

**REFERRAL TO COMMISSION UNDER THE
PUBLIC SECTOR MANAGEMENT ACT 1994
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2016 WAIRC 00040

CORAM : ACTING SENIOR COMMISSIONER P E SCOTT

HEARD : THURSDAY, 22 OCTOBER 2015, FRIDAY, 23 OCTOBER 2015

DELIVERED : MONDAY, 25 JANUARY 2016

FILE NO. : APPL 122 OF 2015

BETWEEN : MS SHARON HISLOP
Applicant

AND

DEPARTMENT OF EDUCATION
Respondent

CatchWords : Industrial Law (WA) – Hearing de novo – School Teacher – Allegations of breaches of discipline and misconduct in administration of NAPLAN test – Standards and Integrity Directorate Investigation Report – Termination of employment – Procedural fairness – Investigation Report so flawed as to be unable to be relied on – Witness evidence unreliable and biased – Allegations not sustained – No finding of misconduct – Application upheld – Reinstatement

Legislation : *Public Sector Management Act 1994* (WA)

Result : Application upheld

Representation:

Applicant : Ms N Barsby of counsel and with her Ms G Little

Respondent : Mr D Anderson of counsel

Reasons for Decision

Introduction

1 The applicant, Sharon Hislop, challenges the respondent’s decision to dismiss her made pursuant to s 82A(3)(b) of the *Public Sector Management Act 1994* (WA) (PSM Act). She says that:

- (a) the respondent relied on an investigation report which was not capable of establishing that the alleged misconduct actually occurred, or that it justified dismissal;
 - (b) she was denied procedural fairness by the respondent relying on an investigation that lacked the necessary level of comprehensiveness and which failed to fully and properly explore or analyse relevant matters; and
 - (c) the decision gave little or no regard to her lengthy and positive employment history or the significant impact that dismissal would have on her and her family.
- 2 Having considered all of the evidence, for the following reasons I conclude that:
- (a) firstly, the investigation itself and the Investigation Report are so flawed as to be unable to be relied on;
 - (b) secondly, the only first hand evidence that contradicted Ms Hislop's evidence as to what happened in the test and in the staffroom, that of Ms Grundy, is so unreliable and biased as to be of little if any value at all.
- 3 In those circumstances, the decision to terminate must be overturned.

Background

- 4 The applicant was employed by the respondent as a teacher at Wundowie Primary School. She was dismissed on 26 May 2015 following findings that she had committed breaches of discipline contrary to s 80(c) of the PSM Act in that she committed a number of acts of misconduct. Those acts are said to have occurred in the administration of the National Assessment Program – Literacy and Numeracy (NAPLAN) test for Language Conventions for a group of Year 3 students, and in making an inappropriate comment regarding one of those students. These incidents are said to have occurred on 13 May 2014.
- 5 The first allegation is that the applicant approached a student, V, during the Year 3 Language Conventions test and assisted V by indicating the correct answers to her.
- 6 The second allegation is that she also approached a number of Year 3 students during that test and assisted them by pointing to the correct answer bubble and explaining the words they did not understand.
- 7 The third allegation is that she arranged the layout of the classroom so that students' desks were in two rows, with students sitting on either side of each other and immediately across from each other. This layout is said to have allowed the students to read other students' test booklets.
- 8 The fourth allegation is that the applicant allowed all of the students approximately 20 minutes' extra time to complete their tests. She is alleged to have then instructed the Education Assistant, Ms Betty Grundy, to remain in the classroom with two students while they finished their tests.
- 9 The fifth allegation is that in an interview with the school Principal, Mr Hayden O'Mara, she admitted assisting the student, V, with her answers, and that immediately following this she had a conversation in the staff room in which she said words to the effect of, 'that little bitch dobbed me in so I had to admit it'. It is clear from the Investigation Report that the investigator viewed the comment as being made about the student, V.

NAPLAN Tests

- 10 The NAPLAN is an annual national assessment of all students across Australia, in Years 3, 5, 7 and 9. The tests are Language Conventions (covering spelling, grammar and punctuation), Writing, Reading and Numeracy.

- 11 NAPLAN test results are said to provide ‘a snapshot of a student’s achievement in comparison to all students of the same year level across the country’ (Exhibit 6, McKee [6]) and all progress of each student is able to be monitored. The results are also reported in such a way as to provide a national report ‘by gender, Indigenous status, language background other than English status, parental occupation, parental education, and location (metropolitan, provincial, remote and very remote) at each year level and for each domain of the test’ (Exhibit 6, McKee [8]).
- 12 The integrity of the testing and the results is said to be important at a number of levels, including for the individual student, the class and school level, and at state and national levels.

The Test Handbook

- 13 School administrators and teachers across Australia who administer the tests are provided with a detailed handbook, the Test Administration Handbook for Teachers, so that the tests are administered in every school in a standardised way.
- 14 The 2014 Test Administration Handbook for Years 3 and 5 sets out a detailed description of how the tests were to be administered. It included a test schedule which provided that the Language Conventions test was to be undertaken on Tuesday morning, 13 May 2014.
- 15 The Writing test was scheduled for the same morning, following a break. The Reading and Numeracy tests were to follow, on Wednesday, 14 May 2014 and Thursday, 15 May 2014, respectively.
- 16 There were two parts to the Language Conventions test. The first part had a 15 minute introduction time ‘for distributing test materials, giving instructions and completing practice questions’ (SH-2, 1.1). The total test time including the introduction time was to be 55 minutes.
- 17 The Test Administration Handbook provides a script for the administrator, and to ensure consistency in the test administration across Australia, the script is to be strictly read. It says that ‘Test administrators MUST NOT vary this procedure’ (SH-2, 1.3). There are instructions for preparing the classroom by arranging desks ‘to minimise opportunities for students to see another student’s work’ (SH-2, 2.1).
- 18 Under the heading **3.4 – Assisting students**, the Handbook provides:

It is expected that professional and ethical behaviour will be demonstrated regarding all aspects of the test administration. Any assistance given to a student that advantages them in any way will be considered cheating. Outlined below are the rules for assisting students in all tests as well as in individual tests.

3.4.1 Protocols

- During **ALL** tests the administrator **MAY**:
 - ✓ read or clarify general instructions
 - ✓ remind students of the response types, e.g. shade a bubble
 - ✓ advise students to leave a question if they are unsure of the answer and move on to another question
 - ✓ advise students to return to any unanswered questions if they have time at the end
 - ✓ encourage students who have lost concentration to refocus.

- During the **Numeracy test only**, you **MAY**:
 - ✓ read the words within questions, but **must not read any numbers or symbols**.
- During **ALL** tests the administrator **MUST NOT**:
 - ✗ give examples or hints
 - ✗ explain, paraphrase or interpret questions or texts
 - ✗ explain the meaning of any symbols in questions or texts
 - ✗ indicate to students whether their answers are correct or incorrect
 - ✗ remind students about work completed in class
 - ✗ provide extra time (except where adjustments for disability have been granted).

3.4.2 Language Conventions test

- During the Language Conventions test the administrator **MUST NOT**:
 - ✗ read or sound out any spelling words
 - ✗ write any spelling words on the board or elsewhere
 - ✗ read any of the test questions.

Exhibit 1, SH 2, 5

- 19 Under the heading of ‘5. Year 3 Test Administration Scripts’, at 5.1.4, is the **Test administration script**. A script is then provided for the test administrator to read to the class as part of the introduction segment in the first 15 minutes of the test. Scripts are also provided for the other tests.
- 20 Interspersed within the scripts are instructions to administrators about how to do the practice test, going through the questions, allowing students to check their work and correct it, and in the test itself, it provides that the administrator is to supervise students closely to make sure they are on task, responding in the correct way and doing their own work.

National Protocols

- 21 There is also a document titled ‘National protocols for test administration’ for the 2014 NAPLAN testing (Exhibit 3, document (1)). This ‘provide[s] detailed information on all aspects of the administration of the tests. The Protocols manage security of the tests, the test environment and other relevant factors to ensure reliable, nationally comparable results are obtained. They specify security requirements and uniform processes and procedures to ensure students complete the tests under similar conditions’ (page 3).
- 22 It also notes that:

In order to maintain the integrity of the tests, the testing process and ultimately test results, these protocols must be followed carefully. Breaches of the *National Protocols for Test Administration* and allegations of cheating or improper behaviour are taken very seriously, and substantiated cases of improper behaviour will be reported publicly in ACARA’s annual test incident report. To assist [the Test Administration Authorities] and schools determine what are appropriate and inappropriate behaviours, a code of conduct is included, along with information on how breaches are dealt with.

23 The Protocols contain a Code of Conduct which sets out a range of appropriate and inappropriate behaviours on the part of a range of participants. At **[8.6] Administering the tests – appropriate behaviours**, it sets out:

- 8.6.1 Test administrators must ensure that professional and ethical behaviour of staff members is demonstrated regarding all aspects of test administration. Any assistance that answers a test question for a student or advantages them in any way will be considered cheating (see also Section 11).
- 8.6.2 ‘Cheating’ refers to behaviour undertaken with the intent of conferring or obtaining unfair advantage in or from the assessment process.
- 8.6.3 In the case of a teacher, test administrator, or school, an advantage would generally be observed in the performance of the school or cohort, and cheating may include:
- viewing test materials before the morning of the test and using this knowledge to prepare students
 - explaining, paraphrasing or interpreting questions
 - giving verbal or physical hints to students about the accuracy of their responses
 - reminding students about related work completed in class
 - providing extra time for students to complete a test (this does not apply where a documented disability adjustment is in place, or where a student has experienced an interruption)
 - informing individual students or groups of students undertaking the test in a catch-up session of test content
 - changing student responses during or after the test
 - knowingly allowing students to engage in behaviour amounting to cheating.
- 8.6.4 Student cheating is not, in itself, considered a breach of these Protocols, but may reflect a breach by test administrators. In the case of students, an advantage would generally be observed in their individual result. Acts of academic misconduct by students during the tests, such as cheating, are to be dealt with through schools’ existing procedures. Cheating may include intentionally:
- taking unauthorised equipment or prohibited information into the test room (e.g. mobile phone, dictionary)
 - communicating with any person other than an administrator during the test introduction time, planning time or during the test
 - looking at another student’s work
 - working on the incorrect test in the ‘flip’ test book.

Where a student is found to have cheated, or is reasonably suspected of having done so, the TAA must be contacted as soon as possible.

- 8.6.5 During the tests, students should be seated so they are not able to read other students’ work. If students take the tests in their classroom, it is expected that the test administrator will be present at all times. If students are seated with a larger group (e.g. in a hall), the student/test administrator ratio must be comparable to that of a regular classroom.

8.6.6 It is expected that test administrators will actively supervise students at all times, including walking around the room, to ensure that test conditions are maintained. When administering the tests in the ‘flip’ test books, test administrators must ensure that students are working on the correct test. The page borders in the test books have been shaded differently to assist this supervision.

8.6.7 Test administrators are responsible for ensuring that only permitted items are taken into the test area.

...

8.6.11 Reading aloud to students

The literacy demands of the test should not exclude a student from accessing the Numeracy tests; however, it is not intended that a test administrator lead the class through the Numeracy test, question by question, unless the literacy standard of the whole class is a barrier to access.

Test administrators **are** permitted to:

- ✓ read the Writing stimulus
- ✓ read Numeracy questions (not numbers or symbols) .
- ✓ read test instructions
- ✓ read practice questions.

Test administrators are **NOT** permitted to:

- ✗ read questions or stimulus material in the Reading or Language Conventions tests
- ✗ read numbers or symbols in the Numeracy tests
- ✗ interpret diagrams or rephrase questions
- ✗ paraphrase, interpret or give hints about questions or texts.

8.7 Instructions by test administrators

8.7.1 Test instructions must be delivered exactly as documented in the *Test Administration Handbook for Teachers*. Instructions outside those specified in the *Test Administration Handbook* should be minimal.

Typically these other instructions may be to:

- remind students of elapsed time
- maintain test conditions for all students
- remind students to check that they have completed all questions.

Under no circumstances is it appropriate to prompt students to record or change any response.

Exhibit 3, document 1

The Language Conventions test

²⁴ This test is made up of four practice questions and 51 questions, to be answered in a number of ways. Some are multiple choice questions where the student is required to shade in an oval or bubble shape adjacent to the correct answer, out of four choices. Other questions require the student to write a single word answer in a box adjacent to the question. The questions are in

blocks relating to spelling, grammar and punctuation. The questions apparently become more difficult as the test progresses.

Tuesday, 13 May 2014

- 25 Ms Hislop administered the NAPLAN Language Conventions test, which commenced around 9.15 am. She did so for a group of Year 3 students. She went through the introductory practice test and then administered the test itself.
- 26 Ms Grundy was present for the test. After the test, Ms Grundy went to see Ms Clare Hawke, another teacher, as the school Principal, Mr Hayden O'Mara, was thought to be away from the school at the time. Ms Grundy told Ms Hawke that she was concerned about what she had witnessed, that the applicant had helped some of the students with their answers. Ms Hawke said that it was necessary to speak to Mr O'Mara.
- 27 Mr O'Mara had arrived by the time Ms Grundy arrived at the main building and she told him of her concerns. These concerns were that:
 - Ms Hislop significantly assisted a number of students to complete the test, in particular the student, V. She had done so by pointing to the correct bubble to be shaded; by holding up a number of fingers to indicate the number of the answer;
 - She had told five students to change their answers;
 - She had changed answers for two students;
 - The students were seated in two straight lines, close together.
- 28 Mr O'Mara then walked out of the office. As he did so, he encountered the student V who had just taken the test, and he spoke to her about how she went in the test. He says that V told him that Ms Hislop had helped her.
- 29 After recess, the Writing test was administered. Ms Hislop administered this test, with Ms Grundy present. Following this, Mr O'Mara asked V to come to his office and he asked her to complete part of the Language Conventions test again for him. He compared her results with the original test.
- 30 Mr O'Mara then spoke with Ms Hislop about the first test that morning, and he says that she acknowledged having assisted V.
- 31 Mr O'Mara then reported the matter to the Australian Curriculum and Standards Authority (ACARA) and also contacted Ms Marilyn McKee of the School Curriculum and Standards Authority (SCASA).
- 32 After having spoken with Mr O'Mara, Ms Hislop went to the staff room where she had a conversation with another teacher, Ms Egan, in which the comment contained in the fifth allegation is said to have been made. This comment was apparently overheard by Ms Grundy and Ms Hilary Joyce, the school's gardener/handy person.
- 33 The next day, Mr O'Mara provided a written report to Ms McKee, along with a brief statement from Ms Grundy. Ms Grundy's document listed the following issues as having arisen in the test on 'Tuesday the 13th June [sic]':
 - Telling 3 students the answers
 - Telling 5 to change their answers
 - Changing answer for 2 students

- All the students sat together so they could help each other.

Exhibit 7, Grundy, BG2

- 34 Ms McKee forwarded the email of Mr O'Mara's report and Ms Grundy's statement to the respondent's Standards and Integrity section.
- 35 Ms Hislop also administered the Reading and Numeracy tests for her class on the Wednesday and Thursday as scheduled.
- 36 The students re-sat the Language Conventions test a week after the first test.
- 37 On Wednesday, 18 June 2014, five weeks after the Language Conventions test, Mr O'Mara, Ms Grundy and seven of the students, V, S, D, H, A, Sh and C, were interviewed by investigators Ms A Plummer and Ms D Bell from Standards and Integrity. During the interviews, Ms Grundy and some of the students drew diagrams of the layout of the classroom for the test.
- 38 Approximately eight months after the test, on 12 February 2015, Ms Grundy was again interviewed, and Ms Hawke and Ms Joyce were interviewed by Ms A Plummer and Ms L Bacon.
- 39 Ms Hislop did not participate in an interview as part of the investigation, on the advice from her then-lawyers.
- 40 By letter dated 27 June 2014, Mr Geoff Davis, Manager Investigative Services, Standards and Integrity, wrote to Ms Hislop setting out the allegations as to her conduct regarding the Language Conventions test; that he was of the view that an investigation was required; he had appointed an investigator; the purpose of the investigation, and what actions may be taken in the event of the alternative findings that may result. He provided Ms Hislop with an opportunity to provide a written submission as to the allegations. Alternatively, if she wished, she could make a submission in person. The letter contained other incidental information.
- 41 By letter dated 6 August 2014, Ms Hislop's then-lawyers responded, denying each of the allegations and inviting Standards and Integrity to discontinue the matter. Attached was a letter from Ms Hislop dated 5 August 2014 in which she specifically denied the allegations and provided a very brief response.
- 42 On 4 March 2015, the investigators provided a briefing note (the First Briefing Note) to the Director General, together with a detailed Investigation Report. The Investigation Report summarised the interviews and analysed the information. It then set out findings open to be made.
- 43 By letter dated 12 March 2015, the Director General wrote to Ms Hislop, setting out the likely findings of the investigation, noting that it was open to her to find that Ms Hislop had committed breaches of discipline in accordance with the allegations; indicating that her preliminary view was to terminate Ms Hislop's employment, and providing Ms Hislop with an opportunity to make a submission about the proposed findings and the proposed termination of employment. Attached was a copy of the Investigation Report.
- 44 Ms Hislop's then-lawyers responded by letter dated 16 April 2015, dealing with the proposed termination. They also dealt with aspects of the evidence contained in the Investigation Report which supported Ms Hislop's version of events and were contrary to the proposed findings. Also attached was a letter from Ms Hislop in which she set out her version of events as to what occurred in the test and in the staff room.

45 On 12 May 2015, the investigators presented a final briefing note (the Second Briefing Note) to the Director General which noted Ms Hislop's lawyers' responses and an addendum addressing each of those responses. It also included a draft letter for the Director General to write to Ms Hislop notifying her that, in essence, the findings made against her were sustained, and that termination of her employment was the most appropriate action. This letter was signed by the Director General, apparently on 26 May 2015.

The Evidence

46 It is not my intention to recite all of the evidence but to set out some of the most significant aspects.

47 Ms Hislop gave evidence and she called evidence from Mr John Vassallo, a retired teacher.

48 The respondent's main witness was Ms Grundy. Other witnesses called by the respondent were Clare Hawke, Marilyn McKee, Hayden O'Mara and Eamon Francis Ryan, Executive Director, Professional Standards and Conduct Division of the Department of Education.

49 In addition to the oral evidence, transcripts of the interviews were received into evidence. The only person who was interviewed but whose transcript of interview was not submitted was Ms Egan. The Investigation Report contains a summary of each of the interviews, including Ms Egan's. Ms Egan was not called to give evidence.

50 As with those witnesses called by the respondent who had been interviewed, the summary of Ms Joyce's record of interview as set out in the Investigation Report effectively formed her witness statement. She was ill on the day of the hearing and did not appear for cross-examination. The applicant consented to the witness statement being received into evidence but says that in the circumstances, little weight should be given to her evidence.

Ms Hislop's case

51 Ms Hislop denies the allegations entirely. She particularly denies admitting to Mr O'Mara that she had assisted students, saying she felt pressured by him, wanted the interview to end, and her admission was merely sarcasm. Mr O'Mara acknowledges in his evidence that he 'pushed the point a little bit' in asking Ms Hislop about assisting students.

52 Ms Hislop says that prior to the Language Conventions test itself, at the beginning of the session, there was a practice test, which lasted approximately 15 minutes. The instruction sheet provided examples and a script telling the test administrator how to read out the question and then to sound out the word.

53 As to allegation one, she says that the student, V, was very upset, crying and saying that she could not do it. She says she went to V, gave her emotional support, put her arm around her and said, to the effect of, 'I believe you. You can do this' and tapped the page. She denies pointing to the correct answer. When V pointed to an answer bubble, seeking guidance, Ms Hislop says she would shake her head to indicate that she was not going to answer it for her.

54 In her letter to the Director General dated 5 August 2014, Ms Hislop said that she 'sat several metres from the child, [V], and she turned to me and raised her eyebrows at me pointing to the answers, nodding to indicate is it this one? I too raised my eyebrows mimicking her actions, and she took that as a yes. I moved from my seat away from the situation.'

55 The student, V, was academically poor at spelling, although very articulate in speaking. She was receiving one-on-one assistance from an Education Assistant in a special assistance program.

- 56 Ms Hislop says that in the interview with Mr O'Mara, soon after the test, she answered Mr O'Mara's question about assisting V with the test, meaning that she had encouraged her to open her book and give it her best go. She was surprised at how well V had done in the first test. She said to Mr O'Mara that her success was a result of lucky guesses. She says that this was her response because Mr O'Mara told her that when he asked V how she went, she said she got the answers correct, and when he asked her how she did it, V said 'I did that by guessing'.
- 57 Mr O'Mara arranged for the class to re-sit the Language Conventions test. Ms McKee says that it was considered that although the students had already been exposed to the test items, the impact on scores of Year 3 students resitting the Language Conventions test would likely be minimal. If anything, the impact might be a little, but to the students' advantage, in the second test.
- 58 Both tests, the original and the second test, were hand-marked by the Principal Consultant English (NAPLAN) at the SCASA office. There was little variation for some students, but several students' scores were considerably lower in the second test than the first, and the pattern of correct and incorrect responses was quite different.
- 59 In the first test, administered by Ms Hislop, V scored 24 correct answers, but when she re-sat the test, she scored only six correct answers. Ms Hislop's opinion was that V and she had a good relationship and that V felt comfortable with her in the classroom, giving her emotional support to begin.
- 60 Another student, S, scored 12 correct answers in the first test, and eight in the second. Again, Ms Hislop says that the better performance in the first test is likely to be because S is very shy, when she entered the classroom she was in tears, and Ms Hislop offered her emotional support and encouragement. Ms Hislop says that during the practice test, she advised S to erase an incorrect bubble she had shaded and directed her to shade the correct bubble.
- 61 Another student, D, scored 26 in the first test and 13 in the second test. Ms Hislop again says she only encouraged this student and gave emotional support.
- 62 Ms McKee gave a number of examples of explanations for variations between the results of the two tests, including that students might be guessing. However, she said one would not expect, where the re-testing is so soon after the original test, that there would be a lot of opportunity for new learning. She said it would be unexpected for there to be a run of correct answers which is not replicated in the second test.
- 63 In the multiple choice questions, with four choices, if the students were guessing, they would probably guess 25% correctly. She said it is unlikely that they would guess correctly in a long sequence.
- 64 It was put to Ms Hislop that she had read out questions and provided answers to another student, H. She says that this was in the practice test and she did this according to the script for the NAPLAN test. During the practice test, she walked around reading out the script, making sure the students marked the bubble or spelt the word correctly in the square provided. If they had not done that, she indicated what to do, pointing to the page and indicating to erase the answer and place it correctly.
- 65 When Mr O'Mara asked her about the results of some of the students, she agreed that she said that they could have copied V but she says that she was being sarcastic. She says this was in relation to the multiple choice questions and the print in the booklets is orange and would have been difficult to see from a distance. She regrets being sarcastic.

- 66 In her witness statement, Ms Hislop said that because many of the students were anxious about the NAPLAN testing, she decided to leave the classroom layout the same as usual, but made students sit with a spare desk between them, making sure they could not copy each other's work. In cross-examination, it was suggested to her that she had arranged the desks in a way that allowed them to copy each other's work, however she was given no opportunity to respond to this suggestion before Mr Anderson, counsel for the respondent, said 'but we'll move on'.
- 67 As to the allegation of allowing students extra time to do the test, Ms Hislop says that in respect of the Numeracy test, two days after the Language Conventions test, most of the students finished early and were becoming restless, so she collected the papers of all of those who were finished. She asked Ms Grundy to stay with a male student, who had not finished, and a female student, who was upset after doing the test. She took the remainder of the students outside. She stood in the doorway of the classroom so she could see both the students playing outside and those in the classroom. After about five minutes, they joined the students outside. In cross-examination, Ms Hislop said that the male student had actually finished his test, but had his jumper, shoes and socks off around the desk. He was to stay at his desk to dress before coming out.
- 68 She says she exercised her discretion to let the students out early because of their behaviour at that time.
- 69 As to the allegation of referring to the student as 'that little bitch', Ms Hislop says that the word she actually used was 'witch' and that this was because this was the student's pet name used by her family, which referred to the way the student styled her hair at that time.
- 70 Betty Patricia Grundy was interviewed on 18 June 2014 at 9.15 am. It was the most lengthy and detailed of all of the interviews. I do not intend to recite all of that evidence in detail but have included some of it as it provides useful insight into her approach to the issues. However, I have considered all of that evidence and set out later my conclusions about it.
- 71 It is difficult to understand from the transcript of Ms Grundy's interviews with the investigators and the diagram of the layout of the classroom drawn by Ms Grundy, where the students actually sat. Ms Hislop's class is usually made up of a mix of Years 1, 2 and 3. On the day of the test, the classroom layout remained the same, with the desks in two rows facing each other and touching. The suggestion from her evidence is that the students were close to one another, 'basically looking at each – across to each other' (transcript of interview, page 7).
- 72 The room usually fits 23 desks, and there were 12 students sitting the test.
- 73 Ms Grundy was emphatic that there was not an empty desk between each student. She denied that there were two rows, saying the students were all sitting at one long desk, except for a student, Sa, who was at a separate desk. She clarified the 'one long desk' to mean two rows backing onto one another.
- 74 Ms Grundy says that students cheated by copying from each other because there were no spare desks between the students. She says that Sa would not have been able to cheat because he was sitting on his own.
- 75 She says that at the start of the test, Ms Hislop read out what she had to read out and told the students that if they had a question, they had to put their hand up and she would go to them, and Ms Hislop then kept walking around the room. She said 'right from the beginning and she did in the other test, too, just wandered'.
- 76 Ms Grundy says that Ms Hislop assisted about six students by pointing to the correct bubble, and V was the student she mainly assisted.

- 77 Ms Grundy said that pointing to the bubbles was not the only assistance Ms Hislop provided. Ms Hislop assisted V by shaking her head when V looked at her, while pointing to a particular bubble, and when V pointed to the right bubble Ms Hislop would shake her head 'yes'. She says that Ms Hislop stood with V helping her for 10 minutes. Other students were watching the answers.
- 78 Ms Grundy says that Ms Hislop assisted V for 'near enough to the whole test'. V is not a high achieving student.
- 79 Ms Grundy described that initially V had gone to Ms Hislop at the front of the class with her test sheet and there was a conversation between Ms Hislop and V which she did not hear. V then went and sat down. Ms Hislop then went over to V and was pointing and saying 'yes' or 'no'.
- 80 She says that she saw Ms Hislop reading out questions and pointing to the answer, to the bubble to be shaded. Because the students were sitting so close, she says that this meant that she was helping the lot if they were looking, but she clarified that Ms Hislop helped about six students.
- 81 Ms Grundy says Ms Hislop allowed the students roughly 20 minutes more than the allocated time to do the test, although it was not one of the complaints Ms Grundy made to Mr O'Mara when she raised her concerns immediately after the test. Ms Grundy subsequently raised another issue. She said that at the end of the test, two students were not finished, and Ms Hislop took the rest of the students outside and asked Ms Grundy to stay with the other two. Ms Grundy says that those two were a girl who had fallen behind and a boy who 'hadn't done anything anyway'. So those two students got another five minutes, after which she took their papers and told them to go out with the others. All of the test papers except those two had been collected and put on the desk before Ms Hislop and the other students went out. Ms Grundy put the other two students' papers on the desk and went out. The tests were not secured during this time. There was no one in the classroom. Ms Grundy says that this was about 10.00 am and that it was nearly recess.
- 82 When the test finished, Ms Grundy went to see Ms Hawke at the oval and told Ms Hawke of her concerns about what had happened. She asked if, in Mr O'Mara's absence, Ms Hawke was collecting the test sheets. Ms Hawke said 'no', and when Ms Grundy asked her why, Ms Grundy said that she was afraid that things might get altered. Ms Hawke told her the test sheets were not being collected from the classroom at that point because the students were to do another test using the backs of those sheets.
- 83 Ms Grundy said she would speak to Mr O'Mara. However, in the meantime, Ms Grundy came across Mr O'Mara herself. He asked her how she got on with the tests and she responded that 'it's the biggest farce I have ever seen'.
- 84 As Ms Grundy was talking to Mr O'Mara, V came down to the front office to get her morning tea. Ms Grundy says that she encouraged Mr O'Mara to speak to V and she could tell him what had happened.
- 85 Ms Grundy then described how she was in the staff room at morning tea and Ms Hislop and Ms Egan were standing at the window. She says that 'she turned around and she looked at me and she said, 'that little bitch just dobbed me in and I had to tell the truth'.' Ms Grundy did not say when asked who 'the little bitch' was, but she said 'because she knew she helped her and she knew I saw it. She knew I saw it'.
- 86 After morning tea, they returned to the classroom for the next test and the test papers from the earlier test were still on Ms Hislop's desk where they had been left during the break.

- 87 Ms Grundy gave evidence about a number of things she says she observed in Ms Hislop's conduct in tests following the Language Conventions test. In respect of the test she next assisted Ms Hislop with, whether it was that afternoon or the next day, Ms Grundy says that Ms Hislop 'hadn't learned her lesson', and was 'sneaky with it'. She said Ms Hislop would hover over the students, they would look up at her and she would put her finger down, and she did this two to three times.
- 88 Ms Grundy also says that in the test on the next day, Ms Hislop had collected the test papers. She saw her 'rub a bubble out, but I saw her not put that shade in there. It went to another shade'. I infer that she means that Ms Hislop erased one of the shaded bubble answers and shaded a different bubble.
- 89 Ms Grundy says that in respect of one student, C, Ms Hislop rubbed out all of his bubble answers and did them herself, and wrote on the bottom of the paper. She says that because Ms Hislop saw that Ms Grundy was watching, Ms Hislop said 'I've got to tell Hayden about this. I've got to tell Hayden what I'm doing here'.
- 90 Ms Grundy says that she asked Mr O'Mara if Ms Hislop had drawn his attention to changes on C's paper and he said 'yes'.
- 91 Ms Grundy says that for the test the following day, Ms Hislop gave her a copy of the test sheet. Ms Grundy was suspicious that Ms Hislop was trying to set her up, to read questions out to the students if they asked. She did not want to be involved, so she put the sheet on the desk.
- 92 Ms Grundy then wrote out a brief report for Mr O'Mara regarding the allegations about Ms Hislop's conduct in the Language Conventions test.
- 93 Ms Grundy also says that on the second day of testing, the student A had finished and gave Ms Hislop her paper. Ms Hislop handed it back to her and pointed to the paper. Ms Grundy thinks that A changed one answer.
- 94 Ms Grundy acknowledged a number of times in the interview that it was very hard to remember.
- 95 Ms Grundy says that at no stage prior to the testing did Ms Hislop explain Ms Grundy's role to her.
- 96 Ms Grundy says that on the second day, following some confusion about whether she was supposed to be assisting in Ms Hislop's classroom with the testing, she did assist. She says that a student (Sh) would say he could not do the test and Ms Hislop would help him a bit by reading out to him and pointing to the bubble. In the end, he just got up, got a ball, and went out.
- 97 Ms Grundy was interviewed again on 12 February 2015.
- 98 She said that in respect of the timing of the first test, she did not have a watch and 'I'm sort of guessing'. She thought they 'could have been a little bit – a few minutes early, a few minutes late, but I don't know. I just can't – I truthfully can't give you a proper time ... I didn't wear my watch' (transcript of second interview, page 3). She says that Ms Hislop got up to mark off the passage of each five minutes, and in Ms Grundy's mind it was longer than five minutes. She said that Ms Hislop said 'Oh, my God. I haven't marked it off ... Oh, I've got to go and mark that' (transcript of second interview, page 4). That was how she picked it up, 'but I thought that was nothing anyway'.
- 99 Ms Grundy said that she thought Ms Hislop 'might have given them an extra five minutes in the timings, but I'm not quite sure'.

- 100 As to the extra five minutes she stayed with the last two students, Ms Grundy said she was guessing the time.
- 101 Ms Grundy then said a couple of times that 10.30 am was the time for morning tea, but when one of the investigators said the information she had was that morning tea was 10.40 am, she agreed with that.
- 102 Ms Grundy says that after the last students left the classroom, she went to the oval and found Ms Hawke. Their conversation lasted about five minutes. She then went back to the staff room and met Mr O'Mara in the passage, and it appears that they walked to the staff room and the bell for recess went while they were in the staff room. Their conversation lasted five to 10 minutes.
- 103 In this second interview, Ms Grundy mentioned something about a tissue box. She said she came to the realisation that Ms Hislop was giving some kind of hint about the shape of the cut in the top of a tissue box where the tissues are pulled out.

Ms Grundy's cross-examination

- 104 Ms Grundy says that no one, including Ms Hislop, went through the NAPLAN Test Administrator's Handbook with her on the day concerned. She says that she read it at some other time in relation to a test she had sat in on before, but she could not recall if she had read the whole book. She had not been given any assistance as to what her role was on that day of the Language Conventions test.
- 105 Ms Grundy says that apart from getting up from her seat once to answer a question from one student, she remained seated.
- 106 Ms Grundy says there was two and a half metres between herself and V.
- 107 She also says that the test administrator was able to do one little test with the students, meaning one question, but she says that it could have been one or two. She later said she could not remember because it was two years ago.
- 108 After the one question that Ms Grundy says Ms Hislop was allowed to read out and explain, and the students completed it, she says Ms Hislop then read out the NAPLAN test.
- 109 When asked whether Ms Hislop had gone around during the practice test checking students' answers and checking if they had shaded the bubble correctly, Ms Grundy said that Ms Hislop could have done that but she was not sure – 'I can't remember that part of it'.
- 110 Ms Grundy says she could see the test papers of the students sitting close to her, approximately a metre away. Those further away she could not see. But, she says, she could see what was being done. She appeared to accept that while Ms Hislop was pointing at the test paper, it was possible that she was not pointing to an answer.
- 111 According to Ms Grundy, one student, H, was crying. V kept coming down to Ms Hislop and then she sat right at the end of the table – 'she moved down so she could get the answers'.
- 112 Ms Grundy said that V has learning difficulties and she had worked with her as an Education Assistant in May 2014, and that V does much better if she has an Education Assistant helping her.
- 113 In the Language Conventions test, Ms Grundy had said in her witness statement that Ms Hislop helped V more than the other students, for approximately 10 minutes, and that Ms Grundy thought Ms Hislop went through nearly the whole test with V. She affirmed her view that Ms Hislop went through the 51 questions with V in approximately 10 minutes, by flicking

through the pages and nodding. She agreed that V would find work like the NAPLAN test challenging, would be slow to complete her work and she could be easily distracted.

- 114 As to the time taken for the test and whether additional time was given, Ms Grundy again conceded that she was guessing the time.
- 115 Ms Grundy was adamant that she saw Ms Hislop nodding and shaking her head to V as V went through each of the questions, and V was watching her and then shading the bubbles.
- 116 Ms Grundy also conceded that she could have been wrong in her assertion that in the second test, Ms Hislop would point to the answers, but acknowledged that the second test was not multiple choice or the identification of a correct answer, it was for the students to write a story. She said 'I could have got that one wrong'.
- 117 She also conceded that she was wrong in asserting that during the beginning of the test, Ms Hislop handed her a document which she assumed was the question and answer sheet, when in fact it was the NAPLAN Handbook. She had assumed that Ms Hislop was trying to set her up.

Consideration

Nature of proceedings

- 118 The issue of whether the matter is heard de novo or is an appeal in the strict sense was briefly addressed by the parties.
- 119 This is a matter referred to the Commission under s 78(2) of the PSM Act. The nature of such proceedings has been considered in a number of decisions of the Commission at first instance, in *Geoffrey Johnston v Mr Ron Mance, Acting Director General, Department of Education* [2002] WAIRC 06155; (2002) 83 WAIG 1553 per Kenner C; and in *Peter John Ayling v Director General, Department of Education and Training* [2009] WAIRC 00413 per Smith C amongst others. Both of those decisions referred to set out extensively the law in respect of hearing de novo as opposed to an appeal in the strict sense.
- 120 In this particular matter, Ms Hislop challenges the process by reference to denial of procedural fairness, and also the substance of the allegations against her. Both parties conducted the matter as if it were a hearing de novo by bringing first hand evidence, in addition to an examination of the investigation which was the basis of the respondent's decision.
- 121 Therefore, I am of the view that as this matter has been argued as a hearing de novo, it is appropriate to be dealt with in that way. In doing so, no mischief is done in respect of any of the authorities referred to which have set out the appropriate approach.

Ms Joyce's evidence

- 122 Ms Joyce's evidence was about the conversation in the staff room when Ms Hislop is alleged to have made the comment contained in allegation five. Given that Ms Joyce was not available for cross-examination and that the precise words used by Ms Hislop form the essential part of the allegation, I intend to give very little, if any, weight to her witness statement.

The failure to call Ms Egan

- 123 Ms Egan was the person to whom Ms Hislop is said to have spoken when she is alleged to have made the derogatory comment regarding the student, V. It is said to have been overheard by Ms Grundy and Ms Joyce.

- 124 As the respondent has alleged that the basis of the decision to terminate was Ms Hislop's misconduct, the respondent bears the evidential onus, as set out in *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224. I also note the decision of the Full Bench in *The Minister for Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Services Board v Denise Drake-Brockman* [2012] WAIRC 0015; (2012) 92 WAIG 203 at [66] per Smith AP and Beech CC.
- 125 Therefore, as the respondent has failed to call evidence from Ms Egan, and it is for the respondent to call that evidence, and Ms Joyce's evidence was not able to be cross-examined, I am left with the conflict between Ms Hislop's and Ms Grundy's versions of what Ms Hislop said in the staff room.

The test requirements

- 126 In considering the allegations about Ms Hislop's conduct, it is essential to know and understand the conditions under which the Language Conventions test was required to be conducted.
- 127 According to the Test Administration Handbook and the Protocols, those things which an administrator may do are:
1. During the introduction time, give instructions and complete practice questions. There were four practice questions in the Language Conventions test.
In completing the practice questions, the administrator goes through each question, the shading of a bubble is demonstrated, allows the students a chance to answer on the test paper, gives the answer, allows the students to check their work and correct it, and answers any questions.
It is entirely conceivable that in assisting the students to check their work and correct it, that the teacher would walk around the room looking at what the students had done in their practice questions.
 2. During the test, read or clarify general instructions; remind students of the response types, eg shade a bubble; advise students to leave a question if they are unsure of the answer and move on to another question; advise students to return to any unanswered questions if they have time at the end; encourage students who have lost concentration to refocus.

- 128 Some of these instructions suggest that in doing these things, the administrator is dealing with individual students rather than dealing with the whole group exclusively. This may involve the administrator walking around the room and, for example, where a student appears to be distracted, encouraging that student to refocus by pointing at their paper or in some way directing them.

The investigation

(i) *The practice test*

- 129 The investigators interviewed a number of eight-year-old students and Ms Grundy, amongst others. They did so five weeks after the Language Conventions test, and during this time the students had sat a further three tests and re-sat the Language Conventions test.
- 130 It would appear that the investigators undertaking the interviews were either unaware of, or if they were aware, placed no significance on the fact that in the Language Conventions test, there

was an introductory part which lasted for around 15 minutes and contained four practice questions.

- 131 The investigators had already interviewed Ms Grundy for the first time at 9.15 am; the student V at 10.15 am; S at 10.40 am, D at 11.10 am and H at 11.30 am, before the student A, interviewed at 12 noon, identified that Ms Hislop did some things in the ‘practice questions’. The next student interviewed, Sh, at 12.20 pm, also referred to the ‘practice test’.
- 132 S, who was interviewed at 10.40 am, gave answers which, read with knowledge of there having been practice questions, indicate that Ms Hislop helped them initially and they could correct their answers, but could not help them at another point.
- 133 Given that there were four practice questions, it is highly likely that V’s reference to Ms Hislop doing four questions is reference to the practice questions.
- 134 The student C, interviewed immediately after Sh at 12.40 pm did not mention the practice questions and the investigators did not pick up on that point with this last student.
- 135 In their interviews, apart from Sh, A and S, none of the other students nor Ms Grundy distinguished between what occurred in the introductory part of the test and the test itself, even if they could have recalled it or distinguished it from the other tests which were sat following the original Language Conventions test, nor did the interviewers raise the issue with them.

(ii) Assistance by Ms Hislop and Ms Grundy

- 136 It is also clear that some of the students in their interviews suggested that Ms Hislop and Ms Grundy were helping them. None of the suggestions by students that Ms Grundy had assisted were pursued by the investigators; they asked only about Ms Hislop.

(iii) Questions about other tests

- 137 The Test Administration Handbook refers to the four different tests: Language Conventions, Writing, Reading and Numeracy. The allegations being investigated related only to the Language Conventions test, yet the investigators asked the students about the reading test, the ‘maths’ test and the writing test. None of those tests were the subject of allegations against Ms Hislop. They also appear to have confused the Language Conventions test with the reading and writing tests, and also referred to a spelling test.
- 138 The transcript of the interviews strongly suggests that five weeks after sitting the tests, it was difficult and confusing for the students to remember each test and distinguish between them.
- 139 It was quite clear at the commencement of V’s interview that she was confused about which test was being referred to. She described Ms Schumachers and Ms Hawke as being present for what she described as the ‘spelling’ test. She had to be corrected and was redirected to what the interviewers referred to as the ‘spelling’ test. She said that when the testing finished, they had to sit on their mats. She also said that Ms Curry was in the room for the second test that day.
- 140 Sh was confused about what happened in the various tests and mixed them up. Many of her answers were about the ‘maths’ test. It was clear from the transcript of H’s interview that she had trouble recalling and distinguishing between the various tests. D was asked to give a description of the seating arrangements for the ‘reading’ test, not for the Language Conventions test. She also gave information about shading bubbles in the ‘maths’ test. A also talked about the ‘maths’ test. The interviewer also attempted to clarify with V whether there was a practice test for the Writing test.

141 S could not recall that there was a second test on the first day. Many of her answers were about the 'maths' test.

142 It is far from clear why the investigators asked students about tests that were not the subject of any allegation against Ms Hislop, and the students were confused and unable to clearly distinguish between what happened in each test.

(iv) The diagrams

143 The diagram drawn by D was the only one which had any context. It showed two rows of desks, facing each other, another small rectangle at the end of the row but separate from it, another long rectangle which may be a table, and another smaller rectangle. The two rows of desks show three students only, but they are sitting with a desk in between each of them. However, the interview transcript indicates that D was asked to draw the layout of the classroom for the Reading test. This was separate from the Language Conventions test.

144 H's diagram is simply four blocks together with a letter in each. It does not show in any way how the room was set up and is of no assistance.

145 Sh's diagram shows two rows of desks and two separate desks, however, it identifies only where one other student and Sh were sitting. It does not show whether the students had spare desks between them or not.

146 The same applies to the diagram drawn by A.

147 That drawn by S shows two separate rows of desks but marks one spot only with an 'X'.

148 V simply put a square in the middle of the page with 'me' under it, and two circles to the side.

149 Ms Grundy's diagram is confused and unclear. Even looking at it whilst reading her interview makes it difficult to comprehend.

150 Therefore, the only diagram which provides any assistance is that drawn by D, and it supports Ms Hislop's evidence that she arranged the desks so that there was a spare desk between and in front of each student, but it is for the Reading test, not the Language Conventions test, the subject of the allegations.

The First Briefing Note

151 The First Briefing Note was prepared by the investigator to the Director General (EFR1). It was attached to the Investigation Report.

152 On the basis of the First Briefing Note and the Investigation Report, the Director General appears to have decided on Ms Hislop's conduct. While I accept that, as Mr Ryan says, the Briefing Note is a summary, it should be accurate. However, it contained a number of errors and omissions including:

- Paragraph seven deals with Ms Hislop allegedly indicating in her written responses that 'she raised her eyebrows while [V] was pointing to an answer and nodded to indicate the correct answer'. This suggests that Ms Hislop nodded to indicate the correct answer. However, in Ms Hislop's written response, she said that she was several metres away from V and that V 'turned to me and raised her eyebrows at me, pointing to the answer, nodding to indicate 'is this the one?'. I too raised my eyebrows, mimicking her action, and she took that as a yes'. In cross-examination, Mr Ryan acknowledged the distinction between the suggestion that Ms Hislop had

nodded to indicate the correct answer and what Ms Hislop says is that V nodded to indicate 'is this the correct one?'

- It did not make some of the finer distinctions contained in the evidence. It recorded that Ms Grundy said she did not look at her watch or clock to confirm the time, but did not record that she actually said that she was guessing.
- At paragraph 10 it says that amongst others, Sh described how Ms Hislop assisted him during the NAPLAN test. Yet this student's interview, as recorded at pages 19 – 20 of the Investigation Report, makes clear that while Ms Hislop told them how to answer the questions, she did not tell them what the answers were. This student also made clear that she told him that she could not show him, he would have to work it out for himself, and that the help she gave other students was to show them how to answer the question – how to do the question. This is a very important distinction which is not drawn within the Investigation Report.
- The table setting out the results of the first and second Language Conventions tests is a grossly over-simplified reflection of the actual results. I deal with those results and how they are problematic later.

The Investigation Report

- 153 In summarising Mr O'Mara's recollection of his conversation with V, and in examining the transcript of part of his conversation with V, I note that the Investigation Report neglects to record that V's first response to Mr O'Mara was to say that she guessed the answers to some of the questions. Mr O'Mara said that he asked V how she did in the test and she said it was easy. He asked her how did she do that, to which she answered 'it was easy, Ms Hislop helped me'. He says he examined her test paper and she got most of the answers to questions 27 to 51 correct, and later that she 'basically answered all of those questions correctly'. This is quoted in the summary of Mr O'Mara's interview in the Investigation Report. However, in the analysis at page 41, the Investigation Report says Mr O'Mara said V 'answered all those questions accurately' (p 3.6). It is not correct. Her first test paper shows she got questions 40, 43, 46, 47, 48 and 50 wrong.
- 154 The recording of Mr O'Mara's conversation with V starts after that conversation began. He said in the interview that he got V's original test out and asked her 'were you assisted? How did you get these all right?' to which she is said to have answered 'I just did them and I guessed them'. Her reference to guessing is not reflected in the analysis contained under allegation one at page 42 of the Investigation Report.
- 155 While her answers included that in respect of 'how did you get them all right?' to which V said 'Mrs Hislop done it', when asked 'Done what?' she said 'That. Well, I done this one'. She was asked 'did you do this by yourself?' to which she said 'No'. She was asked 'Who did this with you?' and she said, 'Mrs Hislop'. It is not at all clear from this exchange what help Ms Hislop gave her.
- 156 In relation to a number of questions, V said she did them by herself, and on others she said Mrs Hislop helped her. It is entirely plausible that if Mrs Hislop encouraged her to focus, to attend to the task, that she helped her. It is also likely that, as Ms Hislop says, V may have interpreted Ms Hislop's mimicking her gestures when V questioned her, as being an indication that she, V, was getting the answer correct, when this was not Ms Hislop's intention. In other questions, she guessed, and had a one in four chance of getting it correct.

- 157 It is not clear cut from simply reading the transcript, in isolation, what actually occurred between V and Ms Hislop in the test.
- 158 The Investigation Report asserts that the investigator examined the Test Administration Handbook. The Test Administration Handbook refers explicitly to the practice questions (1.1). As with the Briefing Note, the Investigation Report does not identify that there were practice questions, nor that the behaviour alleged by Ms Grundy was permissible during the practice questions. Had the distinction been recognised, the investigators ought to have asked questions which might have assisted the students to distinguish between what occurred during the practice questions and the actual test.
- 159 The investigators did not explore the possibility of Ms Grundy being biased against Ms Hislop, yet they reported in the Investigation Report that there was no evidence to suggest that Ms Grundy had made a malicious or vexatious complaint regarding the students being given extra time. I will deal later with Ms Grundy's evidence, but I have found that there was evidence of prejudice and suspicion by Ms Grundy towards Ms Hislop.

Variance between the tests

- 160 Of the top performing students within the two Language Conventions tests, Sh scored 27 in the first test and 19 in the second test; D scored 26 in the first test and 13 in the second test; R scored 33 in the first test and 37 in the second test; A scored 25 in the first test and 26 in the second test; C scored 21 in the first test and 20 in the second test. V is the standout distinction of having 24 in the first test and six in the second test. S scored 12 in the first test and eight in the second test. B scored eight in the first test and nine in the second test. H and C scored the same in both the first and second tests.
- 161 The statistical analysis of the variance between the results in the first and second tests, contained on pages 45-46 in the Investigation Report, appears very shallow. This was not addressed in any depth in the submissions or the evidence. I examined the first and second Language Conventions test papers for four students and sought to use them to confirm the variance figures contained in the schedules in the Investigation Report.
- 162 Attached to the Investigation Report is a series of schedules which set out for each of the students each of the questions in the Language Conventions test. The schedules contains four columns, the first being the question number and answer; the second being whether the answer for Test one was correct, incorrect or not answered; the third being whether the answer for Test two was correct, incorrect or not answered; and the fourth headed 'Variance' records a variance only where the student got the answer correct in one of the tests and incorrect in the other. It does not record a variance where the answers in both tests were wrong but not the same. Nor does it record a variance where one test has no answer and an incorrect answer in the other test, yet it records a variance where there is no answer in one test and a correct answer in the other.
- 163 The schedule attached to the Investigation Report dealing with V's results is inaccurate in a number of respects. For example, in test two, it says that she was incorrect in her answers to questions 5, 6, 7 and 8 when in fact she did not answer those questions at all. Although I appreciate that V's results between the first and second tests vary widely, there are four errors in that schedule. In such an important issue this raises further concerns about the process.
- 164 I have also examined the first and second tests for Sh and I note that although there were a number of questions that he was recorded as having answered incorrectly in both the first and second tests, the answers he gave in both tests were different, for example in questions 31, 32 and 40, each of them were incorrect but the first and second test answers are different. These

were not recorded as variances within the Variance column. The two results suggest a level of guessing which acts against a simplistic conclusion that his first test was better than the second because he was helped in an impermissible way.

- 165 For D, there were a number of answers that were incorrect in both tests, but they were incorrect in different ways. These were not recorded as variances. If they were, the variances would have been 26 not 15. It also records that D gave no answer in the first test to question 20, yet he actually wrote a word.
- 166 The student H, in the first test, is recorded as having made no answer to a number of questions, yet there is an answer, even though it is one letter. In eight of the questions which H got wrong, the answers in the two tests were different, yet these were not recorded as variances.
- 167 If the purpose of the analysis was to show that students got more answers right in the first test than the second, it is correct. But beyond that, its value is questionable.
- 168 Further, there were a number of possible reasons for some students answering more questions, and more questions correctly, in the first test. These include that some of them, including V, were being given emotional support and encouragement to persevere by Ms Hislop. However, this is not the allegation against her. Nor is it impermissible assistance.
- 169 The variances are not of themselves significant in terms of whether Ms Hislop assisted the students. What it means though is that, as Ms McKee noted, some of the answers could have been guesses, that in the multiple choice questions each student had a 25% chance of getting the correct answer, and a 75% chance of getting an incorrect answer. Sometimes a question is answered by the same student incorrectly but in different ways in the two tests.
- 170 This analysis still leaves hanging the question of the first allegation and that V, being a relatively poor student in respect of spelling and language, did significantly better in the test administered by Ms Hislop. Given the conflict in the evidence, it is very hard to come to a conclusion that this resulted purely from Ms Hislop giving V impermissible assistance. It may be that her answers were guesses, it may be that some of them were correct because Ms Hislop encouraged her, gave her emotional support, and her presence in standing near her assisted her to focus.
- 171 This is supported both by Ms Grundy's evidence and in the General Comment written in V's Interim Report for Term 1, 2014, that:

[V] is finding it difficult with the academic demands required to work at a satisfactory level. She finds it a lot easier to work with an assistant giving her good results ... she is easily distracted in class

...

Exhibit 3, document 11

Ms Grundy's evidence

- 172 Ms Grundy was the only person present in the room with Ms Hislop, other than the eight-year-old students. Her complaints were the basis of the allegations. Where Ms Grundy's evidence is not supported by other evidence, I reject her evidence. I do so for a number of reasons.
- 173 Firstly, it is very clear from both Ms Hislop's and Ms Grundy's evidence, that Ms Grundy was suspicious of and antagonistic towards Ms Hislop due to their previous dealings regarding an incident affecting another teacher.
- 174 Ms Grundy also gave evidence that she thought Ms Hislop was trying to set her up when Ms Hislop gave her a copy of the Test Administration Handbook to read, so Ms Grundy did not

read it. Apart from the issue of her attitude towards Ms Hislop, it also meant that she was unfamiliar with the testing requirements and those actions which were permissible and those which were not.

- 175 Ms Grundy made a number of concessions in cross-examination which either severely undermine or completely negate her evidence regarding some of the allegations. For example, she accepted that where she had alleged that Ms Hislop pointed to a correct bubble answer, she could have been pointing at the test paper, not pointing to a particular answer (ts 39).
- 176 She initially said there was only one practice question, then one or two, but later said she could not remember – it was two years ago.
- 177 She described Ms Hislop helping V through ‘near enough to the whole test’, but said that it was for approximately 10 minutes. The test went for 40 minutes.
- 178 Ms Grundy also agreed that, in respect of her allegation that the students were all given more time to do the test, she did not have a watch and was merely guessing. She had in fact acknowledged this during the second interview with the investigators.
- 179 Ms Grundy also conceded that she could be wrong in her assertion that in the second test, Ms Hislop would point to answers, because the second test was a writing test, and there were no multiple choice questions. She said ‘I could have got that wrong’.
- 180 Ms Grundy also conceded that she could have misinterpreted Ms Hislop’s action in checking A’s paper and giving it back to her to correct an answer.
- 181 Also, Ms Grundy named a student, C, as the one on whose numeracy test paper Ms Hislop re-shaded some bubbles, and made a note to explain this. Yet when it became clear that what Ms Hislop had done was not the inappropriate conduct Ms Grundy had suggested, Ms Grundy then claimed that she had not identified C in her witness statement when she had done so.
- 182 Ms Grundy also accepted that she had told Mr O’Mara that the Numeracy test was done correctly, but in her witness statement alleges that Ms Hislop rubbed things out. In any event, she acknowledged that she could not see what Ms Hislop had rubbed out.
- 183 Ms Grundy also alleged that additional time was given to the two students who she had to stay with and that this was in the first test, the Language Conventions test. However, much of the other evidence suggests that this was in the Numeracy test. Further, it was not one of the allegations Ms Grundy made when she wrote out her list of issues that she gave to Mr O’Mara on the day after the first test. The Numeracy test was not until Thursday, 15 May 2014, two days after the Language Conventions test. Ms Grundy also conceded that all of her complaints were about the Language Conventions test.
- 184 Ms Grundy was also wrong about the test papers for the Language Conventions test being left unsecured in the classroom. It is likely that the papers remained in the room, as they were required for the Writing test which was to be held immediately after recess, that the room was locked during recess, and that Ms Hislop unlocked the room when they returned after recess. Ms Grundy did not realise that this was appropriate. It was one of a number of wrong conclusions she leapt to in her suspicion of Ms Hislop.
- 185 Ms Grundy also acknowledged that when she alleged to Mr O’Mara that Ms Hislop had cheated in the test by referring to the tissue box, she was making an assumption about something she did not understand. In cross-examination, she acknowledged that she might have got it wrong about the tissue box.

- 186 Ms Grundy seems to think that Ms Hislop and Ms Egan were having a conversation in the staff room at morning tea, however, other evidence would suggest that this did not occur until lunch time because Mr O'Mara did not meet with Ms Hislop until after recess at the earliest.
- 187 In all of the circumstances, I conclude that Ms Grundy was not familiar with the testing arrangements; did not recognise the distinction between what occurred properly in the practice test as opposed to what occurred in the test itself; misinterpreted, I believe deliberately, Ms Hislop's actions, particularly towards V; made assumptions which were not correct; and did not recognise those permissible interventions of encouraging students to focus and answer the questions even in the actual test. I find that her allegations were not made in good faith.

Conclusion

- 188 Given the multiplicity of problems with the interviews, the First Briefing Note and the Investigation Report, I conclude without hesitation that the Investigation Report is not a reasonable basis upon which the respondent could have made the findings that were made in respect of each of the allegations.
- 189 Apart from that, where the respondent's case relies largely on the evidence of Ms Grundy as to what occurred, it cannot succeed in demonstrating that the misconduct occurred.
- 190 In respect of the first allegation, there is no evidence to support Ms Grundy's allegation that Ms Hislop approached V and assisted her by indicating the correct answers to her. Even if the analysis of the test results were able to indicate something amiss, there are sufficient questions about the analysis to undermine its value. I note that the Protocols says that 'in the case of students, an advantage would generally be observed in their individual result' (exhibit 3, document 1, 8.6.4). More is needed to demonstrate misconduct.
- 191 The same applies to allegation two. In the case of both the first two allegations, the evidence does not allow a conclusion as to whether the assistance given was appropriate as it was given during the practice questions or was inappropriate because it was given in the test. Further, some of the conduct described was appropriate even during the test itself, such as 'reading or clarifying'.
- 192 The third allegation cannot be sustained as there is credible evidence from a number of students (D and S) and Ms Hislop, that there were vacant seats between each of the students. There is also confusion in the evidence about which tests the students' diagrams depict, and most of them are of no assistance. The number of students who usually occupied the room appears to be those in Years 1, 2 and 3, yet only the Year 3 students were present for the test. So there would have been many vacant desks. Further, the allegation is that the layout of the classroom allowed them to read other students' test booklets, yet there is no credible evidence that this was so.
- 193 The fourth allegation contains two elements. The first is that the students were allowed extra time. This is reliant on highly questionable evidence from Ms Grundy and from students who were confused about the tests. Ms Grundy first described the test as finishing about 10.00 am. Yet she said the students were allowed approximately 20 minutes extra. Ultimately, she conceded that she guessed.
- 194 Ms Hawke's evidence is of little assistance because it was first the subject of an interview many months after the tests and she described Ms Grundy as coming to the oval between 10 minutes and half an hour before recess, that is, between 10.10 am and 10.30 am. Therefore, the extrapolations contained in the Investigation Report are no more than guesses.

- 195 The second element is about instructing Ms Grundy to remain behind with two students. Firstly, this appears to have happened in the Maths test not the Language Conventions test as alleged. Secondly, there is evidence that the rest of the class finished early and it is unclear whether the students who remained were actually completing their tests, or whether one was getting dressed and the other was simply upset.
- 196 As to the fifth allegation, four people gave their version of what Ms Hislop said in the staff room to Ms Egan. Ms Egan was not called to give evidence and therefore her interview cannot be corroborated or challenged. Ms Joyce's evidence is of little weight. That leaves Ms Hislop's and Ms Grundy's versions. I have found Ms Grundy's evidence unreliable and that she did not make the allegations in good faith.
- 197 There are a number of possibilities in regard to what Ms Hislop said. The first is that she said what Ms Grundy alleges. The second possibility is that she was actually referring to Ms Grundy when she made the comment that she is alleged to have made. The third is that she referred to the student, V, as 'that little witch'. Each of these is quite plausible, however, only one of them meets the allegation. Given my findings about Ms Grundy's evidence, I am unable to find that Ms Hislop said the words attributed to her in the allegation.
- 198 In all of the circumstances I conclude that, as the allegations are not sustained, there can be no finding of misconduct. The application is to be upheld.
- 199 I am inclined to think that the appropriate remedy is that Ms Hislop be reinstated to her former position on conditions at least as favourable as the conditions on which she was employed immediately before the dismissal, that her employment be deemed to be continuous, and that the respondent pay to her the remuneration lost because of the dismissal.
- 200 However, if the parties wish to be heard on that issue, they should advise my Associate within seven days.