of the appellant's employment contract ("the contract") on or about 23 November 1999. The inquiry assumes that the answer to the question will be either that "the provisions" of a relevant instrument will constitute a terms or terms of the contract, or not. The generality of the inquiry was possibly brought about by pars 3 to 10 of the ASOC. They allege a number of the facts about the contents of the contract. They are set out below:

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1 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158.

"3. The Plaintiff and the Defendant entered into a contract of employment in around late November or early December 1999 (**the employment contract**).

4. The Defendant employed the Plaintiff pursuant to the employment contract for the period 1 January 2000 to 3 July 2009 (**the employment period)**.

5. The employment contract was in writing constituted by:

   a. a letter from the Defendant to the Plaintiff dated 23November 1999;

   b. the QUT Enterprise Bargaining Agreement (Academic Staff) in the form in which it was current at any point in time during the employment period (the EBA);

   c. the QUT Manual of Policies and Procedures in the form in which it was current at any point in time during the employment period (the MOPP); and

   d. statutes and policies made by the Defendant from time to time in the form in which those statutes and policies were current at any point in time during the employment period.

6. The Plaintiff relies on the material terms of the employment contract as though they were set out in full in this Amended Statement of Claim.

7. The employment contract contained additional terms, implied by law, that:

   a. the Defendant owed the Plaintiff a duty of good faith that obliged the Defendant to exercise honest *(sic)*, fairness, prudence, caution, and diligence in the performance of the employment contract (**the term of good faith**); and

   b. the Defendant owed the Plaintiff a duty that the Defendant would not, without proper and reasonable cause, act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Plaintiff and the Defendant (**the term of trust and confidence**); and

   c. the Defendant owed the Plaintiff a duty that the Defendant would create, maintain and not breach healthy and safe workplace environment for the Plaintiff (**the term of health and safety**), and

   d. the Defendant owed the Plaintiff a duty that the Defendant would not breach the Plaintiff's civil and legal rights, including by a reprisal, retaliation and/or recrimination conduct (**the term of civil and legal rights**).

8. The Plaintiff filed in the Court on 22 September 2012 and served on the Defendant his Response to Request for Further Particulars (**Particulars 1**).

9. The Plaintiff filed in the Court on 5 March 2012 and served on the Defendant his Response to the Second Request for Further Particulars (**Particulars 2**).

10. The Plaintiff relies on the facts and circumstances pleaded and provided in Particulars 1 and Particulars 2 as though they were set out in full in this Amended Statement of Claim."

[11] It does not appear to what extent, if any, the respondent admitted those allegations. The defence is not in the appeal books. The primary Judge proceeded on the footing that the starting point is the appellant's letter of appointment dated 23 November 1999. There is no express finding that the letter of appointment constitutes a written contract containing the terms of the agreement between the parties. I proceed on the footing that it did.

[12] Because the central question to be decided on the appeal turns on the proper construction of parts of the text of the letter of appointment, it is appropriate to set out part of the text of the letter. As a matter of context, the genesis of the contract was a prior contract of employment made between the parties by an earlier letter of appointment. That letter was dated 2 February 1998 and provided in part:

> "Dear Dr Gramotnev,
>
> I am pleased to confirm our offer of appointment to the position of Associate Lecturer in the School of Physical Sciences.
>
> **SALARY AND EMPLOYMENT CONDITIONS**
> The term of employment will be from 27 January 1998 to 26 January 2001.
>
> Your salary will be in accordance with the Australian Universities' Academic and Related Staff (Salaries) Award 1987. You will commence on $1,694.70 per fortnight ($44,214 per annum) within the range $1,248.70 to $1,694.70 per fortnight.
>
> Your terms and conditions of employment are as contained in the relevant industrial awards covering academic staff in Queensland higher education institutions. The University will not be responsible for any agreement regarding terms and conditions of employment including salary given in any discussion or correspondence, unless confirmed in writing by the Human Resources Director. Agreements on conditions of employment with your supervisor or other senior staff will not be honoured by the University unless the agreement is confirmed in writing by the Human Resources Director.
>
> In terms of the provisions of the Universities and Post Compulsory Academic Conditions Award 1995 your supervisor is the Head, School of Physical Sciences (Professor Jim Pope).
>
> The appointment is made subject to the Human Resources Department obtaining verification of your highest academic, qualification from the conferring institution. Please complete the attached letter (where necessary) authorising QUT to obtain verification, sign the '*Authorisation of Employee*' section, and return it with your signed letter of appointment.
>
> ...

STAFF DEVELOPMENT AND RENEWAL OF APPOINTMENT
You need to meet with your Head of School within one month of commencing to agree on a Staff Development Plan, and then annually to review this plan. The Staff Development Plan will cover the following areas of academic activity: higher degree study, academic leadership, teaching performance and leadership, research and scholarship and professional leadership. A summary of staff development activities available at QUT and the University's commitment to resourcing these programs is attached.

The selection panel for this position assessed your professional leadership below the level required of an Associate Lecturer. However, the panel assessed you as having the potential to achieve the required level of attainment in this area during the term of appointment. Therefore, the Staff Development Plan that you agree on with your Head of School must include a range of activities designed to assist you to achieve the required level of attainment in this area.

University policy on renewal of academic appointments states:

> Full-time academic staff and staff on academically equated salaries can be appointed for a limited-term period of up to three years on a contract basis. The period of the term is defined before commencement. Limited-term academic appointments other than senior academic managers may be renewed once only, for a period of no longer than that of the original advertised position, to a maximum cumulative term of six years. If the position is to continue beyond the term of a second appointment or is to extend beyond six years it must be advertised externally.

Near the end of this term of employment your Head of School will decide whether a renewal of your appointment for up to three years will be recommended. A recommendation to renew the appointment needs to be approved by the Dean of Faculty. Any decision by the University to enter into a new agreement with you at the expiration of this term of appointment shall be wholly within the discretion of the University. Any recommendation for renewal must be accompanied by a Renewal Activity Statement which you will complete. This statement must include details of your activity during the initial period of employment in the following areas:

> Administration and other related University activities
>
> Teaching performance (include teaching evaluations)
>
> Research and scholarship (may include lists of refereed journals and other publications as well as grants and other support received)
>
> Professional involvement (may include involvement in a professional group or advice on the application of research and scholarship) …"

[13] About 19 months later, the respondent appointed the appellant to a higher position. The offer of employment was made by a letter of appointment dated 23 November 1999. The text appears below, in part:

"Dear Dr Gramotnev,

I am pleased to confirm our offer of appointment to the position of Lecturer in Physics in the School of Physical Sciences, Faculty of Science at the Queensland University of Technology. This position is currently located at the Gardens Point campus of the University.

Category of Appointment
Under the provisions of the Higher Education Contract of Employment Award 1998, your appointment will be on an ongoing, full-time basis.

Supervisor
Your supervisor on appointment is Professor Jim Pope, Head, School of Physical Sciences.

Effective date of appointment
Your effective date of commencement is 1 January 2000.

Classification and remuneration
Your salary will be in accordance with the QUT Enterprise Bargaining Agreement (Academic Staff) 1997 – 1999. Your classification under this Agreement is Academic Level B which has an annual salary range of $49 131 to $58 351. Your commencing salary will be $49 131 per annum, of $1883.20 per fortnight.

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

...

Acceptance of offer
Please sign the enclosed copy of this letter of offer of appointment to indicate your acceptance, and return it to me by 3 December 1999.

If this offer of employment is accepted, this letter will also become the instrument of appointment advising you of your conditions of employment for the purpose of clause 3 of the Higher Education Contract of Employment Award 1998..." (italicised emphasis added)

[14] There are three distinct sources of difficulty that affect the answer to the first separate question. First, the respondent's enterprise bargaining agreements, manuals of policies and procedure, and University statutes and policies have an existence and

legal or administrative function quite apart from whether or not they are made terms of a contract of employment between the respondent and a member of academic staff.

[15] Second, even if a relevant provision of one or more of those instruments constitutes a term of the appellant's contract, so that the appellant is contractually obliged to comply with the term, it is quite another thing to characterise it as constituting a contractual promise by the respondent to the appellant that other employees will also observe that term. Just because another employee may be obliged to observe a term as between himself or herself and the respondent does not mean that a breach of that term is a breach of contract by the respondent to the appellant.

[16] Third, the form of the first separate question is too general. Despite its length and complexity, the ASOC does identify particular breaches of contract. Not every provision of the respondent's enterprise bargaining agreements or the manuals of policies and procedures or University statutes or policies is relevant to the breaches alleged. So, the first separate question should be understood as limited to those provisions engaged by the allegations of breach of contract made in the ASOC.

Enterprise bargaining Agreements

[17] The first question considered by the primary Judge was whether either of the enterprise bargaining agreements made in 2000 or 2005 was expressly incorporated into the contract by the text of the letter of appointment.

[18] The primary Judge concluded that they were not.[2] In his Honour's view, the text of the letter of appointment, that the terms and conditions of appointment "are prescribed by the relevant enterprise bargaining agreements", is insufficiently explicit to make the terms of either of the enterprise bargaining agreements terms of the contract.[3]

Alleged breaches of enterprise bargaining agreements

[19] The allegations of breach of the enterprise bargaining agreements are mostly made in pars 95 and 96 of the ASOC. A close reading of those pars together with pars 97 to 107 of the ASOC, which purport to provide particulars or further explanation of the alleged breaches, brings into relief the prolix and embarrassing nature of the appellant's pleading of his case.

[20] Summarising, it appears that his complaints extend over the period from 2004 to his dismissal on 3 July 2009. He alleges that the respondent failed to consider his several applications for promotion properly. He alleges that his dismissal was unfair. He alleges that he was bullied, harassed, intimidated and subjected to psychological abuse by the respondent over the period from 2004 to 2009. In the same vein, he alleges that the respondent abused its power over him, engaged in coercive manners and practices, failed to address his concerns and complaints, responded to those concerns and complaints with reprisals and recriminations, failed to manage his work environment in a reasonable and responsible way and failed to provide him with a safe work environment. It is necessary to expand on that summary below.

[21] Paragraph 26(b) of the ASOC alleges that the appellant's 2004 promotion application was unsuccessful because the respondent's consideration of the application was made in breach of cls 43 and 7 of the respondent's Enterprise Bargaining Agreement (Academic Staff) 2000-2003 ("EBA2000").

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2 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [48].

3 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [27], [43]-[45].

[22] Clause 7 sets out the objectives of EBA2000 as follows:

> "The objectives of the Agreement are to:
> - create and maintain harmonious industrial relations at the University;
> - provide improved pay and conditions in recognition of the contribution made by academic staff and to strengthen the University's ability to attract and retain staff of the highest quality;
> - provide for the participation of staff and the Union in the implementation of changes to support the University mission while minimising adverse impacts on staff;
> - support strategies that enhance the University's position as a leading tertiary education and research provider;
> - strengthen the University's competitive advantage through improvements in productivity, efficiency, effectiveness, quality, flexibility and equity through the contribution of academic staff; and
> - foster the development of a positive and productive workplace culture underpinned by co-operative and consultative approaches to work."

[23] In my view, the subject matters are aspirational, in the nature of an objects clause. There is no promissory obligation of the respondent that might operate as a contractual term between the respondent as employer and the appellant as an employee.

[24] Clause 43 provides that the parties to EBA2000 are committed to equal opportunity and freedom from all forms of discrimination as determined by legislation or by the Council of the University. It further provides that the respondent is committed to having policies or programs on equal opportunity, prevention of discrimination or harassment and conflict resolution for discrimination related conflicts. In my view, the respondent's commitments as expressed in cl 43 are not obligations that might operate as contractual terms between the respondent as employer and the appellant as an employee.

[25] In 2004 and following, the appellant applied for promotions. Paragraph 33 of the ASOC alleges that the appellant was deprived of the opportunity to alert the Faculty of Sciences Promotion Committee ("FSPC") of the alleged invalid appointment of another staff member to the committee. That staff member sat on the FSPC that decided not to promote the appellant upon his 2004 promotion application. In par 34 of the ASOC, he alleges that was, inter alia, a breach of EBA2000. The appellant does not identify what term of EBA2000 was breached.

[26] An Appeals Committee heard the appellant's appeal against the FSPC's decision. Paragraph 46 of the ASOC alleges that the Appeal Committee failed to properly consider his grounds of appeal in breach of the express terms of EBA2000. The appellant does not identify what term was breached.

[27] In May 2006, the appellant applied for promotion to Associate Professor (Level D). Paragraph 62 of the ASOC alleges that the secretary of the respondent's University Promotion Committee ("UPC") failed or refused to put the appellant's application before the UPC, in breach of cl 7 of the Enterprise Bargaining Agreement (Academic Staff) 2005-2008 ("EBA2005").

[28] In May 2008, the appellant applied for promotion to Professor (Level E). Paragraph 83(d) of the ASOC alleges that the secretary of the UPC failed or refused to put the appellant's application before the UPC, in breach of cl 7 of EBA2005.

[29] Clause 7 of EBA2005 corresponds to cl 7 of EBA2000 and is in similar terms. Again, the subject matters are aspirational, in the nature of an objects clause. There is no obligation of the respondent that might operate as a contractual term between the respondent as employer and the appellant as an employee.

[30] Paragraph 95 of the ASOC alleges that the respondent breached the express terms of the "EBA" (presumably EBA 2000 or EBA2005 depending on which one applied at the relevant time) during the period of the appellant's employment until 3 July 2009. A plethora of instances of breach are alleged. It is only possible to summarise them in these reasons.

[31] Subparagraph 95(a) of the ASOC alleges failure to properly consider the appellant's several applications for promotion, one of which has been mentioned above, but par 96(b) and (c) rely additionally on cl 40 of EBA2005. That clause provides that grievances, disputes and complaints about workplace bullying will be dealt with in accordance with the Grievance Resolution Procedures for Workplace Related Grievances and Bullying. In my view, cl 40 might operate as a contractual term between the respondent and the appellant as an employee.

[32] In passing, I note that cl 34 of EBA2000 also touches on the subject of promotion, but is expressed to operate between the respondent and the National Tertiary Education Union. There is no obligation of the respondent that that might operate as a contractual term between the respondent as employer and the appellant as an employee.

[33] Subparagraph 95(b) of the ASOC alleges that the respondent impeded the development and progression of the appellant's academic career. Paragraph 97 relies on cls 31 and 17.3 of EBA2005. Clause 17.3 provides that all academic staff at the University shall have adequate and appropriate opportunities to perform in the area of, inter alia, academic leadership. In my view, there is no obligation of the respondent that that might operate as a contractual term between the respondent as employer and the appellant as an employee. Clause 31 sets out principles of the respondent's policy on Performance Planning and Review for Academic Staff ("PPR-AS"). It provides that the "management of performance will be in accordance with that policy". The principles of that policy are:

> "31.1 PPR-AS applies to all academic staff employed on an on-going or fixed-term basis (full-time or part-time) for more than twelve (12) months;
> 31.2 PPR-AS combines performance review, planning for staff development, incremental progression, probation, and renewal of fixed-term appointments into one integrated process;
> 31.3 The PPR-AS cycle will normally occur over a twelve (12) month period;
> 31.4 PPR-AS will be conducted by the supervisor who will normally be the Head. It is acknowledged that the Executive Dean may approve the delegation of the authority to supervise;
> 31.5 The supervisor will provide the staff member with feedback;
> 31.6 Activities or involvement in professional associations shall be recognised as contributing to the professional leadership area of achievement for all relevant purposes;

31.7 Where PPR-AS discussions result in decisions concerning annual increments, promotion, probation, renewal of fixed-term appointments, applications for Professional Development Program or any similar matters where the Head gives a reference or assessment, the supervisor will provide the staff member with full details of their recommendations in writing as soon as practicable;

31.8 The performance management documentation remains confidential to the supervisor and the staff member. The Head will also have access to the documentation unless the Executive Dean has replaced the Head as supervisor at the staff member's request;

31.9 Any matters of disagreement between the staff member and supervisor regarding PPR-AS will be referred to the Head (if not the supervisor) or the Executive Dean of Faculty (if the Head is the Supervisor). If disagreements are unable to be resolved, the staff member may refer them to the University's Grievance Resolution Procedures for Workplace Related Grievances and Bullying in the Manual of Policies and Procedures."

[34] In my view, cl 31 and the PPR-AS might operate as a contractual term or terms between the appellant and the respondent. This subject is interconnected with the appellant's allegation that the manual of procedures and policies also operates as a contractual term. The PPR-AS is one of the policies from the manual on which the appellant relies.

[35] Subparagraphs 95(c) to 95(i) of the ASOC allege that the respondent bullied, harassed and intimidated the appellant, subjected the appellant to psychological abuse, abused its power over the appellant and engaged in coercive management practices in relation to the appellant during his employment period. Paragraph 99 of the ASOC relies on cls 7, 17.3, 29.5, 31, 37.1, 37.2, 37.3, 39, 40, 44.2.1, 44.2.2 and 44.2.7 of the EBA2005.

[36] As previously stated, in my view, neither cl 7, nor cl 17.3 of EBA2005 might operate as a contractual term. As to the other clauses referred to in par 99 of the ASOC:

(a) clause 29.5 provides that the procedures of the Unsatisfactory Performance Review Committee, Misconduct Investigation Committee and Redundancy Review Committee must be consistent with the principles of natural justice and adhere to or take into account nine specified matters. In my view, it might operate as a contractual term between the respondent and the appellant as an employee;

(b) clause 31 has been dealt with above;

(c) clause 37.1 provides that '[g]uarantees of Intellectual and academic freedom are essential to the proper functioning of a University culture" and identifies a number of "rights" of academic freedom. Notwithstanding the use of the word "rights", in my view they are not rights that create correlative promissory obligations that might operate as a contractual term between the respondent as employer and the appellant as an employee;

(d) clause 39 provides that a staff member may refer their concern that another staff member is in breach of the respondent's Code of Conduct to the relevant officer or the Registrar of the respondent. This subject is interconnected with the appellant's allegation that the manual of procedures and policies also operates as a contractual term. The Code of Conduct is one of the policies on

which the appellant relies. However, cl 39 does not create an obligation of the respondent that might operate as a contractual term between the respondent as employer and the appellant as an employee;

(e) clause 40 has been dealt with above;

(f) clause 44.2.1 is part of the procedures provided under clause 44 for disciplinary action for Misconduct or Serious Misconduct. It provides that before the Vice-Chancellor takes Disciplinary Action against a staff member the Vice-Chancellor must take the steps in clause 44, subject to exceptions. In my view, it might operate as a contractual term between the respondent as employer and the appellant as an employee;

(g) clause 44.2.2 provides that the Vice-Chancellor will consider any allegation of Misconduct or Serious Misconduct. If he or she believes the allegation warrants further investigation, the Vice-Chancellor will notify the staff member in writing and in sufficient detail and require a written response. In my view, it might operate as a contractual term between the respondent as employer and the appellant as an employee;

(h) clause 44.2.7 provides that if the staff member denies the allegation or has not responded the Vice-Chancellor may decide to take no further action, or counsel the staff member, or refer to matter to the Misconduct Investigation Committee. In my view, it might operate as a contractual term between the respondent as employer and the appellant as an employee.

[37] Subparagraphs 95(j) to (l) of the ASOC allege that the respondent failed to address the appellant's concerns and complaints properly and responded to them with reprisals and recrimination, during the employment period. Paragraph 101 relies on cls 7, 43 and 45 of EBA 2000 and cls 7, 17.3, 29.5, 31, 37.1, 37.2, 37.3, 39, 40, 44.2.1, 44.2.2 and 44.2.7 of EBA2005.

[38] Subparagraphs 95(m) and (n) of the ASOC allege that the respondent failed to manage the appellant's work environment in a reasonable and responsible way (including his dismissal) and failed to provide the appellant with a safe working environment during the employment period. Paragraph 103 of the ASOC relies on cls 7, 17.3, 29.5, 31, 37.1, 37.2, 37.3, 39, 40, 44.2.1, 44.2.2 and 44.2.7 of EBA2005.

[39] Subparagraph 95(o) of the ASOC alleges that the respondent damaged the appellant's reputation during the employment period. Paragraph 106 of the ASOC relies on cls 7 and 45 of EBA 2000 and cls 7, 17.3, 29.5, 31, 37.1, 37.2, 37.3, 39, 40, 44.2.1, 44.2.2 and 44.2.7 of EBA2005.

[40] I have previously considered the possible operation of all of those clauses, except for cl 45 of EBA2000. Clause 45 of EBA2000 makes provision in relation to the respondent's Code of Conduct. It is similar to cl 39 of EBA2005. Clause 45 provides that the Code of Conduct is a guide, is educative and regulates staff behaviour. It provides that a staff member who believes another staff member is in breach of the Code may refer his or her concerns to the relevant officer or Registrar of the respondent.

[41] As well, however, cl 45.7 provides that in all case of alleged breach of the Code of Conduct the relevant officer to whom the matter is referred will ensure the matter is dealt with promptly and fairly and consistently with existing procedures. In my view, it might operate as a contractual term between the respondent as employer and the appellant as an employee.

[42] This summary shows that there are approximately six terms of EBA2000 or EBA2005 alleged to have been breached that might operate as terms of the contract

between the respondent as employer and the appellant as employee. It is necessary, therefore, to return to the reasoning of the primary Judge that there were no terms of that kind from the enterprise bargaining agreements.

Discussion

[43] A similar conclusion to that reached by the primary Judge was reached in *Australian Workers' Union v BHP Iron-Ore Pty Ltd*.[4] In that case, individual plaintiff employees contended that a term of the relevant award obliged the respondent employer not to make a contract with any other employee that contained a term or condition inconsistent with or contrary to the provisions of the award.

[44] There was a letter of offer of employment. It was accompanied by a document headed "Joining Instructions to New Employees at Mt Newman." The letter said that "[i]n general, the terms and conditions of employment are as prescribed" in the award and other agreements, including an enterprise bargaining agreement. The joining instructions stated that where there were inconsistencies, the conditions set out in the enterprise bargaining agreement shall prevail. The question was stated to be whether the terms of the award were incorporated as terms of the contract of employment.

[45] Kenny J referred by way of comparison to two other cases, and decided that:

> "[i]n this case, in the context in which they appear, the words 'are as prescribed' do not indicate an intention to incorporate the terms of the Award into an employment contract."[5]

[46] The primary Judge also referred[6] to *Moama Bowling Club Ltd v Armstrong (No 1)*.[7] In that case, the text was that the agreement "shall be deemed to incorporate the whole of the provisions of the award". That language was held to be enough to incorporate the terms of the award as terms of the contract.

[47] The primary Judge took the approach[8] set out in *Goldman Sachs JB Were Services Pty Ltd v Nikolich* as follows:[9]

> "The principles to be applied in determining whether any, and if so what, parts of WWU were terms of the contract of employment are not in doubt. It is well established that if a reasonable person in the position of a promisee would conclude that a promisor intended to be contractually bound by a particular statement, then the promisor will be so bound. This objective theory of contract has been repeatedly affirmed as representing Australian law by the High Court. Thus, in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179, the Court said:
>
> > 'It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what

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4 (2001) 106 FCR 482, 550 [247].
5 (2001) 106 FCR 482, 552 [252].
6 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [31].
7 (1995) 64 IR 238.
8 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [11].
9 [2007] FCAFC 120, [23].

> a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.'"[10]

[48] This approach is consistent with the recent cognate statement of principle of construction of commercial contracts in *Electricity Generation Corporation v Woodside Energy Ltd*:[11]

> "The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'. As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties … intended to produce a commercial result". A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'."[12]

[49] The appellant relied on *Soliman v University of Technology*.[13] In that case, the plaintiff sued for damages for breach of contract for alleged breaches of the University's staff agreement. The staff agreement was a union collective agreement – a type of workplace agreement regulated by Part 8 of the *Workplace Relations Act* 1996 (Cth), made binding by s 351 of that Act, and containing a dispute settlement procedure. The breaches of the staff agreement alleged were of failure to comply with the provisions for disciplinary action. The plaintiff alleged that the terms of the staff agreement were terms of the contract of employment because the contract provided that "[t]he appointment will be subject to and governed by the relevant provisions (as in force from time to time) of:- The *University of Technology, Sydney Act 1987*… The University of Technology, Sydney, By-Law… Conditions of Employment determined by the University under the above Act…The Australian Universities Academic Staff (Salaries) Award 1987…[and] The Australian Universities Academic Staff (Conditions of Employment) Award 1987."

[50] Jagot J held that the staff agreement was not among the identified instruments, as in force from time to time. It was made 16 years later and was an instrument different in kind from the identified instruments. In any event, her Honour found that, in context, the provision of the contract "identifies relevant information capable of affecting the parties' contractual relations rather than documents intended to be binding and enforceable as part of their contractual relations."[14]

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10 [2007] FCAFC 120, [23].
11 (2014) 251 CLR 640.
12 (2014) 251 CLR 640, [35].
13 (2008) 176 IR 183.
14 (2008) 176 IR 183, 199 [67].

[51] In the present case, the primary Judge considered that a relevant surrounding circumstance known to the parties was that an EBA was an agreement certified under the *Workplace Relations Act* 1996 (Cth).[15] His Honour summarised the legal incidents of an EBA under that Act,[16] concluding that it exists within a statutory framework and has statutory force.[17] In his Honour's view, a reasonable person would be presumed to be aware of the statutory remedies.[18] From there, he reasoned that the benefit to the respondent of additional contractual remedies was tenuous,[19] and that the careful balancing of interests in the process of reaching an EBA suggests that the introduction of a new and additional set of remedies was not contemplated.[20] Further, he concluded that there was no need for express incorporation of the terms of the enterprise bargaining agreement,[21] referring[22] to the High Court's rejection of the implication of a term that the statutory rights of an employee under an award were implied terms of a contract of employment in *Byrne & Anor v Australian Airlines*.[23]

[52] I cannot agree with two of the steps in this reasoning. First, in my view, once it is accepted that the parties may contract on the terms of an enterprise bargaining agreement, even though that agreement has statutory operation outside any contract, it is difficult to reason that the language they employ should be construed on the footing that a hypothetical bystander would be aware that there is no need for express incorporation of the terms. If the language employed is not the language of the contractual agreement, the relevant statutory operation of an enterprise bargaining agreement may explain reference to it in the documents given to a new employee. But I do not consider that the statutory significance is of any greater assistance in construing the language that is used.

[53] In particular, I do not think the statutory significance of an enterprise bargaining agreement should be elevated so that whether the terms of an enterprise bargaining agreement are terms of a contract of employment is tested by what is needed or what is necessary. That is not a conventional approach to the construction of express language contained in a letter of offer that expressly provides for acceptance by signature and return of an enclosed copy, so as to make a contract on the offered terms.

[54] Second, in my view, it is a bridge too far to attribute to the appellant, as a contracting party, any actual awareness of the statutory operation of an enterprise bargaining agreement. Nor is it obvious that a reasonable person in the appellant's position should be presumed, for the purposes of construing the contract, to be aware of the existence of the statutory remedies to enforce an enterprise bargaining agreement.

[55] Still, the argument in support of his Honour's conclusion can be advanced be reference to *Australian Workers Union v BHP Iron-Ore* and other cases.[24] However, none of them is on all fours with this case.

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15 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [35].
16 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [35].
17 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [35].
18 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [36].
19 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [36].
20 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [37].
21 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [40].
22 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [40].
23 (1995) 185 CLR 410, 420, 421.
24 *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen & Ors* [1972] 2 QB 455, 490B; *Cliffe v Hoescht Australia Ltd* [1996] IRCA 531; *BHP Iron-Ore Pty Ltd v Australian Workers Union & Ors* (2000) 171 ALR 680, 701.

[56] In my view, a result which turns on the difference between a contractual provision that an "agreement shall be deemed to incorporate the whole of the provisions of the award" as text sufficient to make the terms of an award terms of the contract[25] and a provision in a letter of offer that "the terms and conditions of your appointment are prescribed by the relevant enterprise agreements" as text insufficient to make the terms of an enterprise bargaining agreement terms of the contract[26] is unsatisfactory. Without recourse to an actual or imputed awareness of the extent of the statutory rights under an enterprise bargaining agreement or a presumption of some kind that the provisions are not to be terms of the contract, in my view, a reasonable person in the appellant's position would not readily distinguish between those textual forms.

[57] The discourse upon incorporation of the terms of an industrial instrument or employers' policies into the contractual terms of a contract of employment has become extensive. Apart from the cases that were referred to in argument,[27] there are further cases at intermediate appellate court level showing a range of views having regard to the particular facts of the case.[28]

[58] In my view, the correct awareness to attribute to a reasonable person in the appellant's position is that he or she is aware of the provisions of the relevant enterprise bargaining agreements, because the letter of appointment (which was a letter of offer) identified them as terms and conditions of appointment. At the time of the contract, that was neither EBA2000 nor EBA2005. They were the enterprise bargaining agreements at the time of the alleged breaches, made relevant by the letter of appointment because they are "relevant enterprise bargaining agreements applicable to the University" and because the "requirement for written advice [of variation of terms] shall not apply to variations arising from changes through enterprise bargaining".

[59] Even if the parties to a contract of employment agree generally that the terms of an enterprise bargaining agreement are terms of the contract, the question whether a particular provision is a contractual promise by the employer to an individual employee is not necessarily answered in the affirmative. That is because not all of the provisions of an enterprise bargaining agreement may be capable of operating, or be properly construed as operating, in that way. In addition, as previously stated, the fact that a term may operate between an employer and employee to oblige the employee to act or refrain from acting in a particular way does not mean that the employer makes a contractual promise to other employees that the particular employee will observe their contractual obligations. Kenny J similarly reached a cognate conclusion about the effect of the alleged term in *Australian Workers Union v BHP Iron-Ore*.[29]

[60] On the other hand, there may well be terms of an enterprise bargaining agreement that are quite capable of operating as contractual promises and obligations and are apt to be construed as operating that way.

[61] Once it is accepted that an enterprise bargaining agreement contains non-contractual provisions as between the employer and an employee, the question arises whether general language purporting to incorporate the terms prescribed by an enterprise

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25 As in *Moama Bowling Club Ltd v Armstrong (No 1)* (1995) 64 IR 238.

26 As in this case and *Australian Workers Union v BHP Iron-Ore* (2001) 106 FCR 482.

27 *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120; *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193.

28 *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177, [33]-[63]; *Zafiriou v Saint-Gobain Administration Pty Ltd* [2014] VSCA 331, [80]-[131]; *Bau v State of Victoria* [2009] VSCA 107, [113]-[122].

29 (2001) 106 FCR 482, 553 [255].

agreement would be understood by a reasonable person in the position of the employee or employer to mean that all the terms of the enterprise bargaining agreement are terms of the contract.

[62] In my view, the answer to this question is the key to the correct answer to the first separate question. Only a handful of the clauses of EBA2000 or EBA2005 alleged to have been breached are, in my view, provisions that might operate as a contractual obligation by the respondent to the plaintiff giving rise to a claim for damages for breach of contract.

[63] A reasonable person in the position of the appellant or the respondent, on reading the enterprise bargaining agreement, would be aware that not all of its provisions could operate as terms or conditions of the contract. I infer that any prior enterprise bargaining agreement is not significantly different to EBA2000 or EBA2005. For this reason, in my view, the provision that "the terms and conditions of your appointment are prescribed by the relevant enterprise bargaining agreements", properly construed, does not have the effect of making all the terms of those agreements terms of the contract of employment.

[64] Accordingly, in my view, subject to the qualifications I have expressed about cls 40 and 44 of the EBA 2005, the primary Judge's conclusion was correct, although I reach it for different reasons. For the most part, the provisions of the respondent's enterprise bargaining agreements did not constitute the terms of the employment contract as alleged in the ASOC.

University statutes

[65] This subject matter can be dealt with quite shortly. Although par 5(d) of the ASOC refers to the statutes "made by" the respondent, no statute is identified elsewhere as containing a contractual obligation of the respondent that was breached.

[66] Accordingly, there is no provision of a relevant statute that constitutes a relevant term of the employment contract. It is unnecessary to decide any wider question to resolve this question on appeal.

Manual of policies or procedures

[67] There are many allegations of breaches of the respondent's manual of policies or procedures in the ASOC. The manual is identified by the acronym "MOPP". It is made up of many parts. Despite the numerous breaches of the manual alleged, not all parts of it are relied on by the appellant as containing terms alleged to have been breached by the respondent.

[68] In dealing with terms of the contract alleged to be contained in the manual, the primary Judge's approach differed from that upon the question whether any terms of the enterprise bargaining agreements or the university statutes were terms of the contract. His Honour's general approach was to consider whether the language used in the particular policy had promissory effect, absent which he considered whether an identifiable alleged obligation was an implied term.[30] In considering whether a policy operated as an implied term, his Honour may have decided questions outside the scope of the first separate question. That is because the appellant did not plead in the ASOC that the policies were implied terms of the contract. Accordingly, strictly speaking, the first separate question did not ask that question. But his Honour's approach did not disfavour the appellant.

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30 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [84].

Promotions Policy

[69] A group of policies collectively identified as "MOPP B/10.1 Promotions for Academic Staff (Promotions Policy)" ("Promotions Policy") deal with the purpose and constitution of a Promotions Committee, the process for making an application for promotion, how an application is to be scored and the promotion decision is to be made, a process by which an appeal against a promotion decision could be brought and the constitution of the Appeals Committee to conduct the appeal against the promotion decision.

[70] The primary Judge considered that the language of the letter of appointment supported the possibility that the Promotions Policy was of contractual effect.[31] In this instance, the contractual text provides that "your employment conditions include the provisions of the MOPP". However, his Honour concluded that the text of the Promotions Policy and the enterprise bargaining agreements are meant to be read together,[32] and that the internal procedures and the enterprise bargaining agreements provide for the remedies of a disappointed staff member.[33] In particular, the policy on Performance Planning and Review for Academic Staff in cl 38 EBA 2000 and cl 31 EBA 2005 sets out principles and provides for a final step of referral to the Head of School or Dean of Faculty.[34]

[71] The primary Judge concluded that the intention is that a breach of the policy be dealt with internally, not by the remedies for breach of contract by a court.

[72] These conclusions are supported by the outcomes provided for by the relevant processes. First, the promotion process results in a recommendation to the Vice-Chancellor: cls 10.1.4 and 10.1.6 of the Promotions Policy. Second, the Promotion Committee's decision is subject to an appeal to an Appeals Committee: cl 10.1.14(vi) MOPP 2005; cl 10.1.11(v) MOPP 2006. Third, the result of a successful appeal is a recommendation to the Chair of the Promotions Committee. There is no provision for any other outcome on a promotion application under the policy.

[73] The primary Judge concluded that it is not necessary that terms of the Promotions Policy are terms of the contract.[35] Therefore, they are not implied terms.

[74] The appellant submits that those conclusions are wrong, relying on *Goldman Sachs JB Were Services Pty Ltd v Nikolich*.[36] The appellant employer in that case conceded that some of the provisions of a 119 page document given by the appellant to the respondent employee contained contractual terms, but disputed whether particular provisions took effect as contractual terms. It was held that a provision in the document that the employer would take every practicable step to provide and maintain a safe and healthy work environment was a contractual promise of the employer.[37] However, provisions that all people within the employer would work together to prevent harassment were an aspiration or expectation, not a contractual promise,[38] and a provision that the employer was committed to make sure that a person with genuine concerns or a genuine complaint would be able to discuss issues was described as a policy and was not promissory.[39]

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31 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [67], [91].
32 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [94].
33 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [96].
34 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [95].
35 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [98].
36 [2007] FCAFC 120, [13].
37 *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120, [30], [155], [329].
38 *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120, [37], [161], [301].
39 *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120, [41], [162], [314].

[75] The appellant also relied on *Riverwood International Australia Pty Ltd v McCormick*,[40] but it is not necessary to discuss that case.

[76] In my view, the reasons of the primary Judge correctly recognise the relationship between the Promotions Policy from time to time and the enterprise bargaining agreements.[41] There are a number of additional factors that bear on whether the Promotions Policy takes effect as terms of the contract. Against that conclusion, the manual states that:

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

[77] That statement is consistent with the organisational structure considered by the High Court in *Griffith University v Tang*.[42] The question raised in that case was whether the University's decision to exclude a student from a postgraduate doctoral programme was a decision made under an enactment. The case was argued on the agreed basis that the relationship was not contractual. As Gleeson CJ described it:

> "The powers that were exercised in establishing policies and procedures relating to research higher degrees, academic standards, investigation of alleged academic misconduct, and exclusion from programmes, all appear to flow from the general description in s 5 of the *Griffith University Act* of the University's functions, the general powers stated in s 6 and the general power to do anything necessary or convenient in connection with those functions, and the powers of the Council as the University's governing body, including its powers of delegation."[43]

[78] Neither an enterprise bargaining agreement nor a contract is a necessary component for such policies or procedures.

[79] The primary Judge carefully considered the differences between the 2 June 2004 and 23 March 2006 versions of the Promotions Policy.[44] His Honour concluded that the language of relevant parts, for example cl 10.1.1, is largely aspirational or descriptive, rather than promissory.[45]

[80] The lynchpin of the primary Judge's conclusion that the provisions of the Promotions Policy are not contractual terms is that a breach of the protocol "was expressly intended to be dealt with internally and … if not … could result in the application of the remedies consequent upon a breach of the EBA."[46]

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40 (2000) 177 ALR 193; on appeal from *McCormick v Riverwood International (Australia) Pty Ltd* (1999) 167 ALR 689.

41 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [96].

42 (2005) 221 CLR 99, 106-107 [8].

43 (2005) 221 CLR 99, 106-107.

44 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [87].

45 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [91].

46 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [96].

[81] His Honour considered that the Appeals Committee process of the policy added force to that analysis.[47] It expressly provides that an aggrieved applicant for promotion may apply for a review on appeal of whether the application was dealt with in accordance with the required procedures. In my view, that carries the argument that the Promotions Policy is not intended to operate contractually only so far as saying that there is a review process, under the respondent's organisational structure, that operates irrespective of any contractual right to have the process observed.

[82] Equally, in my view, the consideration that the provisions of any enterprise bargaining agreement may be enforced by statutory remedies carries the argument that the Promotions Policy is not intended to operate contractually in the same direction.

[83] However, a promise as to the observance of such a process can operate as a contractual promise. Where the outcome is not an appointment to and employment in the promoted position, but a recommendation to a decision maker, the damage suffered by an innocent party for a breach of the promise to observe the process is the loss of a chance of the appointment and employment. There is no difficulty in law, as a matter of principle, that such a loss could be compensated by an award for damages for breach of contract, if it is the loss of a valuable opportunity, even if on the balance of probabilities the disappointed applicant would not have obtained the promotion: *Sellars v Adelaide Petroleum NL*.[48]

[84] In my view, overall, these considerations support the primary Judge's conclusion. In the end, the arguments on this question are finely balanced. In substance, I conclude that his Honour was right for the reasons that he gave, that the Promotions Policy provisions were not terms of the contract.[49]

Promotion Committee Policy

[85] A cognate MOPP policy identified as "MOPP B/10.2 Faculty Promotion Committee" ("Promotion Committee Policy") was dealt with by the primary Judge on the footing that it did not contain contractual terms for the same reasons as the Promotions Policy.[50] In my view, the same result should follow on appeal.

Code of Conduct Policy

[86] The primary Judge gave detailed consideration to the policy identified as "MOPP B/8.1 Code of Conduct" ("Code of Conduct Policy"). His Honour set out particular provisions from the policy dealing with Respect for Persons, Integrity and Diligence and referred to other parts of the policy dealing with Economy, Efficiency and Moral Rights.[51]

[87] Those provisions, read in context, set out expectations or aspirations of the respondent as to the standards it expects staff members to observe. They do not comprise contractual promises by the respondent.

[88] The respondent again relies on *Goldman Sachs JB Were Services Pty Ltd v Nikolich*.[52] In addition, he relies on *Transport Union Workers' Union of Australia v K & S Freighters Pty Ltd*.[53] It is unnecessary to consider them for the reasons that follow.

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47 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [96].
48 (1994) 179 CLR 332.
49 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [98].
50 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [101].
51 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [105]-[108].
52 [2007] FCAFC 120, [13].
53 (2010) 205 IR 137.

[89] The important point here is that the policy deals with the standards to be observed by staff generally. It is one thing to construe such a standard as a contractual promise by a staff member to the respondent that the staff member will observe the required standards. It is quite another thing, in the absence of express words, to construe the respondent's aspirations for or expectations of staff as a contractual promise by the respondent to the appellant that no other staff member will contravene or breach any requirement of the policy.

[90] Thus, the provision that "the code of conduct regulates the behaviour of University officers, and forms part of each staff member's conditions of employment" is not an answer to the conclusion that there is no term in the appellant's contract by which the respondent promises the appellant that no other staff member will breach the code of conduct.

[91] In my view, the primary Judge correctly observed this distinction and accordingly decided that the terms of the Code of Conduct Policy are not terms of the contract of employment in the way that the appellant alleges.[54]

QUT's vision, goals and organisational values

[92] This policy is identified as "MOPPP A/2.1 QUT's vision, goals and organisational values." It can be dealt with briefly. As the primary Judge observed, even the heading suggests the policy details aspirations of the respondent. For the reasons his Honour gave, it does not form part of the contract.[55]

Equal Opportunity and Diversity Policy

[93] This policy is identified as "MOPP A/8.4 Equal Opportunity and Diversity Policy". The primary Judge held that it is not contractual, either in its language or its effect.[56] I agree.

[94] The terms of a policy made after the contract was made could be terms of the contract under the text of the letter of appointment that the "requirement for written advice [of variations] shall not apply to variations arising from … changes to the MOPP."

[95] The particular parts of the policy relied upon by the appellant were introduced in 2007. They state that all students and staff have individual rights to be treated fairly by the University and each other and to study and work in an environment free from discrimination and harassment and that to respect these rights the respondent will administer grievance resolution procedures.

[96] As a matter of context, the statement that the respondent will administer grievance resolution appears in the policy immediately after statements that the respondent will educate and inform members of the University community about their rights and responsibilities (by the Code of Conduct and Student Charter) and will review and reform University practices to ensure that they are inclusive and non-discriminatory.

[97] As the primary Judge concluded, that context reinforces the conclusion that the parts of the policy relied upon by the appellant do not have contractual effect, because they appear as part of a series of policy statements of intention, not contractual promises. It is unnecessary to go further to conclude that the term of the policy are not express terms of the contract.

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54 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [11]-[112], [114]-[125].
55 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [128], [133].
56 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [135], [139]-[140].

[98] The primary Judge next considered the appellant's unpleaded contention that the terms of the policy are an implied term of the contract. In *Commonwealth Bank of Australia v Barker*,[57] the plurality of the High Court said:

> "An implication in law may have evolved from repeated implications in fact. As Gaudron and McHugh JJ observed in *Breen v Williams*, some implications in law derive from the implication of terms in specific contracts of particular descriptions, which become 'so much a part of the common understanding as to be imported into all transactions of the particular description'. The two kinds of implied terms tend in practice to 'merge imperceptibly into each other'. That connection suggests, as is the case, that the 'more general considerations' informing implications in law are not so remote from those considerations which support implications in fact as to be at large. They fall within the limiting criterion of 'necessity', which was acknowledged by both parties to this appeal. The requirement that a term implied in fact be necessary 'to give business efficacy' to the contract in which it is implied can be regarded as a specific application of the criterion of necessity. The present case concerns an implied term in law where broad considerations are in play, which are not at large but are not constrained by a search for what 'the contract actually means'.
>
> In *Byrne v Australian Airlines Ltd*, McHugh and Gummow JJ emphasised that the 'necessity' which will support an implied term in law is demonstrated where, absent the implication, 'the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined' or the contract would be 'deprived of its substance, seriously undermined or drastically devalued'. The criterion of 'necessity' in this context has been described as 'elusive' and the suggestion made that 'there is much to be said for abandoning' the concept. Necessity does, however, remind courts that implications in law must be kept within the limits of the judicial function. They are a species of judicial law-making and are not to be made lightly. It is a necessary condition that they are justified functionally by reference to the effective performance of the class of contract to which they apply, or of contracts generally in cases of universal implications, such as the duty to cooperate. Implications which might be thought reasonable are not, on that account only, necessary. The same constraints apply whether or not such implications are characterised as rules of construction."[58] (footnotes omitted)

[99] In my view, the appellant's alternative contention as to an implied term falls at the hurdle that it is unnecessary to imply the terms of the policy into the contract to give business efficacy to the contract. This was also the conclusion of the primary Judge.[59]

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

[100] As part of the terms incorporated by the respondent's policies, the appellant alleges that Article 7 of the International Covenant on Economic, Social and Cultural

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57 (2014) 312 ALR 356.

58 (2014) 312 ALR 356, 365-366 [28]-[29].

59 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [143].

Rights is incorporated as a term of the contract by the Equal Opportunity and Diversity Policy. The primary Judge gave it separate consideration.[60]

[101] Article 7 provides, in part:

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

[102] I consider the alleged implied term of civil and legal rights below. In my view, for the same reasons as apply there, Article 7 does not operate as part of the domestic statute law of Australia or the State of Queensland. It is not a part of the common law of Australia.

[103] The primary Judge held that the terms of Article 7 did not go without saying as an implied term of the contract as between the appellant and the respondent.[61] Article 7 is not referred to by the parties in any admissible contextual material relating to the contract at the time it was made. In my view, it is unnecessary to imply Article 7 as a term of the contract to give business efficacy to the contract.

Compliance Policy

[104] This policy is identified as "MOPP A/1.3 Compliance Policy". The part relied on by the appellant was adopted in 2007. It provides:

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

[105] The policy continues by detailing actions said to demonstrate the respondent's commitment to the statements in the policy and the respondent's compliance program, including particular aims and how those aims are to be pursued through identified key elements.

[106] The primary Judge held that the language of the policy is aspirational and advisory, not the language of contract.[62] I agree.

Register of Disclosed Interests – Procedure for Disclosed Interests

[107] The respondent's register of disclosed interests is maintained under a procedure identified as "QUT Register of Disclosed Interests – Procedure for Disclosure of Interests". The procedure is not part of the manual, but is a separate policy.

[108] The appellant relies on the procedure as the basis for a series of alleged contractual promises by the respondent to deal with conflicts of interests. The primary Judge

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60 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [148]-[153].
61 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [152].
62 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [158].

held that the procedure did not contain those promises on the proper meaning of the text.[63] Second, the primary Judge held that the procedure did not contain a contractual promise by the respondent to the appellant to ensure that there would not be a breach of the provisions of the procedure by other employees of the respondent.[64]

[109] In my view, the primary Judge was correct on these points for the reasons he gave.

Grievance Resolution Policy

[110] This policy is identified as "MOPP A/6.1 Grievance resolution policy".

[111] The policy states that all managers and supervisors have an obligation and responsibility to proactively promote a workplace free of bullying and intimidation and that all grievances will be dealt with in a supportive environment without victimisation or intimidation to anyone connected with the grievance. It also states that it is the primary responsibility of supervisors to take all reasonable steps to prevent and resolve grievances in their work units.

[112] The breaches of the policy alleged in par 114h of the ASOC are of failure by the respondent to follow an alleged contractual obligation and responsibility to proactively promote a workplace free of bullying and deal with the appellant's grievances in a supportive environment without victimisation or intimidation, and a failure to approach grievance resolution with emphasis on fairness and impartiality, conciliation, the principles of natural justice and procedural fairness or the resolution of grievances as early as possible.

[113] The appellant's submissions to the primary Judge emphasised the respondent's responsibility as an employer for the work environment and its control over the supervisors and managers it employed. However, the primary Judge held that the respondent did not thereby promise in the policy that the workplace would be free of workplace bullying and intimidation.[65] The statement that all grievances would be dealt with in a supportive environment without victimisation or intimidation is intended as a statement of policy not a contractual promise of the outcome.[66]

[114] The appellant's submissions focus on the text of the policy that states that all managers and supervisors have an obligation and responsibility or primary responsibility or the like. While these provisions may create an obligation upon a manager or supervisor as between the manager or supervisor and the respondent, in my view the appellant fails to recognise the difference between the obligation of the manager or supervisor to the respondent and a contractual promise by the respondent to each staff member that their manager or supervisor will perform the obligation.

[115] In my view, for the reasons he gave, the primary Judge was correct in finding that the policy was not a term of the contract under which the respondent made a relevant promise to the appellant.

Discrimination Grievance Resolution Procedures

[116] This policy is identified as "MOPP A/8.5 Grievance resolution procedures for discrimination related grievances". There were two versions of the policy in force during the relevant period.

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63 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [166].
64 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [168].
65 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [174].
66 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [175].

[117] The first version makes provision, as its title suggests, for the procedures a person with a complaint, including a staff member with a grievance, may follow. It refers to external processes under Commonwealth or State anti-discrimination laws. It provides for three stages or levels for the respondent's procedures. The first level is a staff member's supervisor. The second level is a dean of faculty or head of division. The third level is a formal investigation by the Vice-Chancellor through the constitution of a panel to advise the Vice-Chancellor. The second version of the policy is in similar terms.

[118] The breach of this policy alleged in par 114i of the ASOC is of ongoing bullying and harassment of the appellant, on the basis of the appellant's family relationship, by several high ranking administrators over a period of years. The substance seems to be that disputes that the appellant had with other senior staff members over his wife's role or involvement with the university or the appellant's or appellant's students' research amount to discrimination on the part of the respondent.

[119] The primary Judge was not persuaded that the whole of the policy is contractual.[67] His Honour held that any promise contained in the policy could not extend to a requirement that the procedures are effective to prevent bullying or harassment.[68] His Honour understood that the complaint made by the appellant was not as to the process but as to the ineffectiveness of the policy.

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

Bullying Grievance procedures

[121] This policy is identified as "MOPP B/10.1 Grievance resolution procedures for workplace related grievances and bullying".

[122] The primary Judge held that the whole of the policy is not contractual for the same reasons as for the Discrimination Grievance Resolution Procedures.[69] I agree.

Whistleblower's Policy

[123] This policy is identified as "MOPP B/8.3 Whistleblowers protection management policy".

[124] The policy acknowledges the respondent's statutory duties under the now repealed[70] *Whistleblowers Protection Act* 1994 (Qld). It does no more than summarily state the effect of sections of that Act and requests that information about any reprisals should be referred to the Registrar.

[125] The primary Judge held that the provisions of the policy were not contractual in nature and that there was no contractual promise by the respondent to the appellant that no reprisals by University staff would occur.[71] I agree.

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67 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [184].
68 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [181].
69 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [191]-[192].
70 *Public Interest Disclosure Act* 2010 (Qld), s 72.
71 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [196]-[197].

PPR-AS Policy

[126] This policy is identified as "MOPP B/9.2 Performance planning and review for academic staff".

[127] The policy provides for reviews over a 12 month period or cycle so that reviews will occur at least annually. The supervisor of a staff member is required to facilitate staff development and career development opportunities in accordance with an activity statement. The process is to inform decisions and/or recommendations relating to, inter alia, recognition and reward programs, promotion and the professional development program.

[128] Paragraph 114k of the ASOC alleges breach of the policy in failing to conduct a proper performance planning and review for the appellant over a period of nearly three years, placing the appellant in a disadvantaged position concerning recognition of his achievements and career progression.

[129] The primary Judge held that the policy's statements as to the timing of reviews was an aspiration towards which each staff member should work.[72] In reaching that conclusion, his Honour took into account that a staff member is required to actively participate to make the process work effectively.[73] That may be accepted, but it does not speak to the question whether the respondent promised the appellant as a staff member that his supervisor would engage in the process. There is no doubt that the policy casts the obligation upon the supervisor to initiate the process by preparing for the initial planning discussion, obtaining relevant plans and documents and providing copies of the documents to the staff member on request.

[130] In my view, the respondent did make such a promise by the provisions of the policy. First, the text of the letter of appointment that the employment conditions include the provisions of the MOPP supports that conclusion. Second, an important subject of the provisions of the policy is that a staff member will be reviewed by his or her supervisor for the stated purposes. That process was to be available to inform the important subject matters of recognition and reward, promotion and professional development. These are subjects of objective importance to a staff member who agrees to become an employee of the respondent. Third, the promise is of a clear kind that can be performed by the respondent giving employment directions to supervisors to conduct the reviews.

[131] On the other hand, there is a process or outcome to deal with non-compliance with the process by the respondent. The policy provides that matters of disagreement between the staff member and supervisor are to be referred to the head of school or the executive dean of faculty and that if disagreements are unable to be resolved the staff member may refer them to the respondent's grievance resolution procedure.

[132] In my view, the considerations on either side as to whether the policy operates as a contractual term are finely balanced. Overall, I am not persuaded to differ from the primary Judge's view that objectively construed the parties did not intend the policy to operate as a contractual promise.[74]

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72 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [201].
73 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [205].
74 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [210].

Senior Staff Disciplinary Policy

[133] This policy is identified as "MOPP B/-8.5 Disciplinary action for misconduct and serious misconduct – senior staff."

[134] The policy provides the procedures to be followed where an allegation of misconduct or serious misconduct is made against a senior staff member.

[135] Paragraph 114m of the ASOC alleges that the defendant breached the policy through the lack of any action to discipline particular high ranking administrators for their participation in an ongoing campaign of bullying and harassment against the appellant for years. Many paragraphs of the purported particulars are referred to by way of cross-reference. The substance of most of them is not that allegations of misconduct or serious misconduct were made to the Vice-Chancellor or his delegate against the nominated individuals. It is that the respondent did not itself pursue such allegations. However, the purported particulars allege the following communications by the appellant:

(a) email from the appellant to the Vice-Chancellor sent on 5 April 2007;

(b) email from the appellant to the Vice-Chancellor sent on 18 August 2007;

(c) email from the appellant to the Vice-Chancellor sent on 10 January 2008;

(d) email from the appellant to the Vice-Chancellor sent on 1 June 2008;

(e) complaint by the appellant to the Chancellor made on 17 November 2008; and

(f) complaint by the appellant to the Chancellor made on 3 April 2009.

[136] The appellant alleges in the purported particulars that his 17 November 2008 complaint was dealt with by the Chancellor who decided not to take any further action. That is an outcome provided for by the policy. But the appellant alleges that his 3 April 2009 complaint was not dealt with.

[137] On 8 May 2009, the appellant alleges in the purported particulars, the respondent initiated disciplinary action against the appellant. On 3 July 2009, the appellant alleges, he was dismissed from employment as a result of that action. The appellant alleges that the policy was not followed because the Vice-Chancellor did not refer the allegations against him to a Misconduct Investigation Committee.

[138] There are two points to be made about these complaints. First, they are not within the appellant's allegations of breach of contract by lack of any action to discipline the high ranking administrators in par 114m of the ASOC. Second, cl 8.5.7 of the policy provides the Vice-Chancellor with an alternative to referring allegations to a Misconduct Investigation Committee, subject to certain conditions being satisfied, in the case of serious misconduct. When the Vice-Chancellor believes on reasonable grounds that serious misconduct has occurred and it would be unreasonable to require the university to continue employment of the staff member, he or she may terminate the staff member's employment in some circumstances.

[139] The appellant submitted to the primary Judge that the text of the policy results in a contractual obligation of the respondent to comply with the policy and that failure to identify, acknowledge and act upon acts of bullying by senior staff is a breach of that contractual obligation.

[140] The primary Judge rejected the latter part of the alleged obligation.[75] I agree. The policy does not impose an obligation upon the respondent to seek out any misconduct or serious misconduct of senior staff. It provides for how allegations against such staff will be dealt with.

[141] However, that conclusion does not deal with the appellant's submission that the respondent is contractually obliged to follow the policy where allegations of bullying and harassment are made by a staff member. As to that, the primary Judge referred to some of the terms of the policy as aspirational.[76] That may be accepted. However, the policy expressly provides for detailed procedures to manage allegations of misconduct or serious misconduct against senior staff in four phases: first, consideration of the allegation by the Vice-Chancellor and notification of the staff member; second, action by the Vice-Chancellor as to how to proceed, by taking no action, counselling or censuring the staff member, referring the matter to a Misconduct Investigation Committee or in some cases terminating employment without referral; third, where the allegations are referred to a Misconduct Investigation Committee proceedings before that committee; and fourth, following a report by a Misconduct Investigation Committee, decision on the action to be taken by the Vice-Chancellor. In my view, there is no reason why those procedures could not operate as contractual terms.

[142] The primary Judge considered that these procedures do not contain promises about outcomes.[77] In my view, they do provide for how an outcome will be reached. If the Vice-Chancellor is to terminate a staff member's employment without first referring the allegations to a Misconduct Investigation Committee, he or she must act reasonably and fairly, have regard to all surrounding facts and circumstances, including mitigating circumstances, and must have regard to and give appropriate weight to the results of any existing investigation. If the matter proceeds to hearing before a Misconduct Investigation Committee, the committee must observe a number of procedural requirements and must take into account a number of identified factors.

[143] The primary Judge considered that the policy left the decision whether misconduct or serious misconduct has occurred and what action to take to the Vice-Chancellor, whose decision is final.[78] So much may be accepted. But I cannot agree that it constitutes a clear general statement of intent that contractual remedies are not contemplated.[79] Nothing suggests that the parties objectively contemplated that if the respondent refused to comply with the procedures of the policy, a staff member who suffered loss or damage could not claim damages for breach of contract.

[144] However, as previously mentioned, the appellant's alleged breach of the policy is not that the respondent failed to follow the policy in dismissing him. Rather, it is that the appellant failed to follow the policy in failing to act upon bullying by senior staff or to discipline them for bullying. The question is whether the policy operates as a contractual promise by the respondent to an aggrieved staff member who makes an allegation of misconduct or serious misconduct against a senior staff member that the procedures of the policy will be followed.

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75 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [214].
76 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [215].
77 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [216].
78 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [217], [221].
79 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [217].

[145] The primary Judge found that the policy is not contractual in nature and does not form a term of the contract.[80] I cannot agree to the extent that the policy operates as a promise by the respondent to the appellant that an allegation of misconduct or serious misconduct against him will be dealt with according to the procedures of the policy. However, when it comes to a promise to an aggrieved staff member that their complaint against another staff member will be dealt with in accordance with the policy, in my view, the considerations as to whether the policy operates as a contractual term are not so clear. Overall, I am not persuaded to differ from the conclusion of the primary Judge on this point.

Email Policy

[146] This policy is identified as "MOPP F/1.5 Email policy".

[147] The policy states that staff have a responsibility to capture and retain messages to meet business and evidential needs and that periodic deletion of email messages is inappropriate. It also states that staff email accounts remain active for 30 days after the staff member's resignation date. It further provides that ownership of emails sent or received in the performance of their duties by staff members remains with the respondent.

[148] The breach of this policy is alleged in par 118 of the ASOC, and is described as damaging management of the appellant's account.

[149] The primary Judge considered whether the term relied upon by the appellant in the ASOC is that the respondent would not damage the management of the appellant's account.[81] As well, his Honour held that the statement in the policy that accounts remain active after the resignation date does not apply to a dismissal for misconduct.[82] Second, his Honour held that a promise to permit access by keeping an account active is not the same as a promise not to damage management of the account.[83]

[150] In my view, the email policy did not contain a contractual promise made by the respondent to the appellant as to access to the appellant's email account following his dismissal for misconduct.

Health and Safety Policy and Health and Safety Management Policy

[151] These policies are identified as "MOPP A/9.1 Health and safety policy" and "MOPP A/9.2 Health and safety management".

[152] The Health and Safety Policy states, inter alia, that the respondent will meet its legislative obligations and exceed them where feasible. It is to be a risk management approach to include provision of, inter alia, appropriate supervision and enforcement of policies and procedures, including that staff have an obligation to follow safe work practices.

[153] The breaches of these policies are alleged in par 117c of the ASOC. The appellant pleads failure to enforce the policies and procedures to ensure safe work practices and a common law breach of duty to protect employees from employment risks. Those allegations are related to the appellant's dealings with the respondent over his grievances and dismissal.

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80 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [221].
81 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [225], [226].
82 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [230].
83 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [231].

[154] The primary Judge characterised the appellant's submission as being that the policies conveyed a contractual promise that the policies will be complied with in their entirety.[84] His Honour held that there was no such contractual promise.[85] The statement that the respondent is committed to providing a work place that is as safe as practicable is a statement of aspiration or intent, not a contractual promise.[86] The statement that staff have an obligation to follow safe work practices is not a contractual promise by the respondent to the appellant that other staff will follow such practices.

[155] The primary Judge also rejected the appellant's contention that because the policies are derived from the health and safety legislation they must also be implied in to the contract.[87] This point is separately dealt with below under the implied term of health and safety. It is not relevant to the question whether the Health and Safety Policy and Health and Safety Management Policy contain express terms of the contract under the letter of appointment.

[156] In my view, the primary Judge was correct in rejecting that there was a contractual term that the policies would be complied with in their entireties.

Implied term of good faith and implied term of trust and confidence

[157] The primary Judge dealt with these two implied terms together. The appellant relied on the same facts as constituting alleged breaches of the terms, including over 400 paragraphs of purported particulars. In pleading terms, the allegations and particulars of the breach or breaches of either term are grossly embarrassing.

[158] However, any difficulty occasioned by that defective form of pleading may be put to one side. After the decision of the primary Judge in this case, the High Court decided *Commonwealth Bank of Australia v Barker*.[88] From that case, it is clear that under the common law of Australia a term or duty of trust and confidence requiring an employer to take steps in the interests of an employee is not generally a term implied by law into a contract of employment, because it is unnecessary.

[159] As well, I agree with the analysis of the primary Judge of the particular factors that affect the contract in this case.[89] There is no implied term of trust and confidence by reason of which the appellant can seek review, as a breach of contract, of his allegations as to the respondent's dealings with him over the period of his alleged grievances.

[160] However, although *Commonwealth Bank of Australia v Barker* is binding authority in support of the rejection of the alleged implied term of trust and confidence in the contract in this case, it does not answer the question whether there is an implied term of good faith. After rejecting the implied term of trust and confidence, the plurality of the High Court said:

> "The above conclusion should not be taken as reflecting upon the question whether there is a general obligation to act in good faith in the performance of contracts."[90]

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84 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [243].
85 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [252].
86 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [246].
87 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [247].
88 (2014) 312 ALR 356.
89 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [269], [274]-[276], [281]-[282], [287].
90 (2014) 312 ALR 356, [42].

[161] And Kiefel J said:

> "The question whether a standard of good faith should be applied generally to contracts has not been resolved in Australia."[91]

[162] There is authority at the intermediate appellate court level in Australia that there is an implied term or duty of good faith in commercial contracts. It is unnecessary to canvass the rise of the term here.[92] And in *CGU Workers Compensation (NSW) Ltd v Garcia*[93] Santow JA said:

> "[W]hile the duty to act in good faith may be implied in certain contractual contexts such as employment…"[94]

[163] This Court has not had occasion to decide the existence of a term of good faith in an employment contract or a similar context since *Laurelmont Pty Ltd v Stockdale & Leggo (Qld) Pty Ltd*,[95] when it rejected the contention that an implied term of good faith qualified the conduct of business of a franchisor under a franchise contract.[96]

[164] In *Russell v The Trustees of the Roman Catholic Church Archdiocese of Sydney*[97] Rothman J held that there is a separate implied term that an employer will act in good faith in and about the administration of a contract of employment.[98] In the Court of Appeal of New South Wales, the Judges either assumed the existence of the term[99] or treated it as being one with an implied term of trust and confidence.[100]

[165] The reasons of Buchanan JA in the Court of Appeal of Victoria in *Intico (Vic) Pty Ltd v Walmsley*[101] did not confirm or deny the existence of such a term.

[166] In *United Group Rail Services Ltd v Rail Corporation New South Wales*,[102] the New South Wales Court of Appeal said of good faith as part of the law of performance of contracts that:

> "It is fair to say that caution (in some cases a lack of enthusiasm) has been expressed by some, for example: *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 at 445 [40], 452 [88] and 463 [155]; 186 ALR 289 at 301 [40], 312 [88] and 327 [155]; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 at [183] and following; *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84 at 91–98; *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 574; (2001) ATPR ¶41–814 at 42,933; *Asia Television Ltd v Yau's Entertainment Pty Ltd* (2000) 48 IPR 283; *Central Exchange Ltd v Anaconda Nickel Ltd* (2001) 24 WAR 382 at 391 [16]–[22]; on appeal *Central Exchange Ltd v Anaconda Nickel Ltd* (2002) 26 WAR 33

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91 (2014) 312 ALR 356, [107].
92 See *Burger King Corporation v Hungry Jacks Pty Ltd* (2001) 69 NSWLR 558.
93 (2007) 69 NSWLR 680.
94 (2007) 69 NSWLR 680, 710 [168].
95 [2001] QCA 212.
96 [2001] QCA 212, [4], [7], [44].
97 (2007) 69 NSWLR 198.
98 (2007) 69 NSWLR 198, 222 [95], 232 [134].
99 (2008) 72 NSWLR 559, 567 [1], 576 [73].
100 (2008) 72 NSWLR 559, 567 [32].
101 [2004] VSCA 90, [23].
102 (2009) 74 NSWLR 618.

> at 48 [45]–[55]; *Wenzel v Australian Stock Exchange Ltd* (2002) 125 FCR 570 at 586 [80]–[81]; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228; and *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd* (2008) Aust Contract Reports ¶90–269.
>
> Whilst this necessarily incomplete review of authorities reveals that the law in Australia is not settled as to the place of good faith in the law of contracts, this Court should work from the position that it has said on at least three occasions (not including *Renard Constructions*) that good faith, in some degree or to some extent, is part of the law of performance of contracts. It is unnecessary to go beyond this proposition to gain assistance in the construction of this particular clause of this contract. Many issues arise in respect of any implication (whether as a matter of fact or by law) of any term requiring performance of a contract, or the exercise of contractual rights, in good faith. Those issues need not be explored here..."[103]

[167] In my view, in order to decide the present case, it is unnecessary to essay the subject matter of the possible scope of or existence of a generally expressed implied term of good faith, either in this or other contexts.

[168] The appellant's alleged implied term of good faith, is of a particular duty of good faith "to exercise honest[y] fairness, prudence, caution and diligence in the performance [of the] contract". It stems from the judgment of Rothman J in *Russell* that:

> "In the context of an employment relationship, if there exists a duty to act in good faith it 'imports a requirement that the person doing the act exercise prudence, caution and diligence', which would mean due care to avoid or minimise adverse consequences to the other party."[104]

[169] I cannot agree. In my view, that language is the language of a duty of care. It is not apt to describe the obligations of an employer in exercising contractual rights or performing contractual obligations. No other case clearly supports a formulation of an implied term of good faith in those particular terms.[105]

[170] In *Yousif v Commonwealth Bank of Australia (No 2)*,[106] North J said:

> "Counsel for Ms Yousif also contended that there was a term implied by law that the Bank would act in good faith. An authority cited in support of the implication of such a term was the judgment of Rothman J in *Russell v Trustees of the Roman Catholic Church, Archdiocese of Sydney* (2007) 69 NSWLR 198; 167 IR 121. However, there is a preponderance of authority against the implication of such a term: *Aldersea v Public Transport Corporation* (2001) 3 VR 499; *Walker v Citigroup Global Markets Pty Ltd* (2005) 226 ALR 114; *McDonald v Parnell Laboratories (Aust) Pty Ltd* (2007) 168 IR 375."

[171] In *State of New South Wales v Shaw*,[107] the Court of Appeal of New South Wales considered the question. Ward JA, with whom Beazley P agreed, said:

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103 (2009) 74 NSWLR 618, 635 [60]-[61].

104 (2007) 69 NSWLR 198, 227 [117].

105 Compare Berman AJ in *Morton v The Transport Appeal Board (No 1)* [2007] NSWSC 1454, [203] who appears to elide the implied term of good faith and an implied term of trust and confidence.

106 (2009) 185 IR 414, 434 [103].

107 [2015] NSWCA 97.

> "At [117], Rothman J concluded that, in the context of an employment relationship, *if* (my emphasis) there existed a duty to act in good faith it was one that " … 'imports a requirement that the person doing the act exercise prudence, caution and diligence', which would mean due care to avoid or minimise adverse consequences to the other party". That language was clearly drawn from *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 ; (2004) 135 FCR 105 at [143] and [144] where Lee J considered the meaning of the words "good faith" as contained in s 18D of the *Racial Discrimination Act 1975* (Cth).
>
> In *Russell*, Rothman J concluded that it was impossible to imagine that the particular contract of employment there in question could operate without a duty of good faith, in circumstances where, with the exception of terms relating to wages and an initial trial period, there were no express terms of the contract which would allow the parties to regulate an employment relationship that the parties envisaged would be a continuing, indefinite period of employment.
>
> The present case is distinguishable on its facts from that which led Rothman J in *Russell* to conclude that it was necessary for the efficacy of the employment contract there under consideration that the alleged terms be implied. Here, there is a statutory and industrial regime which regulated the respondents' employment contract. Section 25 of the Act provides that, "except in so far as provision is otherwise made by law, the conditions of employment of members of the Teaching Services shall be as may be determined from time to time by the Secretary. It has not been shown to be necessary, to give the probationary contracts effective operation, that a term of good faith be implied.
>
> Nor is it necessary that such a term be implied as an adjunct to the exercise of other contractual rights. Certainly, the respondents did not identify any power exercised by the principal to which an implied duty of good faith was said to attach other than, in oral submissions, to suggest that the principal would presumably have perceived himself to be exercising a management prerogative at the time he handed the documents to Ms Salt."[108]

[172] In my view, there is no implied term of good faith of the contract in the present case in the terms that the appellant alleges.

Implied term of health and safety

[173] The primary Judge rejected that the alleged term was an implied term of the contract. His Honour was right to do so, and for the reasons he gave.[109]

[174] This was an aspect of the appeal where the appellant's lack of understanding of relevant laws and legal principle caused him to elide distinct legal rights and principles. Although sometimes overlooked because there is a corresponding duty of care in tort, it is uncontentious that an employer owes a contractual duty to take reasonable care for the safety of an employee. The question was settled before 1959

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108 [2015] NSWCA 97, [133]-[136].

109 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [289].

when *Davie v New Merton Board Mills Ltd*[110] was decided. Keane JA referred to it in *Wylie v The ANI Corporation Ltd*[111] as a duty "which may properly regarded as a contractual duty"[112] and McHugh J, who was a recognised expert in this field of discourse,[113] said in *Tame v New South Wales*:[114]

> "… the employer's duty of care arises from an implied term of the contract as well as from the general law of negligence… It simply implies a general duty to take reasonable care for the safety of the employee and, it might be added, for the employee's property."

[175] It is also elementary that a claim by an employee against an employer for damages for personal injury caused by a breach of that term is regulated by statute. At the time of the alleged breaches in this case the relevant Act was the *Workers Compensation and Rehabilitation Act* 2003 (Qld), ch 5.

[176] At relevant times, there were statutory duties in relation to workplace safety owed by employers. The *Workplace Health and Safety Act* 1995 (Qld) was in effect at the time when the contract was made, but is now repealed.[115]

[177] The rights, obligations and remedies of employees in these contexts are well developed and stable. Against that background, the appellant alleges an additional implied term that the respondent would create, maintain and not breach [a] healthy and safe workplace environment for the plaintiff.

[178] As the primary Judge said, this is more onerous than the contractual obligation acknowledged by the existing cases.[116]

[179] In my view, the alleged term fails because it is unnecessary to give business efficacy to the contract.

Implied term of civil and legal rights

[180] Although not pleaded in the ASOC, the appellant sought to rely on Articles 14, 16, 17 and 19 of the International Covenant on Civil and Political Rights in support of the implied term of civil and legal rights alleged.

[181] Simplifying somewhat:

(a) article 14 provides for a right to equality before the law by a fair and public hearing by a competent independent and impartial tribunal;

(b) article 16 provides that everyone shall have the right to recognition everywhere as a person before the law;

(c) article 17 provides that no-one shall be subjected to arbitrary or unlawful interference with his privacy, family home, or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such an interference or attack; and

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110 [1959] AC 604, 619.
111 [2002] 1 Qd R 320.
112 [2002] 1 Qd R 320, 340 [50].
113 His Honour was a co-author of Glass, McHugh and Douglas, *The Liability of Employers*, 2 ed, Law Book Co, Sydney, 1979.
114 (2002) 211 CLR 317, 365 [140].
115 The repeal was by the *Work Health and Safety Act* 2011 (Qld), s 277.
116 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [292].

(d) article 19 provides that everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, subject to stated limits.

[182] Again, the appellant's reliance on these provisions shows his basic lack of understanding of the dual operation of international law on the one hand and domestic law, comprising Australian and Queensland statute law and the common law of Australia as to contracts, on the other hand.

[183] The starting point is that the International Covenant on Civil and Political Rights operates in the sphere of international law. But it does not, per se, operate as a domestic law. The appellant in *Dietrich v The Queen*[117] relied on the convention to argue that he had a right to counsel at public expense. Mason CJ and McHugh J said:

> "…the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions."[118]

[184] Thus the Australian common law of contract is not affected by the operation of the convention in the absence of legislation which has that effect. That trite conclusion is the consequence of the "long accepted dualism of international law and Australian domestic law."[119]

[185] Once this point is reached, the alleged term does not meet most of the requirements for implication of a term as necessary to give business efficacy to the contract. The common law rights of a person on the various subject matters covered by those articles are not to be found in the implied terms of a contract of employment. As the primary Judge put it, "there is no demonstrated need for the implication of the term pleaded."[120]

Conclusion

[186] With one exception, these reasons support the answers given by the primary Judge to the separate questions.

[187] The exception is that under the Senior Staff Disciplinary Policy, the respondent contractually promised the appellant that an allegation of misconduct or serious misconduct against him would be dealt with by the procedures of the policy.

[188] I would make the following orders:

1. Order that the appeals are allowed, in part.

2. Set aside the order made on 19 June 2014 as to the answer to the first question.

3. In lieu thereof answer the first question as follows:

   (a) Whether the provisions of the defendant's Enterprise Bargaining Agreements and/or Manual of Policies and Procedures and/or the

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117 (1992) 177 CLR 292.

118 (1992) 177 CLR 292, 305.

119 *Tajjour v New South Wales* (2014) 313 ALR 221, [48]. The dualism is explained in G. Triggs, *International Law: Contemporary Principles and Practices*, LexisNexis Butterworths, Australia, 2006, ch 3.

120 *Dmitri Gramotnev v Queensland University of Technology* [2013] QSC 158, [311].

defendant's statutes and policies constituted a term or terms of the employment contract between the plaintiff and the defendant entered (*sic*) on or about 23 November 1999 ("the employment contract")?

Answer: No, except that that under the Senior Staff Disciplinary Policy the respondent contractually promised the appellant that an allegation of misconduct or serious misconduct against him would be dealt with by the procedures of the policy.

4. Set aside the judgment dismissing the proceeding.

5. Direct that the parties make submissions on costs in writing not to exceed two pages in length within seven days of the date on which the reasons for judgment are published.