



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Jason Kildey**

v

**Technical And Further Education Commission**  
(U2023/6025)

**Norman Browne**

v

**Technical And Further Education Commission**  
(U2023/6009)

**Sharon Kerr**

v

**Technical And Further Education Commission**  
(U2023/6030)

DEPUTY PRESIDENT SLEVIN

SYDNEY, 13 FEBRUARY 2024

*Applications for unfair dismissal remedies. Employees unfairly dismissed. Reinstatement ordered.*

## Introduction

[1] On 13 June 2023, Ms Kerr, Mr Browne and Mr Kildey (**the Applicants**) were dismissed by TAFE. Each applies under s.394 of the Fair Work Act 2009 (**the FW Act**) claiming their dismissal was unfair and seeking orders they be reinstated. Section 390 provides the Commission may order a person's reinstatement, or the payment of compensation to a person, if it is satisfied that the person was protected from unfair dismissal and the person has been unfairly dismissed.

[2] Put briefly, a complaint was made about Mr Browne and Mr Kildey in February 2021 alleging that Mr Kildey was unqualified to teach plumbing and Mr Browne, who was the de facto partner of Mr Kildey's aunt, Ms Kerr, was improperly involved in recruiting and managing him. Preliminary investigations by TAFE led to allegations that Ms Kerr was improperly involved in employing two others, Ms George, Mr Kildey's former partner, and Ms Browne, Mr Browne's daughter. TAFE regarded the complaint and the further matters relating to Ms Kerr as involving potential or actual corruption that required investigation. The Applicants were suspended on full pay. An 18 month investigation was conducted by a law

firm. It found the Applicants' conduct involved fraud, dishonesty, and corruption. A nine month show cause process followed and the Applicants were dismissed due to the findings of the investigation.

[3] Two questions arise in each case. First, was the dismissal harsh, unreasonable or unjust and second, if it was, is it appropriate that the employees be reinstated. A preliminary question is raised in Mr Kildey's case as to whether he was protected from unfair dismissal.

[4] The parties sought permission to be legally represented pursuant to s.596 of the Act. There is some complexity in the facts underpinning the cases given the nature and gravity of the allegations made against the employees. Permission was granted under s.596(2)(a) to enable the matters to be dealt with more efficiently.

[5] The applications were heard together given the substantial overlap in the underpinning facts. The evidence in each was received on the basis that it was evidence in the others.

[6] In the Applicants' cases the following witness material was tendered:

- Two statements of Jason Kildey. In the first he set out his qualifications, experience and employment history. He described his recruitment by TAFE, the nature of his employment, responded to the allegations against him, and described events surrounding his suspension, the investigation and his dismissal. He also provided evidence about his attempts to mitigate his loss and the remedy sought. In his second witness statement, Mr Kildey responded to witness statements filed by the Respondent. Mr Kildey was required for cross examination and was cross examined.
- Two statements of Norman Browne. The first gave his qualifications, employment history including describing his increased workload between 2017 – 2020, the circumstances surrounding Mr Kildey's employment, and his mistake which resulted in waiving of Mr Kildey's fees. Mr Browne also responded to the allegations made against him and described his suspension, the investigation, and the process that led to his dismissal. He described the adverse health impacts of those events. In his second statement, Mr Browne responded to the witness statements filed on behalf of the Respondent. Mr Browne was required for cross examination and was cross examined.
- A statement of Sharon Kerr which went to her qualifications, employment history including her excessive workload since 2016, the additional duties and roles she had taken on, her relationship with Mr Kildey, Ms Deanna George and Ms Nina Browne and her involvement in their employment. She responded to the allegations and described the circumstances of her suspension. She gave evidence of the adverse impact the investigation and dismissal had on her wellbeing. Ms Kerr was required for cross examination and was cross examined.
- A statement of Michael Cullen, Regional General Manager, Western Sydney Region. Ms Kerr reported directly to Mr Cullen. Mr Cullen described 2020 as a difficult year at TAFE in Western Sydney and the support he provided to Ms Kerr at the time she was suspended. Mr Cullen was required for cross examination and was cross examined.

- A statement and a statutory declaration of Lee Wilton. He was Team Leader in Electrical at MT Druitt in 2018 when he also became Team Leader in Plumbing. A role he held until 29 July 2019. Mr Wilton said he was asked by Ms Kerr to take over the team leader role in plumbing because of her de facto relationship with Mr Browne. Mr Wilton described the help Mr Kildey provided in addressing concerns about health and safety training in the plumbing section at Mt Druitt. He described the measures he put in place so that Mr Browne did not directly supervise Mr Kildey. Mr Wilton was required for cross examination and was cross examined.
- A statement of Gregory O’Neil, Team Leader for Carpentry for Western Sydney Region. Mr O’Neil provided evidence going to his interactions with Ms Kerr, the impact of the COVID-19 pandemic and ASQA Audit on Ms Kerr’s workload and the recruitment processes at TAFE NSW. Mr O’Neil was not required for cross examination.
- A statement of Michael Cochrane, Team Leader for Transport and Logistics. Mr Cochrane provided evidence going to his close working relationship with Ms Kerr and her team, the particular work pressure Ms Kerr was under as a result of the 2018 ASQA audit of TAFE NSW, and recruitment processes at Mt Druitt. Mr Cochrane was not required for cross examination.
- A statement of Samuel Fairweather, Manager of Education for Business Services. Mr Fairweather gave evidence going to his observations of the significant work pressure Ms Kerr was under, her sound attitude to compliance, and the fact that specialist recruitment is custom and practice state-wide across TAFE. Mr Fairweather was not required for cross examination and was not cross examined.
- Statement of Shane Judd, Team Leader in Plumbing at Mt Druitt from 29 July 2019. Mr Judd provided evidence going to his knowledge of Mr Kildey’s role in assisting with the plumbing and electrical areas at Mt Druitt on working at heights and other safety issues, he said it was common knowledge that Mr Kildey was a relative of Ms Kerr and described recruitment and administrative practices. Mr Judd was required for cross examination but was not available and was not cross examined.

[7] In TAFE’s case the following witness material was tendered:

- A statement of Mark Hawkins, Executive Director Education and Skills – Western Sydney Region. Mr Hawkins provided evidence going to his decision to dismiss each of the Applicants and his view on their reinstatement. Mr Hawkins was required for cross examination and was cross examined.
- Two statements of Mr James Canavan, Manager, Industrial Relations, provided extensive documents going to the events associated with the dismissals including TAFE NSW Staffing policies and procedures, employment documents, correspondence, and other TAFE records. Mr Canavan was required for cross examination and was cross examined.

- A statement of Gabrielle Crittendon, Director of Media and Communications. Ms Crittendon provided evidence going to Ms Kerr's role in managing major reforms of TAFE NSW during 2018, including the ASQA Audit and COVID-19 Response. Ms Crittendon was not required for cross examination.
- A statement of Steven Tuckwell, Product Manager and Previous Head Teacher of Plumbing. Mr Tuckwell provided material going to the qualifications required to obtain a plumbing license and indicated a Teacher of Plumbing at TAFE NSW will necessarily require at least a Certificate III in Plumbing. Mr Tuckwell was not required for cross examination.
- A statement of Sharon Jenkins, Recruitment Officer for the Western Sydney Region. Ms Jenkin's processed Mr Kildey's recruitment documents at Mr Browne's request. Ms Jenkins was required for cross examination and was cross examined.
- A statement of Nathan Rhodes-Smith, Head Teacher of Plumbing. Mr Rhodes-Smith worked alongside Mr Browne as Head Teacher for Plumbing at Mount Druitt. Mr Rhodes-Smith was aware of Mr Browne's relationship with Mr Kildey and was aware of the view that people not teaching units they had not completed. Mr Rhodes Smith was allocated the task of supervising Mr Kildey. Mr Rhodes-Smith was required for cross examination and was cross examined.
- Two statements of Christopher Greentree, Relieving Director, Supply Chain and eCommerce and an Industry Innovation Specialist. Mr Greentree reviewed TAFE NSW's Education Business System (EBS) and identified that on 14 December 2020 Mr Browne withdrew Mr Kildey from the Certificate III in Plumbing course resulting in fees being waived. Mr Greentree was required for cross examination and was cross examined.
- A statement of Kylie Mosca, previously employed as Manager of Student Services and Support for the Western Sydney Region. Kylie Mosca spoke to Ms Kerr in March 2020 about employing administrative staff in early 2020. Ms Mosca was required for cross examination and was cross examined.
- A statement of Jennifer Cundasamy, Director of Student Services Western Sydney. Ms Cundasamy responded to Ms Kerr and providing correspondence sent in March 2020 in which Ms Kerr requested staff for EAS roles. Ms Cundasamy was required for cross examination and was cross examined.
- A statement of Rebecca Coventry, Head Teacher, Animal Science and Agriculture and Acting Director of Agribusiness, going to recruitment practices involved in EAS roles and said that Ms Kerr provided a reference for Ms George. Ms Coventry was required for cross examination and was cross examined.
- A statement of Ian Gordon, Director of Skills Exchange Operations, responding to evidence of Mr Kerr about her role. Mr Gordon was not required for cross examination.

- A statement of Mark Talbot, Director, Workforce Services at TAFE NSW which disagreed with Ms Kerr's statement as to the extent of her responsibilities. Mr Talbot was required for cross examination and was cross examined.
- A Statement of David Gilder, Program Manager with Kelly Outsourcing and Consulting Group, going to his role in managing the recruitment of contractors for TAFE NSW and his role in the engagement of Ms Browne and Ms George as contractors. Mr Gilder was not required for cross examination.

[8] The witness statements included attachments. More documents were provided during the cross examination. Written submissions were provided. By the end of the proceedings the parties had provided over 6,000 pages of material. The hearing of the matters took 7 days.

### **Preliminary matters**

[9] I am required by s.396 of the FW Act to decide a number of matters relating to the applications before considering the merits. The only issue mentioned in s.396 taken was whether Mr Kildey was protected from unfair dismissal. It was contended that he was not because as a casual employee he was required to complete a period of employment of at least 6 months during which he was regularly and systematically employed and during which he had a reasonable expectation of continuing employment by TAFE on a regular and systematic basis. TAFE contended that any expectation held by Mr Kildey could not be described as reasonable.

[10] The relevant provisions are as follows. Section 382(a) provides that a person is protected from unfair dismissal if the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period. Section 383 defines minimum employment period for a business which is not a small business as 6 months. Section 384(1) defines period of employment at a particular time as the period of continuous service completed with the employer. Section 384(2) specifies that a period of service as a casual employee does not count unless the employee was a regular casual employee and the employee had a reasonable expectation of continuing employment on a regular and systematic basis. The expression regular casual employee is defined in s. 12 as a casual employee who has been employed on a regular and systematic basis.

[11] The approach to be taken in the application of s.384(2) is summarised in a recent decision of Saunders DP in *Donovan Gough v Outdoor Supacentre* [\[2022\] FWC 2435](#) at [4] to [9] and I respectfully adopt that summary without repeating it.

[12] Mr Kildey commenced employment by TAFE on 23 July 2019, which was the beginning of the second semester of 2019. He worked as a casual teacher in the plumbing section of Mt Druitt campus in that semester. He continued to work in both semesters in 2020. He also worked first semester and into the second semester of 2021. He was suspended on pay from 13 September 2021. Whilst working he averaged 30 hours per week. He continued on suspension until he was dismissed on 13 June 2023. He had almost 4 years of continuous service. He taught for around two years of that period and continued to be employed but was not required to teach for the period 13 September 2021 to 13 June 2023.

[13] TAFE submits that Mr Kildey could not have had the reasonable expectation of continuing employment on a regular and systematic basis as required by s382(a)(ii) at any time during his employment. Its first contention is that Mr Kildey was employed ‘on nomination’, which in terms of TAFE recruitment practices meant that he was not employed through a merit based selection process. TAFE’s policies provided that employees engaged other than through a merit based selection process are only employed for one semester. In those circumstances he could not have reasonably expected to be employed for more than one semester. TAFE submits that Mr Kildey was aware that his employment was instigated by Mr Browne, his aunt’s de facto partner, and there was a conflict of interest in Mr Browne doing so. It also said that Mr Kildey did not hold the requisite qualifications or post qualification experience to hold his position. These matters are said to lead to a conclusion that his employment was not properly effected and so any expectation of his employment continuing beyond one semester was unreasonable. TAFE also contended that during the period of time that he was stood down on pay whilst the investigation into the circumstances of his recruitment was occurring, he should have realised that his employment would end and so could have no reasonable expectation of continuing employment.

[14] Mr Kildey says that he was not aware of TAFE’s policy and did not know his employment would be only for one semester. He also contends that, regardless of any policy stipulation, his employment was in fact extended beyond one semester. He submits that he should not have been held responsible for any perceived wrongdoing by Mr Browne in recruiting him or extending his employment and that he was qualified to teach the courses that he was employed to teach. He submitted that TAFE needed his skills and experience. His employment assisted TAFE. He filled a gap in teaching in the plumbing section at Mt Druitt TAFE. He also believed he was a good teacher. TAFE did not act to dismiss him until almost 4 years after he commenced. In those circumstances, Mr Kildey’s expectation that he would continue in employment was reasonable.

[15] I find, and it was contested that Mr Kildey’s employment was regular and systematic.<sup>1</sup> TAFE did not raise that the employment was not regular and systematic. TAFE’s point is that there could be no reasonable expectation that the employment would continue on a regular and systematic basis or on any basis at all.

[16] Full Benches of this Commission have recently said, in different contexts, that a reasonable criterion involves the exercise of a broad evaluative judgment which should be applied in accordance with the ordinary meaning of the word – that is, ‘agreeable to reason or sound judgment’.<sup>2</sup> Reasonableness must be assessed by reference to the circumstances of the case, being the relevant matters and conditions accompanying the case. I will apply that approach here.

[17] I accept Mr Kildey’s submissions that his expectation of ongoing employment was reasonable. As to the first issue, whatever TAFE’s practices were and whatever the relevant TAFE policies said, TAFE continued to engage Mr Kildey beyond one semester. Mr Kildey’s evidence was that he was unaware of any practice or rule that he could only be engaged for one semester. He could not have based his expectations on something of which he was unaware. He was first engaged to teach in second semester of 2019. He continued to teach in both semesters of 2020 and then in both semesters in 2021. TAFE suspended him from teaching work during the course of second semester in 2021. It continued his employment while investigating

allegations made about his employment. Mr Kildey participated in that investigation and contended at all times that he should not be dismissed - that his employment should continue. His view that his employment should continue was based on his belief that the allegations could not be substantiated and should not lead to his dismissal. When he was informed of the outcome of the investigation, he was aware that TAFE were considering dismissing him and his expectation may have waned, but he disputed the findings of the investigation and claimed that he should not be dismissed. His dispute over the dismissal continues in these proceedings. His view continues to be that he was qualified to do his job, he was a good teacher, and any conduct by Ms Kerr or Mr Browne were not matters that should impact his continuing employment. His expectation was and is that his employment should continue.

[18] I find that Mr Kildey had a sound basis for taking the view that his employment should continue. He was qualified to teach. He taught for over 2 years. He no reason to believe that he should not have. He had a sound basis to contest the allegations made against him. On that basis his expectation of ongoing employment was ‘agreeable to reason or sound judgment’.

[19] I do not accept TAFE’s contention that Mr Kildey was not protected from unfair dismissal because he could not be said to have had a reasonable expectation of continuing employment on a regular and systematic basis. On that basis I find for the purposes of s396(b) that he was protected from unfair dismissal.

### **Were the dismissals harsh, unjust or unreasonable?**

#### **Background**

##### *The ASQA audit*

[20] In October 2018, TAFE NSW the Australian Skills Quality Authority (ASQA) conducted an audit of NSW TAFE. The audit arose as NSW TAFE was changing from 11 separate Registered Training Organisations (RTO’s) to one RTO as part of a program referred to as One TAFE. As part of the audit the Mt Druitt campus plumbing section was chosen as representative of the work carried out in the Infrastructure, Energy, Construction Skills Team in Western Sydney Region.

[21] In a later NSW Auditor General report about the One TAFE NSW program released a in December 2020 the ASQA audit was described in this way:

2 November 2018 – ASQA conducts a renewal audit of TAFE NSW. Initial observations raise concerns with the duration of course delivery, inadequate resources and assessment tools for some courses.

[22] A number of Applicants’ witnesses referred to the seriousness of the concerns raised by ASQA and suggested that TAFE was on the brink of being de-registered. TAFE’s witnesses did not cavil with that assessment. A consequence of the audit and its findings was a pressing need for the Mt Druitt campus, especially those involved in the plumbing section, to address the identified shortcomings.

[23] One of those shortcomings was the plumbing section was non-compliant in its training of health and safety matters, including working safely at heights. The witnesses who were employed at the college described addressing the audit as resulting in a dramatic increase in workload, including the need to liaise closely with ASQA's compliance team and engage industry specialists to check learning resources and assessment methods to meet ASQA's concerns.

*Mr Kildey*

[24] Mr Kildey is a qualified specialist Safety Officer in high risk work and site management. He has worked since 1982 across different industry sectors. He has extensive knowledge of Australian Standards and NSW Codes of Practice for many industries including building and construction, engineering, security, and transport.

[25] He has over 20 years' experience working as a Safety Officer at major entertainment and recreational events. He worked as a machine operator and trades assistants on large civil construction and maintenance projects. He worked as a plumber's labourer and trades assistant on domestic and commercial work. He also has experience working as a sheriff's officer, landscaper, slaughterman and maintenance worker at abattoirs, and as a maintenance worker in the club industry. He has performed work as a security officer, trades assistant to various trades at Luna Park in Sydney undertaking general maintenance. He worked on a mini hydro scheme installing pumping systems and pipes for dams and river turbines. He performed similar work on farms, working as a roustabout.

[26] Mr Kildey has the following training and qualifications:

- Diploma in Work Health and Safety.
- Certificate IV in Training and Assessment.
- Certificate IV in Work Health and Safety.
- Certificate IV in Security and Risk Management.
- Certificate IV in Government.
- Certificate II in Drainage.
- High Risk Work Licence for slewing mobile cranes, dogging, basic rigging, basic scaffolding and forklift trucks.
- Heavy Rigid Driver's licence.
- Security Licences.
- Specialist qualifications and experience as:
  - Telescopic Handler
  - Scraper
  - Elevated work platforms- scissor lift and boom lift
  - Work Safety at heights
  - Civil construction skid steer and excavator
  - Height safety inspections
  - Issuing, monitoring, and controlling work permits
  - Conducting hazard analyses
  - Gas testing atmospheres
  - Conducting local risk control
  - Preparing security risk management plans.

[27] In 2018 Mr Kildey was approached to assist the plumbing section of TAFE at Mt Druitt campus and help address the concerns raised by the ASQA audit. He reviewed resources, equipment, and assessment tools relevant to the concerns raised by the ASQA audit. The assistance Mr Kildey provided was voluntary. He worked with a number of staff at the campus including Mr Browne, Mr Rudd, Mr Rhodes-Smith, Mr Fairweather and Mr Wilton. That assistance led to a proposal in early 2019 that Mr Kildey be engaged as a teacher to address the deficiencies in high risk work units and other units of competency in a number of trades courses. Mr Kildey identified three courses offered at Mt Druitt college that contained high risk work units of competency: Certificate III in Plumbing, Certificate III in Roof Plumbing, and Certificate III in Signage.

[28] Mr Lee Wilton, a manager in plumbing at Mt Druitt TAFE, described the help Mr Kildey provided in 2018 as crucial in addressing ASQA's concerns and said that without it TAFE would have lost its RTO status for Plumbing and Electrical. Mr Wilton described the time of the audit as involving everyone being focussed on getting through the audit to keep the accreditation.

#### *The recruitment of Mr Kildey*

[29] In 2019 Mr Browne was one of two head teachers of plumbing at Mt Druitt. He had been in that position since 2014. He commenced at TAFE as a teacher in plumbing at Miller campus in 1985. He transferred to Mt Druitt as a teacher in 2005. He held acting roles as Manager Building Industry Skills Centre in 2009, and Head Teacher Plumbing at Miller in 2013. He became a Head Teacher Plumbing at Mt Druitt in 2013. Mr Browne was the de facto partner of Ms Kerr. Ms Kerr was Mr Kildey's aunt. Mr Browne had Mr Kildey assist in addressing the ASQA audit in 2018. In 2019 he was involved in recruiting Mr Kildey as a teacher.

[30] TAFE is established under the *Technical and Further Education Commission Act 1990 (NSW)* (TAFE Act). Section 18 of that Act provides that the appointment of members of staff, and any promotions, are to be made on the basis of merit. Merit is determined having regard to the nature of the duties of the position, and abilities, qualifications, experience, standard of work performance and personal qualities of the person who is to perform those duties. TAFE has Staffing Procedures. The Staffing Procedures state:

While in exceptional circumstances the best person may be chosen without a competitive process (for example, acting arrangements on nomination), all selection decisions should be based on an assessment of the merit of the Applicants, assessed objectively on the best evidence obtainable. All such decisions must be able to withstand scrutiny and be publicly defensible.

[31] TAFE also has a procedure known as TAFE NSW Procedure Part Time Casual Teachers - Conditions of Employment. The procedure states that where there is a need for a part time casual teacher recruitment will occur from a suitability list. It further provides an exception to this where there is an urgent need for a part time casual teacher and there is no suitability list or teachers on the list are unavailable. The exception allows the appointment, on nomination for a maximum period of one semester.

[32] In 2019 Mr Browne thought it was imperative that Mr Kildey commence teaching because with his qualifications he could assist in meeting the concerns raised in the ASQA

audit. Mr Browne took steps to engage Mr Kildey on nomination. As a Head Teacher he had authority to do so. The steps taken involved completing a pre-employment checklist. The form was completed in early July 2019. It indicated that Mr Kildey met industry currency requirements, that certified copies of qualifications had been collected, and that Mr Kildey met the necessary qualifications and currency requirements. The completed form with annexures was provided to Ms Jenkins, a TAFE Recruitment Officer. Ms Jenkins role was to collect the pre-employment documentation for a candidate, arrange for clearances such as security clearances, and complete a new starter checklist.

[33] Ms Jenkins performed those tasks and completed the new starter checklist on 16 July 2019. On the checklist she described Mr Kildey's position as PTCT Plumbing. PTCT standing for part time casual teacher. The form also indicated that Mr Kildey was recruited on nomination. TAFE was unable to locate a written contract of employment to show the nature of the employment offered and agreed with Mr Kildey.

[34] There was a contest in the evidence as to whether Mr Browne provided Ms Jenkins with the documents to process Mr Kildey's engagement by hand on 2 July 2019 or whether he emailed them on 5 July 2019. Mr Browne's recollection was he delivered them by hand on the earlier date and emailed them again on 5 July 2019. Ms Jenkins states she received them by email on 5 July 2019. I find that Mr Browne's recollection is incorrect. The basis of my finding is an email exchange between Mr Browne and Ms Kerr on 5 July 2019. That email attached various documents that had been scanned to allow them to be sent electronically to Ms Jenkins. Ms Kerr's covering email said that she had scanned Mr Kildey's application and suggested that it be sent to Ms Jenkins with a note that Mr Browne was short of teachers and to request Ms Jenkins start the required checks so Mr Kildey could start in two weeks. Mr Browne's email to Ms Jenkins on 5 July 2019 included the attachments and text that was in the terms Ms Kerr had suggested. This indicates Ms Jenkins received the documents for the first time 5 July 2019. The issue is thereby resolved although the actual date the documents were provided is of little consequence.

#### *Ms Kerr's involvement*

[35] Ms Kerr was a senior manager at TAFE. She commenced with TAFE in 1991 as a part time teacher. In her 32 years of service she progressed from teaching, head teacher, senior head teacher, head of studies, general manager, deputy college director, college director to senior regional management roles. In 2019 she held the position of Head of Skills Team, Infrastructure, Energy & Construction, Western Sydney Institute.

[36] In her statement Ms Kerr denied any involvement in the recruitment of Mr Kildey. During cross examination she was shown a series of emails. The first in time was an email Mr Kildey had sent her on 28 June 2019 attaching a working with children clearance. That document formed part of the documentation Mr Browne provided Ms Jenkins. Ms Kerr was also shown a chain of email communications she had with Ms Long in TAFE's Student Services commencing on 1 July 2019. The emails in the chain requested that students who had enrolled in a Certificate III Plumbing course at Granville TAFE and had only completed enough units to qualify for a Certificate II in Drainage be offered the Certificate II in Drainage. From the email exchange arranging the offer appeared to be a simple administrative matter. Ms Long responded on 2 July 2019 that the offer had been created and approved. The offer was published

on the TAFE website and Ms Long provided Ms Kerr with a link to that site. Mr Kildey was entitled to take up the offer and Ms Kerr sent him the link in an email on 2 July 2019 suggesting he take it up. Mr Kildey did this and was accredited with the Certificate II Drainage qualification. There was no suggestion that he had not completed the required units to be awarded the qualification.

[37] In early July 2019 Ms Kerr was also involved in the email exchanges with Mr Kildey and Mr Browne described above. The emails with Ms Long, Mr Kildey and Mr Browne show that despite her denials Ms Kerr was involved in assisting Mr Kildey in the recruitment process.

[38] Ms Kerr's initial evidence that she had little knowledge of, and no involvement in, the recruitment of Mr Kildey was incorrect. The emails demonstrate that she did. It was put to her in cross examination that she had lied about having no involvement in Mr Kildey's recruitment. Ms Kerr denied lying but accepted that the emails demonstrated that she was involved. Her explanation was that she denied involvement because she had forgotten. She explained that she had not had access to her email account since 2021 and that she had no recollection of these particular emails. Her demeanour in the witness box when shown the emails was such that I believe her explanation. She was genuinely surprised, even shocked, at seeing the emails. She did not attempt to explain them away and accepted that they were contrary to her earlier evidence. This suggests that she had no recollection of them at the time she prepared her statement. The facts that they date from 2019 and Ms Kerr did not have access to her emails to remind her prior to preparing her statement also factor in my conclusion that while she was not correct about her involvement in Mr Kildey's recruitment she had not lied about it.

[39] It is regrettable that Ms Kerr's attention had not been drawn to these emails earlier. TAFE conducted an 18 month investigation into these matters starting in 2021. They were not drawn to her attention in that investigation. It then conducted a show cause process commencing in 2022, which took a further 9 months, and the emails were not raised. In these proceedings directions were issued for material to be filed and served in advance of the hearing, the emails were not included in TAFE's material. TAFE did not draw them to Ms Kerr's attention until she gave her oral evidence in late October 2023, over 4 years after the emails were sent. If TAFE were genuinely seeking to jog Ms Kerr's memories and seek her explanation, the emails should have been raised with her well before she entered the witness box more than 4 years after they were sent. I accept Ms Kerr's explanation and make no adverse finding as to her credit.

[40] As to the emails they show that Ms Kerr was involved in the recruitment of Mr Kildey. Her involvement was that she assisted Mr Kildey in preparing the pre-employment documents for nomination as a teacher. I also find that Ms Kerr was involved in ensuring administrative arrangements were in place for Mr Kildey to have units of study at Granville TAFE recognised in a formal qualification, being Certificate II Drainage. She assisted Mr Kildey in ensuring he had those qualifications recognised. I also find that she was involved by assisting Mr Browne in providing him with an electronic version of the pre-employment documents and advice as to how to progress them within TAFE. Those steps are consistent with Ms Kerr being aware that Mr Kildey was a candidate for employment and had some involvement in having him employed. It is also clear from her evidence that Ms Kerr was aware of the imperatives created by the ASQA audit which involved the need for students who had not been adequately taught units involving working with heights to redo or be reassessed in those units. She was aware of

the urgency attached to those circumstances. Ms Kerr was also aware of Mr Kildey's ability to assist in addressing that need.

*Mr Kildey's teaching*

[41] Two issues arose about Mr Kildey's teaching. The first was whether he was recruited as a specialist teacher within the plumbing section or whether he was engaged to teach plumbing. The evidence of the witnesses working at the Mt Druitt campus involved in or aware of his recruitment was that he was recruited as a specialist teacher in workplace health and safety. Mr Browne, Mr Rhodes-Smith, Mr Judd and Mr Wilton gave evidence to this effect. TAFE witnesses not involved or aware of his recruitment insisted that TAFE policies did not allow specialist teachers to be engaged and that as his recruitment checklist identified him as a teacher in plumbing, then he was engaged as a teacher of plumbing and was required to teach in all plumbing units. Mr Canavan and Mr Tuckwell gave evidence to this effect.

[42] Ms Kerr, who has extensive experience in senior management roles at TAFE gave evidence that specialist recruitment is custom and practice state-wide across most Skills Teams. Ms Kerr provided a list of examples. Mr Browne, Mr Wilton, and Mr Fairweather gave similar evidence. Mr Browne was able to identify a number of specialist teachers who hold specialist qualifications in areas such as crane, traffic control, fire safety and heavy haulage qualifications, who teach across disciplines. Mr Browne gave an example of a teacher engaged in the plumbing section at Mt Druitt in 2015, Mr Pote, who was described as a supervised part-time casual roof plumbing teacher. This was an example of a teacher being engaged to teach a subset of the courses taught by the plumbing section at the campus. Mr Canavan provided the documents associated with Mr Pote's employment, including the employment agreement with Mr Pote, which confirm this was the case and that Mr Pote taught roof plumbing.

[43] Mr Browne's evidence was that Mr Kildey was recommended by both he and Mr Rhodes-Smith as a subject matter specialist, part time casual teacher in work health and safety, high risk work and risk management. Mr Rhodes-Smith evidence was consistent with that evidence. Unlike the pre-employment paperwork associated with Mr Pote, Mr Kildey's paperwork did not state the limited nature of his engagement clearly. Unlike Mr Pote, a written offer of employment, letter of engagement or contract of employment relating to Mr Kildey was not in evidence. The only document describing the terms of Mr Kildey's engagement was the checklist completed by Ms Jenkins.

[44] Mr Wilton said that he recalls that it was proposed that Mr Kildey be engaged to teach in the plumbing section of Mt Druitt TAFE. He said that arising from the ASQA audit TAFE needed to address working at heights protocols to keep its accreditation and the college could not find anyone else with Mr Kildey's experience and qualifications to do the work. He said that when he was engaged Mr Kildey was described as a plumbing teacher as TAFE did not have a title to properly describe the role he was to play.

[45] My attention was also drawn to the TAFE NSW Procedure Part Time Casual Teachers - Conditions of employment at 5.4.1 which states:

5.4.1 As a condition of employment, part time casual teachers must have the relevant technical or professional qualifications, vocational and/or industrial experience, to be able to teach the relevant course, subject or module.

[46] The procedure contemplates that a teacher may be engaged to teach in a course, subject or module. The procedure accommodates the recruitment of Mr Kildey to act as a specialist teacher in the workplace safety subjects or modules for which he had relevant technical or professional qualifications.

[47] I find that Mr Kildey was not engaged as a generalist plumbing teacher required to teach all units in plumbing courses. He was engaged as a specialist teacher in the area of workplace health and safety including working at heights, work health and safety, high risk work, rescue plan management and risk management.

[48] The second issue about Mr Kildey's teaching was the question of what Mr Kildey actually taught. Mr Browne described the focus of Mr Kildey's teaching as remediation teaching and teaching in areas which were adversely mentioned in the ASQA audit. Mr Kildey was the only teacher at Mt Druitt qualified to teach working at heights units and units that included a high-risk component. Rescue plan management was another topic that no other teacher was able to teach. ASQA had advised TAFE that it was required to remediate all students affected by the non-compliant practices identified during the audit, including the assessments of students who had undertaken working at heights units. Remediation involved students returning to be retaught or reassessed. Mr Kildey conducted that work.

[49] Mr Kildey described the teaching he did. His teaching was also described in the evidence of Mr Browne, Mr Wilton, Mr Rhodes-Smith and Mr Judd. Mr Kildey taught safety at heights subjects by teaching some units himself and conducting classes for other teachers who were designated as teachers in the units that included a working at heights component. Mr Kildey referred to these as modules. Mr Kildey provided his own safety equipment for use in teaching. Mr Kildey was an experienced Safework NSW High Risk Work Licence holder and Construction Safety Officer who was also a Height Safety Inspector. According to Mr Wilton, Mr Kildey's employment ensured TAFE was responsible, accountable and working within TAFE's work health and safety written directions.

[50] Mr Kildey was cross examined on the teaching he performed. The cross examination focussed on computer records taken from TAFE's electronic student management system Education Business System (EBS). The system records student assessments that are entered by teachers during or at the end of semester or shortly thereafter. The tenor of the cross examination was that Mr Kildey had made entries into the EBS recording student assessments in courses that he had no qualifications to teach. Mr Kildey maintained that in each of the units that he entered student assessments he was recording assessments of health and safety subjects in accordance with his role as providing expertise in units or modules of courses that involved health and safety. The computer records he was shown were provided by Mr Canavan. After Mr Kildey was cross examined Mr Canavan provided an updated version of the records. During his cross-examination Mr Canavan said that he had compiled the records on the basis of the courses that the assessments were accredited to. He had not considered whether Mr Kildey's assessment related to a subjects or modules within a course.

[51] It was not clear what the EBS records indicated, and whether they were capable of establishing precisely the nature of the teaching that Mr Kildey undertook. It was suggested by

TAFE that in some of the courses that Mr Kildey had entered results he had no qualifications at all. This was a small number of courses.

[52] I prefer the evidence of Mr Kildey, Mr Browne and the other teachers at Mt Druitt, that Mr Kildey taught in units for which he held qualifications. I find that the teaching performed by Mr Kildey was ostensibly in line with his expertise and was in courses that required his specialist qualifications. It appears from the EBS records that there may have been a small number of courses which fell outside of that speciality, but the extent of those occurrences appeared small in number and was not clear.

#### *Supervising Mr Kildey*

[53] There were two head teachers in the plumbing section at Mt Druitt, Mr Browne and Mr Rhodes-Smith. Mr Wilton gave evidence that when Mr Kildey was employed, he had put in place an arrangement by which Mr Kildey was to report to Mr Rhodes-Smith. He made this arrangement not so much arising from a view that there was a conflict of interest with Mr Kildey answering to Mr Browne, but in the interest of good business practice. It was common knowledge at the campus that Mr Kildey was Ms Kerr's nephew and Mr Browne was Ms Kerr's partner. Mr Wilton's view is that it is best to keep those with these types of relationships at arm's length. Mr Wilton was line manager for Mr Browne and Mr Rhodes-Smith up to 29 July 2019. Mr Judd took over that role. Mr Wilton said he told Mr Judd about the arrangement that Mr Kildey report to Mr Rhodes-Smith.

[54] Mr Judd provided a witness statement and was required for cross examination but was unavailable. His evidence was received on the basis that it would be given appropriate weight. Much of his statement was uncontroversial as it confirmed versions of events that were provided by others. He said he was aware of Mr Kildey's volunteer work assisting TAFE with the ASQA audit in 2018. He was also aware of the relationship between Mr Kildey and Ms Kerr. He was aware that Ms Kerr and Mr Browne were de facto partners. Mr Judd described the employment of Mr Kildey as critical to TAFE as it was at risk of losing its RTO status for being non-compliant in its working at heights training. Mr Judd confirmed that Mr Rhodes-Smith was to supervise Mr Kildey. Mr Judd confirmed that Mr Kildey was employed to teach working at heights and safety compliance in the plumbing section and that he was not employed to teach plumbing. Given the evidence of others these matters were uncontroversial.

[55] Mr Rhodes-Smith was not directly involved in Mr Kildey's recruitment. Mr Browne gathered the paperwork and forwarded it to Ms Jenkins. Mr Rhodes-Smith was aware of a personal connection between Mr Kildey and Mr Browne. In the statement provided to the Commission his stated his view that if a teacher had a personal relationship with a head teacher it would be appropriate for another Head Teacher to make decisions about the teacher. He could not recall if a formal arrangement was in place to address the relationship between Mr Kildey and Mr Browne. He did recall a discussion where it was mentioned that Mr Kildey had not completed every unit of competency and that he should only teach in units he had completed. He could not recall the details of that discussion. During his cross examination he was taken to prior statements he had made to the investigator in 2022. He adopted those statements as true. They included that he equally responsible for checking Mr Kildey's qualifications at the time of recruitment and the following statement:

Even if Norm wasn't in the position, I would have hired Jason straight off the street if he had knocked on the door and showed me the qualifications. No issue. He's a more thorough teacher than a lot of guys who are still with us.

[56] Mr Wilton and Mr Browne gave evidence that Mr Rhodes-Smith was Mr Kildey's line manager. Mr Browne said that at the beginning of each semester he and Mr Rhodes-Smith determined the hours each teacher would be allocated together. Mr Kildey's hours were determined by this process. They were also dictated by the fact that he was to teach in accordance with the specialised nature of his engagement in particular he taught all of the working at heights classes in all units.

[57] I find that arrangements were in place at the Mt Druitt campus for Mr Rhodes-Smith to supervise Mr Kildey, and that he did so.

*Working beyond one semester*

[58] Mr Kildey continued to work in 2020 and 2021. The one semester limit on teachers engaged on nomination was not observed. There was no evidence as to how compliance with the rule is monitored or enforced. The evidence was simply that it existed. Mr Browne's evidence was that Mr Kildey's expertise was still required in 2020. Mr Browne also said that due to the response to the COVID-19 pandemic no formal recruitment processes were being undertaken in early 2020. It was suggested by TAFE that there should have been a competitive recruitment process for Mr Kildey's position on 2020. That may have been desirable but the circumstances at the time appear to have militated against that occurring. I make two other observations. First, Mr Kildey appears to have been the best candidate for the that job. He was certainly well qualified and experience to conduct the teaching that he did. Second, as Mr Rhodes-Smith was supervising Mr Kildey, it appears it would have been his responsibility to take the necessary steps for that to occur.

[59] Mr Browne explained that an important aspect of Mr Kildey's contribution to teaching was that he provided his own safety equipment for use in his classes. Mr Browne explained how he had made numerous attempts to have TAFE provide that equipment to no avail. The problem persisted into 2020. In March 2020 Mr Browne wrote to Mr Judd about the work safely at heights and work safely on roofs units suggesting they both be put on hold because TAFE had not allocated funds for safety resources, including for fall protection and perimeter protection.

[60] Mr Browne also explained that the measures implemented to deal with the COVID pandemic included ceasing in-person teaching, with many courses being taught online. The consequence of this was an increased demand on teacher resources. In those circumstances, Mr Kildey was required to assist in meeting the increased demand.

[61] Mr Rhodes-Smith spoke with Mr Kildey in around July 2020. Mr Rhodes-Smith encouraged Mr Kildey to obtain further qualifications to enable him to teach more classes. The conversation is telling as it confirms not just that Mr Kildey was still required, but that he was only teaching limited classes in line with his specialist qualifications. Mr Rhodes-Smith wanted him to teach more than the specialist units.

[62] Mr Kildey continued to teach in the plumbing section of TAFE's Mt Druitt campus in 2021. He continued to average 30 hours per week teaching. No steps were taken in 2021 to formalise his engagement through a merit selection process. He continued to teach until he was suspended on pay on 13 September 2021.

*The recruitment of Ms George and Ms Browne*

[63] From January to the end of May 2020 Ms Kerr was Relieving Deputy Regional General Manager for the Western Sydney region. One of her tasks was to address the number of incomplete training plans across the region. TAFE issues and maintains training plans for apprentices and trainees. The Western Sydney region had around 20,000 apprentices and trainees. It was decided to address the incomplete plans by employing four extra staff to assist in completing the plans by the end of June 2020. The extra staff were to be employed in Education Administration Support (EAS) roles to provide support in completing the training plans.

[64] In early March 2020 Ms Kerr contacted a number of people within TAFE seeking assistance in finding staff to fill the new EAS roles. Ms Cundasamy provided emails in which Ms Kerr made such a request. There was urgency in hiring staff due to the timeframes associated with the project. There was difficulty in finding staff due to the impact of COVID. One of the people Ms Kerr contacted was Ms Mosca, Manager of Student Services and Support. Ms Mosca said she did not know anyone who was looking for work and suggested that Ms Kerr hire through an agency.

[65] Ms Kerr knew that Mr Browne's daughter, Ms Nina Browne and Mr Kildey's former partner Ms Deanna George were available to work. Ms Kerr gave Ms George and Ms Browne details of agencies which TAFE used to fill temporary staff positions.

[66] Kelly Outsourcing Group (Kelly OCG) manages the TAFE process for sourcing temporary staff from external labour providers. The process involves a manager within the relevant section of TAFE raising a request to fill for a contractor with TAFE's central contracting agency. The hiring manager may identify particular candidates or for candidates are sourced by the central contracting agency using external providers. Where a candidate is identified, the central agency offers the engagement to that candidate and does not seek to source another candidate. On 18 March 2020 Ms Kerr made a request to fill four EAS roles. On 25 March 2020 and 16 April 2020 further requests were made identifying Ms Browne and Ms George to fill two of the EAS roles. As a consequence, Ms Browne and Ms George were contracted to fill two of the four EAS positions. The other two positions were not filled. The EAS positions were extended twice, on 12 May and 1 September 2020, when Ms Kerr made requests that the positions continue to be filled by Ms Browne and Ms George.

[67] A number of witnesses, Mr Cullen, Mr O'Neil, Mr Cochrane and Mr Fairweather worked with Ms Kerr and described the difficult circumstances at Mt Druitt at this time. Mr Cullen was the Regional General Manager, Western Sydney Region in 2020. Ms Kerr reported directly to Mr Cullen. He described 2020 as a difficult year at TAFE in Western Sydney. The COVID pandemic had a significant impact on operations in the region as Western Sydney was subject to the highest number of COVID cases and harshest lockdowns in NSW. This resulted in major changes to training delivery with online courses being created and, for courses where

students had to come to campus, the need to abide by Public Health Orders. He described a significant toll being taken on staff at this time as changes were being implemented and with the need for students, parents, and employers to be kept up to date. He also described the additional stress associated with the need to remediate 5,000 student records and dealing with the ASQA audit. Ms Kerr was part of the team dealing with those issues. Mr Cullen described his dealings with Ms Kerr in a positive way and her approach as always being transparent. He supported Ms Kerr at the time she was suspended over engaging Ms George and Ms Browne and said that she told him that she was embarrassed that she had overlooked filling in conflict of interest declarations concerning Ms George, Ms Browne and Mr Kildey.

### *The Complaint*

**[68]** A complaint dated 25 February 2021 was made by a teacher at Mt Druitt campus making allegations about Mr Kildey and Mr Browne, including that Mr Browne had employed Mr Kildey as a part time teacher of plumbing in circumstances where Mr Kildey was not qualified to teach plumbing. The complaint also alleged there was a conflict of interest in relation to Ms Kerr as she is Mr Kildey's aunt. The complainant said he had no personal dislike of Mr Kildey but was concerned that apprentices were not receiving training from suitably qualified teachers. The complainant also disclosed that he had been told that his own teaching hours were to be reduced. The complainant sought an investigation into the qualifications of Mr Kildey and the actions of Mr Browne in recruiting Mr Kildey.

**[69]** TAFE considered the complaint as a public interest disclosure within the meaning of that term in the *Public Interest Disclosures Act NSW*. The complaint found its way to Ms Victoria Toth, Corruption Prevention Specialist in TAFE's Internal Audit - Governance Legal & Risk. Ms Toth sought advice from Ms Fittler, Lead People Business Partner in the People and Culture Branch – Western Sydney Region. Neither Ms Toth nor Ms Fittler gave evidence.

**[70]** Email correspondence shows that Ms Fittler was provided a series of question from Ms Toth. Her response included unsolicited information about the relationship between Ms Kerr and Mr Browne, informed Ms Toth that Ms George and Ms Browne had been engaged in EAS positions following requests to fill being made by Ms Kerr. Ms Fittler was concerned that no declarations of a conflict of interest had been made by Ms Kerr. These matters had not been the subject of the 25 February 2021 complaint or any an independent complaint. It was decided to include them in the investigation of the complaint.

### *Suspension and Maddocks Investigation*

**[71]** On 6 April 2021, TAFE engaged Maddocks Lawyers to conduct an investigation. TAFE instructed Maddocks to prepare a schedule of allegations. There was a 5 month delay before TAFE wrote to Ms Kerr, Mr Browne and Mr Kildey, on 13 September 2021, informing them of the investigation and providing them with the allegations. TAFE also suspended each of the Applicants on full pay commencing that day. No explanation was provided for the delay in sending the letters. They were signed by Mr Cullen. TAFE's policies required a risk assessment be done before suspending employees on pay. No risk assessment was done. No explanation was provided as to why the Applicants could not continue to work while the investigation was carried out.

[72] The letters were in identical terms, save that they each included at attachment 1 a schedule of allegations that was unique to each Applicant.

[73] The letters advised the Applicants that TAFE had received a complaint the contents of which may amount to breaches of the *TAFE NSW Code of Conduct and Ethical Practices* (Code of Conduct) and possibly amount to corruption within the meaning of the *Independent Commission Against Corruption Act 1988* (ICAC Act). They said that the allegations had been reported as a public interest disclosure under the *Public Interest Disclosure Act 1995*. The letter advised that TAFE was taking the matters seriously and had decided to commence an investigation in accordance the *TAFE NSW Commission Staff Guidelines for Management of Conduct and Performance*. The letter said that if it was determined in the investigation that there had been misconduct then disciplinary action may be taken including dismissal.

[74] The letter went on to describe how the investigation would be carried out, identified the investigator as a lawyer at Maddocks, and indicated that the employees would be contacted to arrange a time and date for an interview or to provide a written response to the allegations. The letter also indicated that possible witnesses would also be interviewed. An offer to have a support person present was also conveyed. Confidentiality was stressed with a warning that if it was not observed then disciplinary action including dismissal may result. The employees were also warned that it was unlawful to victimise anyone involved in the investigation. To do so would lead to disciplinary action including dismissal. The letter referred to statutory penalties of \$11,000, 2 years imprisonment or both if detrimental action was taken against the discloser of the allegations. The employees were instructed to not discuss the allegations with any member of staff or student.

[75] The letters notified the employees that TAFE had determined that it was appropriate that they be stood down on pay while the investigation was being undertaken. They were told that they must not work but were required to be available to meet the investigator and otherwise participate in the investigation. The letters stated that they were not to access TAFE's IT system or premises. Documents or information to assist in responding to matters raised during the investigation could be requested. The next steps were described as contact from the investigator to arrange verbal or written responses to the allegations. The employees were offered access to TAFE's employee assistance program.

#### *The course of the investigation*

[76] Maddocks conducted its investigation taking a further 12 months to produce separate reports in relation to each of the Applicants. In the course of the investigation:

- a) Maddocks commenced its investigation in April 2021. The initial task was to formulate the allegations.
- b) The Applicants were informed on the investigation and were provided with the allegations in the letter of 13 September 2021.
- c) The Applicants each provided a response to the allegations on 11 October 2021.
- d) The investigator conducted interviews in October and November 2021.
- e) Further interviews occurred in March 2022.
- f) Further interviews occurred May 2022.
- g) Further interviews were held from late June to August 2022.

- h) Final reports were provided to TAFE dated 6 September 2022.
- i) The reports were provided to the Applicants on 4 October 2022.

[77] None of the applicants were interviewed. The people who were interviewed were TAFE employees. They were interviewed by video conference. Some provided further written material. Written material from Mr Browne and Ms Kerr Applicants was also provided later in the process. Mr Kildey was not contacted by the investigator after his initial response and heard nothing more until the report was provided to him on 4 October 2022.

[78] The Applicants were not provided with witness statements or recordings of witness interviews or other material collected by the investigator. They were not provided with updates of the progress of the investigations.

[79] On 4 October 2022 TAFE provided each of the Applicants with a redacted copy of their investigation report. The redactions were such that the Applicants were unable to identify who had been interviewed. TAFE did not provide unredacted copies of the reports until required to do so by an order to produce issued days prior to the hearing in these matters.

[80] The investigation findings are key. The decisions of TAFE to dismiss each of the Applicants were based on the findings. Consequently, the findings must be the subject of some scrutiny. Given their overlapping nature, this involves some repetition.

#### *Investigation findings – Kildey*

[81] The allegations that were the subject of the investigation into Mr Kildey's conduct were to the following effect:

- 1) Fraudulently obtaining and/or retaining employment with TAFE while not having sufficient industry experience, required qualifications, and/or satisfactorily completing all course requirements for a full plumbing qualification.
- 2) Failing to disclose perceived or actual conflicts of interest arising from being in family relationships with Mr Browne and Ms Kerr.

[82] On 11 October 2021 Mr Kildey wrote to the investigator denying both allegations. He denied that he had fraudulently obtained employment. He provided the background to his engagement at TAFE including that he attended a TAFE Trades Recruitment Information and Assessment Session in May 2018 and was advised that his experience was excellent but that he would need to undertake a Certificate IV in Training and Assessment, which he did.

[83] He explained how he was approached to take on a teaching role in health and safety. He provided his professional background including all qualifications. He denied that he did not have sufficient industry background and outlined his 25 years of relevant industry experience.

[84] He explained that while he did not have a plumbing trade qualification he was not engaged as a plumbing teacher and had qualification for all subjects in which he taught. He also pointed out that he provided his own equipment for use at the Mt Druitt campus as TAFE did not have the adequate equipment required for teaching the units of competency that he taught.

**[85]** As to the second allegation, he agreed that he had not declared his connection to Ms Kerr and Mr Browne but that he was not aware he was required to. He pointed out that the connection between him and Ms Kerr and Mr Browne was well known at the campus.

**[86]** In his report the investigator found both allegations substantiated.

**[87]** The investigator interviewed 10 people in Mr Kildey's investigation. Of those only Ms Jenkins, Mr Judd and Mr Rhodes-Smith gave evidence in these proceedings. The material Mr Browne and Ms Kerr provided to the investigator which was relevant to Mr Kildey was not taken into account in Mr Kildey's report.

**[88]** As to the first allegation, the investigator took the view that Mr Kildey was engaged as a plumbing teacher. He took that view on the basis of information provided to him by Ms Yates, Talent Acquisition Lead TAFE NSW. The investigator described Ms Yates as a subject matter expert. Ms Yates did not give evidence before the Commission although Mr Tuckwell's evidence to the Commission was to similar effect. The report records that Ms Yates told the investigator that because Mr Kildey was assigned to a position of Part Time Casual Teacher of Plumbing, he therefore needed to have the vocational qualification of a plumbing teacher which was at a minimum a Certificate III – Plumbing, he needed to be able to teach all of the units within that qualification, and he was required to have three years post qualification experience.

**[89]** According to the report other TAFE employees interviewed held a different view and said that teachers could teach specific components of a course although it was not common. The report states that Mr Rhodes-Smith, who did give evidence to the Commission, told the investigator that Mr Kildey was qualified and ready to teach certain classes in the plumbing section that could not be covered by other teachers. He accepted that Mr Kildey could not teach in all courses. In the proceedings Mr Rhodes-Smith was taken to the investigator's account of the interview and confirmed that it was accurate, and he adopted it for the purpose of his evidence before the Commission.

**[90]** Having taken the view that Mr Kildey was required to have the full plumbing qualifications, the investigator found that he was not qualified for the position he had been engaged in. He concluded that the first allegation was substantiated as Mr Kildey commenced employment as a part time casual plumbing teacher without the requisite experience and qualifications.

**[91]** As to the second allegation, that Mr Kildey failed to disclose conflicts of interest relating to Mr Browne and Ms Kerr, the investigator noted the allegation was substantiated by Mr Kildey's acknowledgement that he had not disclosed any conflict.

**[92]** The report goes on to provide the investigator's view on the implications of the findings. The investigator first makes reference to TAFE's Code of Conduct and notes that Mr Kildey was not bound by the Code prior to being employed but that once employed he was.

**[93]** The Code at part 2.0 requires that members of staff act with integrity and in good faith in providing service that is honest and impartial.

[94] The Code also provides at part 6.0 that when faced with a situation in which a conflict of interest may be present an employee will assess the situation and surrounding circumstances that could affect any decisions or actions, identify whether a conflict of interest exists, determine the type of conflict, and report it to an immediate leader. The investigator pointed out that the Code states that a conflict of interest situation includes recruiting or approving the recruitment of a family member.

[95] The report includes the opinion that Mr Kildey failed to act with integrity in providing service that was honest and impartial. In this context reference is made to the failure to disclose two conflicts of interest. It is then asserted that it was clear that Mr Kildey did not meet the requirements of the Code of Conduct by failing to assess and report conflicts of interest.

[96] The investigator then makes reference to the definition of corruption in the *Independent Commission Against Corruption Act 1988 (NSW)* (ICAC Act) which includes fraudulently obtaining or retaining employment or appointment as a public official. The investigator made reference to the dictionary definition of fraudulent which includes dishonesty and expressed the view that Mr Kildey's conduct fell within the definition of corruption. The matters which led to this conclusion were said to be Mr Kildey obtained and retained employment at TAFE despite not having the qualifications and experience and by dishonestly failing to declare a conflict of interest.

[97] The investigator concluded the report by recommending that TAFE implement a training programme for senior employees at TAFE Mt Druitt on employees' obligations with respect to conflicts of interest and TAFE recruitment processes including the minimum requirements for specific roles.

[98] Mr Kildey was given a chance to respond to the report in the show cause process described later in these reasons. Ultimately, the decision to dismiss him was made on the basis of the finding and conclusions found in the report.

#### *Investigation findings - Browne*

[99] Attachment 1 to Mr Browne's letter raised 6 allegations. They were to the following effect:

- 1) Improperly employing Mr Kildey as a plumbing teacher when he did not have the necessary skills and qualifications to perform the role.
- 2) Fraudulently entering student attendance and results for Mr Kildey's Certificate III Plumbing.
- 3) Causing student fees owed by Mr Kildey to be waived.
- 4) Repurposing discarded student work to fraudulently represent them as Mr Kildey's work.
- 5) Failing to disclose perceived or actual conflicts of interest of being in family relationships with Mr Kildey and Ms Kerr.
- 6) Acting inappropriately by allowing another student to pass a unit on the sole basis that the student said he had passed a relevant exam.

**[100]** I only need to address allegations 1), 3) and 5) as the investigator found the other allegations unsubstantiated.

**[101]** In his response Mr Browne denied the allegations. He provided details of Mr Kildey's engagement at TAFE, the background of the ASQA audit, details of Mr Kildey's qualifications, and the circumstances relevant to each of the allegations. Mr Browne accepted that he made a mistake in signing the pre-employment documents. He accepted that Mr Rhodes-Smith should have signed them but explained the urgent need to have Mr Kildey commence on 23 July 2023. He also accepted that he made a mistake by not completing a conflict of interest form regarding Mr Kildey. In relation to Ms Kerr, he responded that his relationship with Ms Kerr was common knowledge in TAFE and that appropriate mechanisms were put in place to manage any actual or perceived conflict of interest. He explained that Mr Wilton was responsible for signing off on submissions and other documents that he generated. He also said that he had completed a declaration in 2008 that he was in a relationship with Ms Kerr and had thought he only needed to make the declaration once. He also stated that he understood that Ms Kerr had made annual declarations about the relationship so thought he did not have to make further declarations.

**[102]** The investigator interviewed 14 people in Mr Browne's investigation. Of those only Ms Jenkins, Mr Greentree, Mr Judd, Mr Wilton, and Mr Rhodes-Smith gave evidence in the proceedings before the Commission. The material provided by Ms Kerr and Mr Kildey provided to the investigator and relevant to Mr Browne was not taken into account in Mr Browne's report.

**[103]** The investigator found two of the six allegations substantiated and a third partially substantiated. In making those findings the investigator noted that Mr Browne had referred to various mitigating circumstances, expressed no view about them, and advised that those matters were for TAFE to consider.

**[104]** As to the first allegation, the investigator was confronted with differing opinions from the TAFE employees he interviewed. Some concentrated on whether Mr Kildey's qualifications allowed him to be a plumbing teacher and held the opinion that as Mr Kildey did not have a plumbing trade qualification, he was not qualified to teach plumbing students at all. Others took the approach that Mr Kildey was a specialist in workplace health and safety matters who taught units within plumbing, and he was qualified to teach those units. Mr Rhodes-Smith relayed feedback from students that Mr Kildey was very thorough and stated Mr Kildey was a very knowledgeable person. He also agreed with Mr Browne's account that Mr Kildey only taught in units for which he had qualifications. He also said that he would have employed Mr Kildey regardless of Mr Browne's input. Mr Judd explained to the investigator the need for Mr Kildey's skills to address the ASQA audit.

**[105]** The investigator preferred the view of Ms Yates, who compared Mr Kildey's qualifications with the position description for a general plumbing teacher and said that as Mr Kildey was described as a Part Time Casual Teacher Plumbing Teacher in the checklist prepared by Ms Jenkins, he needed a Certificate III Plumbing qualification to teach in the plumbing section.

**[106]** The second allegation found substantiated was allegation 3), that during Mr Kildey's studies, Mr Browne caused student fees owed by him to be waived or deleted. The fees were waived or deleted as a consequence of Mr Browne making amendments to a number of student

records, including Mr Kildey's, in December 2020. The material relied upon by the investigator in making this finding was information provided from Mr Greentree and written responses of Mr Browne.

[107] In these proceedings TAFE also relied upon a statement of Mr Greentree who at the time he assisted the investigator was a Team Leader - Automotive. Mr Greentree's evidence was given on the basis that he had experience using TAFE's Education Business System (EBS). He did not know any of the Applicants. He explained that the EBS records enrolments, teacher assessments, and qualifications for all students. Teachers input student assessment results into the system. Team Leaders and Head Teachers may also enter results on behalf of teachers. He was asked to review the EBS records relating to Mr Kildey as a student and found that Mr Browne had made various entries on Mr Kildey's student records, including entries in December 2020 which withdrew Mr Kildey from the Certificate III Plumbing course. Mr Greentree explained that one consequence of this was that fees associated with the course were waived and earlier payments made by Mr Kildey were recorded as a credit in Mr Kildey's favour. Mr Kildey's evidence on this topic was that he was unaware of this, and he was not contacted by TAFE about any irregularities with the fees associated with his Certificate III Plumbing course. The first he knew of being withdrawn from the course was when he read Mr Greentree's statement in these proceedings.

[108] Mr Browne did not deny that he withdrew Mr Kildey from the course in December 2020. Mr Browne's explanation was that he did so inadvertently. Mr Browne had intended to withdraw Mr Kildey, and a number of other students, from a unit of study but withdrew them from the whole course instead. Mr Browne provided some examples of other teachers making the same mistake.

[109] The investigator found that through his actions Mr Browne did cause Mr Kildey's fees to be waived and or deleted. The investigator noted the explanation provided but did not consider it. He suggested it should be taken into account when assessing the seriousness of the allegation.

[110] The allegation that the investigator found partially substantiated was allegation 5. The full allegation was:

During his employment as Head Teacher, Plumbing at TAFE Mount Druitt, Mr Browne did not disclose perceived or actual conflicts of interest including

- failing to declare being in a family relationship with Mr Kildey; and
- failing to declare being in a family relationship with Ms Kerr, Head of Skills Team, Infrastructure, Energy and Construction, Western Sydney Region, TAFE NSW.

[111] The investigator's finding was that only the first aspect of the allegation was substantiated, that is, Mr Browne did not disclose a perceived or actual conflict of interest by failing to declare being in a family relationship with Mr Kildey. The investigator found that the second aspect of the allegation was not substantiated because Mr Browne had completed a conflict of interest form regarding his relationship with Ms Kerr in 2008 and circumstances had not changed since then. The investigator also noted that Mr Browne's managers were aware of the relationship.

[112] The investigator noted Mr Browne's response to this part of the allegation as being that he made a mistake by not completing the conflict of interest form regarding Mr Kildey. Mr Browne explained to the investigator that he failed to do so due to the workload which saw him working from 2.00 am almost every day and working weekends in order to manage the workload required of a Head Teacher. He also pointed out that while he had not filled out a form his relationship with Mr Kildey was well known and steps were taken to have Mr Rhodes-Smith supervise Mr Kildey as Head Teacher.

[113] Mr Judd told the investigator that the connections between Mr Kildey and Mr Browne were well known. Mr Rhodes-Smith told the investigator that initially he did not know the specifics of the relationship between Mr Browne and Mr Kildey, but Mr Browne told him once Mr Kildey was recruited. Mr Wilton confirmed that he was aware of the relationship and put in place arrangements for Mr Rhodes-Smith to supervise Mr Kildey, albeit he did not do so because he thought there was a conflict of interest.

[114] The investigator found the allegation concerning Mr Kildey was substantiated given that Mr Browne accepted that he had not filled in the conflict of interest form. He considered that the conflict was an actual conflict of interest as Mr Browne recruited Mr Kildey, entered Mr Kildey's assessment marks into the EBS, assessed Mr Kildey for recognition of prior learning purposes, and caused Mr Kildey's student fees to be waived and/or deleted.

[115] The report goes on to provide the investigator's view on the implications of the findings. The investigator opined that the substantiated allegations amounted to a breach of the TAFE's Code of Conduct. Specifically, Mr Browne failed to act with integrity and provide service that was honest and impartial. The investigator's view was that Mr Browne exercised his senior position in a manner which benefitted a family member. He also held the view that Mr Browne failed to act professionally in reporting the conflict of interest and that he did not meet the requirement in the Code of Conduct to make an assessment of the conflict, report it and document any decisions and actions he took in relation to it.

[116] The investigator also expressed a view that Mr Browne's conduct involved a lack of honesty and bias or prejudice in favour of a family member in the exercise of his official functions as a Head Teacher. Specifically, the investigator pointed to the failure to make Mr Rhodes-Smith aware of his familial connection with Mr Kildey, employing Mr Kildey when Mr Kildey did not have appropriate qualifications, and removing student fees owed by Mr Kildey to TAFE. The investigator concluded that these matters constituted 'corrupt conduct' under the *Independent Commission Against Corruption Act 1988*.

[117] The investigator concluded the report by indicating that he had not considered the mitigating circumstances raised in Mr Browne's responses to the allegations, responses suggesting that TAFE should make its own assessment of those matters when decided about Mr Browne's employment. He also recommended that TAFE implement a training programme for senior employees at TAFE Mt Druitt and suggested a review of recruitment practices associated with 'on nomination' recruitment.

*Investigation findings – Kerr*

**[118]** Attachment 1 to the letter to Ms Kerr dated 13 September 2021 sets out 2 allegations. They were to the following effect:

- 1) Failing to disclose perceived or actual conflicts of interest of being in family relationships with Mr Kildey, Ms George and Ms Browne.
- 2) Allowing Mr Kildey to be employed knowing that he wasn't competent, experienced or qualified, influencing the initial engagement and extension of engagement of Ms George without declaring a conflict of interest; inappropriately acting as referee for Ms George without declaring a conflict of interest, and influencing the initial engagement and extension of engagement of Ms Browne without declaring a conflict of interest.

**[119]** The second allegation is in effect four allegations. The investigator dealt with the four separately. Albeit the allegations about engaging Ms George and Ms Browne were dealt with together.

**[120]** The allegations against Ms Kerr did not form part of the complaint made on 25 February 2021. They arose from the exchanges between Ms Roth and Ms Fittler relating to that complaint.

**[121]** The investigator interviewed 12 people in Ms Kerr's investigation. Of those only Mr Wilton, Mr Judd, Ms Coventry and Mr Rhodes-Smith gave evidence in the proceedings before the Commission. The material provided by Mr Browne and Mr Kildey provided to the investigator and relevant to Ms Kerr was not taken into account in Ms Kerr's report.

**[122]** Ms Kerr's initial response on 11 October 2021 accepted that she had not submitted conflict of interest forms for Mr Kildey, Ms Browne and Ms George. She explained that she had not done so due to her excessive workload in the previous 18 months which involved; acting in the role of Relieving Regional General Manager in addition to her Head of Skills Team role from January to May 2020, the need to work 60 hours per week including evenings and weekends, and the demands of managing the impact of the COVID pandemic on the services TAFE provided including participating in teams developing state-wide protocols to deal with the challenges TAFE faced.

**[123]** Ms Kerr provided a detailed list of the many tasks and responsibilities attached to her roles during this time. Ms Kerr denied that she intended to deceive TAFE for personal gain. Ms Kerr explained Ms Fittler told her on 21 March 2021 that a protected information disclosure had been received and Ms Fittler asked if she had submitted conflict of interest forms for Mr Kildey, Ms Browne and Ms George. Ms Kerr explained that she advised Ms Fittler that she had not submitted the forms. She explained that the excessive workload over the previous 18 months had been such that she had failed to submit the forms. She told the investigator that in retrospect she should have submitted the forms.

**[124]** In response to the allegation that Ms Kerr allowed Mr Kildey to be employed knowing that he was neither competent nor qualified, Ms Kerr explained that she understood that Mr Kildey was employed for his health and safety and high risk work qualifications and expertise and had been engaged by Mr Browne and Mr Rhodes-Smith to assist in the response to the

ASQA audit. She explained the significance of the ASQA audit for TAFE including the remediation requirements.

[125] As to that part of the second allegation that Ms Kerr inappropriately influenced the engagement and extension of work for Ms Geroge and Ms Browne without completing a conflict of interest form, Ms Kerr explained the need for additional staff in 2020 to address remediation issues and record maintenance arising from the ASQA review. She explained the difficulties she had recruiting for the roles, which were initially 3 month positions, including the lack of available candidates. This was caused by the timing of the need, it being in the midst of the lock downs associated with the COVID pandemic. She sought recommendations from colleagues and then raised the availability of Ms Browne and Ms George with another colleague, Ms Mosca. Ms Mosca suggested they be engaged through an agency. Ms Kerr had initially requested four staff to do the work. Due to the recruitment difficulties only Ms George and Ms Browne were engaged. The later extension of their placements was solely to meet the needs of TAFE as they were needed to continue to assist with clearing the backlog of work. Ms Kerr again referred to her workload and provided further details of the pressure she was under at the relevant times, including details of the duties and responsibilities of her role. She emphasised that her focus was on what was best for TAFE.

[126] As to the allegation that she had provided a reference for Ms George to Ms Coventry, who was involved in the process of engaging Ms George as a temporary employee of TAFE, Ms Kerr responded that she had no recollection of doing so.

[127] The investigator found that all of the allegations were substantiated.

[128] In making his findings the investigator noted that Ms Kerr had referred to various mitigating circumstances, expressed no view about them, and advised that those matters were for TAFE to consider.

[129] The report goes on to provide the investigator's view on the implications of the findings. The investigator opined that the allegations taken together amounted to breach of the TAFE's Code of Conduct. Specifically, he said Ms Kerr failed to act with integrity and provide service that is honest and impartial. The investigator's view was that Ms Kerr exercised her senior position in a manner which benefitted family members. He also held the view that Ms Kerr failed to act professionally in failing to report conflicts of interest and that she did not meet the requirement in the Code of Conduct to assess conflicts, report them and document any decisions and actions taken in relation to them.

[130] The investigator also expressed a view about Ms Kerr's conduct *vis-a-vis* the ICAC Act. The investigator concluded that her conduct constituted 'corrupt conduct' within the meaning of the ICAC Act.

[131] The investigator concluded the report by indicating that he had not considered the mitigating circumstances raised in Ms Kerr's responses and suggested that TAFE should make its own assessment of those matters when deciding about Ms Kerr's employment. He also recommended that TAFE implement a training programme for senior employees at Mt Druitt on conflicts of interest, and recruit processes. And suggested a review of recruitment practices associated with "on nomination" recruitment.

*The show cause process*

[132] On 4 October 2022, four weeks after receiving the investigation reports, TAFE wrote to each of the Applicants to advise Maddocks had completed the investigation. Attached to each letter was a redacted copy of the relevant report. The letters were in identical terms save for the formal identification of the Applicants.

[133] The letters referred to the seriousness of the allegations had required an in-depth investigation. The letters stated that the reports had been read, including the information provided by the Applicants, and the findings of the investigator were accepted including that the Applicants engaged in misconduct which was contrary to the Code of Conduct and ‘corrupt conduct’ within the meaning of section 8(1)(b) of the *Independent Commission Against Corruption Act 1988 (ICAC Act)*. TAFE was considering ending their employment. They were invited to provide any information they wished to have considered in making the final decision about their employment.

[134] There followed various requests on behalf of the Applicants seeking further information about the investigation including unredacted copies of the reports, copies of witness statements, and other material relied upon to make the findings. Not all of the material requested was provided. The material that was provided was redacted so as to mask the identity of the original complainant and those interviewed by the investigator. In some instances, the Applicants waited months for responses to their requests.

[135] The Applicants provided responses to the show cause letters at various times between November 2022 and early June 2023. Those responses continued to complain that TAFE had not provided all of the material associated with the complaints and the Maddocks investigations and the failure of TAFE to comply with various provisions of its *Guidelines for the Management of Conduct and Performance* including in relation to the suspensions, investigation and show cause process. Where they dealt with the substance of the findings, the responses were consistent with the responses provided to the investigator save that in the case of Mr Browne and Ms Kerr the correspondence withdrew earlier concessions about the application of the conflict of interest provisions of the Code of Conduct. Advice had been received that the obligation to report conflicts of interest did not apply in the circumstances. The representations made no difference to TAFE’s decision. It not necessary to traverse the detail of that correspondence.

*The terminations of employment*

[136] The Applicants were dismissed by letters dated 13 June 2023. The letters were signed by Mark Hawkins, Executive Director- Western Sydney Region TAFE NSW.

[137] The letter to Mr Kildey informed him that his employment was terminated effective that day. It stated he was not entitled to payment in lieu of notice or accrued entitlements. As to the reason for dismissal it stated:

The reason for the decision to terminate your employment follows from an independent workplace

investigation which resulted in findings that you engaged in conduct which constituted both breaches of the TAFE NSW Code of Conduct and the Independent Commission Against Corruption Act 1988 (NSW) (“ICAC Act”). Specifically:

1. You fraudulently obtained and / or retained employment with TAFE NSW:
  - a) while not having sufficient industry experience;
  - b) without the required qualifications; and
  - c) without having satisfactorily completed all course requirements for your applicable plumbing qualification.
  
2. You failed to disclose a perceived or actual conflict of interest in your reporting line, including:
  - a) failing to declare being in a family relationship with Norman Browne, Head Teacher, Plumbing, TAFE NSW; and
  - b) failing to declare being in a family relationship with Sharon Kerr, Head of Skills Team, Infrastructure, Energy and Construction, Western Sydney Region, TAFE NSW.

The independent investigation report found:

- a. that you failed to discharge your obligation under the TAFE NSW Code of Conduct to act with integrity in providing service that is honest and impartial; and
- b. that your actions in failing to declare conflicts of interest in your reporting line with respect to Mr Browne and Ms Kerr benefitted you directly and that you sought to gain an unfair or dishonest advantage with respect to your employment in breach of the ICAC Act.

On 4 October 2022, you were advised that based on the findings of the workplace investigation, disciplinary action was being considered with the latter including termination of your employment. At the same time you were advised that to inform any action that is determined by TAFE NSW you will continue to be afforded procedural fairness. This meant that you were given 21 days to provide a verbal and/or written response so that it could be taken into consideration by TAFE NSW before a decision is made – which I note was provided by you on 1 November 2022.

After a consideration of all the information before me, including your written responses, I find that your actions failed to uphold the integrity of the educational standards at TAFE NSW. Your conduct has or could bring the reputation of TAFE NSW into disrepute and termination of your employment is the appropriate outcome.

**[138]** Mr Browne’s letter indicated that he would be paid in lieu of notice and the balance of any outstanding entitlements. The letter relevantly stated:

The reason for the decision to terminate your employment follows from an independent workplace investigation which resulted in written findings that you engaged in conduct which constituted both breaches of the TAFE NSW Code of Conduct and the Independent Commission Against Corruption Act 1988 (NSW) (“ICAC Act”). Specifically:

1. You improperly employed Mr Jason Kildey as a Part Time Casual Teacher, Plumbing at TAFE NSW Mount Druitt, despite Mr Kildey not having the necessary skills or qualifications to perform the role, including by:
  - a) submitting and signing a ‘Request to Engage’ for Mr Kildey’s engagement as a Part Time Casual Plumbing Teacher;
  - b) signing Mr Kildey’s declarations confirming his teacher qualifications; and
  - c) failing to make arrangements for a suitable delegate to review Mr Kildey’s teaching application prior to Mr Kildey’s employment as a teacher.

2. During Mr Kildey's studies you caused student fees owed by Mr Kildey to be waived and/or deleted.
3. During your employment as Head Teacher, Plumbing at TAFE NSW Mount Druitt, you did not disclose perceived or actual conflicts of interest, including by failing to declare being in a family relationship with Mr Kildey.

The independent investigation report found:

- a. that you failed to discharge your obligation under the TAFE NSW Code of Conduct to act with integrity in providing service that is honest and impartial and that you have failed to discharge your obligation to model the professional behaviour to be expected of staff.
- b. found your actions in failing to declare conflicts of interest with respect to Mr Kildey's employment and the removal of fees payable by Mr Kildey demonstrate a partial exercise of your senior position which benefitted your family member. TAFE NSW staff are expected to act with professionalism and integrity and report conflicts of interests and your conduct in relation to the substantiated allegations fell short of that expectation.
- c. that your conduct with respect to actual conflict of interests did not meet the requirements of the Code of Conduct in terms of assessment of conflicts, reporting conflicts, and documenting decisions and actions and that your actions can reasonably be said to have involved a lack of honesty, or alternatively a bias or prejudice in favour of your family members in breach of the ICAC Act.

On 4 October 2022 you were advised that based on the findings of the workplace investigation, disciplinary action was being considered with the latter including termination of your employment. At the same time, you were advised that to inform any action that is determined by TAFE NSW you will continue to be afforded procedural fairness. This meant that you were given 21 days to provide a verbal and/or written response so that it could be taken into consideration by TAFE NSW before a decision is made – which I note was provided on 3 March and 5 June 2023.

After a consideration of all the information before me, including your written responses, I find that your actions failed to uphold the integrity of the educational standards at TAFE NSW. Your conduct has or could bring the reputation of TAFE NSW into disrepute and termination of your employment is the appropriate outcome.

**[139]** Ms Kerr's letter indicated that she would be paid in lieu of notice and the balance of any outstanding entitlements. The letter relevantly stated:

The reason for the decision to terminate your employment follows from an independent workplace investigation which resulted in findings that you engaged in conduct which constituted both breaches of the TAFE NSW Code of Conduct and the Independent Commission Against Corruption Act 1988 (NSW) ("ICAC Act"). Specifically:

1. You failed to declare perceived or actual conflicts of interest, including:
  - a) failing to declare being in a family relationship with Jason Kildey, Part Time Casual Teacher, Plumbing at TAFE Mount Druitt;
  - b) failing to declare being in a family relationship with Deanna George, EAS, Animal Science at Richmond; and

- c) failing to declare being in a family relationship with Nina Browne, EAS, Refrigeration at Mount Druitt.
2. You allowed Mr Kildey to be employed by TAFE NSW as a Part Time Casual Teacher Plumbing, knowing that he had neither the competency, or experience, or qualifications required to be employed as a Part Time Casual Teacher at TAFE NSW.
3. You inappropriately influenced the initial engagement and extension in time of the initial engagement of Ms George as a contingent worker (contractor) at TAFE NSW, in circumstances where you did not declare a conflict of interest.
4. You inappropriately acted as referee for Ms George in order to secure temporary employment for Ms George with TAFE NSW in circumstances where you did not declare a conflict of interest.
5. You inappropriately influenced the initial engagement and extension in time of the initial engagement of Ms Browne as a contingent worker (contractor) at TAFE NSW, in circumstances where you had not declared a conflict of interest.

The independent investigation report found:

- a. that you failed to discharge your obligation under the TAFE NSW Code of Conduct to act with integrity in providing service that is honest and impartial and that you have failed to discharge your obligation to model the professional behaviour to be expected of staff.
- b. found your actions in failing to declare conflicts of interest demonstrate a partial exercise of your senior position which benefitted your family members. TAFE NSW staff are expected to act with professionalism and integrity and report conflicts of interests and your conduct in relation to the substantiated allegations fell short of that expectation.
- c. that your conduct with respect to actual conflict of interests did not meet the requirements of the Code of Conduct in terms of assessment of conflicts, reporting conflicts, and documenting decisions and actions and that your actions can reasonably be said to have involved a lack of honesty, or alternatively a bias or prejudice in favour of your family members in breach of the ICAC Act.

On 4 October 2022 you were advised that based on the findings of the workplace investigation, disciplinary action was being considered with the latter including termination of your employment. At the same time you were advised that to inform any action that is determined by TAFE NSW you will continue to be afforded procedural fairness. This meant that you were given 21 days to provide a verbal and/or written response so that it could be taken into consideration by TAFE NSW before a decision is made – which I note was provided on 9 November 2022 and 5 June 2023.

After a consideration of all the information before me, including your written responses, I find that your actions failed to uphold the integrity of the educational standards at TAFE NSW. Your conduct has or could bring the reputation of TAFE NSW into disrepute and termination of your employment is the appropriate outcome.

**[140]** Mr Hawkins provided a statement in the proceedings. He said in the statement that he decided to dismiss the Applicants because there wasn't any other real choice. He adopted all of the findings of the Reports. He was concerned that TAFE policies and procedures had not been followed and referred to:

- the Code of Conduct at Parts 2.0 and 6.0;
- the procedures for withdrawing students on the EBS;
- the Part Time Casual Teachers Conditions of Employment Procedures concerning employees appointed on nomination; and
- policies and procedures in relation to minimum qualifications for teachers.

[141] After recounting in summary form the events that led to the investigations, Mr Hawkins expressed concern about the explanations provided by the Applicants. Mr Hawkins' view was that the matters raised by the Applicants in mitigation exacerbated rather than mitigated the seriousness of the conduct. The statement also said that the matters that led to his decision to dismiss the Applicants meant he had lost trust and no longer had confidence in their ability to serve faithfully as employees of TAFE NSW. He expressed the view that the employment relationship was beyond repair.

[142] Mr Hawkins was cross examined on the content of the statement. During the cross examination he was far less strident in his views. He was taken to the detail of the Maddocks report for Mr Kildey. Significantly, in response to questions relating to the reason for Mr Kildey's engagement, he said the following:

You understand that Mr Kildey was employed specifically because he had particular skills and experience in work health and safety, working at heights, and high-risk work? -Yes. I do.

And you understand that that was the basis upon which he was employed? -That was the rationale that he was employed, yes.

...

And you understand that that is the practice within TAFE that someone such as Mr Kildey, who may not be qualified as a plumber or to be able to teach the whole of the plumbing subject or course, but he can teach individual components if he is qualified and experienced in those individual components. You accept that? -Yes.

[143] Mr Hawkins ultimately accepted that there was nothing in Mr Kildey's report to establish a finding of fraudulent, dishonest, or corrupt behaviour. He also accepted that Mr Kildey had not breached the Code of Conduct. He said he was not aware that the investigator had made findings about Mr Kildey without interviewing him and agreed that knowing that weakened his assessment of the integrity of the report. He agreed that was a denial of procedural fairness.

[144] Mr Hawkins accepted that it was the case that it was not just Mr Browne who was involved in the recruitment of Mr Kildey. At the time there were issues around safe working at heights and that Mr Kildey provided assistance to TAFE in remedying those safety issues, especially the gaps in safe working at heights. He accepted Mr Kildey was open and transparent about his qualifications. He also acknowledged that Mr Kildey supplied, at no cost to TAFE, his own equipment to allow modules to be safely taught. This was all to the benefit of TAFE. He also accepted that when Mr Browne withdrew Mr Kildey from the Certificate III plumbing course in December 2020, resulting in a waiver of fees, he did so by mistake, although he did

maintain that as the mistake involved a relative and the relationship had not been declared, it was a basis for dismissal.

**[145]** After being taken through the report Mr Hawkins gave the following responses to Mr Searle, who represented Mr Kildey:

But having accepted that there was no fraud and no dishonesty and no corruption established against Mr Kildey, and you've accepted that he wasn't in breach of the code, it's the case now, isn't it, that every single thing that you based the termination of his employment upon has fallen away? -Yes, it's questionable.

So you know today the same things that you knew then, but today you would make a different decision? -That's correct, different means.

**[146]** Mr Hawkins said his decision to dismiss Ms Kerr was based on her failure to follow due process by making declarations of conflict of interest in the employment of Mr Kildey, Ms George, and Ms Browne. He agreed that as there was no definition of relative in the Code of Conduct then in these cases it was unclear that the obligations in relation to declaring a conflict of interest applied. He also agreed that, absent the findings of dishonesty, fraud or corruption associated with that conduct his reason for dismissal fell away. He also accepted that the employment of Ms George and Ms Browne were in the best interests of TAFE. Having made those concessions Mr Hawkins shifted in his reasoning and relied upon the general values that underpin TAFE policies. He described those as integrity, being transparent, having self-awareness, knowing what is right and what is wrong, and the ability to do what is right. He was challenged on that evidence:

MR O'DOWD: You haven't identified what it is they did wrong, sir. You haven't identified what they did wrong. What did they do wrong? -We're talking about not disclosing a conflict of interest, right, in regards to the employment of individuals that have a former relationship with the individuals that resulted in favourable, as in regards to the recruitment process.

What is the conflict of interest? -The fact that they are – have some form of personal relationship with the individuals involved.

The obligation - - -? -The expectation would be that someone in a senior leadership role having highly advanced or advanced integrity would know what is right or wrong, and even to have the ability to call out the fact, or have the awareness to know, 'Hang on, maybe I should err on the side of caution.

**[147]** Mr Hawkins said he was unaware of a number of matters associated with the explanations provided by Ms Kerr and Mr Browne. In relation to Mr Browne, Mr Hawkins said he thought that Mr Kildey had not paid fees as a result of Mr Browne's actions in December 2020. In relation to Ms Kerr, he said he was unaware that she had been working 60 hours per week. He was unaware of Mr Browne raising in 2020 that the working at heights courses should not be taught due to TAFE not providing safety equipment. He did not consider the complaints about a lack of procedural fairness as he was assured by others that procedural fairness had been followed.

**[148]** At the end of the cross examination, it was clear that Mr Hawkins was no longer confident that his decisions to dismiss were soundly based. Mr Canavan, who provided Mr

Hawkins with advice about the dismissal, made similar concessions during his cross examination.

## CONSIDERATION

### Were the dismissals harsh, unjust or unreasonable?

[149] The well known passage from *Byrne & Frew v Australian Airlines Ltd* [1995] HCA 24 (*Byrne*) is relevant to the consideration of whether a dismissal is harsh, unjust or unreasonable. The High Court was dealing with the application of an award clause that protected employees from unfair dismissal. The expression harsh, unjust or unreasonable appeared in the clause. Their Honours McHugh and Gummow JJ said at para [128]:

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

[150] Section 387 of the FW Act requires, in considering whether a dismissal was harsh, unjust or unreasonable, the Commission 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.

**[151]** The meaning of ‘valid reason’ in s.387(a) was dealt with in the judgment of Northrop J, who was dealing with the same expression used in s.170DE of the *Industrial Relations Act 1988*, in *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 (*Selvachandran*). This meaning has been applied by members of the Commission and its predecessors for many years and is as follows:

In its context in s 170DE(1), the adjective “valid” should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1). At the same time the reasons must be valid in the context of the employee’s capacity or conduct or based upon the operational requirements of the employer’s business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must “be applied in a practical, commonsense way to ensure that the employer and employee are treated fairly”.

**[152]** Subsections (b)-(e) of s.387 of the FW Act might be broadly characterised as issues relevant as to whether a dismissed employee was afforded procedural fairness. If there was a valid reason for dismissal, the dismissal may still be held to be harsh, unjust or unreasonable on procedural grounds. In *Byrne*, their Honours McHugh and Gummow JJ went on to say at [130]:

That is not to say that the steps taken, or not taken, before termination may not in a given case be relevant to consideration of whether the state of affairs that was produced was harsh, unjust or unreasonable. Thus, it has been said that a decision which is the product of unfair procedures may be arbitrary, irrational or unreasonable. But the question under cl 11(a) is whether, in all the circumstances, the termination of employment disobeyed the injunction that it not be harsh, unjust or unreasonable. That is not answered by imposing a disjunction between procedure and substance. It is important that matters not be decided simply by looking to the first issue before there is seen to be any need to enter upon the second.’

**[153]** In *Wadey v YMCA Canberra* [1996] IRCA 568, Moore J made clear that an employer cannot merely pay ‘lip service’ to giving an employee an opportunity to respond to allegations concerning the employee’s conduct or performance. His Honour said:

In my opinion the obligation imposed on an employer by that section has, for present purposes, two relevant aspects. The first is that the employee must be made aware of allegations concerning the employee’s conduct so as to be able to respond to them. The second is that the employee must be given an opportunity to defend himself or herself. The second aspect, the opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That, in my opinion, does not constitute an opportunity to defend.’

**[154]** While these cases were decided under earlier unfair dismissal regimes the observations have been adopted by members of this Commission many times as guidance in determining whether a dismissal was harsh, unjust or unreasonable for the purposes of the FW Act.

[155] The objects of Part 3-2 Unfair Dismissals of the FW Act are also relevant. They include the following at s381(2):

The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a “fair go all round” is accorded to both the employer and employee concerned.

[156] In *Toms v Harbour City Ferries Pty Ltd* [2015] FCAFC 35 the Full Federal Court, said, per Buchanan J at [30]:

“The statutory scheme to which I have referred, its provision for the exercise of non-judicial power and the antecedents of the basic test (a fair go all round) which is suggested in that scheme (which I will discuss shortly) make it apparent, in my view, that the questions of whether a dismissal is unfair and what (if any) remedy should be granted as a result are matters consigned to the particular assessment and discretionary judgment of the FWC. Although the legislature has given some direction to the FWC about matters to be taken into account in its assessment, judgment of such matters and the selection of appropriate remedies is left to a broad evaluation by the FWC, subject to the appeal mechanisms which the FW Act provides. In particular, the matters offered as examples in the judgments in *Byrne* must be considered against the specific directives which now appear in the FW Act and with adequate regard to the fact that any matters to be taken into account additional to those in s 387(a) to (g) are those which the FWC considers relevant under s 387(h).”

[157] I turn now to the specific matters required to be taken into account in respect to s 387 of the Act. In doing so the letters of termination make it clear that the reason for each of the dismissals followed from the findings of the Maddocks investigation. The investigation found in each case that the Applicants had engaged in conduct which constituted breaches of the Code of Conduct and the ICAC Act. In each case that conduct is described and the findings of the investigator are set out. Mr Hawkins described the report findings as leaving him with no other real choice than to dismiss the applicants.

[158] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.<sup>3</sup> 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.<sup>4</sup> I note that not all of the people the investigator interviewed to reach his conclusion gave evidence before the Commission. In these reasons I have already set out the facts as presented to the Commission and made some findings where facts were contested. I base those findings on the evidence that was before me.

[159] As the conduct relied upon for the dismissals of each of the Applicants was different it is necessary to deal with them separately. I will also consider the matters in s. 387 as they apply to each of the Applicants separately.

**Was Kildey’s dismissal harsh, unjust or unreasonable?**

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

**[160]** The misconduct set out in Mr Kildey's termination letter was that he fraudulently obtained or retained employment and failed to disclose a perceived or actual conflict of interest being his family relationships with Ms Kerr and Mr Browne. It was said that he failed to discharge his obligations under the Code of Conduct to act with integrity in providing service that was honest and impartial and that he benefitted from failing to declare his conflicts of interest by gaining an unfair or dishonest advantage with respect to his employment in breach of the ICAC Act.

**[161]** I have set out the circumstances of Mr Kildey's employment earlier. The background to his employment included the ASQA Audit in 2018 which gave rise to an urgent need for a specialist teacher in workplace health and safety. Mr Kildey was qualified to perform that teaching. He provided assistance to TAFE before being engaged. The teachers at the Mt Druitt campus in 2019 had a view that he should be employed. Mr Kildey received assistance from Ms Kerr in marshalling his qualifications and preparing the necessary paperwork. Mr Browne had him engaged on nomination. His employment was as a specialist teacher. Arrangements were in place for him to be supervised by Mr Rhodes-Smith. There were difficulties in recruiting staff during 2020 due to COVID. There was ongoing need for his expertise in 2020 and 2021. The views of his supervisors were that he was well qualified to teach the units he taught and was a good teacher.

**[162]** I disagree with the investigator's findings. I find that Mr Kildey was not engaged as a generalist plumbing teacher required to teach all units in plumbing courses. He was engaged as a specialist teacher in the area of workplace health and safety including working at heights, work health and safety, high risk work, rescue plan management and risk management. Mr Kildey did not obtain and retain employment whilst not having qualifications and experience to perform his role. It follows that I disagree with the view taken by TAFE on those matters as TAFE adopted the findings of the investigator.

**[163]** The investigation report referred to the Code of Conduct at part 6.0 Conflict of Interest and set out the following provisions relevant to the obligations to manage conflicts of interest:

It may not only be about your own interests. It may include:

- > the interests of members of your immediate family

...

When faced with a situation in which a conflict of interest may be present, I will:

- > assess the situation and the surrounding circumstances that could affect any decisions or actions I may take in the matter
- > identify whether any conflict of interest exists
- > determine the type of conflict of interest
- > report any conflict to my immediate leader.

As a leader, I am required to develop appropriate management strategies to deal with any conflicts of interest and document my decisions and actions.

Whenever I am in doubt I will refer to my immediate leader or the HR area.

Conflict of interest situations include:

- > recruiting or approving the recruitment of a family member, close friend or associate required to declare conflicts.

**[164]** These obligations did not apply to Mr Kildey at the time of recruitment because he was not an employee. Mr Kildey said he didn't declare a conflict of interest because he did not know he had to. I agree that he did not. I cannot see how the policy could be said to apply to Mr Kildey after he was employed either. He was not making any decisions, or taking any actions described in the policy that may give rise to a conflict of interest. No situation or surrounding circumstances existed that could affect any decisions or actions Mr Kildey was taking or would be required to take in performing his duties that would present a conflict as described in the policy. Consequently, I find that Mr Kildey was not required to declare his family relationships, such as they were, with Mr Browne and Ms Kerr.

**[165]** As to the ICAC Act the investigator set out the following definitions from ss.8 and 9 of the Act:

8. (1) Corrupt conduct is—
- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
  - (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
  - (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
  - (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.
9. (1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve—
- (a) a criminal offence, or
  - (b) a disciplinary offence, or
  - (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official ...

**[166]** The investigator referred to the dictionary definitions of fraudulent and fraud and described Mr Kildey's conduct in not declaring his family relationships as dishonest thereby gaining an unfair advantage in gaining employment. It was also said that Mr Kildey's conduct involved a lack of honesty or bias or prejudice in favour of a family member. I disagree. Mr Kildey was not dishonest. Nothing in the material suggested that Mr Kildey acted dishonestly. His failure to declare his family relationship was based on an honest understanding that he was not required to. I find that his understanding was correct. There was no suggestion that he was otherwise dishonest.

**[167]** His conduct is not otherwise contemplated by the definition of corruption in ss.8 and 9 of the ICAC Act. In any event, my view is the exclusion in s.9(c) would apply as there were no reasonable grounds for dismissing Mr Kildey.

**[168]** It follows, given that the reason for dismissing Mr Kildey relies on the findings of the investigator, that I find that there was no valid reason for the dismissal. Mr Kildey was not guilty of the conduct alleged. He did not teach without having the qualifications, skill, or

experience to do so. He did not obtain and retain employment dishonestly and he did not fail to declare interests contrary to the Code. The dismissal is thereby unjust in the sense described in *Byrne*. The reason is also not sound, defensible or well founded as described in *Selvachandran*. I consider this to be the case in the practical sphere of the employment relationship including the various rights, privileges and duties of both Mr Kildey and TAFE. Those matters included obligations under the Code, the legislation that applied to TAFE as a public sector employer and the ICAC Act.

[169] This factor weighs in favour of finding that the dismissal Mr Kildey was harsh, unjust or unreasonable.

**Was the Applicant notified of the valid reason and given an opportunity to respond to any reason related to his capacity or conduct?**

[170] Mr Kildey was given an opportunity to respond to the allegations about his conduct in the Maddock's investigation and show cause processes. However, as I have found that the findings of the investigation, which became the reasons for dismissal, did not constitute a valid reason for dismissal, and following the Full Bench approach in *Read v Cordon Square Child Care Centre*<sup>5</sup> the factors in s.387(b) and (c) are neutral considerations on whether the dismissal was harsh, unjust or unreasonable.

[171] Some complaint was made by Mr Kildey about the procedures followed associated with the investigation and show cause processes. Those matters are dealt with below for the purposes of s.387(h).

**Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?**

[172] Mr Kildey was represented through the investigation and show cause processes and provided written responses to the allegations. Accordingly, s.387(d) is a neutral factor on the question of whether the dismissal was harsh, unjust or unreasonable. The complaints made by Mr Kildey about the procedures followed associated with the investigation and show cause processes are dealt with below for the purposes of s.387(h).

**Was the Applicant warned about unsatisfactory performance before the dismissal?**

[173] The dismissal was not for unsatisfactory performance. The evidence was that Mr Kildey performed his teaching role well. Section 387(e) is a neutral factor on the question of whether the dismissal was harsh, unjust or unreasonable.

**To what degree would the size of the Respondent's enterprise/ absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?**

[174] TAFE is a large employer with dedicated human resource management expertise. Those matters had no impact on the procedures followed in effecting the dismissal. Sections 387(f) and (g) are neutral factors on the question of whether the dismissal was harsh, unjust or unreasonable.

### **What other matters are relevant?**

[175] Section 387(h) requires the Commission to take into account any other matters it considers relevant. The submissions filed by Mr Kildey draw my attention to a number of matters associated with the allegations and the procedure followed in dismissing Mr Kildey. Those matters included that the reasons for dismissal were dire with serious consequences for Mr Kildey. Second, neither the investigator nor TAFE provided Mr Kildey with a full account of the material relied upon by the investigator in making his findings. The material that was provided was incomplete and heavily redacted. The redactions meant that Mr Kildey was never aware of the identity of his accusers and so was hampered in responding to them. Third, Mr Kildey was suspended from work while the investigation was conducted without TAFE first meeting the requirements in the relevant TAFE procedures to conduct a risk assessment before removing him from the workplace. Fourth, Mr Kildey was not spoken to by the investigator during the investigation. Nor was he interviewed by TAFE during the show cause process and the written material Mr Kildey provided in response to the allegations and findings of the report was not given due regard by the investigator or TAFE.

[176] I consider the degree of seriousness of the reasons for dismissal of Mr Kildey are a relevant factor.<sup>6</sup> TAFE dismissed Mr Kildey because they claimed he had acted fraudulently, was dishonest, and had acted corruptly. These are serious allegations. So much was acknowledged by the investigator and TAFE throughout the process. Dismissing Mr Kildey for such serious conduct where the basis for finding that conduct had occurred was not made out was harsh.

[177] I have found that the allegations were not substantiated. I take the view that they were overwrought. At the commencement of the investigation TAFE acknowledged in its letter to Mr Kildey that they were allegations only. When the report was provided TAFE took an uncritical view of the matters contained in the report and effected the dismissal. Mr Hawkins expressed the view that he had no other real choice. I take him to mean that when an external investigator provided a report asserting that employees had acted fraudulently, dishonestly and corruptly then his only option was to dismiss those employees. This view was no doubt informed by the fact that the investigation was carried out by a law firm. There was of course another option for Mr Hawkins and that was to critically review the report and its findings and to form his own view. His statement said that he had regard to the report and the material provided by Mr Kildey. It was clear by the end of his cross examination that he had not taken a critical and independent view of the conclusions contained in the report. By the end of his cross examination, after being taken to the findings and the material upon which they were based, he conceded that it was questionable that the serious allegations of fraud, dishonesty and corruption were sound.

[178] The other matters raised by Mr Kildey go to the procedural fairness afforded by TAFE to meet the allegations. I agree with Mr Kildey that the failure to provide him a full and unredacted copy of the material marshalled against him was unfair. TAFE regarded the initial allegations as a protected interest disclosure protected by the *Protected Disclosures Act*. TAFE's Guidelines for the Management of Conduct and Performance make reference to the Act and state that in matters concerning protected disclosures the identity of the person who made the disclosure is only revealed if it is essential for procedural fairness. Two criticisms can

be made. First, an application of the Guidelines did not justify the extent of the redactions made which went well beyond protecting the identity of the complainant. Second, the revelation of the identity of the complainant was essential for procedural fairness reasons. Mr Kildey had the right to know the identity of the complainant here because the complainant claimed he had no animosity towards Mr Kildey and the complaint appeared to be motivated by the complainant losing teaching hours. Mr Kildey may well have been assisted in his response to the allegations by addressing those two matters. Those matters required the identity of the complainant to be known.

[179] The Management of Conduct and Performance Guidelines also provided for suspension during investigations. The Guidelines stated that the first consideration was whether it was appropriate for the member of staff to continue in their usual duties. The Guidelines required a risk assessment to be undertaken. The assessment being whether there was risk to any complainant, witnesses or the member of staff being investigated. There was no evidence that such an assessment was undertaken and no evidence that would have supported a conclusion that suspension of Mr Kildey was necessary for his protection or the protection of others. The matters being investigated related to his recruitment 2 years earlier. He had assisted TAFE through difficult times with the ASQA audit and the response to the COVID pandemic. He taught without incident in the areas for which he was qualified. I can see no reason to take him away from teaching while the investigation was carried out.

[180] I also agree that Mr Kildey should have been interviewed, at least by Mr Hawkins, before being dismissed. It was not enough that Mr Hawkins invited Mr Kildey to be interviewed. Given the seriousness of the allegations and the denials made by Mr Kildey in his written responses Mr Hawkins should have met with Mr Kildey and allowed him the opportunity to explain why he believed the findings of the report were flawed. The matters raised in Mr Kildey's written response did not differ greatly from the matters that Mr Hawkins accepted during the cross examination. Had Mr Hawkins had the chance to listen to Mr Kildey explain the flaws in the report he may well have come to the same conclusion he did in the witness box that there was no basis for the findings made against him.

[181] I consider these matters relevant to the question of whether the dismissal of Mr Kildey was harsh, unjust or unreasonable. In particular, the manner in which the allegations were formulated, investigated and then blithely accepted by TAFE are relevant factors contributing to the unfairness. The procedures followed were unfair to Mr Kildey. His opportunity to defend himself against them was inadequate and suggest that TAFE were going through the motions in the manner described in *Wadey*.

[182] Each factor weighs in favour of a finding that the dismissal was harsh, unjust and unreasonable.

### **Conclusion**

[183] After considering the matters in s387 and in particular the matters relevant to s387(a) and (h) I conclude that Mr Kildey's dismissal was substantively and procedurally unfair. The lack of a valid reason alone is sufficient to find the dismissal was unfair. Similarly, the deficiencies in the procedures followed by TAFE alone render the dismissal unfair. I find that his dismissal was harsh, unjust and unreasonable.

**Was Browne’s dismissal harsh, unjust or unreasonable?**

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

[184] Mr Browne’s misconduct was said to be that he improperly employed Mr Kildey, caused Mr Kildey’s fees to be waived, and failed to declare a family relationship with Mr Kildey. The letter of termination referred to the findings about his conduct in the investigation report amounted to a failure to act with integrity in providing service that was honest and impartial and a failure to discharge his obligation to model professional behaviour. It also referred to the investigators view that the conduct was contrary to the requirements of the Code of Conduct and involved a lack of honesty or a bias or prejudice in favour of a family member in breach of the ICAC Act.

[185] I disagree that Mr Browne employed Mr Kildey improperly. I have considered Mr Kildey’s employment in the context of what was happening at Mt Druitt campus at the time. There was an urgent need for a teacher who could fill the gaps identified by the ASQA audit. Mr Kildey could do that. Mr Kildey was not employed as a plumbing teacher; he was employed to teach units within the plumbing course. Specifically, those units included health and safety related matters such as working at heights and working on roofs units. Mr Kildey was qualified to teach and taught those units. Mr Browne’s actions in employing him were not improper. The manner in which he went about it, nominating him for the position and signing and providing the necessary paperwork, was a consequence of the urgency associated with the need to have him commence. It may have been preferable that Mr Browne declare the interest, but I do not regard Mr Browne’s failure to do so as rendering the steps taken to employ Mr Kildey as improper. The relationship was known by Mr Browne’s supervisor, Mr Wilton, who was aware of Mr Kildey’s employment, took measures for Mr Kildey to be supervised by Mr Rhodes-Smith, and took the view that there was no conflict of interest. Mr Browne was not responsible for deciding the ongoing employment for Mr Kildey in 2020 and 2021 and so was not responsible for his retention beyond one semester.

[186] Mr Browne explained the circumstances in which he caused Mr Kildey’s fees to be waived. I have set out the circumstances described by the investigator earlier. TAFE relied on Mr Greentree’s assessment of the circumstances. Mr Greentree described how teachers input student assessment results into the EBS. Team Leaders and Head Teachers may also enter results on behalf of teachers. He said that Mr Browne had made various entries on Mr Kildey’s student records, including entries in December 2020 which withdrew Mr Kildey from the Certificate III Plumbing course thus waiving fees associated with the course.

[187] Mr Browne did not deny that he withdrew Mr Kildey from the course. Mr Browne’s explanation was that he did so inadvertently. Mr Browne had intended to withdraw Mr Kildey, and a number of other students, from a unit of study but withdrew them from the whole course instead. Mr Browne provided some examples of other teachers making the same mistake.

[188] Mr Browne’s detailed explanation for the mistake was that he was working late in the year, and while on holiday, to ensure student records were up to date. This is a task that he undertook as Head Teacher at the request of his line manager. There was a pressing need to

finalise the work so that end of semester results could be published. It was a task that was often performed at the end of semester. He said that in December 2020 there were 1,611 missing marks that needed addressing. He described the task as time consuming. His practice in relation to some missing marks was to withdraw the student from the unit of study if it appeared that an assessment had not been done. This involved adjusting student records on the EBS system in a particular manner.

**[189]** He explained that on review of the records he can see that he used the wrong code when attempting to withdraw 29 students, including Mr Kildey, from particular units. Rather than withdraw the students from units he withdrew them from the course. He explained how he made the wrong entries on the computer and explained where he made the error. He provided examples of this being done by other teachers and Head Teachers. Mr Greentree's evidence before the Commission was that this was not the way the entries should have been made. Mr Judd, who was Team Leader Plumbing at Mt Druitt campus, confirmed that the error was not uncommon. The matter had not been raised with Mr Browne prior to the investigation.

**[190]** While I agree with the investigator that in December 2020 Mr Browne caused the fees to be waived, I accept Mr Browne's explanation that it was done by mistake. As I accept his explanation, I also find that Mr Browne was not dishonest. And his conduct was not serious. Mr Browne did not act improperly; he made an honest mistake. He was working late at night to complete an end of semester task on instruction and on behalf of others whilst on his holidays. Mr Kildey also gave evidence that he was unaware of being withdrawn from the course and the waiver of fees. It appears the error was corrected as Mr Kildey has since completed the course.

**[191]** As to the conflict of interest, so far as it needs to be dealt with discretely, I have set out the terms of the Code of Conduct above. I take them into account. I disagree with TAFE's characterisation of this issue. Mr Browne may not have formally declared a possible conflict of interest to his supervisor but his relationship with Mr Kildey, such as it was, was known by his supervisor, Mr Wilton. Mr Wilton put in place measures to ensure Mr Browne did not directly supervise Mr Kildey. Mr Wilton did not consider there was a conflict of interest but put the measures in place as a matter of good business practice. I do not consider Mr Browne's failure to make the declaration misconduct.

**[192]** I also disagree with the findings that Mr Browne acted dishonestly, or with bias or prejudice in favour of his family members in breach of the ICAC Act. I have set out the provisions of the ICAC Act above. Nothing in the material suggested that Mr Browne acted dishonestly. His explanation was that his failure to declare his family relationship was based on an honest understanding that he was not required to. I find that his understanding was correct. When waiving the fees, he made a mistake. He was not dishonest. There was no suggestion that he was otherwise dishonest.

**[193]** As to the terms of the definition of corrupt in the ICAC Act the investigator referred to the dictionary definitions of dishonest and partial and described Mr Browne's conduct in not declaring his family relationships as involving dishonesty or bias or prejudice in favour of Mr Kildey. Mr Hawkins adopted those findings. I disagree. Mr Browne was not dishonest. Nor was his conduct otherwise contemplated by the definition of corruption in ss.8 and 9 of the ICAC Act. In any event, my view is the exclusion in s.9(c) would apply as there were no reasonable grounds for dismissing Mr Browne for his conduct.

[194] It follows, given that the reason for dismissing Mr Browne relies on the findings of the investigator, that I find that there was no valid reason for the dismissal. Mr Browne was not guilty of the misconduct alleged. He did not improperly employ Mr Kildey. He did not dishonestly waive his fees. He did not fail to declare a conflict of interest in breach of the Code of Conduct. The dismissal is thereby unjust in the sense described in *Byrne*. The reason is also not sound, defensible or well founded as described in *Selvachandran*.

[195] This factor weighs in favour of finding that the dismissal Mr Browne was harsh, unjust or unreasonable.

**Was the Applicant notified of the valid reason and given an opportunity to respond to any reason related to his capacity or conduct?**

Mr Browne was given an opportunity to respond to the allegations about his conduct through the Maddock's investigation and show cause processes. However, as I have found that the findings of the investigation, which became the reasons for dismissal, did not constitute a valid reason for dismissal, and following the Full Bench approach in *Read v Cordon Square Child Care Centre*,<sup>7</sup> the factors in s.387(b) and (c) are neutral considerations on whether the dismissal was harsh, unjust or unreasonable.

Some complaint was made by Mr Browne about the procedures followed in investigation and show cause processes. Those matters are dealt with below for the purposes of s.387(h).

**Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?**

[196] Mr Browne was represented through the investigation and show cause processes and provided written responses to the allegations. Accordingly, s.387(d) is a neutral factor on the question of whether the dismissal was harsh, unjust or unreasonable. The complaints made by Mr Browne about the procedures followed in the investigation and show cause processes are dealt with below for the purposes of s.387(h).

**Was the Applicant warned about unsatisfactory performance before the dismissal?**

[197] The dismissal was not for unsatisfactory performance. The evidence of Mr Wilton was that Mr Browne was devoted to his role at TAFE. He worked long hours to promote a good learning environment for students. Section 387(e) is a neutral factor on the question of whether the dismissal was harsh, unjust or unreasonable.

**To what degree would the size of the Respondent's enterprise/ absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?**

[198] TAFE is a large employer with dedicated human resource management expertise. Those matters had no impact on the procedures followed in effecting the dismissal. Sections 387(f) and (g) are neutral factors on the question of whether the dismissal was harsh, unjust or unreasonable.

### **What other matters are relevant?**

[199] The submissions filed by Mr Browne draw my attention to a number of matters associated with the process followed by TAFE in dismissing him. First, Mr Browne was removed from his duties without a risk assessment being conducted in accordance with the TAFE Guidelines for Management of Conduct and Performance. Second, the investigation took well in excess of 18 weeks allowed for such investigations in the Guidelines. Third, Mr Browne was not provided with 12 weekly updates on the investigation required by the Guidelines. Fourth, neither the investigator nor TAFE provided Mr Browne with a full account of the material relied upon by the investigator in making his findings. Fifth, Mr Browne suffered both mentally and emotionally as a consequence of the unfair treatment he received in breach of the guidelines.

[200] I regard these matters as relevant to my consideration of whether the dismissal was harsh, unjust or unreasonable.

[201] I agree that the manner in which the suspension occurred was contrary to the requirements of the Guidelines and unfair. I can see no reason for Mr Browne to be removed from the workplace. I also agree that the inordinate length of the investigation and show cause process was unfair. It was also contrary to TAFE's Guidelines. The explanation in the report about the delay is that it took time to gather the material and conduct the interviews. All of the material came from TAFE. All of the interviewees were TAFE employees. The matters being investigated were not complex. The facts were of relatively limited compass. It should not have taken 18 months for the investigator to gather that material and prepare the report. It was contrary to the Guidelines and unfair that Mr Browne was not provided with updates on the progress of the investigation. Similarly, it should not have taken 9 months for TAFE to finalise the show cause process. The delay appears to have been caused by TAFE resisting requests for the provision of material that should have been provided during the investigation. When material was provided it was heavily redacted. There were periods of months where correspondence went unanswered. I have already addressed TAFE's reliance on the PID Act in relation to Mr Kildey. The same reasoning applies to Mr Browne. The failure to provide him a full and unredacted copy of the material marshalled against him was unfair. These factors weigh in favour of a finding that the dismissal was harsh, unjust and unreasonable.

[202] The treatment of Mr Browne was also harsh in its consequences on Mr Browne's personal situation. He gave evidence that he sought medical treatment in relation to his mental and emotional state. He described the nature of his work including the pressure he was under and the long hours he worked to provide the best learning environment that he could for the many students he was responsible for. He described his commitment to TAFE over a 15 year career. He had an unblemished record with no prior complaints about his conduct, capacity or performance. He said that being stood down and then dismissed from the role he loved and thrived in had a significant detrimental effect on his health. I consider this factor weighs in favour of a finding that the dismissal was harsh, unjust and unreasonable.

### **Conclusion**

[203] After considering the matters in s387 and in particular the matters relevant to s387(a) and (h) I conclude that Mr Browne's dismissal was substantively and procedurally unfair. The lack of a valid reason alone rendered the dismissal unfair. Similarly, the procedures followed were enough to conclude the dismissal was unfair. I find that his dismissal was harsh, unjust and unreasonable.

**Was Kerr's dismissal harsh, unjust or unreasonable?**

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

[204] Ms Kerr's misconduct was said to be failing to declare a family relationship with Mr Kildey, Ms George and Mr Browne, allowing Mr Kildey to be employed when he was not competent or experienced or qualified, improperly influencing the engagement and extension of Ms George and Ms Browne's as contract staff, and providing a reference for Ms Browne. The termination letter referred to the findings of the investigator that the conduct amounted to failing to act with integrity by providing service that was honest and impartial, and failing to discharge her obligation to model professional behaviour. It also referred to the investigator's view that by failing to declare conflicts of interest Ms Kerr exercised her senior position to the benefit of family members. Her conduct in both regards was said to not meet the requirements of the Code of Conduct and lacked honesty or to displayed bias or prejudice in breach of the ICAC Act.

[205] Dealing first with the conduct associated with Mr Kildey's engagement. I have set out the circumstances of Mr Kildey's employment earlier. I do not repeat them. I disagree that Mr Kildey was employed improperly. Ms Kerr's involvement in Mr Kildey's employment was to assist him in preparing and gathering paperwork and details of qualifications for the purpose of having them submitted to Mr Browne. I do not consider this conduct as fitting the description of allowing Mr Kildey to be employed. I do not regard these actions as otherwise constituting misconduct. Nor do I regard there as having been a need for Ms Kerr to declare her relationship with Mr Kildey under the Code of Conduct. There was no evidence that Ms Kerr had any influence over Mr Kildey's recruitment or his ongoing employment. She did not nominate him for employment. She was some steps removed from supervising his work. Had circumstances arose where she may have been called upon to make a decision about Mr Kildey's employment, the policy would require her to consider those circumstances and, if a conflict arose, manage it. But there was no evidence that those circumstances arose.

[206] The conduct relating to Ms George and Ms Browne arises from the allegation that Ms Kerr inappropriately influenced the initial engagement and extension in time of the engagements of Ms George and Mr Browne without declaring a conflict of interest. There was also an allegation that Ms Kerr acted as referee for Ms George to secure temporary employment without declaring a conflict of interest. I note that these allegations were not the subject of the original complaint but arose from investigations about that complaint.

[207] The investigator found that the first of these matters was substantiated, referring to the steps taken by Ms Kerr during 2020. On 18 March 2020, Ms Kerr submitted a request to fill form for four EAS roles to be filled by contractors. She later pre-identified Ms George and Ms Browne as candidates for two of those roles. By doing so Ms Kerr, as the hiring manager

ensured that Ms George and Ms Browne were engaged. The investigator found that by submitting another request to fill form in May 2020 Ms Kerr ensured that Ms George and Ms Browne's engagements as contractors were extended. Ms George later secured temporary employment directly with TAFE in September 2020 in a process where Ms Kerr was not involved, having declared her interest. Ms George's temporary employment was extended by a request to fill form submitted by Ms Kerr in November 2020. Those factual matters were not disputed.

**[208]** No conflict of interest form was provided. Ms Kerr initially acknowledged that this was a mistake and explained that she did not do so due to her workload at the time. The work pressures that staff were experiencing at the time in TAFE Western Sydney Region were referred to in the evidence of Mr Wilton and others. The ASQA audit remediation process was ongoing, and the lock downs associated with the COVID pandemic were particularly strict in the region. Mr Cullen, who supervised Ms Kerr, gave evidence that Ms Kerr was under significant workload pressures. Ms Kerr describes the various additional roles she undertook during this period. There was some caviling with the detail about what roles Ms Kerr held, but I accept that Ms Kerr's workload was onerous and made more so by the ASQA audit and COVID response. She described working long hours including weekends. That evidence was not challenged. I accept her explanation and note that it was understandable that filling in the conflict of interest forms was overlooked.

**[209]** The last of the allegations was that Ms Kerr inappropriately acted as referee for Ms George when she secured temporary employment with TAFE. Ms Coventry told the investigator that she prepared a referee checklist report for Ms George while on a phone call with Ms Kerr. Ms Coventry's account was that the call arose due to Ms George identifying Ms Kerr as a referee on her application. In that conversation Ms Kerr endorsed Ms George for the role. Ms Coventry did not recall informing Ms Kerr that she was calling for the purpose of performing a reference check. Ms Kerr had no recollection of giving a reference for Ms George. Her recollection of the phone call was that Ms Coventry called because she was proposing to offer Ms George a role and asked about the work Ms George had performed. Ms Kerr did not consider the call to be a reference check. Her practice was to only provide written references. TAFE relies on the reference report filled out by Ms Coventry.

**[210]** Ms Kerr was cross examined on these events. She was adamant that she did not provide a reference check during that phone call. She insisted that her practice was to only provide references in writing. Ms Coventry's evidence was to the effect that Ms Kerr may not have been told that she was being asked to give a reference check and may well have understood the conversation to be a general discussion about Ms George albeit Ms Coventry's view was that the context of the call made it clear that that it was in the nature of a reference check. I find that Ms Kerr's evidence is to be believed. Ms Kerr was clear that she did not believe the call to be for the purpose of a reference check and believed Ms Coventry's call to be in the nature of enquiries about the work Ms George had performed for Ms Kerr as a contractor. I accept that evidence. It follows that I find Ms Kerr's conduct was not misconduct.

**[211]** That leaves the allegations that Ms Kerr failed to declare a conflict of interest in her dealings with Ms George and Ms Browne and had improper influence on their recruitment and the extension of their engagements as contractors. Ms Kerr did have influence in regard to those matters. Ms Kerr explained the circumstances. The engagement of the two women was caused

by a need to get urgent remediation work done and a shortage of available candidates to take up EAS roles. The extensions were for the same reasons. The engagements were not improper nor was the influence that Ms Kerr had in effecting them improper. They did not involve dishonesty on Ms Kerr's part.

[212] I agree that Ms Kerr acted contrary to the Code of Conduct by failing to make a declaration about a possible conflict of interest. My view is that the Code required employees to be conscience of the possibility that conflicts of interest may arise in their work. It requires employees to assess situations where a conflict may be present, to report them to supervisors, and to manage them.

[213] The proposal to engage Ms George and Ms Browne gave rise to possible conflicts of interest. Ms Kerr breached the Code in failing to provide a conflict of interest declaration in writing or otherwise. Ms Kerr appeared to accept this was the case in her initial responses to the allegations. She described her actions as a mistake. In later responses, especially those made to TAFE on her behalf, and in these proceedings, she denied that the code applied in the circumstances, there being some doubt about whether there was an adequate familial relationship between her and the two women to enliven a conflict. I find that Ms Kerr was correct in her initial reaction which showed that she understood that the Code did apply, and she should have declared the possible conflict. The Code does not simply apply to immediate family but also to relatives. In context, which includes a reference in the Code to conflicts arising in relations to friends, I read the word 'relative' broadly to encompass the relationships between Ms Kerr, Ms George and Ms Browne. The recruitment of a relative is a situation contemplated by the Code that may give rise to a conflict of interest.

[214] Ms Kerr's failure to declare a conflict of interest was contrary to the Code. It was misconduct.

[215] I find however that the misconduct arose in the unusual circumstances of the need for urgent assistance. In one sense, as suggested by Ms Kerr's submissions, Ms Kerr and TAFE's interests were not in conflict. Ms Kerr and TAFE's interests were to fill the EAS roles. The recruitment occurred at a challenging time due to the COVID lock downs. Finding staff was difficult. So much is evident from the fact that there were four roles available and only two were filled. Ms Kerr proposing Ms Jones and Ms Browne to fill the roles was in TAFE's interest. However, it was not in TAFE's interest that it occur without full transparency so conflict did exist.

[216] The fact that the roles were filled without a merit selection process and by persons related to the manager who proposed them for the work was contrary to TAFE's obligations as a public sector employer and against its policies and procedures. The exceptions in TAFE policies to recruitment by merit selection did apply but this did not take away the requirement to declare the conflict in filling the positions with relatives.

[217] Ms Kerr's misconduct however needs to be considered in context. And I find Ms Kerr's actions in recruiting the two women to be justified. She made a mistake in not filling in a form declaring the interest. Had she declared the interest before making the requests to fill then the policy would have been met. Had she not made the request, Ms George and Ms Browne would no doubt have applied and succeeded on merit as it appears there were no other candidates. I

base that conclusion on the fact that of the four positions available two went unfilled. Given the need for the EAS roles to be filled and the difficulties associated with recruitment the sensible course was to fill the roles with Ms George and Ms Browne. This could have been done by someone else making the request to fill or by simply allowing Ms George and Ms Browne apply for the roles independently. Either way the outcome would have been the same. The extension of the contracts as well as the extension of Ms George's temporary role can be considered the same way.

[218] Consequently, while I regard Ms Kerr's conduct to be misconduct, I do not consider it to be misconduct justifying dismissal. It was a mistake. Ms Kerr was not dishonest, she simply failed to make a record of the relationship and take steps to distance herself from the appointments.

[219] As the misconduct was not dishonest, I do not regard it as corrupt. I also disagree with the investigators findings that Ms Kerr acted with bias or prejudice in favour of her family members in breach of the ICAC Act. I have set out the provision of the ICAC Act earlier. Nothing in the material suggested that Ms Kerr acted with bias or prejudice. There were no other candidates who were affected by the decision and who could be said to be disadvantaged by her conduct. Her failure to declare her relationships was explained by the workload she was under.

[220] Ms Kerr's conduct did not fit the definition of corruption in ss.8 and 9 of the ICAC Act. In any event, my view is the exclusion in s.9(c) would apply as the conduct did not provide a reasonable ground for dismissal.

[221] It follows, given that the reason for dismissing Ms Kerr relies on the findings of the investigator including findings of dishonesty and corruption, that I find that there was no valid reason for the dismissal. I do not consider the dismissal to have been sound, defensible or well founded in the circumstances of the employment relationship. I understand those circumstances to include TAFE's obligations as a public sector employer to ensure perceived conflicts of interests are managed, but in the circumstances of Ms Kerr's explanation that the recruitment of Ms George and Ms Browne was important to remediate marks, the difficulties in recruiting staff in early 2020, and Ms Kerr's excessive workload leading her to overlook declaring the interests, Ms Kerr was not treated fairly.

[222] This factor weighs in favour of finding that the dismissal of Ms Kerr was harsh, unjust or unreasonable.

**Was the Applicant notified of the valid reason and given an opportunity to respond to any reason related to her capacity or conduct?**

[223] Ms Kerr was given an opportunity to respond to the allegations about her conduct through the Maddock's investigation and show cause processes. However, as I have found that the findings of the investigation, which became the reasons for dismissal, did not constitute a valid reason for dismissal, and following the Full Bench approach in *Read v Cordon Square Child Care Centre*<sup>8</sup> the factors in s.387(b) and (c) are neutral considerations on whether the dismissal was harsh, unjust or unreasonable.

[224] Some complaint was made by Ms Kerr about the procedures followed associated with the investigation and show cause processes. Those matters are dealt with below for the purposes of s.387(h).

**Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?**

[225] Ms Kerr was represented through the investigation and show cause processes and provided written responses to the allegations. Accordingly, s.387(d) is a neutral factor on the question of whether the dismissal was harsh, unjust or unreasonable. The complaints made by Ms Kerr about the procedures followed in the investigation and show cause processes are dealt with below for the purposes of s.387(h).

**Was the Applicant warned about unsatisfactory performance before the dismissal?**

[226] The dismissal was not for unsatisfactory performance. The evidence was that Ms Kerr performed her role well. She worked long hours and was described as being devoted to TAFE. Section 387(e) is a neutral factor on the question of whether the dismissal was harsh, unjust or unreasonable.

**To what degree would the size of the Respondent's enterprise/ absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?**

[227] TAFE is a large employer with dedicated human resource management expertise. Those matters had no impact on the procedures followed in effecting the dismissal. Sections 387(f) and (g) are neutral factors on the question of whether the dismissal was harsh, unjust or unreasonable.

**What other matters are relevant?**

[228] The submissions filed by Mr Kerr draw my attention to the same matters raised in Mr Browne's case. First, Ms Kerr was removed from her duties without a risk assessment being conducted in accordance with the TAFE Guidelines. Second, the investigation took well in excess of 18 weeks allowed for such investigations in the Guidelines. Third, Ms Kerr was not provided with the 12 weekly updates on the investigation required by the Guidelines. Fourth, neither the investigator nor TAFE provided Ms Kerr with a full account of the material relied upon by the investigator in making his findings. Fifth, Ms Kerr suffered both mentally and emotionally as a consequence of the unfair treatment she received.

[229] As with Mr Browne's case, I regard these matters as relevant to my consideration of whether the dismissal was harsh, unjust or unreasonable.

[230] As to the matters that go to the procedural fairness afforded by TAFE, I agree that the manner in which the suspension occurred was contrary to the requirements of the Guidelines and unfair. I can see no reason for Ms Kerr to be removed from the workplace while the investigation took place. I also agree that the inordinate length of the investigation and show cause processes was unfair. It was also contrary to the Guidelines. For the reasons already

canvassed it should not have taken 18 months for the investigator to gather the material and prepare the report. It was contrary to the Guidelines and unfair that Ms Kerr was not provided with updates on the progress of the investigation. Similarly, it should not have taken 9 months for TAFE to finalise the show cause process. I have already addressed TAFE's reliance on the PID Act in relation to Mr Browne and Kildey. The same reasoning applies to Ms Kerr. The failure to provide her a full and unredacted copy of the material marshalled against her was unfair. These factors weigh in favour of a finding that the dismissal was harsh, unjust and unreasonable.

[231] The treatment of Ms Kerr was harsh. She gave evidence that despite her senior position and 32 years' service she was isolated from the moment she was suspended. She had some contact from Mr Cullen following her suspension but after he resigned in October 2021, she was not contacted by anyone at TAFE. Ms Kerr described her experience supporting staff who were under investigation in the past, including regular contact through phone calls and text messages. She was not afforded the same support and described the lack of support she received as unimaginable. I find that the lack of support offered by TAFE was harsh.

### **Conclusion**

[232] After considering the matters in s387 and in particular the matters relevant to s387(a) and (h) I conclude that Ms Kerr's dismissal was substantively and procedurally unfair. The lack of a valid reason alone supports that finding. The procedural matters alone also support that finding. I find that her dismissal was harsh, unjust and unreasonable.

### **Remedy**

[233] In considering an appropriate remedy in a case of unfair dismissal, regard must be had to the legislative object set out in s.381 of the FW Act. This includes an emphasis on the remedy of reinstatement<sup>9</sup> and on ensuring that a "fair go all round" is accorded to both the employer and employee concerned.<sup>10</sup>

[234] The Applicants seek reinstatement to their previous positions. TAFE opposes reinstatement. The basis of the opposition is TAFE's contention that due to their conduct there has been a loss of trust and confidence in the Applicants.

[235] A Full Bench in *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, identified the following propositions relevant to the impact of a loss of trust and confidence on the appropriateness of an order for reinstatement:

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

- *An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.*
- *The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.*
- *The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.*"<sup>11</sup>

[236] The Full Bench concluded that, "[u]ltimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party."<sup>12</sup>

[237] Mr Hawkins gave evidence about the loss of trust and confidence in the Applicants. The basis of his view that the employment relationship was beyond repair was the nature of the conduct as found by the investigator. The findings led him to believe that he had no real choice but to dismiss them underpins. His view was that based on those findings he could not have any confidence in the Applicants' ability to serve faithfully. He emphasised that he regarded the actions of the Applicants as lacking honesty. He was concerned that Ms Kerr's senior position required her to show leadership to 10 direct reports and over 100 employees indirectly reporting to her. Similarly, Mr Browne as a head teacher held a leadership role. Ms Kerr and Mr Browne were also required to work autonomously and without close supervision. Mr Hawkins was concerned that Mr Kildey was not qualified to teach in all subjects. During cross examination he confirmed that there was teaching available for Mr Kildey to perform. He also confirmed that Ms Kerr and Mr Browne's positions were currently filled on an interim basis.

[238] The concessions made during the cross examination of the two most senior witnesses for TAFE, Mr Hawkins and Mr Canavan, leads me to conclude that there would be little if any reluctance by TAFE to shift to a view the employees were not guilty of serious wrongdoing or misconduct justifying dismissal, and so there is no sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.

[239] Given the findings I have made, and on observing Mr Hawkins in the witness box, I am of the view that the employment relationship can be restored in all three cases. Ms Kerr's misconduct was not such that she can longer be trusted in her senior role. She made a mistake at a time when the organisation was under considerable pressure, and she was faced with an extraordinary workload. Those circumstances will hopefully not arise again. Mr Browne's conduct was not dishonest. Mr Kildey has since being dismissed gained further qualifications. Mr Hawkins was willing to accept in the witness box that the conduct may not have been as serious as the conclusions in the report made out.

[240] I do not consider that the requisite level of trust and confidence cannot be restored to make the relationship viable and productive. I believe it is appropriate and consistent with the

objects of the FW Act that I reinstate each of the applicants. I am satisfied that I should make an order reappointing each of the Applicants to the position in which they were employed immediately before the dismissal within fourteen days of the date of this decision, pursuant to s.391(1)(a). An order to that effect will accompany this decision.

[241] I will also make an order to maintain the continuity of the employment and the period of continuous service of each of the Applicants with the employer pursuant to s.391(2).

***Reinstatement - is it appropriate to make an order to restore lost pay?***

[242] Section 391(3) of the FW Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order that the Commission considers appropriate to cause the employer to pay to the Applicant an amount for the remuneration lost, or likely to have been lost, by the Applicant because of the dismissal.

[243] Section 391(4) of the FW Act provides that, in determining an amount for the purposes of such an order, the Commission must take into account:

(a) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the Applicant during the period between the making of the order for reinstatement and the actual reinstatement.

[244] An order to restore lost pay does not necessarily follow an order for reinstatement. The Commission may only make an order if it considers it appropriate to do so and only make an order that the Commission considers appropriate.<sup>13</sup> Where an employee has engaged in misconduct, the Commission may refuse to make any order to restore lost pay.<sup>14</sup>

[245] I consider it to be appropriate in the circumstances to make an order to restore lost pay. Such amount should take account of each of the matters referred to in s.391(4). The Applicants have taken reasonable steps to mitigate their loss. Ms Kerr obtained employment. Her earnings should be taken into account in accordance with s.391(4)(a). Mr Kildey has worked in his own business. His earnings should be taken into account in accordance with s.391(4)(a). I am not aware of the extent of those earnings and any earnings of Mr Browne since the dismissal. I do not consider it appropriate to reduce the amounts otherwise payable.

[246] The parties are ordered to confer and provide agreed orders as to the amount of lost pay within fourteen days from the date of this decision. In the absence of agreement, brief written submissions should be provided to enable me to determine the appropriate amount to be included in any order.

[247] Orders and directions reflecting my decision in each matter will issue separately.



DEPUTY PRESIDENT

*Appearances:*

Applicant (Jason Kildey):

The Honourable *A Searle*, Counsel

Instructed by:

Mr *C Fesel*, Senior Solicitor

Applicants (Norman Browne and Sharon Kerr):

Mr *D O'Dowd*, Counsel

Instructed by:

Mr *M Gillis*, Partner

Respondent:

Mr *B Lim*, Counsel

Instructed by

Mr *J White*, Senior Associate

*Hearing details:*

7 day Hearing.

In person.

Sydney.

30 October 2023.

31 October 2023.

1 November 2023.

2 November 2023.

3 November 2023

10 November 2023.

13 November 2023.

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<sup>1</sup> See *Bronze Hospitality Pty Ltd v Janell Hansson* [2019] FWCFB 1099 adopting *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 369 at [65]; cited in *Ponce v DJT Staff Management Services Pty Ltd t/a Daly's Traffic* [2010] FWA 2078.

<sup>2</sup> *Suncoast Scaffold Pty Ltd* [2023] FWCFB 105 at [17] cited in *UFU v FRV* [2023] FWCFB 180.

<sup>3</sup> *Edwards v Justice Giudice* [1999] FCA 1836, [6] and [7].

<sup>4</sup> *King v Freshmore (Vic) Pty Ltd Print S4213* (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

<sup>5</sup> *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49]; see also *Bartlett v. Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429 at [19].

<sup>6</sup> See *Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033

<sup>7</sup> *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49] see also *Bartlett v. Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429 at [19].

<sup>8</sup> *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49] see also *Bartlett v. Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429 at [19].

<sup>9</sup> s 381(1)(c).

<sup>10</sup> *BlueScope Steel Limited v Sirijovski* [2014] FWCFB 2593 at [73].

<sup>11</sup> At [27].

<sup>12</sup> At [28].

<sup>13</sup> *Aurora Energy Pty Ltd v Davison* PR902108 (AIRCFB, Watson SDP, Williams SDP, Holmes C, 8 March 2001), [25].

<sup>14</sup> See, eg, *Regional Express Holdings Ltd v Richards* [2010] FWAFB 8753, [29].