



DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Trustees for the Roman Catholic Church, Archdiocese of Canberra and Goulburn

v

Michael Crowley
(C2019/4374)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT BOOTH
COMMISSIONER CAMBRIDGE

SYDNEY, 24 DECEMBER 2019

Appeal against decision [2019] FWC 4643 of Deputy President Dean at Sydney on 10 July 2019 in matter number U2018/7289.

[1] Pursuant to s 604 of the *Fair Work Act 2009* (FW Act), the Trustees for the Roman Catholic Church, Archdiocese of Canberra and Goulburn (Archdiocese) have lodged an appeal, for which permission to appeal is required, against a decision issued by Deputy President Dean on 10 July 2019¹ (decision). The decision concerned an application made by Michael Crowley for an unfair dismissal remedy in respect of his dismissal from his employment as a teacher at Lumen Christi Catholic College in Pambula (College), a school operated by the Archdiocese, effective from 25 June 2018. The Deputy President determined that Mr Crowley's dismissal was unfair and ordered his reinstatement to his former position, the maintenance of his continuity of employment and period of continuous service, and that he be paid the amount of remuneration lost from the date of the dismissal to 31 January 2019. The Archdiocese contends that the decision was attended by appealable error in a number of respects, and seeks that the decision be quashed and Mr Crowley's application for an unfair dismissal remedy be dismissed.

[2] The factual background may be summarised as follows. Mr Crowley has been a teacher since 1991. He commenced employment at the College as a Personal Development, Health and Physical Education (PDHPE) teacher in February 2002. At all relevant times prior to his dismissal, his employment was subject to the *NSW and ACT 2015 Catholic Systemic Schools Enterprise Agreement 2015* (Agreement) and *Catholic Education's Guidelines for Professional Conduct in the Protection of Students and Young People* (Guidelines). As part of his duties, he had since 2004 taught a Year 9 elective course known as "*Physical Activity and Sports Studies*" (PASS). This course included, in Term 1, surf lifesaving and, in Term 4, kayaking. The kayaking element of the course included practical (i.e. on-water) classes. Relevant to the conduct of these classes, Mr Crowley had successfully completed a course

¹ [2019] FWC 4643

offered by Canoeing Australia, was a member of the Tathra Surf Lifesaving Club, and held a Bronze Medallion and undertook annual proficiency tests in surf lifesaving. Prior to the incident occurring at a practical kayaking class on 17 November 2017 which led to Mr Crowley's dismissal, he had taught kayaking at the College for 12 years without incident or complaint.

[3] The students making up the Year 9 PASS class who participated in the kayaking lessons in Term 4 2017 had already undertaken the Term 1 lifesaving activities and had passed the test for the Surf Rescue Certificate. The first practical kayaking lesson in Term 4 2017 was conducted in the surf at Pambula Beach on 9 November 2017 in wet weather, and during this lesson the students were instructed in how to fit their buoyancy vests and helmets. The second practical lesson was that which occurred on 17 November 2017, and involved a total of 13 students. Mr Crowley was assisted in his conduct of the class (as he had the previous week) by Hamish Wenczel, a former student of the College and an AFL Sports Ready Trainee who was working at the College. Initially it was Mr Crowley's intention to conduct the lesson at Pambula Beach again, but he assessed the surf conditions as being unsuitable. Accordingly, the lesson was conducted in the Pambula River some distance from where it crosses the bar at the southern end of Pambula Beach. The students were fitted with buoyancy suits and helmets.

[4] The students and Mr Wenczel were paired in seven two-person kayaks, and Mr Crowley had his own kayak. Mr Crowley initially instructed the class to cross the river from the northern to the southern bank, and this was undertaken without difficulty. Mr Crowley then attempted to lead the class on the return leg to the northern bank. However a number of the students' kayaks departed from the direction in which Mr Crowley intended to lead them and ended up in waves breaking at the mouth of the river. A number of the kayaks got into difficulties and capsized, and Mr Crowley himself capsized when he turned and went to their assistance. A member of the public called emergency services, but ultimately Mr Crowley, Mr Wenczel and the students were able to return to shore in their kayaks or by swimming without outside assistance. One student went to hospital, but was sent home after being examined.

[5] Not surprisingly, the incident was the subject of a degree of publicity and parental concern. The Archdiocese arranged for an investigation into the incident, and arising from that investigation a formal allegation of misconduct was made against Mr Crowley to the effect that "...on 17 October 2017 [sic], you did not act in a professional manner or meet your duty of care requirements in regards to your activities with your Year 9 Activity and Sports Studies class at the mouth of the Pambula River". This allegation was supported by seven "*particulars*" of such misconduct. The allegation and the particulars were communicated to Mr Crowley in a letter dated 11 December 2017. There was then an external review of the incident, which resulted in a report finding that all seven of the particulars were sustained. Mr Crowley was given an opportunity to respond in writing to the findings. After consideration of his response, the Archdiocese sent a "*Final Findings Letter*" dated 24 May 2018 and signed by Ms Stacey Ozanne, Head of Human Resources at the Catholic Education Office, which identified those particulars of the allegation of misconduct which were found by the Archdiocese to have been sustained, and the reasons for that conclusion, as well as those which were not sustained. The four particulars which were sustained, and the reasons given as to why they were sustained, were as follows:

1. Conducted the activity at a time of deteriorating weather conditions, tidal run-out and high sea swell without an adequate risk assessment or appropriate consideration for the safety of the students

Reason for finding:

I accept the findings in the Investigation Report that:

- a. Prior to the activity occurring, the weather conditions had been a mix of thunder and rain with the rain being a combination of a light to heavy down pour.
- b. At some point during the morning, there was lightning. However, it is not clear at what time this was.
- c. On arrival at the location the conditions were overcast with light rain.
- d. The weather conditions deteriorated from the time of arrival and whilst the students undertook the activity.
- e. The swells were up to 1.8 metres with an outward flowing fast tide from where the students were to be engaged in their activity out to sea.
- f. The conditions where the students were to be engaged in their activity of kayaking were dangerous, with a foreseeable risk that students could find themselves swept out to sea.
- g. The risk assessment process you undertook on this day did not adequately account for the conditions and risks posed for yourself and students in entering the water.
- h. It was reasonable for you, based on your experience, to have identified the risks associated with entering the water, including a potential risk of kayaks subsiding, students being swept out to sea, and potentially drowning and that you should have adjusted your actions accordingly, including by not allowing students to enter the water.

I therefore find that you did conduct the activity at a time of deteriorating weather, tidal run-out and high sea swell without an adequate risk assessment being conducted by yourself in the field at the time or appropriate consideration for the safety of the students.

2. Failed to conduct sufficient safety pre-checks of helmets and buoyancy vests for students, yourself or your assistant

Reason for finding:

I accept the findings in the Investigation Report that:

- a) You failed to provide an adequate safety briefing given the nature of the conditions on the day.
- b) You failed to sufficiently conduct a pre-activity safety check for all students who participated in the activity, for yourself and your assistant.

Based on the conditions on the day at the location, your failure to provide an adequate safety briefing resulted in students going into the water inadequately briefed and underprepared to deal with the dangerous conditions that they were entering into. Your failure to provide an adequate briefing to the students prior to the activity being conducted meant that there was confusion when the students entered the water in their kayaks as they were not clear on:

- a) how they were to conduct the activity;
- b) where (if anywhere) it was safe to kayak;
- c) what areas they should avoid; and
- d) what to do if they found themselves having trouble in the water.

This failure was particularly marked in the context of some students having inadequate life-saving safety equipment that would have been noticed by you had adequate pre-activity safety checks been undertaken.

A combination of these two factors, and the conditions on the day, placed students at a foreseeable risk of capsizing, being swept out to sea and/or drowning if they fell into the water.

I therefore find that you did fail to conduct a sufficient pre-activity safety check of helmets and buoyancy vests for students, yourself or your assistant and this placed the students at risk of drowning when entering the water on their kayaks.

3. Recklessly led the students into a wave and current area at the mouth of the river that was dangerous, leading to several students, as well as yourself, capsizing and having to be assisted by other students, police, ambulance and a Lifeguard. One student subsequently required treated for hypothermia

Reason for finding:

I accept the findings in the Investigation Report that:

- a) Your actions (before and during the activity) including failing to brief the students clearly on how the activity was to be conducted and what to do should any dangerous situations arise resulted in you recklessly leading students into a wave zone where multiple students were tipped from their kayaks.
- b) Your failure to ensure student safety equipment was adequately fitted created a risk for the students of drowning. The fact the students did not drown when they capsized their kayaks does not mitigate the risks you exposed the

students to, but merely means that the equipment performed as it was intended to, despite the equipment being inadequate.

The failure to provide an adequate briefing meant that some students followed you into the wave area when they should not have, which placed them at an increased risk of capsizing their kayaks, and potentially drowning, given the weather conditions.

This risk was partially realised when several students did, in fact, capsize their kayaks and enter the water, ultimately requiring rescuing to prevent them from drowning. I am satisfied that the risk was sufficiently apparent to those on the beach that given the weather and sea conditions, the students in the water were at such a serious risk of drowning or being swept out to sea that they deemed it necessary to contact emergency services personnel who were dispatched the beach to render assistance.

I am satisfied that had the students in the water been adequately briefed they would not have entered the wave and current area, and your failure to brief them, and your actions in entering the area yourself, placed those students who followed you into the area at a substantially increased risk of drowning that they would not have otherwise have been exposed to.

Given the weather and sea conditions, the special position of trust you are placed in when taking students on these types of field trips and your extensive experience as a physical education teacher, you are expected to have a high level of awareness regarding student safety. In these circumstances it is incumbent on you to mitigate foreseeable risks for students in your care.

It is not unreasonable to expect that you should have taken appropriate action to mitigate the risks in light of the adverse weather conditions on the day by:

- a. not allowing the students to enter the water; or
- b. by providing an adequate safety briefing and properly ensuring that the relevant pre-activity safety checks had been undertaken.

I find that your failure to mitigate the risks in light of the adverse weather conditions was reckless and/or negligent in the circumstances.

I therefore find that you recklessly led the students into a wave and current area at the mouth of the river that was dangerous, which resulted in several students, as well as yourself, capsizing their kayaks and having to be assisted by other students, police, ambulance and a Lifeguard from the water.”

4. Failing to follow appropriate CE Policies and Procedures.

Reason for finding:

The investigation report identified the various Policies which as a teacher taking students on a field trip you were obliged to follow. This includes the CE Sport and Physical Safety Policy and the CE Excursion Policy.

I find, that based on the investigation and the review, your failure to:

- a) provide an adequate safety briefing;
- b) complete the pre-activity safety checks; and
- c) leading students into dangerous water

constitute breaches of the requirements set out in the CE Sport and Physical Policy and the CE Excursion Policy.”

[6] It may be noted that, to a very large extent, the reasons given for sustaining particulars 1-3 bear little or no relationship to the actual allegations stated in the particulars. Particular 4 appears simply to relate particulars 1-3 to various policies of the Archdiocese rather than raising a separate substantive allegation.

[7] The “*Final Findings Letter*” went on to advise:

“I find that the evidence identified in the investigation identified that you did not through your actions comply with the relevant provisions of the Enterprise Agreement and, in particular, section 9 of the Guidelines and:

- a) Failed to meet your duty of care obligations to the students to maintain their safety when conducting this activity by failing to take action to properly assess and mitigate the risks you were exposing the students to, including the risk of drowning, given the sea and weather conditions;
- b) Did not demonstrate the highest standard of professional behaviour and exercise appropriate professional judgement by the way you conduct these activities, in particular by allowing students to enter the water at all, or alternatively, by allowing them to enter the water without an adequate briefing or before adequate pre-activity safety checks had been conducted;
- c) Did not adhere with the official guidelines in conducting this activity; and
- d) Did not by your actions and how the activity was conducted conduct yourself in such a manner as to protect and enhance the esteem and standing of Catholic Education.”

[8] The above passage appears to be a recapitulation or reframing of the findings concerning particulars 1-4 rather than the statement of new substantive reasons for dismissal. The letter went on to say that the Archdiocese had decided to terminate Mr Crowley’s employment at the College, but gave him the opportunity to propose for its consideration other positions in Catholic Education which he was able and suitably qualified to perform. Mr Crowley was initially unable to engage with this offer because of medical incapacity and a number of difficult personal and family circumstances, and when he asked for a meeting to discuss alternative positions this was refused. On 22 June 2018 the Archdiocese sent a letter to Mr Crowley informing him that his employment would be terminated on the basis of serious misconduct effective from 25 June 2018.

The Decision

[9] In the Decision, the Deputy President after recounting the background to the matter dealt with the evidence bearing upon the four particulars of the allegation of misconduct which were found by the Archdiocese to be sustained and formed the basis of his dismissal. At the outset of her consideration, the Deputy President made some general findings about the evidence given by 12 of the students (who were 14-15 years old) who participated in the kayaking class on 17 November 2017. The Deputy President took into account that the incident on the day in question could reasonably be described as chaotic and frightening for most of those involved, that the students gave evidence a year after the incident took place, and that for them giving evidence could be a daunting and intimidating experience.² However the Deputy President went on to accept a submission made by counsel for Mr Crowley that, when the students were interviewed during the investigation of the incident, they were “heavily led” and when answers were given which either supported Mr Crowley’s position or were inconsistent with the line of the investigator’s leading questions, the questioning was “shut down or steer[ed]... off in a different direction”, which explained why some of the students gave evidence at the hearing which was quite different to what was before the Archdiocese.” The Deputy President stated that, in light of this, there were inconsistencies in the evidence of the students including between what they told the investigation and the answers they gave in cross-examination, and their recollection of the incident was, at least in part, “vague and unclear”.³

[10] The Deputy President then proceeded to summarise the evidence given by the witnesses as it pertained to each of the particulars of the allegation of misconduct. This consisted of the evidence of Mr Crowley, Mr Wenzel and 12 of the students (given pseudonyms of Student A-L) who were directly involved in the incident; Ms Joy Aitken, a local resident who observed part of the incident and called emergency services; Mr Matthew Evans, a PDHPE teacher at the College and head of the department; Mr Steven Centra, the Principal of the College; and Ms Ozanne, who led the conduct of the disciplinary process against Mr Crowley and who was the effective decision-maker in respect of his dismissal.⁴

[11] After summarising the submissions and finding (uncontroversially) that Mr Crowley was a person protected from unfair dismissal, had been dismissed, and that the Small Business Fair Dismissal Code and genuine redundancy were not applicable to his dismissal, the Deputy President considered whether the dismissal was harsh, unjust or unreasonable. In doing so, the Deputy President took into account and made findings about each of the matters requiring consideration under s 387 of the FW Act. In relation to s 387(a), the Deputy President after setting out the relevant legal principles (in an, again, uncontroversial way) first stated that she was not satisfied that the Archdiocese had established misconduct on the part of Mr Crowley or that there was a valid reason for Mr Crowley’s dismissal. Before giving her reasons as to why each particular did not amount to a valid reason, the Deputy President critically said (footnote omitted):

“[516] Perhaps unsurprisingly given the chaos that ensued, it is difficult to determine exactly what occurred from the time the first kayak overturned. In fact, it is in part unnecessary to do so given the nature of the particulars that were found to be

² Ibid at [39]

³ Ibid at [40]-[41]

⁴ Ibid at [45]-[416]

sustained in relation to the Allegation. In essence, the particulars relate to Mr Crowley's judgement in conducting the activity in the first place, the adequacy or otherwise of the risk assessment and his consideration (or lack thereof) for the safety of the students, the sufficiency of the safety pre-checks, and whether he recklessly led the students into a dangerous wave and current area at the mouth of the River. Finally, did he follow the various policies that a teacher taking students on a field trip was obliged to follow, including the CE Sport and Physical Safety Policy, and the CE Excursion Policy.

[517] There was an acceptance by the counsel for the Archdiocese that the recollection of the students of the Incident was 'mixed'. I have already expressed a concern as to the leading nature of the questions initially asked of the students by the investigator, and which helped inform the decision of the Archdiocese to dismiss Mr Crowley. Given the issues already noted about the veracity of the students' evidence, I prefer the evidence of Mr Crowley and Mr Wenczel to the extent there is any inconsistency with the evidence of the students."

[12] In relation to Particulars 1 and 2, the Deputy President found:

- Mr Crowley gave proper consideration as to whether the activity could be done in light of the weather conditions, and his assessment that it was safe was not unreasonable in the circumstances at the time it was made;
- he checked the weather forecast shortly before going to the River and by assessing weather conditions when he arrived at the River;
- his assessment was also reasonably informed by his extensive experience in water activities and his knowledge of the students' abilities acquired over the course of the year;
- he took into account the risk of lightning, and this informed his decision as to the location of the activity in that he considered he could get the students out of the water if necessary;
- a storm did arrive while the students were in the water, but it arrived after the class ought to have concluded;
- there was nothing otherwise to indicate that the weather was deteriorating at the time the class arrived at the River or that the River was dangerous;
- the "*high swell*" referred to in Particular 1 was on the other side of the sand bar at least 150 metres from where the activity was to be conducted, and there was no evidence to support a finding that kayaking in an outgoing tide was inherently unsafe;
- a current was required for the "*ferry gliding*" activity that was being taught that day, and it was therefore reasonable for Mr Crowley to look for such a current consistent with a standard part of the course which had been taught by the College for many years without incident;

- Ms Aitken’s evidence as to the weather did not assist an assessment of Mr Crowley’s conduct, given that there was no real dispute as to the overcast conditions at the time the activity commenced nor that a storm arrived while the students were still in the water;
- the students were wearing appropriate safety equipment, and the instruction given by Mr Crowley to ensure that life jackets and helmets were secure, the physical checks undertaken by Mr Crowley and Mr Wenczel, and the instruction to use the buddy check system were adequate;
- Mr Crowley had used the risk assessment process that was in place at the College at the time of the incident and applied it with an appropriate level of diligence, and had additionally developed his own safety checklist which had been provided to students prior to the incident; and
- Mr Crowley was aware of the students’ capability in the water and took it into account in his decision-making process.⁵

[13] The Deputy President completed her consideration of Particulars 1 and 2 by concluding: “Overall, I am satisfied that Mr Crowley’s assessment of the risks was adequate and he had appropriate consideration for the safety of the students in his care”.⁶

[14] In relation to Particular 3, the Deputy President relevantly found:

“[535] The evidence does not support a finding that Mr Crowley recklessly led students into a wave or current area that was dangerous.

[536] There was no difficulty encountered by any student when travelling from the northern to the southern shore.

[537] Those students who did follow Mr Crowley’s instruction to ‘follow me’ and stay on his line did not encounter any difficulty while kayaking.

[538] It was the students who did not follow the instruction and instead decided to ‘catch some waves’ that subsequently got into difficulty.

[539] I am satisfied Mr Crowley reached the northern shore (from the southern shore) without entering the wave area. He stopped in shallow water approximately 5-8 meters from the shore line and was not in a current.

[540] Before Mr Crowley left the northern shore to render assistance to those who had deviated off his line and into the wave zone, Mr Wenczel heard Mr Crowley say words to the effect of ‘everyone go to shore’. Given Mr Wenczel was at the rear of the group and heard the instruction to go to shore, it is reasonable to infer that those students who had followed Mr Crowley and had arrived at the northern shore also heard this instruction. Some of these students subsequently decided to assist their classmates who were in the wave area. While their decision to do this was no doubt made with the best

⁵ Ibid at [519]-[533]

⁶ Ibid at [534]

of intentions, it remains that they disregarded an instruction from Mr Crowley to go to the shore. It is understandable in the chaos that unfolded that some students may have felt it was more important to assist their classmates, however the fact remains that Mr Crowley issued an instruction that was not followed.

[541] At least six students gave evidence that they were aware of the swell and wave conditions and indicated concern about the conditions for kayaking. In doing so, they showed an awareness and knowledge of the risk of venturing into the wave area. Despite this, some of the students who expressed these concerns were those who deviated into the wave area.

[542] Seven students recalled Mr Crowley saying words to the effect that ‘we are not going in the wave zone’. Another student who did not recall these words, did say that ‘the boys knew not to go into the waves because it was common sense not to paddle out into the bigger waves’.

[543] I am satisfied on the evidence that the students were clear as to the instruction to follow Mr Crowley. I am also satisfied that some of the students deliberately disregarded the instruction and decided instead to ‘catch some waves’. Given the evidence of the majority of the students as to their concerns around the weather and the size of the swell in the vicinity of where the River meets the open ocean, it is difficult to see why any student would have thought it a sensible idea to disregard the instruction. I am satisfied on the evidence that had they followed Mr Crowley, the events that unfolded would not have occurred.

[544] That Mr Crowley had his back to the group when travelling from the southern to the northern shore was reasonable in the circumstances, those being that he had a second supervisor (Mr Wenczel) with him who was endorsed by the College and who was maintaining a position at the rear of the group. I do not accept that this amounted to Mr Crowley failing to be vigilant and not providing constant supervision.

[545] I do not accept the argument that ‘students push boundaries’ as being one which supports a finding of misconduct on the part of Mr Crowley.

[546] There is an inherent risk in water sports. The school and parents accept a level of residual risk when allowing students to engage in this type of activity. This is not to say that all reasonable steps should not be taken to minimise risks – of course this should occur. However, it is not sustainable on the evidence to find that Mr Crowley was reckless. He took reasonable care in the circumstances for the safety of the students in his care.”

[15] As to Particular 4, the Deputy President concluded that, given her findings as to Particulars 1 to 3, she was not satisfied that Mr Crowley breached the relevant provisions of the Agreement or the Guidelines.⁷ The Deputy President then noted some additional matters as relevant to her conclusion in respect of s 387(a):

⁷ Ibid at [547]

- despite the investigation concluding that the College's risk policies and procedures were lacking and required a full review, no action was taken against Mr Centra, who bore ultimate responsibility for risk management at the College;
- it was evident from Mr Centra's evidence that the response of the College to the incident was at least in part driven by a desire to placate some of the parents of the students involved;
- in deciding to dismiss Mr Crowley, Ms Ozanne relied in part on Mr Crowley's failure to apologise to parents and students, when in fact he had been instructed not to talk to parents and students making an apology impossible;
- Ms Ozanne admitted that she had no regard for the letters of support from staff, in circumstances where the evidence supported a finding Mr Crowley was highly regarded by his PDHPE teaching colleagues and a number of former students;
- Mr Crowley properly accepted that he ought to have conducted a more thorough briefing and that there was a communication breakdown at the time he went to assist students who had capsized, but nonetheless his instructions were adequate, clear and unambiguous, and while with the benefit of hindsight he should have done things differently, his role in the incident was insufficient to warrant a finding of misconduct such as to justify dismissal; and
- the earlier final warning related to a matter of a different character and could not reasonably be relied upon to validate the dismissal.⁸

[16] The Deputy President concluded that she was not satisfied that there was a valid reason to dismiss Mr Crowley relating to his conduct.⁹ The Deputy President then made findings in respect of the matters in paragraphs (b)-(g) of s 387 which are not challenged in the appeal. In respect of s 387(h), the Deputy President took into account the seriousness of the incident and its impact on the students, along with Mr Crowley's employment history, and found that these matters were not sufficiently persuasive to warrant a finding that the dismissal was fair.¹⁰ The Deputy President then concluded that she was satisfied that that dismissal was harsh, unjust and unreasonable, and was therefore unfair.

[17] In considering the remedy to be awarded to Mr Crowley, the Deputy President took into account the Archdiocese's submissions that reinstatement was not appropriate because there was a history of incidents in addition to a previous final warning and the incident on 7 November 2017 and because of Mr Crowley's lack of acceptance of error and responsibility and his expressed attitude towards Mr Centra, parents and students, as well as Mr Centra's preference not to have Mr Crowley return to the College as a teacher.¹¹ The Deputy President also had regard to the fact that Catholic Education had given Mr Crowley the opportunity to propose other positions that he was suitably qualified to perform, and treated this as indicative that the Archdiocese was prepared to retain him in employment and supportive of a finding

⁸ Ibid at [548]-[554]

⁹ Ibid at [555]

¹⁰ Ibid at [565]

¹¹ Ibid at [570]-[571]

that reinstatement was not impracticable.¹² Having considered these matters, the Deputy President determined that the reinstatement of Mr Crowley to his former position in accordance with s 391(1)(a) was appropriate in all the circumstances.¹³ The Deputy President also considered it appropriate to make an order to maintain Mr Crowley's continuity of employment and period of continuous service with the Archdiocese.¹⁴ In respect of an order for the payment of lost remuneration, the Deputy President determined that such an order was appropriate in respect of remuneration lost until 31 January having regard to Mr Crowley's admission that there was a communication breakdown which was his fault and which contributed to the incident.¹⁵

[18] The Deputy President ended the Decision by making the following "Final Observations":

"[584] It is clear the Archdiocese had a level of concern in relation to Mr Crowley's conduct, having issued him with a Final Warning. Mr Crowley should not take this decision as in any way relieving him of his obligation to follow CE policies and procedures and conduct himself in a manner consistent with the Guidelines and Enterprise Agreement. This decision does not provide him with immunity from further disciplinary action, including dismissal, if he does not meet those standards.

[585] Mr Crowley should carefully consider the steps he will now take to ensure his return to the College is positive and productive for all involved. If the offer to Mr Crowley of mentoring and professional development is still open to him, he should seriously consider accepting it."

Appeal grounds and submissions

[19] The Archdiocese's amended notice of appeal contains 11 substantive appeal grounds, which may be divided into two parts: grounds 1-7 challenge the Deputy President's finding that the Archdiocese had not established that there was a valid reason for Mr Crowley's dismissal, and grounds 8-11 concern the Deputy President's award of the remedy of reinstatement.¹⁶

[20] Grounds 1-7 are as follows:

- (1) The Commission erred at [515]-[555] in finding there was not a valid reason for the dismissal of the Respondent.
- (2) The Commission made the following significant errors of fact in finding that there was not a valid reason for dismissal, including:
 - (a) at [519]-[527], [532]-[533], having regard to the admissions and evidence given by the Respondent and others, whether the Respondent gave proper consideration to identification of the risks associated with

¹² Ibid at [573]

¹³ Ibid at [574]

¹⁴ Ibid at [577]

¹⁵ Ibid at [582]-[583]

¹⁶ We have corrected for numbering errors in the appeal grounds in the amended notice of appeal.

undertaking a kayaking class in the circumstances that prevailed on 9 November 2017, whether the Respondent had considered and implemented appropriate control measures to mitigate against those risks, and whether the activity could be undertaken safely, and whether in those circumstances the Respondent's assessment of risk was adequate and appropriately gave consideration for the safety of students. The Deputy President should have found on the evidence that the Respondent's assessment of risk was inadequate, and he did not give appropriate consideration for the safety of students such that there was a valid reason for termination;

- (b) at [522] the storm arrived after the class ought to have concluded, in light of the evidence of the Respondent set out in [46] which was inconsistent with and could not be reconciled with Ms Joy Aitken's evidence set out at [400]-[401] and which evidence was not rejected by the Deputy President (including at [527] where it was simply found that Ms Aitken's evidence did not assist). Ms Aitken's evidence contradicted the Respondent's assertions as to the state of the weather at the time that the kayak class was to commence and was relevant to the assessment of the conditions which then prevailed and the Respondent's assessment of risk;
 - (c) at [529]-[531], having regard to the admission made by the Respondent that his briefing to students was 'brief' because of the conditions that prevailed on 9 November 2017, he failed to conduct sufficient safety pre-checks;
 - (d) at [537]-[538] that it was "the students who did follow the Respondent's instruction to 'follow me' and stay on his line who did not encounter any difficulty" and "it was the students who did not follow instruction" of the Respondent to follow him from the southern shore to the north shore, but "instead decided to 'catch some waves' that subsequently got into difficulty". That finding is wrong and not supported by the evidence, and is contrary to the evidence;
 - (e) at [553] the Respondent's instructions were clear and unambiguous where the evidence was that the so-called instruction was given in the circumstances of the move from the Southern shore to the Northern shore, where the Respondent was (on his own admission) in his kayak 35-40 metres off the Southern shore at the time he claimed he gave the instruction by shouting it, with the group of student kayakers scattered between his position in the water and certain students who were still up on the beach.
- (3) The Deputy President's finding at [517] in preferring the evidence of the Respondent and Mr Wenzel over that of the students to the extent of any inconsistency, did not deal with inconsistencies between the Respondent's evidence and Mr Wenzel's evidence and disregarded various admissions by the Respondent.

- (4) The Commission erred at [549]-[552] in taking into consideration matters not relevant to whether the Respondent had misconducted himself and whether there was a valid reason for dismissal.
- (5) As a result of not accepting the seriousness of the Respondent's misconduct the Commission erred at [547] in finding that the Respondent had not breached relevant provisions of the appellant's Enterprise Agreement and Guidelines.
- (6) The Commission erred and/or misapplied legal principle by finding that the Respondent met the duty of care required of a teacher responsible for the care and supervision of students for the task and in the environment that it was performed.
- (7) The Commission erred and/or failed to take into account the following material considerations in determining whether the Respondent had misconducted himself and whether there was a valid reason for dismissal:
 - (a) the Respondent did not expressly brief his assistant, Mr Wenzel, on the extent, nature and procedures for the activity, such that Mr Wenzel was not clear on the extent of any authority he had in relation to the students, or the priorities to adopt in the event of an emergency;
 - (b) the failure by the Respondent to provide a thorough briefing to the students at the start of the activity;
 - (c) the inadequacy of the Respondent's instruction for the movement from the southern shore back to the northern shore;
 - (d) Ms Aitken's evidence as to the weather at 2:30pm [527];
 - (e) the inadequacy of instruction when the Respondent went to assist the first capsized kayak; and
 - (f) the combination of subparagraphs (a)–(c) and (e) above ultimately resulted in students who had done nothing wrong following the Respondent into the area of the first capsized kayak and also getting into difficulty.

[21] In support of these grounds of appeal, the Archdiocese advanced 15 propositions of fact supported by evidence which it contended was “*unassailable*”, evidence the subject of contest which was not resolved in the reason given by the Deputy President, or evidence of witnesses which did not require the rejection of any other witness's evidence. These propositions, it was submitted, compelled the conclusion that the four particulars of misconduct were made out, that there was a valid reason for the dismissal, and that the Deputy President erred by finding otherwise. The 15 proposition were, in summary:

(1) Weather conditions that day

On 17 November 2017 the weather conditions were poor. There were high winds of up to 30 km/h, and a chance of a thunderstorm. The

Deputy President made no express finding as to the chance of a thunderstorm or high winds.

(2) Novices at kayaking

The students in the class on 17 November 2017 were novices. For the majority of students it was their first or second time kayaking, as Mr Crowley conceded. The Deputy President made no findings about this fact.

(3) Teenagers on an outdoor activity will push boundaries

Mr Crowley accepted that:

- (a) students who take the PASS class are ones who might be more inclined to push boundaries; and
- (b) there were stronger lads who may “*seek out the waves*”.

(4) Students were uncomfortable

Particular students were uncomfortable with undertaking the activity on the day.

(5) First time at this river

The 17 November 2017 was the first time that the class had been conducted at the Pambula River mouth for this cohort of students. It was only their second kayaking practical lesson, and for some students it was their first practical lesson.

(6) Class plan

Mr Crowley claimed he had prepared a class plan for the lesson which was “in his head”, but:

- (a) there was no evidence that he communicated any part of this class plan to the students;
- (b) there was no evidence that the students were told anything about locating a current to conduct “ferry gliding”: and
- (c) Mr Crowley did not disclose the intention to locate a current because if he could not find one, he would be embarrassed.

The failure to communicate any part of the class plan is in the context where, as Mr Crowley accepted, he was conscious that the weather could “*blow up*”, there might be a need to make a quick exit from the water in the event of lightening or thunder, and for some students it was only the second time in a kayak.

(7) Mr Crowley did not communicate his class plan to Wenczel

Mr Crowley gave evidence that he had communicated the “*class plan*” to Mr Wenczel, but Mr Wenczel denied this, and said that he was only instructed to bring up from the rear to ensure no one fell in, and told that they were going ferry gliding in the lunch room at the School, but nothing else. This contest in the evidence was not resolved in the Decision.

(8) No instruction to students or Wenczel about what to do in the event of an emergency or the weather coming in.

Mr Crowley did not give any instruction to the students or Mr Wenczel about what to do in the event of an emergency or the weather coming in. Mr Wenczel did not know that he would be in charge in the event that the Applicant at first instance was incapacitated. Mr Crowley conceded that he ought to have communicated what to do in the event of an emergency. This was significant because Mr Wenczel and students went to help when students got into difficulties, and they did so because there had been no prior indication from Mr Crowley as to what they were supposed to do. This caused the escalation of the situation on the day.

(9) Conditions when the class arrived at river

There was contradictory evidence as to the state of the weather when the class arrived at the river mouth. Despite providing evidence that the conditions were calm and that there was light rain, Mr Crowley conceded that:

- the weather could “*blow up*” and “*lightening weather closes us down*”;
- he was conscious of bad weather being around on the day, including a threat of lightening, which is why he chose the river as the location for the class; but then said in cross examination there was no threat of lightening;
- storm clouds were approximately 10-15 km away from the shore, and there were 30 km/h winds.

At best, the storm clouds were approximately 20-30 minutes away. The students gave a different assessment of the weather when they arrived at the river mouth, and their evidence is corroborated by Ms Aitken, an independent bystander.

(10) Timing

The observations of the weather set out above need to be viewed in the context of the following timing:

- the class is a double period, which lasts for 100 minutes;
- the class got onto the water at approximately 2:20pm;
- there was limited time to dress and conduct a briefing.

Ms Aitken telephoned 000 at approximately 2:30pm and was connected to police services at 2:38pm.

(11) Independent evidence

There was an objective assessment of the state of the weather provided by an independent bystander, Ms Aitken. The timing of her observations can be independently framed by reference to the 000 call she made at 2:30pm. It follows that Ms Aitken made a call when she saw trouble at a point between 2:30pm and 2:38pm. She said that:

- there were dark clouds and it appeared obvious to her that a storm was coming;
- the clouds were as “*black as the Ace of Spades*”;
- she considered that only an “*idiot*” would be out on the water;
- she heard no shouting, despite being in close proximity; and
- she saw the class in trouble and called emergency services;

Her evidence was entirely consistent with the fact that the clouds were offshore, but dark, and there were high winds bringing the storm clouds into shore. She contradicted the evidence about the weather from Mr Crowley and Mr Wenczel.

(12) Evidence of students

Ms Aitken's evidence was consistent with the observations made by a number of students in their evidence. Most of the students made their own independent observations before and at the point of arriving at the river, that kayaking would not be proceeding due to the weather conditions. This evidence was largely consistent with Ms Aitken's evidence. It would appear that only the Mr Crowley and Mr Wenczel did not appreciate the risk of the weather conditions.

(13) Evidence regarding the Applicant's instructions to stay out of waves

There was no evidence that Mr Crowley gave an instruction before they were on the river to stay out of the waves. He claimed that that he gave this instruction once on the river and on departure from both the North and South banks. The Deputy President accepted this evidence. However if he gave such an instruction he did not ensure that all the students were able to hear it, and thus it was not an effective risk control measure. Mr Wenczel only heard an instruction to “*follow me*”. Students B, L, F, I, K, G and C heard Mr Crowley say “*follow me*”, but did not hear him say where not to go. Student E could not remember what the Applicant said. Student A saw Mr Crowley give a hand signal, but did not hear any direction. Students D, E, J and H were not watching or did not see or hear Mr Crowley give any direction. Only student F recalled Mr Crowley say “*stay away from the waves*” or “*stay on my line*” on departing the South bank. This inconsistency reinforced the absence of clear instruction and a well-planned lesson.

(14) Inefficacy of instructions when on water

Mr Crowley conceded that he ought to have provided clearer instruction, but this did not feature anywhere in the Decision. The students were 4-40 metres away when he gave his instructions near the South bank, and he gave evidence that he “*hoped*” they heard his instruction, and did not know where the students were while he was on the water. Mr Crowley accepted that this was a mistake, but these concessions are not referred to anywhere in the Decision. As Mr Crowley left the South bank he headed towards the waves. His evidence, which was contested, was that he proceeded in a semi-circular route, meaning that initially direction was towards the waves. The students, who were scrambling to follow by all accounts, would have seen him heading in that direction and hastened to follow. The majority of students did not hear his instructions.

(15) Risk assessment

The pro forma risk assessment identified the risks and the appropriate control measures, but there was no compliance with those control measures: The control measures were to assess the beach area; be vigilant at all times; explain the rules; and undertake constant supervision. However:

- *assess the beach area*: Mr Crowley said the conditions were calm, but this was inconsistent with 30km/h winds and dark storm clouds being 10-15km away, and combined with the admitted risk of lightening.
- *vigilance at all times*: Mr Crowley had his back to the students on the way from the South bank to the North bank. It was no answer that Mr Wenczel was bringing up the rear, because he did not know what the plan was or that he was responsible in the event of an emergency, and was not an employee of the school and admitted he was not keeping a look out. Mr Crowley also gave evidence that he knew he had trouble makers in his class, and in particular Student P.
- *rules explained*: Mr Crowley gave no explanation to the class about what they were doing that day. In the previous class the students had been taught how to catch the waves, and Mr Crowley admitted that with hindsight, in light of the previous class, the students may be looking to catch waves. He did not tell them they were doing ferry gliding because he didn't want to be embarrassed if he could not find a current. He gave no instruction about what to do in the event of an emergency or what points of exit there were to either Mr Wenczel or the students. Any instruction about staying out of the waves was at best only heard by some, if it was given at all, and Mr Crowley did not ensure that all students heard or were aware of his instructions.
- *constant supervision*: As above in relation to “*vigilance at all times*”.

[22] Mr Crowley submitted, in relation to appeal grounds 1-7 that:

- his application was decided on its particular facts, and the grant of permission to appeal would not be in the public interest because the appeal did not raise any important issue of general application, the matters in issue had not been the subject of diverse first-instance decisions such that appellate guidance was required, the legal principles applied were not disharmonious with similar recent decision, and the outcome did not manifest injustice nor was it counter-intuitive;
- the Deputy President correctly apprehended the nature of a teacher's duty of care in making findings concerning the relevant events, took into account and evaluated all of the evidence, and made assessments as to the credibility and reliability of the witnesses;
- the grounds of appeal amounted to little more than a complaint that the Deputy President did not weigh the evidence relevant to each particular of misconduct in the manner it wanted, and they went no further than inviting the Full Bench to re-exercise the evaluative judgment undertaken by the Deputy President;
- the findings of fact made by the Deputy President were significantly based on a preference for the evidence of Mr Crowley and Mr Wenczel over the conflicting evidence of the students, and this was not the subject of challenge in the appeal;
- the Deputy President took into account all the relevant factual considerations in concluding that the allegations in the first and second particulars were not made out;
- contrary to the Archdiocese's contention, the Deputy President did give consideration to the evidence of Ms Aitken, which was not relevantly the subject of contest, and the weight that was assigned was a matter for the Deputy President which could not be the subject of a contention of appealable error;
- the evidence showed that Mr Crowley made an assessment that the class, which would take about 30 minutes, would be completed before the weather deteriorated, and likewise showed that this was a reasonable assessment;
- the Deputy President's conclusions that the evidence did not support a finding that Mr Crowley recklessly led the students into a wave or current area that was dangerous, and that it was the students who did not follow his instruction and instead went to catch waves who subsequently got into difficulty, were not only open on the evidence but were undeniable;
- in reaching this conclusion the Deputy President had the benefit of an inspection of the area in the river where the incident occurred, and was therefore in a better position than the Full Bench to assess the evidence at the hearing;
- the evidence of Mr Crowley and Mr Wenczel demonstrated that Mr Crowley only went into the wave zone after having observed that students who had knowingly disregarded his instructions were playing in the waves and capsizing, and after having told the remaining students to return to shore;

- it was perverse to suggest that Mr Crowley acted recklessly in going into the wave area in circumstances where he was going to the aid of these students;
- the Archdiocese’s submissions effectively sought to transform Mr Crowley’s duty to take reasonable care of the safety of the students to one to insure them against harm; and
- the Deputy President did not err in concluding that Mr Crowley had taken reasonable care to ensure the safety of the students in his care by trying to “sandwich” the students between him and Mr Wenczel when traversing the river, and there were no incontrovertible facts or uncontested testimony inconsistent with her Honour’s findings, nor were the findings clearly improbable or contrary to compelling inferences, such as to justify appellate intervention.

[23] The grounds of appeal concerning the grant of the remedy of reinstatement were:

- (8) The Commission erred and/or misapplied legal principle at [573] in relying on an opportunity that had been provided to the respondent to propose other positions within the Appellant’s organisation as grounds for reinstatement of the Respondent into the role he was performing at the Lumen Christi Catholic College immediately prior to his dismissal.
- (9) The Commission erred and/or misapplied legal principle at [574] by not giving adequate reasons as to why it is “appropriate in all the circumstances” to reinstate the Respondent to his former position.
- (10) The Commission erred and/or misapplied legal principle [574] in determining, without explanation or reasons, why it is “appropriate in all the circumstances” to reinstate the Respondent to his former position in all of the circumstances, including:
 - (a) the Deputy President misunderstood and/or misrepresented the opportunity provided to the Respondent by Catholic Education for him to propose to the Respondent possibilities for alternative roles;
 - (b) failed to give sufficient weight to the conduct and performance management concerns expressed by the Principal, and the Respondent’s previous resistance to performance management as noted at [571]-[572];
 - (c) failed to take into account the concerns of the Principal about managing the Respondent, in conjunction with his management of other stakeholders including students, and parents;
 - (d) failed to give sufficient weight to the Final Warning previously issued to the Respondent on 22 December 2016;
 - (e) failed to give sufficient weight to the Respondent’s unrepentant attitude, lack of willingness to accept errors and accept responsibility.

- (11) The Commission's determination at [574] is counter-intuitive and manifests injustice on the Appellant particularly given the evident concerns of the Commission with the Respondent's conduct as expressed at [584]-[585] under the heading "Final Observations", and at [582] that based on Respondent's contribution to the kayaking incident, in particular his part in the "communication breakdown" the Deputy President only awarded payment of lost remuneration up until 31 January 2019.

[24] The Archdiocese submitted that the Deputy President's decision to reinstate Mr Crowley was unreasonable or plainly wrong. In respect of the remedy awarded, the appeal notice contends that the grant of permission to appeal would be in the public interest because "*The order of reinstatement in circumstances of prior misconduct [that] was a threat to the health and safety of children, prior underperformance and lack of contrition is inconsistent and disharmonious with the reasoning and outcomes in earlier decisions of the Fair Work Commission dealing with the appropriateness of reinstatement*".

[25] Mr Crowley submitted in respect of the Archdiocese's challenge to the remedy awarded that:

- the dismissal having been found to be unfair, the presumptive remedy was reinstatement unless the view was formed that reinstatement was inappropriate;
- the determination of the remedy involved a broad evaluative judgment, and it was necessary for the Archdiocese to demonstrate an error in the exercise of the discretion;
- there was no appealable error, in that the Deputy President asked herself the correct question and did not overlook or fail to have regard to any particular factor;
- the grant of the remedy of reinstatement could almost never be described as unreasonable in circumstances where there was no valid reason for the dismissal; and
- the Deputy President expressly took into account the impact of reinstatement and the fact of Mr Crowley's earlier warning, and accurately characterised the Archdiocese's proposal prior to dismissal that Mr Crowley nominate another position in its employ as an alternative to dismissal.

Consideration – valid reason – appeal grounds 1-7

Permission to appeal

[26] In respect of appeal grounds 1-7, which challenge the Deputy President's conclusion that she was not satisfied that there was a valid reason for Mr Crowley's dismissal, we consider that the grant of permission would be in the public interest. This aspect of the decision involves important issues of child/student safety, and we consider that public confidence in the decision will be enhanced if it is subject to full appellate review in this respect. Accordingly, permission to appeal in respect of grounds 1-7 must be granted in accordance with s 604(2) of the FW Act.

Issues raised in the appeal

[27] At the outset, it is necessary to observe that three critical elements of the Deputy President's decision are not the subject of direct challenge in the Archdiocese's appeal grounds. First, as we have earlier set out, the Deputy President made an important finding concerning the credit of the witnesses to the effect that, in relation to that part of the incident on 17 November 2017 which related to the reasons for dismissal, she preferred the evidence of Mr Crowley and Mr Wenczel to that of the students to the extent that they were in conflict. This was in part based on subsidiary findings concerning the leading manner in which the students had been interviewed in the investigation of the incident, inconsistencies between what students told the investigators and what they said while giving evidence at the hearing, and vagueness and a lack of clarity in parts of their evidence. The Archdiocese does not contend that the Deputy President erred in making any of these findings. However, notwithstanding this, the Archdiocese relies upon evidence given by certain of the students about the incident to sustain its contentions of error in other respects and to fix primary blame for the incident upon Mr Crowley. As we shall explain, we consider this approach taken in the appeal to be flawed. The Archdiocese also contends that the Deputy President did not deal with inconsistencies between the evidence of Mr Crowley and Mr Wenczel but, as explained below, these do not concern any material matter.

[28] Second, the Archdiocese does not directly challenge (either in its grounds of appeal or its 15 propositions) the Deputy President's conclusion (in paragraph [535] of the decision) that the evidence could not sustain a finding that Mr Crowley recklessly *led* the students into a wave or current area that was dangerous. It was this very serious allegation which made up the third particular of the Archdiocese's conclusion that Mr Crowley had committed serious misconduct warranting dismissal and appears to have constituted the Archdiocese's "case theory" as to the direct cause of the incident. As explained in the investigation report, this allegation was founded on the proposition that "*On the available evidence, Mr Crowley led the students to an area where the current took student kayaks into the wave zone*", and was explicitly based on a rejection of Mr Crowley's explanation and an acceptance of what certain students had said when being interviewed as part of the investigation process.¹⁷ The "*Final Findings Letter*" also made reference to Mr Crowley "*leading students into dangerous water*". The Archdiocese did not in the appeal try to defend the third particular in the terms it was actually expressed, but instead raised associated matters concerning the communication and clarity of Mr Crowley's instructions for the return journey, the extent to which non-compliance with these instructions caused kayakers to get into difficulty, and the events which occurred subsequent to this. These were matters raised in the reasons for sustaining the third particular given in the "*Final Findings Letter*" but, as we earlier observed, they do not directly relate to the allegation that was made.

[29] Third, there is also no direct challenge to the Deputy President's finding (in paragraphs [528]-[530] of the decision) that adequate safety checks of helmets and life jackets had been undertaken, which involved a direct rejection of the allegation contained in the second particular. Again, in its appeal the Archdiocese raises a number of other matters which were similar to those raised in the reasons given for sustaining the second particular in the "*Final Findings Letter*", and has in appeal ground 2(c) attempted to refashion the second particular into one concerned with the adequacy of any briefing which Mr Crowley gave to students before commencing the kayaking exercise, but it has not attempted to contend that the evidence sustained the second particular in the terms in which it was made.

¹⁷ Investigation report pp.33-35, appeal book 2165-2167.

[30] That means that the appeal against the Deputy President’s conclusion concerning whether there was a valid reason for the dismissal, insofar as it related to the four particulars of misconduct which constituted the basis upon which Mr Crowley’s dismissal proceeded, only challenges the findings concerning the first and fourth particulars. The allegation contained in the first particular concerned Mr Crowley’s conduct in undertaking the class at all on 17 November 2017 in what were said to be deteriorating weather conditions, tidal run-out and high sea swell without an adequate risk assessment of appropriate consideration for the safety of students. This allegation was rejected by the Deputy President in paragraphs [519]-[527] of the decision, and only some of the findings made the by Deputy President in respect of the first particular are challenged by the Archdiocese in its appeal. Findings not the subject any apparent challenge include that:

- the “*high swell*” referred to in particular 1 was on the other side of the sand bar out towards the ocean at least 150 metres away from where the kayaking activity on 17 November 2017 was to be conducted, and not in the River (paragraph [524] of the decision); and
- there was no evidence to support a finding that kayaking in an outgoing tide was inherently unsafe (paragraph [525] of the decision).

[31] Unlike the first particular, the fourth particular as earlier stated does not contain any specific allegation but simply alleges a failure to follow appropriate College procedures and policies. In terms of what policies and procedures Mr Crowley was said not to have complied with, the fourth particular has undergone radical evolution over time. As initially formulated in the investigation report, the allegation related to a failure to comply with the NSW Department of Education *Guidelines for Safe Conduct of Sport and Physical Activity in Schools* insofar as they concerned “*Surfboard, Wave Ski and Bodyboard Riding*”, and appears (by way of a comparison of the type of kayaks used by the class with wave skis) to contend non-compliance with these qualifications insofar as Mr Crowley did not hold the required qualifications, conducted the activity at other than a patrolled beach, did not constitute a “*shore patrol*” consisting of half the students and a teacher, did not maintain a time record or log of each session, did not attach a wave ski rope to paddles, and allowed the activity to proceed without a shore patrol equipped with a lifesaving rescue tube or board, first aid kit with resuscitation mask and space blanket, effective flag and whistle and emergency phone or whistle. The investigation report noted that “*The [kayaking] activity has apparently been conducted for 17 years and the school has apparently been non-compliant for the whole time*”.¹⁸ By the time of the “*Final Findings Letter*”, although reference was made to the findings of the investigation report, the reasons for sustaining the allegation in the fourth particular were completely different: they referred to a failure to provide an adequate safety briefing and complete the pre-activity safety checks and Mr Crowley “*leading students into dangerous water*” as constituting breaches of the requirement of Catholic Education’s “*Sport and Physical Safety Policy*” and “*Excursion Policy*”. At the hearing before the Deputy President, the focus of the Archdiocese moved away from these policies, and the contention was that Mr Crowley breached the relevant provisions of the Agreement and the Guidelines. In paragraph [547] of the decision, the Deputy President dealt with the further particular by stating that, given her findings concerning particulars 1-3, she was not satisfied that Mr Crowley breached the Agreement or the Guidelines. In its appeal, the Archdiocese does not allege any independent error in respect of particular 4, but simply contends that by reason of

¹⁸ Investigation report p.38, appeal book 2170

the Deputy President's errors in respect of particulars 1-3, she erred in respect of particular 4. That means that particular 4 does not require any separate consideration in this appeal.

[32] This should mean that the appeal (insofar as the Deputy President's consideration under s 387(a) is concerned) should be confined to a consideration of the Deputy President's finding concerning the first particular. However, as already indicated, the Archdiocese's case in the appeal proceeds upon a much wider range of matters than just the specific allegations embodied in the particulars. The appeal grounds and the Archdiocese's 15 propositions go well beyond the specific allegations which caused Mr Crowley to be dismissed, and include a range of other alleged matters such as the existence and communication of a class plan, the lack of a briefing of Mr Wenczel, the lack of a proper briefing of the students, the nature and adequacy of the instructions given by Mr Crowley to the students at the South bank, the discomfort of some students about undertaking kayaking on the day, the decision by Mr Crowley to lead the students on the return journey to the North bank and the consequent limitation on his capacity to exercise vigilance over the students, the propensity of some students to "push boundaries", the adequacy of instructions given by Mr Crowley once he saw that some students had got into difficulties, and the failure of Mr Crowley to comply with the control measures identified in his own risk assessment. The diversity of matters raised against Mr Crowley by way of the particulars of misconduct that constituted the reason for his dismissal, the original basis for those particulars as disclosed in the investigation report, the quite different and logically disjunctive reasons for sustaining four of the particulars given in the "*Final Findings Letter*", the further reasons forming part of the case advanced by the Archdiocese at first instance, and the case now advanced in the appeal, makes it difficult to pin down precisely what the Archdiocese relies upon as constituting the valid reason(s) for Mr Crowley's dismissal.

[33] This is indicative of a scattergun approach whereby the Archdiocese is prepared to attribute fault to any element of Mr Crowley's conduct on 17 November 2017 if it can assist in sustaining the conclusion that Mr Crowley was wholly culpable for the incident which occurred on that day. As a matter of general approach, we consider that the Deputy President was correct in conducting her s 387(a) analysis by reference to the four particulars of wrongdoing upon which the dismissal of Mr Crowley proceeded. Properly speaking, the appeal insofar as it challenges the Deputy President's findings as to the existence of a valid reason for dismissal should be confined to contentions of error in respect of findings concerning the specific reasons for the dismissal identified in the letter of dismissal. The broad and diverse range of matters raised by the Archdiocese in its appeal – particularly its "15 propositions" go beyond this, and suggest an effort to have the Full Bench simply re-decide the case for itself.

Causation of the incident

[34] Having regard to these matters, we consider that the first and primary issue we need to deal with in this appeal concerns the identification of the actual cause of the incident which occurred on 17 November 2017. The evidence demonstrated that there was no inherent difficulty involved in having the students kayak from the north to the south bank of the river and then return in an area which was some distance from the wave area at the mouth of the river. Mr Crowley gave uncontradicted evidence that he had done this same activity on this same stretch of river for many years without incident. It may be reiterated that there is no challenge to the Deputy President's findings that the "*high swell*" referred to in the first particular was not in the river but some 150 metres away from where the activity was to be

conducted on the other side of the bar and that there was no evidence that kayaking in an outgoing tide in the river was inherently unsafe. It is further not in dispute that the initial leg from the north bank to the south bank was conducted without difficulty, and there is no contention that the conduct of this part of the kayaking lesson involved any negligence or recklessness on the part of Mr Crowley or involved any element of significant risk to safety. It took about 5-8 minutes to execute. Both Mr Crowley and Mr Wenczel said that there was no discernible current.

[35] Mr Crowley's evidence was that when the south bank was reached, he was in his kayak and slightly away from the shore, and some students were on the beach on the shore. He said that he instructed the students to "*follow me exactly and stay away from the waves*" and "*stay on my line*", and also used hand signals for those who might not have heard him when he said this to indicate that they should stay on the river side of his position. Mr Wenczel said that he heard Mr Crowley say "*follow me*" to the class, "*instructing them to follow him back to the northern side*". Although there was a difference in the evidence concerning who led the class on the first leg, Mr Crowley and Mr Wenczel had a joint understanding that Mr Crowley would lead on the way back and Mr Wenczel would follow and watch from behind.

[36] Mr Crowley's evidence was that on the return journey, he paddled along a semi-circular line and maintained a distance of at least 25 metres from the "reform waves" on the river side of the bar (to be distinguished from the larger waves on the sea side of the bar). He reached the northern shore and stopped about 5 or 6 metres from the shore, where his feet were on the sand in shallow water. He did not detect any current while crossing or at the point at which he stopped. He was about 40 metres down the river from the initial entry point. When he turned, he saw that about three of the kayaks had not followed his line, but had gone about 30 metres in the seaward direction and were riding the reform waves. He signalled them to come to him by raising his paddle, and he said he might have called out for them to come to him as well. It was at this point that he saw the first of the kayaks capsize. Mr Crowley then shouted to the class and Mr Wenczel "*Get on the sand, I have to go*". He then paddled into the wave area towards the capsized kayak to assist.

[37] Mr Wenczel's evidence was to the same effect. He observed Mr Crowley cross to Northern side and stop about 40 metres downriver from the starting point and about 5-8 metres out from the shore. He also observed from his rear position that "*a couple*" of kayaks in the middle of the river had gone about 20-25 metres seaward from where they should have been. Instead of following Mr Crowley, they had gone to try and catch and surf the reform waves, which were about 50 centimetres high. Mr Wenczel said three or four of the kayaks had followed Mr Crowley and were in sheltered waters near him which was out of the current, but there was a pull out to sea where the other couple of kayaks had gone to catch waves. He saw Mr Crowley raise his paddle in the air to signal that the class should come to him, and he saw him yelling to the students catching the waves to make their way back to him. One or two of the kayaks in the wave area then capsized, and while the students were trying to get back on their kayak, the current moved them seaward. Mr Crowley yelled for everyone to go to shore and then went to assist, and Mr Wenczel went to assist as well.

[38] We have earlier described how the incident developed from that point, including that a number of the students who had followed Mr Crowley's line to the northern shore went to assist those in difficulty, notwithstanding Mr Crowley telling them to go to shore, and then themselves got into difficulty. The evidence of Mr Crowley and Mr Wenczel concerning

events to that point recited above was clearly consistent to a high degree as to the matters of significant relevance. As we have already stated, the Deputy President's preference for the evidence of Mr Crowley and Mr Wenczel over any inconsistent evidence given by the students was not challenged in the appeal. An analysis of the evidence of many of the students amply confirms the correctness of this credit finding made by the Deputy President. An example of this is the evidence of Student G and Student I, who shared a kayak. Student G gave the following evidence in his witness statement concerning the return journey from the south to the north bank:

"...[Student I] and I did not make it to the other [south] side of the river. Before we got there Mr Crowley said to follow him. I do not recall exactly what he said. [Student I] and I followed him, we were close behind him.

As we were following Mr Crowley, I could feel we were being swept out with the current. I felt okay at this point, it was not too difficult to paddle diagonally across the water, but I recall once we got swept towards the waves it got hard. The kayak was bumping up and down. The waves were not very big where [Student I] and I were but I recall we were in the white wash.

I was aware that the other kayaks were following us, got swept out by the current into the waves.

I saw Mr Crowley near the rocks. He was not in the wave zone. He had his legs out over the kayak. The strong current swept us out and Mr Crowley into the waves. I saw him get dunked by the waves and tipped out of his kayak. I saw a wave hit him from the side. He tried to gesture for students to come over."

[39] This evidence seeks to portray Student G and Student I as having followed Mr Crowley on the return leg to the north shore, and in doing so having been swept out into the waves by the current. However Student I said (emphasis added):

"...I estimate we were approximately two thirds of the way across the river at this point (on the north-south leg). I recall Mr Crowley then called out to the people on the other side of the river. He used words along the lines 'come back'. He also said words to the effect of 'follow me'.

The students ended up following him out into an area on the river close to the rocks. I recall Mr Crowley was leading the group. I could see him from my kayak. I recall [Student G] and I were in the middle of the group of students following Mr Crowley. I could see Mr Crowley pretty close to the rocks.

Student G and I were having a good time catching some waves into the river. The waves were not very big at this point in time or where we were. I did not think it was good kayaking conditions.

I do not recall seeing Mr Crowley catching any waves, he was sitting in his kayak. I estimate at this point that the waves were between 1.5 metres and 2 metres high. I then saw Mr Crowley get knocked off his kayak, near the rocks..."

[40] Student I notably said nothing about being swept out by a current, and admitted that he and Student G had in fact been catching waves (although he does not explain how they came to be doing so). It is obvious that his account of what occurred is radically inconsistent with that of Student G, although they were in the same kayak and therefore had the same viewpoint of what occurred. When this inconsistency was raised with Student G in cross-examination, the following exchange occurred:

Okay. [Student I] told the investigator that came out to interview you back in December, and he has prepared a statement for this Commission in which he says:

Tully and I were having a good time catching some waves in the river.

Yes, that's what you were doing?---Yes, I remember me and [Student I] went to get a wave because we enjoy catching waves.

And where do you say you did that?--- Probably in between large waves and reform waves. Or actually, maybe at reform waves.

So you say you went all the way out to between reform waves and wind chop, is that right?---Yes.

Sorry?---Yes.

Sorry, I just couldn't hear. Mr Crowley didn't paddle out there did he?---I don't think so.

Now you didn't follow him out there, did you?---Did not.

You and [Student I] went out there to have a good time catching some waves in the river, didn't you?---Yes.

[41] The above answers given by Student G above are completely inconsistent with what he said in his witness statement - but are consistent with the evidence of Mr Crowley and Mr Wenczel. Both Student G and Student I said in their witness statements that they heard Mr Crowley's instruction to follow him on the return trip to the northern bank of the river (notwithstanding that they never actually made it all the way to the southern shore), and it is clear that they chose not to comply with that instruction but instead went out to the wave zone in order to catch waves. Their witness statements are indicative of a general problem with the evidence of many of the students, namely that their culpability in the causation of the incident by their failure to follow Mr Crowley's simple instructions is sought to be obscured.

[42] The evidence of Mr Crowley and Mr Wenczel is, we consider, firmly demonstrative of the following propositions:

- (1) Particular 3, which alleged that Mr Crowley "*recklessly led the students into a wave and current area at the mouth of the river that was dangerous*", was clearly unsustainable, and the Deputy President was correct in finding that this could not constitute a valid reason for the dismissal.
- (2) The proximate cause of the incident was that the students in two or three of the kayaks did not follow Mr Crowley's kayak on the return journey from the

southern to the northern shore of the river as instructed, but instead diverted from his line and went approximately 25 metres further seaward in order to catch reform waves on the river side of the bar. This exposed them to the risk of capsizing and placed them in a position where there was an outward current. The further development whereby other students went to their assistance in their kayaks and got into difficulties themselves involved non-compliance with Mr Crowley's further instruction to return to the shore. The Deputy President was correct in finding that had the students followed Mr Crowley's instructions, "the events that unfolded would not have occurred".

- (3) There is no evidence that the weather conditions played any role in the causation of the incident. We will return to the first particular in due course, but there is simply no basis to conclude that "*deteriorating weather conditions, tidal run-out and high sea swell*" made the kayaking class on 17 November 2017 inherently dangerous or were the cause of students getting into difficulties. The possibility of a storm arriving had nothing to do with what occurred. This necessarily diminishes the significance of the weather conditions, and differences in the evidence concerning the precise weather conditions when the students entered the water and the time of the arrival of stormy weather, in the consideration required under s 387(a).

[43] The matters raised by the Archdiocese in its appeal largely concern alleged deficiencies in Mr Crowley's preparation for and conduct of the kayaking class which were themselves not the direct cause of the incident and which, but for the failure of a number of students to follow Mr Crowley's instructions, would not have had any detrimental consequence. Those alleged deficiencies arose in the context in which, on the evidence, it appears that Mr Crowley ran the class in the same way as he had been doing for 12 years without any difficulty and without any performance issue ever having been raised by the management of the College or the Archdiocese. If they existed, those deficiencies may fairly be characterised as systemic rather than capable of being fixed solely upon Mr Crowley such as to justify his dismissal.

[44] In summary, we consider at the outset that the evidence before the Deputy President demonstrated that:

- Mr Crowley's conduct was not the proximate cause of the incident;
- but for the failure of a number of students to follow his simple instructions the incident would not have occurred; and
- there must be systemic responsibility for any other non-causative deficiencies in his preparation for or conduct of the class.

[45] These matters alone would make reasonably available the conclusion that there was not a valid reason for Mr Crowley's dismissal arising from the incident on 17 November 2017. We will now turn to give specific consideration to the appeal grounds 1-7. We note that appeal ground 1 is simply a generic challenge to the Deputy President's conclusion as to whether there was a valid reason for dismissal. Because s 387(a) requires the making of an evaluative judgment in the nature of the exercise of a discretion, a mere assertion that the conclusion reached pursuant to that provision is wrong does not amount to a proper

contention of appealable error.¹⁹ Accordingly appeal ground 1 does not require separate consideration.

Appeal ground 2(a)

[46] This ground of appeal concerns the risk assessment and control measures undertaken by Mr Crowley, and ultimately whether it was safe to undertake the activity on 17 November 2017 at all. We note at the outset that this appeal ground and the Archdiocese's submissions concerning this matter proceed on the implicit presumption that the College was able to entirely delegate its risk assessment function concerning the conduct of the PASS class to Mr Crowley such that he would bear sole responsibility if anything went wrong. We do not accept this a fair and valid premise for the purpose of the s 387(a) analysis. Like workplace health and safety, child safety in schools is properly a matter to be managed in accordance with an established and safe system of risk assessment and control, with individual employees conducting themselves within the framework of that system.

[47] There was no established procedure for the conduct of the kayaking element of the PASS course. That the investigation had to resort to the NSW Department of Education's guidelines in respect of surfboard, wave ski and bodyboard riding in an attempt to critically assess Mr Crowley's conduct is evidence enough of that. The only system disclosed as being in place was the completion of a risk assessment proforma, and the investigation found that Mr Crowley had completed this in accordance with the applicable procedures. The investigation recognised that this risk assessment process was inadequate but, as the Deputy President found, this was not the fault of Mr Crowley. It was in fact the fault of the Archdiocese.

[48] It can be inferred from the evidence that the College had no system for the safe conduct of the kayaking class beyond complete reliance on the experience and judgment of Mr Crowley. The conduct of Mr Crowley is properly to be assessed within this unsatisfactory framework. The evidence showed that Mr Crowley took the following steps concerning the assessment and control of any risk associated with the conduct of the class on 17 November 2017:

- As earlier stated, he had completed the risk assessment proforma in accordance with the applicable procedures.
- As the Deputy President found, Mr Crowley had developed his own personal safety checklist to supplement the risk assessment process. This required consideration of a range of considerations including features of particular kayaking locations, weather, tides, entry and exit points, emergency exit procedures, the "buddy" system, teacher positioning, boat traffic, skill and fitness requirements, the swell and wave zone, river current, student fatigue, student count, checking for injuries and equipment handling.
- At the first kayaking lesson the week before, Mr Crowley had given a detailed explanation as to how to fit buoyancy vests and helmets. He also explained how the

¹⁹ *Tasmanian Ports Corporation Pty Ltd t/a Tasports v Gee* [2017] FWCFB 1714, 266 IR 253 at [42]

“buddy” system worked whereby students were placed in pairs who were meant to check each other’s safety, including by checking equipment before entering the water.

- Mr Crowley had (again, as found by the Deputy President) checked the Bureau of Meteorology weather and tidal forecast for the region shortly before departure for the river. This showed that there was a high chance of showers and a chance of a thunderstorm later that day.
- Mr Crowley determined to conduct the class in the Pambula River rather than at Pambula Beach, where the previous week’s class had been conducted. There was an inconsistency in the evidence as to when and how this decision was made. Mr Crowley said he made it on the basis of the weather forecast to ensure that the students could make a quick exit if a storm arrived. Mr Wenczel said the decision was made on the bus, after a visual inspection of the beach showed that there was too much swell. However, on any view, Mr Crowley made an assessment concerning which was the safest location to conduct the class.
- Mr Crowley had a discussion with Mr Wenczel in the staffroom prior to departure about his plan for the lesson, which at least included an indication that he intended to carry out an activity known as “ferry gliding”. They had a further discussion at the river at which Mr Crowley told Mr Wenczel that they would be going to the southern side and he (Mr Wenczel) would take the rear.
- Mr Crowley assessed the weather and river conditions upon arrival at the river, and determined it was safe to proceed. He observed a storm about 15kms to sea, which he considered gave him sufficient time to conduct the lesson, which he estimated would take about 30 minutes.
- Before the students entered the river, Mr Crowley told students who had been absent the previous week to check with their buddy about how to fit their buoyancy vest and helmet. He and Mr Wenczel visually checked whether the students had fitted their equipment correctly and physically checked the equipment of at least some students (Student D said in his witness statement that Mr Crowley checked everyone’s life jackets and helmets).

[49] These matters make it amply clear, we consider, that Mr Crowley made reasonable efforts to assess and control the risks associated with the conduct of the PASS class on 17 November 2017. The conclusion reached by the Deputy President (at paragraph [534]) that “Mr Crowley’s assessment of the risks was adequate and he had appropriate consideration for the safety of the students in his care” was reasonably available to be made on the basis of the above evidence, and furthermore we agree with it.

[50] Notwithstanding the above matters, the Archdiocese contended in its appeal that in the weather conditions prevailing, Mr Crowley should not have let the class proceed at all, and the fact that he did allow it to proceed was demonstrative that he did not appropriately assess the risk and give consideration to the safety of the students. However the Archdiocese never properly articulated the nature of the relationship between the weather conditions and the occurrence of the incident. As we have earlier stated, the incident was caused by the disobedience of students in not following Mr Crowley but rather moving into the wave zone in order to catch waves, and then the further non-compliance by students with the direction to

return to shore once students in the wave zone had got into difficulties. Once students entered the wave zone and become subject to the pull of the current, the weather conditions may arguably have made conditions there more dangerous than they would have been in finer weather. Nonetheless the decision to proceed with the class rather than cancel it did not itself have any causal relationship with the fact that students chose to enter the wave zone.

[51] Difficult judgments about the conduct of outdoor sporting activities in the prevailing weather conditions are required to be made by teachers and members of the community day in and day out. As earlier stated, the College's system for the safe conduct of the kayaking element on the PASS course was, in substance, to entirely rely on Mr Crowley's experience and judgment. There had been no criticism of him in this respect over the previous 12 years in which he had conducted the class. Mr Crowley had the responsibility to make a fine judgment on whether the kayaking class should proceed on 17 November 2017, and in making the decision he did he took reasonable steps to assess and control the risks involved. The decision he made did not cause the incident which followed. In those circumstances, we do not consider that the Deputy President erred in failing to be satisfied that this did not constitute a valid reason for Mr Crowley's dismissal. We reject this appeal ground.

Appeal ground 2(b)

[52] In relation to this appeal ground, we do not consider that the evidence demonstrates that the Deputy President's finding that the storm arrived at a time when the class should have concluded was wrong. The Archdiocese's submissions to this effect rely upon the timing of two events: first, that the class started at 2.20pm and, second, that Ms Aitken observed kayaks moving out towards the river mouth and decided to call 000 at 2.30pm. However, both these times were merely approximations given by witnesses and cannot be given the precision sought to be assigned to them by the Archdiocese. The only certain time is that Ms Aitken's emergency call was put through to the police and logged on their system at 2.38pm.

[53] Despite the fact that she had apprehensions about the weather, Ms Aitken and her husband were walking on the beach when she saw the students kayaking, and she said that there was no rain and she could not recall that it was windy, but she could see black clouds and considered that a storm was "*not far away*". It is apparent that Ms Aitken and her husband considered that there was a time window for them to walk on the beach in a similar way to Mr Crowley's judgment that he had a time window to conduct his class. Ms Aitken appears, on her evidence, to have seen the class at the point where some of the students on the return leg to the northern shore had begun to paddle out seawards in the river mouth in order to catch waves. This was before anyone got into difficulty, since Ms Aitken described the class "*initially to be happy*". A reasonable estimation is that this must have been approximately 15 minutes after the class entered the water, having regard to the evidence concerning the time it took for the class to cross from the northern to the southern bank. It was at this point, and *before* she saw any students get into difficulty, that Ms Aitken said she called 000.

[54] Ms Aitken described being on the emergency line for about 30 minutes before she was cut off, and it was only after she had been on the line for some considerable time and was describing what was occurring before her that the storm hit and it began teeming with rain. Student E, who was logged as having made an emergency call at 2.44pm, described the stormy weather as arriving at about the time he decided to make that call. He said he had been in difficulty in the wave zone for *half an hour* before he got out of the water and was able to make the call. This cannot be reconciled with Ms Aitken's evidence concerning the

timeframe, but the evidence of both witnesses suggests that the class must have entered the water some time before the 2.20pm estimate upon which the Archdiocese relies. If so, it was reasonably available for the Deputy President to find that the class, which was intended to take no more than 30 minutes, should have finished before the storm arrived.

[55] In any event, this appeal ground seeks to relate the weather conditions to the incident in a way which is again not properly articulated. As Ms Aitken’s evidence clearly demonstrates, the students had got into significant difficulty in the wave zone some considerable time before the arrival of the storm. The incident would almost certainly have unfolded in substantially the same way even if the storm had never arrived. We reject this appeal ground.

Appeal ground 2(c)

[56] This appeal ground seeks to refashion the second particular of misconduct relied upon by the Archdiocese, which was specifically concerned with “*sufficient safety pre-checks of helmets and buoyancy vests*”, not with the length of the briefing given by Mr Crowley before the class entered the water. Paragraphs [529]-[530] of the decision are concerned with the actual allegation concerning the checking of the helmets and buoyancy vests, not with the sufficiency of the briefing (paragraph [531] is concerned with the separate issue of the risk assessment). The Deputy President elsewhere in the decision (at paragraph [553]) noted Mr Crowley’s concession that he ought to have conducted a more thorough briefing but truncated it because it was raining. However, as we discuss below in connection with the sufficiency of his instructions, it is not clear to us what he might have said in addition to remove the possibility of students simply disobeying him. We reject this appeal ground.

Appeal ground 2(d)

[57] The findings which this appeal ground challenges, contained in paragraphs [537]-[538] of the decision, should fairly be read as concerning the point in time where Mr Crowley had reached the northern shore, and had then realised that some students had not followed him but had headed off into the wave zone and had got into difficulty. The finding that those students who had followed him had not got into difficulty at that point was correct. As the Deputy President went on to find in paragraph [540], Mr Crowley directed the students to go to shore before he went off to attempt to assist those in difficulty. It is not in dispute that a number of students who had to that point followed Mr Crowley did not comply with this further instruction, went out to assist, and then themselves got into difficulty. However that is not demonstrative of any error in the findings in paragraphs [537]-[538]. It is clear to us that if *all* the students had followed Mr Crowley to the point where he stopped at the northern bank as he had instructed, the incident would never have happened. We reject this appeal ground.

Appeal ground 2(e)

[58] This appeal ground concerns the sufficiency of the instruction which Mr Crowley gave when the class had reached the south side of the river. The Archdiocese does not appear to dispute that Mr Crowley, at least, instructed students to “*follow me*” when they reached the south bank and were to return. That appears to us to be an unambiguous direction, and could not be understood to mean that a diversion into the wave zone was part of the plan. The Archdiocese relies on the evidence of students to the effect that when they reached the southern side, they went on the shore, did not hear any instruction from Mr Crowley (who

remained in his kayak some distance off the shore), and only went back into the water when they saw the teachers and the other students returning in their kayaks. This, it is submitted, demonstrates that Mr Crowley did not ensure that his instruction was heard by all the students, and resulted in some students entering the water without a clear understanding of what was intended.

[59] We are not satisfied that the Deputy President’s conclusion in paragraph [553] of the decision that Mr Crowley gave clear and unambiguous instructions was in error. The Archdiocese’s challenge to this finding is dependent upon the evidence of certain students who went on shore, and said they did not recall or denied hearing Mr Crowley’s instruction. However this disregards the credit finding which the Deputy President made in respect of the evidence of the students. The following specific evidence was given by the students in respect of this issue in their witness statements:

- Student E gave evidence that he was paired with Student F, and they arrived at the southern shore at the same time as Students D and H, who were paired together. They all disembarked onto the sand on the southern shore, and then looked for the rest of the class. He then saw Mr Crowley and Mr Wenczel “*paddling towards the wave zone*” with the rest of the class following them. They waited 2 or 3 minutes and then decided to follow them.
- Student F likewise said that he and Student E disembarked on the sand, along with Students D and H. However he said he *did* hear an instruction from Mr Crowley, “*along the lines of ‘we’re heading out’ and [he] pointed towards the river mouth*”. He says he and Student E then got back in their kayak and “*...went out behind Mr Crowley and we were going over the waves*”.
- Student D said that he and Student H got to the southern bank first together with Students E and F. They pulled their kayaks onto the sand and were talking, playing on the rocks and picking mussels for about five minutes. He turned around and saw Mr Crowley’s kayaks and the other students’ kayaks going out towards the wave zone. He said “*I do not know if Mr Crowley told the students to go out or not*”. He and students H, E and F got into the kayaks and went out “*in the direction of the mouth of the river as well*”, where they saw other students catching waves and joined in.
- Student H said that he and Student D raced Students E and F to the southern side, and got there first. They pulled their kayaks onto the sand and began poking around the beach and nearby rocks looking for mussels. He said no one joined them on the beach and he wondered why. He then saw the rest of the class kayaking towards the river mouth and into the wave zone, and said “*crap*” to the other boys. They ran back to their kayaks, and starting paddling towards the rest of the class.

[60] The inconsistencies in the above evidence are obvious, not least that Student F says that he did hear an instruction from Mr Crowley (albeit recalled in radically different terms from what it is apparent was actually said), and that they all followed this instruction. For reasons we have earlier given, the suggestion by Students E, D and H that they saw Mr Crowley leading the other students into the wave zone cannot be accepted.

[61] Notwithstanding the above evidence, Mr Wenczel said that like Students E, F, D and H, he also reached the southern shore and disembarked (albeit briefly), and he heard the

“*follow me*” instruction from Mr Crowley. Having regard to his evidence, the Deputy President’s general preference for the credit of Mr Crowley and Mr Wenczel as witnesses, and the evidence of Student F that he heard a direction from Mr Crowley, we do not consider that error on the part of the Deputy President can be established by reliance upon the evidence of Students E, D and H. Moreover, the following concessions were made by the witnesses in cross-examination:

- Student E, when it was put to him that Mr Crowley had given the instruction “*Follow me exactly. Stay away from the waves. Stay on my line*”, answered “*I’m not sure. People were yelling because we were (indistinct) – so he might have said it, he might not have, I can’t remember*”. We note that he had not mentioned any yelling before, nor had any other student.
- When the same proposition was put to Student F, he answered “*I remember he called out something. I don’t remember what the words were but something like that, yes*”. We note that this answer is difficult to reconcile with what Student F said in his witness statement.
- Student D recalled that, before they got into the water on the northern shore, Mr Crowley said “*Follow Hamish to the other shore. We’re not going near the waves*”. He also admitted that on the return journey he and Student H deviated seaward from the line taken by Mr Crowley in order to go and play in the waves, that he knew he was supposed to follow Mr Crowley when engaging in water activities and failed to follow Mr Crowley’s instruction to “*Follow me*”.
- Student H said that he did not hear the instruction “*Follow me exactly, stay away from the waves, stay on my line*”, but he did understand that he was supposed to be following Mr Crowley, and he accepted that he did not do this but rather went seaward in order to catch some waves.

[62] We are satisfied that the Students E, F, D and H all understood, from instructions given by Mr Crowley either at the northern shore or the southern shore, that they were meant to be following Mr Crowley, and that they chose not to do so but instead deviated seawards into the wave zone in order to catch waves. The Archdiocese’s submissions concerning this appeal ground are flawed because they seek to rely upon various assertions made by various student witnesses without challenging or even addressing the credit finding made by the Deputy President and the obvious inconsistencies and contradictions in the evidence given by many of the students. We reject this appeal ground.

Appeal ground 3

[63] As adverted to earlier, such differences as there were between the evidence of Mr Crowley and Mr Wenczel were not material to the issue of Mr Crowley’s culpability for the incident. It is not correct that the Deputy President did not take into account concessions made by Mr Crowley in his evidence; his concessions that he should have conducted a more thorough briefing and that there was a “*communication breakdown*” when he went to assist the students in difficulty were taken into account by the Deputy President in paragraph [553] and in her determination as to the appropriate remedy in paragraphs [582]-[583]. We reject this appeal ground.

Appeal ground 4

[64] At paragraphs [549]-[552] of the decision, the Deputy President is said to have taken into account a number of matters not relevant to whether Mr Crowley had misconducted himself and whether there was a valid reason for his dismissal. This appeal ground is rejected because, regardless of whether the matters adverted to were relevant, the Deputy President had already determined that the four particulars constituting the reasons relied upon by the Archdiocese to justify the dismissal were not validated by the evidence.

Appeal grounds 5 and 6

[65] The Deputy President's conclusion in paragraph [547] that Mr Crowley had not breached the Agreement or the Guidelines was consequential upon her findings in respect of the four particulars, which we consider were not attended by appealable error. The same position applies with respect to the question of whether Mr Crowley discharged his duty of care. It is non-controversial that the common law duty of care of a teacher is as stated in *Richards v State of Victoria*,²⁰ viz:

“In general, a school master owes to each of his pupils whilst under his control and supervision a duty to take reasonable care for the safety of the pupil. It is not, of course, a duty of insurance against harm but a duty to take reasonable care to avoid harm being suffered...”.

[66] The findings reached by the Deputy President concerning the four particulars, which we affirm, support a conclusion that Mr Crowley took reasonable care for the safety of the students in the PASS class on 17 November 2017. These appeal grounds are therefore rejected.

Appeal ground 7(a)

[67] It is said by the Archdiocese that the Deputy President erred by failing to take into account that Mr Crowley did not sufficiently brief Mr Wenzel such that he had a proper understanding as to the extent of any authority he had over the students or the priorities to adopt in the event of an emergency. The Archdiocese did not point to any established policy framework or system for the safe supervision of children within which Mr Crowley might have undertaken such a task. It has not been established that Mr Crowley had the capacity to delegate his authority over the students to Mr Wenzel, or what role this might have played in avoiding the incident which occurred. As a practical matter, Mr Crowley had a plan for the conduct of the return trip from the south to the north bank of the river whereby he would lead the students on a safe route to the correct location for a ferry glide, and Mr Wenzel would take up the rear to ensure the students followed his line. Mr Wenzel fully understood that this was his role, so there was no failure of communication in that respect. It is unclear to us what Mr Crowley might reasonably have told Mr Wenzel about the priorities to adopt in the event of an emergency that might have avoided or mitigated the incident which occurred. Mr Wenzel assisted to bring to shore students that were in difficulty, as might be expected, and beyond this we cannot identify anything that he might reasonably have been briefed to do in such a situation that he did not do. The appeal ground is rejected.

²⁰ (1969) VR 136 at 138-9

Appeal ground 7(b)

[68] The contention that the Deputy President failed to take into account the failure by Mr Crowley to give a thorough briefing to the students at the commencement of the activity is incorrect. As earlier discussed, the Deputy President noted Mr Crowley's concession to that effect in paragraph [553] of the decision, but nonetheless found that he gave clear and unambiguous instructions to the students as to the safe conduct of the class. We have found no error in that conclusion. If those instructions had been complied with, the incident would not have occurred. Thus, while it might have been desirable for Mr Crowley to have given a longer briefing, this would not have avoided a decision by some students not to comply with Mr Crowley's clear instructions. This appeal ground is rejected.

Appeal ground 7(c)

[69] We have earlier dealt with the issue of the adequacy of Mr Crowley's instructions for the movement from the southern to the northern shore, and we do not consider that the decision was attended by any error in this respect. This appeal ground is rejected.

Appeal ground 7(d)

[70] We have earlier dealt with Ms Aitken's evidence as to the weather at the time she first observed the students in their kayaks. This evidence was considered by the Deputy President in paragraph [527] of the decision, and we agree with the Deputy President that Ms Aitken's evidence did not properly bear upon Mr Crowley's culpability for the incident.

Appeal ground 7(e)

[71] The four particulars which constituted the reasons for Mr Crowley's dismissal did not contain any allegation concerning the adequacy of his instruction to students when he went to assist the first capsized kayak. It is not clear on what basis this issue is now raised. In any event, multiple witnesses confirmed Mr Crowley's evidence that he gave an instruction for students to return to the shore. Taking into account that it had become urgent for Mr Crowley to assist the students who had got into difficulty, we cannot identify any alternative or additional instruction that Mr Crowley might have given. The Deputy President dealt with this issue in paragraph [540] in a way which we consider was fully supported by the evidence. This appeal ground is rejected.

Appeal ground 7(f)

[72] It is said by the Archdiocese that the matters raised in appeal grounds 7(a)-(c) and (e) resulted in students "*who had done nothing wrong*" following Mr Crowley into the area of the first capsized kayak and getting into difficulty. Again, this appears to be a new allegation which did not feature in the reasons given for the dismissal. It also appears to us to be a non-sequitur: if Mr Crowley instructed students to go to shore before moving to assist the first capsized kayak, and a number of students instead chose not to go to shore but rather follow him into the wave zone, it is not apparent why that would constitute a valid reason for Mr Crowley's dismissal.

Other matters

[73] The Archdiocese's 15 propositions raise a range of other matters without making clear their relationship to the appeal grounds or the four particulars of alleged misconduct. We consider it is sufficient to deal with those propositions that we have not already dealt with in connection with the appeal grounds as follows:

- That a majority of the students were novices at kayaking (Proposition 2) is a statement of the obvious, since the whole point of the kayaking element of the PASS course was to teach students the basics of kayaking. We do not consider that it was necessary for the Deputy President to make a specific finding about this. Likewise it was necessarily the case, being early in the term, that it was the students' first or second practical lesson (Proposition 5). It is not clear how this fact might have altered the risk assessment and control process which was undertaken by Mr Crowley.
- That students might "*push boundaries*" (Proposition 3) was taken into account by Mr Crowley, in that the purpose of Mr Wenczel taking up the rear on the return journey was to ensure that the students followed Mr Crowley's line.
- That some students felt uncomfortable with undertaking the kayaking activity on the day (Proposition 4) is a subjective matter which is not determinative of the objective safety of undertaking the kayaking lessons on that day. Additionally, there must be caution attached to accepting some of the evidence of the students to that effect. For example, Student H was one of those who said in his witness statement that he expressed concern about the kayaking class proceeding because of the weather, but he was also one of those who admitted that he later departed from Mr Crowley's line on the return to the north shore and went into the wave zone to catch waves.
- Insofar as Mr Crowley did not disclose to the students that part of his class plan was to locate a current to conduct "ferry gliding" (Proposition 6), this had no bearing on the occurrence of the incident.
- The proposition that Mr Crowley failed to exercise "*vigilance at all times*" when he decided to lead rather than follow the group on the return to the north shore and thus could not observe the students (Proposition 15) is entirely unrealistic, since it was necessary for him to guide the students on a safe route to a location where it might be possible to conduct the ferry gliding activity. Mr Wenczel's role was to bring up the rear to ensure that the students followed Mr Crowley's line. It was obviously not possible for Mr Crowley himself to fulfil all these functions simultaneously. That Mr Wenczel was not an employee of the school and did not have the training or legal responsibility of a teacher raises a question about the sufficiency of human resources provided by the College to conduct the lesson but it is not indicative of culpability justifying dismissal on the part of Mr Crowley.

Conclusion re valid reason

[74] We are not satisfied that there was any error in the Deputy President's conclusion that the Archdiocese had failed to demonstrate a valid reason for Mr Crowley's dismissal.

[75] We agree with the Deputy President's observation that, with the benefit of hindsight, the kayaking class might have been conducted in a more organised and effective manner. It is doubtful however that this would have avoided the occurrence of the incident in the face of

the preparedness of a number of students not to comply with clear and unambiguous instructions. On one view, the problem was that it was simply not possible for one teacher (Mr Crowley), with the limited assistance provided by a trainee (Mr Wenczel) to respond quickly and effectively to mass disobedience on the part of the class in an inherently risky on-water situation. It may be noted that the “*Surfboard, Wave Ski and Bodyboard Riding*” guidelines relied upon by the investigation and to which we have earlier referred required a second teacher and a “*shore patrol*” of students equipped with a range of safety equipment to be present. Although those guidelines were clearly not directed at kayaking, nonetheless they point to a range of resources required for other types of on-water activities which Mr Crowley did not have at his disposal. It may have been a better approach for the Archdiocese to address the incident of 17 November 2017 as indicative of a systems failure rather than to seek to wholly blame Mr Crowley for the incident.

Consideration – remedy of reinstatement – appeal grounds 8-11

[76] In respect of the appeal grounds challenging the Deputy President’s decision to order the remedy of reinstatement, we are not satisfied that it would be in the public interest to grant permission to appeal. We have determined that the Deputy President’s conclusion that she was not satisfied that there was a valid reason for Mr Crowley’s dismissal was not attended by appealable error, and her conclusion in that respect founded (and indeed made virtually inevitable) the further conclusion that Mr Crowley’s dismissal was unfair. Consideration of the appeal grounds concerning the Deputy President’s decision to award reinstatement necessarily proceeds on that premise.

[77] Reinstatement is the primary remedy in respect of an unfair dismissal in the sense that s 390(3)(a) of the FW Act requires that there be a finding that reinstatement is inappropriate before any power exists to make an order for compensation.²¹ Where, as here, there has been a finding that there was no valid reason for the dismissal and the applicant seeks reinstatement as a remedy, it might be said that reinstatement is “on the cards” unless there are strong countervailing factors present. The reluctance of an employer to shift from a view that the employee committed misconduct justifying dismissal, or that it would be difficult or embarrassing for the employer to be required to re-employ someone whom the employer considered to be guilty of such misconduct, do not provide a sound basis for concluding that there has been a loss of trust and confidence such as to render reinstatement impracticable.²² A decision concerning whether to grant reinstatement pursuant to s 390(1) is a discretionary one, such that an appeal against such decision must demonstrate error of the type identified in *House v The King*.²³

[78] We are not satisfied that the appeal grounds disclose any arguable contention of appealable error in respect of the Deputy President’s reinstatement order. The Deputy President took into account the matters which were relevant, which included that Mr Crowley had at the time of his dismissal been on a final warning arising from an unrelated matter, the need of the College to manage relationships with parents and stakeholders, and Mr Crowley’s personal circumstances and the preparedness of the Archdiocese to retain him in some form of

²¹ *Melanie Millington v Traders International Pty Ltd* [2014] FWCFB 888 at [66]

²² *Nguyen v Vietnamese Community in Australia* [2014] FWCFB 7198 at [27], *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191-2

²³ [1936] HCA 40, 55 CLR 499 at p.505

teaching employment as an alternative to his dismissal. The outcome determined by the Deputy President, far from being counter-intuitive or manifesting any injustice, was clearly in the range of reasonably available outcomes having regard to the principles we have earlier stated. The determination of the remedy was based on the particular facts of Mr Crowley's case, and the appeal does not raise any question of law or principle that is of general or wider application.

[79] Accordingly permission to appeal in respect of appeal grounds 8-11 will be refused in accordance with s 400(1) of the FW Act.

Conclusion

[80] We determine as follows:

- (1) Permission to appeal is granted in respect of appeal grounds 1-7 in the amended notice of appeal. Permission to appeal is otherwise refused.
- (2) The appeal is dismissed.



VICE PRESIDENT

Appearances:

Y Shariff of counsel and *K Brotherson* of counsel on behalf of the Trustees for the Roman Catholic Church, Archdiocese of Canberra and Goulburn
A Howell of counsel with *C Matthews* on behalf of Mr Crowley.

Hearing details:

2019.
Sydney:
24 September.

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<PR714422>