

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974

S 29(1A) application for hearing of an industrial dispute

Mr A

(T14576 of 2018)

and

Minister administering the State Service Act 2000/Department of Health and Human Services

DEPUTY PRESIDENT ELLIS

24 May 2018

This is a redacted version of a decision previously made and has had the names de-identified to protect the identity of the young person.

Alleged unfair termination of employment- whether valid reason for dismissal- out of hours conduct-procedural fairness- dismissal found to not be unfair- application dismissed

DECISION

Introduction

[1] On 31 January 2018, Mr A (the Applicant) applied to the President, pursuant to s 29(1A) of the *Industrial Relations Act 1984* (the IR Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (Department of Health and Human Services) (DHHS) (the Respondent) arising from a dispute in relation to termination of the Applicant's employment.

[2] The Applicant maintains that the termination was unfair and that his employment was terminated without proper cause and process, and seeks reinstatement to his role as a Child Safety Officer (CSO) with Child Safety Service (CSS)/Department of Health and Human Services.

Background

[3] Mr A is a CSO and stated he commenced employment in 1981 in a variety of roles within the Tasmanian State Service, predominantly working with children, community corrections and youth justice. He commenced employment as a CSO on 4 December 2005. His position prior to termination was a permanent full time CSO providing case management.

[4] He was the CSO case worker for a young person Ms B, for approximately seven years. Ms B was subject to a care and protection order issued by the Court under the *Children, Young Persons and Their Families Act 1997*. Under s 42 of this Act, a care and protection order ceases when the child turns eighteen years of age.

[5] Ms B reached the age of 18 years on XXX, however due to administrative issues, the case was formally closed on XXX. Ms B did not receive case management post XXX (her birthday).

[6] A complaint was forwarded from Ms A Sturges, General Manager of Kennerley Children's Homes on 27 June 2017 to the CSS, outlining concerns with the nature of the details of a series of screen shots of text messages between Ms B and the Applicant and the subsequent impact on Ms B.

[7] An investigation under the authority of the Employment Direction 5 (ED5) was commenced on 14 July 2017 and the Applicant was suspended on full pay in accordance with Employment Direction 4 (ED4). The Applicant provided a statement to the Investigator as part of the investigation. The allegations outlined in the ED5 Investigator's report were;

"That on or about, in the course of State Service employment, you Mr A, allegedly sent numerous inappropriate text messages to a vulnerable young woman [Ms B- de-identified to protect privacy] at random times of the day (up to midnight and early hours of the mornings including weekends) whilst she was a resident of the Moving on Program, Kennerley Children's Home, contrary to s 9(1) and/or 9(3) and/or 9(4) of the said Act. It is noted you were [Ms B's] former Child Safety Officer."¹

[8] DHHS wrote to Kennerley Children's Home on 3 November 2017, in an attempt to verify the complaint, requesting they "reconsider their position and provide the investigator access to interview" Ms B and a response received on 7 November, indicated they would not contact Ms B or support her being interviewed, "due to concerns they held regarding her emotional health and wellbeing"²

[9] The ED 5 investigation report was completed on 6 September 2017. The DHHS Secretary forwarded the report to the Applicant with a letter outlining the formal determination of the ED5 investigation and the proposed sanction on 18 December 2017. In this letter, Mr M Pervan outlined his proposed sanction in the following terms:

"As a first point, it is necessary for me to determine whether or not the text messages were within the course of your State Service employment. I am satisfied that the texts were work related as they occurred in the course of employment and/or directly linked to your employment, specifically the client relationship. In relation to the allegation put to your investigator in the correspondence of 14 July 2017, I have determined that you have breached Section 9(1), 9(3), and 9(14) of the *State Service Act 2000* Code of Conduct (the Code)."

As detailed under "Proposed Sanction" below, I propose to terminate your employment. In determining this level of sanction, I have considered the allegations found, the ignorance of professional boundaries, the likelihood of a reoccurrence of this type of communication, and the risk this conduct presents to both the Department and the young people in care."³

¹ Exhibit R2, attachment 2

² Ibid, Attachment 4

³ Ibid attachment 3

[10] On 8 January 2018, Mr A provided a response to the Secretary and on 30 January 2018, the Secretary sent correspondence to the Applicant which reaffirmed termination of employment was the appropriate sanction in accordance with s 44(3)(a) of the *State Service Act 2000*, effective from the date of that letter.

[11] An application for a hearing in respect to an industrial dispute relating to the termination of employment pursuant to s 29(1A) of the IR Act was made by the Applicant on 31 January 2018.

[12] A conciliation conference was held in Hobart on 8 February 2018 and the dispute remained unresolved. Directions were issued on 13 February 2018 and the hearing was listed for 20 March 2018. A further Directions Hearing was held on 19 March 2018 by teleconference. It is noted the Respondent raised concerns with the lack of compliance by the Applicant to meet the timeframes arising from the Directions, however as the Applicant was self-represented, there was some leeway granted. This was accepted by the Respondent.

[13] There was no contest that the Applicant made a valid application within the timeframe stated in s 29 (1A) of the IR Act.

Statutory framework

[14] Section 29(1A) (a) of the IR Act provides a right for a former employee to make an application to dispute the termination of his or her employment.

[15] Section 30(3) of the IR Act provides clear criteria with respect to termination of employment and states:

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

- (a) The capacity, performance or conduct of the employee; or
- (b) The operational requirements of the employer’s business.”

[16] Certain conditions are excluded from being valid reasons under s 30(4)(d) which includes:

“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 inherent nature of work precludes employment for any of those reasons;” (emphasis added)

[17] Section 30(5) of the IR Act states the onus is on the employer to prove a valid reason for the termination. In this context, valid pertains to whether there was a sound, defensible, well founded reason for the dismissal, in the context of the employee’s capacity or conduct. 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. A common sense approach must be applied to ensure that the employee and employer are each treated fairly.

[18] Additionally, s 30(6) of the IR Act states:

"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"

[19] The Commission is bound by s 30(2) of the IR Act which provides:

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

To that effect, all material before me was reviewed and considered.

[20] State Service employees are required to comply with Code of Conduct (Code of Conduct) as set out in the *State Service Act 2000*. For the purpose of this decision, the relevant subsections are as follows, s 9(1); 9(3); 9(14):

"9. The State Service Code of Conduct

(1) An employee must behave honestly and with integrity in the course of State Service employment.

(2) An employee must act with care and diligence in the course of State Service employment.

(3) An employee, when acting in the course of State Service employment, must treat everyone with respect and without harassment, victimisation or discrimination.

(4) An employee, when acting in the course of State Service employment, must comply with all applicable Australian law

(5) For the purpose of subsection (4),
Australian law means

(a) any Act (including this Act) or any instrument made under an Act; or

(b) any law of the Commonwealth or a State or Territory, including any instrument made under such a law.

(6) 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.

(7) An employee must maintain appropriate confidentiality about dealings of, and information acquired by, the employee in the course of that employee's State Service employment.

(8) An employee must disclose, and take reasonable steps to avoid, any conflict of interest in connection with the employee's State Service employment.

(9) An employee must use Tasmanian Government resources in a proper manner.

(10) An employee must not knowingly provide false or misleading information in connection with the employee's State Service employment.

(11) An employee must not make improper use of–

(a) information gained in the course of his or her employment; or

(b) the employee's duties, status, power or authority–

in order to gain, or seek to gain, a gift, benefit or advantage for the employee or for any other person.

(12) An employee who receives a gift in the course of his or her employment or in relation to his or her employment must declare that gift as prescribed by the regulations.

(13) An employee, when acting in the course of State Service employment, must behave in a way that upholds the State Service Principles.

(14) An employee must at all times behave in a way that does not adversely affect the integrity and good reputation of the State Service.

(15) An employee must comply with any other conduct requirement that is prescribed by the regulations.

(16) For the purposes of this section, a reference to an employee includes a reference to an officer and a reference to State Service employment includes a reference to an appointment as an officer and an arrangement made under section 46(1)(a). (Emphasis added)

The Applicant's position

[21] Mr A alleges he was unfairly dismissed on a number of grounds and if the termination and is seeking reinstatement as a remedy. The grounds leading to an alleged lack of procedural fairness are as follows:

- the complaint made was not confirmed with Ms B or authentic and there was an alleged bias due to the poor history with the complainant;
- the lack of an independent or specialist investigator for the ED5 investigation and the unacceptable length of the process, taking over six months;
- the lack of weight given to the information from the Team Leader;
- the lack of implementation of DHHS Policy;
- the text messages were taken out of context;
- the allegations made occurred outside the course of his employment and were not work related;
- there was a failure to consider the lengthy period of employment and his age was a contributing factor; and
- the sanction was not appropriate.

The Respondent's position

[22] The Respondent submitted there was a valid reason for termination of the Applicant's employment in accordance with s 30(3) of the IR Act. The grounds relied on to establish a valid reason are based on:

- a breach of professional boundaries and judgement through the distribution of inappropriate text messages, particularly after hours to a client/previous client;
- ED5 investigation leading to determination of a breach of s 9(1); s 9(3) and s 9(14) of the Code of Conduct;
- incompatible conduct with the Statement of Duties of a Child Safety Officer (CSO);
- a breach of trust in the employment relationship;
- a lack of self-awareness, a repeated pattern of behaviour and disregard for previous directions;
- the inappropriate conduct caused damage to the Department's interest and a risk to young people in care.

[23] Furthermore, it was submitted that "the employment relationship is terminal"⁴, the termination was based on valid reasons and the Applicant was provided with procedural fairness. The Respondent sought the application be dismissed and in the alternative, that the "employment relationship and the trust has broken down to such a degree"⁵ that the principal remedy of reinstatement, was impossible.

The evidence before the Commission

[24] The Applicant provided various documents to the Commission⁶, including his application, with an attached letter from the DHHS Secretary Mr M Pervan, Determination of Sanction regarding Employment Direction No. 5 Investigation, dated 30 January 2018. Further documents consisted of:

- Submissions in relation to the hearing, dated 22 and 26 February 2018;
- Statement from Rebecca Flakelar, Team Leader Child Safety Service, dated 26 February 2018;
- Statement in support of Mr A from Ms Anne Marie Kerr dated 6 March 2018;
- Statement from Madeline Clare Smart, CSS Team Leader, dated 21 August 2017, tendered as part of the ED5 Investigation⁷;
- Statement from Rebecca Woolley, Coordinator-AK Young Women's Emergency Accommodation Service, dated 2 January 2018;
- Letter from Mr A to the Secretary DHHS dated 20 October 2018 in response to the allegations contained in the ED5 Investigation;
- Email trail, dated 7 July 2017, re positive feedback from the Secretary DHHS to Mr A re a client;
- Email from Gail Eaton-Briggs to Mr A, dated 3 March 2017, re positive feedback;
- Response to Witness Statement by Pauline Muskett, dated 15 March 2018,

⁴ P78 Transcript

⁵ P 71 ibid

⁶ Exhibit A1

⁷ Exhibit R2

- DHHS Policy, Responding to Care Concerns impacting on a child in Out of Home Care⁸ (Policy) and Care Concern Flow Chart⁹ (Flow Chart).

[25] The Applicant gave sworn evidence in which he confirmed his position in relation to the various assertions contained in those relevant documents. Witness evidence was also led from the following colleagues:

- Ms Rebecca Flakelar¹⁰, Senior worker with DHHS with extensive experience in CSS since 2005 and has worked with the Applicant for approximately ten years.
- Ms Anne- Marie Kerr¹¹, Team Leader and has worked in CSS since 2014.

[26] The Respondent provided an outline of submissions which included various documents:

- James Cumming Investigation Service Pty Ltd Report "Employment Direction No. 5 Investigation" dated 06/09/17, which included screen shots of the text messages and copies of interview statements;
- Mr Michael Pervan, DHHS Secretary "Determination on Employment Direction No. 5 Investigation" dated 18/12/17;
- Mr Michael Pervan, DHHS Secretary "Determination of Sanction regarding Employment Direction No. 5 Investigation" dated 30/01/18.

[27] The Respondent provided a witness statement, dated 13 March 2018 and led evidence from Ms Paulette Muskett, Child Safety Manager, who has worked in child safety for 22 years. No authorities were relied on.

[28] Overall, I found each witness provided evidence honestly and to the best of their ability.

Valid reason

[29] The Respondent predominantly relied on the alleged inappropriate content of the text messages sent by the Applicant to Ms B and the outcome of the subsequent ED5 investigation, as the valid reason for termination.

[30] The Respondent tendered screen shots of nine text messages sent between 20 October 2015 to 27 October 2015, by the Applicant to a child who was under the age of 18 at the time, and under a care and protection order. Ms B turned 18 years on 29 October 2015. There was an additional message with no clear indicated date which in oral submissions, the Respondent submitted it was assumed it was sent prior to the next sequential message in the screen shots dated 13 March 2016.

[31] There were numerous other texts sent during the period 13 March 2016 to allegedly June 2017, based on the ED5 Investigator's report, although some of the screen shots were undated.

[32] The Respondent considered all texts were work related and sent in the course of his employment and/or were directly linked to his employment, specifically the client relationship. It was determined that the texts sent following the care and protection

⁸ Exhibit A2

⁹ Exhibit A3

¹⁰ Exhibit A4

¹¹ Exhibit A5

order cessation and the case closure were a continuation of the employment relationship and within the course of state service employment.

[33] Reasons for this decision were provided in the Secretary's letter¹², noting the relationship only commenced due to his role as her CSO and Ms B believed that the Applicant was the conduit to receive her child safety files as part of his role as CSO from the CSS. Such a perception was reflected in some of her texts. The Respondent has relied on this process to indicate that the conduct was in the course of employment. In cross examination, Mr Johnston sought to clarify the Applicant's understanding of his relationship with Ms B and the Applicant acknowledged that he was representing the Department in following up the provision of her files, following the cessation of the order.

MR JOHNSTON: Again, in the message immediately after it which is dated Tuesday 18 April at 10.34 pm, the young person asks you a direct question about your files – about her files?---Yes.

Continuing:

"Can I please have the files I've applied for? Do you know when I'm going to get them?"

"?---Yes, yes."

"Did you ever answer that question? Did she ever get her files from you?"

"---She doesn't get them from me."

"She's asking you for them.."

"No but she doesn't get them and she knows she doesn't get them from me."

"And yet - - -?---

"She's actually talking to me as the department. So as a result of that I would go to whoever is dealing with it – I don't provide the files."

"Sorry, just to – you said there, she's speaking to you as the voice and the person of the department?---Yes because she got – she couldn't get anyone from the department to answer her call."

"Now, this is after she has turned 18?"

"Yes."

"And she's dealing with you as a member of the department?"

"---No, as a – as"

"You said that?"

"No, I didn't say that."

¹² Exhibit R2, Attachment 4

"Sorry?"

"She's dealing with me as a person"

THE D.PRESIDENT: Just the question.

"...who has access to the files because all she's asking is Could you tell me when I'm going to get my files because I've applied for them months and months and months ago and I haven't got them."¹³

[34] Additionally, it was noted that s 9(14) of the Code of Conduct "does not require the alleged conduct to have occurred within the course of your employment."¹⁴

[35] For completeness the following screen shot texts were sent and received by the Applicant and Ms B (comments from Ms B are in italics):

20 October 2015, 7.57 pm

Mr A: Hello Treesa

Hey haha

Mr A: Then we could change you surname from Woods to Green

And then your name would be Treesa Green

HAHAHAH

20 October 2015, 9.20 pm

Mr A: And I can change mine to Mr Perfect of course

Do you want to see my body piercings

Go to sleep or I will snack you.bum

I can't get to sleep I'm nervous

27 October 2015, 6.16 am

Mr A: Hey beautiful are.you awake

Yes I am!

Just think money

I know haha

27 October 2015, 8.51 pm

Mr A: Goodnight gorgeous

Unknown date but prior to 13 March 2016 and follows text 27 October 2015

Mr A: The body of a goddess

Goodnight and sweet dreams

The following texts are dated post Ms B turning 18 years of age.

15 March 2016 10.44am

Call again sorry lol

Can you please come now? Haha

Mr A: Do you feel fertile?

18 March 2016

Mr A: Sorry I couldn't pick you up I was looking at XX'sbelly button

it's fine! I didn't go anyway, I might go in on Monday!

¹³ P29 Transcript

¹⁴ Exhibit R2, Attachment 2

Also have you got the letter written for me yet for my exemption for my p's?

Friday 14 April 2017

Mr A: I got a job at Dark mofo
Really!!!?? Omg cool

Mr A: I got a job as a naked barman

Tues 18 April 2017

Hey Mr Naked Barman do you know when I'll get my files I applied for? ☺

Mr A: I am still ironing the wrinkles out of my uniform
I will check cheeky

Tuesday 2 May 2017 9:41pm

Mr A: I just farted under the doona

Tuesday 9 May 9:42pm

Mr A: Night gorgeous
Night

Tues 16 May 2017 1:02pm

It's \$2,500 isn't it?
2000

Friday 19 May 2017 7:54pm

Mr A: Yo good looking

Date unknown: But report states 26 July 2017

Mr A sent Emoji of a man and a woman and a bed with a question mark

Responds with an emoji of a gun

Mr A responds with an emoji of a target and a hand with the middle finger up

Mr A then sends a photo of himself with his tongue poking out

Date unknown but presumption is 2017 (stated in report)

Mr A sends Ms B a photograph of 2 older men partially naked and wearing g-string underwear

hahahahaha omg

Mr A: Now that will take your mind off your sorr throat. Just as well I had a hair cut

Date unknown

I'm in hospital again

Mr A: oh no your throat

Yep Also I'd love to do some reading lol when will my files be ready?

Mr A: They are still doing them But I can give you a copy of my gay life story

There must be heaps then! Hahahahaha thanks

Mr A: Goodnight gorgeous

Date unknown (excluded from consideration)

Mr A: I just joined a nudist club

I thought that said the nutsack club ahahaha

Mr A: Rude bitch

Only joking Joyce

hahahaha it's Ms B not Joyce

Mr A: So can I borrow your tanning spray

And how do I spray my eyelids

[36] The nature and content of the texts were considered by the Respondent and found to be “extremely concerning, entirely inappropriate and a breach of the Code, per section 9(1), 9(3), 9(14)”¹⁵ and a “‘reasonable person’ would consider the messages are overstepping boundaries and are of a sexualised nature.”¹⁶

[37] Furthermore, the Respondent submitted the messages were found to be in direct conflict to the duty as a CSO and instigated by the Applicant. The Respondent also cited further contributing factors as the power imbalance and relationship between the CSO and his client.

[38] In the letter from the Secretary DHHS, he noted the nature of the CSO role and the importance of communication which was outlined in the CSO Statement of Duties and the:

“...onus was on the CSO to responsibly manage the communication process; ergo, to communicate appropriately and respectfully with a vulnerable young person. The responsibility to act/communicate in an appropriate way rests with the CSO, who is the professional in the relationship; specifically in this case the onus was on you to maintain professionalism.”¹⁷

[39] It was also noted that the texts were sent at inappropriate times, late at night, early mornings and weekends and outside of work hours. The communication was via the Applicant’s personal phone. The Respondent stated that all after hours contact should be made through the After Hours Emergency Service (AHES) and there was no need for direct after hours general communication. It was acknowledged that there was no policy for after hours communication with clients.

[40] Ms Muskett, Child Safety Manager CSS, provided evidence in response to the statement of Ms Smart, the Applicant’s team leader, that there should be “little or no reason” for contact with young people after hours as there would be a risk to the CSO who is not covered by Agency policies. She stated any afterhours contact should be “by formal arrangement with their team leader as necessary work and this would be recorded as TOIL or overtime.”¹⁸

[41] Examination-in-chief of Ms Muskett confirmed that there were no guidelines for after hour communication and she clarified the after-hours processes and stated:

“...there should be no communication between a CSO and a young person out of hours, really for any reason other than safety, which could be a reason. If that were to be the case, it would be well documented, it would be authorised-the team leader, and probably a clinical practice – a CPCE or a senior quality practice advisor might be asked to consult about that and there would be plenty of evidence of that being needed on Sipas”¹⁹ (sic)

[42] In relation to the role and involvement of the CSO following clients who have previously been under care, Ms Muskett stated it was a grey area and “it is a difficult position to disentangle from a worker” and occasionally, a young person may contact for

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Exhibit R1

¹⁹ P59 Transcript

advice and the previous CSO may refer the young person to a support service for assistance, transparently. She stated ongoing contact is not encouraged by the Agency.

[43] The Respondent cross examined the Applicant who acknowledged the requirement to keep case notes on interactions with young people in care and when questioned, the Applicant noted he could not remember if he had recorded the after hour contacts with Ms B:

"The question is did you make file notes in regards to those conversations around those three email texts?"

"While she was still under 18?"

"---I assume so, or else I would have talked it over with – with my team leader. I don't know."

[44] There was no further evidence provided by the Respondent to determine if the file notes for each contact had been completed by the Applicant or discussed with his Team Leader, however the Secretary stated in his letter that there had been a review of her file and there were no recorded file notes supporting the greater level of contact for these exchanges.

[45] The Respondent relied on the Secretary's reasoning and determination that on the balance of probabilities, the Applicant breached s 9(3) due to the messages being disrespectful and that there was "a level of sexually harassing behaviour towards her." A breach of s 9(1) was determined due to the lack of integrity in communication towards Ms B. Finally the Secretary determined that s 9(14) was breached due to the conduct being incompatible with the duties of a CSO and this conduct damaged the Department's interests and "adversely affected the integrity and good reputation of the State Service."²⁰

[46] The Respondent submitted that there was a pattern of behaviour, which although was not considered as part of the ED5 investigation, was considered in the determination of the final sanction to terminate the employment of the Applicant. This previous conduct was outlined in the Secretary's letter and the ED5 Investigation report. It is reported that it consisted of a previous ED5 investigation in 2011 for allegedly sending inappropriate text messages to a young person in care, which was referred to the Tasmanian Police, where a breach was not determined arising from either investigation and no action was taken. Furthermore, the Applicant was issued with a lawful and reasonable directive in December 2016, which was not tendered, relating to inappropriate communication with a young person who was no longer a client and this complaint was also referred to the Police; no action was taken by the Police. No evidence was led on the past conduct.

[47] It was also submitted that the lack of ability of the Applicant to recognise that the communication with the client/former client was inappropriate, raised a risk of repetition of the unacceptable conduct and fell short of the expectations of the DHHS.

[48] In closing submissions, the Respondent noted in response to the remarks made by the Applicant, where he stated he worked in the best interest of the children, not the DHHS. They submitted that he:

²⁰ Exhibit R2 Attachment 4

"...does not have the autonomy to operate in the manner with which he sees fit and he operates under the direct delegation, as do all the CSS staff, of the Secretary of the Department on behalf of the Government."²¹

[49] The Respondent submitted that there was a valid reason for the termination of the Applicant's employment and despite some good results and success achieved in the role this did not outweigh the fact that there were breaches of both the Code of Conduct and trust in the performance of the role and an irreconcilable breakdown in the employment relationship.

[50] The Applicant submitted that there was not a valid reason for termination of his employment.

[51] He gave evidence that he wrote the screen shot text messages but stated they have been taken out of context and were not tendered in totality leading to misrepresentation:

"The evidence hasn't been shown in total. And I think I've been highlighting that fact, that if all the evidence had been shown – and the onus is on the department, because they're the one making the accusations – a totally different interpretation would be put on all those."²²

[52] He also denied that the contents of the text messages were of a sexual nature or inappropriate stating, "None of these three messages are sinister in any way"²³

[53] The Applicant acknowledged he received and sent the texts on his personal mobile telephone and he did not keep a copy of the texts to enable demonstration of the text trail and context:

"I don't keep texts. I've got no reason to keep texts but I'm sure if the Department had have been serious they could have got copies from the providers."²⁴

[54] In his outline of submission, he described the nature of the majority of the texts:

- "The contact was from an adult female to me, on my personal phone, not a Department phone, late in the evening, seeking advice in relation to discomfort from a recent tonsillectomy;
- I am not, nor have ever been a doctor, but I am a grandfather;
- Rather than be abrupt, I recognised the caller needed to discuss her situation;
- It is my nature to receive calls from ex-clients, currently I receive calls from an ex-client aged 47 yrs;
- I advise all callers that I have no official role with them, but I am there to listen;
- So the calls and messages received were from an adult person who is not a client of DHHS, nor a client of Kennerley, who has contacted me on my private phone at home, to discuss non DHHS matters;

²¹ P78 Transcript

²² P43 Transcript

²³ Exhibit A1

²⁴ P14 transcript

- It is my submission that this is not a Breach of Code of Conduct, and the wording of that material will support my claim claim that Natural Justice has not been applied, and in fact I should have received no sanction."²⁵

[55] Furthermore, the Applicant submitted that only those texts sent during the period Ms B was under a court order could be considered, in the course of his employment:

"I'm of the opinion that, in view of the age of the young person at that time that she makes contact with me – I've never – I never instigate contact; I respond to contact – she was an adult. It was matters totally irrelevant to the Department. She was not on any orders. She was not associated with anyone else. She contacted me as a friend and – and that was it, and I don't believe that that applies to a breach of code of conduct...It's not directly related to the employment."²⁶

[56] In cross examination, the Applicant explained the text relating to the body piercing was relevant to her state at the time:

"She was only 17. That's why she needed permission to have something put in her ear."

"So she was still subject to an order?"

"Yes."

"And you were her child safety officer?"

"Yes."

In the ED 5 Investigation report, the Applicant's statement in relation to the body piercing noted as follows:

"It was in line with pulling [Ms B] through whatever issues she was suffering at the time; whether they be relationship issues or issues with the Moving on Program or issues at school or university. If I can brighten up a young person by saying a stupid comment I will and that is what I have done. There is nothing sexual in anything I have ever said to [Ms B], including this comment."²⁷

[57] He submitted that the comment about smacking her bottom, was stated as she was starting a new job the next day and in cross examination stated:

"Did you write that message?"

"I would believe so. Yes. Yes because I – I explained it earlier on, if you were listening earlier on, she was to start a new job the following day and she was very nervous and she was talking about going to get some sort of substance to make her sleep."²⁸

²⁵ Exhibit A1

²⁶ P75 Transcript

²⁷ Exhibit R2 Attachment 4

²⁸ P20 Transcript

[58] The Applicant was concerned and used language to have impact “at their level so they can understand exactly what they’re doing is wrong and cease doing it” as he believed she was at risk of taking drugs.

[59] In cross examination, the Applicant explained the context of the message, “The body of a goddess. Good night and sweet dreams.”

“The week before this occurred the young person’s grandmother – she said – the young person said to her grandmother that she had the body of a goddess and the grandmother said yes, a Citroen goddess. Her grandmother is about my age, probably the same sort of – a Citroen goddess is a car.”²⁹

He explained that he had repeated what her grandmother had said:

“That’s what her grandmother said to her and we were having a bit of a laugh about that. Nothing sinister at all.”³⁰

[60] When asked to explain the comment “I’ve got a job as a naked barman” he indicated Ms B was looking for work and his comment was relevant:

“ I checked on the internet and there was jobs going at Dark Mofo and because of our relationship we were throwing – she’s having a shot at me – having a shot at me because – because of my age, my size and the way you’re wearing, the worst thing you could ever think of would be being a naked barman.”³¹

He stated in his submission to the ED5 investigation that:

“I believe it was appropriate and that it should be viewed in line with the comments that she had made to me and the general nature of our interactions and relationship.”³²

[61] In response to the texts “Hey Mr Naked Barman do you know when I’ll get my files I applied for? “I am still ironing the wrinkles out of my uniform”, the Applicant stated it was appropriate and intended in a funny joking nature. He also explained that “I just farted under the doona” was also “in line with the sorts of conversations we would occasionally have.” He acknowledged sending the photo of two semi-naked men wearing g strings and in response; “it was just part of the nature of the conversations that she was having with me at that time.”

[62] The Applicant’s witnesses supported his concerns regarding the risk of taking comments out of context and Ms Flakelar stated:

“So my concerns were that messages can be construed in a lot of different ways and without context they can be quite damning or dangerous. So I’m not – I’m not saying that the information is good or bad or otherwise. I’m simply saying that without the context of the pre-messages, the after messages, the whole context of a conversation, that my worry in there is that any staff member could be called in now today with similar concerns and allegations based on snippets that they get from text messages or even email correspondence without the full picture. And, as I say, in there that that’s my concern also as a worker, as a field

²⁹ P25 Transcript

³⁰ Ibid

³¹ P 28 Transcript

³² Exhibit R2, Attachment 3

worker, that that could well be me tomorrow. So I think context is really important.”³³

[63] Ms Maddie Smart, the Applicant’s team leader provided a statement for the ED5 investigation and broadly supported the Applicant’s practice.

“It is also my observation that (Mr A) puts himself “out there” to make the person he is interacting with feel at ease and that is in my view the intention behind the way he communicates”³⁴

However, she acknowledged that:

“Overall in relation to (Mr A)’s communication style, it is a fact that he can be blunt on occasions when he sends emails and potentially there is room for him to review how he tends to communicate at times.”

[64] Following a client visit with Ms B, she noted the client had a “poor self image” at the time and there was,

“potentially some significance in the observations I made at the time of that visit in 2014 and what I am advised is (Mr A)’s perspective that his communications with Ms B were designed to uplift her and improve her self esteem and sense of self worth”³⁵

She commented she did not personally encourage after hours contact with clients as workers needed downtime:

“However, (Mr A) is used to being on the after-hours team and based on my observations of his practice he does not seem to need downtime or separation”

“It seems to be (Mr A)’s view that he should be available for those in his caseload all the time and although, for self-care reasons, I do not encourage that, based on my observations as his Team Leader, (Mr A) had the best intentions in that regard.”

In relation to ongoing involvement with clients following the conclusion of the care order, she stated:

“In relation to a CSO ceasing their involvement with a young person who has previously been under their care, in my view it is unavoidable that there would be still some communication between them; particularly when a young person has relied on a CSO for a lengthy period of time. In fact, ceasing all contact with a young person who has been under care once they turn 18 can potentially be damaging.”³⁶

[65] The Applicant closed noting Ms B was not on any orders, but contacted him as a friend and therefore the texts were not related to his employment, there was no breach of the Code of Conduct and therefore no valid reason for the termination of his employment.

³³ P45 Transcript

³⁴ Exhibit R2, Attachment 3

³⁵ Ibid

³⁶ Ibid

Consideration and Findings

Was there a nexus between the Applicant's conduct and his employment?

[66] There are three periods of text messaging for consideration. It is clear there is a period when the Applicant was communicating with his client as part of his duties as a CSO, in a professional relationship and during the course of his employment, while Ms B was under a care and protection order. The timing of the second group of text messaging is from the cessation of the care and protection order to the date of obtaining her case files and this exact date is unknown. There is no date provided when she actually obtained her files so for the purpose of this consideration, I have included the texts up to the last request for files, which includes all screenshots, including the photos and emoji but excludes the last undated screenshot page. The third period relates to the last undated screenshot page and this has been excluded from this consideration.

[67] I note the client legally ceased to be under the care and protection order on the date of her eighteenth birthday on 29 October 2015 and that the DHHS had no legal right or jurisdiction to maintain her as a client after this date. The dates of the reported text messaging are from 20 October 2015 to June 2017. The Secretary considered the ongoing communication after the cessation of the order as part of the ongoing work relationship, and on this basis considered the conduct relating to all the presented text messages. The Applicant's position is once the care and protection order ceased, the relationship was not work related but one of friendship between adults.

[68] There is no contest that the first period of text messaging was within the course of employment. The question to determine was did the employment relationship continue past the care and protection order ceasing? The Applicant's employment was the relevant nexus in this case to the relationship between Ms B and the Applicant, and this relationship only stemmed from the Applicant's employment as her CSO for seven years. There was no evidence there was any other nexus for their relationship. It is also relevant that Ms B believed that the Applicant was her contact for the CSS and continued to refer to the files in the texts, until at least the finalisation of the procurement of her files.

[69] Furthermore, the Applicant in evidence, stated he was representing the Department in this process and Ms B was also relying on his role within the CSS to facilitate the attainment of her files. This period extended to at least the last text, seeking information about the files. This continues to the end of the second period.

[70] I find that the relationship is a result of their long term CSO/client relationship and in this instance coupled with the ongoing role and expectation, I conclude the conduct for the periods while she was under a care and protection order and while he was facilitating the procurement of her files, were directly linked to the Applicant's employment. Therefore, this is a period relevant to performing standards to meet the State Services Code of Conduct.

Consideration of the out of hours conduct

[71] The majority of texting occurred after hours. There is increasing employment law dealing with social media and social communications in relation to unfair dismissals and out of hours conduct. A key decision of Ross VP, of the previously known, Australian Industrial Relations Commission in *Rose v Telstra Corporation Ltd*³⁷, (*Rose*) sets out

³⁷ [1998] AIRC 1592

principles for a general approach having regard to the particular circumstances of each employment relationship. The passage (at pages 11-12) provides clarification:

"It is very clear that in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited:

- The conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or
- The conduct damages the employer's interests; or
- The conduct is incompatible with the employee's duty as an employee.

In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee."

[72] Mr B Rose's dismissal was found to be harsh and related to an out of hours altercation with another Telstra employee. VP Ross noted at the end of his decision (at page 17) that:

"..employers do not have an unfettered right to sit in judgement on the out of work behaviour of their employees. An employee is entitled to a private life. The circumstances in which an employee may be validly terminated because of their conduct outside of work is limited."

[73] Whilst a nexus has been established for the relationship arising and continuing from the Applicant's role as CSO, the conduct needs to be considered objectively to determine whether there was a valid reason for his dismissal.

[74] In *Hansen v Secretary of Transport*[2016] NSWIRComm 1011, consideration of whether there was a direct connection between out of hours criminal activity of child sexual exploitation and public sector employment as a justification for dismissal, the seriousness of the crime was found to be such that it warranted dismissal. Murphy C found at para 50:

"Conduct amounting to a repudiation of the employment contract, as was considered in *Rose* and *Silling*, is not the yardstick against which the out-of-hours conduct of the applicant needs to be measured so as to justify dismissal in the present matter. The starting point for such consideration is the gravity or seriousness of that conduct."

[75] In this matter, the seriousness and gravity of the conduct must be considered. The Applicant's role as a CSO is a specific statutory role to protect young people from harm and CSOs are required to have "sound self-management, self-awareness, and emotional maturity."³⁸ Communication is a crucial part of the role as outlined in the Statement of Duties. Albeit, the context of the screen shot text messages are not complete, I am satisfied that despite the lack of a complete trail of messages, the content of many of these messages and photos were inappropriate for a Child Safety Officer to send to a client/past client at any time. I do not accept that the statements in the text messages could be construed as part of the nature of their relationship. The context of the words are sexual in nature ie "Do you feel fertile" "the body of a goddess, goodnight and sweet dreams", "ironing the wrinkles out of my uniform" relating to the naked barman comment.

³⁸ DHHS Statement of Duties, Child Safety Officer, May 2011

[76] I find that the conduct undertaken resulted in crossing professional boundaries, and did not display self-awareness nor emotional maturity and hence breached his duties as set out in the Statement of Duties. I also note he showed a lack of insight indicating the language was completely acceptable. I find that there were sexual undertones in the messages sent by the Applicant and that messages of this nature are unacceptable for a CSO to forward to a client/past client constituting a serious breach of the professional boundaries.

[77] The inherent power imbalance of the relationship between the Applicant and Ms B contributed to the seriousness of this conduct. Finally, the conduct breached the trust inherently invested in the CSO role, which demonstrates the gravity of this matter.

[78] The CSS is dependent on the community's trust and respect of the public service. In the circumstances in *Kevin Cooper v Australian Taxation Office*³⁹, Lawrence DP accepted that the overriding obligation of Commonwealth public servants is "not just in worktime or workplaces, for an employee to behave with the highest ethical standards so the APS's reputation is maintained." The applicant's convictions in this matter were of a serious offence and nature which he found were unethical.

[79] Employees in the Tasmanian State Service are bound by the Code of Conduct and are required to act with integrity in the course of employment and importantly at all times, behave in a way that does not adversely affect the integrity and good reputation of the service. The nature of this conduct may adversely affect the reputation of the CSS, with a CSO providing inappropriate sexualised text messages to a client/past client. Public servants have a high bar to meet the expected standards. Where Lawrence DP referred to the commonwealth public service standards, the Tasmanian State Service Code requires similar levels of integrity of conduct.

[80] I am satisfied that the Applicant has breached s 9(1), s 9(3) and s 9(14) of the Code of Conduct and he has not met the expectations arising from his duties outlined in the SOD as a CSO managing vulnerable children and young people. Despite the Applicant's explanation of lack of context, I find the conduct and sexual undertones of the text messages sent during the stated periods, are completely inappropriate and unsustainable for a person employed as a CSO in the State Service.

[81] The conduct at the core of the determined Code of Conduct breaches, is particularly concerning to the maintenance of required trust between a CSO and a vulnerable person. Furthermore it is incompatible with the reputation and community expectations of this service. I note there has been a previous lawful and reasonable directive provided to the Applicant in 2016, regarding inappropriate communication with clients.

[82] Noting the seriousness and gravity of this conduct and applying the general principles set out in *Rose*, the Applicant's conduct has caused a serious breakdown in the relationship and a breach of trust between the employee and employer due to the lack of insight, resulting in a risk to the reputation of the service. There is a risk of repeated behaviour as the Applicant maintains that the conduct was appropriate and there is no insight that the use of sexual language is unacceptable.

[83] Accordingly, I find that the Respondent had a valid reason to terminate his employment.

³⁹ [2015] FWCFB 868

[84] I now turn to the consideration whether the termination of employment was unfair, noting the onus of proof rests with the Applicant.

Was procedural fairness offered to the Applicant?

[85] The Applicant submitted there were numerous grounds where he believed procedural fairness was not availed to him during this process. It is these grounds which form the basis for his submission that the termination of his employment was unfair and for ease of consideration they have been grouped into three themes:

- the complaint process including the lack of utilisation of the Policy;
- the investigation process; and
- the extensive service and age of the Applicant.

The complaint process including the alleged lack of utilisation of the Policy;

[86] The first issue the Applicant raised was the validity of the complaint. He submitted that the young person (Ms B) was not interviewed and the "complainant progressed this action without the permission of Ms B, and in fact had been directed by Ms B to mind their own business."⁴⁰ The Applicant submitted that the Respondent "made no attempt to validate the accuracy of the evidence, or to validate the source, through the service provider."⁴¹

[87] The Applicant submitted that the Investigator undertaking the ED5 investigation did not talk to Ms B, and this is confirmed in the investigation report which noted:

"The young person-she did not wish to become involved in the investigation process and was advised by Ms Sturges that she would not be required to do so. I have honoured that commitment with consideration to potential for her involvement to interfere with her wellbeing."⁴²

[88] The Applicant's evidence was that:

"We're told that the young person didn't want to be interviewed by the – the onus is on the investigator to ask the young person. And if this process had have been followed, the senior practice consultants would have picked up the phone and rung her. She's not hiding. She has got the phone on. And if she didn't want to talk to the investigator, that's fine but he needs to be told by the young person "I don't want to say anything."

"Now, that didn't happen. The manager at Kennerley decided – on two occasions she told him "You're not going to talk to the young person." Well, that's irrelevant."⁴³

[89] The Applicant submitted that the complainant, Ms Sturges, was biased against him and that they had a long history where he believed she had controlled the complaint process by not allowing anyone to have access to Ms B:

⁴⁰ Applicant's application

⁴¹ Exhibit A1

⁴² Exhibit R2, Attachment 3

⁴³ P12 Transcript

"I like to think this has been an opportunity to have a good old go. I have history with that manager at Kennerley. It's just the – it's number 5 that she has tried to have a go at me."⁴⁴

[90] The Applicant submitted that the DHHS determined to treat the complaint under an ED5 investigation rather than their own policy, "Responding to Care Concerns impacting on a child in Out of Home Care"⁴⁵ and the processes outlined in the CSS "Care Concern Flow Chart".⁴⁶ The DHHS/CSS did not refer the allegation to the CSS, Senior Quality Staff, the Tasmanian Police, rather CSS proceeded directly to an ED5 investigation. He submitted this resultant investigation process denied him the consideration of the context of the service and was "...designed for termination and not for Natural Justice."⁴⁷

[91] Ms Rebecca Flakelar provided evidence that the Policy is the process for investigating concerns about care, when a child is under a care and protection order. She was less experienced about the use of the Policy in employee investigations. In cross examination:

"Do you know of this policy responding to care concerns impacting on a child in out-of-home care being used to investigate state servants before? Does that happen?"

"I wouldn't know that, no. I – I come from a practitioner background, a team leader background, so middle management and my understanding is that it's there – it is – the investigation is on the young person..

"Yeah?"

"... whom we have legal responsibility for, but it's there to protect all parties so that a process is followed and evidence is gathered. I'm not sure about it being for an employee as such. I would assume that would be a joint process or a dual process, one with a complaint in care potentially for the young person whom we have responsibility for and a dual process of submitting a Tasmania Police referral if it involved an adult with such serious allegations. That would be a dual process that I myself would enforce with the MOU that we have with Tasmania Police as well."⁴⁸

[92] The Respondent submitted that procedural fairness was upheld throughout the process and:

"...further the Applicant was appraised as to his right throughout the process including his rights to representation, reply, and dispute. He was further reminded he had access to the Employee Assistance Program on a confidential basis should he wish."⁴⁹

[93] The Respondent submitted that the Applicant presented no evidence to substantiate his reasons for unfair dismissal.

⁴⁴ P13 Transcript

⁴⁵ Exhibit A2

⁴⁶ Exhibit A3

⁴⁷ Exhibit A1

⁴⁸ P48 Transcript

⁴⁹ Exhibit R2, Submissions for the Respondent.

[94] The Respondent addressed these issues in written submissions including the details outlined in the Secretary's letters regarding the ED5 report and determination of sanction and oral submissions at the hearing.

[95] Mr Johnston confirmed the complaint was forwarded to the CSS by the General Manager of Kennerley Children's Homes, Ms Sturges, a mandated notifier. She was also the point of liaison for the Department in attempting to seek access to Ms B. The Respondent also confirmed the screen shots of the text messages were provided by Ms B, unsolicited to Ms Sturges. The Respondent stated;

"As General Manager Ms Sturges was an agent for Kennerley for the purposes of liaison and had no inappropriate involvement in any aspect of the process resulting in the Applicant's dismissal."⁵⁰

[96] The Respondent submitted that there was no real evidence led from the Applicant to prove "...a myth that somehow Ms Sturges was in control and this is some type of grand conspiracy and vendetta against Mr A, with no direct evidence led to that regard..⁵¹

[97] He confirmed that Ms Sturges would not consent to providing the investigator or the DHHS any contact with Ms B and that based on her professional advice the CSS agreed that any contact may be detrimental to her wellbeing:

"We think that was an appropriate decision that did not deny procedural justice and – procedural fairness and natural justice to the respondent at that stage, now the applicant."⁵²

[98] It was also submitted that it would be expected that a third party agency would notify the CSS of any concerns and that after the initial notification, the Agency dealt with the processes. The only ongoing contact with Ms Sturges, was an attempt to access Ms B. Ms Sturges had no delegation or authority over the ED5 investigation or process. No information was provided about any previous issues between Ms Sturges and Mr A.

[99] The Respondent relied on the screen shots provided by Ms Sturges as they could not seek any contact with Ms B. The Respondent did not contest that Ms B was not interviewed and noted that there are no powers during an ED5 investigation to compel participation by an external third party. They also confirmed that Ms B was over the age of 18 when the complaint was forwarded by Ms Sturges to CSS.

[100] Additionally, the Investigation Report reported that Donna Wright, who is Kennerley Children's Moving On Co-ordinator, outlined the discussions with Ms B leading to the complaint and the clear concerns that she was unsure how to cope with the content of the text messages and that he was texting her at all hours.

[101] The evidence of Ms Muskett provided that the DHHS policy⁵³ is not used to investigate state service employees rather:

"No, it is very clear that this is about a child in out of home care and concerns regarding their care arrangements in care."

⁵⁰ Exhibit R2

⁵¹ P66 Transcript

⁵² P67 Ibid

⁵³ Exhibit A2

[102] The Respondent stated that the Policy is designed to protect vulnerable young people who are in the out of home care system and not for complaints against state service employees:

"...regardless of whether it's kinship carers or external third-party agency, whatever. That's not what occurred here. What occurred was someone who wasn't subject to orders brought concerns to an external third party who then, as a mandatory reporter, brought it straight to us.

It was to do with the conduct of an employee, not to do with the conduct of a carer, which the out of home care policy as it has been presented today actually deals with. No one could present any evidence that that policy has ever been used to investigate a State server for employment conduct-related matters, because that's not what it's for. It's for protecting children from those people who should be their carers. So we think it's an irrelevant red herring for the particular matter here. The relevant statutory instrument that dictates the investigation of alleged breaches of the code, or conduct matters by State servants is the State Service Act, and arising from that, ED5 in this context. And that's what we did."⁵⁴

Consideration

[103] I have carefully considered the process of the complaint made by Ms Sturges to the CSS following the report made by Ms Donna Wright, the Moving on Coordinator, in relation to information gained through her discussions with Ms B. Her concerns were based on the supplied screen shots of text messages received from Ms B's case manager, CSO Mr A , both whilst in care and following cessation of the care and protection order, when Ms B turned 18 years of age. Ms Wright and Ms Sturges were concerned with the distressed reaction of Ms B, arising from the alleged inappropriate content and timing of those text messages.

[104] There is a mandatory reporting requirement for prescribed persons under the *Children, Young Persons and Their Families Act 1997*, Ms Sturges, in her role as general manager of Kennerley Children's Homes, was a mandatory reporter and was bound to report the allegation under s.14(2). Reasonable grounds for suspecting abuse is considered when a child informs someone that he/she has suffered non accidental physical injury, neglect, sexual abuse and/or emotional trauma (for example extreme fear).

[105] The Respondent submitted that there were reasonable grounds to require the reported conduct of the Applicant to be mandatorily reported. Nevertheless, once the complaint was received, the content and nature were concerning and needed to be considered to determine whether to commence an ED5 investigation. Even if there was no mandatory reporting requirement, the fact the complaint was made in these circumstances, required consideration. The commencement of the ED5 investigation was not contested at the time by the Applicant.

[106] The complaint had to be investigated, and would the outcome be different if Ms B was interviewed? The uncontested evidence was the screen shots of text messages were sent and received by the Applicant. I am satisfied that the investigator respected the professional advice of potential harm to Ms B in his decision not to contact Ms B and the Respondent did make reasonable attempts to seek further clarification from Ms B

⁵⁴ P73 ibid

following the investigation and prior to the determination. I also note Ms B was over the age of 18 at the time of the complaint and outside the jurisdiction of the CSS.

[107] The Applicant submitted there was a five year history with Ms Sturges, however, no witness evidence was led or evidence provided that Ms Sturges was biased against the Applicant. Therefore, in my view, there is insufficient detail to consider the issue of bias as claimed by the Applicant. I am also satisfied that Ms Sturges did not have further influence or control over the ED5 investigation process and final determination of the DHHS Secretary.

[108] Conflicting evidence was led on the application of the DHHS Policy to the conduct of state service employees providing care to children in out-of-home care. The Policy applies to:

“All Children and Youth Services staff state-wide including Child Protection Services, Senior Quality and Practice Advisers (Quality Improvement and Workforce Development); Area Directorate state-wide; Community Sector Out of Home Care Providers.”⁵⁵

The Policy’s purpose is to provide clear principles to CYS staff and community sector organisations responding to concerns relating to the safety and care of a child or young person in Out of Home Care. The Policy states it “only applies to children in the care, custody or guardianship of the Secretary and placed with an approved carer or funded out of home care provider.”⁵⁶ There was no evidence to indicate this Policy has been used to investigate the conduct of a state service employee, despite being applicable to employees, which binds their requirement to implement the principles for responses to concerns. I defer to Ms Muskett’s evidence that this Policy is not applicable to investigating the conduct of state service employees, rather the conduct of a carer, noting it is firstly assessed and clarified at the Secretary or Deputy Secretary’s office.

Findings

[109] I am satisfied that the uncontested evidence of the content of the text messages is adequate for consideration of conduct and that the inability to interview Ms B, did not change the substance of the texts. The wording and photos within the text messages were plain to read and understand. In this case, the agreed evidence did not require verification from Ms B and I find that this did not unfairly affect the outcome.

[110] I am satisfied that the complaint was correctly made by Ms Sturges to the appropriate authority and the Agency were required to investigate utilising the ED5 investigation process, without any further influence from Ms Sturges. There is insufficient evidence before me, to suggest that Ms Sturges was biased against the Applicant, rather she was bound by law to make this complaint.

[111] Having reviewed the DHHS Policy and reviewed the evidence, the Policy was not the correct process to be implemented in this case, as Ms B was an adult at the time of the complaint. Where there are suspected breaches of the Code of Conduct by a State Service employee, which were eventually determined as part of the valid reason for the termination of the Applicant, an impartial investigation must and did commence under ED 5. I find the ED 5 investigation provided procedural fairness to the Applicant.

⁵⁵ Exhibit A2

⁵⁶ Ibid

The Investigation Process

[112] The Applicant submitted the lack of independence and use of a non-professional specialist investigator, denied him procedural fairness. He raised concerns that a "Private Investigator, who claims to specialise in Workplace Bullying"⁵⁷ was contracted and stated that an independent investigator should have been appointed from within the specialised area. He noted that he was not interviewed by the appointed Investigator, being James Cumming, rather "he sent someone else out". He had also requested a psychological report be undertaken, which was declined by the DHHS.

[113] He further supported his submissions by casting doubt on the independence of the investigation:

"If a private investigator is appointed by the department to provide an investigation, well, it's not independent because he is being paid. So the independence is gone once he gets paid."⁵⁸

[114] During the investigation process, the Applicant raised concerns that there was minimal questioning of operational staff and the "lower weight" given to the information provided by his Team leader which contributed to the lack of procedural fairness in the investigation:

"So the internal investigator – or private investigator I believe was responsible for – and those managing him, responsible for a gross miscarriage of justice in relation to procedural fairness and natural justice in relation to me. I notice that through his investigation it was definite lack of any inquiries to operational staff.

There was only one operational staff that was interviewed and that was the team leader, Maddie Smart, who I provided her response. That was a positive response. She was actually saying that she knows how I work, she has got confidence in how I work and the kids have confidence in how I work. But that was not accepted."⁵⁹

[115] Further to the process of the investigation, the Respondent drew on clause 7.1 ED 5 regarding the choice of investigator:

"At 7.1 ED 5 relevantly provides that "the Head of Agency must appoint, in writing, a person (the Investigator) to investigate the alleged breach" and that "the Investigator must be impartial...". There is no requirement to appoint a specialist from a given area of work or with specific expertise. The assertion of the Applicant in regards to the Secretary having erred by not appointing a specialist in Child Safety is without foundation and incompetent."⁶⁰

[116] It was submitted the business of James Cummings Investigation Service Pty Ltd, employs investigators who as agents of the company are delegated to undertake investigations. James Cummings does not personally interview and undertake all contracted investigations. The Respondent did not lead evidence in relation to the ED5 Investigation Report, although a full copy of the Report was admitted into evidence.

⁵⁷ Exhibit A1

⁵⁸ P15 Transcript

⁵⁹ P13 Transcript

⁶⁰ Exhibit R2

[117] The Respondent provided further rationale to the application of the clinical practice context in the Letter from the Secretary, re Determination of the Sanction where it was confirmed that the investigator and the DHHS sought considerable clinical practice and procedure advice from CYS Clinical Support Manager Angela McCrossen and Ms Pauline Muskett, Manager of Child Safety Service South, which the DHHS “considered authoritative”.

Consideration and Findings

[118] ED 5 Investigation Process, Clause 7.1 states in full the procedure for appointing an investigator:

“Should a Head of Agency have reasonable grounds to believe that a breach of the Code may have occurred, the Head of Agency must appoint, in writing, a person (the Investigator) to investigate the alleged breach of the Code in accordance with these procedures. The Investigator must be impartial and must report to the Head of Agency in accordance with Clause 7.9 on the outcome of their investigation.”

The Head of Agency appointed James Cumming Investigation Service Pty Ltd (Licence No. 3054) and that business in turn employs investigators and staff to undertake the contracted work. This business is paid for the contract to undertake the investigation and provide a Report, however, defers to the Secretary to establish the final determination and sanction. I am satisfied that the investigation was undertaken impartially by a qualified professional investigation service.

[119] The investigator interviewed/obtained witness statements from Ms Sturges, (General Manager, Kennerley Children’s Homes) , Ms Wright (Moving on Coordinator Kennerley Children’s Homes), Ms Smart (Team Leader CSS)and Ms Redden(Job Coach, Lifestyle Solutions), and sought background advice from Ms McCrossen (Clinical Support Manager, CSS) and Ms OBrien (Operations Manager, Kennerley Children’s Homes) for the purposes of the investigation. The Respondent has relied on Ms McCrossen for clinical and practice advice as part of this process.

[120] I am satisfied that the investigation process included clinical practice advice from both parties. The appointment of an impartial investigator was satisfied by outsourcing this work to James Cummings Investigation Service Pty Ltd.

The extensive service and age of the Applicant

[121] The Applicant noted the lack of consideration of his significant length of service in employment and his good work record and productive case management of over 1000 children:

“I’ve worked out I’ve case managed over 1000 children since I first started in 1981. Not one complaint. The complaints are from adults. In this instance the complaints – and I believe – and I feel for the young person involved because I believe that she probably shared phone messages with her sister and it’s all snowballed from there and taken out – and you can tell by her response, “I don’t want anything to do with it.”⁶¹

[122] The Applicant’s witnesses supported his commitment to the role and reflected that he acted in the children’s best interest. His Team Leader, Ms Smart noted he is never

⁶¹ P 75 Transcript

disrespectful to his clients, is child and client focused, respected and solution focused. However, she noted that he can be blunt in his communication style.

Ms Woolley, Co-ordinator AK Young Women's Emergency Accommodation Service prepared a statement tendered by the Applicant which indicated support of the working relationship with the Applicant:

"During my engagements with (Mr A) I have witnessed him conduct himself in a caring and compassionate manner. And at no time have I witnessed any boundaries being crossed."⁶²

[123] Evidence was provided by Ms Rebecca Flakelar, who has been a colleague of the Applicant for ten years and indicated there were no issues with the way the Applicant worked or his interactions with young people.

[124] Ms Ann Marie Kerr, who is a current Team Leader and has been employed at CSS since 2014, gave the following evidence:

"You've said we've worked together in a team. We've worked – she is not my team leader but very closely associated with my team. Have you ever had any concerns with relation to my work?"

"No."

"Have you had any concerns in relation to children that I work with?"

"No."

"And in relation to carers or adults that I've worked with?"

"No."⁶³

[125] The Applicant stated that his age was a contributing factor to his termination and noted in his submissions that the Secretary had determined he had been employed for too long and that termination was the best course:

"I am seventy two years of age, and I believe I should receive a little more respect, than the Secretary has chosen"⁶⁴

[126] Finally, he submitted the length of time to undertake this process caused him considerable stress and contributed to a lack of procedural fairness.

[127] The Respondent submitted that his age was not a factor in the dismissal and highlighted that age is expressly precluded from being considered as a valid reason for dismissal in s 34 of the IR Act. He noted the lack of evidence provided by the Applicant in relation to his age being a reason for his termination. "Needless to say, age was not a factor in coming to the determination"⁶⁵

⁶² Exhibit A1 Attachment 5

⁶³ P52 ibid

⁶⁴ Exhibit A1

⁶⁵ P65 Transcript

[128] The final ground relied on from the Applicant to prove the unfair process, was his length of service and success in the role, to which the Respondent stated in the Secretary's final letter:

"It is not in dispute that you have had success in your role as a Child Safety Officer and that you have achieved good results with difficult and troubled families. However, instance of good conduct and successes in the performance of the role, regardless of frequency, do not outweigh the fact that you have also breached the Code."⁶⁶

Consideration and Finding

[129] It is not disputed that the Applicant has had a lengthy employment service working in many challenging areas of the DHHS. His colleagues noted his respect and focus on the children's best interest. The Respondent conceded the Applicant has had success and has achieved some good results in a complex environment. This has been relayed to the Applicant throughout this process.

[130] I am satisfied that the balance of performance was considered and I concur that the valid reason for the Applicant's termination of employment and serious nature of the conduct, overrides the previous good performance.

[131] Little evidence was led or provided of the impact of the Applicant's age on his termination, albeit that he is years old. I find that age was not a contributing factor to his termination and additionally, it is an excluded ground under the IR Act from contributing to a valid reason for termination.

Conclusion

[132] I find the Applicant was afforded procedural fairness, throughout the process. Therefore, I find that he was not treated unfairly.

[133] Accordingly, having considered all the matters, the termination was for valid reasons and not unfair. This application is dismissed.



NM Ellis
Deputy President

Appearances:

Mr A, the Applicant
Mr Mat Johnston, for the Respondent
MS A Davis, for the Respondent
Ms G Willis-Croft for the Respondent
Ms G Eaton-Briggs for the Respondent

⁶⁶ Application, Attachment 1

