

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974

s29(1A) application for hearing of an industrial dispute

Dean Moss

(T14692 of 2020)

and

Minister administering the State Service Act 2000/Tasmanian Health Service

DEPUTY PRESIDENT N ELLIS

HOBART, 25 JANUARY 2021

Alleged unfair termination of employment –valid reason for termination found- unfair dismissal due to lack of payment of notice period-order issued

DECISION

[1] On 16 September 2019, Mr James Eddington, Legal and Industrial Officer at the Health Services Union, (HSU) applied to the President on behalf of Mr Dean Moss (the Applicant), pursuant to s 29(1A) of the *Industrial Relations Act 1984* (Tas) (the IR Act) for a hearing before a Commissioner in respect of an industrial dispute relating an alleged unfair termination of employment with the Minister administering the *State Service Act 2000* (MASSA)/Tasmanian Health Service (THS) (the Respondent).

[2] The Applicant was employed as a Chef by the Respondent at the Launceston General Hospital (LGH). The Applicant had been employed in this role for six years and nine months.

[3] The Applicant was dismissed on 27 August 2019 as a result of findings made by the Secretary of the Department of Health (DoH) following an investigation commenced under Employment Direction 5 (ED5).

[4] Mr Damien Durkin, representing the Applicant, alleges the termination of employment was a summary dismissal. He submitted Mr Moss did not act inappropriately in the course of his employment and he did not engage in serious and wilful misconduct. The Applicant submits that if I find that the disputed allegations form a valid reason, then the termination of employment is nevertheless unfair and harsh. He is seeking a remedy of reinstatement.

[5] The Respondent states there were valid reasons for the termination of employment of Mr Moss, and 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.¹

¹ Pursuant to section 10 of the SS Act.

[6] There were 38 allegations of harassment towards female colleagues, with 21 being substantiated. Mr Michael Pervan, Secretary of the Department of Health, determined that the Applicant²:

- a) Exhibited inappropriate and unacceptable workplace behaviour;
- b) Communicated and behaved in a manner which was disrespectful and constituted harassment, and
- c) The behaviour was not compliant with the previous direction.

[7] He stated in the letter outlining the proposed sanction, dated 7 August 2019, that he determined there was a breach of ss 9(3) and 9(6) of the Code of Conduct and noted the significant impact the Applicant's actions had on the two young female trainees, Ms Lily Stagg and Ms Chloe Faulkner, when he was in a position of power over the employees making the complaints. The significant age difference also exacerbated this position of power. His non-compliance with the previous direction, his lack of acceptance of the breach and his lack of modification of his behaviour in the workplace were contributing factors.

[8] Accordingly this case turns on whether I accept the substance of the evidence of the Applicant and his witness or that of the witnesses called by the Respondent.

Summary of the background, complaint, investigation and dismissal

[9] The Respondent provided a useful chronology of events relating to the background to the Applicant's employment and events leading to the decision to terminate his employment. I set this out in its entirety:

<u>"Date</u>	<u>Event</u>
12 Nov	Moss commences employment with the THS
7 May 2015	Complaint re Jamie-Lee Evans and Doug Pinner
18 May 2015	Formal meeting between Moss & Dale Anderson re behaviour & incidents on 31 March and 7 May 2015 involving Jamie-Lee Evans & Doug Pinner. Advised to refrain from inappropriate behaviour &
28 Jul 2017	Formal complaint from Jasmine Nelson – meeting between Jasmine, Darren Davis and
30 Jul 2017	Written complaint lodged by Jasmine Nelson
22 Aug 2017	Nelson complaint resolved via written direction to act, behave and communicate in accordance with THS protocol
23 Aug 2017	Written complaint Corey Smith re 18 August 2017 verbal altercation during which Darren Davis directed Moss to go home
20 Sep 2017	Smith complaint determined – Moss found to have engaged in inappropriate communication & intimidation
2 Nov 2017	Further incident - Corey Smith - aggression

² Exhibit R67.

14 Dec 2017	Formal complaint by Darren Davis of verbal abuse and aggression
April 2018 – Oct 2018	Multiple incidents involving Chloe Faulkner, Lily Stagg and Lisa Hodge, which culminated in 38 allegations comprising
11 Sep Sep 2018	Parma Day – followed Chloe Faulkner home on bus Freya Stokell – hit on bottom with pan
26 Sep 2018	W & T complaint re Faulkner, Goodluck, Stagg and Nelson – meeting between P Hunt and D Anderson Cc camera footage in Baby Cino Café talking to Chloe Faulkner – ‘came to look at you not the scones’
5 Oct 2018	Lisa Hodge lodges formal complaint re seafood baskets and comment re Bridie Goodluck
9 Oct 2018	THS letter to Moss re Hodge
21 Nov 2018	Stands behind and wraps arms around Lily Stagg to demonstrate food preparation technique – told by Davis not appropriate
23 Nov 2018	Moss suspended on full pay, pending investigation and ED5 investigation commences
10 Apr	Moss provided with a copy of the investigation report
3 May 2019	HACSU writes to THS raising procedural and evidentiary issues with the report
7 Aug 2019	Moss notified about the outcome of the investigation and offered an opportunity to show cause
20 Aug	HACSU provides response to invitation to show cause
27 Aug 2019	Moss notified employment to be terminated
28 Aug 2019	Moss’ employment terminated
16 Sep	Moss makes application to the TIC”

The Law

[10] The parties are not in dispute about the law which applies to the case. Section 30 of the IR Act relates to the criteria which I must apply in relation to disputes regarding termination of employment. Relevantly for this dispute it provides as follows:

“(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 –

(a) the capacity, performance or conduct of the employee; or

(b) the operational requirements of the employer's business.

...

(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."

[11] The Respondent submitted Mr Moss' 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;"

[12] Section 10 of the SS Act relevantly provides:

"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."

[13] The Respondent has submitted the Applicant was not summarily dismissed. Mr Moss was employed under the *Health and Human Services (Tasmanian State Service) Award* (the Award) and Part 1, clause 9 'Contract of Employment', states:

- " (a) Except as otherwise provided by the State Service Act 2000, employment is by the fortnight. Any employee not specifically engaged as a casual employee is deemed to be employed by the fortnight.
- (b) An employee (other than a casual employee) who is willing to work his or her normal ordinary hours of work, is entitled to be paid a full fortnight's salary at a rate fixed by this award or relevant industrial agreement.
- (c) Notice of termination by Employee and Employer

- (i) Notice of termination by Employee

Employment is to be terminated by an employee by the giving of two week's notice to the employer or by the forfeiture of two weeks wages as the case may be.

- (ii) Notice of termination by the Employer

- (1) Employment is to be terminated by the employer by the giving of notice in accordance with the following table:

<u>Period of Service</u>	<u>Period of Notice</u>
From commencement and up to the completion of 3 years	2 weeks
3 years and up to the completion of 5 years	3 weeks

5 years and over

4 weeks

- (2) In addition to the period of notice provided an employee aged 45 years and older with 2 or more years of service is entitled to an additional week's notice.
- (3) Payment in lieu of the period of notice must be made if the appropriate period of notice is not given or in circumstances where it is agreed the period of notice is to be waived and payment in lieu substituted.

(d) Summary Dismissal

The employer has the right to dismiss an employee for serious misconduct or serious neglect of duty and in such circumstances the normal salary rate, allowances, penalty payments and accrued entitlements are to be paid up to the time of dismissal only."

The Applicant's Case

[14] Mr Durkin alleged that Mr Moss was summarily dismissed following receipt of a letter on 27 August 2019 from Mr Pervan. In this letter, he was advised his employment was terminated in accordance with s 44(3)(a) of the SS Act, effective from the date of the letter.³

[15] Prior to his termination of employment, the Applicant submitted he was notified by Mr Pervan in a letter dated 23 November 2018 of the intention to investigate 38 allegations and an alleged breach of the Code of Conduct pursuant to ED5. The Applicant was suspended on full pay pursuant to Employment Direction 4 (ED4), effective from the date of the letter.⁴

[16] The Applicant stated the decision to terminate his employment was based on an investigation outcome, which he alleged was incomplete and not objective. The Applicant stated there were alternative reasons for the unsubstantiated allegations that should have been further investigated.

[17] It was submitted the proof for serious misconduct which needs to be satisfied is found in *Briginshaw v Briginshaw* and should not be found in inexact proofs and indefinite testimony.⁵ The Applicant alleges the information before Mr Pervan would not support his finding of serious misconduct as his finding was unreasonable:⁶

"...because it was decided upon inferences not reasonably drawn from the material available and is harsh in its consequences for the personal and economical situation of the Applicant because it is disproportionate to the gravity of the alleged misconduct in respect of which the Respondent acted."

[18] It was stated that the Respondent needs to prove that there was a valid reason for the summary dismissal, where the test remains whether the reason was "sound, defensible or well founded".⁷ The Applicant submitted the 2017 performance issues and more recent finding of the breach of the Code of Conduct do not provide valid reasons for the termination of his employment.

³ Exhibit R72.

⁴ Exhibit R56.

⁵ Applicant's Outline of Submissions, paragraph [16].

⁶ Ibid, paragraph [19].

⁷ Ibid, paragraphs [14]-[15].

[19] The Applicant further alleges the report relied on had significant errors, it failed to consider the specific context and lacked specific evidence with a vague time frame when events allegedly occurred.

[20] At the hearing, Mr Durkin raised an issue with the existence of two versions of the transcript from Ms Faulkner. It was submitted that the investigation was: "...tainted by falsification of transcript".⁸ Mr Durkin provided a summary of legal advice he had obtained, submitted with his closing submissions, which alleges the falsification of the transcript taints the entire investigation and the resultant determination by Mr Pervan with illegality.

[21] It was submitted that there was "an enhanced version"⁹ of the transcript of the alleged key witness Ms Faulkner, which was provided to Mr Pervan to assist in his determination. It was submitted:¹⁰

"Almost all the substantiated allegations were in relation to Ms Faulkner. Ms Faulkner had only one interview with Ms Siggins on 8 October 2018 commenced at 1.35pm and concluded at 2.30pm. But two transcripts of her interview exist. The Verity Group Final report (R60 & A05) dated 22 March 2019 contained a transcript with 817 Lines. The other transcript submitted by Ms Chen was from the Preliminary Report (R41) containing 809 Lines."

[22] Mr Durkin provided examples of the alleged fabricated evidence which included changing a small section of words, He stated it allegedly substantiated three more serious allegations by reflecting the comments of the Applicant to be of a sexual nature and disregarding the context of the fancy dress fundraising.

[23] It was submitted the amendment included additional words on the transcript as highlighted in bold include: "And he came in **to the café and he'd seen me in my jeans**. He was, like, "You don't even have to try"..."¹¹ It was alleged this transcript had been altered and subsequently stated: "He came in **and said he couldn't wait to see what I was wearing, I was working at the time so I didn't react to it, I just brushed it off. He saw me wearing jeans and** he was like, "You don't even have to try"..."

[24] It was submitted that without the "doctoring" of the transcript, some allegations would not have been substantiated. It was stated:¹²

"If Secretary Pervan had known the investigation was "doctored", that Mr Moss had confronted Executive Chef, Mr Darren Davis on 13 August 2018 in regards to the theft of meat that he ordered and removed, and the NICS café staff were upset about the Union Bans being implemented on the NICS café of whom they blamed Mr Moss, for being a Union Delegate?"

[25] Mr Durkin alleged the inclusion of the more serious allegations enabled the State to terminate his employment on those grounds citing serious and wilful behaviour.

[26] The Applicant provided HSU with a response to all allegations but it was stated this was not forwarded based on the advice from HSU that it was inappropriate to respond to the vague allegations.¹³

[27] It was submitted that Mr Moss did not act inappropriately in the course of his employment and he did not engage in serious and wilful misconduct.

⁸ Applicant's Closing Submissions, page 1, Appendix D.

⁹ Applicant's Closing Submissions, page 3.

¹⁰ Ibid, page 8.

¹¹ Ibid, page 9.

¹² Ibid, page 15.

¹³ Ibid, page 14.

[28] It was initially submitted that sections 759 and 760 of the *Fair Work Act 2009* were enlivened and in turn s 117 and Regulation 1.07, due to the dismissal being summary. It was alleged that the written notice of termination of employment was not provided and payment for the notice period payment in lieu was not paid. However, at the hearing Mr Durkin submitted that they were withdrawing the submissions relating to the application of the *Fair Work Act 2009* and notice period payment.¹⁴

[29] The Applicant submitted it was harsh to leave him waiting with no communication from management for such a lengthy period and alleged the Respondent failed in its duty to keep the Applicant informed. He stated the investigation report was completed on 22 March 2019 and there was no explanation provided for the delays. The process of investigation and subsequent termination of employment commenced on 28 November 2018 to the termination of his employment on 27 August 2019.

[30] The Applicant submitted he had never been issued with a warning or “reprimand” pursuant to s 10(1)(b) of the SS Act, nor offered training programs. He noted the report relied on previous lawful and reasonable directions and the report states the investigator was unaware of the reasons behind the directive.¹⁵ He contested that direction was regarding an unrelated matter.

[31] It was submitted that directions are “a standard letter”¹⁶ from the Respondent to act, behave and communicate in a respectful manner regardless of whether an allegation is substantiated or unsubstantiated.

[32] The Applicant raised allegations of coercion of the complainants through the assertion that the allegations did not come first, rather the investigation came first and then the allegations were formed. This allegation is based on the differing evidence of the dates of meetings and concerns the one combined meeting, held on 26 September 2018 was used to gather all complainants in one room to share their concerns about the Applicant.

[33] It was alleged that the complaints were not in written form, and only personal file notes were made by Mr Darren Davis, Head Chef at the LGH, and Mr Dale Anderson, Manager –Food Service LGH.¹⁷ It was acknowledged that minutes of the meeting¹⁸ between Mr Anderson, Mr Paul Hunt, Ms Faulkner, Ms Lisa Hodge, Ms Jasmine Nelson, Ms Bridie Goodluck and Ms Stagg were recorded and that these may have been provided to the Investigator as the basis for the allegations.

[34] It was also alleged that the Investigator gathered information at the preliminary investigation stage and Mr Durkin referred to s 7.4 of ED5 warning against an investigator being prejudiced by information gained prior to the formulation of allegations and the investigation. A breach of impartiality of the investigation is alleged.¹⁹

[35] The Applicant submitted he has been denied procedural fairness due to his inability to provide a right of reply to Mr Pervan regarding the issue of two transcripts.

[36] It was submitted the sanction was disproportionate to the allegations and that it would be hard to be remorseful when he was struggling to understand the allegations particularly as there were allegedly two versions of Ms Faulkner’s allegations.

¹⁴ Transcript, page 10, paragraphs [27] – [44].

¹⁵ Applicant’s Statement in Support of Application, paragraphs [7] – [8].

¹⁶ Applicant’s Closing Submissions, page 4.

¹⁷ Ibid, page 6.

¹⁸ Exhibit R37.

¹⁹ Ibid, page 5.

[37] Mr Durkin stated the Applicant has suffered significant hardship as a result of the process and he has been left with significant mental disease and expense for the treatment. He was the primary income earner of the household.²⁰

[38] The remedy sought is reinstatement and it was alleged the employment relationship had not broken down.

[39] The Applicant's response to the key allegations will be dealt with in a later section dealing with the allegations.

The Respondent's case

[40] Ms Gretel Chen submitted there was a valid reason to terminate the Applicant's employment pursuant to s 30(5) of the IR Act which was "sound, defensible or well founded".²¹

[41] The Applicant, a permanent employee had his employment terminated pursuant to s 44 of the SS Act following the finding of a breach of the Code of Conduct.

[42] It was submitted the sanction of termination of employment was consistent with s 10(1)(g) of the SS Act and there had been compliance with the statutory regime.

[43] Ms Chen tended a series of materials used in the decision to terminate his employment:

- The letter to the Applicant from Mr Pervan dated 23 November 2018 by which he was given notice of the initiating of the Code of Conduct investigation;²²
- A response by the Applicant to the foregoing, being an undated and unsigned document entitled '*Response to Allegations Dean Moss*';²³
- The investigation report of Ms Jo Siggins, including all attachments to it, dated 22 March 2019;²⁴
- The letter of Mr Pervan to Mr Moss dated 10 April 2019 providing the report of Ms Siggins;²⁵
- Email from the Applicant's representative dated 3 May 2019 containing the Applicant's response to the Siggins report;²⁶
- Letter from Mr Pervan to the Applicant, dated 7 August 2019 regarding the proposed sanction;²⁷
- Letter from the Applicants industrial representative to Mr Pervan dated 20 August 2019 regarding proposed sanction;²⁸ and

²⁰ Ibid, page 21.

²¹ Northrop J (with whom Lindgren and Leharne JJ agreed) found the meaning of "valid reason" in *Cosco Holdings Pty Ltd v Do & Ors* (1998) 15 ALR 127.

²² Exhibit R50.

²³ Exhibit R59.

²⁴ Exhibit R60.

²⁵ Exhibit R61.

²⁶ Exhibit R64.

²⁷ Exhibit R67.

²⁸ Exhibit R68.

- Letter from Mr Pervan to the Applicant dated 27 August 2019 with his determination.²⁹

[44] Mr Pervan found 21 of the 38 allegations were substantiated and those substantiated allegations were supported by corroborating witnesses.

[45] The Respondent relied on the Applicant's poor conduct and non-compliance with a series of reasonable and lawful directions issued and performance management.

[46] The key reasons and evidence provided by the Respondent for the valid reasons are as follows. The grounds for termination of employment include:

- Breaches of the Code of Conduct;
- The Applicant showed no indication of remorse, intention to modify his behaviour or any insight to his inappropriate behaviour in the workplace;
- He was in a position of power and there was a significant age difference over the females making the complaints;
- There was a pattern of behaviour with non-compliance with previous directions; and
- The significant impact on the complainants.

[47] Ms Chen submitted there was a valid reason for the termination of the Applicant's employment and the termination was not unfair. It was stated that reinstatement was impracticable and by virtue of the Applicant receiving close to six months of workers compensation payments, no further award of compensation is appropriate.

[48] Furthermore, it was stated that the termination of employment was in accordance with the provision of the SS Act and any notice entitlements under the Award did not apply.

[49] The Respondent submitted the application should be dismissed.

The Evidence

[50] The Applicant provided a witness statement³⁰ and gave oral testimony which was subject to cross-examination. He had provided a written statement through HSU to the appointed investigator who undertook the ED5 investigation.³¹

[51] His written response to the majority of the allegations stated he could not provide an answer as the allegations were vague and unspecific and an answer could jeopardise his right to procedural fairness. He admitted eight of the allegations in part and provided a different context than was alleged. He denied three of the allegations. His evidence recalled the culture of the kitchen where joking, banter and laughter were normal.

[52] His evidence provided continued to maintain his position from his written response or deny most of the allegations, however in cross-examination he changed his position to deny 20 of the allegations, maintained his response to 15 allegations and admitted partly five allegations. His inability to recall many of the allegations and his offer of an apology if he had caused offence, conflicted with his evidence that he could not respond to or

²⁹ Exhibit R72.

³⁰ Exhibit A6.

³¹ Exhibit R59.

denied many of the allegations, particularly when he admitted he had supplied a written response to each incident raised as an allegation to HSU during the ED5 investigation, which was not forwarded to the investigator.³² I found his evidence evasive and not reliable.

[53] Mr Matthew Bessell provided a witness statement³³ and gave oral evidence. He works in the stores area of the kitchen at the LGH. He supported the Applicant's character and confirmed the jovial culture of the kitchen and the banter during regular breaks taken in the Northern Integrated Care Service (NICS) cafeteria. His evidence was credible and provided to the best of his ability.

[54] The Respondent brought on evidence from the three complainants, Ms Stagg, Ms Hodge and Ms Faulkner. Each witness provided a statement³⁴ with the transcript from the ED5 interviews attached, and provided oral evidence. I found that their evidence was honest and sincere and will be examined within the section dealing with the allegations.

[55] Evidence was also provided by Mr Davis, who was the Applicant's direct supervisor³⁵. He had made formal and informal complaints against the Applicant and his evidence provided observations of inappropriate, derogatory and aggressive behaviour by the Applicant in the workplace. He confirmed hearing the sexist remarks made by the Applicant about women including inappropriate comments about Ms Faulkner and Ms Stagg.

[56] He stated that he moved Ms Faulkner from NICS to work in Baby Cino, which is a small coffee area situated inside the main cafeteria. He transferred her after being made aware of the complaints to: "... remove her out of this situation so she wasn't put in that situation" ³⁶ He provided evidence that he did not schedule the girls to work with Mr Moss at the pasta bar after the allegations were made. He also stated the Applicant was not required to go up to the Baby Cino area of the cafeteria as there was no hot food provided there, and the cafeteria staff had different supervisors. This was in contrast to the Applicant's evidence.

[57] He provided his account of the aggressive conduct from the Applicant on receipt of the letter from Mr Andersen on 26 November 2018. His evidence was clearly articulated and I found his evidence convincing.

[58] Mr Corey Smith, Assistant Storemen LGH, gave evidence that the Applicant would cuddle and touch girls "...he'd touch girls on you know, the backside, things like that."³⁷ He confirmed the Applicant made sexual remarks about the women to the male staff and he felt threatened by the Applicant. He lodged a formal complaint about the Applicant on 21 August 2017 in relation to his aggressive, threatening and intimidatory behaviour in the workplace. I found he provided frank responses.

[59] Ms Nelson, a former apprentice chef and Chef at LGH, provided evidence that she did not enjoy working with the Applicant and found him to be rude and yell at her. She lodged a formal complaint against the Applicant on 28 July 2017 to Mr Davis and Work and Training. She believed that the Applicant received a formal written direction to behave in a respectful way. She stated she would not want to work with the Applicant again. I found her evidence was credible and considered.

³² Transcript, pages 113-114.

³³ Exhibit A8.

³⁴ Exhibits R82, R83, and R84.

³⁵ Exhibit R8.

³⁶ Transcript, page 138.

³⁷ Transcript, page 154.

[60] Additional material was tendered and included informative photos of NICS café and the main LGH cafeteria and kitchen and a video w the which included the Baby Cino area. The Applicant stated the photos were out of date and taken at a time when there were no trolleys or people present.

Consideration of key allegations

[61] The key allegations of misconduct were made by the young female trainees, many with substantiation from colleagues who experienced and witnessed these behaviours. The key allegations to be considered involve alleged inappropriate touching of girls, acting inappropriately in the workplace, offensive comments of a sexual nature, persistent unwelcome calling and offering rides.

The Applicant viewing inappropriate sexual screenshots of girls in NICS

[62] It was alleged that Mr Moss would view photos of “scantily clad girls” on his mobile phone in a public area of NICS café. The Applicant maintained his written position in cross-examination that he could not respond to the allegation as it was too vague and unspecific.

[63] Ms Hodge provided evidence that she observed the Applicant viewing online content of girls in bikinis or naked on his phone on an almost daily basis. When she raised an objection with the Applicant, his response was that he was on a break and could do what he likes on his break and he became aggressive. She stated she was concerned other customers could see what he was viewing.

[64] Mr Davis corroborated this behaviour in cross examination and said the following³⁸:

“MR DURKIN: (Resuming) – So were you aware – did you witness, in Nick’s, the banter that went on between the boys, that is Matthew Bessell, Chris Lee?.....When I would walk in there to get a drink, yes I would.

What do you recall the banter that was - ?.....It was a long time ago mate. I can recall obviously people making mention of what they were looking at on their phone. Sexually-clad women, all that sort of stuff, through Facebook, that’s the sort of banter that it –”

[65] Ms Hodge’s evidence is corroborated by Mr Davis and I am satisfied that the Applicant did look at screenshots of women scantily dressed while on breaks in the public area of the NICS café.

[66] Ms Faulkner, a seventeen year old trainee, provided a witness statement with an attached transcript of her interview with Ms Siggins as part of the ED5 investigation, dated 8 October 2018. Ms Faulkner attested to the contents of her documents as being true and correct. I have accepted this statement as part of her evidence, with no objection at the time from Mr Durkin.

The Applicant requesting Ms Faulkner to send him photos of herself.

[67] Ms Faulkner gave evidence that Mr Moss requested her to send through photos of herself to him. She said:³⁹

“Yes. All right. You then talk requests for photos. Yesterday, Mr Moss was in the witness box and he talked about you two being friends on Facebook and he couldn’t recall whether you invited him to be your friend on Facebook or whether he invited

³⁸ Transcript, page 147, and Exhibit R79.

³⁹ Transcript, page 256.

you to be his friend. Can you remember how it started?.....He added me as a friend on Facebook.

Right?.....Which I accepted.

Yes. You then go on to talk about requests that he made for photographs. Can you explain what happened there?.....So he would refer to other girls' photos and asked me to send him some. I uploaded a photo on my Facebook profile picture and he was then requesting photos with less clothes on or saying that I was too covered up in those pictures and it became a continuous thing. He would then come up and say, "You still haven't sent me those photos," along those lines.

And how did you react when he did that?.....I don't think I really said a great deal. I didn't – I wasn't really sure how –

Yes?..... – to react.

How did you feel about it?.....I felt a bit uncomfortable, yeah.

Right. How long did that go on for, the photo requests?.....It was a while. It was a continuous thing. He then came up a couple of days later with his phone blank saying, "Yeah, you still haven't sent me your photo." So it was probably a couple of weeks it just went on for.

And did you send him photos?.....No.

Why didn't you?.....Because I didn't want to.

Yeah?.....No."

[68] Ms Hodge provided an example of when Ms Faulkner would feel uncomfortable with Mr Moss' behaviour and her evidence was that Mr Moss asked Ms Faulkner to message photos of herself to him. She said that Mr Moss stated it didn't matter if Ms Faulkner didn't have clothes on.⁴⁰

[69] In closing submissions, the Applicant states he did not ask Ms Faulkner for photos. In evidence he conceded they were Facebook friends, but denied he had asked for photos from Ms Faulkner.⁴¹

[70] Having confirmed the Facebook friendship, the corroborating witness evidence, I am satisfied the Applicant requested sexual photos of Ms Faulkner. I find this workplace behaviour inappropriate from a male senior employee to a young female trainee.

Parma for a Farmer day allegations of the Applicant commenting on what Ms Faulkner was wearing, requesting to touch her and touching Ms Faulkner, and constant phone calls to Ms Faulkner

[71] It was alleged that the Applicant in the presence of Ms Hodge, made comments to Ms Faulkner about her clothing to the effect of:⁴²"Oh I couldn't wait to get up here to see what you had on" and he said: "You don't even have to try. Those jeans. And/or Can I have a touch? \$50 for a touch? And/or on my lunch break, in the storeroom."

[72] Additionally, it was alleged the Applicant walked up to Ms Faulkner while she was in the storeroom bending over to get a rubbish bag, and he walked backwards towards

⁴⁰ Transcript, pages 215-216.

⁴¹ Transcript, page 25.

⁴² Transcript, page 30.

her with his hand outstretched and again said the words to the effect: "Can I have a touch?" Ms Faulkner provided evidence that the Applicant touched her on various occasions, mainly on the hips and buttocks. During this day, he came up to her and moved behind her and placed his hands on her hips, while trying to get a plate out of the cupboard.⁴³

[73] Ms Faulkner gave evidence that she and Ms Hodge had discussions about dressing up in farm clothes as part of the Parma for a Farmer fundraiser, but had not involved others including Mr Moss about their clothes. Her evidence in relation to these allegations is as follows:⁴⁴

"Could you take us through to what happened on parma for a farmer day at – the morning of parma for a farmer day?.....He came upstairs and – well which was up to Nick's Café and had said that he couldn't wait to see what I was wearing and that I didn't have to try in those jeans. Which, to me referred to as though they looked good. Then he kept asking – he offered me fifty dollars for a touch-

Touch – touch of wear?.....Well, he didn't get specific.

Yeah?.....But, then kept repeating "Can I have a touch, can I have a touch" and so on. Which to me was, touch me.

Yes?.....And, then he asked to touch me in the storeroom on his lunch break. When I was getting rubbish bags out of the storeroom he had then come towards me with his back facing me and his arm reaching out, asking to touch me. He ended up not touching me, but yep.

Did you say anything in response to these requests to touch you?.....I don't think so. I think I just walked away – walked past him.

How did you feel when that was happening?.....That was the first time that it'd gotten that bad, so I felt extremely like that was just too much for me. I felt extremely uncomfortable and after that I just didn't want him to come up there anymore. I didn't want me to be around me at all.

Yes. He denies that he said to you "Can I have a touch?", what do you say to that?.....It did happen, and it is true."

[74] Ms Hodge provided evidence that she heard Mr Moss ask Ms Faulkner for a touch and offer Ms Faulkner \$50 if she let him touch her. She said he was like a dirty old man.

[75] Her evidence was she also witnessed Mr Moss at NICS café in his break to say to Ms Faulkner that he couldn't wait to get up there to see what she had on and he persistently rang Ms Faulkner from the kitchen asking what she was wearing. She stated she reported Mr Moss to Mr Davis asking for something to be done about his behaviour. Ms Faulkner stated he called her five times that day.

[76] Mr Moss denied saying he couldn't wait to see Ms Faulkner and that the employees had been discussing what they would be wearing for weeks. He said:⁴⁵

"And, did they tell you what they were going to dress up in?.....Oh, they'd been saying for a week, week and a half before "Wait and see what we're wearing, wait and see what we're wearing". That – that sort of stuff, you know.

⁴³ Exhibit R84.

⁴⁴ Transcript, page 260-261, and Exhibit R 84.

⁴⁵ Transcript, page 30.

[77] He also denied he has ever touched anyone inappropriately. His evidence was as follows:⁴⁶

"In, or about late-August 2018 to early-September 2018 while Ms Faulkner was in the café you walked up behind Ms Faulkner and placed one hand on either side of her hips and moved her away from the cupboard she was standing in front of to retrieve a plate. When you moved her away from the cupboard you moved your hand down towards her left buttock.

Now back when that was put to you during the ED5 process, HACSU did not provide a response to it. You hadn't put a response to it – the proceeding before the commission. Your view, or Mr Durkin's view being it's not relevant. What do you say now to that allegation?.....I remember that I wanted to get in and get a plate. She done on a few occasions, to get a bowl out, and underneath the bain, I asked her to move. I said, 'Can you move for me please,' and she laughed, and she said, 'No, no.' I said, 'Can you move,' because we didn't have long for breaks, and she laughed again and she said, 'You move me,' like that. I put her hands on her hips and I just went like that, and that was it.

Right, so you've just recalled that very detailed conversation?.....Mmm.

Between you and Ms Faulkner about that incident?.....Mmm.

The memory has just come back to you?.....I wouldn't say it was a very detailed incident, but I remember that.

You have a clear recollection - ?.....I've never touched anyone inappropriately. That's what I'm saying.

I would suggest to you that you moved her away, and you moved your hand down towards her left buttock?.....No, that never happened."

[78] Based on the evidence, I find that Ms Faulkner and Ms Hodge prepared for the fundraiser, Parma for a Farmer and had not included the Applicant in their discussions on what they were wearing. The continuous calling by the Applicant to NICS café to speak to Ms Faulkner was witnessed by Ms Hodge and reported. The Applicant conceded he did make numerous calls as a joke. Constant unwelcome calls to Ms Faulkner during his shift, is in my opinion, harassment and unacceptable behaviour in the workplace.

[79] I am satisfied that the Applicant commented to Ms Faulkner that he couldn't wait to see what she was wearing as outlined in the evidence of both Ms Faulkner and Ms Hodge. In my view, the request to touch her is substantiated through corroboration by Ms Hodge. It is unacceptable workplace behaviour and his unwelcome touching of the girl trainees is a constant theme of the complainants.

The Applicant offering Ms Faulkner lifts home

[80] It is not disputed that the Applicant offered Ms Faulkner lifts home after work. Ms Faulkner's evidence is that he offered her lifts home on an almost daily basis. She said she would say no and catch the bus home. On one occasion she stated she observed him driving past and beeping his horn as she walked home from the bus.

[81] Ms Hodge's evidence was she observed the Applicant offering to take Ms Faulkner home and that Ms Faulkner became quite distressed by the Applicant consistently offering

⁴⁶ Transcript, pages 76-77.

her lifts home.⁴⁷ Ms Hodge had driven Ms Faulkner home as she was scared to catch the bus home. Ms Hodge stated that the Applicant lived at Summerhill whereas Ms Faulkner lived at Punchbowl so it was not on his way home.

[82] This evidence was not challenged as Mr Durkin did not cross examine Ms Faulkner. The Applicant did not provide a response to the investigation.

[83] I am satisfied that the Applicant did offer to take Ms Faulkner home initially by mutual agreement but as provided by the evidence, the offers became unwelcome and it went past a point where Ms Faulkner felt comfortable. I am satisfied this constitutes unwelcome behaviour from the Applicant.

The Applicant continued to see Ms Faulkner after she was transferred to Baby Cino area

[84] Ms Faulkner gave evidence that she was disappointed to be moved from NICS café to the main cafeteria in the Baby Cino area and that the transfer was due to the Applicant's behaviour. She stated that the main café had more people and staff and Mr Anderson moved her as he did not want her in an isolated area and therefore to be away from the Applicant.⁴⁸

[85] A specific incident occurred on about 26 September 2018 on Grand Final Footy colours day. A video of this incident was provided as evidence and viewed at the hearing.⁴⁹ Ms Faulkner said believed the Applicant was unaware of the reasons she had been moved and he came into the Baby Cino area to see her and ask her why she had moved out of NICS. After viewing the video, her description was:⁵⁰

"Um, so this was just after I'd been moved out of Nick's. Dean wasn't aware as – of the reason why at the time. So, I had to act like there was no issue to begin with. He come over and was asking why I was moved out of Nick's Café and I said, I wasn't sure. I think I said they were just rotating the trainees. And, then he was talking away and said, "I just came for a look at you not at the scones". and, kept talking. After that he left and I went and reported it to I think it was Dale and Rohan or Jason."

[86] The Applicant's evidence is that he has no knowledge or recollection of the incident. He conceded he was the man in the video and agreed it was Ms Faulkner standing behind the counter. He denied saying those words and stated it was part of his duties to go to the main cafeteria and pasta bar and make sure the staff and the food were okay.

[87] After viewing the video, Mr Davis confirmed the Applicant was the man behind the bain-marie and that he was the supervisor of the Applicant. He stated the Applicant was not required to go to the Baby Cino area:⁵¹

"Do his work duties require him to go to the Baby Chino Café?.....They required to go up to the cafeteria _ to the main cafeteria and to the pasta bar but actually not into Baby, we don't do – all the hot food that goes up there is just sent up in the lift and the girls look after that one.

So, we would contradict Mr Moss' evidence this morning that he was required to go to that part of the hospital?.....Not under my supervision. I would have lent – no lent him there."

⁴⁷ Transcript, pages 214-215.

⁴⁸ Transcript, page 262, and Exhibit R84.

⁴⁹ Exhibit R79.

⁵⁰ Transcript, page 263.

⁵¹ Ibid, page 138.

[88] Mr Davis confirmed he moved Ms Faulkner to Baby Cino from NICS café to ensure she wasn't put in the situation to be in contact with the Applicant, following discussions with Mr Andersen and the complaints against the Applicant.

[89] I am satisfied the video evidence shows the Applicant moving behind Ms Faulkner behind the bain-marie in the Baby Cino section of the cafeteria. The Applicant did not directly provide evidence he was required to attend the Baby Cino section. I prefer Mr Davis' evidence to that of the Applicant, that Mr Moss was not required to be in the Baby Cino section. The Applicant provided vague evidence that he did not recall the event but after viewing the video, confirmed he was the man in the video and then stated he did not say the words and recalled further details.

[90] Based on the evidence, I find he was not required to attend the Baby Cino section but rather sought out Ms Faulkner and deliberately went there to see her. His supervisor Mr Davis stated he did not approve the Applicant to be in that area. Having regard to the evidence including his verification he was in Baby Cino area in the video, I am satisfied his presence was not required as part of his duties and he was not required to be at the Baby Cino section. I prefer the evidence of Ms Faulkner over the Applicant regarding the inappropriate comment made by the Applicant.

The Applicant tapped Ms Stagg on the right hip above her buttocks with his open hand and said the words "Bad Girl"

[91] Ms Stagg gave the following evidence in relation to this incident:⁵²

"Okay. At par10, you describe an incident happening in August or September when Mr Moss slapped you, you said, on the ass "while I was in the kitchen"?.....Yep.

"He said, 'Bad girl' in a sexual kind of way at the same time"?.....Yep.

"He then just walked around the bench and walked off"?.....Yep.

Now, yesterday, Mr Moss gave evidence that he made that comment after you had been told off – ?.....Yep.

– by one of the chefs. Do you remember that?.....Yep.

Yes. And he says that he tapped you on the lower back. Do you disagree with that?.....No, it was on the bottom.

It was on the bottom?.....Yep.

And he says he did it to make you feel better, effectively?.....No, I didn't get that impression at all, no.

Did it make you feel better, being patted on the bottom like that?.....No, it just made me uneasy and confused on why that happened, and it definitely wasn't my lower back."

[92] Mr Davis stated Ms Stagg reported the incident that the Applicant had slapped her on the backside and called her a bad girl. He confirmed she had complained the tap was on her rear end not hip. The file notes, dated 17 September 2018 taken by Mr Davis⁵³,

⁵² Ibid, page 183.

⁵³ Exhibit R36.

note Ms Stagg's complaint and her discussion with her boyfriend at home, who supported her to report it as he believed it was sexual harassment.

[93] The Applicant's closing submissions stated he did not slap Ms Stagg on the backside. They raised concern that Ms Stagg alleges the incident happened on 20 August 2018 but she didn't raise it until September 2018. Mr Moss' evidence was as follows;⁵⁴

"I went past because I could see Lily was a bit upset and I tapped her – it was on the side, above her hip and just went "bad girl" and made a joke of it, you naughty girl. And I said to her at the time, "It'll be all right, don't worry about it"."

[94] The Applicant has admitted he called Ms Stagg a "bad girl" and tapped her above her hip following her performance feedback. In my view, any form of touching is inappropriate in the workplace, noting the effect of this conduct made Ms Stagg feel uneasy.

Ms Stagg carried a bunch of cucumbers and the Applicant asked what she was going to do with them.

[95] Ms Stagg gave evidence in relation to this incident:⁵⁵

"At par11, you mention that in September 2018, you were carrying some cucumbers from the fridge and you needed to cut them up, and he said to you, "Lily, what are you going to do with those?", and you said, "The way he said it felt like he meant I was going to take them somewhere else and use them in a sexual way"?.....Yeah.

Now, yesterday, he gave evidence in relation to that and he said that he was making a genuine inquiry of you as to what you were going to do with those vegetables?.....He just said it in a really seductive way and I'd come out of the fridge with them as if – well, he must've assumed that I was doing something to myself with them –

Yes?..... – or that I intended to.

He also said that you had previously got zucchinis and cucumbers confused?.....No.

Had that ever happened?.....No."

[96] The Applicant's evidence is that she got confused between zucchinis and cucumbers and he alleged he wanted zucchinis for the roast vegetable pasta dish. He denied there was any sexual context. Mr Durkin accepted Ms Stagg's clarification that she never got cucumbers and zucchinis confused.

[97] My finding in relation to this incident is that there is a lack of evidence for this allegation to be substantiated.

The Applicant wrapped his arms around Ms Stagg to demonstrate training and other physical embraces.

[98] There were multiple allegations of the Applicant touching or reaching over Ms Stagg. One such example relates to the training session where it is alleged the Applicant wrapped his arms around Ms Stagg as she was with her trainer demonstrating how to

⁵⁴ Transcript, page 30.

⁵⁵ Ibid, page 184.

make quenelles. Ms Stagg's evidence was that she felt the Applicant was in her personal space and it was unnecessary, as he could have shown her from the side.

[99] Mr Davis' evidence is that Ms Merylyn Thurlby (Ping), the workforce trainer was demonstrating a technique to Ms Stagg. The Applicant then put his arms around Ms Stagg from behind to assist the demonstration. Mr Davis said that was not an appropriate technique to demonstrate and there were other ways such as standing beside her on the bench. The trainer said she thought it was strange and inappropriate behaviour and Mr Davis requested her to put incident in writing, which she did, noting that the Applicant stood behind Ms Stagg with his arms out in front of her.⁵⁶

[100] The Applicant stated he was trying to show Ms Stagg how to make quenelles as she was struggling:⁵⁷

"Okay. And I suggest to you that it is entirely inappropriate to demonstrate to any member of staff, let alone a female, how to make a quinoa by standing behind her and wrapping your arms around her - ?.....Okay.

- so that you completely surround her body?.....Okay. I – can I explain this. I tried – quinoa as having two spoons and you go like that. She was having trouble doing it. I stood beside her first of all and tried to show her how to do it. She couldn't get the hand movement. Yes, looking back, probably, but I just reached round, I wasn't pressing into her, I reached round, I held her hand so I could make – move her hands like that. That was fine.

I suggest to you she found that uncomfortable?.....No one suggested to me that at the time."

[101] The Applicant contested whether Mr Davis was present as Ms Stagg could not recollect who was present, but her witness statement included Mr Davis as being present.

[102] Ms Stagg alleged that the Applicant would come up behind her while she was working at the pasta bar and rub his pelvis up against her backside.

"So you're saying he comes in front and brushes up you like that?.....He's facing the front. Like, he'll brush his front up against me."

[103] The photographs of the kitchen⁵⁸ set out the scene and she stated there was a one to two metres area around her where contact could have been avoided or he could have pushed the trolleys away to access the shelves. Her evidence⁵⁹ was this happened a couple of times a week and she said it really freaked her out.

[104] Mr Moss questioned the photographs as the kitchen appeared to have been different to when he worked there and there were no trolleys on the floor. However he agreed that Ms Stagg worked at the depicted bench and the sink area and bench were still present.

[105] His evidence was that there were many trolleys and you could hardly move and were banging into people constantly. He stated you had to stretch up to the shelf to get stuff.

[106] Mr Durkin cross examined Ms Stagg to describe where on her back Mr Moss touched her:⁶⁰

⁵⁶ Exhibit R46.

⁵⁷ Transcript, page 90.

⁵⁸ Exhibit R77.

⁵⁹ Transcript, page 185

⁶⁰ Transcript, page 195.

"Would it be fair to show – to see whether or not that photo is representation – I don't particular want Mr Moss standing up in his current medical condition. So when he grazes past you would it be fair to say that what hits you is his gut?.....It just seemed like he was rubbing up against me.

With what?.....His pelvis, like I said.

His pelvis?.....Yes.

So would that mean he comes past you sideways like that?.....No, front on. Front on."

[107] The Applicant's closing submissions noted the allegation of brushing past Ms Stagg with his groin was unsubstantiated in the Verity Group Final Report⁶¹ and stated he did not deliberately graze his groin against Ms Stagg and that he is overweight and his stomach would most likely be encountered.

[108] Ms Stagg gave consistent, convincing evidence that the Applicant repeatedly reached over her to get items off the higher shelf above her, touching his front on her back while she was working at the pasta bar. The Applicant has conceded that they worked in close confines and that they were constantly banging into people. I prefer the evidence of Ms Stagg and am satisfied that the Applicant did touch Ms Stagg's back while reaching up to the shelves above her. It matters not that it was his large stomach or his groin, as Ms Stagg would only feel the touch and not see exactly what part of his body was touching her from behind. I am satisfied that this inappropriate behaviour in the workplace could have been avoided. Nothing in my view, including the lack of space, makes this behaviour acceptable.

Allegations relating to the Applicant's comments about his testicles

[109] Ms Hodge gave evidence that in the NICS café, the Applicant said as:⁶² "he stopped at the counter that his nuts were itchy while he put his hand on his crotch." She said he explained he had shaven the night before and his testicles were itchy. Ms Hodge said she felt disgusted and she said many others in NICS were as well.

[110] The Applicant stated he had no knowledge or recollection saying those words.

[111] Ms Faulkner gave evidence to the investigator and at the hearing supporting Ms Hodge's recollection. Her sworn witness statement contained the attachment with the transcript from the interview dated 8 October 2018. While there is some contention raised by the Applicant, which will be dealt with later, she said:⁶³

"Then, there was one time when I was in NICS, he'll come past and say something about his nuts being itchy, and just gross things like that. He said to me and Lisa that his nuts were itchy because he had shaved them. I don't remember word for word what he said. I wasn't really paying too much attention at the time."

[112] The discussion with Ms Hodge has been corroborated by Ms Faulkner, with no by comment made by the Applicant. I prefer the evidence of Ms Hodge and Ms Faulkner and accept that the statement was made by the Applicant. In my view it is an offensive comment made in the public area of the workplace, leaving both female employees feeling uncomfortable.

⁶¹ Exhibit R60.

⁶² Transcript, page 213.

⁶³ Ibid, and R84.

Non-compliance with a previous written direction provided in August 2017.

[113] The Respondent submitted informal and formal warnings were issued to the Applicant over the course of four years. It was alleged by Ms Chen, the Applicant demonstrated he would work on his own terms and he would act with impunity, refusing to be managed and continuing to not comply with reasonable and lawful directives.

[114] It was submitted the Applicant has not shown any remorse for his actions and he demonstrated a lack of insight into the effect of his behaviour on others.

[115] The first complaint was lodged on 7 May 2015 by Jamie-Lee Evans and Doug Pinner, where the Applicant was advised to refrain from inappropriate language and behaviour, following a formal meeting with management. The file note tendered⁶⁴ outlining this complaint, was dated 24 March 2020 and objected to by Mr Durkin due to the date. The Respondent submitted the date should read 24 March 2015. I am satisfied this is an accurate file note as the header indicated the correct entity named in 2015, being the Northern Area Health Service which the THS was then known. All other details appear in order and reflective of a file note.

[116] The Applicant signed a file note prepared following the meeting held on 18 May 2015⁶⁵, agreeing he understood the severity of the incidents and to guarantee he would change the way he works. A formal letter⁶⁶ was forwarded to the Applicant by Mr Cameron Matthews, Director –Corporate Services, from the THS predecessor entity, the Tasmanian Health Organisation- North stating:

“...as should there be a further occurrence then the matter may be dealt with as a disciplinary process. A sanction arising out of a disciplinary process includes termination of employment.”

[117] A complaint from Mr Davis in December 2016 resulted in a formal letter being issued by Mr Rohan Beardswood, Deputy Food Services Director LGH⁶⁷, finding the Applicant used inappropriate language, and enclosing a copy of the Agency’s Workplace Behaviour Protocol. There was a stated expectation:

“Inappropriate language and behaviour will not be tolerated in the workplace and it is my expectation that you must exhibit respectful workplace behaviour to your colleagues at all times.

In particular, I highlight to you that failure to comply with the Protocol without providing good reason for doing so, may lead to disciplinary action. Disciplinary action may include warnings, or in serious cases termination of employment.”

It was acknowledged the other party did not meet the expected workplace standard and there was an apology by both parties.”

[118] The Respondent relied on his conduct and non-compliance with a prior written direction on 22 August 2017 in response to allegations by Ms Nelson by Mr Andersen. Mr Pervan noted that the Applicant had received a previous lawful and reasonable direction in 2017. In the letter, Mr Andersen stated:⁶⁸

“However, I am concerned that there have been a number of occasions prior to this current matter in which your behaviour has led you to communicate or interact

⁶⁴ Exhibit R02.

⁶⁵ Ibid R03.

⁶⁶ Exhibit R04.

⁶⁷ Exhibit R012.

⁶⁸ Exhibit A5, attachment 1.

with colleagues in a manner that is contrary to our expectations with respect to workplace behaviour and the relevant Policies and Protocols related to workplace behaviour.

This behaviour cannot continue, and I direct that you must act, behave and communicate (including in writing) in a considered and respectful manner consistent with the Tasmanian Health Services' relevant Policies and Protocols concerning workplace behaviour, a copy of which I is enclosed for your reference.

I must advise that failure to comply with this directive may result in disciplinary action being taken and that may result in a determination that you have breached Section 9(6) of the *State Service Act 2000*."

[119] A complaint from Mr Smith⁶⁹ in September 2017, resulted in a counter complaint by the Applicant⁷⁰. Mr Anderson formally advised the Applicant of his concerns that this was a further occasion of communication with a colleague that was contrary to the standard expected. The Applicant was advised that failure to comply with the previous directive will result in disciplinary action and counselling was advised to assist to develop strategies in dealing with his behaviour in the workplace.

[120] Further complaints were received from Mr Smith and Mr Davis in November and December 2017 around incidents of inappropriate workplace aggression and communication.

[121] The incidents and complaints from the workplace trainees and other female staff commenced in April 2018. This culminated in 38 allegations investigated as part of the ED5 process.

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

[122] To determine if there was a valid reason for his termination of employment, the onus of proof rests with the Respondent.⁷¹ Valid reasoning pertains to whether there was a sound, defensible, well founded reason⁷² for the dismissal, in the context of the employee's capacity or conduct.

[123] 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."

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

- Breaches of the Code of Conduct;

⁶⁹ Exhibit R27.

⁷⁰ Exhibit R31.

⁷¹ 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.

⁷² *Selvachandran v Peteron Plastics Pty Ltd* (1995)62 IR 371, 373.

- The Applicant showed no indication of remorse or intention to modify or insight to his inappropriate behaviour in the workplace;
- He was in a position of power and significant age difference over the females making the complaints;
- There was a pattern of behaviour with non-compliance of previous directions; and
- The significant impact on the complainants.

[125] I am not bound by the reasons given by the employer, rather I must determine afresh whether there was a valid reason for dismissal. My decision is not based on which transcript was before the decision maker, rather I am assessing all the evidence before me. The matter of the two versions of the transcripts is not material in my decision on valid reason, as I relied on the transcript attached to the statement of Ms Faulkner which she attested to be true and accurate and was not challenged by Mr Durkin at the time it was tendered.

[126] This is not a review of the decision by Mr Pervan as relied on by the Applicant. In closing, the Applicant submitted⁷³:

“We assumed the Hearing would be based on what Mr Pervan had in front of him when he made his decision to terminate Mr Moss’s employment. Otherwise, we would have provided statements from witnesses.”

[127] Relying on the principles outlined in *Walton v Mermaid Dry Cleaners Pty Ltd*,⁷⁴ 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.”⁷⁵

[128] I must take into account all the circumstances of the case⁷⁶ and have considered the evidence, the authorities and materials provided by the parties, and the context of the conduct and applied a common sense approach. I have not made a finding on each of the 38 allegations but have considered all the evidence and materials surrounding those allegations not described in this decision.

[129] The Respondent has stated the termination of employment was not a summary dismissal. Therefore, I am satisfied the Applicant’s submission regarding the higher level of proof requirement for serious misconduct is not relevant.

[130] I find the written directives were legally framed, reasonable and lawful directives and each letter clearly outlined the recourse if the directives were not complied with by Mr Moss. He was provided with a copy of the workplace policy, THS Workplace Behaviour and Performance, and offered support through the Employee Assistance Program (EAP).

[131] I am perplexed that the Applicant submitted he had never been issued with a warning or reprimand and the directions were a “standard letter”. I am satisfied he had been issued with lawful directives and needed to take the direction seriously and comply with the clear expectations, despite the workplace behaviour differing from the current incidents. The resultant expectations stated in the directives were generic in nature relating to respectful workplace behaviour and communication in the workplace. I am satisfied he breached the directives and in doing so, breached the Code of Conduct in the SS Act. Section 9(6) states an employee must comply with any lawful and reasonable direction given by a person having authority to do so.

⁷³ Applicant’s Closing Submissions dated 7 October 2020, page 20.

⁷⁴ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681.

⁷⁵ *Ibid* at 685.

⁷⁶ Section 30(2) of the IR Act.

[132] In my view, he has caused considerable harm to many trainees through his sustained unwelcome physical contact and verbal comments including many inappropriate sexually explicit comments. I am satisfied he displayed a pattern of inappropriate workplace behaviour which is evidenced through the significant history of performance management and findings related to the above incidents.

[133] He was made aware of the expected conduct in the workplace and yet, still showed no insight or remorse. He consistently failed to comply with management's expectations and did not demonstrate respect for others, despite the supervisory nature of his role working with predominantly female trainees. I note his position of power over the trainees and the significant age difference. I find his conduct is of a serious nature and this conduct cannot be tolerated in any workplace.

[134] Based on the principles set out in *Briginshaw v Briginshaw*,⁷⁷ I am satisfied that there are a number of incidents which occurred as set out above, which collectively constitute a valid reason for termination of employment. Additionally, I find the Applicant persistently breached the policies and protocols of workplace behaviour, despite a number of formal and informal warnings. It is remarkable his employment was not terminated at an earlier juncture, when he first breached the written, lawful directions.

Was the termination of employment fair?

[135] Having found, on the balance of probabilities, that the Applicant's conduct constituted a valid reason for the termination of his employment by the Respondent, I will now turn to determining if the dismissal was unfair in the context of the Applicant's personal circumstances.

[136] This onus of proof lies with the Applicant, as stated in s 30(6) of the IR Act:

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

[137] Mr Durkin submitted the termination of the Applicant's employment was unfair for a number of reasons:

- Faulty Investigation:
 - Lack of substantial detail in the allegations;
 - Alleged collusion of the complainants and complaints not in written form;
 - Motive of NICS café staff was due to them being upset regarding union bans and closure of NICS café;
 - Preliminary investigation may have prejudiced the investigator so she was not impartial;
 - Denied right of reply regarding two versions of the transcript of Ms Faulkner;
 - Fabricated evidence;
 - Denied interview with investigator;
- The length of time to keep him waiting was harsh;
- Lack of previous performance issues:
 - He has never allegedly been given written warnings or "reprimand", nor offered training programs;

⁷⁷ (1938) 60 CLR 336.

- Inappropriate sanction;
- Resultant hardship; and
- Termination without notice.

[138] The Respondent submits there has been compliance with the statutory regime and his termination of employment met the standard of reasonable industrial behaviour and was fair.

[139] Ms Chen highlighted the following considerations in making this assessment⁷⁸:

- The nature of the Applicant's conduct;
- The effect of the Applicant's conduct on fellow employees;
- The risk posed by the Applicant in the workplace;
- The Applicant's prior conduct; and
- Prior warnings, instructions and directions issued to the Applicant.

Investigation

[140] The Applicant through his union representative, HSU, initially raised concerns and provided a response to the ED5 report. HSU stated the report lacked detail on the majority of allegations, including the inability of witnesses to recall dates or times, partial substantiation of some findings, and a theme of constructing the case against the Applicant. HSU requested the report should not be relied upon by the decision maker.⁷⁹

[141] The Applicant was notified of the proposed sanction and offered an opportunity to show cause. HSU responded stating the proposed sanction would err both in fact and in law. The proposed sanction of termination of employment would be harsh and unreasonable and again raised the issues he had been targeted as the HSU delegate and had not been appropriately reprimanded in the past. HSU stated the Applicant had not had been offered a chance to complete an interview with the investigator therefore denying procedural fairness.⁸⁰

[142] I am satisfied the evidence was that the investigator, Ms Siggins emailed Mr Matt Harvey, Human Resources Consultant, and confirmed the Applicant had been offered the opportunity to be interviewed during the investigation, but chose to respond in writing. Ms Siggins response was:⁸¹

"Dean was offered an interview twice, verbally during our initial phone call and in writing via email (attached). He chose to provide a written response."

[143] She noted that most of the Applicant's written statement contained the comment: "I cannot provide answer to this alleged fact as it is vague and unspecific. To provide an answer would be jeopardising my right to procedural fairness."

[144] In response to the allegation of witness collusion, the Respondent noted that there was no evidence provided by the Applicant to substantiate this allegation. The Applicant alleges multiple meetings were arranged for complainants to come together in one room to share their concerns. It is alleged that the allegations in this matter did not come first and rather the investigation was initiated without the allegations.

[145] The Applicant concedes there was a meeting held on 26 September 2018 with Mr Andersen, Mr Davis, Mr Hunt and the complainants. It was alleged by the Applicant that

⁷⁸ Outline of Submissions of the Respondent.

⁷⁹ Exhibit R64.

⁸⁰ Ibid R68.

⁸¹ Exhibit R70, and R71.

there is a material difference from an informal discussion and providing a written statement and there was a lack of a formal statement of complaint. The Applicant submitted that following this meeting, Ms Siggins was requested to do a Preliminary Investigation on 27 September 2018, based on the collated notes from this meeting.⁸²

[146] Relying on ED5, the Applicant alleges the Investigator had taken the role to formulate and particularise the allegations and then to investigate these formulated allegations. It was further alleged that s 7.4 of ED5 prohibits the commencement of the investigation before allegations have been developed and that in s7.1 the investigator must be impartial. It was alleged this has been breached.

[147] The Respondent submitted the appointment of the Investigator to investigate the alleged breach of the Code of Conduct, was in accordance with ED5.

[148] I observe Mr Pervan had responded to the issues raised by the Applicant throughout the process. In a letter dated 27 August 2019, Mr Pervan stated he was satisfied that management took appropriate action in relation to the Applicant's behaviour in 2017 and his role as the union delegate did not influence this process. The Applicant had been offered an opportunity to be interviewed during the investigation. Mr Pervan confirmed the complainants had provided details for each allegation of the approximate period, what was said or actions, and the location, which Mr Pervan stated was sufficient detail.

[149] I am satisfied the allegations as stated could be addressed. The Applicant submitted he had responded to all the allegations to HSU, but it was decided by HSU not to forward his response as part of the investigation process.

[150] While there were considerable submissions on the minute detail of differences between witness evidence relating to the compilation of the complaints, in my view, this does not demonstrate unreliable witnesses or fabricated evidence. In my view, there were small recollection issues around who was present at the meeting, exact dates and who commenced the process but this does not support the claim of procedural unfairness. The complainants were supported to express their workplace concerns with management in a safe environment with their workplace trainer present, and the allegations were formed from this process. This is not collusion as alleged.

[151] It is not unlawful, nor procedurally unfair to use the interview from the preliminary investigation in the final report. There is no requirement for allegations to be made formally in writing and I am satisfied that the recording of complaints by management is considered acceptable as notification of the complaint.

[152] It is my view that there was compliance with the ED5 requirements and the independent investigator showed no deviation from impartiality and properly investigated the 38 allegations.

[153] I am also satisfied that during this process, the evidence demonstrates the Applicant was offered procedural fairness and an opportunity to respond to:

- The investigation through an interview or written response,
- The ED5 Investigation Report; and
- The proposed sanction in this process.

[154] Turning to the further allegations of the termination of employment being unfair, I note the time for the process was lengthy, some nine months, and this could cause employees subjected to the process undue concern. IN this case, I consider this does not render the process unfair.

⁸² Ibid.

[155] I have addressed the concerns raised that there had allegedly not been prior reprimands in paragraph 126. The evidence establishes the Applicant had been provided with a copy of the relevant policy and counselling to assist him to develop strategies to deal with his workplace behaviour and access to the EAP services.

[156] I note there were two versions of the transcript from Ms Faulkner which is concerning and whilst I have found that my decision relies on the attested transcript from Ms Faulkner which was not objected to by Mr Durkin, nor did he cross examine Ms Faulkner on whether the details in the latter transcript were inaccurate. Did the lack of right of reply to the second transcript by the Applicant affect procedural fairness?

[157] The differences are outlined below:

Summary of Differences between the Preliminary Report and Final Verity Report relating to Ms Faulkner’s Transcript

Preliminary Report	Final Report
Sent to Mr Gino Fratangelo	Sent to Mr Pervan
Ms Faulkner transcript 809 lines	Ms Faulkner transcript 816 lines
<p>Page 7 of 23 Beginning at line 215</p> <p>“And, on – back to the Parma for a farmer. He made comments about what I was wearing, ‘cause I was wearing jeans. And, he came in to the café and he’d seen me in my jeans. He was, like, “You don’t even have to try.” And, I was, like, “What do you mean?”</p>	<p>Page 7 of 23 Beginning at line 215</p> <p>“And, on – back to the Parma for a farmer. He made comments about what I was wearing, ‘cause I was wearing jeans. [Addition/Modification: He came in and said he couldn’t wait to see what I was wearing. I was working at the time so I didn’t really react to it, I just brushed it off. He saw me wearing jeans and he was, like, “You don’t even have to try”. He saw me wearing jeans and he was, like,] “You don’t even have to try.” And, I was, like, “What do you mean?”</p>
<p>Page 16 of 23 Beginning at line 571</p> <p>“And then – so, he said that and then – I forgot what I was going to say. Then, he came back – there was one time when I was in NICS, he’ll come past and say something about his nuts being itchy, and just gross things like that. Then, obviously, after he – he asked me to be his girlfriend, which is, kind of, like, weird, I was – went back up to NICS and stuff.”</p>	<p>Page 16 of 23 Beginning at line 572</p> <p>And then – so, he said that and then – I forgot what I was going to say. [Addition: He said he was horny because Sharon wouldn’t have sex with him. I can’t remember the exact words. Whenever he said things like that, I didn’t know if he was joking. I didn’t know how to react and would be like, ‘right. That’s just too much information’. I didn’t say anything back to him, I just ignored it.] Then, there was one time when I was in NICS, he’ll come past and say something about his nuts being itchy, and just gross things like that. [Addition: He said to me and Lisa that his nuts were itchy because he had shaved them. I don’t remember word for word what he said. I</p>

	wasn't really paying too much attention at the time.】 Then, obviously, after he – he asked me to be his girlfriend, which is, kind of, like, weird, I was – went back up to NICS and stuff.
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[158] Mr Durkin refers to the amended wording, stating it enabled Mr Pervan to include the more serious allegations to form the view of serious and wilful misconduct, allegedly leading to summary dismissal. The Respondent states this termination of employment was not on the grounds of summary dismissal. The issue raised by the Applicant was the amended transcript led to some allegations being substantiated.

[159] For the purpose of this determination, I have addressed this matter in paragraph 125. It is stated that Mr Pervan considered the entirety of the report both the substantiated and unsubstantiated allegations and also considered other materials and background. I am satisfied, while it could not be considered best practice and needs further investigation, the slightly amended version does contain additional words but it is not the only evidence nor complaint which resulted in the decision to terminate the employment. In light of the lack of response by the Applicant to the other allegations, it is my view, this would not have altered the outcome, nor change the allegations. Ms Faulkner's allegations were not the only allegations being investigated.

[160] I note the Applicant offered an apology at the hearing if: "people took offence to it".⁸³ I perceived a sense of requirement to apologise, while still denying his actions, rather than a genuine insight and remorse for his behaviour and effects on others.

[161] I acknowledge the outcome of his termination of employment has had harsh consequences on the Applicant and his family.

Was there a requirement to pay a period of notice of termination by the Employer?

[162] I now turn to the remaining matter relating to the Applicant's final payment following termination. Mr Durkin raised this issue subject to the *Fair Work Act 2009*, for which this Commission has no jurisdiction. I requested further submissions in the closing submissions relevant to the Award application of the period of notice.

[163] Mr Durkin continued to submit that this termination of employment was a summary dismissal as there had been no period of notice paid, but only attached the Award with the relevant sections of the clause in bold. There were effectively no submissions from the Applicant.

[164] Ms Chen stated there was no requirement to pay the period of notice as Mr Moss' employment was terminated pursuant to s 44(3)(a) of the SS Act on the grounds he was found under s 10 of the SS Act to have breached the Code of Conduct. She submitted his employment was not terminated in accordance with clause 9(c) of the Award.

[165] She stated in the Respondent's closing submissions:

"99. The SS Act grants no entitlement to any particular notice period or payment of notice, it merely provides for notice in writing. The notice provided to the Applicant was in compliance with section 44 of the SS Act. It was expressed to take immediate effect i.e. from 27 August 2019."⁸⁴

⁸³ Transcript, page 68.

⁸⁴ Exhibit R72.

100. Accordingly, it is submitted that the notice provisions of clause 9 of the Award have no application to the current case. Clause 9 of the Award does not contemplate termination for breach of the code of conduct in the exercise of a statutory power. It follows that no notice is payable."

[166] I do not concur with these submissions for the following reasons. The Respondent determined the Applicant breached the Code of Conduct and his employment was terminated pursuant to s 44(3)(a) of the SS Act. The notice of his termination of employment was in writing and met this component of the statutory requirements.

[167] However, it is my view that the SS Act needs to be read as a whole. Section 44 is not dealing with the period of notice, only the power to terminate employment of employees and the Award provisions are not inconsistent. Section 38 of the SS Act states that the terms and conditions of employment of employees are specified in the Award. The entitlement for period of notice is found in the Award enabled by s 38 of the SS Act. This cannot be disregarded by the employer as it was a condition of his employment at the time of the termination of his employment.

[168] If the Applicant was summarily dismissed, there would be no period of notice payment as specified in clause 9 (d) of the Award. The employee would be paid up to the time of dismissal only. The Respondent has stated that the Applicant was not summarily dismissed.

[169] However, where the employment is terminated by the employer, as was the case for the Applicant, clause 9 (c)(ii)(1), provides that employment is to be terminated by the giving of notice. There is a table to calculate the period of notice relevant to the period of service. There is an entitlement for payment in lieu of the period of notice. The period of notice for the Applicant should be 4 weeks as he has worked over five years, and dependent on whether he is aged over 45 years an additional one week's notice payment.

[170] The Applicant received workers compensation payments 26 days after his termination date on 27 August 2019. He received no payment from 28 August 2019 until 22 September 2019 totalling 18 working days.

[171] I find the Applicant is entitled to payment in lieu of notice period pursuant to clause 9 (c)(ii)(1) of the Award. Workers compensation payments are payments of salary. The payments are calculated in accordance with the way in which the employee is paid while at work. Therefore, the workers compensation payments must be taken into account in calculating the required notice period.

[172] The Applicant would be entitled to a minimum of twenty days of notice period. This period of notice would depend on his age at the time of his termination of employment and may include an additional five days. Two days of the four week notice period (20 days) has been compensated through the receipt of workers compensation payments.

Would reinstatement or re-employment be practicable?

[173] Mr Durkin submitted the employment relationship had not broken down and did not need to be re-established. There was no evidence led on this submission, although Mr Bessell provided character evidence that the Applicant was "well liked".⁸⁵

[174] The Respondent adduced evidence from six witnesses to show that none of these former colleagues would be confident or wanted to work with the Applicant again; some stating the level of concern would be to the level of fear. The evidence was they would be uncomfortable, anxious and feel intimidated and would not want to work with him again.

⁸⁵ Exhibit A08.

[175] Ms Chen relied on *Nicholson v Heaven and Earth Gallery Pty Limited*⁸⁶ 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.

[176] She also referred to *Perkins v Grace Worldwide (Aust) Pty Ltd*,⁸⁷ where 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.

[177] Ms Chen submitted the Applicant does not comply with reasonable and lawful directives and is resistant to management and is a risk to the workplace health and safety of his co-workers and could not be reinstated to the workplace. It was submitted reinstatement is impracticable.

[178] The evidence was compelling and I observed many of the witnesses who were the complainants, were anxious and stated they were afraid of working with the Applicant again. I am satisfied that there is a complete breakdown of trust and Mr Moss could not be reinstated in the LGH kitchen due to the concern of safety to co-workers and therefore, it would be impracticable.

Conclusion

[179] I have found there were valid reasons for the termination of the employment of Mr Moss as set out above.

[180] The absence of notice is a relevant factor to be taken into account. I am satisfied the ED5 process and the process of the termination of employment has been procedurally fair. I find all elements of the Applicant's submissions on proving the termination unfair have been unsubstantiated.

[181] However, failure to pay period of notice is a process error essentially of a technical nature. This error occurred after the Applicant's employment was terminated where I have found all processes except the final payment were accorded with procedural fairness. Furthermore, the error did not alter the outcome of the termination of employment. However, I am satisfied this final payment error results in unfairness for the Applicant due to the lack of notice period payment, arising from the employer terminating his employment.

[182] Pursuant to s(30) of the IR Act, my view is that reinstatement or re-employment is not feasible, not only because the evidence of the complainants is such I am persuaded that this would be impracticable, but the misconduct was of such a serious nature and incompatible with a safe workplace and the payment error was essentially only of a technical nature. However, Mr Moss had a contractual and statutory right to payment in lieu of notice as he was not summarily dismissed. I am satisfied that notice period should be paid to Mr Moss.

Order

Accordingly, pursuant to section 31 of the IR Act, I hereby order the Minister administering the *State Service Act 2000* pay a limited compensation to the Applicant based on this

⁸⁶ (1994) 1 IRCA 199.

⁸⁷ (1997) IRCA 15.

technical element of the lack of payment of the notice period less any workers compensation payments.



Appearances

Mr Damien Durkin with Mr Dean Moss the Applicant

Ms Gretel Chen, Mr Hari Gupta and Mr Matt Harvey for the Respondent

Date and place of hearing:

7 and 8 September 2020

LAUNCESTON