



TASMANIAN INDUSTRIAL COMMISSION

Decision redacted so as to prevent identification of the Applicant.

CITATION: AB v Minister administering the *State Service Act 2000* – Department for Children, Education and Young People [2024] TASIC 10

PARTIES: AB (Applicant)

Minister administering the *State Service Act 2000* – Department for Children, Education and Young People (Respondent)

SUBJECT: *Industrial Relations Act 1984*, s 29(1A) application for hearing of an industrial dispute

FILE NO: T15084 of 2023

HEARING DATE(S): 17 - 19 April 2024

HEARING LOCATION: Hobart

DATE REASONS ISSUED: 31 October 2024

COMMISSIONER: Deputy President N M Ellis

CATCHWORDS: Industrial dispute – termination of employment – no valid reason for termination – unfair dismissal found – principal remedy reinstatement with conditions

REPRESENTATION:

Applicant: Ian Neil SC

Respondent: Mark Jehne

**AB V MINISTER ADMINISTERING THE STATE SERVICE ACT 2000 –
DEPARTMENT FOR EDUCATION, CHILDREN AND YOUNG PEOPLE**

REASONS FOR DECISION

31 OCTOBER 2024

[1] AB (the Applicant) had his employment as a teacher at Mountain Heights School terminated on the grounds that he allegedly intentionally touched three female students on their bottoms over their clothes.

[2] Thereafter, the Applicant applied to the Tasmanian Industrial Commission on 22 November 2023 for a hearing¹ in respect of an industrial dispute relating to the termination of his employment.

[3] The Applicant has been permanently employed by the Department for Education, Children and Young People (the Respondent) (DECYP) since 2015. The Respondent began an investigation pursuant to Employment Direction No.5 (ED5) on 23 August 2022 and the Applicant was found to have breached the State Service Code of Conduct (Code of Conduct).

[4] The allegations were heard before the Magistrates Court on 18 October 2023, where Magistrate Brown dismissed all charges of indecent assault against the Applicant.

[5] The Applicant consistently denied all the allegations. He said he did not intentionally or knowingly touch a student, there was no valid reason for termination of employment and that the termination was unfair. The remedy sought is reinstatement of his employment.

[6] The Respondent submitted that his employment was terminated in accordance with s 44(3)(a) of the *State Service Act 2000* (Tas) (SS Act) on the grounds of breaching the Code of Conduct.² The decision was based on the substantiation of the three allegations of inappropriate physical contact and/or child sexual abuse by touching three students on the bottom. It was submitted the decision was sound, defensible, and well-founded and therefore based on a valid reason.

[7] During the hearing, witness IF³ made further allegations that the Applicant touched her on the side of her body and the side of her breast. These allegations were not subject to the ED5 investigation or the Secretary's determination. However, the Respondent submitted⁴ if any of the allegations were found to be true, it would also constitute a valid reason for termination of the Applicant's employment.

[8] The Respondent submitted the Applicant poses an unacceptable risk to female students. Both his Teachers Registration Board registration (Teachers registration) and Registration to Work with Vulnerable People (RWVP) have been suspended, which are

¹ The application was lodged pursuant to s 29(1A) of the *Industrial Relations Act 1984* (Tas) (IR Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000/Department for Education, Children and Young People (the Respondent).

² *State Service Act 2000* (Tas), s 3.

³ As agreed by the parties, certain witnesses will be referred to by their initials to protect the identities of children under 18.

⁴ *Healy v Wage Inspectorate Victoria* [2024] FWCFB 261, [28]; *Shepherd v Felt and Textiles of Australia* (1931) 45 CLR 359.

essential requirements of the position of a teacher. There is a loss of trust and confidence in the Applicant, and the employment relationship could not be repaired. Reinstatement is therefore impracticable.

BACKGROUND

[9] Whilst the conduct for which the Applicant was dismissed is in dispute, I summarise the events leading to this application in the table below:

Date	Event
2020	Applicant commenced work at Mountain Heights School but had been employed by DECYP since August 2015.
16 June 2022	IF sent Applicant an email to “do his job properly”.
April 2022	Allegations of touching IF and CA in an Art class.
June 2022	Allegations of touching PP in an unconfirmed class.
7 July 2022	Applicant reported poor behaviour by students by email. PP and TJ raise allegations with Ms Venter by an email sent to the Acting Principal, Mr Lutwyche, and Ms Burgess-Norris.
26 July 2022	Allegations against Applicant (first school day after holidays) raised by IF with parents.
27 July 2022	Ms Burgess-Norris received allegations from IF and reported to Mr Lutwyche.
28 July 2022	Applicant participated in two interviews with Tasmanian Police. Applicant charged with three counts of indecent assault (criminal proceedings). Applicant directed to leave and remain away from Mountain Heights School and suspended on full pay.
29 July 2022	Applicant’s RWVP suspended.
23 August 2022	Applicant informed by the Respondent about commencement of ED5 investigation. Applicant’s pay was suspended due to suspension of RWVP.
6 September 2022	ED5 Investigator, Mr Sales, invited the Applicant to provide a response to allegations. Applicant’s representatives confirm with Mr Sales that they are preparing a written response and requested access to the school database, Student Support System (SSS).

13 September 2022	Follow up by Applicant's representatives on written response to allegations.
5 October 2022	Applicant's Teachers registration was suspended.
12 October 2022	Applicant's written response denied allegations and further requested access to SSS.
7 November 2022	Applicant informed of the commencement of an Employment Direction No.6 investigation (ED6 investigation).
20 December 2022	Applicant provided response to the ED6 investigation.
16 January 2023	Applicant provided with the Investigation Report and advised of opportunity to respond.
7 February 2023	Applicant received Mr Sales' final reports for both investigations dated 6 February 2023. The reports concluded Applicant had engaged in inappropriate physical contact and/or sexual abuse with complainants.
30 March 2023	Documents for SSS entries and call logs produced for criminal proceedings.
3 April 2023	Further documents for SSS entries and call logs produced for criminal proceedings.
12 – 13 September 2023	Criminal proceedings heard in the Magistrates Court in Burnie.
20 September 2023	Respondent determined Applicant breached ss 9(2) and 9(3) of the SS Act (Determination) and invited the Applicant to show cause to the proposed sanction of termination of employment.
18 October 2023	Magistrate Brown dismissed all three counts in the criminal proceeding.
19 October 2023	Email from DECYP legal service to Ms Jo Pook outlining outcome of court decision.
20 October 2023, 2 November 2023	Applicant provided show cause response to Determination.
31 October 2023	Applicant received a letter from Respondent directing him to vacate the apartment.
7 November 2023	Applicant received a letter from the Secretary, informing him of decision to terminate his employment effective 6 November 2023.

[10] The allegations which formed the grounds of the determination to terminate the Applicant's employment and a valid reason for termination of employment are set out below⁵:

"Allegation 1

Between February and June 2022 during the course of your State Service employment as a Teacher at Mountain Heights School you engaged in inappropriate physical contact and/or child sexual abuse with student IF by touching her on the bottom with your hand and in doing so you:

- (a) failed to act with care and diligence contrary to Section 9(2) of the Code; and/or
- (b) failed to treat everyone with respect and without harassment, victimisation or discrimination contrary to Section 9(3) of the Code.

Allegation 2

Between February and June 2022 during the course of your State Service employment as a Teacher at Mountain Heights School you engaged in inappropriate physical contact and/or child sexual abuse with student PP by touching her on the bottom with your hand and in doing so you:

- (a) failed to act with care and diligence contrary to Section 9(2) of the Code; and/or
- (b) failed to treat everyone with respect and without harassment, victimisation or discrimination contrary to Section 9(3) of the Code.

Allegation 3

Between February and June 2022 during the course of your State Service employment as a Teacher at Mountain Heights School you engaged in inappropriate physical contact and/or child sexual abuse with student CA by touching her on the bottom with your hand and in doing so you:

- (a) failed to act with care and diligence contrary to Section 9(2) of the Code; and/or
- (b) failed to treat everyone with respect and without harassment, victimisation or discrimination contrary to Section 9(3) of the Code."

[11] The ED5 process commenced on 23 August 2022 when the Secretary found reasonable grounds to believe that a breach of the Code of Conduct in the SS Act by the Applicant may have occurred.

[12] A breach of the Code of Conduct was determined for all three allegations by the Secretary, Mr Bullard.⁶ It was stated this was based on the students' credibility, the strong correlation of the allegations by the students, the Investigation Report, the Applicant's response to the report, the police interview transcripts and the relevant DECYP policies and guidelines. The Secretary alleged the Applicant conducted child sexual abuse and stated in the letter of determination⁷:

⁵ Exhibit R2, Attachment F, p 2.

⁶ Ibid.

⁷ Ibid p 41.

“The evidence before me indicates that the Employee has sought to conceal his abuse of the students by walking while swinging his arms in a way that allowed him to perpetrate the sexual abuse, that is, touching the girls on the bottom with his hand in a way that was hidden and caused his victims to question if their teacher, an individual in a significant position of power and authority over them, had ‘accidentally’ touched them on the bottom...”

[13] The Secretary determined the Applicant did not have his RWVP or Teachers registration and, following the procedure set out in ED6, found he is unable to efficiently and effectively undertake the assigned duties. The Secretary stated⁸:

“...Therefore, although I have found the employee is unable to efficiently and effectively perform the duties of a teacher for the reasons outlined above, I consider it appropriate that I deal with this matter by way of the ED5 process, rather than as an inability, given the serious nature of the conduct I have found proven.”

[14] The Applicant’s employment was terminated by the Secretary in a letter dated 6 November 2023,⁹ which included the reasons for the final determination.

LEGISLATIVE FRAMEWORK

[15] When determining a dispute in relation to the termination of employment, the following criteria must be considered, pursuant to s 30 of the *Industrial Relations Act 1984* (Tas) (IR Act):

30. Criteria applying to disputes relating to termination of employment

“(1) In this section –

continuing employment means employment that is of a continuing or indefinite nature or for which there is no expressed or implied end date to the contract of employment;

employee means a person who is or was engaged to work casual employment, part-time employment, full-time employment or probationary employment and includes a former employee;

relationship status means the status of being, or having been, in a personal relationship, within the meaning of the Relationships Act 2003.

(2) In considering an application in respect of termination of employment, the Commission must ensure that fair consideration is accorded to both the employer and employee concerned and that all of the circumstances of the case are fully taken into account.

(3) 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 –

⁸ Exhibit R2, Attachment F, p 32.

⁹ Ibid Attachment H.

- (a) the capacity, performance or conduct of the employee; or
 - (b) the operational requirements of the employer's business.
- (4) Without limitation, the following are not valid reasons for termination of employment:
- (a) membership of a trade union or participation, or involvement, in trade union activities;
 - (b) seeking office as, acting as, or having acted as, a representative of employees;
 - (c) non-membership of a trade union;
 - (d) race, colour, gender, sexual preference, age, physical or intellectual disability, marital status, relationship status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, except where the inherent nature of the work precludes employment for any of those reasons;
 - (e) absence from work during maternity or parental leave;
 - (f) temporary absence from work because of illness or injury, provided that nothing in this paragraph is to be construed as removing an employer's right to terminate an employee's employment on account of persistent or unjustified absenteeism;
 - (g) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities.
- (5) Where an employer terminates an employee's employment, the onus of proving the existence of a valid reason for the termination rests with the employer.
- (6) Where an applicant alleges that his or her employment has been unfairly terminated, the onus of proving that the termination was unfair rests with the applicant.
- (7) The employment of an employee must not be terminated for reasons related to the employee's conduct, capacity or performance unless he or she is informed of those reasons and given an opportunity to respond to them, unless in all the circumstances the employer cannot reasonably be expected to provide such an opportunity.
- (8) An employee responding to an employer under subsection (7) is to be offered the opportunity to be assisted by another person of the employee's choice.
- (9) 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.

(11) In determining the amount of compensation under subsection (10), the Commission must have regard to all the circumstances of the case, including the following:

- (a) the length of the employee's service with the employer;
- (b) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated;
- (c) any other matter the Commission considers relevant.

(12) Where the Commission finds that an employee's employment has been unfairly terminated and has determined that reinstatement or re-employment is impracticable, any amount of compensation must not exceed an amount equivalent to 6 months' ordinary pay for that employee.

(13) The Commission is to take into account any efforts of the employee to mitigate the loss suffered as a result of the termination of his or her employment."

[16] The Respondent submitted the Applicant's employment was terminated in accordance with s 44(3)(a) of the SS Act. Section 44 of the SS Act relevantly provides:

"Termination of employment of officers and employees

- (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;
 - (b) that the Head of Agency has requested the Minister under section 47(11) to terminate the employment of the permanent employee;..."

[17] Section 10 of the SS Act relevantly provides the possible sanctions where a breach of the Code has been found. It states:

"Breaches of Code of Conduct

- (1) The Minister may impose one or more of the following sanctions on an employee who is found, under procedures established under subsection (3), to have breached the Code of Conduct:
 - (a) counselling;

...

(g) termination of employment in accordance with section 44 or 45.

...

- (2) The Employer is to establish procedures for the investigation and determination of whether an employee has breached the Code of Conduct..."

WAS THERE A VALID REASON FOR TERMINATION OF THE APPLICANT'S EMPLOYMENT?

Applicant's Position

[18] The Applicant contended there was and is no valid reason for termination of his employment. An assessment is required based "on the balance of probabilities and with the requisite degree of satisfaction", of the credibility and reliability of the witnesses and the Applicant. This is an "oath-on-oath case".¹⁰

[19] The Applicant stated the principles set out in the following passage from *Briginshaw v Briginshaw* apply¹¹:

"The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency."

[20] A reason for the termination of an employee's employment must be "sound, defensible or well founded" to be valid.¹² "[T]he reason for termination must be defensible or justifiable on an objective analysis of the relevant facts".¹³ The Commission must make a finding as to whether the conduct occurred based on the evidence before it.¹⁴

[21] The Commission must be satisfied to the degree of satisfaction required in the *Briginshaw* principles that the Applicant did in fact touch the complainant students in the way alleged knowingly and intentionally.

[22] Concerns were raised with the Respondent's reliance on the hearsay evidence and submitted that no weight should be given to any hearsay evidence for any proposal adverse to the Applicant. It was advanced that while the Commission is not bound by the rules of evidence,¹⁵ general guidance should be taken based on the hearsay evidence not being credible or reliable without being subject to cross examination testing for the making of findings of fact.

¹⁰ Applicant's reply to the Respondent's Further Closing Submissions, 12 July 2024, [5].

¹¹ (1938) 60 CLR 336 at 362; see also *Evidence Act* 2001, s.140(2)(c).

¹² *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.

¹³ *Rode v Burwood Mitsubishi*, AIRCFB, Print R4471, at [19].

¹⁴ *King v Freshmore (Vic) Pty Ltd*, AIRCFB, Print S4213, at [24].

¹⁵ *Industrial Relations Act 1984* (Tas), s 20(1)(c).

[23] It was stated the responsibility of the parties is to assist the Commission with the provision of witness evidence and the choice by the Respondent to deprive the Commission of the opportunity to see and hear the witnesses give evidence is unfair to the Applicant.

[24] Finally, it was submitted the evidence provided by the hearsay witnesses is deficient. None of the diagrams relating to their police interviews or in court are available and the testimony is only provided in writing or audio removing the ability to assess the demeanour of hearsay witnesses.

[25] The Applicant opposes the Respondent seeking that the Commission depart from the Magistrate's findings against the hearsay witnesses, who had the advantage of seeing and hearing the witnesses. It is submitted that the departure from such findings is analogous to an appellate court or tribunal seeking a departure from findings of fact. In the case of *Fox v Percy*¹⁶, the High Court held that an appellate court:

"...must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share."

[26] The allegations that gave rise to the termination have always been denied by the Applicant, and the Applicant relied on the Magistrate's decision that he has consistently "denied any impropriety whatsoever in relation to any of these matters".¹⁷

[27] The Applicant's submissions in relation to the Magistrate's decision are as follows¹⁸:

5. The allegations were extensively interrogated and tested during a criminal hearing before Magistrate Simon Brown in Burnie Magistrates Court in September 2023. In those proceedings the Applicant voluntarily gave evidence. He was cross examined. The same students on whose allegations the Respondent relies in these proceedings also gave evidence.
6. The Applicant was acquitted of all charges against him. In a carefully reasoned decision, the Magistrate rejected the students' evidence, drawing attention to its many inconsistencies, and making adverse credit findings against each of them: for example, that the allegations of IF were 'at the very least grossly exaggerated or perhaps re-invented to a considerable degree' and were 'not convincing', giving rise to 'very real concerns that her complaints to the school are unreliable'; the evidence of PP was 'entirely unconvincing'; and that his Honour was 'far from satisfied' about the evidence of CA.
7. The Magistrate held, 'I am not satisfied of any single episode of any touching and I am certainly not satisfied that the defendant did intentionally brush past any student, let alone that he had any indecent intention in doing so...I am not satisfied to the requisite standard that any of the charges brought against the defendant have been proved...I have also reached the conclusion that I must reject entirely all three allegations made against [the Applicant].'

¹⁶ (2003) 214 CLR 118 at [23], per Gleeson, Gummow and Kirby JJ.

¹⁷ Exhibit R2, Attachment BB, [86].

¹⁸ Applicant's Outline of Submissions, 9 April 2024, [5]-[8].

8. Notwithstanding the strength of these emphatic findings, the Respondent arbitrarily dismissed the criminal court findings and, without challenge, accepted the complainants' accounts given in police interviews, effectively ignoring the fact and result of the criminal proceedings."

[28] The Respondent, who bears the onus of proving the existence of a valid reason for termination of employment, relied on the allegations made by the three complainants which allegedly occurred between 1 February 2022 and 26 July 2022 and on the intention of the Applicant.

[29] It was emphasised that the element of intentionality is essential for a valid reason to be found, that is the Applicant knowingly and deliberately touched the three complainants on the bottom. Any failure to prove the element of intent would be fatal to establish a valid reason.

[30] An entirely new allegation was made by IF in her witness statement for these proceedings, that on unspecified occasions, the Applicant's stomach or arm touched the side of her body or the side of her breast. She had not raised this allegation in either the police statements or Magistrates court proceedings.

The Respondent's Position

[31] The valid reason for the Applicant's termination of employment is connected with his conduct pursuant to s 30(5) of the IR Act. The case is that the Applicant intentionally touched each of the three complainant's bottoms over their clothes and this conduct is inconsistent with any innocent explanation, that is, the conduct was not a coincidence or accidental.

[32] The Respondent is relying on proving one or more of the allegations to establish valid reason for termination. Mr Jehne stated at the hearing¹⁹:

"And the key question in these proceedings is not, we respectfully submit, whether the touching occurred or not, but whether that was intentional."

[33] The parties agreed that although the rules of evidence do not strictly apply to the Commission, they are a useful guide to the requirements of fairness.

[34] The Respondent relied on s 165A of the *Evidence Act 2001* (Tas) which sets out the warnings in relation to children's evidence before a jury.

[35] It was also submitted that tendency and coincidence evidence is capable of significantly bearing proof in respect to each complainant's allegation. It was asserted the Applicant had a tendency to act in this way and that it is improbable that the events occurred coincidentally, due to the similarities of the evidence of the students, being the touching of bottoms as he walked past them in classroom settings.

[36] In determining the probative value to the tendency or coincidence evidence of the purpose of ss 97(1)(b) and 98(1)(b) of the *Evidence Act 2001* (Tas), it was submitted it would not be open for the Commission to have regard to any possibility the evidence of the students may be as a result of collusion or concoction.²⁰

¹⁹ Transcript, p 179.

²⁰ *Evidence Act 2001* (Tas), s 94(5).

[37] The Applicant stated the tendency lacks significant probative value as the tendency alleged is that the Applicant intentionally makes contact with students' bottoms.

[38] The Applicant has been a teacher for over 10 years with no prior allegation of this conduct. The five occasions of touching the students outlined in the allegations were over a short period of time and all from the same friendship group. The alleged tendency relies on the evidence of IF, which should not be accepted as reliable and the hearsay evidence of CA and PP, the two other complainants who have both conceded the alleged touch may have been accidental.

[39] Magistrate Brown expressly rejected the reliance on the tendency rule and noted the prosecution case became weaker not stronger when the allegations were put together. The Applicant submitted the Respondent has not identified how the coincidence rule is said to apply.

The Evidence Relating to the Alleged Incidents

[40] The Respondent has identified the intentional conduct of the Applicant through three allegations as the basis for a valid reason for termination of employment, as follows:

- a. "Between 1 February 2022 and 26 July 2022 AB touched IF:
 - i. On her bottom over her clothes;
 - ii. To the side of her body; or
 - iii. To the side of her breast;
- b. Between 1 February 2022 and 26 July 2022 AB touched CA on her bottom over her clothes;
- c. Between 1 February 2022 and 26 July 2022 AB touched PP on her bottom over her clothes."

[41] There was significant evidence led at the hearing and documentation tendered. Having regard to the evidence I specifically refer to the evidence relevant to the issues that I have determined are necessary. I should also add that I had the benefit of seeing and hearing two witnesses which has helped me reach my conclusions about what evidence I should accept and the credibility of the witnesses.

[42] The complainant witness IF has now provided three statements: initially to the Police in the form of statements, evidence under oath in the Magistrates Court, and evidence before the Commission. Two of the three complainants did not appear to provide evidence in these proceedings and the Respondent relied on their police statements, the Magistrate Court transcript and video interviews with Police.

[43] Similarly, the Applicant provided the above evidence and further statements throughout the investigation²¹ and show cause processes.

[44] The third witness, CH, the mother of IF has provided two statements: one to the Police and the evidence before the Magistrates Court proceedings. She relied on her police statement for this matter.

²¹ The Applicant was subject to an Employment Direction 5 investigation.

[45] The Applicant opposed the hearsay evidence of the two complainants not appearing and stated there would be a denial of procedural fairness if their evidence were accepted untested under cross examination in this jurisdiction. The Respondent stated CA and PP's evidence was tested in the Magistrates Court proceedings.

[46] Both parties agree the rules of evidence do not apply in the Commission proceedings. I have given limited weight to the tendered statements and evidence provided in other jurisdictions of those complainants who have not appeared in these proceedings.

[47] The Respondent submitted that this is not an oath-on-oath case, as the Applicant accepts the possibility, he may have touched the three students on the bottom with incidental contact. It was stated that the potential scope for cross examination of PP, CA and XF was limited to the proposition they were mistaken. In addition, it was submitted the credibility of the complainants could be assessed through viewing the police video interviews, police statements and the Magistrates Court transcript.

[48] The Applicant countered this position to say the essential element of intentionality, which is the element to prove a valid reason for his termination of employment, has been disregarded and the Applicant has always denied ever touching a student in the way alleged intentionally or knowingly. To satisfy to the degree of satisfaction required by the *Briginshaw* principles, the evidence of the complainant students must be tested and accepted.

[49] It was submitted the Commission should make an independent assessment of the evidence and cannot delegate its responsibility to make findings as to credibility and reliability to the Magistrates Court and is at liberty to make different findings on credibility and reliability of CA, PP, and XF as that found by Magistrate Brown.

[50] The Applicant stated the Commission can only make an assessment of the reliability of a person's account by assessment of the sworn evidence before it and it is contrary to every principle of practice and s 20(1)(a) of the IR Act to not apply equity, good conscience, and the merits of the case without regard to technicalities or legal forms.

[51] There is no basis for the Commission to depart from the Magistrate's findings who heard and saw the evidence of CA, PP and XF.

[52] In the proceedings before the Commission, IF provided evidence by videoconference with her father present in the room as a support person. CH also provided videoconference evidence. The evidence relied on by the Respondent included the police interview videos, statements and transcript of the evidence before the Magistrates court of CA, PP and XF and the teachers.

[53] The Respondent conceded there were plainly tensions between the Applicant and the group of 14-year-old girls in the first half of 2022. Those tensions are not inconsistent with the truth of the girls' allegations that the touching had occurred and that they felt uncomfortable around him. It was stated IF's complaints are corroborated by the evidence of CA, PP and XF in the Magistrates Court and evidence from her mother, CH.

[54] The Respondent submitted any delay in IF having made a police complaint is not inconsistent with the truth of the allegations. IF has accepted that she initially thought that the touching was accidental and seemingly gave the Applicant the benefit of the doubt.

[55] The Applicant submitted there is no evidence that he had any intention to touch any of the complainants. It was stated the evidence of IF contains a number of inconsistencies, is

implausible, and demonstrates significant issues with her credibility. Additionally, the evidence from PP and CA has been assessed in the findings of Magistrate Brown and he found issues with reliability, truthfulness and credibility of the complainants and witnesses.

Contextual Background

[56] There are three student complainants. Their allegations form the basis of the valid reason used by the Respondent to terminate the Applicant's employment. It is agreed that based on the evidence, a finding of intentional touching of a student would confirm the valid reason for termination of employment.

[57] The main complainant was IF, who provided evidence in these proceedings. She alleged there were four discrete incidents of the Applicant touching her. In two of those matters, her friends CA and PP were also in class or with her, but there were no direct witnesses and I have addressed all allegations in this context. CA and PP did not provide evidence in these proceedings.

[58] It is important to consider the context of the educational environment and the students' relationship with the Applicant to assist in the assessment of the likelihood of the allegations occurring. I rely on the students, the Applicant and other teachers, including the Acting Principal who have set the scene through their police statements and evidence before the Magistrates Court and in this Commission.

[59] IF gave evidence that she didn't mind having the Applicant as a teacher and he was "alright". However, her email dated 16 June 2022 to him states²²:

"...just because I told you to do your job properly does not give you teachers the right to sit there and give me dirty looks throughout the whole block."

The Applicant forwarded this email to Ms Burgess-Norris on the same day.

[60] In cross examination IF responded²³:

"Does that, do those words accurately state what you thought about Mr AB at the time you wrote and sent the email?.....Because I told him to do his job properly because he was just sitting at the front of the class on his laptop, not teaching us, yeah.

Very well. And so, annoyed about that you – you thought he wasn't doing his job properly, correct, that's what you actually thought – ?.....Agree.

– and you had no difficulty, aged what 14, telling him that?.....Yeah.

And – and did you think that teachers were sitting there and giving you dirty looks?.....Yeah.

Did that include Mr AB?.....Yes.

And again, you had no difficulty, aged 14, in writing those words and sending them to an adult teacher – agree?.....Yeah, I agree."

²² Exhibit A1.

²³ Transcript, p 77-8.

[61] PP acknowledged in her police statement that there were arguments with the Applicant as she doesn't listen a lot to teachers, has detentions for not doing her work and they just don't like him.²⁴

[62] The SSS report²⁵ completed by the Applicant on 25 July 2022, but the incidents happened on 26 July 2022, supported numerous incidents of poor student behaviour from TSM, IF and TS, which included talking in quiet reading, the Applicant being told to go away, a student deliberately knocking the worksheet off the table and his need to go over to the students to keep them on task.

[63] Ms Burgess-Norris acknowledged she had given IF and TJ a detention with her at recess due to their behaviour with the Applicant following notification through an email²⁶ on 26 July 2022 at 12.31pm from the Applicant to her. In this email, which formed the basis of the above SSS, the Applicant stated:

"Will enter this into a SSS but noticed heightened behaviour from them this am. It is pretty minor stuff but it is pretty consistent behaviours I got last term, and an impediment to me doing my job. I am more than happy minimizing my interactions with them...but find it hard when they are being constantly disruptive. It is also behaviour that becomes an issue when I'm required to take a class alone."

[64] The allegations from IF were only disclosed to Ms Burgess-Norris on 26 July 2022, during this meeting relating to the above disruptive behaviour by IF.

The First Alleged Incident reported by IF in the Humanities and Social Sciences (HASS)/English Class

[65] IF stated the first time the Applicant allegedly touched her was in the HASS or English lesson when he walked over and stood close to her and leaned on her with either his arm or stomach touching the side of her body.²⁷

[66] She then stated she was touched on the side of her arm to the side of her breast²⁸ which lasted a few seconds. No one witnessed this incident and she did not tell anyone about it at the time.²⁹

[67] IF used the term "side of her body" when she alleged he was leaning on her and said it made her feel uncomfortable.

[68] Under cross examination, she stated she had prepared her three-paragraph witness statement³⁰ dated 7 March 2024 for the Commission, and reworded the draft after Mr Jehne had sent her a prepared draft and once satisfied it was accurate and complete, she then signed it and affirmed it was true and accurate at the hearing.

[69] She then agreed³¹ it was "not fully" correct and accepted she had omitted to include she told her father, that there were not "occasions" nor would the Applicant "always come over to her". Rather, there was only one occasion the Applicant touched the side of her body

²⁴ Exhibit R2, Attachment N, p 7.

²⁵ Exhibit A6.

²⁶ Exhibit A7.

²⁷ Transcript, p 16-7.

²⁸ Ibid p 12.

²⁹ Ibid p 52-53.

³⁰ Exhibit R1.

³¹ Transcript, p 35-9.

or breast, which she stated was a spelling mistake in paragraphs one and two of her witness statement.³²

[70] She agreed she had spoken about the Applicant touching her to her parents and friends CA, PP, and brother XF, teachers Mr La Spina, Ms Burgess-Norris, the Police and the Magistrate. IF also agreed she had not mentioned the Applicant's stomach had come into contact with her. The cross examination is as follows³³:

"To not one of those people, on not one of those occasions, to whom and when you have given an account of your allegations that Mr AB touched you, on not one did you ever mention that Mr AB's stomach had come into contact with any part of your body. Do you agree? Not before the making of your statement on the 7th of March?.....Yeah, I agree.

To not one of those people, on not one of those occasions, did you ever mention Mr AB's stomach coming into contact with the side of your body. Do you agree?.....I agree.

To not one of those people, on not one of those occasions, did you ever mention Mr AB's stomach coming into contact with the side of your breast. Do you agree?.....I don't agree with that one.

Before the making of your statement of the 7th of March? You don't agree with that?.....No.

And to whom do you say you said that?.....My mother.

And presumably your father? Because you were at home?.....No, not my father. Not your father? When did you tell your mother about the side of the breast allegation?.....A couple of weeks before I told them about everything else.

Did you not tell the commission earlier, that the conversation with your parents, that took place after the episode in which you yelled at Mr AB, was the first time that you'd told them about these allegations?.....I wasn't sure about that.

But you're now sure are you?.....Not a hundred per cent sure, but I'm pretty sure."

[71] She stated she told her mother in the car on the way home from school after the incident. She stated³⁴:

"So you – if I can understand your evidence, so you're saying you have an actual recollection, you think, pretty sure, that you told your mother about Mr AB's stomach coming into contact with the side of your breast, soon after that happened, and you did so in a conversation that took place in the car, on the way home from school?.....Correct."

[72] Further questioning ensued about why she never mentioned the first alleged incident to the Police about the Applicant standing close to her and his body coming into contact with

³² Exhibit R1.

³³ Transcript, p 39-40.

³⁴ Ibid p 41.

her side of body or breast, nor in the Magistrate court proceedings, nor when she told Ms Venter, nor Mr La Spina. IF said she was too scared and did not know what to tell them.

[73] IF eventually agreed under cross examination the first incident that the Applicant's stomach or arm allegedly touched her side of her body to the side of her breast was first reported in her witness statement prepared for this hearing at the Commission.³⁵

CH's Evidence

[74] CH concurred the first report she received from IF was about the alleged art room incident and after a lengthy exchange, she accepted that if IF had told her about a teacher touching her breast she would remember.

[75] She also conceded that in the Magistrate Court proceedings she stated IF had been touched on the breast to the Police, but later conceded she may not have used the word "breast", rather the side of her body. She complained about the Police in the Magistrates Court and in the record of the proceedings³⁶ she replied:

"I told them a lot that wasn't in the statement. And I had pointed that out to them. It had a lot of spelling mistakes there were in my statement. A lot of it wasn't fixed. They said that they were going to do that further away from school. I was meant to go back to the police station with them, but I never did. I've never seen them after that until months later."

[76] She stated she went back to the station a few times, however she discovered that the female police officer that she went to see was on holiday. Despite telling the receptionist she wanted to review her statement, no one in the police station did anything. Additionally, when CH met with the female police officer, she said it had been so long she wasn't going to do anything further.³⁷

[77] CH recounted that her evidence before the Magistrates Court was that IF did not mention to the Police being touched on the breast by the Applicant.

[78] Referring to the police statements and Magistrates proceedings of other teachers, Ms Venter only referred to the complaint of the Applicant "swings his arms and results in hitting their butts, which had happened to IF more than once".³⁸ There was never any report of the Applicant touching the side or breast of IF.

[79] Mr La Spina³⁹ gave evidence in the Magistrates Court proceeding and denied any of the complainants had ever made any complaint to him about the defendant.

[80] The Applicant consistently denied having any intentional contact with the students in his police interview before the Magistrates Court and in these proceedings.

[81] When directly asked whether he stood so close to IF parts of his body touched the side of her body, her upper arm and the side of her breast to which he responded: "it's preposterous".⁴⁰

³⁵ Exhibit R1.

³⁶ Exhibit R2, p 227.

³⁷ Transcript, p 106.

³⁸ Exhibit R2, Attachment S.

³⁹ Ibid Attachment BB.

⁴⁰ Transcript, p 212.

[82] In the Respondent submissions, it was stated that the evidence of IF was consistent over time that he had touched her arm or side, noting it was less specific about the nature of the touching. It was submitted that IF's evidence that he "kept leaning on me and making me feel uncomfortable" was consistent with her evidence in the Commission of the Applicant touching her side of her body and side of her breast.⁴¹

[83] It was conceded IF did not specifically say he touched her breast in the Magistrates court or to the Police. It was stated that CH corroborated this by saying he touched her side. It was CH who said he touched the side of her breast first in the Magistrates Court but had not mentioned the word "breast" to the Police.

[84] The Applicant submitted the side of the body could not be understood to be touching her breast. The police video shows IF pointing to the lower side of her body in the vicinity of her hip, nowhere near her breast. It was contended this recent invention seriously undermines the reliability of both IF and her mother CH.

Consideration of the First Allegation

[85] In my view, IF is a strong personality and appeared very confident in providing evidence and during cross examination was forthright with her answers, not requiring breaks as offered and clearly passionate about this case and implicating the Applicant in her allegations. I consider that a grade 8 student who emails her teacher to say he is not doing his job properly and who has demonstrated strong willed inappropriate behaviour to other teachers can be viewed as capable to provide evidence of her account.

[86] However, I find the evidence provided by IF to be inconsistent, directly contradicting the evidence of PP, XF, and CA. Her versions of the story changed three times in each of the jurisdictions and her evidence was also at odds with the teachers' versions. Through cross examination, her affirmed witness statement was shown to be inaccurate, exaggerated, and false.

[87] I find her evidence of her relationship with the Applicant clearly untruthful as she said she didn't mind him as a teacher and he was alright. This was not reflected in her emails or corroborated in the evidence from her friends or other teachers.

[88] Her new allegations of the Applicant touching her thigh with his fingertips and moving up to her bottom and touching the side of her breast are examples of a lack of reliability and credibility. For these reasons, I am not convinced she is a reliable or credible witness.

[89] I find the evidence provided by CH to be unreliable as she was evasive to the questions, was reluctant and unsure in her responses. She conceded she had messed up information.

[90] The Respondent submitted IF's complaint was corroborated by her mother, CH. I disagree. CH was the first person to raise this unreported allegation purported by the Applicant, touching the side of IF's breast with his arm or stomach in her evidence before the Magistrate, which in my view, was an exaggeration and a fabrication of the allegation from IF that the Applicant stood close to her and sometimes touched her on her arm with his arm.

[91] The original allegations from IF did not include the Applicant touching the side of her body or breast and this was not raised in the allegations as part of the ED5 investigation or

⁴¹ Respondent's Further Closing Submissions, 21 June 2024, [62].

determination by the Secretary. I am satisfied she did not report this to the Police, nor report this allegation to her family, friends or her teachers. Therefore, neither the investigator nor the Secretary considered this allegation.

[92] I am satisfied this appears to be a new allegation raised initially by CH in her evidence before the Magistrates Court, however, she and IF failed to mention such a significant allegation in their police statements. CH's reasons provided for this omission were unbelievable and to state the Police were not interested in her additional comments for her statement goes to her lack of credibility.

[93] I am satisfied the Applicant did not ever touch IF on the breast or intentionally on the side of her body while leaning over her. I note the Applicant is not a tall man, with an average height and solid build, and in my view, it would be physically impossible for his body to touch her side or breast, rather if unintentional contact was made, there potentially could only be contact with IF's arm.

[94] Had IF reported the Applicant touching her breast with his body, CH stated she would have remembered that alleged contact as it is a serious allegation.

[95] Both paragraphs of the witness statement of IF now allege the Applicant 'would always come over' and 'on occasions' stand so close his stomach or his arm would touch the side of her body or the side of her breast. IF conceded her witness statement was incorrect and it contained other mistakes after affirming it was correct in the hearing. CH's evidence was directly in conflict with IF.

[96] Her evidence contradicted her witness statement and her examination in chief, as she stated the first report was after the Art room incident on the night of the 26 July 2022. IF stated that she had told her mother, but CH conceded that the report to touching IF's breast did not occur.

[97] Further evidence from the teachers indicates IF did not raise this particular complaint with them. The evidence is clear and I find it supports the Applicant's consistent express denial and evidence he did not ever knowingly touch the complainant inappropriately. I find there was no intentional touching of IF on her arm, side of her body or side of her breast.

The second alleged incident in the Art Class

[98] IF gave evidence about the second incident which allegedly occurred a month later in the Art Class where the Applicant:

"...walked right behind me and like brushed the - my bottom. And then about 10,15 minutes later, it happened to my friend CA."⁴²

[99] She stated she was standing at a table doing paper mâché with her friend CA standing beside her.⁴³ She stated:

"It was like, the palm of his hand and fingers, and it was, like, across one cheek, and from the side of my thigh to one cheek of my butt."⁴⁴

⁴² Transcript, p 13.

⁴³ Ibid, p 16.

⁴⁴ Ibid.

[100] When they went up to get more newspaper for their paper mâché, IF told CA about the incident. She was walking back from collecting more newspaper and she stated she was near the corner of the table about half a metre away from CA, and saw him touch the back of her bottom, with a swipe like a brush across her bottom for a few seconds. She said CA was just standing there facing the table and the Applicant just walked behind her.⁴⁵

[101] IF said CA told her about him touching her in class and that day IF told either Mrs Venter or Mr La Spina and her brother XF about what happened.⁴⁶

[102] She stated she and CA were minding their own business doing work and the Applicant walked past and touched her on the butt for around 10 seconds.⁴⁷

[103] Under cross examination she said the Applicant touched her for 10 seconds,⁴⁸ although she stated she was confused regarding the time, but included she was also touched on the thigh. This was the first time she had given evidence regarding being touched on her thigh,⁴⁹ this was not provided to the Police or the Magistrates Court.

[104] Drawing on her police statement⁵⁰ she stated the Applicant only touched her on the bottom one time with his hand at most for 10 seconds and that one time was in the Art class. This was confirmed in cross examination where she agreed⁵¹:

“When you answered, “it only happened one time” I want to note, was it true or false that Mr AB-according to you, that Mr AB only touched you on the butt once, that one time in the art room, Is that true or false?...Yes. True.”

[105] Initially her evidence was she had gone to get more paper mâché glue and paper and was walking back when she saw him touch the back of CA’s bottom. CA was standing at the table and CA was about half a meter away. The Applicant allegedly walked behind CA and brushed her bottom for a few seconds. She said CA told her immediately.⁵²

[106] IF conceded that the recount of the incident to the Police conflicted with the evidence given at the Magistrates Court, where with the aid of diagrams, (which were not available for these proceedings) she had stated she was walking up to get more paper. Later, she agreed with her evidence given in the Magistrates Court that CA was walking away from the main table, not IF as previously stated in evidence in the Commission and to the Police. In the police statement⁵³ IF stated she saw the Applicant touch CA on the bottom, as IF was walking back from the materials table.⁵⁴

[107] In this scenario, the Applicant would have been walking past the back of CA at the materials table with IF positioned on the other side at the work table behind his back.

⁴⁵ Ibid p 16.

⁴⁶ Ibid p 17.

⁴⁷ See ibid.

⁴⁸ Ibid p 45.

⁴⁹ Ibid p 72-3.

⁵⁰ Exhibit R2, Attachment M.

⁵¹ Transcript, p 45.

⁵² Transcript, p 16-7.

⁵³ Exhibit R2, Attachment M.

⁵⁴ Transcript, p 62-7.

[108] IF's evidence was she could see his fingers swipe off her and he kept on walking. CA then got the materials and came back to tell IF that the Applicant had just touched her "ass".⁵⁵ Her evidence at the Commission was⁵⁶:

"And so what explanation do you give now for having flipped back, abandoned the evidence that you gave in the Magistrates Court, under oath, and gone back to what you told the police in July 2022?.....Well, it's hard to remember everything that happened in the specific order, considering it was two years ago."

[109] IF stated after she saw the Applicant touch CA, she told CA she had also been touched.⁵⁷

[110] This was in direct conflict with the recorded evidence provided by CA to the Police which was played at the hearing. CA said she was standing next to IF facing the art table and he would walk past with his arms out like that and touch her bum thing.⁵⁸ In her police statement she said that she didn't really tell anybody apart from the teachers and she did not see him touch IF.⁵⁹

[111] CA stated in evidence before the Magistrates Court⁶⁰, that it could have been an accident that he brushed past her as he went past and that IF didn't say anything to her at the time, but it could have been a couple of days, maybe weeks later, not remembering what IF did say to her.

[112] IF also stated she told both teachers, Mrs Venter and Mr La Spina about the alleged incident of touching her butt in the Art room.⁶¹ This was also conceded as part of her police statement and evidence in the Magistrates Court. However, the teachers denied this notice in their evidence to the Magistrates Court. Ms Burgess-Norris's evidence was that the first she heard of any allegation of touching was on 26 July 2022, when the matter was raised with her and referred to the Police.⁶²

[113] The Respondent provided final submissions and stated:

"51 In cross-examination in relation to the art room incident (the second allegation of touching) it was put to IF that her evidence in chief had been that Mr AB had been standing behind her. That line of questioning was unfair to the witness as it was based on a false premise. IF's evidence in chief had been that she was standing and that Mr AB walked behind her and touched the back of her thigh to her bottom.

52. In relation to the art room incident [IF] made appropriate concessions in cross-examination as to an inconsistency in her evidence as to whether she or [CA] were going to the materials table when the touching occurred. [IF] agreed that she had given one version to the police and in her evidence to the Commission, and a different version in her evidence in the Magistrates Court. As [IF] frankly conceded, "Well, it's hard to remember everything that happened in the specific order, considering it was two years ago". Such minor inconsistencies in peripheral detail,

⁵⁵ Exhibit R2, Attachment M.

⁵⁶ Transcript, p 71.

⁵⁷ Ibid p 16.

⁵⁸ Exhibit R2, Attachment L.

⁵⁹ Ibid.

⁶⁰ Exhibit A5, Annexure E, p 8-9.

⁶¹ Transcript, p 47-51.

⁶² Exhibit R2, Attachment AA.

recalled two years after the event, do not undermine the reliability and credibility of [IF]'s evidence." (references omitted)

CH Evidence

[114] CH said IF had come home from school and said a teacher had touched her on the bottom, but she couldn't remember if IF had complained about any other incidents earlier.⁶³

[115] Her son XF, said he had not seen anything with his sister, but he'd seen something with CA.⁶⁴

[116] Her evidence regarding not knowing that CA had told IF anything directly conflicted with that given in the Magistrates Court, where she stated one of the girls had also told IF they had been touched on the bottom.⁶⁵

[117] Following discussions with XF, she recalled he had said he stood next to the girls in class.⁶⁶ Despite these reports from her children, she agreed she did not report the incident as she wanted to make sure of the allegations.

[118] She stated in her police statement⁶⁷ that XF had told her he saw the Applicant touch CA's bottom but did not see him touch IF.

[119] CH admitted to not having told anyone before, that IF's father was present in the room during her conversation with IF.⁶⁸ This also came up for the first time in these proceedings.

[120] CH provided confused evidence on when IF told her about the allegations. She initially said at the end of April or maybe May,⁶⁹ but then was unsure if that was the first time she received the complaint. She said she spoke to XF maybe on the same day or the day after or later that night. She had another conversation but cannot recall dates relating to the Applicant leaning over IF and touching IF on the side of her arm and the side of her body. She recalls receiving a phone call from Ms Burgess-Norris about IF disrupting the class somewhere around June or July.⁷⁰

[121] She responded to questioning about the July 2022 yelling incident and said⁷¹:

"And what did she tell you at that time?.....She had brought up that that– he keeps coming over to her constantly, it's consistent, it's multiple times a week that he's coming over and leaning on her and touching her while she's doing her work and he's making her feel uncomfortable, she doesn't like it, and because she had brought up the art incident I told her to relay that to her father, what had happened, and I said, "Well, maybe there is more to this story. Maybe it's not just a – as she's disrupting the class on purpose, maybe she's disrupting the class because something happens in that class."

⁶³ Transcript, p 83-4.

⁶⁴ Ibid.

⁶⁵ Exhibit R2, Attachment AA.

⁶⁶ Transcript, p 96.

⁶⁷ Exhibit R2, Attachment Q.

⁶⁸ Transcript, p 103.

⁶⁹ Ibid p 96.

⁷⁰ Ibid p 86.

⁷¹ Ibid p 87.

[122] The first time IF mentioned her father's presence was in relation to the yelling incident but couldn't remember if he was there for the whole conversation. This contrasts with IF's evidence that she told them about him touching the side of her breast incident a couple of weeks before she told them about everything else.

[123] CH conceded under cross examination that she could have messed up the information that happened in the Art class.⁷²

CA Evidence

[124] CA provided evidence to the Police and the Magistrates Court, but not in these proceedings. In her police statement⁷³, she stated both IF and herself were standing at the table in the Art class when the Applicant walked past them with his arms out and touched her "bum thing". She did not see him touch IF. She alleged it happened over different classes and thought the other time was in HASS or English class but didn't remember a lot of what allegedly happened or when.

[125] In the Magistrates Court,⁷⁴ she alleged that IF and herself were standing together working at the desk and the Applicant walked behind her and brushed past her bottom with his hand. She stated she did not see the Applicant touch her. She agreed it could have been an accident as he walked past in the Art class or just brushed past her. In relation to the second allegation, she agreed she didn't see him touch her and he didn't say anything at the time.

[126] CA denied having a conversation with IF or XF that day but stated she may have had a conversation a couple of days or weeks later with IF. This directly conflicts with the evidence of IF and XF. She couldn't remember if XF came around and stood near her after the incident. She also stated she did not tell the teachers about it.

[127] CA's evidence is that she does not remember IF telling the Applicant that he touched her after the class, nor him apologising. CA agreed the touch could have been an accident.

[128] Her allegation that he touched her in another class was tested in the Magistrates court proceedings where she stated the teachers move around the class and conceded she did not see him touch her and it was possible it could have been other contact, or an accidental bump and she didn't think too much of it.

XF Evidence

[129] In his police interview, XF stated that he and the girls were standing next to each other at the table and asked to go outside when the Applicant walked past and made physical contact with IF and CA. XF was across the table from them and said the girls turned around and were "like oh my gosh".⁷⁵ It was only when they went outside that the girls told XF that the Applicant had made contact with their bottoms. He alleged the Applicant was swinging his arms while walking and whacked their bottoms with the back of his hand. He also recalled it happened when CA was drawing at the table.⁷⁶

⁷² Transcript, p 95.

⁷³ Exhibit R2, Attachment L.

⁷⁴ Ibid Attachment AA.

⁷⁵ Ibid Attachment O, p 11.

⁷⁶ Ibid.

[130] XF recalled that they were doing lino prints on the day and he does not remember many details. However, he described the lino carving and printing process clearly.

[131] In his Reasons for Decision, Magistrate Brown noted that XF provided an entirely different version of events to that which IF had provided and his recall about his interactions with IF and CA immediately after the event, are in conflict with CA's evidence. He said he was sitting across the tables in Art class. His sister, IF, and CA were standing opposite him across the table. He said the Applicant walked behind them with approximately one metre of space. His evidence was that they then both made a face at the same time. The group went outside to a garden area and XF asked IF what happened, but he could not remember what they said. When questioned, he said IF had told him he had touched them when he walked past.⁷⁷

[132] At the Magistrates Court, XF's evidence was that he did not see the Applicant touch either IF or CA and only IF told him she had been touched when they went outside.⁷⁸

[133] XF stated he believed IF told her parents that night after the incident but XF was asleep at the time.⁷⁹

Teachers' Evidence

[134] Without the benefit of the teachers providing evidence in this case, I refer to their evidence provided in the Magistrates Court and police statements. Ms Venter provided evidence that she was called to a classroom on 7 July 2022 because of an incident between two of the girls from the same friendship group who were having an altercation where the Applicant appropriately stepped in between them.⁸⁰

[135] When one of the girls took issue with being "interrupted" by the Applicant, Ms Venter defended the Applicant's conduct and the girls responded that he "touches their butts". The complainant was not PP, and IF and CA were not present. She gained the impression it was accidental swinging of his arms and was confident the contact was accidental.⁸¹

[136] Ms Venter summarised in her police statement the content of her email dated 7 July 2022 to Mr Lutwyche⁸²:

"The girls then brought up the fact that AB touches their butts. I asked them to explain and the way they demonstrated it and described it, it seems to be when he walks he swings his arms and not realizing this actions results in him hitting their butts. They said it has happened to [IF] more than once and seems to have had a few close calls with others."

[137] Ms Venter confirmed she received an email from the Applicant dated 7 July 2022 at 9.02am about the alleged inappropriate student behaviour and she followed up and spoke to those students. This email from the Applicant predated the allegations made by IF, CA and PP and related to the alleged inappropriate behaviour from some of the members of this group:⁸³

⁷⁷ Ibid, Attachment BB, [24].

⁷⁸ See *ibid*.

⁷⁹ See *ibid*.

⁸⁰ Ibid Attachment S.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid Attachment I.

“Incident with TSM in home group. Her and TJ had an argument. When I told them to stop TSM called me a fat fucking cunt. She called me a cunt again after. Should go home. Will SSS it later. Had issue with IF as well. AB.”

[138] Ms Venter’s view was one of those students involved, TJ, is quite vocal and it is her view that had anything happened to TJ, she would have verbalised and reported it immediately, which she did not do.⁸⁴

[139] Mr La Spina gave evidence in the Magistrates Court proceeding and denied any of the complainants had ever made any complaint to him about the defendant.⁸⁵

[140] The then Acting Principal, Mr Lutwyche’s statement to Police outlined he was informed about the allegation by IF of the Applicant touching her “butt”,⁸⁶ by Ms Burgess-Norris on 27 July 2022. He acknowledged that he had not acted on the earlier email from Ms Venter.⁸⁷

[141] Mr Lutwyche gave evidence to the Magistrates Court that there was little respect between the Applicant and that the students (IF, CA, PP, TSM and TJ) were disruptive students.⁸⁸

[142] A mandatory report was lodged by Ms Burgess-Norris on 27 July 2022.⁸⁹ Mr Lutwyche stated that the mandatory report was based on the report provided by IF to Ms Burgess-Norris whilst IF was being disciplined for her poor behaviour. IF alleged the Applicant touched her on the “butt”⁹⁰ in class. He stated he had not received any report of student allegations from any other teachers.

The Applicant’s Position

[143] The Applicant consistently denied having any intentional contact with the students in his Police interview before the Magistrates Court and in these proceedings.⁹¹

[144] The Applicant’s evidence in the Magistrates Court was consistent with his evidence in this hearing. He denied having any recollection of touching the complainants, having any indecent intent and having any intention to make contact, but conceded there may have been unintentional touching of which he is not aware⁹².

[145] The date of the relief teaching shift in Art was 23 February 2022 and the Applicant covered another Art class in April.

[146] In his witness statement,⁹³ the Applicant denied the allegations and affirmed the truth of his evidence as set out in his police statement and evidence to the Magistrates hearing as set out on transcript.

⁸⁴ Ibid Attachment S.

⁸⁵ Ibid Attachment BB.

⁸⁶ Transcript, p 16.

⁸⁷ Exhibit R2, Attachment T.

⁸⁸ Ibid Attachment AA.

⁸⁹ See *ibid*.

⁹⁰ Transcript, p 16.

⁹¹ Ibid Attachment P.

⁹² Ibid Attachment AA, p 1.

⁹³ Exhibit A8.

[147] In these proceedings, the Applicant stated he was initially confused with the line of cross examination. He denied that his statement to Police⁹⁴ conceded any touching on the complainant's bottoms. He said: "There could have been incidental contact as I walked past, but never with an open hand."⁹⁵ In cross examination he conceded that there was a possibility he touched them on the bottom accidentally.⁹⁶

[148] There was only one "inconsistency" put to the Applicant under cross examination. He recalled as part of the investigation he had initially reported he "bumped into" CA, whereas his evidence in the Commission was he may have touched CA on the bottom accidentally.

[149] The Applicant provided evidence that there was only around 1.2 metres of space to get around the students in the Art room.⁹⁷

[150] The Applicant gave evidence that IF said to him at the end of that Art class in February 2022, that he had touched CA's bottom. His evidence was that he said in response: "I don't think I did but if I did, I'm sorry" as he wanted to diffuse the situation knowing IF was volatile. He stated IF did not raise any allegation of him touching her. He said that was the end of the interaction. He said he was unaware of any physical contact and didn't touch the student and CA seemed to accept his apology.⁹⁸

[151] CA also does not remember IF saying anything to the Applicant at the end of class about CA being touched or the Applicant apologising if he did touch her.

[152] His evidence was that he accepts touching a student's bottom is a serious allegation and he did not report this allegation because he knew that he had not touched her⁹⁹:

"I didn't touch the student, so I didn't think it was required. And [CA] seemed to accept my apology."

[153] In the Magistrates Court, IF denied she said to the Applicant at the end of the Art class that he touched CA and she did not mention that he touched her. She also denied that he said in response: "I don't think I did but I apologise if I did".¹⁰⁰

[154] The Applicant was charged with offences of assault with indecent intent on 28 July 2022 and was bailed¹⁰¹ on conditions he must not go within 20 m of the Mountain Heights School and not within 10 metres of any student, which prevented him from working as a teacher.

[155] The Applicant expressed concern about the investigation process and in his witness statement noted that the ED5 investigator did not review his internal emails nor the SSS entries. The Applicant did not speak to the relevant teachers, Ms Burgess-Norris, Mr La Spina, Ms Venter and Mr Lutwyche, and instead relied on the police interviews only.¹⁰²

⁹⁴ Exhibit R2, Attachment P.

⁹⁵ Exhibit A5, Attachments G and H.

⁹⁶ Exhibit R2, Attachment P.

⁹⁷ Ibid Attachment BB, p 13.

⁹⁸ Transcript, p 173.

⁹⁹ Exhibit R2, Attachment AA, p 2.

¹⁰⁰ Transcript, p 183.

¹⁰¹ Ibid p 184.

¹⁰² Exhibit R2, Attachment AA.

[156] In cross examination, when challenged that he deliberately engaged in the alleged conduct, he stated¹⁰³: “I totally deny it.”

Consideration of the Second Allegation

[157] IF’s evidence has changed over time with her direct evidence in these proceedings having multiple flaws and inconsistencies, and it is not corroborated. The evidence is summarised below:

- a. The Applicant touched IF on the bottom as he walked past them in the Art class;
- b. The touch to the back of her thigh and her bottom, lasted for 10 seconds but he did not stop behind her, although this was changed to a few seconds;
- c. IF went to the materials table to get some more paper mâché paper and then conceded it was actually CA who walked to the materials table;
- d. In her police statement IF said it was her walking back from the materials table when she saw the Applicant touch CA, whereas it was the opposite scenario and this is conflicting with the evidence from CA and XF that both CA and IF were standing together at the table;
- e. IF saw the Applicant touch CA’s bottom on her return, yet the Applicant was standing between IF and CA with his back to IF;
- f. IF said she told CA about being touched, which CH corroborated, however, this conflicted with CA, who said IF had not told her and she did not tell IF about the incident at the time, maybe a couple of days or weeks later;
- g. CA said she was standing next to IF at the table when the Applicant walked past them both and his arms brushed her bottom in direct contrast to IF’s evidence. She did not see him touch IF;
- h. IF stated she told the teachers about the alleged incident; however, the teachers deny being told until 26 July 2022
- i. XF said they were going outside when the Applicant touched both IF and CA as they stood at the table with one metre of space behind the table, but he claimed that he didn’t see it - he just saw the surprised look on their faces. He said they were in a lino class, not paper mâché class, in contrast to IF; and
- j. Neither CA nor IF remember IF telling the Applicant after class that he had touched CA.

[158] The alleged episode in the Art room consisted of one touch to IF’s bottom as conceded by IF. The evidence is conflicting and uncorroborated with no one witnessing the Applicant touch IF and she appears not to have reported such a serious allegation according to the teacher’s evidence.

¹⁰³ Exhibit A8, p 5.

[159] The Applicant completely denies he touched either girl, although by his own admission, he said IF told him he had touched CA on the bottom at the end of class. He apologised to remove the risk of any potential heightened reaction by IF, but noted he did not think he had touched her so did not report it. I find this evidence credible.

[160] The other teacher's evidence is also credible and supports the Applicant's position and the context of the disruptive nature of the behaviour of the complainants. This evidence includes emails from the teachers, the Applicant and the students which indicate the Applicant reported the disruptive behaviour prior to any allegations.

[161] I am of the view that if the Applicant had touched IF, she would have raised it with the Applicant, when she mentioned CA. She had no problems assertively raising issues with his competence in other forums. Neither girl remembers this discussion with the Applicant. The absence of recall from either IF or CA again raises concerns on reliability as I see no reason for the Applicant to make up this discussion.

[162] The evidence from CH was that the first report of allegations from IF was in relation to this incident. She did not report this alleged incident to anyone. I find it inexplicable a mother would not report an allegation by her 14 year old daughter that she was touched on the bottom by a teacher. She also noted she had not told anyone in the course of providing statements that IF's father was in the room when IF reported the allegations. Whether or not the father was in the room again results in questioning the reliability of the evidence.

[163] CH does not corroborate the allegation and conceded she could have messed up the information about reporting the Art room incident. I find her evidence was inconsistent and vague, and I doubt the veracity of her evidence.

[164] I am left with conflicting evidence and no clear version or witness to the allegation that IF was touched on the back of her thigh to her bottom by the Applicant. I am not satisfied that IF was actually touched by the Applicant.

[165] In relation to the allegation of touching CA, it is my view there may have been an incidental brushing past of CA but CA agreed it could have been accidental and she did not tell the teachers. I find that it is unbelievable that IF witnessed this alleged touch due to her position behind the Applicant when CA was near the materials table.

The Third Alleged Incident in the HASS/English Class

[166] IF was standing behind her desk in HASS/English class waiting to be dismissed and the Applicant walked up behind her and she felt fingertips touch the back of her thigh to her bottom for a few seconds. Another friend, PP, was two metres away at the other side of the table.

[167] This was the first time IF had alleged the Applicant had touched the back of her thigh and then run his hand up to her bottom.

[168] The statement made by IF to Police¹⁰⁴ in a recorded video interview on 28 July 2022 explained that following the Art class incident, the Applicant had been "real touchy" and when questioned, she said he had touched her around 10 times, and said a "few times last term like the start of it and then it stopped near halfway and then continued...till the end of it".

¹⁰⁴ Exhibit A5, Annexure J.

[169] In the second interview¹⁰⁵ to Police, IF stated that after the Art class incident, he would stand close to her and it continued to happen.

[170] In both references to the Applicant standing close to her in class, IF only referred to "his arm on her arm". There was no mention of breast.

[171] CH stated¹⁰⁶ that following the Art incident "there were a couple of other times that she told me about the Applicant touching her on the side or on the arm, but nothing further happened in that class."

[172] IF stated the Applicant walked past her and PP, who were both standing behind a desk waiting to be dismissed. PP was facing the desk and IF was facing away from the desk, when IF saw him brush his hand across her bottom as he walked past, and she saw PP had a "shocked face".¹⁰⁷

[173] There was no evidence IF told anyone of this incident before this hearing.

[174] IF described an incident where she witnessed the Applicant touch PP on the bottom. IF gave the following evidence¹⁰⁸:

"And can you please explain to the Commission what you saw with respect to that incident with (PP)?.....So (P) and I were standing behind our desk, again, at the end of a HASS/English lesson, and we were waiting to be dismissed. I had my back turned towards the desk, and she was facing the desk, and he had walked past her and brushed her bottom.

And when you say that he had brushed her bottom, what could you actually see from where you were standing?.....His hand, like, this part of his hand go across her bottom.

And can you just explain to the Commission again where you were standing, as compared to (P)?.....So we were both standing behind a desk. She was facing towards the desk, and I was facing away from the desk, kind of, like, to my side, and he walked past.

When you say 'he' walked past, who was it that walked past?.....Mr AB."

PP's Evidence

[175] PP's police statement¹⁰⁹ alleges the Applicant walked up behind her when she was standing at her desk and swung his arms and his arm lightly brushed past but he probably did not mean it. She said there was enough room to walk through easily.

¹⁰⁵ Exhibit R2, Attachment M.

¹⁰⁶ Ibid Attachment Q.

¹⁰⁷ Transcript, p 19.

¹⁰⁸ Ibid.

¹⁰⁹ Exhibit R2, Attachment N.

[176] She stated she did not think he meant to touch her. She stated to the Police¹¹⁰:

“Maybe in one of the class, in one of the classrooms I reckon, I was just like, I was standing and he just like walked behind me, but probably didn’t mean to, but it was just like yeah.”

[177] PP stated she told IF the next day, who said the Applicant had touched her once. She did not remember where this allegation occurred, just at school and consistently said he probably didn’t mean to do it but it was a light brush “just like went across”. She stated this happened at the end of last year, Term 4.

[178] She said she had not told any teachers, despite having a conversation with Ms Venter on 7 July 2022 about the Applicant touching butts relating to IF.

[179] Her evidence before the Magistrates Court was the alleged touching was in late 2021, well before the date of the allegation by IF to being touched in mid-2022, which concerned the Magistrate and he named her “a most unimpressive witness indeed”.¹¹¹ It was noted Magistrate Brown was critical of PP’s credibility as a witness and she was not cross examined in the Magistrates Court.

[180] She gave some supplementary evidence that the touching was actually in Term 1 of 2022 but was unclear of the date or where the allegation occurred. Her excuse was she had a bad memory. She had sent an email¹¹² to Mr Lutwyche on 28 July 2022 to clarify the incident was in Term 1 of 2022.

[181] PP did not corroborate the allegation happened at the same time as IF’s alleged contact, but reiterated to Police and the Magistrate that the group of students did not like the Applicant.

[182] The Respondent acknowledged PP was not called as a witness and not available for cross examination.

Consideration of the Third Allegation

[183] Without the benefit of hearing direct evidence from PP, I was only able to read the Magistrate Court transcript and decision, Police transcript, the police statement and view PP’s interview with the Police. In my view, she was unconvincing, vague and consistently admitted the Applicant probably did not mean to touch her.

[184] I also note the difficult relationship between the two parties, the stated fact they did not like the Applicant and the disruptive nature of the behaviour of PP, which the Applicant was trying to address.

[185] I am of the view the responses by PP to Police were vague and her allegation was not convincing. She admitted the Applicant may not have meant to touch her and I cannot accept her response of having a bad memory to make up the details of the allegation and her uncertainty of such a significant event occurring in which she cannot name the class, area of the school or approximate dates.

¹¹⁰ Ibid.

¹¹¹ Ibid Attachment BB, [38].

¹¹² Ibid Attachment U, Attachment V.

[186] Her evidence was she told IF the next day, however this directly conflicts with IF's evidence that she had seen him touching PP.

[187] I am satisfied that the Applicant did not touch PP, as alleged.

[188] I also note the finding of Magistrate Brown who found PP to be unconvincing and determined the Applicant did not touch PP as set out in the allegation.

[189] I am convinced the new allegation from IF that the Applicant allegedly touched her with his fingertips from her thigh up to her bottom is not credible. She did not tell anyone else about this allegation and she had not raised this allegation in either of the proceedings before.

[190] In my view, this is a further example of extending the allegations in each proceeding from his arm touched her arm to his fingertips touched from her thigh to her bottom to increase the potential impact factor of the allegation.

The Fourth Alleged Incident in the English class

[191] In an English class with the Applicant co-teaching with Ms Burgess-Norris on 26 July 2022, IF yelled at the Applicant to go away because he came over and was really close to her and she didn't feel comfortable. She and her friend were talking, catching up after the holidays and he came over and wouldn't move away so she raised her voice. She said he was 20 centimetres away or about the size of an A4 piece of paper away. The Applicant did not touch her on this incident.

[192] Ms Burgess-Norris intervened and asked her to leave the class.

[193] She stated she spoke to both her parents for the first time after this incident and then reported the earlier alleged incidents to Ms Burgess-Norris. She attended two interviews with the Police who provided a statement within two days on the 28 July 2022.

[194] In cross examination, IF stated during the second police interview, she did not mention she had reported the incidents to her father and was unsure if she had in the first interview. Her evidence was that she was unsure if she had told Police but insisted she had told her father at the time.

[195] Her evidence was that she spoke to her mother and father at the same time after this incident. She confirmed she told them about the first incident of the Applicant touching her on the side of her body and her breast and the Art room incident.

[196] In both police interviews, IF only mentioned she had informed her mother without any mention of her father. This is a statement made by in relation to her witness statement, where she explained she forgot to mention her father.

[197] She reported to Police she was just sitting at her desk with one of her friends and they were talking about their work and what they did in the holidays. The Applicant stood really close and said he would go when they were actually working. IF asked him to go away and he wouldn't so she raised her voice and said: "can you go away, I don't want you near me."

[198] Ms Burgess-Norris came over from where she was working with another student and the Applicant moved away. She asked IF to leave the room.

[199] In the Magistrates Court, IF alleged the Applicant was leaning over her desk as close as an A4 piece of paper, but the evidence of Ms Burgess-Norris who was co-teaching in the same classroom at the time, was that he was standing 2 metres away from IF on the other side of the desk. He was standing still and she could not recall seeing the Applicant any closer than that to IF.

[200] In the Magistrates Court, CH said that IF explained her behaviour in class as trying to draw attention to her because she was being touched. IF denied she said that.

[201] Ms Burgess-Norris called CH about the relationship between IF and the Applicant and reported IF was disruptive in class.

[202] In an SSS report dated 26 July 2022 at 4.54pm from Ms Burgess-Norris, it stated that she spoke to CH about IF and XF and relevantly wrote about IF: “Involving herself with drama and pushing others away.” It records that CH has spoken to IF about not getting involved and she is aware of IF’s poor behaviour. Ms Burgess-Norris spoke about IF and the Applicant not getting along which had the potential to blow up as they need to spend time together for the rest of the year.

[203] CH recalled IF told her the Applicant constantly comes over “multiple times a week” and leans on her touching her while she works. She said¹¹³:

“And what was the content of that conversation?.....That was after she’d gotten home from work. Her father and I had sat down and speaking with her and told her, you know, essentially you need to pull your head in at school. Stop stuffing around in class, stop disrupting the class, just had a complaint about you disrupting the class and blowing up and causing a scene and I asked her that she did go to school the next day and apologise to the teacher, and then that’s when she’s broken down and she said to me, “It wasn’t like that, it was because he had been touching me, and I don’t like him so close to me. And I was yelling and screaming at him to move away from me, to bring some sort of attention at the back of the class so that everybody else would turn around and see what was going on.”

[204] CH stated IF had reported to her she was feeling uncomfortable in the classroom¹¹⁴:

“Think about it in time. Can you tell the Commission what the next conversation you had with [IF] was?.....No, I don’t know how long afterwards that was. I can’t recall dates. But she said that she’d been feeling uncomfortable in the classroom, because the teacher was leaning over the front of her, or behind or beside her, touching her on the side and the arm. No, I don’t – as a mother I don’t – the question, again, you know, are you sure it’s not coming to checking the work, he’s not just accidentally – ’cause you know, she feels that he doesn’t need to be that close to me, is what she said.

And think carefully about what she told you on that occasion. Did she describe in any greater detail about where she was touched?.....I’ve asked her and she said [indistinct words] arm and down her side. And perhaps if you can just put in words, [CH], what you have just demonstrated over the video-link, please?.....I’ve just showed you exactly where she’s shown me where she was being touched down the

¹¹³ Transcript, p 86.

¹¹⁴ Ibid p 85.

side of her arm and down the side of her body, depending on how she was sitting, whether she's sitting forward, whether she's leaning back on her chair. That's how she said to me, it depended on where she was touched."

[205] She told IF to talk to Ms Burgess-Norris and report the incidents. The Acting Principal reported the allegations to the Police on 28 July 2022. CH attended the first interview with IF, but not the second.

[206] CH gave evidence that she had not told anyone before that IF's father was present during the conversation about the alleged incidents.

[207] Ms Burgess-Norris provided evidence in the Magistrates Court and to the Police that she co-taught with the Applicant. Her evidence relates to the incident in the HASS/English class where she co-taught with the Applicant and had observed him in a teaching role and student interactions throughout 2022.

[208] Her evidence in relation to this alleged incident is that she was co-teaching the class and they were both moving around the room observing half the class which was around 10 students. She heard IF complaining loudly to the Applicant: "Get away from me" and she immediately looked up and saw the Applicant standing stationary about two metres away from IF on the opposite side of her desk.

[209] Ms Burgess-Norris said IF was attempting to get eye contact with her friends to get their attention and she immediately went to stand between IF and the Applicant. She told IF she would discuss the incident the next day with her, and she should discuss her behaviour with her mother. She followed this up with a call to IF's mother.

[210] Ms Burgess-Norris stated to CH that IF and the Applicant did not get on and she asked CH to speak to IF that night, and other unrelated issues of concern were discussed.

[211] The next morning on 27 July 2022, she met with IF who stated the Applicant made her feel uncomfortable and she said: "he touched me". She reported this to the Acting Principal. This was the first time she had heard these allegations.

[212] Ms Burgess-Norris suggested the friendship group containing IF, CA and PP were a disruptive group, talkative and at times inappropriate and could be triggers to escalate issues which caused difficulties for the teachers. She had not seen the Applicant touch a student in any way and his moving around the classroom was unremarkable.

[213] The SSS report¹¹⁵ completed by the Applicant on 25 July 2022, but it happened on 26 July 2022, documents the incident of the stationary position of the Applicant on the other side of the desk to IF which was witnessed and corroborated by Ms Burgess-Norris. Relevant to this allegation, the Applicant reported:

"8. When off task, I went over and asked them to get back on task. They wouldn't let me look at their work. I said I'd go when they'd started again. I'm standing other side of the desk and then a good foot back. IF said she had started. Advised by Alex to just give them space shortly after which I did."

[214] The Respondent submitted the discrepancy of the inconsistent distance between them and the evidence from Ms Burgess Norris he was standing on the other side of the

¹¹⁵ Exhibit A6.

desk is merely peripheral to the core allegation and does not substantially undermine IF's credit.

[215] It was further stated, the incident of 26 July 2022 on the first school day after the holidays has the ring of truth to it. The issue having been raised with her parents previously and Ms Venter on 7 July 2022 (and nothing having been done), IF felt uncomfortable when the Applicant was close to her. It was only when Ms Burgess-Norris enquired into why IF was acting out that the allegations were aired.

[216] This was countered by the Applicant who stated the differences substantially undermine the reliability of IF's evidence and are not able to be brushed aside as peripheral.

Consideration of the Fourth Allegation

[217] I am satisfied the Applicant was two metres away on the other side of the desk when IF became disruptive. I accept the evidence of Ms Burgess-Norris provided to the Magistrate as honest and credible. She was a witness in the classroom to the fact the Applicant stood two metres away from IF, who had stated he was only an A4 piece of paper away. She was present in the classroom with the Applicant and immediately looked up when she heard the noise from IF and she saw the positions of both parties. Her view was IF was attention seeking to her friends.

[218] I am unable to accept IF's version of events. As the Applicant was two metres away from IF, in my view it is implausible he could have touched her or been uncomfortably close to her. I accept Ms Burgess-Norris' evidence and the evidence of the Applicant, which was substantiated in writing by the Applicant in the form of the SSS report submitted prior to the allegations being made.

[219] I am satisfied the Applicant did not touch IF in the HASS/English class. Rather, he was appropriately monitoring the progress of the schoolwork of disruptive students.

Consideration on Valid Reason

[220] To determine if there was a valid reason for his termination of employment, the onus of proof rests with the Respondent.¹¹⁶ Valid reasoning pertains to whether there was a sound, defensible and well-founded reason for the dismissal, in the context of the employee's capacity or conduct.¹¹⁷

[221] 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 -

the capacity, performance or conduct of the employee; or

the operational requirements of the employer's business."

¹¹⁶ 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.

¹¹⁷ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[222] The parties agree the Applicant had a reasonable expectation of continuing employment as a permanent employee of the State Service.

[223] The reasons for the termination of employment must be valid, not just in the subject matter, but in soundness, defensibility and based on a proper foundation.

[224] The civil standard of proof, which is the balance of probabilities, applies as do the principles in *Briginshaw v Briginshaw*. The Commission must reach a comfortable level of satisfaction in finding the matters proved on the balance of probabilities consistent with the seriousness of the allegations and reflecting the serious consequences of any finding. Consistent with these principles, one would need a very high standard of evidence to accept any of the allegations made by the three students are true on the balance of probabilities.

[225] An examination of the key reasons and evidence provided by the Respondent for the valid reasons are as follows:

- a) Breaches of the Code of Conduct based on the allegations by three female students;
- b) the loss of trust and confidence in the Applicant as an employee;
- c) he presents an unacceptable risk of harm to female students under his supervision as a Teacher;
- d) suspension of his registration under the Registration to *Work with Vulnerable People Act 2013* and the *Teachers Registration Act 2000*.

[226] I am not bound by the reasons given by the employer. Rather, I must determine afresh whether there was a valid reason for dismissal based on all the evidence before me.

[227] Relying on the principles outlined in *Walton v Mermaid Dry Cleaners Pty Ltd*,¹¹⁸ my role is not to stand in the shoes of the employer who made this decision, rather the role of the Commission is "...to assess whether the employer has a valid reason connected with the employee's capacity or conduct".¹¹⁹

[228] I have taken into account all the circumstances of the case and have considered the evidence, the authorities and materials provided by the parties, and the context of the conduct and applied a commonsense approach to my determination.

[229] My determination is based on the assessment of the evidence before me and I concur with the Applicant that this is an "oath-on-oath" case. In this matter, the two witnesses were not convincing and in fact contradicted each other on many occasions.

[230] The Respondent did not present the other two complainants to provide witness evidence, so I was unable to assess their credibility or have the benefit of hearing any cross examination. Accordingly, I have weighted and considered their complaints based on written evidence.

¹¹⁸ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681.

¹¹⁹ *Ibid* [685].

[231] I find myself unable to accept the allegations are true and find the Applicant did not intentionally touch any of the three students on their bottoms, side of body or breasts (as newly introduced in these proceedings) based on the reasons earlier set out.

[232] The Applicant has been working as a teacher since 1996. He commenced working with the Respondent in 2015. These complaints are the first and only allegations that have been made against him.¹²⁰

[233] He has been employed at Mountain Heights School since 2020. This school is in the seventh percental of Index of Community Social Educational Advantage and the students have significant behavioural issues. There is no dispute between the parties that the complainant students have a pattern of disruptive behaviour at school. This was confirmed by the teacher's evidence given before the Magistrates Court. This theme came across strongly and, in my view, may have been a factor in the behaviour of the students in making these allegations.

[234] I reject the Respondent's claim that the tendency and coincidence evidence is capable of significantly bearing proof of each complainant's allegations. I have a complete lack of evidence before me that the allegations of walking behind students and intentionally touching their bottoms were true and therefore it was not a pattern of behaviour by the Applicant. I accept his long tenure as a teacher with no previous allegations and his evidence that he did not intentionally touch the students.

[235] The Applicant has consistently denied the touching occurred, however, conceded there may have been incidental touching or brushing as he has walked past but never with an open hand. He has been forthright in his evidence in all jurisdictions denying that he has intentionally touched their bottoms over clothes.

[236] Three year eight students alleged the Applicant touched their bottoms over their clothes while in class. Police interviews were held on 26 July 2022 and included IF's brother XF, allegedly a witness to one of the incidents.

[237] The Applicant was directed to leave and remain away from the workplace on 28 July 2022 and an ED5 investigation commenced on 23 August 2022. His RWVP registration was suspended on 29 July 2022 and on 5 October 2022 his Teachers Registration was suspended based on these allegations.

[238] An ED6 investigation commenced alleging he was unable to efficiently and effectively perform his duties of a teacher as he did not hold current mandatory registrations.

[239] The criminal proceeding was heard on 12 and 13 September 2023 and on 18 October 2023, Magistrate Brown dismissed all three counts of assault.

[240] The Secretary determined the Applicant had breached the Code of Conduct one day after receipt of the Applicant's show cause response and following the Magistrates decision. I note the Secretary stated she had taken into account the findings and progressed with the sanction of termination of his employment in accordance with s 44(3)(a) of the SS Act on 7 November 2023. I cannot agree with the finding of a breach of State Service Code of Conduct based on the evidence before me, due to the fact I have found the conduct of intentional touching of the students did not occur.

¹²⁰ Exhibit A8.

[241] In these proceedings, the Respondent relies on new allegations which were not considered by the Secretary, nor before the Magistrates Court which include the Applicant touching the side of IF's body or breast with his stomach or arm and touching her thigh up to her bottom. I find these new allegations unconvincing and reflected negatively on the credibility of both witnesses.

[242] The key condition in determining a valid reason, is whether the touching was intentional and if found, would warrant the finding of a valid reason for termination of employment. There is a complete lack of evidence before me to substantiate any intentional touching of the three students by the Applicant.

[243] The Applicant has admitted there may have been incidental, accidental touching with the back of his hand which he was unaware of. I find his evidence was truthful and find his consistent denials believable. I am satisfied he has never intentionally touched a student. An incidental touch is not a basis for a valid reason for termination of employment.

[244] Having made my decision based on the evidence before me, I note Magistrate Brown had come to a similar conclusion. In his decision he rejected all three allegations against the Applicant and stated¹²¹:

“However, as discussed below, I am not satisfied about any such pattern of behaviour. Indeed, I am not satisfied of any single episode of any touching and I am certainly not satisfied that the defendant did intentionally brush past any student, let alone that he had any indecent intent in doing so.”

[245] Having found the four allegations from IF against the Applicant to be unsubstantiated and the two allegations from PP and CA to have no basis, I am satisfied that the alleged conduct did not occur and therefore there was not a valid reason for termination of his employment pursuant to s 30(3)(a) of the IR Act.

[246] Having found there was no valid reason for the termination of employment of the Applicant, I find he was accordingly unfairly dismissed.

Remedy

[247] Having found the Applicant was unfairly dismissed, I now consider the relevant submissions to determine the remedy. It is a fact that the Applicant had his RWVP suspended because of the allegations being made. As the investigation process, including criminal investigation had not concluded, an application for renewal of his RWVP was not renewed. Additionally, his registration with the Teachers Registration Board was suspended as a result of the suspension of the RWVP.

[248] An essential requirement to teach is holding both a RWVP and a Teachers Registration. He cannot teach until both registrations are renewed.

[249] Reinstatement to the job he held immediately before the termination of his employment is the principal remedy in accordance with s 30(9) of the IR Act. Other options include re-employment or if either of these options are impracticable, compensation.

¹²¹ Exhibit R2, Attachment BB.

Applicant's Submissions

[250] The Applicant seeks reinstatement to the job he held immediately before the termination of his employment.

[251] While it is accepted the Applicant is required to hold a current Teachers Registration and a valid RWVP, the suspensions are directly related to the allegations that are the basis for the Respondent's reasons for termination of employment. It was submitted that if there was a finding that the allegations were not substantiated, it would be unfair for the Applicant to be blocked from reinstatement on the grounds he did not hold current registration.

[252] While it was acknowledged the registration process is outside the jurisdiction of the Commission, with the finding the allegations are not true in addition with the Magistrates decision, the Applicant is confident he can reapply for the RWVP and subsequently seek the lifting of the suspension of his teacher's registration.

[253] It was submitted that there was virtually no evidence led by the Respondent, who bears the onus, on the impracticality of the Applicant's return to the workplace.

[254] The Applicant's former colleagues provided statements to the Police and evidence in the Magistrates Court and there was no evidence they would have any difficulty working with the Applicant in the future.

[255] In response to the alleged loss of trust, the Applicant relied on the propositions in *Nguyen and Le v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter*¹²² at [27], where the Full Bench stated:

"[27] The following propositions concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate may be distilled from the decided cases:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or

¹²² [2014] FWCFB 7198.

misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.

- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.

[256] In relation to loss of trust, the Applicant submitted that the finding of an unfair dismissal based on the allegations being found to be untrue should relieve that issue.

[257] It was stated there could not be a risk to female students if the allegations are not found, and he cannot stand forever condemned as a risk.

[258] The Applicant submitted s 31 in conjunction with s 20 of the IR Act provides a wide power to make an order directing anything required to be done or any action required to be taken to settle the dispute.

[259] In the event the finding is he has been unfairly dismissed, it was stated the Applicant should have a chance to obtain the principal remedy by application for the respective registrations.

[260] The Applicant has provided in his witness statement¹²³ an outline of the hardship suffered as a result of the process of being stood down pending the investigation of the allegations and subsequent determination. He left Queenstown on advice from the Police, he had to relinquish his subsidised accommodation, has been impacted by medical issues, had additional costs moving to Sydney and commenced a health plan to manage his mental health deterioration. This is all within a background of the criminal proceedings, legal fees and the loss of salary and continuing employment impacting with his loss of professional reputation as an experienced teacher and resultant significant financial hardship.

[261] The Applicant stated in his witness statement: "I would dearly love to return to my career, and the vocation that I love".

Respondent submissions

[262] The Respondent submitted the employer has sound and reasonable grounds that reinstatement or re-employment is impracticable on the grounds of the loss of trust and confidence in the Applicant and the unacceptable ongoing risk to female students. Additionally, the Applicant does not hold the requisite registrations to perform his duties.

[263] The performance of his duties as a teacher would be unlawful due to the fact he currently does not hold registration of the RWVP and the Teachers registration. This makes reinstatement or re-employment impracticable.

[264] It was the evidence of Ms Pook¹²⁴ that finding that the Applicant has touched students in an unnecessary, unwanted, and inappropriate manner means "there remains a concern that Mr AB does pose an unacceptable risk to students." The Department has a duty of care to keep children safe for any actual harm or an acceptable risk of harm.

¹²³ Exhibit A8.

¹²⁴ Transcript, p 120-1.

[265] IF provided evidence¹²⁵ that she would not want to go back to school and would be terrified if the Applicant got his job back at Mountain Heights School.

[266] The Respondent states that if an unfair dismissal is found, reinstatement or re-employment is impracticable and is seeking up to 6 months ordinary pay by way of compensation.

Consideration and findings

[267] Section 30(9) of the IR Act provides that the principal remedy is reinstatement to the job the Applicant held immediately before the termination or if the Commission deems it appropriate, an order for re-employment of the employee for that job. Subsections (10), (11) and (12) provide the Commission with power to order compensation if in the Commission's opinion, reinstatement or reemployment is impracticable and includes the matters to consider in respect to the issue of compensation.

[268] I rely on *Nicholson v Heaven and Earth Gallery Pty Limited*¹²⁶ where Wilcox CJ said that all the circumstances of the case relating to both employee and employer need to be considered and evaluated to assess the practicality of reinstatement and if that poses unacceptable problems to productivity or harmony with the business, it may be impracticable to order reinstatement.

[269] It is the discretion of the Commission to determine whether it is impracticable for the Applicant to return to the workplace, after consideration of all the circumstances relating to both the employer and employee. I am satisfied that in the event the Applicant is reinstated, there would be no loss of productivity or harmony in the business, providing he is reinstated to a school in another region of Tasmania.

[270] In *Perkins v Grace Worldwide (Aust) Pty Ltd*,¹²⁷ the Full Bench commented that a loss of trust and confidence is a relevant consideration and each case must be decided on its own merits. They also said that for a viable and productive employment relationship there must be sufficient trust. It was said at page 191:

“In most cases, the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive.”

[271] The Respondent relies on the Secretary's loss of trust and confidence in the Applicant to work in the State Service as one of the grounds it is impracticable for him to return to the workplace. That belief was based on the Secretary's finding that he had committed the intentional acts of touching female student's bottoms. Based on the further evidence before me, I find that is simply not true. In my view, this position now negates the perceived loss of trust and confidence. His colleagues have not provided any evidence of any loss of trust and confidence in the Applicant.

[272] There was limited evidence led by the Respondent on the impracticability of the Applicant's return to the workplace by his colleagues or supervisor. Ms Pook provided

¹²⁵ Ibid p 22-3.

¹²⁶ [1994] IRCA 43.

¹²⁷ [1997] IRCA 15.

evidence that he continues to pose a potential risk to students, but that was in the context of the Secretary's finding of Breach of the Code of Conduct, resulting in the sanction of termination. In my view, there can be no further risk to students based on the finding of the Commission.

[273] Upon notification of the suspension of the Applicant's RWVP registration¹²⁸, the Teachers Registration Board served the Applicant with a notice of suspension¹²⁹ under s 17BA(2) and s 28 of the *Teachers Registration Act 2000*, which sets out the Board may suspend or cancel a teacher's registration if he does not hold vulnerable person registration.

[274] I am satisfied his registrations were suspended solely on the basis of the three allegations from the complainants, which have now been determined to be unfounded.

[275] In my view, through no fault of his own and noting the complaints and processes were completely out of his control, the Applicant's Teachers Registration remains suspended and he does not hold a current RWVP at this time. He is now at liberty to seek renewal of his RWVP and have his suspended Teachers Registration reinstated.

[276] I have sympathy for the Applicant and the hardship he has faced due to the false allegations by the three female students who were a strong friendship group and did not like the Applicant.

[277] I am convinced the principal remedy should be ordered to allow the relevant bodies to consider the relevant registration applications. I find there are no other factors blocking the Applicant's return to teaching in the State Service.

ORDER

Pursuant to section 31 of the *Industrial Relations Act 1984*, I hereby order that:

- a. The Department for Education, Children and Young People reinstate AB (the Applicant) to the substantive position he held immediately prior to termination; and
- b. Should the Applicant make an application to the Registrar pursuant to the *Registration to Work with Vulnerable People Act 2013* (Tas) within 30 days of this Order, the Department for Education, Children and Young People will continue to pay the Applicant a salary until such time as his application for registration is determined by the Registrar; and
- c. Should the Registrar, pursuant to s 19 of the *Registration to Work with Vulnerable People Act 2013* (Tas) either register or provide the Applicant with RWVP registration subject to conditions and the Applicant makes application to the Teachers Registration Board in accordance with s 17AB(6) of the *Teachers Registration Act 2000* (Tas) to revoke the suspension of his Teachers Registration within 30 days of being notified of the RWVP registration, the Department for Education, Children and Young People will continue to pay the Applicant a salary for no longer than six months after the application to the Teachers Registration Board is made; and

¹²⁸ Exhibit R2.

¹²⁹ Exhibit R3.

- d. If the Teachers Registration Board Tasmania subsequently renews the Applicant's Teacher registration, a position will be allocated in a mutually agreed location excluding Queenstown; and
- e. In the event the Registration to Work with Vulnerable People is refused and/or the Teachers Registration Board does not revoke the suspension of the Applicant's registration, the Department will pay compensation of 6 months of ordinary pay in accordance with s 30(12) of the *Industrial Relations Act 1984* (Tas), inclusive of salary paid in accordance with (b) and (c) from the date of this decision; and
- f. There will be no break in continuity of employment for accrual of leave purposes.

