



REASONS FOR DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Catherine Kelly

v

**The Hills Christian Community School Inc T/A The Hills Christian
Community School**
(U2018/4154)

COMMISSIONER PLATT

ADELAIDE, 12 JULY 2018

Application for an unfair dismissal remedy – no valid reason – procedural deficiencies – dismissal harsh, unjust and unreasonable – reinstatement ordered.

Summary

[1] On 20 April 2018, Ms Catherine Kelly lodged an application pursuant to s.394 of the *Fair Work Act 2009* (the Act) seeking a remedy for an alleged unfair dismissal by her former employer The Hills Christian Community School Inc T/A The Hills Christian Community School (HCCS) which took effect on 11 April 2018.

[2] There was no dispute that Ms Kelly was protected from unfair dismissal at the relevant time pursuant to s.382 of the Act.

[3] The matter was arbitrated on 28 and 29 June 2018. Ms Abbey of counsel represented Ms Kelly and Mr Hassall of counsel represented HCCS. Permission was granted under s.596(2) of the Act.

[4] An ex tempore Decision was made on transcript shortly after the conclusion of the hearing on 29 June 2018 awarding reinstatement, loss of wages and continuity of service. An Order¹ was also issued.

[5] This document provides the reasons for that decision.

[6] The parties each filed a written outline of their submissions in support of their respective positions. Ms Kelly also filed an outline of closing submissions on 29 June 2018. HCCS also filed written submissions on reinstatement.

[7] On 18 June 2018, I made an Order by consent pursuant to ss.593(3)(c) prohibiting the publication of material which identified or tended to identify any student of the school. As a

result of this order, I will refer to the student the subject of this matter as the Student, the Student's parents as the Student's Parents and refer to other students simply as students.

[8] The dismissal arose out of an incident at the School where Ms Kelly gave the Student a treat 'chocolate' bar. The Student was known to suffer from a number of allergies. The School contended that Ms Kelly's actions were in conflict with the procedure adopted for the Student, a breach of her duty of care and the code of conduct. Ms Kelly contended that her conduct was consistent with the written and verbal procedures given to her at a handover prior to the incident. Amongst other matters, it is necessary for me to determine the procedures that Ms Kelly was required to observe and what was said at the handover meeting.

[9] The second issue to determine is if the investigation and disciplinary process adopted by the School resulted in a lack of procedural fairness.

[10] Given my ultimate findings, the final issue which arose was the appropriateness of reinstatement as a remedy.

[11] The evidence which I have summarised in this decision is focussed on these three topics.

[12] I had regard to the statements (including attachments), the exhibits, the witness evidence and the manner in which it was given, and submissions including replies in making my decision.

[13] Ms Kelly provided a witness statement,² a supplementary statement,³ and a second supplementary statement⁴. Ms Kelly gave evidence on her own behalf.

[14] HCCS provided a witness statement of Mr Tony Fielke (Principal and Board Member),⁵ witness statement of Mr Mike Rogers (Chairman of the Board),⁶ witness statement of Ms Angela Harvey (Head of Primary)⁷ and a witness statement⁸ and supplementary witness statement⁹ of Ms Louise Romaldi (Relief Primary School Teacher).

The Witness Evidence

Catherine Kelly

[15] Ms Kelly's evidence is relevantly summarised as follows:

- Ms Kelly was engaged by HCCS as full-time Reception Teacher.
- On 29 November 2017, a meeting was held about the Student's needs. The meeting was attended by the (then) Principal, Ms Harvey, the Student's Parents, and three other persons who were not involved in this matter. Ms Kelly made notes at the meeting.¹⁰ The notes referred to a letter of introduction to be written to families by the Student's Parents. This letter was dated 7 December 2017.¹¹ This letter described the Student, and included information about the Student's history and the condition with some risk mitigation strategies. The letter advised parents of suggestions regarding "[Student] friendly foods" and advised them to "... always check the ingredients labels before giving anything to [the Student]...". A non-exhaustive list of food options was provided. Ms Kelly advised that nothing was

said during this meeting to the effect that the Student could only eat food supplied by the Students Parents.

- In January 2018, Ms Kelly suffered a serious illness which prevented her from working. During the period of the illness, Ms Romaldi was engaged on a short term contract to fill Ms Kelly's position. Ms Kelly recovered and it was agreed she would return to work on 19 March 2018 and work Mondays, Wednesdays and Fridays (0.6 FTE). Ms Romaldi would teach the class on the other two days of the week.
- It was agreed that Ms Romaldi would work alongside Ms Kelly in her first week back in the classroom. These three days were intended to be "handover" days in which Ms Romaldi would get Ms Kelly up-to-date with the classroom policies and procedures.

Handover

- On 15 March 2018, Ms Romaldi and Ms Kelly had a planning meeting and they discussed "handover issues". One of the students in the class suffered from potentially life threatening allergies. Part of the handover process included a discussion about this Student.

[16] What was discussed at this handover is the subject of dispute.

- A handwritten document concerning the Student was used during this meeting. Ms Kelly asserts that she made an annotation at the foot of the document and that it did not contain any highlighting. This document is Exhibit R1. Ms Romaldi contends that the document was the same as R1 but contained yellow highlighting. This document is Exhibit R1A.
- Ms Kelly contends that Ms Romaldi went through a handwritten document about procedures to deal with the Student's condition.¹² A photograph taken at the time the handover took place was tendered together with an electronic version.¹³
- Ms Kelly submits that the only documents she received identified the Student's allergies, risk mitigation processes and provided information on appropriate foods (including pictures) and required the teacher to check the ingredients label to ensure any food given to the Student was suitable.

[17] Ms Kelly denies being told that the Student could only be supplied with food provided by the Student's Parents.

Incident

- On 4 April 2018, another student in the class had a birthday. It was customary for the students to have a treat on their birthday. Ms Kelly gave the Student an 'Oscar' chocolate bar which she had examined and believed met the ingredient limitations specified by the Student's Parents in their letter dated 7 December 2017.

- The Student ate the ‘Oscar’ chocolate bar and subsequently suffered a mild allergic reaction.
- On the evening of 5 April 2018, the Student’s father emailed Ms Kelly¹⁴ and sought information about the treat that had been given to the Student. This email was also copied to Ms Romaldi. Ms Kelly responded that evening and provided a photocopy of the wrapper of the treat provided to the Student and advised that she had double checked the chocolate to make sure it was dairy-free, vegan approved and nut-free chocolate. The Student’s father sent a text reply thanking Ms Kelly for providing the details, appreciated her efforts to ensure the Students wellbeing and advised they would touch base in a few days to discuss possible future options.¹⁵

Disciplinary Process

- On the morning of 6 April 2018 Ms Kelly received a text message to meet with Mr Fielke and Ms Harvey at 8.15am. Ms Kelly was suspended with pay and later that day was emailed a letter which detailed the allegations.¹⁶
- The letter alleged that Ms Kelly had failed to comply with the Student’s Eating Plan and Guidelines, as given to Ms Kelly during an extensive handover in written and verbal form, and the Student could only eat food provided by the parents. It was alleged that the Ms Kelly’s conduct gave rise to a serious breach of her duty of care towards the student. The letter confirmed that Ms Kelly was suspended pending investigation of the matter and advised that she was required to attend a meeting on 11 April 2018 at 11.30 am and that she could bring support person.
- On 10 April 2018 (sic), Ms Kelly attended the meeting referred to in the letter dated 6 April with her legal representative. Also present was Mr Fielke, Ms Harvey and Ms Sonia Albertini from the Association of Independent Schools of South Australia. Ms Kelly read from a prepared response.¹⁷
- Ms Kelly’s written response as it relates to the matters in dispute is summarised as follows:
 - Collaboration with Ms Romaldi has been difficult on occasions.
 - During the scheduled three day transition in the week commencing 19 March, Ms Romaldi was away for two of the days and unable to work with Ms Kelly for much of the third.
 - Ms Kelly was not advised in writing or verbally that she could only provide the student with food supplied by the Student’s Parents.
 - The hand written notes¹⁸ were the only handover document received.
 - Ms Kelly had adhered to the guidelines provided by the student parents by checking the ingredients.
 - Ms Kelly denied breaching the Code of Conduct or breaching her duty of care.

- The meeting discussed the schools requirements, the handover and other matters, and then adjourned for 20 minutes. When the meeting resumed Mr Feilke advised they needed to investigate matters further and the School would advise of their decision the following day. Ms Kelly provided Mr Fielke a copy of her written response.
- On 11 April 2018, Ms Kelly received a letter detailing the investigation findings, advising her that her conduct was regarded as serious misconduct and that she was summarily dismissed;¹⁹
- Ms Kelly accepted that she was the subject of a written complaint by a group of parents and that she had a discussion with the then Principal as a result. No formal warning was issued;
- Ms Kelly sought employment post dismissal including non-teaching work;
- Ms Kelly considered seeking employment as a teacher but ascertained that she would be required to advise the Education Department of her dismissal and that this record could have a negative impact on her seeking employment, and would remain with her, despite her belief that the dismissal was unfair. For that reason Ms Kelly did not formally apply for work within the Department of Education or Catholic Education South Australia.
- Ms Kelly has not received any income post dismissal.

[18] In response to the material filed by HCCS Ms Kelly stated:

- The first time she saw the Daily classroom procedures for the Student was when she received Ms Romaldi's statement.
- She first became aware of the document titled Eating Practices 2018 attached to Ms Romaldi's Statement on 10 April 2018.
- The folder used by Ms Romaldi at the handover was her ordinary planning folder which was red in colour.
- She had received the Action Plan for Anaphylaxis document on 19 December 2017.
- She had received an email copy of the document titled '[Student]- Food Guidelines' prior to the handover, but never observed a document which had the hand written words next to the item treats as contained in Ms Romaldi's statement.
- The school newsletter contained a picture taken at the handover meeting.²⁰
- The reference in her response document that Ms Grace helped her give to chocolate to the student was incorrect. Ms Kelly gave the chocolate to the student and advised Ms Harvey of that fact.
- She was never told of any dissatisfaction with her teaching methods or interactions with the teaching team, prior to her dismissal. On 19 March 2018 Mr Fielke said in a letter to her that she had been a 'wonderful member of our team'.

- Ms Kelly rejected the contention that she had questioned the honesty of other staff members, but could not understand the difference between her account of what happened and that given by Ms Romaldi.

[19] During cross-examination Ms Kelly:

- Confirmed her recollection of the instructions she received from Ms Romaldi during the handover on 15 March as to the provision of food to the Student. Ms Kelly disputed that Ms Romaldi had told her she could only provide the Student with treats provided by the Student's Parents.²¹
- Asserted that the instructions in relation to the Student (Exhibit R1, R1A) was located in the red teacher planning folder.²²
- Rejected the proposition that Ms Romaldi had referred to the green folder²³ at the meeting.²⁴
- Asserted she was not aware prior to her dismissal that a direction was issued in late January, early February that the Student was only to eat food provided by the Student's Parents.²⁵
- Ms Kelly did not recall seeing a copy of a letter from the Student's Parents with any handwritten notation stating treats were to be supplied by the Student's Parents.²⁶

[20] HCCS provided witness statements and led evidence from:

- Ms Louise Romaldi (Relief Teacher);
- Ms Angela Harvey (Head of Primary School);
- Mr Mike Rogers (Board Member); and
- Mr Tony Fielke (Principal and Board Member).

Louise Romaldi

[21] Ms Romaldi provided a witness statement²⁷ and a second witness statement²⁸.

[22] In her second statement and at the commencement of her evidence Ms Romaldi advised that attachment LR3 to her first statement was not the version of that document referred to at the time of the handover. Ms Romaldi advised that LR3 was modified after the incident on 5 April as the Student's father requested the written procedures be clarified.

[23] The difference between the two versions of LR3, was that the version of LR3 appended to Ms Romaldi's witness statement (and described in paragraph 14.7 of that statement) contained two sections titled 'Class Celebrations' which (in effect) required that the Student only ate food supplied by the Student's Parents. It was conceded that this version of the document was not produced until after the dismissal.

[24] The correct LR3²⁹ did not contain any restrictions on the food to be supplied to the Student but did contain requirements as to where the Student ate food, that the other students who were eating certain foods must not sit near the Student, and hand washing/sanitising requirements.³⁰

[25] Ms Romaldi contended that LR3 had been kept in her desk in a green folder titled Term 1.

[26] Ms Romaldi also advised that attachment LR4 to her witness statement which was a document titled 'Eating Practices 2018' and contained a statement that the Student only eats his own food as provided by his parents, was not prepared by her but by Ms Harvey. Ms Romaldi contends she mistook LR4 for LR5. Contrary to the account in her witness statement, Ms Romaldi advised in her second statement that LR4 was not in her green folder and she did not show it to Ms Kelly.

[27] The balance of Ms Romaldi's evidence is relevantly summarised as follows:

- HCCS employed her as a relief teacher.
- At the beginning of 2018 she was engaged to cover Ms Kelly's absence.
- Prior to her commencement in 2018 she was made aware of the Student's allergies.
- In December 2017, the Student's Parents corresponded with HCCS, by letter dated 7 December 2017, about the Student's allergies and ways in which he could be protected.³¹
- On 19 December 2017 an Action plan for Anaphylaxis for the Student was distributed.³²
- Before implementing the procedures in LR4 and the handwritten document LR5, Ms Romaldi discussed the contents with the Student's father who confirmed he was happy with the contents.
- Ms Romaldi provided Ms Kelly with an extensive handover about the students and their progress with Ms Kelly spending a few days in the classroom.
- On 15 March 2018, Ms Romaldi participated in a handover meeting with Ms Kelly. During that meeting she gave Ms Kelly a green folder which contained an extensive handover package to assist Ms Kelly.³³ The documents comprised the Action plan for Anaphylaxis, a medical report summary, handwritten notes, TRT Notes, and the letter from the Student's Parents dated 7 December 2017. The TRT notes did not reference the treats that could be given to the Student. Ms Romaldi contended that the letter from the Student's Parents dated 7 December also contained a written annotation 'supplied by [Student's Parent]' next to the subheading 'Treats' in the green folder at the time of the handover.
- Ms Romaldi contends that a large part of the handover included discussing the procedures in relation to the Student, and that Ms Kelly took the folder and photocopied some of the contents.

- Ms Romaldi explained and demonstrated all of the written procedures in place.
- Ms Romaldi verbally emphasised the Student's allergies and showed Ms Kelly where the Student friendly chocolates were.
- In her second statement Ms Romaldi contends that she specifically advised Ms Kelly that the Student was not to be given anything supplied by another parent as per the direction from the Student's father in early February 2018.
- On 5 April 2018, at about 3.35pm, the Student's mother told Ms Romaldi that the Student had eaten a chocolate supplied by Ms Kelly. The Student told his mother that he had a sore tummy and the chocolate made him feel sick. The mother reported that the Student had red and itchy eyes. Ms Romaldi reported the matter to Ms Harvey.
- Later that day Ms Romaldi was copied into an email sent by the Student's father. Ms Romaldi forwarded that email to Ms Harvey and Mr Fielke.
- Ms Romaldi was copied into Ms Kelly's reply to email from the Students father. Ms Romaldi was concerned that Ms Kelly had acted contrary to the procedures put in place for the Student and the handover information she had given her. Ms Romaldi forwarded this information to Ms Harvey and Mr Fielke.
- On 6 April 2018, Ms Romaldi wrote a letter to Ms Harvey concerning what she had told her and to provide more detail about what was discussed at the handover.³⁴

[28] In cross examination Ms Romaldi:

- Rejected the suggestion that she could have missed a key part of the information about the Student in the handover.³⁵
- Believed that she had given Ms Kelly an explicit handover relating to the Student.³⁶
- After some questioning, accepted that the written procedures did not require that the Student only have food brought by the Student's Parents.³⁷
- Did not consider that her actions could have contributed to the incident.³⁸
- When discussing the letter she wrote to Ms Harvey, after being contacted by the Student's Parents, Ms Romaldi described her role as to relaying information that had been told to her. Ms Romaldi accepted that her assertion that the incident was in her opinion 'an extreme breach of the duty of care' was more than relaying information.³⁹
- Was unable to satisfactorily explain why she did not contact Ms Kelly after she became aware of the incident to ascertain what had occurred.⁴⁰
- Rejected any suggestion that she was motivated by a desire to be placed in Ms Kelly's teaching position.

Angela Harvey

[29] Ms Harvey provided a witness statement.⁴¹

[30] A significant proportion of Ms Harvey's statement contains information advised to her by other witnesses in this matter. I do not propose to repeat that information. The key parts of Ms Harvey's evidence concern document AH4 and AH5 attached to her statement, the conduct of the investigation, any discussions with Ms Kelly concerning her performance and threats of students or teachers leaving the school and the Board meeting where a decision was made to dismiss Ms Kelly.

[31] Ms Harvey's statement included copies of documents LR3 and LR4⁴² which were contained in Ms Romaldi's statement. Despite the assertions contained in the statement, LR3 and LR4 were not the versions of the documents that were available to Ms Kelly at the handover, and the correct version did not contain a requirement that only parent supplied food was to be provided to the Student.

[32] In examination in chief Ms Harvey advised that the document titled 'Eating Practices 2018'⁴³ was not prepared by Ms Romaldi as had been suggested in her statement, but was prepared by her on request by Mr Fielke after the incident had occurred.⁴⁴

[33] Ms Harvey contended that the letter from the Student's Parents supports the instruction that the student was only to eat food provided by his parents.⁴⁵ Ms Harvey said this instruction was found in the section of the 7 December 2017 where it was stated 'We really appreciate your support by talking to your children reinforcing a few basic habits like don't share your food.'⁴⁶

[34] Ms Harvey contended that her first thought when informed of the incident was for the safety of the child and that she had no concerns about HCCS being in trouble.⁴⁷

[35] Ms Harvey did not contact Ms Kelly to ask what had happened prior to her suspension,⁴⁸ and could not satisfactorily explain why she had not done so.⁴⁹

[36] Ms Harvey said the purpose of the investigation was to find out what happened on the day and whether or not there was a reaction.⁵⁰ Ms Harvey denied that the investigation was focussed on showing Ms Kelly was at fault.⁵¹

[37] Ms Harvey advised that she had not told Ms Kelly she was about to be performance managed, or that she was a poorly performing staff member, or that there was anything that caused her to consider that was the case.⁵² Ms Harvey did not have any performance concerns with Ms Kelly.⁵³

[38] Ms Harvey stated she had not raised with Ms Kelly any issues concerning the potential loss of 10 students, or that other staff were considering their future at the school.⁵⁴

Mike Rogers

[39] Mr Rogers provided a witness statement and his relevant evidence is summarised below.⁵⁵

- Mr Rogers is the Chairman of the HCCS Board. The Principal, Mr Fielke, is responsible to the Board.
- On Thursday 5 April 2018, Mr Fielke informed Mr Rogers about the incident involving Ms Kelly and that he had conducted an investigation with Ms Harvey and, as more time was needed, that it was recommended that Ms Kelly be suspended pending the completion of the investigation.
- The Board members approved the suspension.
- On 10 April 2018, Mr Fielke informed Mr Rogers that it was his and Ms Harvey's belief that Ms Kelly had made a serious breach of the HCCS Code of Conduct and that summary dismissal was an appropriate outcome.
- An Extraordinary Board meeting was convened on 11 April 2018. Mr Fielke outlined the allegation letter of 6 April 2018 and Ms Kelly's response, and detailed the investigation and its findings. The Board voted unanimously to dismiss Ms Kelly due to the seriousness of the breach and the high risk to the Student it created. The Board determined it could not trust Ms Kelly to look after the health and safety of the students.
- The Board requested Mr Fielke advise Ms Kelly of the outcome of the decision in writing.⁵⁶
- The minutes of the Board meeting were attached to his statement.

[40] In cross examination Mr Rogers responded as follows:

- He recalled the tabling of a Summary Document which had been prepared by Mr Fielke.⁵⁷
- Mr Fielke read the document to the meeting.⁵⁸ The document was not discussed at length.
- Mr Rogers contended that the section of the summary document which referred to performance issues, potential loss of students and loss of high performing staff was mentioned but that he focussed on the issue of the duty of care to the child.⁵⁹

Tony Fielke

[41] Mr Fielke provided a witness statement and his relevant evidence is summarised below.⁶⁰

- He is employed by HCCS as Principal with all of the teaching staff reporting to him.
- All employees of the School are bound by the Code of Conduct.⁶¹
- HCCS has an Allergy and Nut Awareness Policy.⁶²

- A student in Ms Kelly's class on 4 April 2018 suffered from a number of allergies and the School had a procedure in place to reduce exposure to the allergens. The procedure required that the Student could only eat food (including treats) supplied by his Parents.
- On 5 April 2018, Ms Harvey advised him that the Student's mother had complained about the Student being given an unsafe chocolate by Ms Kelly.
- Mr Fielke instructed Ms Harvey to investigate the matter.
- Mr Fielke received two emails forwarded by Ms Romaldi.⁶³
- Mr Fielke determined the investigation needed more time and it was decided that Ms Kelly would be suspended. Board approval was obtained.
- Mr Fielke and Ms Harvey met with Ms Kelly at 8.00am on 6 April 2018 and advised her of the allegations of a breach of the Code of Conduct and that she would be suspended pending the completion of the investigation.
- At 5.25pm on 6 April 2018 Mr Fielke emailed Ms Kelly a letter advising of the allegations against her and inviting her to a meeting on 11 April 2018 with a support person if she wished.⁶⁴
- On 10 April 2018 (sic) Mr Fielke met with Ms Kelly and her legal representative. Ms Kelly provided a response to each allegation. Mr Fielke contended that Ms Kelly said that she was aware of the Student's allergy but was unclear on the processes of providing treats to him. Ms Kelly thought it was permissible to provide the student with an alternative treat and that she had checked the ingredients of the treat and found that it was allergen free. Ms Kelly also provided a written response to the allegations.⁶⁵
- Mr Fielke contended this was a clear breach of the requirements that were in place.
- Ms Kelly contended she had not breached the Schools procedures or the Code of Conduct and that her actions did not pose a serious health risk.
- Mr Fielke reported that Ms Kelly had told him Ms Grace had helped hand the treats out to the class. Mr Fielke contacted Ms Grace and was advised that she did not give the treat to the student.
- Mr Fielke was concerned that Ms Kelly had questioned the honesty of four other staff members in her statement and that it would be difficult to reconcile Ms Kelly's relationships with these teachers.
- Mr Fielke informed the Board Chairman, Mr Rogers.
- A Board Meeting was conducted on 11 April 2018 where the allegations letter was presented and discussed. The Board resolved to dismiss Ms Kelly as the

misconduct was so serious that she could not be trusted to look after the health of the students. Mr Fielke provided a copy of the Board Minutes.

- Mr Fielke dismissed Ms Kelly by letter dated 11 April 2018.⁶⁶

[42] During his oral evidence Mr Fielke gave evidence on the potential impact of an order of reinstatement. This is relevantly summarised as follows:

- He did not have any trust in the fact that Ms Kelly could return and be part of the School as Ms Kelly gave an anaphylactic student a chocolate bar.⁶⁷
- Mr Fielke accepted that the written instructions did not require that Ms Kelly only gave the Student treats provided by his parents, but still contended Ms Kelly should not have put anything of that nature in the Student's mouth.⁶⁸
- Mr Fielke had concerns that Ms Kelly may not have been honest or factual during the investigation and was evasive.⁶⁹
- Mr Fielke accepted that the HCCS written instructions did not support the obligation that he suggested was incumbent upon Ms Kelly.⁷⁰
- Mr Fielke suggested Ms Kelly would not follow his instructions – an example given was that Ms Kelly changed the type of pencils used by the students without consultation.⁷¹
- Ms Kelly breached the confidence of the matter by contacting another teacher after she was dismissed, and by instructing her representative to send a letter to each Board member (seeking a review of the decision) which included a person who was no longer a board member.⁷²
- He was concerned that he could have 30 to 40 parents complaining that a teacher who had shown a lack of care had returned to the school.⁷³
- Two staff indicated concerns about teaching with Ms Kelly.⁷⁴

[43] In cross examination Mr Fielke stated:

- He was shocked by the glowing position Ms Kelly gave of her capabilities as an educator.⁷⁵
- Ms Kelly had changed the structures of the class without consultation (e.g. changes to pencils and changes to the classroom setup and returning to a 4 day week).⁷⁶ Mr Fielke did not discuss any concerns about these matters with Ms Kelly.⁷⁷
- When questioned on his statement that 30-40 parents would have a problem with Ms Kelly's reinstatement – he said that the number was not relevant and then said he had just picked a number out, eventually conceded he did not know how many parents might complain and that he had just plucked a number out of the air.⁷⁸

- Mr Fielke never raised any difficulties with Ms Kelly other than the chocolate bar incident.⁷⁹
- Mr Fielke was unable to establish that Ms Kelly's written response accepted that she was unclear of her responsibilities.⁸⁰
- Mr Fielke accepted that Ms Kelly could be returned to non-teaching duties for the balance of 2018 and then be allocated a class in 2019.⁸¹

Consideration

[44] The first issue to be determined is the instructions that were given to Ms Kelly about foods that could be given to the student. The evidence in relation to LR3 confirms that no reference to the Student only being allowed food that was supplied by his parents was present prior to the incident. LR4 was not prepared until after the incident. The only reference to a written instruction was Ms Romaldi's written comment on the latter dated 7 December written by the Students' Parents. Ms Kelly disputes the comments were on the copy of that document shown to her, and she was already in possession of an uncommented version of that letter. In any event the handwritten comments did not expressly prohibit the provision of non-Parent supplied food to the Student.

[45] The only other evidence in support of the requirement to not provide food to the Student other than that supplied by his Parents was from the verbal component of the handover.

[46] This matter can only be resolved by an assessment of the credit of the evidence of Ms Kelly versus Ms Romaldi.

[47] A significant amount of Ms Kelly's cross examination relied on her recollection of the event without reference to her statements.⁸² There were a few occasions where Ms Kelly did not directly answer a question, or sought to answer a question before it was finished. Ms Kelly had a sound recollection of the events which correlated with her prior statements. Ms Kelly's recollection of the handover meeting on 15 March 2018 was definite, detailed⁸³ and unshaken by cross examination. Ms Kelly consistently denied being told by Ms Romaldi that only treats provided by the Student's Parents could be given to the Student. Ms Kelly disputed the use of the green folder by Ms Romaldi⁸⁴ and her recollection was supported by the photograph of the handover which showed a red folder which contained a document relevant to the discussion (R1 or R1A). Ms Kelly made concessions where appropriate.⁸⁵ Ms Kelly was an impressive witness.

[48] Ms Romaldi's recollection of the manner in which the handover occurred is inconsistent with the photograph⁸⁶ which recorded the event. The green folder is not present in the photograph but the red folder referred to by Ms Kelly is.

[49] Ms Romaldi did not accept that the document in the top plastic sleeve of the red folder in the photograph was Exhibit R1 (highlighted) or Exhibit R1A (not highlighted). Ms Romaldi was definite about her response. Whilst it was conceded in final submissions by HCCS that the document was Exhibit R1, and Mr Hassall sought to explain that by the fact that Ms Romaldi did not have access to a digital copy of the photo where she could zoom in and was unable to identify the document.⁸⁷

[50] Ms Romaldi contended that when the Exhibit R1 was put together sections were highlighted in yellow. It was agreed by Ms Romaldi that another document in the photograph taken at the handover⁸⁸ contained yellow highlighting, but that the document contained in the plastic sleeve uppermost in the green folder did not contain yellow highlighting. Ms Romaldi was unable to explain how two different copies of the same document existed or that why the document she said was used at handover did not appear to be present in the photograph.⁸⁹

[51] It is not in dispute that Exhibit R1 did not contain any instruction restricting food to be given to the Student, or that food only be supplied that is provided by his parents. Considering the seriousness of the allergy I am surprised as to why such an important piece of information was omitted, and it tends towards a conclusion that the requirement was not in place and /or not discussed.⁹⁰

[52] It does not appear to me that Ms Romaldi's letter to Ms Harvey after the incident was that of an objective observer simply relaying what information they had. Ms Romaldi appears to have become an advocate for action to be taken against Ms Kelly. There is insufficient evidence before me to conclude that Ms Romaldi's actions were motivated to secure Ms Kelly's ongoing teaching position, but it appears that Ms Romaldi's approach may not have been entirely objective.

[53] Having considered the manner in which these two witnesses gave their evidence, statements and testimony and the evidentiary inconsistencies, I prefer the account of the handover meeting given by Ms Kelly.

[54] I do not accept that the handwritten notation on the 7 December 2017 communication by the Students' Parents was shown to Ms Kelly.

[55] I find that Ms Kelly was not instructed in writing or verbally that the Student could only be given food provided by his Parents.

[56] I find that the instruction given was consistent with the written material, that is – the Student could be given food that was not supplied by his parents provided that the ingredients were checked.

[57] I find that Ms Kelly acted in accordance with that requirement.

[58] The majority of the evidence in respect of the conduct of the HCCS investigation came from Ms Harvey. It appears to me that HCCS determined that Ms Kelly's conduct was the target of the investigation without considering the potential of any contribution by Ms Romaldi. A review of the detail of the handover and the documents relied upon may have changed the course of this matter.

[59] Other than that oversight the investigation appears to have been conducted appropriately.

[60] The final issue is the conduct of the Board meeting which sanctioned Ms Kelly's dismissal and the information which was relied upon. The investigation summary document,⁹¹ prepared by and referred to in the meeting by Mr Fielke, contained a number of allegations that were not put to Ms Kelly for response or identified as reasons for the dismissal. These

matters included performance issues, a potential loss of 10 students and the retention of high performing staff.

[61] Mr Rogers gave evidence that the summary document was read to the meeting, and that it was not discussed at length, and gave his view that the gravity of the situation was such that the additional matters had no bearing on the dismissal decision.⁹²

[62] Mr Fielke gave evidence that his mind was made up prior to the meeting that Ms Kelly should be dismissed. That view is not surprising given that he authored the memo which recommended Ms Kelly's dismissal.

[63] There is no evidence before me as to how this information impacted the other Board Member's decisions.

Was the dismissal harsh, unjust or unreasonable?

[64] Pursuant to s.387 of the Act, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- “(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.”

Valid reason - s.387(a)

[65] Notwithstanding its formulation under a different legislative environment, I have adopted the definition of a valid reason set out by Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*⁹³ which requires the reason for termination to be ‘sound, defensible or well founded.’

[66] I have found that Ms Kelly acted in accordance with the procedures and instructions she was given.

[67] HCCS's contentions of a breach of duty of care or the code of conduct rely on Ms Kelly breaching HCCS procedure and/or instruction in relation to the Student. Ms Kelly did not breach the procedure and/or instructions I have found to have been given. Accordingly, there can be no breach of Ms Kelly's duty of care or the code of conduct. Ms Kelly was simply doing as she had been instructed.

[68] I find that there was no valid reason for the dismissal.

Notification of valid reason - s.387(b)

[69] Ms Kelly was advised of the reasons for her dismissal (which related to the incident which occurred on 4 April 2018) by letter on 11 April 2018. Ms Kelly was not advised of any other matters which contributed to her dismissal, including those detailed on the investigation summary document or the minutes of the Board Meeting.

[70] It appears to me from the evidence of Mr Rogers that the Board in reaching its decision relied primarily on the incident. Had the Board relied on the other matters it would have resulted in a breach of procedural fairness.

Opportunity to respond - s.387(c)

[71] Ms Kelly had an opportunity to respond to the reason for dismissal as it related to her conduct on 4 April 2018.

Any unreasonable refusal by the employer to allow Ms Kelly have a support person present to assist at any discussions relating to dismissal - s.387(d)

[72] Ms Kelly had a support person and/or representative during the disciplinary process.

Warnings relative to unsatisfactory performance - s.387(e)

[73] There were no formal warnings. There is evidence of a discussion between Ms Kelly and the previous Principal over a letter of complaint from parents, but I do not accept this resulted in a warning regarding unsatisfactory performance.

Size of the employer's enterprise and absence of dedicated human resources support - ss.387(g) and (f)

[74] HCCS is a medium sized employer with no dedicated HR support. It did however access the services and seek the advice of an employer organisation during the disciplinary process.

Other matters considered relevant - s.387(h)

[75] I have considered the circumstances of the school including the considerable duty of care incumbent upon HCCS and its staff and the close school 'community.' I have also

considered the impact of the dismissal on Ms Kelly, the loss of her calling, the financial impact and the impact on the access to the school ‘community’.

Conclusion

[76] The Explanatory Memorandum to the Act⁹⁴ explains the approach of the Commission in considering the elements of section 387:

“FWA must consider all of the above factors in totality. It is intended that FWA will weigh up all the factors in coming to a decision about whether a dismissal was harsh, unjust or unreasonable and no factor alone will necessarily be determinative.”

[77] In *Byrne and Frew v Australian Airlines Pty Ltd*,⁹⁵ the following observations made by McHugh and Gummow JJ are relevant to my conclusion:

“It may be that the termination is harsh but not unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.”

[78] Having considered each of the factors detailed in s.387 of the Act, I have concluded that the termination of Ms Kelly’s employment was harsh, unjust and unreasonable.

Remedy

[79] The relevant provisions of Division 4 of Part 3-2 of the Act state:

“Division 4—Remedies for unfair dismissal

390 When the FWC may order remedy for unfair dismissal

- (1) Subject to subsection (3), the FWC may order a person’s reinstatement, or the payment of compensation to a person, if:
 - (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
 - (b) the person has been unfairly dismissed (see Division 3).
- (2) the FWC may make the order only if the person has made an application under section 394.
- (3) the FWC must not order the payment of compensation to the person unless:

- (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
- (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies.

... ..

391 Remedy—reinstatement etc.

Reinstatement

- (1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:
 - (a) reappointing the person to the position in which the person was employed immediately before the dismissal; or
 - (b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

- (a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and
- (b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:

- (c) appoint the person to the position in which the person was employed immediately before the dismissal; or
- (d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

- (2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:
 - (a) the continuity of the person's employment;

- (b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

- (3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.
- (4) In determining an amount for the purposes of an order under subsection (3), FWC must take into account:
- (a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and
- (b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

[80] The prerequisites contained in ss.390(1) and (2) of the Act have been met in this case.

[81] Ms Kelly seeks reinstatement. In her evidence Ms Kelly appropriately conceded that there would be some difficulties to overcome but she believed that reinstatement would be successful and was motivated to do whatever was necessary to rise above these events.

[82] HCCS submitted that reinstatement was not feasible or appropriate due to the loss of trust and confidence in Ms Kelly's ability to perform in a high risk environment involving the supervision of children and referred me to the decision of *Perkins and Grace Worldwide (Aust) Pty Ltd*⁹⁶, *Thinh Nguyen and another v Vietnamese Community in Australia T/A Vietnamese Community Ethnic School South Australian Chapter*⁹⁷, *Shahin Tavassoli v Bupa Aged Care*⁹⁸ and *Wilson v Anglo Coal*⁹⁹.

[83] In *Thinh Nguyen and another v Vietnamese Community in Australia T/A Vietnamese Community Ethnic School South Australian Chapter*¹⁰⁰ the Full Bench summarised the principles relevant to this consideration as follows:

“[27] The following propositions concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate may be distilled from the decided cases:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on

the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.

- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.
- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.

[28] Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party."

[84] I have applied those principles in my consideration of this matter.

[85] Mr Fielke questions Ms Kelly's honesty during the investigation and in her responses. There is nothing before me which suggests Ms Kelly was dishonest. The fact that Ms Kelly had a different recollection as to the facts or disputed the account given by Ms Romaldi does not suggest she was dishonest.

[86] Ms Kelly initially contended she had not received a copy of the code of conduct. She subsequently accepted that she had received the code of conduct during the hearing. I do not accept her failure to recall an event some time earlier was an act of dishonesty.

[87] There is no evidence that Ms Kelly was evasive during the investigation.

[88] Mr Fielke suggests he could not trust Ms Kelly to come back to the school. He was unable to put a sound argument to support this view.

[89] There is no evidence before me which suggests Ms Kelly stated that she was unclear about the procedures in place.

[90] I have found that Ms Kelly's conduct in respect of the Student was in accordance with the written procedures and instructions given by HCCS and its staff. There is no creditable evidence which would allow a conclusion that Ms Kelly breached the code of conduct or her duty of care.

[91] I am required to carefully scrutinise a claim that reinstatement is inappropriate due to a loss of trust and confidence. In cross-examination Mr Fielke admitted that there was no basis for his statement in evidence in chief that 30-40 parents might complain if Ms Kelly returned

to work at the School. This conduct reflects poorly on Mr Fielke and it is appropriate that I treat his uncorroborated evidence about the impact of Ms Kelly's reinstatement with caution.

[92] In cross-examination Mr Fielke accepted that a proposal put on behalf of Ms Kelly that she would perform non-teaching duties for the balance of 2018 and step back into teaching with a new class in 2019 was an option.¹⁰¹ This indicates to me there is at least one basis upon which reinstatement could succeed.

[93] Section 390 of the Act makes it clear that compensation is only to be awarded as a remedy where the Commission is satisfied that reinstatement is inappropriate and that compensation is appropriate in all the circumstances.

[94] Each case must be reviewed on its merits. I have considered my findings as to the facts in this matter and in particular my findings in relation to the basis upon which HCCS reached a conclusion that reinstatement was not appropriate. I am unable to accept that the basis for HCCS's position that reinstatement is not appropriate is not soundly and/or rationally based.

[95] I find that reinstatement to Ms Kelly's pre-dismissal position with effect from 23 July 2018 with continuity of employment and service is an appropriate remedy and so determine.

[96] I find that pursuant to s.391(3), and considering the matters detailed in s.391(4), it is appropriate to order that HCCS pay Ms Kelly the earnings that she would have otherwise received between the date of dismissal and 23 July 2018. This amount represents remuneration lost because of the dismissal.

[97] Taxation is to be paid on the amount determined.

[98] An Order¹⁰² reflecting this decision has already been issued.



COMMISSIONER

Appearances:

Ms Abbey of counsel, with permission for the Applicant.

Mr Hassall of counsel, with permission for the Respondent.

Hearing details:

2018.

Adelaide.

June 28, 29

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¹ PR608597.

² Exhibit A1.

³ Exhibit A2.

⁴ Exhibit A3.

⁵ Exhibit R7.

⁶ Exhibit R6.

⁷ Exhibit R5.

⁸ Exhibit R3.

⁹ Exhibit R4.

¹⁰ Exhibit A1, CK3.

¹¹ Exhibit A1, CK4.

¹² Exhibit A1.

¹³ Exhibit A5 and A5A respectively.

¹⁴ A copy of the email is contained in Exhibit R7, TF4.

¹⁵ Exhibit R1, CK11.

¹⁶ Exhibit RA1 – CK12.

¹⁷ Exhibit A1- CK13.

¹⁸ Exhibit R1.

¹⁹ Exhibit A1, CK15.

²⁰ Exhibit A5 and A5A (digital version).

²¹ PN346-357.

²² PN373-378.

²³ Exhibit R2.

²⁴ PN371.

²⁵ PN382-390.

²⁶ PN444-456.

²⁷ Exhibit R3 with attachments.

²⁸ Exhibit R4 with attachments.

²⁹ Exhibit A7.

³⁰ PN621-646.

³¹ Exhibit R3, LR1 which is the same as Exhibit A1-CK-4.

³² Exhibit R3, LR2.

³³ Exhibit R3, LR5.

³⁴ Exhibit R3, LR9.

³⁵ PN735.

³⁶ PN757.

³⁷ PN794-804.

³⁸ PN753.

³⁹ PN829-840.

⁴⁰ PN842.

⁴¹ Exhibit R5 with attachments.

⁴² Referenced as Exhibit R5, AH4 and AH5.

⁴³ Exhibit R5, AH5 also in Exhibit R3 as LR4.

⁴⁴ PN1344.

⁴⁵ PN1368.

⁴⁶ PN1380.

⁴⁷ PN1455-1463. PN1476-1481.

⁴⁸ PN1486-1502.

⁴⁹ PN1588.

⁵⁰ PN1595.

⁵¹ PN1596.

⁵² PN1655-1658.

⁵³ PN1661.

⁵⁴ PN1659-1660.

⁵⁵ Exhibit R6 with attachments.

⁵⁶ Exhibit R6, MR3.

⁵⁷ PN1730.

⁵⁸ PN1731.

⁵⁹ PN1733-1738.

⁶⁰ Exhibit R7 with attachments.

⁶¹ Attachment TF1 to Exhibit R7.

⁶² Exhibit R7, TF3.

⁶³ Exhibit R7, TF4 and TF5.

⁶⁴ Exhibit R7, TF6.

⁶⁵ Exhibit R7, TF7.

⁶⁶ Exhibit R7, TF9.

⁶⁷ PN1766.

⁶⁸ PN1770-1775.

⁶⁹ PN1783-1784.

⁷⁰ PN1780.

⁷¹ PN1794.

⁷² PN1794-1801.

⁷³ PN1802.

⁷⁴ PN1807.

⁷⁵ PN1822.

⁷⁶ PN1901-1906.

⁷⁷ PN1910-1911.

⁷⁸ PN1918-1929.

⁷⁹ PN1934-1937.

⁸⁰ PN2180-2193.

⁸¹ PN2250-2254.

⁸² PN180.

⁸³ E.g. PN243-245.

⁸⁴ PN371.

⁸⁵ E.g. PN190, PN395.

⁸⁶ Exhibit A5 and A5A.

⁸⁷ PN2342.

⁸⁸ Exhibit R5.

⁸⁹ PN1102-1117, PN1148-1155.

⁹⁰ PN1171-1181.

⁹¹ Exhibit A4.

⁹² PN1731-1733.

⁹³ (1995) 62 IR 371 at 373.

⁹⁴ *Explanatory Memorandum to the Fair Work Bill 2008*.

⁹⁵ *Byrne and Frew v Australian Airlines Pty Ltd* [1995] HCA 24.

⁹⁶ (1997) 72 IR 186.

⁹⁷ [2014] FWCFB 7198.

⁹⁸ [2017] FWC 3200.

⁹⁹ [2017] FWC 4386.

¹⁰⁰ [2014] FWCFB 7198.

¹⁰¹ PN2250-2255.

¹⁰² PR608597.