



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Jack Gibson

v

Australian Capital Territory (Represented by ACT Education Directorate)
(U2024/10441)

DEPUTY PRESIDENT DEAN

CANBERRA, 16 JANUARY 2026

Application for an unfair dismissal remedy – valid reason but harsh - dismissal unfair – compensation ordered.

[1] Mr Jack Gibson (Applicant) has made an application for a remedy pursuant to s.394 of the *Fair Work Act 2009* alleging that he was unfairly dismissed from his employment as a teacher with Australian Capital Territory as represented by ACT Education Directorate (Respondent).

[2] The application was heard on 24 February, 14 and 15 May 2025. Both parties were granted permission to be represented pursuant to s.596 of the Act. Ms A Costin of Counsel appeared for the Applicant and Ms B Gallifuoco of Counsel appeared for the Respondent. Closing submissions were made in writing, with that process concluding on 20 June 2025.

[3] For the reasons set out below, I find that the Applicant's dismissal was unfair, and I have decided in the circumstances that compensation should be granted.

Confidentiality order

[4] I made an order prohibiting the publication of the names of students referred to in the evidence unless those names are replaced with pseudonyms.

Background

[5] The Applicant commenced employment with the Respondent in January 2023 as a teacher. He had previously held teaching positions in private schools in the ACT.

[6] Between August 2023 and March 2024, the Applicant worked as a teacher in the United Arab Emirates while on unpaid leave from his position with the Respondent.

[7] On 21 February 2024 he was provided with a notice of seven allegations made against him by the Respondent (the Allegations Letter). At that time, he was making arrangements to

return to Australia and to his employment with the Respondent. The Allegations Letter was in the following terms:

“Dear Jack

Notice of Preliminary Assessment

I am writing to advise that allegations have been raised in relation to inappropriate behaviour and reportable conduct by you and as a result a preliminary assessment process will be undertaken. The process will be conducted in accordance with *Section G2 Preliminary Assessment* of the *ACT Public Sector Education Directorate (Teaching Staff) Enterprise Agreement 2023-2026* (the Agreement).

It is important to understand that in providing you this letter no judgement has been made. The purpose of the preliminary assessment is to inform you of the allegations and gather further information, including a response from you. The assessment will assist myself as the delegate to determine whether the matter requires further action or not. Clause G2.4 of the Agreement identifies a number of potential outcomes from the preliminary assessment process.

It is alleged that;

1. On 23 October 2023, you initiated contact with [Student 3], student from Erindale College via social media app Instagram, instant messaging and engaged in ongoing conversations outside of your role as a classroom teacher.
2. During October 2023, you participated in a group chat via Instagram with students from Erindale College, [Student 8], [Student 9], [Student 10] and [Student 11] engaging in ongoing conversations outside of your role as a classroom teacher.
3. From 23 February 2020 through to 02 October 2023, you engaged in conversations via social media app Instagram with student, [Student 2] from Erindale College outside of your role as a classroom teacher.
4. Sometime in mid-2023, you attended the strength & sports recovery centre in Fyshwick with students, [Student 10], [Student 9] and [Student 8] from Erindale College, taking a photo of them in an ice bath using the app BeReal which showed you were in the room with them.
5. On 26 May 2023, you drove students from Erindale College, [Student 11], [Student 12], [Student 10] and Student 9] in your car to Queanbeyan to watch student [Student 8] play AFL. This was not a school organised event and was outside of your role as a classroom teacher.
6. In mid-2023, you drove students from Erindale College, [Student 10] and [Student 9] to and from netball training in your car. This was not a school organised team and was outside your role as classroom teacher.
7. Prior to your commencement of leave without pay, you would sit close to student, [Student 11] at lunch and when she moved over, you would move closer to her. You went through [Student 11]’s school bag without her permission and when she asked you to stop you laughed.

Please note, should any further information become known through the preliminary assessment process, which may be considered an allegation of reportable conduct or inappropriate behaviour, you will be notified in writing and provided with an opportunity to respond.

Opportunity to Respond

You are invited to provide a response to the above allegation and any other relevant information. You may provide a response in writing to me and [email address] by close of business 28 February 2024.

Alternatively, you can provide your response in an MS Teams meeting with me and Karen Vitler, Assistant Director People Cases. You are welcome to bring a support person or union representative to attend this meeting with you. If you are unable to attend this meeting, please advise of a reasonable alternate date and time.

The meeting details are as follows:

Time: 12:30pm (AEST)

Date: 28 February 2024

Location: Microsoft Teams

Please advise me of your preferred method of response by close of business 26 February 2024.

Confidentiality

This is a confidential matter, please do not discuss any aspects of the matter with anyone other than your support person and/or industrial representative, unless given permission to do so by me. A breach of this direction may constitute misconduct and result in disciplinary action.

Reportable Conduct

The Directorate is required by law to notify the ACT Ombudsman of any reportable conduct allegation. Due to the nature of the allegation a report will be made to their office in accordance with the requirements of the ACT Reportable Conduct Scheme. The allegations will be considered in the category of *Misconduct of a sexual nature - crossing professional boundaries*.

It is important to understand that it is an allegations-based scheme and is not an indication that any judgement has been made. If you require any further information about the scheme, you can access the ACT Ombudsman's website at www.ombudsman.act.gov.au/accountability-and-oversight/reportable-conduct/reportable-conduct-resource-kit [hyperlink removed]

Employee Assistance Program and Support

I would like to remind you support is available via the Employee Assistance Program (EAP). The EAP is available to provide confidential and professional counselling to you and members of your family. These services can be sought by contacting Converge International (Converge) on [telephone number] (within Australia) or [telephone number] outside Australia.

Alternatively, you can contact Next Step, a free and confidential service run by Beyond Blue on [telephone number].

If you have any queries, please contact me on [telephone number] or [email address]. Alternatively, you can contact Karen Vitler, Assistant Director People Cases on [telephone number] or [email address].

Yours sincerely

Katherine Stretton
Principal
Erindale College
21 February 2024”

[8] The Applicant provided a reply on 27 February 2024. In relation to the first allegation, he said he did not initiate contact with the student but had responded to her after she had sent him an email. In terms of the second allegation, he explained that the group chat had been created by the students and its initial purpose was to ensure permission was provided in relation to attendance at a sports game. He said he removed himself from the group chat after the “conversation detoured” to other topics. In relation to the third allegation, which referenced contact with a student prior to his employment with the Respondent, the Applicant explained that the contact had been through sporting teams and through his friendship with her parents. In terms of the fourth allegation, the Applicant explained he ran an annual program called “Girls in Sport” and the named students were part of this program. Further, he had obtained parental consent for their participation in the program. As to the photo, the girls were wearing sports attire while in the ice bath and he and other staff were in the area to supervise the girls. As to allegation five, he said he did drive the named students to the sports game to support another student who was having a difficult time. He had parental permission from two of the four students’ parents and had provided his car details and phone number to the other two students to provide to their parents. He transported them to the game only and they went home with other parents. In relation to allegation six, the Applicant explained that he had transported the students to the sports game in his capacity as a member and coach of the Tuggeranong Netball Association. The parents had provided permission for him to do so and they had expressed how grateful they were to him for providing transport. The Applicant denied the seventh allegation. As a general comment, he said that:

“My participation in sport as a coach and mentor outside of the school system, while being employed as a teacher, appears to have been perceived by some as inappropriate. While I can categorically state that I have at no time acted inappropriately with any student, and that all actions outside the College system have occurred with the full knowledge and approval of a parent or guardian, with hindsight, I can see that in my endeavours to provide opportunities and support, I have potentially placed myself at risk

of creating false and unfavourable perceptions. I will ensure that in my return to the College, boundaries are set and are clearly in place to ensure that such perceptions do not occur in the future.”

[9] On 4 March 2024 the Respondent provided the Applicant with a letter stating that a preliminary assessment had been undertaken and a decision had been made to refer the matter to the ACT Public Sector Standard Commissioner (PSSC) for investigation.

[10] On 29 May 2024 the Applicant provided a statement in relation to the allegations (the Admissions Statement) which had been prepared by one of the investigators from the Professional Standards Unit (PSU). The Admissions Statement is as follows:

- “1. This statement is true and accurate to the best of my knowledge and belief. I acknowledge that the wilful provision of false information may constitute misconduct under clause G4.5 of the *Education directorate Teaching Staff Enterprise agreement 2023-2026* and sections 9(1)(d) and 9(2)(a) of the *ACT Public Sector Management Act 1994*.
2. I acknowledge and accept that this statement may be disclosed to Public Sector Standards Commissioner as well as to other persons, where relevant to the investigation, an appeal or other associated processes.
3. On 2 April 2024, I received a letter from the Professional Standards Unit (PSU) which detailed the allegations of misconduct against me, and which included the option to provide an admission statement.
4. Pursuant to that letter and consistent with clauses GS.5 and GS.6 of the *Education Directorate Teaching Staff Enterprise agreement 2023-2026*, I voluntarily agree to provide the Delegate with this admission statement.
5. In relation to **Allegation 1**, On 23 October 2023, Mr Gibson initiated contact with [Student 3], student from Erindale College via social media app Instagram, instant messaging and engaged in ongoing conversations outside of their role as a classroom teacher.
6. I agree that the alleged facts occurred, as set out below.
7. In relation to allegation one, I did initiate contact with [Student 3] on the 23rd via Instagram. This was after [Student 3] initiated contact with me previous to that via my Gmail and I didn't hear a response from [Student 3], so I initiated contact via Instagram.

With that allegation, I acknowledge my role within it and accept full responsibility. The content around that conversation was supporting her through a relationship break-up and a friendship that was broken and her general wellbeing.

At the time of initiating contact via Instagram I was on leave without pay and was overseas in Dubai. I was still employed by the ACT Education Directorate, and this

was inappropriate behaviour. Its outside my role as a classroom teacher, a clear crossing of professional boundaries and I should have contacted Erindale College to inform them of my concerns around [Student 3]'s wellbeing.

My understanding of communicating with students over telecommunications or social media is that it should not be done at all. I gain this understanding from the Code of conduct for teachers, also our enterprise agreement, but also the policy and procedures the executive set as a school.

I did not comply with those requirements in this instance. I understand now I that my reasoning was, while I was on leave without pay, overseas, I made a very poor error in judgement. I did not provide my personal Gmail account details to any students directly however did provide it to parents of my students and offered my ongoing support whilst I was overseas should the students require it.

8. I acknowledge that my behaviour as set out above amounts to misconduct as defined by clause G4.5 of the *Education Directorate Teaching Staff Enterprise agreement 2023-2026* and section 9 of the Public Sector Management Act, specifically subsection 9(2)(a), which states:

- (2) A public servant must not-
 - (a) behave in a way that-
 - (i) is inconsistent with the public sector values; or
 - (ii) undermines the integrity and reputation of the service; or

9. In relation to **Allegation 2**, During October 2023, Mr Gibson participated in a group chat via Instagram with students from Erindale College, [Student 8], [Student 9], [Student 10] and [Student 11], engaging in ongoing conversations outside of their role as a classroom teacher.

10. I agree that the alleged facts occurred, as set out below.

11. I acknowledge my participation in this group chat during October 2023. This group chat was initially created to arrange transport which directly links to allegation five, it was arranged to organise transport to support [Student 8] for her football game. It was created with the intent to obtain parental permission.

It was done to support [Student 8] in what was a challenging time for her, however I completely acknowledge that it's a breach of the code of conduct and crosses professional boundaries. During this time in October 2023, I was on leave without pay, from the directorate, however I made the choice to participate in this group chat while I was overseas.

When the conversation deviated from its purpose, I made the decision to remove myself, however, I admit and acknowledge fully my participation in this group chat and I understand that its outside my role as class room teacher. I created the chat group to obtain parental permission.

I understand that I shouldn't communicate with students via telecommunications or social media. It was a very poor error in judgment and obviously looking at legislation and the code of conduct it's a complete crossing of professional boundaries and I take full responsibility for what has happened.

The intent was to do something in good will however it's a poor error in judgement and against the code of conduct.

12. I acknowledge that my behaviour as set out above amounts to misconduct as defined by clause G4.5 of the *Education Directorate Teaching Staff Enterprise agreement 2023-2026* and section 9 of the Public Sector Management Act, specifically subsection 9 (2)(a), which states:

- (2) A public servant must not-
 - (a) behave in a way that-
 - (i) is inconsistent with the public sector values; or
 - (ii) undermines the integrity and reputation of the service; or

13. In relation to **Allegation 3**, On 02 October 2023, Mr Gibson engaged in conversations via Social Media App, Instagram with student, [Student 2] from Erindale College outside of their role as a classroom teacher.

14. I agree that the alleged facts occurred, as set out below.

15. On the 2nd of October 2023, while on leave without pay and while overseas, I contacted [Student 2] in relation to a touch football tournament, she was at the time a student of Erindale College and I was still employed by the ACT Education Directorate. Contacting [Student 2] during this time was a clear breach of the code of conduct and crosses professional boundaries. I admit to that allegation on that particular date, and I can acknowledge that.

By our code of conduct that should not be done at all. While on leave without pay, my reason of contact was because of the familiarity in the relationship of myself and [Student 2] over numerous years, as I've known [Student 2] since she was 12-13 years old. I touched base with her while overseas, however, it was a poor decision in fact of the student teacher relationship at Erindale College and a clear breach of the code of conduct.

16. I acknowledge that my behaviour as set out above amounts to misconduct as defined by clause G4.5 of the *Education Directorate Teaching Staff Enterprise agreement 2023-2026* and section 9 of the Public Sector Management Act, specifically subsection 9(2)(a), which states:

- (2) A public servant must not-
 - (a) behave in a way that-
 - (i) is inconsistent with the public sector values; or
 - (ii) undermines the integrity and reputation of the service; or

17. In relation to **Allegation 4**, Sometime in Mid-2023 Mr Gibson attended the strength and sports recovery centre in Fyshwick with students [Student 10], [Student 9], and [Student 8] from Erin dale College, Taking a photo of them in an ice bath using the app 'BeReal' which showed Mr Gibson in was in the room with them.

18. I agree that the alleged facts occurred, as set out below.

19. With allegation four, [Student 10], [Student 9], [Student 8] and [Student 11] were part of program called 'girls in sport, which was a private program that I run outside of teaching as a coach. It was not declared with Erindale College or the Directorate. I admit to taking this photo of the student using the 'BeReal' application which clearly shows me in the photo with the girls. The girls were in the Ice Bath, and I was near the ice bath and not inside it with the girls.

The ice baths are part of the recovery centre in reset which was at the time supervised by myself and also a female staff member of Reset. The girls [Student 10], [Student 9] and [Student 8] had parent permission, and [Student 11] was involved and came with [Student 8] to the centre with assumed parent permission as well. The girls were encouraged to take photographs to promote the business however that shouldn't have involved me in those photos.

Being involved in this photo and it being posted on social media without my knowledge is a clear crossing of professional boundaries and breaches the code of conduct.

Looking at it, I should have declared my private run program to Erindale College and outline that the girls from the college were participating. I admit to the allegation. I don't recall who's phone the photo was taken on. The girls said to take a photo, which like I said, I encouraged to promote the business, however obviously when that photo was taken it took a photo of me as well. I worked out what the application was. To my knowledge I wasn't aware that that photo was actually posted but it was to the 'BeReal' app.

Parental permission was obtained from [Student 8] and [Student 11] turning up together. [Student 10], [Student 9] and [Student 8] had informed me of permission prior. [Student 8]'s parents said that she was coming, and [Student 8] had told me that [Student 11] was coming along, so the three girls had permission from their parents. I assumed that [Student 11] had permission from her parents. [Student 10], [Student 9] and [Student 8] all had written or verbal permission.

There were emails sent out to the girls. [Student 10], [Student 9] and [Student 8] were all sent permission notes for that program. But as I said it's irrelevant the problem is the photo and the breach of code of conduct from that.

By the code of conduct I should have declared that program to Erindale College and the Directorate. I was running a private run program called 'Girls in Sport' which provided opportunities for young women to participate in Gym sessions, recovery

sessions and additional training as well, but that should have been declared as an outside run activity by me.

I have run programs like this in the past and haven't declared them as run by me as private run programs in other employments and as I said, a poor lack of judgement, looking at that and looking at the code of conduct it should have been declared as a program but if I answer that same question again with the photo, it was just a very poor lack of judgment from myself and I should have understood the consequences of that and the perceptions around that photo.

Again, I am unsure if I reviewed [sic] a written permission from [Student 11] because [Student 11] came with [Student 8] on that particular day but [Student 10], [Student 9] and [Student 8] all had written or verbal permission. I sent out information and details about that to which the parents responded, I'd have to go back through some of my emails to find the responses. This is done through my personal email, it's all outside of Erindale College it's a privately run program I have run for years. Each year it changes as to who's involved in that program, but I offer to around anywhere for six to ten girls depending on funding from sponsorship and things like that but its an outside of work program.

However, I understand that looking at the code of conduct and the enterprise agreement, any activities outside of school with students from the college needed to be declared.

20. I acknowledge that my behaviour as set out above amounts to misconduct as defined by clause G4.5 of the *Education Directorate Teaching Staff Enterprise agreement 2023-2026* and section 9 of the Public Sector Management Act, specifically subsection 9 (2)(a), which states:

- (2) A public servant must not-
 - (a) behave in a way that-
 - (i) is inconsistent with the public sector values; or
 - (ii) undermines the integrity and reputation of the service; or

21. In relation to **Allegation 5**, On May 26 2023, Mr Gibson drove student from Erindale College, [Student 11], [Student 12], [Student 10] and [Student 9] in their car to Queanbeyan to watch student (sic).

22. I agree that the alleged facts occurred, as set out below.

23. I'd like to refer to allegation two again because both of these are obviously linked so the participation was to organise that for [Student 8]. All of the girls except [Student 12] had verbal permission from their parents, it wasn't organised, it wasn't written permission or anything like that it was verbal permission from those parents to them (the students).

I had verbal permission from the parents of [Student 10] and obviously [Student 9] because they've been transported by me in my vehicle before as we will see in the

next allegation as well, however, it wasn't declared by me as an event and its not something that is in my role as a classroom teacher and I understand that it's a break in the code of conduct and no students should be allowed in a teachers vehicle unless there is permission obtained, especially by the College. I am admitting to the inappropriateness of it.

As I have said repeatedly, all of these allegations are a very very poor error in judgement and I was trying to do something in good will and jest, but not following the right procedures and protocols around it. This was not okay.

This was on a Friday evening, going back to allegation two, [Student 8] was experiencing a tough time and we organised to go out there and support her and I tried to organise the transport the girls out to Queanbeyan to watch [Student 8] play.

But again, I just want stress that it's a clear break of the code of conduct.

24. I acknowledge that my behaviour as set out above amounts to misconduct as defined by clause G4.S of the *Education Directorate Teaching Staff Enterprise agreement 2023-2026* and section 9 of the Public Sector Management Act, specifically subsection 9(2)(a), which states:

- (2) A public servant must not-
 - (a) behave in a way that-
 - (i) is inconsistent with the public sector values; or
 - (ii) undermines the integrity and reputation of the service; or

25. In relation to **Allegation 6**, In mid-2023, Mr Gibson drove students from Erindale College, [Student 10] and [Student 9] to and from netball training in their car. This was not a school organised team and was outside their role as a classroom teacher.

26. I agree that the alleged facts occurred, as set out below.

27. So, myself, [Student 10] and [Student 9] are a part of the Tuggeranong Netball Association where I am a coach for multiple age levels. I do have approval from their parents and would take them to and from training, sometimes from the college as well, this was also known to the association.

However, again looking through the code of conduct, any transport of students as well should have been declared with Erindale College and with ACT Education Directorate. As it was not it is a breach of the code, and it is crossing professional boundaries.

My understanding is now that my role as a teacher and my role as a coach has become blurred and I needed to understand where I was and where I am at a certain time, and that was as a classroom teacher, and as a classroom teacher that particular event and all of these allegations, some of my decisions should have been mentioned or declared to Erindale College and the ACT Education Directorate.

28. I acknowledge that my behaviour as set out above amounts to misconduct as defined by clause G4.5 of the *Education Directorate Teaching Staff Enterprise agreement 2023-2026* and section 9 of the Public Sector Management Act, specifically subsection 9(2)(a), which states:

- (2) A public servant must not-
 - (a) behave in a way that-
 - (i) is inconsistent with the public sector values; or
 - (ii) undermines the integrity and reputation of the service; or

29. I agree that there is no need for an investigation and understand that the Delegate will now decide the appropriate disciplinary action to be taken pursuant to clause G 4.6 of the Enterprise Agreement.

30. I agree that I have received, or have had the opportunity to obtain, advice in connection with the preparation and signing of this admission statement, whether from an independent legal advisor or employee representative or union representative. I have read it in its entirety, I understand its contents and I am signing it freely and voluntarily, without duress or undue influence from any party.”

[11] As is clear, the Applicant admitted the conduct, which he acknowledged amounted to misconduct, in relation to the first six allegations. However during the hearing he said he was unaware of the need to provide a comprehensive response which was then provided as part of the evidence in this application.

[12] On 29 July 2024 the Respondent sent the Applicant a letter in the following terms:

“Dear Mr Gibson

Proposed Sanction following an Admission Statement process

On 4 March 2024, you were provided with the outcome of a preliminary assessment into allegations of inappropriate behaviour and reportable conduct by you. You were advised the matter would be referred to the ACT Public Sector Standards Commissioner (PSSC) for investigation in accordance with Section G of the *ACT Public Sector Education Directorate (Teaching Staff) Enterprise Agreement 2023 - 2026* (the Agreement).

Pursuant to clause GS.5 of the Agreement the PSSC may determine that no investigation is necessary where the employee admits to the alleged misconduct and the employee agrees that there is no need for investigation. For this to occur, the employee must fully understand the misconduct they are admitting to and make an Admission Statement. On 29 May 2024, you voluntarily provided an Admission Statement to the Professional Standards Unit (PSU) Investigator (Attachment A). On 2 July 2024, the PSSC accepted the Admission Statement provided by you and agreed that no investigation was necessary.

Within the Admission Statement you agreed to engaging in the following allegations;

1. On 23 October 2023, you initiated contact with [Student 3], student from Erindale College via social media app Instagram, instant messaging and engaged in ongoing conversations outside of your role as a classroom teacher.
2. During October 2023, you participated in a group chat via Instagram with students from Erindale College, [Student 8], [Student 9], [Student 10] and [Student 11] engaging in ongoing conversations outside of your role as a classroom teacher.
3. From 23 February 2020 through to 2 October 2023, you engaged in conversations via social media app Instagram with student, [Student 2] from Erindale College outside of your role as a classroom teacher.
4. Sometime in mid-2023, you attended the Strength & Sports Recovery Centre in Fyshwick with students, [Student 10], [Student 9] and [Student 8] from Erindale College, taking a photo of them in an ice bath using the app BeReal which showed you were in the room with them.
5. On 26 May 2023, you drove students from Erindale College, [Student 11], [Student 12], [Student 10] and [Student 9] in your car to Queanbeyan to watch student [Student 8] play AFL. This was not a school organised event and was outside of your role as a classroom teacher.
6. In mid-2023, you drove students from Erindale College, [Student 10] and [Student 9] to and from netball training in your car. This was not a school organised team and was outside of your role as a classroom teacher.

As part of the admission statement process you agreed there was no need for an investigation, you admitted to the allegations of misconduct, and you understood that your behaviour was in breach of section 9 of the *Public Sector Management Act 1994*, including but not limited to:

- (2) *A public servant must not-*
 - a. *behave in a way that-*
 - (i) *is inconsistent with the public sector values; or*
 - (ii) *undermines the integrity and reputation of the service;*

Therefore, consistent with the Admission Statement I agree that the behaviour in Allegations 1 through 6 constitute misconduct in accordance with the Agreement.

Clause GS.6 provides that where an employee makes an admission in accordance with subclause GS.5, the Head of Service may proceed to determine the appropriate disciplinary action/sanction in accordance with clause G9.

Proposed sanction

As the delegate for the Head of Service I have carefully considered all relevant information including the preliminary assessment, your admission statement, the nature

and seriousness of the misconduct, the degree of relevance to your duties, the circumstances of the misconduct, any mitigating factors including any full admission of guilt and your previous employment history and general conduct. Taking these factors into consideration, I propose the following sanction in accordance with subclause G9.2.5 of the Agreement:

- **Termination of employment**

I consider the proposed sanction to be appropriate and proportionate to the degree of misconduct. The reasons for my decision are outlined in Attachment B.

Reportable conduct

During the preliminary assessment you were advised that this matter constituted allegations of reportable conduct and would be notified to the ACT Ombudsman in accordance with the Reportable Conduct Scheme. As delegate, I am required to make a finding of reportable conduct based on all available information to me.

I have considered all evidence, and my proposed reportable conduct determination is that Allegations 1 through 6 are sustained in the category of *misconduct of a sexual nature - crossing professional boundaries*.

The ACT Ombudsman's *Practice Guide No. 2* provides;

Crossing professional boundaries, includes behaviour that involves an inappropriate and overly personal or intimate relationship with, conduct towards or focus on a child or class of children. Persistent less serious breaches of professional conduct in this area, or a single serious 'crossing of the boundaries' by an employee, may constitute sexual misconduct, particularly if the employee either knew, or ought to have known, that their behaviour was unacceptable. Communications directed to an individual child that are different or exclude other children may also be inappropriate. Codes of conduct that outline the nature of the professional boundaries which should exist between employees and children/young people can be particularly useful when considering whether a person has crossed these boundaries.

Following the final determinations a final report will be provided to the ACT Ombudsman's office in accordance with section 17J of the *Ombudsman Act 1989*.

Opportunity to respond

In line with clause G9.7 of the Agreement you have seven calendar days from the date of this letter to provide a written response to the proposed sanction and reportable conduct findings. Your response should be provided by email to [Email address].

Following consideration of your response, or if no response is received from you, you will be informed in writing of my final determination.

Information sharing

Following any final sanction decisions, the Directorate will inform the ACT Teacher Quality Institute (TQI) in accordance with s70B of the *ACT Teacher Quality Institute ACT 2010* and the Commissioner for Fair Trading in accordance with the *Children and Young People Act 2008* and/or the *Working with Vulnerable People (Background Checking) Act 2011*.

Confidentiality

A reminder that the misconduct process is a sensitive and confidential matter, as such, you are directed not to share or disclose the contents of this letter to any person, except your identified support person and/or employee representative, without my prior permission.

Employee Assistance Program and Support available

Should you require support in relation to this matter, the Employee Assistance Program (EAP) is available to provide confidential and professional counselling to you and members of your family. These services can be sought by contacting Converge International (Converge) on [telephone number] or via the online booking portal using organisation code **[Code]**.

Alternatively, you can contact Next Step, a free and confidential service run by Beyond Blue on [Telephone number].

If you have any queries, please contact me via email at [Email address] or Justine Fisher at [Email address].

Yours sincerely

David Matthews
Chief Operating Officer
Executive Group Manager, People, Governance and Communications ACT Education Directorate

29 July 2024”

[13] On 12 August 2024 the Applicant provided his response to the proposed sanction, in which he expressed his shock and devastation about the proposed sanction. His response included the following:

“When these allegations were first brought to my attention, I was in disbelief, but understood my faults and the perceptions associated with the behaviour. From this exact moment, when I returned from overseas and into the ACT education directorate, I immediately engaged in support services, including appointments with a psychologist and my general practitioner and enrolled and completed courses that supported a better understanding of professional boundaries, hence the course completed by Davaar

Consultancy. It is these mitigating factors that would support a sanction of 'further training and support', not a termination. As a passionate educator, I believe it's a waste to our system and the profession to not provide an alternative sanction. I am extremely remorseful for my actions and am asking you to consider further training and support, rather than a termination of employment."

[14] He noted the references he had from his current Principal and Assistant Principal at the school where he had worked since returning from UAE, and he acknowledged his poor behaviour and emphasised how sorry he was. He went on to say:

"Lastly, I have admitted to the allegations and the facts within each of them. I have also tried to explain the contextual factors behind them. I don't believe these contextual factors have been considered in their entirety, as I don't believe that my conduct constitutes reportable conduct. In all these allegations, you have not considered the prior connection due to sporting teams that I coach or that permission from associations, clubs and parents have been achieved. If these mitigating factors were considered, you would understand that by obtaining permission and approval by other parties, it demonstrates no harmful or malicious intent or that this behaviour was committed in secrecy, therefore I believe it does not constitute reportable conduct or termination. I plead with you to reconsider these factors and consider an alternative sanction. Again, I will re-state that my behaviour was never malicious, harmful or of a sexual nature. I want to outline that although these facts may be true, it doesn't mean that the whole allegation or any purported breach of reportable conduct is valid. The mitigating factors and contextual factors are critical in distinguishing whether termination is justified. These factors help to explain that these actions were not malicious or with harmful intent and provide reasoning for further training and support as a sanction of this behaviour. It also provides justification that it does not constitute reportable conduct ..."

[15] In addition to the letter of 12 August 2024, the Applicant provided a letter from his lawyers dated 14 August 2024. This letter sought to explain why dismissal would be a disproportionate sanction. Amongst other matters, the letter highlighted that while the Applicant admitted to certain facts contained in the allegations, he did not accept that his conduct, when considered in light of the context he had provided, amounted to reportable conduct or misconduct warranting termination of his employment. The letter provided a long list of mitigating factors that included:

- A. his exemplary references from former colleagues,
- B. his volunteer work with the Tuggeranong Netball Association (which had been formally notified to the Respondent in February 2024),
- C. his demonstrated remorse,
- D. the training he had undertaken (and paid for) proactively,
- E. That he had ceased his involvement in the "Girls in Sport" program,
- F. That he was still teaching at another school of the Respondents, and the fact that he had not been suspended pending the outcome of the investigation was indicative that this was not the sort of behaviour that warranted dismissal, and
- G. The overall context including the parental consent that had been obtained.

[16] The letter also stated that a lack of procedural fairness had impacted the process and that the interview giving rise to the Admissions Letter was poorly run and disorganised. By way of example, allegation three states that between February 2020 and October 2023 the Applicant engaged in conversations via Instagram outside his role as a classroom teacher, however he did not commence teaching at the College until 2022, so any conversations prior to this time were not related to his role as a classroom teacher.

[17] The letter implored the Respondent to consider any alternative sanction available other than dismissal.

[18] On 29 August 2024 the Respondent sent further correspondence to the Applicant advising him of the termination of his employment. The Termination Letter is as follows:

“Dear Mr Gibson

Final Sanction following an Admission Statement process

On 29 July 2024, I wrote to you as the delegate for the Head of Service and provided you with my proposed sanction decision following an admission statement process completed by the Professional Standards Unit (PSU) in accordance with clause G5.5 of the *ACT Public Sector Education Directorate (Teaching Staff) Enterprise Agreement 2023 – 2026* (the Agreement).

As part of the admission statement process you agreed there was no need for an investigation, you admitted to the allegations, admitted your actions were misconduct, and you understood that your behaviour was in breach of section 9 of the *Public Sector Management Act 1994*, including but not limited to:

- (2) *A public servant must not—*
 - (a) *behave in a way that—*
 - (i) *is inconsistent with the public sector values; or*
 - (ii) *undermines the integrity and reputation of the service;*

Therefore, consistent with the Admission Statement I affirmed that the behaviour in Allegations 1 through 6 constituted misconduct as defined within clause G4.5 of the Agreement.

Having carefully considered all relevant information including the preliminary assessment, your admission statement, the nature and seriousness of the misconduct, the degree of relevance to your duties, the circumstances of the misconduct, any mitigating factors including a full admission of guilt and your previous employment history and general conduct, I proposed the sanction of **Termination of employment**.

You were invited to provide a response to the proposed sanction. I acknowledge that you provided a written submission on 12 August 2024, and a further submission was received on 14 August 2024, via your legal representative MV Law.

After careful consideration of your responses and after having sought advice regarding the procedural concerns raised within your representations, I am satisfied that the process completed was fair. Furthermore, there is no new or materially significant information contained within your responses which would dissuade my original decision.

Therefore, I am confirming the sanction decision of **Termination of employment** in accordance with subclause G9.2.5 of the Agreement. The termination of employment will take effect from close of business 30 August 2024.

Please note, based on your length of service, your notice period is 2 weeks. However, as per subsection 117(2)(b) of the *Fair Work Act 2009* (Cth), you will be paid in lieu of the notice period you would otherwise have received.

I consider the final sanction to be appropriate and proportionate to the degree of misconduct. The reasons for the decision are provided again for reference at Attachment A. These reasons were previously provided to you as part of my correspondence concerning my proposed decision and have not changed.

Right to Appeal

Subclause G9.9.4 of the Agreement requires me to advise you of the appeal mechanisms that are available to you under Section J of the Agreement. However, as my final decision is to terminate your employment, none of the appeal mechanisms under Section J of the Enterprise Agreement apply in this matter.

However, as per subclause G11.12 of the Agreement:

An employee may have an entitlement to bring an action under the FW Act in respect of any decision under this section to terminate the employee's employment. This is the sole right of review of such a decision.

Reporting Obligations

The Education Directorate has a number of reporting obligations in relation to this matter. These obligations are outlined below.

a) ACT Ombudsman – Reportable conduct

As indicated in previous correspondence, reportable conduct relating to Allegations 1 through 6 was **sustained** in the category of *misconduct of a sexual nature – crossing professional boundaries*. The ACT Education Directorate (the Directorate) will proceed to prepare a final report for the ACT Ombudsman in accordance with section 17J of the *Ombudsman Act 1989*.

b) TQI Notification

In accordance with section 70(B) of the *ACT Teacher Quality Institute Act 2010*, the Directorate is required to notify TQI when disciplinary action is taken against a teacher. Therefore, the Directorate will notify TQI of the termination of your employment.

c) Working with Vulnerable People

Reportable conduct information in relation to this matter will be shared with the Commissioner for Fair Trading in accordance with section 863CA of the *Children and Young People Act 2008*.

The above entities may contact you to seek further information in relation to this matter.

Confidentiality

A reminder that this process is a sensitive and confidential matter, as such, you are not to share or disclose the contents of this letter to any person, except your identified support person and/or employee representative, without my prior permission.

Next Steps

Please contact the Principal of Mount Stromlo High School to complete a separation checklist [Hyperlink removed] and ensure the return of any Directorate assets. Should you have any questions regarding the separation process or calculation of final monies please contact Ms Keyta Slattery, Director – HR Business Partnering (South) via [Email address].

If you have any queries regarding the content of this letter please contact me via [Email address] or [Email address].

Yours sincerely

David Matthews
Chief Operating Officer
Executive Group Manager, People, Governance and Communications ACT Education Directorate

29 August 2024”

The case for each of the parties

[19] The Applicant gave evidence in support of his application. He expanded on and gave further context to his conduct in relation to each of the allegations. He also outlined in more detail his involvement in sport and coaching, and his struggles with mental health. The character references provided to the Respondent as a part of his response to the allegations included references from former teachers and a Principal of a previous school where he had worked which described him as being an exceptional teacher who conducted himself with the highest professionalism.

[20] Ms Antonakos, the Senior Coordinator at Tuggeranong Netball Association, gave evidence. She said that she had observed the Applicant encouraging female athletes and that he had always conducted himself in a professional manner. She said parents often reached out to the Applicant to ask if he could help with transport when they were struggling to get their children to training or games, and he would go out of his way to assist. Her own

daughter participated in the “Girls in Sport” program which she said was run very professionally by the Applicant. This included a permission form for the purposes of giving consent to participate. Ms Antonakos said she found the allegations against the Applicant strange given she was aware of a female teacher at the same school who regularly provided transport to students from school to netball training.

[21] The Vice President of the Tuggeranong Netball Association, Ms Lauchland, also gave evidence. She said it was common for coaches to provide transport for their players. She gave evidence that the Applicant was highly regarded by the parents of the players he coached and she regularly received positive feedback from parents, colleagues and other coaches about the Applicant. Further, no complaints about the Applicant had ever been received.

[22] The mother of Student 9 gave evidence in support of the Applicant. She had known the Applicant since 2019 in his role as one of the coaches assisting the ACT Touch Football team, of which her daughter was a member. She said that when the Applicant commenced at Erindale College in 2023, he offered to transport her to training directly from school, which she accepted. The mother said that both she and her daughter were comfortable with that arrangement. She said she strongly believed that the Applicant was very professional, kind and caring, and that she trusted and respected him.

[23] Finally, Mr Radford, the Principal of the school at which the Applicant taught following his return from UAE, gave evidence that the Applicant “carried an outstanding attitude to his teaching” and that the students enjoyed his presence. He further observed that the Applicant was an excellent teacher and considered him a real asset to the school. Mr Radford said that they had lost “an exceptional, quality and sensible leader” and he could not speak more highly of the Applicant, and he would welcome him back if he had the opportunity.

[24] The Respondent led evidence from the following people:

- A. Mr Mitchell Scott, a teacher at the College, who in early February 2024 reported comments that had been made by students to him about the Applicant, including that the Applicant would drop some students home after sports training. He said it would be awkward if the Applicant was to return to the school.
- B. Mr David Matthews, who was the Acting Deputy Director General and the delegate who made the decision to dismiss the Applicant. Mr Matthews explained that he considered all the information available to him in making his decision to dismiss the Applicant, including his admission of misconduct and his lack of insight into his behaviour, the reputation of the Respondent, and the effect of the behaviour on the students involved. He placed particular weight on the witness statements provided by some of the students, and considered that the Applicant had created an improper relationship with them. He said it was difficult to envisage any appropriate sanction other than termination of employment in the circumstances. In terms of the Applicant’s request for reinstatement, Mr Matthews said he would be uncomfortable with the Applicant returning to a teaching role, given the considerable loss of trust between the Respondent and the Applicant. He also noted that the Applicant was

required to hold registration with the Teacher Quality Institute (TQI) and a Working with Vulnerable People card to work as a teacher, and that either or both of these registrations could be negatively impacted as a result of his misconduct admissions and potentially disqualifying him from performing a teaching role.

- C. Ms Katherine Stretton, Principal at the College, explained her role in terms of receiving the notification and conducting a preliminary investigation. She noted that teachers are expected to understand their obligations under the Code of Conduct, and that permission is required if a teacher is going to leave school grounds with students in their car. She said she considered the Applicant's engagement with students via social media to be clearly crossing professional boundaries. Ms Stretton said the Applicant should not be reinstated given the seriousness of his actions.
- D. Mr Mark Armstrong, the Deputy Principal at the College, gave evidence that he had had an informal discussion with the Applicant in around May 2023 about mobile phone communication with students. This occurred after he was informed that the Applicant had sent a text message to one of the students during class time. He said he raised the matter with Ms Stretton and another Deputy Principal, however there were no allegations of inappropriate behaviour made at that time. In February 2024 Mr Scott and another teacher, Ms Edstrom, raised concerns with Mr Armstrong about the Applicant. Mr Armstrong then spoke with students and other teachers about the Applicant and made notes of his conversations, which subsequently led to the allegations made to the Applicant. Mr Armstrong said he would be very concerned if the Applicant was reinstated, especially after talking to the students.
- E. Ms Lina Edstrom, classroom teacher at the College, gave evidence about a conversation she had with some year 11 students regarding the Applicant's interactions with other students, which she then reported to Mr Armstrong.

Consideration

Protection from Unfair Dismissal

[25] There is no dispute and I am satisfied that the Applicant is a person protected from unfair dismissal by virtue of s.382 of the Act. I now turn to consider if his dismissal was unfair within the meaning of the Act.

Was the dismissal unfair?

[26] A dismissal is unfair if the Commission is satisfied on the evidence before it that the circumstances set out at s.385 of the Act existed. Section 385 provides the following:

385 What is an unfair dismissal

A person has been *unfairly dismissed* if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and

- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Note: For the definition of *consistent with the Small Business Fair Dismissal Code*: see section 388.

[27] There is no dispute that the Applicant was dismissed and that subsections (c) and (d) do not apply.

Was the dismissal harsh, unjust or unreasonable?

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

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

[29] The ambit of the conduct which may fall within the phrase ‘harsh, unjust or unreasonable’ was explained in *Byrne v Australian Airlines Ltd*¹ as follows:

“... 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.”

[30] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.²

Valid reason - s.387(a)

[31] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”³ and should not be “capricious, fanciful, spiteful or prejudiced.”⁴ However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.⁵

[32] In cases concerning conduct, the Commission must determine whether, on the balance of probabilities, the conduct allegedly engaged in by the employee actually occurred⁶. The test is not whether the employer believed on reasonable grounds, after sufficient inquiry, that the employee was guilty of the conduct and therefore acted in the belief that the termination was for a valid reason. The Commission must make a finding as to whether the conduct occurred based on the evidence before it⁷.

[33] Further, the Commission does not ‘stand in the shoes’ of the employer but will need to be satisfied that the termination of the employee was for a valid reason⁸.

[34] There is no mandate for giving the ‘valid reason’ criterion any greater emphasis or weight than any of the other criteria in s 387. It is well settled that the statutory requirement to ‘have regard to’ or ‘take into account’ requires the Commission to give the matter(s) weight as a fundamental element in the decision making process. Even if it is found that there was a valid reason for the dismissal, an overall assessment must be made as to whether the dismissal was harsh, unjust or unreasonable.

[35] It is also well settled that the employer bears the onus of establishing the misconduct upon which it relies to demonstrate a valid reason for the dismissal.

[36] For the reasons that follow, I find that the evidence supports a finding that there was a valid reason for the Applicant’s dismissal.

[37] The Applicant acknowledged that his conduct warranted sanction, albeit not dismissal. From the outset, he freely acknowledged that his conduct reflected a very poor lack of judgment. In the Applicant’s closing submissions, his behaviour was described as “foolish and childish” as well as immature. I agree with that characterisation. The Applicant’s submissions also confirm his acceptance that he crossed the teacher-student boundaries.

[38] It should be made clear that there were no allegations made against the Applicant involving sexual behaviour or sexual misconduct. This was confirmed by Mr Matthews during the hearing⁹. Rather, the Applicant was found to have engaged in “undeclared, improper communications which constituted a breach of his professional boundaries”¹⁰.

[39] The Respondent's submissions confirm that it relied on certain sections of the Code of Conduct, that being sections 8.1, 21.7, 21.8, 21.10, 21.11, 21.14 and 21.15 in deciding that dismissal was warranted.

[40] The difficulty for the Respondent arises from the structure of the Code of Conduct. The main section on which the Respondent relied (ie section 21) is headed "Sexual harassment or sexual misconduct". It is under this heading that the only provisions regarding 'maintaining professional boundaries' are found. Read in context, the requirement to maintain professional boundaries is specifically related to sexual harassment and sexual misconduct and is, in my view, not a generally applicable provision.

[41] Clearly, given Mr Matthews evidence, there were no allegations of sexual misconduct made against the Applicant, and hence no findings were made (nor do I make any such findings) that he had engaged in behaviour that met the definition of sexual harassment or sexual misconduct.

[42] Unlike the Code of Conduct, the ACT Ombudsman's Practice Guide referenced in the Respondent's 29 July proposed sanction letter, provides separate sections for misconduct of a sexual nature and crossing professional boundaries. These guidelines which apply generally to ACT Government agencies also state that "codes of conduct that outline the nature of the professional boundaries which should exist between employees and children/young people can be particularly useful when considering whether a person has crossed professional boundaries. For employees who either intentionally breach such codes or have demonstrated an inability to apply them appropriately, it may also be necessary to provide more detailed written advice about what constitutes appropriate behaviour to the employee".

[43] The Respondent also relied on section 8 of the Code of Conduct which provides that a teacher can only engage in electronic communication with students, including by way of text and social media, if it is authorised by the school principal prior to such contact being made. I am satisfied that the Applicant engaged with students via electronic means without prior authorisation from his principal.

[44] These communications with students were described by the Respondent as uncharacteristic of a teacher, or even a coach. Rather, they read as a peer-to-peer communication; message exchanges one might expect from a teenage boy. He also mocks, ridicules and criticises other students to the group. There is no question that the Applicant's language was inappropriate, and I agree with the Respondent's characterisation of these communications.

[45] I also agree with the Respondent's submissions that a school owes a significant duty of care to its students, and that the Respondent is vicariously liable for its teachers' actions, even if they occur away from school or outside school hours if there is a sufficient connection with the teachers' authorised activities.

[46] I accept the Respondent's submissions that it is common sense that the Applicant's behaviour was inappropriate regardless of what the Code of Conduct provides. His role as a teacher is one of significant trust, and the importance of maintaining appropriate boundaries is

vital. His lack of insight into the inappropriateness of his behaviour, shown by his engagement in the group chats over a period of time, is concerning.

[47] Given my findings and the Applicant's own admissions, and despite my concern about the impact of the structure of section 21 the Code, I am satisfied overall that there was a valid reason for his dismissal.

Notification of the valid reason and opportunity to respond - s.387(b) and (c)

[48] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made,¹¹ in explicit terms¹² and in plain and clear terms.¹³ In *Crozier v Palazzo Corporation Pty Ltd*¹⁴ a Full Bench of the Australian Industrial Relations Commission dealing with similar provision of the *Workplace Relations Act 1996* stated the following:

“[73] As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted.”¹⁵

[49] An employee protected from unfair dismissal must also be provided with an opportunity to respond to any reason for dismissal relating to the conduct or capacity of the person. Such requirement will be satisfied where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern.¹⁶ This criterion is to be applied in a common sense way to ensure the employee is treated fairly and should not be burdened with formality.¹⁷

[50] The requirement to notify of the reason, together with the requirement to provide an opportunity to respond to the reason, involves consideration of whether procedural fairness was afforded to the Applicant before his dismissal was effected.

[51] Given the correspondence between the parties set out earlier, I am satisfied that the Applicant was notified of a reason for his dismissal and was given an opportunity to respond.

Unreasonable refusal by the employer to allow a support person - s.387(d)

[52] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, the employer should not unreasonably refuse that person being present.

[53] The Applicant was not refused a support person.

Warnings regarding unsatisfactory performance - s.387(e)

[54] A warning for the purposes of s.387(e) must clearly identify:

- a. the areas of deficiency in the employee's performance;
- b. the assistance or training that might be provided;
- c. the standards required; and
- d. a reasonable timeframe within which the employee is required to meet such standards.¹⁸

[55] The warning must also "make it clear that the employee's employment is at risk unless the performance issue identified is addressed."¹⁹

[56] The Applicant was dismissed for reasons of misconduct and not because of unsatisfactory performance.

Impact of the size of the Respondent on procedures followed (s.387(f)), and the absence of dedicated human resources management specialist/expertise on procedures followed (s.387(g))

[57] I am satisfied that the size of the Respondent did not impact on the procedures followed by it in effecting the dismissal.

Other relevant matters - s.387(h)

[58] Section 387(h) of the Act provides the Commission with a broad scope to consider any other matters it considers relevant.

[59] There are other relevant matters that need to be considered under this section which are as follows.

[60] The Applicant acknowledged from the time the allegations were put to him that his conduct was inappropriate and warranted sanction, but said his conduct did not warrant dismissal which was disproportionate to the facts and overall circumstances.

[61] The Applicant did not engage in conduct of a sexual nature, nor did the Respondent make such an allegation.

[62] Some students were known to the Applicant for some time prior to becoming his students. This connection and contact, through outside sporting activities, was undertaken with the knowledge and/or consent of the students' parents. I accept the evidence of Ms Lauchland that it was common practice for coaches to provide transport to their players with parental permission, and I accept the evidence given by the students' parents.

[63] The Applicant undertook courses at his own expense regarding professional conduct obligations and expressed considerable remorse as to his conduct.

[64] The Applicant's dismissal could lead to the cancellation of his professional registration as a teacher. This is, as the Applicant put it, a catastrophic consequence, denying him not only

his job, but his career. I accept the evidence that the Applicant is an outstanding teacher. I consider that his inability to be able to teach again would be a harsh and disproportionate consequence.

[65] The Applicant remained in a teaching role at another of the Respondent's schools after his return to Australia until his termination and was not suspended pending the outcome of the investigation, suggesting the misconduct was not serious.

Conclusion as to unfairness

[66] Having weighed all the matters requiring consideration under s.387, I find that the dismissal of the Applicant was harsh because of the matters considered under s.387(h).

[67] I now turn to the appropriate remedy.

Remedy

[68] Having found that the Applicant was protected from unfair dismissal, and that his dismissal was harsh, it is necessary to consider what, if any, remedy should be granted to him.

[69] Under section 390(3) of the Act, I must not order the payment of compensation to the Applicant unless:

- a. I am satisfied that reinstatement is inappropriate; and
- b. I consider an order for payment of compensation is appropriate in all the circumstances of the case.

[70] In this case, I am satisfied that reinstatement is inappropriate. This is because I accept that the Respondent has lost trust in the Applicant's ability to maintain professional boundaries with students.

[71] I am also satisfied that an order for the payment of compensation is appropriate, given my finding that his dismissal was unfair.

[72] Section 392(2) of the Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation including:

- (a) the effect of the order on the viability of the Respondent;
- (b) the length of the Applicant's service;
- (c) the remuneration that the Applicant would have received, or would have been likely to receive, if she had not been dismissed;
- (d) the efforts of the Applicant (if any) to mitigate the loss suffered by his because of the dismissal;
- (e) 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 compensation;

- (f) the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the Commission considers relevant.

[73] In determining an amount to be paid as compensation, and as was noted by a Full Bench, “[t]he well-established approach to the assessment of compensation under s.392 of the FW Act ... is to apply the “Sprigg formula” derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul’s Licensed Festival Supermarket (Sprigg)*.²⁰

Remuneration received, or likely to be received (s392(2)(c))

[74] While the evidence in this regard is limited, I consider that it is likely that the Applicant’s employment would have continued for a lengthy period, and certainly longer than six months.

Remuneration earned and income likely to be earned (s392(2)(e) and (f))

[75] The evidence of the Applicant was that he had applied for a range of jobs but remained unemployed and unable to secure work, other than some casual work in hospitality. There is no evidence as to what specifically he earned.

Length of service (s392(b))

[76] The Applicant’s employment with the Respondent is a relatively short period (given the period of leave without pay) and I consider it does not support reducing or increasing the amount of compensation ordered.

Viability (s392(a))

[77] While there is no evidence before me as to the effect of an order for compensation might have on the viability of the Respondent, I consider it highly unlikely that an order will have any negative effect on the Respondent’s viability.

Mitigation efforts (s392(d))

[78] The Applicant gave evidence of his attempts, which were unsuccessful, to obtain other work (other than casual hospitality work). I do not consider it appropriate to reduce the amount of compensation otherwise calculated for this factor.

Other relevant matters (s392(g))

[79] There are no other matters relevant to this consideration. Specifically, I do not consider it necessary to discount or increase the amount for ‘contingencies’. This step is a means of taking into account the possibility that the occurrence of contingencies to which the Applicant was subject might have brought about some change in earning capacity or earnings.

Misconduct (392(3))

[80] The Act requires that if I am satisfied that misconduct contributed to the Respondent's decision to dismiss the Applicant, I must reduce the amount I would otherwise order by an appropriate amount on account of the misconduct. I will reduce the amount by one month's base salary on account of the Applicant's misconduct.

Shock, distress etc (s392(4))

[81] The amount of compensation does not include a component for shock, humiliation or distress.

Total amount not to exceed 26 weeks

[82] I am satisfied there is no basis to reduce the amount by reason of s 392(5) of the Act.

Conclusion

[83] In *Hanson Construction Materials Pty Ltd v Pericich*²¹, the Full Bench said that:

"Sprigg is a useful servant, but is not to be applied in a rigid determinative manner. In deciding the amount of a compensation order the Act directs that the Commission 'must take into account all of the circumstances of the case' including the particular matters set out at s.392(2)(a) to (g)."

[84] Having considered all of the matters necessary in determining an appropriate quantum of compensation, I find that the appropriate amount in all the circumstances is five months base salary. It is unclear on the evidence what the dollar amount of this amount is. The parties have liberty to apply within the next 14 days if there is a dispute as to the quantum.

[85] An order to this effect will be separately issued.



DEPUTY PRESIDENT

Appearances:

A Costin of Counsel for Jack Gibson.

B Gallifuoco of Counsel for Australian Capital Territory (Represented by ACT Education Directorate).

Hearing details:

2025.

Canberra:
February 24;
May 14 and 15.

Final Written submissions:
20 June 2025.

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¹ (1995) 185 CLR 410 at 465 per McHugh and Gummow JJ.

² *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

³ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

⁴ *Ibid.*

⁵ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

⁶ *Edwards v Giudice* (1999) 94 FCR 561.

⁷ *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213 [24].

⁸ *Miller v University of New South Wales* (2003) 132 FCR 147.

⁹ Transcript PN2922.

¹⁰ Transcript PN2465.

¹¹ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 at [41].

¹² *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

¹³ *Previsic v Australian Quarantine Inspection Services* Print Q3730.

¹⁴ (2000) 98 IR 137.

¹⁵ *Ibid* at 151.

¹⁶ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

¹⁷ *RMIT v Asher* (2010) 194 IR 1, 14-15.

¹⁸ *McCarron v Commercial Facilities Management Pty Ltd t/a CFM Air Conditioning Pty Ltd* [2013] FWC 3034, [32].

¹⁹ *Fastidia Pty Ltd v Goodwin* Print S9280 (AIRCFCB, Ross VP, Williams SDP, Blair C, 21 August 2000), [43]-[44].

²⁰ (1998) 88 IR 21.

²¹ [2018] FWCFCB 5960 at [39].