[2021] FWC 2341 [Note: An appeal pursuant to s.604 (C2021/2816) was lodged against this decision - refer to Full Bench decision dated 14 October 2021 [[2021] FWCFB 6026] for result of appeal.]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Simon Parris
v
Trustees of Edmund Rice Education Australia T/A St Kevin's College
(U2020/2749)

COMMISSIONER LEE MELBOURNE, 28 APRIL 2021

Application for an unfair dismissal remedy.

[1] On 10 March 2020, Mr Simon Parris (Applicant) made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for an unfair dismissal remedy, alleging that he had been unfairly dismissed from his employment with Trustees of Edmund Rice Education Australia T/A St Kevin's College (Respondent). The Applicant seeks seeks orders for reinstatement and restoration of lost pay.

When can the Commission order a remedy for unfair dismissal?

[2] Section 390 of the FW Act provides that the Commission may order a remedy if:

(a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and

(b) the Applicant has been unfairly dismissed.

[3] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

[4] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;
(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

When has a person been unfairly dismissed?

[5] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

The hearing

[6] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[7] After considering the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing for the matter (s.399 of the FW Act).[1]

[8] It should be noted that there was an earlier decision made by me to delay the hearing of the matter until December 2020, after an application was made to that effect by the Respondent.[2]

Permission to appear

[9] Both the Applicant and the Respondent sought to be represented before the Commission by a lawyer.

[10] Relevantly, s.596(1) of the FW Act provides that a party may be represented in a matter before the Commission by a lawyer or paid agent only with the permission of the Commission.

[11] Section 596(2) provides that the Commission may grant permission for a person to be represented by a lawyer or paid agent in a matter before the Commission only if:

(a) it would enable the matter to be deal with more efficiently, taking into account the complexity of the matter; or

(b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or

(c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

[12] The decision to grant permission is not merely a procedural step but one which requires consideration in accordance with s.596 of the FW Act.[3] The decision to grant permission is a two-step process. First it must be determined if one of the requirements in s.596(2) have been met. Secondly, if the requirement has been met, it is a discretionary decision as to whether permission is granted.[4]

[13] Having considered those matters, I determined that allowing both the Applicant and the Respondent to be represented by a lawyer would enable the matter to be dealt with more efficiently taking into account the complexity of the matter. I have therefore decided to exercise my discretion to grant permission for both the Applicant and Respondent to be represented. [5]

[14] Accordingly, during the hearing held on 7, 8 and 9 December 2020 and 4 February 2021, the Applicant was represented by Mr J Darams, of Counsel, and the Respondent was represented by Mr N Harrington, of Counsel.

Witnesses

[15] The Applicant gave evidence on his own behalf.

[16] The following witnesses gave evidence on behalf of the Respondent:

- Mr John Crowley, Acting Principal, St Kevin's College;
- Mr Ted Guinane, Director of Administration, St Kevin's College;
- Student A, St Kevin's College;
- Student B, St Kevin's College;
- Mr Colin Macfarlane, Teacher and Head of House, St Kevin's College;
- Mr Robert Windle, Teacher and Head of House, St Kevin's College; and
- Mr David Thompson, Digital Forensic & Cyber Security Specialist.

Submissions

[17] Submissions, witness statements and other materials were filed in the proceedings. Those materials were compiled into a digital court book for ease of reference during the proceedings. The hearing was conducted using Microsoft Teams because of the restrictions imposed by the COVID-19 pandemic.

Confidentiality orders

[18] In this matter, several confidentiality orders have been issued by the Commission.[6]

[19] Two of the confidentiality orders, issued on 15 July 2020[7] and on 9 December 2020,[8] relate to the identification of students who attended St Kevin's College that are involved in these proceedings.

[20] The confidentiality order dated 15 July 2020 provides for the anonymisation of any person who was a student and/or under the age of 18 during the employment of the Applicant by use of descriptors such as Student A and/or Student B. This order extends to the anonymisation of any parent of a student during the employment of the Applicant. In this decision, references to three students have been anonymised as "Student A", "Student B" and "Student C". Where the parents of a student are referred to, for example the parents of Student A, they will be referred to as "parent of Student A". The initials of any student will also be anonymised as "SA", "SB" or "SC" wherever necessary.

[21] The confidentiality order dated 9 December 2020 relates to the evidence of Student A. During the hearing, Student A gave their evidence in private in a closed session. There are strict regulations contained in that order regarding the evidence of Student A.

Jurisdiction

[22] The relevant parts of the legislation dealing with jurisdiction in unfair dismissal matters are dealt with above. It is not in dispute that there is jurisdiction in the Commission to hear and determine the application.

[23] The Respondent in their written submissions confirmed as follows:

> "• the Applicant was protected from unfair dismissal pursuant to s.382 of the *Fair Work Act 2009* (Cth) (the FW Act) because he earned less than the high-income threshold and was covered by the Victorian Catholic Education Multi Enterprise Agreement 2018 (the Agreement);
>
> • the Applicant made his application within 21 days: s.394(2) of the FW Act;
>
> • this is not a case involving a genuine redundancy;
>
> • EREA is not a small business for the purposes of the FW Act; and
>
> • the Applicant was dismissed by EREA: s.385(a) and s.386(1)(a) of the FW Act.
>
> The Agreement applied to the Applicant's employment.
>
> There is jurisdiction in the Commission to hear and determine the Application."[9]

Background

[24] The Applicant is 52 years old. He has worked in teaching for 29 years. He has taught at several schools prior to the St Kevin's College, including Marian College, Mount Lilydale Mercy College and St Michael's Grammar School.[10]

[25] The Applicant was employed by the Respondent on 25 January 2013. The Applicant was a maths and chemistry teacher and was also head of theatre productions for the Respondent for a period of time. As head of theatre productions, the Applicant was involved in running musicals for the Respondent.[11]

[26] In addition to his teaching load, the Applicant spent a significant amount of his time involved in theatre productions for the school. The Applicant states that:

> "All St Kevin's staff are required to undertake co-curricular work. This means work that is done in addition to classroom teaching. … For seven years, from 2013 to 2019, I was Teacher In Charge (TIC) of Productions, overseeing a period of significant growth and success in this area. I liaised with colleagues at six girls' schools and oversaw up to 11 productions each year. I also directed a musical each year. This was rewarding but very demanding work, taking the majority of my available time at work and involving being at school on a great many nights and weekends."[12]

[27] It is largely through his involvement in the theatre productions that the Applicant had cause to interact with Student A, rather than as a classroom teacher.

[28] The Applicant sets out in his witness statement his "Performance History".[13] The Applicant considers himself a high performing teacher. The Respondent does not raise any issue with the performance of the Applicant as a teacher. The matters in issue in this case involve the alleged conduct of the Applicant. A key issue is the allegations of hugging and inappropriate touching of Student A. However, there are also various other allegations of misconduct that do not involve Student A.

The Evidence

The first warning about hugging a student

[29] In February 2019, the Applicant attended a meeting with Mr Russell, then Principal of the school. Mr Russell told the Applicant that he had been contacted by the parents of a student who were unhappy that the Applicant had hugged their son. That hugging was alleged to have occurred in the previous year, being 2018.[14]

[30] According to the Applicant, Mr Russell told him at that time in February 2019, "to be careful to ensure that I did not to (*sic*) hug a student again."[15] The Applicant did not know at that time that the student's parents who complained were in fact Student A's parents. The Applicant became aware of that fact in June 2019, as explained further below.

[31] Student A gave the following evidence regarding the Applicant:

> "What I have described above as 'the touchy feely' behaviour included Mr Parris giving boys hugs after musical rehearsals, putting his arm around boys and being very hands on in the way he directed people around stage. Mr Parris would give me, as well as a handful of other boys, a hug after almost every rehearsal dating back to the shows in which I performed in year 9. He did not hug everyone. I was never comfortable with Mr Parris hugging me. Other teachers did not hug me."[16]

[32] On 14 June 2019 (hereafter also referred to as the "June 14 incident", or "June 14"), the Applicant went to the class that Student A was in to attain a graphic design file that Student A was working on. Student A was in a class that was being taught by Mr Macfarlane, and not the Applicant. The Applicant asked Mr Macfarlane if he could speak to Student A, after which Student A left the class and went with the Applicant to sit down on a couch in the McCarthy House area.[17] There is significant factual contest as to what then occurred and the extensive

evidence on the point is dealt with more fully later in the decision. For present purposes, I will set out what the Applicant in his witness statement conceded did occur:

- He put his arm across Student A's shoulders and as he was doing so said words to the effect of "thanks [Student A]."[18]
- They then got up from the couch, and as they stood, Student A appeared slightly uneasy.[19]
- He then tried to "lighten the situation" by asking Student A, "what's wrong sweetie?"[20]
- On 19 June 2019, he attended a meeting with Ms Canny, then Acting Headmaster.[21]
- Ms Canny put to him that Student A felt uncomfortable with his actions and language on 14 June.
- He agreed to Ms Canny that he:
    - Visited Student A in class;
    - Sat on the couch with Student A;
    - Put his arm across Student A's shoulders; and
    - Used the word "sweetie" in reference to Student A.[22]
- He was also informed at that meeting that: "the parents who had contacted Mr Russell about me having engaged in a hug with their son in 2018 were the parents of [Student A]."[23]
- He apologised to Ms Canny for his actions.[24] He was then sent home for the rest of the day and was told to meet with Ms Canny the next day.[25]
- He then wrote a "personal reflection" which he sent to Ms Canny.[26]
- He met with Ms Canny and Mr Jones the next day, 20 June 2019.[27]

[33] The personal reflection sent to Ms Canny includes the following concessions by the Applicant:

- That he took full responsibility for his behaviour.
- He acknowledged being spoken to by Mr Russell in February 2019 about a student who was uncomfortable with being hugged.
- It was not clear to him now why attaining the graphic design file from Student A was so urgent that he visited Student A in class.

- Student A prompted him to reflect on the difference between how he sees a student-teacher relationship and how a student sees it.

- He now needs to further reflect on the way he comes across to all students.

- That his father's sudden death in February and work pressure from carrying out the role as the TIC of productions may have contributed to him acting in a careless manner.[28]

[34] The reflection note also included the following:

> "I recollect that I put my arm around [Student A's] shoulder in saying thank you for the work, for which I was very grateful. Looking back, I do not know why I did this and, of course, I deeply regret it. I acknowledge that I used some sort of affectionate term in asking if [Student A] was feeling ok. Looking back, this is very odd to me now as I so rarely, if ever, speak like that. Nonetheless, I do not argue the point, and I can fully see how this would make [Student A] feel very uncomfortable."[29]

[35] On 20 June 2019, there was a further meeting with Ms Canny, Mr Jones and the Applicant. Ms Canny gave the Applicant a letter, which contains the following:

> "Dear Simon
>
> I write to formally record a breach of the EREA Code of Conduct, which occurred on Friday, 14 June 2019 involving the student, [Student A].
>
> Your actions in removing [Student A] from his class, sitting with him on a couch in a physically close situation in the locker bay area, concluding your discussion by hugging him and speaking to him in a familiar, affectionate manner, compromised the professional boundaries that should exist between student and teacher. This resulted in a situation in which [Student A] felt uncomfortable and unsafe.
>
> The EREA Code of Conduct Section 3.2 states: "Workers must abide by Professional Boundaries, acknowledging that interactions with students by their very nature are open to scrutiny. Workers should avoid placing themselves or a student in a compromising position and avoid actual and/or perceived breaches of the Code."
>
> Thank you for attending the meetings with the Director of Studies, Mr Gary Jones and myself on Wednesday, 19 June and Thursday, 20 June 2019, where you acknowledged the above situation had occurred. You were relieved of your teaching duties yesterday and asked to go home. I note receipt of a written report by you in which you take full responsibility for your actions and reflect deeply on your inappropriate behaviour. You have also noted the meeting you had with the Headmaster in February 2019, where matters relating to the nature of your interaction with students were discussed.
>
> Following advice from the Commission for Children and Young People, a Reportable Conduct Notification has been made by me on behalf of the College. I'm now obliged to provide the Commission with a report of the allegations, the investigation carried out and the steps undertaken by the College in response to the allegations. I have attached

an Information Sheet to this letter which provides guidance about the Reportable Conduct Scheme.

I need to state very clearly that should there be another breach of the Code of Conduct of a similar nature, then there would be an increased disciplinary response, which could include termination of your ongoing employment.

I acknowledge your apology and the commitment you have given to be far more careful about upholding professional boundaries in the future. There must be no physical contact or informal dialogue with students.

I also note that both the student and you have requested a restorative meeting which will take place in Term 3.

This matter remains confidential to protect all parties involved.

Yours sincerely

Janet Canny"[30]

[36] In early Term 3, Student A discontinued his role in the musical directed by the Applicant. The evidence of Student A is that he did so after a series of meetings with Ms Canny. During these meetings, Ms Canny put a number of options to Student A in an effort to move forward. According to Student A, Ms Canny emphasised the option that Student A leave the musical, while the Applicant would stay involved in the musical, as well as a "restorative meeting." Student A's evidence is that being influenced to choose this option made him feel like he was being punished for the conduct of the Applicant and he was devastated.[31]

[37] On 24 July 2019, the Applicant attended a "restorative meeting" with Student A in the office of Mr Macfarlane, a teacher, and Head of House for the Respondent. Mr Macfarlane, Student A and the Applicant attended that meeting. According to the Applicant's evidence, the meeting's content and outcome was generally positive.[32] In contrast, Student A's evidence was that:

"Ms Canny suggested the "restorative meeting" with Mr Parris. I had never heard of a "restorative meeting" before this time. From a discussion with Mr Macfarlane, I understood the purpose of the restorative meeting was to sit down with Mr Parris and discuss what had happened and make amends.

The restorative meeting was organised for 24 July 2019 and Mr Macfarlane also attended. I was greatly anxious and nervous going into the meeting. The meeting was also held near the couches where the incident had occurred on 14 June 2019.

During the restorative meeting, Mr Parris made excuses and tried to justify his behaviour. Mr Parris told me how excited he was about my work (being the logo) and how proud he was of me. He made a comment to the effect that perhaps his excitement helped explain his behaviour.

The meeting was overwhelming and it made me unfocussed for the rest of the day. I was extremely anxious as a consequence of this meeting.

> I felt angry and confused after the restorative meeting. I felt that it was counterproductive."[33]

[38] Throughout the rest of the year, the Applicant met weekly with Ms Canny for "ongoing support and guidance."[34]

[39] There is a claim by Student A that he observed the Applicant hugging students in February 2020 at the Newman College retreat. Student A also claims that after June 14, he saw the Applicant hugging and touching other boys on the arm around the school.[35] The Applicant vigorously disputes both of these claims.[36] I deal later in the decision with these allegations that the Applicant was hugging students at the Newman College retreat and on other occasions at the school.

[40] On 19 August 2019, Student A went to see Ms Keel, the school counsellor, as a result of the anxiety and paranoia he was feeling about seeing the Applicant around the school as a result of the June 14 incident. His evidence was that he told the school counsellor about the June 14 incident, including that the Applicant had "touched my leg." The notes that Ms Keel made on the day recorded among other things that "Mr. P placed his hand on his knee."[37] I deal more extensively with the evidence on alleged leg touching later in the decision.

[41] It would appear that Ms Keel reported on the counselling session with Student A to Mr Russell because on the next day, 20 August 2019, the Applicant was summoned to the office of Mr Russell. According to the Applicant, Mr Russell told him that he had been told by a school counsellor that Student A had said that he had put his hand on Student A's leg while there were on the couch on 14 June 2019. The Applicant denies that he did so. The Applicant also states that this was the first time the "hand on the leg" allegation was made and that he was upset by it.[38]

[42] According to the Applicant, Mr Russell then said the following:

> "• Mr Russell told me that he had looked at CCTV footage and said that from the angles [Student A] and I were sitting, and my arm position, this action physically could not have possibly happened and could not be true.
>
> • I was instructed by Mr Russell that, moving forward, I was to use a particular set of stairs in the Kearney building so as to minimise the probability of crossing paths with [Student A];
>
> • Mr Russell told me that he was going to change my yard duty position to decrease the chance of [Student A] and I crossing paths;
>
> • Mr Russell also said that these arrangements would continue until the end of the school year for 2019."[39]

[43] It is apparent from the Applicant's evidence that Mr Russell accepted the Applicant's denials and concluded that the leg touching allegation was not true.

[44] In the last week of Term 3 in September 2019, the Applicant again met with Mr Russell. The Applicant states that he was told by Mr Russell that:

"• CCYP [Commission for Children and Young People] had not provided a response yet;

- I was to be removed from my co-curricular position of Teacher in Charge of Productions;
- I was not to direct any productions in 2020;
- I had to continue to use alternative stairs and be sure to avoid any contact with [Student A];
- I had 7 weeks of long service leave at the start of 2020 and I was offered an additional 2 weeks ex gratia long service leave;
- With 9 weeks leave, I could take long service leave for the whole of term one 2020 or, at half pay, I could take the whole of semester one 2020; and
- In answer to my question, I was told that if I did not take up the offer of long service leave, there would be no particular change to my teaching load for 2020."

[45] The Applicant declined the long service leave offer.[40]

[46] On 21 October 2019, Mr Russell provided a letter to the Applicant which set out the school's formal response to the June 14 incident. That letter was in the following terms.

"Dear Simon

This letter is a formal notice to you that the Commission for Children and Young People (CCYP) has advised me on 18 October 2019 that the matter referred to them, following your conduct on 14 June 2019, is closed.

This means that the CCYP were satisfied with the investigation conducted by the College and the finding that the allegation of sexual misconduct against a child was substantiated, in line with the CCYP descriptors of sexual misconduct. The College also confirms the previous finding that you were in breach of the EREA Staff Code of Conduct 3.2

The CCYP has forwarded their findings and relevant information to the Secretary of the Department of Justice and Community Safety (DJCS) for the purposes of a Working with Children Check reassessment, in accordance with s.16ZD of the Child Wellbeing and Safety Act 2005 (Vic). Notification has also been passed to the Victorian Institute of Teaching.

The CCYP does not propose to take any additional action.

This letter is also a final warning that should any behaviour, interaction or contact of a similar nature occur in the future, with any student, then there would be an immediate significant disciplinary response, which could include termination of your employment.

I acknowledge your co-operation and involvement in continued professional training in child safety matters, your apology and ongoing meetings with the Deputy Head.

Throughout 2020, you are to avoid direct contact with [Student A] of Year 12, continuing to use the means we have had in place throughout Terms III and IV 2019.

Your removal as TIC of Productions for 2020 is also part of the College's formal response to your actions of 14 June 2019.

You are welcome to discuss the content of this letter with myself or the Deputy Head, Janet Canny.

Yours sincerely

Stephen F Russell"[41]

[47] On 29 November 2019, the Applicant received a letter from the Victorian Institute of Teaching (VIT) which the Applicant has summarised as follows:

"• I may have engaged in category C conduct resulting from the substantiated allegation of reportable conduct against me concerning the incident at St Kevin's on 14 June 2019;

- I could continue to undertake the duties of a teacher;
- My registration would not be updated to reflect the new expiry date of my registration;
- I would not receive a new registration card with my new registration expiry date of 30 June 2020;
- I could use this letter as proof that I could continue to be registered as a teacher until 30 June 2020 or until a decision in relation to the application for renewal for registration had been made by the Institute;
- I was requested to provide VIT with a statement; and
- I was requested to provide VIT with character references and personal reflection."[42]

[48] In December 2019, the Applicant sent an email to VIT attaching a statement of personal reflection and the letters that he had received from the Respondent in relation to the June 14 incident.[43]

[49] A character reference in regard to the Applicant's service for the Respondent was also submitted to VIT from Mr Russell. The character reference is generally positive and states in summary that the Applicant:[44]

- came to St Kevin's College highly recommended, specifically, the Principal of his previous employer, St Michael's Grammar, had assured Mr Russell there were no concerns regarding child safety and student welfare,

- has good classroom practice in teaching Mathematics and Chemistry classes,
- is generous with his time and commitment to tutoring students out of class time, generally as part of group sessions with other teachers,
- is an "effective and sensible" pastoral leader of Kearney House, with responsibility for 21 boys each year,
- has held the position of Director of Musicals, steering the production of musicals which involve multiple students and staff,
- volunteers his time to help tutor refugees as part of a partnership with St Ignatius Richmond's Friday Night School, and
- he has taken the allegations seriously, complied with the restrictions imposed, engaged with the investigation process openly and honestly, and has shown insight into the finding of sexual misconduct.

[50] Having regard to the chronology of events set out above, the Applicant considered the June 14 incident to be over because:

- The 21 October letter suggested that the matter was over from the Respondent's perspective, and
- While his registration was only extended to June 2020, the Respondent gave him a full teaching load, suggesting that the Respondent felt the matter was closed and that the VIT process would proceed smoothly.[45]

[51] On 11 February 2020, the Applicant was emailed and asked to attend a meeting with Mr Russell and Ms Canny. The Applicant had a support person present with him, Mr Ian Nott. The Applicant's evidence is that at the meeting he was told:

"• the parents of [Student A] had emailed Mr Russell on Sunday 9 February 2020 requesting a meeting with Mr Russell;

- the parents of [Student A] met with Mr Russell the next day. From what Mr Russell said to me, I understood that they told Mr Russell and Ms Canny that [Student A] felt anxious because I was at the School and that he might see me;
- Mr Russell said to me, which I took as a reinforcement of what we had discussed in the 2019 school year, that it was very important that I use the alternative stairs at the school to avoid [Student A];
- I was to be taken off yard duty all together. I understood that this was to further minimise the possibility of contact with [Student A];
- weekly meetings with Ms Canny were to recommence; and
- In response to a question by me as to whether there was anything else that I could do to help the situation, Mr Russell and Ms Canny said that they were perplexed as what

else to do to appease [Student A's] parents. I asked whether the parents had alleged that I had had any specific interactions with [Student A] and was told that they had not made any such allegations. At the end of the meeting I saw Mr Russell throw his hands up in the air and he said words to the effect: "I don't know what else we can do to satisfy the parents of [Student A]."[46]

[52] On 13 February 2020, the Applicant was called into another meeting with Mr Russell and Ms Canny, where Mr Nott also attended in support. At that meeting, the Applicant's evidence is that the following exchanges occurred:

"• Mr Russell said that the parents of [Student A] had met with him again and were pushing for a new report to be made to CCYP regarding the 14 June Incident;

- Mr Russell said that a new investigation would occur saying that he usually ran such investigations but in this instance an external investigator would be appointed and that he had a good idea of who to use and would see if they were available;
- I was told I must hand in my work laptop;
- I was told that my school email account and access to the College Portal would be disabled;
- I was directed not to attend school on Friday 14 February 2020 and Monday 17 February 2020;
- I would be called into a further meeting on 17 February 2020;
- I asked if I should provide lesson plans for my classes for the following day. Mr Russell said that he would be grateful if I would do so.
- at the end of the meeting Mr Russell shook my hand at the door of his office;
- as I walked out of the building with Ms Canny, she put her hand on my arm and said to me: "I just don't see how this is a sackable offence".

Ms Canny then accompanied me to my desk in the staff study and I gave her my laptop. Ms Canny went back to her office."[47]

[53] On 17 February 2020, the Applicant was directed to attend a further meeting at 3:30 pm that day. The Applicant was provided with a letter prior to that meeting which relevantly included the following:[48]

"Dear Simon

Re: Concerns in relation to your professional conduct

Several concerns have recently been brought to my attention regarding your conduct at St Kevin's College Toorak (the College).

In summary, the concerns are composed of allegations that fall under the following

categories:

1. Alleged behaviour that may have caused significant emotional or psychological harm to a child, as that phrase is defined by the reportable conduct scheme contained within the *Child Wellbeing & Safety Act 2005* (Vic). Specifically, the parents of [Student A] have alleged that your conduct towards [Student A] on 14 June 2019, the subject of the initial reportable conduct findings of which you are aware, has caused [Student A] to develop anxiety. This has necessitated a new notification to the Commission for Children and Young People.

2. Possible breach of clause 4.2 of the Edmund Rice Education Australia Code of Conduct **(Code)** by posting a sexualised comment on your personal Twitter account (@SimonManinChair) on 14 June 2019 that could be perceived as bringing the College or EREA into disrepute, by stating:

> "*Fosse/Verdon is a Broadway dancer's wet dream from which I hope we all never wake up*".

Clause 4.2 of the Code relates to not bringing yourself, Edmund Rice Education Australia or the College into disrepute by inappropriate personal online behaviours. It is noted in relation to allegation 2 above, the website link (https://simonparrismaninchair.com/about/) on your Twitter profile under the "About" section includes a comment from you dated 12 May 2017 at 8.41pm which identifies your employer as the College. You write:

> "*Donna! I should have replied immediately when you first left this comment. Thanks so much for making contact. I went on to St Michael's and have since moved to* ***St Kevin's.*** *Running Productions and still teaching Maths (and Chemistry). Glad to hear you are involved in your school's shows too. Best wishes*", [our emphasis]

(collectively referred to as the **Concerns).**

The College has not pre-judged the Concerns and has made no assessment of the substance at this stage. However, as you will understand, the College is subject to significant regulatory and public scrutiny and must at all times act in the best interests of student welfare when any complaint is raised.

In accordance with clause 13.2(a) of the *Victorian Catholic Multi-Enterprise Agreement 2018* **(VCEMEA),** the College is contacting you to have a discussion about the Concerns.

You are invited to a meeting with me on **Monday 17 February at 3.30pm** in the Headmaster's office in accordance with clause 13.2(a) of the VCEMEA to discuss these concerns with me.

Depending on the substance of the discussion and any other relevant matters it may be that other action including an investigation will take place. If that occurs you will be advised in writing of the detail of any complaints or allegation and the detail of any investigation (clause 13.2(b) VCEMEA)."[49]

(emphasis per original)

[54] The Applicant's evidence is that at the meeting on 17 February 2020:

- He was again told that the parents of Student A allege that his actions in the June 14 incident caused Student A to develop anxiety and that neither Mr Russell nor Ms Canny said there was any other cause for the anxiety of Student A than the actions of the Applicant on the June 14 incident.

- As to the second allegation, the Applicant told Mr Russell he had deleted the tweet and comment on his personal website.

- There was no discussion about the allegation, and he was not asked to provide any comment or response at that meeting.

- The Applicant was told that an external investigator would investigate the two allegations and that he was to remain at home on paid leave until he met with the investigator.[50]

[55] On the evening of Monday 17 February, the Applicant watched an episode of an ABC programme called Four Corners which focused on the Respondent. The Applicant's evidence is that the episode did not mention him nor the June 14 incident.[51] The Four Corners episode which the Applicant refers to is not part of the evidence in these proceedings. It would not seem to be in contest that the Four Corners episode caused reputational damage to the Respondent. The Acting Principal, Mr Crowley, agreed that was the case.[52]

[56] Two days after the broadcast of the Four Corners episode, on Wednesday 19 February 2020, Mr Russell announced his resignation as Headmaster. On Thursday, 20 February 2020 Ms Canny was suspended by the Respondent.

[57] By 20 February 2020, Mr Crowley was appointed as the Acting Principal. On 20 February 2020, the same day Mr Crowley was appointed, the Applicant was requested to attend a meeting at the Headmaster's office that afternoon at 5:00 pm.

[58] The Applicant's evidence is that he was unable to secure a support person given the short period of notice prior to the meeting taking place.[53] On 20 February 2020, the Applicant also received a letter[54] that essentially restated the two allegations outlined in the 17 February 2020 letter.[55] However, the 20 February 2020 letter did not refer to a possible investigation, instead it stated that:

> "Following this meeting and my consideration of the relevant matters pertaining to the Concerns, consideration will be given to whether further action will be taken in accordance with clauses 13.4 and 13.5 of the *Victorian Catholic Education Multi Employer Enterprise Agreement 2018,* including whether we might hypothetically require you to comply with an Employee Improvement Plan; whether we issue a final warning, or termination of your employment."

[59] The meeting took place and Mr Crowley and Mr O'Halloran, a lawyer who acts for the Respondent, attended. The Applicant attended the meeting alone.[56]

[60] There is some contested evidence as to what occurred at the meeting. However, it is not in contest that the Applicant's employment was terminated by Mr Crowley at that meeting. The Applicant was paid in lieu of notice in accordance with the Agreement.[57] I deal with the process of the dismissal in more detail later in this decision.

[61] The next day, on 21 February 2020, the Applicant received the termination letter by email. That letter includes the following:

> "Dear Simon
>
> **Termination of employment with notice**
>
> I refer to the informal meeting you attended with Stephen Russell last week and the formal meeting you attended with Mr John Crowley, Acting Principal of St Kevin's College on 20 February 2020.
>
> I am writing to confirm that, following careful consideration of your responses, relevant facts, evidence and mitigating circumstances, the College has decided to terminate your employment on the grounds of misconduct, with notice.
>
> The grounds on which we have based this decision has been discussed with you in our formal meeting and you had an opportunity to respond to the proposed course of action. Accordingly, the College has found, on the balance of probabilities, that the following behaviours by you constitute misconduct:"

[62] The letter then sets out again the two allegations that were in the 17 and 20 February letters, which were collectively referred to in the letter as the "Concerns". There is no need to repeat them again here. The letter goes on to state as follows:

> "It is considered that these Concerns are in breach of:
>
> - Clause 4.2 of the EREA Code of Conduct by ensuring you do not bring yourself, EREA or the College into disrepute by inappropriate behaviours involving "Technology", which is defined in the Code to include computers (laptops and tablets) and social media;
>
> - Your implied duty of good faith towards the College; and
>
> - Your duty not to conduct yourself in a manner likely to seriously damage or destroy the trust and confidence between yourself and the College.
>
> Your behaviour and conduct is inconsistent with our values and the expectations of an employee in a Catholic school and has the potential to seriously damage the reputation of the College, if members of the public become aware of your conduct.
>
> In terms of mitigating factors, the College has considered your length of service, prior performance record and other matters that you raised during our formal interview. However, I am satisfied that none of those matters outweigh the nature of your conduct such that any outcome other than dismissal is appropriate.

> You will be paid out your minimum notice period and other entitlements in accordance with the *Victorian Catholic Education Multi Enterprise Agreement 2018.*
>
> You should be aware that since the termination of your employment, further allegations of your behaviour towards students have come to our attention. We are currently investigated (*sic*) and have reported these concerns to the Commission for Children and Young People and will be reporting them to the Victorian Institute of Teaching. We reserve the right to rely upon further conduct for the purposes of substantiating your dismissal should we need to do so.
>
> Please confirm with me what College property you have in your possession and I will arrange for a courier to collect it from your home.
>
> Yours sincerely
>
> John Crowley
>
> Acting Principal"[58]

[63] Subsequently, the Applicant then applied to the Commission for an unfair dismissal remedy. The Applicant seeks orders for reinstatement and restoration of lost pay.[59]

Other events post dismissal

[64] The VIT has given the Applicant an interim suspension from teaching while it prepares to investigate the Applicant and his fitness to be a teacher.[60]

[65] The Applicant states that he is eagerly awaiting VIT's independent investigation which VIT has told him will occur.[61]

[66] The Applicant has not obtained remunerative employment since he was terminated. He has applied unsuccessfully for a position at St Michael's Grammar School, St Kilda.[62]

Subsequently discovered alleged misconduct

[67] The Respondent also asserts that there are other valid reasons for the dismissal of the Applicant, beyond those set out in the letter of termination, that were not relied on at the time of the dismissal as they were not known. These issues include the use of the school laptop computer to access, view and store pornography, and sending emails to students that breached the professional boundaries between teacher and student. There is also, depending on the findings of fact in this matter, the prospect that the Applicant's dishonesty in the investigation process associated with the investigation of the June 14 incident is a valid reason for dismissal. I deal with these matters later in the decision.

[68] There was also evidence from Student C which is dealt with in Mr Crowley's statement. The Applicant denied all of the allegations made by Student C. Student C was not called and the Applicant's representative was not able to test his evidence. In the circumstances, I have placed no weight on the evidence of Mr Crowley regarding Student C.

The duties and responsibilities of the Applicant as a teacher at St Kevin's College, and the Applicant's knowledge of those duties and responsibilities

[69] A number of documents were tendered into evidence in the proceedings which set out the various duties and obligations imposed on the Applicant while he worked for the Respondent. These documents were:

- the Child Safety Standards;[63]
- the St Kevin's College Handbook, (and in particular the sections titled *Child Safe Commitment* and *Student Welfare*);[64]
- the Child Safe Policy (and in particular the section titled *Our commitment to our students*);[65]
- the Edmund Rice Education Australia Code of Conduct (the Code),[66] including:
  - (i) interactions with students and the '*unique position of influence'*;[67]
  - (ii) 'professional boundaries'[68]
  - (iii) physical contact with students;[69]
  - (iv) use of technology;[70]
  - (v) harm caused to a student;[71]
- the weekly update from the Headmaster;[72]
- the laptop acceptance form (Laptop Acceptance Form).[73]

[70] The Applicant set out in his statement that he was never formally trained in the Code referred to in the termination letter, nor was he trained in the use of internet and appropriate protocols on personal use and social media.[74] However, the Applicant, almost without exception, accepted during cross examination that he was well aware of his various responsibilities as set out in these documents. Some of the following exchanges during cross examination make clear the Applicant's level of understanding of his obligations:

> "So you realised it was a requirement or term of your employment that you had to adhere to the principles set out in the staff handbook, didn't you? -I did."[75]

> "What did you understand Child Safe or Child Safety Standards to mean, when you heard it used at St Kevin's College? -That it's a practice that's overseen by a body, above all schools, called CCYP, which came into existence at a certain point. And it's principles that a school follows to seek to prevent and take care of students and staff, at all times, to minimise any danger for children."[76]

> "Do you agree, as a teacher at St Kevin's, if you were to inflict serious emotional or psychological harm on a student/child, that could constitute child abuse, for the purposes of that Ministerial order? -Based on this definition, that would appear to be correct."[77]

"Okay. If I can take you to the tribunal book, at page 202 and do you see, midway down, "5.2 Staff Code of Conduct" and it says, "Staff are asked to refer to the EREA Code of Conduct". Do you recall, when employed at St Kevin's College, whether you ever had regard to or read or looked at the EREA Code of Conduct? -Yes. The excerpts from the code would be published on the headmaster's memo, which came out generally each Wednesday. It didn't always have excerpts of the code, but when it did that would be used. That's the main time I've seen it, when it's been excerpts from the code on the headmaster's memo, which is a weekly memo to the staff.

Yes. And you might recall, if you've read the material, that has been filed in this application that I think Mr Crowley produces some instances back in, I think, September '19 or whenever it was, of that weekly maybe it's a newsletter or a memo from the headmaster, where the headmaster refers to extracts, as you've said? -Yes.

Did you receive that headmaster memo each week in your inbox, I suspect, is that right? -Yes.

Thank you. Did you read it, when you got the headmaster's memo? -Yes."[78]

"All actions and programs will maintain high ethical standards and work in accord with child safe practices and Child Protection reporting guidelines.

…

Put simply, it was - there was - there was a requirement imposed upon you, as a teacher who had the care of students, to maintain child safe practices, wasn't there? -I think that's putting it too strongly to say that I'm required to maintain child safe practices, but I would - I would personally should act in a way that is - in line with child safe practices, but I wouldn't say that I'm maintaining them. That sounds like a broader meaning.

Would the word "observe" them, observe child safe practices, that was required of you, is that a fairer way of putting it? -There was an expectation of that, yes."[79]

"*All students deserve, as a fundamental right, safety and protection from all forms of abuse and neglect.*

You agree that that was a principle that operated at the school, when you were employed there, do you agree with that? -As an under-riding principle, I would - it wouldn't be prevalent every day of the year of every week of every day, but it's an under-riding principle.

You don't cavil with or have a disagreement with that, as a principle operating and imposing obligations on a teacher at a school, though, do you? -No."[80]

"*The wellbeing of children in our care will always be our first priority and we do not and will not tolerate child abuse.*

Now, when you worked at St Kevin's College you agree that that was an operating principle or approach, wasn't it? -A general operating principle, yes."[81]

"Did you know that you were bound by the EREA Code of Conduct, whilst employed at St Kevin's College? -I believe it was on the letter of employment that I signed, yes.

…

So you had the opportunity, or you had access to it, is that right? -I had access to the full document and pages were brought to our attention, on the headmaster's memo.

When you say you had access to it, I think my question was a bit more refined than that, and I apologise if I wasn't clear, you had access to it but did you, in fact, go to it, look at it, look at sections of it, at any time? -Not that I can recall.

Okay. Your best understanding of reading the substance of it was to read the memo from the headmaster, which attached sections or extracts, is that right? -Yes. I believe - at one point Mr Russell basically went through it, from start to finish. Each week, like a novelisation of a book, he gave a little bit of it each time, on the memo.

Right. I think you've already said that you would read the memo and you would read the extract, is that right? -I would have the chance to read them and see them, yes.

No, well, you said you had the chance to read them and see them, I'm asking you whether, in fact, you read them? -I would read the memo very carefully and the attachments I would look at but I would generally read."[82]

"*As such, it is their duty to establish and maintain Professional Boundaries with students at all times.*

Now, do you agree with that broad proposition of professional boundaries being maintained? -I agree with it as a broad principle, yes."[83]

"*Professional Boundaries "Means parameters that describe the limits of a relationship in circumstances where one person, a student, entrusts their welfare and safety to another person, a worker, in circumstances where power imbalance exists, or could reasonably be perceived to exist".*

You agreed with the proposition that it was a duty to establish and maintain professional boundaries, I'm going to give you an opportunity to reflect upon your agreement to that proposition because I'm taking you to the definition here, okay? Do you see that definition of professional boundaries? Do you agree, in the school setting, as a teacher, that it - that you were required to understand and observe professional boundaries, as defined in this way? -Yes."[84]

"*Workers should avoid placing themselves or a student in a compromising position and avoid actual and/or perceived breaches of the code.*

Now, when you worked at the school, St Kevin's, you agreed that it was important for you to avoid placing yourself, or a student, in a compromising position, wasn't it? -That would be a general principle of me working there, yes."[85]

"*Workers must be vigilant and proactive, taking all reasonable steps to protect children from harm.*

Do you see that sentence? -Yes.

Do you agree that when you were a teacher at the school that you were required to be vigilant and proactive, taking all reasonable steps to protect children from harm? -That was an expectation, yes."[86]

"*Child abuse is defined in within the relevant Child Protection program.*

I want to take you to bullet point 3, as a notion of harm to a student, and it's this:

Any detrimental effect of a significant nature on the student's physical, psychological or emotional wellbeing, by any cause, other than confirmed accidental harm not involving negligence or misconduct.

Do you see that definition of harm caused to a student? -Yes.

Do you agree that if we look at that definition that that is a fair summary of harm that could be caused to a student? -Yes. It covers many different aspects, yes."[87]

"*Not bring themselves, Edmund Rice Education Australia or the school into disrepute by inappropriate personal online behaviours.*

Do you see that? -Yes, I do, yes.

Did you understand personal online behaviours to be a reference to the use of Twitter, you know, tweeting things, to some degree, you know, social networking and the like? Is that what you understood personal online behaviours to refer to? -Yes."[88]

"*Workers must avoid, as far as possible, situations where they are alone with a student.*

Do you agree with that? -I see that, yes. Yes.

As far as possible, you agree with that? -As far as possible, yes. Like in a classroom there'll always be the very first student who walks in, but then - as a practice, you just clinch the door open - clinch the door open, so that when the students are coming in the door's open and then there's no danger of that, for example."[89]

…

Where personal relationships with students, such as family relationships and close friendship networks may exist, questions of conflict of interest may arise and professional boundaries may be tested. Where such a situation may arise a worker is expected to be appropriately diligent in developing and maintaining professional boundaries.

Do you agree with that proposition? -Yes.

That applied when you were a teacher at St Kevin's, didn't it? -Yes.

Can I take you over to page 255 of this document, or the tribunal book, and it's, "3.7 Physical contact with students - general", do you see that heading? -Yes.

Workers are required to develop and exercise prudent judgment and sensitivity regarding appropriate physical interactions with students.

Do you agree with that proposition? -Yes.

And that that operated when you were at the school, at St Kevin's, you were required to exercise prudent judgment and sensitivity, weren't you? -Yes."[90]

"Then if we go to JC5, again you will see, at 281 - this is 8 August 2018 - there's a reference - the same italics are at the bottom of 281 and then if you go to 282, there's a different extract, it's the Child Safe Code of Conduct, and I have already taken you to 3.2 and 3.3, but again, back in 2018, that was communicated to you. Then if we go to page 284/285 through to 286, you will see there's another extract again. You have seen that, haven't you? -Yes.

Your best evidence is, "Yes, I received them and, yes, I read them when they came to me"? -Yes."[91]

"*All email communications between workers and students should be via the school email system and reflect the professional boundaries between worker and student.*

When you were employed at St Kevin's, were you aware that when you used your email, communicating directly with students, as you did, you still had to observe the professional boundaries as defined? -Yes."[92]

"*I will not create or transmit any material that could be reasonably deemed offensive, obscene or indecent, intimidating or distressing.*

Even if you didn't read it, did you know that when you took possession of the school laptop that had been provided to you, you were not allowed to create or transmit offensive or obscene material by the use of that laptop? -I would have known that by sort of common sense and also by being aware of how schools work and what they expect."[93]

"You would agree that storage of hardcore pornographic material on your school laptop in the 21st century is completely unacceptable conduct, isn't it? -Yes."[94]

"Okay. Do you concede that if you had used your laptop provided by the school to store hardcore pornography and that was made public - I put an "if" there - if you have used it to store and it became apparent and it was made public, that could damage the reputation of the college? -Yes."[95]

[71] The exchanges set out above demonstrate overall that the Applicant had a clear understanding of the various obligations and responsibilities imposed upon him as a teacher at St Kevin's College.

[72] However, the Applicant's evidence when cross examined on the Code and its examples of when physical contact with a student may be necessary showed that the Applicant "struggled" to some extent with the principles. To be clear, the Code provides a list of examples of when physical contact may be necessary, beneficial and/or supportive. It includes examples such as, "Comforting in a pastoral manner an upset student" or "A congratulatory handshake or pat on the back."[96]

[73] The Code then sets out that any physical contact, as referred to in the examples, is only acceptable if the contact is reasonable for the purpose of the management or care of the student. The Applicant was asked about that part of the Code, and some of the relevant parts of that exchange are as follow:

"Do you agree with that proposition? -As a proposition, I can see where it's coming from.

But do you agree in practice and reality it was only acceptable if, "it is reasonable for the purpose of management and care of the student"? -Reasonable?

What are you struggling with, Mr Parris, which part of the aspect of that proposition troubles you? -I suppose, in a broader sense, I'm struggling with the fact that principles on a typed piece of paper are slightly different to real life. Slightly, potentially, sports and other activities things don't always go perfectly, in align with these sort of points but, as a principle, it should be reasonable. That goes hand-in-hand with the teacher exercising caution."[97]

"But it was somewhat of a struggle, was it? -Only in that all people are human and there's certain situations where the situation can influence what's happening. But I wouldn't say I struggled with it, in a very deep or ongoing or difficult sense that caused me any difficulty."[98]

"I put a proposition to you, whether you struggled with the caution that was required, as a product of prudent judgment and sensitivity? -Right.

With interacting with students in the teacher in charge/directing context, whether your struggled with that? -All right.

And I don't want to misquote you and the transcript will say what it says, but the sense in which you - the sense you conveyed to me in the answer was that not really, that you didn't really struggle but, to some extent "we're all human" is how you put it? -Yes.

I put to you, well, it sounds, by that answer, that you did struggle with that idea of the caution of the sensitive judgment with physical interactions with students? -The term "struggle" suggests to me being torn and having to reflect and not knowing what to do, and I can't say that that would characterise how I felt.

So what did you struggle with? -I'm not sure I can put it into words. I'll have to keep thinking about it.

All right. So you struggled with something, an element of this idea, you struggled with an element of it, and we can leave the topic for now, but you struggled with an element of it, but you're not sure that you can properly articulate what it was that maybe caused you anxiety, trying to understand what you can and can't do, is that a way of putting it? -I don't think I particularly had anxiety or that it was something that was an overly present struggle that I can focus on.

Well, is it fair to say then that there was something within you, in that setting, that niggled or caused you some discombobulation in your interactions with those students? -Well, maybe I could give you an example, if that would help?"[99]

[74] The example that the Applicant went on to give revealed that the Applicant had on a number of occasions hugged a student who was suffering from clinical depression during a theatre production of Brigadoon in 2018.[100] The Applicant maintained that the student initiated the hugs and that while his initial response was to respond in kind, ultimately, he refrained from hugging the student.[101] In that context, he indicated it was an example of the "struggle" earlier referred to, in this case "a student in need."[102]

[75] The Applicant was reticent to accept that doing so was a mistake,[103] but then, the Applicant agreed that doing so was inappropriate and crossed a professional boundary.[104]

[76] The Applicant also conceded as follows:

> "Your conduct on 14 June was overly personal or intimate, wasn't it? -Yes.
>
> And your conduct back in the Brigadoon rehearsal where you initiated the hug, that was overly personal or intimate, too, wasn't it? -Yes.
>
> So, for the purposes, and only for the purposes, of the CCYP and the Child Wellbeing and Safety Act 2005, there are two instances of sexual misconduct by you in the school setting, aren't there? -Yes."[105]

[77] The Applicant at first agreed that his actions of hugging the student were impulsive, but then said that he thought through it and allowed the student to embrace him.[106] Then later responded when asked:

> "So your intuitive, almost unthinking response, was to allow it to happen, wasn't it? -Yes."[107]

[78] The Applicant sought to minimise the contact he was describing to that of a "brief pat on the shoulder" but then conceded that it was hugging.[108]

[79] The Applicant conceded that the physical contact with that student was not necessary for the management of the student.[109]

[80] Notwithstanding the example the Applicant gave which involved a student who initiated the hug, the Applicant also made the following concession as to him initiating hugs with students:

> "Mr Parris, I commend your facility with language, I'm not trying to trip you up, I'm trying to ask you a very basic question about driving something you initiating. Your emphasis, it's you that's propels into that hug, that's what I'm asking you about, and you did do that on occasion, didn't you? -Well, the - I would say yes, on occasion, if I'm saying it's not meant by anything insidious in that meaning or anything illicit.
>
> So the answer is, yes, you did? -Yes."[110]

[81] The Applicant also admitted to hugging students at year 12 farewells,[111] in contradiction to what he had told Mr Russell in February 2019:

> "I explained to Mr Russell that I have only ever engaged in a hug with a student to congratulate them and acknowledge their happiness and relief at a successful production or rehearsal; for no other reason."[112]

[82] The Applicant's understanding of the possible consequences of a breach of the obligations is reflected in the following exchange:

> "You realise that termination could be a possible outcome if you, for example, crossed a professional boundary or abused the power that you had in interacting with students; is that right? Did you understand that? -I understand that such an infringement would be dealt with by the principal, yes."[113]

The June 14 incident

[83] The Applicant in his witness statement said that he needed to attain a graphic design file that Student A was working on to get it "in good time" for the work to be ready for the production. [114] This part of the Applicant's statement seems to impugn a sense of some urgency. However, this claim is at odds with the concession he made in his reflection to Ms Canny that it was not clear to him why the matter was so urgent that he needed to see Student A while he was in class.

[84] The Applicant claims that he and Student A could be seen on the couch, "while there were no other students around, the 27 students in Mr Macfarlane's classroom saw me arrive at the classroom door to talk to Student A, and they could have easily looked through the glass window and seen us sitting on the couch. The couch was in a space that is an open thoroughfare, accessed by stairs and nearby classrooms. Any of the 155 students who are members of the House could have visited the area to take something from their locker at any time."[115]

[85] However, this evidence conflicts somewhat with Mr Macfarlane's witness statement which indicates that:

> "The couch that Mr Parris and [Student A] sat on during the Incident is not visible from the classroom (named "C503") that I was in at the time of the Incident. The C503 classroom has two walls that are glassed and two solid walls. One side of the classroom has glass windows that look out towards the Kearney West building and the Glen Waverley rail line. The other side of the classroom that has glass windows looks out onto the Yarra River and Monash Freeway. There is a solid wall separating the McCarthy Area (in which Mr Parris and [Student A] were sitting during the Incident) from C503. Therefore, on 14 June 2019 I could not see out onto the McCarthy Area area (*sic*) from C503. Attached and marked "CM-3" is a copy of the Screenshot with my annotations showing the glass and solid walls of the C503 classroom in relation to the McCarthy Area (where Mr Parris and [Student A] can be seen sitting on the couch)."[116]

[86] This evidence was clear and cogent as was all of the evidence from Mr Macfarlane. I prefer his evidence on this to the Applicant's, who claims that he could be seen. More detailed findings on witness credit is set out later in this decision.

[87] As to what then occurred once Student A had left the class, as set out earlier, and in his evidence in chief, the Applicant accepted that he engaged in the following conduct:

- He put his arm across Student A's shoulders.
- That he said "what's wrong sweetie" when they had stood from the couch.

[88] In his statement, Student A gave evidence that the Applicant:

- "hugged me a few times";
- "hugged me at the start and at the end of the conversation";
- "hugged me using his arm to pull me in closer";
- "the hugs felt really constricting and uncomfortable, like he was on top of me";
- "I felt suffocated."[117]

[89] The Applicant is strenuous in his denials of the conduct alleged by Student A:

> "I never hugged Student A *"a few times"*. In my written reflection to Ms Canny on 19 June 2019 (see SP-1), I admitted that I placed my arm across Student A's shoulders in a brief thanks once the job was completed. The couch was positioned in an open location with Mr Macfarlane nearby and able to view us from his classroom as well as security cameras in the area. The version of events that Student A alleges did not happen.
>
> I deny the allegation made by Student A. I did not place my right hand on his right upper thigh. I did not run my hand slowly up and down his right leg. At no time then or at any other time have I rubbed or touch (*sic*) Student A's leg."[118]

[90] The Applicant's evidence was, "I don't call a hug what happened, although I can see how it can be called that."[119]

[91] Mr Macfarlane gave evidence that he had a conversation with Student A on Monday 17 June 2019, and he recorded the following facts as they were reported to him by Student A at the time:

- Student A stated that on a number of occasions that the Applicant touched Student A on the arm,
- he hugged him early in the conversation,
- at the end of the discussion, the Applicant leaned over Student A and gave him a hug.[120]

[92] In cross-examination, Mr Macfarlane revealed that he had watched and reviewed the CCTV footage of the June 14 incident at the time that the incident occurred.[121] Mr Crowley's evidence is that the CCTV footage no longer exists.[122] However, a still shot of the CCTV footage was in evidence.[123] The still shot depicts the Applicant sitting very closely to Student A.

[93] Mr Macfarlane said he stopped the footage and took the still shot at the moment of maximum contact between Student A and the Applicant.[124] Mr Macfarlane indicated that the relevant camera is fixed in position and does not move.[125]

[94] In re-examination, Mr Macfarlane was asked whether he had seen anything on the CCTV footage which caused him any concern, to which he replied that "the whole incident caused me concern."[126] Mr Macfarlane stated that he thought that the Applicant was far too close to Student A. He elaborated as follows:

> "What about the incident caused you concern? -The intimate nature of the advance towards Student A, the two hugs that I witnessed, Mr Parris lounging across Student A with his arm around his back and his hand obviously across his legs and pointing at possibly a laptop screen that Student A had on his lap at the time. In my opinion, that's crossing a boundary in that it is far too close to a student."[127]

[95] Mr Macfarlane also said that:

- The Applicant moved closer to Student A throughout the course of the incident that occurred on the couch;[128]
- there were two hugs;
- that there was a hug early on in the conversation; and
- that there was a hug at the end of the conversation.[129]

[96] Mr Macfarlane also said that he did not observe Student A move towards the Applicant.[130]

[97] Mr Macfarlane stated that the nature of the hugs he observed on the CCTV were "the sort of hugs I'd give my two children… In that I'd be quite close to them, pulling them towards me, expressing my feelings towards them",[131] and that the second hug involved the Applicant wrapping his arms around Student A's body and that "Student A was standing prone".[132] Mr Macfarlane did not consider the still shot of the Applicant with his left arm over Student A as a hug.[133]

[98] During cross-examination, the Applicant said that he did not engage in hugging, or alternately, that it was "side hug".[134] The Applicant says that he does not describe the putting his arm around Student A as a hug.[135] The Applicant denies multiple hugs. The Applicant says that what was involved was "a pat on the shoulder".[136] The Applicant defines a hug as two people facing and both using their arms.[137]

[99] The Applicant in his witness statement sought to characterise the couch they were sitting on in a way that explained the need for closeness by stating that "the only place to sit in the McCarthy House area was a single couch that was deep and not overly wide."[138] The Applicant's evidence was:

> "the reason that we sat together on the couch was to readily see the small screen of the laptop to assist with amending the file. The couch was only wide enough to seat two people. We worked together to make the necessary changes."[139]

[100] However, when evidence as to the size of the couch was filed by the Respondent, the Applicant in his statement in reply claimed that this was a different couch to the one he sat on with Student A, and that the couch he sat on was much smaller.[140] However, the Applicant conceded ultimately that was wrong and the couch that the Respondent referred to in the evidence was the couch they sat on. That couch is a 1.8 metre long three-seater couch. The Applicant was tested on his evidence as to the size of the couch and any need to sit so close to Student A:

> "A **1.8 metre three-seater**, that's a sizeable couch, isn't it? That's enough for two people to sit on, no doubt, isn't it? -Yes."[141]
>
> (emphasis added)

[101] The evidence of the Applicant at first instance that the couch was small and the inference that this made it necessary to be close to Student A is not credible considering the facts as to the size of the couch. There is ample room on the couch for appropriate space between them. What can be seen from the still photo is that Student A is at the far left of the couch and the Applicant is pressed up so close to him that he significantly obscures the view of Student A.

[102] The Applicant also sought to explain his closeness to the Applicant by way of the need to see the laptop, though his evidence on this varied from claiming that this was the reason to conceding there was no need to be so close to Student A:

> "I want you to look at that [CCTV still shot] image very closely. You've got Student A out of the class, you've gone over to the couch, it's a 1.8 metre long three-seater couch, and you, Mr Parris, are **hard up against** Student A, aren't you? -In that photo.
>
> No, in the real world, in real life, you were hard up against Student A, weren't you? -I **had to sit close** to see the laptop."[142]
>
> (emphasis added)

[103] Later in cross examination the Applicant agreed:

> "You did not need to be that physically close to Student A at that point in time, did you? -No."[143]

[104] However, he then reverts to the explanation of needing to see the laptop:

> "Right, so that's your explanation for leaning close to him, so that you could see the laptop; is that right? -Yes."[144]

[105] Despite the claims of the Applicant that he simply put his arm around the shoulder of Student A, he accepted the following more detailed description of what he was actually doing as shown in the still shot:

> "Well, let's just break that down. Your left shoulder - open shoulder because you've got your left arm along the back of the couch more or less - is up against his right shoulder. You agree with that, don't you? -Yes.

You are touching - your shoulders are touching at that time when the image is taken; correct? -Yes.

Your left arm is in a crook-style position, the elbow is near the top of the couch; do you agree with that? -Yes.

And it's in a crook or a bent condition because your left arm is around the back of his neck on his shoulder, and I will take you to JC21 so you can get a much closer view of this. Do you see how you've got a bent elbow and your left arm is around the student's shoulder? -Yes, I see it, yes."[145]

[106] The Applicant made various concessions as to his conduct on June 14 as follows:

- The Applicant did agree that the conduct was overly personal or intimate.[146]

- The Applicant accepted, in respect to the June 14 incident, that he could not control his impulse.[147]

[107] Further concessions as to the June 14 conduct included:

"That is crossing that professional boundary line to refer to a student in a very, some might say intimate, but a very personal way like that, isn't it? -Yes.

In fact, it wasn't just "Sweetie" because it was preceded by a couple of words, which is this, "What's wrong, Sweetie"? -Mm-hm"[148]

"Do you agree now that, looking back, that language is far too familiar between a teacher and a student? -Yes, I agree, yes."[149]

[108] Having regard to the evidence before the Commission as to what occurred on June 14, the Respondent submits as follows:

"It is open to the Commission to find that the Applicant misled Ms Canny in his 'Reflection' dated 19 June 2019. He minimises his 'hug' (an admission now withdrawn) to that of '*I put my arm around [Student A's] shoulder in saying thank you.*' But the Commission should find there were two hugs and a slow creep forward down the couch toward a reticent Student A. That evidence has been corroborated by Mr Macfarlane.

Upon the evidence, the Commission should find the Applicant has lacked candour and failed to tell the truth about what in fact he did on 14 June 2019. Mr Macfarlane's independent account is to be preferred. He watched the conduct on CCTV and was not challenged on his recollection. He corroborates Student A on all matters (save for the 'leg touching') which he could not see due to the position of the camera: Student A's lower body and legs were obscured by the Applicant."[150]

[109] I agree that the findings above are open for the reasons described, and on the balance of probabilities, I am satisfied that is what occurred. In reaching this finding, I have taken into account the standard in *Briginshaw v Briginshaw* (Briginshaw).[151] For reasons set out more

fully later in the decision, where there is a conflict in the evidence between the Applicant and Student A or Mr Macfarlane, I prefer the evidence of Student A and Mr Macfarlane. The Applicant has misled Ms Canny in his reflection for the reasons summarised by the Respondent above. The clear and cogent evidence of Mr Macfarlane corroborates what Student A claims occurred, with the exception of the leg touching. It is to that allegation that I will now turn to in more detail.

The leg touching allegation

[110] Student A gave the following evidence

> "For a short time - perhaps 1 to 2 minutes, Mr Parris, who was on my right side, had his right hand placed on my right upper thigh while we were looking at the laptop. He was resting his right hand on my thigh as his body was turned toward me on the couch. The laptop was sitting on my lap towards my left leg, and turned so that Mr Parris could see the screen, meaning my right leg was exposed. During this time, Mr Parris ran his right hand slowly up and down my right leg, from my knee up to my upper thigh near my groin, maybe two or three times before resting his hand again. He did this as he spoke to me. Mr Parris did not touch my groin area. Mr Parris' hand was sometimes still on my leg and sometimes moving. Mr Parris continued to speak to me as he was rubbing my leg. I felt extremely uncomfortable while he was doing this. I did not know what to do."[152]

[111] The Applicant is adamant that he did not touch Student A's leg at all.[153]

[112] In his witness statement, Student A referred to a meeting he had with Mr Macfarlane and Mr Coyne on 17 June 2019. His evidence was, "I cannot say with certainty but I believe I said something about Mr Parris's hand stroking my leg."[154] Mr Macfarlane's file note from the day does not mention any leg touching.[155]

[113] While giving his evidence in chief at the hearing, Student A altered that position to say that he did not say anything to Mr Macfarlane about that, stating that "I did not say anything about Mr Parris' hand stroking my leg."[156]

[114] When cross examined about why he did not tell Mr Macfarlane about the leg touching at the time, Student A's evidence was:

> "Why did you leave out important things? -Because I was still trying to process what had happened, I was traumatised from the event."[157]

[115] Student A's evidence is that he did tell the school counsellor about the leg touching:

> "On 19 August 2019, I made an appointment and went to see the school counsellor because of the anxiety and paranoia I was feeling about seeing Mr Parris around school and the 14 June 2019 incident. I saw the counsellor a number of times. I told the counsellor about the incident with Mr Parris on 14 June 2019, including that Mr Parris touched my leg. Attached and marked "SA-2" is a copy of what I understand to be the notes taken by the counsellor of our session on 19 August 2019. The notes record the following [among other things]:

…

- Mr P. placed his hand on his knee"[158]

[116] The Applicant points out that this does not record that there was touching of the leg in the manner described by Student A in his witness statement. The Applicant submits that it is "implausible" that if Student A had of said that to the counsellor she would not have written that down.[159] While there is some force to that submission, it is the Applicant's evidence that in August, when Mr Russell spoke to him, Mr Russell said that the counsellor had told him that he had put his hand on Student A's leg,[160] not that she said that he had his hand on his knee. Accepting the Applicant's evidence on this point, this suggests that irrespective of the note referring to the knee, Ms Keel described it in that way to Mr Russell.

[117] In any case, I prefer the evidence of Student A as to what he told the counsellor about the leg touching. His evidence was credible. It is also consistent with what he told Mr Windle on 23 August 2019, only four days after he saw the counsellor, that the Applicant touched his inner thigh.[161] Mr Windle didn't press Student A for further particulars at that time, as Student A was very upset. Mr Windle's evidence, which was not seriously challenged, was as follows:

> "In the afternoon on Friday, 23 August 2019 I was teaching Revs when I noticed that Student A was deep in a discussion with other students. I saw that he had a worried look on his face. With the Declining Performance and Vaping Incident also in mind, I approached Student A after class. I asked Student A whether there was something going on. Student A then said to me that in June 2019 Mr Simon Parris (Mr Parris) had sat down next to him on a couch in the McCarthy area and had hugged him and had put his hand on Student A's inner thigh (the Incident). Student A said to me that the Incident had affected him more than he had thought. He said he had been kept in the dark about what action the College had taken in relation to Mr Parris after the Incident. He said he had started to question whether he had made too big a deal out of the Incident. Student A became emotional and started to cry while he was explaining these matters to me. He was very emotional and I sensed that he was preoccupied by these matters. He seemed deeply affected in the retelling of these events. Student A also told me of other interactions when Mr Parris said to Student A he was a "*sexy diver*" and referred to his body as a "*hard body*".[162]

[118] As indicated above, the evidence of Mr Macfarlane was that he could not see any leg touching because of the angle of the camera:

> "In your recollection of viewing that footage, at any time - sorry, what could you see, if anything, of Student A's lower body and legs? -I couldn't because they were obscured by Mr Parris."[163]

[119] In my opinion, the still photo in evidence does not assist in resolving the conflict on this particular matter. It is difficult to see, and in any case only records one moment in time.

[120] Student A himself did not tell his parents about the alleged leg touching until 1-2 weeks before they saw Mr Russell:

> "I had only told Mum and Dad about Mr Parris touching my leg touching (sic) maybe 1 or 2 weeks before they met with Mr Russell and Ms Canny. I had not told them sooner

> because I was embarrassed about what had happened. I also had not liked talking about it at home. With everything happening at school, school was a really anxious place for me. I did not like being at school. Coming home was sort of a safe space. So when I came home I did not really like talking about it."[164]

[121] Ultimately, the determination as to whether the touching of the leg occurred needs to be resolved. It is a serious allegation. To a significant extent, it must be determined having regard to findings of credit of the witnesses. I return to the consideration on this point later in the decision.

The impact of the June 14 incident on Student A

[122] It is convenient to next deal with the evidence surrounding the anxiety that Student A is said to have experienced as a result of the conduct of the Applicant on June 14.

[123] Student A's evidence is that:

> "After the 14 June 2019 incident with Mr Parris, and in particular after the restorative meeting, I began to feel constantly anxious and paranoid about seeing Mr Parris around the College. The school became a highly anxious place for me. I did not want to go to school as I feared I would see Mr Parris.
>
> ….
>
> I continued to see Mr Parris around school regardless of which stairwell he was using. It was just seeing Mr Parris that made me feel really anxious and would ruin my day. On a number of occasions in late 2019, I went into the toilets to cry after seeing Mr Parris because the whole thing was so anxiety-inducing. I went into a cubicle and cried by myself."[165]

[124] Student A gave the following evidence about how he was affected by the June 14 incident as at 31 July 2020, when he completed his witness statement:

- he still feels embarrassed that a teacher hugged and touched him;
- he still feels anxiety and anger about what happened;
- he still feels confused and has 'thoughts' about it, and that those thoughts will not go away;
- he is "haunted" by what happened in June 2019.[166]

[125] Student A mentioned an example of the effect of the Applicant's conduct on him:

> "I then had to sit a maths test that I had missed out on the week before. I sat the maths test alone in the corridor. While I was completing the maths test, Mr Parris walked past me on the way to his class. I completely lost my concentration. I could not focus on the test after I saw Mr Parris and I did not think I did well on the test."[167]

[126] His further evidence as to the effect of the conduct included:

"I now feel angry that I did not stand up for myself on 14 June 2019, when Mr Parris dragged me out of class to spend time on the couch with him. I still feel embarassed (*sic*) that a teacher touched me and hugged me like that. I am really conscious of 'self pity' but I continue to feel anxiety and anger about what happened.

I am still confused as to why this happened to me and the very strong reaction I experienced. I continue to have thoughts about the couch incident in June 2019. I get flashbacks to the other uncomfortable interactions I had with Mr Parris, such as hugs and comments about my body. Those thoughts will not go away. This is something that has haunted me since the incident in June 2019 happened. I feel it continues to impact my daily life. I continue to be pre-occupied with the question as to why I did not act sooner. The more I think about it, the more I realise I need to get some help. It has seriously interfered with my previous positive experience and enjoyment of my school life at the College."[168]

[127] Student A gave evidence that he is still seeing a psychologist.

"Why are you seeing that psychologist? -Because I still have ongoing trauma and anxiety about what has happened and then the events afterwards."[169]

[128] In respect to the evidence as to the anxiety of Student A, the Respondent submits that:

"No objection was taken to the hearsay evidence of Student A's parents. The emails dated 9 February 2020 and 10 February 2020 (8.26pm) are expressly relied upon in the Applicant's submissions.[170] The parents communicated the following about their son's *mental health at the start of 2020:*

"His presence at the school continues to be a source of anxiety for [Student A];

"Our priority is to relieve the stress and anxiety [Student A] continues to suffer".

It is important that the Commission record that the Applicant made no challenge whatsoever in the hearing of the Application to the fact of Student A's anxiety and the psychological treatment he continued to receive in 2020. That evidence of psychological injury stands uncontroverted. It is important because the 'anxiety' is evidence of the harm suffered by Student A as a consequence of the Applicant's unlawful conduct as a teacher. A duty was breached and an injury was sustained."[171]

[129] Counsel for the Applicant made submissions to the effect that while Student A is experiencing anxiety, that may also have been caused by other factors.

[130] However, as I put to Counsel for the Applicant, all roads lead back to the June 14 incident, and he agreed:

"MR DARAMS: Then the next page over, Commissioner - the next email on page 649 of the court book - then we have - we'll come back to this email later on in the submissions. But they say:

We appreciate Student A's ongoing anxiety is new information to you, including the amount of the stress he's experienced from his peers.

MR DARAMS: They're referring to other matters which are contributing to the - what we would submit the feelings that Student A has in February:

We have discussed with Student A your offer of ongoing support and meetings but at this stage he has declined as he wants to try and keep it as normal as possible. Notwithstanding Student A has reiterated to us that he wants Mr Parris gone, his presence at school continues to be a source - - -

MR DARAMS: A source - not the sole source but a source:

- - - of anxiety.

MR DARAMS: So there are two points that we try to make or two propositions that fall from all of this. The first is that it's not the case that the anxiety had developed in February 2020. It's clear that anxiety was being felt by Student A but being felt from - or we would submit on the evidence because we don't have the medical evidence to determine it one way or the other - there were likely numerous or a number of sources of the anxiety that is being felt or contributing factors to it.

Obviously, the incident itself did contribute to that. We accept that.

THE COMMISSIONER: And the added stress he has experienced from his peers - that's not disconnected to the incident, is it?

MR DARAMS: No, you're right.

THE COMMISSIONER: All roads lead back there.

MR DARAMS: No, that's right.

THE COMMISSIONER: Yes.

MR DARAMS: In one sense, you're right; all roads do lead back to it in this proposition, Commissioner. If the conduct didn't happen the anxiety that is being felt wouldn't have occurred. We accept that, okay? Obviously, that can be made."[172]

[131] It is apparent on the evidence that Student A is suffering from anxiety and that the anxiety was caused by the conduct of the Applicant.

The Respondent's knowledge of previous misconduct and its effects on Student A

[132] It is clear on the evidence that Student A is suffering from anxiety and trauma, and that anxiety and trauma has been caused, or substantially caused, by the actions of the Applicant on 14 June 2019.

[133] The Applicant argued strongly on the point that the Respondent itself was aware of the misconduct of the Applicant and the associated anxiety for Student A and had chosen to give

the Applicant a final warning for that. It is therefore not open to the Respondent to now change its mind and terminate the Applicant for the same misconduct, including its effects, that they chose in October 2019 to give him a final warning for.

[134] On this point, the evidence is that the Respondent knew that Student A was suffering from anxiety when he had seen a school counsellor and told her that he had been experiencing significant anxiety at the school.[173]

[135] However, The Respondent submits that what was new information for the school was that there were ongoing effects of the anxiety. Knowledge of these ongoing effects was new information to the school. The impact of the Applicant's behaviour was ongoing. Student A was anxious about returning to school and seeing the Applicant again. The Respondent also submitted that it did not know all the facts about the misconduct of the Applicant and that it was more serious than they realised.

[136] Mr Crowley commenced as Acting Principal on 20 February 2020. His evidence was:

> "At some point on this day, I sat down at the desk that had been previously occupied by Mr Russell, in the Headmaster's office. I saw and read an email dated 13 February 2020 and sent at 1.13pm from Student A's Father. The email was addressed to Mr Russell and Ms Canny with the subject line "Police report" (13 February Email)".[174]

[137] Mr Crowley's evidence regarding the new information he says that he had on 20 February 2020 included the following:

> "Let's just be clear about this. When you keep referring to coming to learn new information that you didn't know in August, you're actually referring to the email that is referred to in paragraph 40 of your statement, is that right? -Yes."[175]

> "And you were satisfied - and you knew this, as at August 2019, that the school's response was appropriate? -I believed that it was appropriate, yes. I was reassured, obviously, at the time. You can't work with any other authority than what the school was, yes. What my concern was, was that the incident, as I learnt about it, was far more serious, in my opinion, than what had been responded to. Not only that, there were other reports around Mr Parris and his suitability around students, that were identified in Student B's interactions with school leadership. I identified issues going back in time, and I learnt about these through an interview with Student B and Student B's parents, in the time after that. There was a reference to, in the email that I read from Student A's father, that there were other examples. So my concern was that what I understood to be the issue that the school was working with the regulators was not consistent with what the parents of Student A saw the issue to be, so I had concerns."[176]

[138] The email to which Mr Crowley is referring is set out in full below:

> "Dear Stephen,
>
> [Student A's mother] has spoken to the investigator Ian Bucher today.

> The officer had no knowledge of the numerous verbal comments Mr Parris had made to [Student A] about his "diving" body, his muscles, nor the comments like "my sweetie" "my darling".
>
> **He did not know about the rubbing of [Student A's] leg from knee to upper thigh or the touching of his face.** He did not know about the prior concerns raised by the other student.
>
> This raises further significant concerns for [Student A's mother] and I. What has actually been reported? We are now gravely concerned that the reports made to CCYP and VIT are incomplete and have omitted damning parts of the complete story.
>
> We have never been given the opportunity to see [Student A's] statement. We have not been given the reports despite requesting them on multiple occasions both verbally and in writing.
>
> We request these reports immediately, and prior to our discussion tomorrow.
>
> Regards
>
> [Student A's parents]
>
> *Sent from my iPhone"*[177]

(emphasis per original)

[139] Mr Crowley's evidence about his response to the 13 February email included the following:

> "I was immediately concerned at what I had read. I recalled that I had been told about interactions between Mr Parris and Student A back in August 2019. But I considered the additional allegations and other comments to reach a new level of seriousness. I could also see from the email that the parents were upset and worried about their son's welfare.
>
> On Thursday, 20 February 2020, I came to understand that:
>
> a) Mr Parris had been recently suspended by Mr Russell because of a Twitter comment that Mr Parris had made which included the words "wet dream" (**Twitter Comment**). It was alleged the Twitter Comment could be connected to College. Student A's Father had uncovered the Twitter Comment. He had also discovered that Mr Parris' Twitter account was connected to Mr Parris' blog. I learned that Mr Parris' blog had a reference to the College in a comment posted on it. Student A's Father had reported these matters to Mr Russell. Now produced and shown to me and marked "**JC-12**" is a copy of the email from Student A's Father to Mr Russell sent at 5.57pm on 12 February 2020 attaching a copy of the Twitter Comment and a second email sent at 6.43pm advising Mr Russell that Mr Parris' blog *"identifies he is at St Kevin's"*;

b) there were concerns with Mr Parris' fitness to teach and be around children given the 14 June Incident and its enduring consequences for Student A; and

c) importantly, Mr Parris' misconduct relating to the 14 June Incident was more serious than I had previously been told (as described at paragraph 35 of my witness statement) - the 13 February Email alleged that Mr Parris had engaged in further (possibly intimate) conduct in that he had rubbed Student A's leg from knee to upper thigh.

Based on the matters described at paragraph 43, the fact of the 14 June 2019 incident, that Student A was still suffering and that there was a new allegation, I considered that Mr Parris had a case to answer for his apparent inability to understand the importance of professional boundaries that must be maintained in dealing with children at the school. I considered there was a live issue as to student safety with Mr Parris.

…

The situation had not resolved and appeared to have become aggravated over time. The touching of the leg allegation had not been investigated and resolved. I consider that to be a failing by the College. It was a serious matter that needed a resolution."[178]

[140] As mentioned earlier, Mr Crowley gave evidence that he did have previous knowledge of the conduct of the Applicant that he had attained while in his previous role as Regional Director from mid-August to the end of September 2019.[179] While in that role, he visited Mr Russell who told him about the June 14 incident by indicating that "Mr Parris was on the couch with Student A, with his arm around him, and that he had called him "Sweetie"." [180] Mr Crowley indicated, however, that the process concluded after he had gone back to his other role of Principal at St Patrick's College in Ballarat.[181]

[141] Mr Crowley indicated that during the conversation that he has with Mr Russell, he advised him to obtain independent legal advice,[182] and to continue working closely with CCYP and VIT.[183]

[142] Importantly, Mr Crowley indicated that:

"This was the first time I had heard of Mr Parris. Mr Russell did not mention any allegations that Mr Parris had touched Student A's knee to upper thigh, face, comments about his body or about any concerns regarding Mr Parris prior to the 14 June Incident. I came to learn of those specific allegations before I made the decision to dismiss Mr Parris, on or about 20 February 2020, as described further in paragraph 40 below."[184]

[143] Mr Crowley indicated that he was not certain if the Respondent was aware of the allegations that "Mr Parris had touched Student A's knee to upper thigh, face, made comments about his body or about any concerns regarding Mr Parris, prior to the 14 June incident",[185] and that was why he reopened the CCYP investigation:

"So you understand that to be that whether you knew or not, the school was aware of these allegations, is that right? -Well, I'm not certain about that. One of the things I've been trying to do this year is find out, from the Commission for Children and Young People, what was the exact nature of the information that was exchanged between the

school. You will be aware, Mr Darams, that I have reopened the CCYP investigation to find the truth in all of this. So the - sorry, if I could just finish. The school is in the process of trying to establish what was shared with the Commission, what was shared with VIT, as a matter of ensuring that the matter is thoroughly responded to."[186]

[144] Mr Crowley expressed concerns that the CCYP had concluded that the matter was resolved:

"And, finally, you said on a number of occasions addressing the CCYP that – well, two things – first of all you made a comment to the effect that you had formed a view that it was in error in its findings its resolution. Did I get that right? -I have formed a view which I am hoping that the re-engagement of the CCYP investigation will help to resolve. That the advice given to the college in respect to the resolution of the matter was flawed, should have taken into account additional information provided to it in respect to Mr Parris's actions going back some six months earlier in, I think, February 2019 which clearly demonstrated in my eyes that there were issues of student safety in respect of Student A and Mr Parris clearly identified, and if we accept that that information was provided to the regulator which I believe that it was, then I am saying that I am astonished that in October the regulator concluded that the matter was resolved."[187]

The allegation that the Applicant touched the cheeks of Student A and made comments about his body

[145] The evidence of Student A is that the Applicant squeezed his cheeks at the canteen in August 2018.[188]

"From about year 10, that is 2018, Mr Parris' behaviour towards me included the following:

- comments about my arms and abs being strong because of my diving;
- calling me "my strong little boy", "sweetie" and "cutie";
- pinching my cheeks in the College's tuckshop area; and
- asking me to go to Loreto Mandeville Hall, the girls school participating in the musical, with another student because he said I was a good looking boy who would get the girls interested.

Mr Parris' behaviour described above made me feel uncomfortable."[189]

[146] Consistent with this evidence, Student A told the counsellor, Ms Keel, about it and she recorded the following note during the conversations with Student A on 19 August 2019:

"Mr P. squeezed his facial cheeks"[190]

[147] Student A was asked about the accuracy of that record:

"What do you say about the accuracy of that record by Ms Keel? -Well, that note was accurate, but it reads as if it was all in one incident. I think those notes are reflective of the broader story, so when Mr Parris squeezed my facial cheeks, that didn't happen on the couch, that was prior.

You say it was prior. Where did that happen? -Outside the tuckshop."[191]

[148] Student A also gave evidence about what he told Ms Canny about the conduct of the Applicant:

"To the best of your recollection, what did you tell Ms Canny about on that occasion? -About a hug after musical and about how Mr Parris squeezed my cheeks in front of the tuckshop.

As I said, 325, the page you have got in front of you, is Ms Canny's notes and I want to take you to the second box, if I can describe it like that, where it says, "There was another incident." Do you see that box? -Yes.

It says:

> *There was another incident in the tuckshop area where Mr Parris touched me on the cheek. It was a sign of affection like a grandmother might do –*

It goes on:

> *- in that he touched me with his knuckles gently.*

Can you tell the Commissioner what you said to Ms Canny on that occasion about what I will call the tuckshop incident? -I told Ms Canny that Mr Parris squeezed my cheeks and then I made the analogy like a grandmother might do.

Okay. So those words that Ms Canny records, "in that he touched me with his knuckles gently", what can you say about the accuracy of that record by Ms Canny? -They're not accurate, I didn't say that.

Just finally, Student B, who I will refer to in this setting as (Student B), has given or will give some evidence about speaking to you after the tuckshop incident. Do you recall that interaction with him, (Student B)? -Yes.

What did he say to you? -Roughly that he was concerned and asked if I was okay and he wished to notify his parents or Ms Canny about it."[192]

[149] Student B gave the following evidence in the proceedings:

"Sometime during September 2018, when I was in year 10, I went to the College's canteen to buy my lunch. There were many students in the area and lots of foot traffic. I was at the canteen checkout paying for my food when I saw Mr Parris stroking [Student A's] face. [Student A] and Mr Parris were about 4 or 5 metres in front of me. I was struck by this image.

> I watched and saw Mr Parris smiling as he stroked [Student A's] face. He was touching [Student A's] face with his fingers and an open hand. Something was being said, but I didn't hear the subject. I estimate the stroking lasted about 5 or 6 seconds. To me, it looked like a tender stroke. I formed an opinion that the conduct was very unusual in the school context. I was worried by it."[193]

[150] The Applicant denies that he touched the cheeks of Student A.[194]

[151] There is some variation in the description from Student A and Student B, that is squeezing of the cheeks as opposed to stroking of the cheeks. The note of Ms Canny also differs slightly with the reference to knuckles touching. It is not possible to be certain in what way the Applicant was touching the face of Student A given these variations. However, I am satisfied on the evidence that the Applicant was touching the cheeks of Student A in an affectionate manner. I make this finding as I prefer the evidence of Student A over that of the Applicant's. Further, the claim that the Applicant touched the cheeks of Student A was corroborated by Student B.

[152] The Applicant was asked about the comment that he allegedly made to Student A about having a "strong diver's body":

> "Is it possible you said, "You have a strong diver's body"? -Again, the word "strong", I'll acknowledge, but it's not possible that I said, "You have a strong diver's body."[195]

[153] I take this as an admission from the Applicant that he acknowledges he was referring to Student A as "strong" but denies saying that Student A has a strong diver's body.

[154] Again, I prefer the evidence of Student A for the reasons set out later in the decision. I am satisfied that the Applicant would make inappropriate comments to Student A about his body in the manner described by the Student A.

Allegations that the Applicant was hugging and touching students after 14 June 2019

[155] There are two components to the allegations made here. The first is that Student A says that he saw the Applicant "hugging and touching other boys on the arm in the courtyard" after the June 14 incident.[196]

[156] The Applicant denies Student A's allegation that he was touching or hugging students after 14 June 2019. The Applicant's evidence was that:

> "after the 14 June 2019 incident, along with the meetings I had with Ms Canny, I was very careful with my interactions with students. I deny Student A's assertions that I was *"hugging and touching other boys on the arm in the courtyard"* or *"around the school"*. These are simply not true. The courtyard is a relatively narrow central place in the school. At recess and lunchtime, it is filled with around three hundred students and several staff members including members of St Kevin's leadership team. Members of the leadership team supervise the area every recess and lunchtime, along with other staff members who are rostered on for supervision duty. It simply would not be possible for me to hug a student or touch him on the arm without dozens of witnesses, which have not been presented to this matter, because it is untrue."[197]

[157] Again, I accept the evidence of Student A over that of the Applicant's. I am satisfied that there was some touching and hugging of students by the Applicant after June 14. However, there is scant detail, in contrast with the detailed evidence as to the June 14 incident, as to what occurred. On that basis, while I believe Student A on the point, the lack of clarity as to the nature of the contact with the other students means that I am not satisfied on the evidence that it constituted misconduct.

Was the Applicant hugging students at the Newman College retreat in February 2020?

[158] In February 2020, Student A attended the Newman College retreat organised by the Respondent. The Applicant also attended the retreat. Student A states that he witnessed the Applicant hugging "a couple of boys from his home room."[198] In cross examination, Student A could not say who the boys were.[199]

[159] The Applicant denies that he hugged any boys at the retreat.[200]

> "At the start of 2020, and I am assuming it could be late January or early February - I don't have the date of this Newman College event - but you were in attendance that night, weren't you? -Yes, for the dinner only."[201]

> "[Y]ou were standing at the door of the dining hall and saying "Goodbye" and you hugged some boys as they exited the dining hall, he saw you hugging boys as they exited the dining hall. That's right, isn't it? -I didn't do that."[202]

[160] Student A was cross examined on this. While he was clear that he saw some hugging, there was little additional detail.[203] Student A denied the proposition that he made up this allegation because he knew that the Applicant wanted his job back.[204]

[161] Mr Guinane gave evidence that he was at the dinner but did not see the Applicant at all.[205]

[162] I am satisfied that the Applicant hugged two to three students at the Newman College retreat because I prefer the evidence of Student A where there is a conflict with the evidence of the Applicant. However, there is no detail of the nature of the hugs. The evidence is vague beyond the viewing of some hugging. This evidence stands in stark contrast to the June 14 incident where I have detailed evidence as to the nature of the hugs, level of physical contact, and other relevant details. While I am satisfied there was hugging of students at the Newman College retreat in February 2020, there is not enough evidence to satisfy me the Applicant was engaging in misconduct.

The Fosse/Verdon wet-dream tweet

[163] This conduct was identified earlier in the decision. The fact that the tweet was posted is not disputed.[206] What is at issue is whether the Applicant breached the school's Code of Conduct by sending the tweet.

[164] The Code reads that a teacher is not to "bring themselves, Edmund Rice Australia or the School into disrepute by inappropriate personal online behaviours."[207]

[165] For context, the tweet posted was in relation to a Netflix special based on the career of Fosse, who created a number of famous musicals in the United States.[208]

[166] During the hearing, the Applicant accepted that:

- The term "wet dream" involved "an erotic experience in your sleep";[209]
- He realised it could be read as sexualised language;[210]
- If a person before him had not used the term, he would not have used it;[211]
- It is possible to link the tweet to him being a teacher at St Kevin's College.[212]

[167] The Applicant also contends that the tweet was posted using his private account in private time.[213] However, this is inconsistent with the Applicant agreeing that he understood the social media rules that applied to him.[214]

[168] Ultimately, the Applicant submits that:

> "… the Applicant's conduct did not breach clause 4.2 of the Code of Conduct. There is no evidence that could justify a finding that by posting the Fosse/Verdon Tweet the Applicant brought the Respondent or St Kevin's into disrepute. The only evidence about the existence of the Tweet was that it was located by the father of Student A, who had to go through a process to obtain the connection between the Tweet and St Kevin's … and no one else brought it to St Kevin's attention … Tellingly, there is no evidence that Student A's father thought any lesser of the Respondent or St Kevin's *because* of the Tweet or in fact any evidence at all that anyone thought any lesser of the Respondent or St Kevin's *because* of the Tweet. It is simply not open for the Respondent to allege a breach of its Code of Conduct in the way suggested (and as set out and worded in the policy) and then fail to adduce any evidence that actually demonstrates the breach."[215]

[169] The Respondent submits that:

> "The Submissions at 28 assert there is no evidence that Student A's father thought any lesser of the Respondent and therefore the Tweet did not bring the Applicant or the Respondent into disrepute. That is a nonsense. A clear inference can be drawn from the tone and tenor of the father's 12 and 13 February 2020 emails that he is livid with the Applicant and the College.[216]
>
> The Tweet breached the Code because it did bring the Applicant and his employer into disrepute with at least the parents of Student A. That is enough. It was misconduct."[217]

[170] I agree with the submission of the Respondent on this matter. It is apparent that the father of Student A was extremely upset about the tweet. The tweet did bring the Applicant and therefore his employer into disrepute with at least the parents of Student A. The parents of Student A and their view of the reputation of the school is important. It is enough to establish that this was misconduct.

The hardcore pornography on the Applicant's laptop

[171] After the Applicant's dismissal, the Respondent conducted a search of the Applicant's work laptop. During that search, it was discovered that the Applicant had transferred hardcore pornography onto a workplace device in his possession and watched it on that device. The device being the school provided laptop computer. The transfer and viewing of the pornography by the Applicant took place in 2016/2017.

[172] There were three pornographic films on the device. These films had been deleted at the time that Mr David Thompson, a Digital Forensic & Cyber Security Specialist, inspected the device. The Applicant said he had deleted them, but he could not say when he deleted them.[218]

[173] The Forensic Analysis Report prepared by Mr Thompson included the following:

> "Analysis of the laptop Disk Drive image identified the following records, regarding deleted video files associated with the Microsoft Windows user profile for the user "parriss", which appeared to be pornographic related"[219]

[174] There are three such files identified by Mr Thompson. There are still shots of the pornographic films in evidence. The statement of Mr Crowley describes the content of these files.[220] An example is:

> *"[clips4sale.com]FourTeasingHands_Dylan_STHJ.wmv"*. The Forensic Report identifies that the file was opened on 5 January 2017. The Forensic Report also identifies the video file called *"Edged, Milked, Tickled - High Definition"* with the same file name. The Forensic Report12 contains a screen shot of the video file with a description of the video. The description begins:
>
> > "Dylan is very horny and hellishly ticklish, and today Rich has him tied to the rack for unbearable torment. Rich gently strokes his cock and with Dylan gasping and moaning like the horny 22 y/o he is until he shoots an unauthorized, hands free load on his stomach and Rich's hand…."*[221]*

[175] The descriptions of the other files are similar in that they also describe hard core pornography.

[176] There was some reticence from the Applicant's representative to describe the material as hardcore pornography. It is not clear why as it is apparent that the films are hardcore pornography. As put by the Respondent, the material is consistent with the definition in the Cambridge Online Dictionary, in that they show "sexual acts clearly and in detail."[222] Mr Crowley states that this conduct represents a breach of the laptop acceptance form signed by the Applicant.[223]

[177] In his witness statement in reply, the Applicant deals with the evidence about the pornographic files on his work laptop. The Applicant states that he took his laptop overseas with him on a personal trip in January 2017.

[178] The Applicant's evidence at the time that he made that statement was that:

> "On that trip, I believe around about those dates I did view some files including those files that are identified in paragraphs 74(a)-(c). However, I say the following:

- I did not access that website at that time or ever on the work computer. I did not purchase or download those files at that time or ever on the work computer. The files were stored on a personal external hard drive that I took to London with me and that I temporarily linked (by inserting the external drive) to the work computer and from which I played the files. I obtained those files by downloading them onto my home desktop computer and then stored them on an external hard drive. I did not use the work computer to obtain those files at any stage.

- I believed at that time that by using my external hard drive that I was simply using the work laptop like a TV screen or monitor. It was silly of me to do this and I seriously regret it and I am truly sorry. When the clips were played, the laptop placed them in the *"videos"* folder of Windows Media Player. I did not save or store the files on the work computer. As such, I did not consciously or deliberately *"delete"* the files, if that is being suggested.

- I had other files on the hard drive, and I viewed these while on the trip as well. These files were television programs I had transferred from my personal computer onto the hard drive.

- I did not ever use the work computer to access pornographic websites, download pornographic content from websites or the internet or store pornographic content. I accept that by viewing the clips on the work computer it might be said that I had I therefore *"accessed"* pornographic material. But I deny that I used the work computer to access pornographic websites. I did not do that."[224]

[179] The Applicant indicated that he knew it was prohibited to have hardcore pornography on a school device or a laptop.[225] The Applicant confirmed he watched all three videos.[226]

[180] Subsequent to the Applicant filing his statement in reply, the Respondent sought a further Forensic Analysis Report from Mr Thompson. In that report, Mr Thompson identified that the computer records appear to indicate that the three pornographic videos had been copied to the "parriss" user profile "Videos" folder and that the videos were actually accessed from that videos folder on the laptop, not an external hard drive.[227] The further analysis also revealed that the files were deleted.[228] It could not be determined when the files were deleted. That evidence was provided in a further statement of Mr Thompson that was filed prior to the hearing.

[181] Despite being aware of the further evidence of Mr Thompson, the Applicant affirmed his reply statement as a truthful account of what occurred. He did not seek to amend that statement in his evidence in chief. The Applicant was then asked about the further Forensic Analysis Report on cross examination. It was only then that the Applicant altered his previous evidence:

> "So you accept that you didn't just use the work laptop like a television screen to watch the material, you copied on and you later deleted; is that right? -Now that I see this other evidence, I have come to recall that, yes."[229]

[182] The Applicant's claim was that he was able to remember more information after he saw the further Forensic Analysis Report prepared by Mr Thompson.[230] However, this is not plausible given the clear evidence that the Applicant had already given on the matter.

[183] As to the risks associated with having the pornography on his work laptop and not knowing when he deleted it, the Applicant gave the following evidence:

> "Isn't there also the risk that if you get back from overseas and you've forgotten you have copied it on and it's in a maths class in the first week of February, or whatever, that somehow - and strange things happen - students could see it? There's a risk of that, isn't there? -If I hadn't have deleted it, it would have been a risk."[231]

[184] The evidence of Mr Crowley was that he had significant concerns about the conduct involving the viewing of the pornography:

> "…my concerns would be that the incredible level of unprofessionalism of using a school laptop in that way, ensuring the safety of students, that no students were – you know – inadvertently subjected to any images – harmful images or movies. For me it is, you know, it comes down to understanding. You know that line of professionalism and responsibility that we have as educators, to be acting in a way, at work at all times that's consistent with the responsibility that we have, of educating young people."[232]

[185] In final submissions, the following position was put by the Applicant:

> "• he accepts that he transferred the three pornographic videos to his work computer and used the work computer to watch those videos while overseas in January 2017;
>
> • his conduct in doing so was unacceptable (PN1498-PN1499); but
>
> • he does not accept that this conduct gives rise to a valid reason for his dismissal, as opposed to a lesser sanction."[233]

[186] In terms of the seriousness of his conduct, the Applicant contends that it was at the lower end of cases before the Commission involving pornography and that it was a "one off" event.[234]

[187] The Respondent submits that the Applicant lacked candour on his ownership of the pornography and engaged in "pettifoggery" on the issue. The Respondent submits that it involves a question of character and credit. [235]

[188] The Respondent draws particular attention to the fact that the Applicant cannot recall when he deleted the pornographic files, and it was possible that they were stored on the laptop well into the 2017 school year which is reckless.[236]

[189] As set out earlier, The Applicant accepts that he understood the rules surrounding the use of the schools IT, including the laptop.

[190] The Respondent contends that the actions of the Applicant in transferring the pornographic files to the work laptop and storing them there was misconduct. Further, that it was serious misconduct to fail to delete them until an unknown point in the future.[237]

[191] I am satisfied that this conduct of the Applicant was indeed serious misconduct. My reasons for doing so are set out later in the decision.

Grommr

[192] The Applicant created an account for himself on a website called Grommr.

[193] The Applicant accepted that he used his school email address for his Grommr membership for one day, and that this was a lapse in his judgement.[238]

[194] The Respondent contends that this action was a lapse of judgement that exposed the Applicant and the Respondent to serious embarrassment in the public realm.[239]

[195] I agree that the Applicant's actions with regards to the Grommr site and using his school email address was a lapse of judgement. However, in all the circumstances, given the short period of time and lack of any evidence to suggest that the use of his school email address could lead to the discovery that the Applicant's Grommr site was associated with a teacher at the school, leads me to conclude this action cannot be characterised as misconduct.

Student email communications

[196] The Forensic Analysis Report of the Applicant's computer also revealed a number of email exchanges that the Applicant had with students. The Respondent contends that the emails breach professional boundaries of the type described in the Code and other materials referred to earlier.

[197] The emails in evidence were sent in the time period ranging from November 2013 to June 2019. The primary observation that the Respondent makes about the emails is the Applicant's constant reference and reinforcement to the students that he is their "friend".

[198] The Respondent submits that the Commission should make the following findings in relation to the emails:

> "• …the Applicant did not comprehend the obligations imposed upon him by the relevant professional boundaries contained in the Code; and
>
> • the Applicant communicated to students in a manner that was not consistent with the relevant professional boundaries in that he was far too familiar.
>
> • The Applicant's email communication with students was unprofessional and liable to cause confusion and possible harm to students. It was misconduct."[240]

[199] There are a number of email communications in evidence between the Applicant and a number of students. A summary of the evidence on this issue is set out in Annexure A to the Respondent's closing submissions. There is no issue with the fact that the Applicant was emailing students. The issue is whether some of the content of those emails represented a breach of professional boundaries.

[200] The Applicant sought to contextualise the various emails he sent. For example, that he used terms coined by students (e.g., "friends for life"), that a student had an injury and operation, so he was trying to convey a sense of "warmth", and that he was supporting a student through some difficult personal circumstances and that he appreciated the student's trust. Other

references include that it was light-hearted, a student needing positive encouragement and support, and that he was "picking up" on a student's light-hearted tone.[241]

[201] Some examples of the email exchanges and the responses of the Applicant during cross examination are reproduced below:

Document Date	Document description	Applicant's response
7 November 2013	"… Mr Parris (aka friend for life 😊)"	Cross examination PN1561: "…That is a term the student had come up with when the musical finished. He said we would be friends for life and I would use that as an expression when I saw him at the school. … I put a smiley face to be in the – of like a wink, to try and show time."
23 March 2017	"*…too late to warn me not to miss you too much, I miss you terribly. I ask the other guys about you every day. Hope some of them have contacted you.* ... *Take care big guy,"*	Cross examination PN1549: "…I picked up on his tone about the "Don't miss me too much". You can't express tone in an email. I was trying to be light." PN1550: "the language you have used is, "I miss you terribly." Do you think that language or that sentiment crosses the line in the context?---If it was meant in sincerely word value of what it says, it would be the wrong thing to say, but I believe the boy would understand. To use - for want of a better word - the tongue in cheek style of my reply, it was to be - and I believe he would understand it. … Looking at cold words on paper it's hard to analyse it now." PN1551: "…this is how I talk, this is how I express myself. I have confidence the students understand it and respond to it in the right

		way, and that's what I've done. I don't understand – I don't know what else I can say."
18 August 2017	"…*I really enjoyed spending time with you on CLC. I'm honoured to be your friend, and I look forward to working with you even more closely as your VCE continues."*	Cross examination PN1535: "…Do you accept the whole reference point of "you are my friend" and "our friendship" is simply wrong? It's an error of judgment, do you accept that?---No, I believe the student understood the use of the term." PN1536: "It's too familiar, isn't it, Mr Parris?---There would be a great many more familiar words than that. I don't think it's too familiar." PN1537: "It fails by the language that you use to maintain a clear distance between yourself as a teacher and a pupil, doesn't it?---It does. I agree it's not formal language." PN1538: "…It's framing that relationship around friendship that is problematic and you say, "No, Mr Harrington, that's not problematic." Is that your evidence?---No problems have arisen from it, so I can only say it's not problematic."
29 March 2018 – 31 March 2018	"…*Thanks for all your friendship and support in the year so far. Many more good times to come.* *Best wishes,*"	Reply statement "(28) …referred to [the student's] *"friendship and support"*, which I trust that he took in the respectful spirit in which the words were used."
26 September 2018	"…*Still smiling over your beautiful email to me from Monday night. I respect you all the more for taking the time to mention your appreciation so sweetly. I enjoy the time we spend*	Reply statement "(23) I noticed that towards the end of term 3 (just before the September school holidays), [student] had been struggling somewhat with his focus and motivation and I tried to offer my encouragement."

	together doing school work, and our friendship means the world to me. *…* *See you tomorrow bud.* *Your friend,* *Mr Parris"*	
30 September 2018	"*…It is such a privilege to be your friend and mentor."*	Cross examination PN1520: "This involves a young man here, you're the teacher and you're speaking of "privilege to be your friend" and "our friendship". That's sending the wrong message because it's too familiar, Mr Parris, isn't it?---I believe the student understands the use of the word." PN1521: "But you can't be certain of that, Mr Parris, because it's a student under your care, it's a power relationship where he's vulnerable, you're in control and you are talking about friendship, aren't you?---That's how I speak. I believe students understand it." PN1524: "So you think it's okay and it's acceptable to communicate with students who you teach, who you are responsible for and talk of that relationship in terms of a friendship, do you?---You can see how many times I've done that and they've used the word in return. I believe it's acceptable if I'm trusting and understanding that the student understands my meaning." PN1525: "Mr Parris, isn't this where particularly there is a prospect where there can be a breakdown of communication because the student looking with wide eyes at the teacher that he or she may deeply respect and love in a very, you know, loose sense

		of the word, once that teacher starts talking about "our friendship" and "my friend", it has the capacity to distort the relationship and create ambiguity, doesn't it?---No, if it's used with trust, which is what I'm doing."
24 October 2018	"…*I will cherish these photos. Happy memories of six happy years of friendship, all centered around our musicals. Thanks for always being such a great friend.*"	(Not the subject of cross examination).

[202] Having considered the evidence, I am satisfied that the contents of the emails referred to above crosses professional boundaries and constitutes misconduct on the part of the Applicant.

[203] The Applicant accepted in respect to one exchange that it fails to maintain a clear distance between himself and the student. In respect of other instances, his explanations that the familiarity was driven by difficult and personal circumstances, or he was just using terms that the students used, demonstrate that even though the Applicant was aware of the obligations regarding professional boundaries in the Code he did not comprehend them. The Applicant has on numerous occasions communicated to students via email in a manner that was too familiar and had breached the Code in doing so.

The process followed to effect the dismissal

[204] One of Mr Crowley's first acts when he assumed the role of Acting Principal on 20 February 2020 was to dismiss the Applicant.[242] Mr Crowley describes the environment of the school on the day as "bedlam" in the aftermath of the Four Corners episode, and that he had to respond to the concerns of staff and parents, while being brought up to speed around a range of issues, including the Applicant.[243]

[205] Mr Crowley was cross examined extensively on the process followed and whether there were any shortcomings. He stated in his evidence that:

> "Mr Parris attended alone. He chose not to bring a support person. I was aware that earlier in the day Mr O'Halloran telephoned Mr Parris with Ms Ryan, to arrange the meeting. Mr O'Halloran asked Mr Parris if he wanted to bring a support person to the meeting. Mr Parris said no. In any event, I again asked Mr Parris whether he wanted a support person for the meeting, as he had not brought one. Mr Parris said that he was okay for the meeting to go ahead without a support person."[244]

[206] However, the Applicant was in fact called at 3:35pm for a meeting at 5:00pm. Given the lack of notice, the Applicant's evidence was that:

> "It was not that I chose not to bring a support person as Mr Crowley asserts. I was left with an incredibly short period of notice to arrange a support person. I refer to paragraph

> 76 of my First Statement which details that I called my support person, Mr Nott, but he did not answer and therefore I was not able to organise his attendance at the meeting"[245]

[207] It is apparent that the Applicant was not denied a support person, but in practical terms it was extremely difficult for him to arrange one given the short time frame. Given that he was already suspended, there was no apparent need to give the Applicant such a short period of notice.

[208] The Applicant claims that Mr O'Halloran and Mr Crowley were speaking over one another.[246] Mr Crowley said that he asked Mr O'Halloran to run the meeting.[247]

[209] There was considerable focus by Counsel for the Applicant on the issue of whether Mr Crowley dismissed the Applicant for touching the leg of Student A, and whether he put that allegation to the Applicant.

[210] Some of the key evidence on this includes:

> "You had no interest, at all, in what me (*sic*) might say, in response to that allegation, did you? -I had responsibility for 2100 boys and I was not convinced, in any way, shape or form, that he was an appropriate person to work with children. I made a tough decision. I acknowledge the procedure was not perfect, I acknowledge that, but I made the right decision."[248]

> "Why didn't you include, in the allegation, in paragraph 1, this allegation about touching the leg? -Why didn't I?
>
> Yes? -Well, at that stage, I hadn't met with the parents. I'd obviously been aware of some communication. My concern was around the combination, the misjudgement of 14 June, which I acknowledge was referred to the appropriate regulatory authorities, but it still does not diminish the fact that Mr Parris was given a warning, overstepped the mark. In addition, the tweet represented to me a complete lack of awareness and understanding of the fact that he was already under a very clear direction from the school, regardless of the additional information. When you put those two together, that was satisfactory for me to call this meeting."[249]

> "I just want to know why didn't you include that allegation in the letter? -Well, because I - - -
>
> Why (indistinct)? -Because - well, I've tried to answer it. Because, at that point in time, I had not investigated those allegations further. I have subsequently done so, through re-initiating the CCYP investigation. I had and still maintain the strongest concerns over Mr Parris working with children. In the letter, strike 1, 15 June, 14 June, completely overstepping the boundaries. I accept the issue was to work though it with the regulatory authorities, and a warning was issued. Second matter, Twitter, failure to understand professional boundaries in his relationship as professional teacher. They are the two issues that I wanted to focus with him in that - in that meeting."[250]

> "What about the allegation, in relation to touching the leg? -Well, we've already covered that.
>
> Did you give that careful consideration? -Yes, I did. I considered it - I considered that it would be something which I would investigate further, in opening an additional CCYP allegation, as I've explained. However, I'm suggesting to you that the 15 June, in addition to Mr Parris's tweet of the highly sexualised comment, the fact he was on suspension, were the circumstances on which I made the decision to terminate his employment."[251]

[211] Overall, Mr Crowley was inconsistent in his evidence as to whether he was relying on the allegation of leg touching as put as the reason for dismissal. Mr Crowley said that he believed the parents' email[252] and believed Student A,[253] and said he would investigate further.[254] But the following exchange suggests that he has made up his mind on the matter of the leg touching:

> "Did you have any interest - I withdraw this. The allegation about the leg touching, what if it was false? Did you have any interest in determining that? -No."[255]

[212] On the evidence, Mr Crowley believed the leg touching had occurred and it is unlikely that it did not inform his decision to dismiss the Applicant, notwithstanding there was no mention of it in the letter of termination.

[213] It is also apparent that Mr Crowley didn't take into account mitigating circumstances.[256]

[214] Mr Crowley accepts that the process set out under clause 13 of the Agreement was not followed:

> "…what was missed in the process was then the next meeting where the staff member has an opportunity to respond to that course of action. That was the part that was missed. I outlined my intended course of action, I'd made my decision, I terminated his employment, and I acknowledge that the next step in the process was missed."[257]

[215] Mr Crowley further conceded that:

> "Let's just focus on what you wrote. "You had an opportunity to respond to the proposed course of action", that is not right, is it, Mr Crowley? -I have already conceded that that step was missed.
>
> Yes. Why did you write it in the letter then? -Well, it's - obviously it's an oversight."[258]

[216] In seeking to explain the procedural failings, Mr Crowley was consistent that his paramount concern was to protect the safety of students.[259] I accept that was his paramount concern and should be. However, it has to be borne in mind that the Applicant was on suspension, so this does not explain the haste of calling the meeting and not following the requisite steps in the Agreement. Mr Crowley accepted this.[260]

[217] There was some time spent by the Applicant's Counsel seeking to have Mr Crowley concede that he terminated the employment of the Applicant because Student A's parents desired the outcome. Indeed, it is clear from the evidence that is what Student A's parents wanted. Mr Crowley responds to that general line of questioning as follows:

> "I have spent hours and hours with the parents of Student A. They do not believe that the matter, 15 June, was reported appropriately. They have seen, first hand, the damage to their son. And, as any parent would, they would want to see the risk and the harm to their son, in the form of Mr Parris's continuing employment, to be addressed by the school. So I don't, in any way, shape or form, blame the parents for bringing that to the attention of the school, because that was further evidence to them, and to the school because I've said that I shared the view, that this is inappropriate behaviour, on the part of its teacher. It steps outside of professional boundaries."[261]

[218] It should be noted that during the hearing, Mr Crowley often erroneously referred to 15 June, but clarified that he meant 14 June.[262]

[219] It is apparent that Student A's parents threatened to expose the Respondent to Four Corners if the Applicant was not terminated. However, Mr Crowley was clear in his evidence that he did not know that until it was put to him during the hearing.[263] The evidence is that Mr Crowley met Student A's parents for the first time shortly after terminating the Applicant.

[220] As to whether Mr Crowley had made up his mind to dismiss the Applicant before the meeting his evidence included:

> "I would not say that I had, categorically, made my mind up to sack him. I would say that I certainly recognised that that would be an option. That would clearly be an option, based on my understanding that what I had read, in Student A's father's email, was alarming, was concerning, from the position of child safety. There had clearly been an additional tweet that I think, as a principal of some 14 years, is highly inappropriate, as a person in the teaching profession, and that he was on suspension."[264]

> "So when you went into this meeting, on 20 February, you weren't interested at all in determining whether or not the allegation of the leg touching was false? -Sorry, I - I had ever interest in determining the validity - - -
>
> So what - - -? -Sorry, let me finish, the validity of that, through my CCYP investigation, moving forward. What I said to you was, 15 June, serious, serious issue. Mr Parris had an opportunity to respond to that, make sure there were never any other issues. I get to the school, he's on suspension. There's been a tweet around an inappropriate comment that's been identified by a member of the community. The headmaster, at the time, saw it fit to suspend him. I've come into that meeting and I've made the decision that that's behaviour that I'm not going to tolerate, as the principal of the school."[265]

[221] In my view it is apparent that if Mr Crowley had not made up his mind to terminate the employment of the Applicant, he was very close to having done so. Taking into account that his paramount concern was the safety of students and he had formed a view that the Applicant was not an appropriate person to work with children, and that he believed the allegations of

Student A and the parents, it is more likely that Mr Crowley was inclined to dismiss the Applicant prior to the meeting and was merely "going through the motions".

The witnesses and findings on credit

The Applicant

[222] The Applicant was a most unsatisfactory and unimpressive witness. His evidence was often self-serving and evasive. The Applicant often sought to minimise the conduct he was involved in and concocted dubious excuses to explain the misconduct that he admits to. The Respondent submits that the evidence of the Applicant should be viewed with caution. I agree with that proposition for the following reasons.

[223] As the Respondent points out, the Applicant's evidence of the June 14 "hug" on the couch was inconsistent and self-serving.[266] The Applicant now denies that there was ever a hug,[267] instead asserting that the impugned conduct only involved a "pat on the shoulder",[268] or "one arm across both shoulders of the student"[269] or that he "patted him across the shoulders."[270] Finally, it was said to be a "side hug",[271] "involving somewhat of a slight pressure."[272] He says that he leaned across to him.[273]

[224] As set out earlier, the Applicant's evidence to the effect that there was some urgency to see Student A on June 14 conflicted with what he included in his "personal reflection".

[225] There is also an attempt by the Applicant to explain his closeness to Student A by his clear evidence at first instance that it was a small couch and implying that the school had swapped couches. This was clearly incorrect and his explanation for this error was not credible:

> "You, in your evidence, challenged that that was the same couch and, frankly, Mr Parris, you suggested the school had swapped couches, didn't you? -That was my understanding at the time. I could see that the couch in CM2 was against a wall and it was in a different position and, without being able to check or see for myself, I had to go by the best of my memory, but, as I say, I totally accept Mr Macfarlane's statement now that I've seen additional evidence."[274]

[226] The Applicant was also inconsistent regarding his evidence about the need to be so close to Student A on the couch as set out earlier.

[227] The Respondent's final written submissions deal succinctly with other reasons to doubt the evidence of the Applicant where it conflicts with others and for convenience part of those submissions are reproduced below:

> "• the Applicant asserted under oath that he only hugged boys in final rehearsals or after theatrical shows. That 'qualification' was undermined by Student A's evidence and the Applicant's own evidence that he had hugged another student (multiple times) when approached by that boy in a rehearsal in 2018;
>
> • he was uncertain and careful to qualify any acceptance of proposition about power disparity between teachers and students. He seemed unable to accept that he was in a 'unique position of influence';

- as to the transfer and storage of pornographic material, the Applicant's evidence lacked candour. On one view, he was entitled to put the Respondent to its proof on such a serious allegation. However, at all material times, the Applicant must have known how he had come into possession of the obscene material – and then how he had stored and watched it. He positively asserted (with some precision) a considered/compelling story concerning use of a personal external hard drive and conduct akin to using his laptop like a television and some form of automatic copying onto the laptop. But upon production of the Second [expert] Witness Statement of David Thompson (Second Thompson Statement), his evidence changed. He then manifestly failed to correct the record in evidence in chief. But for cross-examination, the Respondent and Commission had no notice as to his recovered memory that he had deliberately transferred the obscene material on to his work device for storage – it only was admitted late in cross-examination. The Applicant played 'ducks and drakes' on this matter. The Reply Statement at 11(b) was wholly inaccurate and misleading and caused the Respondent to incur the cost of a second forensic report from its expert. The above reflects poorly on his candour and integrity on such an important issue."[275]

  (footnotes removed)

[228] The Respondent's summary of these aspects of the Applicants evidence is accurate and I agree with it. The Applicant was not a credible witness on a number of the key factual issues.

Student A

[229] Student A was 16 years old in 2019, and 17 years old in December 2020 when he gave his evidence.

[230] Reasons that the Applicant's Counsel urge me to consider as suggesting that Student A is not credible include that Student A changed his evidence to say that he was now certain that he had not told Mr Macfarlane about the Applicant's hand on his leg. However, in my view, this is not a significant matter, when his first evidence was that he was not sure, but then thought he had done so. Changing his position to say that his uncertainty was now replaced with certainty is reasonable in the circumstances.

[231] Student A was tested on why he did not report the leg touching incident to Mr Macfarlane earlier. His explanation was, in all of the circumstances, a reasonable one. He was still trying to process what happened.[276] He was embarrassed about what happened.[277]

[232] Student A gave the following evidence to this effect:

> "Why did you leave out important things? -Because I was still trying to process what had happened, I was traumatised from the event."[278]

[233] In any case, Student A did tell the school counsellor Ms Keel about it, and she made a note about it.[279] The note says that the Applicant had his hand on Student A's knee. However, as I set out earlier, I accept Student A's evidence that he told the counsellor that the Applicant was touching his inner thigh. While the record of Ms Keel is not consistent with this, it is consistent with the Applicant's evidence that the day after Student A told the counsellor, Mr Russell told him of the allegation that he was touching the leg of Student A on June 14. Further,

Student A also told Mr Windle about the Applicant touching his inner thigh in August 2019. Mr Windle said:

> "You have given a complete account of what you were told by Student A? -To the best of my recollection, yes.
>
> What he told you was this, that Mr Parris sat down next to him on a couch in the McCarthy area; correct? -That is correct, yes.
>
> And hugged him; that's correct? -Yes.
>
> And put his hand on Student A's inner thigh? -Yes, that's correct.
>
> He didn't tell you anything more about that? -Not from my recollection, that's what he told me, but, at that stage, he was very upset, so I didn't push him any further than that that I remember."[280]

[234] Overall, any suggestion that Student A's credibility was in question because he did not report the leg touching to Mr Macfarlane is not supported by the evidence. He didn't mention it to Mr Macfarlane because he was still processing it. I have in assessing the evidence had regard to the direction to the jury from the Chief Judge in *Pell v The Queen*. The following excerpt, which the Respondent referred me to, provides guidance on approaching matters of this nature:

> "When you are assessing the evidence, also bear in mind that experience shows the following. One, people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time. Two, trauma may affect different people differently, including by affecting how they recall events. Three, it is common for there to be differences in accounts of a sexual offence. For example, people may describe a sexual offence differently at different times to different people or in different contexts. And finally, both truthful and untruthful accounts of a sexual offence may contain differences."[281]

[235] The evidence of Student A as to what he said about the leg touching and to who and when he did should be considered in this context. Student A's evidence on the point is largely consistent. However, to the extent there is inconsistency, it needs to be assessed having regards to the trauma he has experience and the effect that may have had on his recall of the event.

[236] The Applicant put to Student A he made up the allegations as he did not want the Applicant at the school.[282] Student A denied that proposition when it was put to him.[283] However, Student A was clear that he did not want the Applicant to get his job back.[284] In summary, Student A denied the central assertion, but he admitted that he did not want the Applicant to return to St Kevin's College. It is relevant that Student A's delay in reporting the leg touching does not extend beyond the Applicant's dismissal, it was made in August 2019 to the counsellor and Mr Windle, well before the Applicant was terminated. I am not satisfied on the evidence that Student A made up the allegation of leg touching because he did not want the Applicant to return to the school.

[237] Nor do I accept the rather spurious notion that Student A invented the hand on leg allegation because he was feeling upset about being accused of vaping in the school toilets.

Student A denies this,[285] and the denial is plausible. Furthermore, when Student A spoke to Mr Windle and was upset, he did not mention the vaping.[286]

[238] In my view, Student A was a credible and cogent witness throughout the proceedings.

Macfarlane

[239] Mr Macfarlane was forthright and crystal clear in his evidence. I agree with the Respondent that there was no reason for Mr Macfarlane to lie.[287] I agree that Mr Macfarlane is to be believed as a truthful witness.

Student B

[240] Student B was a credible witness. He was cross examined on his evidence and was not shaken on it, and I have no reason to doubt the evidence of Student B.

[241] Having regard to the foregoing consideration, the evidence of the Applicant is not preferred where it conflicts with any of Student A's, Student B's or Mr Macfarlane's evidence.

Findings of fact regarding the June 14 couch incident and the leg touching allegation

[242] The key evidence as to what occurred on June 14 is that of the Applicant, Student A and Mr Macfarlane as he viewed the CCTV footage of the incident in question and gave evidence as to what he saw.

[243] The evidence of Student A has been set out at length earlier.

[244] Mr Macfarlane largely corroborates that evidence, having seen the CCTV footage. Mr Macfarlane observed the Applicant:

- On a number of occasions touch Student A on the arm;
- Hug Student A early on in the conversation; and
- At the end of the discussion, the Applicant leaned over and gave Student A a hug.

[245] Mr Macfarlane's evidence was also that the Applicant moved closer to Student A during the discussion. As to the nature of the hugs, Mr Macfarlane's description aligns with that of Student A's. Mr Macfarlane described them as "the sort of hugs I'd give my two children… I'd be quite close to them, pulling them towards me, expressing my feelings towards them."[288] In the second hug, Student A was standing prone, and the Applicant wrapped his arms around him.[289]

[246] I prefer the evidence of Student A corroborated by Mr Macfarlane. There were two hugs. The hugs were constricting hugs where the Applicant was pulling Student A in close. They were far more invasive than merely an arm around the shoulder or a side hug as portrayed by the Applicant.

[247] The still image clearly shows the Applicant extremely close to Student A. The Applicant has sought to minimise and obfuscate what transpired on June 14. At times he sought to excuse

the behaviour, suggesting the size of the couch was a factor requiring him to sit close to Student A. It is a three-seater couch. It is apparent from the photo that there was ample room for the Applicant to maintain an appropriate distance from Student A. The Applicant at first suggested to Ms Canny that there was some urgency to needing to see Student A as an excuse for his behaviour, then the concession was made in his reflection that there was no such urgency after all. The Applicant accepts the intentional nature of his conduct on June 14 and is prepared to admit that he made a mistake,[290] but still does not know why he did it.[291]

[248] The Applicant asserts, and I agree, that the leg touching incident is a serious allegation. It should be approached in line with the principal set out in *Briginshaw*.[292] I have considered and applied the principal in my consideration of the matter.

[249] I prefer the evidence of Mr Macfarlane that when he viewed the CCTV footage he could not see the leg of the Applicant and if it was being touched given the angle of the camera, to the hearsay evidence from the Applicant who claims that Mr Russell told him that "it could not be true."[293]

[250] Ultimately, the finding on whether or not the Applicant was rubbing the leg of the Applicant comes down to one of credit, as between Student A and the Applicant. I have already indicated the reasons I prefer the evidence of Student A to that of the Applicant where there is an inconsistency.

[251] The fact that Student A took some time to fully articulate what happened on June 14 regarding the leg touching is understandable. His evidence was that he was embarrassed about it. Further, as referred to earlier, Student A was at the time of the misconduct, a minor, and he has experienced some psychological trauma as a result of it. As Student A said, he was still processing it. Student A's direct evidence is that the told Ms Keel that the Applicant "touched my leg."[294] Ms Keel recorded that the Applicant placed his hand on Student A's knee. I prefer the direct evidence of Student A as to what he said to Ms Keel. Further, Student A told Mr Windle only days after speaking to Ms Keel in August that the Applicant's hand was on his inner thigh.

[252] The Applicant denies any leg touching at all. His evidence as to the June 14 incident overall lacks credibility for the reasons set out earlier. I prefer the evidence of Student A where it conflicts with the Applicant's. On the balance of probabilities, I find that the Applicant, on June 14, put his right hand on Student A's inner right thigh. The denials by the Applicant that he touched the leg of Student A at all is consistent with his self-serving minimising and sanitising of the June 14 incident. I do not accept the Applicant's denial that he touched the leg of Student A in the manner described by Student A. Having regard to the evidence, I am satisfied on the balance of probabilities that the Applicant on June 14, when sitting next to the Student A on the couch, put his right hand on Student A's upper right thigh and moved it up and down his upper thigh two or three times.

Dishonesty in the investigation process

[253] The Respondent invites the Commission to find that the Applicant was not honest and truthful during the investigation process pertaining to the June 14 incident. I agree that the evidence supports that finding. The Applicant did not admit to touching the leg of Student A, which objectively renders the conduct of the Applicant more serious than it was on the facts admitted to at the time by the Applicant.

[254] Further, the Applicant misled Ms Canny in his reflection note for the reasons set out earlier. His reflection note fell far short of the conduct the Applicant actually engaged in. He also misled Mr Russell when he denied the leg touching allegation when it was put to him. Dishonesty in an investigation process can be a valid reason for termination, and I am satisfied that it is in this matter a valid reason for dismissal.

The Applicant's insight into his behaviour

[255] The Applicant demonstrated an overall lack of insight into his behaviour. He also demonstrated on a number of occasions that he struggled with understanding his responsibilities as a teacher.

[256] For example, he had trouble agreeing that students were vulnerable young people:

> "But when you're a teacher at a school, and the kids are dropped off in the morning and picked up at night, if they're not boarding, et cetera. The parents are handing over those young people, vulnerable - do you agree they're vulnerable young people? -What do you mean by "vulnerable"?
>
> Well, you may well be a maths teacher, but you're also a reviewer of the performing arts and I know you have a facility with language, you know what I mean by "vulnerable", don't you, Mr Parris? Do you not know what the word vulnerable means? -But in the context - I want to be clear, if I'm agreeing to something, what you mean by "vulnerable". Vulnerable to what?"[295]

[257] The Applicant struggled with the notion that there was an inherent power imbalance between a teacher and student. He agreed that a teacher has "slightly" more power,[296] but had trouble understanding what "power" technically means:

> "Well, if you don't know the answer then I don't know the answer? -Okay. I would say yes, there's an imbalance of power.
>
> Why? -Because I'm a teacher and Student A is a student.
>
> Yes, but why? Why is there an imbalance? -Well, if there is, in that situation, then there is at all times, with students - between students and teachers. I'm not sure.
>
> You don't know why there's a power imbalance? -I do know why it would be, specific to that example and not to other times.
>
> Well, I'm just giving you a concrete example, to make it easier for you to answer me, that's all? -Well, I'd say there would be at that time, yes."[297]

> "How do you describe those errors or mistakes that you made? Do you say that they were simply one offs or do you concede that there is any sort of pattern to the behaviour? -I can see in productions there was a style - a manner to my behaviour and, as pointed out, I made a terrible error on 14 June, but since then with the counselling, with meeting with

the deputy head every week, all I can say is that there was no other allegations sent through at school when I was there through the rest of 2019 into 2020, but I learnt from that. I took it extremely seriously. I reflected on it. I couldn't be more sorry or serious about it and I've already be able to show the difference in how I have behaved and acted since then."[298]

[258] The Applicant did not agree that hugging students in 2018 was a mistake.[299]

[259] However, the Applicant did demonstrate insight on some matters. He accepted that he allowed the practice of hugging in his professional life as a teacher,[300] that he hugged on impulse,[301] and that he initiated hugs.[302] The Applicant also agreed that there are two instances of sexual misconduct by him in the school setting.[303]

[260] Nonetheless, the Applicant was unable to explain why he engaged in the conduct on June 14:

"…Mr Parris, you have been unable to explain today after a period of reflection of 18 months why you engaged in that conduct on 14 June 2019, have you? You can't explain it, can you? -Not in any terms that would be anything meaningful or that - no. I can't explain it, no."[304]

"Because of that video still that we have been looking at and because of how close you were to him on that couch, and I know you contest the assertion that you had a hand on a leg and I know you've denied that and you still do? -Yes.

Do you fully comprehend the manner in which you have exposed yourself and the school by that conduct on that day? -Yes."[305]

"What were those things that you have done wrong, because I have read a lot of material that you produced. There are statements and there is an outline of argument, et cetera, but you tell me what are the things that you did wrong? -I understand my action in the 14 June incident was misjudged and a poor decision to have done on the day. I accept the use of the laptop for viewing (audio malfunction) was not the right thing to do."[306]

[261] The Applicant, on the conduct that he accepts he engaged in, does show some acknowledgment of the impact on Student A:

"Do you accept that your conduct on that day on 14 June imperilled Student A's safety? -Looking at it now, I can see it did. It wasn't intended to do that at the time, no."[307]

[262] However, he minimises the conduct by suggesting that it was the start of a difficult time for Student A:

> "You don't take any responsibility, as I understand it, you don't take any responsibility? -Yes, I do, I acknowledge that my action on 14 June was the beginning of a difficult time for Student A."[308]

[263] The Applicant sought to blame others for the impact of his conduct, as can be seen from the following exchanges:

> "Who else is responsible for it - your impression? -The school, the other leadership people at the school, and I've got no idea about - - -."[309]

> "So the school is as responsible as you are for whatever flowed from 14 June; is that your evidence? -I would almost go as far as to say that they are more responsible because it was so much out of my hands by that point."[310]

> "But you say in your evidence, "It may be my fault, but probably the school's fault more than my fault." Is that your evidence? -That's putting it a bit simply, but I believe the situation was out of my hands by that point."[311]

[264] The Applicant's evidence is that he made a concerted effort to change and adhere to the rules around avoiding Student A.[312] I accept that the Applicant made that effort. I have also determined that Student A observed the Applicant was still hugging and touching students to some extent after June 2019. In any case, overall, the evidence is clear that the level of insight of the Applicant into his conduct is extremely low.

Was the dismissal harsh, unjust or unreasonable?

[265] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.

[266] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[313] I set out my consideration of each below.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?

[267] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[314] and should not be "capricious, fanciful, spiteful or prejudiced."[315] However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[316]

[268] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[317] "The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination."[318]

[269] The Applicant took me to the decision of Saunders C, as he then was, in *Conicella v Phillip W Hill & Associates Pty Ltd*[319] (Conicella) as a summary of the legal position on the question of reliance by an employer on earlier instances of misconduct when making a decision to dismiss. In *Conicella*, the Commissioner canvassed the decisions in *Toll Holdings Ltd v Johnpulle* (Johnpulle)[320] and *Diaz v Anzpac Services (Australia) Pty Limited*.[321] Having considered those decisions, the Commissioner summarised the legal position as follows:

> "In my view, the following principles are apparent from these authorities on the question of reliance by an employer on earlier instances of misconduct on the part of an employee when making a later decision to dismiss the employee:
>
> - where an employer with full knowledge of earlier instances of misconduct on the part of an employee has decided to retain the employee in employment, those earlier instances of misconduct cannot, of themselves, constitute valid reasons for dismissal;
>
> - however, the earlier instances of misconduct may be relevant to the question of whether there was a valid reason for dismissal because they may increase the gravity of later misconduct, particularly where the earlier misconduct was of the same or a similar character and the employee was warned not to repeat it, thereby contributing to a finding that the reason(s) for dismissal were "sound, defensible and well founded"; and
>
> - the earlier instances of misconduct and any warnings in relation thereto may also be "relevant matters" (s.387(h)) to an assessment of whether the dismissal was too harsh a penalty in the circumstances."[322]

[270] The Respondent did not take issue with those principles.

[271] In respect to the first principle set out by the Commissioner, this operates in circumstances where an employer has full knowledge of the earlier misconduct. This draws on the decision in *Johnpulle*, which in turn refers to the decision in *Rankin v Marine Power International Pty Ltd* (Rankin).[323] In *Rankin*, the following passage is relevant to the consideration of full knowledge:

> "An employer who has full knowledge of the misconduct of an employee, and who makes a decision to continue to employ the employee, cannot at a later date, unless of course other facts come to his knowledge, dismiss him summarily on the basis of the employee's known misconduct. It is said that the employer has waived his right to dismiss the employee summarily, and thereby condones the misconduct.
>
> In Phillips v Foxall (1872) LR 7 QB 666, Blackburn J said, at p.680 –
>
> > "Now the law gives the master the right to terminate the employment of a service on his discovering that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects, after knowledge of the fraud, to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned. This right the master may use for his own protection."
>
> It is noted that his Lordship used the words "elects", "waive" and "condone" as meaning the same thing. There has been much written in the past 100 years concerning those three expressions in the law, and it is not for me to add to the material, on what each word means and their application. It is clear that no such waiver, condonation or election can take place until the employer has full knowledge of the misconduct. Hence, it must follow that an employer would not be held to have condoned the wrongdoing, where he believed the employee's denial and subsequently found out the truth. See Federal Supply Co v Angehrn (1910) 103 LT 150 (PC)."[324]

[272] It is apparent in this case, that Mr Russell, the decision maker at the time, had some knowledge of the wrongdoing, in respect to the June 14 incident, but did not have full knowledge. In particular, the allegation as to the touching of the leg at the June 14 incident was put to the Applicant by Mr Russell in August 2019 and the Applicant denied that it happened. The denial was believed it would seem by Mr Russell, but the truth is, as I have determined, that the leg touching did occur. Beyond the leg touching, the Applicant has misled the Respondent in respect to his reflection note for the reasons set out earlier. In those circumstances the Respondent cannot, applying the reasoning in *Rankin*, be taken to have condoned the wrongdoing. The circumstances here are that the employer has believed the employee's denial but the denial was not truthful. In the circumstances, the earlier warning for the June 14 conduct does not constitute a barrier to a finding of valid reason for dismissal based on the Applicant's June 14 misconduct.

[273] I take into account that the Applicant was warned in February 2019 about his conduct in 2018 and warned again in October 2019 about the conduct that the Respondent had accepted occurred on 4 June 2019 as a factor under 387(h) in the assessment as to whether the dismissal was unfair.

[274] There are a number of sound and defensible reasons for the dismissal of the Applicant.

[275] The facts are that the Applicant has "crossed the line" in terms of his behaviour of hugging and touching boys on more than one occasion. The line that has been crossed is one where the Applicant has failed to observe professional boundaries between a teacher and student. The offending is serious when one considers that there are particular responsibilities of a teacher. The Respondent referred me to the decision in *Puccio v Catholic Education* Office,[325] where Wilcox J made observations about the particular employment relationship of a teacher in a school and the paramount obligation of child safety. He spoke of the foreseeable risk of "further transgression":

> "On the other hand the care, safety and well-being of students is a matter also entitled to great weight. Where a teacher commits a clear breach of a direction squarely related to safety and welfare issues after due warning, the school, generally speaking, will be left with no option but to terminate the services of the teacher. To allow the teacher to continue would be a foreseeable risk of further transgression by the teacher to occur. The school has a clear duty at law to take steps to guard against foreseeable risks adverse to their safety and welfare and will be held liable if it fails to do so and a claim made against the school. So important is the duty of care resting on an employer where safety issues are involved, that the employer may have a valid reason relating to an employer's capacity or conduct even within the meaning of s.170DE(1) of the Act to dismiss an employee even where reported misconduct is disputed by the employee…."[326]

[276] The consideration of valid reason in this case is to be considered in that context.

[277] As was set out earlier, the Applicant hugged Student A in 2018. The parents of Student A complained. The Applicant was warned not to hug students. The Applicant admitted that he was crossing the line, but he did not "think about it to a great extent"[327] at the time as to whether he knew he was crossing the line. Student A was not the only student that the Applicant was hugging in 2018. The Applicant admitted in cross examination that he was hugging another boy in 2018 during Brigadoon rehearsals.[328]

[278] The Applicant should have known that hugging and other associated physical touching of students was crossing the line of the acceptable boundary without being warned about it. Nevertheless, were there any doubt, it was removed by the warning that Mr Russell gave the Applicant in February 2019.

[279] Despite the warning, the Applicant engaged in the conduct on June 14 of twice hugging Student A and sitting extremely closely to him on the couch. In doing so, he again crossed the line that he admitted he crossed in 2018. However, there was more to the conduct on the couch than was admitted to by the Applicant. In particular, the Applicant touched and rubbed the inner thigh of the Student A. The conduct of the Applicant on June 14 has had a significant impact on Student A, he suffers from anxiety and requires ongoing counselling. The actions of the Applicant have caused harm to Student A. The Applicant's conduct was a conscious and deliberate departure from the Child Safe Standards including the *Ministerial Order No 870*, the Edmund Rice Education Australia Code of Conduct, and the Child Safe Code of Conduct.

[280] The conduct of the Applicant on 14 June 2019 was in my view egregious conduct. It was serious misconduct. It is most certainly a valid reason for dismissal. It weighs strongly against a finding the dismissal was unfair.

The June 2019 "wet dream" tweet

[281] The tweet referring to a wet dream was posted by the Applicant on 14 June 2019. A wet dream, it was conceded by counsel for the Applicant, is where "someone ejaculates in their sleep."[329] It is clearly a reference of a sexualised nature. The Applicant, when asked if he agreed that the term carried a sexual connotation did not directly answer the question, but said "I realise it could be read like that"[330] and that he wouldn't have used it if the person (to who's tweet he was replying) had not used it.[331] The Applicant accepted that, while it might be a "hop, skip and a jump", it was possible to identify, via a link to the Applicant's personal website, to find a reference to him being a teacher for the Respondent. Certainly, the father of Student A was able to find the reference.[332]

[282] Taken literally, a reference to a wet dream, whilst in this case used in reference to a Broadway dancer, is nevertheless a sexual reference. I accept that the Applicant did not think of it in that way and just used the language from the preceding tweet. But the issue for the Applicant is that it is a sexual reference, it was posted online, and it was possible for the public at large to find it and, indeed, it was discovered by the father of Student A.[333]

[283] I agree with the Respondent that a clear inference can be drawn from the tone and tenor of Student A's father's emails that he is livid with the Applicant and the Respondent. It is clear that the tweet has brought the school into disrepute with the father of Student A. As a parent of a student at the school, that is significant.

[284] The Code makes plain that a teacher is not to "bring themselves, Edmund Rice Australia or the School into disrepute by inappropriate personal online behaviours."[334] I am satisfied that this is a valid reason for dismissal. I note that in terms of gravity of misconduct, it is at the lower end of the scale, particularly when compared to the conduct of June 14 and the storage and viewing of the pornography on the school laptop. Nevertheless, it is a valid reason for dismissal for the reasons set out and it weighs against a finding that the dismissal is unfair

The post-employment discovery of the storage and viewing of hardcore pornography on a school device

[285] It is not in dispute that the Applicant transferred pornography from a USB onto his work laptop. He then stored it there. There were three films or clips. He watched them on the school supplied laptop a number of times.[335]

[286] The Applicant concedes that copying, storing and watching hardcore pornography on the work laptop at any time is unacceptable.[336] The Cambridge Online Dictionary defines "hard porn" as, "pornography (= books, films, etc. showing sexual acts) that shows sex in a very detailed way". The three clips fall squarely into that category.

[287] The Applicant also accepted that there was a risk that, when he returned from overseas, students could have seen it if he had not deleted the material.[337] However, the Applicant does not know when he deleted it. In the circumstances, it is conceivable that the pornography was on his laptop when it was being used to teach students when he returned from overseas. The conduct of the Applicant in regard to the pornography was reckless. It was a clear breach of the Respondent's policy. There was a serious and imminent risk to the health and safety of students were they to accidentally view the material, and a risk to the reputation of the Respondent,

where it to be discovered that a teacher that it had employed was watching and storing this material on a school device. It was serious misconduct.

[288] The Applicant knew it was wrong to store and access the pornography on his school laptop because he knew it breached the guidelines. But he did it anyway. The storage and viewing of the hardcore pornography on the school laptop is serious misconduct. It is a valid reason for dismissal. It weighs strongly against a finding that the dismissal was unfair.

The emails

[289] I have set out the consideration of the emails earlier. I am satisfied that the Applicant did not comprehend the obligations imposed on him by the relevant professional boundaries contained in the Code and the Applicant communicated to students in a manner that was not consistent with the relevant professional boundaries in that he was far too familiar.

[290] The sending of the emails constitutes a valid reason for dismissal and weighs against a finding that that dismissal was unfair.

Other matters

Dishonesty in the investigation process

[291] I have found, for the reasons set out earlier, that the Applicant was dishonest and misled the Respondent in its investigation of the June 14 incident. The Applicant sought to minimise, downplay and deny aspects of what he actually did to Student A on June 14 to the Respondent when it investigated it.

[292] An employee's dishonesty may constitute misconduct and a valid reason for dismissal. The Applicant's failure to be truthful with his Respondent about the conduct on June 14 is most certainly misconduct. The Applicant had an obligation to be truthful to the Respondent. This is particularly so where the safety of a student was in issue. This dishonesty is a further valid reason for dismissal.

s.387(b) – Notified of the reason

[293] The Applicant was notified to only a limited extent of the valid reasons for dismissal.

[294] Notification of 'the reason' relates to the 'valid reason' for dismissal.[338]

[295] Notification of the valid reason to terminate must be given to the employee:

- before the decision to terminate is made[339]
- in explicit terms,[340] and
- in plain and clear terms.[341]

[296] In *Crozier v Palazzo Corporation Pty Ltd*,[342] the Full Bench established the following:

> "[73] As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG (3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted."

[297] Although considering provisions in previous legislation, the principle in *Crozier v Palazzo Corporation Pty Ltd* remains unchanged and continues to apply.[343]

[298] In this case, the extent of the identification of the reasons for dismissal is limited to the contents of the letter of termination dated 21 February 2020. That is, that the 14 June incident had caused Student A to develop anxiety and the "wet dream" tweet could be perceived as bringing the Respondent to disrepute.

[299] It is apparent that the Applicant was not notified of the balance of the valid reasons set out earlier in this decision. In the case of the pornography and the emails to students, these were facts acquired after the dismissal and it was not possible to notify of the reasons. Similarly, the rubbing of Student A's leg on June 14 was not put to the Applicant nor the associated dishonesty in the investigation process.

[300] The failure to notify the Applicant of a number of the valid reasons for dismissal weighs in favour of a finding of unfairness.

s.387(c) – Opportunity to respond

[301] It follows from the consideration under s.387(b) that the Respondent did not provide an opportunity to respond to the Applicant in respect of the valid reasons not included in the letter of termination. The Applicant was given an opportunity to respond to the wet dreams tweet. The Applicant seeks to characterise that opportunity as simply going through the motions and paying lip-service to the obligation.

[302] I agree that is a fair characterisation of the evidence as to what occurred at the time of the dismissal. I accept that there was "bedlam" at the school at the time of the dismissal and that is to be taken into account. Nevertheless, a proper opportunity to respond should have been provided. The failures to provide an opportunity to respond to the valid reasons weigh in favour of a finding that the dismissal of the Applicant was unfair.

s.387(d) – Unreasonable refusal of a support person

[303] There was no unreasonable refusal of a support person. However, the meeting on 20 February was convened with such haste that I accept that it was at least extremely difficult for the Applicant to secure a support person. I consider this factor under s.387(h).

s.387(e) – Warnings – unsatisfactory performance

[304] The Applicant was dismissed for misconduct, not unsatisfactory performance. This factor is not relevant.

s.387(f) and s.387(g) – Size of employer's enterprise and human resource specialist

[305] The school had the benefit of legal advice, and their solicitor was present during the termination process. These factors should not have impacted the ability of the Respondent to follow a fair process in effecting the dismissal. This factor weighs in favour of a finding that the dismissal was unfair but not significantly so.

s.387(h) – Other matters

The warning in October and the positive reference to the VIT

[306] It is a relevant matter that, even on what it accepted did occur on June 14, that the Respondent chose to give the Applicant a warning for that misconduct, and provided a positive reference to VIT in December, rather than terminating his employment at the time. This is a factor that weighs in favour of a finding the dismissal was unfair.

Lack of insight

[307] While there are some exceptions, the Applicant has demonstrated overall that he lacks insight into his behaviour. He does not take responsibility for the harm done to Student A as a result of his actions. I have set out the evidence and my findings as to his lack of insight and failure to take responsibility in some detail earlier. This is a factor that weighs against a finding that the dismissal was unfair.

Failure to follow the Agreement's disciplinary process

[308] Mr Crowley accepted that he did not follow the steps in the Agreement's disciplinary procedure when effecting the dismissal. [344] He did not allow the opportunity for the Applicant to attend a further meeting to allow him to respond to the allegations. The requirements in clauses 13.1(a), 13.1(c), 13.5(a) and 13.3(6)(iii) were not adhered to. It is of considerable significance that the process was not followed. Enterprise Agreements are enforceable instruments and should be observed. Its agreed terms for disciplinary procedures are presumably there to provide a measure of protection for employees during a disciplinary process. They should not be ignored as would seem to be the case here. The failure to follow the mandated steps of the disciplinary process in the Agreement weighs strongly in favour of a finding that the dismissal was unfair.

Speed of convening the meeting

[309] As mentioned above, the speed at which the meeting on 20 February was convened meant that the Applicant was not in a position to secure a support person in the limited time available. This is a factor weighing in favour of unfairness.

Length of service and past performance

[310] I have also taken into account the fact that as a consequence of his dismissal the Applicant has been denied the opportunity to continue in his chosen vocation for more than a year. There is also no evidence that before the period February - June 2019 the Applicant had been subjected to any warnings or disciplinary conduct. He had a "clean record" for the previous 28 years. Mr Guinane says that the Applicant is "a person of good character, honest and

reliable",[345] but also could not answer if he would work with him again.[346] This factor weighs in favour of a finding that the dismissal was harsh.

Conclusion

[311] The Commission must apply justice to both parties or in the words of s.381(2) of the Act "ensure that a fair go all round is accorded to both the employer and employee concerned." The Commission has ultimate discretion in weighing each matter carefully in arriving at a decision.[347]

[312] In this matter, there are a number of valid reasons for dismissal. The Applicant's misconduct associated with the June 14 incident is of significant gravity as is the misconduct involving the pornography. These valid reasons weigh heavily towards a finding that the dismissal was not unfair. There is also the wet dream tweet which is of lower gravity but is nevertheless a valid reason. This also weighs towards a finding that the dismissal was not unfair. The emails to students are also a valid reason of some significance, and also weigh against a finding that the dismissal was unfair. The Applicant's dishonesty in the investigation process is also a very serious matter. It is another valid reason for dismissal. It weighs in favour of a finding that the dismissal was not unfair.

[313] For the reasons set out above, the consideration of the factors under ss.387(b) and (c) weigh in favour of a finding the dismissal was unfair. Consideration of the factors in ss.387(f) and (g) also weigh towards a finding of unfairness but not significantly so. The factors under ss.387(d) and (e) are either not relevant or neutral considerations for the reasons set out.

[314] In terms of other matters, there are a number that weigh towards a finding the dismissal was unfair. The fact that the Applicant was warned and not dismissed for the misconduct that the Respondent accepted did occur on June 14 is a factor I have taken into account in this category. There is also the fact that the Respondent chose, despite what they knew of the Applicants conduct, to supply him with a positive reference. These factors weigh in favour of a finding the dismissal was unfair.

[315] Also weighing in favour of a finding the dismissal was unfair was the failure to follow the disciplinary process in the Agreement. This weighs strongly towards a finding of unfairness. There was also the lack of notice provided to the Applicant of the meeting. The Applicant's length of service and prior performance record also weighs towards a finding that the dismissal was harsh.

[316] The overall lack of insight of the Applicant into his action, and his failure to take responsibility for his actions weigh against the finding that the dismissal was unfair.

[317] Taking all of the factors into account, the significant gravity and extent of the Applicant's misconduct weighs heavily against him. In particular, in engaging in the conduct identified, he has caused harm to Student A. The misconduct involving pornography is also serious. This is significant when considering the failures in the process to effect the dismissal. While there are obvious failings in that regard, it does not necessarily mean that the dismissal is unfair in the circumstances, having regard to the seriousness of the misconduct. The dismissal of the Applicant was inevitable given my findings as to the seriousness of his misconduct. The observations of the Full Bench in *Anthony Farquharson and Qantas Airways Limited* are relevant in this regard:

> "The fact of unfairness in the employer's decision making process, even if it involves a breach of a term in a certified agreement, is but a factor to be taken to account in determining whether a termination of employment was harsh, unjust or unreasonable. In circumstances where, as here, the merits of a termination of employment based on misconduct have been the subject of a full hearing in the Commission (in which the employer must establish the alleged misconduct on the balance of probabilities) and the dismissal has been found to be justified, it will be rare for a defect in an internal disciplinary process that preceded the termination justifying a conclusion that the termination was harsh, unjust or unreasonable. This is so because, almost invariably in such circumstances, it may be inferred that the outcome of the disciplinary process would have been the same even if there had been no such defect."[348]

[318] The October 2019 final warning and positive reference, while weighing in favour of the Applicant, have to be considered against the background that the Respondent did not have full knowledge of the Applicant's conduct. The Applicant's previous performance record and length of service weighs in favour of the Applicant, but his lack of insight and failure to take responsibility for the harm caused to Student A weigh against a finding of unfairness.

[319] In conclusion, I have taken into account the factors that weigh in favour of a finding that the dismissal was unfair. However, there are also a number of factors that weigh against that finding. Having weighed each matter carefully, after considering all of the circumstances, I find that the termination of the Applicant was not harsh, unjust, or unreasonable.

[320] The application for an unfair dismissal remedy is dismissed. An order will be issued concurrently with this decision.

COMMISSIONER

Appearances:

J. Darams, of Counsel, for the Applicant
N. Harrington, of Counsel, for the Respondent

Hearing details:

2020.
Melbourne (by video link via Microsoft Teams):
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[1] Transcript at PN293.
[2] [2020] FWC 5673.
[3] *Warrell v Fair Work Australia* [2013] FCA 291.
[4] Ibid.
[5] Transcript at PN292.
[6] PR718369; PR720962; PR725284.
[7] PR720962.
[8] PR725284.
[9] DCB at page 125, paragraphs 12 – 14.
[10] DCB at page 53, paragraphs 8 – 11.
[11] DCB at page 146, paragraphs 31 – 32.
[12] DCB at page 54, paragraph 20.
[13] DCB at pages 54 to 56, paragraphs 21 – 29.
[14] DCB at page 125, paragraph 15.
[15] DCB at page 57, paragraph 30(c).
[16] DCB at page 404, paragraph 10.
[17] DCB at page 405, paragraph 14.
[18] DCB at page 57, paragraph 33.
[19] Ibid.
[20] Ibid.
[21] DCB at page 58, paragraph 39.
[22] DCB at page 59, paragraph 39(a) - (b).
[23] DCB at page 59, paragraph 39(d).
[24] DCB at page 59, paragraph 39(c).
[25] DCB at page 59, paragraph 39(e).
[26] DCB at page 59, paragraph 39(f); SP-1.
[27] DCB at page 59, paragraph 40.
[28] SP-1.
[29] SP-1.
[30] SP-2.
[31] DCB at page 407, paragraph 33.
[32] DCB at page 60, paragraph 43.
[33] DCB at page 407, paragraphs 34 – 38.
[34] DCB at page 60, paragraph 44.
[35] DCB at page 408, paragraph 40.
[36] DCB at page 537, paragraph 67.
[37] DCB at page 408, paragraph 43.
[38] DCB at page 61, paragraph 49.
[39] DCB at page 62, paragraph 49(b) – (f).
[40] DCB at page 62, paragraphs 50 – 51.
[41] SP-3.
[42] DCB at pages 63 to 64, paragraph 54; SP-5.

[43] DCB at page 64, paragraph 55.
[44] DCB at page 703.
[45] DCB at page 64, paragraphs 58 – 59.
[46] DCB at page 65, paragraph 61.
[47] DCB at page 66, paragraphs 63 – 64.
[48] SP-6.
[49] Ibid.
[50] DCB at page 66 to 67, paragraph 69.
[51] DCB at page 67, paragraph 71.
[52] Transcript at PN1874 to PN1875.
[53] DCB at page 48, paragraph 59(a).
[54] SP-9.
[55] SP-6.
[56] DCB at page 150, paragraph 49(a).
[57] DCB at page 152, paragraph 52.
[58] SP-11.
[59] DCB at page 50, paragraph 65.
[60] Ibid at page 77, paragraph 113.
[61] Ibid.
[62] Ibid at page 77, paragraph 115.
[63] JC-1.
[64] JC-2.
[65] JC-3.
[66] JC-4.
[67] DCB at page 252.
[68] DCB at page 269.
[69] DCB at page 255.
[70] DCB at page 258; 272.
[71] DCB at page 268.
[72] JC-5; JC-7.
[73] JC-9.
[74] DCB at page 75, paragraph 99.
[75] Transcript at PN563.
[76] Transcript at PN582.
[77] Transcript at PN587.
[78] Transcript at PN591 – PN594.
[79] Transcript at PN624, PN628 – PN629.
[80] Transcript at PN653 – PN655.
[81] Transcript at PN660 – PN661.
[82] Transcript at PN670, PN672 – PN676.
[83] Transcript at PN711 – PN712.
[84] Transcript at PN718 – PN719.
[85] Transcript at PN736 – PN737.
[86] Transcript at PN741 – PN743.
[87] Transcript at PN752 – PN756.
[88] Transcript at PN960 – PN962.
[89] Transcript at PN795 – PN797.
[90] Transcript at PN799 – PN815, PN812 – PN818.
[91] Transcript at PN956 – PN957.
[92] Transcript at PN931 – PN932.
[93] Transcript at PN999 – PN1000.
[94] Transcript at PN1011.

[95] Transcript at PN1032.
[96] DCB at page 255.
[97] Transcript at PN838 – PN840.
[98] Transcript at PN843.
[99] Transcript at PN848 – PN854.
[100] Transcript at PN855 – PN858.
[101] Transcript at PN857 – PN863.
[102] Transcript at PN855.
[103] Transcript at PN865 – PN866.
[104] Transcript at PN866 – PN870.
[105]Transcript at PN1320 – PN1322.
[106] Transcript at PN874.
[107] Transcript at PN879.
[108] Transcript at PN873 - PN876.
[109] Transcript at PN910.
[110] Transcript at PN914 – PN915.
[111] Transcript at PN1054.
[112] DCB at page 56, paragraph 30(b).
[113] Transcript at PN942.
[114] DCB at page 57, paragraph 31.
[115] DCB at page 536, paragraph 63.
[116] DCB at page 552, paragraph 18.
[117] DCB at page 405, paragraph 20.
[118] DCB at page 536, paragraphs 59 – 60.
[119] Transcript at PN1058.
[120] CM-1.
[121] Transcript at PN3645; PN3649 – PN3652.
[122] Transcript at PN2161.
[123] JC-20 and JC-21.
[124] Transcript at PN3640.
[125] Transcript at PN3745.
[126] Transcript at PN3659.
[127] Transcript at PN3765.
[128] Transcript at PN3750
[129] Transcript at PN3766.
[130] Transcript at PN3763.
[131] Transcript at PN3767 – PN3767.
[132] Transcript at PN3786.
[133] Transcript at PN3788.
[134] Transcript at PN1086.
[135] Transcript at PN1071; PN1080.
[136] Transcript at PN1057.
[137] Transcript at PN1059.
[138] DCB at page 57, paragraph 33.
[139] DCB at page 535, paragraph 55.
[140] DCB at page 525, paragraph 9.
[141] Transcript at PN1171.
[142] Transcript at PN1175 – PN1176.
[143] Transcript at PN1188.
[144] Transcript at PN1231.
[145] Transcript at PN1180 – PN1183.
[146] Transcript at PN1320.

[147] Transcript at PN1112.
[148] Transcript at PN1157, PN1158.
[149] Transcript at PN1163.
[150] Respondent's Closing Submissions, paragraphs 95 – 96.
[151] (1938) 60 CLR 336.
[152] DCB at page 406, paragraph 21.
[153] Transcript at PN1238 – PN1241.
[154] DCB at page 407, paragraph 32.
[155] CM-1.
[156] Transcript at PN2971.
[157] Transcript at PN3042.
[158] DCB at page 408, paragraph 43.
[159] Applicant's Closing submissions, paragraph 23.
[160] DCB at page 61, paragraph 49(a).
[161] DCB at page 400, paragraph 10.
[162] Ibid.
[163] Transcript at PN3762.
[164] DCB at page 412, paragraph 48.
[165] DCB at page 407, paragraph 39; page 410, paragraph 44.
[166] DCB at page 412, paragraphs 50 – 51.
[167] DCB at page 411, paragraph 45(b).
[168] DCB at page 412, paragraphs 50 – 51.
[169] Transcript at PN3006.
[170] Applicant's Closing Submissions, paragraph 6(p).
[171] Respondent's Closing Submissions, paragraphs 117 – 118.
[172] Transcript at PN4231 – PN4244.
[173] DCB at page 43, paragraph 40.
[174] DCB at page 147, paragraph 40.
[175] Transcript at PN2082.
[176] Transcript at PN2079.
[177] DCB at page 147, paragraph 40.
[178] DCB at page 148, paragraph 42 – 44; page 149, paragraph 47.
[179] Transcript at PN1752 – PN1753
[180] Transcript at PN1753.
[181] Transcript at PN1755.
[182] Transcript at PN1972.
[183] Transcript at PN1755.
[184] DCB at page 147, paragraph 39.
[185] Transcript at PN2110 – PN2112.
[186] Transcript at PN2115.
[187] Transcript at PN2734.
[188] DCB at page 325; Transcript at PN2993.
[189] DCB at page 405, paragraphs 12 – 13.
[190] DCB at page 408, paragraph 43.
[191] Transcript at PN2983 – PN2984.
[192] Transcript at PN2993 – PN 3002.
[193] DCB at page 512, paragraphs 16 -17.
[194]DCB at page 534, paragraph 51(c); Transcript at PN1128, PN1130, PN1132.
[195] Transcript at PN1142.
[196] DCB at page 408, paragraph 40.
[197] DCB at page 537, paragraph 67.
[198] DCB at page 412, paragraph 49.

[199] Transcript at PN3231 – PN3232.
[200] Transcript at PN1414; DCB at page 538, paragraph 72.
[201] Transcript at PN1411.
[202] Transcript at PN1414
[203] Transcript at PN3225 – PN3237.
[204] Transcript at PN3244.
[205] Transcript at PN2878.
[206] Applicant's Closing Submissions, paragraph 27.
[207] DCB at page 258; Transcript at PN974 – 980.
[208] Transcript at PN1331.
[209] Transcript at PN1337.
[210] Transcript at PN1338.
[211] Transcript at PN1341.
[212] Transcript at PN1347.
[213] Transcript at PN1356.
[214] Transcript at PN960 – PN962.
[215] Applicant's Closing Submissions, paragraph 28.
[216] JC-11 and JC-12.
[217] Respondent's Closing Submissions, paragraphs 128 – 129.
[218] Transcript at PN1489 - PN1490
[219] DCB at page 427.
[220] DCB at page 156, paragraph 74(a) - (c).
[221] DCB at page 156, paragraph 74(c).
[222] Transcript at PN4673 – PN4674.
[223] DCB at page 157, paragraph 77.
[224] DCB at pages 525 to 526, paragraph 11(b)(i)-(iv).
[225] Transcript at PN1416.
[226] Transcript at PN1455 - PN1456.
[227] DCB at page 719.
[228] DCB at page 720.
[229] Transcript at PN1946.
[230] Transcript at PN1483.
[231] Transcript at PN1500.
[232] Transcript at PN2711 – PN2714.
[233] Applicant's Closing Submissions, paragraph 31.
[234] Applicant's Closing Submissions, paragraph 33 - 34.
[235] Respondent's Closing Submissions, paragraph 131.
[236] Respondent's Closing Submissions, paragraph 132.
[237] Respondent's Closing Submissions, paragraph 132.
[238] Transcript at PN1507 – PN1508.
[239] Respondent's Closing Submissions, paragraph 133.
[240] Respondent's Closing Submissions, paragraphs 139(a) – (b) and 140.
[241] DCB at pages 527 to 531, paragraphs 16 - 34.
[242] Transcript at PN1853.
[243] Transcript at PN1854.
[244] DCB at page 150, paragraph 49(a).
[245] DCB at page 524, paragraph 7.
[246] DCB at page 69, paragraph 78(g).
[247] DCB at page 150, paragraph 49(d).
[248] Transcript at PN2122.
[249] Transcript at PN2287 – PN2288.
[250] Transcript at PN2309 – PN2310.

[251] Transcript at PN2467 – PN2468.
[252] Transcript at PN2186 and PN2514.
[253] Transcript at PN2186 and PN2611.
[254] Transcript at PN2468.
[255] Transcript at PN2386.
[256] Transcript at PN2486.
[257] Transcript at PN2264.
[258] Transcript at PN2490 – PN2491.
[259] Transcript at PN2499.
[260] Transcript at PN2037 - PN2039.
[261] Transcript at PN2553.
[262] Transcript at PN2601 – PN2602.
[263] Transcript at PN1892, PN1922.
[264] Transcript at PN1759.
[265] Transcript at PN2387 – PN2388.
[266] Respondent's Closing Submissions, paragraph 38(b).
[267] Transcript at PN1305.
[268] Transcript at PN1055 – 1057.
[269] Transcript at PN1069; PN1079.
[270] Transcript at PN1161.
[271] Transcript at PN1086.
[272] Transcript at PN1221.
[273] Transcript at PN1223.
[274] Transcript at PN1169.
[275] Respondent's Closing Submissions, paragraph 38.
[276] Transcript at PN3042.
[277] DCB at page 412, paragraph 48.
[278] Transcript at PN3042.
[279] DCB at page 408, paragraph 43.
[280] Transcript at PN3845 – PN3849.
[281] [2019] VSCA 186 at [76] per Chief Justice Ferguson and President Maxwell.
[282] Transcript at PN3249.
[283] Transcript at PN3249.
[284] Transcript at PN3284.
[285] Transcript at PN3193.
[286] Transcript at PN3874.
[287] Respondent's Closing Submissions, paragraph 73.
[288] Transcript at PN3767 – PN3768.
[289] Transcript at PN3786.
[290] Transcript at PN1245.
[291] Transcript at PN1202.
[292] (1938) 60 CLR 336 at 361 – 362 (per Dixon J).
[293] DCB at page 62, paragraph 49(b).
[294] DCB at page 408, paragraph 43.
[295] Transcript at PN686 – PN687.
[296] Transcript at PN691.
[297] Transcript at PN702– PN706.
[298] Transcript at PN1584.
[299] Transcript at PN866.
[300] Transcript at PN902.
[301] Transcript at PN1104.
[302] Transcript at PN914.

[303] Transcript at PN1322.

[304] Transcript at PN1585.

[305] Transcript at PN1242 – PN1243.

[306] Transcript at PN1573.

[307] Transcript at PN1250.

[308] Transcript at PN1254.

[309] Transcript at PN1256.

[310]Transcript at PN1261.

[311] Transcript at PN1277.

[312] DCB at page 62, paragraph 50; Transcript at PN1603.

[313] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

[314] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[315] Ibid.

[316] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

[317] *Edwards v Justice Giudice* [1999] FCA 1836, [7].

[318] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

[319] [2016] FWC 7906.

[320] [2016] FWCFB 108.

[321] [2016] FWCFB 7204.

[322] [2016] FWC 7906 at [31].

[323] (2001) 107 IR 117.

[324] (2001) 107 IR 117 at [352] to [354].

[325] (1996) 68 IR 407.

[326] (1996) 68 IR 407 at [417].

[327] Transcript at PN1123.

[328] Transcript at PN854 – PN866.

[329] Transcript at PN4355.

[330] Transcript at PN1338.

[331] Transcript at PN1341.

[332] Transcript at PN1347.

[333] JC-12.

[334] DCB at page 258.

[335] Applicant's Closing Submissions, paragraph 35.

[336] Transcript at PN1498 – PN1499.

[337] Transcript at PN1500.

[338] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) at para. 41.

[339] *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000) at paras 70–73, [(2000) 98 IR 137].

[340] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[341] Ibid.

[342] *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000) at para. 73, [(2000) 98 IR 137].

[343] See for example *Gooch v Proware Pty Ltd T/A TSM (The Service Manager)* [2012] FWA 10626 (Cargill C, 20 December 2012).

[344] Transcript at PN2264.

[345] Transcript at PN2865.

[346] Transcript at PN2869.

[347] *R v Hunt; Ex parte Sean Investments Pty Ltd* [1979] HCA 32 (19 July 1979) at para. 6 (Murphy J), [(1979) 180 CLR 322]; cited in *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) at para. 37.

[348] *Anthony Farquharson and Qantas Airways Limited* (AIRCFB, Lawler, VP, O'Callaghan, SDP, and Raffaelli, C, 10 August 2006, PR971685), at [41].