APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 132/2019 GIVEN ON 21 JULY 2020
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2021 WAIRC 00102
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
HEARD	**:**	BY WRITTEN SUBMISSIONS WEDNESDAY, 3 FEBRUARY 2021, FRIDAY, 5 FEBRUARY 2021, TUESDAY, 9 FEBRUARY 2021
DELIVERED	**:**	THURSDAY, 15 APRIL 2021
FILE NO.	**:**	FBA 9 OF 2020
BETWEEN	**:**	DONALD ANDREW PARNELL Appellant AND THE ROMAN CATHOLIC ARCHBISHOP OF PERTH Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram	**:**	**SENIOR COMMISSIONER S J KENNER**
Citation	**:**	**2020 WAIRC 00419**
File No	**:**	**U 132/2019**

CatchWords	**:**	Industrial law (WA) – Appeal against decision of the Commission – Termination of employment of Deputy Principal – Claim of harsh, oppressive or unfair dismissal – Remedy of reinstatement sought – Historical sexual assault allegations – Claim dismissed at first instance – Appeal to the Full Bench – Commission to be satisfied that employer had genuine and honest belief based on reasonable grounds – Commission does not have to be satisfied that misconduct occurred – Commission properly applied Briginshaw standard –

		Commission can accept hearsay evidence – Circumstantial evidence – Witness of truth – Statements compelling and credible – Investigation process conducted in fair and reasonable way – Character witness evidence accounted for – Appeal dismissed
Legislation	:	*Industrial Relations Act 1979* (WA)
Result	:	Appeal dismissed

Representation:

Appellant	:	Mr P Mullally as agent
Respondent	:	Mr I Curlewis of counsel

Case(s) referred to in reasons:

Amalgamated Metal Workers and Shipwrights Union v Robe River Iron Associates (1989) 69 WAIG 985

Australian Workers' Union West Australian Branch, Industrial Union of Workers v Hamersley Iron Pty Limited (1986) 66 WAIG 322

Baron v George Western Foods Ltd trading as "Joyce (WA)" (1984) 64 WAIG 590

Bi-Lo Pty Ltd v Hooper (1992) 53 IR 224

Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336

Byrne & Frew v Australian Airlines Ltd (1995) 185 CLR 410

Chamberlain v R (No 2) [1984] HCA 7; (1984) 153 CLR 521

Consolidated Edison Co. v National Labour Relations Board [1938] USSC 176; (305 U.S. 197)

Copeland v Port Adelaide Central Mission Inc [2003] SAIRComm 4

Devries v Australian National Railways Commission [1993] HCA 78; (1993) 177 CLR 472

Director General, Department of Education Western Australia v State School Teachers' Union of WA (Incorporated) [2020] WAIRC 00927

Franklins Ltd v Webb (1997) 72 IR 257

Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36; (2003) 83 WAIG 893

Gregory v Philip Morris (1998) 24 IR 397; 80 ALR 455

Gromark Packaging v Federated Miscellaneous Workers Union of Australia, WA Branch (1992) 46 IR 98

House v The King [1936] HCA 40; (1936) 55 CLR 499

Kavanagh v Chief Constable of Devon and Cornwall [1974] 1 QB 624

Miles v Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385

Minister for Health v Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203

Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch Industrial Union of Workers (1988) 68 WAIG 677

NU v NSW Secretary of Family and Community Services [2017] NSWCA 221; (2017) 95 NSWLR 577

Palmer v Dolman [2005] NSWCA 361

Pastrycooks Employees, Biscuit Makers Employees & Flour and Sugar Goods Workers Union (NSW) v Gartrell White (No 3) (1990) 35 IR 70

Pochi v Minister for Immigration and Ethnic Affairs [1979] AATA 64; (1979) 26 ALR 247

Reg v Deputy Industrial Injuries Commissioner, Ex parte Moore [1965] 1 QB 456

Richardson v Perales [1884] USSC 274; 402 US 389

Robe River Iron Associates v Australian Workers' Union, WA Branch (1987) 67 WAIG 320

Rode v Burwood Mitsubishi (Unreported, AIRC, Dec 451/99 M Print R4471, 11 May 1999)

Sangwin v Imogen Pty Ltd [1996] IRCA 100

Seymour v Australian Broadcasting Commission (1977) 19 NSWLR 219

Shire of Esperance v Mouritz (1991) 71 WAIG 891

Shop, Distributive & Allied Employees' Association, NSW Branch v Jewel Food Stores (1987) 22 IR 1

Stearnes v Myer SA Stores Print No 9A/1973

T.A. Miller Ltd v Minister of Housing and Local Government [1968] 1 WLR 992

The Australian Builders' Labourers' Federated Union of Workers, Western Australian Branch v The Building Management Authority [1993] WAIRC 11876; (1993) 73 WAIG 1876

The King v War Pensions Entitlement Appeals Tribunal; Ex parte Bott [1933] HCA 30; (1933) 50 CLR 228

Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries (1994) 75 WAIG 9; (1994) 58 IR 22

Western Mining Corporation Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (1084)

Winkless v Bell (1986) 66 WAIG 847

Texts cited:

Black's Law Dictionary (10th ed abridged, 2015)

Reasons for Decision

SCOTT CC and WALKINGTON C:

Introduction

1 The appellant appeals against the decision to dismiss his claim that he was harshly, oppressively or unfairly dismissed ([2020] WAIRC 00419).

Background

2 The appellant was employed as a deputy principal at Lumen Christi College in 2019 when, following an investigation of allegations made against him, he was dismissed. The allegations included that he had sexually assaulted a student, A, on a school trip to Indonesia in 1997, more than 20 years ago. The investigation arose when A's family raised the issue following A's death.

3 The appellant denied the allegations. He also claimed that the investigation was flawed and that conclusions drawn were contrary to an expert psychologist's report. He sought reinstatement without loss.

Reasons for decision at first instance

4 The learned Senior Commissioner set out in his Reasons for Decision ([2020] WAIRC 00420) that in the break between Term 3 and Term 4 in 1997, the appellant accompanied a group of students on a tour to Indonesia. The group was made up of four female students and one male student from MacKillop College. The tour was organised and led by another teacher, Ms Clarissa Hunter.

5 The tour was due to finish by spending one night in Bali and returning to Perth the next day from Denpasar airport. However, the flight was overbooked, and the group could not return that day. They stayed that night, the second night, at a hotel where it was alleged that there were insufficient separate rooms and that the only real option was that the only two males, A and the appellant, shared a room. It was alleged that it was here that the appellant assaulted and subsequently threatened the student on the last night of the tour.

6 It was alleged, too, that there was an incident on the flight home which is said to have been because the appellant was attempting to ensure that A did not communicate with Ms Hunter.

7 Following the group's return home, nothing untoward was reported. However, A's parents say that after the return, they noticed that A became unusually withdrawn and was having trouble with schoolwork. They spoke to him, but he did not indicate that he was having any difficulties. By the end of Term 1 in 1998, A told them that he wanted to leave the College but provided no explanation. He left the school and enrolled in another secondary school. He stayed only a few weeks and did not complete Year 12 or sit the TEE examinations. He enrolled in a short TAFE course but did not complete it.

8 A then developed some significant mental health problems and began abusing alcohol and drugs. His parents said that he became erratic, no longer participated in his interests and became socially isolated.

9 A's parents say that 20 years after the tour, in March 2017, he told them and his sister separately that he had been raped by the appellant while they were staying at the hotel on the last night of the Indonesian tour. He also told his sister that the appellant had taken the students to a bar and bought them alcohol, after which, on returning to the hotel, the appellant had raped

him. He told her that the appellant had told him that he had himself been raped by his older brother. He also told her that the appellant said that he knew where he lived and regularly rode his bike past the house. He believed that the appellant told him this to threaten him.

10 A told his sister that during the incident in the hotel room, to cover things up, the appellant had yelled out of the window of the hotel room to make it sound like an argument had occurred, to account for the other noise or commotion which had occurred earlier in the room.

11 Later, A is said to have told his sister that either Ms Hunter or one of the students had spoken to him about having heard a noise coming from the room he shared with the appellant. The learned Senior Commissioner also recorded that there was a suggestion that the appellant had told the other students that A had tried to hit him. He noted that A told his sister that the appellant had been angry with him on the plane on the way back to Perth.

12 Both of A's parents and his sister are recorded as having said that once he had spoken to them about these events, A's behaviour improved considerably, he visited them more often and played music again. A died in October 2018.

13 On 6 February 2019, A's parents wrote to the Catholic Education Office (CEO) about their son's disclosures to them and on 12 February 2019, they met with Ms Carmen Jones, the Employment Relations Team Leader for CEO, and Mr Tim Wong, the Coordinator, Child Safe Team for CEO.

14 In addition to the letter of 6 February 2019, given to Ms Jones at that meeting, A's parents showed her and Mr Wong a copy of two sets of type-written notes (the Statements) found after A's death. The Statements were said to be A's description of what happened on the Indonesian tour, which were said to have been made by him in therapeutic sessions with a counselling service.

15 Ms Jones and Mr Wong informed A's parents that there would be an investigation into the allegations.

16 On 14 February 2019, the appellant was informed of the allegations and provided with a letter setting them out, and informing him that if the allegations were substantiated, it may constitute serious misconduct. This may result in disciplinary action being taken against him, up to and including termination of his employment.

17 The appellant responded through his then-solicitor on 21 February 2019. He denied the allegations, describing the words and actions alleged of him as being 'heinous and sickening', 'inconceivable and did not happen' and 'they are utterly offensive and false'. He denied ever having engaged in conduct remotely close to that alleged. He referred to his 'exemplary record' with Catholic Education Western Australia (CEWA). The appellant expressed his distress, including that it was compounded by only finding out on the evening after the meeting that the student was deceased. He said this compounded his 'distrust and disbelief in the transparency of the process'.

18 The appellant's response also noted that he generally had positive interactions with A on the trip and said that he had to speak to him about smoking cigarettes. He said he had no contact whatever with A from the end of 1998, when he finished Year 12, until March 2017, when he received a series of tweets from A. The appellant said the tweets made no sense, and he did not know what they referred to. He did not respond and blocked A from his Twitter account. He attached to his response screenshots of the tweets. Otherwise, the appellant said he had limited contact with A in Year 12 and no communication or contact after Year 12.

19 The learned Senior Commissioner then set out that an investigation was conducted by Ms Jones, Ms Jayne Taylor, an Employee Relations Consultant, and Mr Wong, commencing in February and concluding in August 2019. The process of the investigation involved consideration of various policies of the CEO dealing with child protection and allegations of misconduct by staff. The standard of proof adopted by the investigators was the balance of probabilities. They considered documentary evidence including A's parents' letter of complaint and the Statements found by his parents in A's belongings. The Senior Commissioner noted that Ms Taylor contacted WA Police regarding the allegations and a copy of an Incident Report recording the contact was tendered as an exhibit (Exhibit C1). The Incident Report noted that WA Police had no jurisdiction over the matter because the victim was deceased and the alleged assault took place overseas.

20 The Reasons then record that the investigation included interviews with several people including the appellant, A's parents, Ms Hunter, two of the students who participated in the tour, A's sister and one of his close friends. The Final Investigation Report (the Report) observed that there were difficulties due to the time that had elapsed since the alleged conduct, some credibility issues with one or two witnesses and that much of the evidence gathered was hearsay. The Senior Commissioner then set out the relevant points of the interviews.

21 In his interview, the appellant said he had no distinct memories of Bali, the accommodation and the return. However, when prompted, he recalled some matters. He had his own room for the whole trip and was adamant that he did not share a room with A. He said that he had been on many tours, trips and camps and had never shared a room with a student. The appellant later said he was 100 per cent sure that he did not share a room with A.

22 A's parents told the investigators about their son's revelations to them and his behaviours. The father said that Ms Hunter told him that she recalled two girls coming to her saying that horrible noises were coming from the room A and the appellant occupied but she did not go to the room. The father said that A had told him that he was crying like a baby on the night, and that the next day the girls asked the appellant and A what had happened the night before, and that they had heard a baby crying.

23 Ms Hunter's interview included that during the tour, only the girls shared accommodation and that each of the appellant, A and she had their own rooms. She said that when they could not return on their scheduled flight, accommodation was provided by the airline. The appellant suggested to her that he and A could share a room. She named the hotel and described their accommodation as being a three-bedroom villa attached to the hotel, at the front of the hotel near the road.

24 Ms Hunter said that students were drinking cocktails in the pool on the first night in Bali. They went for a walk with the appellant and then to the Hard Rock Café. She stayed at the hotel and was dealing with other issues. On the second night, they had room service.

25 Ms Hunter expanded on recalling the students drinking at the pool and it being the first night there because she said the 19-year-old Indonesian who had escorted them to that point was there, but then left.

26 Ms Hunter described how the appellant had taken the students to the Hard Rock Café on the last night and had bought them drinks. She only learned of this when they had returned to Perth, that one of the girls had told her. Her report of events was quite detailed. The girls had been watching a movie, 'Scream', she had asked them where A was, and they told her that he had gone to bed and was in a room with the appellant. Student S suggested Ms Hunter go and

knock on the door but did not expand on why, she might have heard banging noises, but did not seem worried. However, Ms Hunter said she did not check on them.

27 Ms Hunter reported that A's disposition changed so much after the trip that she always wondered what had happened. She was not surprised when A's father contacted her, and she knew something had happened because she knew A so well.

28 Ms Hunter said A's father did not give her the Statements A had written. They just spoke over the phone, both in 2017 and subsequently, when he told her that A had died.

29 Ms Hunter said that arising from the telephone conversation with A's father, she had first thought that the appellant had 'just touched him up', but that 'now she knows it was full rape', and that A's father had disclosed this information about the alleged rape in the more recent of the telephone calls. She said she had no doubt that the sexual assault occurred and described A's conduct after returning from the trip as being in stark contrast to that prior to the trip. The learned Senior Commissioner also recorded in his Reasons that 'Ms Hunter commented that from the way A wrote his statements coupled with her research and experience now, in hindsight, she thinks the applicant was grooming her as well, so she would not doubt him. She said that if she had any doubts about the applicant at the time, she never would have put them in a room together.' As to her use of the word 'grooming', Ms Hunter later said she meant the way the appellant tried to mentor her when she did not want to be mentored.

30 The learned Senior Commissioner then set out the details of the investigation in respect of the interviews with two students, B and S, who went on the Indonesian trip.

31 Student B recalled some aspects of the tour and the accommodation in Bali. She recalled that they stayed in a hotel, and the hotel had a pool; that she shared a room with another student, S, most of the time and that the two other girls shared a room; she did not think that the students consumed alcohol but possibly the Indonesian teacher did; she did not recall the sleeping arrangements while the group was in Bali; she did not recall where the teachers slept, or the appellant and A sharing a room. She recalled going to the Hard Rock Café.

32 Student S's recollections were not clear about the accommodation arrangements and whether the group stayed in different hotels on the two nights in Bali. She described the last night, when the airline paid for the accommodation, as a 'bunk in' situation. Her recollection of whether they drank alcohol was that they did not drink but said that at the Hard Rock Café they drank cocktails in huge glasses. She described it as being dark and loud like a nightclub. She did not recollect whether the teachers were present. Student S described possible accommodation allocations on the last night but could not be sure. The students stayed in the room on the last night and had food there and watched a movie.

33 The Senior Commissioner's Reasons then set out the details of the investigators' interview with A's friend, Mr Scott Bardowski. He said that in late 2017 or early 2018, A had told him that a teacher was in the same room with him on the trip and raped him. A told him some of his recollections, and that the teacher had threatened him. He told Mr Bardowski that the memory had been 'buried in a dark corner of his mind' and he had dreams and was remembering what happened to him. Mr Bardowski confirmed that A had difficulties with drugs and depression, was diagnosed with bipolar and ADD, and was on various medications for those conditions.

Expert report

34 The learned Senior Commissioner then recorded that, having gathered the above evidence, the investigators then sought expert advice on aspects of the investigation from

Dr Christabel Chamarette, a psychologist with extensive experience and qualifications in cases of adult victims of child sexual abuse. She was asked for advice about the reliability of the Statements A had made, including in the context of his history of alcohol abuse, and that he had also disclosed in his counselling another unrelated sexual assault on him some years after the Indonesian tour. She was asked about whether those factors may have influenced the credibility of A's account of events.

35 The Senior Commissioner recorded her report as including that:

(a) A believed himself to have been a victim of sexual assault from the appellant, even though he had blocked it out for 20 years;

(b) this appeared to have substantially altered his behaviour, school attendance and adjustment and may have contributed to his alcohol/drug addiction and depression (PTSD); and

(c) the literature on delayed recall and disclosure of sexual assault in childhood supports the patterns of behaviour and the way in which A brought out the allegations around the incident occurring in 1997.

36 Dr Chamarette observed that there was no indication of the context in which A provided those statements. Dr Chamarette said that '[i]f documents were made in the course of therapy, they may contain emotional truth of the experiences being worked through but not necessarily strictly factual or accurate accounts of what occurred and which people may have been involved even though he named (the appellant) as one of the two people from whom he told his sister that he had experienced sexual assault.' She also noted that there was uncertainty as to the intent of him writing the Statements as he had stated to his parents that he did not want to pursue the matters through the police. Dr Chamarette also commented on his indicating that he had forgotten or repressed all memory of the incident and the subsequent alleged rape but was reminded of them by encountering the person involved in the second unrelated alleged rape, which apparently reactivated his memories and recall of both instances. Dr Chamarette said '[t]his pattern of receiving a 'trigger' which recalls historical material is very frequent and a characteristic of disclosure of historical abuse.'

37 Dr Chamarette found A's accounts 'credible and compelling with regard to his belief that it occurred but would not support his written statements as being totally accurate and factual in all aspects because of the therapeutic context in which they are written as opposed to affidavits or official or formal complaints.' She did not regard his drug use as a sufficient explanation for his memories being said to be drug-induced or delusional, although she could see 'the possibility of conflation of other sexual trauma as a question which is not possible to resolve'.

38 Dr Chamarette noted that she had assessed the appellant's response to the allegations on the basis of his written response because she could not meet him face to face. He had declined an opportunity to meet with her. She noted:

> The main challenges to his credibility in response to the allegations revolve around his vagueness and inaccuracy in relation to the events .eg1) his lack of definite memories and his apparently inaccurate denial that he shared a room with the only other male in the party when it was in a three-bedroom villa. eg 2 his inability to recall that he had then had [A] in his English class and that he had dropped out after 1 term in 1998.

39 Dr Chamarette went on to note that:

> Some people might see his lack of accurate memories or any memories as consistent with his denial that anything untoward occurred. However, it can also support the idea that just as [A] blocked out his memory, that (the appellant) may also have been appalled or traumatised by the events and blocked the entire period out of his mind. This is more credible to me than that he is lying as he would not have become so distressed.

40 Dr Chamarette was also asked about two of the three possible options identified by the investigators in their interim report of being that the allegations were substantiated, they were unable to be substantiated or were disproven. Ultimately in respect of the allegations being substantiated, she noted that:

> [W]hile something may have occurred and that [A] sincerely believed and recalled the sexual assault in great detail, the material which presents the evidence is significantly flawed in that it did not come from his intent to pursue the complaint himself but to make it known to his parents and to seek resolution and occurred in a therapeutic context which remains unclear. You may need legal advice as to whether 'on the balance of probabilities' this would be considered sufficient in an Australian context.

41 In respect of whether or not the allegations are unable to be substantiated or disproven, Dr Chamarette said she found them more persuasive as being unable to be sustained or disproven than for substantiation. Dr Chamarette said '[w]hile I don't find the evidence for substantiation of the allegations convincing, neither do I see any strong support for disproving the allegations and providing sufficient grounds for exoneration of (the appellant) simply on the basis of his strong denial.'

42 The learned Senior Commissioner noted that when members of the investigation team were called to give evidence by the respondent during the hearing before him, they suggested that Dr Chamarette had gone outside of her brief to make the observations in relation to whether the allegations were substantiated, unable to be substantiated or disproven.

The investigation outcome

43 The learned Senior Commissioner then set out the findings and outcome of the investigation. He noted that the findings themselves were reached on the 'balance of probabilities' based on the information then available. The Report found that the evidence did not support that the group had dinner and drinks at the Hard Rock Café on the final night, but that witness evidence indicated that it had occurred on the preceding night. The Report noted that this was 'not considered to be fundamental to the veracity of the allegation of assault but has been taken into consideration'. The Report then set out ten aspects of the evidence that supported the substance of the allegations, concluding that:

> For the reasons outlined above, it is reasonable to conclude that on the balance of probabilities, the allegations are substantiated. The recommended outcome for Karen Prendergast (the principal of Lumen Christi College) to consider in this instance would be a finding of serious misconduct and the termination of (the appellant's) employment.

44 The Reasons then record that Ms Prendergast acted on the recommendation and the appellant was summarily dismissed for misconduct by letter dated 20 August 2019.

The applicant's challenge to the findings and the respondent's decision

45 The Commission then set out the applicant's grounds at first instance for attacking the respondent's decision to dismiss him, being:

1. That there was no direct evidence to substantiate the allegations that he sexually assaulted A, that the evidence was hearsay and some of it was circumstantial;
2. Aspects of the investigation and subsequent findings were flawed; some findings were not supported by any evidence;
3. Several persons spoken to and interviewed by the investigators, including Ms Hunter, had been contacted by A's father in the months before the investigation, thereby tainting the evidence;
4. The investigators had reversed the onus of proof, casting it upon the appellant to disprove the allegations;
5. Simple facts were not checked by the investigators, for example, whether the appellant had an older brother, in the context of him having told A in the hotel room that he had been sexually assaulted by his older brother. A second example was that the appellant had told A that he knew where he lived as he rode his pushbike past his house. The appellant submitted that he did not have a pushbike in 1997 and could not have done what was alleged;
6. That allegations about having dinner on the last night at the Hard Rock Café was not supported by any evidence. The assertion that the appellant purchased alcohol for the students was said by him to be based on third-hand hearsay as reported by one female student only, and not any other; and
7. That the investigators did not turn their minds to the appropriate level of proof required, given the seriousness of the allegations. The appellant had submitted that the ***Briginshaw*** standard ([1938] HCA 34; (1938) 60 CLR 336) should have been applied, meaning that a level of certainty on the evidence, consistent with the gravity of the allegations, would be needed. This was especially so as Ms Taylor is a legal practitioner.

46 The respondent submitted that, based on the totality of the evidence, including the oral interviews and documents, it was open to the investigators to conclude on the balance of probabilities that the appellant's conduct had been established. The disclosures made by A to his parents and to his sister constituted evidence that was consistent and compelling. The conclusions reached by the investigators were consistent with the evidence called in the proceedings before the Commission from the counsellor to whom A had made disclosures in his therapy sessions.

47 The learned Senior Commissioner also recorded that the respondent contended that the ***Briginshaw*** approach should not be adopted but given the highly unusual circumstances, the standard of proof should be that applicable to the National Redress Scheme arising from the Royal Commission into Institutional Responses to Child Sexual Abuse. That standard is 'a reasonable likelihood'.

48 The respondent contended that despite the seriousness of allegations, it had conducted as thorough an investigation as it could, absent the police doing so, given that the conduct took

place outside of Australia. The respondent said that the appellant was given a fair go in the process and that the respondent followed its relevant policies.

The Briginshaw standard

49 The learned Senior Commissioner then examined the question of the standard of proof by reference to various authorities and concluded that '[g]iven the gravity of the allegations in this case, the ***Briginshaw*** approach should be adopted.'

50 He then examined the nature of the evidentiary onus in misconduct cases and referred in detail to the decision of the Full Bench in ***Minister for Health v Drake-Brockman*** [2012] WAIRC 00150; (2012) 92 WAIG 203. Having considered a number of authorities, the learned Senior Commissioner concluded that 'in situations such as the present, where serious allegations of sexual assault or physical assault are made against an employee, as postulated in ***Sangwin (Sangwin v Imogen Pty Ltd*** [1996] IRCA 100), the approach in ***Bi-Lo (Bi-Lo Pty Ltd v Hooper*** (1992) 53 IR 224) is appropriate'.

51 The learned Senior Commissioner then dealt with a related issue of whether there was any conflict between applying the approach to the balance of probabilities test, as applied in ***Briginshaw***, and the approach to cases in summary dismissal for misconduct in ***Bi-Lo*** and concluded that there was no conflict. He examined the authorities on that matter and concluded that:

> Whilst the standards of the police cannot be reasonably expected in a workplace investigation, being undertaken in an employment and commercial environment, an investigation the circumstances such as the present, still needs to satisfy the *Bi-Lo* test of rigor, as I have mentioned above in par 82.

Circumstantial evidence

52 The learned Senior Commissioner concluded that he would apply the approach set out by the Court of Appeal of New South Wales in ***Palmer v Dolman*** [2005] NSWCA 361 per Ipp JA, with whom Tobias and Bastian JJA agreed. This approach set out a number of authorities and concluded that 'it is sufficient in a civil case that the circumstances raise a more probable inference in favour of what is alleged'.

53 The Senior Commissioner adopted and applied that approach in determining the matter, noting that 'the issue to decide is not whether the applicant was guilty of the alleged conduct, in a criminal liability sense. Rather it is whether the respondent, after as proper and as thorough an inquiry as was necessary in the circumstances, had an honest and genuine belief, based upon reasonable grounds, that the misconduct alleged occurred.'

The evidence

54 The Senior Commissioner then examined the evidence of all of the witnesses. The first was the evidence of the appellant himself. He also recorded the evidence of a number of character witnesses called by the appellant. These character witnesses gave evidence by witness statement, which were tendered by consent and were not cross-examined.

55 The Senior Commissioner then examined the evidence of Ms Stephanie Parnell, the appellant's wife from whom he separated in January 2019. Ms Parnell is a solicitor with experience in sexual abuse cases. Most of Ms Parnell's evidence recited by the Commission was in the way of a critique of the investigation from that perspective rather than being substantive factual evidence. She gave some general character evidence on behalf of the appellant, to whom she had been married for just over nine years before they separated.

56 There was also evidence from Mr Peter Glasson, the principal at MacKillop College at the time of the trip to Indonesia.

57 Ms Hunter's evidence was set out in detail, as her evidence was the most significant in terms of the arrangements for the trip to Indonesia, the accommodation arrangements in Bali in particular and what occurred from her recollection.

58 A's mother and father gave evidence about their son's disposition, changes they observed upon his return from the Indonesia tour, their conversations with him and his disclosures to them.

59 Attached to A's father's witness statement were the Statements found in A's belongings after he died. The Senior Commissioner set these out in full, noting that '[w]hilst they may be distressing to some readers, they provide some insight into A's description given around the time that the disclosures were made.'

60 A's sister also gave evidence about her brother and the circumstances under which A had made his disclosures to her and what he told her.

61 The learned Senior Commissioner then recorded attempts made to obtain the records of counselling received by A following his disclosures and recorded the conclusions he had reached in his earlier oral Reasons that he did not propose to consider the detail of the content of the counselling file. He said that it was sufficient to say that its content was consistent with much of the evidence given on behalf of the respondent in relation to the incident occurring; A's mental health problems; his drug and alcohol abuse and his naming the perpetrator as being the appellant. The Senior Commissioner considered the counsellor's evidence and the circumstances of that counselling.

62 The three members of the investigation team, Ms Jones, Mr Wong and Ms Taylor, each gave evidence about the circumstances of the investigation and in particular, the issue of whether the investigators applied the ***Briginshaw*** approach to the balance of probabilities standard of proof. Ms Prendergast also gave evidence about the dismissal.

63 Under the heading of Consideration, the Senior Commissioner, having already determined a number of matters of law and the appropriate approach to be taken to the question of the test to be applied, and questions of hearsay and circumstantial evidence, acknowledged that due to the historical nature of the allegations against him, the appellant was at a forensic disadvantage. He noted that it was necessary for him to also have regard to the lengthy delay in the complaint being made and to take it into consideration, particularly as the complainant was now deceased.

64 He said that he was satisfied that the investigators 'were cognisant of the substantial lapse of time involved from the alleged assault and the time that A disclosed the events to his family, his close friend, and to the counsellor.'

65 The learned Senior Commissioner was also satisfied that the investigators knew of the fact that a considerable amount of material gathered by them was technically hearsay and circumstantial, and that it was incumbent on them to weigh all of that material and form a view whether the misconduct occurred on balance, having regard to the gravity of the allegations.

66 The learned Senior Commissioner noted that:

> 177. … whilst the Commission is not bound by the rules of evidence, the accepted approached over many years is that hearsay evidence is not inadmissible, but is to be accorded the appropriate weight, depending on the totality of evidence before the Commission. This includes circumstantial evidence, which, depending on the nature of

> the case, may be most important. It is the evidence in its totality that must be considered …'

67 He noted that even though the rules of evidence do not apply, 'facts can be fairly found, without the strictures of the rules of evidence, as long as the tribunal refrains from "spinning a coin" and bases its conclusions on material that has probative value, with the weight to be given to such material, being a matter for the tribunal'.

68 In a third conclusion, the learned Senior Commissioner was satisfied that the investigators had regard to the appropriate principles in approaching the workplace investigation and under the CEWA policy *Unsatisfactory Performance and Misconduct*. He said that there could be no question 'that an allegation of sexual assault during the employment would constitute misconduct of the most serious kind.' He noted that the policy recognises the principles of procedural fairness and he was satisfied that the respondent complied with the policy. He was also satisfied that the investigators were independent and that it would not have been appropriate to conduct such an investigation at school-level.

69 The Senior Commissioner noted that despite the criticism by the applicant of the level of experience of the investigators, he did not consider that to be fair criticism. He said that they had undertaken many workplace investigations, some including allegations of a sexual nature. He acknowledged the circumstances confronting the respondent of the conduct having occurred overseas and outside the jurisdiction, and that with the complainant being deceased, the respondent was in a very difficult position. The Senior Commissioner noted that the police could not investigate and the context of the investigation undertaken by the respondent 'was to enquire into whether the applicant had engaged in serious misconduct in breach of his contract of employment, not whether the applicant had committed the offence of sexual assault under the criminal law. The standards and approaches to enquiries in both contexts are different.' In spite of this, the learned Senior Commissioner was satisfied that the investigators were aware of the seriousness of the allegations and, on the evidence of Ms Taylor, he was satisfied that the investigators knew of the need for an 'actual persuasion' to the affirmative case 'that serious misconduct had occurred, consistent with the principles in ***Briginshaw***.' He was not satisfied that the investigators commenced with a presumption of guilt as submitted by the applicant. He said that '[t]he fact that they sought expert opinion from Dr Chamarette, and the context in which that opinion was sought, is inconsistent with such a presumption'.

70 The learned Senior Commissioner then dealt with a number of the applicant's criticisms of the investigation.

71 As to the records from the counselling service, the learned Senior Commissioner noted that for confidentiality reasons, that material could not be obtained by the investigators. However, he said it was open for the investigators to have regard to A's parents' evidence about their son's school performance decline and that Ms Hunter's evidence was that his schoolwork deteriorated on his return from the trip to Indonesia. He noted that it was open for the investigators to conclude that something was amiss in A's school performance from that time.

72 The Senior Commissioner also found that, based on the evidence of Ms Jones, the applicant's good character was assumed by the investigators and that his service record was not in issue.

73 He did not accept that Dr Chamarette was not an appropriate person to consult on the matter. He found that she was highly qualified and experienced in the field and 'well qualified to provide the opinion sought by the respondent'. He noted that it was open to the applicant to have called Dr Chamarette but did not do so. He did not consider that the criticism that the

respondent ignored Dr Chamarette's comments on the options as to substantiation was fair criticism. He said that a balanced reading of her conclusions reflects some ambivalence and that she did not express a clear view either way. He did not consider that it was fair to say that her opinion was disregarded. The learned Senior Commissioner found that '[o]verall, the Investigators approached their task thoroughly in the context of a workplace investigation.' As to the criticism that the investigators did not interview Mr Glasson, the former principal at MacKillop College, the learned Senior Commissioner said that it was not clear how he could have assisted the investigators.

74 As to the evidence of the disclosure made by A, the learned Senior Commissioner noted that despite the views expressed by Dr Chamarette and the investigators, there was no firm evidence that both of the Statements found in A's possessions, Parts 2 and 4, were made in his therapy with the counselling service. He found that this was an assumption. He said that it was open to assume that there may have been other writings produced by A which were not located, given that the Statements found were titled Part 2 and Part 4. He found that the statement headed Part 4 may have been in a therapeutic context, but he said '[t]here is no basis for a finding on the evidence in my view, that this first document (Part 2) was created in a therapeutic context.' He said that even if that were not correct, and both Statements were made in a therapeutic context, 'it is important to recognise, as a matter of the sequence of events, that the Statements were not the first step in A's disclosure.' The Senior Commissioner noted that prior to seeking professional help, A had already made disclosures to his sister and his parents in March 2017 and that it was as a consequence that they encouraged him to seek professional help. His disclosures to his sister were made because of triggers from a chance meeting with a perpetrator of a subsequent assault, well after the trip to Indonesia. A's disclosures to his sister were detailed, graphic and emphatic, he found, and that she was a very credible witness. He found that the Statements were compelling and credible, and noted that Dr Chamarette found the same. He said '[t]hey are detailed, although not as to all aspects of the trip, as suggested in the Final Investigation Report.' He noted that the Report erroneously described the Statements as being handwritten but in fact, they were typed with some handwriting on them. However, he said the first statement correctly identified the number of students and two teachers on the trip. The subsequent description, starting with the delay, the overbooked flight, the airline having to arrange hotel accommodation and that it was close to the airport, was very accurate and consistent with other evidence.

75 The learned Senior Commissioner then considered Ms Hunter's evidence. He did so in some detail, considering her recollections and the arrangements that she described. He compared that with the applicant's recollections. He found that:

> 203. Whilst I have reservations as to aspects of what Ms Hunter told the Investigators, for example the assertions of the applicant 'grooming' her not being in the sinister sense, rather mentoring her, and some confusion as to whether she had done 'research' about historical sexual assault, and whether this was told to the Investigators and/or whether it was accurately recorded by them, in all other respects, and in particular on the core issue of the accommodation arrangements on the final night at the Kartika Plaza Hotel at Bali, I accept Ms Hunter's evidence. I regard her as a witness of truth. It was open for the Investigators on the same basis, to accept Ms Hunter's version of events.
>
> 204. It would, with passing time, be unusual for there not be inconsistencies in recollections. The applicant and the students did go to the Hard Rock Café but on the first and not the second night it seems. As to the allegation of the drinking of alcohol on that evening, it would appear from the interview of at least student S, that when they did go to the Hard Rock Café she did think that they were consuming alcohol and

> referred to cocktails in large glasses. She also described the atmosphere as being dark and like a nightclub, which was consistent with at least in part, A's description in his Part 2 Statement, of the group having dinner at the Hard Rock Café. Also, whilst the counsellor referred to A being given alcohol in the room by the applicant on the last night immediately before the assault, this was not mentioned in A's Part 2 Statement.
>
> 205. Ms Hunter said that it was not until she returned to Perth that one of the students told her that the applicant took the group to the Hard Rock Café and bought them drinks. This was denied by the applicant. On this issue I have doubts whether the investigation could conclude on balance, that it was established that the applicant had purchased drinks for the students. There was no direct evidence to this effect. In all other respects however, the general consistency in the essential narrative was striking.

76 The learned Senior Commissioner also noted that Ms Hunter's evidence was also consistent with at least the interview of student S regarding the students watching a movie on the final night. He had no reason to doubt Ms Hunter's evidence that neither the applicant nor A was present and that she was told by the students that the appellant and A had gone to bed earlier. He also noted that Ms Hunter referred to student S asking her to knock on their door as noises were heard. He accepted Ms Hunter's evidence that there was some form of altercation on the flight home involving the applicant and A, but Ms Hunter did not know what that was about.

77 The learned Senior Commissioner then dealt with the contention that Ms Hunter's evidence was entirely contaminated because she had spoken to A's father before her interview with the investigators and had seen the Statements. He did not accept that this was the case, but rather that in accordance with Ms Hunter's evidence, that she had not seen the Statements until two weeks before the hearing in these proceedings. Ms Hunter agreed that she had spoken to A's father on two occasions, the first time briefly and on the second occasion, in more detail when he had told her about A's complaints.

78 The learned Senior Commissioner then found:

> 208. Overall, I found the consistency between the disclosures made by A to his sister, to his parents, their evidence as to what A told them and the manner in which it was told, taken with A's Statements, to be compelling. There was also A's disclosure to his friend Mr Bardowski, to a similar effect.

79 He found that the evidence of the counsellor was strongly corroborative in relation to the events, even though it was given after the conclusion of the investigation.

80 The learned Senior Commissioner then noted the substantial body of circumstantial evidence and dealt with 12 of those matters. They included A's decline in schoolwork and what occurred in relation to his schooling thereafter. He balanced this against the evidence of both Mr Gavin Greaves and Mr Robert Holt, called as character witnesses by the applicant, that they had not noticed any substantial changes in A's behaviour or performance after the trip to Indonesia. However, the Senior Commissioner said that they could not have been as close to A as A's parents or Ms Hunter, who was one of his teachers at the time.

81 The Senior Commissioner noted A's descent into alcohol and drug abuse and his destructive behaviour generally. He noted the uncontroversial evidence of his family and the counsellor that once A had disclosed the assault, he seemed to have a sense of relief.

82 The sixth matter he described as being important was the series of tweets sent by A to the applicant in March and April 2017, which were sent at about the same time as A's disclosures to his family and before he attended counselling in early May 2017. He said:

> There can be no reasonable explanation, as a matter of logic, given the timing and content of some messages, other than something of significance had occurred between the applicant and A sometime in the past. … The applicant did nothing about the tweets and blocked them. He did not report them to anyone, if he had any concerns as to the welfare of A, as a former student at MacKillop College, given his pastoral care role. Such a failure to act on the tweets is also consistent with the applicant not wanting to call attention to A in his past, and prompt the asking of questions.

83 The seventh matter of circumstantial evidence was that of the counselling file, and that the counsellor was sufficiently seriously concerned to report the matter to police. Whilst no formal police record of that report is in evidence, it did not alter the fact that contact had been made with the police.

84 The eighth matter of circumstantial evidence was that of the counsellor, that at some undisclosed time, A had made telephone calls to the applicant at work when he was at another school, possibly for the purpose of seeing if the applicant had done to anyone else what A said he had done to him. This, according to the Senior Commissioner, appeared to have been a consistent theme in A's narrative.

85 The ninth matter of circumstantial evidence was the complete lack of any possible ulterior motive for A to make a malicious complaint of such seriousness against the applicant.

86 He considered the triggering of the memories and the disclosures to A's family and counsellor in the context of comments made by Dr Chamarette.

87 He considered Ms Hunter's evidence about the accommodation and room allocations, and that A attended counselling shortly after his disclosures and this was 'consistent with the legitimacy of A's grievance and the need for therapeutic assistance'.

88 The learned Senior Commissioner then concluded that having regard to all of the surrounding circumstances, in his view, looked at in the totality of what was before the investigators and what was before the Commission:

> 220. … it is open to draw inferences more probable than not, which support the holding by the employer of an honest and genuine belief, based on reasonable grounds, that the most serious allegation of misconduct complained of, occurred. These inferences, open on the material assessed as a whole, go beyond mere conjecture or surmise.

89 The learned Senior Commissioner was not satisfied that it was reasonably open for it to be concluded that the appellant purchased drinks for the students at the Hard Rock Café, but said that this conclusion did not detract from the principal allegation. He said that, '[a]ll the material, including the circumstantial evidence, supports the primary conclusion reached by the Investigators in the Final Investigation Report, as said by Ms Taylor in her evidence, "with some conviction"'.

90 For those reasons, the Senior Commissioner found that the dismissal for misconduct was not harsh, oppressive, or unfair.

Consideration

Introductory comments

91 In his opening submissions on the appeal, the appellant points to submissions at first instance by the respondent as to the context in which allegations of child sexual abuse might be viewed in light of the Royal Commission into Institutional Responses to Child Sexual Abuse. The

appellant urges the Full Bench to not be swayed by the respondent's approach. This was not raised as a ground of appeal, however, we wish to address it.

92 We note what the appellant says about the approach arising from the Royal Commission of the benefit of the doubt being given to the child, or the child's interests prevailing. Ms Taylor said that this was taken into account for the purpose of assessing the level of risk, had they reached a conclusion that the appellant was to return to work. However, 'in the context of investigating this from our employment perspective, that, you know, we were still very focussed on whether the allegations could be substantiated'. She noted that the decision was not borderline, but 'the decision was made with a certain level of conviction'.

93 In our view, the correct approach to be taken by the Full Bench is that which relates to the usual considerations in dealing with whether there has been error in the decision appealed against (***House v The King*** [1936] HCA 40; (1936) 55 CLR 499). There is no ground of appeal, nor is there any indication, that the learned Senior Commissioner allowed considerations of the nature referred to by the appellant to affect his decision-making. His questions of the respondent's counsel at first instance suggest that he did not view it as an appropriate approach. The only reference in the Reasons for decision to the Royal Commission was that Mr Wong had approached the 'case as influenced by the Royal Commission'. The remainder of the Senior Commissioner's considerations appear to be orthodox in dealing with a claim of unfair dismissal for reason of summary dismissal for misconduct, regardless of the nature of the particular allegations, while taking account of their seriousness.

94 We see no reason that the Full Bench might be affected in the way the appellant suggests such that it ought to consciously guard against it.

Grounds 1 and 2

95 The first and second grounds of appeal are related in that the second flows from the first.

96 The first ground is, in essence, that the learned Senior Commissioner erred in deciding that he had only to be satisfied that the respondent, after a reasonable investigation, held an honest and genuine belief based on reasonable grounds, that the misconduct alleged of the appellant occurred. Rather, the appellant says that the Commission must be satisfied that the misconduct occurred.

97 The second ground is that the Commission erred in failing to make a finding based on the requisite standard of proof that the alleged serious misconduct occurred and was a valid reason for the dismissal. This included that the Commission failed to apply the ***Briginshaw*** standard to his findings.

98 The appellant refers to the decision of the Full Bench in the ***Minister for Health v Drake-Brockman*** [2012] WAIRC 00150; (2012) 92 WAIG 203, where Smith AP and Beech CC, with whom Harrison C agreed, observed that an employer has an evidentiary burden to show there is sufficient evidence to raise the factual matters it relies upon as a reason to dismiss and employee. Once the employer establishes its position in this regard, the onus moves to the employee to show that dismissal for that reason was harsh, oppressive or unfair.

99 The appellant then goes on to refer to ***Newmont Australia Ltd v The Australian Workers Union*** (1988) 68 WAIG 677, which the appellant says sets out a stricter onus on an employer than that set out in ***Bi-Lo***, asking whether the legal right of the employer to terminate the employment had been exercised so harshly or oppressively against the employee as to amount to an abuse of that right.

100 The appellant notes that in ***Drake-Brockman***, the Full Bench referred to ***Shop, Distributive & Allied Employees' Association, NSW Branch v Jewel Food Stores*** (1987) 22 IR 1, a case involving an employee who was summarily dismissed for dishonesty. In that case, it was observed that the employer must be 'fully satisfied' after careful investigation that the accusation has been made out, that it is also required to consider other matters, and that industrial tribunals should apply the same standard 'when considering reinstatement'.

101 The respondent says that the learned Senior Commissioner applied the correct approach in considering the nature of the allegations, namely a matter relating to the personal safety of a juvenile and the public interest. The respondent says what it referred to as the ***Sangwin***/***Bi-Lo***/***Drake-Brockman*** approach was appropriate given the serious nature of the allegations.

Consideration of grounds 1 and 2

102 The appellant refers to the observations by Hasluck J in ***Garbett v Midland Brick Company Pty Ltd*** [2003] WASCA 36; (2003) 83 WAIG 893 at [29] – [32] to support his contention that the Commission is obliged to decide for itself whether the misconduct occurred as a matter of fact. However, our reading of his Honour's remarks does not lead us to that conclusion. His Honour cited Franklyn J's comments in ***Gromark Packaging v Federated Miscellaneous Workers Union of Australia, WA Branch*** (1992) 46 IR 98. What Franklyn J was referring to was the distinction between the approach to be taken after a finding of fact had been made in respect of dismissal for redundancy rather than misconduct. Neither of these judgments is authority for the proposition raised by the appellant that the Commissioner is required to make a finding that the misconduct actually occurred.

103 ***Drake-Brockman*** was a case involving an employee who was dismissed for misconduct. It was alleged that she made false claims for a salary sacrifice benefit based on receipts which more than one person had used to claim the same reimbursement; that it was misconduct for alleged dishonesty. The first ground of appeal in that matter was on all fours with this matter in that it was about whether the requirement was for the employer to demonstrate, and the Commissioner to make a finding about, whether the employer had honestly and reasonably believed, and had reasonable grounds for believing on the information available at the time of dismissal, that the employee had misconducted herself.

104 The Full Bench reviewed the law applicable to a claim of unfair dismissal. Firstly, it noted the provision of s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) which allows an employee to refer a claim of harsh, oppressive or unfair dismissal to the Commission, and that the task of the Commission was not limited to the reasonableness of the appellant's actions in dismissing the employee but it was to decide whether the decision to dismiss was harsh, oppressive or unfair, in particular, by reference to ***Miles v Federated Miscellaneous Workers Union of Australia*** (1985) 65 WAIG 385 (***Undercliff***) and ***Amalgamated Metal Workers and Shipwrights Union v Robe River Iron Associates*** (1989) 69 WAIG 985, 987.

105 They went on to deal with the criteria governing the evidentiary onus on the employer by reference to the decision of the Industrial Commission of South Australia in ***Bi-Lo Pty Ltd v Hooper*** (1992) 53 IR 224 where it was observed at (229) - (230):

> 229. An employee is entitled to both substantive and procedural fairness in respect of a dismissal. Substantive fairness will be satisfied if the grounds upon which dismissal occurs are fair grounds. Broadly speaking a dismissal will be procedurally fair if the manner or process of dismissal and the investigation leading up to the decision to dismiss is just.

> Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.
>
> 230. If a fact or facts come to light subsequent to the dismissal which cast a different light on the Commission of the alleged misconduct, such fact or facts will not necessarily or automatically render the dismissal harsh, unjust or unreasonable. In our view in such circumstances what will need to be considered is whether the employer, if it had acted reasonably and with all due diligence, could have ascertained those facts before the dismissal occurred.
>
> The Commission is required to objectively assess the subjective actions and beliefs of the employer as at the time of dismissal and not at some subsequent time: see ***Gregory v Philip Morris*** (1998) 24 IR 397 at 413; 80 ALR 455 at 471; see also ***Stearnes v Myer SA Stores*** Print No 9A/1973 at 5. Whether the employer will satisfy that objective test will depend upon the facts of each case. The gravity of the alleged offence will dictate the nature and extent of the inquiry which the employer must conduct. An employer must ensure that an employee is given as detailed particulars of the allegations against him/her as is possible, an opportunity to be heard in respect of such allegations, and a chance to bring forward any witnesses he/she may wish to answer those allegations.

106 The Full Bench also noted the test set out in ***Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch Industrial Union of Workers*** (1988) 68 WAIG 667, where O'Dea P at page 679 observed that in a case of summary dismissal such as that one, that 'there is an obligation upon the employer to show on balance that the misconduct had in fact occurred. That obligation may conveniently be regarded as an evidentiary onus, as distinct from the obligation which remains on the party who alleges that there has been oppression injustice or unfair dealing on the part of the employer towards the employee'. His Honour also observed that:

> The applicable principles are obvious and beyond question but it remains to determine whether in the present circumstances there was a proper evaluation of the fairness of the employer's action in terminating employment and that judged according to an objective standard of whether the employer has acted reasonably.

107 However, the Full Bench went on to compare ***Bi-Lo*** and ***Newmont***, saying:

> 55. Whilst in ***Bi-Lo*** and ***Newmont*** the tests posed require an assessment of the circumstances of the conduct which is said to be the basis of a dismissal to be undertaken objectively as to whether an employer has acted reasonably in making a decision to dismiss, in ***Newmont*** the evidentiary onus is said to be on the employer to show on balance that misconduct had in fact occurred. If ***Bi-Lo*** is applied it is not necessary for the employer to prove the misconduct only to prove that the employer honestly and genuinely believed, and had reasonable grounds for believing on the

information available at the time the decision was made, that the employee was guilty of the misconduct alleged.

56. Importantly, ***Bi-Lo*** deals with the test to be applied where the misconduct alleged is theft, other acts of dishonesty or matters where the gravity of an offence is such that damage can be done to an employer's business. In such a case the Commission should only intervene where it is necessary to protect an employee against a harsh, oppressive or unfair exercise of an employer's right of dismissal. In ***Bi-Lo*** the Industrial Commission of South Australia made this distinction clear when they said (229):

> In a case as the present one where the employee is dismissed for misconduct in respect of dishonest dealing with the employer's property we do not believe it is a correct test to state as did the learned trial judge that the employer must prove, on the balance of probabilities, on the evidence submitted to the Commission, that the employee actually stole the goods, before it will escape a finding that a dismissal based upon such an alleged theft is to be treated as harsh, unjust or unreasonable.

108 They noted that in ***Bi-Lo***, the Industrial Commission of New South Wales in ***Shop, Distributive & Allied Employees' Association, NSW Branch v Jewel Food Stores*** (1987) 22 IR 1, 2 observed that it can be a difficult balance for store management to:

> 9. … protect their enterprise from dishonesty in the handling of funds, particularly in circumstances where the enterprise is vulnerable and dishonesty difficult to detect and eliminate. … where dishonesty is alleged as the reason for summary dismissal, management should only summarily dismiss if it is fully satisfied after careful investigation that the accusation has been made out.

It noted a range of other matters that a 'prudent and fair employer will take into account' and concluded that 'this same standard should be applied by industrial tribunals when considering reinstatement'.

109 The Full Bench in ***Drake-Brockman*** went on to observe that:

> 58. Even when the test in ***Bi-Lo*** is applied, it may still be appropriate in some matters for the Commission to draw a conclusion as to whether or not misconduct had occurred. This is a different issue from whether an employer has met an evidentiary onus.

110 The Full Bench then examined the decision of von Doussa J in ***Sangwin v Imogen Pty Ltd*** [1996] IRCA 100, a decision made in the context of s 170DE of the *Industrial Relations Act 1988* (Cth) (repealed). This section prohibited an employer from dismissing an employee unless the employer thought there was a valid reason. In that case, von Doussa J found that the employee was not party to an attempted theft from the employer and therefore had not committed misconduct. However, his Honour also considered whether the employer had a valid reason for dismissal on grounds that the employer had an honest belief on reasonable grounds after sufficient inquiry, that the employee had been guilty of serious misconduct. The plurality of the Full Bench noted that '[w]hen considering this test, von Doussa J relevantly set out circumstances where it is not necessary for a tribunal hearing an unfair dismissal application to make a finding of proof of misconduct'. His Honour observed the hardship that may be visited on a dismissed employee. However, he noted that:

> … in considering the application of Division 3 of Part VIA of the Act, it must be recognised that its provisions are intended to operate in the practical arena of commercial activity, and that in an endeavour to achieve industrial fairness it is necessary to balance the interests and well-being of an individual employee against the interests of the employer, and also to have regard to matters of wider public interest which may be involved. The construction of the Act is not to be considered only from the viewpoint of the employee.

111 His Honour then went on to set out some examples of situations where an employer may meet the test of holding a valid reason for dismissal. He said:

> Take a situation where a person is employed as a skilled operator of equipment where human life depends on its proper operation or performance, and the employer receives a report that the operator is suspected of suffering a medical condition that is likely to impair his ability to perform his duties. The employer would be duty bound to ensure human safety. If after sufficient inquiry the suspected diagnosis could not be excluded would not the employer then have a sound and well founded, i.e. 'valid', reason connected with the employee's capacity, or alternatively connected with the operational requirements of the undertaking, establishment or service for terminating the operator's employment (assuming, of course, that there is not some other position reasonably available to which the employer can transfer the employee)? It would be odd if, after dismissal, it was later held that no valid reason existed at the time of dismissal because later events, e.g. the passing of time or a new diagnostic procedure, proved that the operator had not been suffering the suspected medical condition.
>
> An employer of a health worker or child care provider against whom was made an allegation of serious physical abuse that threatened the health and safety of those in that person's care would be duty bound to act to protect those under care. If, after sufficient inquiry, the employer honestly believed on reasonable grounds that the allegation was correct the employer would be in dereliction of duty to those in care if the employee were allowed to return to duty. Again, would not the employer have a sound or well founded reason connected with the operational requirements of the undertaking, establishment or service for terminating the operator's employment even if, after dismissal, a tribunal or court held that it was not satisfied that the misconduct alleged had occurred, or that it did not occur?
>
> These are extreme examples based on human safety issues. Other examples based on the serious risk of property damage or monetary loss which might arise if employees against whom serious allegations of a breach of safe operating practices or dishonesty had been made were allowed to continue performing their normal employment duties would pose similar rhetorical questions. Although the examples may not be representative of the risk of harm that could arise in many workplace situations, they lead me to the view that s 170DE(1) should not be construed so as to exclude from the notion of a 'valid reason' an honest belief held on reasonable grounds by the employer, after inquiry of the type envisaged in ***Bi-Lo Pty Ltd v Hooper***, that a state of fact exists which justifies termination of the employment. In my opinion if the employer honestly believes on reasonable grounds after sufficient inquiry that the employee has been guilty of serious misconduct a valid ground within the meaning of s 170DE(1) exists for terminating the employment of the employee.
>
> Even where such a belief constitutes a 'valid reason', there may nevertheless still be cases where a dismissal based on that belief may be harsh, unjust or unreasonable within the meaning of s 170DE(2). Many considerations of the kind likely in other cases to lead to a finding that a dismissal was harsh, unjust or unreasonable would probably have been excluded in the course of reaching the conclusion that a 'valid reason' existed, but there would be other matters as well to be considered. These would include whether dismissal was disproportionate to the gravity of the believed misconduct on which the employer acted and to the risk of harm to the employer and others had the employee not been dismissed; the gravity of the personal and economic consequences of dismissal on the employee; and any mitigating circumstances such as the length, loyalty and quality of the employee's work record.

112 The Full Bench in ***Drake-Brockman*** then observed:

> 60. Considerations going to the interests of both employer and employee are part of the requirement at law, that in assessing whether a dismissal is unfair, the Commission is to have regard to the principle of a fair go all round, that is fairness to the interests of

the employer and employee. Pursuant to s 26(1)(c) of the Act, the Commission is also required to have regard to the interests of persons immediately concerned whether directly affected or not and, where appropriate, the interests of the community as a whole.

61. In ***Newmont*** the circumstances were different to the factual issues raised in ***Bi-Lo*** and ***Sangwin***. No issue of personal safety, protection of an enterprise from dishonesty or any issue going to the public interest was raised. What was alleged in Newmont was that the employee had been dismissed as he had used abusive language on two occasions. There were also allegations of poor work performance and an allegation of an inability to follow reasonable directions. In such a matter the Commission would inevitably be bound to make an assessment as to whether the conduct which was alleged to have occurred was misconduct, as unless such conduct is proven, it would most likely follow that termination by an employer could not be said to be justified.

62. In this matter, as the factual circumstances relied upon by the employer raise an issue going to dishonesty, the Commissioner properly referred to ***Bi-Lo*** as the setting out the evidentiary onus.

63. In any event, leaving aside the application of ***Bi-Lo***, it is well established that where misconduct is alleged or relied upon there is a burden on the employer to demonstrate that the alleged incident did occur and also to evaluate mitigating circumstances: ***Garbett v Midland Brick*** [2003] WASCA 36 [72]; (2003) 83 WAIG 893, 901.

64. In ***Garbett*** Hasluck J observed that Franklyn J in ***Gromark Packaging v Federated Miscellaneous Workers Union of Australia, WA Branch*** (1992) 46 IR 98 had drawn upon the reasoning in ***Robe River Iron Associates v Australian Workers' Union, WA Branch*** (1987) 67 WAIG 320 when assessing whether a dismissal was unfair. Hasluck J relevantly observed that Franklyn J [31]:

> [H]eld that a decision on the question of whether a dismissal was unfair is a discretionary decision because a value judgment is required to be made as to whether the conduct which gave rise to the dismissal, viewed in all of its circumstances, justified the dismissal. However, a finding of misconduct or of redundancy, which gives rise to a legal right to dismiss an employee, is not the subject of a discretionary judgment. A finding as to misconduct or redundancy is a conclusion of fact. The exercise of discretion arises only at the next step, that is to say, in determining whether the consequence of the misconduct or redundancy is fairly that of dismissal.

65. What emerges from these cases is that findings of fact must be made by the Commission as to what was the conduct which gave rise to the dismissal, what are the circumstances of that conduct and in making an assessment, regard should be had to the evidentiary onus on the employer.

66. The evidentiary onus has been described as an evidentiary burden: ***Winkless v Bell*** (1986) 66 WAIG 847, 848; ***Pastrycooks Employees, Biscuit Makers Employees & Flour and Sugar Goods Workers Union (NSW) v Gartrell White (No 3)*** (1990) 35 IR 70, 84; ***Franklins Ltd v Webb*** (1996) 72 IR 257, 260. The employer does not have to establish that the employee was actually guilty of the misconduct alleged, rather it must show that following a proper inquiry there were 'reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal': ***Bi-Lo*** and see too ***Western Mining Corporation Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers***

(1084); ***The Australian Builders' Labourers' Federated Union of Workers, Western Australian Branch v The Building Management Authority*** (1993) 73 WAIG 1876, 1877 per Fielding C. In ***Shire of Esperance v Mouritz*** (1991) 71 WAIG 891 Kennedy J stated (895):

> [I]t appears that the Full Bench misunderstood the nature of an evidential burden when it referred to the evidential burden being upon the employer to establish that summary dismissal for misconduct was justified. An evidential burden does not require the person upon whom it lies to establish anything. It imposes only an obligation to show that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue.

113 In our respectful view, the Full Bench in ***Drake-Brockman***, in referring to ***Newmont*** as setting 'a stricter test' of whether the legal right to terminate employment has been exercised harshly or oppressively such as to be an abuse of that right, does no more than refer back to the bed-rock test of unfairness in a dismissal – that it is not about the legal right to dismiss but it is about fairness. Reference to ***Jewel Stores*** and the extract referred to by the appellant must be taken in the overall context of the authorities.

114 We note that after a thorough examination of ***Bi-Lo*** and other authorities on unfair dismissal claims and the evidentiary burden, the Full Bench in ***Drake-Brockman*** concluded that:

> 66. … The employer does not have to establish that the employee was actually guilty of the misconduct alleged, rather it must show that following a proper inquiry there were 'reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal.

115 Further, they referred to Kennedy J's conclusion in ***Shire of Esperance v Mouritz*** (1991) 71 WAIG 891 at 895, that the evidential burden 'does not require the person upon whom it lies to establish anything. It imposes only an obligation to show that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue'.

116 This builds on the balance referred to by von Doussa J in ***Sangwin,*** of the interests of the employer and the employee, and the wider public interest. This is a matter of fairness in the employment realm, not a matter of criminal conduct.

117 The learned Senior Commissioner set out the evidentiary onus to be applied, by reference to the serious nature of the allegations of sexual assault or physical assault and found that the test in ***Sangwin*** and ***Bi-Lo*** was appropriate. He considered the process of investigation undertaken by the respondent including the issues raised by the applicant. He examined the conclusions and the belief of the investigators. He concluded that having regard to all of the circumstances and 'the totality of what was before the Investigators and what is before the Commission, … it is open to draw inferences more probable than not, which support the holding by the employer of an honest and genuine belief, based on reasonable grounds, that the most serious allegation of misconduct complained of, occurred.' In other words, the respondent had discharged the evidential burden which fell to it, in accordance with the authorities.

118 It is clear, then, that the Senior Commissioner applied the proper principle about the employer's belief. The Senior Commissioner did not and was not himself required to be satisfied that the misconduct occurred. In a case of this nature, where the allegation is of one of the most serious, of sexual assault by a teacher against a student, in circumstances where, as in ***Sangwin,*** an issue of human safety arises, and in ***Bi-Lo***, the employer is entitled to act even if

the employer is not able to prove that the employee was actually guilty of the conduct. Where, in a case like this, a school investigates such a serious allegation, and has good reason for its conclusion, then it would be unreasonable for the school to be required to continue to employ such a teacher. Further, it would not be in the public interest to do so.

119 We would dismiss ground 1.

Ground 2

120 Insofar as ground 2 deals with the same matter as ground 1, we would dismiss it also.

121 The appellant also asserts that the learned Senior Commissioner failed to apply the ***Briginshaw*** standard to his findings.

122 The learned Senior Commissioner set out the law regarding the appropriate standard of proof in paragraphs [68] - [72], concluding that, '[g]iven the gravity of the allegations in this case, the ***Briginshaw*** approach should be adopted.' He went on to deal with the nature of the evidentiary onus in misconduct cases from [73] - [85] and the issue of the circumstantial evidence, and concluded at [87] that he would 'adopt and apply the above approaches in determining this matter'. He then set out the test he had previously adopted, from ***Bi-Lo***, saying:

> Importantly, in these proceedings, the issue to decide is not whether the applicant was guilty of the alleged conduct, in a criminal liability sense. Rather is it whether the respondent, after as proper and as thorough an inquiry as was necessary in the circumstances, had an honest and genuine belief, based upon reasonable grounds, that the misconduct alleged occurred.

123 The learned Senior Commissioner then examined the evidence. He noted that Ms Taylor, the member of the investigation team who drafted the Report, and who was a legal practitioner, said she discussed the ***Briginshaw*** approach within the investigation, that given the seriousness of the allegations, while they were to apply the balance of probabilities standard of proof, they needed to be sure. In her evidence, she said that the investigation would not have been satisfied if only a borderline decision was available, and that they reached their conclusion with a 'level of conviction'.

124 The learned Senior Commissioner considered and weighed all of the evidence, noting consistencies and inconsistencies, and drew conclusions. He examined the circumstantial evidence to identify those parts that supported the findings of the investigation and those that did not. He described some of the evidence in strong terms, for example, he found the 'consistency between the disclosures made by A to his sister, to his parents, their evidence as to what A told them and the manner in which it was told, taken with A's Statements, to be compelling. There was also A's disclosure to his friend Mr Bardowski, to a similar effect'. He 'found the counsellor's evidence to be highly credible and compelling. Taken with the evidence of A's sister, his parents and the content of the Statements made by A, the evidence of the counsellor is strongly corroborative in relation to the events, even though it was given after the conclusion of the investigation'. He noted the 'logical consistency of A and the applicant sharing a room' and that given the complement of the group that it was 'of itself, compelling'.

125 Finally, in his concluding paragraph, the learned Senior Commissioner said that '[a]ll the material, including the circumstantial evidence, supports the primary conclusion reached by the Investigators in the Final Investigation Report, as said by Ms Taylor in her evidence, "with some conviction".

126 The use of such language as 'compelling', 'highly credible' and 'strongly corroborative' is indicative of a proper approach to the evidence and the conclusions, in accordance with the ***Briginshaw*** standard. It was not a persuasion based on inexact proofs, indefinite testimony or indirect inferences.

127 The learned Senior Commissioner's conclusions indicate that he was satisfied that the respondent had met its evidential burden to the ***Briginshaw*** standard. That was what was required of him, given the context of the test in ***Bi-Lo***. We would dismiss this ground.

Ground 3

128 In this ground, the appellant challenges the receipt of hearsay evidence and the weight given to it by the Commission.

129 The appellant is correct that the Commission is not bound 'by any rules of evidence, but may inform itself on any matter in such a way as it thinks just' (see *Industrial Relations Act 1979* (WA) s 26(1)(b)). However, that does not mean that it may receive and consider any material without consideration of its probative value. In ***Pochi v Minister for Immigration and Ethnic Affairs***, [1979] AATA 64; (1979) 26 ALR 247, 256 - 257, Brennan J set out the law regarding the application of the rules of evidence by tribunals which are expressly not bound by those rules. His Honour said that it was well established that in such circumstances, the tribunal should only act on material that is reliable and logically probative. His Honour said:

> The Tribunal and the Minister are equally free to disregard formal rules of evidence in receiving material on which facts are to be found, but each must bear in mind that "this assurance of desirable flexible procedure does not go so far as to justify orders without a basis in evidence having rational probative force", as Hughes CJ said in ***Consolidated Edison co. v National Labour Relations Board*** [1938] USSC 176; (305 U.S. 197 at p 229). To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force, as Evatt J pointed out, though in a dissenting judgement, in ***The King v War Pensions Entitlement Appeals Tribunal; Ex parte Bott*** [1933] HCA 30; (1933) 50 CLR 228 at p 256:
>
> > Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by any rules of evidence.' Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'.
>
> That does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence. Diplock LJ in ***Reg v Deputy Industrial Injuries Commissioner, Ex parte Moore*** [1965] 1 QB 456 at p 488 said:
>
> > These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached

> to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.

Lord Denning MR in ***T.A. Miller Ltd v Minister of Housing and Local Government*** [1968] 1 WLR 992 at p 995 said much the same:

> Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law

and he repeated that observation in ***Kavanagh v Chief Constable of Devon and Cornwall*** [1974] 1 QB 624 at p 633. In the United States where considerable judicial attention has been given to fact finding by administrative tribunals (see Schwartz Administrative Law, Boston, 1976 paras 115 et seq), substantially the same principle has been expressed. It was thought, at one time, that the ***Consolidated Edison*** judgment required that some legal proof had to be adduced, and that hearsay evidence alone could not support an adverse finding (see Schwartz, op cit, para 118). But in ***Richardson v Perales***, [1884] USSC 274; 402 US 389 at p 407 the ***Consolidated Edison*** case was construed in this way:

> The contrast the Chief Justice was drawing … was not with material that would be deemed formally inadmissible in judicial proceedings but with material 'without a basis in evidence having rational probative force.' This was not a blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value. The opposite was the case.

130 Therefore, while the Commission is not bound by the rules of evidence, it must only act on material that is logically probative, that has rational probative force, and is relevant to a matter in issue. The matter before the Commission involved allegations of sexual abuse of a child by a teacher, and the allegations arise from events said to have occurred more than 20 years ago. It also affected the approximately 30-year career of a teacher, the appellant. As serious as this situation is, it does not impose on the Commission an obligation to observe the rules of evidence in the same way as would apply to a court, which is bound by those rules. It is not the only way for justice to be served. The Commission may, as s 26(1)(b) provides, inform itself in such a way as it thinks just. In doing so, it ought to assess the evidence before it as to how credible and reliable it may be, taken with other evidence.

131 The appellant complains that by receiving and giving weight to hearsay evidence, the Commission did not inform itself in a way that was just. He says that the Senior Commissioner ought to have preferred his own evidence given on oath.

132 In our respectful view, the learned Senior Commissioner carefully considered all of the evidence and nothing has been put by the appellant to suggest that, in any particular aspect, the Commission's weighting of the evidence was in error. Merely because the appellant's evidence was first-hand and given on oath, does not make that evidence preferable. The learned Senior Commissioner was at pains to examine and analyse all that was before him and to give it appropriate weight. He considered those aspects of the evidence that were consistent and supported the allegations and those that were not consistent and supportive. He found weaknesses with the appellant's evidence as well as in the other evidence, and in light of the competing evidence and the amount of it, he was entitled to conclude as he did regarding the totality of the evidence.

133 The learned Senior Commissioner did not find certain aspects of the appellant's evidence to be plausible, although it was first-hand and given under oath. For example, he examined the appellant's evidence regarding the Tweets he received from A and concluded aspects of it made no sense. He also noted at [200] that during the investigation, the appellant changed his position from initially strongly believing that he did not share a room with A to being '100% sure that he did not do so', having previously indicated that he had no distinct memory of Bali.

134 The learned Senior Commissioner was also particular about analysing the evidence and comparing various accounts so as to rule out some of it, concluding a number of issues in the appellant's favour. One example is the allegation of him having purchased drinks for the students.

135 The particulars also allege that the typed Statements lacked provenance. We will deal with that matter in detail in ground 6. As to whether the Statements were 'inherently incredible' as the appellant alleges, Dr Chamarette did not think so, and she is an expert in the field.

136 Therefore, in our view, the Senior Commissioner did not err by accepting hearsay evidence and in doing so in preference to the sworn, first-hand evidence of the appellant. We would dismiss this ground of appeal.

Grounds 4, 5, 6, 7 and 9

137 In these grounds, the appellant asserts that the learned Senior Commissioner mistook the facts.

Ground 4

138 The appellant says that the Commission erred in fact and in law in using circumstantial evidence to draw inferences adverse to the appellant.

139 The appellant argues, in reliance on ***Seymour v Australian Broadcasting Commission*** (1977) 19 NSWLR 219 at 232, that one of the features of circumstantial evidence is that there is always more than one possible explanation for the evidence. However, we also note that in his judgment in that matter, Mahoney JA pointed out:

> I am conscious that, in dealing with these two matters and in considering the other matters relied on by the defendant, the problems involved are complex. The facts from which, in the end, the defendant suggested the inference should be drawn that the plaintiff was involved in the fraud were, in several respects, themselves matters to be proved only by inference from the details of the evidence, and issue was taken at the trial both upon the main facts and upon these details. The plaintiff's argument before this Court contested, not merely that the inference of association in the fraud was open from the facts on which the defendant relied, but also denied that those facts, or the details from which the defendant would have them inferred, were themselves open to be established by inference in the way the defendant claimed. It was not practicable for the judge in summing-up, nor is it in this Court, practicable to pursue the permutations and combinations of the factual material. The ultimate conclusion must depend upon the overall impression of the facts and the interplay of the facts, upon the mind of the Court and the jury.

140 His Honour's comments are most apposite to this matter and in fact almost all, if not all, of the issues in this ground. Further, in our respectful view, there is very little in what the appellant submits in these points.

141 Firstly, the learned Senior Commissioner, and the investigators initially, drew together a complex set of facts and inferences to come to their conclusions. The investigators weighed all of the evidence, taking account of issues of the difficulties in dealing with allegations about circumstances that were nearly two decades ago, and that memories are affected. Witnesses were unavailable and the alleged victim was deceased. However, they considered all that was before them and, rather than relying on one or two pieces of circumstantial evidence, they had before them, and the Commission had before it, a myriad of evidence, albeit a large portion being circumstantial, as well as expert evidence, and came to a conclusion that was reasonably open.

142 The appellant also relies on ***Chamberlain v R (No 2)*** [1984] HCA 7; (1984) 153 CLR 521, per Brennan J at 27, that where an entire case consists of circumstantial evidence, the prosecution will have difficulty in discharging the burden of proof. His Honour said that '[s]uch a case is destroyed by the existence of any fact which is inconsistent with the inference of guilt that the prosecution asks the jury to draw from circumstantial evidence'. This may be so for the prosecution of criminal charges, particularly with its high standard of proof required but, with respect, it is not so in a jurisdiction where the rules of evidence do not strictly apply and the standard of proof is the balance of probabilities. This is so even where the ***Briginshaw*** standard applies.

143 The Senior Commissioner was clearly alive to the need for caution in dealing with circumstantial evidence, and he dealt with it accordingly, as he was entitled to do.

144 We do not intend to deal with all of the aspects of circumstantial evidence raised by the appellant, as, generally speaking, they constituted evidence the learned Senior Commissioner was entitled to consider. However, some of the matters warrant particular attention. The first issue of circumstantial evidence raised under this ground is that the Commission did not consider the alternative inferences that may be drawn from circumstantial evidence and suggests that a possible explanation for the allegations lies in the mental illness suffered by A. This involves the circumstantial evidence referred to by the appellant in [75] - [86]. There was no suggestion at any stage, either during the investigation or before the Commission that A was not mentally ill. All of the material supports that assumption, including the counselling records. However, the appellant brought no evidence before the Commission that the mental illness may have been an explanation for the allegations. It cannot do so now.

145 Having said that, we note that Dr Chamarette expressed the views that A's belief that he had been the victim of sexual assault from the appellant 'and that this appeared to have substantially altered his behaviour, school attendance and adjustment and may have contributed to his alcohol/drug addiction and depression (PTSD)'. That is, his belief in the sexual assault was the cause of the mental illness. She also noted that alcohol abuse would not explain the allegations.

146 The second point relates to A's having become increasingly withdrawn potentially being due to a range of factors in a Year 11-12 student. However, the appellant points to no evidence to support such an alternative explanation or inference.

147 The appellant says the seventh conclusion is not borne out by Exhibit R9 at all. This conclusion was that the counselling file (Exhibit R9) contained evidence of a report by the counsellor to the police:

> The counsellor clearly felt seriously concerned enough to do so. The note records that the police could not deal with the matter because it took place outside the jurisdiction.

148 The appellant's assertion must be rejected because the last page of Exhibit R9 is a case note which sets out the counsellor's action in reporting the matter to WA Police, Bunbury because the counsellor 'felt a duty of care to inform police', and recorded the outcome that:

> There is a file where (A) has reported the incident to police and named the perpetrator. As the incident took place in Indonesia and not in WA the file was closed.

149 Another matter is the eleventh conclusion which relies upon Ms Hunter's evidence, that Ms Hunter allocated A and the appellant to the same room. The appellant attacks this conclusion on the basis of ground 5, which is that the Commission was wrong in accepting Ms Hunter as a witness of truth. This issue is raised in ground 5. We will deal with it then.

150 None of these issues satisfies us that the learned Senior Commissioner erred in the use of circumstantial evidence. We would dismiss this ground.

Ground 5

151 This ground is that the learned Senior Commissioner erred in his regard of Ms Hunter as a witness of truth in the face of a number of concerns about her evidence, including whether and when she had read A's Statements, and whether that and her contact with A's family tainted her evidence.

152 The respondent notes that the appellant's motivation in challenging the 'witness of truth' finding is made clear in that her evidence is significant to the conclusion that the appellant shared a room with A. This motivation to undermine her credibility is said to be further illustrated by the 'appellant's misguided application to lead new evidence before the Full Bench in November 2020. The application was withdrawn by the appellant after the application was shown to have absolutely no merit'. In fact, the application was made without any supporting evidence, and it made unfounded allegations against Ms Hunter that appear to have caused the Teacher Registration Board of Western Australia to make enquiries about whether the respondent had breached its reporting obligations. At the conclusion of that hearing, we recorded our concerns about the application having been made without evidence and having caused delay and irrecoverable costs.

153 However, in our respectful view, the appellant's motivation for attempting to undermine Ms Hunter's evidence is that her evidence is highly significant to the whole case against him as its acceptance, taken together with other evidence, leads to conclusions adverse to him, the most important being the accommodation arrangements on the last night in Bali. That is a valid motivation. If the motivation were malicious, that might be a different matter. In any event, and most significantly, for the purposes of this appeal, the issue is whether the Commission at first instance erred in his description of Ms Hunter as a witness of truth.

154 The appellant refers to the joint judgment of Dawson and Deane JJ in ***Devries v Australian National Railways Commission*** [1993] HCA 78; 177 CLR 472. However, the majority view, that of Brennan, Gaudron and McHugh JJ, was that:

> … a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his (or her) advantage' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable' (*citations omitted*).

155 The Senior Commissioner set out much of the detail Ms Hunter had recalled at [139] - [199]. He expressed reservations about aspects of what Ms Hunter told the investigators and gave the following examples:

- Her assertion that the appellant had 'groomed' her not being in the sinister sense, rather, mentoring her; and
- Confusion as to whether she had done 'research' about historical sexual assault, and whether this was told to the investigators and/or whether it was accurately recorded by them.

156 He had previously commented about Ms Hunter's evidence, that in both her interview with the investigators and her evidence before the Commission, she went off on tangents on occasions. However, he found that her 'recollection of the trip, accounting for the long lapse of time, was detailed'.

157 The learned Senior Commissioner then said 'in all other respects, and in particular on the core issue of the accommodation arrangements on the final night at the Kartika Plaza Hotel at Bali, I accept Ms Hunter's evidence. I regard her as a witness of truth. It was open for the investigators on the same basis, to accept Ms Hunter's version of events'.

158 The appellant points, mostly, to a range of issues relating to Ms Hunter having communicated with members of A's family; of reading the Statements; attending the counselling service to find out what was going on, and that she did not remember the last night in Bali until she read A's Statement but that it all came back to her when she read it. The appellant says that Ms Hunter's evidence was clearly contaminated by these things and this contamination was not addressed by the Commission. The appellant also notes that her version of events, including the accommodation arrangements, was not supported by students interviewed during the investigation; and although she had called the principal that night, she did not inform him about the significant change in accommodation arrangements. There were other serious matters she failed to disclose to the principal.

159 Neither of the parties submitted that the term 'witness of truth' has been authoritatively defined. We are unable to find any such definition. However, 'truth' means 'accuracy in recounting of events; conformity with actuality; factuality' (Black's Law Dictionary (10^{th} ed)). We conclude that the term 'witness of truth' means the evidence of the witness can be believed because of some particular quality of truthfulness of the witness. The whole of the witness's evidence ought to be treated as being credible. There are some questions about a witness that only the Commissioner hearing that evidence could decide, for example, did the witness come across as being truthful? Did the explanations ring true? The evidence of a witness, not described as witnesses of truth, may be credible in some but not all respects. Even though there are problems with particular aspects of the evidence of the witness, other aspects may be credible and accepted, but not the whole of the evidence. We would not then describe such a witness as a 'witness of truth' because all of their evidence cannot be the truth.

160 We agree that there were a number of elements of Ms Hunter's evidence that were questionable, for example, her explanation for changing the description of the appellant from grooming her to mentoring her does not withstand scrutiny. Her failure to disclose to the school principal the presence of a young Indonesian man on the tour or that she had been told that the appellant had supplied alcohol to students do not go to her credit. However, it seems from reading her record of interview, her witness statement and the transcript of her evidence before the Commission that the essential elements of her evidence about what she recalled went well beyond anything in A's Statements or the interviews with the students. They included details only she would have known. Other matters, she recalled in detail, including providing additional information. For example, she named the hotel that they stayed in on the first night as being the Adhi Dharma, and explained that she recalled this because it was the hotel where the police had caught the Bali Nine. She recalled the name of the airline as Sempati Air and the name of its representative with whom she dealt as Roxanne. She explained that the reason the group could not return was not because the flight itself was cancelled, but because a smaller plane was being used, a 737 not a 747, and accordingly 75 people were put off.

161 Ms Hunter recalled the name of the hotel they stayed in for the second night in Bali, and that they were in a three-bedroom villa with a loungeroom, and recalled its proximity to the hotel and the road. She recalled that the next day as they were leaving, the woman tried to charge them for the accommodation, and she refused 'and just closed the taxi door'.

162 Ms Hunter recalled the movie the girls were watching that last night, and that it was the student, S, who had suggested that she knock on A's and the appellant's room door.

163 Her evidence regarding whether the appellant took the group to the Hard Rock Café on the first or second night was confused.

164 As to whether her interview or evidence were tainted by having read A's Statements, it was not undermined in cross-examination. Although her evidence lacked complete clarity, she was not undermined as to not having read them when she was interviewed on 16 March 2018. She said that she referred to the Statement in her interview because she had been told that before he died, he had made a statement to the counselling service. She said that she received the Statements later, about two weeks after she wrote her witness statement on 28 January 2020.

165 It is true, too, that some of Ms Hunter's evidence or recollections may have been affected by her conversations with A's family and her reading his Statements. However, some of her own recollections differ from those in A's Statements. Those things do not account for the detail which clearly came from her own recollection. Some of it may have been because other information jogged her memory. That does not make it less credible.

166 Given the issues associated with Ms Hunter's evidence, we are of the view that the learned Senior Commissioner erred in referring to her by the term 'witness of truth'. In that respect, the appeal ground is correct insofar as it goes and we would uphold this ground of appeal in that limited context. However, in our view, it does not alter the learned Senior Commissioner's entitlement to have accepted some essential elements of Ms Hunter's evidence as compared with that of the appellant. In most respects relating to matters of significance, the learned Senior Commissioner accepted her evidence and found that it was open to the investigators to accept her version of events. He did so by comparing her version of events, as well as the way she gave her evidence, with that of the appellant. Accordingly, in our view, it does not mean that the findings made by the Senior Commissioner, including that he accepted her evidence, were in error.

167 The appellant says that none of the students interviewed by the investigators supported Ms Hunter's version of events. We note, firstly, the incidents happened around 20 years ago, and the students' interviews reflect the effect this had on their recollections. However, one of the students, S, identified that, as stated by Ms Hunter, they stayed in a different hotel on the second night in Bali. She also said that she 'was under the impression in Bali as the airline paid for it that it was a bunk in situation as well. Like there's this many people and this many rooms, work it out yourselves'. This strongly supports Ms Hunter's account of having to allocate a limited number of rooms amongst the group and having a difficult choice which left A sharing with the appellant. The other student recalled very little of the Bali part of the trip. She answered many of the questions by saying she did not recall. One of those was that she did not recall A and the male teacher sharing a room.

168 Secondly, the students were asked open-ended questions about their recollections. They were generally asked a range of questions and having answered them, they were asked some follow-up questions. However, it seems that specific propositions arising from other evidence

were not all put to them to confirm or deny or say they did not recall. Such matters included that S was not asked whether she heard noises coming from A's room, or whether she asked Ms Hunter to check on them. Therefore, while their evidence does not corroborate all of Ms Hunter's evidence about what occurred, nor does it address the central issues because, having answered indicating their lack of or vague recollections, they were not asked the specific questions relating to the issues which could have either supported or rejected Ms Hunter's evidence.

169 Therefore, although we would uphold this ground of appeal, it does not otherwise upset the learned Senior Commissioner's conclusions. Weare not satisfied that the learned Senior Commissioner erred in preferring important parts of Ms Hunter's evidence, or that he failed to use or palpably misused his advantage of observing the witnesses.

Ground 6

170 This ground submits that the learned Senior Commissioner erred in fact when he found that the essence of the written Statements made by A to be compelling and credible. It is said that the Statements were hearsay; they lacked provenance; that A's mother believed they were written by someone else; that the evidence pointed to them having been prepared in a therapeutic context and therefore not statements of fact, and they were attributed to A who suffered from mental illness, and who the counsellor described in her notes as profoundly unwell with suicidal tendencies and drug abuse.

171 As to the Statements being hearsay, that is correct. However, as we concluded in ground 2, the Commission was entitled to receive and give appropriate weight to hearsay evidence. The Reasons show that the learned Senior Commissioner took that into account and examined the Statements in light of the other evidence, as he was obliged to do. The fact that they were hearsay does not mean they did not have probative value or rational probative force.

172 As to the question of the provenance of the Statements, A's mother's and father's evidence was that the Statements were found in his effects after his death. Nothing in the parents' letter to the respondent, the meeting, their interview or their oral evidence indicates any reservations about the provenance of the Statements. The parents treated them as being written by their son. The only possible qualification was that A's mother said, in re-examination, that they found the Statements 'in a file. Um, and, um, it seemed to me that it was probably from the counselling service, but it didn't actually say that it was from the counselling service so I'm not sure where it came from. Um, it was well typed out, I think it was a professional person involved in doing it with him, that's the impression I got'. She then confirmed that the handwritten notes contained in the Statements were her son's writing.

173 We take this evidence to mean that there was a file containing the Statements. A's mother was not sure where the file came from, but the creation of the Statements, either their substance or the typing of them, was done with a professional person involved in their production with their son, and they contained his handwritten notes. There is no suggestion elsewhere in the evidence that they were not their son's statements. To state, as the appellant does, that A's mother believed the Statements were written by someone else puts a gloss on her evidence that a proper reading does not admit.

174 The Senior Commissioner considered whether the Statements were likely to have been prepared in a therapeutic context. He concluded, based on the counsellor's evidence, that the counsellor was not aware of the Statements and that there was no reference to them in the counselling file. He concluded from the content of Part 2, that there was no basis for believing

that this part was created in a therapeutic context. Part 2 contained the detailed description of the trip and the detailed account of the allegation of the assault. The Senior Commissioner considered that Part 4 may have been created in a therapeutic context.

175 As to whether the veracity of the Statements is affected by A's mental illness and drug abuse, the investigators sought expert advice from Dr Chamarette 'on the reliability of the two statements'. They sought this opinion 'in light of evidence that A suffered from drug and alcohol addiction'. They also sought it given that A had disclosed that he had subsequently been sexually assaulted in unrelated circumstances. They wanted to 'ascertain the likelihood that either of these factors have influenced the credibility of (A)'s version of events, as outlined in his statements'. Dr Chamarette's response included that she was aware A was mentally unwell, with 'depression/PTSD'. Taking account of her own consideration of whether the Statements were made in a therapeutic context and other uncertainty about the intent in making the statements, nonetheless, Dr Chamarette said she found A's accounts 'credible and compelling with regard to his belief that it occurred but would not support his written statements as being totally accurate and factual in all aspects because of the therapeutic context in which they are written as opposed to affidavits or official or formal complaints'. She did not reject them as fanciful or false but considered them in context.

176 Dr Chamarette noted that:

> Although possible conflation with the subsequent and unrelated sexual assault cannot be ruled out, his drug use was highly unlikely to have created delusional memories of this nature.

177 Given that Dr Chamarette was clearly aware of A's mental illness, and her having ruled out his drug use creating delusional memories, one would assume that given her expertise in the area of historical sexual abuse, she would have commented on the prospect of mental illness causing rather than being a consequence of the alleged abuse. She did so as we have set out in [145].

178 There was no evidence to support the suggestion that A's mental illness in any way explains the allegations. Had the appellant wished to bring evidence of this, the time to do so was at the hearing at first instance.

179 The finding at first instance that the essence of the Statements was compelling and credible was a conclusion open to the learned Senior Commissioner. In this way, the learned Senior Commissioner was able to consider the evidence of the disclosures and come to a reasonable conclusion regarding the veracity of the Statements.

Ground 7

180 This ground asserts that the learned Senior Commissioner erred in fact when he found that the tweets sent by A to the appellant were consistent with something of significance having occurred between them in the past.

181 The appellant is correct that the tweets were sent at around the same time as A made the disclosures to his family and was attending therapy. In that sense, they raise an issue of something having occurred. In deciding whether what occurred was related to the allegation of sexual assault disclosed to A's family around this time opens up the issue of why the appellant dealt with them in the way he did. The appellant says that there were explanations available other than those reached by the Commission, but that they were not considered.

182 While we acknowledge the points raised by the appellant, the learned Senior Commissioner was entitled to treat the tweets as circumstantial evidence that, taken together with a number of other matters, raised inferences.

183 Even if the learned Senior Commissioner erred as suggested in this ground, in our view, the issue of the tweets was a small part of the overall picture. If they are not included in the consideration of the matter, it does not affect the overall conclusion. We would dismiss this ground.

Ground 9

184 This ground is in the alternative, should ground 1 be rejected. It asserts that the learned Senior Commissioner erred in concluding that the respondent had satisfied the test in reaching its conclusions. Many of the particulars have already been dealt with in other grounds. Others, with respect, appear to be inconsequential even if correct.

185 In our respectful view, the learned Senior Commissioner was entitled to conclude that, overall, the investigation, undertaken after a substantial lapse of time and considering the seriousness of the allegations, was conducted in a fair and reasonable way, and he rejected the appellant's arguments about a range of issues. He found that the investigation had not proceeded on the presumption of guilt, that the investigation was independent and was conducted in accordance with proper procedures. The investigators knew of the need to be actively persuaded to the affirmative case. He noted that Ms Taylor, a legal practitioner, said they reached their conclusions regarding the alleged sexual assault 'with some conviction', indicating that this satisfies the ***Briginshaw*** standard. He found that Ms Taylor said that although she did discuss the ***Briginshaw*** principle in dealing with the investigation, 'it was acknowledged by everyone involved in the investigation from the outset that the seriousness of the allegation was such that, you know, we - we had to be absolutely sure … we set ourselves a high bar in terms of our investigation process'. They were aware of the nature of hearsay evidence. He noted that '[o]verall, the Investigators approached their task thoroughly in the context of a workplace investigation'.

186 However, we will address a number of particulars raised by the appellant. The appellant says that the investigation was not conducted independently of the employer and was therefore flawed. There is no requirement that an investigation in an employment context ought to be conducted externally, and the appellant points to none. In any event, the investigation was not conducted at the school-level but at the systemic level, involving three investigators with different backgrounds and qualifications. Each was a relevant person to be involved.

187 Further, the appellant raises no issues to support the suggestion of the likelihood that the investigators were actually or subconsciously biased.

188 The appellant also asserts that the investigation failed to comply with the respondent's *Unsatisfactory Performance or Misconduct* policy. This is said to be that they failed to meet the requirement in *Phase 3: Formal Response Meeting & Conduct Investigation* to thoroughly interview witnesses and produce detailed transcripts, which were to be signed.

189 The policy provides at 5.2.3 reference to 'a flowchart of the preferred format' of the investigation. The flowchart sets out a number of phases of the process. *Phase 2 Initial Meeting* includes 'record and produce detailed transcript of the meeting present summary/transcript to the staff member post-meeting for written comment and signature'. *Phase 3: Formal Response Meeting & Conduct Investigation* includes 'thoroughly interview

witnesses and produce detailed transcripts (use a secretary to transcribe testimony or record and transcribe post-interview). All transcripts must be dated and signed'.

190 We note that the investigators were not cross-examined about complying with the policy and recording or transcribing the interviews. The appellant's submission to the Commission at first instance complained that the policy was not appropriate to the investigation of historical cases involving criminal conduct and was 'hopelessly flawed'. He also noted that the requirements of the policy regarding transcripts were not met.

191 The learned Senior Commissioner found:

> The interviews with the witnesses, as set out in the Final Investigation Report, were conducted fairly and properly. An open-ended questioning technique was used. The interviews were comprehensive. Although the interviews themselves did not seem to be audio recorded, detailed interview notes were taken, and no suggestion was advanced by the applicant that anything of substance was left out. He accepted that his statement was accurate in correspondence to the Investigators dated 28 March 2019.

192 There was no complaint that the records of interview were inaccurate. Mr Parnell wrote to Ms Taylor and Ms Jones after his interview on 15 March 2019. He said that the record of the meeting provided to him 'accurately conveys the contents of the meeting'. He went on 'to provide some additional responses and corrections to both my written statement (14/03/19) and responses at the meeting (15/03/19)'. Even where there were some corrections to be made, Mr Parnell was not adversely affected.

193 It is clear that the policy was used more as a guide and was not applied strictly in a number of ways including that the policy appears to assume that the investigation will be conducted at school-level by the principal. This was clearly not appropriate. Secondly, reference is to the 'preferred' format set out in the flowchart. This means it was able to be adapted to suit the circumstances. In our view, the learned Senior Commissioner did not err in finding that the investigators conducted fair and proper interviews, even though there was not strict compliance with the policy.

194 With respect to the issue of failing to check basic facts, the appellant says this includes the failure to inspect the hotel in Bali or obtain any evidence from the hotel. We would agree that this may have been an important step in an investigation by police, rather than in the context of an employment-based investigation. It also ignores the reality of the allegations relating to events alleged to have occurred more than 20 years ago, assumes that there would have been no structural changes to the hotel and that it had maintained accurate accommodation records. In our view, this suggestion lacks any realistic basis.

195 As to obtaining and ignoring Dr Chamarette's advice, she was asked for her professional advice on specific issues. However, she went on to consider whether the allegations were substantiated and did not favour that. Dr Chamarette's role was to give her professional opinion in her area of expertise, not to decide the outcome. That was the role of the investigators, taking account of her advice and considering all of the evidence. The investigators undertook interviews, including with the appellant, and had the benefit of observing and hearing from them. All of this was taken into account by the learned Senior Commissioner. However, he found that the view that part of the Statements were made in a therapeutic context was an assumption.

196 The appellant complains that the investigators relied heavily on evidence of his demeanour. He particularly relied on Mr Wong withdrawing the aspect of his statement regarding the appellant's demeanour in the interview, on the basis that he had never met the appellant and relied on hearing about the appellant's reaction after the findings were delivered to him. A couple of things need to be noted. There were three investigators. Generally, two of them would interview witnesses - not all three did so. Ms Jones and Ms Taylor interviewed Mr Parnell. Mr Wong and Ms Jones interviewed Ms Hunter, the former student S, A's sister and Mr Bardowski. Ms Jones and another person interviewed the former student B. The investigators discussed the evidence, and weighed it all, including the consistencies and inconsistencies, as well as the likelihood of various aspects being correct. There is no indication that undue reliance was placed on demeanour. It cannot be said that the investigators did so in a way that ignored or subordinated the other evidence. There was a great deal of evidence recited in the Report, as well as analysis of the evidence, far beyond any consideration of demeanour.

197 We are not satisfied that the learned Senior Commissioner erred in his ultimate conclusion by reference to the issues raised in this ground. We would dismiss it.

Ground 8

198 The appellant says that the learned Senior Commissioner failed to take into account a material consideration being the evidence of six character witnesses.

199 The character witness evidence is set out in paragraphs [104] – [114] of the Reasons. The Reasons note that witness statements were tendered and that the witnesses were not cross-examined.

200 At the end of [166], in that part of the Reasons where he examined Ms Jones's evidence, the learned Senior Commissioner noted that:

> In relation to the applicant's criticism of the investigation that no attempt was made to interview character witnesses on behalf of the applicant, Ms Jones testified that the applicant's good character was assumed for their investigation.

201 Under the heading of 'Consideration', where the learned Senior Commissioner considered the evidence and drew his conclusions, at [185], he said:

> As to the applicant's character, I refer to the evidence of Ms Jones, who said for the investigation, the applicant's good character was assumed.

202 Taken in context, this is not merely an observation about Ms Jones's evidence which he had already recorded at [166], but was, by the use of the words 'As to the applicant's character', a conclusion made by referring to the investigation having assumed the appellant's good character and endorsing it. This comment is also to be taken in the context of the approach taken by the Senior Commissioner, dealt with in grounds 1 and 2.

203 The fact of the character witness evidence being recited, the Senior Commissioner's endorsement of Ms Jones's evidence at [185] and the conclusion at [200] that the Commission had taken account of 'the totality of what was before the Investigators and what is before the Commission', confirms that it was taken into account. We would dismiss ground 8.

204 We would dismiss the appeal.

EMMANUEL C:

Background

205 Mr Parnell was employed by the Roman Catholic Archbishop of Perth (**Archbishop**) as Deputy Principal at Lumen Christi College. Before that, he had been employed in the Catholic education system since 1990.

206 On 20 August 2019, the Principal of Lumen Christi College dismissed Mr Parnell for serious misconduct following an investigation into historical sexual assault allegations made against him by a former student (**A**) in relation to a school trip to Indonesia in 1997. The allegations were made by A's parents in February 2019, after A's death in October 2018.

207 Mr Parnell made an unfair dismissal application to the Commission. In summary, he argued that there was no valid reason for his dismissal because the misconduct did not occur, the investigation process was flawed for a number of reasons, including that the investigators had insufficient expertise and the evidence that they relied on was contaminated, and he was not given a proper opportunity to respond to the allegations. Mr Parnell sought an order that he be reinstated to his role of Deputy Principal without loss.

208 The Archbishop argued that Mr Parnell was dismissed for a valid reason, as a result of a fair investigation, and that Mr Parnell was not unfairly dismissed. The Archbishop argued that Mr Parnell 'was provided with all relevant information related to the allegations in writing and through face to face meetings', and that 'the respondent found through a fair process that, on the balance of probability, allegations of serious misconduct were substantiated.'

209 The learned Senior Commissioner dismissed Mr Parnell's application, concluding:

> Having regard to all of these surrounding circumstances, in my view, looked at in the totality of what was before the Investigators and what is before the Commission, including the direct evidence of the applicant and Ms Hunter, it is open to draw inferences more probable than not, which support the holding by the employer of an honest and genuine belief, based on reasonable grounds, that the most serious allegation of misconduct complained of, occurred. These inferences, open on the material assessed as a whole, go beyond mere conjecture or surmise… All the material, including the circumstantial evidence, supports the primary conclusion reached by the Investigators in the Final Investigation Report, as said by Ms Taylor in her evidence, "with some conviction". [220]

210 Mr Parnell has appealed the Senior Commissioner's decision to the Full Bench on nine grounds.

Decision at first instance

Background

211 In 1997, five students from Mackillop College travelled to Indonesia on a school tour organised by their teacher, Ms Hunter. One of the five students, A, was the only male student on the tour. Because of this, Mr Parnell was also asked to accompany the tour group on the trip, which he did.

212 The tour was generally uneventful, except for the last night when the group's return flight was delayed and they had to stay an extra night in Indonesia, at the Kartika Plaza Hotel. It was on this night that the serious misconduct was said to have occurred.

213 After the tour, no mention or report was made to the Principal of Mackillop College or anyone else. A's parents said that his behaviour changed following the tour and he became withdrawn, and had issues completing his schoolwork. By early 1998, A had changed schools, and did not

complete year 12. He enrolled in a short TAFE course but did not complete this either. A developed significant mental health challenges.

214 Twenty years later in 2017, A contacted his parents in a distressed state and told them that he had been experiencing the return of memories suppressed for many years. A told his parents that while he was on the Indonesian tour in 1997, he was raped by Mr Parnell while staying at the hotel. A also sent his sister a text message saying the same thing. A told his parents that he did not want to formally progress the matter through legal avenues.

215 A's sister phoned A immediately after receiving his text message. She said that A described the whole event to her in detail, and told her that Mr Parnell tried to cover it up and told A that he knew where A lived.

216 A died in October 2018 of an accidental overdose.

217 In February 2019, A's parents wrote a letter to the Catholic Education Office about what A had said. They met with Ms Jones and Mr Wong of the Catholic Education Office and handed the letter to them at that meeting. A's parents also showed Ms Jones and Mr Wong a copy of two typed statements found after A's death, which they understood were made by A during counselling sessions (**Statements**).

218 Ms Jones and Mr Wong told A's parents that because of the seriousness of the allegations, an investigation would need to take place.

Investigation process

219 The Senior Commissioner set out a detailed description of the investigation process from [34] to [59] of his reasons for decision. He explained that a team of three investigators at the Catholic Education Office conducted the investigation: Ms Jones (Employment Relations Team Leader), Ms Taylor (an Employee Relations Consultant) and Mr Wong (the Coordinator Child Safe Team) (**Investigators**).

220 The Investigators considered several policies including the 'Child Protection Policy', the 'Child Protection Procedures - Dealing with Allegations of Misconduct and Serious Misconduct against Staff in Catholic Schools' and the 'CECWA Policy Unsatisfactory Performance and Misconduct'.

221 The standard of proof adopted by the Investigators was on the balance of probabilities. The documentary evidence that was before them included the February 2019 letter from A's parents to the Catholic Education Office and the Statements. In the course of the hearing of Mr Parnell's unfair dismissal application, a copy of an incident report from WA Police relating to Ms Taylor's contact with WA Police when she reported the incident was obtained. The incident report records that police informed Ms Taylor that they did not have jurisdiction over the matter because the victim was deceased and the alleged assault occurred overseas.

222 The Investigators interviewed eight people as part of their investigation: A's parents and sister, Mr Parnell, Ms Hunter, two of the other students who went on the 1997 trip to Indonesia and one of A's close friends. Summaries of these interviews are set out in the Senior Commissioner's reasons for decision at [37] - [48].

223 In May 2019, based on what was before them at that time, the Investigators sought expert advice on parts of the investigation. The Investigators asked Dr Chamarette, a psychologist with extensive experience and qualifications in cases of adult victims of child sexual abuse, about the reliability of the Statements, in the context of A's history of alcohol and drug abuse

and a separate and unrelated sexual assault on A that occurred several years after the Indonesia trip. The Investigators also asked Dr Chamarette about the credibility of Mr Parnell's responses to the allegations. Mr Parnell was given an opportunity to meet with Dr Chamarette but he chose not to.

224 The Senior Commissioner set out a summary of Dr Chamarette's opinion at [51]-[56] of his reasons for decision. Broadly, he considered that Dr Chamarette had formed the view that there was no doubt A believed himself to have been a victim of sexual assault from Mr Parnell, and that 'the literature on delayed recall and disclosure of sexual assault in childhood supports the patterns of behaviour and the way in which A brought out the allegations around the incident occurring in 1997.' Dr Chamarette also said that if the Statements were produced in the context of therapy, they may contain emotional truths but not necessarily strictly factual accounts.

225 In relation to Mr Parnell's credibility, Dr Chamarette said that his vagueness and inaccuracy could be explained by a lack of memory, but could also be consistent with Mr Parnell having been appalled or traumatised by the events, and therefore having blocked the entire period out of his mind.

226 Finally, Dr Chamarette gave her view that the allegations could not be substantiated or disproven, however some of the Investigators gave evidence that they considered Dr Chamarette went outside of her brief in relation to this point.

Investigation report

227 In his decision, the Senior Commissioner set out the following extract from the final investigation report, dated 2 August 2019:

> **8. Findings and Outcomes**
>
> As it appears there are no longer any viable lines of enquiry in this investigation process, findings must now be reached on the *"balance of probabilities",* based on the information currently available.
>
> **REDACTED**
>
> * It is noted that one element of the allegations as put to Don Parnell is likely incorrect - A's statements indicate that the alleged assault occurred on the final night in Bali after the group had dinner and drinks at the Hardrock Cafe. Witness evidence appears to indicate that the group had dinner at the Hardrock Cafe on the preceding night. This is not considered to be fundamental to the veracity of the allegation of assault but has been taken into consideration.
>
> **a. Option One: Allegations Substantiated**
>
> The first option is to reach a determination that the allegations are substantiated. This can be justified as the standard of proof for a workplace investigation is *"on the balance of probabilities"*- this means the determination must be reasonable but is also somewhat subjective. In other words, *"is it reasonable to determine based on all the information currently available to us that this incident is likely to have occurred?"* . While witness evidence was largely unhelpful and in some instances, unreliable, there are a number of factors that would support this as a reasonable determination:
>
> 1. The level of detail with which A described the alleged assault is very compelling, and his version of events as outlined in his written statements remained consistent with each person he recounted the incident to including [A's parents], [A's sister] and [A's friend].
> 2. A's statement outlined the sequence of events during the trip to Indonesia in great detail and by all other accounts, his recollection of the trip is accurate. The question then remains, if he had such a clear and accurate recollection of the trip (when they went, who was there, where they

visited, the activities they participated in, the flight delay in Bali etc.), why would the alleged assault as recounted in his statement be fabricated or incorrect?

3. It could be argued that A had a personal issue with Don Parnell which compelled him to fabricate this allegation against him, however this would make little sense. If A had a personal vendetta against Don Parnell and fabricated the alleged assault for the purpose of tarnishing his reputation , one can only conclude that he would have openly told many others about the alleged assault in an attempt to disparage him long before 2016/2017 when he finally disclosed it to his family.
4. A's "tweets" to Don Parnell in March 2017 demonstrate that he was trying to communicate with Don Parnell about something that happened or they discussed in the past. It remains unclear why A would send these "tweets" to Don Parnell if they had no history other than both attending the trip to Indonesia.
5. A sought counselling support from (name omitted), a service specialising in counselling for victims of sexual abuse. It is highly unlikely that unless the alleged assault did occur (or at the very least A himself truly believed it happened), that he would have sought this type of help.
6. A's pattern of disclosure is consistent with statistics for adult survivors of child sexual abuse in that he disclosed some twenty years after the alleged incident. Further, A was reticent to report the incident to the Police for fear of having to relive it.
7. Witness evidence from Clarissa Hunter and A's family regarding the change in A's behaviour following the trip to Indonesia would further support the likelihood that the alleged assault occurred as the reported change in A's behaviours are consistent with those typically demonstrated by survivors of sexual abuse, including becoming withdrawn and antisocial.
8. Witness evidence from Clarissa Hunter does serve to support the allegation that A and Don shared a hotel room in Bali.
9. Don Parnell has denied the allegations but has failed to provide any compelling evidence to suggest that he did not in fact share a room with A in Bali (i.e. he was unable to say what the hotel sleeping arrangements were on that final night in Bali) and has also demonstrated a tendency to respond dishonestly to questions asked of him. For example, he categorically denied that he purchased or drank alcohol with students on the trip, however it was confirmed by witness evidence that this did in fact occur.
10. Each of the above arguments has been supported by the expert opinion of Christabel Chamarette, although it is noted that A's statements were written in a therapeutic context and cannot be taken as statements of fact.

For the reasons outlined above, it is reasonable to conclude that on the balance of probabilities, the allegations are substantiated. The recommended outcome for Karen Prendergast to consider in this instance would be a finding of serious misconduct and the termination of Don Parnell 's employment.

REDACTED

Matters in dispute at first instance

228 Throughout his application to the Commission, and the hearing of that application, Mr Parnell denied the allegations against him. He said there was ‘no direct evidence against him to substantiate the allegations that he sexually assaulted the student’, that much of the evidence was hearsay and some of it was circumstantial. Mr Parnell also argued that significant findings in the investigation report were not supported by any evidence, and some of the evidence given by people interviewed as part of the investigation was tainted by earlier conversations that they had had with A’s father. Mr Parnell further argued that the Investigators had reversed the onus

of proof (such that he had to disprove the allegations), that simple facts were not checked by the Investigators and that the Investigators did not turn their minds to the appropriate level of proof required given the seriousness of the allegations. Mr Parnell said that 'the civil standard of proof, as discussed and applied by the High Court in ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 should have been applied.'

229 The Archbishop argued that based on the totality of the evidence it was open to the Investigators to conclude on the balance of probabilities that the allegations could be substantiated. Further, he argued that:

> [G]iven the Royal Commission into Institutional Responses to Child Sexual Abuse, that the approach to the civil standard of proof set out in ***Briginshaw*** should not be adopted by the Commission. Rather, given the highly unusual circumstances, the standard of proof should be that applicable to the National Redress Scheme, which is a "reasonable likelihood" threshold.' [66]

230 The Archbishop also contended that the Catholic Education Office conducted as thorough an investigation as possible in the circumstances and that Mr Parnell was given a 'fair go'. Consequently, the Archbishop argued that he had a valid reason for Mr Parnell's dismissal and that it was not unfair.

Legal principles at first instance

Standard of proof

231 A key issue at first instance was the standard of proof in the context of a serious misconduct matter, where the alleged misconduct involved historical sexual abuse allegations.

232 At [71] of his reasons for decision, the Senior Commissioner applied the reasoning in ***NU v NSW Secretary of Family and Community Services*** [2017] NSWCA 221; (2017) 95 NSWLR 577, which considered the approach in ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 (**Briginshaw)** in the context of a civil matter where an allegation of child sexual abuse had been made. Beazley P (McColl JA and Schmidt J agreeing) explained at [53]:

> The ***Briginshaw*** standard, like the principle in ***Jones v Dunkel*** (1959) 101 CLR 298; [1959] HCA 8, is often misunderstood. Correctly applied, as the Court stated in *Re Sophie* at [50]:
>
> > The requirement stated in ***Briginshaw*** *v* ***Briginshaw***, that there should be clear and cogent proof of serious allegations, does not change the standard of proof, but merely reflects the perception that members of the community do not ordinarily engage in serious misconduct: ***Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*** (1992) 67 ALJR 170 at 171, per Mason CJ, Brennan, Deane and Gaudron JJ; ***Palmer v Dolman*** [2005] NSWCA 361 at [41]-[47] per Ipp JA (with whom Tobias and Basten JJA agreed).
>
> I accept that where there is an allegation such as of sexual abuse in circumstances such as arise in this case, it is appropriate and necessary to apply the ***Briginshaw*** standard, as properly understood. Indeed it is generally accepted that there is no underlying conceptual difference in the application of the ***Briginshaw*** standard and the *Evidence Act*, s 140.

233 At [72] the Senior Commissioner found that: 'Given the gravity of the allegations in this case, the ***Briginshaw*** approach should be adopted.'

Evidentiary onus

234 At first instance, the Senior Commissioner requested further written submissions from the parties on the point raised in ***Minister for Health v Drake-Brockman*** [2012] WAIRC 00150; (2012) 92 WAIG 203 (**Drake-Brockman**), where the Full Bench compared the approaches taken in ***Shop, Distributive & Allied Employees' Association, NSW Branch v Jewel Food***

Stores (1987) 22 IR 1 (**Jewel Food Stores**), ***Sangwin v Imogen Pty Ltd*** [1996] IRCA 100, (1996) 40 AILR 3-388 (**Sangwin**), ***Bi-Lo Pty Ltd v Hooper*** (1992) 53 IR 224 (**Bi-Lo**), and ***Newmont Australia Ltd v The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers*** (1988) 68 WAIG 677 (**Newmont**). In ***Drake-Brockman***, the Full Bench concluded that in the context of cases where there are allegations related to theft or other dishonesty, personal safety, issues of public interest or where the gravity of an offence is such that damage can be done to an employer's business, the ***Bi-Lo*** approach is appropriate. Whereas, the Full Bench suggested that in other circumstances, such as where misconduct is abusive language in the workplace, the ***Newmont*** approach is appropriate.

235 In ***Drake-Brockman***, the Full Bench said at [55]: 'in ***Newmont*** the evidentiary onus is said to be on the employer to show on balance that misconduct had in fact occurred. If ***Bi-Lo*** is applied it is not necessary for the employer to prove the misconduct, only to prove that the employer honestly and genuinely believed, and had reasonable grounds for believing on the information available at the time the decision was made, that the employee was guilty of the misconduct alleged.'

236 Mr Parnell submitted that Von Doussa J's observations in ***Sangwin*** were obiter and are not binding on the Commission. He highlighted that the Full Bench in ***Drake-Brockman*** said that in some cases it may still be appropriate for the Commission to be satisfied that the misconduct occurred. Further, even accepting 'the industrial and employment environment of the investigation' the requirement to conduct a full and extensive investigation was not met because of the Archbishop's reliance on hearsay evidence and failure to properly check facts.

237 The Archbishop submitted that the facts of ***Sangwin*** are very similar to those in this matter, because in ***Sangwin*** a health worker or childcare provider was accused of serious physical abuse (a serious public interest issue). There, the court held that 'the employer, after a sufficient inquiry, if it held an honest belief on reasonable grounds, then it was bound to dismiss the employee as a part of its duty of care.'

238 The Senior Commissioner considered the Full Bench's comment in ***Drake-Brockman*** that 'even when the test in ***Bi-Lo*** is applied, it may still be appropriate in some matters for the Commission to draw a conclusion as to whether or not misconduct had occurred.' He considered that comment to be at odds with the reasoning immediately before it. The Senior Commissioner explained that he was 'of the view that as discussed in ***Drake-Brockman***, in situations such as the present, where serious allegations of sexual assault or physical assault are made against an employee, as postulated in ***Sangwin***, the approach in ***Bi-Lo*** is appropriate.'

239 At [82] of his reasons for decision, the Senior Commissioner said 'In a case such as the present, where allegations are most serious, the nature and extent of the inquiry needs to reflect this. I see no reason to not apply the approach that those investigating in such a matter, would need to feel an "actual persuasion" of the affirmative conclusion on the material before them, which should not be based on "inexact proofs, indefinite testimony or indirect inferences".'

240 In relation to the appropriate standards of a workplace investigation, the Senior Commissioner applied ***Drake-Brockman*** and commented at [85] that 'whilst the standards of the police cannot be reasonably expected in a workplace investigation, being undertaken in an employment and commercial environment, an investigation in circumstances such as the present, still needs to satisfy the ***Bi-Lo*** test of rigor, as I have mentioned above in [82].'

Circumstantial evidence

241 At [86], the Senior Commissioner set out the cases he considered in deciding what weight to give the circumstantial evidence given in this case. The Senior Commissioner defined 'circumstantial evidence' as 'indirect evidence, from which inferences may be drawn as to the existence or non-existence of facts in issue.'

242 He explained that there is a distinction between the principles applicable in civil and criminal proceedings and referred to ***Palmer v Dolman; Dolman v Palmer*** [2005] NSWCA 361 (***Palmer v Dolman***) at [35]-[39], where Ipp JA (Tobias and Basten JJA agreeing) adopted the approach set out by the High Court in ***Bradshaw v McEwans Pty Ltd*** (1951) 217 ALR 1 at [5]:

> Of course as far as logical consistency goes many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture: (see per ***Lord Robson, Richard Evans & Co Ltd v Astley*** [1911] AC 674, at 687). But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as mere conjecture or surmise…

243 Adopting this approach, the Senior Commissioner found the issue he had to decide was not whether Mr Parnell was guilty of the alleged conduct in a criminal liability sense. Instead, the question for him in deciding whether the dismissal was unfair is 'whether the respondent, after as proper and as thorough an inquiry as was necessary in the circumstances, had an honest and genuine belief, based upon reasonable grounds, that the misconduct alleged occurred.' [87]

Hearsay evidence

244 A key matter considered by the Senior Commissioner at first instance was that much of the evidence gathered by the Investigators was technically hearsay. He explained at [176] that he was satisfied that the Investigators had properly considered this and taken it into account when weighing up all of the material to form their view that 'on balance, having regard to the gravity of the allegations' the misconduct occurred.

245 At [177], the Senior Commissioner set out the principles that he considered applied when deciding the issue of hearsay evidence:

> In these proceedings, whilst the Commission is not bound by the rules of evidence, the accepted approach over many years is that hearsay evidence is not inadmissible, but is to be accorded the appropriate weight, depending on the totality of evidence before the Commission. This includes circumstantial evidence, which, depending on the nature of the case, may be most important. It is the evidence in its totality that must be considered: ***Baron v George Weston Foods Ltd*** (1984) 64 WAIG 590; ***Australian Workers' Union WA Branch v Hamersley Iron Pty Ltd*** (1986) 66 WAIG 322. Where, as in s 26(1)(b) of the Act, the rules of evidence do not apply, facts can be fairly found, without the strictures of the rules of evidence, as long as the tribunal refrains from "spinning a coin" and bases its conclusions on material that has probative value, with the weight to be given to such material, being a matter for the tribunal (and in this case the Investigators): ***Reg v Deputy Industrial Injuries Commissioner; Ex parte Moore*** [1965] 1 QB 456 at 488 per Diplock LJ.

Evidence at first instance

246 Three people gave evidence for Mr Parnell: himself and his wife (Ms Parnell) and Mr Glasson, the principal of A's school at the time of the alleged assault. Four more witness statements were also tendered (by consent) as part of Mr Parnell's case. These statements were character references from Mr Holt, Ms O'Brien and Mr Greaves, teaching colleagues of Mr Parnell at A's school, and Mr Melton who was the principal of a school at which Mr Parnell worked from 2010 - 2015.

247 A's parents both gave evidence at the hearing. The Archbishop also called the following people to give evidence:

- A's sister;
- Ms Prendergast, the principle of Lumen Christi College who dismissed Mr Parnell;
- Ms Jones, one of the three investigators of the allegations;
- Mr Wong, the second of the three investigators of the allegations;
- Ms Taylor, the third of the three investigators of the allegations;
- Ms Hunter, the teacher who coordinated and attended the school trip to Indonesia in 1997 with Mr Parnell; and
- a counsellor who specialised in sexual assault, trauma and domestic violence, who had seen A six or seven times in 2017.

248 For the purposes of this appeal, rather than setting out in detail the evidence given by all witnesses, it is enough to summarise the evidence given about the key matters in dispute: the Statements found in A's room after his death, the tweets that A sent to Mr Parnell, Ms Hunter's credibility and the significance of the character evidence that was tendered on Mr Parnell's behalf.

<u>The Statements</u>

249 Part of the documentary evidence available to the Investigators was the two Statements that A's parents found in A's belongings after his death. The Statements were five pages long. They were titled 'Part 2 of my soul: start' and 'Part 4 of my soul: The Next Step'. Some of the pages had handwritten annotations (which A's parents identified as his handwriting). The Statements are set out in full at [137] of the Senior Commissioner's reasons for decision. The Statements appear to be A's description of what he believes occurred in Indonesia on the school trip, when he was in year 11.

250 When the Investigators referred the matter to Dr Chamarette for an expert opinion, they specifically sought advice about the reliability of the Statements. Dr Chamarette was asked whether A's history of alcohol and drug abuse, as well as the further sexual assault that A disclosed in counselling, may have influenced the credibility of A's version of events. In his decision, the Senior Commissioner included the following extracts from Dr Chamarette's expert report at [51]:

> There doesn't seem to be any doubt that A believed himself to have been a victim of sexual assault from Mr Don Parnell (even though he had blocked it out for 20 years) and that this appeared to

> have substantially altered his behaviour, school attendance and adjustment and may have contributed to his alcohol/drug addiction and depression (PTSD). The literature on delayed recall and disclosure of sexual assault in childhood supports the patterns of behaviour and the way in which A brought out the allegations around the incident occurring in 1997.
>
> …
>
> It is understood that [A] wrote two undated statements which are the basis for the allegations of historical child abuse in the course of counselling with (name omitted), a specialist sexual assault/abuse counselling service based in (location omitted). There is no indication of the context in which he provided this. If documents were made in the course of therapy they may contain emotional truth of the experiences being worked through but not necessarily strictly factual or accurate accounts of what occurred and which people may have been involved even though he named Mr Parnell as one of the two people from whom he told his sister that he had experienced sexual assault. There is also uncertainty as to intent of the writing as he had stated to his parents that he did not want to pursue the matters through the Police. [A] told his sister in 2016 that he had forgotten or repressed all memory of the incident in Indonesia for 20 years and also a subsequent unrelated rape experience which he was reminded of by meeting the person involved which had apparently re-activated his memories and recall of both instances. This pattern of receiving a "trigger" which recalls historical material is very frequent and a characteristic of disclosure of historical abuse.
>
> …
>
> In summary, I find A's accounts credible and compelling with regard to his belief that it occurred but would not support his written statements as being totally accurate and factual in all aspects because of the therapeutic context in which they are written as opposed to affidavits or official or formal complaints. I do not regard his drug use as a sufficient explanation that his memories are drug-induced or delusional though I could see the possibility of conflation with other sexual trauma as a question which it is not possible to resolve.

251 Mr Parnell's evidence directly conflicted with the Statements in relation to several key matters. According to Mr Parnell, A said that on the last evening, the students went to the Hard Rock Café and Mr Parnell purchased alcoholic drinks for A. Mr Parnell disputes this and gave evidence that (as summarised by the Senior Commissioner):

> He did not go near where the students were staying and did not go into any student's rooms and strongly denied that he shared a room with A. The fact that when he caught A and the other student smoking again, and found the ashtray with cigarette butts in it in a central living area, led him to believe that his view that the students were accommodated in a three-bedroom villa, which would have included a central living area, was correct. [96]

252 Mr Parnell also strongly denied that there was any confrontation between himself and A on the return flight to Perth.

253 When the Investigators interviewed Ms Hunter, she told them that A's father had told her about the Statements, but that he did not give them to her. She also told the Investigators that 'from the way A wrote his statements coupled with her research and experience now, in hindsight she thinks that the applicant was grooming her as well, so that she would not doubt him.'

254 The Senior Commissioner summarised Ms Hunter's evidence about A's Statements at [126]:

> Ms Hunter was cross-examined about A's Statements. She said that she had not seen or read them before her interview with the Investigators but had known the Statements had been made. She said that she had seen the Statements only about two weeks before the hearing. Her evidence was that when she read the Statements, and how detailed they were about what the group had done on the

> tour, while she may have had doubts before, having read the Statements, it gave her no doubt about the allegations made by A.

255 A's father confirmed that he gave Ms Hunter a copy of the Statements about one month before the hearing.

256 The Archbishop submitted that although Dr Chamarette referred to the Statements as having been written in a therapeutic context, there was no clear evidence to establish that. Ms Jones, one of the Investigators, accepted that the Statements were not formal signed complaints, but said that they were considered alongside what A had said to others about the alleged assault. Mr Wong, another one of the Investigators, initially said that the Investigators took the Statements to be statements of fact but then later said that they were taken into consideration in the context of the other people interviewed by the Investigators.

257 Ms Taylor, the final member of the Investigators, wrote the investigation report. She has been a legal practitioner for at least eight years. The Senior Commissioner summarised her evidence at [169]:

> Whilst she had not investigated a rape allegation previously, Ms Taylor said she has been involved in many other workplace investigations. She testified that she did discuss within the investigation the "Briginshaw" approach to the balance of probability standard of proof, and that given the seriousness of the allegations against the applicant, that the Investigators needed to be sure in the conclusions reached. Especially in relation to A's Statements, Ms Taylor said that she had to acknowledge that it may not necessarily have been a statement of fact, as it was made in a therapeutic context. Therefore, she testified that she had to look at other evidence through other witnesses, to place reliance upon them.

258 In his consideration, the Senior Commissioner found that the Statements were found in A's belongings after he died, they were undated, they were not on the counselling file (exhibit R9) and that on the second statement ('Part 4 of my soul: The Next Step) there is a reference to the counselling service and 'therapeutic intervention, counselling and support'. The Senior Commissioner considered that it was an assumption that the Statements were made as part of A's therapy with the counselling service. There was no evidence that the counsellor was aware of the Statements. The Senior Commissioner considered there was no basis for a finding that the first statement was created in a therapeutic context. He concluded at [192]:

> I find the essence of the Statements made by A compelling and credible, as did Dr Chamarette. They are detailed, although not as to all aspects of the trip, as suggested in the Final Investigation Report. They were also not handwritten but had handwriting on them, contrary to the description in the Final Investigation Report. I do not regard this error in the Report as being of any significance, however. The detail of the first Statement related to events once the tour group got to Bali and not before then. The Statement correctly identified the number of students and two teachers on the trip. However, the subsequent description, starting with the delay, the overbooked flight, the airline having to arrange hotel accommodation and that it was close to the airport, was very accurate and consistent with other evidence.

<u>The tweets</u>

259 When Mr Parnell initially responded to the allegations put to him, he wrote that:

> From the end of 1998 (when he finished Year 12) to March 2017 I had no contact whatever with A (name omitted). In March 2017 I received a series of tweets from A (name omitted). I could not make any sense of the tweets. I did not know what they meant or to what they were referring. I did not respond to the tweets and blocked A (name omitted) from my twitter account. Screen shots of

> these tweets are attached. Other than the tweets I had no communications or contact with A (name omitted) post Year 12 and limited contact only in Year 12.

260 When giving evidence, Mr Parnell explained that the tweets concerned him but he did not respond or do anything about them. They were received from 23 March 2017 to 1 April 2017. Some contained messages (like 'I have a bone to pick with you', 'I remember what we spoke about' and 'You fly back to school now, deputy principal Parnell. Fly, fly, fly…'). Some of the tweets contained only emojis.

261 The Senior Commissioner noted the timing of the tweets, commenting that they were around the same time that A made disclosures to his family and before he attended counselling. He found that:

> There can be no reasonable explanation, as a matter of logic, given the timing and content of some messages, other than something of significance had occurred between the applicant and A sometime in the past. It just makes no sense to see them in any other light. The applicant did nothing about the tweets and blocked them. He did not report them to anyone, if he had any concerns as to the welfare of A, as a former student at Mackillop College, given his pastoral care role. Such a failure to act on the tweets is also consistent with the applicant not wanting to call attention to A in his past, and to prompt the asking of questions. [212]

Ms Hunter's evidence

262 The Senior Commissioner's consideration of Ms Hunter's evidence is set out at [193]-[207]. While he had 'reservations' about aspects of what Ms Hunter told the Investigators (in relation to her describing Mr Parnell as 'grooming' her and then later as 'mentoring' her), in all other respects he accepted her evidence and regarded her as a witness of truth. The Senior Commissioner also noted at [202] that in his view a portion of Mr Parnell's evidence 'was devoted to criticism of Ms Hunter because she had not properly planned the trip; she lacked leadership; and that she spent a lot of time away from the group with her friends etc.' He stated that, in his view:

> None of these matters were at all relevant to the central allegations and it is open to infer, and I do infer, these matters were raised by the applicant to impugn Ms Hunter's credibility. This is despite Ms Hunter acknowledging at the outset, that when the Indonesian tour was undertaken, she was only a relatively junior teacher. [202]

263 Further, the Senior Commissioner did not agree with Mr Parnell's suggestion that Ms Hunter's evidence was contaminated because she had spoken to A's father. The Senior Commissioner appeared to accept that Ms Hunter had spoken to A's father twice, the first time briefly and the second time in more detail. The Senior Commissioner accepted Ms Hunter's evidence that she first saw the Statements two weeks before the hearing.

Character evidence

264 The Senior Commissioner set out the character evidence given about Mr Parnell from [104] – [114] of his reasons for decision. At [185], the Senior Commissioner confirmed that, as it was for the investigation, Mr Parnell's good character had been assumed.

Conclusion

265 The Senior Commissioner was satisfied that the Investigators were aware of the substantial lapse of time from the alleged assault and when A disclosed the events to his family. The Senior Commissioner was also satisfied that the Investigators were aware that much of the material they gathered was technically hearsay and was circumstantial in nature, and he was

satisfied that they had regard to the appropriate principles in approaching workplaces investigations.

266 The Senior Commissioner considered that the Commission, while not bound by the rules of evidence, was able to accord some weight to circumstantial evidence. Relying on ***Baron v George Western Foods Ltd trading as "Joyce (WA)"*** (1984) 64 WAIG 590 and ***Australian Workers' Union West Australian Branch, Industrial Union of Workers v Hamersley Iron Pty Limited*** (1986) 66 WAIG 322, the Senior Commissioner considered that it was the evidence in its totality that he had to consider. He said:

> Where, as in s 26(1)(b) of the Act, the rules of evidence do not apply, facts can be fairly found, without the strictures of the rules of evidence, as long as the tribunal refrains from "spinning a coin" and bases its conclusions on material that has probative value, with the weight to be given to such material, being a matter for the tribunal (and in this case the Investigators): ***Reg v Deputy Industrial Injuries Commissioner; Ex parte Moore*** [1965] 1 QB 456 at 488 per Diplock LJ. [177]

267 The Senior Commissioner, in coming to his conclusion, 'found the consistency between the disclosures made by A to his sister, to his parents, their evidence as to what A told them and the manner in which it was told, taken with A's Statements, to be compelling. There was also A's disclosure to his friend, to a similar effect.' He also found the counsellor's evidence to be 'highly credible and compelling'.

268 In relation to circumstantial evidence, the Senior Commissioner made the observation at [210] that 'there is a substantial body of circumstantial evidence' including:

- evidence given to the Investigators and in the Commission proceedings about A's decline in schoolwork standards and his behaviour;
- the change A's parents noticed in him as A became increasingly withdrawn;
- A leaving Mackillop College with no explanation, then leaving school altogether, despite evidence from his family that A had been a diligent student before the Indonesian trip (balanced against the character witnesses' observations as former teachers at A's school that they noticed no change in A's behaviour);
- A's descent into alcohol and drug abuse and generally destructive behaviour;
- uncontroversial evidence of A's family and the counsellor that once A had disclosed the assault, he seemed to have a sense of relief;
- the series of tweets that A sent to Mr Parnell, and that Mr Parnell did nothing about them and did not report them to anyone if he had concerns about the welfare of A;
- the evidence in the counselling file that the counsellor made a report about the assault to the police;
- the counsellor's evidence (and notes in the file) about A telephoning Mr Parnell when Mr Parnell was at work at another school;
- the 'complete lack of any possible ulterior motive for A to make a malicious complaint against the applicant of such seriousness';

- the disclosure made by A to his family and counsellor of a subsequent sexual assault, and meeting one perpetrator, which triggered the revival of repressed memories of what occurred on the Indonesian tour;

- accepting Ms Hunter's evidence about the tour group having a three-bedroom villa on the final night of the tour, the logical consistency of A and Mr Parnell sharing a room as the only two males on the trip, as opposed to either of them sharing a room with a female(s); and

- A's attendance at the counselling service is consistent with the legitimacy of A's grievance and the need for therapeutic assistance.

269 The Senior Commissioner's conclusion is at [220]. He said:

> Having regard to all of these surrounding circumstances, in my view, looked at in the totality of what was before the Investigators and what is before the Commission, including the direct evidence of the applicant and Ms Hunter, it is open to draw inferences more probable than not, which support the holding by the employer of an honest and genuine belief, based on reasonable grounds, that the most serious allegation of misconduct complained of, occurred. These inferences, open on the material assessed as a whole, go beyond mere conjecture or surmise. I am not satisfied however, that it was reasonably open on the material before the Investigators, or in these proceedings, to sustain the allegation that the applicant purchased drinks for the students at the Hard Rock Café. However, this conclusion does not detract from the principal allegation. All the material, including the circumstantial evidence, supports the primary conclusion reached by the Investigators in the Final Investigation Report, as said by Ms Taylor in her evidence, "with some conviction".

The appeal

Ground one

270 Ground one of the appeal is that:

> The learned Senior Commissioner erred in law when he found that in deciding the evidentiary onus on the respondent to establish that the alleged misconduct took place, he only had to be satisfied that the respondent employer after a reasonable investigation held an honest and genuine belief based on reasonable grounds that the allegations of misconduct against the appellant complained of occurred.

Mr Parnell's submissions

271 Mr Parnell says that the Senior Commissioner erred in law by acting on a wrong principle.

272 In effect, Mr Parnell's submission is that the Senior Commissioner considered there was an evidentiary onus on the Archbishop to establish that the employer, after a reasonable investigation, held an honest and genuine belief based on reasonable grounds that the alleged misconduct occurred. Instead the Senior Commissioner should have considered that the evidentiary onus on the Archbishop was to establish that the alleged misconduct occurred.

273 Mr Parnell argues that the Senior Commissioner failed to follow the established principle and authority that the Commission, in deciding a matter referred to it under s 29 of the *Industrial Relations Act 1979* (WA) (**IR Act**), must be satisfied to the requisite standard that the misconduct occurred. According to Mr Parnell, a claim of unfair dismissal is 'to seek protection from a harsh, oppressive and unfair dismissal.' It is made under 'protective legislation of the employee and any watering down of the evidentiary onus on the employer should not be upheld.'

274 Mr Parnell says that the Senior Commissioner misinterpreted ***Drake-Brockman*** and misdirected himself by failing to conclude that the question of whether Mr Parnell's alleged misconduct occurred was a question of fact to be decided by the Commission.

275 Mr Parnell says that, following the reasoning of Smith AP and Beech CC in ***Drake-Brockman,*** 'the employer has an evidentiary burden to show there is sufficient evidence to raise the factual matters it relies upon as a reason to dismiss an employee. Once the employer establishes its position in this regard, the onus moves to the employee to show that dismissal for that reason was harsh, oppressive or unfair.'

276 ***Drake-Brockman*** explores a number of cases, including ***Bi-Lo*** and ***Newmont***, in relation to the standard to which an allegation of serious misconduct must be proved in order to provide a valid reason for summary dismissal. For the reasons set out above at [238], the Senior Commissioner found that of the two, the reasoning in ***Drake-Brockman*** supported the use of the ***Bi-Lo*** test in this matter.

277 Mr Parnell relies on the reasoning of O'Dea P at 679 of ***Newmont*** and argues that ***Newmont*** 'sets out a stricter onus on an employer than the onus applied in ***Bi-Lo***, *asking* whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an *abuse of that right*'. (original emphasis)

278 He also relies on ***Jewel Food Stores***, another case considered in ***Drake-Brockman***, and says that:

> Where dishonesty is the reason for summary dismissal, an employee should only be dismissed if the employer is 'fully *satisfied after careful investigation that the accusation has been made out. In coming to such a conclusion, a prudent and fair employer will take into account, where relevant, as part of the circumstances of the case, an employee's youth or inexperience, the nature and effect of any interrogation and any admissions or denials made. We consider that this same standard should be applied by industrial tribunals when considering reinstatement.'* (original emphasis)

279 Mr Parnell submits that 'findings of fact must be made by the Commission as to what was the conduct which gave rise to the dismissal, what are the circumstances of that conduct and in making an assessment, regard <u>should be had to the evidentiary onus on the employer.</u>' (original emphasis). He says that the Senior Commissioner made an error of law because he set 'the wrong threshold for the employer and for the Commission in his remit as to whether the dismissal of the appellant was harsh oppressive or unfair.'

280 Finally, Mr Parnell submits that if he is wrong about the correct application of ***Drake-Brockman***, then:

> It is our further submission that there is in the industrial jurisprudence of Australia the fundamental requirement in misconduct cases for the Tribunal to the satisfied [sic] that the misconduct in fact occurred. It is a question of fact to be decided by the Commission.

281 In submissions in reply, Mr Parnell argues that in an unfair dismissal case, whether the misconduct involves stealing or murder, the same principles apply. The first question to be answered is whether the misconduct occurred and the employer must prove that it did.

282 Mr Parnell disagrees with the Archbishop that the Senior Commissioner found that the misconduct occurred.

<u>Archbishop's case</u>

283 The Archbishop submits that Mr Parnell has not criticised the way the Senior Commissioner reconciled the ***Briginshaw*** balance of probabilities test and the ***Bi-Lo*** approach to a case of

summary dismissal for misconduct. Rather, Mr Parnell's complaint is inherently only against the application of ***Bi-Lo***.

284 The Archbishop says the Senior Commissioner was correct to adopt the '***Sangwin, Bi-Lo/Drake-Brockman***' approach in the context of the allegations against Mr Parnell. The allegations related to the personal safety of a juvenile, being A's safety as a student, and the public interest, being the societal attitude to child sexual abuse. The Senior Commissioner was entitled not to rely on ***Newmont*** in circumstances where that case concerned dishonesty and not serious misconduct.

285 To the extent Mr Parnell suggests that 'a lesser standard should be applied', the suggestion that the Senior Commissioner was dealing only with misconduct (rather than serious misconduct) is wrong. The Senior Commissioner made it clear that the approach he adopted related to matters where 'serious allegations of sexual assault or physical assault' were concerned. Mr Parnell seeks to trivialise the allegations against him. In reply, Mr Parnell denies trivialising the allegations and says it is because the allegations were so serious that ***Briginshaw*** applies.

286 The Archbishop argues that the Senior Commissioner did make a finding that the misconduct occurred at [220] of his reasons for decision. That finding was consistent with ***Drake-Brockman***.

287 The Archbishop submits there was no miscarriage of justice. Mr Parnell had every opportunity in the extensive investigation and then before the Commission to defend the allegations made against him. On material issues he was found to lack credibility, and such a finding was reasonably open to the Senior Commissioner. There was no error of law and ground one must fail.

Consideration

288 I consider that [220] of the reasons for decision can only be read as the Senior Commissioner making a finding about the employer's belief about the misconduct. He did not make a finding that the misconduct occurred.

289 In my view, the reasons for decision show the Senior Commissioner considered that he did not need to make a finding about whether the misconduct actually occurred. He applied ***Bi-Lo*** and found on the ***Briginshaw*** standard of proof that the Archbishop had an honest and genuine belief, based on reasonable grounds, that the most serious allegation of misconduct occurred.

290 In the circumstances of this case, relating as it does to personal safety, the wider public interest and where the gravity of the alleged offence is such that damage can be done to an employer's business, ***Bi-Lo*** was the correct authority to apply. Such an approach is consistent with the Full Bench's reasoning in ***Drake-Brockman*** at [56].

291 It also draws support from the reasoning of the Industrial Appeal Court in ***Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 75 WAIG 9; (1994) 58 IR 22. That case involved personal safety and a physical altercation. The Court referred to the reasons for decision of the Acting President, with whom the other members of the Full Bench agreed, in which the Acting President referred to ***Bi-Lo*** and concluded that the appropriate test to apply was 'to objectively assess the subjective actions and beliefs of the employer as at the time of the dismissal' (10). The Court quoted the Acting President at (10):

> Although in the case of summary dismissal it is incumbent upon the employer to establish that it had reason to effect the dismissal summarily, it is not obliged to prove, on the balance of

> probabilities, that the offence complained of occurred but, rather, that there were reasonable grounds for it to believe that such offence had occurred.

The Industrial Appeal Court dismissed the appeal and endorsed the approach taken by the Full Bench: (11).

292 The Senior Commissioner was not bound to apply ***Newmont*** in this case. Although the Full Bench in ***Drake-Brockman*** said at [58] that 'even when the test in ***Bi-Lo*** is applied, it may still be appropriate in some matters for the Commission to draw a conclusion as to whether or not misconduct had occurred', it is clear from that decision that the Full Bench upheld the ***Bi-Lo*** principle in cases of unfair dismissal where allegations relate to theft or other dishonesty, personal safety, issues of public interest or where the gravity of an offence is such that damage can be done to an employer's business. In such matters, like this one, it is not necessary to find that the misconduct occurred. The Senior Commissioner correctly identified the evidentiary onus in this case as being 'whether the respondent, after as proper and as thorough an inquiry as was necessary in the circumstances, had an honest and genuine belief, based upon reasonable grounds, that the misconduct alleged occurred' [87]. He did not act on a wrong principle.

293 Ground one of the appeal is not made out.

Ground two

294 Ground two is that:

> The learned Senior Commissioner erred in fact and law when [he] failed to make a finding based on the requisite standard of proof that the alleged serious misconduct against the appellant in fact occurred and was a valid reason for the appellant's dismissal.

Mr Parnell's case

295 Mr Parnell says the Senior Commissioner acted on a wrong principle, because the established 'principles and authorities' mandate that there must be a valid reason for the dismissal. The Senior Commissioner therefore erred in fact and in law when he failed to make a finding that there was a valid reason for the dismissal. He 'failed to apply the ***Briginshaw*** standard in his findings' and applied the wrong principle when he applied the ***Bi-Lo*** test, because it was necessary for him to make a finding about whether the alleged misconduct actually occurred.

296 Mr Parnell says that 'it will not be enough for an employer to say that they acted in the belief that the termination was for a valid reason', citing ***Rode v Burwood Mitsubishi*** (Unreported, AIRC, Dec 451/99 M Print R4471, 11 May 1999) at [19].

297 He argues that 'there is binding authority from the High Court and the Industrial Appeal Court of Western Australia as well as previous Full Bench decisions' that in an unfair dismissal case involving misconduct, the employer must prove that the alleged misconduct actually occurred.

298 Mr Parnell submits that the High Court 'has made it abundantly clear that determining whether misconduct took place is a question of fact to be determined by the Tribunal: ***Byrne & Frew v Australian Airlines Ltd*** (1995) 185 CLR 410 (***Byrne & Frew***) at [30] and [42]. Mr Parnell argues that deciding whether a case was harsh, unjust or unreasonable is very closely analogous to the 'harsh, oppressive or unjust' wording of the IR Act. The High Court said a dismissal may be unjust because the employee was not guilty of the misconduct on which the employer acted. Therefore the Commission must decide whether the alleged misconduct occurred.

299 Finally, Mr Parnell says that in ***Garbett v Midland Brick Company Pty Ltd*** [2003] WASCA 36 (**Garbett**) [at 72] and ***Max Winkless Pty Ltd v Bell*** (1986) 66 WAIG 847, 'misconduct is identified as a question of fact', so it 'logically follows that the Commission must make a determination as to whether or not it occurred.'

300 Mr Parnell says that in the unfair dismissal regime set out by the *Fair Work Act 2009* (Cth), there is a requirement that the Fair Work Commission consider whether there was a valid reason for the dismissal, and that that reason 'must be sound and defensible and not capricious' Mr Parnell says that the same principles should apply when this Commission is considering a unfair dismissal application and asks how a dismissal could be fair if the Commission has not decided 'the evidentiary issue whether the serious misconduct relied upon by the employer actually occurred'. He says the Commission 'must decide the evidentiary issue whether the misconduct relied on actually occurred' and that that is 'an abrogation of the statutory duty created by the IR Act.'

301 Mr Parnell points to the Senior Commissioner having made a statement during the hearing to the effect that in a case of summary dismissal for serious misconduct, there is an evidentiary burden on an employer to establish the misconduct occurred. During closing submissions, the Senior Commissioner then said 'But the evidential burden, if you can put it that way, rests with the employer to at least establish the facts upon which it relied to support the decision to dismiss summarily. I mean that's been settled law in this jurisdiction for decades.'

Archbishop's case

302 The Archbishop repeats his submissions in relation to ground one. Further, he says that the three cases Mr Parnell relies on arise in a different legislative context and are not relevant to his contention that the ***Bi-Lo*** approach should not have been followed.

Consideration

303 It is not the case that in every claim for unfair dismissal involving misconduct the employer must prove that the alleged misconduct actually occurred.

304 As set out at [290], ***Bi-Lo*** is the correct authority to apply in this case. In my view, the Senior Commissioner did not make a finding about whether the misconduct occurred. In the circumstances of this matter, where the allegations related to personal safety, public interest and where the gravity of the alleged offence is such that damage can be done to an employer's business, it was not necessary for the Senior Commissioner to make a finding about whether the misconduct occurred. Rather, he needed to make a finding about whether the employer had an honest and genuine belief, based on reasonable grounds, that the misconduct alleged occurred. The Senior Commissioner made that finding at [220]. There was no error.

305 It does not follow from the statement: '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' at (465) in ***Byrne & Frew*** that in every unfair dismissal case involving misconduct the Commission must make a finding about whether the misconduct occurred.

306 ***Byrne & Frew*** involved the dismissal of two baggage handlers who were dismissed because they were thought to have assisted another baggage handler to rifle through passengers'

luggage. Both baggage handlers denied stealing. ***Byrne & Frew*** was not a statutory claim for unfair dismissal. It was a claim that the employer had breached the following provision of the *Transport Workers (Airlines) Award 1988*: 'Termination of employment by an employer shall not be harsh, unjust or unreasonable. For the purposes of this clause, termination of employment shall include termination with or without notice.' It was in that context that the statement relied on was made.

307 In the federal legislative context, there is (and has been since at least 1994) a requirement that the Fair Work Commission consider whether there was a valid reason for the dismissal. No such requirement is set out in the IR Act.

308 In ***Copeland v Port Adelaide Central Mission Inc*** [2003] SAIRComm 4, an employee of a nursing home was dismissed after it was alleged that he engaged in inappropriate behaviour of a sexual nature towards a client. The employee denied the allegations. Deputy President Hampton considered that where the alleged misconduct is in dispute, there is an evidentiary burden cast upon the employer. The Deputy President applied ***Bi-Lo*** and said at [70]:

> I also add that in ***Byrne v Australian Airlines Ltd*** [1995] HCA 24; (1995) 185 CLR 410, the High Court recognised that termination of employment may be harsh if the dismissal was disproportionate to the gravity of the offence. *In this case however,* ***should*** *the respondent meet the evidentiary burden as to the alleged misconduct within the strict requirements of Bi-Lo, I would accept that the serious nature of the conduct and the context within which the applicant was employed, were such that a valid reason for termination would clearly exist and the dismissal would be within the range of reasonable responses open to the respondent.* (emphasis added)

309 In this jurisdiction the test to be applied is whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right: ***Miles & others t/a Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385 at (386). That test must always be applied without gloss: ***Garbett*** [72].

310 Referring to ***Garbett***, in effect Mr Parnell relies on a single sentence and submits that that decision is authority for the proposition that the Commission must always determine whether or not alleged misconduct occurred. That submission is misconceived.

311 The sentence relied on by Mr Parnell, '[w]here misconduct is alleged or relied upon there will be a burden on the employer to demonstrate that the alleged incident did occur and also to evaluate any mitigating circumstances' by EM Heenan J was obiter. ***Garbett*** was not a case that involved misconduct. The employee in question was dismissed on the grounds of redundancy. EM Heenan J's statement was a broad comment in relation to misconduct generally. It did not consider or deal with the nuance that exists depending on the type of misconduct, the nature of the workplace and the circumstances of the dismissal. As EM Heenan J notes in the immediately previous paragraph, 'a full examination of the features of the particular case must always be undertaken to assess the nature and effect of the dismissal in its particular context.' Indeed, the Full Bench in ***Drake-Brockman*** said at [63], specifically citing ***Garbett***: '*Leaving aside* ***Bi-Lo***, where misconduct is alleged, there is a burden to show the misconduct occurred.' (emphasis added). There is a burden to show misconduct occurred, other than where ***Bi-Lo*** applies.

312 Of course it may be that in a particular matter the dismissal was unfair because the employer lacked a valid reason. But it does not follow that the Commission must, in every instance involving misconduct, make a finding about whether the misconduct actually occurred. In any event, a fair reading of the Senior Commissioner's reasons for decision shows that he

considered that Mr Parnell's dismissal was not an abuse of the Archbishop's right to dismiss because of the employer's honest and genuine belief, based on reasonable grounds, that the most serious allegation of misconduct occurred. That was the reason for the dismissal. It can only be inferred from the reasons for decision that the Senior Commissioner considered the reason for dismissal was valid in the circumstances.

313 The submission that the reason for dismissal will not be valid unless there is a finding that the misconduct occurred is misconceived.

314 On the authorities, including ***Drake-Brockman*** and ***Bi-Lo***, the Commission should apply ***Bi-Lo*** where the misconduct alleged relates to personal safety, protection of an enterprise from dishonesty, an issue going to the public interest or where the gravity of the offence is such that damage can be done to the employer's business. The evidentiary onus on the employer is to establish that it 'honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged': ***Drake-Brockman*** at [55]. The employer does not have to prove that the misconduct actually occurred. In accordance with ***Drake-Brockman***, while it may be appropriate for the Commission to make a finding about whether the misconduct occurred, it is not necessary in every case for the Commission to do so.

315 Here, the evidentiary onus on the Archbishop was to establish that he honestly and genuinely believed, and had reasonable grounds for believing on the information available at that time, that Mr Parnell engaged in the misconduct alleged. In my view, on the evidence it was open to the Senior Commissioner to be satisfied, as he was, that the evidentiary onus had been met. It was not necessary for the Senior Commissioner to make a finding about whether the misconduct actually occurred.

316 Ground two of the appeal is not made out.

Ground three

317 Ground three is that the Senior Commissioner 'erred in fact and in law in his findings with respect to the receipt of and weight to be afforded to the hearsay evidence led in this case.'

Mr Parnell's case

318 Mr Parnell accepts that the Commission is not bound by the rules of evidence but says that the Senior Commissioner is bound to exercise his discretion in accordance with s 26(1)(a) of the IR Act, that is, according to equity, good conscience and the substantial merits of the case. He argues the Senior Commissioner failed to do so.

319 Mr Parnell says the hearsay material includes:

- the written statement found in the A's belongings after his death;
- A's statements made to members of his family;
- A's family members' testimony at the hearing;
- the counsellor's testimony at the hearing; and
- suppressed exhibit R9 – the counselling service file.

320 Mr Parnell says that the relevant evidence from A's family was hearsay and should have been afforded little weight, if any. The typed statement found in A's belongings 'was hearsay, lacked provenance and was inherently incredible and ought to have been afforded no weight at all as to matters of fact'. Further, he says that parts of Ms Hunter's evidence were hearsay and ought to have been afforded little or no weight.

321 Mr Parnell contends that 'broadly speaking, apart from the direct evidence of the appellant and [Ms Hunter], all of the evidence used to assess whether the dismissal was harsh, oppressive or unfair was hearsay', including the evidence given by the counsellor.

322 He points to various authorities and the *Uniform Evidence Act 1995* (Cth) , arguing that the Senior Commissioner should have given the hearsay evidence in this matter little or no weight, and where it differed from Mr Parnell's evidence given under oath, the Senior Commissioner should have preferred Mr Parnell's evidence.

323 Mr Parnell submits that although the Commission is not bound by rules of evidence (including the common law rule against the use of hearsay to establish facts or assertions), the Senior Commissioner was obliged to decide the case in accordance with s 26(1)(a) of the IR Act. This meant he had to inform himself 'in a way that was just. To do so in this case he ought to have given the hearsay evidence little or no weight and where it differed from the appellant's sworn unchallenged evidence on oath, justice dictates that he prefer that evidence to hearsay material accordingly.'

324 Mr Parnell argues:

> In a case where the allegations are of a sexual abuse of a child, by a teacher more than 20 years ago justice will only be served by observing the rules of evidence being well established principles to ensure that justice is served.

325 In reply, Mr Parnell says the effect of s 26(1)(a) and (b) of the IR Act is that there must be substantial justice for him. He submits that he is not simply disgruntled with the outcome at first instance. Mr Parnell maintains the Senior Commissioner made appealable errors when deciding the case.

Archbishop's case

326 As Mr Parnell concedes, the Commission is not bound by the rules of evidence but may inform itself on any matter in such way it thinks fit. The Commission must exercise its discretion according to equity, good conscience and the substantial merits of the case. Accordingly, the Senior Commissioner's reasoning at [177] was correct. The Senior Commissioner meticulously analysed the totality of the evidence between pages 40 and 71 of his reasons for decision.

327 The Archbishop says Mr Parnell has taken an 'all or nothing' approach, saying because the allegations were about sexual abuse of a juvenile by a teacher more than 20 years ago, hearsay should be entirely disregarded by the Commission. That approach disregards the context of the investigation process and the Commission's obligation under s 26(1)(a) of the IR Act. The Commission 'must not spin a coin or consult an astrologer' and 'the Commission may take into account any material which, as a matter of reason, has some probative value': ***R v Deputy Industrial Injuries Commissioner; ex parte Moore*** [1965] 1 QB 456 at 488. It is apparent from the reasons for decision that no coin was spun. Rather, the Senior Commissioner thoroughly assessed and ultimately accepted the hearsay evidence.

328 Accordingly, ground three has no substance.

Consideration

329 The Senior Commissioner noted that hearsay evidence is not inadmissible but should be accorded appropriate weight, depending on the totality of the evidence before the Commission. In accordance with ***R v Deputy Industrial Injuries Commissioner; ex parte Moore***, he held that facts can be fairly found, without the strictures of the rules of evidence, as long as the tribunal refrains from 'spinning a coin' and bases its conclusions on material that has probative value, with the weight to be given to such material being a matter for the tribunal.

330 The Commission is not bound by the rules of evidence. It was open to the Senior Commissioner to receive hearsay evidence and ultimately place weight on it. He comprehensively analysed the totality of the evidence, taking into account material with probative value. The Senior Commissioner did not spin a coin or consult an astrologer.

331 It is apparent from the Senior Commissioner's reasons for decision that he was aware of and acted in accordance with the obligations in s 26(1) (a) and (b) of the IR Act. Contrary to Mr Parnell's argument, the focus is not merely on 'substantial justice for him'. 'Justice' must involve a balancing of interests, including but not limited to the interests of Mr Parnell.

332 Ground three of the appeal is not made out.

Ground four

333 Ground four is that the Senior Commissioner 'erred in fact and in law in using circumstantial evidence to draw inferences adverse to the appellant.'

Mr Parnell's case

334 Mr Parnell says that inferences drawn by the Senior Commissioner in relation to several matters were not the only inferences available and so he ought not have made the findings he did based on circumstantial evidence. The Senior Commissioner failed to weigh up or have regard to alternative inferences.

335 Mr Parnell says suppressed exhibit R9, the counsellor's evidence and A's father's evidence make it clear that in 2017 A was suffering from bipolar disorder, which is a serious mental illness.

336 Relying on ***Seymour v Australian Broadcasting Commission*** (1977) 19 NSWLR 219 at 232, Mr Parnell argues that the nature of circumstantial evidence is that there is always more than one possible explanation for the evidence, and such explanation may be an innocent one. He argues the High Court has cautioned against the use of only circumstantial evidence and has recognised the difficulty of circumstantial evidence discharging the burden of proof: ***Chamberlain & another v R (No 2)*** (1984) 153 CLR 521. Mr Parnell says the fact that that case was a criminal one does not diminish the principle. The only difference in this case is that the burden of proof in this matter is 'of course at a much lower level.'

337 Mr Parnell submits it can be inferred from the Senior Commissioner's reasons for decision that 'due to the circumstantial evidence he identified he concluded that the misconduct had occurred.'

338 Specifically, Mr Parnell says that:

- the evidence from A's parents about the decline in his schoolwork 'was just as likely to be related to the onset of his bi-polar disorder' and was never reported to the school by the parents;

- A's alcohol and drug abuse was 'just as likely to have been due to his developing bi-polar disorder';

- that A became increasingly withdrawn 'could be due to any range of factors in a year 11-12 student';

- the Senior Commissioner did not explain why an adverse inference could be drawn from A leaving school without any explanation;

- the 'so-called sense of relief is not born out by the counsellor's notes. In fact a feature of A's distress when attending counselling was his concern that his parent's [sic] did not believe him.'

- the counsellor's note about a report to the police is not borne out by the police file;

- the probative value of the tweets 'must be undermined by the fact that the author of them suffered a mental illness and that the appellant voluntarily produced them to investigators'. It is highly unlikely that Mr Parnell would have produced the tweets to the Investigators if he had something to hide;

- the Senior Commissioner's seventh conclusion that, although there is no formal evidence that A made a complaint to the Bunbury police in relation to the assault, the fact that the counsellor contacted police and was told something by a detective is not altered, is not borne out by exhibit R9;

- the conclusion that 'at some undisclosed time, A made telephone calls to the applicant at work when he was at another school' was not put to Mr Parnell by the Investigators or during the hearing. It is denied by him;

- the Senior Commissioner's conclusion about A having a lack of motive is pure speculation. A's mental illness can explain a range of unusual behaviours;

- there is no evidence A disclosed the subsequent sexual assaults to anyone other than the counsellor. That there was more than one subsequent sexual assault may have changed Dr Chamarette's views about the reliability of A's disclosures;

- the conclusion that 'A and the applicant sharing a room as the only two males on the trip, as opposed to either of them sharing a room with a female(s), is of itself, compelling' relies on Ms Hunter's evidence, which should not be accepted; and

- the Senior Commissioner does not explain why A's attendance at the counselling service is consistent with the legitimacy of A's grievance and the need for therapeutic assistance, given there were at least two other sexual assaults and A's father recommended that A attend counselling.

339 Mr Parnell argues the inferences drawn by the Senior Commissioner were not the only possible inferences and he failed to give any weight to alternatives. This amounts to mistaking the facts and an error of law.

340 In reply, Mr Parnell denies his arguments in relation to A's mental health are intended to or do tarnish A. He refers to:

- exhibit R9 as including a written record of A's diagnosis;
- A's father's evidence that A had been a voluntary patient at Sir Charles Gairdner Mental Health Unit in 2011 for three weeks, that he had been diagnosed with bipolar disorder and was under the care of a mental health practitioner and a psychiatrist;
- A's sister telling the Investigators that A had told her he used heroin and she said he drank heavily. At the hearing she said that A used drugs recreationally; and
- A's friend telling the Investigators that A 'was into' opiates and oxytocin, and was on prescription medication for bipolar disorder and ADD.

341 Mr Parnell says 'A was profoundly unwell on any view of the evidence and this ought to have been taken into account in the decision making [sic] process.' The Senior Commissioner's failure to consider that evidence as part of a balanced deliberation was a mistake of fact.

Archbishop's case

342 The Archbishop says the Senior Commissioner highlighted the distinction between criminal and civil proceedings and appropriately relied on dicta in ***Palmer v Dolman***. Mr Parnell's reliance on ***Seymour v Australian Broadcasting Commission*** and ***Chamberlain & another v R*** is misplaced. Those cases deal with criminal cases and the required higher level of proof.

343 The Archbishop says Mr Parnell's reference to A's mental illness is disingenuous. He had the opportunity to call expert evidence about the consequences of perceived mental illness before the Commission but did not. To now opine before the Full Bench is speculative and too late.

344 The Archbishop says the inferences drawn by the Senior Commissioner were logical, probative and consistent with evidence. On any fair reading of the evidence, those inferences were reasonably open, whereas the conclusions put forward by Mr Parnell are not reasonably open on a balanced assessment. Ground four is not made out.

Consideration

345 The Senior Commissioner was correct to rely on the reasoning in ***Palmer v Dolman***.

346 Underlying Mr Parnell's complaint in relation to this ground is his misconceived focus on possibilities and not probabilities.

347 Generally, Mr Parnell's criticism of the way the Senior Commissioner dealt with the circumstantial evidence is unwarranted. In particular:

(a) To the extent Mr Parnell says the evidence from A's parents about the decline in his schoolwork 'was just as likely to be related to the onset of his bi-polar disorder', in my view the evidence does not support this submission.

(b) The submission that A's alcohol and drug abuse was 'just as likely to have been due to his developing bi-polar disorder' is a submission entirely unsupported by evidence, let alone expert evidence.

(c) There is an obvious adverse inference that can be drawn from a generally diligent student leaving school without any explanation.

(d) That the counsellor's notes do not refer to A's sense of relief does not undermine the evidence from A's family members and the counsellor that A seemed to have a sense of relief once he had disclosed the assault.

(e) It is unsurprising that the counsellor's report to police would not have been recorded in a police file made in response to a report by Ms Taylor. In any event this does not undermine the probative value of the counsellor's note about making a report to police. Contrary to Mr Parnell's submission, exhibit R9 does support a finding that the counsellor contacted police and was told something by a detective.

(f) Mr Parnell's submission that the Senior Commissioner's conclusion about A having a lack of motive 'is pure speculation' because 'A's mental illness can explain a range of unusual behaviour' is entirely unsupported by evidence, let alone expert evidence.

(g) Mr Parnell's submission that there is no evidence A disclosed the subsequent sexual assaults to anyone other than the counsellor is incorrect. A's sister gave evidence that he disclosed at least one of the subsequent sexual assaults to her.

(h) Further, it was open to Mr Parnell to call Dr Chamarette at first instance and put to her that the fact there was more than one subsequent sexual assault may have changed her views about the reliability of A's disclosures. Mr Parnell chose not to run his case in that way and he cannot now rely on that argument.

348 Mr Parnell's observation that the counsellor's evidence (and notes in the file) about A telephoning Mr Parnell when Mr Parnell was at work at another school was not put to him by the Investigators or in cross-examination is a fair one. However, that was merely one factor, and not a significant factor, that was included in the totality of the evidence. I do not consider that it made, or could make, any difference to the outcome.

349 Mr Parnell's attempt to paint A's drug use and mental health challenges, including his diagnosis of bipolar disorder, as an explanation for having made the very serious allegations involved in this matter is not remotely compelling. If Mr Parnell wanted to argue that A's mental health challenges or drug use were or could be responsible for some of the matters set out at [268], he should have led expert evidence to that effect at first instance. He led no evidence in support of that submission, expert or otherwise.

350 It does not follow that having used drugs and experienced mental illness, including having a diagnosis of bipolar disorder, means that A was necessarily an untruthful or unreliable complainant. In the circumstances, Mr Parnell has made a number of unfounded, discriminatory submissions about a complex medical issue, entirely unsupported by evidence. Such submissions reflect poorly on Mr Parnell and his representative.

351 I disagree that it can be inferred from the Senior Commissioner's reasons for decision that 'due to the circumstantial evidence he identified he concluded that the misconduct had occurred.' As set out in [288] – [289], I consider the Senior Commissioner made no finding about whether

the misconduct had occurred. It was not necessary for the Senior Commissioner to make a finding in that regard, so making no finding was not an error.

352 Mr Parnell says the Senior Commissioner failed to consider that A was profoundly unwell and that this amounts to a mistake of fact. I disagree. A fair reading of the reasons for decision shows that the Senior Commissioner was well aware that A had experienced mental health challenges. He referred to A developing 'some significant mental health problems' and said the counselling file 'paints the picture of A as a deeply troubled individual.'

353 The Senior Commissioner did not err in fact or law in the way he dealt with the circumstantial evidence.

354 Ground four of the appeal is not made out.

Ground five

355 Ground five is that the Senior Commissioner erred in fact by finding that Ms Hunter was a witness of truth and preferring her evidence to Mr Parnell's evidence.

Mr Parnell's case

356 Mr Parnell particularises this ground of appeal as follows:

5.1 The witness Mrs Hunter was the Indonesian Teacher at MacKillop Catholic College who was in charge of the student tour in 1997 during which the alleged misconduct of the appellant took place;

5.2 Mrs Hunter was interviewed by the respondent's investigators on the 15th March 2019;

5.3 In the Final Investigation report by CEWA Mrs Hunter was described as erratic and having non-coherent responses;

5.4 Mrs Hunter testified at the hearing on the 12 February 2020 and gave evidence which was erratic;

5.5 Mrs Hunter had spoken to [A's] family members before giving evidence to the hearing;

5.6 Mrs Hunter was given the typed statements found by the parents of [A] and had read those statements prior to giving evidence;

5.7 Mrs Hunter's evidence was tainted and compromised;

5.8 There were significant inconsistencies between her statement to the investigators on the 15th March 2019, her written but unsigned witness statement dated the 28th January 2019 and her evidence in the witness box at hearing on the 11th February 2020;

5.9 Mrs Hunter alleged that a couple of weeks after the tour, a student told her that the appellant had bought alcoholic drinks for the students on the tour, but she failed to report this to the Principal;

5.10 Mrs Hunter included a 19 year old male companion in the tour from Indonesia called Jack, but she failed to disclose this to the Principal of the school or to the parents of the students, four of whom were females;

5.11 Mrs Hunter told the investigators on the 15th March 2019 that the appellant was grooming her during the tour, but resiled from that position at hearing;

5.12 Mrs Hunter failed to report to the Principal Peter Glasson of the changed accommodation arrangements on the last night of the tour and specifically (as she alleged) that the appellant was to share a bedroom with a student namely [A];

5.13 Mrs Hunter gave inconsistent evidence about the appellant sharing a bedroom with [A] on the last night of the tour;

5.14 Mrs Hunter gave inconsistent evidence about which night the students went out to the Hard Rock Café;

5.15 Mrs Hunter expressed an antagonistic and adverse view of male teachers who had taught previously at Trinity College which included the appellant.

357 Mr Parnell's submissions focus on Ms Hunter's evidence about the Statements and the inconsistency and changes between the statement that Ms Hunter gave to the Investigators and the evidence she gave at the hearing of this matter.

358 Mr Parnell argues that it was clear from Ms Hunter's interview with the Investigators that she had seen the Statements before the interview, because she said 'the way [A] wrote his statements'. He also says that in cross-examination at the hearing she denied having read the Statements after A's funeral in 2017 but had earlier said 'the statements I read two weeks ago'. He submits that this means Ms Hunter had refreshed her memory from reading the Statements and that she could not be considered a witness of truth. The Senior Commissioner mistook the facts 'which meant that his discretion miscarried and thereby triggered a ***House v The King*** breach'.

359 Mr Parnell says that a further reason to doubt Ms Hunter's credibility arises out of the 'significant changes she makes from her statement in March 2019 to her written, unsigned witness statement on 28 January 2020', specifically in relation to the group's accommodation, the outing to the Hard Rock Café and the alleged altercation between Mr Parnell and A on the flight home, all matters central to the dispute.

360 Mr Parnell says:

> None of the changes in Clarissa Hunter's statements, nor ultimately her [sic] the essence of her 28 January statement is supported by any of the statements given by the students on the tour who were interviewed as part of the CEWA investigation. Mrs Hunter did not report to the Principal Peter Glasson that (as she alleged) the appellant as to share a bedroom with [A]. According to her 28 January statement and evidence at the Hearing, these changed accommodation arrangements also required Mrs Hunter to share a room with 2 girls on the tour. Mrs Hunter was unable to recall the names of these 2 girls, nor did she report to the Principal that she shared a room with the girls.

361 He argues Ms Hunter's statement to the Investigators 'the way [A] wrote his statements' can only be explained by her having read the Statements, which is at odds with her evidence that she read the Statements after the interview (two weeks before the hearing). Ms Hunter was 'clearly untruthful in the witness box about how she received her information' and her witness statement was silent about those matters.

362 Mr Parnell submits that the Senior Commissioner did not give any consideration or weight to Ms Hunter's 'tainted or contaminated evidence'. Further, the Senior Commissioner did not explain how he was able to discern what evidence Ms Hunter had as an independent recollection and what she had learned from A's Statements. Accordingly little, if any, weight can be given to her evidence. In submissions in reply, Mr Parnell cites ***Director General, Department of Education Western Australia v State School Teachers' Union of WA (Incorporated)*** [2020] WAIRC 00927 and seems to suggest the Senior Commissioner's reasons were inadequate in relation to how he accepted Ms Hunter's evidence 'as opposed to the clear and unchallenged denial by the Appellant that he shared a room with A.'

363 Mr Parnell argues that Ms Hunter said different things about accommodation, the outing to the Hard Rock Café and altercation on the plane in her statement to the Investigators, her unsigned witness statement and her testimony at hearing. Specifically:

(a) What she said to the Investigators about accommodation did not involve her sharing with female students, whereas at the hearing she said she did.

(b) She told the Investigators that Mr Parnell took the students to the Hard Rock Café and bought them drinks on the night before the last night, whereas her witness statement has this occurring on the last night and in cross-examination Ms Hunter was unsure of which of the two nights this event occurred.

(c) In the interview with Investigators, Ms Hunter did not recall anything about the plane trip home. In her witness statement she recalled an altercation on the plane trip and at the hearing Ms Hunter gave evidence that the female students were shocked by the conflict and words used by Mr Parnell. No student recalled anything that occurred on the plane trip home when interviewed by the Investigators.

364 Mr Parnell says these changes in Ms Hunter's version of events more closely correlate with the content of A's Statements. These changes are not supported by the interviews given by the students.

365 Ms Hunter did not report the changed accommodation arrangements to the principal at the time, nor that the group would be accompanied by a young male chaperone, Jack. Mr Parnell says Ms Hunter's evidence about Jack was evasive. Further, Mr Parnell says though the Senior Commissioner had concerns about a young man accompanying the group for the tour, unknown to the school and parents, the Senior Commissioner did not mention that evidence or his concerns about it when deciding that Ms Hunter was a witness of truth.

366 Mr Parnell says that in deciding Ms Hunter was a witness of truth, particularly in relation to the accommodation arrangements on the final night, the Senior Commissioner did not have regard to Mr Parnell's uncontested evidence that he had a separate room. Mr Parnell was not cross-examined about that evidence.

367 Mr Parnell referred to various authorities in relation to the dangers of a witness reading a statement to refresh memory. Mr Parnell says Ms Hunter was erratic, evasive and had a poor memory without any independent recollection of the events in question. It was a mistake of fact to find that Ms Hunter was a witness of truth and therefore 'This means that the discretionary decision to dismiss the application, [sic] miscarried'. As a result, the principle in ***Devries & another v Australian National Railways Commission and another*** [1992-1993] 177 CLR 427 (***Devries***) is overtaken.

Archbishop's case

368 The Archbishop submits the Senior Commissioner had the benefit of hearing Ms Hunter's evidence firsthand. He was in the best position to assess her evidence. Noting the reasons for decision refer to the Senior Commissioner paying 'close attention to Ms Hunter when she was giving her evidence', the Senior Commissioner thoroughly assessed and then accepted the core issues, including those about accommodation.

369 Simply disagreeing with a finding is no reason to set a finding aside: ***Devries***. The Archbishop says there is no basis for Mr Parnell to suggest that the Senior Commissioner palpably misused

his advantage or acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable.

370 The finding that Ms Hunter was 'a witness of truth' is particularly compelling given the Senior Commissioner was aware of the observations made about Ms Hunter in the investigation report.

371 The Archbishop says the transcript and the reasons for decision show that the Senior Commissioner did not 'misuse his advantage'. His findings about Ms Hunter's credibility were reasonably open on all the evidence and must stand. In particular the finding that Ms Hunter's evidence was not contaminated was reasonably open.

372 The Archbishop submits that Mr Parnell's criticism of Ms Hunter's evidence completely disregards the adverse comments made by the Senior Commissioner about Mr Parnell's credibility. The Senior Commissioner had the benefit of hearing the evidence of Mr Parnell and Ms Hunter. For example, Mr Parnell had little recollection of the stay in Bali and only remembered 'exceptional matters'. However he maintained, in a self-serving way, that the accommodation was in three separate villas without explaining how that was exceptional. The Archbishop says given the small number of persons to be accommodated, it would have been 'exceptional' for three separate villas to be allocated.

373 The Archbishop says this ground of appeal should be dismissed.

Consideration

374 I do not consider that Mr Parnell has established that the Senor Commissioner made an error of fact by finding that Ms Hunter was a witness of truth and preferring her evidence to Mr Parnell's evidence.

375 As the Senior Commissioner noted, there was some change in Mr Parnell's position about whether he shared a room with A. In his initial response to the allegations, Mr Parnell said: 'I strongly believe that I did not share a room with A.' In the interview Mr Parnell said he was '100% sure he did not do so.'

376 Ms Hunter had a detailed recollection of the stay in Bali, whereas Mr Parnell said he had little recollection of it. Mr Parnell did not recall whether the group stayed in the same hotel on both nights in Bali. The effect of Mr Parnell's evidence was that, given the passage of time, he could only recall exceptional matters. Mr Parnell maintained that the accommodation was in three separate villas provided by the airline, that he and Ms Hunter had a villa each and the students shared the other villa. The Senior Commissioner's observation that Mr Parnell 'did not say how this was an exceptional matter, so he could recall it and for Ms Hunter to be so wrong, when he had little independent recollection of so many other matters' was a fair observation given the evidence.

377 I do not accept the submission that Ms Hunter's statement to the Investigators 'the way [A] wrote his statements' can only be explained by her having read the Statements. Her sworn testimony at the hearing was that she knew about the Statements because A's father had told her about them in around March 2019. Notwithstanding robust cross-examination on this point, when Mr Parnell's representative put to Ms Hunter that she saw the Statements shortly after A's funeral, Ms Hunter was adamant that she had not. Rather, Ms Hunter's evidence was that before the investigation A's father had told her about A's Statements. That was what Ms Hunter was referring to when she said 'the way [A] wrote his statements'. She first read the Statements about two weeks before the hearing. In my view, Ms Hunter's evidence about this

matter was not disturbed in cross-examination. Her evidence that Mr Parnell shared a room with A was also undisturbed.

378 It was open to the Senior Commissioner to find Ms Hunter was a witness of truth and prefer her evidence to that of Mr Parnell.

379 Ground five of the appeal is not made out.

Ground six

380 Ground six is that the Senior Commissioner 'erred in fact when he found the essence of the written statements made by [A] to be compelling and credible.'

Mr Parnell's case

381 Mr Parnell submits that the Statements were hearsay evidence and lacked provenance. He says that A's mother believed the Statements were prepared by someone else, that the evidence pointed to the statements having been prepared in a therapeutic context and not being statements of fact and that the Statements 'were made by a person who suffered from a mental illness diagnosed as bi-polar and who as the Counsellor described in her notes as profoundly unwell with suicidal tendencies and drug abuse'.

382 Mr Parnell says the Statements ought to have been given no weight at all because 'the alleged author was not available to testify to the statements' and there 'was no evidence that in fact these were the statements of the deceased and some parts of the writings were incredible and contradictory to other evidence'.

383 A significant detail in the Statements is that the group went to the Hard Rock Café for dinner on the night of the assault and that Mr Parnell purchased alcohol there. The Senior Commissioner found, and the Archbishop conceded, that did not occur.

384 In reply, Mr Parnell said the counsellor's evidence revealed more inconsistency, because A told her that rather than alcohol being bought and consumed at the Hard Rock Café, A had said that Mr Parnell had invited A into the room they were sharing and that was where they consumed alcohol. Exhibit R9 discloses that A wrote stories about his experiences.

Archbishop's case

385 The Archbishop repeats his submissions in relation to ground three. The finding was reasonably open on the basis of the Statements and properly made. The fact that one aspect of the Statements was not correct does not discredit the documents in their entirety. As the independent arbiter, the Senior Commissioner was entitled to accept, as he did, that the Statements had weight.

Consideration

386 In my view, it was open to the Senior Commissioner to find the essence of the Statements to be compelling and credible. The observations made by the Senior Commissioner at [192] of his reasons for decision were accurate and fair.

387 For the reasons set out at [349] – [350], the submission about the Statements being 'made by a person who suffered from a mental illness diagnosed as bi-polar and who the Counsellor described in her notes as profoundly unwell with suicidal tendencies and drug abuse' reflects poorly on Mr Parnell and his representative.

388 The Statements were found in A's belongings and included handwriting on them that A's parents testified was A's handwriting. The Statements are detailed and in large part consistent

with other evidence. I agree with the Senior Commissioner, for the reasons he provided, that it was an assumption that the Statements were made as part of A's therapy with the counselling service. That the Statements included aspects that were incorrect, for example in relation to the group going to the Hard Rock Café for dinner on the night of the assault and that Mr Parnell purchased alcohol there, does not mean the Statements should have been given no weight at all. In my view, in the context of this matter, those were relatively minor details. The Statements clearly had probative value and it was open to the Senior Commissioner to consider the Statements in the totality of the evidence.

389 Ground six of the appeal is not made out.

Ground seven

390 Ground seven is that the Senior Commissioner erred in fact when he found that the tweets sent by A to Mr Parnell were consistent with something of significance having occurred between them in the past.

Mr Parnell's case

391 Mr Parnell says that the tweets were sent by A when he was 36 years old and had bipolar disorder. The tweets were sent at or around the time that A told his family about the alleged assault and counselling. The tweets are therefore consistent with his actions at the time – being that of disclosing and seeing a counsellor.

392 The tweets are not evidence that something did occur any more than disclosure, of itself, means that the sexual assault actually occurred. The disclosure is not a statement of fact, could not be cross-examined and should be treated as hearsay. Further, the tweets do not refer to anything physical happening, let alone violent acts and threats.

393 Mr Parnell argues that the Senior Commissioner should have had regard to the evidence about 'A's mental health and years of significant mind altering drug use', and been open to the possibility that 'a mental illness that leaves one vulnerable to delusionary experiences as well as a level of drug use that could result in delusionary experiences and psychotic episodes'.

394 Mr Parnell criticises the finding that the tweets demonstrated that something of significance occurred between Mr Parnell and A, and that Mr Parnell failing to act on those tweets was consistent with him not wanting to call attention to his past. Mr Parnell argues that those findings disregard that Mr Parnell gave the tweets voluntarily to the Investigators.

395 Mr Parnell submits that given his previous submissions about how circumstantial evidence ought not to be used in this matter, it was a miscarriage of justice for the Senior Commissioner to partly rely on the tweets when concluding that the allegations were made out.

Archbishop's case

396 The Archbishop says the finding made by the Senior Commissioner about the tweets was 'overwhelmingly and the most obvious finding that was open' to make. The matters relied on by Mr Parnell in support of this ground of appeal have no probative value. They also disregard Mr Parnell's evidence that because he did not know what to do about the tweets, he disregarded them and blocked them. The Archbishop says 'that dismissive approach was taken by the appellant as a very seasoned and experienced deputy principal' and highlights why the Senior Commissioner correctly reached the conclusion that he did about Mr Parnell.

Consideration

397 Mr Parnell's description of A's 'years of significant mind altering drug use' is a material overstatement of the evidence. Similarly, the submission that the Senior Commissioner should have been open to the possibility that 'a mental illness that leaves one vulnerable to delusionary experiences as well as a level of drug use that could result in delusionary experiences and psychotic episodes' [124] is entirely unsupported by evidence, let alone expert evidence. Again, for the reasons set out at [349] – [350], such a submission reflects poorly on Mr Parnell and his representative.

398 Given the nature, timing and content of the tweets, it was fair to conclude that the tweets supported a finding that something of significance had occurred between A and Mr Parnell in the past. The Senior Commissioner was right to consider that Mr Parnell's failure to act on the tweets, merely blocking them and not reporting them was consistent with Mr Parnell not wanting to call attention to A in his past, nor to prompt the asking of question. That Mr Parnell gave the tweets to the Investigators does not lead to an alternative conclusion.

399 Ground seven of the appeal is not made out.

Ground eight

400 Ground eight is that the Senior Commissioner 'erred in fact and in law when he failed to take into account unchallenged character evidence about the appellant'.

Mr Parnell's case

401 Mr Parnell says that the Senior Commissioner 'completely disregarded the character evidence' that was introduced by Mr Parnell and that was substantially unchallenged.

402 Mr Glasson gave evidence that Mr Parnell was a highly respected senior member of staff. During the time that Mr Glasson was principal, there was no accusation or hint of Mr Parnell behaving inappropriately.

403 Mr Parnell's wife gave 'very strong, credible evidence as to Mr Parnell's non-violent character and teaching and leadership values.' Mr Holt said Mr Parnell's integrity was beyond reproach. Ms O'Brien said Mr Parnell was a gentleman of integrity who showed genuine warmth to others and easily made good relationships with staff and families. Mr Greaves described Mr Parnell as a very caring person who was loyal to the values and principles of the school.

404 Mr Melton said Mr Parnell had sound educational beliefs based largely on the respect for the worth and integrity of the individual. Mr Parnell commanded respect of students and staff with a strong sense of social justice. Mr Melton gave evidence that he trusted Mr Parnell and 'only encountered honesty and commitment.' Mr Parnell was very much a family man who treated teaching as a vocation.

405 Mr Parnell submits none of this character evidence was taken into account when weighing up the evidence. A proper analysis of the character evidence should have led to a finding that it was 'most unlikely' that the allegations were true. The Senior Commissioner should have given weight to the character evidence about Mr Parnell and consequently preferred his evidence to Ms Hunter's evidence. The Senior Commissioner's failure to do so 'meant his discretion miscarried.'

406 In submissions in reply, Mr Parnell says it was not enough for the Senior Commissioner to simply be cognisant of the character evidence. The Senior Commissioner was obliged to take the evidence into account and he did not. Had the Senior Commissioner taken the character

evidence into account, and given the challenges to Ms Hunter's evidence, he would have come to a different conclusion. Failing to have regard to important material is contrary to ***House v The King*** (1936) 55 CLR 499.

Archbishop's case

407 The Archbishop submits that the Senior Commissioner referred to the fact that Mr Parnell's 'good character was assumed' by the Investigators. The Senior Commissioner was clearly cognisant of the character references: [104]-[114]. Further, on Mr Glasson's evidence, Mr Parnell's failure to report student smoking in Bali was a 'serious matter'.

Consideration

408 The Senior Commissioner did not disregard the character evidence. Rather, he comprehensively set it out at [104] – [114] and in [116] of his reasons for decision. At [185] he said: 'As to the applicant's character, I refer to the evidence of Ms Jones, who said for the investigation, the applicant's good character was assumed.' In my view, the character evidence formed part of the totality of the evidence considered by the Senior Commissioner.

409 In any event, it was sufficient that the Senior Commissioner noted that Mr Parnell's good character was assumed for the investigation. This is because what the Senior Commissioner had to decide was whether the Archbishop honestly and genuinely believed, and had reasonable grounds for believing on the information available at that time, that Mr Parnell engaged in the misconduct alleged, and not whether the misconduct occurred.

410 A fair reading of the reasons for decision shows that the Senior Commissioner did not err in fact or law by failing to take into account character evidence.

411 Ground eight of the appeal is not made out.

Ground nine

412 Mr Parnell's final ground of appeal is that:

> If the appellant is wrong with respect to Ground 1 and the correct function of the Commission on hearing an unfair dismissal case is to be satisfied that the respondent in dismissing the appellant, held an honest and genuine belief, based on reasonable grounds that the most serious allegation occurred (which is denied by the appellant) then the learned Senior Commissioner erred in fact and in law in finding that the respondent had satisfied that standard.

Mr Parnell's case

413 Mr Parnell argues that the Archbishop did not conduct a reasonable investigation and could not therefore have an honest and genuine belief that the misconduct occurred.

414 Mr Parnell says that he was denied the presumption of innocence because in the final investigation report, it says that he 'failed to provide any compelling evidence to suggest that he did not in fact share a room with [A] in Bali' and that he 'demonstrated a tendency to respond dishonestly to questions asked of him'. The Investigators gave the example that 'he categorically denied that he purchased or drank alcohol with students on the trip, however it was confirmed by witness evidence that this did in fact occur.' Mr Parnell says that any information that does not go towards supporting the allegations has been ignored or disregarded. Given the submissions made by the Archbishop at the hearing in relation to the modern atmosphere and psyche in the post Royal Commission into Institutional Responses to Child Sexual Abuse era, as well as the public view of sexual assault in recent times, it was very likely that the Investigators had an actual or subconscious bias.

415 In essence, Mr Parnell says the Investigators appear to have considered that Mr Parnell had to disprove the allegations. They did not 'give attention or consideration' to Mr Parnell's version of events. Mr Parnell's evidence in his response to the allegations, at the interview and during the hearing was that:

(a) he had to make phone calls in his room;

(b) his accommodation was a little way from the students and he had to walk to the students' accommodation to talk to them; and

(c) on the last morning he found that A and another student had been smoking the previous night.

416 Mr Parnell says that evidence was not given any attention by the Archbishop or the Senior Commissioner.

417 He says the Investigators did not understand or have regard to what constituted hearsay. One of the Investigators, Mr Wong, worked on the basis that A's Statements were true and gave evidence that he did not understand what constituted hearsay. Mr Wong admitted the investigation report exaggerated the description of A's Statements as containing 'extensive information about the Bali Trip. Ms Jones did not know what constituted hearsay.

418 Mr Parnell submits the Investigators relied upon erratic evidence. He says Ms Hunter's evidence was erratic because in the interview, she said that two girls told Ms Hunter after the end of the tour that Mr Parnell bought alcohol for the students. The Investigators accepted this, even though no student referred to Mr Parnell buying alcohol for the students. Further, Ms Hunter did not report this to the Principal. At the hearing of the matter, Ms Hunter says one of the girls was called [S]. However, [S] did not mention this in her interview.

419 Mr Parnell submits that the Investigators did not carry out basic fact checks, like whether Mr Parnell had an older brother or rode his bicycle past [A]'s parents' home.

420 He also says that the configuration of the hotel and the hotel computer records were not accessed as part of the investigation, which is a serious defect in the investigation process. No records were sought or obtained from the school about the trip, its participants or the teachers involved. A's school records were not sought or obtained.

421 Mr Parnell says the Investigators did not understand the concept of the ***Bringinshaw*** principle. At the hearing, Mr Wong said the ***Briginshaw*** principle was not raised with him and he had never heard of it. At the hearing, Mr Wong and Ms Taylor agreed that they were unable to substantiate the allegations at the end of the factual investigation.

422 Dr Chamarette relied on commentary from the investigation report which suggested that Mr Parnell was dishonest. Mr Parnell says that where an expert report is founded on a factual premise that is later found to be flawed, then the report must be discounted to that degree. He also argued that that Investigators obtained an expert opinion from Dr Chamarette, whose recommendations they ignored, and that:

> It can hardly be found to have been a reasonable investigation when at the end of the factual investigation the investigators cannot make up their mind as to substantiation and commission an expert report and then disregard its opinion.

423 Mr Parnell says the Investigators 'relied heavily on demeanour evidence of [Mr Parnell]', although he does not explain why he says that. Mr Parnell says Mr Wong 'withdrew that aspect

of his statement' after cross-examination revealed that Mr Wong never met Mr Parnell and he based his comments on hearing about Mr Parnell's reaction after the findings were delivered to him. Such demeanour evidence was not relevant to the investigation.

424 Mr Parnell says the Investigators did not obtain character evidence about Mr Parnell. They did not interview the principal of the school at the time, either for character evidence or for basic fact-checking. Ms Jones said the principal's evidence would not have been relevant and Mr Wong said it might have been useful to speak to the principal.

425 Finally, Mr Parnell says that [A]'s mental illness would have been 'a reasonable matter to investigate' and that 'a reasonable investigator would have followed this line of evidence to ascertain any specific symptoms relevant to his disclosures.' Mr Parnell says it would have been reasonable for the Investigators to obtain A's medical records, given his previous psychiatric treatment and that A 'had taken his life'.

426 Mr Parnell's overarching submission is that the Archbishop's investigation was 'substantially overrated' by the Senior Commissioner. Witnesses were not thoroughly interviewed and a transcript was not produced and signed. Ms Hunter was able to resile from her interview. The notes of Ms Hunter's interview do not include the questions she was asked, which is significant in circumstances where her responses were descripted as 'erratic'. Notes were not taken at times when Ms Hunter 'significantly and consistently digressed'.

427 The investigation was beyond the expertise of the Investigators and carried out by the Catholic Education Office of Western Australia, which is not independent from the employer.

428 In submissions in reply, Mr Parnell argues that the issues he raises with the investigation are not academic. They go to the heart of a sound and fair investigation. The investigation did not warrant a finding that the employer was able to hold an honest and genuine belief that the misconduct occurred. This amounts to a mistake of fact.

Archbishop's case

429 The Archbishop says much of the criticism of the investigation came from Ms Parnell. Her interest in the outcome of the application is clear and that detracts from her criticism. Further it is abundantly clear that Mr Parnell was given a 'fair go all around' in the investigation over many months. He participated in the process and took every opportunity to respond and plead his case. The investigation was carried out as thoroughly as circumstances permitted, given the circumstances and background to the allegations.

430 The Archbishop argues that none of the matters relied on by Mr Parnell, individually or collectively, negate that there was a sound, comprehensive and procedurally fair investigation over a lengthy period. Ground nine should be dismissed.

Consideration

431 In my view, it was open to the Senior Commissioner to find, as he did, that the investigation was reasonable and the employer's belief that the misconduct occurred was honest and genuine.

432 Separate to the grounds of appeal, Mr Parnell made a general submission that the Senior Commissioner may have been 'influenced either consciously or unconsciously in his decision making process by what the Respondent said about public opinion, modern psyche regarding child sexual abuse and the general atmosphere regarding these serious issues.'

433 I understand Mr Parnell to be referring to a rather nebulous submission made at the hearing by the Archbishop that was said to '[head] in the direction' of the benefit of doubt being given to the child where allegations of child sexual abuse are made, and a more flexible approach being taken now than in earlier years.

434 I am unpersuaded by Mr Parnell's contention that the Archbishop's submission about the modern atmosphere and psyche in the post Royal Commission era means it was very likely that the Investigators had an actual or subconscious bias. I do not consider that submission went any further than noting attitudes toward allegations of sexual abuse against children have changed. Moreover, Mr Parnell did not put to the Investigators in cross-examination that they were biased. It is not open now for Mr Parnell to make that argument.

435 The submission that the Archbishop and the Senior Commissioner did not 'give any attention to Mr Parnell's version of events' is unpersuasive. The report shows that the Investigators considered but ultimately did not accept Mr Parnell's version of events. The Senior Commissioner comprehensively set out Mr Parnell's version of events. However, given all the other evidence, ultimately the Senior Commissioner was not persuaded by it.

436 In relation to hearsay, Mr Wong said that he 'looked at all of the evidence before us…hearsay or otherwise. And based on the total evidence… arrived on the – arrived at a conclusion…on the balance of probabilities.' Ms Jones thought that the question of whether A's Statements were hearsay was 'a legal question' but said that when interviewing Ms Hunter, the Investigators were careful to ask her to clarify whether what she was saying came from her own memory or from something someone had told her. Ms Jones also said, when asked in cross-examination whether the other evidence about whether A bought the students drinks was 'wildly hearsay', that 'we felt on the balance of probabilities it was enough to find that allegation partially substantiated'. Finally, Ms Taylor said:

> But it was acknowledged by everyone involved in the investigation from the outset that the seriousness of the allegation was such that, you know, we - we had to be absolutely sure. And we had to do everything we possibly could. And so right from the very beginning, we set ourselves a high bar in terms of our investigation process. You know we didn't just accept certain evidence on face value when there was evidence. That we needed maybe, like, some level of evidentiary value because it might have been hearsay, for example. We did the best we could to - with, you know, given the circumstances and the fact that it was historical, we - we did our best to deep dive into doing what we could to verify that information and to check the veracity of it. So for example, deceased complainant's statement, we had to acknowledge that, you know, it wasn't necessarily a statement of fact, it had been written in the context of his counselling. And - and that being the case, we wanted to do what we could to, I guess, determine how reasonably we could rely on that information.

437 It is clear Ms Taylor understood the concept of hearsay. The report acknowledged that the Investigators have taken into account 'Whether the evidence is hearsay or derived directly from [the witnesses'] own recollection of events. In particular, the Investigators are aware that [A's father] had discussed the alleged assault with a number of the witnesses prior to the start of this investigation and had also shared details of the alleged assault throughout the broader Busselton community.'

438 To the extent the report describes A's Statements as containing extensive information about the Bali Trip, rather than more accurately describing it as containing extensive information about the last night of the Bali Trip, does not bear on the outcome in this matter.

439 Mr Parnell complains about Ms Hunter's erratic evidence. Witnesses for the Archbishop explained that Ms Hunter's evidence was described as erratic because she went off on tangents and became distracted. That does not detract from the truthfulness or probative value of her evidence about relevant matters.

440 That the Investigators did not verify whether Mr Parnell had an older brother or rode his bicycle past A's parents' home does not undermine the investigation.

441 Mr Parnell complains that the Archbishop did not get hotel computer records or information about the hotel configuration. He does not explain how those records and that information would have assisted the investigation or what would have been established. In preparing his case before the Commission at first instance, Mr Parnell could have made those same enquiries of the hotel for the hotel computer records and information about the hotel configuration if he thought they were of such probative value. Mr Parnell did not tell the Commission he had attempted to do so.

442 While it may have been helpful to get hotel computer records, information about the hotel's configuration, A's school records and the schools records of the trip, it was not vital to do so. Failure to consider such records and information does not mean the investigation was inadequate.

443 Contrary to Mr Parnell's submissions, Ms Taylor did not agree in cross examination that the Investigators were unable to substantiate the allegations at the end of the factual investigation:

> **MULLALLY, MR:** At the time you'd completed the preliminary investigation report, it's the case, is it not, Ms Taylor, that you could not decide that the allegations were substantiated?
>
> **TAYLOR, MS:** Not necessarily. I think that at that point in time, we weren't attempting necessarily to make a determination. We had just, sort of, reached a point in the investigation where we had exhausted - - -
>
> **MULLALLY, MR:** All the - - -?
>
> **TAYLOR, MS:** - - - avenues of - of speaking to witnesses. And so we had a - a preliminary meeting based on that report where we determined that we - we wanted to - to look into it further.
>
> **MULLALLY, MR:** All right. So are you saying that you, from your point of view - I'm not talking about the group, I'm talking about from your point of view - at the conclusion of the preliminary report, you would have found the allegations substantiated?
>
> **TAYLOR, MS:**---No, we - we weren't considering the outcome at that time.
>
> **MULLALLY, MR:** Well, why did you put three possible outcomes in the preliminary report sent to the psychologist?
>
> **TAYLOR, MS:** ---Because at that point, we - we - it was based on what we had done at that point in the investigation, we did put some options in there, but we never actually turned out minds to making that decision in that preliminary meeting for the purpose of the fact that we really needed to - we - we decided at that point that we - we wanted to get some more information, particularly around the, I guess, the voracity of deceased complainant's statement.

444 Although Mr Wong said he had not heard of the ***Briginshaw*** standard, Ms Jones gave evidence that she knew about the ***Briginshaw*** standard and Ms Taylor gave evidence that the Investigators all discussed and were guided by the principles in ***Briginshaw***.

445 In cross-examination, Ms Taylor said:

> **MULLALY, MR:** Did you discuss with the team within the concept of a balance of probabilities, the Briginshaw principles?
>
> **TAYLOR, MS:** ---Yes, we did.
>
> **MULLALY, MR:** You did?
>
> ---Yeah. So I would say that, you know, perhaps we never talked about it in the sense of, you know, me giving anyone a rundown of the - the case.
>
> **MULLALY, MR:** The law, yes?---
>
> **TAYLOR, MS:** Or the legal principle, as such. But it was acknowledged by everyone involved in the investigation from the outset that the seriousness of the allegation was such that, you know, we - we had to be absolutely sure. And we had to do everything we possibly could. And so right from the very beginning, we set ourselves a high bar in terms of our investigation process. You know we didn't just accept certain evidence on face value when there was evidence. That we needed maybe, like, some level of evidentiary value because it might have been hearsay, for example. We did the best we could to - with, you know, given the circumstances and the fact that it was historical, we - we did our best to deep dive into doing what we could to verify that information and to check the veracity of it. So for example, [A]'s statement, we had to acknowledge that, you know, it wasn't necessarily a statement of fact, it had been written in the context of his counselling. And - and that being the case, we wanted to do what we could to, I guess, determine how reasonably we could rely on that information. And so we did have discussions and - and as a result of that, we - - -
>
> **MULLALY, MR:** All right. Well - - -?
>
> **TAYLOR, MS:**--- - - - ended up interviewing two other witnesses that we might not have ordinarily - - -
>
> **MULLALY, MR:** Just a moment, I didn't ask you about that. I just asked you about the standard you applied and the balance of probabilities. But you did not mention the Briginshaw principles in your summary of the investigation principles, did you?
>
> **TAYLOR, MS:**---No, because the balance of probabilities still remains the standard of proof.
>
> **MULLALY, MR:** Of course. It does?
>
> **TAYLOR, MS:**---Yes.
>
> **MULLALY, MR:** But you didn't mention Briginshaw, did you?---No. Not in the report, no.

446 In response to questions from the Senior Commissioner, Ms Taylor explained that the decision was made 'with a certain level of conviction':

> **KENNER SC:** And it seemed to be Mr Wong's evidence, unless I've misunderstood what he told me, that where there might be some degree of inconclusiveness - - -?
>
> **TAYLOR, MS:**---Mm.
>
> **KENNER SC:**- - - that, in effect, the benefit of the doubt should be given to the child, or the interest of the child should prevail?

TAYLOR, MS:---Yeah.

KENNER SC: Would - is that your view?

TAYLOR, MS:---Look, that - I mean, it's something that, you know, we do take into account. We had to assess the level of risk. Had we reached an alternative finding and Mr Parnell was to return to work, in the existence of doubt, we did have to consider that, absolutely. But I suppose, in the context of investigating this from an employment perspective that, you know, we were still very focussed on whether the allegations could genuinely be substantiated.

KENNER SC: To the higher standard of balance of probability?

TAYLOR, MS:---Exactly. Yeah. That it is more likely than not.

KENNER SC: And that was the standard you applied?

TAYLOR, MS:---Yes. Well, we - we applied the - the balance of probabilities. And I would say that, you know, we had agreed that it was never going to be a case that - we would never have been satisfied with a finding or a substantiation if, you know, it was a really borderline decision. And when it came to the end, I would say that that decision was made with a certain level of conviction.

447 It is apparent from the evidence that the Investigators were focussed on the 'seriousness of the allegation', having 'to be absolutely sure', needing 'to do everything [they] possibly could', setting themselves 'a high bar' and the decision being 'made with a certain level of conviction'. In my view, it was open to the Senior Commissioner to be satisfied on the evidence that the ***Briginshaw*** standard was applied.

448 I am not persuaded by Mr Parnell's submissions that at the end of the 'factual investigation' the Investigators could not make up their mind about whether the allegations were substantiated. Ms Jones said the Investigators wanted more information at that point and it was apparent from Ms Taylor's evidence that the Investigators had not yet considered whether the allegations were substantiated. The Investigators commissioned Dr Chamarette to write the report because they wanted more information. There is nothing improper about this. It is also not significant that the Archbishop did not follow Dr Chamarette's recommendations, particularly in circumstances where some of those recommendations strayed into legal analysis.

449 Mr Parnell does not explain why he says the Archbishop 'relied heavily on demeanour evidence' of Mr Parnell. I do not consider the report or evidence at hearing suggests the Archbishop 'relied heavily' on Mr Parnell's demeanour.

450 In my view, the character evidence seems somewhat incompatible with the uncontested evidence that Mr Parnell did not report the smoking issue nor the presence on the trip of the young male chaperone. In any event, there was no requirement for the Archbishop to obtain character evidence for Mr Parnell nor to interview the principal of the school at the time. Mr Parnell's good character was assumed. That the Archbishop did not obtain character evidence for Mr Parnell does not undermine the investigation.

451 In my view, Mr Parnell's criticism of the Archbishop's approach, given A's mental health challenges, is underpinned by an outdated, discriminatory attitude toward mental health. Further, Mr Parnell referred to A having 'taken his life'. There was no evidence at all to support the submission. A's mother and father both gave evidence that A died of an accidental overdose. A's sister and friend told the Investigators that A's death was accidental.

452 To carelessly mislead the Commission about that sensitive fact, unnecessarily adding to the distress experienced by A's family and friends, in circumstances where the matter involves such a devastating history, did not assist Mr Parnell's case. Again, it reflects poorly on Mr Parnell and his representative.

453 That there was no signed transcript of the interviews does not render the investigation unreasonable. Mr Parnell did not submit that anything of substance was left out. The record of questions and answers were sufficient.

454 While it may be that the conduct of an investigation by an external party assists with the quality of the investigation, it is not a requirement that an investigation be done by an external party. Here I am not persuaded the investigation went beyond the expertise of the Investigators.

455 The allegations were very serious and they related to Mr Parnell's conduct in the course of employment. In those circumstances, there was (and is) much at stake for Mr Parnell and his employer. But this matter does not involve a criminal investigation. The investigation was not undertaken by an enforcement agency with coercive powers. In my view, the Archbishop approached the serious, complex and historical allegations in a considered, thorough manner. None of the matters Mr Parnell relies on, individually or taken together, lead to a conclusion that the investigation was lacking. The investigation was fair and reasonable. It was as full and extensive an investigation into all the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances. Mr Parnell had every reasonable opportunity and sufficient time to respond to all allegations. It was open to the Senior Commissioner to be satisfied that the employer honestly and genuinely believed, and had reasonable grounds for believing on the information available at the time the decision was made, that Mr Parnell engaged in the most serious misconduct alleged.

456 Ground nine of the appeal is not made out.

Conclusion

457 I would dismiss the appeal.