

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974

S 29(1A) application for hearing of an industrial dispute

Shane Pinner

T14618 of 2018

and

Minister administering the State Service Act 2000/TasTAFE

DEPUTY PRESIDENT ELLIS

11 January 2019

Alleged unfair termination of employment - whether valid reason for dismissal - valid reason for dismissal found misconduct involving teacher - dismissal found to be unfair and disproportionate to misconduct - reinstatement - order issued

DECISION

[1] Shane Pinner was a permanent full time teacher, employed by TasTAFE in Devonport. He arguably engaged in inappropriate touching of a mature age student on three occasions while on a field trip at Cradle Mountain.

[2] Mr Pinner's employment was terminated on 27 July 2018. He claims that there was not a valid reason for the termination of his employment and that it was unfair. He seeks to have his employment reinstated¹.

[3] TasTAFE submitted the alleged touching incidents, forming the valid grounds relied on to terminate Mr Pinner's employment, are as follows;

- a) That he breached s9(3) of the Code of Conduct by failing to treat the individual student and the group of students with respect and without harassment, victimisation or discrimination;
- b) He abused the teacher student power relationship;
- c) He breached the *TasTAFE Practice and Behaviour Guidelines (TasTAFE Guidelines)*; and
- d) That the behaviour was inconsistent with the ethical and professional standards of a teacher and extremely inappropriate conduct.

[4] The issues I must determine are:

- a) Whether there was a valid reason for the termination of employment.
- b) If a valid reason is found, was the termination of employment unfair considering the following context:
 - Inappropriate sanction;
 - Lack of any previous performance issues;

¹ *Industrial Relations Act 1984 s29(1A)*.

- Demonstrated remorse; and/or
- Hardship.

c) If the termination of employment is unfair, whether reinstatement is reasonable as a remedy.

Preliminary matter: Redaction of students' name

[5] The respondent has requested the students' names be redacted as they were students undertaking a regulated activity at TasTAFE, who are considered "vulnerable persons", pursuant to section 4 of the *Registration to Work with Vulnerable People Act 2013* (the RWVP Act).

[6] It is submitted the students lodged the complaint in good faith and that they are the innocent parties to this dispute. It was further submitted it would be contra to the *Industrial Relations Act 1984* (IR Act) and the public interest to ignore the 'vulnerable person' status of the involved students. Redaction of their names provides protection of the rights of these students.

[7] The applicant did not provide further written submissions in relation to this issue. They initially indicated support and requested Mr Pinner's name also be redacted as he could be identified as the student's teacher.

[8] I am satisfied that during the Employment Direction 5 (ED5) investigation, the students were made aware their statements and "what they said at the interview"² could be used as evidence if the matter proceeded to the Tasmanian Industrial Commission (TIC). All named students with the exception of Ms H, stated they understood and did not object. Ms H did not attend for an interview for the ED5 investigation and therefore she has not provided consent through that process.

[9] It is a fundamental rule of the common law that the administration of justice must take place in the open. Likewise the decisions relating to such proceedings should be subject to public scrutiny.

[10] I have carefully considered the request on behalf of the students and consent to redact only the name of the student at the centre of the incidents. She has not consented to her name being made public as part of these proceedings. The other mature aged students understood and did not object to their statements being presented to the TIC. I do not find there is potential for harm to those students.

Background

[11] Mr Pinner had been employed as a Tourism Guide teacher by TasTAFE since 1999. He was predominantly working with mature aged students in the Adventure Tour Guiding Program.

[12] He participated in a three day field trip with nine TasTAFE Certificate III Guiding students, between 3 October 2017 and 5 October 2017, in an assisting role, along with teacher, Mr Paul Cooper.

[13] While the students of this field trip were mature age, they are defined as 'vulnerable persons' as adult students accessing regulated activity, which includes TasTAFE courses.³

² Exhibit A6.

³ *Registration to Work with Vulnerable People Act 2013* (Tas) (RWVP Act) s4.

[14] On 9 October 2017, Ms Jenny Dodd, Chief Executive Officer at TasTAFE, received a formal grievance complaint collectively lodged by the nine students. It outlined a number of concerns, predominantly relating to Mr Pinner's conduct towards a student, Ms H on the field trip.

[15] An investigation under the authority of the ED5 was undertaken. During this time, he was suspended on full pay in accordance with Employment Direction 4 (ED4). Mr Pinner provided a written statement to the investigator and was offered an opportunity to view the photographic and video evidence. However, due to the unavailability of his support person, Mr Pinner was unable to view this evidence until he received the final report on 17 May 2018.

[16] On 20 June 2018, Ms Dodd sent a letter to Mr Pinner outlining the formal determination following the ED5 investigation and the proposed sanction. Her findings were that three of the allegations had been substantiated and therefore a breach of the Code of Conduct had occurred⁴.

[17] She determined that Mr Pinner allegedly breached s9(3) of the Code of Conduct by failing to treat students with respect and without harassment, victimisation or discrimination when;

- "he tucked student, Ms H's hair from either side of her face into the hood of her raincoat with both of his hands at least 2 to 3 times during the field trip;
- during a group discussion between staff and students he stood behind student Tanya H and rested/placed both of your hands on her shoulders;
- he kissed student, Ms H on the lips for approximately 3 seconds, holding her face to do so."⁵

[18] In this letter, Ms Dodd outlined her proposed sanction in the following terms:

"The breaches are considered to be at the higher end of seriousness given the teacher-student relationship is one of unequal power and behaviour of a nature outlined in the allegations suggest an abuse of that power. I add that the behaviour is also inconsistent with the ethical and professional standards of a teacher in Tasmania.

Indeed, I believe that given the seriousness of the breaches found, the highest sanction of termination of employment [section 44(3)(a) of the Act] is under consideration."⁶

[19] Mr Pinner provided a response to Ms Dodd's proposed sanction. However further correspondence, dated 27 July 2018, was forwarded by Ms Dodd and she reaffirmed termination of employment as the appropriate sanction,⁷ effective from the date of that letter.

The evidence before the Commission

[20] Mr Pinner provided evidence by way of a witness statement⁸ and orally at hearing and his evidence was subject to cross examination.

⁴ Exhibit A8.

⁵ Ibid.

⁶ Exhibit A9.

⁷ *State Service Act 2000* (Tas) s 44(3)(a).

⁸ Exhibit A1.

[21] The respondent did not lead any witness evidence but relied predominantly upon photographic⁹ and video evidence¹⁰.

[22] The evidence provided by Mr Pinner was generally accepted and I believe, was provided to the best of his recollection. Where there is conflict between the sworn evidence provided by Mr Pinner and the unsworn witness statements arising from the Investigation Report¹¹, I prefer the applicant's evidence. I will provide reasons if I do not accept the applicant's evidence.

Allegation 1. Did the applicant tuck the hair of student, Ms H, from either side of her face into the hood of her raincoat with both of his hands at least 2 to 3 times during the field trip?

[23] The respondent tendered a photograph displaying this alleged event¹². In this photo, Mr Pinner is standing amongst the group of students, in front of Ms H, with his hands appearing to tuck her hair back into her hood.

[24] The respondent submits the event relating to tucking back the student's hair was:

"inappropriate, unwelcome and uninvited and we say contributed to a pattern of behaviour that we submit is sexual harassment."¹³

[25] In evidence, Mr Pinner said he initially provided a response to this incident, stating he did not tuck her hair back as he did not recall the incident and stated at the hearing that he still did not recall the incident specifically. He confirmed he did not lie.¹⁴

[26] In cross examination, he confirmed the photo was taken at Marion's Lookout and recalled the concern he had about hypothermia of the students. He stated:¹⁵

"that was right at the top of Marion's Lookout and she's most probably approached me and said, "Would you mind tucking my hair in to the side of my hood," which I did. That's all I was doing and at the same time I was looking at her to see if she was okay, along with the other students at the time to see if they were showing signs of hypothermia and one of the things that sort of most probably driving that and fresh in my mind, ... so it was in my mind, hypothermia, and I'm not making excuses, I'm telling you just the facts and no, I don't recall the exact incident..."

[27] He stated in evidence that he did not intend to disrespect Ms H or the nine students through this action, nor did he intend to harass, victimise or discriminate against her or the nine students.

[28] His response to the draft ED5 Report indicated that he did not recall the incident, but he apologised and sincerely regretted the incident and was remorseful that it occurred. He also stated in no way did he intend to offend, upset or make Ms H uncomfortable.¹⁶

⁹ Exhibit A2, A3, A4.

¹⁰ Exhibit R3.

¹¹ Exhibit A6.

¹² Exhibit A2.

¹³ Transcript of Proceedings, 14618 of 2018 *Pinner v Minister Administering the State Service Act 2000/TasTAFE* (Tasmanian Industrial Commission, T14618 of 2018, Deputy President Ellis, 6 November 2018) P 69.

¹⁴ Above n 13, Transcript P 26-28.

¹⁵ Above n 13, Transcript P 29.

¹⁶ Exhibit A7.

[29] Ms H stated in further written particulars to the original complaint that Shane Pinner "neatened up/tucked back her hair" and that it "was an unusual action to do, and somewhat strange to do it more than once."¹⁷

[30] In statements for the ED5 Investigation report, fellow students stated they witnessed this event. Most students did not initially recall the event, but when shown the photo¹⁸ were prompted to remember the incident.

[31] Considering all the evidence, I accept that Mr Pinner did tuck Ms H's hair from her face into the hood of her raincoat with both hands at least once during the field trip. I am satisfied, Ms H did not complain or indicate she was affected by this incident at the time, but merely thought it was strange behaviour.

[32] I accept Mr Pinner's evidence that he did not mean to disrespect Ms H. There was no evidence before me that she found it disrespectful or felt harassed, victimised or discriminated by the action. For those reasons, I am not satisfied that tucking her hair back into her hood in those conditions, breached s9(3) of the Code of Conduct.

Allegation 2. Did the applicant stand behind student, Ms H and rest/place both of his hands on her shoulders during a group discussion between staff and students?

[33] The respondent tendered a photo of Mr Pinner standing behind Ms H with both hands placed on her shoulders in a group discussion with at least six other people present.¹⁹

[34] In cross examination, Mr Pinner agreed he placed his hands on her shoulders and massaged her shoulders.²⁰

[35] In evidence in chief, he denied he intended to disrespect or intend to victimise, harass or discriminate either Ms H or the group of students through this action.²¹

[36] His response to the draft ED5 Report²², indicated he only recalled the incident after he viewed the photo and that he should have said no to rubbing her shoulders, but foolishly agreed and regretted doing it. He added he was sorry that it occurred and did not intend his actions to cause harm.

[37] Mr Pinner's evidence was that Ms H requested her shoulders to be rubbed due to soreness caused from the pack:²³

"...Ms H had been complaining as part of the group all the way round Dove Lake that she was suffering from pain in her shoulders and then they said, "Okay, the lunch break is over," and she said, "Oh my shoulders are killing me, would someone mind massaging them." I stood up and she was actually directly in front of me and I said – well, I don't know whether I actually said but whether she asked or I offered because nobody else had, to relieve the pain off of her shoulders. I thought nothing of it, I thought there are plenty of witnesses and as suggested earlier by a line of questioning in sexual connotations which it wasn't, I was just relieving the pain because once again I was concerned about somebody's well-being because if somebody continuously complains and complains, it can start to bring the rest of

¹⁷ Exhibit A5.

¹⁸ Exhibit A2.

¹⁹ Exhibit A3.

²⁰ Above n 13, Transcript P 33.

²¹ Above n 13, Transcript P 10.

²² Exhibit A7.

²³ Above n 13, Transcript P 47-48.

the group down. Over the years my experience of walking, that's what I've witnessed taking groups of scouts and other people so that finished, she said, "Thank you, I really appreciate it." Young Meg Williams asked me to massage her and I said, "No, I'm sorry, you're not in pain, completely different situation." She said, "That discriminatory," and that's basically it in a nutshell.

MS SIEJKA (sic): Okay. So just to confirm, this picture does not depict anything sexual?.....No way.

Or victimising?.....No.

Or harassing?.....No, and as I said I thought okay, this is - there are plenty of witnesses to actually see what was going on.

In relation to - and at no time, sorry, did Ms H or anyone else complain about that?.....No, as I said Ms H said thank you afterwards for helping."

[38] The respondent submitted that placing his hands on the student's shoulders would be considered inappropriate and that massaging is even more significant. Mr Todd Sales, for the respondent, stated²⁴:

"This is not a relationship between two friends or a couple who are taking a bushwalk together, this is a teacher and a student. This is a fiduciary relationship and in that context we say there cannot be consent."

[39] Ms H did not address this incident in her unsigned statement following a request to provide more specific details of the grievance. Some students stated in their statements that they saw Mr Pinner massaging Ms H's shoulders to relieve her soreness. Only one student indicated that she perceived Ms H appeared to be uncomfortable and give a 'shiver'.²⁵

[40] I am satisfied that the photographic evidence and the applicant's concession is evidence that the incident of resting/placing both hands on her shoulders occurred on the field trip. However, I am not satisfied that this incident is a breach of s9(3) of the Code of Conduct due to the following reasons: the affected student did not include any comments about this incident in her complaint particulars, there was no suggestion the contact was unwanted and in fact, the contact was requested from the evidence of Mr Pinner, his evidence was that he was applying a form of first aid/support to a student who was suffering from shoulder pain, and there is an absence of evidence that there was a lack of respect shown to Ms H or the group of students in relation to this incident.

Allegation 3. Did the applicant kiss student, Ms H, on the lips for approximately 3 seconds, holding her face to do so?

[41] The respondent tendered a USB with a video²⁶ of an incident showing the group listening to their teacher, Mr Cooper. When he finishes, student Stefan Clark says to Mr Pinner and Ms H, "one last photo" and Mr Pinner turns to Ms H, who is standing next to him and puts both hands on her face and the two parties lean in to kiss. The kiss on the lips is held for approximately 3 seconds and at the end, Ms H says "oh my goodness" and initially smiles but then pulls a face. Mr Clark is heard to say, "ah, special, special". Mr Pinner stated "did you get the photo" to which Mr Clark replied "I did, I did." They continue to walk with the group. Two other students following behind, Meg Williams and Kyrren Cooper, are joking and laughing. This description is also stated in the ED5 investigation report.

²⁴ Above n 13, Transcript P 71.

²⁵ Exhibit A6.

²⁶ Exhibit R3.

[42] Ms H provided better particulars in her grievance²⁷:

"The class was walking. I was not in conversation with Shane Pinner at the time. I partially turned around to see Shane's face very close to me. I heard him say, "ready?" (with a tone as if posed as a question, he may have said, "are you ready", but I can only be certain that I heard the word "ready?"). He grabbed me on the face, by placing one hand on each of my cheeks/jaw. Before I knew what was happening, he placed his mouth on mine, and kept his lips on mine for quite some seconds. It seemed as if at least five seconds, as I recall thinking to myself, just hold still and it will all be over soon. He released my face and his mouth from mine. I was shocked and stunned. The only thing I could manage to say was, 'goodness!'. I turned away from him, and continued walking. His actions were unexpected, uninvited and a complete shock."

[43] The investigator undertaking the ED5 investigation stated²⁸:

"Unfortunately, the perspective of Ms H was unable to be obtained as she declined to participate in an interview with the investigator so there is only the benefit of Mr Pinner's version of events."

[44] The respondent submitted that the unsworn statements of the students during the investigation corroborated the unwanted and uninvited behaviour. Their comments indicated that Ms H was distressed by the incident, was in shock, horrified, and looked displeased and was very quiet. One student reported she felt physically ill and extremely uncomfortable with his behaviour.

[45] One student stated she did report the incident to the teacher, Mr Cooper on the trip but it appears he did not address the behaviour with Mr Pinner at the time.²⁹

[46] The respondent submitted that the alleged multiple acts of unwanted and uninvited physical contact between teacher and student amounted to a lack of respect for the student and amounted to sexual harassment. Despite the wintry, isolated conditions where the duty of care and professionalism should be strengthened, Mr Pinner allegedly took unwelcome and inappropriate interest in one student.

[47] Mr Sales submitted that Mr Pinner ignored the professional boundaries of the teacher/student relationship.

[48] It was submitted his behaviour was in clear conflict and contrary with the *TasTAFE Guidelines*.³⁰ The *TasTAFE Guidelines* apply to all employees and explicitly state:

'Under no circumstances should any TasTAFE staff have contact with students participating in programs (unless in the event of an emergency or first aid situation) that:

- ...
- involves kissing; ...'

[49] The respondent noted Mr Pinner's evidence in that he was unaware of the *TasTAFE Guidelines* and had not received any professional development. He then referred to the

²⁷ Exhibit R2.

²⁸ Ibid, P 23.

²⁹ Exhibit A6.

³⁰ Exhibit R5, p 2.

Teacher's Registration Board "*Professional Boundaries: Guidelines for Tasmanian Teachers*" (*TRB Guidelines*)³¹.

[50] Mr Sales said Mr Pinner had a professional responsibility as a teacher to keep up to date with policies that apply in his workplace. The *TRB Guidelines* state³²:

"As professionals, teachers should:

- Maintain an up-to date knowledge and understanding of, and implement and comply with, student protection policies as they apply in their workplace;"

[51] The respondent submitted that the Secretary considered all the material before her, including the relevant materials and professional standards, and found the breaches of the Code of Conduct, due to extremely inappropriate conduct between Mr Pinner and Ms H. They formed the valid reason for termination of his employment.

The breaches were:

"at the higher end of seriousness given the teacher-student relationship is one of unequal power, and behaviour of a nature outlined in the allegations suggests an abuse of that power."³³

[52] In evidence, Mr Pinner did not deny he kissed Ms H but that he did not intend to disrespect her, harass, victimise nor discriminate against her or the group of students.

[53] His response to the ED5 report, stated that his action was foolish, he is embarrassed and remorseful and sincerely apologised for the incident. He gave an undertaking it would never happen again.³⁴

[54] In cross examination, Mr Pinner stated and appeared confused when he responded to a series of questions regarding whether he was aware of acceptable behaviour with students. He denied he had any knowledge or professional development about the *TasTAFE Guidelines*:³⁵

MR SALES: Deputy President, I guess what I'm asking is, did he have the understanding, the common understanding, that a teacher cannot have actions with a student that have a sexual connotation.

DEPUTY PRESIDENT: Can you answer that question?

WITNESS: Well no, because there was no sexual connotation, it's –

MS SIEJKA: To assist, I think maybe do you need the question down? It's not talking about your conduct that is the actions here. It was just, as I understand it, a question, are you aware that –

DEPUTY PRESIDENT: So, Mr Sales, you may want to rephrase that question so that Mr Pinner understands the context.

WITNESS: I'm getting confused, to be quite honest.

³¹ Exhibit R6.

³² Ibid, P 5.

³³ Exhibit A9.

³⁴ Exhibit A7.

³⁵ Above n 13, Transcript P 15.

DEPUTY PRESIDENT: Yes. Now, we'll make it fairly simple. So, Mr Sales, rephrase that question.

MR SALES: (Resuming) And this is in a – this is a group of questions, Mr Pinner. So, perhaps I can just take us back to the first one. Were you aware at the time of that trek that teachers were not permitted to kiss students?.....No.

You – you were not aware that that was something that – an activity that would not be permissible?.....No.

DEPUTY PRESIDENT: So, the question being put to you is, were you aware that teachers should not kiss students on a field trip?

WITNESS: Not from the Tas TAFE policy, no, if – if that's the question."

[55] Mr Pinner gave evidence that on the previous day whilst walking around Dove Lake, Ms H had tried to kiss him³⁶:

"I didn't realise she was the one beside me, tried to kiss me, and I jumped back. Stefan made the comment, "Oh bugger, I didn't get the photo." Paul Cooper said, "Oh, don't worry, Shane, we won't tell Noni, and whatever happens on the mountain stays on the mountain."

[56] Mr Pinner described the sequence of photos and said³⁷:

"The weather was less than ordinary, and once again Stef had said, "Oh, let's get a photo of you two beside each other. So, I did and foolishly, stupidly – male; can't help it at times, the male gene as the other half describes it. And Stef said, "Oh just face each other and pretend to kiss." And so went to – and he said, "Oh, put your hands on the side of Tania's head", and she agreed, and then he said, "Oh right, done." And he said, "Oh, I didn't get the photo." And so then he said, "Could you do it again", and the second time actually kissed, stupidly, and I think I even made the comments, "Did you get that" because that was the photo he wanted. Now, I knew a photo was being taken. I was hamming it up as to say foolishly – what do you call it, brain fade or whatever in – in all the years of teaching; just one of these stupid, stupid, stupid moments which have so far cost me my career;..."

[57] Mr Pinner said there were two attempts to take the photo but the first attempt was not included in the video evidence. He stated in evidence that Stefan Clarke asked both parties to participate, both consented and it was not an impulsive move, but planned.

[58] In evidence, he described the kiss was more of pursed lips with no sexual motivation, rather to "ham it up". He stated Ms H did not complain at the time.

[59] Ms Kirsten Siejka, for the Applicant, submitted that the incident did not amount to treating students with a lack of respect and without harassment, victimisation or discrimination and there is no evidence that it was of a sexual nature.

[60] I am satisfied that the alleged kiss did occur between the applicant and Ms H as witnessed by other students, the video, and conceded by Mr Pinner.

[61] I am also persuaded that the students found that a kiss between a teacher and a student is an inappropriate action by the teacher. Mr Pinner has not denied this may have been the reaction. He has offered an apology if the student or others were offended.

³⁶ Ibid, P 46.

³⁷ Ibid.

[62] There is a lack of evidence from the respondent to demonstrate that Mr Pinner intended the kiss to be sexual in nature. I accept the applicant's sworn evidence that this was not of a sexual nature. It was planned and the parties were aware that a video was being taken of the incident. I do not concur with the respondent that the incident had sexual intent. I note, the allegation of sexual harassment had not been raised as a reason for termination of employment by Ms Dodd, nor in the ED5 investigation.

[63] However, I am satisfied that the particulars of the written complaint demonstrate that Ms H was upset and shocked by the incident. Her fellow students have also substantiated her concerns.

[64] I note some confused evidence provided by Mr Pinner in relation to his understanding and knowledge of how he should act with students and his knowledge as a teacher. He appeared to misunderstand the questioning and thought he was responding to sections of the *TasTAFE Guidelines*, which he has denied any knowledge of, rather than responding to the questions.

[65] I do not agree with the applicant that the teacher assist role has a different, lower power balance. I am satisfied all employed teachers have, by virtue of their registration and role, an assumed higher level of power and authority.

[66] I am satisfied that this incident is a breach of s9(3) of the Code of Conduct and there was a demonstrated lack of respect shown to Ms H. I find the contributing factors include:

- a) A breach of the mandated strict professional boundaries of the teacher student relationship and despite the alleged consent by the applicant, there is a fiduciary duty annulling consent between a student and teacher;
- b) A breach of the *TasTAFE Guidelines* which states under no circumstances should a teacher kiss a student;
- c) A breach of *TRB Guidelines* which note that a teacher should be aware of and maintain relevant employment policies; and
- d) A failure to respect and an abuse of the power imbalance of the teacher/student relationship.

Was there a valid reason for the termination of Mr Pinner's employment?

[67] To determine if there was a valid reason for his termination of employment, the onus of proof rests with the respondent.³⁸ Valid reasoning pertains to whether there was a sound, defensible, well founded reason³⁹ for the dismissal, in the context of the employee's capacity or conduct.

[68] Section 30(3) of the IR Act provides clear criteria with respect to termination of employment and states:

"The employment of an employee who has a reasonable expectation of continuing employment must not be terminated unless there is a valid reason for the termination connected with -

³⁸ Section 30(5) of the IR Act states the onus is on the employer to prove a valid reason for the termination. This context should be applied to the relationship between an employer and employee where both parties have rights, responsibilities and duties conferred and imposed on them. A common sense approach must be applied to ensure that the employee and employer are each treated fairly.

³⁹ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

- (a) the capacity, performance or conduct of the employee; or
- (b) the operational requirements of the employer's business."

[69] The employment of Mr Pinner was terminated pursuant to section 44(3)(a), termination of employment of officers and employees of the *State Service Act 2000*, which states:

"(1) The Minister may at any time, by notice in writing, terminate the employment of a permanent employee.

(2) The notice is to specify the ground or grounds that are relied on for the termination.

(3) The following are the only grounds for termination:

(a) that the permanent employee is found under section 10 to have breached the Code of Conduct;"

[70] An examination of the key reasons and evidence provided by the respondent for the valid reason are as follows. The grounds for termination of employment include a breach of the Code of Conduct. While I have determined that one incident breached the Code of Conduct, I need to consider and determine if this conduct provided a valid reason for the termination of his employment by the employer. I am not bound by the reasons given by the employer, rather whether I find there was a valid reason for dismissal.

[71] The respondent refers to *Walton v Mermaid Dry Cleaners Pty Ltd* and the role of the Commission "to assess whether the employer has a valid reason connected with the employee's capacity or conduct"⁴⁰

[72] I have considered the evidence, the authorities and materials provided by the parties and the context of the conduct.

[73] The respondent relied on all three incidents, which the Secretary deemed breached the Code of Conduct, to constitute a valid reason for termination of employment. It was submitted that this misconduct was not a mere "trivial misdemeanour" and the reasons were sound, defensible and well founded as opposed to "capricious, fanciful, spiteful or prejudiced".⁴¹

[74] Ms Siejka submitted there was not a valid reason for his termination of employment as the incidents should not have been determined as breaches of the Code of Conduct, Ms Dodd took into account matters she should not have, there was a lack of evidence supporting the respondent's position and there was no sexual nature nor harassment, victimisation or discrimination of any of the actions.

[75] She said the *TasTAFE Guidelines*, *TRB Guidelines* and fiduciary responsibilities were not relevant to the determination of the valid reason by the Commission. I do not agree with these submissions, as the employee is a Teacher and the context and expected standards of a teacher must be considered in my determination.

[76] I am satisfied that the employer had a valid reason for termination of his employment based on his conduct. The reasons for this decision are set out below.

[77] I find the conduct of Mr Pinner towards the students on this field trip was unacceptable in the course of his employment as a teacher. It is my view that he clearly favoured one student, Ms H, who was singled out during this trip. This was demonstrated

⁴⁰ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

⁴¹ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

by the incidents of tucking her hair back, placing hands on her shoulders and kissing her. I am satisfied this behaviour had a negative impact on the other students in the group on the field trip, leading to their complaint.

[78] I am satisfied his conduct breached his professional obligations and the *TasTAFE Guidelines* in his employment. The behaviour crossed the physical boundary between teacher and student. While I concur there is a breach of the Code, the valid reason is considered in the context of the conduct of the three incidents with the one student during this field trip.

[79] I concur with the respondent and do not accept that consent or implied consent of the student can be considered in a fiduciary relationship, such as teacher and student. Teachers are always in a position of trust and authority.

[80] I do not accept the applicant's position that the lesser role of 'observe and assist' reduces the power imbalance. I am satisfied that a registered teacher is in a trusted position where the relationship is never equal, resulting in an inherent power imbalance⁴² regardless of the role undertaken.

[81] I find Mr Pinner's conduct and breach of the Code of Conduct provided a sound, well founded valid reason for the termination of employment by the employer.

Was the termination of employment unfair?

[82] Having found, on the balance of probabilities, that Mr Pinner's conduct on the field trip constituted a valid reason for the termination of his employment by TasTAFE, I will now turn to determining if the dismissal was unfair in the context of the applicant's personal circumstances.

[83] This onus of proof lies with the applicant, as stated in s30(6) of the IR Act:

"Where an applicant alleges that his or her employment has been unfairly terminated, the onus of proving the termination was unfair rests with the applicant."

[84] Ms Siejka submitted the termination of Mr Pinner's employment was unfair for a number of reasons. She did not raise issues of procedural fairness in the process of the investigation, subsequent rights of reply and process of termination of employment.

Inappropriate sanction

[85] Ms Siejka submitted the sanction was disproportionate to the gravity of the conduct for a number of reasons, including the conduct was during one short period on the same field trip, the actions were not wilful misconduct and there was no intent to cause harm, rather the acts were foolish and stupid.

[86] Ms Siejka stated; "The most serious sanction is reserved for the most serious breaches"⁴³. She stated the sanction is disproportionate and unfair when alternative sanctions were available. Ms Siejka submitted counselling or a reprimand as a more appropriate sanction to adequately address Mr Pinner's conduct.

[87] The characterisation of the breach of the Code of Conduct was described by Ms Dodd as at the higher end of seriousness and despite a range of sanctions being available, the determined sanction was termination of employment.

⁴² Exhibit R6.

⁴³ Above n 13, Transcript P 7.

Lack of any previous performance issues.

[88] Mr Pinner gave undisputed evidence⁴⁴ that he had worked for TasTAFE for 17.5 years and had never been performance managed, received any complaints, reprimands or warnings in relation to his performance of teaching duties or interaction with students. He stated he had an unblemished work record.

[89] He stated he had received positive feedback from his colleagues, students and other Registered Training Organisations in relation to his work and within the teaching industry. His evidence was that the students congratulated him on the conclusion of the trip, had made no complaints on the trip and his teacher colleague, Mr Cooper had also not raised any complaints or issues about his conduct on the trip.⁴⁵

[90] There was no evidence led by the respondent relating to past performance history.

Demonstrated Remorse

[91] Mr Pinner has shown remorse regarding the actions both in writing, in evidence in chief and in cross examination. In response to the ED5 investigation draft report⁴⁶, Mr Pinner stated:

"I have been employed at TasTAFE since October 1999 and this is the first time such behaviour of mine has occurred, I regret my actions, I am sorry and remorseful for what happened. I have not only tarnished my reputation but also of TasTAFE. I have also tarnished the professional reputation of the teaching profession and as such feel embarrassed and the hurt that I may have caused to all those involved.

I do appreciate the gravity of my actions, I sincerely regret my actions. Since the matters were raised there is not a day that goes by without some reflection on what has happened. I have felt scared, stressed, very emotional and I believe this will follow me for the rest of my life and press me to continue to question my actions and how they may impact on other people moving forward."

[92] In this same document, he further emphasised his regret, appreciated the gravity of his actions, outlined his intention to ensure no repetition of such behaviour, and apologised to all involved for his actions and the harm it may have caused.

[93] The CEO acknowledged these written submissions and accepted Mr Pinner was regretful, however, did not believe he fully appreciated the seriousness of his actions.⁴⁷

[94] In evidence, Mr Pinner repeatedly stated his actions were foolish and stupid⁴⁸:

"...in all the years of teaching; just one of these stupid, stupid, stupid moments which have so far cost me my career..."

[95] The respondent submitted that during the proceedings, the applicant's claims to be remorseful hold no credence due to ongoing arguments of the actions predominantly being "trivial misdemeanours" and the professional guidelines and policies being irrelevant.

⁴⁴ Exhibit A1.

⁴⁵ Above n 13, Transcript P 9.

⁴⁶ Exhibit A7.

⁴⁷ Exhibit A9.

⁴⁸ Above n 13, Transcript P 45.

Hardship

[96] Mr Pinner provided undisputed evidence of the personal, professional and financial hardship due to the decision to terminate his employment. He is 57 years of age and his employment with TasTAFE was his sole source of income.

[97] His expenses are \$3338 per month and his wages, prior to termination of employment were \$4500 per month. He stated his partner paid for groceries and entertainment. His payout quantum has been spent and he now has to access his superannuation entitlements, being of preservation age and required to pay tax of 15%. He stated he never intended to retire this early and:

"...given my age I do not hold out much hope of being able to obtain gainful employment outside of what I did at TasTAFE."⁴⁹

[98] The respondent did not provide any submissions or evidence in relation to this issue.

Consideration

[99] I must determine if the termination of employment was unfair, taking into account the context and personal circumstances of the matter.

[100] In determining whether a dismissal for misconduct may be "harsh, unjust or unreasonable", the Fair Work Commission Full Bench held in *B, C, and D v Australia Postal Corporation T/A Australia Post [2013]*, that the Commission were required to consider⁵⁰:

"The personal or private circumstances of the employee that bear upon the substantive fairness of the dismissal. [This includes, matters such as length of service, the absence of any disciplinary history and the harshness of dismissal for the employee and his or her dependents.]

[101] In *Shane Duke and Minister administering the State Service Act 2000*, T13870 of 2012, President Abey found that context and circumstances of the incidents relating to a dismissal of a teacher aide must be considered as relevant in the matter.

[102] Considering the context of these actions during the single field trip, I have considered the following factors as relevant:

- a) Mr Pinner has worked for TasTAFE for 17.5 years with an unblemished work record;
- b) Mr Pinner has co-operated and provided statements to the investigator and CEO to the best of his ability in recalling the incidents;
- c) The incidents occurred over a period of three days during the same field trip;
- d) Mr Pinner has shown remorse, and regret at the incidents and provided an apology and an undertaking there will be no reoccurrence;
- e) Mr Pinner stated in evidence there has been no sexual intent nor harassment, victimisation or discrimination;
- f) The conduct was not deliberate or wilful, rather foolish and stupid;

⁴⁹ Exhibit A1.

⁵⁰ *B, C, and D v Australia Postal Corporation T/A Australia Post [2013]* FWCFB 6191, 42.

- g) With the lack of sworn evidence from the students, I cannot deduce there have been ongoing harmful impacts;
- h) The effect of the dismissal has effectively resulted in the end of his teaching career, with little prospects for re-employment as a teacher in a small regional area;
- i) In undisputed evidence, Mr Pinner's expenses are \$3338 per month which were previously covered by his wages. His accrued entitlements have been exhausted and he has been forced to access his superannuation, earlier than anticipated due to the termination of his employment;
- j) The consequences of his dismissal are significant, both financially and on a personal basis.

[103] Whilst Mr Pinner's behaviour was inappropriate and unacceptable in his role as a teacher on the field trip, I find the lack of any past performance issues indicate it was not a pattern of behaviour, rather a one off mistake and a lack of professional judgement on the specific field trip. Given the demonstrated remorse, the recognition of the stupidity of the mistake and the lack of wilful intent to cause harm in evidence, I am convinced that the likelihood of re-occurrence would be negligible.

[104] I am satisfied that Mr Pinner has been offered procedural fairness throughout this process.

[105] A key principle from the judgement of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*⁵¹ states a dismissal may be harsh notwithstanding the existence of a valid reason for dismissal, because it is disproportionate to the gravity of the misconduct and harsh in its consequences for the personal and economic situation of the employee.

[106] While I have found a valid reason for the employer to terminate the employment of Mr Pinner, considering all evidence and materials in accordance with s30(2) of the IR Act, I find the termination of employment was unfair and disproportionate in relation to the context of the conduct⁵². I have taken into consideration the above relevant factors in the context of the incidents. The reasons include the lack of any previous performance management, any warnings revealing a pattern of poor behaviour during a lengthy career at TasTAFE and the significant personal and economic impact on Mr Pinner.

If the termination of employment is unfair, is reinstatement reasonable as the remedy?

[107] Mr Pinner seeks reinstatement or re-employment as the remedy in accordance to s30(9) of the IR Act. It was submitted that the principal remedy is an order of reinstatement, and the respondent has not provided evidence supporting reinstatement as not being appropriate.

[108] Ms Siejka submitted that the alleged loss of trust and confidence in Mr Pinner by the Department is not enough to conclude that the relationship has been destroyed. She said the Department appeared to be reluctant to reinstate Mr Pinner as it would be difficult and inconvenient, with the result being unfair to Mr Pinner.

[109] In evidence, Mr Pinner said he could not see in what way he had broken the trust with his employer and that the relationship had not broken down through him. He also

⁵¹ (1995) 185 CLR 410 at 465.

⁵² Pursuant to s30(6) of the IR Act.

provided a range of teaching subject skills he possessed, to effectively teach in other areas.⁵³

[110] The applicant referred to the following case law. In *Australia Meat Holdings Pty Ltd v McLaughlin*⁵⁴, the Commission stated that a loss of trust and confidence is one factor but not necessary conclusive to whether reinstatement is appropriate.

[111] In *Perkins v Grace Worldwide (Aust) Pty Ltd*⁵⁵, the Full Bench found the circumstances of the case must be considered to determine the standard and degree of trust and confidence to make the relationship viable and productive. The term impracticable was the test and an accusation of wrongdoing by the employer did not destroy the necessary trust and confidence. It was found to adopt this approach would deny unfairly dismissed employees the primary remedy of reinstatement.

[112] It was submitted in applying the above case that while it may be difficult or inconvenient to reinstate or re-employ Mr Pinner, due to TasTAFE believing he is guilty of wrongdoing, it does not necessary indicate such a loss of confidence to make it inappropriate to be reinstated.

[113] In *Regional Express Holdings Limited trading as REX Airlines v R Richards*⁵⁶, the Full Bench upheld the decision to reinstate an employee who had been found to deliberately drive a work vehicle in an unsafe manner and to have been dishonest at a disciplinary hearing. The Full Bench stated that all the circumstances should be taken into account, including factors of the unblemished work record, not all alleged conduct was proven, nor did the misconduct relate directly to the respondent's professional duties. It also found the consequence of lost employment is another matter that may be taken into account in assessing appropriateness of reinstatement.

[114] Ms Siejka stated that no evidence had been presented from TasTAFE to indicate there had been an irretrievable breakdown of working relationships to the point where reinstatement would be inappropriate.

[115] Mr Sales submitted that TasTAFE had lost all trust and confidence in Mr Pinner's ability to perform the role of teacher, working with and being responsible for vulnerable persons as defined in the RWVP Act.

[116] He alleged there was a failure by Mr Pinner of his responsibilities, denial and a lack of remorse or recognition of the seriousness of his conduct. It was submitted that the nature of the breaches and his attitude to them were inconsistent with his continued employment at TasTAFE and presented an unacceptable risk to TasTAFE.

[117] Mr Sales submitted Mr Pinner did not lack subject knowledge, rather he could not be trusted in the role, no matter the subject matter⁵⁷.

[118] He stated the public interest should be considered and the rights and safety of TasTAFE students should outweigh the detriment to Mr Pinner brought by his own actions.⁵⁸

[119] He submitted Mr Pinner's personal situation did not outweigh the seriousness of his conduct.⁵⁹

⁵³ Above n 13, Transcript P 11.

⁵⁴ (1998) 84 IR.

⁵⁵ (1997) 72 IR 186 at 191.

⁵⁶ [2010] FWA 8753.

⁵⁷ Respondent's response to additional closing submissions, para 23.

⁵⁸ Above n 13, Transcript P 93.

⁵⁹ *Homer Abarra v Toyota Motor Corporation Australia Ltd* U2016/2962.

[120] Mr Sales relied on T14576 of 2018 *Mr A and Minister administering the State Service Act/Department of Health and Human Services* as an example of termination of employment for inappropriate and sexualised behaviour towards clients.

[121] Mr Sales submitted that in the event that the applicant's termination of employment was found to be unfair or invalid, the only acceptable remedy, consistent with public interest, would be an amount of compensation pursuant to s31(1B)(b) of the IR Act.

[122] The principal remedy is an order for reinstatement of the employee or if appropriate in all the circumstances of the case, an order for re-employment. Section 30, ss(9) and (10) of the IR Act state:

"The principal remedy in a dispute in which the Commission finds that an employee's employment has been unfairly terminated is an order for reinstatement of the employee to the job he or she held immediately before the termination of employment or, if the Commission is of the opinion that it is appropriate in all the circumstances of the case, an order for re-employment of the employee to that job.

(10) The Commission may order compensation, instead of reinstatement or re-employment, to be paid to an employee who the Commission finds to have been unfairly dismissed only if, in the Commission's opinion, reinstatement or re-employment is impracticable." (my emphasis)

[123] The Respondent did not lead evidence to reveal that reinstatement or re-employment was impracticable. There were submissions regarding the loss of trust and confidence in Mr Pinner and the perceived risk of his return to the role.

[124] I support the findings in *Australia Meat Holdings Pty Ltd v McLaughlin*⁶⁰ that an employer stating the loss of trust following allegations is not conclusive that reinstatement is inappropriate.

[125] The test to be considered is whether reinstatement or re-employment is impracticable. The Full Bench in considering all the individual circumstances in *Perkins v Grace Worldwide (Aust) Pty Ltd*⁶¹ found accusations from employers caused some degree of a loss of trust but this was not always to the degree that made a return to the workplace impracticable. I support this finding that the process alone would not negate a return in a large workplace, such as TasTAFE.

[126] The evidence from Mr Pinner is weighted accordingly and indicates that he believed there was no breakdown of relationship and that he could not see how he had broken the relationship of trust with his employer. He also stated how he wished to return to his former role and workplace and acknowledged this was practical.

[127] I have already found that there is a negligible risk of reoccurrence and that Mr Pinner has learnt from this conduct and process to mitigate putting future students at risk. I am satisfied that given his long service to TasTAFE and students, his remorse and undertakings and the employer submissions that he is competent with subject matter, the public interest is met.

[128] In the absence of evidence from the Respondent to enable me to ascertain if it would be impracticable to return to workplace, I find that the principal remedy must be applied.

⁶⁰ (1998) 84 IR.

⁶¹ (1997) 72 IR 186 at 191.

[129] Finally, as I have previously concluded, Mr Pinner is not without blame and has made an error of judgement and a foolish mistake. Accordingly, I propose to order reinstatement from the date of this decision, which imposes a significant financial penalty in recognition of the culpability.

[130] It is also open for the employer to apply any reprimand, warning, counselling and/or additional training considered appropriate.

Order

Pursuant to s31 of the *Industrial Relations Act 1984*, I hereby order:

1. The Minister administering the *State Service Act 2000* to reinstate Mr Shane Pinner to the position of Teacher which he held prior to his termination of employment on 27 July 2018.
2. For the purposes of continuity of service, the date of reinstatement shall be 27 July 2018.
3. Mr Pinner is to be paid his normal weekly wage from 11 January 2019.
4. The reinstatement is to occur as soon as it is practicable, but no later than the beginning of Term 1, 2019.

The file will remain open for a period up until the commencement of Term 1 and the Commission is available to assist the parties in the implementation of the order if required.



N M Ellis
Deputy President

Appearances:

Mr S Pinner, Ms K Siejka, and Ms N Marzella for the applicant
Mr T Sales and Ms M Brady for the respondent

Date and place of hearing:

2018
6 November
HOBART