TASMANIA

TASMANIAN INDUSTRIAL COMMISSION

CITATION: Edward Sherrin v Minister administering the *State Service Act 2000*/Department for Education Children and Young People [2025] TASIC 35

PARTIES:

Edward Sherrin (Applicant)

Minister administering the *State Service Act 2000* (Respondent)

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

FILE NO: T15228 of 2025

HEARING DATE(S): 8, 16, 17 December 2025

DATE REASONS ISSUED: 19 June 2026

COMMISSIONER: Acting President N M Ellis

CATCHWORDS: Industrial dispute relating to termination of employment - lawful and reasonable direction as warning - valid reason found - application dismissed.

REPRESENTATION:

Malcolm Upston for the Respondent

James Eddington and James Milligan for the Applicant

EDWARD SHERRIN v MINISTER ADMINISTERING THE *STATE SERVICE ACT 2000* – DEPARTMENT FOR EDUCATION CHILDREN AND YOUNG PEOPLE [2025] TASIC 35

REASONS FOR DECISION **19 JUNE 2026**

[1] This is an application in relation to an industrial dispute relating to the termination of the Applicant's employment following an Employment Direction No. 5 (ED5) investigation into alleged misconduct which occurred between August 2019 and November 2021.[1]

[2] The Applicant submits that the termination of his employment was not based on valid reasons and, otherwise, was significantly unfair.

[3] The Respondent submits that the Applicant's misconduct provides a valid reason for the termination of the Applicant's employment. It is the Respondent's position that the termination was not otherwise unfair, and the application should be dismissed.

Background

[4] The Applicant was employed as a Child Safety Officer (CSO) with the then Department of Communities in Launceston since January 2008.[2]

[5] In this role, he was responsible for completing assessments of children at risk of harm, making recommendations to address concerns, liaising with key stakeholders and implementing Care Plans for children subject to orders.[3] He volunteered for the After Hours Team Leader position from 2009 to 2019. At the time of being stood down, he was working in "response" which has an investigation role. He was a delegate of the Health Services Union (HSU).

[6] On 22 November 2021, the Applicant received a letter from the then Secretary of the Department of Communities, Michael Pervan, notifying him that he was suspended on full pay under Employment Direction No. 4 (ED4) as the Secretary had reasonable grounds to believe that he may have breached the State Service Code of Conduct.[4] The letter detailed eighteen alleged breaches of the Code of Conduct, which occurred between June 2020 and November 2021, to be investigated in accordance with ED5.[5]

[7] On 5 December 2022, the Applicant participated in an interview with the Investigator.[6]

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[1] The names of some persons have been omitted for reasons of privacy.
[2] Attachment C, Exhibit A1, page 211 and 212
[3] Exhibit A1
[4] Attachment H, Exhibit A1
[5] Ibid.
[6] Attachment C, Exhibit A1, page 211

[8] On 8 February 2023, the Applicant received a letter from the then Secretary of the Department for Education, Children and Young People, Tim Bullard, detailing a further allegation of misconduct which occurred in 2019.[7]

[9] On 15 February 2023, the Applicant provided a written response to the additional allegation. An initial report was completed by the Investigator on 17 February 2023.[8]

[10] In May 2023, the Investigator provided additional questions to the Applicant who responded via his HACSU representative.

[11] In June 2023, the Applicant was provided an initial ED5 report and a supplementary ED5 report. The Applicant provided a detailed response.[9]

[12] In late November 2024, the Respondent provided the Applicant with a letter that included a summary of evidence, the findings and proposed sanction of termination of employment. The letter also provided the Applicant with a show cause opportunity to respond to the proposed sanction.[10]

[13] On 9 December 2024, the Applicant's HSU representative lodged an application with the Tasmanian Industrial Commission for a review of any other State Service action, in accordance with s 50(1)(b) of the *State Service Act 2000 (SSA).* Over the next few months, the matter was conciliated, and the Applicant requested the opportunity to meet with the Secretary to assist with responding to the show cause letter.

[14] On 7 March 2025, the Applicant received an email from the Respondent's Principal Consultant, Workplace Relations, Stuart Locke, advising that the Secretary was not prepared to meet with the Applicant. Following receipt of this correspondence, the Applicant discontinued his application with the Tasmanian Industrial Commission.

[15] On 4 April 2025, the Applicant responded to the Respondent's show cause letter.

[16] On 4 July 2025, the Applicant received a letter from the Respondent terminating his employment.

[17] On 24 July 2025, the Applicant's HSU representative lodged an application with the Tasmanian Industrial Commission under s29(1A) of the *Industrial Relations Act 1984* (the Act).

LEGISLATIVE FRAMEWORK

[18] The relevant statutory framework applicable to this dispute is Section 30 of the Act which sets out the criteria to be applied. It provides:

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[7] Attachment I, Exhibit A1
[8] Attachment C, Exhibit A1
[9] Attachment E, Exhibit A1
[10] Attachment D, Exhibit A1

30. Criteria applying to disputes relating to termination of employment

(1) In this section –

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

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

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

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

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

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

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

(4) Without limitation, the following are not valid reasons for termination of employment:

(a) membership of a trade union or participation, or involvement, in trade union activities;

(b) seeking office as, acting as, or having acted as, a representative of employees;

(c) non-membership of a trade union;

(d) race, colour, gender, sexual preference, age, physical or intellectual disability, marital status, relationship status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, except where the inherent nature of the work precludes employment for any of those reasons;

(e) absence from work during maternity or parental leave;

> (f) temporary absence from work because of illness or injury, provided that nothing in this paragraph is to be construed as removing an employer's right to terminate an employee's employment on account of persistent or unjustified absenteeism;
>
> (g) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities.

> (5) Where an employer terminates an employee's employment, the onus of proving the existence of a valid reason for the termination rests with the employer.
>
> (6) Where an applicant alleges that his or her employment has been unfairly terminated, the onus of proving that the termination was unfair rests with the applicant.
>
> (7) The employment of an employee must not be terminated for reasons related to the employee's conduct, capacity or performance unless he or she is informed of those reasons and given an opportunity to respond to them, unless in all the circumstances the employer cannot reasonably be expected to provide such an opportunity.

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

[19] The Applicant's evidence is that 16 of the 19 allegations investigated as part of the ED5 process were not raised with him by any supervisor.[11] It is the Applicant's view that despite having fortnightly meetings, his supervisor had not provided "correction, guidance or supervision" on the issues.

[20] The Applicant submits that the "dismissal was not based on valid reasons and, otherwise, was significantly unfair".[12]

[21] The Respondent submits that the Applicant failed to comply with the State Service Code of Conduct and that the sanction of termination of the Applicant's employment should be upheld.[13] The Respondent's submissions detail nine allegations where the Respondent found that the Applicant's conduct breached the State Service Code of Conduct forming the valid reason for termination of employment.[14]

The Respondent's position

[22] "The Respondent found that Mr Sherrin had:

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[11] Exhibit A3, page 3.
[12] Exhibit A1, Applicant's submissions dated 29 December at 255.
[13] Respondent's submissions dated 10 November 2025, page 20.
[14] Ibid, page 2.

i Between approximately 1 June 2020 to 22 December 2020, during the course of his State Service employment, he failed to act professionally by commencing and/or maintaining a personal, as opposed to professional, relationship with MT (sic), and doing so he acted contrary to Section 9(2) and/or 9(8) and/or 9(14) of the Code.

ii On or about 1 December 2020, during the course of his State Service employment, he failed to satisfy a standard of behaviour generally expected of a Child Safety Officer by having dinner with Child Safety Service users, and in doing so he acted contrary to Section 9(2) and/ or 9(8) of the Code.

iii Between approximately 26 July 2020 to 23 December 2020, during the course of his State Service employment, he accessed Child Protection Information System information, relating to MT's (sic) grandchild, without a valid reason to do so, and in doing so he acted contrary to Section 9(1) and/or 9(9) and/or 9(11) of the Code.

iv On or about 9 December 2020, during the course of his State Service employment, he provided false and/or misleading information to Ms Cassie Tennant (Team Leader), insofar as he said words to the effect that he had not accessed the Child Protection Information System information regarding MT's (sic) grandchild between approximately 26 July 2020 and 9 December 2020, and in doing so he acted contrary to Section 9(1) and/or 9(2) and/or 9(10) of the Code.

v On or about 12 February 2020, during the course of his State Service employment, during a meeting with Ms Tennant and Ms Melody Kuhlmann, he engaged in inappropriate behaviour, including yelling, and in doing so he acted contrary to Section 9(2) and/or 9(3) of the Code.

vi On or about 4 October 2021, during the course of his State Service employment, when discussing a Special Care Package request with Ms Tennant, he engaged in inappropriate behaviour including swearing and/or yelling, and in doing so he acted contrary to Section 9(2) and/or (3) of the Code.

vii On or about 15 October 2021, during the course of his State Service employment, you sent an inappropriate email to Dr Neil Atherton (Paediatrician) questioning and/or criticising his decision, and in doing so acted contrary to Section 9(2) and/or 9(3) and/or 9(14) of the Code.

viii On or about 27 October 2021, during the courses of his State Service employment, he misled and/or misinformed Dr Strong by failing to disclose previous advice you had received from Dr Atherton regarding the administration of medication to a Child Safety Service user, and in doing so he acted contrary to Sections 9(2) and/or 9(3) and/or 9(10) and/or 9(14) of the Code.

ix On or about 9 August 2019 during a meeting with Acting Assistant Manager Mr Jack Davenport in his office in Launceston he failed to treat Mr Davenport with respect by: questioning his qualifications/experience and professional status, acting in an aggressive manner by standing up with your fists clenched and stepping toward him, snarling at him and describing him as "useless" (or words to that effect), describing him as "a fucking dickhead" who did not know what he was talking about (or words to that effect) contrary to Section 9(2) and 9(3) of the Code."[15]

[23] Consideration of the allegations which formed the valid reason is set out below.

Allegation of developing a personal relationship with MT, the grandmother of client AT

[24] Between 1 June 2020 to 22 December 2020 the Applicant allegedly developed a personal relationship with MT, the grandmother of AT, a Child Safety Service (CSS) client. MT lives in Queensland, and the Applicant attended a dinner with her during her visit to Tasmania.

[25] At the end of June 2020, the Applicant had no responsibility for MT's grandchildren as the file had been transferred to the case management team. He admitted he attended a dinner on 1 December 2020 with MT, a foster carer, Detective Hinds, and the Applicant's wife. The Applicant does not deny attending the dinner and stated they did not discuss the case or cross professional boundaries.[16]

[26] The fact that the Applicant continued a personal relationship with MT has not been denied. However, he stated it was not in a work capacity. He refutes this to be a conflict of interest and stated a breach of the procedure was not put to him in the context of the ED5 investigation.

[27] After he ceased the case management of AT, he described his relationship with MT as ongoing. He had telephone calls with her but if she enquired about the case, he redirected her to the relevant case manager. He stated their personal conversation topics revolved around their shared religious faith and her history whilst working for a legal firm.[17]

[28] Following the dinner, the Applicant told Anna-Lisa Petersen, Regional Manager, CSS that he had dinner with MT the previous night. The Applicant said he knew MT was meeting with Ms Petersen that day. Ms Petersen's evidence was she did not discuss the dinner or the conversation with MT. However, she formed the view that case direction had been discussed.[18]

[29] On 14 December 2020, Cassie Tennant, Team Leader, CSS, Jodie Rayner, Regional Manager CSS and Ruby Dennison, HR Consultant met with the Applicant to discuss his attendance at the dinner with MT and professional boundaries.

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[15] Ibid
[16] Ibid
[17] P36 Transcript
[18] Attachment 6a, Exhibit R24.

[30] The email record of the meeting from Ms Tennant dated 14 December 2020, summarises the Applicant's response that MT was not a client, he was having limited contact and not providing her with case direction. He also stated that others knew about the dinner, including Practice Manager, CSS, Anna-Lisa Petersen and Child Safety Officer, Wendy Pearson. He refused to cease contact with the family.[19]

[31] On 22 December 2020, following that meeting, the Applicant received a formal reminder letter, from the Director of Child Safety Services, Clare Lovell regarding professional boundaries and conduct which was based on his attendance at the dinner.[20] In this letter, reference to the previous reminders relating to professional boundaries issued to the Applicant in 2017, 2019, and 2020 were highlighted.

[32] Despite the Director identifying a possible breach of the Code of Conduct, the conduct was not referred to the Secretary at the time to determine the need for an ED5 investigation.

[33] Following a S50(1)(b) review of action application pursuant to the SSA, RO22 of 2020/2021, the parties agreed to settle the matter based on the withdrawal of the letter[21] and the allegations proceeded to the ED5 investigation process.

[34] The Applicant's evidence to the Investigator and under cross examination was that he "probably" should have discussed this relationship with his supervisor, and it was only when the other guest, a detective, mentioned he had sought permission from his manager that the Applicant thought he should have raised it with management.[22] He stated he regretted he had not sought permission, and it would have been sensible to do so.[23]

[35] The Applicant stated he failed to understand how this relationship is a conflict of interest to declare or manage as MT was not a client in his case load and had not been for a period of 6 months. He understands the power imbalance could lead to a declaration of conflict but in his view, only while working on the case.[24]

[36] The Applicant stated other staff knew he had at least an acquaintance with MT, a finding he alleges was confirmed by the Investigator.

[37] The Applicant requested permission via email from Ms Tennant to drive MT and her granddaughter, AT to the airport. The flight changed and he did not drive MT and AT to the airport. In cross examination, Ms Tennant acknowledged this request[25]:

> "And in that email you say that – there's a – a comment there that you say that Mr Sherrin drove MT sic to the airport after dinner. Can you see that

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[19] Attachment C Exhibit A1
[20] Attachment C, Exhibit A1
21 Para 78, Exhibit A1
[22] Attachment C, Exhibit A1
[23] Ibid, and P37 Transcript
[24] Attachment C P57, Exhibit A1
[25] P164 Ibid

somewhere?......Um, “Mr Sherrin requested that he be able to – be allowed to take AT (sic) to the airport to say goodbye to MT (sic).”

I think it – ?...... “I did not respond.”

[38] Ms Petersen confirmed to the Investigator that MT informed her the Applicant was going to take her and AT to the airport to return to Queensland, to enable MT to say goodbye to AT.[26]

[39] In response to the Investigator, the Applicant stated[27]:

> “The only thing I would say is the fact that I had occasionally kept in touch with this lady and again she would ring me, um there was no secret to that either so as far as I knew it was known, um even to the extent that the manager gave permission for me, I think in the notes it says that I drove her to the airport, I didn’t, the manager gave me permission for me to do so, but in the end I didn’t.”

[40] An email dated 6 November 2022, was tendered in which the Applicant reported contact by MT to his manager, Principal Practitioner, Office of the Chief Practitioner, Kai Kitchen, and he sought approval to attend a gathering of all the children and foster carers, with his wife and Detective Hindle. Despite a request for a follow up from the Applicant on 14 November, there was no response from management.[28]

[41] Consent was sought to enable the Applicant to talk to MT’s granddaughter AT on 31 March 2023, which was provided by Kelly Munting on 3 April 2023.[29] In the email, the Applicant noted he was “under a direction to obtain permission.”

[42] It was the Respondent’s position that even though he was not case managing MT, she was being assessed as a kinship carer for AT and the children during that period. It is alleged he breached professional boundaries and duties of confidentiality.[30]

[43] The Associate Secretary’s determination found the Applicant had failed to disclose and take reasonable steps to avoid a conflict of interest in connection with his employment resulting in a breach of s 9(8) of the State Service Act 2000.

[44] The Investigator’s findings at page 18, were:

> “Even if there was a conflict of interest, the respondent was at all times quite open about his relationship with MT (sic), and my factual findings are not capable of substantiating a breach of this section, and consequently this reason did not amount to a breach.”

[26] Attachment C, Exhibit A2
[27] Ibid
[28] Attachment 1, Exhibit A1
[29] Ibid Attachment 2, Exhibit A1
[30] P 13, Respondent’s outline of submissions

[45] The Applicant submitted that based on the Procedure, the only way a conflict of interest could be managed would be through the discontinuation of the relationship. Under cross examination, Ms Rayner provided evidence that the COI resulted from their relationship, and she said it should never have been commenced. In reply to a question from Mr Eddington, she stated:[31]

> "So, you agree that it's at that point that, going out to dinner, that the relationship has crystalised to the point that it needs to be made known?......It was at that point that I became aware of the situation, it's my understanding through advice given to me by others that there may have been other communications occurring up to that point."

[46] Ms Rayner gave evidence on the application of the Department's Conflict of Interest (COI) Procedure[32] and agreed that all officers and managers should manage conflicts of interest. When asked to review the example in the Procedure she said she disagreed with management:[33]

> "WITNESS: I disagree with the procedure. I don't think that particular example is actually appropriate, and I don't think that Michelle should have been continuing to lead Peter in her team.
>
> MR EDDINGTON: (Resuming) So, you're now putting evidence that the department's own procedure is defective?......It's incompatible with my professional boundaries and ethics, yes."

[47] When asked to review the COI Procedure[34], she agreed that the management strategy approach includes relinquishing a relationship but when "the employee is unwilling to or unable to relinquish the relevant private interest", the approach is deemed unsuitable. In reply to questioning from Mr Eddington, Ms Rayner agreed there were other strategies:

> "And that means that you have to look at some of the other approaches that are listed there as the management strategy approach? And can I take you to Restrict? It says,
>
> The description of the strategy, restrictions are placed on the affected party's involvement in the matter.
>
> And I put to you that in this circumstances that's a reasonable management strategy?......According to this policy, yes.
>
> And it says Recruit:

[31] P83 Transcript
[32] Attachment 8, Exhibit R13
[33] P84-85 Transcript
[34] Attachment 9, P 16, Exhibit R13

Introduction of an additional party who has no conflict of interest to oversee the matter.

I put to you that that's a reasonable approach?......In regard to this procedure, yes.

And Remove:

The affected party is removed from involvement in the matter.

I put to you that that's a reasonable approach?......Yes.

So, you agree that there were other – as prescribed in this policy and procedure, there's other management strategies that are prescribed and could be adopted, rather than the one that can't be adopted which is relinquish. Do you agree with that?......I'm not sure what you mean by relinquish. By relinquishing the personal relationship do you mean?

Yes?......Yeah, I think all of these strategies were based upon knowledge that there was actually a conflict of interest, and as I've stated, I wasn't aware that there was one until December of 2020.

But your position is, you just put it on evidence that you considered that the only strategy should be that Mr Sherrin should discontinue the relationship with MT(sic)?......Yes, but that's my personal opinion. The procedure provides something different. But again, this is incumbent upon him having declared the conflict of interest, and I wasn't aware of it until December 2020."[35]

[48] Ms Kitchen, the Applicant's manager, also agreed with the COI Procedure but explained she did not implement a management strategy as she did not know about the relationship until December 2020.[36]

[49] Ms Petersen[37], Ms Kitchen,[38] and Ms Tennant[39] concurred with Ms Rayner's understanding of the management strategies as outlined in the COI Procedure, however stated they needed to know about the conflict to manage it and to apply the management strategy.

[50] There was no evidence provided by any manager they knew about the Applicant's relationship with MT prior to the dinner party.

[51] The COI Procedure[40] requires staff to notify management and states:

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[35] P86 Transcript
[36] P140 Transcript
[37] P 251 Transcript
[38] P 134 Transcript
[39] P 170 Transcript
[40] Attachment 8, Exhibit R13

> "It is important, that employees are proactive in discussing any real or perceived conflicts of interest due to personal relationships or connection with clients with supervisors as soon as they are aware of the conflict so that appropriate management can be implemented."

[52] I am satisfied the relationship between the Applicant and MT, was formed through a work connection. He has admitted to continuing the relationship after his case management was transferred, albeit in a personal rather than professional manner. In hindsight, he has admitted and regrets that he should have declared formally to management his ongoing relationship and attendance at a dinner. This non-disclosure is in breach of the employee responsibilities set out in the COI Procedure.

[53] I am satisfied some of his colleagues were aware of an ongoing personal relationship and that the relationship was not formally declared to management, as required by employment procedures.

[54] However, I am concerned the Applicant has demonstrated no understanding this relationship formed, through a power balance lens, during his work connection with her and should have been declared as a perceived conflict of interest in the interests of protecting both sides. MT was still involved with CSS and was being assessed as a Kinship carer for her granddaughter.

[55] I do not support the assertion that as the conduct was out of hours it was private and not connected with his employment. *Rose v Telstra*[41] established the enduring test for out-of-hours conduct. Out-of-hours conduct can justify dismissal only where it:

> "1. seriously damages the employer–employee relationship; or
> 2. damages the employer's interests; or
> 3. is incompatible with the employee's duties;
> and is of such gravity as to indicate repudiation of the contract."[42]

[56] Whilst the personal relationship began after the removal of case management, reducing any direct conflict, the relationship is directly linked to his employment and previous role as case manager of MT's granddaughter. The case was still being managed by CSS.

[57] In my view, the relationship contributed to potentially compromising impartiality, could be perceived to influence ongoing actions and could have damaged trust within the CSS service. I concur with the Respondent's position that this relationship, without acknowledgement, may have damaged the employee-employer relationship and was incompatible with his duties.

[58] Due to the absence of declaration of the relationship to management until after the dinner, when the Applicant knew MT would be meeting with Ms Petersen, in my view, gives rise to concerns regarding both a lack of disclosure and a perceived conflict of interest.

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[41] [1998] IR CommA 1592; [1998] AIRC 1592

[42] Ibid.

[59] I find that the Applicant was aware of the nature and consequence of meeting a client/user of CSS and his own admission is, he should have declared the attendance at the dinner. In my view, he should have declared his intention to attend to management prior to the occasion to protect the service and avoid any perceived conflict of interest or allegations of the appropriateness of the discussions. Additionally, he should have openly declared to management his formation of a personal relationship with his previous client, despite his removal as case manager.

[60] Despite, the Applicant stating others were aware of the personal relationship with MT and the dinner, the evidence was contradictory and stated management did not know and were only made aware the day after the event when the Applicant notified Ms Peterson.

[61] The Applicant's evidence that he did not discuss case management is to be accepted in the absence of any other direct evidence. In a mixed social setting, I find it probable that the case management was not discussed. However, the occasion was a face to face catch up with a previous client, but due to her continuing association through her grandchildren with CSS, I remain of the view, he should have declared the dinner prior to attending. This would have provided management an opportunity to consider and discuss the options with the Applicant and manage any perceived conflicts of interest.

[62] All managers who gave evidence stated they could have managed the situation if the conflict had been declared. The evidence around the COI Procedure is only relevant once the employee has declared the perceived or direct conflict and management strategies are considered. It also provides clear guidelines when an employee should be

> "…proactive in discussing any real or potential conflicts of interests due to personal relationships or connections with clients as soon as they are aware of the conflict so that appropriate management can be implemented." [43]

[63] The letter sent to the Applicant outlining the alleged breaches of the Act[44] and the commencement of an investigation pursuant to ED5, dated 22 November 2021, sets out the alleged sections of the Code. This included section 9(8) of the Act that an employee must disclose, and take reasonable steps to avoid, any conflicts of interest in connection with the employee's employment. Accordingly, I do not accept the allegation of a perceived conflict of interest was not put to the Applicant as he stated.

Allegations of accessing Child Protection Information System (CPIS) records

[64] Included in the valid reason for termination of employment, the Respondent relied on the substantiation of the allegation the Applicant accessed CPIS information relating to MT's grandchild without a valid reason, and he provided false and/or

[43] Attachment 8, Exhibit R13
[44] Attachment H and Attachment C of Exhibit A1

misleading information to Ms Tennant, denying he had accessed CPIS relating to MT's grandchild.

[65] Concerned about the topics of the conversations with MT and the Applicant, Ms Petersen sought an audit report of the CPIS access by the Applicant[45]. The audit report was provided by email on 12 January 2021. The audit report revealed 33 access entries made after the transfer of the cases to another case worker. Of these, 12 were in relation to AT, MT's grandchild, and eight were in respect of the TR CSS child and five related to MT.

[66] In an email to Mr Upston dated 12 December 2025[46], Ms Raynor stated the Applicant has gone into 'case' rather than individual children, so all four children's case notes were available. In her view, he should have searched case name, clicked into the case and added a case note. She gave evidence that after 18 August 2020 there was no reason for the Applicant to access the files, and she did not believe he innocently clicked but believed he was casual browsing the CPIS files. The allegation relating to inappropriately influencing an outcome beneficial to MT was not substantiated by the ED5 Investigator or the Secretary in her determination.[47]

[67] A letter from Claire Lovell, dated 8 June 2021 sought a response from the Applicant to a number of "recent concerns" regarding professional boundaries. These included that he allegedly advocated for MT to Ms Petersen in relation to custody, he had accessed the CPIS system after he was no longer case manager in contravention of the Procedure for Accessing CPIS and he misled his Team Leader. It was requested he provide a written response to the concerns and stated the future steps may include an investigation under ED5 and outlined the sanctions if a breach was found. Employee Assistance Program support was offered.

[68] Following a SSA s50(1)(b) review of action application, the Department agreed to withdraw the letter. This process did not resolve the issues of alleged misconduct at the time and the allegations were put to him as part of the ED5 process.

[69] The Applicant stated he did not access the system to gain information or a benefit for himself or anyone else. There is also no evidence that the Applicant disclosed confidential information. He agreed he accessed the CPIS system for work related reasons during the period 26 July 2020 and 9 December 2020 and that it was normal for a period of continuation upon transfer of clients to a new case manager. He was aware that IT can trace these records.

[70] His evidence confirmed his knowledge and acceptance of the principles outlined in the Child Protection Client File Management Policy and Practice Guidelines[48], the Personal Information Protection and CPIS Policy and Practice Advice[49] reflected in his signed declaration to the Authorisation to use CPIS[50] form dated 13 August 2010.

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[45] Exhibit R24
[46] Exhibit R15
[47] Attachment D, Exhibit A2
[48] Exhibit R7
[49] Exhibit R9
[50] Exhibit R8

[71] It was submitted the investigation interview regarding this allegation occurred two years after the alleged access and the hearing for this matter is five years post the alleged access. This made it difficult to recall the reasons for short access of the database.

[72] Additionally, it was stated it was unfair to rely on the non compliance with the CPIS authorisation form when no allegation of a breach of the policy or procedure was put to him.[51]

[73] When the Applicant was asked by his Team Leader, Ms Tennant, to explain why he "unlawfully" accessed the case files and that he was providing advice to the grandmother, he denied this allegation, but not his access to CPIS.

[74] The Applicant consistently denied lying to Ms Tennant about his CPIS access and he confirmed he did not mislead his Team Leader. His evidence in chief explained the context when asked the question:[52]

> "You told Cassie Tennant, your team leader, that you had not accessed the CPIS system regarding the MT(sic) grandchildren, when, in fact, you're telling us now that you did?......I dispute Ms Tennant's claim that I said that. When I met with Ms Tennant, Ms Tennant immediately put the claim to me that I had been improperly accessing, ah, the file and I think that she even made accusation that I had been providing MT(sic) information. That's – was my response to Ms Tennant. I was incredulous at it. Um, and I responded that that is not true."

[75] Mrs Tennant's witness statement[53] in evidence was that the Applicant had said to her that he had not viewed AT's file since the case was transferred. When asked to clarify the conversation in examination in chief her response was: "Can you recall what you asked him precisely?......I can't remember precisely, no."[54]

[76] The Applicant stated his access to the CPIS was for the purpose of recording attendance at courts with the Criminal Investigation Branch and a Police interview record. Additionally, he said he accessed the files from 26 October 2020 to 22 December 2020 linked to the behaviour of a new client, MM, who was placed in the same placement as siblings.

[77] The Applicant conceded he needed to keep abreast of the issues relating to the children as they were biological siblings of AT. The Applicant stated that while he was making decisions for his client MM, the file of AT was inextricably linked to the files of AT's siblings.[55]

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[51] Para 144 Applicant, Outline of Submissions
[52] P34 Transcript
[53] Exhibit R19
[54] P145 Transcript
[55] P152-156 Transcript

[78] His evidence under cross examination was that it could take a couple of months to finish the case notes and he stated:[56]

> "…my understanding was that my explanations for those entries up until December were accepted by, um, Kai Kitchin or largely accepted by Kai Kitchin. Um, sometimes it's necessary to review a file that's not – you're not working on simply because the file you are working on has got a relationship connection."

[79] He explained that the time taken between clicks, was unrelated as it could be reading time or other distractions. He denied he was browsing files and confirmed his access was work related.

[80] Ms Kitchen's response to the ED5 investigation relating to the CPIS access summarised that the access on 27 July 2020, 18 and 31 August 2020 was relevant to the court matters. However, she could not explain why he accessed the files after August 2020 and confirmed he made no case note entries for this period in question.

[81] Ms Kitchen states that his access on 8 December 2020 to AT and MT files were totally unrelated to his new client MM. In her response to the investigation[57], she questioned the access to AT's file on 5 November 2020: "who according to Ted is quite unrelated to his new client (MM)".

[82] Under cross examination Ms Kitchen did concede that due to the alleged unlawful behaviour of ER and TR, whilst living with MM, there may have been relevance to access the files as part of his case management of MM.[58]

[83] In her statement to the investigation, Ms Kitchen outlined the accessed information relating to AT on 5 November on five occasions and on 8 December, he accessed the files of AT on six occasions and on the same day accessed the file of MT four times. Her view was these files were totally unrelated to MM. No cases notes were added. In her view, it was totally inappropriate for the Applicant to access the file in relation to MT on 8 December 2020.[59]

[84] The ED5 allegation only relates to access to AT files, MT's grandchild. From the audit report, the actual access to AT files occurred on 27 July 2020, 5 November 2020 and 8 December 2020. Access to the MT files was reported on 8 December 2020.[60]

[85] Ms Tennant's evidence disputes "innocent clicks" as it is deliberate physically tapping on the keyboard which "cannot be described as innocent scrolling of a file".[61]

[86] Ms Tennant concurred with Ms Kitchin about case access once transferred and in cross examination stated:[62]

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[56] P32 Transcript
[57] Attachment 14, R17
[58] P128 Ibid
[59] Attachment 13(e), Exhibit R17
[60] Exhibit R10
[61] Exhibit R19
[62] P166 Transcript

> “Well, as I said previously, there could be the odd occasion that we would access a file that we’re not currently involved. And yes, Ms Kitchin could be right, if could be in relation to a legal matter or a police matter.”

[87] Mrs Tennant confirmed that the Applicant was not sharing information gained through CPIS access. Her evidence in cross examination was

> “Do you agree that there is no evidence that Mr Sherrin has inappropriate shared information from the CPIS system?......Not that I’m aware of.” [63]

[88] The Respondent submitted the evidence of Ms Tennant was preferred in relation to the allegation that the Applicant denied accessing records regarding the AT case.

[89] The Applicant submitted the finding of a breach of s 9(11) of the *State Service Act 2000* Code of Conduct was in error, as the evidence is that there has been no improper use of any information gained and no benefit or advantage to the employee or any other person.

[90] I am satisfied his access to the CPIS files are accounted for and supported until 31 August 2020. I am of the view that access to the MT and AT files were not satisfactorily explained by the Applicant after that time. I accept the witness evidence that this access is unaccounted for and that there was no connection with his client MM. In my view, he was simply browsing.

[91] This case was an extremely sensitive matter and, in my view, needed to be respected and quarantined as such. His casual CPIS access after 31 August 2020 was not acceptable and in breach of his signed declaration as it was not seeking information required to perform his specific duties. I am satisfied there was no improper use of this information, or benefit to any person.

[92] There is a contemporaneous link between the Conflict of Interest allegation and the CPIS access allegation. The unauthorised CPIS access by the Applicant on 9 December was eight days after the dinner party.

[93] I prefer the Applicant’s evidence in relation to his response to Mrs Tennant regarding the allegation he lied to her. She was unsure of the content of her question to the Applicant and provided vague responses. He has been consistent in his response to this allegation. Her response in cross examination was vague.

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[63] P150 Transcript

Allegations of disrespectful communication with colleagues

First incident - Mr Davenport

[94] Chronologically, the first alleged incident of disrespectful communication with colleagues occurred in August 2019. However, it was only brought to light on 8 February 2023. It was raised on 8 February 2023 after the initial commencement of the ED5 investigation on 22 November 2021.

[95] At a meeting between the Applicant, Ms Tennant and Acting Assistant Manager, Jack Davenport, it was alleged the Applicant questioned Mr Davenport's qualifications/ experience and professional status. It was also alleged the Applicant acted in an aggressive manner by standing up with his fists clenched and snarled at Mr Davenport calling him "useless" and "a fucking dickhead" who did not know what he was talking about.

[96] The meeting was called to discuss the Applicant's response to the proposed direction to no longer support drug testing of parents. The Applicant submitted there was no use to the meeting as he had no intention of listening to any feedback regarding the proposal. The Applicant's evidence was that he used the term "useless" pertaining to the meeting not directed at Mr Davenport personally.

[97] His evidence was:[64]

> "I'd meant that after a reasonably significant time, Mr Davenport being dismissive and argumentative, I became frustrated and thought it best just to leave the meeting, as continuing it was not going to bring any change, and in doing so, I stated the word 'useless'. I was not stating that Mr Davenport was useless; rather, commenting on the fruitfulness of trying to reason with him and the prospect of a resolution from the meeting."

[98] There was no contemporaneous complaint made by Mr Davenport or Ms Tennant at the time of the alleged misconduct.

[99] The Applicant submitted there was no follow up meeting to discuss the event, no safety event form, nor any discussion with the Applicant at the time. Ms Tennant's evidence was she did not lodge a Safety Event Management Form (SEMF) regarding the incident. She also conceded Mr Davenport "was at least as argumentative as Mr Sherrin was in respect of that subject".[65]

[100] The Applicant was unaware that Mr Davenport had lodged a SEMF form until the Secretary's final determination dated 4 July 2025.

[101] The allegation of physical intimidation is denied and if it happened, some contemporaneous disciplinary action would have been taken.[66] He strongly denied

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[64] P53 Transcript
[65] P154 Ibid
[66] P9 Transcript

using the words “fucking dickhead” and stated to the investigator, he would have included that in his apology.

[102] His recollection of the incident during examination in chief with Mr Upston, was as follows[67]:

> “I’ll put it to you that you did stand up with your fists clenched and stepped forward towards Mr Davenport in a state of rage?......Incorrect.
>
> So, none of that’s true?......It’s not – no, it’s not true.
>
> And I’ll put it to you that upon leaving the room, you called Mr Davenport ‘useless’ and did slam the door behind you?......I did call him useless. It wasn’t the intention, but I – I did say – say the word ‘useless’. Um, I dispute that I slammed the door. Again, that door’s – office is beside Ms Tennant’s and they’re old, 19th-century large doors, and I just don’t believe you can slam them, unless you stand there with two hands and slam it. I don’t think you could slam them.
>
> In the document that you have there on page 5, in relation to Mr Davenport, you do acknowledge that you regret acting in an aggressive manner? It’s the highlighted bit?......Yes.
>
> So, you disagree that it was a rage?......Yes, I disagree it was a rage.”

[103] The Investigator found the “Applicant (sic) was at the very least careless in the manner in which he behaved toward Mr Davenport” and he “did not treat Mr Davenport as a fellow employee and Acting Assistant Manager with respect”.[68]

[104] Ms Tennant gave evidence that the Applicant called Mr Davenport “a dickhead” but conceded he did not question his qualifications just his experience. She said:[69]

> “So, he was asking about experience, but you put in your statement that he was questioning Mr Davenport’s qualifications. Do you concede that that was an error and that he wasn’t asking Mr Davenport about his qualifications at all?......It was how I perceived it, but it could have been in terms of like experience and background.”

[105] In cross examination, Ms Tennant stated there was no follow up of the incident and it was not documented as a safety event. She stated the issue was over a difference in opinion and witnessed both parties being argumentative and said:[70]

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[67] P40 Ibid
[68] P22 Attachment C, Exhibit A1
[69] P156 Transcript
[70] P155 ibid

> "I put to you that in that meeting, the August 2019 meeting, that Mr Davenport was being at least as argumentative as Mr Sherrin was in respect of that subject?......Yes."

[106] Mr Davenport gave evidence he thought the requested feedback on his drug testing proposal from Mr Sherrin was excessive. He stated:[71]

> "And I'll put to you that Mr Sherrin wasn't being critical but was rather just providing a point of view in the form of a submission?......The content of the email was clearly a detailed criticism that went into excess in my opinion."

[107] His witness statement[72] provided the following account:

> "Mr Sherrin became agitated and angry. He questioned my qualifications and experience. Mr Sherrin stood up, fists clenched, stepping forward towards me in a state of rage. I felt physically threatened and believed that he was about to strike me and left the room, calling me 'useless', slamming the door behind him. I had seen this agitated angry state of Mr Sherrin before."

[108] Mr Davenport stated he defended his position, in an assertive manner. He conceded the Applicant did not question his academic qualifications, rather his experience and professional status. In response to the alleged slamming of the door. Mr Davenport did not recall this action in 2022 but has now added that emphasis, years later.

[109] Mr Davenport confirmed he received an email containing an unprompted apology from the Applicant. Mr Davenport gave evidence that he "found the apology to be unconvincing because, while being unprompted, it conveyed a 'both sides' argument and failed to account for his behaviour and the implications of violence."[73] When questioned in cross examination Mr Davenport said:

> "Yes, but I put it to you that he wasn't aware that there were any implications of violence and therefore, he could not apologise for it?......That would just tell me that he was lacking self-awareness, which is also an important trait to have in child protection."[74]

[110] Additionally, Mr Davenport's evidence was that he was not involved in any disciplinary proceedings at the time as a witness or complainant. He stated he thought he made a safety report, but no such documentation has been provided.

[111] The submissions from the Applicant stated he was concerned his comment "useless" may have been misconstrued and the email was intended to clear up any potential misunderstanding.[75]

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[71] P187 ibid
[72] Exhibit R20
[73] Exhibit R20
[74] P190 Transcript
[75] Para 244, Exhibit A1

[112] Considering the evidence, I am not persuaded this incident was a hostile one sided meeting between a manager and the Applicant. In my view, the manager was intent on getting a new policy adopted, which was not supported by the staff and was frustrated with the Applicant for his lengthy response and position. The evidence is that both parties were argumentative.

[113] The issue of standing up and walking out of the meeting, which was followed up shortly thereafter by an unprompted email apology, demonstrates reflection on behalf of the Applicant. I prefer the evidence of the Applicant that he said the meeting was ‘useless’, not that Mr Davenport was ‘useless’.

[114] I am not convinced the Applicant swore at Mr Davenport. Mr Davenport did not describe any swearing by the Applicant in his two statements, and he cannot recall any other swear words, only behaviours.

[115] The fact that there was no disciplinary meeting, safety event notification or any meetings, despite two managers being present, indicates that the conduct at the meeting was not untoward, but passionate positioning between two employees reflecting difference of opinions. I am satisfied there may have been a level of disrespect shown by both sides.

[116] Without raising any concern, contemporaneous investigation or performance management about this interaction at the time, management appear to have condoned the behaviour and not treated it as misconduct.

[117] However, it has been included in the ED5 investigation some four years after the event and considered as part of the valid reason for termination.

Second incident - meeting with Ms Tennant and Ms Kuhlman

[118] The alleged inappropriate behaviour occurred during a meeting on 12 February 2020 with Ms Tennant and Melody Kuhlman, Clinical Practice Consultant and Education, CSS. This allegation formed part of the ED5 investigation on 22 November 2021.

[119] The context of the incident was that the Applicant was passionately advocating for a child not to travel interstate. However, the case note on CPIS had documented a false allegation that the Applicant supported the child travelling interstate. The Applicant was case managing the child and had authority to document case notes.

[120] Ms Kuhlman had authored the entry to the case notes which she agreed to amend following the Applicant’s heightened response.

[121] Ms Tennant confirmed in cross examination that Ms Kuhlman accused the Applicant of reading a case note, without authority and she recalled[76]:

[76] P173-174 Transcript

> "So, there was this conversation about who was putting in – Mr Sherrin was concerned or making an allegation, at least, that a case note had been entered improperly, and I put to you that as that conversation was progressing, Ms Kuhlmann chimed in by accusing Mr Sherrin of reading case notes that he should not have. Do you recall that?......Yes.
>
> And I put to you that in the situation of Ms Kuhlmann making an allegation to Mr Sherrin that he was reading a case note that he should not have, when he had a perfectly good reason to be reading those case notes, and putting case notes in, because he was actively working on a case. That that could cause him to be upset. Do you agree with that?......Possibly.
>
> Well, the concept of somebody making a false allegation to – could cause you to be upset, do you agree with that?......Yes."

[122] Ms Tennant observed the Applicant improved his behaviour after a meeting was held to discuss the May 2020 incident:[77]

> "I put to you after this meeting that Mr Sherrin indeed changed his behaviour, and that there weren't similar instances subsequent to that?......That's right. Mr Sherrin spoke to me about wanting to – or changing his behaviour after Ms Rayner and I met with him."

[123] Ms Kuhlmann reflected on the incident and said in examination in chief:[78]

> "I'm not denying our relationship was really good. Um, I mean – at – in the instant when we had the confrontation or the confrontation occurred, um, you know – I felt really overwhelmed. I felt that I had to say something to Mr Sherrin about the fact that he shouldn't have, um, been looking at the case note at the time, and suggested – but I also agreed to change it because I wanted to de-escalate the situation. I mean – it's – you know – he may view me as being aggressive in the past – you know – I don't – but I certainly haven't intended on being aggressive. I haven't tried to be aggressive. Um, and I'm sorry if it was experienced that way. Um, but – you know – it didn't then warrant the incident that occurred in May 2020."

[124] Under cross examination Ms Kuhlmann described the confrontation as aggressive and said he entered the room upset[79]:

> "He was already aggressively speaking to us. It may cause him to be upset, but he was already very heightened and attacking when he entered the room. It may have escalated him further but again, I just felt that I had the responsibility as a senior staff member. Maybe I misunderstood, I'm not accepting what you're saying in relation to this case note, and that this was appropriate, and that there was appropriate access. It's very possible though

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[77] Ibid, P175
[78] Ibid, P199
[79] Ibid, P204-205

because I don’t know. But I am saying that you know, I was just trying to do what I felt was right in the moment. Bearing in mind that I didn’t get a very clear explanation of why he’d come in and was shouting at us.”

[125] Tegan Popowski’s office was 2 meters down the corridor., Ms Popowski gave evidence that she was in Ms Tennant’s office when the Applicant entered. The evidence from her three colleagues does not support her being present in the office. Ms Popowski conceded she did not see the conversation taking place, nor did she see her colleagues looking “upset and shaking” as set out in her witness statement.[80]

[126] Ms Popowski held a belief the Applicant leaked information to the media. When questioned she stated:[81]

> “But it’s speculative he’d – ?......Yes, absolutely. As like with any workplace, there is often a lot of conversations, a lot of stuff that you know has gone on, without actually having the direct evidence of it occurring.”

[127] Ms Petersen confirmed she witnessed Mr Sherrin yelling at Ms Tennant and Ms Kuhlmann and her evidence was:[82]

> “As I continued to proceed, I approached Cassie’s office door, as I was doing that Mr Sherrin come out and slammed the door. I proceeded to go in, and I seen Cassie sitting behind her desk where her computer is, and Melody sitting on the chair near there, both looking like they’d just seen a ghost. White, shocked, um, frightened to be honest. And um, then, from memory, Mr Sherrin went down to his work area, got his motorbike helmet and stuff, walked out past the door.”

[128] Both Ms Tennant, Ms Kuhlman and Ms Popowski completed a SEMF after the event and answered the severity section saying no harm or injury occurred and no treatment was required. The risk assessment boxes were ticked as negligible consequences on initial risk assessment, and low to medium on residual risk.[83] However, all three employees were distressed by the incident leaving work early and stated they felt threatened and intimidated.[84]

[129] Witness evidence on the behaviour of the Applicant during the incident was consistent and corroborated that he was yelling loudly or shouting, his face was red, he pointed his finger, was spitting, shaking and standing over them.[85]

[130] The Applicant apologised to Ms Tennant for raising his voice and admitted his “shame” relating to his inappropriate behaviour on the day. He stated he was provoked by the accusation of not having authority to look at a case file, after being

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[80] Exhibit R22
[81] P220 Transcript
[82] P233 Transcript, Exhibit R24
[83] Exhibit R19, Exhibit R21 and Exhibit R22.
[84] Ibid
[85] Attachment 16 of Exhibit R19, Attachment 7 of Exhibit R22

requested by Ms Tennant to interview the child. He denies swearing but admits he was angry.[86]

[131] The Applicant gave evidence that his apology was accepted by Ms Tennant, when the matter was raised in a more formal meeting with his Manager, Kai Kitchen, HR representative Ruby Dennison and the Applicant's HSU representative, Lucas Digney. At the meeting the Applicant was reminded of his obligations. He stated[87]:

> "I understood that to be the end of the matter and Ms Tennant and I had a good working relationship for the rest of the year."

[132] In an email dated 13 February 2020[88], Ms Rayner sought advice from Gemma Merrick, Human Resource Consultant regarding the incident on 12 February 2020. The Applicant attended meetings with Ms Rayner and Ms Tennant, and then later with Ms Kitchen. A verbal formal reminder was issued, but there is no record of the outcome. The Applicant stated in his witness statement[89]:

> "That the matter was dealt with by way of a 'verbal reminder' was stated in Claire Lovell's 'Formal Reminder-Professional Boundaries and Conduct' letter of 22 December 2020."

[133] In my view, the facts are the Applicant assertively went to the office of Ms Tennant to address the issue of the CPIS entry. His behaviour is corroborated by both witnesses as more than raising his voice to his colleagues.

[134] I am satisfied he was yelling and aggressive towards the staff leaving lasting impacts on their wellbeing. Despite recording on the SEMF the severity as "no harm", the evidence is that there was harm, and the affected staff did not feel safe. The evidence was that the staff were distressed and had to leave work early due to that distress. Threatening behaviour towards colleagues is not acceptable conduct.

[135] This incident was included as an allegation in the ED5 process.

Third Incident - Meeting with Ms Tennant

[136] On 4 October 2021, Ms Tennant sent an email to the Applicant, requesting that further work be done on an internal document. Ms Tennant went into the Applicant's office to clarify the documentation, and the Applicant raised his voice and stated the email was rude and that the Director does not know what work was involved in an assessment and that her comments were "fucking ridiculous".[90]

[137] Ms Tennant acknowledged in her witness statement that the Applicant was overworked, frustrated and he left work early on that day, stating there needed to be a change of attitude. She completed a SEMF but stated there was no harm or injury,

[86] Attachment E, Exhibit A2
[87] Para 44, Exhibit A3
[88] Attachment 11, Exhibit R13
[89] Para 40, Exhibit A3
[90] Attachment 7a, Exhibit R19

but the incident was classified under aggression, exposure to verbal abuse including threats.[91]

[138] Under cross examination Ms Tennant stated that a lot of Child Safety staff swear and that the Applicant appeared to be under significant pressure.[92]

> "So, you would agree that in relation to this incident, in summary, that there wasn't any abuse indicated by Mr Sherrin directly towards you?......That's correct."

[139] Despite lodging a SEMF [93], there was no management action taken to raise concerns about his behaviour. She stated:[94]

> "At 21, you indicate that staff would come to you about Mr Sherrin's conflictual behaviour, opinions and assertiveness. I put to you that you did not raise these in those fortnightly meetings, is that correct?......That's correct. I raised it with management and HR instead.
>
> So, if Mr Sherrin hasn't been advised of what your thoughts are in respect of these in the fortnightly meetings, it makes it very difficult for him to be aware that it's a problem, doesn't it?......It does."

[140] The Applicant relied on a statement to the Investigator from Wendy Pearson, as a witness to the incident, as she shared an office with the Applicant. Ms Pearson's evidence to the Investigator was as follows:[95]

> "I had completed many SCP applications, and they are detailed, complex and lengthy. Ideally, the SCP should provide for an extended placement, but the director had only provided authority for four days from the 1st to 4th of October."

[141] Furthermore, she stated:

> "Ted had worked on this difficult case and he was clearly annoyed at having to file another SCP application, as well as trying to source alternative accommodation in Launceston."

[142] Ms Pearson also confirmed swearing was common in the workplace and said:

> "Although, I cannot recall specifically Ted swearing, I would not deny that he did. I have been told that Ted is alleged to have said, "Fucking ridiculous," or "How the fuck can the department expect me to have

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[91] Ibid
[92] Ibid
[93] Attachment 7(a), Exhibit R19.
[94] P154 Transcript.
[95] Attachment J and Attachment C, Exhibit A1

> this information?" And that type of language was commonplace in the – within the department."[96]

[143] I am not convinced this allegation has been substantiated to the degree of misconduct. I accept swearing occurred in the workplace but that there was no evidence of aggression by the Applicant, rather that he displayed frustration at his Team Leader's request.

Allegations of inaccurate communication with Doctors

[144] In an email dated 15 October 2021[97], from the Applicant to Dr Atherton, the Applicant relayed his knowledge that child client T was given ADHD medication at school and the foster carer was only given one tablet per day by the school. The Applicant's belief was the PBS register was set up to prohibit the child's mother from taking the medication. In the email, the Applicant recommended that if the foster carer could give the medication to the child at 7.30 am it would be best for both the school and child.

[145] The Applicant states the email response from the Doctor was short and said, "simply no" and stated the PBS sets the restrictions and it was unlikely it would be changed until a permanent placement was arranged.

[146] The next day Dr Atherton provided more detailed reasoning as to why he could not unilaterally remove the restriction. In Dr Atherton's email[98], dated Saturday 16 October 2021 he asked the Applicant to reflect on his email and stated that the Applicant's response was "unprofessional, inflammatory, not conducive to interagency cooperation and completely untrue."[99]

[147] The Applicant submitted he apologised four times for any misunderstandings or any offence he may have caused. He did not hear back from Dr Atherton.[100]

[148] The Applicant conceded he questioned the paediatrician's advice in his email, dated 15 October 2021 to Dr Atherton, and stated:

> "At the core of the finding is that I questioned and/or criticised the paediatrician's advice, which I admit to doing."

[149] In an email[101] dated 16 October 2021 sent at 2.38pm from the Applicant to Dr Atherton and Ms Tennant, the Applicant apologised numerous times for any misunderstanding. He reiterated that Dr Atherton's response:

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[96] Ibid
[97] Attachment 15, Exhibit R13
[98] Ibid
[99] Ibid
[100] Para 203-220, Exhibit A1
[101] Attachment 16 Exhibit R13

> "…was in my view curt and raised again the lack of communication as you put it, leading me to believe, no doubt erroneously, that you were refusing the request based on the previous misunderstanding."

[150] In Ms Tennant's statement to the Investigator, she commented[102]:

> "In view of the contents of the last email from Ted to Dr Atherton, which included an apology I felt that this may have been the end of the issue in so far as the two men were concerned. This however did not turn out to be the case."

[151] Despite the apologies, on 27 October 2021, Dr Atherton made a complaint[103] about the Applicant to Ms Tennant around the language and content of his email. He thought the matter had settled until he received a phone call from Dr Strong. His view was stated:

> "My clinical ability, professionalism and work ethic has been questioned. This whole process has potentially damaged the Specialist/GP relationship, the Specialist/carer relationship and interagency cooperation which can only impact on the delivery of care to a vulnerable child."[104]

[152] The Applicant met with General Practitioner, Dr Jane Strong with the carer and child T. Dr Strong prepared a statement for the Investigation[105], which confirmed the Applicant told her he had contacted Dr Atherton seeking a change in the administration requirements but had not heard back. The Applicant had asked whether she could call Dr Atherton.

[153] The response from Dr Atherton took Dr Strong by surprise as he was "clearly very angry" and he proceeded to tell her the PBS set the conditions of dispensing and administration and he did not have authority to change existing conditions.

[154] Dr Strong stated it was during the ED5 investigation that she found out that Dr Atherton had sent an email to the Applicant stating the above.

[155] The Applicant's response to the final report of the ED5 investigation[106] confirmed he told Dr Strong that he had not heard back from Dr Atherton on the decision of the PBS. He stated that Dr Atherton had formed a view that he had misled Dr Strong by not stating his advice that the medication change needed to have written approval from the PBS. He stated that was not true.

[156] In Jodie Rayner's witness statement[107], she stated:

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[102] Attachment C, Exhibit A1
[103] Attachment 12,13,14 Exhibit R13
[104] Ibid
[105] Attachment 14, Exhibit R13
[106] Attachment E, Exhibit A1
[107] Exhibit R13

> "I agree with Dr Atherton's assessment that there were some reasonable concerns regarding Mr Sherrin's dealings with him. However, I believe the overall interaction was influenced by differing communication styles and expectations rather than misconduct."

[157] Ms Rayner, under cross examination, conceded that the interaction was influenced by different communication styles:[108]

> "In relation to the interactions with the doctors, the last one sentence that we have agreed to retain, you indicated however I believe the overall interaction was influenced by different communication styles and expectations rather than misconduct, and this is in relation to the interaction between Mr Sherrin and Dr Atherton, it's in your statement so you naturally agree with that?......Yes, I do."

[158] It appears the misunderstanding came from the Applicant's visit to Dr Strong where he was clear he had indicated to Dr Strong he had received advice from Dr Atherton, but that he had not heard back and therefore was effectively getting a second opinion on the requirement to make the application to the PBS. The Applicant's submissions were:

> "When Dr Strong indicated that Mr Sherrin had said that he had not heard from Dr Atherton, what she was meaning was that Mr Sherrin had said, he had not heard back from Dr Atherton regarding application to the PBS regarding medication and administration, not that he had heard from Dr Atherton at all. It was really a simple misunderstanding that could have easily been resolved in the hands of the fair-minded employer had they had the intent for a fair resolution. But we say, at that point, that that was not their intent." [109]

[159] There was no evidence from the Doctors presented to this Commission. With the limited untested documentation and reliance on emails and a witness statement from Dr Strong, I am satisfied there was a misunderstanding and a difference in communication styles rather than wilful insubordination by the Applicant.

[160] However, in my view, the tone of the Applicant's email was unprofessional, disrespectful and inflammatory by accusing Dr Atherton of being curt, challenging his action of his request based on a misunderstanding, despite his apologies.

[161] Additionally, the appointment with Dr Strong may have been unnecessary and further provoked Dr Atherton. In my view, disclosure to Dr Strong of the email conversation between the Applicant and Dr Atherton, may have precluded the strong response and interaction.

[162] There was no internal grievance procedure undertaken. This matter was referred to the Secretary as part of a suite of allegations, forming the basis of an ED5 investigation which commenced on around November 2021.

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[108] P100 Transcript
[109] P281 Transcript

Consideration of Past Conduct

[163] The Respondent submitted the entirety of the conduct should be considered and past conduct of similar character which was not formally relied upon in the stated valid reason forms part of the assessment of the gravity of the misconduct.

[164] The Respondent noted the Commission reviews employment decisions *de novo* and does not have to rely on the reasons advanced by the employer at the time of termination of employment. The Respondent relied on the findings in *Virgin Airlines v Blackburn*[110] and submitted the following in relation to past conduct:[111]

> "The Fair Work Full Bench has summarised the principles relating to the extent to which prior misconduct may be relevant in assessing whether a dismissal is unfair and the way that consideration of prior misconduct may arise during the course of a hearing into an unfair dismissal application, as follows:
>
> a. the Commission must assess whether, on all the available evidence, there was a valid reason for dismissal;
>
> b. that calls for an objective analysis, which is not confined to the evidence that the employer expressly relied upon to effect the dismissal;
>
> c. if the Commission believes that a valid reason exists that was not advanced by the employer, then it must act judicially and accord the parties procedural fairness before acting on that reason;
>
> d. this applies equally in respect of prior misconduct that might have formed a valid reason for dismissal, but which was earlier 'condoned' by the employer (including by being the subject of an outcome short of dismissal); and
>
> e. an employer's condonation of prior misconduct might be relevant to assessing whether a valid reason exists, but it is not determinative."

[165] The Respondent also relied on the principle that past conduct of a similar nature may increase the gravity, particularly if the employee was warned not to repeat the conduct.[112]

[166] A series of incidents relating to poor judgement and professional boundaries had been previously addressed with the Applicant. In 2014, he took two CSS children out on his boat on a Saturday on Australia Day in 2014 without permission and after consideration of his response, a formal reminder was issued on 24 April 2014.[113]

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110 Virgin Airlines Pty Ltd v DeVania Blackburn [2022] FWCFB 232
111 P 4-5 Respondents Outline of Submissions
112 P 4-5 Respondents Outline of Submissions
113 Exhibit R1

[167] The right to review that formal reminder was specified and my understanding is that this formal reminder was not challenged. The consequences of failure to comply were outlined:

> "The consequences of an employee failing to comply with the *State Service Act* and the *Code of Conduct* are that disciplinary action may be taken against the employee, which in turn may result in sanctions being taken against that employee."[114]

[168] In 2017, the Applicant took a CSS child out in his boat for an overnight fishing trip, without approval, in his own time. It was determined he did not seek prior approval, it was outside his role as a CSO and was a conflict of interest.

[169] A Lawful and Reasonable Direction (LRD) was issued with the formal reminder[115] following the Applicant's response to the event. While it was noted that the Applicant had "not acted consistently with the Formal Reminder issued to you on the 24 May 2015", there was no disciplinary action commenced. The reminder included a "failure to Comply with a Reasonable Direction" statement, potential disciplinary actions and outlined the possible sanctions. The right to review this decision was specified and my understanding is that this LRD was not challenged.

[170] The Applicant admitted it was wrong at the time to take a CSS child out on the boat, but in context, the child's welfare was the top priority.[116] Under cross examination, the Applicant admitted he knew it was wrong to take a CSS child out in his boat after hours and that he had not acted consistently with the Formal Reminder dated 2015.[117]

[171] Ms Kitchen stated[118] that no recommendations were put forward to the Secretary to outline a possible breach of the Code of Conduct at the time. She concurred that no formal disciplinary action in respect of the 2014 and 2017 incidents was taken. In cross examination she said [119]:

> "You accept, in respect of all the matters in respect of this, until the final ED5, that contemporaneously say for example, the 2014 incident or the 2017 incident, that there was no formalisation for an ED5?......Not to my knowledge, no.
>
> Thank you. Paragraph 24, you say that:
>
> Mr Sherrin was advised of the consequences of an employee failing to comply with the State Service Act and code of conduct, other

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[114] Ibid
[115] Exhibit R2
[116] Page 2 Exhibit A4
[117] P20-21, Transcript
[118] P109 Transcript
[119] P109-110 Ibid

> disciplinary action may be taken against that employee, which – in turn may result in sanctions being taken against that employee.
>
> Do you agree that even though that was stated to Mr Sherrin, that there was never any disciplinary action that was taken in respect of that issue, 2014 or subsequently 2017?......No, there was no disciplinary action.
>
> Thank you, and from 25, you talk about the 2017 incident, and you agree that there was no disciplinary ED5 action in respect of that either?......No, there was not."

[172] Ms Kitchen confirmed the CSS children continued to be case managed by the Applicant until they turned 18 years old and his behaviour did not seem problematic enough to remove the boys from his caseload.[120]

[173] In 2019, he met with a family outside of business hours without prior approval from the Team Leader or Manager in breach of the previous LRD. A formal reminder was again issued on 24 June 2019 that he had breached the LRD and it stated he must comply with the LRD.[121]

[174] The Applicant's evidence is that he complied with the measures to interview the children in an open space, at his home with his wife present. He stated:[122]

> "I thought at the time I was being practical, and didn't breach any-any policy at the time that I was aware of, in doing so. So I thought I was just complying with these measures."

[175] In 2020, the Applicant allegedly breached professional boundaries and took a CSS child to his home to meet his dog and then took another CSS child home to interview her on his porch, while his wife was inside. Approval had been granted, by Ms Tennant, to meet the CSS child in an open space, whilst implementing social distancing and COVID measures. However, no consent or request had been provided to take the CSS child to his house.[123]

[176] A meeting was held on 29 July 2020 with the Applicant, Ms Kitchen, HSU representative, Mr Digney and Human Resources Consultant, Ms Merrick. At this meeting, Ms Kitchen raised his "ongoing pattern of acting outside professional boundaries".[124] The outcome of this meeting was a Professional Development Agreement, that supervision and mentoring would be provided. It was stated by Ms Merrick, that it was not a punitive or disciplinary process.[125]

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[120] P 114 Transcript
[121] Exhibit R3
[122] P 48 Transcript
[123] Exhibit R4 and Exhibit R5
[124] Attachment 13(d), Exhibit R17
[125] Ibid

[177] When questioned about the Practice Advice, Visiting Children, Young People and Their Families for Assessment Purpose, dated 3 August 2016[126], Ms Rayner provided evidence about interviewing children at CSS employee's homes and stated:

> "Did you ever contemplate Mr Sherrin taking anyone – a child home?......It never occurred to me that anybody would consider taking the child to their own home. As mentioned, primarily visits occurred in the yards of foster carers or families that we were visiting and the conversations would occur in those locations.
>
> What should Mr Sherrin do?......If Mr Sherrin was uncertain about an appropriate location to interview or to speak to a child, it would have been appropriate to consult with his practice leader, with a clinical practice consultant and educator or myself."[127]

[178] The Respondent submitted these examples of conduct are of the same nature of the allegations forming the determination and sanction. In the determination by Ms Ginna Webster, Acting Secretary Department Education, Children and Young People, she stated [128]:

> "I find the instances of misconduct found proven demonstrate a pattern of disregard for the Department's expectations around professionalism and maintaining professional boundaries with Child Safety Service Users. You have additionally, demonstrated a lack of understanding of the need to declare, manage and mitigate and indeed avoid conflicts of interest in employment and have not exercised good judgement in your access to the Child Protection Information Systems without a valid work context for doing so."

[179] The Applicant contested that no manager referred the matters to seek advice as to whether there may have been a breach of the Code of Conduct leading to an investigation under ED5. Therefore, it was stated there had been no disciplinary action taken, which was confirmed in cross examination by Ms Kai Kitchen, Child Protection Manager North (for the relevant period).[129]

[180] The Applicant submitted the investigation process arising from the ED5 denied him an opportunity to respond to breaching formal lawful and reasonable directions, or formal reminders. It was stated that prior warnings must relate to the conduct and in this matter, the directions related to engagement with clients during the pandemic and were completely unrelated to the reasons for dismissal.[130]

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[126] Attachment 6e, Exhibit R13
[127] P66 Transcript
[128] Attachment D, Exhibit A1
[129] P109-110 Transcript
[130] Exhibit A1

[181] The Applicant distinguished the reliance on *Virgin Australia Airlines v Blackburn*[131] because the primary judge disregarded prior warnings. In this matter, it was alleged there were no prior warnings for consideration.

[182] The Applicant relied on the *Simon Parris v Trustees of Edmund Rice Education Australia T/A St Kevin's College [2021] FWC 2341.*

[183] The Applicant submitted this case supports their position that past alleged misconduct is only relevant and forms part of the matrix of reasons for dismissal if they are the:

> "… same or similar character and the employee was warned not to repeat it, thereby contributing to a finding that the reasons for dismissal were 'sound, defensible and well founded."[132]

[184] The Applicant's position is that the Respondent has condoned the misconduct by not taking the appropriate disciplinary action at the time. It had full knowledge of the alleged misconduct but elected to do nothing.

[185] It was conceded the gravity of alleged later misconduct is increased but only where the allegations are of the same or similar character and there had been warnings not to repeat the conduct. In this case, it was submitted by the Applicant that the past conduct has no relevance to the matters that formed the reasons for dismissal, as none of the reasons concerned the engagement with clients and he did not receive a warning which would have impacted his future conduct. It was stated prior unrelated matters cannot be used to assess a valid reason for dismissal.[133]

Consideration

[186] To determine if there was a valid reason for his termination of employment, the onus of proof rests with the Respondent.[134] Valid reasoning pertains to whether there was a sound, defensible, well founded reason for the dismissal, in the context of the employee's capacity or conduct.[135]

[187] Section 30(3) of the 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

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[131] Virgin Airlines Pty Ltd v DeVania Blackburn [2022] FWCFB 232
[132] Exhibit A1
[133] Ibid
[134] Section 30(5) of the 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.
[135] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

the operational requirements of the employer's business."

[188] The parties agree the Applicant had a reasonable expectation of continuing employment as a permanent employee of the State Service. There is agreement the requirements set out in ED5 have been met and procedural fairness has been afforded to the Applicant.

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

[190] A reason for the termination of an employee's employment must be "sound, defensible or well founded" to be valid.[136] "[T]he reason for termination must be defensible or justifiable on an objective analysis of the relevant facts".[137] The Commission must make a finding as to whether the conduct occurred based on the evidence before it.[138]

[191] The Commission must be satisfied to the degree of satisfaction required in the principles as set out in the following passage from *Briginshaw v Briginshaw* [139]:

> "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

[192] The standard of proof remains on the balance of probabilities. Are the alleged acts more likely than not to have occurred on the evidence before the Commission supporting the findings? The degree of satisfaction increases with the seriousness of the consequence, being the termination of employment.

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

a) Breaches of the Code of Conduct;

b) the loss of trust and confidence in the Applicant as an employee;

c) Long standing pattern commencing in 2014, of breach of professional standards and formal reminders.

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[136] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.
[137] *Rode v Burwood Mitsubishi*, AIRCFB, Print R4471, at [19].
[138] *King v Freshmore (Vic) Pty Ltd*, AIRCFB, Print S4213, at [24].
[139] (1938) 60 CLR 336 at 362; see also *Evidence Act* 2001, s.140(2)(c).

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

[195] Relying on the principles outlined in *Walton v Mermaid Dry Cleaners Pty Ltd,*[140] 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."[141]

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

[197] The expected professional standards of a CSO are found in the Statement of Duties (SOD), the State Service Code of Conduct and the CSS Practice Advice Guidelines, which include:

a. Visiting Children, Young People and their Families for Assessment Purposes, 3 August 2016;
b. Reporting and Managing Conflict of Interest in Children and Family Services;
c. Conflicts of Interest Procedure, 19 November 2019;
d. Authorisation to access CYS Information, signed 13 August 2010;
e. Child Protection Client File Management, October 2008;
f. Personal Information Protection and CPIS, 3 August 2010;
g. Restricting Access to Client Files, 30 April 2021.

[198] The SOD for a Child Safety Officer[142] sets out the expectations for working within the sensitive context of child safety and wellbeing. The Applicant confirmed in cross examination he understood his obligations contained in the SOD.[143]

[199] The level of responsibility in the SOD sets out the expectation to use the general guidelines, Departmental procedure manuals and documents to exercise professional judgment when working under limited direction. The requirements to work with honesty, integrity, adherence to confidentiality requirements are also spelt out.

[200] The values, behaviours and workplace diversity principles are outlined in the SOD. Additionally, there is a requirement to ensure the standards of behaviour and conduct are adhered to as set out in the State Service Principles and Code of Conduct, contained in the *State Service Act* 2000.

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[140] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681.
[141] Ibid 685.
[142] Exhibit R6
[143] P29 Transcript

[201] There is an expectation for all state service employees to maintain a safe workplace for all employees with a zero tolerance to all forms of violence pursuant to the *Work Health and Safety Act* 2012.

[202] I am satisfied the Applicant was aware of the professional boundaries in relation to relationships with clients, families and other staff. He had worked in the CSO role since 2008 and demonstrated a high level of commitment to working with children, young people and their families in a highly emotional setting.

[203] In my view, the public rightly expects CSOs to uphold the highest standards of professionalism whilst dealing with a vulnerable sector of the community.

[204] Section 9(6) of the State Service Code of Conduct sets out the mandatory obligations of an employee to comply with an LRD, and a breach can amount to a breach of the Code of Conduct. It states:

> "An employee must comply with any standing orders made under section 34(2) and with any lawful and reasonable direction given by a person having authority to give the direction."

[205] In relation to considering the past conduct as part of the valid reason for dismissal, I have reviewed the authorities and am satisfied the nature of the past conduct equates to non-compliance with the expected standards set out in the LRDs the Applicant received.

[206] The Applicant's inappropriate conduct included a personal relationship with a relative of a CSS client, lack of formal notification of this personal relationship, particularly relating to a private dinner and reluctance to seek permission from his managers, as well as compliance with professional standards. The expectation to work with the CSS policies, procedures and/or guidelines, the CSS Practice Manual and Code of Conduct was set out in the 2017 LRD.

[207] The first formal reminder received by the Applicant in 2014 following non-compliance with expected standards outlined the requirement to seek permission from management prior to taking CSS children on outings. He was warned that the consequences of not complying with the Code of Conduct would be disciplinary action, which may result in sanctions. This was expressed as a Formal Reminder and stated the employers ongoing expectations of the Applicant's future conduct.

[208] The second incident of non-compliance with expected standards in 2017, resulted in the issue of a Lawful and Reasonable Direction. It required compliance with the following requirements: seeking approval for meetings outside working hours, not taking any CSS child in his personal transportation and compliance with the CSS and DHHS policies, procedures and/or guidelines and the CSS Practice Manual and Code of Conduct. The LRD set out conditions including potential disciplinary action and the possible sanctions for breach of a Code of Conduct should the Applicant fail to comply.

[209] However, in 2019 the Applicant failed to comply with the 2017 LRD by meeting with a CSS family outside business hours without prior approval. A further formal reminder was issued, and it stated that the Applicant must comply with LRD and reiterated that disciplinary action would be taken in the future.

[210] I am satisfied the terms of the LRDs and formal reminders expressly outline the misconduct, stated the employer's expectations and the consequences of non-compliance of potential disciplinary action.

[211] The verbal Formal Reminder dated April 2020, was in relation to ongoing breaches of the LRD in taking two CSS children to his private residence, without seeking explicit permission, breaching professional boundaries, resulting in risks to himself and the children.

[212] The formal disciplinary ED5 investigation commenced on 22 November 2021 based on allegations between June 2020 and November 2021.

[213] In *Con Margaritis v Safiery Pty Ltd* [2024] FWC 1844, Commissioner Connolly expressed a requirement to provide an employee with due warning and an opportunity to rectify behaviour. It was found enforceable directions must set out clear expectations, be in writing and contain a warning that disciplinary action could result as a consequence of poor conduct.

[214] Where a Lawful Reasonable Direction identifies unsatisfactory conduct, sets out expected standards of performance and conduct, indicates required corrective performance and foreshadows disciplinary consequences, it covers the essential requirements of a warning. Contrary to the Applicant's assertions, I am satisfied the LRDs and Formal Reminders in this matter met the above requirements and constituted clear warnings.

[215] Accordingly, I have considered the incidents of the Applicant's misconduct between 2014-2019 as part of the totality of valid reasoning.

[216] The Applicant is correct that formal disciplinary proceedings under ED5 were not investigated following breaches of the LRDs. However, I do not concur with the Applicant that they elected to do nothing. They continued to meet with the Applicant and issue further formal reminders for compliance.

[217] However, in my view, the lack of follow up on the consequences to formal discipline can only be accounted for as poor management. If these matters had been managed in line with the expectations as set out at a much earlier stage, consideration of a possible breach of the Code of Conduct for an investigation may have been the consequence. The behaviour was not condoned by management, rather ongoing formal reminders both written and verbal, were given over a period of seven years.

[218] I have considered the conduct and set out my reasons above. I find that the following allegations are proven:

a. Developing a personal relationship with MT, the grandmother of a client, having dinner with MT and not formally declaring that relationship;

b. Accessing the CPIS system regarding MT's granddaughter, without authority or professional reasons from 31 August 2020 to 9 December 2020, in breach of the Policy and Practice Advice and the Employee Declaration;

c. Disrespectful, unacceptable behaviour towards colleagues, Ms Tennant, Ms Kuhlmann, Mr Davenport in three different meetings between 2019-2021; and

d. Disrespectful behaviour and communication with Dr Atherton and Dr Strong.

[219] The Applicant was aware of the requirement to work within professional boundaries and these incidents display an ongoing pattern of conduct to take matters into his own hands and despite warnings, to continue to work outside these agreed boundaries, often without communicating with managers, as directed in the Formal Reminders.

[220] I do not concur with the Applicant's assertions that proper management of these processes would have allowed the Applicant to correct his behaviour. In my view he had sufficient warnings and time to improve his conduct but there is a pattern of assertive and non-compliant behaviour, which continued over time, despite warnings.

[221] In my view the Applicant was passionate about his clients. However, this was to the detriment of his working relationships and resulted in crossing professional boundaries. This is demonstrated by the context of many of the workplace disputes, regardless of the LRDs directing him to seek prior permission. This behaviour is untenable in the workplace.

[222] I am satisfied the Applicant's conduct forms a sound, defensible and well-founded reason for the existence of a valid reason for termination of employment and meets the requirements under s 30(5) of the Act.

Was the termination of employment unfair?

[223] Having found, on the balance of probabilities, that the Applicant's conduct constituted a valid reason for the termination of his employment, I now turn to determining if the termination of employment was unfair.

[224] This onus of proof lies with the Applicant, as stated in s 30(6) of the 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."

[225] The Applicant submits the termination of employment was unfair. The Applicant is 62 years old and has 17 years of service and he has little chance of reemployment resulting in significant financial impact.

[226] It was contended there were a lack of warnings. The Applicant's opening submissions stated[144]:

> "If at any stage of the applicant's employment he had been warned, if indeed that there was something that he was doing wrong, he would have been given the opportunity to take stock and amend his conduct."

[227] It was stated by the Applicant, that LRDs are not warnings or reprimands, nor products of a procedurally fair ED5 processes. Additionally, the two LRDs are not of the same nature as the conduct that the Respondent gave as reasons for dismissal.

[228] The Applicant submitted the unfairness of the reinvigoration of matters for this ED5 process, noting the LRD, dated 12 February 2020, which was as a result of two internal meetings. The matter was concluded, and it was stated the Respondent cannot two years later, prosecute the same issue for the purposes of ED5. The Applicant was directed to provide a response to the allegation on access to CPIS, and then the ED5 investigation included that allegation.

[229] The stockpiling of allegations is unfair. In the termination letter, it was stated there was a pattern of behaviour of repeatedly failing to comply with expectations and to ensure a fair process the earlier allegations should have been investigated through an ED5 process, to ensure corrective actions and clear expected behaviour. It was stated had this occurred, the Applicant would have had opportunity to meet the standards required. This process did not happen.

[230] I find the Applicant was provided with an opportunity to respond under the provisions set out in ED5 to the allegations and proposed sanction which was imposed. Additionally, when the Respondent flagged the inclusion of prior misconduct in their case, the Applicant filed a further witness statement[145] in relation to the incidents prior to 2019 and therefore has an opportunity to respond.

[231] Noting the management of conduct through meetings and the issuance of LRDs, Formal Reminders and performance management processes, I have found in para [215] these constituted warnings.

[232] The Applicant alleged the Respondent was revisiting matters previously dealt with, including the allegation of inappropriate access to CPIS, which appears to be enlivened and managed through the ED5 process.

[233] The review at the Commission, RO22 2020/2021, relating to the issue of the LRD on 22 December 2020 resulted in the LRD being withdrawn as per para [28].[146]

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[144] P11 Transcript
[145] Exhibit A4
[146] P55, Transcript of Edward Sherrin, 5 December 2022, Attachment C, Exhibit A1

The retraction of the letter was not the conclusion of the matter. These allegations were then included in the ED5 investigation.

[234] A further review at the Commission, RO32 of 2021/2022, was lodged in December 2021, relating to the commencement of the ED5 and ED4. This matter was also discontinued.

[235] I am satisfied the management of the allegations previously raised in 2020 and 2021 was not finalised and were referred as part of the suite of allegations investigated through the ED5 commencement.

[236] I support the submissions of the Applicant that the management of the Applicant's conduct was far from best practice. Many issues relating to conduct were identified throughout the period 2014 to 2021.

[237] The Respondent agreed the management of conduct was not "done properly". When I questioned about why the allegations of some concerns with potential WHS issues arising and SEMF notifications were not managed as disciplinary actions, the Respondent stated:[147]

> MR UPSTON: I firstly acknowledge that things weren't done properly, and that is an element that you will take into consideration in regard to unfairness, but we again point to the volume of material that we have that points to misconduct

[238] The evidence is that management did not manage or, in some instances, even raise the issues with the Applicant, rather consulted with Human Resources and did not act in a timely manner. When cross examined the managers indicated that ED5 investigations were not commenced at all in the earlier years. Despite attending fortnightly meetings, the evidence is his manager did not raise some of the conduct issues.

[239] In my view, there were many examples of management inaction in response to SEMFs, and other reported misconduct. SEMF reports were not followed up and the Applicant appears to be unaware of some of the reports.

[240] Consequences of breach of LRD's were not enacted. When he breached the 2015 LRD, disciplinary action was not undertaken. When he breached the 2017 LRD, he received another formal reminder.

[241] I note and concur with the fairness of the ED5 process which mandates that only when new information is found, a previous matter which has been dealt with can be re-examined and clause 8.9 of ED5 states:

> "A Head of Agency may not commence a new Code process where a decision or action has been taken… unless substantial and material new evidence becomes available."

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[147] P288

[242] I concur with the Applicant it would be unfair to punish an employee twice by relying on already resolved issues and reopening them to a new investigation through an ED5 process.

[243] As highlighted above, the ED5 process mandates a new Code process cannot be commenced based on allegations which have been managed and an action or decision made. It appears the decision in this matter was to refer the allegations into an ED5 investigation. I note there were 19 allegations and only nine were substantiated and the Acting Secretary determined the Applicant breached the Code of Conduct and the sanction was termination of employment.

[244] The Fair Work Commissioner Durham found dismissal of an employee unfair in *Mullins v KAB Seating Pty Ltd [2025] FWC 371*, where some of the allegations had been previously dealt with. The employer should not rely on matters already addressed and resolved. It is my view that these allegations against the Applicant had not been finalised and resolved. The allegations were referred to the ED5 process.

[245] It is clear the Respondent had the opportunity to formally deal with his conduct from 2015 onwards, with supported performance management and disciplinary measures where he breached the expectations as set out. Unfortunately, this complacency led to a pattern of behaviour and crossing of professional boundaries over a six year period.

[246] I am satisfied the Applicant was afforded procedural fairness in the ED5 investigation process and determination. At all stages, he was provided opportunities to respond, and the Respondent complied with the provisions set out in the ED5.

[247] In my view, his conduct should not have continued, he was provided with fair warnings, and clear expectations were set out. As a long standing CSO, he stated he was aware of the requirement to comply with professional boundaries as outlined in numerous documents including the Statement of Duties, the State Service Code of Conduct and the CSS Practice Advice Guidelines.

CONCLUSION

[248] I have considered the totality of the matters and applied the balance of probability test. For the reasons provided above, the Applicant's consistent disregard for management warnings which did not change his conduct, the pattern of workplace conflict and a failure to comply with management directives lead me to conclude there was a valid reason for termination of his employment.

[249] I am satisfied the termination of employment was fair pursuant to s 30(6) of the Act.

[250] Accordingly, the matter is dismissed.

Neroli Ellis
Acting President
Tasmanian Industrial Commission