

Decision appealed by MASSA 2000 (Matter T13912 of 2012 lodged 7 June 2012)
Application also made by MASSA 2000 to suspend the decision under s.71(4) of IR Act
Appeal withdrawn by MASSA 2000 on 3 September 2000

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29 application for hearing of an industrial dispute

Shane Duke
(T13870 of 2012)

and

The Minister administering the State Service Act 2000

DEPUTY PRESIDENT TIM ABEY

HOBART, 25 May 2012

Industrial dispute – unfair termination of employment – meaning of serious misconduct – valid reason for dismissal but found to be harsh and disproportionate - procedural fairness – code of conduct – CD5 – found that procedural fairness denied in material respects –dismissal found to be unfair – modified form of reinstatement – order issued

DECISION

[1] On 10 January 2012 Shane Duke, (the applicant), applied to the President, pursuant to s.29(1A) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (MASSA) (Department of Education [DOE]) arising out of the alleged unfair termination of his employment.

[2] A hearing commenced at 144 Macquarie St, Hobart on 1 February 2012 before Commissioner J P McAlpine and continued on 8, 9 and 10 May in St Helens before Deputy President Tim Abey.

[3] At the hearing Ms Kier Tyson of the Community and Public Sector (SPSFT) Inc. (CPSU) represented Mr Duke with Ms C Miller. Mr M Watson of the DOE appeared for MASSA.

Overview

[4] Mr Duke began permanent employment with the DOE as a teacher aide in 2001. He has been employed in that capacity at St Mary's District High School since that time. During that time he worked with students with 'special needs' and in particular with two students (R and J) from grade 2 through to grade 10. The 'special needs' category is a consequence of mild to moderate intellectual disability which necessitates, amongst other things, one to one coaching of a repetitive nature. Two incidents occurred on 9 November 2011. As a consequence of statements taken from two students and one teacher, Mr Duke was required to attend a meeting with the School Principal, Mrs L Rose on 15 November 2011. At that meeting Mr Duke was handed a letter from the Secretary of DOE, Mr Pettit. The letter read:¹

"Dear Mr Duke

I write to inform you that on Monday 14 November 2011 Learning Services North was advised by the Principal, St Mary's District High School of a number

¹ Exhibit A9

of allegations being made against you by students and a work colleague. I can advise that these allegations relate to conversations of a sexual nature with both students and the work colleagues. I have enclosed copies of the relevant statements.

As a result of the serious nature of the allegations, and in accordance with Regulation 34 of the State Service Regulations 2000, and under the provisions of Commissioners' Direction No. 8, I advise that I am suspending you from duty with pay effective immediately. The allegations made against you are extremely serious and therefore I suggest that you seek your own representation and advice from your Union or another person of your choice as soon as possible.

I have enclosed a copy Commissioner's Direction No. 8 for your information.

You will be contacted shortly to arrange a meeting, with your representative if you choose, to give you an opportunity to respond to the allegations.

For the period of suspension and/or until further notice you are directed not to enter the grounds of any Tasmanian public school. Additionally, you are directed not to make contact with, or attempt to make any contact with any student or member of staff at St Mary's District High School without prior consent being sought from my Office.

Should you have any queries in relation to this matter I ask that you contact Natalie Jackson, acting Manager (Conduct and Investigations) on 6233 7538 in the first instance."

[5] Mrs Rose said that from that point on "*the process was then completely out of the school's hands*" and effectively taken over by the Department as distinct from the school. There can be little doubt that Mr Duke was emotionally devastated by the allegations and the process that followed. The following day he contacted his union, and, on the union's advice, sought counseling assistance. Mr Duke said that he told his union representative that he wished to cooperate fully with the Department and answer the allegations as soon as possible, as he wished to return to work as quickly as could happen. A meeting with the Department's Conduct and Investigations officers took place at Mr Duke's home on 21 November. Mr Duke presented a written statement² at the meeting and discussed the two incidents with the investigators.

[6] A transcript of the 21 November meeting was sent to Mr Duke under cover of correspondence dated 23 November. The amended version of the transcript was confirmed by an email from Ms Tyson dated 30 November.³ It would appear that on the same day the CPSU advised that "*Shane has confirmed that he does not wish to meet again at this point therefore please forward all the relevant papers to the Secretary.*" By letter dated 20 December 2011 from the Secretary of the DOE Mr Duke was summarily dismissed. The letter stated in part:⁴

"I consider your actions as detailed in this letter to be behavior by you that is inconsistent with continuation of your contract of employment in that you have made inappropriate and offensive comments of a sexual nature to students and offended a fellow staff member in discussing and showing her a battery operated sex toy and this behavior is unacceptable, notwithstanding

² Exhibit A8

³ Exhibit A14

⁴ Exhibit A10

your response in mitigation. I therefore consider that your actions constitute serious misconduct warranting summary dismissal."

[7] The applicant contends that the incidents did not amount to serious misconduct warranting summary dismissal. An alternative sanction/s should have been considered.

Evidence

[8] Sworn evidence was taken from the following witnesses.

For the applicant:

- Shane Charles Duke, the applicant.
- Heather Anne Marshall, science teacher, St St Mary's District High School.
- Ian Charles Summers, recently retired automotive teacher with 12 years' service at St Mary's District High School.
- Geoffrey Robert Green, wood/metal teacher who had worked with applicant for over six years.

For the respondent:

- Louise Karen Rose, Principal, at St Mary's since March 2011, 23 years teaching experience.
- Barry Louis Le Fevre, Assistant Principal, St Mary's for eight years, 32 years teaching experience.
- Annette Lesley Yaxley, Industry and Policy Advisor, Family Planning Tasmania, previously a teacher since 1980.
- Student H.
- Matthew Gordon Bennell. Principal at St Helens District High School for past 18 months, 10 years teaching experience in Tasmania.
- Darren Max Stopps, Senior Psychologist with DOE for past seven years.
- Melissa Munday, Automotive Teacher, St Helen's District High School. Up until the end of 2011, the program was delivered on the St Mary's campus.

[9] All witnesses presented in a straightforward and consistent manner. Whilst there was some conflict in the evidence, this is not unusual in circumstances whereby witnesses are asked to recall what was said or done at a particular time. There was certainly no reason to make an adverse finding as to witness credit in any instance. In addition to sworn evidence a number of references in support of Mr Duke were tendered.

The Incidents

[10] Both incidents occurred on 9 November 2011.

Incident No 1

[11] The incident took place in a paddock area adjacent to the automotive workshop. According to Ms Munday, four students remained behind after a lesson to watch a scrap metal truck collect car bodies. Mr Duke was engaged in conversation with the students, who were male and likely in the age range of 15 to 18 years old. It seems likely that

student J and/or student R were in the vicinity. Ms Munday said she walked in on the conversation and that the students were *"laughing and shaking their heads."* Ms Munday asked what was going on and *"they said Shane was just asking them how their weekend was."*⁵

[12] Later that day student H (present at the incident) approached Ms Munday and indicated in broad terms the nature of the comments attributed to Mr Duke. Ms Munday followed this up with student H the next morning, seeking a more precise recollection of what was said. Ms Munday reported this exchange via email to Ms Thorne, who is charge of teacher aides.

[13] On Friday 11 November Ms Munday spoke to students K and D about the incident. It would seem that neither showed any sort of willingness to make a statement. Ms Munday then submitted a statement⁶ to the Principal.

[14] On 14 November, Mr Bennell took a statement from student H.⁷ On the same day Mr Le Fevre took a statement from student K. From the evidence there can be no doubt that student K was most reluctant to provide a statement. Indeed the Commission was informed that subsequently (March 2012) student K's parents made it known that he was not to give evidence in any hearing before the Commission. I do have some misgivings as to the manner in which this statement was obtained, particularly the level of persuasion applied and the uncertainty concerning parental consent. The reality is however that student K did provide a statement which was put to Mr Duke and was subsequently presented to the Secretary at the conclusion of the investigatory process. There is no dispute that Mr Duke made a comment/s to the students nor is there any real dispute as to subject matter of Mr Duke's comments. It seems clear that the subject matter embraced an inquiry as to whether the students got any sex over the weekend, followed by a description of the sex act. What is in dispute is the words actually used by Mr Duke.

[15] The allegations as presented assert that Mr Duke used sexually explicit, indeed ribald language. Mr Duke did not deny the subject matter of his comments, but said he did not use the words alleged. Whilst he could not recall the precise words, he maintained that it was not *"as blunt."*⁸

[16] Notwithstanding that this incident occupied considerable prominence during the hearing, I see little value in any further forensic examination of the evidence in this decision.

[17] In the letter of termination the Secretary said:⁹

"After considering the first allegation and your responses, I am satisfied that you made a comment to students which may not have been exactly as alleged but was very close and had the same meaning. I am also of the view that your comment was more likely to have included the language as alleged by the students as opposed to your recollection. I have come to this conclusion on the basis that I have two independent statements from students and that your response is not specific."

[18] On the material before the Secretary I find that this conclusion was reasonably open.

⁵ Exhibit R3

⁶ Exhibit R3

⁷ Exhibit R9

⁸ Exhibit R8

⁹ Exhibit A10

[19] Further, after hearing the evidence and notwithstanding the absence of a statement from the second student, I have reached a similar conclusion.

Incident No 2.

[20] This occurred on the same day as the first incident but prior events are relevant. Again there is some conflict in the evidence although the broad nature of the incident is not in dispute.

[21] It was common ground that that Mr Duke and Ms Munday had previously engaged in conversations concerning eight ball, tattoos and the fact that Ms Munday's husband was often away for work during the week.

[22] Approximately one week prior to the incident Mr Duke, along with a number of students, was involved in the dismantling of motor parts on a vehicle in preparation for collection by a scrap metal merchant. Ms Munday appeared and commenced taking photos for the school magazine, including one or more photos of Mr Duke leaning into the engine bay of the vehicle. It would seem that the conversation continued in a similar vein to previous occurrences. I would describe this as light hearted banter bordering on quite harmless flirtation.

[23] The incident in question occurred during the lunch break on 9 November. Mr Duke maintains that whilst looking for gloves for the students in his shed, he accidentally discovered a shopping bag containing two or more battery operated sex toys. He stated that they had been left in the shed some years previous by tenants. Mr Duke stated that on the basis of the conversation a week or so earlier, he felt that Ms Munday may be interested. Accordingly he placed the bag under the front driver's seat of his car and took it to work.

[24] Mr Duke's Recollection of the lunch break conversation with Ms Munday was:¹⁰

"...I said oh I've got something in the car you might be interested in. She said what and I said oh it's one of those battery operated things that you were referring to last week. She went oh yeah, right. She said oh I'll have a look at it..."

[25] Ms Munday had a different recollection stating:¹¹

"...Shane told me he had a new tool set to show me in his van, and I agreed to take a look."

[26] Both then proceeded to Mr Duke's car, which was parked in a public car park adjacent to the school grounds, at which point Mr Duke showed Ms Munday the contents of the shopping bag. It would seem that the light hearted banter continued although concluding in an inconclusive and disputed manner. Ms Munday in her evidence said she *"...didn't make a big deal out of it and just walked away."*¹²

[27] In the letter of termination the Secretary stated:¹³

"After considering the second allegation relation to the conversation of a sexual nature and the battery operated sex toy, I have considered your

¹⁰ Exhibit A8

¹¹ Exhibit R3

¹² Transcript p 187

¹³ Exhibit A10

responses and accept that there are different accounts of the events leading up to the incident at your car, however you have admitted bringing the object to school to show Ms Munday, discussing same with Ms Munday and showing it to her. This particular incident, although serious, would not have resulted in the termination of your employment as a stand-alone incident, however coupled with the comments you made to students as details above, I have taken this incident into account in making my decision."

[28] I do not share the Secretary's view as to the seriousness of this incident. Whilst Mr Duke's action was arguably foolish, it must be seen in full context. The incident took place in a public car park during the lunch break. No students were involved or realistically exposed to any risk. The incident was the culmination of a period of light hearted exchanges between Mr Duke and Ms Munday to which they both contributed. On the available evidence, Ms Munday was not offended or distressed by the incident. In my view this incident had a neutral impact on the question of whether Mr Duke was guilty of serious misconduct of such a nature as to justify summary dismissal.

The Investigation Process

[29] A recurring issue throughout the hearing is that the employer did not conduct a Code of Conduct Investigation (CD5 Investigation) pursuant to section 10 of the *State Service Act 2000* (SSA). This is an important question to which I return later in this decision. This section focuses on whether procedural fairness was observed, notwithstanding the absence of a formal CD5 investigation.

[30] The impetus for the investigation came from an approach to Ms Munday from student H referred to in the preceding section. Ms Munday quite properly referred this to the Assistant Principal and subsequently submitted a comprehensive statement. The obtaining of the statement from student H was properly undertaken.

[31] As previously indicated I do have some misgivings as to the manner in which the statement was obtained from student K (before the Secretary but not the Commission.) Student K was clearly reluctant to make a statement and it is unclear whether parental consent was obtained. Mr LeFevre went to some lengths to persuade student K to make a statement.¹⁴ Of the two other students present at the time of the incident, student M was also a reluctant witness and apparently was not pursued. It would seem that student C was not approached.

[32] On 15 November Mr Duke was asked to attend a meeting with the Principal, Mrs Rose, and the Principal of St Helens District High School, Mr Bennell. Mr Duke was handed the letter from the Secretary outlining the allegations and suspending him on full pay pending an investigation. Whilst acknowledging that this was an incredibly stressful process for Mr Duke, I do not accept the CPSU submission that a support person should have been present. The purpose of the meeting was to outline the allegations and the process to follow. Mr Duke was not required or expected to respond in any way. The opportunity for the presence of a support person at this point in the process is not a requirement of either s30(8) of the Act or of Commissioner's Direction No. 5.

[33] Mr Duke, through his union, made it known that he wished to cooperate fully with the investigation and that he wished for it to be dealt with as quickly as possible. Accordingly a meeting with the departmental investigators, Ms N Jackson and Ms L Eaton, was arranged for 21 November.

¹⁴ Transcript p 150

[34] Mr Duke was accompanied by his union representative, Ms Tyson, and presented a statement in response to the allegations. Mr Duke was then given the opportunity to verbally respond to the allegations and answered questions from the investigators. A transcript of the meeting was prepared and forwarded to Mr Duke shortly thereafter, with an invitation to amend the record if necessary.¹⁵ The transcript was incomplete in a number of respects although clearly identified where sections of the conversations were omitted. The covering letter also provided a summary of Mr Duke's response to the allegations, together with an invitation to provide additional information and/or meet with the investigators again.

[35] Confirmation of the transcript (with amendments,) the summary of Mr Duke's response, was, together with advice that Mr Duke "*does not wish to meet again at this point therefore please forward all relevant papers to the Secretary,*" forwarded from the union on 30 November.

[36] On its face, the above process strongly suggests that procedural fairness was afforded to Mr Duke.

[37] There is however, one important, perhaps even critical element, which was missing. At no stage prior to the Secretary's letter of 20 December was Mr Duke advised that termination of employment was a possible outcome. I examine this issue in the next section.

Knowledge of Possible Sanctions.

[38] Section 10.1 of the SSA prescribes:

"(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;

(b) a reprimand;

(c) deductions from salary by way of fine not exceeding 20 penalty units;

(d) reduction in salary within the range of salary applicable to the employee;

(e) reassignment of duties;

(f) reduction in classification;

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

[39] Section 10(3) of the SSA prescribes that the State Service Commissioner is to establish procedures for the investigation and determination of whether an employee has breached the Code of Conduct. This procedure is commonly referred to as CD5. Section 4.4 of CD5 prescribes that prior to the commencement of an investigation, the Head of Agency must inform, in writing, the employee suspected of committing a breach of the Code:

¹⁵ Exhibit R1

"(c) of the possible implications for the employee if the matter proceeds to a determination by the Head of Agency that the employee has breached the Code."

[40] This did not occur. The letter from the Secretary dated 15 November refers to the allegations as being *"extremely serious"* but makes no mention of possible sanctions if proven.

[41] At no subsequent point in the investigation process, including the interview on 21 November, was Mr Duke made aware that his employment might be in jeopardy. Indeed there is evidence to suggest that Mr Duke had reason to believe that the contrary was the case.

[42] In his evidence in relation to the meeting on 15 November Mr Duke said:¹⁶

"Matt [Bennell] spoke to me and said, 'The reason why I'm here is that I'm here in support for you. You can get through this, I was in a situation and now look at me, I'm principal. I know you're a good bloke, you have a few bridges to cross and you'll get through this.' He spoke to me and advised that it should wash over as he had been in a bit of strife before and he was OK."

[43] Mr Bennell agreed that this was a fair representation of what he said.¹⁷

[44] Mr Bennell attended the meeting as a representative of the Department. Whilst he displayed admirable compassion, it would be wrong for his role to be characterised as a support person within the meaning and intent of s.30(8) of the Act.

[45] At the interview on 21 November the following exchange took place:¹⁸

"NATALIE [JACKSON]

And I mean that will be part of the outcome. So, obviously I mean we, and I say we because I've already included Linda, we're independent, we're just investigating, I mean Colin, the Secretary, has got the complaints, um, he'll get your response. Obviously we'll get the actual transcription, Colin will actually see the transcript, so it's not just my view here, the document that you sign, that we send to you that says yes this is what I said on Monday. He actually sees that, reads all of that, and the other notes we've got, anything else, and makes a decision and then obviously the outcome, depending on the outcome, then we look after everything else. So, um if the outcome, and this is just pure speculation on my part, this is my first investigation, so really pure speculation, but if the outcome was an apology from you and a reprimand, then there may be you know, counseling in terms of making sure you're OK. Um, what you want us to do in terms of other staff, the school, anything else. What you don't want said to staff or anybody else.

SHANE [DUKE]

In regards to?

NATALIE [JACKSON]

¹⁶ Exhibit A4

¹⁷ Transcript P174 L22

¹⁸ Exhibit A8

So in terms of we don't...

SHANE [DUKE]

In regards to this you mean?

NATALIE [JACKSON]

Yeah. We don't, but also if necessary, anything ongoing, so if we say right we've resolved this, and you say I want to move on, I don't want anybody at the school to know what's happened, end of story, that's it, we're moving on. But, these things have got to change in the future. So there may be some discussion about that down the track, further to what you've said about, you start doing a job, and it evolves. And maybe there needs to be more support one way, or more support the other or more boundaries, more guidelines. So, I would certainly expect that at the end of this, there is at the very least, that sort of outcome. So we say it's not reasonable to expect this, or it's not reasonable to expect this without this happening as well."

[46] There was a further exchange in this meeting which is relevant to this consideration:

"(Shane advised he and Kier have discussed the option of obtaining references).

LINDA [EATON]

With regard to this and taking it any further, yes you've answered the allegations and we need to take that back now, but I guess the final question would be, rather than you ask people to give you references or statements that would be our role as our preference, if you have anyone, and you mentioned there was a student that may be able to back something up. You may not want them to do that right now, you don't want to give us a name, but you might later. If there's anyone that you'd like to mention now that you'd like us to talk to or seek clarification from you certainly have the right to mention them. We prefer that we approach those people rather than you going to them."

[47] There is nothing in itself untoward about this comment. In the context of a likely outcome short of termination, the position of Ms Eaton was reasonably open. To this point the focus of the investigation had been virtually entirely on determining the facts of what happened, rather than the broader issues surrounding dismissal, including proportionality of sanction. However had Mr Duke been aware he was fighting for his job, the issue of references could well have been of the utmost importance. He was effectively denied this opportunity to present references, or at the very least discouraged from so doing. There is no evidence of who else (if anyone) the investigators interviewed.

[48] There is no doubt that Mr Duke was anxious to have this process completed as quickly as possible. The elapse of time between the incidents and the confirmation of the transcript was remarkably short. There was evidence that Mr Duke took shortcuts to speed the process up, eg the apparent acceptance of an incomplete transcript. This is not what would be expected of an individual who was aware that his job was on the line. I have no hesitation in concluding the shock Mr Duke felt on receiving the termination notice was genuinely placed.

[49] There is one further aspect I refer to at this point. Section 4.10 of CD5 states that the Head of Agency shall provide the employee with a copy of the Investigator's report and provide the employee with an opportunity to respond. This did not occur in this case. The correspondence of 23 November 2011¹⁹ did no more than seek confirmation of Mr Duke's own evidence. This does not in my view amount to an 'Investigator's Report' within the meaning of CD5.

Mitigating Circumstances

[50] There can be no doubt that Mr Duke was extremely remorseful concerning incident No. 1. in particular. At the meeting on 21 November he offered to apologise to the students if the Department felt it appropriate.

[51] In his statement Mr Duke observed that *"they are not primary school students they are adolescents who think and talk about sex."* Mr Duke went on to say:²⁰

"16. At the interview I provided a written statement that described the fact the Department has required me to attend the Family Planning sessions with two students regarding sexual education. The Family Planning sessions were organised by previous St Mary's School Principal Brian Shepherd and Assistant Principal Mel Thorne. They also directed me to take the boys out to lunch during some of these sessions to guide and help them engage in social settings. In the Family Planning sessions I was completely out of my comfort zone and was required to discuss in great detail and with persistence sexual education with my students. As part of my role as Teacher Aide we have been told by the department to create an inclusive environment for students with special needs. The incident in auto shop last year is exactly what I was doing when the sex talk occurred with the high school boys and where my two special needs students were present.

17. As confirmed by the Family Planning Education Officer Christopher John in his letter provided for this matter, the Department did not send me to the relevant workshop for professionals in relation to the Disability Education Program. I was not aware this course existed and I think this put me at a disadvantage. With Chris's guidance I did my best to provide the boys with the education."

[52] In support the applicant tendered undated correspondence from Mr Christopher John, who at the time was Disability Education Program Officer with Family Planning Tasmania.

[53] The correspondence in part read:²¹

"FPT welcomes and encourages professional participation in the Disability Education Program – such as Teachers Aides/Assistants – because this represents unparalleled opportunities for content and strategies to be carried over into natural learning environments. Such professionals enjoy invaluable teaching opportunities to provide a degree of personalized revision, repetition and reinforcement, and help ensure consistency of information and language across social and learning contexts."

¹⁹ Exhibit R7

²⁰ Exhibit A4

²¹ Exhibit A3

Topics in a typical program to adolescent people living with a disability include:

- *public and private places, body parts, behavior and talk.*
- *protective behaviours.*
- *puberty and adolescence.*
- *sexual and reproductive health.*
- *safer sex.*
- *healthy relationships;*
- *safer sexual behaviours;*
- *sex and the law.*

In my experience Shane Duke's support of the two students participating in FPT's Disability Education Program 2010 was exemplary, invaluable and unwavering. Shane's focus on the content and respectful support of the students during their session at FPT was most welcome and appreciated. Shane and the students often revised the Disability Education Program material in lessons outside of the FPT center at Launceston, and this reflected positively in the student progress in the Disability Education Program.

FPT understand that issues regarding sexual and reproductive health and the naming of pervade body parts can appear confronting to someone who lacks the knowledge and expertise in relations and sexuality education."

[54] However the evidence of Ms Yaxley was:²²

"The aim of the program is to deliver knowledge and information in order for young people to lead safer sexual lives and have respect for relationships, and the other point I would make is that if that comment had been made, then we would say at Family Planning that that is sexualising young people, that it's actually encouraging young people to go out and have a sexual relationship. Now, the aim of Family Planning programs are always to, as I said, for young adults to actually lead safer sexual and social lives and to make the decisions about having sexual relationships in the context of that respectful relationship and so that would be completely out of – it would not be the kind of comment that Family Planning would condone, nor would it be the kind of comment that any educator would make."

References

[55] References from eleven teaching colleagues were tendered.²³ These included a reference from Mr Duke's immediate supervisor, Ms Roslyn Smith. All but one had been provided subsequent to Mr Duke's termination. Without exception the references were very supportive of Mr Duke both at a work and individual level. A recurring theme was Mr Duke's apparent ability to relate to and communicate with students with special needs, which in turn optimised the students' progression through the school program. A reference from student J's mother dated 13 March was tendered. The reference said in part:²⁴

"I have the utmost respect for Mr Duke and what he has helped my son and children like him achieve. I believe my son would not have been able to attend school with such confidence had it not been for Mr Duke's impact on him."

²² Transcript P160 L22-35

²³ Exhibit A2

²⁴ Exhibit A6

[56] A reference from student J was also tendered.²⁵

[57] A number of witnesses gave direct evidence in support of Mr Duke.

[58] Ms Marshall said in her evidence:²⁶

"In my experience I couldn't fault him. He was brilliant with the special needs kids. He had a way of getting them to knuckle down and get to work, he was able to spend the time with those students that I wouldn't have otherwise been able to put in."

[59] In relation to the development of special needs students, Mr Summers said:²⁷

"Right. And with your work with Shane how would you describe his ability working as a teacher-aide?.....As a teacher-aide?"

Mm.....Exemplary. They are difficult children, Student R especially, his temper is a little uncontrollable and I would say at the end of the grade five I would have doubts about him completing high school with us –

Oh right.....- because of his abilities and his temperament not fitting in very well at all, but to his credit and I believe to Mr Duke's credit he has completed a full high school career with us at St Mary's and the bulk of it has been very pleasurable."

[60] And later:²⁸

"Right. And what – and you've spoken in your reference about their development and that Shane had a role in that, what – what sort of impact do you think, you know, if he hadn't have been – if he hadn't have been there to do that?.....It's the style of district high schools, you – right, it's because the relationship is built up over a long time. A teacher-aide is assigned to students and that tends to carry through, so they become a very close little team and they know each other really, really well. After several years of this, and when they go through a whole high school career, they are very familiar with each other.

So without that or without Shane Duke can you – what are your thoughts that if that hadn't of been there?.....They may well have been assigned another teacher-aide who could do just as good a job, but they didn't, they got Mr Duke and I think it was just wonderful because I couldn't see how they could get through high school.

Yes.....And yet thanks to his efforts that has happened. I know it can't possibly be down to just one person but there is a lot of contact, and it was good contact in my opinion."

[61] Mr Green's evidence was:²⁹

"MS TYSON (Resuming): Can you please talk a little bit about your experience of Shane Duke's abilities with – as a teacher-aide and with the

²⁵ Exhibit A5

²⁶ Transcript P79-80

²⁷ Transcript P91 L20-31

²⁸ Transcript p 92

²⁹ Transcript p 97

kids?.....Well I found him probably the most skilled teacher's-aide I've ever worked with actually. I think that comes from his continuity of having the same students over a period and he knows their strengths and weaknesses very well and that's an invaluable aid in the classroom, specially when you've got kids with mild disabilities, and so Shane can point out things that they might be able to understand or not understand, he can recommend different ways of approaching tasks. He also knows what might be upsetting to a student and can ameliorate situations with other students with his knowledge of the abilities of people he's looking after and always has encouraged students to be well behaved obviously and not only assisted them with their work, assisted them with their social interaction as well, and that's particularly important in a classroom where you're doing physical activity because he can very quickly get on top of a situation that might develop and explain to other students why his students are approaching something differently or why they may have said something and quite often diffuse difficult situations in the classroom in that way. So yeah, I find that's been really helpful. He often will suggest to me a different way of approaching a task and even before a lesson he may come in and say, "What are doing today, what do you think if these people do it this way, would that be better", so he was actually actively thinking through what these students need, and I find that's been really helpful.

And in your experience as a teacher why is that important that he is able to be aware or teach them around their social – socialising as well, because you mentioned socialising, you know, in a social environment?.....Well he's always been a strong advocate for these students he's looked after, usually with some mild impairment of some sort, quite often intellectual, and differences are pretty quickly picked up by kids and often picked on and Shane is very skilful at bring other kids into the net, if you like, that we're all in it together, you have a difference too, and he'll assimilate these children into the school and the school's social environment, that's a very big – that's more than just being a teacher's aide, that's going beyond that role, and I think he does that just because he's generally a good person.

Meaning of Serious Misconduct

[62] Mr Duke was summarily terminated pursuant to clause 9(c)(iii) of Part I of the State Serve Award (the award) which reads:

"9. CONTRACT OF EMPLOYMENT

...

(c) *Notice of termination by Employee and Employer*

...

(iii) *Summary Dismissal*

The employer has the right to dismiss an employee for serious misconduct or serious neglect of duty and in such circumstances wages are to be paid up to the time of dismissal only."

[63] It is axiomatic that the "serious misconduct" must be of such a nature as to justify termination.

[64] Section 1.07 of the *Fair Work Regulations* relevantly defines *serious misconduct* in the following terms:

"1.07 Meaning of serious misconduct

(1) For the definition of serious misconduct in section 12 of the Act, serious misconduct has its ordinary meaning.

(2) For subregulation (1), conduct that is serious misconduct includes both of the following:

(a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;

(b) conduct that causes serious and imminent risk to:

(i) the health or safety of a person; or

(ii) the reputation, viability or profitability of the employer's business.

(3) For subregulation (1), conduct that is serious misconduct includes each of the following:

(a) the employee, in the course of the employee's employment, engaging in:

(i) theft; or

(ii) fraud; or

(iii) assault;

(b) the employee being intoxicated at work;

(c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment."

[65] In essence the test in this case is whether Mr Duke deliberately engaged in behavior which caused serious and imminent risk to the health and safety of a person, or the reputation of the school.

[66] Relevantly *Labour Law Fifth Edition*³⁰ observes at 18.26:

"Similarly, where misconduct is involved, 'repeat offences' would normally be required unless the matter is one of particular gravity, for instance, involving dishonesty or a gross breach of trust."

[67] Mr Watson tendered a decision of the Victorian Civil and Administrative Tribunal, *Davidson v Victorian Institute of Teaching*.³¹ The questions before the Tribunal were

³⁰ Breen Creighton & Andrew Stewart

³¹ (2007) VCAT 920 30/5/2007.

firstly, whether or not a teacher (Davidson) had engaged in serious misconduct, and secondly, whether the teacher is fit to teach. Some care must be exercised in relying on this decision, particularly from the point of view that the tribunal was dealing with a question of professional registration, which of course is not paralleled in the instant case. Allowing for the arguably higher standards which might attach to an issue of professional registration, the decision does however provide some useful insights as to how the question of serious misconduct should be approached.

[68] Mr Watson, noting the relaxed regulatory and supervisory environment of Mr Davidson's employer, Alia College, relied on the following observation:³²

1. *"However the standard against which Mr Davidson must be measured is not the standard of Alia College. It must be the standard of conduct of the whole of the teaching profession. The particular learning environment will of course be important, but the standard against which he must be judged as a teaching professional is that of the teaching professional at large, not just the standard adopted in the school in which he happens to be teaching. The standard is as applied to medical practitioners, in the case cited below, and to many other professions since: -*

'conduct which would reasonably be regarded as disgraceful or dishonorable by his professional brethren of good repute and competency'."

[69] Applied to the instant matter I accept that there is no warrant to apply a lesser standard for St Mary's District High School than would apply to the school system generally.

[70] On the question of serious misconduct the tribunal referred to *Parr v Nurses Board of Victoria*³³ in which Kellam J observed:

"In my view the question of whether or not a nurse has engaged in unprofessional conduct of a serious nature must depend upon the facts of each case. Clearly such conduct would not be serious if it was trivial, or of momentary effect only at the time of the commission or omission by which the conduct was so defined. It must be a departure, in a substantial manner, from the standards which might be reasonably expected of a registered nurse. The departure from such standards must be blameworthy and deserving of more than passing censure."

[71] In *Davidson* a number of specific allegations had been made concerning his relationship with adolescent female students. Before dealing with each of the allegations, the tribunal made a number of general observations:³⁴

"In common with other professions, the teacher is in a position of trust. It is often said that a teacher is in loco parentis to a student. However, this does not mean that a teacher must literally act as a parent of a student. Indeed, he or she must not do so. The teacher must maintain a professional detachment from a student. His role cannot be that of a parent. Further, he cannot be the 'best friend' of adolescent girls, (or boys for that matter.)

Accordingly, actions such as lying on the floor with students to watch videos, letting students draw on his hand in class, and discussing intimate details of

³² Ibid para 144

³³ VCAT 2/12/1998

³⁴ Ibid paras 149-153

students' sex lives, are inappropriate. This is not just because of the potential for the development of sexual relationships, but because they inappropriately cross the boundary between student and teacher.

Davidson assumed a familiarity with his students that would not otherwise be present between a 38 year old man and adolescent girls. He could only maintain such familiarity by reason of his position of authority over them. Over time, the students who had initially welcomed this familiarity, came to see it as 'creepy.' They sensed that the teacher had crossed over the boundary.

Over-familiarity with students is a difficult concept to define. To some extent it depends on age and sex. A primary school teacher may be able to physically interact with 7 year olds in a way that a male secondary teacher must not do with 16 year olds girls. A primary teacher might well need to hold a small child's hand. It is hard to visualise circumstances in which a secondary teacher would be justified in doing the same thing.

It is clear that any sort of sexual overtures to a student would constitute serious misconduct. This is not such a case. However, we must also protect children and their parents from the development of inappropriate relationships or emotional dependency between teacher and student which may have deleterious effects upon the student, even where there is no overt sexual suggestion made."

[72] And finally concluded:³⁵

"We take the view that a finding that a teacher is unfit to teach must carry with it a perception that the conduct complained of is of a continuing and persistent nature. It is conduct which throws doubt on how he would conduct himself in the future in the classroom. A teacher may commit a single act of serious misconduct, or a series of such acts, but those acts may be explicable in context and unlikely to recur. A determination that a teacher is unfit to teach appears to us to be a more severe penalty. It carried with it an assessment that that person should not be in a position of authority and trust with children, because his whole approach to teaching and to the children in his care is profoundly and irretrievably flawed. It would often involve consideration of criminal conduct."

[73] Of some five specific allegations the tribunal found that Davidson had engaged in 'serious misconduct' in relation to three of them. However in each case the tribunal declined to make a finding the applicant was 'unfit to teach.' In determining penalty, the tribunal observed "...that he has skills which would in the future be of great benefit to the community" and found "that it is unlikely that he will reoffend in the future."

[74] The tribunal concluded by imposing a period of suspension. In my view the notion as to whether the applicant in the above case was 'unfit to teach' is, for all practical purposes, the same question as in the case of Mr Duke. Put another way, a finding in *Davidson* that the applicant was unfit to teach would be equivalent to a finding of serious misconduct justifying summary termination in the matter before the Commission. Perhaps not surprisingly, witnesses before the Commission expressed differing views as to the seriousness of the allegations against Mr Duke. As an indication I refer to the evidence of Mr Le Fevre and Ms Marshall. Both witnesses were aware of the precise details, as distinct from the broad nature of allegations, against Mr Duke.

³⁵ Ibid para 169

[75] Mr Le Fevre said:³⁶

"Over thirty two years experience you built up a – I guess a code of conduct yourself, what is and isn't right in schools. You deal with staff on those issues. When it was mentioned to me what the allegation was and then I saw it in writing I just thought that Shane – and it wouldn't matter who it was – would be dismissed instantly, and I believe that it just goes against the – all the code that I've ever worked by and kids are sent to school in a trust situation where we work with them in a safe way and we have to look after – we look after them and I just felt that comment was totally inappropriate..."

[76] Whereas the evidence of Ms Marshall was:³⁷

"Okay. So the allegations – or I put to you that the allegations are quite serious, would you agree with that, the allegations themselves?.....I don't actually think they're very serious, I'm sorry."

[77] And later:³⁸

"At the end I said that I wasn't overly impressed with the fact that this had been made a mountain out of what I consider to be a molehill.

So can I just clarify that then, a mountain out of a molehill, meaning?.....Meaning that this is not a huge great big thing, I don't believe it's a huge great big thing, and if I was a teacher where I had a TA make a comment like that I would certainly take them aside and I would spend quite a bit of time with them discussing what was appropriate and what was not appropriate. I may well take it to the principal and discuss that with the principal, but I don't really think that it should go any further. I think a person who makes a mistake by saying something stupid should have counselling and help in modification of the language that they use rather than be beaten with a big stick.

Okay, so just – just following on from that point then, that's – well obviously that's your view because that's your evidence?.....That's right.

So if you did – because I think you said a second ago if a TA working with you, you heard them say that -.....Yeah.

- you may take it to the principal, you may not?.....I think I would look at the context that it was in and I think there are certain workplaces that you have to be a little bit more open with kids and perhaps use their language to get through to them and perhaps in some circumstances, depending on what you're trying to get across, using language that is understood by them can really enhance the education thing rather than sort of like go, "Oh horrors, this is terrible language", and all this sort of stuff.

Okay.....And I think, you know, I think quite often we get a little bit hung up on babying our fifteen or sixteen year olds who are very shortly going to be out in the workplace, who are very shortly going to be able to vote and who are perfectly capable of carrying on a conversation with an adult that is fairly racy actually."

³⁶ Transcript p 152

³⁷ Transcript p 86

³⁸ Transcript p 87

Findings

[78] Virtually without exception, witnesses who were asked expressed the view that the behaviour of Mr Duke was inappropriate. That conclusion is beyond argument, and no one, including the applicant, sought to characterise the allegations as behaviour beyond reproach. The question to be determined is whether the behaviour amounted to serious misconduct of such a nature as to justify summary termination. I accept that language of sexually explicit nature directed at one or more students by an individual in a position of authority (including a teacher aide,) would in an extreme case, amount to a valid reason for termination. However the context in which the event occurred is of considerable importance.

[79] Like the Secretary, I accept that the language used by Mr Duke was probably of a sexually explicit nature. I note that in relation to second incident, the Secretary concluded that whilst serious, as a stand-alone incident, it would not have resulted in termination of employment.

"However coupled with comments made to students as detailed above, I have taken this incident into account in making my decision."

[80] I have already found that the second incident was '*neutral*' in terms of determining this matter. Accordingly, the focus of this decision is on the first incident alone. It is of course not known what the Secretary's position might have been had he similarly discounted the second incident.

[81] In terms of context, the following considerations are relevant:

- The age range of the students (all male) was likely to have been 15 to 18 (Years 9-12.) In *Davidson* the tribunal found that gender and age was a relevant contextual consideration.³⁹ I suspect it is highly likely that these students had been exposed to similar language in their day to day life. The difference in this case is of course is that the language was expressed by a person in authority.
- The incident did not occur in a classroom setting.
- The behaviour was not directed at the students in any sort of predatory sense. Accordingly it could not be said that there was any sense of threat or intimidation. This is a relevant consideration in that Mr Duke was in a position of authority in relation to the students. There is evidence that some of the students treated the comments in a jocular manner, although it must be said that student H was moved to report the incident to Ms Munday.
- There is no evidence that any student suffered psychological damage as a consequence. (see evidence of Mr Stopps.)⁴⁰
- Mr Duke maintained that his comments were an extension of his role in assisting students with sex education, via Family Planning Tasmania. In particular he referred to the notions of constant repetition and integration of special needs students with the mainstream. I am prepared to accept that Mr Duke may have genuinely held this view, but if that was the case, it was sadly misplaced. There was considerable evidence about relevant training available in the school and

³⁹ Ibid para 152

⁴⁰ Transcript p 181

whether or not Mr Duke participated in it. In my view training (or the absence thereof) is not a major factor. Commonsense dictates that the incident was inappropriate, training or no training.

- Mr Duke was extremely remorseful about the incident and immediately offered to apologise to the students involved. He also cooperated fully with the investigation.
- My own view is that the incident amounted to a misguided attempt on Mr Duke's part to communicate with the students at their level. From the references and evidence, communication with students is something that Mr Duke does very well. I can only conclude that this incident was out of character.

[82] I am unable to conclude that Mr Duke willfully or deliberately engaged in behavior which caused serious and imminent risk to the health and safety of a person. There is simply no evidence to suggest that the health and safety of an individual/s was compromised, let alone evidence that there was willful or deliberate intent.

[83] I accept that the nature of the incident, depending on how it was handled did give rise to the potential for some damage to the school's reputation. However any damage of this nature would, I suspect, be minimal and passing in nature. Even allowing for this potential, I am unable to accept that Mr Duke willfully set out to create such damage. To the contrary, I formed the impression that Mr Duke would recoil at any suggestion that he would deliberately behave in a manner which might damage the school's reputation.

[84] Whilst the behavior of Mr Duke was, on any measure, inappropriate, I am satisfied that it was a consequence of a 'one off' error of judgment. In light of the references and evidence in support, and absence of contrary evidence, I can only conclude that Mr Duke has an unblemished record of over ten years as a teacher's aide at St Mary's District High School. I am quite confident that the likelihood of repetition would be almost negligible.

[85] Comparing the circumstances of this case with that of *Davidson* (upon which the respondent relied,) I conclude that the latter was far more serious. In *Davidson*, there were three proven incidents of serious misconduct. In addition there was a pattern of behavior upon which the tribunal commented adversely. Yet despite this, the tribunal declined to make a finding that the applicant was 'unfit to teach', which, as I have stated earlier, is the equivalent of a finding of summary termination in Mr Duke's case. The tribunal instead opted for a period of suspension.

[86] Having regard to entire context of the incident, together with the authorities to which I have referred, I conclude that the summary dismissal of Mr Duke was both harsh and disproportionate to the gravity of the offence.

[87] I turn now to the matter of procedural fairness.

[88] Prior to the conclusion of the hearing I invited both parties to address the issue of a summary termination in the absence of a CD5 investigation and a finding that the Code of Conduct had been breached.

[89] Mr Watson referred to s38(1) of the SSA which reads:

"38. Terms and conditions of employment of employees

(1) The terms and conditions of employment of employees are to be those specified in an award relating to persons engaged in the work for which they

are employed or, if no such award is in force, are to be determined by the Minister."

[90] Mr Watson submitted that this invoked clause 9(c)(iii) of Part I of the Award which reads:

"9. CONTRACT OF EMPLOYMENT

...

(c) *Notice of termination by Employee and Employer*

...

(iii) *Summary Dismissal*

The employer has the right to dismiss an employee for serious misconduct or serious neglect of duty and in such circumstances wages are to be paid up to the time of dismissal only."

[91] Mr Watson contended that this provided the head of power to summarily terminate for serious misconduct and that the CD process was not a prerequisite.

[92] Ms Tyson acknowledged that the Award did provide the head of power for summary termination, but did not elaborate.

[93] I respectfully disagree.

[94] Section 44 of the SSA relevantly reads:

"44. 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 [my emphasis] grounds for termination:

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

[95] Section 10[1] sets out the sanctions available to the employer in the event that an employee is found, *"under procedures established under subsection (3), to have breached the Code of Conduct. One of those sanctions is "termination of employment in accordance with section 44 and 45."*

[96] Section 10(3) provides for the State Service Commissioner to establish procedures for the investigation and determination of whether an employee has breached the Code. This procedure is known as CD5.

[97] I readily acknowledge that the SSA provides that terms and conditions of employment are to be those specified in an award.

[98] Clause 9(c)(3) upon which Mr Watson relies is found under the broad heading of "*Notice of termination by Employee and Employer.*" The sub clause, under three separate subsections, specifies the amount of notice to be given by an employee, by an employer with notice and summary dismissal. The positioning of a sub clause in the context of a broad heading is an important consideration in award interpretation. (See T13586 of 2009 MASSA v ANF at 56.)

[99] I conclude that the entirety of subclause (c) is dealing with the amount of notice required in different circumstances. In the case of serious misconduct, wages are to be paid up to the time of dismissal only. In my view it would be incorrect to read subsection (c) as granting a head of power to summarily terminate without regard to other statutes. If subsection (3) is to read as standing alone, then so must subsection (2) dealing with termination with notice.

[100] I am strengthened in this view by virtue of s.42 of the *Industrial Relations Act* which reads:

"42. An award has effect subject to the provisions of any Act dealing with same subject matter."

[101] If I am to accept Mr Watson's contention, then clearly the provisions of the SSA referred to above are dealing with the same subject matter, namely, dismissal. If so, by virtue of s48, to the extent of any inconsistency, the provisions of the SSA would prevail. I suspect the better construction is that clause 9(c) of the Award deals with 'notice,' and the SSA deals with matters leading up to and including dismissal. Either way, I have reached the tentative conclusion that the termination of a permanent State employee, in the absence of an adverse Code of Conduct finding, would be invalid. My hesitation is driven only by the absence of more comprehensive arguments and perhaps the intervention of other interested parties on this important issue of law.

[102] Leaving aside questions of validity, I feel strongly that at the very least the spirit and intent of CD5 should have been followed. It was not and I have already found that process had significant shortcomings in terms of procedural fairness. I refer to:

- The failure by the respondent to identify at any time during the process that Mr Duke's employment may have been in jeopardy.
- Failure of the respondent to provide Mr Duke with a copy of the Investigator's report, within the meaning of CD5.
- The effective preclusion by the investigators of the submission of references

[103] These shortcomings are material on the context of this case. Mr Duke had good reason to expect an outcome involving a reprimand, probably a warning and perhaps counseling and additional training. He and his representatives presented his case accordingly.

[104] Granted the respondent sought to remedy this shortcoming in correspondence dated 18 January 2012 when the Secretary offered a further opportunity to present additional information. However this really misses the point. The proverbial horse had bolted, the decision to terminate had been made and the matter was before the Commission less than two weeks ahead. I have difficulty envisaging a circumstance whereby a significant breach in procedural fairness can be remedied retrospectively after the decision to terminate had been made and communicated.

[105] I conclude that Mr Duke was denied procedural fairness in material respects.

[106] Taking into account the totality of the evidence and submissions, I find that Mr Duke was unfairly terminated. Having made this finding, I make it clear that Mr Duke was not without blame, a factor which is reflected in my order.

Remedy

[107] The primary remedy pursuant to s31(1B) is reinstatement or re-employment. It is only where this is found to be impracticable, that the question of compensation may be considered. On the question of reinstatement or re-employment, the evidence of School Principal, Mrs Rose is very much to point.

[108] Mrs Rose presented as a highly professional educator who cared deeply about her school, the students and staff. She readily acknowledged that Mr Duke had a level of support within the school.

[109] Mrs Rose said that it would be "*totally untenable*" for Mr Duke to be reinstated. Enlarging on this comment, Mrs Rose spoke of the closeness of the St Mary's community and the pivotal role of the school within that community and that working with children was a gift and not something that should be taken lightly. She said she expected the highest standards, even if she didn't always get it. Mrs Rose said:⁴¹

"If Shane is reinstated at our school, what message is that giving staff about the way in which they communicate with the children; to the parents about what is okay to say to kids in our community, and how untenable is that going to be for myself and my APs to work with Shane believing - I have no doubt that Shane has said these things to students, and so it's my own personal belief of the inappropriateness of the actions and my belief as a principal as a duty of care to the students that I have at the school, how can I – you know, if Shane's reinstated and I – what work can I give him to do believing that he has made these statements. What work can I give him to do? That will go against every core value and belief."

[110] The following exchange with the Commission is also relevant to this question.⁴²

DEPUTY PRESIDENT: Can I – do I correctly summarise your evidence, or your reasoning for that, is that you perceive there to be some sort of risk to either the school or the students in that event?

WITNESS: I suppose it's not so much risk, it's about knowing and believing the allegations and me in my role with a duty of care, I have around that and try – and wanting to put the very best people we can in front of our kids, and a big part of it is also is about the messages that this gives the community and the staff about the way in which they can speak to children, and the way in which they can speak to each other.

DEPUTY PRESIDENT: But the allegations aren't in the public domain, are they?

WITNESS: No, they are not, but they know – staff know that the allegations were of a sexual context, and they know that the allegations were made by two students and a staff member. There is a lot of talk out in the community for what they actually – what they accurately know. It certainly hasn't come from me, but the issue is thought that the Secretary terminated Shane's

⁴¹ Transcript p 131

⁴² Transcript p 144

contract based on the allegations, so people know it's very, very serious, so from my perspective what messages that's giving people when someone has been terminated and then get reinstated, it just –

DEPUTY PRESIDENT: So it –

WITNESS: It makes the situation very difficult.

DEPUTY PRESIDENT: All right. No, I just want to be clear on this?

WITNESS: Yes.

DEPUTY PRESIDENT: So it's not so much a risk factor, it's what message it would send? Is that right?

WITNESS: That's right."

[111] Balanced against the evidence of Mrs Rose is the evidence of many of Mr Duke's teaching colleagues.

[112] The majority of the references supplied supported Mr Duke's reinstatement. Not surprisingly, none of the references opposed reinstatement. I note also that student J and student J's mother strongly support a return to work for Mr Duke.⁴³

[113] The evidence of Ms Marshall was:⁴⁴

".....I am aware of the sentiments of many other teachers at the school, yes.

And their – that's how I should have said, in relation to Shane's character and his work ethic, have you received any feedback about that or -.....I am aware that, I would say, a large percentage of the staff at St Mary's have been quite shocked by – well the situation we're in right now and surprised that it's come to this and I would say without you asking me any questions I will state categorically that I'd have no problems with working with Shane and I know that most of those staff would have no problems either. I know the majority of the staff at the school have no problems with working with Shane, I know that for a fact as I've asked the question.

Did Shane show you the allegations?.....Yes, he did.

And it doesn't change your view?.....No, he asked me if I would write a reference for him and I said, "Look, I'm coming back from my holiday and this particular date and I will not do anything until I see absolutely everything in front of me", and so I went to his house and I read for a day.

*Given your knowledge of that would you work with Shane again, I'll just clarify the question?.....Absolutely.
Yeah.....No hesitation."*

[114] Mr Green in his evidence said:⁴⁵

"Well I've spoken to many teachers and everyone I've spoken to, which isn't everybody but I've spoken to a lot, and they all feel – well basically they feel that Shane's been unfairly treated, but that's just a feeling, but they also

⁴³ Exhibits A5 & A6

⁴⁴ Transcript p 82

⁴⁵ Transcript p 98

would be quite happy to have Shane come back and work with them and would like him to come back and work.

Yes, so where are you – where do you currently reside?.....Where do I reside?

Yeah.....In Bicheno.

Yes.....Yep, so I travel from there with a group of teachers. I can't really speak for every other teacher or everyone that travels from Bicheno –

No.....- but I know the majority of them, shall we say, are disappointed in what's happened."

[115] Based on the reference material and direct evidence, I can only conclude that despite this regrettable incident, Mr Duke has a great deal to offer in continuing his role as a teacher aide. He clearly has strong support from many individuals within the St Mary's District High School community.

[116] I am satisfied that Mr Duke's return to the workplace would not pose a threat to any individual.

[117] A careful analysis of the evidence of Mrs Rose reveals that she was not particularly concerned about any threat to the school or the students, but rather the message she felt it would send to the community and the staff.

[118] I have great respect for the views of Mrs Rose. It is however inevitable in any successful challenge to an alleged unfair dismissal, that the employer may feel that their authority is being challenged. In a general sense this should not necessarily be the case, and in this instance certainly should not be viewed as such. I say this for a number of reasons.

- Firstly, from the moment the initial statements were taken, the process was taken out of the school's hands. From that point the Principal played no part in either the process or the ultimate decision.
- Secondly, the Commission has the benefit of having all the evidence and argument and hearing the witnesses first hand. This is a distinctly more advantageous position than that of the Secretary, who could only rely on limited documentation.
- And finally, under the order I propose, Mr Duke will not come through unscathed. Apart from the stress, anxiety and the impact on his health, together with possible damage to his standing in the community, Mr Duke will also incur a significant financial penalty.

[119] I propose to order a modified form of reinstatement and I see no reason why that should not be at St Mary's District High School. I make it clear that this is my strongly preferred position.

[120] However in light of Mrs Rose's strongly held views I will also propose an alternative. That alternative will require the Department to find an equivalent position in a school within reasonable geographic proximity. In addition, if this option is chosen, the employer will be required to pay Mr Duke a travelling allowance broadly equivalent to the additional cost (as distinct additional time) involved in travelling to and from this school, which is over and above the cost of travelling from Mr Duke's home to St Mary's and return. Such allowance would continue for a period of 12 months.

[121] I would also make it clear that, should the alternative be adopted, there should be no artificial impediment to Mr Duke returning to St Mary's should an appropriate opportunity arise in the future. This however is an observation, and does not form part of the order.

[122] Finally, as I have previously concluded, Mr Duke is not without blame. Accordingly, whilst I propose to order reinstatement from the date of termination, the order will require that wages be paid from 8 May 2012, being the first day of formal hearing. Whilst this is an arbitrary date, it does impose a significant financial penalty which I consider commensurate with Mr Duke's culpability. Notwithstanding, continuity of service shall be maintained from the date of termination.

[123] It is also open for the employer to apply any reprimand, warning, counseling and/or additional training considered necessary.

Order

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

1. The Minister administering the State Service Act 2000 reinstate Mr Shane Duke to the position as a teacher aide which he held prior to his termination on 20 December 2011.
2. For the purposes of continuity of service, the date of reinstatement shall be 20 December 2011.
3. Mr Duke is to be paid his normal weekly wage from 8 May 2012.
4. Subject to point 5 below, Mr Duke is to be reinstated to his former position at St Mary's District High School.
5. In the event that employer determines that reinstatement at St Mary's District High School to be impracticable, Mr Duke is to be employed in an equivalent position at a school within reasonable geographic proximity. In addition, Mr Duke is to be paid a travel allowance equivalent to the additional cost of travelling to and from the alternative school, which is over and above the cost which Mr Duke would incur in travelling from his home to and from St Mary's District High School. Such an allowance is to be paid for a period of 12 months.
6. The practical reinstatement of Mr Duke is to occur as soon as is practicable but not later than the beginning of term 2, 2012.

The file shall remain open for a period and the Commission is available to assist the parties in the implementation of this order if necessary.

Tim Abey
DEPUTY PRESIDENT

Appearances

Ms K Tyson with Ms C Miller of the CPSU for Mr S Duke
Mr M Watson of the DOE for MASSA

Date and place of hearing:

February 1
Hobart
May 8, 9 10
St Helens

<TIC0001/2012>