

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 13/09/2019 2:58:17 PM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Notice of Appeal from Federal Circuit Court (Fee for Leave Not Already Paid) - Form 121 - Rule 36.01(1)(a)
File Number:	QUD567/2019
File Title:	JAMES COOK UNIVERSITY v PETER VINCENT RIDD
Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Dated: 16/09/2019 8:12:28 AM AEST

A handwritten signature in blue ink, reading "Warwick Soden".

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 121
Rule 36.01(1)(a)

Notice of appeal from the Federal Circuit Court of Australia

No. of 20

Federal Court of Australia
District Registry: Queensland
Division: Fair Work

On appeal from the Federal Circuit Court of Australia

James Cook University

Appellant

Peter Vincent Ridd

Respondent

To the Respondent

The Appellant appeals from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Level 6, Harry Gibbs Commonwealth Law Courts Building
119 North Quay (cnr Tank Street)
Brisbane QLD

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party)	The Appellant
Prepared by (name of person/lawyer)	Hedy Cray
Law firm (if applicable)	Clayton Utz
Tel	(07) 3292 7003
Fax	(07) 3221 9669
Email	hcray@claytonutz.com
Address for service (include state and postcode)	Level 28 Riparian Plaza, 71 Eagle Street, Brisbane QLD 4000



The Appellant appeals from the whole of the judgment of the Federal Circuit Court of Australia given on 16 April 2019 in Brisbane in *Ridd v James Cook University* [2019] FCCA 997 (**Liability Judgment**), the judgment of the Federal Circuit Court of Australia given on 6 September 2019 in Perth in *Ridd v James Cook University (No 2)* [2019] FCCA 2489 (**Penalty Judgment**) and all of the orders made on 6 September 2019 in Perth (**Orders**) on the grounds set out below.

Grounds of appeal

Challenge to findings that the Respondent was exercising rights of intellectual freedom

1. The primary judge erred by:

- (a) finding (at [67], [92], [107]-[108], [127]-[129], [141], [146]-[148], [156]-[158], [196]-[198], [207]-[208], [224]-[225], [232]-[234] and [303] of the Liability Judgment) that the Respondent, by engaging in the conduct the subject of these findings, was exercising rights pursuant to clause 14 of the *James Cook University Enterprise Agreement 2013* (the **Enterprise Agreement**);
- (b) finding (at [80] and [291]-[292] of the Liability Judgment) that the Appellant, by issuing directions the subject of these findings, impermissibly sought to restrict the Respondent's exercise of intellectual freedom pursuant to clause 14 of the Enterprise Agreement;
- (c) declaring (at order 1, subparagraphs (a), (b), (d), (l) and (m) of the Orders) that each of the findings and decisions made by the Appellant amounted to a breach of clause 14 of the Enterprise Agreement; and
- (d) failing to find that:
 - (i) the Respondent was not exercising rights pursuant to clause 14 of the Enterprise Agreement when he engaged in the conduct the subject of the findings referred to in Ground 1(a) above;
 - (ii) the Appellant was not restricting the Respondent's exercise of rights pursuant to clause 14 of the Enterprise Agreement when it issued directions the subject of the findings referred to in Ground 1(b) above;
 - (iii) in circumstances where the Respondent's pleaded case was that the Appellant's disciplinary directions and decisions (including the decision to terminate) were only unlawful because the Appellant had acted in breach of clause 14 of the Enterprise Agreement, these directions and decisions were valid.

**Error of construction**

2. The primary judge erred in:

- (a) finding (at [251]-[255], [264]-[265], [289], [299] and [301] of the Liability Judgment) that an exercise of a right pursuant to clause 14 of the Enterprise Agreement is not subject to any limitation and could not amount to a breach of the Code of Conduct;
- (b) finding at [257] and [297] of the Liability Judgment that the Code of Conduct was not part of the Enterprise Agreement and that the Code of Conduct contravened clause 14 of the Enterprise Agreement;
- (c) declaring (at order 1, subparagraphs (c), (e), (f), (g), (h), (i), (j) and (k) of the Orders) that each of the directions issued by the Appellant to the Respondent amounted to a breach of clause 14 of the Enterprise Agreement;
- (d) failing to find that:
 - (i) each of the directions issued to the Respondent by the Appellant was lawful and did not contravene clause 14 of the Enterprise Agreement;
 - (ii) in circumstances where the Respondent's pleaded case was that the Appellant's directions were only unlawful because the Appellant had acted in breach of clause 14 of the Enterprise Agreement, these directions were valid.

Errors as to confidentiality directions

3. The primary judge erred in:

- (a) finding (at [277] and [285] of the Liability Judgment) that clause 54.1.5 of the Enterprise Agreement does not mandate confidentiality obligations on a staff member and cannot be invoked to issue directions to a staff member;
- (b) finding at [286] of the Liability Judgment that the Appellant in giving various directions to the Respondent as to confidentiality and at trial was not relying upon any right at common law to do so;
- (c) finding at [289] of the Liability Judgment that clause 14 of the Enterprise Agreement prevailed over any obligation of confidentiality either under clause 54.1.5 or at common law; and
- (d) failing to find that:
 - (i) each of the confidentiality directions issued to the Respondent by the Appellant did not contravene clause 14 of the Enterprise Agreement;



- (ii) in circumstances where the Respondent's pleaded case was that the Appellant's directions were only unlawful because the Appellant had acted in breach of clause 14 of the Enterprise Agreement, these directions were valid.

Error as to compensation ordered

4. The primary judge erred in making order 2 of the Orders by:

- (a) finding (at [32] and [34] of the Penalty Judgment) that the Respondent's pleaded case in the Amended Statement of Claim at [54D] was that he would have worked full-time until 24 December 2021 (the day before his 61st birthday) and part-time until 24 December 2024 (the day before his 64th birthday) and calculating his alleged loss on that basis;
- (b) failing to find that the Respondent's pleaded case was that he would have worked full-time until the age of 60 and part-time until the age of 63, as pleaded in the Further Amended Statement of Claim at [54D(a) and (b)];
- (c) finding (at [57]-[74] of the Penalty Judgment) that the compensation for future economic loss ought be discounted at a rate of 5% only on the basis of vicissitudes of life or human contingencies, and in doing so failing to take into account:
 - i. the probability of changes to the Respondent's planned retirement dates, including due to illness, death or resignation; and
 - ii. that the Respondent's employment may have been terminated by the Appellant for other reasons, including for misleading the Appellant;
- (d) finding (at [75]-[100] of the Penalty Judgment) that the Appellant had failed to prove that the Respondent had not mitigated his losses, and in doing so:
 - i. failing to take into account that the question for assessment was mitigation into the future and incorrectly taking into account (at [81]) that the Appellant did not point to "any position upon which [the Respondent] could avail himself";
 - ii. finding and taking into account (at [83]) that, because of this litigation, the Respondent was "damaged goods";
 - iii. finding and evaluating (at [85]) the prospect of the Respondent's future income solely by reference to work associated with the Great Barrier Reef, when his actual skills are as a physicist;



- iv. failing to take into account that the Respondent may have to lower his sights in the future;
 - v. finding (at [98]) that it was not unreasonable for the Respondent not to accept undertakings, which would have meant that, if they were accepted, the Respondent would have remained in employment with the Appellant pending the outcome of these proceedings, because to do so would have deprived him of the resources to fund his litigation,
- (e) finding (at [103]-[152] of the Penalty Judgment) that the Respondent was entitled to compensation for general damages in the amount of \$90,000 and in doing so:
- i. applying an incorrect principle of law (at [107] and [149]) that the assessment of general compensation was to be done "in the context of the need to protect an employee against unfair treatment";
 - ii. finding (at [104]) that notwithstanding that there was no psychiatric injury or other medical condition diagnosed, the Respondent's suffering was no "any less real or palpable";
 - iii. finding (at [131]) that the email sent to staff of the Appellant damaged the Respondent's reputation;
 - iv. finding (at [135]) that the Appellant's intent was to ensure that the Respondent did not enjoy the "fruits of his victory"; and
 - v. finding (at [146]) that the Appellant "did what it could to undermine the [Liability Decision] and deprive [the Respondent] of "the fruits of his victory". It then further attempted to blacken his name".

Error as to penalty imposed

5. The primary judge erred in making order 3 of the Orders by:

- (a) failing to identify that either under s 557 of the *Fair Work Act 2009* (Cth) and/ or at common law that the course of conduct principle required that the Appellant not be punished twice for essentially the same culpability where there is an interrelationship between legal and factual elements of two or more contraventions;
- (b) failing to find that there were interrelated legal and factual elements as amongst the contraventions found by the primary judge such that pursuant to s 557(1) of the *Fair Work Act 2009* (Cth) that those separate contraventions were taken to constitute a single contravention;



- (c) alternatively to (b), failing to finding that there were interrelated legal and factual elements as amongst the contraventions found by the primary judge such that pursuant to s 557(1) of the *Fair Work Act 2009* (Cth) or at common law that those separate contraventions were to be grouped into no more than 3 (as was, in fact, submitted by the Respondent in the proceedings below);
- (d) finding (at [159]-[161] of the Penalty Judgment) that the contraventions ought be grouped into four distinct courses of conduct with four penalties being imposed in respect of each contravention, without taking into account that there were common or interrelated legal and factual elements amongst those four contraventions;
- (e) finding at [179] of the Penalty Judgment that the appropriate penalty for the first course of conduct grouping is \$15,000, at [181] of the Penalty Judgment that the appropriate penalty for the second course of conduct grouping is \$30,000, at [184] of the Penalty Judgment that the appropriate penalty for the third course of conduct grouping is \$35,000, and at [187] of the Penalty Judgment that the appropriate penalty for the fourth course of conduct grouping is \$45,000 and in doing so:
 - (i) failing to assess the objective seriousness of the contravening conduct, or mischaracterising the objective seriousness of the contravening conduct, where such conduct constituting the contraventions (which are denied as per Grounds 1 to 3) arose from an available interpretation of clause 14 of the Enterprise Agreement;
 - (ii) finding at [180]-[185] of the Penalty Judgment that the Appellant engaged in conduct that was "reprehensible", "extremely serious", amounted to a trampling of the Respondent's rights, an "egregious abuse of the power an employer has over an employee";
 - (iii) taking into account irrelevant considerations at [173]-[176] of the Penalty Judgment;
 - (iv) failing to apply the principles of totality.

Orders sought

6. That the Appeal be allowed.
7. Set aside the Orders and in lieu thereof order that the application made by the Respondent to the Federal Circuit Court of Australia be dismissed.



This Notice of Appeal was prepared by Bret Walker SC, Yaseen Shariff and Vanja Bulut, counsel.

Appellant's address

The Appellant's address for service is:

Place: Clayton Utz
Level 28 Riparian Plaza
71 Eagle Street
Brisbane QLD 4000

Email: hcray@claytonutz.com

Service on the Respondent

It is intended to serve this application on the Respondent.

Date: 13 September 2019

A large, stylized handwritten signature in black ink, which appears to read "Hedy Cray Clayton Utz". The signature is written over a horizontal line.

Signed by Hedy Cray
Lawyer for the Appellant