HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **PETER VINCENT RIDD**
Appellant

and

JAMES COOK UNIVERSITY
Respondent

APPELLANT'S REPLY

Part I: Certification

1. This reply is in a form suitable for publication on the internet.

Part II: Reply

2. JCU gives clause 14 of the EA a construction that does not accord with its text, context, and purpose. Its construction starts from a premise that the clause, contrary to its express words, does not confer any right to intellectual freedom on employees. It ends with the result that the clause does not protect an employee from disciplinary action for the exercise of intellectual freedom. This is achieved by changing the clause — under the guise of construction — from a protected right for its employees to engage in intellectual freedom, into a commitment by JCU to enforce the Code of Conduct *against* those employees.

3. Contrary to JCU's submission, the drafters of the EA did not intend to recognise merely a "so called right" to intellectual freedom [JCU's submissions (**RS**), [24], [38], [43]].

4. JCU's construction violates the **text**, because it ignores the express terms of the clause, including the words "intellectual freedom" and "right". It replaces and overrides the specific limits to intellectual freedom in the various sub-clauses of clause 14, with all of the more general and restrictive requirements in the Code of Conduct.

5. It violates the **context** because it is inconsistent with the words of clause 13.3.

6. It obstructs the **purpose** because it detracts from — rather than protects — intellectual freedom. Clause 14 recognises a principle of significant importance to universities and their employees. The right is protected by its inclusion in the EA, as an industrial

instrument made under the *Fair Work Act 2009* (Cth). The purpose is to provide a protection to employees when engaging in intellectual freedom. JCU's construction does not further that purpose.

7. JCU is driven to its construction because of an assumption that it made when it first took disciplinary action against Dr Ridd under the EA. It adopted, and then maintained, the assumption that the right to intellectual freedom in clause 14 of the EA was subject to the Code of Conduct.[1] The assumption collides, however, with clause 13.3 which confirms that the Code was not intended to detract from clause 14. JCU therefore proposes a construction whereby clause 14 intellectual freedom, is no more than a commitment to enforce the Code of Conduct. But this is simply not supported by the words of the EA. By further reply Dr Ridd submits the following:

8. **First**, to contend that the Code is the "'mechanism' by which the University had agreed to honour its commitment" to intellectual freedom [RS, [10]], is to take away from the protection of intellectual freedom under clause 14.

9. The purpose of the clause is important: Intellectual freedom is *not* essential to protect an employee from an employer, for the expression of popular or orthodox opinions, or those that promote the interests of the employer and its perceived stakeholders. It *is*, however, needed to protect the expression of "unpopular or controversial views". As in this case, such opinions are liable to be characterised as inconsistent with the general requirements of the Code of Conduct (and therefore to punishment by the employer). If the "mechanism" for the protection of clause 14 intellectual freedom is enforcement of the Code, then employees who exercise that intellectual freedom have no protection from disciplinary action under the Code. No clear words would justify this result, which plainly detracts from the right.

10. **Second**, JCU questions whether clause 14 is intended to confer a right to intellectual freedom at all. This is not faithful to the words of the clause, which is concerned with "intellectual freedom" and expressed in terms of a "right". It appears that JCU considers that a right would only be conferred upon employees if every sub-clause of clause 14 referred to a "right" [RS, [11]-[13], [28]]. An enterprise agreement is a practical document intended to achieve practical ends [AS, [61]]. JCU approaches the concept of intellectual

[1] For instance, in the Final Censure, JCU said that it "does not accept that academic freedom justifies your criticism of key stakeholders of the University in circumstances where you communicated such criticism in a manner inconsistent with your obligations under the Code of Conduct" (**AFM 184**).

freedom as one that is potentially inconvenient, to be read down or sidelined as far as possible, rather than one of importance to the enterprise and its employees. So much does not further the purpose of clause 14.

11. **Third**, JCU impermissibly reads into clause 14 limits that do not appear in its text. The clause expressly recognises a right to participate in public debate. JCU suggests, however, that public debate must be made within "academic articles and research" [RS, [30]]. It excludes speaking to journalists or "appearing on a television show", which it dismisses — without explanation — as "a different thing altogether" [RS, [30]]. Such limits to intellectual freedom, whilst calibrated to capture some of Dr Ridd's conduct in this case, are foreign to the terms of the clause itself.

12. **Fourth,** JCU misstates Dr Ridd's case. It erects a false dichotomy between the general obligations imposed by the Code of Conduct, and intellectual freedom that is independent of "all constraint or responsibility", or is "absolute or unqualified" [RS, [37], [39]]. This is a strawman, because it ignores the words of clause 14 that includes specific limits on the right. It is also no part of Dr Ridd's case that clause 14 confers immunity from the general law, or statutory prohibitions on certain types of speech [cf RS, [22], [36]]. It would not and could not do so. The right in clause 14 is intramural to the relationship between employer and employee [AS, [40]]. It regulates the circumstances in which speech by an employee, in the exercise of intellectual freedom, is to be protected from disciplinary or other adverse action by the employer.

13. **Fifth**, JCU relies upon the phrase in clause 14.3 that reads: "…a responsibility to protect the rights of others and they do not have the right to harass, vilify, bully or intimidate those who disagree with their views". JCU says that Dr Ridd's construction gives the words "rights of others" no work to do [RS, [21]]. That is not so, the phrase is descriptive of the particular rights there listed. The phrase does not, by sidewind, incorporate into clause 14 all of the general obligations imposed by the Code of Conduct, as JCU suggests. The specific limits in clause 14.3 are serious conduct capable of interfering with the legal rights of another person. The genus of those limitations is very different to the obligations in the Code of Conduct (for example, to uphold reputations and be collegiate).

14. JCU then misquotes the relevant part of clause 14.3, describing it as an obligation to "treat others with respect" [RS, [24]]. That is not what the clause says, and for good reason. Respect and collegiality are desirable aims but they are often in the eye of the beholder. If hardened into obligations — punishable by disciplinary action by the employer — they

would operate to reduce the scope of intellectual freedom (particularly, for the expression of unpopular or controversial views). In the drafting of clause 14, the makers set the standard for intellectual freedom significantly higher. As has been observed: "[p]assionate advocacy and strong critique can all too easily be mistaken for incivility — especially, perhaps, when the ideas being expressed are challenging and unorthodox. Evidence and reasoning are the touchstones of academic discourse, civility is not".[2]

15. **Sixth**, JCU refers to an "obligation" on JCU to act "in accordance with" the Code of Conduct, found in clause 14.1. It says that "for the University to act 'in accordance with' the Code of Conduct, the University must enforce the Code of Conduct" [RS, [44]]. This broad proposition elides the very question of construction in this case, which is whether any general power, or even obligation, to enforce the Code against an employee, extends to conduct that is an exercise of intellectual freedom under clause 14 (including by complying with the limits within that clause). It does not [see AS, [63]-[64], cl 13.3.].

16. **Finally**, JCU seeks to cast a negative aspersion upon Dr Ridd by saying that he did not challenge that his conduct breached the Code of Conduct, implying further that he agrees his conduct was "threatening" [RS, [8(b)]]. This is incorrect. JCU has accepted, at all times, that Dr Ridd's conduct did not harass, vilify, intimidate, or bully any person in any way [FCAFC, [133] (**CAB 174**)]. Dr Ridd's case has always been that clause 14, rather than the Code, applied to his conduct. To assert that Dr Ridd concedes contraventions of the Code, when the very issue is whether the Code applied at all, distracts attention from the real issues in dispute.

Relief

17. The primary judge made 28 findings of contraventions by JCU of the clause 14 right (**CAB 79-81**). JCU accepted on the special leave application that each of Dr Ridd's grounds turned upon the question of construction, but now appears at least equivocal on this issue [RS, [4], [47]-[49]]. JCU ought not retreat from its considered position, as expressed in both its written and oral submissions on special leave.

18. If the majority in the Full Court erred in its construction of the EA, the orders of the Full Court that had set aside all of the findings of contraventions by JCU of clause 14,

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[2] C Evans and A Stone, *Open Minds*, (2021, MUP). 94. In December 2020, Cambridge University decided not to amend its freedom of speech policy to include a requirement that staff and students be "respectful".

including all three disciplinary decisions, must be set aside. That is for two reasons. **First**, the majority's reasoning on the 'alternative' ground was affected by its erroneous construction referring for example to "the correlative duty Professor Ridd owed to his colleagues" [FCAFC, [133] (**CAB 174**)]. **Second**, the majority did not address all of the primary judge's finding, confining itself to an observation that "some of the elements of Professor Ridd's conduct are unable to be characterised as an exercise of intellectual freedom" [FCAFC, [135] (**CAB 174**)].

19. JCU also now seeks to uphold the orders of the Full Court concerning the contravention of confidentiality directions [RS, [49]]. Two things may first be noted: **First**, these comprised only three of the seventeen factual findings made by JCU against Dr Ridd (all of which the primary judge held were in contravention of clause 14). **Second**, each of the three disciplinary decisions (First Censure, Final Censure and Termination) were cumulative on the other; and each were infected by JCU's error of construction. **Further**, the alleged breach of confidential directions depends upon the conclusion that those directions (that had purported to require Dr Ridd not to protest the unlawful disciplinary action against him) were lawful and reasonable directions. The Full Court majority concluded that they were "justified" and "lawful and reasonable" directions [FCAFC, [122] (**CAB 171**)]. But did so in light of its anterior holding (challenged by ground one) that JCU's disciplinary action did not contravene Dr Ridd's clause 14 right. There is no finding that it was a lawful and reasonable direction to keep confidential an unlawful process, nor a finding (not by JCU, the primary judge, or the Full Court) that breach of such a direction was, or even could be, of itself serious misconduct.

Dated: 27 May 2021

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