FEDERAL COURT OF AUSTRALIA

Yu v ACT Education Directorate [2022] FCAFC 110

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| Appeal from: | *Yu v ACT Education Directorate (No 2)* [2021] FedCFamC2G 267 |
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| File number(s): | ACD 100 of 2021 |
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| Judgment of: | **THOMAS, SC DERRINGTON AND HALLEY JJ** |
|  |  |
| Date of judgment: | 30 June 2022 |
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| Catchwords: | **INDUSTRIAL LAW** – adverse action – whether employee exercising a workplace right under s 343(1)(a) of the *Fair Work Act 2009* (Cth) – where employee claimed to have been exercising her right to take reasonable care of her own health and safety under s 28(a) of the *Work Health and Safety Act 2011* (ACT) when refusing the directions of her employer to prepare a Professional Pathways Plan, to teach under observation and to attend certain meetings  **INDUSTRIAL LAW** – Enterprise Agreement – construction of – alleged contravention in breach of s 50 of the *Fair Work Act 2009* (Cth) – whether breach of obligation to place permanent teachers in suitable positions – whether employer caused emotional distress – whether breach of procedural requirements relating to disciplinary process  **INDUSTRIAL LAW** – National Employment Standards – whether contravention of s 44 were final entitlements not paid on date of termination but were subsequently paid in full  **PRACTICE AND PROCEDURE** – trials – procedural fairness – where applicant gave oral evidence and was cross-examined before trial adjourned part-heard – where matter subsequently determined, at primary judge’s suggestion, “on the papers” three and half years later – where primary judge indicated relevant findings could not be made in the absence of cross-examination of the respondent’s witnesses – where no issue of procedural fairness raised by either party – whether primary judge erred in failing to make findings on evidence before him  **PRACTICE AND PROCEDURE –** procedural fairness – where primary judge considered and made “observations” or purported preliminary findings adverse to the respondent on legal issues not raised by the parties – whether such observations and preliminary findings had any bearing on the primary judge’s ultimate conclusions |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 340, 343, 44, 50  *Work Health and Safety Act 2011* (ACT) s 28 |
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| Cases cited: | *Yu v ACT Education Directorate* [2019]FCA 272  *Lee v The Queen* (1998) 195 CLR 594  *Tattsbet Ltd v Morrow* [2015] FCAFC 62; 233 FCR 46 |
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| Division: | Fair Work Division |
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| Registry: | Australian Capital Territory |
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| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 96 |
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| Date of hearing: | 16 May 2022, 8 June 2022 |
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| Counsel for the Appellant: | Appellant appeared in person |
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| Counsel for the Respondent: | Ms P Bindon with Ms K Weir |
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| Solicitor for the Respondent: | ACT Government Solicitor |

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| **Table of Corrections** |  |
|  |  |
| 30 June 2022 | Paragraphs 94-96 were inserted |
| 4 July 2022 | Catchwords - updated |
| 4 July 202 | Legislation - updated |

ORDERS

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|  | | ACD 100 of 2021 |
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| BETWEEN: | JING YU  Appellant | |
| AND: | AUSTRALIAN CAPITAL TERRITORY (EDUCATION DIRECTORATE)  Respondent | |

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| order made by: | THOMAS, SC DERRINGTON AND HALLEY JJ |
| DATE OF ORDER: | 30 June 2022 |

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. Order 1 of the Federal Circuit and Family Court of Australia (Division 2) dated 18 November 2021 be set aside.

3. The appellant’s claims against the respondent for breach of ss 44(1), 340(1) and 343(1)(a) of the *Fair Work Act 2009* (Cth) as pleaded in the Amended Application filed on 3 April 2017 be dismissed.

4. The appellant’s claim against the respondent for breach of s 50 of the *Fair Work Act 2009* (Cth) as pleaded in the Amended Application filed on 3 April 2017, in so far as it relies on contraventions of cll A2.2, R2.9 and R3.10 of the *ACT Public Sector Education and Training Directorate (Teaching Staff) Enterprise Agreement 2014-2018*, be allowed.

5. The appellant’s claim against the respondent for breach of s 50 of the *Fair Work Act 2009* (Cth) in relation to all other pleaded contraventions of the *ACT Public Sector Education and Training Directorate (Teaching Staff) Enterprise Agreement 2014-2018* be dismissed.

6. The matter be remitted to the Federal Circuit and Family Court of Australia (Division 2) for the determination of appropriate remedies.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 Ms Yu prosecuted four substantive claims against the Australian Capital Territory (Education **Directorate**) in the Federal Circuit and Family Court consequent upon her dismissal from the Directorate in 2016. Ms Yu was employed by the Directorate as a teacher of Mandarin since 1991.

2 Ms Yu claims the Directorate has breached various provisions of the *Fair Work Act 2009* (Cth) (***FWA***). In particular, she seeks compensation from and the imposition of pecuniary penalties on the Directorate for:

(1) adverse action for exercising a workplace right in breach of s 340(1) of the *FWA*;

(2) coercion not to exercise a workplace right in breach of s 343(1)(a) of the *FWA*;

(3) contravention of an Enterprise Agreement in breach of s 50 of the *FWA*; and

(4) contravention of the National Employment Standards in breach of s 44(1) of the *FWA*.

3 The primary judge dismissed Ms Yu’s claims, holding that neither the processes undertaken by the Directorate, nor any of the reasons provided in support of its actions, constitute circumstances that would entitle Ms Yu to any of the relief as sought (**Reasons** at [20]).

4 Despite this apparently straightforward conclusion, the primary judge held that the Court was unable to make any formal findings of adverse action ‘in light of the inability (and agreement by the parties) to conduct the balance of the litigation “on the papers”’ (Reasons at [198]). The primary judge said further (Reasons at [215]):

…on the evidence she provided, and how her case was presented, together with the procedural anomaly and immense difficulty of no cross examination of the Respondent’s witnesses, making relevant findings was almost impossible. Additionally, the evidence, from a legal perspective simply did not support the claims made.

5 The primary judge’s comments must be examined in the context of the procedural history of the matter.

6 Ms Yu has at all times been self-represented. Her initiating application was filed on 18 November 2016 and was subsequently amended on 3 April 2017 (**Amended Application**). The trial commenced in March 2018 but was adjourned part heard. The resumed hearing was scheduled for 12 March 2019. The delay was consequent upon Court availability, the availability of critical witnesses for the Directorate, and an application (and subsequent appeal) brought by Ms Yu for the primary judge to disqualify himself.

7 At pre-hearing directions listed for 7 March 2019, Ms Yu did not appear because of ill-health. The hearing date of 12 March 2019 was vacated and the matter was listed for further directions on that same day. Ms Yu was again unable to attend on health grounds and proffered a medical certificate attesting to her stress and anxiety-depression. The Court adjourned the matter to June 2019 and sought a psychiatric report in respect of Ms Yu.

8 Submissions were made by the Directorate, pursuant to Order 2 of Orders made by the primary judge on 20 June 2019, proposing that the parties be permitted to address alternatives to a further full hearing and noting that Ms Yu had had the benefit of having concluded her case in chief more than a year previously. Orders were subsequently made on 20 September 2019 dismissing all extant applications and granting Ms Yu leave to reopen the matter in six months’ time.

9 On 20 March 2020, Ms Yu sought to have the matter reinstated and relisted. A directions hearing was held on 17 August 2020. At a further directions hearing on 3 November 2020, the following concerns were summarised in the notations to the Orders made (Reasons at [38]):

*A. The orders of 17 August 2020 provided that the parties notify the Court if there was an agreement to deal with the matter on the papers. The parties indicated that there was agreement for the matter to proceed in this way;*

*B. Given that the matter has been on foot for a significant period of time and the matter previously progressed to a final hearing where the Applicant gave evidence, the Court sought to enquire what the parties say the Court should do with that earlier evidence;*

*C. Both parties were of the view that the evidence of the Applicant should be retained and considered by the Court. However, the Respondent indicated that it considered it necessary for the Court to have an oral hearing unless the Court could be satisfied that the Applicant fully understood that (and continues to understand) the balance of the “hearing” would be conducted “on the papers” and that there would be no further cross-examination of any party or witness;*

*D. The Court is also concerned about the Applicant’s ability to conduct the proceedings, especially given that correspondence was previously sent to the Court by the Applicant in March 2019 indicating that due to her health issues she was unable to deal with matters relating to the proceedings (see Annexure A and B to these Orders). The Court raised the possibility of the appointment of a litigation guardian pursuant to Division 11.2 of the Federal Circuit Court Rules (2011) (Cth);*

*E. The Applicant strongly opposed the appointment of a litigation guardian*

10 In her affidavit filed on 6 January 2021, Ms Yu deposed:

[56] On 29 September 2020, to my astonishment, Mr Karcher, solicitor for the Respondent, emailed the Associate of the Judge, raised a new issue, i.e. *I may not fully understand the meaning of “matter to be dealt with on the papers”*. He requested a hearing to confirm my understanding. No application, legal or factual basis were presented to justify the existence of the issue and the needs of the process. I was disturbed greatly.

[57] Notwithstanding that *I sent a response showing my understanding of this simple term,* the Court listed a hearing to deal with my “understanding issue” and in addition, to deal with the litigation guardian issue that the Respondent raised 15 months ago (see [53] herein). I was extremely worried about being force out of the proceedings.

…

[59] On 3 November 2020, at the hearing, the Judge proposed to make an order for me to get a confirmation from my psychologist about my capacity, and Mr Karcher also submitted that I get a confirmation from my psychologist about my “understanding”. This disturbed me further as I had no doubt that the Respondent has the capacity to get a report that supports the appointment of a litigant guardian for me (my psychologist has worked for the Respondent before). I was extremely frustrated because my capacity/understanding was evidenced to all concerned – *I have managed this straightforward matter for 4 years, a confirmation report from a psychiatrist about my capacity has already been filed on 20 March 2020* (see [55] herein)…

(emphasis added)

11 Ms Yu now appeals the Orders of the primary judge made on 18 November 2021 on three grounds.

12 By **Ground One**, Ms Yu contends the primary judge incorrectly or falsely summed up the case. The gravamen of her complaint seems to be that the primary judge was wrong to find, as a matter of fact and law, that the Directorate did not breach the relevant provisions of the *FWA*. This emerges from her contention that, although the Directorate did not dispute, or did not seriously dispute, the existence of the factual matrix which led to her dismissal, the primary judge ‘changed my case and told the reader the wrong story’.

13 By **Ground Two**, Ms Yu contends the primary judge did not comply with the rules of evidence. Ms Yu asserts the primary judge refused to accept relevant evidence she says proved the legal elements of her claims under ss 340, 50 and 44(1) of the *FWA* and her claims for aggravated/exemplary damages. Further, Ms Yu contends that the primary judge accepted the Directorate’s submissions which were unsupported by evidence. She also complains the primary judge did not comply with the rules of evidence by regarding the transcript of her cross-examination as ‘the Applicant’s oral evidence’.

14 By **Ground Three**, Ms Yu contends the primary judge ‘did not address any relevant issues of this matter, nor found any relevant facts. There is no valid reason to justify the conclusion’. In particular Ms Yu contends that, contrary to the primary judge’s observation that ‘with no cross-examination of the Directorate’s witness, making relevant findings was almost impossible’, there was relevant evidence before the judge to make the necessary findings. Ms Yu says that if the lack of cross-examination is a reason for being unable to find the facts, the primary judge erred in suggesting to the parties that the remainder of the matter be heard on the papers. Ms Yu contends further that the primary judge dealt with groundless or irrelevant issues, including: her legal capacity; consideration of the appointment of a litigation guardian; potential claims for apprehended bias and unfair procedures; and use of the AAT approaches.

15 The Directorate filed a **notice of contention** by which it contends the judgment of the Federal Circuit and Family Court should be affirmed on grounds other than those relied on by the Court. Specifically, the Directorate contends (particulars of the notice of contention omitted) that:

(1) The primary judge erred in considering, and making “observations” or purported preliminary findings adverse to the Directorate, on legal issues that were not part of the claim that was before him to determine (**irrelevant legal issues**), including:

(a) The issue of “apprehended bias” of the decision-maker who made the decision to terminate Ms Yu’s employment and of the investigator who prepared a report for the decision-maker for the purposes of making that decision – see [9]-[11], [16]-[17], [21]-[22], [159]-[176] of the Reasons.

(b) The issue of “unfair procedures” or “failure of process” by the Directorate in its dealings with Ms Yu – see [177]-[188] of the Reasons.

(c) The issue of the decision-maker who made the decision to terminate Ms Yu’s employment failing to take account of “relevant considerations” in his reasoning process – see [143]-[148] of the Reasons.

(2) The primary judge erred in making “observations” adverse to the Directorate, following from his consideration of the irrelevant legal issues, as to the manner in which the Directorate ought to have dealt, or ought in the future to deal, with Ms Yu’s claims including:

(a) That the Directorate should have engaged a counsellor, or engaged an alternative dispute resolution process – see [91], [96], [103] and [149] of the Reasons.

(b) That the Directorate should have paid Ms Yu a redundancy payment – see [137]-[138] of the Reasons.

(c) That the Directorate consider making an *ex gratia* payment to Ms Yu – see [24], [91] and [216] of the Reasons.

(3) The primary judge erred in concluding that he was not able to make any “findings” about adverse action for the purposes of Ms Yu’s claim under s 340 of the *FWA* because the proceeding was in part determined on the papers and/or the Directorate’s witnesses had not been cross-examined – see [98], [202], and [215] of the Reasons.

16 Grounds 1 and 2 of the notice of contention appear to contend that this Court should find the primary judge erred in making admittedly irrelevant observations and considering a range of issues irrelevant to his ultimate findings (a matter with which Ms Yu agrees) and that the finding of such errors are grounds for affirming the judgment below. The logic of such a contention is difficult to discern. It is apparent that none of the matters complained of by the Directorate had any bearing on the primary judge’s ultimate decision – they were no more than observations along the way. Grounds 1 and 2 of the notice of contention must be dismissed.

17 As to Ground 3 of the notice of contention, similarly, Ms Yu agrees the primary judge erred in concluding he was unable to make any findings about adverse action for the purposes of her claim under s 340 of the *FWA*. For the reasons discussed below in respect of Ground Three of Ms Yu’s amended notice of appeal, Ground 3 of the notice of contention is upheld.

18 At first blush, given the matter has been heard in two different modes, with only one party’s witness having been cross-examined, it might be thought that there is little alternative but to remit the matter to Federal Circuit and Family Court of Australia for an orthodox hearing, shorn of the unnecessary observations about the “unpleaded and unexplored claims” which the primary judge considered ought to have been pursued. That, however, is a less than desirable course given the obvious stress afflicting Ms Yu arising from these proceedings and the difficulties surrounding the fact that the matters required to be traversed again took place now almost seven years ago. It is also apparent from the paragraph in Ms Yu’s affidavit set out above that she was adamant she understood how the matter would be dealt with and was content with the hearing to be finalised ‘on the papers’.

19 The evidence filed before the primary judge was extensive comprising:

* Affidavit of Jing Yu filed 5 May 2017 (**Aff-JY 5/7/17**)
* Affidavit of Jing Yu filed 20 September 2017 (**Aff-JY 20/9/1**7)
* Affidavit of Jing Yu filed 13 March 2018 (**Aff-JY 13/3/18**)
* Affidavit of Jing Yu filed 20 March 2020 (**Aff-JY 20/3/20**)
* Affidavit of Jing Yu filed 26 June 2020 (**Aff-JY 29/6/20**)
* Affidavit of Jing Yu filed 6 January 2021 (**Aff-JY 6/1/21**)
* Affidavit of Catherine Crook filed 31 July 2017 (**Aff-CC**)
* Affidavit of Natalie Stewart filed 31 July 2017 (**Aff-NS**)
* Affidavit of Eileen Currie filed 31 July 2017
* Affidavit of Samara Chisholm filed 31 July 2017
* Affidavit of Philip Beecher filed 31 July 2017 (**Aff-PB**)
* Affidavit of Katrina Sheaves filed 31 July 2017 (**Aff-KS**)
* Affidavit of Lauren Harman filed 31 July 2017 (**Aff-LH**)
* Affidavit of Dougal Whitton filed 7 September 2017 (**Aff-DW**)

20 In addition, as has already been observed, Ms Yu was cross-examined on her affidavit evidence at the initial hearing in March 2018.

## Grounds Two and Three

21 It is convenient to first deal with Grounds Two and Three together. The gravamen of both is that the primary judge failed to deal with the relevant issues and evidence appropriately which resulted in his Reasons failing to justify the conclusion.

22 Ms Yu contends the primary judge did not comply with the rules of evidence “by refusing to accept the relevant evidence” that was said to support her claims under the *FWA*. The primary judge did not refuse to accept her evidence, nor did he find that she was untruthful in her evidence. The primary judge observed her evidence was “confused and confusing” and “in certain respects and degrees histrionic” (Reasons at [96]) but accepted that, on her evidence, she was engaged in “something of a David and Goliath battle between herself and the Directorate” (Reasons at [97]).

23 Ms Yu also contends the primary judge did not comply with the rules of evidence by disregarding her evidence relating to her claim for aggravated/exemplary damages. This contention seems to relate to the repetition before the primary judge of matters which were raised in her application for the primary judge to disqualify himself. That application had already been dismissed and unsuccessfully appealed to the Federal Court (*Yu v ACT Education Directorate* [2019] FCA 272). That evidence was not relevant to her claims as currently articulated before the primary judge.

24 Ms Yu contends the primary judge erred in accepting the Directorate’s submissions without supporting evidence. She gives as an example the Directorate’s submission that its actions were lawful. There is no substance to this complaint. The primary judge drew clear distinctions between the parties’ submissions and the evidence and matters of law on which those submissions were based. It is the function of submissions to put a party’s case to a judge, both in respect of what weight it is said should be given to particular evidence and in relation to what the party contends the law to be.

25 Similarly, there is no substance to Ms Yu’s contention that the testimony a witness gives in the course of cross-examination is not to be treated as evidence relevant to the claim. The examination and cross-examination of witnesses is integral to the testing of evidence within an adversarial legal system (*Lee v The Queen* (1998) 195 CLR 594, [32]).

26 Nevertheless, it is necessary to examine what evidence was available to the primary judge from which it was possible to make relevant findings (Ground Three), including findings as to whether or not Ms Yu proved the legal elements of her claims under ss 340, 50 and 44(1) of the *FWA*.

27 The primary judge summarised Ms Yu’s claims under the *FWA* as (Reasons at [196]):

(1) adverse action for exercising a workplace right (s 340(1) *FWA*);

(2) coercion not to exercise a workplace right (s 343(1)(a) *FWA*);

(3) contravention of an enterprise agreement (s 50 *FWA*); and

(4) contravention of the National Employment Standards (s 44 *FWA*).

28 The primary judge dealt briefly with the coercion claim and the claim for contravention of the National Employment Standard. This was appropriate and no error has been demonstrated in respect of these two claims.

### The coercion claim - s 343(1)(a)

29 The primary judge held (Reasons at [208]) there was no evidence to support this claim. Ms Yu abandoned the coercion claim on appeal.

### The contravention of National Employment Standard claim - s 44

30 As was found by the primary judge (Reasons at [213]), Ms Yu has been paid her full entitlements. Ms Yu did not dispute that. The primary judge was correct to dismiss that claim.

### The adverse action claim – s 340(1) and s341(1)(a), (c)

31 In dismissing the first claim, the primary judge said (Reasons at [198]):

Regrettably, in relation to all of the Applicant’s formally stated claims in her material, to state the obvious, albeit in negative terms, in the first instance, the Court can make no formal findings of adverse action in the light of the inability (and agreement by the parties) to conduct the balance of the litigation “on the papers.” Further, also regrettably, so much of the Applicant’s evidence, properly and fairly viewed, was an amalgam of assertions and complaints. To the contrary, to the degree that it is apposite to comment at all, the Respondent’s various Affidavit evidence from its [unexamined] witnesses does not disclose any relevant action that could reasonably or relevantly constitute adverse action for the purposes of s.361(1), and s.340 of the FW Act.

32 The primary judge did, however, find that Ms Yu had misunderstood the processes relating to the Professional Improvement Plan (**PIP**) on the one hand, and the Professional Pathways Plan (**PPP**) on the other, which misunderstanding led her “inaccurately – to form an inappropriate view regarding the matters just mentioned – her work, health and safety, and legitimate and proper direction at her place of employment” (Reasons at [199]).

33 Although the primary judge lamented that the comments and evidence of Mr Whitton, who was the decision-maker in respect of Ms Yu’s dismissal “is not able to be relevantly challenged” (Reasons at [203]), in circumstances where the primary judge invited the parties to continue with the resumed hearing “on the papers” and where the parties took up that invitation, it is unfortunate to say the least that the primary judge considered findings could not be made because of the inadequacies in the trial process.

34 Despite having expressed his inability to make appropriate findings, the primary judge was correct to dismiss the adverse action claim.

35 Division 3 of the *FWA* is concerned with workplace rights. Section 340 provides:

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

36 The meaning of ‘adverse action’ by an employer against an employee is defined in Column 2 of Item 1 of s 342(1) of the *FWA* as if the employer:

(a) Dismisses the employee; or

(b) Injures the employee in his or her employment; or

(c) Alters the position of the employee to the employee’s prejudice; or

(d) Discriminates between the employee and other employees of the employer.

37 A ‘workplace right’ is defined in s 341:

(1) A person has a workplace right if the person:

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

(c) is able to make a complaint or inquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee—in relation to his or her employment.

38 There was no dispute between the parties that the Directorate took adverse action against Ms Yu. What remained in dispute was whether Ms Yu had established that she had exercised, or proposed to exercise, a workplace right. If that were established, it was then for the Directorate to establish that whatever adverse action it took was not *because of* the exercise, or proposed exercise, of a workplace right (*Tattsbet Ltd v Morrow* [2015] FCAFC 62; 233 FCR 46 at [119]).

39 In her Amended Application, Ms Yu pleads the workplace right on which she relies is provided for in s 28(a) of the *Work Health and Safety Act 2011* (ACT) (***WHSA***) (or alternatively cl A2.17 of the *ACT Public Sector Education and Training Directorate (Teaching Staff) Enterprise Agreement 2014-2018* (**EA**)) being that, while at work, “a worker must take reasonable care for his or her own health and safety” (which includes physical and psychological health). It is assumed that this right is said to fall within the ambit of s 341(1)(a) of the *FWA*. The Directorate, quite properly, accepted that s 28(a) of the *WHSA* might, in certain circumstances, give rise to the exercise of a workplace right for the purposes of s 341(1)(a). The Directorate submitted, however, these were not such circumstances. Although there is no doubt that Ms Yu was distressed by the circumstances in which she found herself, it is tolerably clear from all the evidence before the primary judge that Ms Yu’s refusal to comply with the Principal’s directions that her teaching be observed on 27 May 2016 and 9 June 2016, and to attend the meeting to finalise her PPP was not done in the exercise of her workplace right to take reasonable care for her own health and safety. Rather, her refusals were a consequence of her “suspicion” formed at the very commencement of her time at Canberra High School (**CHS**)that she had been sent there to be performance managed out of her employment, and her fundamental disagreement with the management of CHS that she needed any assistance with improving her teaching performance so as to enhance her prospects of securing a permanent position.

40 Further, Ms Yu relies on her workplace right provided for in s 341(1)(c) of the *FWA*, to make a complaint or inquiry – to a person or body having the capacity under a law to seek compliance with that law or a workplace instrument, or if the person is an employee, in relation to his or her employment. Ms Yu seems to suggest that, in her case, she was able to make a complaint to the Principal. This emerges from paragraphs [18] - [20] of her Amended Application. If that is indeed the basis of her claim, there is some evidence that Ms Yu made a complaint to the Principal that she was concerned that she had received a dishonest report from a colleague who had observed her class. This was not a matter that was pressed below.

41 Ms Yu also pleads that the workers’ compensation claim she brought in 2008 for psychological injury caused by the Directorate, and in which she was ultimately successful before the Administrative Appeals Tribunal in 2010, was the exercise of a workplace right. There was no dispute that Ms Yu had exercised such a right in 2008. The primary judge formally ruled that any matter raised and settled in the Comcare proceedings in 2008 was not and would not form part of any current matter to be determined in the current proceedings (Reasons at [16]). To the extent that the primary judge indicated the ruling might be revisited, this was in the context of what are described as the “unpleaded and unexplored claims” as to which the primary judge made no findings.

42 The matter therefore proceeded at first instance on the basis that the only relevant work place right was that relating to Ms Yu’s health and safety.

43 The background to Ms Yu’s dismissal commences in January 2016 when she was moved to CHS which had a Mandarin programme. By this time, she had become a supernumerary teacher – she no longer held a permanent position as a teacher of Mandarin but remained employed by the Directorate at Experienced Teacher 2 level. Ms Yu confirmed in her oral evidence that she did not apply for any permanent positions for the 2016 teaching year. So much was not in dispute before the primary judge.

44 Shortly after commencing at CHS, on 8 February 2016, Ms Yu was given a draft PPP prepared by Natalie Stewart, the Professional Practice Executive teacher. The Principal of CHS, Mr Beecher, Ms Stewart, and Ms Currie, Ms Yu’s Executive Teacher, all deposed to that having occurred at a meeting with Ms Yu. In oral evidence, Ms Yu denied the meeting took place. Nevertheless, Ms Yu does not dispute that she was given the draft PPP, nor that she had had a discussion with Mr Beecher about doing the PPP to give her some support (Reasons at [70]).

45 It is apparent that, from this point onwards, Ms Yu became distrustful of the Directorate and the staff at CHS. Part G of her Amended Application at [9] states:

A week later, on 8 February 2016, for reasons unknown to her, the applicant was issued a Six-week Pathway to Improvement Plan written by the School Principal and the Deputy Principal. No evidence was tabled to warrant such action imposed upon the applicant. The applicant has always been efficient in her work over the 25 years of her employment, hence she disputed the legitimacy of the process.

46 Ms Yu’s reference in that paragraph to a ‘Pathway to Improvement Plan’ (PIP) was a misapprehension, no doubt coloured by her experience of having had one put in place for her in 2008. Relevantly, a PIP, as described in the affidavit of Ms Harman, is a process to improve an employee’s performance at work in accordance with the Performance and Development Procedures in the EA (Aff-LH at [6]). By contrast, a PPP is required of every teacher at the beginning of each year to set out a teacher’s professional development goals (Aff-PB at [12]; Aff-KS at [32]; Aff-NS at [7]).

47 Although the evidence discloses there were multiple occasions on which the purpose of a PPP was explained to Ms Yu, it is clear from her evidence that she did not accept she was being required to complete a PPP to assist with her career. From the outset, she remained convinced the PPP was in fact to be used to performance manage her out of her job:

(1) At paragraph [15] of Aff-JY 6/1/21, in relation to being asked to sign a PPP, Ms Yu deposed:

I realised that this process was for an improper purpose and would bring serious harm to my career and well-being. For my own protection, I did not accept the process.

(2) In her oral evidence, she denied the PPP was with a view to increasing her teaching of the Year 8 Mandarin class, saying:

It was for assessment purposes (Reasons at [68]).

(3) She said further that the object of either a PPP or a PIP was the same in the sense that there was always an “agenda” (presumably likely to be adverse to her) behind it (Reasons at [69]).

(4) In her oral evidence, when asked about being moved to CHS, Ms Yu said (Reasons at [67]):

I’m not placed there to teach. There’s no class for me to teach. I go there to go through a performance process, so they legally to get me out. (sic)

(5) Ms Yu was read an email dated 12 February 2016 (Aff-LH Annexure LH5) which recorded that Ms Yu had ‘expressed a view that she felt [a PPP] was a punishment and did not wish to proceed with the development of the professional pathways plan’. In oral evidence, Ms Yu agreed that she (Reasons at [71]):

(a) Believed the PPP was a punishment because she thought it was a performance management plan;

(b) Thought ‘this punishment different’, despite agreeing every teacher had to do one and believed she could write the plan on her own; and

(c) Always insists to do her own PPP saying ‘I don’t want the plan they impose on me and it doesn’t work’.

(6) Ms Yu was asked in evidence whether she wanted to get a position and whether there was therefore anything offensive about [CHS] suggesting they wanted to help her get a position. Ms Yu’s response was (Reasons at [79]):

Why need help me to get a position? If there’s a position, just give it to me and let me teach.

(7) When it was put to Ms Yu it was because she was in her third year without successfully getting a permanent position, she replied (Reasons at [79]):

Because they secretly – secretly give the position to the temporary – temporary employee. They don’t want to use me. That’s the whole thing…I will have evidence for that.

(8) Ms Yu gave further oral evidence that comments made by Ms Currie following observation of her teaching were ‘not honest’ (Reasons at [87]).

(9) She confirmed she told the Principal, Mr Beecher, she did not want anyone further to observe her teaching and that ‘the whole management at Canberra High School had some sort of background agenda to exit [her] from the school’ (Reasons at [88]).

48 There was no dispute before the primary judge that Ms Yu refused to sign a PPP, nor that following two observations of her teaching, she refused to be further observed.

49 At paragraphs [10]-[11] of Part G of her Amended Application, Ms Yu claims:

From then on, adverse action against the applicant were frequently organised by the respondent, for example, repeatedly pressed the applicant to sign the Improvement Plan, carried on ad hoc lesson observations, produced dishonest lesson observation report, and suggested that she resign.

Meanwhile, the school management excluded the applicant from participating in whole school programs, for example, the professional community learning programs which including peer observation in the classroom and feedback.

50 There was no dispute before the primary judge that a series of meetings were arranged between various staff at CHS and Ms Yu in an attempt to have her discuss a PPP and sign off on it. The first was on 12 February 2016 between Ms Yu, Ms Harman, Ms Sheaves, and Ms Chisolm.

51 There was no dispute before the primary judge that a follow-up meeting was scheduled for 16 February 2016 and that Ms Yu took sick leave and did not attend.

52 Similarly, there was no dispute before the primary judge that, on 29 February 2016, Ms Yu received a letter by hand (Ms Yu had not yet set up an email account at CHS) from Ms Harman noting that it was now the end of week 4 of Term 1 and the importance of finalising a PPP so that ‘the school can work with you to develop your teaching skills to enable you to gain a transfer into a substantive position by the end of 2016’ (Aff-LH Annexure LH9). The letter invited Ms Yu to comment on the draft, identify any additional support mechanisms or professional learning opportunities, and to bring a support person. There was no dispute that Ms Yu returned from sick leave on 29 February 2016, that she refused to participate in the meeting, that she was requested to attend Mr Beecher’s officer where he gave her a letter directing her to attend a meeting on 1 March 2016 at 8.30am to finalise the PPP, and warned her that “Failure to comply with my direction would be considered misconduct and may lead to discipline action”. The letter also gave Ms Yu a further opportunity “to comment on the draft plan and to identify any additional support mechanisms or professional learning opportunities” (Aff-PB Annexure PB1).

53 There was no dispute before the primary judge that Ms Yu again took sick leave but did not tell CHS any particulars of her illness. Ms Yu returned to CHS on 22 March 2016 when, it is not disputed, she was directed to attend a meeting with Ms Harman, Ms Sheaves, Mr Beecher, and Ms Chisolm and again refused to sign, indicating she would take some long service leave (Reasons at [53] referring to Aff-JY 6/1/21 at [19]). Ms Yu took a period of long service leave sometime shortly after 23 March 2016 until 5 May 2016 (Aff-PB at [32]).

54 On 8 April 2016, Ms Yu sent a revised draft of a PPP, which had been prepared by her in March, which was little different from the original on which she had been given feedback. In oral evidence, Ms Yu confirmed that “lesson plans can be good for some teachers but they are not suitable for her” (Reasons at [84]).

55 There is no dispute that, on 9 May 2016, Ms Yu received a letter from Cathy Crook, Manager HR People Services in the Directorate which explicitly set out the performance expectations and professional responsibilities of employees classified as “Experienced Teachers 2”, detailed the concerns with her performance, including that she was struggling to demonstrate satisfactory attendance, effective teaching practice or constructive engagement with professional support structures, and listed the “reasonable administrative requests” she was declining to follow. Those were specified to be declining: to teach her allocated workload; develop and enact a PPP with suitable goals; be observed by her colleagues with a view to providing her with constructive feedback; and undertake the broader responsibilities of a teaching role (including planning differentiated learning; assessing and reporting learning outcomes). The letter directed Ms Yu to (Aff-CC Annexure CC1):

(a) finalise and sign a Professional Pathways Plan that is agreed with the Principal and/or Deputy Principal and that is consistent with the *National Professional Standards for Teachers* and with whole school priority areas (of which, at Canberra High School, one is curriculum and assessment differentiation).

*Consequence of inaction* – If this does not occur by Monday 16 May then the draft Plan which you have previously been given, and invited to annotate, will be deemed to be operational. If progress is not made against the goals in this plan by Friday 10 June then you will transition to Pathways to Improvement and potentially to underperformance action.

(b) teach an allocated workload of Chinese lessons and engage meaningfully with support structures (including mentoring and lesson observations) to further develop your professional practice.

*Consequence of inaction* – disciplinary procedures.

(c) apply for advertised classroom teaching positions in your areas of learning specialisations/experience, including Chinese and EALD. A current option is a local site selection at Mawson PS closing on 18 May and I expect to see your application in the selection schedule.

Failure to follow my directions may constitute professional misconduct and lead to disciplinary action that could result in the termination of your employment.

56 Ms Yu took further sick leave and returned to work on 26 May 2016. There was no dispute before the primary judge that Ms Yu refused to meet with Ms Crook and Mr Whitton on 27 May 2016. In oral evidence, Ms Yu said she refused to be observed teaching, she had done nothing wrong, and the school management was treating her unfairly which caused her much distress (Reasons at [92]). Her oral testimony was that in her letter in response to the allegations she “explained on 27 May I had to protect myself from further harm because I was in an aggressive and antagonistic work environment and was experiencing anxieties” (Reasons at [93]). The text of that letter, dated 15 June 2016, referred to in Aff-JY 5/7/17 at [119], said:

Circumstances and reasons that lead me to cancelling the appointment with Ms Crook and did not wish to attend arranged the meeting on 27 May 2016

By 12:20 pm I was feeling very weary and I could not see any constructive purpose of the meeting this afternoon. I am here alone, helpless and powerless on the other side, two powerful HR managers supported by three powerful school leaders. I felt this was a source of misery. Should I go on to get more wounds or give up and take some refuge? I choose the latter. So I rang Phil to let him know that I could not attend the meeting.

At the beginning of lunch I went to the school yard for a walk to relieve my heavy heart. After seeing Wei, I went to the school library, sat in a corner writing my prayers to get some rest and solace. After lunch I went back to my staffroom, sat on my desk and continued with my writing. I did not go to the meeting when Phil repeatedly asked me to. I have given up defending myself and did not wish to risk myself with more wounds. Besides, at that time I needed some space; my soul was yearning for peace and solace. (sic)

57 There was also no dispute that Ms Yu took unapproved leave from 30 May 2016. On 31 May 2016, Ms Harman was appointed to investigate the allegations of Ms Yu’s misconduct which, by then, were identified as (Reasons at [127]):

1. refusal to conduct lessons on 27 May 2016 while under observation (the Observation Allegation);

2. failure to comply with an express direction to attend a meeting to discuss her PPP (the Meeting Allegation); and

3. being on unapproved leave since 30 May 2016 (the Leave allegation).

58 There was also no dispute that Ms Harman directed Ms Yu to attend a meeting with her on 3 June 2016 but Ms Yu declined on the basis of ill health. Ms Harman then requested a detailed response to the allegations in writing by close of business on 9 June 2016.

59 Ms Yu returned to CHS on 9 June 2016. There was no dispute that Ms Yu again refused to teach under observation and so would not teach. Ms Yu then met with Ms Harman, at which time Ms Harman determined it was not tenable for Ms Yu to remain at CHS and she was stood down with pay in accordance with cl U7.6 of the EA (Aff-LH at [37]).

60 It is uncontroversial that, on 7 July 2016, Mr Whitton wrote to Ms Yu advising that he proposed to terminate her employment (Aff-DW at [30]). Ms Yu responded to that letter on 3 August 2016 reiterating her previously expressed views to the management and staff at CHS and within the Directorate that: it was unreasonable for her lessons to be observed more than every other teacher; it was unreasonable for her to be pressed to sign a ready-made PPP when the Guidelines state that the teacher is responsible for developing and recording a professional pathways plan; and she was distressed, in tears, and in no condition to attend any meeting and it was unreasonable to repeatedly demand her attendance at meetings under duress and “acting to protect my own welfare is not misconduct” (Aft-JY 5/7/17 Annexure JY10.36).

61 Ms Yu’s employment was terminated by letter dated 17 August 2016 in which Mr Whitton concluded (Aff-DW at [34]):

You have not provided me with any information that would change my view that you have engaged in wilful and deliberate conduct that is inconsistent with continuation of the contract of employment. As a result, I have no alternative but to terminate your employment.

62 This summary of the circumstances leading up to Ms Yu’s claims demonstrates the evidence before the primary judge, relevant to the material elements of the claims, was largely undisputed. There was direct evidence in Mr Whitton’s affidavit as to his reasons for determining to dismiss Ms Yu. His uncontradicted evidence was that he “did not find that [Ms Yu] had engaged in misconduct because she had or sought to exercise any workplace rights, or for any other reason unrelated to the reasons” he had outlined (Aff-DW at [33]). The fact he was not cross-examined on it does not mean relevant findings could not be made on the basis of the uncontradicted evidence before the primary judge.

63 There was a sufficient evidential basis to support the primary judge’s conclusion that Ms Yu is unable to establish her claim under s 340(1) of the *FWA*.

### Breach of the EA – s50 FWA

#### The scope of the claim

64 At [31] of her Amended Application dated 3 April 2017, Ms Yu claimed the Directorate breached s 50 of the *FWA* by its contravention of cll A2.2, R2.9, H1.4, H2.1, H2.2(e), H2.3, H7.1, H7.2, A2.16, A2.17, Section K, and H1.2 of the EA.

65 A summary of the particulars of those claims follows:

A2.2 The Directorate agrees to use temporary employees only where no officer is available with necessary expertise, skills or qualifications; Ms Yu was removed from Hawker College in 2013 and replaced with a temporary/casual; Ms Yu was not offered position at CHS in 2016 but position given to a casual. (Amended Application at [32])

R2.9 The Directorate had the obligation, which takes precedence over any other method of filling vacancies, to place Ms Yu in a suitable position; they did not do so in 2015/6 (Amended Application at [35]).

H1.4 The Directorate was required to act in accordance with principles of procedural fairness, and in a manner that promotes the values and general principles of the Australian Capital Territory Public Service (***ACTPS***) (Amended Application at [36]); the particulars of failure to do so are:

H2.1, H2.2(e) and H2.3 – procedures around initiating a preliminary assessment; Ms Yu was not informed that a preliminary assessment process had been commenced; the Principal did not make an allegation of inappropriate behaviour nor any preliminary assessment or recommendation for further action until 27 May 2016 (Amended Application at [37])

H7.1 and H7.2 – the Directorate may commence an investigation process and stand down/suspend a person after receiving a recommendation from school management under H2.2(e); no recommendation was received from school management but HR commenced an investigation process on 2 June 2016, stood Ms Yu down on 9 June 2016 and suspended her on 7 July 2016 (Amended Application at [39]).

A2.16/17 The Directorate is committed to promoting, achieving and maintaining highest levels of health and safety of all employees and the Directorate and all employees must act in a manner consistent with the *WHSA*; the Directorate failed in its duty under A2.16/7 and took adverse action against Ms Yu for taking reasonable care of her safety (Amended Application at [41]).

Section K The Directorate made Ms Yu an excess Mandarin teacher but refused to treat her fairly and manoeuvred her out of the workplace by using disciplinary action instead (Amended Application at [43]).

H1.2 HR managers and school leaders failed to act responsibly and to be accountable for their actions (Amended Application at [44]).

66 These particulars were expanded upon in “The Applicant’s Outline of Submissions” dated 13 March 2018 (filed only 10 days before the hearing) at [54] – [100] by which additional breaches were alleged, namely of F25.4, U10.5, R3.10, R4.1, A2.10, G1.1, H1.4, H2.2(b), H10.1, U7.6, R9.2 and A2.18.

67 Before the primary judge at the first hearing, the Directorate submitted these subsequent claims should not be entertained on the basis that leave had not been sought to amend the claim and the Directorate had already filed all of its affidavit evidence. Before the matter eventually resumed on the papers, the primary judge made orders, on 11 November 2020, relating to the filing of submissions and “updating affidavits” which were to explain to the Court what the party understood its position and its case to be. The dates for compliance with those orders were subsequently amended to 6 January 2021 for Ms Yu and 3 February 2021 for the Directorate.

68 Ms Yu filed her “updated” affidavit and a further “Applicant’s Outline of Submissions” on 6 January 2021. It appears from this material that the only claim relevant to the breach of s 50 which was additional to those contained in the Amended Application was that relating to an alleged breach of cl R3.10 of the EA. The references to clauses F25.4, U10.5, R4.1, A2.10, G1.1, H1.4, H2.2(b), H7.1, U7.6, R9.2 and A2.18 that had appeared in her Submissions dated 13 March 2018 had been deleted (except to the extent that cl F25 was identified as a particular of the alleged breach of A2.16/A2.17).

69 The Directorate filed an affidavit of Justin Robert Karcher, solicitor for the Directorate, dated 5 February 2021 (**Aff-JRK**), in which he deposed to the enlarging of Ms Yu’s claim without leave, or an application for leave, and contended her claims for contravention of s 50 ought be limited to those in her Amended Claim. In its submissions, the Directorate did not address any claims for which it contended leave was required, despite there being no ruling at that stage as to what would be considered by the primary judge.

70 The primary judge dealt with the objection to the enlarged claims in his Reasons. The primary judge referred to Mr Karcher’s affidavit (Reasons at [14]-[15]). His Honour referred to his raising of concerns at the outset of the hearing on 22 March 2018 as to the expansion of the claims (Reasons at [18]), which, at that point, included the larger number of alleged breaches stipulated in Ms Yu’s Submissions dated 13 March 2018. It is tolerably clear from the transcript that those concerns were in fact raised by counsel for the Directorate and their attribution to the primary judge is an error in the transcript. Ultimately, the primary judge indicated that (Reasons at [19]):

Unless otherwise indicated, I cannot, and will not, have any regard to material filed in contravention of the Orders made by consent dated 11th November 2020 and subsequently amended, also by consent. More particularly, unless otherwise specified, the Court’s primary points of reference regarding the Applicant’s claims will be (a) the Amended Application filed 3rd April 2017, and (b) her Summary Affidavit, filed 7th January 2021. I will also have regard to the Applicant’s primary submissions, filed 7th January 2021 and those filed in Reply, on 6th April 2021.

The filing date of the Summary Affidavit and the primary submissions should be read as 6 January 2021.

71 Piecing together the relevant changes as between the Submissions dated 13 March 2018 and those dated 6 January 2021, it appears the primary judge was content to accept the additional claim of an alleged breach of cl R3.10 of the EA, but not the additional claims concerning F25.4, U10.5, R4.1, A2.10, G1.1, H1.4, H2.2(b), H7.1, U7.6, R9.2 and A2.18.

72 Having made that ruling, the primary judge found (Reasons at [209]-[211]):

There are no particulars or relevant details of the Applicant’s contention regarding *some* breaches of the EA. As such, she has not discharged her evidentiary onus to establish relevant facts to form a basis for the Court to determine such a claim. On this basis alone, this claim cannot succeed.

(emphasis added)

To the degree that there was compliance with all relevant parts of the EA, the Respondent’s witnesses depose that all such action was so undertaken. This included the processes undertaken regarding the investigation into the Applicant’s conduct pursuant to Clauses H7.1 and H7.2.

Other than assertion, there is no evidence provided by the Applicant to establish any breach of s. 50 of the FW Act.

73 The primary judge’s reasons do not provide any indication of which alleged breaches of the EA were insufficiently particularised nor of the extent to which those which were not decisive to his finding that Ms Yu could not discharge her evidentiary onus. That is unfortunate. Although some of the alleged breaches of the EA were of a general nature and underpinned by bare assertion, it cannot be said that there were insufficient particulars of several breaches which were also amply supported by the evidence before the primary judge.

#### Cll A2.16 and A2.17

74 In her Amended Application at [41], Ms Yu contended the Directorate contravened clause A2.16 or A2.17 by ‘failing to fulfil its duty of care’ under the clauses and by taking adverse action against her for taking reasonable care of her own health and safety. Those clauses provide:

A2.16 The ACTPS is committed to promoting, achieving and maintaining the highest levels of health and safety for all employees.

A2.17 The ACTPS will take all reasonable steps and precautions to provide a healthy, safe and secure workplace for the employee. The ACTPS and all employees will act in a manner that is consistent with the *Work Health and Safety Act 2011* (ACT)(WHS Act).

75 In her written submissions filed on 6 January 2021, Ms Yu submitted the Directorate breached these clauses by “wilfully engaging in unlawful actions that caused the Applicant’s emotional distress” at [9]. The gravamen of the complaint appears to be that the breaches alleged flow necessarily from the allegation that the Directorate took adverse action against Ms Yu. For reasons that have already been explained in relation to the claim under s 340 of the *FWA*, the Directorate did not take adverse action against Ms Yu.

76 The primary judge was correct to find no breach of cll A2.16 or A2.17 of the EA had been established.

#### Cll H2, H7.1 and H7.2

77 Clauses H2.1, H2.2(e) and H2.3 of the EA relate to the manner in which a preliminary assessment is to be conducted. Ms Yu particularised the alleged breach of cl H2 at [38] of her Amended Application. There was no evidence before the primary judge that there had been a breach of this clause. To the contrary, the evidence establishes that a preliminary assessment was made by Mr Beecher in the form of a report to Human Resources (Aff-PB, PB-2 and PB-3).

78 Clauses H7.1 and H7.2 relate to commencing and investigation and standing down or suspending employees. Ms Yu particularised the alleged breach at [40] of her Amended Application. There is, however, no substance to the allegation that these clauses were breached. The evidence establishes that Mr Whitton received the relevant assessment from Mr Beecher and then determined that the alleged misconduct could not be resolved without investigation (Aff-DW at [24]-[26]). He took appropriate steps under cl H7.1(a) – (c) by appointing Ms Harman to conduct the investigation who then notified Ms Yu (Aff-DW at [26]; (Aff-LH at [33]).

79 There was a sufficient evidentiary basis before the primary judge for him to conclude that no breach of cll H.2, H7.1 and H7.2 had been established.

#### Section K

80 The primary judge was also correct to dismiss Ms Yu’s contention that Section K of the EA had been contravened. It was uncontroversial that Ms Yu was not an excess employee, but a supernumerary employee. As such the provisions of Section K simply did not apply to her.

#### Cll A2.2, R2.9 and R3.10

81 Clause A2.2 of the EA provides:

A2.2 In order to promote permanent employment and job security for employees, the ACTPS will endeavour to minimise the use of temporary and casual employment. The ACTPS agrees to the use of temporary employees only where there is no officer available with the expertise, skills or qualifications required for the duties to be performed or the assistance of a temporary nature is required for the performance of urgent or specialised work within a particular business unit of the ACTPS and it is not practical in the circumstances to use the services of an existing officer.

82 Ms Yu alleges the Directorate breached this clause by removing her from Hawker College and filling her position with a temporary staff member. Ms Yu deposed to her position at Hawker College having been filled by a casual maths teacher ‘who was on a temporary working visa’ (Reasons at [53]). Nothing in the Directorate’s evidence before the primary judge disputes this allegation.

83 Ms Yu also contends the Directorate breached cl R2.9 by failing to meet its obligation under that clause in 2015/2016, and cl R3.10 by advertising a Mandarin teaching position on the Jobs ACT website when the position ought first to have been offered to her.

84 Clause R2.9 provides:

R2.9 The head of service has the right and obligation to place permanent teachers in suitable positions, as required. This requirement takes precedence over any other method of filling vacancies.

85 Clause R3.10 provides:

R3.10 There will be an annual classroom teacher transfer process. Teachers identified for transfer will be considered for placement through the annual process. Vacancies unable to be filled through transfer or central placement will go to open advertisement in accordance with subclause R4.1.

86 Ms Yu’s allegations in relation to cll A2.2 and R2.9 were articulated and particularised in her Amended Application in 2017. As has already been said, the allegation relating to cl R3.10 was first made on 13 March 2018 and reiterated in her Outline of Submissions filed on 6 January 2021. Although the Directorate objected to the inclusion of the claim relating to cl R3.10 without leave to amend having been granted, the Directorate could not have been taken by surprise given the foundation of the allegation in relation to cll A2.2 and R2.9 is the same that underpins the alleged breach of cl R3.10 – namely, that she was a permanent employee who should have been placed in or offered a permanent position before any position for which she was qualified was given to a temporary or casual employee or was advertised externally. Being on notice that this was a live issue, the Directorate had the opportunity to seek to adduce further evidence about the operation of cll A2.2, R2.9 and R3.10 before the matter resumed in 2021 but apparently did not do so.

87 As has already been observed above, there was no dispute before the primary judge that by January 2016 when she was moved to CHS, Ms Yu had become a supernumerary teacher. Nevertheless, she remained employed by the Directorate at Experienced Teacher 2 level.

88 Ms Yu confirmed in her oral evidence that she did not apply for any permanent positions for the 2016 teaching year and that she did not see the advertisement for the position at CHS in *Jobs ACT* (Reasons at [64]). In her written submissions, Ms Yu contended that the Directorate breached cl R2.9 by failing to place her, being a permanent teacher, into a suitable position before filling the vacancy at CHS through external advertisement.

89 Similarly, Ms Yu alleged that she had been identified for transfer and so ought to have been transferred to CHS before the position went to open advertisement. It is clear from the Directorate’s evidence before the primary judge that there had been no consideration of Ms Yu for the vacant position as a teacher of Mandarin at CHS (Aff-KS at [30]) as required by cll R2.9 and R3.10 – rather it seems to have been expected that she should have applied for the position through the open advertisement process (Aff-PB at [7]). In its written submissions, the Directorate contended that the onus lay on Ms Yu to nominate a reasonable range of schools (cl R3.13) but submitted that Ms Yu had in fact been placed in accordance with cl R2.9. The Directorate’s written submissions did not address the alleged breach of cl R3.10 despite the nature of that breach being inextricably linked with the alleged breach of cll A2.2 and R2.9.

90 In oral submissions, the Directorate suggested, in accordance with cl R3.13, the onus was on Ms Yu to nominate herself for a reasonable range of positions to enable a transfer. There was no evidence that Ms Yu had been made aware of any suitable positions for which she might seek a transfer. When read alongside cl R3.10, the Directorate contended the clause allowed for open advertisement as another mechanism for filling positions and that the clause should be construed as “vacancies not filled” by central placement or transfer rather than “unable to be filled”. The Directorate’s argument cannot be sustained. Clause R2.9 imposes on the “head of service” an obligation to identify and place permanent teachers in suitable positions. If that obligation cannot be fulfilled, *viz*, the vacancy is “unable” to be filled through transfer or central placement, only then does the vacancy “go to open advertisement in accordance with subclause R4.1”.

91 The primary judge ought to have found that the Directorate contravened cll A2.2, R2.9 and R3.10 of the EA and so contravened s 50 of the *FWA*.

92 For these reasons, Grounds Two and Three must be upheld.

## Ground One

93 In light of the conclusion reached in relation to Grounds Two and Three, it is unnecessary to deal with the first ground of appeal as to whether or not the primary judge “incorrectly or falsely summed up the case”.

## Disposition

94 For the reasons given, the appeal must be allowed and Order 1 of the Orders of the Federal Circuit and Family Court of Australia (Division 2) dated 18 November 2021 must be set aside. Orders will be made to the effect that the Directorate has breached s 50 of the *FWA* by contravening cll A2.2, R2.9 and R3.10, but no other clauses, of the EA and dismissing the claims under ss 44 and 340(1) of the *FWA*.

95 The matter will be remitted to the Federal Circuit and Family Court of Australia (Division 2) for determination of the quantum of damages and for consideration of any penalty.

96 Given that this is a matter within the Fair Work jurisdiction, and no submissions were made to the contrary, there will be no order as to costs.

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| I certify that the preceding ninety-six (96) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Thomas, SC Derrington and Halley. |

Associate:

Dated: 30 June 2022