



TASMANIAN INDUSTRIAL COMMISSION

CITATION: Armstrong v Minister Administering the State Service Act 2000 [2026] TASICFB 3

PARTIES: Angela Jane Armstrong (Appellant)

Minister Administering the State Service Act 2000/Department of Justice (Respondent)

SUBJECT: Appeal to the Full Bench under the Industrial Relations Act 1984, s 70(1)(ba) from the dismissal of an application for an unfair dismissal remedy in T15203

FILE NO: T15327 of 2025

HEARING DATE(S): 10 September 2026

HEARING LOCATION: Hobart

DATE REASONS ISSUED: 13 October 2026

COMMISSIONERS: Thompson C, Lee C, and Cirkovic C

CATCHWORDS: Appeal against dismissal of unfair dismissal claim – Appellant terminated in respect of her management of a conflict of interest and breach of lawful and reasonable direction – No error demonstrated.

Procedure – Accidental slips, omissions and errors – Slip rule – Where reference to wrong source of power – Whether permissible to amend source of power – Appeal competent.

REPRESENTATION:

A Armstrong, the Appellant

N Winton (State Litigation Office), for the Respondent

ARMSTRONG v MINISTER ADMINISTERING THE STATE SERVICE ACT 2000

REASONS FOR DECISION

13 OCTOBER 2026

[1] Angela Armstrong appeals against the dismissal of her claim for unfair dismissal. Ms Armstrong was a legal practitioner at Tasmania Legal Aid (TLA) within the Department of Justice (Department). The Department terminated her employment on the basis of conduct, broadly speaking, relating to conflict with her advocacy for foster carers and children in foster care. The Commission at first instance found (i) some of the conduct to be proven; (ii) the proven conduct to have been a valid reason for termination; and (iii) that termination was not unfair. Ms Armstrong challenges those findings. The employer contends that the findings are not attended by error but also that the Commission's decision is not amenable to appeal.

[2] At the conclusion of the hearing of the appeal, we were satisfied that the employer's jurisdictional objection failed but that none of Ms Armstrong's grounds of appeal succeeded. We therefore made orders confirming the decision under appeal and said that we would publish our reasons later. These are those reasons.

Background

[3] Ms Armstrong was admitted as a legal practitioner in 2022 and, later the following year, employed within TLA's 'Legal Help Program'. Although a newly admitted legal practitioner, Ms Armstrong came to TLA with significant experience advocating for children in foster care. While still subject to a probation period, the employer became concerned about Ms Armstrong's conduct and considered that she may have breached the Code of Conduct (the Code) under s 9 of the *State Service Act 2000* (SSA). The employer commenced an investigation under Employment Direction 5 (ED5) under the SSA which found several breaches of the Code. In consequence, Ms Armstrong's employment was terminated.

[4] Ms Armstrong applied for an unfair dismissal remedy under the *Industrial Relations Act 1984* (IRA). The matter was heard by the Commission's Deputy President, who found most of the employer's allegations proven. Based on the allegations that were proven, the Commission found there to be a valid reason for Ms Armstrong's termination and that termination was not unfair. The Deputy President therefore dismissed the application. We will refer to this as the Primary Decision or PD.¹

[5] Ms Armstrong instituted this appeal to the Full Bench. After the appeal was instituted but before it was heard, the Deputy President amended the Primary Decision. The PD identified the source of the power to dismiss the application as s 31(1) of the IRA. After hearing from the parties, the Deputy President amended the PD by referring to s 21(2)(c)(iv) as the source of power to dismiss.² We will refer to this as the Slip Rule Decision or SRD. This is the source of the employer's objection to the appeal's competency.

Is there a right of appeal?

[6] The employer contends that the SRD was ineffective such that there is no right of appeal against the Primary Decision. If the employer's argument is correct, the Full Bench would have no jurisdiction to hear the appeal and would be bound to dismiss it.

¹ *Angela Jane Armstrong v Minister administering the State Service Act 2000/Department of Justice* [2025] TASIC 12; T15203 of 2025 (Primary Decision or PD).

² *Angela Jane Armstrong v Minister administering the State Service Act 2000/Department of Justice* [2025] TASIC 28; T15203 of 2025 (Slip Rule Decision or SRD).

[7] The argument may be summarised as follows. First, the Deputy President dismissed the application under s 30(1). Second, there is no right of appeal to the Full Bench from a dismissal under s 30(1). Third, the SRD was an impermissible and ineffective use of the slip rule, such that the SRD must be disregarded.

[8] There are several reasons why the employer's objection fails. It is true that an appeal does not lie to the Full Bench from a dismissal under the IRA, s 30(1). So much is clear from the Full Court's decision in *Bennett v Minister Administering the State Service Act 2000*.³ But the employer's third proposition may be doubted and the first is incorrect. We will briefly explain why.

[9] *Bennett* makes plain that s 31(1) does not confer a power to *dismiss* a proceeding.⁴ Properly characterised, a dismissal is the corollary of the *absence* of an order under s 30(1). So much was made plain by Porter J's judgment in *Bennett*⁵ at first instance, which the Full Court affirmed on appeal. In response to *Bennett*, Parliament amended the IRA to insert s 70(1)(ba). That provision confers a right of appeal to the Full Bench from the dismissal of an application under s 21(2)(c). The Deputy President undoubtedly had the power to order the dismissal of Ms Armstrong's application under s 21(2)(c). There is no reason to think that the Deputy President was unaware that an appeal lay from dismissal under s 21(2)(c) but not the absence of an order under s 31(1). The Deputy President stated at PD [170]:

In accordance with s 31(1) of the Act, I dismiss the application.

[10] It is implausible that the Deputy President *deliberately decided* to dismiss the application under a provision which did not permit dismissal and from which an appeal did not lie. Contrary to the employer's submissions, the only characterisation reasonably open is that the Deputy President made an accidental slip or omission.

[11] As the employer submits, s 21(2)(l) is a statutory iteration of the slip rule. The employer concedes that the rule may operate even where an appeal has since been instituted.⁶ To that extent, the employer's reliance on the Full Bench's decision in *Australian Nursing Federation, Tasmania Branch v Minister Administering the State Service Act 2000*⁷ is misplaced. In that case, the Commissioner below relied on s 19(2)(a) rather than s 21(2)(l) to grant leave to reopen and amend the disposition of an application. The Full Bench held that the Commissioner was *functus officio*. That decision must be distinguished because the slip rule did not arise. As the Full Bench in that case observed, while the Commissioner was *functus officio*, it was "not however [the Full Bench's] intention to make a rule of general application as each case must be determined on its own facts".

[12] Returning to this matter, the employer further submits that the slip rule does not apply where the mistake is the consequence of a 'deliberate decision' or where it is necessary to exercise an independent discretion'.⁸ That is correct. But here the Deputy President was not required to 'exercise an independent discretion. There was not a genuine discretion whether to dismiss the application under s 31(1) or s 21(2)(c)(iv). Dismissal could only be under s 21(2)(c)(iv). We repeat that s 31(1) does not, in fact, confer a power to *dismiss* a proceeding. Instead, it allows the Commission to direct that something "be done or that action be taken". The Primary Decision's use of the word 'dismiss', a word appearing in s 21(2)(c)(iv) but not in s 31(1), makes clear that the intention was to *dismiss* the application rather than simply *not*

³ (2009) 19 Tas R 210 at [17]-[18] (Crawford CJ, Tennent J agreeing) and [22] (Evans J).

⁴ *Ibid* at [17].

⁵ *Minister Administering the State Service Act 2000 v Leary* (2009) 182 IR 81 at [40]-[42], [46].

⁶ *Commonwealth v Davis Samuel Pty Ltd (No 9)* (2015) FLR 62 at [77]-[81] (Refshauge J).

⁷ T14002 of 2012, 21 June 2023.

⁸ The employer referred to *McLeary v Swift* [2013] NSWSC 1674 at [19] (Windeyer AJ) and *Elyard Corporation Pty Ltd v DDB Needham Sydney Pty Ltd* (1995) 61 FCR 385 at 390-392 (Lockhart J, Black CJ agreeing).

direct that something be done or that action be taken. So viewed, the reference to s 31(1) was an error.

[13] We will briefly address the appellant's first proposition. Although unnecessary to decide, we doubt that the Deputy President was required to refer to a specific provision in dismissing the appeal. As we have explained in the preceding paragraph, it is plain that s 21(2)(c) is and was the source of the power to dismiss an application.

[14] In any event, there is a more fundamental reason why the employer's objection fails. The appeal right to the Full Bench is conferred by statute. The appeal lies against the Deputy President's order *dismissing* the application. To the extent that the employer challenges the SRD, the appropriate mechanism is judicial review.⁹ On its face, Ms Armstrong's appeal is against the Primary Decision as subsequently amended by the Slip Rule Decision. That is, the appeal is against the dismissal under s 21(2)(c). Appeals lie from orders, not reasons.¹⁰ Given our conclusion that the SRD was effective, it is unnecessary to determine whether the SRD is amenable to collateral attack by way of an appeal to the Full Bench against the PD. It suffices to say that we doubt such a collateral attack to be permissible, although we have not had the benefit of full submissions.

[15] The employer's jurisdictional objection fails. The Full Bench has jurisdiction to hear the appeal against the dismissal of Ms Armstrong's claim.

Facts

[16] We commence with the decision under appeal. Because the Deputy President found proven only some of the Department's allegations against Ms Armstrong, and the Department does not challenge the findings in respect of the unproven parts of the other two allegations, it is unnecessary to consider all the evidence at first instance.

[17] Ms Armstrong had spent several decades as an advocate in relation to the foster care system. That is the context which led to Ms Armstrong's termination.

[18] The Secretary of the Department for Education, Children and Young People (DECYP) has functions with respect to child safety/child protection under the *Children, Young Persons and their Families Act 1997* (CYPFA). Those functions are undertaken by an area of DECYP known as Child Safety Services, or CSS. Where legal advice or representation is required, CSS instruct the Office of the Director of Public Prosecutions (ODPP) to represent the Secretary. As will be seen, that is what happened in this matter.

[19] In early 2023, CSS removed Person 1's children from their foster care placement with Person 2. Ms Armstrong advocated for Person 2 in her attempts to have Person 1's children returned to her. Ms Armstrong's advocacy involved written communications signed-off with a line stating that she was a 'Mother, [Past] Foster Care, Foster Child and Foster Child Advocate and Lawyer'. Some of the communications included other references to Ms Armstrong being a lawyer.

[20] CSS were concerned about Ms Armstrong's communications and instructed Katryn Brown of the ODPP. Ms Brown became concerned that Ms Armstrong may have been acting as a legal practitioner for Person 2 without authority to practice and asked Ms Armstrong to clarify her role. Ms Armstrong replied, "I advocate for the children and [Person 2]". Around a month later, Ms Armstrong made a submission to the Children's Commissioner. She made

⁹ Such as relief in the nature of the prerogative writs under the *Supreme Court Rules 2000*.

¹⁰ *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 64 (Barwick CJ and Kitto J).

the submission as a “Solicitor and Barrister admitted to Tasmania and the Federal Court of Australia”, notwithstanding that she was not practising as a solicitor or barrister.

[21] In April 2023, Ms Armstrong applied for a temporary administrative support role at the ODPP. She was unsuccessful due to the conflict of interest arising from the role’s access to the ODPP’s files, including Ms Brown’s file against Ms Armstrong. In June 2023, Ms Armstrong telephoned CSS at least twice seeking information in relation to Person 2 making an application for third party guardianship of Person 1’s children.

[22] This all occurred before Ms Armstrong commenced employment with the respondent.

[23] On 11 July 2023, Ms Armstrong commenced with TLA as a level 1 legal practitioner within the Advice and Legal Services (ALS) team. She was admitted as a legal practitioner the year prior and had spent some time working within a private law firm as a paralegal and then as a solicitor. Her employment at TLA was permanent (i.e. ongoing) and subject to a six-month probation period.

[24] The Department relied on four allegations as providing a valid reason for termination. The Deputy President found each of allegation 3 and allegation 4 proven in its entirety. Allegations 1 and 2, while not proven as alleged, were nonetheless determined adversely to Ms Armstrong.¹¹

Allegation 1 – contacting Person 1 and representing herself to be a lawyer

[25] On 10 October 2023, Ms Armstrong telephoned Person 1. She told Person 1 that she was a lawyer and attempted to organise a meeting at a Banjo’s café between Person 1 and her children, Person 2, and Ms Armstrong. As the mother of children in state care, Person 1 was in a vulnerable position and had a negative view toward Person 2.

[26] The Deputy President found that, although Ms Armstrong did not represent herself as being from TLA, this was nonetheless:

“inappropriate and a serious lapse of professional judgement due to her lack of recognition of the conflict and therefore, undeclared conflict of interest with her role as a [TLA] lawyer”¹²

Allegation 2 – attempting to obtain a benefit for Person 2

[27] For similar reasons, the Deputy President found that Ms Armstrong used her position at TLA inappropriately to attempt to gain a benefit for Person 2. Although the Deputy President was not persuaded that Ms Armstrong identified herself as a TLA employee, Ms Armstrong nonetheless attempted to gain a benefit for Person 2.

[28] Ms Armstrong was an Australian legal practitioner, and therefore entitled to practice law, only by virtue of her employment with TLA. The entitlement or authority to practice was limited to her duties with TLA. The Deputy President found that Ms Armstrong passed herself off as a lawyer, using phrases such as “[Person 2’s] legal adviser”, and “Solicitor and Barrister admitted to Practice in the Supreme Court of Tasmania and Federal Court of Australia”. Her personal email signature stated that she was a lawyer. She used her TLA email account to email Person 2 about applying to have a decision made by CSS reviewed by the Tasmanian Civil and Administrative Tribunal. She encouraged Person 2 to apply for a grant of legal aid

¹¹ PD at [166]; AB 36.

¹² PD at [81]; AB 24.

for TLA to act for her in the custody dispute. Person 2 became a client of another TLA practitioner and a file was opened in Person 2's name.

[29] This all occurred while Ms Armstrong was employed at TLA. Some of it occurred during business hours while Ms Armstrong was on duty and being paid by TLA. The Deputy President found that Ms Armstrong "leveraged her position as a lawyer for her advocacy".¹³ Although she did not represent herself as a TLA lawyer, she represented herself as a lawyer. As a matter of law, she was entitled to refer to herself as a barrister or solicitor by virtue only of her employment with TLA.¹⁴

Allegation 3 – failure to disclose a conflict of interest

[30] The third allegation is that Ms Armstrong failed to disclose a conflict of interest when resuming her advocacy for Person 2, contrary to s 9(8) of the Code. That provision requires an employee to:

[D]isclose, and take reasonable steps to avoid, any conflict of interest in connection with the employee's State Service employment.

[31] The conflict was between Ms Armstrong's work as a legal practitioner at TLA, and her role as a state-appointed foster carer and her advocacy work on behalf of children in state care and for those who care for them.

Allegation 4 – breach of a lawful and reasonable direction

[32] The fourth allegation is that Ms Armstrong breached a lawful and reasonable direction given to her by the Secretary of the Department (the Secretary). On 3 January 2024, the Secretary wrote to Ms Armstrong to advise her of the investigation under ED5. The Secretary's letter also directed Ms Armstrong not to discuss the investigation with anyone except support persons, and to avoid prejudicing the investigation by not communicating with persons named as witnesses or those who may have knowledge of the allegations. The Code, s 9(6) required Ms Armstrong to comply with the employer's lawful and reasonable directions.

[33] On 15 February 2024, Ms Armstrong emailed Ms Brown in the following terms:

Dear Ms Brown

The false allegations made out about me by your client the Department of Education Children and Young people [sic] need to be addressed. I have grounds for defamation against your client and as it has transpired today the Department of Justice for mismanagement of this matter.

Your [sic] faithfully

Angela Armstrong BA LLB HDLP MScFMH

[34] Ms Armstrong admitted receiving the lawful and reasonable direction and sending the email. However, her culpability is in issue. We consider this as part of the appeal grounds.

[35] The Deputy President found that sending the email breached the lawful and reasonable direction (and, necessarily, that the direction was both lawful and reasonable), and

¹³ PD [111]; AB 21.

¹⁴ *Legal Profession Act 2007*, s 15.

could be perceived (but was, in fact, not perceived by Ms Brown) as bullying, intimidatory, and threatening.

The hearing

[36] For completeness, we record who gave evidence before the Deputy President. Ms Armstrong gave evidence herself and called evidence from Maria Menichelli (CSS), and Person 1 (a mother of children in state care). The employer called Annique Rattray (CSS), Person 2 (a foster carer), Katryn Brown (ODPP), Susan Johnson (a human resources representative), Anne-Marie Kerr (TLA), and Vanessa Fenton (TLA). It is unnecessary to recount their evidence.

What is the test on appeal?

[37] The IRA, s 70(1A) provides:

(1A) A Full Bench is not to uphold an appeal under subsection (1) unless in its opinion –

(a) the Commissioner against whose decision the appeal is made, in reaching

that decision –

(i) made a legal error; or

(ii) acted on a wrong principle; or

(iii) gave weight to an irrelevant matter; or

(iv) gave insufficient weight to a relevant matter; or

(v) made a mistake as to the facts; or

(b) the decision was plainly unreasonable or unjust.

[38] Ms Armstrong's grounds of appeal must be assessed against those types of error.

Grounds of appeal

[39] While it is convenient to consider each ground separately. Ms Armstrong's appeal notice and written submissions were somewhat discursive. We approach each ground on the basis of its meaning confirmed by Ms Armstrong during her oral submissions. Because there is overlap between the grounds and the parties' submissions as to them, our reasoning with respect to each ground should not be read in isolation of the other grounds.

Ground 1 – the lapse in judgment did not constitute a valid reason for termination

[40] Ground 1 contends that the Deputy President erred in law in finding that Ms Armstrong's lapse in judgment constituted a valid reason for termination given the finding that the more serious allegations against Ms Armstrong were not proven. Ms Armstrong relies on *Selvachandran v Peteron Plastics Pty Ltd*¹⁵.

[41] As required by *Selvechandran*, the Deputy President considered that the employer needed to establish a reason is 'sound, defensible, well-founded' and 'not capricious or trivial'. The test is not stringent.

¹⁵ (1995) 62 IR 371 (Northrop J).

[42] There was ample evidence before the Deputy President to establish a valid reason for termination.

[43] We reject Ms Armstrong’s characterisation of her conduct as a mere “lapse in judgment”. She continued her advocacy work during her employment at TLA in circumstances where the conflict of interest was clear.

[44] The breach of the lawful and reasonable direction was particularly serious. Considered against the context of the ongoing investigation into, in part, inappropriate communications, the email to Ms Brown alone provided a valid reason for termination. Contrary to Ms Armstrong’s submission, her conduct could not be characterised as a lapse in judgment. It was sustained and repeated. Ms Armstrong was on notice as to the seriousness of the matter.

[45] Contrary to Ms Armstrong’s submission, the employer was not required to adduce evidence of the Code. The Code is prescribed by the SSA. It is a form of legislation, not evidence, and thus judicial notice must be taken of it.¹⁶ Similarly, we reject Ms Armstrong’s contention that a particular conflict of interest policy or definition adopted by an unrelated statutory body (here, the Tasmanian Assessments, Standards and Certifications Board) vitiates or in any way informs the Code’s interpretation.

[46] The Deputy President found that Ms Armstrong used her position inappropriately while working at TLA to:

- Obtain a benefit for herself (to check in on the children’s welfare);
- Obtain a benefit for Person 2 (meet with Person 1 and have the potential to see the children); and
- Pursue the adoption of Person 2’s previous foster children.

[47] We consider those findings to be unassailable. That not all the employer’s allegations were proven (specifically, that Ms Armstrong represented herself as being from TLA as opposed to a lawyer generally) does not negate those findings. The conduct as proven was a valid reason for termination. Ms Armstrong’s refusal to take responsibility for and appropriately manage those conflicts also constituted a valid reason for termination.

[48] We accept the employer’s submissions at [116]-[122]:

The Appellant clearly had perceived conflicts of interest. The first perceived conflict is that the Appellant was advocating for Person 2 to have care and/or access to Person 1’s children in circumstances where the Appellant knew Person 2 was also a client of TLA in respect of Person 2’s desire to obtain custody of Person 1’s children. Even if the Appellant was ‘advocating’ when she called Person 1, Person 1 was a potential witness and key figure in [the client’s] matter. Conflicts of interest can and do extend to associates of legal practitioners, i.e. other practitioners within the practice. TLA closed Person 2’s file as a result of the perceived conflict.

There was a second perceived conflict of interest between the Appellant’s advocacy for children in care and their foster carers, and the Appellant’s obligation to provide impartial legal advice in respect of child safety matters. This is why the Respondent made an immediate management decision to stop the Appellant providing advice on child safety matters after the 13 October 2023.

¹⁶ *Acts Interpretation Act 1931*, s 6(7).

Furthermore, the Commission found that the Appellant received the non-pecuniary benefits set out in para [110] above.

The Appellant's refusal to take responsibility for, and appropriately manage, the clear conflicts of interest is a valid reason for termination connected with conduct, in that it is 'sound, defensible, well-founded, not capricious or trivial.'¹⁷⁴ This is particularly so given the Appellant's former role as a legal practitioner.

Whilst the Respondent accepts that allegation 4 would not alone constitute a valid reason when combined with the substantively proven allegation 2 and the entirely proven allegation 3, there is undoubtedly a valid reason connected with conduct for the purposes of s 30(3) of the IRA.

Even if Allegation 1 was not made out as drafted, the Commission's finding that the Appellant's conduct was 'inappropriate and a serious lapse of professional judgment' was sound and could also constitute a valid reason in conjunction with the foregoing. Furthermore, the Appellant's sworn evidence as to the date of the phone call could not logically be accepted in the face of the contemporaneous evidence.

If the Respondent had not used her position as a lawyer inappropriately, this whole matter would not have arisen. The Appellant was purporting to act as a child advocate in contacting Person 1. If she had not misused her position as a lawyer, there could have been no confusion that she was calling from TLA. Instead, she leveraged her position as a lawyer to gain trust or authority over a vulnerable person, who could have been a witness in Person 2's matter. The Appellant's conduct was inappropriate and serious lapse of judgment.

[49] Ms Armstrong submits that the Deputy President erred in finding that Ms Armstrong had a private interest in Person 2's care of and access to the children. Ms Armstrong also submits that insufficient weight was given to the absence of personal gain. Those submissions must be rejected. They mischaracterise the Primary Decision and the nature of an interest.

[50] It is true that Ms Armstrong did not gain financially from her advocacy for Person 2. However, the concepts of private interest and personal gain extend beyond personal financial gain. The word *private* distinguishes an interest unconnected to employment from one that is. Ms Armstrong's advocacy and support for Person 2 was not in furtherance of her employer's interests. Ms Armstrong had a *private* interest in advocating for and assisting Person 2 in that the interest was not the result of her employment. It was Ms Armstrong's *personal* interest, even though it was ostensibly in furtherance of Person 2's own interests. It did not coincide with her employer's interests. In fact, it was contrary to TLA's interests.

[51] This is not to say that advocacy for Person 2 was unworthy or unmeritorious.¹⁷ The vice arose from the *conflict* with Ms Armstrong's employment with TLA. Ms Armstrong's submissions overlook that point.

Ground 2 – the finding that termination was not unfair was not reasonably open

[52] Ground 2 contends that the Deputy President erred in finding that termination was not unfair. Relying on the IRA, s 70(1A)(b), *House v The King*,¹⁸ and *Minister for Immigration and Citizenship v Li*,¹⁹ Ms Armstrong submits that the decision was unjust or plainly unreasonable.

¹⁷ The Primary Decision acknowledges that Ms Armstrong's "conduct resulted out of passionate advocacy": PD [168].

¹⁸ (1936) 55 CLR 499.

¹⁹ (2013) 249 CLR 332; [2013] HCA 18.

[53] Before the Commission, Ms Armstrong conceded that the employer's process under ED5 which led to termination was fair.²⁰ As to substantive fairness (that is, was the outcome of termination unfair?), Ms Armstrong did not discharge her burden. The breaches of the Code were serious, repeated, and commenced early on in the employment relationship. This occurred while Ms Armstrong's employment was subject to probation, which meant that the employer *could* have terminated it without cause.²¹ Ms Armstrong was a legal practitioner and ought to have been alert to conflicts of interest. That remains the case even for a junior legal practitioner at the start of her career. Indeed, Ms Armstrong had only relatively recently completed her legal training which included learning about her professional conduct obligations.

[54] That Ms Armstrong was subject to a probation period is not dispositive.

[55] As we put to Ms Armstrong during her submissions, that a worse or more egregious conflict of interest, or worse or more egregious conduct, could be imagined did not ameliorate Ms Armstrong's conflict or conduct. Ms Armstrong submits that insufficient weight was given to the absence of her own personal gain. In addition to the points made above at [50], there are two flaws with that submission. First, the Deputy President found that Ms Armstrong did personally gain in that she obtained information for herself about the children. That finding is unassailable. Even though Ms Armstrong's intentions may have been altruistic, she nonetheless obtained information which benefited her. Second, that there was not a greater personal gain (such as financial gain) did not diminish the seriousness.

[56] Ground 2 fails.

Ground 3 – too much weight was placed on Person 1's hearsay evidence

[57] Ground 3 contends that the Deputy President placed too much weight on the hearsay evidence of Person 1.

[58] This ground is meritless. Person 1 and Ms Armstrong each gave evidence before the Deputy President and was cross-examined. The Deputy President's findings were based on the evidence of Ms Armstrong, Person 1, and Ms Fenton.²² Ms Fenton's evidence was used to make findings about the employer's concern about Ms Armstrong using her position as a lawyer as a 'trust building' exercise with Person 1.

[59] In any event, the Commission is not bound by the rules of evidence.²³ Reliance on hearsay itself would not be an error.

[60] It is worth restating some general principles with respect to fact finding. First, rejecting some of a witness' evidence does not mean that all of that witness' evidence must be rejected.²⁴ Thus, accepting *some* of Ms Armstrong's evidence was a course perfectly open to the Deputy President. Second, we must give due weight to the Deputy President's advantage in observing the witnesses' evidence and weighing it up holistically.

[61] Person 1's evidence was detailed and tested in cross-examination. The Deputy President considered it, accepted some but not all of it, and explained her reasoning. Error is not apparent. This ground fails.

Ground 4 – insufficient weight was given to Ms Armstrong's evidence

²⁰ AB 383.

²¹ But the employer decided not to and instead embarked on the Code process.

²² PD [61]-[82].

²³ IRA, s 20(1)(c).

²⁴ *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [94].

[62] Ground 4 contends that the Deputy President failed to give sufficient weight to evidence in Ms Armstrong's favour. It is the corollary of Ground 3. Our reasoning should be read conjunctively.

[63] The Deputy President *generally* preferred the evidence of Ms Rattray and Person 1 over Ms Armstrong. However, she accepted Ms Armstrong's evidence that she did not tell Person 1 that she was from TLA. This was a permissible approach to fact-finding.²⁵ This ground fails.

Ground 5 – termination was disproportionate

[64] Ground 5 contends that termination was a disproportionate sanction. This ground of appeal is little more than Ms Armstrong simply seeking a different outcome from the Full Bench rather than suggesting error on the part of the Deputy President. In any event we deal with the propositions advanced by Ms Armstrong under this heading and why we do not accept them below.

[65] Ms Armstrong relied on eight reasons why termination was disproportionate.²⁶ We set out each reason and our comments on it below. There is some overlap between the eight reasons.

[66] First, there were a limited number of findings of misconduct. We address this below.

[67] Second, those findings were limited in nature. We address this below.

[68] Third, there was an absence of more serious conduct. Ms Armstrong correctly submits that the employer cannot convert allegations that was not established into aggravating features of misconduct that was established. But the Primary Decision discloses no such conversion. The Deputy President carefully set out her factual findings. It is plain that her conclusions as to the nature of the misconduct are based on those findings. That is, the misconduct is limited to the matters which were found proven.

[69] Fourth, there was an absence of fraud, dishonesty, or corruption. Ms Armstrong points that there was no finding that she acted corruptly, obtained financial gain, deliberately deceived her employer for personal enrichment, misappropriated client funds, deliberately compromised confidential information, caused her employer financial loss, deliberately prejudiced a client, or engaged in criminal conduct. That is true, but it does not establish error. That aggravating features were absent or that a worse case could be considered does not mean that the most serious sanction available under the SSA, s 10 was disproportionate or not reasonably open on the evidence. Although termination is the harshest or most serious sanction prescribed by s 10, it is not reserved for the worst case imaginable.

[70] Fifth, there was an absence of financial harm. This is the corollary of the fourth reason, which we have addressed.

[71] Sixth, remediation between Ms Armstrong and TLA should have been considered. We reject this submission. Ms Armstrong's conduct was not an aberration or the result of a momentary lapse in judgment. In any event, that the employer *could* have taken an alternative course does not establish that dismissal was unfair, less still that it was not reasonably open to the Commission not to find unfairness.

[72] Seventh, Ms Armstrong's long professional history and advocacy for foster carers meant that she was not acting in her role at TLA when the misconduct occurred. No error is

²⁵ *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [94].

²⁶ T20.1-15; T21.29-37.

apparent. We repeat that the Deputy President found that Ms Armstrong did not assert to Person 2 that she was a TLA lawyer, which is a finding favourable to Ms Armstrong.

[73] Eighth, the consequences of dismissal. The Deputy President appropriately addressed this matter, finding that it was not the cause of Ms Armstrong's inability to obtain other employment following her termination. Ms Armstrong has not pointed to any error in that finding.

[74] Ground 5 fails.

Ground 6 – the decision was infected by bias/conflict

[75] Ground 6 pleads that the Primary Decision was infected by bias and/or conflict on the part of the Department and/or the Department for Education, Children, and Young People (DECYP). This is not a proper ground of appeal. We accept the employer's submissions at [139]-[140]:

It was TLA within the Respondent who identified the Appellant as the caller and took disciplinary action against the Appellant, not DECYP (or the ODPP). It was Ms Kerr and Ms Fenton of TLA who were concerned about the Appellant's conduct and there is no evidence that they had any contact from anyone within DECYP or ODPP.

There is no evidence which could establish that DECYP influenced the Respondent's conduct, or that that there was 'bias' or 'conflict' involved between the two. The Department was, in effect, Ms Armstrong's employer. DECYP is responsible for child safety.

[76] In any event, the Primary Decision was the result of a hearing *de novo*. Any bias on the part of DECYP or the Department, or the ODPP for that matter, could not, by the fact itself, be relevant to the central issues: whether there was a valid reason for termination and whether termination was not unfair. Mr Armstrong's submissions in support of this ground are no more than speculation.

[77] Ground 6 fails.

Concluding observations about the Primary Decision

[78] None of the grounds of appeal is made out. Lest we have misunderstood Ms Armstrong's submissions, we have nonetheless carefully considered the evidence before the Deputy President. We are satisfied that the decision to dismiss Ms Armstrong's application is unassailable.

Orders

[79] Pursuant to the IR Act, s 71(13)(a), the decision to dismiss the application is confirmed.



S Thompson
Commissioner