

OUTLINE OF SUBMISSIONS ON BEHALF OF THE DELEGATE

1. THE PROPOSED DECISION

- 1.1 The subject of the Review Committee's consideration is the proposed decision of Professor Stephen Garton, Provost and Deputy Vice-Chancellor, to terminate the employment of Dr Tim Anderson pursuant to clause 384(d)(iii) of the *University of Sydney Enterprise Agreement 2018-2021 (Enterprise Agreement)*.
- 1.2 The proposed decision was made after Professor Garton formed the view that Dr Anderson had engaged in Serious Misconduct within the meaning of the Enterprise Agreement and that disciplinary action in the form of the termination of Dr Anderson's employment was appropriate. Professor Garton holds the necessary delegation to make the proposed decision under the *University of Sydney (Delegations of Authority – Administrative Functions) Rule 2016* at 7.11.
- 1.3 The proposed decision was communicated to Dr Anderson by letter from Professor Garton dated 3 December 2018 in which he advised Dr Anderson that he was satisfied that Dr Anderson had engaged in serious misconduct within the meaning of the Enterprise Agreement.
- 1.4 In reaching his proposed decision, Professor Garton had regard to the fact that between April 2017 and October 2018, Dr Anderson had been the subject of allegations of misconduct on three separate occasions relating to his social media activity and his failure to comply with his obligations under the Code of Conduct.
- 1.5 The misconduct allegations resulted in Dr Anderson receiving a written warning on 2 August 2017 (**Written Warning**) and a final warning on 19 October 2018 (**Final Warning**).
- 1.6 Immediately after receiving the Final Warning, Dr Anderson republished on social media content that had been referred to in the Final Warning. This resulted in further allegations and, on substantiation of these, a finding of Serious Misconduct and the proposed decision to terminate Dr Anderson's employment.

2. ROLE OF THE REVIEW COMMITTEE

- 2.1 The role of the Review Committee in this matter is to make a recommendation to the Delegate (i.e. the decision-maker, in this case Professor Garton) in relation to the proposed termination of Dr Anderson's employment: clause 464 of the Enterprise Agreement.
- 2.2 In making its recommendation, the Review Committee must have regard to:
 - (a) whether any Misconduct or Serious Misconduct occurred, and any factors in mitigation;
 - (b) whether the procedures that were followed afforded the staff member the procedural fairness afforded by clauses 384(c) and (d) of the Enterprise Agreement, and if not, whether the outcome was affected by any procedural defect that may have occurred; and
 - (c) whether the proposed termination is reasonable in the circumstances.

3. RELEVANT PROVISIONS OF THE ENTERPRISE AGREEMENT

- 3.1 Dr Anderson is employed as a Senior Lecturer in the Department of Political Economy within the School of Social and Political Sciences in the Faculty of Arts and Social Sciences and has been employed by the University since 16 February 1998. Dr Anderson is covered by the Enterprise Agreement.
- 3.2 As an employee of the University, Dr Anderson is bound by the Enterprise Agreement and was previously bound by the predecessor agreements that applied at the time, including the *University of Sydney Enterprise Agreement 2013-2017 (2013-2017 Enterprise Agreement)*.

- 3.3 Clause 384 of the Enterprise Agreement sets out the process for dealing with allegations of Misconduct or Serious Misconduct. The equivalent clause in the 2013-2017 Enterprise Agreement was clause 309.
- 3.4 'Misconduct' is defined in clause 3 of the Enterprise Agreement as "conduct or behaviour of a kind which is unsatisfactory" and includes as examples of misconduct "a breach of a Code of Conduct (as defined in this clause) or a refusal or failure to carry out a reasonable and lawful instruction."
- 3.5 'Serious Misconduct' is also defined in clause 3 of the Enterprise Agreement and includes "serious misbehaviour of a kind that constitutes a serious impediment to the carrying out of a staff member's duties...". Examples of conduct that may constitute Serious Misconduct include, relevantly, "a serious breach of a Code of Conduct" and "persistent or repeated acts of Misconduct".
- 3.6 'Code of Conduct' is defined as the University's *Code of Conduct – Staff and Affiliates* or the *Research Code of Conduct (Code of Conduct)*.
- 3.7 Clause 306 of the Enterprise Agreement imposes an obligation on staff to comply with the Code of Conduct. The equivalent clause in the 2013-2017 Enterprise Agreement was clause 251.
- 3.8 Clauses 315 to 317 of the Enterprise Agreement deal with Intellectual Freedom and refer to the rights of academic staff "to engage in the free and responsible pursuit of all aspects of knowledge and culture ...in public debate" and "to express unpopular and controversial views, provided that in doing so staff must not engage in harassment, vilification or intimidation." The equivalent clauses in the 2013-2017 Enterprise Agreement were clauses 254 to 256.
- 3.9 Clause 317 provides that the parties to the Enterprise Agreement "will uphold the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards."

4. **CODE OF CONDUCT**

- 4.1 Dr Anderson is bound by the Code of Conduct by virtue of clause 306 of the Enterprise Agreement and by the terms of his employment contract.
- 4.2 The Code of Conduct requires staff to act in a way that furthers the University's object and upholds its values and to comply with the obligations set out in the Code. The object of the University is stated to be "the promotion of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence, as well as to secure the observance of its values". The University's stated values include, relevantly, "integrity, professionalism and collegiality in our staff".
- 4.3 The Code of Conduct further states that the values must inform the conduct of staff in upholding and advancing, among other things, "freedom to pursue critical and open inquiry in a responsible manner" and "tolerance, honesty, respect, and ethical behaviour".
- 4.4 Clause 4 of the Code of Conduct sets out the behaviour and conduct required of staff in performing their University duties and functions and includes to "act fairly and reasonably, and treat students, staff, affiliates, visitors to the University and members of the public with respect, impartiality, courtesy and sensitivity" and to "maintain a cooperative and collaborative approach to working relationships."
- 4.5 Clause 9 of the Code of Conduct provides that staff who make public comments or representations and, in doing so, identify themselves as staff or affiliates of the University must comply with the University's Public Comment Policy.
- 4.6 The Public Comment Policy provides, among other things, that "any public statement made by a member of staff should not bring the University into disrepute" and that "Staff should be aware that the University may take disciplinary action where this policy or the Code of Conduct have been breached." As the University does not have a separate social media policy, the Public Comment Policy applies to the publication by staff of content on social media.

5. RELEVANT FACTS AND CHRONOLOGY

- 5.1 On 30 May 2017, Professor Jagose, Dean of the Faculty of Arts and Science, on behalf of the University, advised Dr Anderson of allegations of misconduct against him relating to material he published on his social media accounts (**First Allegations**) pursuant to clause 309(c) of the 2013-2017 Enterprise Agreement, which applied at that time. The University became aware of the material as a result of a complaint made by a member of the public.
- 5.2 The First Allegations included that, by publishing the relevant content on his Twitter and Facebook accounts, Dr Anderson was in breach of his obligations under the 2013-2017 Enterprise Agreement, the Code of Conduct and the Public Comment Policy. Dr Anderson's Facebook and Twitter accounts are public and both identify him as an employee of the University.
- 5.3 The letter of allegations attached the relevant provisions of the 2013-2017 Enterprise Agreement, the Code of Conduct and Public Comment Policy, and printed screen shots from Dr Anderson's social media accounts of the relevant material.
- 5.4 In his response to the First Allegations, Dr Anderson did not deny that he had made the posts in questions or that the posts were made on his social media accounts. However, Dr Anderson rejected the allegations and relied on the 2013-2017 Enterprise Agreement provision regarding intellectual freedom (clauses 254 to 256 of the 2013-2017 Enterprise Agreement). Dr Anderson asserted that in making the First Allegations, Professor Jagose was motivated by bias against Dr Anderson for criticisms he had expressed about a separate issue. Simon Kempton (NTEU Industrial Officer) on Dr Anderson's behalf requested a review of the decision to issue misconduct allegations against Dr Anderson under clause 367 by the Delegated Officer (Staffing) (being the Chief Human Resources Officer).
- 5.5 Although the Chief Human Resources Officer, rejected the allegation of bias against Professor Jagose, at Professor Jagose's request, Professor Garton assumed responsibility for the investigation and determination of the First Allegations. On 28 June 2017, Professor Garton advised Dr Anderson of six further allegations of misconduct arising from further posts made by Dr Anderson on his social media accounts on and after 30 May 2017 in further breach of the Code of Conduct and the Public Comment Policy (**Further Allegations**). Further particulars of the First Allegations were also provided at this time.
- 5.6 The posts that were the subject of the Further Allegations were made by Dr Anderson on and after 30 May 2017, and therefore with the clear knowledge and understanding that the University considered that the posting of such material breached Dr Anderson's obligations as an employee of the University.
- 5.7 The Further Allegations also concerned emails that Dr Anderson sent to Professor Jagose and to other Faculty staff in which he disclosed information that he had been directed to keep confidential and made a number of allegations about the University and Professor Jagose personally.
- 5.8 Dr Anderson replied to the First Allegations and the Further Allegations by letter dated 5 July 2017 and denied any wrongdoing. He did not deny that he had posted the relevant material but relied on clause 254 of the 2013-2017 Enterprise Agreement as conferring an unconditional right to publish such material.
- 5.9 By letter dated 2 August 2017, Professor Garton advised Dr Anderson that he was satisfied that most of the First Allegations and Further Allegations were substantiated. He found that Dr Anderson had engaged in Misconduct within the meaning of the 2013-2017 Enterprise Agreement but had not engaged in Serious Misconduct. Professor Garton issued a Written Warning to Dr Anderson. The Written Warning was in the following terms:

"You must, hereafter, appropriately discharge your obligations pursuant to your contract of employment with the University, the Enterprise Agreement and the Code of Conduct – Staff and Affiliates and the Public Comment Policy going forward. I specifically remind you of the requirement to exercise good and ethical judgement in any public comment, demonstrate professionalism (including in public comment) and exercise appropriate restraint. I also remind

you of your obligations to act fairly and reasonably, and treat all relevant persons, including staff and members of the public, with respect, impartiality, courtesy and sensitivity.

...you have indicated that you intend to continue to...engage in public comment based on your own standards rather than those set by the University. In light of the outcome of this investigation, I encourage you to carefully consider your obligations you owe as an employee of the University. Should any further incidents of this nature occur, the University will rely upon this letter to determine any appropriate further Disciplinary Action, up to and potentially including the termination of your employment."

- 5.10 On 30 April 2018, the University received a complaint from a student regarding a post made by Dr Anderson on his social media accounts on 23 April 2018.
- 5.11 On 30 July 2018, whilst the University was still in the process of considering this complaint, the University received a separate complaint from a member of the public regarding other posts made by Dr Anderson on his social media accounts. These other posts were the subject of some media comment.
- 5.12 On 3 August 2018, Professor Jagose wrote to Dr Anderson directing him to delete these posts from social media. On 4 August 2018, Dr Anderson responded by email stating:
- "I never respond favourably to secret demands and threats. You should know that you have no right to demand any censorship of my social communications. Your claim for secrecy of communications is also rejected."*
- 5.13 On 10 August 2018, Professor Jagose wrote to Dr Anderson and advised him of allegations arising from posts made on his social media accounts between 22 July 2018 and 3 August 2018 (**Second Allegations**). The student complaint of 30 April 2018 was not included in the allegations, due to the time that had elapsed. The conduct that was the subject of the Second Allegations was relevantly similar to the conduct that was the subject of the Written Warning.
- 5.14 Professor Jagose's letter set out the details of the alleged conduct and attached screenshots of the relevant content. Dr Anderson was advised that if substantiated, the conduct could constitute breaches of Dr Anderson's obligations under the Enterprise Agreement, his employment contract, the Code of Conduct and the Public Comment Policy for which disciplinary action may be taken, including termination of employment. Dr Anderson was asked to respond to the Second Allegations by 24 August 2018.
- 5.15 On 15 August 2018, Dr Anderson lodged a complaint of bullying and harassment against Professor Jagose (**Bullying Complaint**). The alleged bullying and harassing behaviour by Professor Jagose included the making of the First Allegations and the Second Allegations.
- 5.16 On 20 August 2018, Professor Garton advised Dr Anderson that the Bullying Complaint would be investigated and determined prior to the determination of the Second Allegations. An external investigator was engaged by the University to investigate the Bullying Complaint.
- 5.17 On 22 August 2018, Dr Anderson provided a written response to the Second Allegations and further particulars of the Bullying Complaint. Dr Anderson denied the Second Allegations and claimed the "protection of the academic freedom provisions of the EA".
- 5.18 On 8 October 2018, Professor Garton advised Dr Anderson that the University accepted the investigator's finding that the Bullying Complaint was not substantiated.
- 5.19 On 19 October 2018, Professor Garton advised Dr Anderson that the Second Allegations were largely substantiated and that Dr Anderson's breaches of the Code of Conduct constituted Misconduct. Professor Garton's letter referred to the Written Warning issued on 2 August 2017 in relation to similar conduct and stated: "It is of significant concern to me that you have repeated conduct in respect of which you received a formal warning."

- 5.20 Dr Anderson was issued with a Final Warning that he must appropriately discharge his obligations under his contract of employment, the Enterprise Agreement, the Code of Conduct and the Public Comment Policy. The letter also stated: "Should any further incidents of this nature occur, the University will rely upon the 2 August 2017 letter, and this Final Warning letter to determine any appropriate further Disciplinary Action, up to and potentially including the termination of your employment."
- 5.21 In his letter of 19 October 2018 to Dr Anderson, Professor Garton also drew Dr Anderson's attention to a Facebook post he had made on 23 April 2018 (which had not been included in the previous allegations) that contained an image of a cropped Swastika superimposed over the Israeli flag (**Image**), and advised Dr Anderson of his view that a reasonable person would regard the Image as offensive but made no findings relating to the Image.
- 5.22 On 19 October 2018, approximately two and a half hours after receiving the Final Warning, Dr Anderson re-published the Image on his Twitter account and on 20 October 2018, he re-published the Image on his Facebook account.
- 5.23 On 26 October 2018, Professor Garton advised Dr Anderson of allegations of Serious Misconduct in relation to his social media activity on 19 and 20 October 2018 (**Third Allegations**). The letter referred to the Written Warning issued on 2 August 2017 in relation to "the posting by you of material on your social media accounts that was offensive or inappropriate and in breach of University policy and your employment obligations", and to the Final Warning issued on 19 October 2018. The letter also referred to Professor Garton's advice to Dr Anderson on 19 October that it was the University's view that a reasonable person would find the Image offensive. The allegations included that the posts by Dr Anderson, including the posting of the Image "was a deliberate and direct contravention by you of the Final Warning issued to you on 19 October 2018."
- 5.24 Dr Anderson was advised that, if substantiated, the Third Allegations would amount to Serious Misconduct and may, in all the circumstances, justify the termination of his employment. Dr Anderson was invited to respond to the Third Allegations by 12 November 2018.
- 5.25 On 27 October 2018, Dr Anderson advised Professor Garton that he rejected the Final Warning and made a number of allegations against Professor Garton, including that he made "clumsy unprincipled attempts to act as political censor" of Dr Anderson's "political comments" and that Professor Garton was dishonest, evasive and lacking in respect for intellectual freedom, and that he had engaged in censorship and politically motivated interference in relation to Dr Anderson's work.
- 5.26 On 3 December 2018, Professor Garton advised Dr Anderson that he was satisfied that the Third Allegations were substantiated and amounted to Serious Misconduct, in respect of which Professor Garton proposed to terminate Dr Anderson's employment. Professor Garton also advised Dr Anderson that he had not had regard to the allegations that Dr Anderson had made against Professor Garton personally (which Professor Garton had rejected).

6. THE UNIVERSITY'S POSITION

- 6.1 Dr Anderson has engaged in Serious Misconduct within the meaning of the Enterprise Agreement that justifies the termination of his employment.
- 6.2 A finding of Serious Misconduct was reasonable in all the circumstances having regard to the following:
- (a) Dr Anderson had engaged in repeated acts of misconduct, being breaches of the Code of Conduct and refusal or failure to carry out lawful and reasonable instructions.
 - (b) Dr Anderson received a Written Warning in August 2017 in relation to the First and Further Allegations and a Final Warning in October 2018 in relation to the Second Allegations. The previous acts of misconduct involved conduct that was relevantly the same as the Third Allegations;
 - (c) Dr Anderson had engaged in repeated and serious breaches of the Code of Conduct;

- (d) The posts that were the subject of the Third Allegations were made immediately after Dr Anderson received the Final Warning, in direct and deliberate breach of the Final Warning;
- (e) There was no factual dispute that Dr Anderson had posted the content that was the subject of the Third Allegations (and previous allegations). Dr Anderson's primary defence of the allegations was that the posts were a purported exercise of a right of intellectual freedom granted by the Enterprise Agreement. This is misconceived.

6.3 The termination of Dr Anderson's employment would be reasonable in all the circumstances having regard to the following:

- (a) It is clear from Dr Anderson's conduct and his responses to the First, Further, Second and Third Allegations, that he does not accept the University's right to determine the appropriate standard of conduct required of him by the Code of Conduct, the Enterprise Agreement or his employment contract;
- (b) It is clear from Dr Anderson's conduct and his responses to the First, Further, Second and Third Allegations, that he does not accept that the right of intellectual freedom referred to in the Enterprise Agreement is qualified by, or subject to his obligations to comply with the Code of Conduct and the Public Comment Policy, along with the obligation to act in accordance with the highest ethical, professional and legal standards;
- (c) Dr Anderson's view that it is his right (and his alone) to determine the appropriateness of his publicly expressed views and social media comments is fundamentally incompatible with his obligations as an employee;
- (d) It is clear from the circumstances of the Further, Second and Third Allegations that further disciplinary action (other than termination of employment) will not have the effect of deterring or dissuading Dr Anderson from further misconduct or serious misconduct and will not result in future compliance by Dr Anderson of his employment obligations; and
- (e) It is clear from Dr Anderson's conduct and his responses to the First, Further, Second and Third Allegations that he does not accept the authority of the Dean or the Provost. His communications with both demonstrate a lack of respect and courtesy (see paragraph 4.25 above).

6.4 In reaching the proposed decision to terminate Dr Anderson's employment, the University complied with its obligations under clause 384(c) and (d) of the Enterprise Agreement and as such afforded Dr Anderson with procedural fairness throughout the process. In particular:

- (a) Details of the allegations of Serious Misconduct were provided to Dr Anderson in writing (by letter from Professor Garton on 26 October 2018).
- (b) Dr Anderson was given a reasonable opportunity to respond to the allegations. Dr Anderson was provided with a more generous time period than required under the Enterprise Agreement for him to respond in relation to the Second and Third Allegations. Ordinarily, staff members are to be provided with 10 days to respond to the allegations of misconduct under clause 384(c). However, given that Dr Anderson was on special studies program leave during the time of the misconduct allegations being brought, Dr Anderson was provided with additional time for him to respond to the Second and Third Allegations.
- (c) All relevant information, including Dr Anderson's response, was considered before a decision was made and was considered by an unbiased decision maker.
- (d) Dr Anderson was given notice of the proposed termination of his employment and advised of his right to refer the decision to a Review Committee.

- 6.5 On a proper construction of the Enterprise Agreement, the 'right' contained in clause 315 of the Enterprise Agreement does not override or qualify the obligation imposed by clause 306 to comply with the Code of Conduct.
- 6.6 The University supports and is committed to upholding the principles of academic freedom and the right of academic staff to discuss and express opinions on controversial or unpopular topics. However, any expression of academic freedom must be in accordance with the highest ethical, professional and legal standards. This is consistent with the object and values of the University and is reflected in the Code of Conduct and Public Comment Policy.
- 6.7 Clause 315(b)(iv) of the Enterprise Agreement expressly states that the right of staff to express "unpopular or controversial views" is subject to a prohibition on staff engaging in "harassment, vilification or intimidation" while clause 317 makes it clear that the exercise of intellectual freedom is required to be in accordance with ethical, professional and legal standards. The Code of Conduct set out the standards of behaviour required of University staff.
- 6.8 There are no mitigating factors against the termination of Dr Anderson's employment: Dr Anderson has shown no remorse for his conduct – indeed he has refused to accept any responsibility or acknowledge any wrongdoing on his part, he has deliberately breached the terms of the Written Warning and Final Warning and he has demonstrated a contempt for the authority of the University and for the relevant decision makers.
- 6.9 Dr Anderson was advised by Professor Garton on 3 December 2018 of the outcome of the Third Allegations and the proposed termination of his employment. On 4 and 5 December 2018, Dr Anderson published on his social media accounts the contents of Professor Garton's 3 December letter. This was a deliberate breach by Dr Anderson of his obligations to keep confidential correspondence and information concerning the University's disciplinary processes, and a deliberate contravention of directions previously given to Dr Anderson. On 7 December 2018, Professor Garton wrote to Dr Anderson in respect of this conduct.

7. **CONCLUSION**

- 7.1 The proposed termination of Dr Anderson's employment is fair and reasonable in all the circumstances and should proceed
- 7.2 In addition to these submissions, the Delegate also relies on his statement dated 14 January 2019 and the Chronology and attachments to the Chronology.
- 7.3 It is submitted that the Review Committee should endorse the proposed decision.