Federal Court of Australia

Yu v ACT Education Directorate [2025] FCA 335

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| Appeal from: |  |
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| File number: |  |
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| Judgment of: | **RAPER J** |
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| Date of judgment: | 9 April 2025 |
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| Catchwords: | **INDUSTRIAL LAW** –the appellant was employed by the respondent under the terms of an enterprise agreement – the respondent was found on appeal by a Full Court to have breached s 50 of the *Fair Work Act 2009* (Cth) by contravening cll A2.2, R2.9 and R3.10 of the *ACT Public Sector Education and Training Directorate (Teacher Staff) Enterprise Agreement 2014-2018* – the matter was remitted to the Federal Circuit and Family Court of Australia to determine compensation for breach and penalty – the appellant appeals the remitted judgment on remedies  |
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|  | **PENALTY** –assessment of penalty – whether the penalty judge erred in his assessment of penalty **–** reassessment of penalty  |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth)*Fair Work Act 2009* (Cth) ss 44, 50, 340(1), 343(1)(a), 546(1), 557(1)*Federal Court of Australia Act 1976* (Cth) ss 21, 23, 28(1)(c), 37M*Judiciary Act 1903* (Cth) s 39B(1)*Federal Court Rules 2011* (Cth) rr 1.32, 39.05(e) |
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| Cases cited: | *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; 262 CLR 157*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR 540*Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25*Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 4)* [2013] FCA 318*Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482*Community and Public Sector Union v Telstra Corp Ltd (No 2)* [2001] FCA 479; 112 FCR 324*Dib Group Pty Ltd v Coolabah Tree Aust-Wide Pty Ltd* [2011] FCAFC 57*Ebner**v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337*Fair Work Ombudsman v Ho* [2024] FCAFC 111*Fernando v Commonwealth of Australia* [2014] FCAFC 181; 231 FCR 251*Harvard Nominees Pty Ltd v Nicoletti* [2022] FCAFC 179*Harvard Nominees Pty Ltd v Tiller (No 4)* [2022] FCA 105; 403 ALR 498*House v The King*(1936) 55 CLR 499,*Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507*Yu v ACT Education Directorate (No 2)* [2021] FedCFamC2G 267*Yu v ACT Education Directorate* [2022] FCAFC 110*Yu v ACT Education Directorate* [2022] HCASL 205 |
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| Division: | Fair Work Division |
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| Registry: | Australian Capital Territory |
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| National Practice Area: |  |
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| Number of paragraphs: | 77 |
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| Date of hearing: | 3 December 2024  |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Counsel for the Respondent: | Ms P Bindon and Ms J Cunliffe |
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| Solicitor for the Respondent: | ACT Government Solicitor |

ORDERS

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|  | ACD 7 of 2024 |
|   |
| BETWEEN: | JING YUAppellant |
| AND: | ACT EDUCATION DIRECTORATERespondent |

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| order made by: | RAPER J |
| DATE OF ORDER: | 9 April 2025 |

THE COURT ORDERS THAT:

1. The appeal be allowed in part.
2. The first order made on 19 January 2024 by the judge, on remittal, who determined penalty, be set aside and in lieu thereof, the respondent pay pecuniary penalties totalling $18,600 to the appellant within 28 days of the date of this order.

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

REASONS FOR JUDGMENT

RAPER J:

1. The appellant, **Ms** Jing **Yu** was employed by the respondent, Australian Capital Territory (Education **Directorate**) as a teacher of Mandarin between 1991 until she was dismissed in 2016. By originating application filed on 18 November 2016, Ms Yu commenced proceedings against the Directorate alleging it had contravened numerous provisions of the ***F****air* ***W****ork* ***Act*** *2009* (Cth) during the course of her employment and upon termination. Ms Yu’s claims included that the Directorate had taken unlawful adverse action against her, breached the National Employment Standards, unlawfully coerced her not to exercise her workplace rights, and breached some 15 terms of the *Public Sector Education and Training Directorate (Teaching Staff)* ***Enterprise Agreement*** *2014–*2018: ss 44, 50, 340(1), 343(1)(a) of the FW Act.
2. Ms Yu’s application was dismissed in *Yu v ACT Education Directorate (No 2)* [2021] FedCFamC2G 267 (the **first instance judgment**), from which an appeal was allowed in part by the Full Court of this Court: *Yu v ACT Education Directorate* [2022] FCAFC 110 (the **Full Court judgment** or **FC J**).
3. The Full Court found that the Directorate had breached cll A2.2, R2.9 and R3.10 of theEnterprise Agreement, constituting contraventions of s 50 of the FW Act. Ms Yu sought special leave to appeal this decision, which was refused: *Yu v ACT Education Directorate* [2022] HCASL 205. The Full Courtremitted the matter back to the **F**ederal **C**ircuit and **F**amily **C**ourt **o**f **A**ustralia for the determination of appropriate remedies.
4. On 19 January 2024, judgment was delivered in the remitted matter by the penalty judge: *Yu v ACT Education Directorate* [2024] FedCFamC2G 29 (**penalty judgment** or **PJ**). His Honour imposed penalties upon the Directorate (payable to Ms Yu) of $5,100 in respect of its breach of cl A2.2 and $5,400 in respect of its breaches of *both* cll R2.9 and R3.10. Ms Yu’s claims for compensation (including aggravated damages) and exemplary damages were otherwise dismissed.
5. Ms Yu appeals from the whole of the penalty judgment and orders made on six grounds. Additionally, Ms Yu seeks to set aside or invalidate the first instance and Full Court judgments (and orders).

#### Ms Yu’s oral submissions

1. Ms Yu’s oral submissions on appeal did not address each ground of appeal in turn but rather concerned a central theme—that there had been a lack of due process in each of the proceedings that had been before the FCFCOA (at first instance and upon remittal) and this Court (on appeal) such that she had been denied procedural fairness and where she was seeking for this Court to determine (in her view) properly all her claims below and as were before the previous Full Court. It was her submission that each of the previous decisions had failed to disclose the material facts. This was said to be indicative of a continuing failure in each forum to consider the relevant facts and law and not expose in their reasoning how their conclusions had been reached. It was her submission that the Full Court had ignored the case she had presented, ignored legally significant facts, misunderstood and misconstrued the facts and the litany of errors were too numerous to describe and failed to give reasons as to the assertions she had made.
2. Ms Yu sought to challenge and set aside all of the previous decisions, purportedly on the basis of r 39.05(e) of the ***Federal Court Rules*** *2011* (Cth)(where the judgment or order entered does not reflect the intention of the Court) or that the decisions ought be quashed by reason of the Court’s general power under s 23 of the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth). After the hearing of the appeal, Ms Yu, filed additional submissions in which she identified further bases upon which the Court purportedly had power and ought “set aside or quash” or redetermine the previous decisions on the basis of s 39B(1) of the *Judiciary Act 1903* (Cth), s 21 of the Federal Court Act or r 1.32 of the Federal Court Rules.

#### Scope of the appeal

1. Whilst it is accepted that the Court has jurisdiction to reopen a judgment which has apparently miscarried, the mere assertion of the Court’s jurisdiction by reference to the Court’s general powers is insufficient to enliven the Court’s jurisdiction to reopen previous judgments.
2. The exercise of the Court’s power to vary or set aside an order or judgment after entry is limited to “truly exceptional” circumstances and requires caution, mindful of the overarching principle of the finality of litigation: *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 4)* [2013] FCA 318 at [6]; *Dib Group Pty Ltd v Coolabah Tree Aust-Wide Pty Ltd* [2011] FCAFC 57 at [77]. By r 39.05(e), the “intention of the Court” extends beyond the intention of the judge but to what the intention of the Court would have been, but for some accidental slip or omission or the inadvertence of a party’s legal representative.
3. Ms Yu’s attempt to deploy these parts of the Federal Court Act and Federal Court Rules to set aside judgments as a way to re-litigate or re-argue her cases offends the overriding principle as to the public interest in the finality of litigation. I have carefully considered Ms Yu’s lengthy grounds of appeal and her submissions, purportedly identifying error in these previous decisions. It is apparent that Ms Yu is attempting, by a backdoor method, to re-argue those aspects of her case that have been unsuccessful.
4. As a consequence, the appeal is confined to task of the penalty judge on remitter, namely his determination of remedies.
5. For Ms Yu’s appeal to be successful, Ms Yu must identify error arising from the penalty judge’s decision, given the task of the appellant court is to correct such error: *Australian Competition and Consumer Commission v* ***Reckitt*** *Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [44]–[53]. As enunciated in *House v The King*(1936) 55 CLR 499, Ms Yu is therefore required to show that in the exercise of the discretion, the penalty judge acted upon a wrong principle; allowed extraneous or irrelevant matters to guide or affect the decision; made a mistake on the facts; or did not take into account some material consideration. Error is not involved merely because an appeal court would have reached a different conclusion: *Reckitt* at [50].
6. As will be evident from the below, whilst on a general level, Ms Yu challenges the whole of the penalty judge’s reasons, Ms Yu’s challenges are essentially two-fold: *First*, Ms Yu seeks to impugn the whole of the decision on the basis that she sought for the penalty judge to go beyond the scope of the remittal and to re-determine the whole of her case again. *Secondly*, Ms Yu makes specific challenges to those aspects of the penalty judge’s reasons concerning the assessment of penalty not his findings regarding compensation.
7. For the reasons which follow Ms Yu’s appeal succeeds in part. Whilst, Ms Yu fails in her challenge, to the extent that she sought to, either by challenge of the penalty judge’s reasons or to ask that this Court, on appeal, to overturn the first instance judge’s and the Full Court’s determinations on liability, Ms Yu’s appeal concerning the assessment of penalty succeeds in part.

## Why Ms Yu’s appeal succeeds in part

#### What needs to be taken into account when assessing penalties?

1. Ms Yu’s challenges to the penalty judge’s reasons must be understood in the context of the applicable legal principles. The penalty judge was assessing penalties. As summarised by the Full Court in *Fair Work Ombudsman v* ***Ho***[2024] FCAFC 111 at [65] the following organising principles apply to the discretionary power to impose penalties:

(a) Section 546 confers a discretion that is to be exercised judicially, that is, fairly and reasonably having regard to the subject matter, scope and purpose of the legislation: see *Australian Building and Construction Commissioner v* ***Pattinson*** [2022] HCA 13; 274 CLR 450 at [40] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

(b) Civil penalties are imposed primarily, if not solely, for the purpose of deterrence: see *Pattinson* at [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). That is, the purpose of the penalty is to promote the public interest in compliance and to attempt to put a price on a contravention that is sufficiently high to deter repetition by the contravenor and by others who are in a position to contravene legislation: see *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 (the **Agreed Penalties Case**) at [55]).

(c) A penalty is appropriate if it is no more than might be considered to be reasonably necessary to deter further contraventions of a like kind by the contravenor and others: *Pattinson* at [9].

(d) Whilst the imposition of the penalty is at large, there should be some “reasonable relationship between the theoretical maximum and the final penalty imposed”: *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [156]. The reasonable relationship should be considered by reference to the need for deterrence: *Pattinson* at [55].

(e) Whilst the Court’s task is to determine what is an appropriate penalty, the authorities have identified several factors which inform the assessment of a penalty of appropriate deterrent value. However, such factors should not be approached as a rigid catalogue or checklist: *Pattinson* at [18]–[19], citing French J in *Trade Practices Commission v CSR Ltd* [1990] FCA 521; [1991] ATPR ¶41-076 at 52,152–53. The factors set out by French J were: the nature and extent of the contravening conduct; the amount of loss or damage caused; the circumstances in which the conduct took place; the size and power of the contravening company; the deliberateness of the contravention and the period over which it extended; whether the contravention arose out of the conduct of senior management; whether the company has a corporate culture conducive to compliance; and, whether the company has shown a disposition to co‑operate with the authorities responsible for the enforcement in relation to the contravention.

#### The scope of remittal

1. Ms Yu’s grounds of appeal and her submissions arise, in part, from a misunderstanding of the scope of the penalty’s judge’s powers on remittal from the Full Court.
2. On appeal, the Court has the power to set aside the judgment appealed from, in whole or in part, and remit the proceeding to the court from which the appeal was brought: s 28(1)(c) of the Federal Court Act. In the present case, the Full Court ordered that:

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

1. The remittal does not involve a new trial but rather a further hearing is conducted to deal with the matter that is the subject of remittal: *Fernando v Commonwealth of Australia* [2014] FCAFC 181; 231 FCR 251 at [52]–[53] (Besanko, Barker and Robertson JJ), citing with approval *Community and Public Sector Union v Telstra Corp Ltd (No 2)* [2001] FCA 479; 112 FCR 324 at [17].
2. The remitter hearing must also be conducted within the confines of what was remitted. In *Harvard Nominees Pty Ltd v Tiller (No 4)* [2022] FCA 105; 403 ALR 498 at [40]–[51], (approved by the Full Court on appeal in *Harvard Nominees Pty Ltd v Nicoletti* [2022] FCAFC 179 at [96]) Justice Jackson helpfully distilled the principles associated with remittal, noting at [47], that the primary court, on remitter, cannot go outside the scope of what is remitted (in Ms Yu’s case, the determination of the appropriate remedies and therefore it was *not* open for the penalty judge to re-determine the question of liability). Further, the primary court is not able to reconsider any of its previous findings that have not been disturbed by the appellate court (therefore in this case, it was not open for the penalty judge to reconsider and disturb any of the findings of the first instance judge not disturbed by the Full Court). Further, the penalty judge was not able to reconsider or disturb any findings made by the Full Court regarding liability.

#### How did the penalty judge approach the assessment of penalty?

1. It is worthwhile considering at this point in the reasoning, how, in short compass, the penalty judge approached, the assessment of penalty. It is noted that the penalty judge also dealt with Ms Yu’s claim for compensation. However, as already referred to above, no challenge was made on appeal with respect to the penalty judge’s orders concerning compensation (save for at a high level).
2. The penalty judge allowed the parties to put on evidence and submissions with respect to remedies. Ms Yu availed herself of that opportunity and put on evidence and submissions (some before and after the Directorate filed its submissions and evidence). The penalty hearing occurred over two days: 12 and 13 December 2023. The penalty judge adjourned the hearing just after lunch on 12 December 2023, to allow Ms Yu time after hearing the Directorate’s submissions to think about them and then make her submissions in reply the following day. Ms Yu also filed a further written submission on 13 December 2023.
3. The penalty judge first identified the relevant findings of the Full Court giving rise to the contraventions. For the reasons given above, the penalty judge was required to do so given the limited scope of the remittal from the Full Court. The penalty judge was required to consider the nature and extent of the contravening conduct, the circumstances in which it took place and its consequences as they are relevant matters which inform the assessment. However, the penalty judge was correct to confine his consideration to the reassessment of penalty in light of the findings made by the Full Court, upon rehearing, on the question of liability. It was not within the scope of the remittal for the penalty judge, upon the urging of Ms Yu, to reassess liability again.
4. Upon the marshalling of the relevant factual circumstances giving rise to the contravening conduct, it was then for the penalty judge to consider the nature of the relief sought arising from that conduct. The penalty judge considered the respective parties’ evidence. The penalty judge then assessed Ms Yu’s claim for compensation and then penalties. With respect to the latter, the penalty judge identified the purpose of imposition of civil penalties and summarised the parties’ submissions in this regard.
5. Of particular relevance to ground four, the penalty judge made reference to the parties’ submissions with respect to whether two breaches of the Enterprise Agreement (cll R2.9 and R.3.10) should be treated separately and therefore a separate penalty be imposed with respect to each of them.
6. The penalty judge noted the parties’ respective submissions in this regard, (at PJ[36]–[38]):

36 Ms Yu’s written and oral submissions did not advance the issue. She submitted that:

… breaching cl R2.9 and cl R3.10 of the EA are separate contraventions. Breaching cl R2.9 was ongoing and systematic, lasting for 2 years and 8 months in Ms Yu’s case and at system level, for more than 10 years affecting many teachers, while breach of cl R 3.10 of EA was not ongoing. In addition, there were different people involved in those breaches. Breaching cl R2.9 of the EA involves Ms Crook, Ms Sheaves, director of HR People and Performance, Director-General or delegate while breaching cl R3.10 involves Mr Beecher and Ms Sheaves.

37 The Directorate submitted that the contraventions of cls.R2.9 and R.3.10 of the EA were different parts of a particular course of conduct and so should attract only one penalty at most, in accordance with s.557 of the FW Act which relevantly provides:

**557 Course of conduct**

(1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:

(a) the contraventions are committed by the same person; and

(b) the contraventions arose out of a course of conduct by the person.

38 The Directorate continued:

77. As is clear from the evidence of Katrina Sheaves … it is evident that the way in which the Directorate had managed the Applicant in the face of her position at Hawker College becoming surplus to requirements was based on its understanding of what was permissible under the Enterprise Agreement. In short, the Directorate had not considered that clause A2.2 required it to move the Applicant into the maths positions (or at least offer it to her) once her position at Hawker College became surplus to requirements in order for her to keep teaching the reduced Mandarin load required for 2014.

78. Similarly, as explained at [25]-[26] above, the Directorate’s breach of clauses R2.9 and R3.10 lay in advertising the vacancy for the permanent Mandarin teaching position at Canberra High School without having first offered that position to the Applicant.

79. As with clause A2.2, it is clear from the evidence of Katrina Sheaves noted at [14]-[15] above … that the way in which the Directorate had managed the vacancy for the Mandarin position at Canberra High School was based on its understanding of what was permissible under the Enterprise Agreement. …

…

81. Having regard to the terms of clauses A2.2, R2.9 and R3.10 and accepting that the Directorate’s construction of those clauses was erroneous, it must be acknowledged nonetheless that the construction was arguable and the breaches cannot be characterised as demonstrating a flagrant or wilful disregard for the Enterprise Agreement.

82. As such, the Directorate submits that the legislative purpose of deterrence is not furthered by the imposition of any penalty in respect of the contraventions in this case.

1. The penalty judge then gave very brief reasons for the imposing of the penalty. The penalty judge accepted that the decision-making process that led to the failure to appoint Ms Yu to the position at Canberra Hospital was a single course of conduct in respect of which the contraventions of cll R2.9 and R3.10 occurred, and accordingly accepted of Directorate’s submission: at PJ[41]. It is worthwhile extracting the penalty judge’s conclusions concerning penalty in full:

40 I accept that the Directorate did not intend to contravene the EA and there is no evidence that it had contravened it previously. I have regard to the fact that, notwithstanding that she was without a particular teaching position, because she remained employed by the Directorate Ms Yu did not suffer a reduction in her remuneration as a result of the contraventions. I have also found that the contraventions have not been shown to have caused psychological injury and were not, themselves, the cause of any compensable emotional or psychological distress suffered by Ms Yu. There is no reason to suspect that the Directorate will repeat the contraventions or that it has any desire to do otherwise than to observe its industrial obligations. I conclude that the need for specific deterrence is negligible, but that nonetheless the need for deterrence more widely is necessary to demonstrate that even well-intentioned public sector bodies will be penalised if they fail in their obligations.

41 I accept that the contraventions of cls.R.2.9 and R.3.10 should be considered to be a single course of conduct arsing out of the decision-making process that led to the failure to appoint Ms Yu to the position at CHS.

42 I consider that the breach of cl.A2.2 should attract a penalty of $5,100 and that the breaches of cls.R.2.9 and R.3.10 should attract a penalty of $5,400, each representing 10% of the maximum penalty applicable at the relevant time. I am satisfied that the total penalty of $10,500 is reasonable in the circumstances. It should be paid to Ms Yu.

#### None of grounds 1, 2, 3, 5 and 6 establish error in the penalty judge’s determination of penalty

1. By ground one, Ms Yu contends that the penalty judge “failed to ensure that justice [was] done in the proceedings by failing to ascertain the material facts of the case.” Accompanying the first ground are some eight pages and 58 paragraphs of “particulars” which provide for, among other things, a chronologically ordered series of facts and factual contentions.
2. Ms Yu submitted the following in support of this contention:

The answer should be “Yes”. It is an error of law for failing to ascertain the material facts.

(1) Ascertaining the material or relevant facts is an essential part of the judicial function. Without ascertaining the facts, the decision cannot be made, just like without ingredients, meals cannot be made.

(2) Ascertaining the material facts according to law ensures that the case is properly understood and that the relevant circumstances and underlying facts are taken into account.

(3) Judge Cameron ignored the admissible evidence and did not ascertain the material facts of the case.

(4) If judge Cameron ascertained the material facts of the case, his decision would be very different.

1. As can be seen from the summary above of Ms Yu’s oral submission on appeal, and as was apparently made before the penalty judge and the Full Court, Ms Yu repeatedly seeks that the first instance judge, the Full Court, the penalty judge and now this Court accept her narrative of her grievance. By the allegation of “failure to ascertain the material facts”, in essence, Ms Yu is claiming that there has been a failure to make the findings she wanted to be made, in the order she wanted them to be made and with the level of detail she considered appropriate.
2. By ground two, Ms Yu contends the penalty judge failed to resolve the factual and legal disputes in respect of the rights and liabilities between the parties. Ground two is accompanied by 32 paragraphs of “particulars”, here being a combination of factual and legal contentions and questions, (inferentially intended for this Court to answer).
3. In support of this ground, Ms Yu made the following written submission:

The answer is “Yes”. It is an error of law for not considering Ms Yu’s claims:

(1) Judge Cameron has failed to exercise statutory functions by failing to consider the claims that are properly supported by the material. By doing so, Judge Cameron “has neglected to carry out the very legislative function that it is purporting to perform”.

(2) Judge Cameron acted contrary to s139 of the FedFamC Act which requires Judge Cameron to determine the matter in dispute completely and finally before disposing of the proceeding.

1. On remittal the penalty judge was required to consider the relevant facts, as established on liability, by the Full Court and then any additional evidence relied upon for the purpose of penalty. I am not able to decipher from Ms Yu’s generalised submission how the penalty judge erred in the exercise of his discretion by failing to make factual findings (which are supported by evidence) of the kind that could sound in appellable error: Generalised disagreement with the facts, or seeking to elicit answers to questions that the litigant ponders and would support the litigant’s unsuccessful case theory do not provide a foundation for appellable error.
2. By ground three, Ms Yu contends the penalty judge to have erred in failing to have regard to 10 matters in the course of determining the penalty to be imposed. The 10 particularised matters are convenient to extract:

(1) the context or circumstances of the case.

(2) prejudice resulting from the serious omissions made by Judge Neville, Justices Thomas, SC Derrington, and Halley.

(3) the respondent had no contrition and remorse for the contraventions; the denial of the liability is intentional and reckless.

(4) the senior management had been directly involved in the contraventions.

(5) the contraventions were conscious, deliberate and in some cases, systematic.

(6) the contraventions had seriously affected or damaged Ms Yu’s career, health, well-being, and her capacity for work/employment.

(7) the contraventions caused the waste of enormous public funds and resources.

(8) the Directorate is a large and well-resourced government agency.

(9) the Directorate appeared to have a culture of making decisions/actions without regard to the EA or the relevant guidelines, without regard to the employee’s right and employer’s obligations. They also have a culture of misusing the lawful program for improper purposes and have little to no regard for work health obligations.

(10) Issues raised regarding the penalties and Ms Yu’s contentions.

1. Ms Yu submitted the following in support of this contention, in answer to the question, “Did Judge Cameron err in failing to have regard to the factors relevant to deciding the penalty?”:

The answer should be ‘Yes”. The decision is affected by jurisdictional errors:

(1) In assessing the appropriate penalty, Judge Cameron is obligated to take the relevant considerations into account [footnote 19: This is described as improper exercise of power under the *Administrative Decisions (Judicial Review) Act (Cth) 1977,* s 5(2)], that is, the relevant factors.

(2) Judge Cameron ignored Ms Yu’s contentions regarding penalties [footnote 20: Applicant’s submissions filed on 6 January 2021, 1 June and 29 November 2023].

(3) If Judge Cameron took into account the above matters, the outcomes would be very different and a higher penalty would be imposed.

1. I do not accept Ms Yu’s submissions in this regard. *First,* the penalty judge’s decision is not an administrative decision reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). *Secondly,* it is not apparent from Ms Yu’s one line generalised submission, what aspects of her three sets of submissions, she says were ignored and how, by reason of that purported failure, the penalty judge erred in the exercise of his discretion. *Thirdly,* given the nature of Ms Yu’s bald submission, I am not satisfied that, it could be argued that the outcome would have been different. However, even if that were so, it does not mean, absent the identification of error, that this Court, on appeal can intervene in the exercise of its supervisory jurisdiction.
2. Further, none of the ten particulars to ground 3 provide a foundation for error. As to the alleged “failings”, the penalty judge did consider the context or circumstances of the case when (1) isolating the Full Court’s factual findings establishing liability (at PJ[4]–[5]); (2) considering the appellant’s and the respondent’s evidence (at PJ[10]–[19]); (3) and then applying those facts to the determination of compensatory relief (at PJ[28]–[31]) and penalty (at PJ[40]–[42]). It was not a matter for the penalty judge, upon remittal, to have regard to the purported “prejudice resulting from the [purported] serious omissions of” the Full Court. In any event, I can discern no such prejudice nor serious omissions from the Full Court’s reasoning.
3. As to the allegation that the penalty judge failed to have regard to the Directorate’s purported absence of “contrition and remorse”, and that the conduct was “intentional and reckless”. Ms Yu points to no evidence supportive of this allegation. It was the Directorate’s case before the penalty judge, that its conduct was not deliberate in the sense, that it arose from a misunderstanding of its obligations under the Enterprise Agreement. The Directorate relied upon the evidence of Ms Sheaves that its breaches of cll A2.2, R2.9 and R3.10 of the Enterprise Agreement were the result of an honest and genuine understanding of the operation of those clauses and where the Directorate was endeavouring to support Ms Yu. Ms Sheaves’ evidence was not challenged under cross-examination. The penalty judge expressly accepted that the Directorate did not intend to contravene the Enterprise Agreement: PJ[40].
4. With respect to the allegation that senior management were directly involved, the Directorate accepted on appeal, that those persons involved in the decisions that gave rise to the breaches of cll A2.2, R2.9 and R3.10 of the EA, were the respective principals of Hawker College and Canberra High School and Ms Sheaves who was at that time “Manager, HR People Services”. However, it was the evidence of both the principals and Ms Sheaves, that they each proceeded according to the process for filling vacancies understood to be correct at the relevant time. There was no challenge, by way of cross-examination, to their evidence in this regard by Ms Yu (save for what was contained in her submissions).
5. Ms Yu also contends that there was conscious or deliberate contravening, on the basis of “systematic” breach. Whilst, it may be accepted that the contraventions were “systematic” in the sense that the filling of the vacancies that gave rise to the breaches of cll A2.2, R2.9 and R3.10 of the Enterprise Agreement was the system in place at the time. There was no evidence of deliberate conduct, in the sense of a known and deliberate flouting of their obligations under the Enterprise Agreement. The penalty judge adverted to this issue, by reference to the Directorate’s submissions, (at PJ[38]–[39]), his express finding (at PJ[40]) and then his later finding, in the same paragraph that, for the purpose of assessing the need for specific deterrence, there was no reason to suspect that the Directorate would repeat the contraventions or had any desire to do otherwise than to observe its industrial obligations.
6. For the same reasons, Ms Yu’s challenge, as contended with respect to ground five must fail.
7. I do not accept that the penalty judge failed to have regard to the fact that the contravening conduct affected her health. The penalty judge specifically dealt with and rejected this submission. His Honour considered the purported impact of the contraventions on Ms Yu when addressing the question of compensation (at PJ[23]–[31]) and then briefly summarised his conclusions about that evidence again when considering penalties: PJ[40]. The penalty judge ruled that Ms Yu’s medical evidence as to her psychological damage was inadmissible (about which no issue was taken on appeal), and that even if it had been admissible it did not support the contention that damage was caused by the Directorate’s contraventions of the Enterprise Agreement: PJ[24].
8. Ms Yu submitted that the penalty judge ought to have had regard to the fact that the contraventions caused the waste of enormous public funds and resources. Ms Yu made no specific submission about this allegation nor referred to specific evidence the penalty judge failed to have regard to.
9. Further, it was alleged that the penalty judge erred in failing to have regard to the fact that the Directorate was a large and well-resourced government agency. Contrary to Ms Yu’s assertion, it was apparent that the penalty judge was acutely aware of this fact, hence in part, why his Honour rejected the Directorate’s submission that no penalty ought be imposed in the circumstances and stated that there was a need for general deterrence “to demonstrate that even well-intentioned public sector bodies will be penalised if they fail in their obligations”: PJ[40].
10. In respect of the remaining allegations, there was no evidence at all of any such “culture” or “improper purposes” being deployed by the Directorate and such a contention would be contrary to the penalty judge’s finding that the contraventions were not deliberate: PJ[40]. Further, Ms Yu failed to identify any relevant “issues” or “contentions’ the penalty judge failed to consider. This particular adds nothing to Ms Yu’s other nine particulars in respect of ground 3 and should be rejected for the reasons given above.
11. By ground six, Ms Yu contends that the penalty judge had no jurisdiction to conclude the matter or dismiss the proceedings in circumstances where his Honour had not performed the basic duties necessary for administering justice and resolving the issues in dispute between the parties. I do not accept that Ms Yu has made out this contention at all. For the reasons given above, the penalty judge, acted with the terms of the remittal and had jurisdiction to conclude the matter. Whilst the penalty judge erred in one respect (as found with respect to ground 4 below), there is no basis whatsoever for the allegation that he failed to otherwise discharge his duties according to law.
12. For these reasons, grounds one, two, three, five and six fail.

#### The penalty judge erred in finding that two contraventions of the Enterprise Agreement amounted to a single contravention

1. By ground four, Ms Yu challenged the penalty judge’s grouping of the contraventions of cll R2.9 and R3.10 such that on one penalty was awarded with respect to them. For the following reasons, the penalty judge erred in finding that these two contraventions of the Enterprise Agreement amounted to a single contravention such that only one penalty was imposed with respect to them.
2. The Directorate, in its filed submissions on appeal, sought to defend the manner in which the penalty judge had grouped the two contraventions.
3. As a consequence, prior to the hearing of the appeal, the Court alerted the parties to the recent Full Court decision in *Ho*, which affirmed previous authority that s 557(1) may only operate to group contraventions of the same (and not different) terms of enterprise agreements and modern awards: *Ho* at [21]–[24]. This Court then sought, prior to and during the appeal hearing, to understand whether the Directorate maintained its position with respect to this ground of appeal. The Directorate changed its position at the hearing and conceded that there had been an error.
4. It is clear from the reasoning in *Ho* that the penalty judge erred in grouping two contraventions of different terms of the Enterprise Agreement together. It is clear from the submissions below, that unfortunately the penalty judge was led into this error by the submissions of the Directorate, where the line of authority was not drawn to his attention. However, it is noted that the *Ho* decision was not handed down until August 2024 after the penalty judge had determined his decision, in January 2024.
5. As a consequence, the Court sought to understand from the Directorate what it said the consequence of that error would be on the determination of the question of penalty, whether remittal was necessary or this Court could reassess penalty and if so, what the effect of that reassessment would be. Given that Ms Yu was unrepresented, the Court asked that the Directorate confirm these new oral submissions, which had not been foreshadowed with Ms Yu before the hearing, in writing, after the hearing and then allow Ms Yu to put on further submissions in response.
6. The effect of this error is that the two contraventions, which were erroneously grouped together, must be reassessed for the purpose of penalty.

#### It is appropriate for this Court to reassess penalties

1. This Court considers it appropriate to reassess the penalties to be imposed on the Directorate. Ms Yu made no submission regarding remittal. This course is consistent with the overarching purpose of civil practice and procedure to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible: s 37M of the Federal Court Act. This is particularly so in this case given, it involves the assessment of two penalties and where the arc of the litigation history is long.
2. As referred to above, the Court ordered a timetable which would allow the parties to put on further submissions in this regard.
3. The Directorate submitted that, upon reassessment, that the total penalty imposed by the penalty judge for the breaches of cll R2.9 and R3.10 ($5,400) ought be the same as that previously, erroneously imposed as if there were one contravention because the awarding of the total sum of $5,400 (therefore a penalty of $2,700 for each contravention) “remains sufficient to achieve the object of deterrence”.
4. This was said to be so because of the following findings of the penalty judge:
5. the contraventions arose out of the same course of conduct (at PJ[41]);
6. the Directorate did not intend to contravene the Enterprise Agreement (at PJ[40]);
7. there is no evidence the Territory has committed prior contraventions of the Enterprise Agreement: (at PJ[40]);
8. the contraventions did not result in any financial loss to Ms Yu (at PJ[23], [40]);
9. the contraventions did not cause psychological injury, or any compensable emotional or psychological distress to Ms Yu (at PJ[28], [30], [40]); and
10. there is no reason to believe the Directorate will repeat the contraventions or has any desire to do otherwise than to observe its industrial obligations: PJ[40].
11. Whilst orders were made to allow Ms Yu to file further submissions in this regard, Ms Yu filed submissions seeking for my recusal but filed no submissions with respect to the reassessment of penalties. Her application in this regard is dealt with at the end of these reasons.
12. Deterrence is the primary, if not sole, purpose of a civil penalty: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ); *Pattinson* at [9], [15]–[16]. As a consequence, the appropriate penalty should deter future contraventions by the contravener (achieving specific deterrence) and, by example, other would-be contraveners (achieving general deterrence): *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; 262 CLR 157 at [116] (Keane, Nettle and Gordon JJ).
13. It is worthwhile considering the specific clauses of the Enterprise Agreement which the Full Court found had been breached (and which are the subject of the ground four error).
14. 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.

1. 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.

1. The Full Court determined, on the following factual bases, that the Directorate had breached these clauses (at FC J[87]–[91]):

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.

1. This Court, is bound, as the penalty judge was, by the Full Court’s findings on remittal. However, this Court is not bound by any findings made by the penalty judge.
2. It is clear from the terms of the clauses, and the circumstances giving rise to the breach (as found by the Full Court) that, as Ms Yu submitted, at [40] of her reply submissions, dated 1 June 2023, before the penalty judge, that the circumstances giving rise to, the persons involved (or potential persons involved) and the period over which each of the breaches occurred were different.
3. Whilst the evidence was less than clear, I accept Ms Yu has established that the breach with respect to cl R2.9, whilst overlapping, in effect, was different from the more confined breach under cl R3.10. I accept also that the breach of cl R2.9 involved the obligations of, the most senior public servant, the Head of Service. However, I accept that ultimately it was Ms Yu’s contention, as identified by the Full Court (at FC J[83]), that the breaches of both cll R2.9 and R3.10, crystallised by the advertisement of a Mandarin teaching position on the Jobs ACT website when the position ought first have been offered to Ms Yu. This was the cumulative, combined effect.
4. It is my view, therefore that the relevant conduct, whilst overlapping, is not the same. There is no evidence that, the Directorate intended to contravene the Enterprise Agreement. There is also no evidence that the Directorate has committed prior contraventions of the Enterprise Agreement. Further, there was no evidence which established the contraventions caused any financial nor other compensable loss to Ms Yu and there is no reason to believe the Directorate will repeat the contraventions or has any desire to do otherwise than to observe its industrial obligations.
5. The fixing of a penalty involves a process of “intuitive or instinctive synthesis of all relevant factors”: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR 540 at [6] (Allsop CJ); *Reckitt*at [44]. In determining an appropriate penalty, the Court can have regard to prescribed maximum penalties. Here the maximum number of penalty units applicable for a breach of s 50 of the FW Act was 60 units for an individual and 300 units for a corporation. Accordingly, the maximum penalty at the relevant time (end of 2015/early 2016) was $54,000.
6. As observed by the High Court, in *Pattinson* at [10] (in the context of s 546(1) of the FW Act) maximum penalties are not reserved for the most serious examples of misconduct. Instead, there must be “some reasonable relationship between the theoretical maximum and the final penalty imposed” (*Reckitt* at [156], quoted in *Pattinson* at [10]), which “is established where the maximum penalty does not exceed what is reasonably necessary to achieve the purpose” of the legislation of deterring future contraventions: *Pattinson* at [10].
7. As a consequence of my findings above, I am of the view that the need for specific deterrence is low in this case, given the circumstances. However, there remains a strong need for general deterrence for all persons, whether governmental agencies or otherwise, to not breach enterprise agreements and to be incentivised (by the awarding of penalties) to know and conform with their obligations under industrial instruments.
8. In all the circumstances, and contrary the to the Directorate’s submission, it is appropriate to award Ms Yu, $8,100 (for the breach of cl R2.9, representing 15% of the maximum), $5,400 (for the breach of cl R3.10, representing 10% of the maximum) and noting the penalty judge’s order (not disturbed on appeal, concerning the breach of cl A2.2, remains $5,100).
9. As a consequence, the Court will order that the previous order made by the penalty judge awarding $10,500 be set aside and substituted with an order that the Directorate pay Ms Yu $18,600.

#### Appeal grounds in relation to the first instance and Full Court judgments

1. The amended notice of appeal also contains what appear to be two further (categories) of grounds of appeal under a heading titled “Other relevant matters”: The first category relates to the first instance judgment; the second, to the Full Court judgment.
2. For the reasons given above, I reject Ms Yu’s contentions that there is any basis to set aside the decisions of the first instance judge or the Full Court.

#### Allegations of apprehended bias

1. As already adverted to above, after the Court became aware that the Directorate did not appear to be aware of the Full Court authority in *Ho*, the Court sought further submissions from the Directorate (so that Ms Yu would have the benefit of its submissions in writing concerning the consequences of a finding in her favour with respect to Ground 4) and an opportunity to put on further submissions regarding whether the matter should be remitted for reassessment of penalty or determined by this Court.
2. However, rather than put on submissions concerning the consequences of her appeal being successful in this respect, Ms Yu filed no further submissions with respect this issue, but rather filed submissions, as to why I ought to recuse myself from deciding the case, purportedly on the basis that I was actually biased: Actual bias requires proof that I had prejudged the issues and could not be swayed by the evidence at hand. It requires proof of a state of mind so committed to a conclusion already formed for it to be incapable of alteration, whatever evidence or arguments may be presented: *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507 at [72]. To the extent that the allegation is one of apprehended bias, Ms Yu is required to establish, the two-step test identified in *Ebner**v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 at [8] per Gleeson CJ, McHugh, Gummow and Hayne JJ:

First, it requires the identification of what is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an “interest” in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

1. Ms Yu alleges that I had already determined her case and “lacked honest or genuine attempts to consider Ms Yu’s application”. I do not accept that the evidence establishes this. Ms Yu contended that by my drawing to the parties’ attention the decision in *Ho* (which on any view would assist Ms Yu and had the effect of the Directorate conceding Ground four in her favour) that in fact I was “using court’s authority to manipulate the subject-matter into irrelevance”. Ms Yu variously claimed that I had the “appearance of bias or of acting in bad faith”, including that I had overlooked her allegations of the lawyers’ misconduct in the previous proceedings. It appears that the foundation for Ms Yu’s complaint is her apprehension that I may not accept her arguments and in particular, not accept that she could use the appeal as a way to re-litigate unsuccessful arguments she had previously raised before the first instance judge, the Full Court, the High Court and the penalty judge. The concern that I may not or will not ultimately accept her arguments, does not provide a foundation for an occasion of actual or apprehended bias.

## Conclusion

1. For these reasons, Ms Yu’s appeal has been successful in part and the Court will order that the previous order made by the penalty judge awarding $10,500 be set aside and replaced with an order that the Directorate pay Ms Yu $18,600.

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| I certify that the preceding seventy-seven (77) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Raper. |

Associate:

Dated: 9 April 2025