



Case number: NST-E23-75631

Case Title: Applicant v National Sporting Organisation

Determination

National Sports Tribunal General Division

sitting in the following composition:

Panel Member

Mr Robert Heath KC

in the arbitration between

The Applicant

Applicant

Represented by Patrick Knowles of Senior Counsel, instructed by Anthony O'Reilly, Solicitor

– and –

National Sporting Organisation

Respondent

Represented by Ivan Gristi of Counsel

1. This determination is in ten parts, namely:

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I Introduction and parties

2. This arbitration is subject to the *National Sports Tribunal Act 2019* (Cth) (**'the NST Act'**). It concerns a disciplinary dispute arising from two complaints against a member of the National Sporting Organisation (NSO) and it has been conducted in the General Division of the National Sports Tribunal (**'NST'** or **'Tribunal'**). The complainant is and was at all material times a minor. In order to protect the complainant, in the balance of these reasons, the Tribunal has referred to her as "AB".¹
3. The Applicant is [REDACTED] (**'[REDACTED]'** or **'the Applicant'**). In the sport of [REDACTED], the Applicant is a nationally accredited coach; and he is a member of a State and/or Territory Association, an affiliate of the Respondent (**'the Association'**). For many years, he has earned his livelihood in the sport; and he continues to earn his livelihood in the sport.² He is represented in this arbitration by: (1) Mr Anthony (Tony) O'Reilly of Kandos Scanlan, solicitors; and (2) Mr Patrick Knowles of Senior Counsel.

¹ The Tribunal shall also use acronyms to refer to other minors. The relevant minors and corresponding acronyms are set out in Annexure A of this determination. This Annexure is confidential to the parties and the NST.

² In May 2020, on an Association website, he was described as "Assistant National Coach, [REDACTED]". This website is accessible via [REDACTED].

4. The Respondent is a public company limited by guarantee; it is responsible for administering the affairs of the sport of ██████ in Australia; and it is the sole Australian member of the International Governing Body of the sport ('IGB'). The IGB is recognised as the sole sporting body with authority to make and enforce regulations for the encouragement and control of the sport of ██████; and the IGB recognises the Respondent as the sole body for the control of ██████ in Australia. The Respondent is represented in this arbitration by Mr Ivan Griscti of counsel.
5. The Application arises from decisions of a body formed in accordance with the relevant provisions of the Respondent's National Member Protection Policy ('MPP').³ The body in question is described below as "the MPP Committee". Having received a copy of the relevant decisions, and as a person aggrieved by the decisions, the Applicant submitted an "Application for Review" to the President of the Respondent.⁴ By way of summary only, in this document, the Applicant asserted that: (1) the Tribunal should set aside the decisions; and (2) it should dismiss the relevant complaints to which those decisions relate.
6. In these circumstances, under clause 4 of the ██████ Policy ('Relevant Policy'), the Respondent was required to convene a Tribunal to hear the Applicant's Application for Review ('AFR').⁵ As this matter fell within the definition of an "NST Eligible Matter", as required under clause 4(b)(1) of the Relevant Policy, the President of the Respondent referred the AFR to the General Division of the National Sports Tribunal ('NST').⁶
7. Clause 5 of the Relevant Policy deals with matters referred to the General Division of the NST. In respect of this clause, the Tribunal notes the following matters:
 - (a) First, clause 5(a) provides that the procedure "for an arbitration in the NST will be in accordance with the NST Legislation".⁷ In clause 21 of the Relevant Policy, "NST Legislation" is defined to mean the NST Act "and all legislative and notifiable instruments adopted under that Act, as in force from time to time".⁸ Accordingly,

³ The MPP is a "Policy" within the meaning of the Respondent's constitution. One of the objects of the Respondent is to "adopt, formulate, interpret and amend Policies for the control and conduct of ██████ in Australia": see clause 2 of that constitution. The MPP took effect on 1 February 2020: see section 2 of the MPP [TB 2186]. The MPP replaced a like policy which had been in place since 2014 ('2014 MPP').

⁴ According to clause 10.1 of the MPP [TB 2198-2201]:

- "Application for Review" means "an application for review of an [sic.] MPP Committee Decision made pursuant to this Policy, in accordance with the ██████ Policy"; and
- "Tribunal" means "a tribunal convened under the ██████ Policy to hear an Application for Review of an MPP Committee Decision made under this Policy".
- "██████" means the "██████ policy of the Respondent as in force from time to time".

⁵ [TB 2219]. The Relevant Policy took effect on 15 August 2021: see clause 1(b) [TB 2218].

⁶ As to the definition of "NST Eligible Matter", see clause 21 [TB 2229].

⁷ [TB 2220].

⁸ [TB 2229].

this definition picks up the *National Sports Tribunal (Practice and Procedure) Determination 2021* ('**P&P Determination**').⁹ Section 55 of the P&P Determination relates to hearings in the General Division of the NST.¹⁰ In particular, this provision deals with "*the burden and standards of proof and methods of establishing facts and presumptions*" in such hearings.¹¹

- (b) Second, clause 5(b) applies clause 10 of the Relevant Policy to NST proceedings.¹² According to clause 10, subject to any stay order made by the NST, the decision under review remains in full force and effect pending the determination of the AFR.¹³
- (c) Third, in respect of referrals of this sort, clause 5(d) empowers the NST to do as follows:
 - (a) repeal the "*Original Decision*" and "*substitute a decision for that of the original Decision-Maker*";
 - (b) impose any sanction or disciplinary measure for which any [REDACTED] Policy provides; and/or
 - (c) refer the "*Original Decision*" back to the "*Original Decision-Maker for determination in accordance with the applicable [REDACTED] Policy*".¹⁴

II Background

- 8. By way of introduction, and by way of summary only, I note the following provisions of the MPP:
 - (a) According to the Preface:
 - (a) The Respondent "*is committed to providing a safe, fair and inclusive environment for all of its members and participants engaging in [REDACTED] activities*".¹⁵

⁹ [TB 2237]. The P&P Determination took effect on 23 July 2021.

¹⁰ [TB 2258].

¹¹ Section 55 of the P&P Determination provides as follows:

- (1) *For a dispute before the General Division, the burdens and standards of proof and methods of establishing facts and presumptions are to be as set out in the constituent documents of the sporting body, or in the separate agreement between the parties to the dispute referring the dispute to the Tribunal.*
- (2) *Where neither the constituent documents nor the separate agreement set out a standard of proof, the default standard of proof is to be the balance of probabilities.*

¹² [TB 2220].

¹³ [TB 2222].

¹⁴ [TB 2220].

¹⁵ [TB 243].

- (b) It is a *“fundamental right of our members and participants to be treated with respect and dignity, and to be safe and protected from discrimination, harassment and abuse while participating in our sport”*.¹⁶
 - (c) The MPP *“aims to ensure that all people engaging in [REDACTED] activities maintain responsible behaviour so that everyone can participate in a positive environment and enjoy the sport”*.¹⁷
 - (d) The MPP *“informs our stakeholders of their legal and ethical rights and responsibilities and the standards of behaviour that are expected. It also covers the care and protection of children participating in our sport”*.¹⁸
 - (e) The MPP *“represents the [REDACTED] commitment to encouraging an environment where the rights of stakeholders are protected and appropriate standards are maintained to ensure a safe and enjoyable sporting experience”*.¹⁹
- (b) Clause 4 of the MPP provides, among other things, that the [REDACTED] must deal with the following: (1) *“any Complaints made under this Policy in an appropriate manner”*; and (2) *“any breaches of this Policy ... in an appropriate manner”*.²⁰
 - (c) Clause 5 of the MPP sets out the responsibilities of individuals to whom the MPP applies. According to clause 5(b), for example, individuals must place *“the safety and welfare of Children above other considerations”*.²¹
 - (d) Clause 6.2 of the MPP sets out the [REDACTED] position in respect of child protection;²² and clause 6.3 sets out the [REDACTED] position in respect of *“Discrimination”* and *“Harassment”*.²³
 - (e) According to clause 7.1(a) of the MPP, the [REDACTED] aims to provide a simple, procedure for complaints based on the principles of *“Natural Justice”*.²⁴

¹⁶ [TB 243].

¹⁷ [TB 243].

¹⁸ [TB 243].

¹⁹ [TB 243].

²⁰ [TB 245].

²¹ [TB 246].

²² [TB 246].

²³ [TB 246, 247]. Under clause 6.3(d), *“Harassment”* is *“any unwelcome conduct, verbal or physical, that intimidates, offends or humiliates another person and that happens because a person has a certain personal characteristic protected by State or Federal anti-discrimination legislation”*. In this case there is no allegation, or even suggestion, that AB’s complaint is one to which this definition applies.

²⁴ [TB 251]. The definition of *“Natural Justice”* appears in clause 10 of the MPP [TB 258]. According to this definition, *“Natural Justice”* picks up the following principles (among others): (i) *“both the Complainant and the Respondent must know the full details of what is being said against them and have the opportunity to respond”*; (ii) *“all relevant submissions must be considered and irrelevant matters must not be taken into account”*; and (iii) *“the decision maker/s must be unbiased, fair and just”*.

- (f) Pursuant to clause 7.2(a) of the MPP, upon receipt of a complaint within the meaning of the MPP, the [REDACTED] must establish a committee to investigate that complaint in accordance with the procedural requirements identified in Attachment C1 of the MPP ('**MPP Committee**').²⁵
- (g) Under Attachment C1 of the MPP, having conducted a preliminary investigation, the MPP Committee may refer a complaint to an independent investigator for further investigation ('**Independent investigator**').²⁶
- (h) Under Attachment C3 of the MPP, the Independent investigator is required to make a finding as to whether the complaint is:
- (a) "*substantiated*" – that is, "*there is sufficient evidence to support the Complaint*";
- (b) "*inconclusive*" – that is, "*there is insufficient evidence either way*";
- (c) "*unsubstantiated*" – that is, "*there is sufficient evidence to show that the Complaint is unfounded*"; or
- (d) mischievous, vexatious or knowingly untrue.²⁷
- (i) Under clause 7(a)(2) of Attachment C1 of the MPP, having regard to the findings of an Independent investigator, the MPP Committee will issue a decision in relation to the complaint ('**MPP Committee Decision**').²⁸
- (j) Under clause 7.2(c) of the MPP, in respect of complaints, the MPP Committee is responsible for making final decisions, notwithstanding any findings that an Independent investigator may have made.²⁹
- (k) According to clause 9.1(b) of the MPP, if the MPP Committee determines that a person has breached the MPP, that committee may impose one or more of the disciplinary measures for which clause 9.1 provides.³⁰
- (l) Clause 10 contains a dictionary of defined terms.³¹ According to this dictionary:

²⁵ [TB 252].

²⁶ Clauses 6.1(a) and 6.3(b)(3) of Attachment C1 of the MPP [TB 265, 266].

²⁷ See clause (a)(5)(A)-(D) of Attachment C3 of the MPP [TB 269]. This attachment deals with the investigation process, assuming that the MPP Committee has referred a complaint to an Independent investigator: see paragraph 8(g) above.

²⁸ [TB 267]. There is no requirement for the MPP Committee to make a finding as to whether a complaint falls within one of the four categories identified clause (a)(5)(A)-(D) of Attachment C3 of the MPP.

²⁹ [TB 252].

³⁰ [TB 254].

³¹ [TB 256].

- (a) *“Child Abuse” includes sexual abuse “where a child is forced to watch or engage in sexual activity or where a child is subject to any other inappropriate conduct of a sexual nature (e.g. sexual intercourse, masturbation, oral sex, pornography, including child pornography, or inappropriate touching or conversations”.*³²
- (b) *“Sexual harassment” means “unwelcome behaviour of a sexual nature which could reasonably be expected to result in a person feeling humiliated, intimidated or offended ... [it] can take many different forms and may include unwelcome physical contact, verbal comments, jokes, propositions, displays of pornographic or other offensive material or other behaviour that creates a sexually hostile environment”.*³³

9. Against this background, I turn to the two complaints the subject of the AFR.
10. By email from AB dated 23 February 2021 (**‘First complaint email’**), the ■■■ received a complaint concerning the Applicant (**‘First complaint’**).³⁴ At that time, AB was a fourteen year-old student whom the Applicant had coached. The First complaint comprised four distinct complaints, as to which the First complaint email stated relevantly as follows:

Description of alleged incidents:

1. There was an instance on 11 February 2021 when I was squatting weights, and he came up behind me and placed both his hands on my bum. I felt that it was inappropriate and uncomfortable for him to be touching me there.
2. I frequently find that he will hover around the changing room whilst I am getting changed rather than leaving me in private. I only ever change down to my underwear, but I still feel uncomfortable having him watch.
3. For the last two (2) years, he has often commented about my period cycle's timing, which is not something I'm comfortable discussing with him.
4. He also behaves like a school friend rather than a coach, which I understand can be challenging to differentiate given the club is such a close community, but he generally makes me feel uncomfortable.

Nature of the Complaint? (category/basis/grounds): Harassment, Sexual/sexist & Sexuality.

11. In relation to these four complaints, in the balance of these reasons, I shall use the following definitions:

Complaint	Abbreviation
The complaint described in para. 1 of the First complaint email	The bottom-touching complaint (Complaint 1)
The complaint described in para. 2 of the First complaint email	The loitering complaint (Complaint 2)
The complaint described in para. 3 of the First complaint email	The menstruation-

³² [TB 256].

³³ [TB 258].

³⁴ [TB 232].

	related complaint (Complaint 3)
The complaint described in para. 4 of the First complaint email	The school friend complaint (Complaint 4)

12. By letter dated 25 February 2021, the Respondent brought the First complaint to the Applicant's attention.³⁵ This letter also explained that, in relation to the Applicant, the MPP Committee had made a series of "interim orders" with immediate effect ('**Interim orders**'). One of these orders suspended the Applicant's coaching accreditation, meaning that he could not earn income as a [REDACTED] coach.³⁶
13. In the following weeks, the Respondent and the Applicant corresponded with each other in respect of the First complaint. For example, by a letter to the Applicant dated 13 March 2021, the Respondent confirmed that the allegations were as follows: (1) "that you inappropriately touched a minor"; and "that you have had other inappropriate interactions of a sexual nature with a minor".³⁷
14. By letter to the Applicant's solicitors dated 24 March 2021, the Respondent provided an extract of the First complaint email.³⁸ Further, by this email, the Respondent informed the Applicant's solicitor that the MPP Committee was conducting a Preliminary Investigation under the MPP.
15. By reason of mandatory reporting requirements under the laws of New South Wales, having regard to the nature of the allegations the subject of the First complaint, the matter was referred to the [REDACTED] Police Force ('[REDACTED] Police'). The [REDACTED] Police commenced an investigation into the allegations. By 12 March 2021, the [REDACTED] Police had decided to suspend this investigation.³⁹ The [REDACTED] Police decided in effect to take no action in respect of the allegations the subject of the First complaint.
16. Notwithstanding this suspension decision, by separate email to the Association dated 12 March 2021, the [REDACTED] Police shared some information obtained in the course of the investigation.⁴⁰ That email states relevantly as follows:

It may also be of interest to you, a number of girls mentioned to me that [REDACTED] makes inappropriate comments that make the girls feel uncomfortable.

³⁵ [TB 295].

³⁶ See paragraph 202 of the Applicant's submissions dated 11 February 2022 (but incorrectly dated 11 February 2021) [TB 768].

³⁷ [TB 1812].

³⁸ [TB 1814].

³⁹ See the email from Detective Senior Constable [REDACTED] [REDACTED] to the Association and the Respondent dated 12 March 2021 [TB 236].

⁴⁰ [TB 333].

These matters are not criminal and are not something the [REDACTED] Police would take action about.

I have encouraged these girls and their parents to share these concerns with you.

17. Having received this email, the Respondent determined to treat the statements therein as a fresh complaint against the Applicant under the MPP (**'the Second complaint'**).
18. By letter dated 28 March 2021, the Respondent drew the Second complaint to the Applicant's attention.⁴¹ By this letter, the Respondent also notified the Applicant that: (1) the MPP Committee had conducted a Preliminary Investigation into the First and Second complaints; and (2) the MPP Committee had determined to refer these complaints to an Independent investigator.⁴²
19. Subsequently, the Applicant's solicitors asserted that the Second complaint did not constitute a complaint under the MPP. Relevantly, they contended as follows: (1) no person had made a complaint; (2) the [REDACTED] Police had not identified any person to whom the Applicant had made the *"inappropriate comments"*; and (3) in the absence of an actual complaint, it was not possible to identify the conduct on which the Second complaint rested.
20. By letter dated 30 March 2021, the MPP Committee appointed Sport Integrity Australia (**'SIA'**) to investigate the complaints as an Independent investigator.⁴³
21. As to the First complaint, by this letter, the MPP Committee supplied a copy of the first complaint email to SIA. The MPP Committee asked SIA to make findings in respect of the First complaint as required under clause 1 of Attachment C3 of the MPP.
22. As to the Second complaint, by this letter, the MPP Committee asked SIA to investigate the extent to which the conduct of the Applicant had caused *"athletes"* to feel *"uncomfortable"*. The MPP Committee asked SIA to identify the names of the relevant athletes. Further, on the assumption that the alleged conduct had occurred, the MPP Committee asked SIA to identify *"the extent to which that conduct had occurred and over what time"*.
23. On 16 April 2021, the Applicant was interviewed by two officers of the [REDACTED] Department of Communities and Justice (**'DCJ'**).⁴⁴ At that stage, the DCJ was investigating the allegations the subject of the First complaint.
24. By email 27 April 2021, [REDACTED] of SIA notified the Applicant that SIA had appointed her to investigate the complaints as an Independent investigator under the MPP (**'the SIA Investigator'**).⁴⁵

⁴¹ [TB 1129].

⁴² [TB 306].

⁴³ [TB 238].

⁴⁴ [TB 2088]. It appears that the DCJ commenced its investigation in or around late February 2021.

⁴⁵ [TB 426].

25. In early May 2021, the [REDACTED] DCJ decided to take no action against the Applicant.⁴⁶ A representative of the [REDACTED] DCJ expressed the view in correspondence that, on the balance of probabilities, the Applicant had done no harm to AB.⁴⁷ In the circumstances, the Applicant retained his Working with Children Check registration.
26. In the period between early May 2021 and September 2022, the SIA Investigator conducted an investigation into the First and Second complaints. The investigation was a lengthy one. It is apparent from contemporaneous documents that the Independent investigator conducted a thorough investigation in which SIA: (1) collected evidence from a variety of sources; (2) gave AB opportunities to provide further details of the complaints; and (3) ensured that each of AB and the Applicant had an opportunity to respond to matters contradicting his or her account of events.
27. By letter to the Respondent dated 20 July 2022 [TB 1565], in relation to the First complaint, SIA communicated the following findings to the Respondent:

Allegation	Finding
1. On or around 11 February 2021 the Respondent, as a [REDACTED] coach at [REDACTED] [REDACTED] placed his hand/s on the buttocks of the Complainant whilst she was performing a weighted squat.	Unsubstantiated
2. That between 2019 and 2021, the Respondent, as a [REDACTED] coach at [REDACTED] [REDACTED] on multiple occasions engaged in conversations and asked questions to the Complainant regarding her menstrual cycle and other intrusive and or personal issues.	Unsubstantiated
3. That between 2019 and 2021 the Respondent, as a [REDACTED] coach at [REDACTED] [REDACTED] loitered in the change area while [REDACTED] [REDACTED] was changing her upper attire.	Unsubstantiated

28. By the same letter: (1) SIA recommended that the MPP Committee lift the Interim orders (as identified in paragraph 11 above); and (2) SIA notified that it was working to finalise the investigation report as a matter of priority.
29. By another letter to the Respondent dated 20 July 2022, SIA addressed the Second complaint.⁴⁸ In substance, in paragraph 7 of this letter, SIA said as follows: (1) the relevant allegation was bereft of particulars; (2) in the circumstances, the Second complaint did not constitute a complaint under clause 7.1(b) of the MPP; (3) in the absence of a specific complaint, and where the complaint did not identify a specific complainant, it was not the role of the Independent investigator to conduct a wide-ranging enquiry into “any conduct” that may have contravened the MPP or the Code of Conduct; and (4) SIA would not address the second complaint in the “forthcoming investigation report”.

⁴⁶ [TB 2089].

⁴⁷ See paragraph 37(a) of the Applicant’s amended application for review (‘AAFR’) [TB 1989].

⁴⁸ [TB 1567].

30. On the afternoon of 20 July 2022, a representative of SIA had a conversation with the Applicant's solicitor. In the course of this conversation, according to the representative, she conveyed SIA's findings in respect of the First complaint.
31. On 10 August 2022, on SIA's recommendation, the Respondent lifted the Interim orders, including the interim order suspending the Applicant's coaching accreditation. On the same day, the Respondent provided the Applicant with a copy of SIA's first letter dated 20 July 2022 (that is, the letter recording SIA's finding that each allegation comprising the First complaint was "*unsubstantiated*").
32. By letter to the Respondent dated 31 August 2022, SIA supplied a copy of its investigation report ('**SIA investigation report**').⁴⁹
33. By letter to the Respondent dated 19 September 2022, the Applicant's solicitor requested a copy of the SIA investigation report.⁵⁰ He also asked the Respondent when the MPP Committee expected to issue its determinations in respect of the two complaints. According to the Applicant, there was no response to this letter.
34. In November 2022, the Applicant's solicitors telephoned the Respondent's solicitor to enquire about the matters raised in his letter dated 19 September 2022. According to the Applicant, there was discussion at that time, and the Respondent's solicitor neither returned the telephone call nor responded to a subsequent email.
35. By 9 February 2023, the MPP Committee had made decisions in respect of the matters the subject of the First and Second complaints. By letter dated 9 February 2023, the Respondent communicated these decisions to the Applicant.⁵¹ In the balance of these reasons, and in light of the language of clauses 3 and 5 of the Relevant Policy, I shall refer to these decisions as "*the Original Decisions*".
36. By way of summary only, in respect of the First complaint, the Respondent informed the Applicant that the MPP Committee had rejected SIA's findings. The Respondent informed the Applicant that the MPP Committee had found as follows:
 - (a) as to Complaint 1, the evidence is inconclusive;
 - (b) Complaint 2 is substantiated, meaning that there is sufficient evidence to support this complaint;
 - (c) Complaint 3 is substantiated, meaning that there is sufficient evidence to support this complaint; and

⁴⁹ [TB 908] (the letter); and [TB 911] (the report).

⁵⁰ [TB 1951].

⁵¹ [TB 26].

- (d) Complaint 4 is substantiated, meaning that there is sufficient evidence to support this complaint.
37. As to contraventions and disciplinary measures, the Respondent informed the Applicant that the MPP Committee had determined as follows:
- (a) as to the conduct the subject of each substantiated complaint, such conduct was conduct in contravention of the MPP and the relevant codes of conduct;⁵² and
- (b) as to disciplinary measures, the MPP Committee issued the following “*directions*” (**‘Disciplinary measures’**):
- Should you wish to continue coaching in the sport of █████, you must be accredited by the █████ as a █████ coach. Your █████ coaching accreditation will be restricted to adult students until such time as you complete, at your expense, a series of programs of training to be selected and approved by the Committee aimed at supporting you to maintain appropriate boundaries when coaching minors. The restriction on future █████ coaching accreditation will remain until you provide evidence to the █████ of completion of all courses listed at Schedule 1.
38. By way of summary only, in respect of the Second complaint, the Respondent informed the Applicant that:
- (a) As SIA had “*declined to formerly and adequately pursue the matter*”, the MPP Committee had “*suspended any further action on the matter*”.
- (b) In the event that the Respondent received “*any additional serious complaint(s)*” relating to the Applicant’s conduct, the MPP Committee reserved the right to investigate his “*conduct*”, and such investigations may involve looking at the same or similar issues raised in respect of Complaint 4.
39. On or around 7 March 2023, in relation to the Original Decisions, the Applicant’s solicitor sent the AFR to the President of the Respondent.
40. On 20 March 2023, in the circumstances explained in paragraph 7 above, the Respondent referred the AFR to the NST.
41. There is no dispute that the NST has jurisdiction to conduct an arbitration of the dispute arising from the AFR. As noted in paragraph 6 above, clause 4(b)(1) of the Relevant Policy has at all times enabled the referral of this disciplinary dispute to the NST. Further, there is no dispute that the Relevant Policy is a “*constituent document*” for the purposes of the following: (1) section 23 of the NST Act; and (3) the P&P Determination.

⁵² As recorded on page 28 of the letter [TB 28], the MPP Committee found that the Applicant had breached the following: clauses 8(a)(1) and 8(a)(4) of the MPP; item (j) of the Coach Code of Conduct; and items (a), (c) and (j) of the General Code of Conduct.

III Appointment of the Arbitral Tribunal

42. In late March 2023, the CEO of the NST nominated me to act as the arbitrator in respect of the matters arising from the AFR. The parties did not object to my appointment as the arbitrator responsible for determining the matters the subject of the AFR.

IV Procedural history

43. In late March 2023, the Applicant applied to the NST for an order staying the Disciplinary Measures until further order. In early April 2023, the parties agreed that the NST should make such an order. On 6 April 2023, with the consent of the parties, I made such an order.⁵³

44. On 13 April 2023, the parties attended a preliminary conference over which the CEO of the NST presided. The parties reached agreement in respect of a set of orders for the disclosure of documents. Pursuant to section 28(3) of the NST Act, I approved these orders. Subsequently, on 21 April 2023, each party disclosed the relevant documents.

45. On 1 May 2023, I presided over a directions hearing (**'First directions hearing'**). Following constructive discussions, I made directions in respect of procedural matters, including a timetable relating to the filing and service of various documents.

46. On 3 May 2023, the Applicant filed and served an amended application for review (**'AAFR'**).⁵⁴

47. On 19 May 2023, the Respondent filed and served its statement of facts and contentions (**'SFC'**).⁵⁵ In this document, the Respondent noted that the Second complaint "*is general in nature and lacks specificity*".⁵⁶ In the circumstances, according to the Respondent, it is "*appropriate that the Second Complaint ... is dismissed*".⁵⁷ This is a concession to which I shall return.

48. On 14 June 2023, the Applicant filed and served the following documents: (1) his written response to the SFC (**'Response'**);⁵⁸ a signed statement of Mr O'Reilly dated 13 June 2023;⁵⁹ and (3) a set of handwritten notes annexed to that statement.⁶⁰

53 [TB 163].

54 [TB 1983].

55 [TB 2021].

56 See paragraph 24 of the SFC [TB 2024].

57 See paragraph 25 of the SFC [TB 2024].

58 [TB 2045].

59 [TB 2088].

60 [TB 2074].

49. On 19 June 2023, I presided over a directions hearing at which the parties discussed various matters, including matters relating to the main hearing. At this hearing:
- (a) The parties acknowledged and confirmed the nature and scope of the Tribunal's review. This is discussed in greater detail in Section V below.
 - (b) With the consent of the parties, the Tribunal granted the Applicant leave to file and serve the third witness statement of Mr O'Reilly dated 13 June 2023.
 - (c) Having regard to concessions made by the Respondent, and with the consent of the parties, the Tribunal repealed the decisions of the MPP Committee in respect of the Second complaint, being the decisions identified in paragraph 37 above. Further, by consent, the Tribunal made a declaration that the Second complaint did not constitute a complaint for the purposes of the MPP.
 - (d) The Tribunal directed the Respondent to file and serve a further statement of facts and contentions by 4.00pm on 28 June 2023.
 - (e) The Tribunal confirmed the date of main hearing.
50. Subsequently, the parties and the Tribunal signed the document recording the orders, the directions and the declaration made at that hearing.⁶¹
51. On 28 June 2023, the Respondent filed and served an amended Statement of Facts and Contentions ('**ASFC**').⁶² Relevantly, in this document, the Respondent contended in substance as follows: (1) the Tribunal should find that the evidence relating to the touching allegation is "*inconclusive*"; (2) the comments of the Applicant in relation to AB's menstrual cycle were unprofessional, and they constituted contraventions of the MPP and relevant codes of conduct; (3) the Respondent wished to "*withdraw*" the loitering complaint, noting that there is no basis for a finding of a contravention of the MPP or any relevant codes of conduct; (4) as to the "*twerking*" text message that the Applicant sent to AB and others, the sending of this message was unprofessional, and it constituted contraventions of the MPP and relevant codes of conduct; and (5) assuming that the Tribunal made any finding of contravention of the MPP or any relevant code of conduct, it should impose the "*remedial or educative*" sanctions which the MPP Committee had hitherto imposed.
52. On 6 July 2023, the Applicant filed and served his written response to the ASFC ('**Further Response**').⁶³

⁶¹ The relevant orders do not record the formal grant of leave identified in paragraph 49(b) above. However, there is no dispute that the Tribunal granted such leave to the Applicant in the course of the hearing on 19 June 2023, and counsel indicated as much at the commencement of the substantive hearing on 21 July 2023.

⁶² [TB 2096].

⁶³ [TB 2126].

53. Further, on 6 July 2023, the Applicant filed and served documents in support of the following: (1) an application to further amend the AAFR ('**Amendment application**');⁶⁴ and (2) an application for the Tribunal to issue a document production notice upon the Respondent ('**Production notice application**').⁶⁵ According to the Applicant, these applications arose from the Respondent's decision to exclude him and Witness C from the [REDACTED] Centre ('**the Centre**').
54. Having received the documents served in support of these two applications, the Tribunal convened a case management hearing on 18 July 2023. Having heard submissions in respect of the applications, and having discussed matters with the parties, the Tribunal decided to adjourn the hearing of each application to a date to be fixed after the determination of extant issues of substance in the proceeding. Further, by consent, the Tribunal made the following: (1) an order repealing the decisions of the MPP Committee in respect of the loitering complaint; (2) a declaration that the available evidence does not substantiate the loitering complaint; and (3) order repealing all other decisions of the MPP Committee. The parties consented to these things on the basis of their agreement to this effect: in respect of the nature and scope of the review, the Tribunal and the parties should follow the approach summarised in Section V below.
55. The main hearing took place on 21 July 2023. Neither party called any witnesses and counsel for each party made extensive oral submissions. In accordance with the Agreed procedure, in terms of the sequence of oral submissions, the Respondent's counsel made his submissions, the Applicant's counsel made his submissions, and the Respondent's counsel made his submissions in reply. I am grateful to Messrs Knowles and Gristi for the considerable assistance that they provided to the Tribunal at the main hearing. The oral advocacy was first rate.

V The nature and scope of the Tribunal's review

56. Initially, the Applicant challenged the legality and reasonableness of the Original Decisions. Looking at the terms of the AFR, in challenging the Original Decisions, the Applicant's arguments draw on (1) the principles of legal unreasonableness and (2) the principles of illogicality and irrationality in administrative decision-making.⁶⁶ In short, in the AFR, the Applicant invited the NST to vitiate the Original Decisions on various grounds, including legal unreasonableness, illogicality and irrationality.
57. At the First directions hearing, the Tribunal invited the parties to make submissions concerning the role of the NST in this case, including the nature and scope of the NST's review. In particular, the Tribunal invited the parties to consider whether the NST and the

⁶⁴ [TB 2136, 2145].

⁶⁵ [TB 2136, 2146].

⁶⁶ As to these principles, I refer to *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 94 at [130] to [146] (Wigney J).

parties should conduct the hearing as a full merits review. In making this invitation, as discussed in the course of this hearing, the Tribunal wanted the parties to consider whether it was necessary for the Applicant to establish that the NST should set aside the Original Decisions on the grounds described in the AFR.

58. In the AAFR, as to the scope of the review, the Applicant proposed a review process in which the Tribunal would determine the following:
- (a) whether the MPP Committee was justified in rejecting the SIA's findings as recorded in the SIA Investigation report;
 - (b) whether each of the Original Decisions was the correct or preferable decision;
 - (c) if the Tribunal found that the evidence substantiated any complaint, what sanction should the Tribunal impose, if any.
59. In short, the Applicant proposed that: (1) the Tribunal would conduct a "full review of the merits" of the Original Decisions; (2) the Applicant would not be required to demonstrate that a vitiating error affected each of the Original Decisions; and (3) the Tribunal would consider the matter afresh without any deference to the Original Decisions or any presumption in favour of the correctness of these decisions.⁶⁷
60. Further, the Applicant proposed as follows:
- (a) subject to evidence provided with the Tribunal's leave, it should only have regard to the material that provided to the MPP Committee, or the material to which the MPP Committee had regard, at the time it made the Original Decisions;
 - (b) absent a grant of leave, the Tribunal should not receive evidence other than the materials identified in the preceding subparagraph and material produced in accordance with the Tribunal's directions;
 - (c) absent a grant of leave, the Tribunal should not permit cross-examination of witnesses; and
 - (d) the Tribunal may receive further evidence in respect of the question of sanctions, if any, assuming that this stage is reached.⁶⁸
61. As a matter of substance, in May 2023, the Respondent accepted these matters, including the Applicant's proposal as described in the preceding paragraph.⁶⁹

⁶⁷ See paragraphs 91 and 92 of the AAFR [TB 1999].

⁶⁸ See paragraphs 93 to 98 of the AAFR [TB 1999, 2000].

⁶⁹ In this regard, see paragraph 2 of the SFC [TB 2021]. This paragraph states as follows:

■ agrees that this matter proceed as a merit based review and, further, subject to leave, that the evidence be confined to that which was before the MPP Committee.

62. At the procedural hearing on 19 June 2023, the parties confirmed that the Tribunal should adopt the following: (1) the agreed approach described in paragraphs 60 and 61 above; and (2) the proposal on which they had also agreed. In particular, the parties appeared to agree that the Tribunal should repeal the Original decisions and make substitute decisions.
63. In light of the above matters, and given clause 5(d) of the Relevant Policy (see paragraph 7 above), the Tribunal has followed the agreed approach described in the preceding paragraphs (**‘Agreed approach’**).
64. Conformably with the Agreed approach, in the weeks leading to the main hearing on 21 July 2023, the parties consented to the following: (1) an order repealing the decisions of the MPP Committee in respect of the Second complaint; (2) a declaration that the Second complaint does not constitute a complaint within the meaning of the MPP; (3) an order repealing the decisions of the MPP Committee in respect of Complaint 2; (4) a declaration that there is insufficient evidence to substantiate Complaint 2; and (5) an order repealing all other decisions of the MPP Committee. In effect, by consenting to the orders repealing all decisions of the MPP Committee, the parties gave effect to the Agreed approach.⁷⁰
65. The main hearing took place on 21 July 2023. At the commencement of that hearing, the parties confirmed their adoption of the Agreed approach. In particular, the parties confirmed that the Tribunal was not required to deal with the matters proposed in paragraph 90 of the AAFR.⁷¹

VI The applicable rules and some relevant principles

66. In terms of procedural matters, and in terms of evidentiary matters, the parties accepted that the Tribunal should exercise its decision-making powers in accordance with the relevant provisions of the following documents: (1) the MPP; (2) the Relevant Policy; (3) the NST Act; and (4) the P&P Determination.
67. As noted in paragraph 7 above, where the President of the Respondent has referred a “*NST Eligible Matter*” to the General Division of the NST, the applicable procedural rules are those for which the “*NST Legislation*” provides.
68. Against this background, the starting point is section 40 of the NST Act. For present purposes, I note the following parts of this section:
- (a) According to section 40(1)(a), subject to the NST Act, procedural matters are within the discretion of the Tribunal.

⁷⁰ As to the orders described in (3), (4) and (5), the Tribunal refers to the orders made on 18 July 2021.

⁷¹ [TB 1999].

- (b) Section 40(1)(c) provides that “*the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate*”.⁷² This provision frees the Tribunal from the rules of evidence. However, this freedom does not absolve the Tribunal from a core duty – namely, the duty to make findings of fact based on material which is logically probative.⁷³ Put another way, as a matter of law, the Tribunal is bound to act on the basis that any conduct alleged against a person should be established to its satisfaction by some rationally probative evidence.
69. Next, the Tribunal refers to section 55 of the P&P Determination.⁷⁴ Under section 55(1), the “*the burdens and standards of proof and methods of establishing facts and presumptions are to be as set out in the constituent documents of the sporting body, or in the separate agreement between the parties to the dispute referring the dispute to the Tribunal*”. In this case, though, the constituent documents of the Respondent do not set out such matters. Nor does the arbitration agreement between the parties. In the circumstances, in this case, the balance of probabilities is the default standard of proof.⁷⁵
70. Under the MPP, substantiation of a complaint depends upon the existence of “*sufficient evidence*” to support the complaint.⁷⁶ Satisfaction on the balance of probabilities requires actual persuasion – nothing more and nothing less.⁷⁷
71. In this context, the Tribunal refers to the *Briginshaw* principle.⁷⁸ According to this principle, a decision-maker should approach his or her task with caution, having regard to the following: (1) the seriousness of the allegations made; (2) the inherent unlikelihood of an occurrence of a given description; and (3) the gravity of the consequences flowing from a particular finding.
72. In light of section 40(1)(c) of the NST Act, strictly speaking, the *Briginshaw* principle does not apply to the Tribunal’s exercise of its decision-making power in this case. Notwithstanding this technical position, however, the factors underpinning this principle are relevant to the question whether an allegation is made out to the reasonable satisfaction of the Tribunal. For example, adopting the language of Dixon J in *Briginshaw*, reasonable satisfaction should not be produced by “*inexact proofs, indefinite testimony, or indirect inferences*”, especially where the allegations are serious and where grave consequences will

⁷² Section 28(1) of the P&P Determination is to like effect [TB 2251].

⁷³ See *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555 at paragraphs 4 to 16 (Logan J), a case relating to the conduct of a merits review in the Administrative Appeals Tribunal (‘AAT’). It is noted that, in exercising decision-making powers, the NST operates under a materially similar statutory charter to that under which the AAT operates.

⁷⁴ [TB 2258].

⁷⁵ Section 55(2) of the P&P Determination [TB 2259].

⁷⁶ See clause (a)(5)(A) of Attachment C3 of the MPP [TB 269].

⁷⁷ See *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262 at paragraph 136.

⁷⁸ As to this evidentiary principle, see *Briginshaw v Briginshaw* (1938) 60 CLR 336 (‘**Briginshaw**’).

flow from a particular finding.⁷⁹ These matters accord with the core duty identified in paragraph 68(b) above and also the terms of clause 9.1(b) of the MPP.

73. There is one other *Briginshaw* concept that warrants mention here. Where there is an issue in a civil proceeding as to whether a crime has been committed, the standard of proof is the same as upon other civil issues, but weight is to be given to the presumption of innocence and exactness of proof is required.⁸⁰
74. Other principles also bear on the Tribunal's fact-finding role. In particular, the Tribunal refers to the following principles:
- (a) First, a decision-maker must not take irrelevant evidence into account.
 - (b) Second, a decision-maker cannot draw conclusions from the absence of evidence. This principle applies to findings of fact and the discounting of facts otherwise open to be found.
 - (c) Third, a decision-maker should not lightly dismiss the evidence of a corroborative witness that bears directly on the allegations.
 - (d) Fourth, a decision-maker must avoid the misuse of evidence through illegitimate, irrational, unsound or prejudicial forms of reasoning. For example, the use of tendency evidence may be prejudicial and unsound.⁸¹
 - (e) Fifth, the inherent improbability of an event having occurred will, as a matter of common sense, be a relevant factor in deciding whether it did in fact occur.⁸²
 - (f) Sixth, evidence on an issue is to be weighed according to the relative capacity of the parties to adduce the relevant evidence – that is, in accordance with the proof which it was in the power of one side to produce and the power of the other side to contradict.
75. Lastly, it is necessary to note that: (1) the Tribunal received only documentary evidence, being the same documentary evidence that the MPP Committee had received plus the third statement of Mr O'Reilly; (2) this documentary evidence included documents recording information provided to the SIA investigator; (3) at the main hearing, the parties did not adduce any oral evidence; and (4) there was no cross-examination of persons who had

⁷⁹ *Briginshaw* at 362.

⁸⁰ *Briginshaw* at 363 and 372.

⁸¹ In *Hoch v The Queen* (1988) 165 CLR 292, the High Court of Australia discussed tendency evidence, including the dangers of such evidence.

⁸² In *Jones v Birmingham City Council* [2023] UKSC 27 at [51], Lord Lloyd-Jones made this basal point. The Law Lord went on to say this: "... proof of an improbable event may require more cogent evidence than might otherwise be required".

provided information to the SIA investigator, in which case the parties could not use cross-examination to test such evidence.

76. In the absence of oral testimony at the main hearing, and in the absence of cross-examination at this hearing, how has the Tribunal assessed the probative value of the oral and written information provided to the SIA investigator? In short, in assessing the weight and reliability of each person's evidence, the Tribunal has examined the following matters: (1) the consistency of his or her evidence with what is agreed, or clearly shown by other evidence, to have occurred; (2) the internal consistency of his or her evidence; and (3) the consistency of his or her evidence with what he or she has stated on other occasions. The Tribunal has also had regard to the logic of the circumstances in question, the overall probabilities of the matters in question, and the motives of witnesses.⁸³ For obvious reasons, as a general proposition, the Tribunal has afforded significant weight to incontrovertible facts and contemporaneous documents. Further, as a general proposition, the Tribunal has afforded weight to direct evidence compared with indirect evidence. Lastly, the Tribunal has exercised caution in respect of the tendency evidence on which the Respondent relies.
77. In analysing of the evidence, and in assessing whether the available material enabled me to reach logical and rationally probative decisions, I have had regard to the principles described above. For each complaint, on the question where the truth lies, the Tribunal has applied the above rules and principles to reach a conclusion concerning what happened in contested circumstances.

VII The issues raised by the parties in the proceeding

78. In the AAFR, in the ASFC, and in the oral submissions at the substantive hearing, the essential issues raised were as follows:
- (a) **Issue 1:** What determination(s) should the Tribunal make in respect of Complaint 1?
 - (b) **Issue 2:** What determination(s) should the Tribunal make in respect of Complaint 3?
 - (c) **Issue 3:** What determination(s) should the Tribunal make in respect of Complaint 4?
 - (d) **Issue 4:** If the Tribunal finds that the Applicant engaged in any conduct as alleged, by engaging in such conduct, did he contravene the 2014 MPP, the MPP or the relevant codes of conduct as alleged?
 - (e) **Issue 5:** If the Tribunal makes one or more contravention findings:

⁸³ *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep. 1 at 57 (Goff LJ). The reference to "overall probabilities" picks up the inherent probability or improbability of an event having occurred.

- (a) Should the Tribunal impose any sanctions on the Applicant?
 - (b) If yes, what sanction or sanctions should the Tribunal impose on the Applicant?
79. At the commencement of the hearing on 21 July 2023, counsel for each party confirmed that:
- (a) by reason of consent orders and declarations, subject to the hearing and determination of the Amendment application, Issues 1, 2, 3, 4 and 5 were the only substantive issues for determination in the arbitration (**'substantive issues'**);
 - (b) if the Tribunal made one or more contravention findings, it should only determine Issue 5 after a subsequent hearing relating to the question of sanctions (and after the parties had received an opportunity to file further evidence relating to the question of sanctions); and
 - (c) if the Tribunal granted the Amendment application, further issues would arise for the Tribunal's determination.

VIII Witnesses and tendency evidence

80. **Witnesses:** Given the nature of the complaints, and given the nature of the evidence provided to the MPP Committee, much turns on the credibility of witnesses. In particular, much turns on the credibility of AB, the Applicant, XT and Witness C.
81. In assessing the credibility of witnesses, I have considered various indicators of unsatisfactory witness evidence. These indicators include the following: evasive answers; argumentative answers; self-contradiction; internal inconsistency; shifting case; selective disclosure of information; and the provision of new evidence.⁸⁴
82. AB was an unsatisfactory witness; and, in many important respects, her evidence was unreliable. I will give detailed examples later, but for now I summarise my general impression:
- (a) I did not expect her to have recalled exhaustively and accurately all that took place in respect of relevant matters. However, I did expect her to have recalled consistently and accurately the essential matters. I regard the day on which the alleged bottom-touching occurred as one such matter, primarily on the basis that the identification of the day in question is critical to the testing of the evidence bearing on this complaint.

⁸⁴ See *Rancom Security Ltd v Girling & Ors* [2023] EWHC 1115 (Ch) at paragraph 33 for a list of the main indicators. See also paragraph 55 of the Applicant's submissions (incorrectly) dated 11 February 2021 [TB 1379].

- (b) In relation to the Complaint 1, however, she was unable to maintain a consistent, coherent and reliable account. In relation to some issues, her account simply changed over time. In relation to others, her account shifted in important respects in response to evidence given by others. In some cases, the shift involved AB stepping away from her initial account. These things cast considerable doubt on the probative value of AB's evidence.
- (c) Further, there were some untrue statements in her evidence. I am sure that she is an essentially truthful person, but I think that some of her evidence was affected by a concern to bolster the complaint. In one case, when confronted by evidence showing that her account was untrue, she abandoned her earlier account. In other cases, she exaggerated or overstated aspects of her account. These matters raise serious questions concerning the reliability and credibility of her evidence. In the circumstances, I have approached her evidence with a high degree of caution.
83. These concerns stem from the following matters (among others): (1) the general nature of the relevant evidence of AB; (2) the unsatisfactory and manifestly implausible evidence that AB gave in respect of Complaint 1; and (3) the apparent speed with which AB volunteered incorrect or speculative information concerning the nature of the relationship between the Applicant and Witness C.⁸⁵ The second and third matters demonstrate a proneness to exaggeration.
84. As a result of these things, and as a result of other matters to which I refer below, I do not regard AB as a reliable witness. In short, her evidence cannot be relied on unless it is corroborated by other evidence. Where it conflicts with the evidence of the Applicant, I have no hesitation in preferring the Applicant's account.
85. By way of contrast, in respect of each major issue, the Applicant gave a consistent, clear and detailed account to the SIA investigator. In relation to Complaint 1, he marshalled an extraordinary amount of evidence that corroborated his account. In respect of some matters, he provided frank and candid evidence. He accepted that some of his conduct had caused some people to experience discomfort. He expressed genuine regret in this regard.⁸⁶ I regard him as a reliable and truthful witness.
86. The Respondent urged me to reject or discount Witness C's evidence on the basis of her "close relationship" with the Applicant.⁸⁷ However, I see no reason whatsoever to question the reliability of Witness C's evidence on this basis (or any other basis). There is no dispute that: (1) Witness C and the Applicant are friends; and (2) he has helped her over the years.

⁸⁵ Transcript no. 1, p. 33 of 38, lines 14-15 [TB 369] (Question no. 376: "Do they have an intimate relationship that you know of?", A: "Yeah."). Having given this answer, though, AB went on to say that she did not know this "for sure". This was a sensible retreat from the original, unqualified answer. But the fact that AB gave the original, unqualified answer is in itself significant.

⁸⁶ See paragraphs 94 and 95 of his statutory declaration dated 11 February 2022 [TB 797].

⁸⁷ As to this description of their relationship, the Tribunal refers to paragraph 3 on page 4 of the MPP Committee's decision table [TB 2041].

But these matters do not detract from the cogency and reliability of her evidence, particularly where that evidence accords with the evidence of other witnesses.⁸⁸ In my judgment, she was a truthful and reliable witness.

87. XT was a truthful and reliable witness, and each party accepted as much. At the time of giving her evidence, she had worked closely with the Applicant, and she was therefore well placed to comment on his conduct.
88. UZ was a reliable witness, in my view. Like XT, she was well placed to give evidence in respect of the Applicant's conduct.
89. Witness D and Witness E were truthful and reliable witness. Witness D is a former director of the Association, and he had no motivation to give inaccurate or untruthful evidence. Witness E was a member of the [REDACTED] State [REDACTED] Squad at the time of the alleged incident. Like Witness D, he was an independent witness with no axe to grind.
90. Neither Witness F, Witness G nor Witness H witnessed the alleged conduct about which AB complained. However, each one gave evidence concerning the past conduct of the Applicant. The Respondent argued that this evidence demonstrated the Applicant's propensity to engage in the conduct about which AB complained. On this basis, so the argument ran, such evidence corroborated AB's evidence in a general sense. In section A.2 below, I make some brief comments in respect of tendency evidence. For present purposes, though, it is sufficient to note that such evidence can have a prejudicial effect.
91. In relation to Witness F, I make the following points:
 - (a) She provided a signed witness statement to the SIA Investigator.⁸⁹ At all material times, she was one of the [REDACTED] [REDACTED] [REDACTED] [REDACTED] Officers. In that capacity, she was a person to whom [REDACTED] and others could communicate complaints in respect of matters arising at the national level. In 2018, [REDACTED] [REDACTED] [REDACTED] [REDACTED] and the [REDACTED] of the Centre.
 - (b) In 2018, she became the Respondent's Operations Manager and the manager of the Centre.⁹⁰
 - (c) She did not witness the alleged Complaint 1; and she did not witness the alleged comments relating to Complaint 3. Notwithstanding these matters, and notwithstanding that she made no official complaint in respect of the Applicant's conduct, she took it upon herself to provide colourful and manifestly prejudicial evidence in respect of the Applicant. The language of her evidence also indicates

⁸⁸ For example, the Tribunal refers to the evidence of Witness C in respect of 11 February 2021 [TB 554]. This evidence is consistent with the evidence of Witness E, an indisputably independent witness, and a past or present director of the Association.

⁸⁹ [TB 1320].

⁹⁰ See paragraph 8 of her statement [TB 1321].

that she had an axe to grind. Indeed, some her language indicates that she harbours considerable animus toward the Applicant.

- (d) In relation to Complaint 1, her evidence is prejudicial and irrelevant. It relates to alleged touching in the course of instruction or coaching. It is far removed from the alleged groping about which AB complained. I do not consider that it has significant probative value.
 - (e) Further, in important respects, her tendency evidence is vague and imprecise. As a result, it is very difficult to conclude that the past conduct was conduct in contravention of any policy or code of conduct. In other words, it is very difficult to say that the evidence discloses a pattern of inappropriate conduct. It follows that the probative value of this evidence is very low.
 - (f) Notwithstanding the strident nature of her evidence, she made no official complaints in respect of the Applicant's conduct. The obvious inference is that, when she observed any conduct of the Applicant's, she did not consider that it warranted a complaint.
 - (g) Lastly, in late February 2021, Witness F participated in a discussion with AB and others. Plainly, this discussion related to AB's complaint. However, Witness F gave no evidence in respect of this discussion; and she provided no explanation in this regard. Given the seriousness of the Complaint 1 allegation, such evidence would have been relevant to an assessment of AB's evidence.
92. In light of such matters, I do not regard Witness F as a reliable witness, and the probative value of her tendency evidence is very low. I cannot place any real weight on her evidence.
93. Witness G also gave tendency evidence. It was largely hearsay and supposition. While I do not doubt that Witness G was doing her best to help, I cannot place any real weight on her evidence.
94. Witness H gave tendency evidence. It was vague and imprecise; and it contained hearsay based on information received from unidentified "female [REDACTED]". Further, it is wholly unclear whether the alleged past conduct created a relevant pattern. For example, he gave evidence that the Applicant engaged in "unliked behaviours" (whatever that means). Assuming without accepting that the Applicant did in fact engage in such "unliked behaviours", such conduct does not (and could not) increase the probability of a fact in issue in respect of any complaint. Accordingly, the probative value of this evidence is very low.
95. The Respondent also relied upon tendency evidence provided by Witness I and Witness J. I am unable to place any real weight on this evidence. The evidence is largely irrelevant and prejudicial, and it does not point to a clear propensity on the Applicant's part to engage in conduct of the sort about which AB complained.

96. **Tendency evidence:** Tendency evidence is evidence relating to a person's character, reputation, or conduct that is adduced to prove that someone has a tendency to act or think in a particular way. As noted above, the Respondent relies upon the evidence of Witness F, Witness G, Witness H, Witness I and Witness J as tendency evidence. It contends that this tendency corroborates the evidence of AB. According to the Respondent, the Applicant's past conduct is probative of the Applicant engaging in the conduct of which AB complained. Put another way, so the argument runs, such evidence rationally affects the assessment of the probability of the existence of facts in respect of the complaint.
97. In the balance of this section, I have set out some principles relating to tendency evidence. These principles are drawn, in the main, from the relevant provisions of the *Evidence Act* 1995 (NSW) ('**Evidence Act**'). The reference to these principles is designed to shed some general light on the following: (1) the nature of tendency evidence; (2) the problems relating to tendency evidence; and (3) one statute-based method for dealing with such problems.
98. According to the Dictionary in the *Evidence Act*, "*tendency evidence*" is defined as the evidence to which section 97(1) refers.⁹¹ Under that section, tendency evidence is evidence "*of the character, reputation or conduct of a person, or a tendency that a person has or had*" which is adduced to prove that the person "*has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind*". Section 97(1) also provides relevantly that such evidence:
- is not admissible to prove that a person has or had a tendency ... unless ... the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.*
99. Evidence has "*significant probative value*" for the purpose of section 97(1) if it could rationally affect the assessment of the probability of the relevant fact in issue to a significant extent — that is, the evidence must do more than is required by section 55 of the *Evidence Act* to establish relevance.⁹² In assessing whether the evidence has significant probative value, it is necessary to consider the following matters: (1) the extent to which the evidence, by itself or together with other evidence, supports the tendency; and (2) the extent to which the tendency makes more likely the facts making up the allegation.⁹³
100. In summary, under the *Evidence Act*, evidence that someone has behaved in some way on a previous occasion is not, in itself, significantly probative of that person having behaved subsequently as alleged. To make evidence of previous behaviour significantly probative of the subsequent behaviour, there needs to be "*something more*" about the nature or circumstances of the earlier behaviour which rationally affects to some significant degree the assessment of the probability that the person engaged in the behaviour as alleged.⁹⁴ Under

⁹¹ In the past, tendency evidence was often called "*propensity evidence*".

⁹² *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569 at [72] & [73].

⁹³ *Hughes v The Queen* (2017) 92 ALJR 52 at [41].

⁹⁴ *Hughes v The Queen* (2017) 92 ALJR 52 at [154] per Nettle J.

the *Evidence Act*, proof of past behaviour may meet the basal test of relevance, but such evidence may be incapable of meeting the requirement of significant probative value for admission as tendency evidence. This higher threshold is designed to guard against the admission of evidence that may have a prejudicial effect on the person the subject of the allegations.

101. Obviously, there are no questions of admissibility in this case. But I consider that the “*significant probative value*” test is a useful way of approaching the assessment of the tendency evidence. In this regard, in respect of each item of tendency evidence on which the Respondent relies, it is valid to ask whether the probative value of that evidence substantially outweighs its prejudicial effect. It is valid to ask whether, adopting the language of Nettle J in *Hughes v The Queen*, there is “*something more*” about the nature or circumstances of the earlier behaviour which rationally affects “*to some significant degree*” the assessment of the probability that the Applicant engaged in the behaviour as alleged.
102. Lastly, for completeness, I refer to the term “*coincidence evidence*” as defined in the *Evidence Act*.⁹⁵ This is evidence that a party seeks to adduce in order to prove that, because of the improbability of two or more substantially and relevantly similar events occurring in substantially similar circumstances coincidentally, a person did a particular act or had a particular state of mind.

IX Determination of the substantive issues

103. I deal with the determination of the substantive issues under the following headings:

Part	Heading	Page no.
A	Issue 1: Complaint 1	26
A.1	My decision on Issue 1	27
A.2	Discussion of Issue 1	27
B	Issue 2: Complaint 3	51
B.1	My decision on Issue 2	52
B.2	Discussion of Issue 2	54
C	Issue 3: Complaint 4	72
C.1	My decision on Issue 3	76
C.2	Discussion of Issue 3	76
D	Issue 4	84
E	Issue 5	84

⁹⁵ This is evidence to which the “*coincidence rule*” in section 98(1) of the *Evidence Act* refers. In the past, coincidence evidence was often called “*similar fact evidence*”.

A Issue 1: Complaint 1

104. In respect of this issue, at this stage of the proceeding, the following sub-questions arise for determination:

- (a) **Sub-issue 1.1:** Looking at the available evidence, on the balance of probabilities, did the Applicant touch AB as alleged?
- (b) **Sub-issue 1.2:** Is the Tribunal required to make a formal finding as to whether this complaint falls into one of the four categories identified in clause (a)(5) of Attachment C3 of the MPP (**'Attachment C3 categories'**) [TB 269]?
- (c) **Sub-issue 1.3:** If yes, having regard to the available evidence, into which one of Attachment C3 categories does this complaint fall?

A.1 My decision on Issue 1

105. For the reasons set out below, I determine that:

- (a) On the balance of probabilities, the Applicant did *not* touch AB as alleged.
- (b) Although the Tribunal is not bound to find that the complaint falls within one of the Attachment C3 categories, the complaint falls into the "*unsubstantiated*" category. That is so because the evidence supporting Complaint 1 lacks probative value.
- (c) The complaint does not fall into the "*inconclusive*" category because:
 - (a) there is sufficient probative evidence to find that the Applicant did *not* touch AB as alleged;
 - (b) there is insufficient probative evidence to find that the Applicant did in fact touch AB as alleged; and
 - (c) in the circumstances, it is impossible to say that the "there is insufficient evidence either way".

106. It follows that, in respect of this complaint, the question of contravention does not arise. In other words, Issues 4 and 5 do not arise in respect of this complaint.

107. In the circumstances, the Tribunal shall dismiss Complaint 1.

A.2 Discussion of Issue 1

108. By way of introduction, I note the following matters.

109. At the commencement of his submissions in respect of Issue 1, counsel for the Respondent made a significant concession. On behalf of the Respondent, he conceded that the available evidence does not establish this complaint ('**Concession**').⁹⁶ In my view, for the reasons explained in section A.2.1 below, this Concession was correctly made.
110. As a result of the Concession, the debate between the parties devolved into one concerning the correct interpretation of clauses (a)(5)(B) and (a)(5)(C) of Attachment C3 of the MPP.⁹⁷ I shall address the substance of this debate in section A.2.3 below.
111. Notwithstanding the Concession, and notwithstanding the devolution described above, I have not refrained from dealing with sub-issue 1.1. It has been necessary to deal with this sub-issue in order to deal sensibly and fairly with sub-issue 1.3.
112. In light of these matters, I turn to the analysis of each sub-issue.

A.2.1 Sub-issue 1.1

113. At the outset, I note as follows: (1) there is no objective evidence supporting this complaint; (2) there are no contemporaneous documents supporting this complaint; (3) apart from AB's evidence, there is no direct evidence from any witness supporting this complaint; (4) there is some so-called tendency evidence on which the Respondent relies; and (5) there is no other evidence supporting this complaint. It follows that a careful assessment of the probative value of AB's assessment is critical to the determination of sub-issue 1.1. I have conducted this assessment by reference to the relevant principles and by reference to all of the available evidence, including the evidence that is inimical to the allegation.
114. In light of the above matters, the starting point is the identification of AB's evidence in respect of this complaint.
115. [paragraphs redacted]
116. I turn to an assessment of AB's evidence in respect of this complaint. In carrying out this assessment, I have had regard to the following matters: (1) the extent to which, if at all, AB's evidence is consistent with objective data, including known events; (2) the extent to which, if at all, AB's evidence is consistent with probabilities, including likely or expected matters or events; (3) the extent to which, if at all, AB's evidence is consistent with the evidence of others; (4) the extent to which, if at all, AB's evidence is internally consistent; (5) the extent to which, if at all, AB's evidence lacks credibility; and (6) the known or apparent motives of witnesses.

⁹⁶ In paragraph 50 of the ASFC [TB 2103], the Respondent made a like concession.

⁹⁷ The former clause states as follows: "*The investigator will ... Make a finding as to whether the Complaint is ... inconclusive (there is insufficient evidence either way)*" [TB 269]. The latter clause states as follows: "*The investigator will ... Make a finding as to whether the Complaint is ... unsubstantiated (there is sufficient evidence to show that the Complaint is unfounded)*" [TB 269].

117. As noted above, the Respondent concedes that, on the balance of probabilities, the Applicant did not touch AB as alleged. As a result of this concession, it is unnecessary to undertake a full and detailed assessment of the available evidence. In the balance of this section, I have highlighted matters demonstrating the following: (1) the correctness of this concession; and (2) the absence of sufficiently probative evidence founding this complaint. Some of these matters also illustrate the conclusions reached in respect of some witnesses and their evidence.
118. **The first matter – objective data:**
119. [paragraphs redacted]
120. **The second matter – inherent improbability:** This matter relates to the following: (1) the likely number of people present at the time; and (2) having regard to those likely numbers, and having regard to the nature of the alleged incident, the inherent improbability of that incident having occurred.
121. [paragraphs redacted]
122. **The third matter – inherent improbability:** Other matters indicate the inherent improbability of the alleged incident. I accept the Applicant’s submissions in this regard.⁹⁸
123. [paragraphs redacted]
124. **The fourth matter – leaving the tendency evidence to one side, there is no evidence corroborating AB’s account:**
125. [paragraphs redacted]
126. **The fifth matter – there is a substantial body of evidence contradicting AB’s account of the alleged incident:**
127. [paragraphs redacted]
128. **The sixth matter – AB’s ultimate inability to identify the date of the incident:**
129. [paragraphs redacted]
130. **The seventh matter – other internal consistencies inimical to the reliability and credibility of AB’s account:**
131. [paragraphs redacted]
132. **The eighth matter – credibility problems:**

⁹⁸ As to improbable matters, the Tribunal refers to paragraph 77 of the Applicant’s submissions to the SIA investigator dated 11 February 2022 [TB 1385].

133. [paragraphs redacted]
134. **The ninth matter – the significance of other investigations:** The Police investigated the First complaint, as did the DCJ. There is no evidence concerning the materials gathered in each of these investigations. However, there is evidence to the following effect: (1) having “*suspended*” its investigation, neither the Police nor the Director of Public Prosecutions took any further action; and (2) the DCJ took no action against the Applicant in respect of the same complaint. These matters fortify the Tribunal’s conclusion that, on the balance of probabilities, the touching did not occur as alleged.
135. **The tenth matter – the tendency evidence has no real probative value:** Lastly, I refer to the tendency evidence on which the Respondent relies. This evidence lacks real probative value, and, as such, I have given no real weight to this evidence.
136. [paragraphs redacted]
137. **Conclusion:** Having regard to the available evidence, on the balance of probabilities, I find that the Applicant did *not* touch AB as alleged. Further, I find that the evidence supporting the complaint provides an insufficient evidentiary foundation for upholding this complaint. In that sense, the complaint is unsubstantiated. On the strength of these findings, the Tribunal shall dismiss this complaint.

A.2.2 Sub-issue 1.2

138. The question is whether, looking at the relevant language of the MPP, the MPP Committee is bound to make one of the four listed categorisation findings (and thereby adopt the language in which the selected category is expressed). It is an important question because, in conducting the full merits review in accordance with the Agreed approach, the Tribunal must place itself in the same position as the MPP Committee.
139. In relation to this sub-issue, the Tribunal refers to the text and context of Attachment C3 of the MPP. In this regard, the Tribunal notes as follows:
- (a) In respect of Complaints, looking at clause 6.3 of the MPP, it is clear that: (1) the MPP Committee is required to conduct a Preliminary Investigation; (2) following the Preliminary Investigation, the MPP Committee must decide whether there is enough information to determine whether the matter alleged in the Complaint did or did not occur; and/or (3) the MPP Committee must determine what further action to take, if any, including referring the matter for independent investigation in accordance with the procedure outlined in Attachment C3.⁹⁹

⁹⁹ [TB 266]

- (b) Attachment C3 identifies the steps that the independent investigator must follow unless otherwise agreed.¹⁰⁰ Clause (a)(5) of Attachment C3 provides that, having followed the steps outlined in clauses (a)(1)-(4), the independent investigator will make one of the four listed categorisation findings ('**Categorisation findings**').¹⁰¹
- (c) Clause (c) of Attachment C3 provides that the MPP Committee will provide a report to the Complainant and the Respondent documenting the complaint, the investigation process and "*summarising key points that are substantiated, inconclusive, unsubstantiated and/or mischievous*". It is not entirely clear whether, in this report, this summary of "*key points*" is supposed to address the Categorisation findings or the subsequent categorisation findings made by MPP Committee. Nor is it entirely clear that the language of clause (c) imposes on the MPP Committee a requirement to make one of the four listed categorisation findings.
- (d) Clause 7 of the MPP provides that, following the independent investigation conducted in accordance with Attachment C3, the MPP Committee "*will issue a decision in relation to the Complaint*". It is clear from clause 7(a)(2) that, in making such a decision, the MPP will have regard to the Categorisation findings. However, it is far from clear that the MPP Committee is bound to make one of the four Categorisation findings. It is reasonable to conclude that, when making findings, the MPP Committee is not confined to making findings in the language for which clause (a)(5) of Attachment C3 provides. In this regard, I note the open-ended language in which clause 7(b) is expressed, and I note that Attachment C3 relates to the investigation process to which independent investigators must adhere.

140. Notwithstanding the above analysis, I will refrain from determining this issue. I did not advise the parties that the Tribunal would consider this analysis and, as a result, I did not receive any submissions directed to this issue.

141. In any event, it is unnecessary to determine this issue. It is a sterile debate because:

- (a) I have no difficulty in rejecting "*inconclusive*" as the Attachment C3 category into which this complaint should fall;
- (b) I have no difficulty in placing this complaint into the "*unsubstantiated*" category;¹⁰² and

¹⁰⁰ [TB 269]

¹⁰¹ That is, the Complaint is (A) "*substantiated*", (B) "*inconclusive*", (C) "*unsubstantiated*" or (D) "*mischievous, vexatious or knowingly untrue*".

¹⁰² Indeed, the characterisation of this complaint as "*unsubstantiated*" is consistent with the following: (1) the Concession; and (2) the Tribunal's decision in respect of sub-issue 1.1.

- (c) for the reasons explained in section A.2.3 below, the language of clause (a)(5)(C) does not prevent the placement of this complaint into the “*unsubstantiated*” category.

A.2.3 Sub-issue 1.3

142. It is common ground that the SIA investigator collected some evidence supporting this complaint. The evidence of AB lends support to this complaint. But the question is whether, in light of the existence of such evidence, the Tribunal can place this complaint into the “*unsubstantiated*” category. The determination of this question hinges on the correct interpretation of clause (a)(5)(C) of Attachment C3 of the MPP.

143. In relation to this question, in summary, the Respondent contended as follows:

- (a) by reason of the explanatory words in clause (a)(5)(C) of Attachment C3 of the MPP (“*there is sufficient evidence to show that the Complaint is unfounded*”), the MPP Committee may only make an “*unsubstantiated*” if the complaint is wholly baseless (that is, “*without basis in fact*”);¹⁰³
- (b) in respect of this complaint, an “*unsubstantiated*” finding is inapt;
- (c) such a finding is inapt because there is some evidence that supports the complaint, namely the evidence of AB, and her evidence is not false;
- (d) in the circumstances, this complaint is not “*unfounded*”;¹⁰⁴ and
- (e) a finding that the complaint is “*inconclusive*” is apt where the evidence does not establish that the bottom-touching occurred as alleged, and where there is no evidence to establish that the complaint is baseless (that is, “*unfounded*”).

144. The Applicant challenged these contentions, arguing in substance that:

- (a) as matter of interpretation, the wording of clause (a)(5)(C) did not require a positive finding that the complaint was wholly groundless or without basis in fact;
- (b) an “*unsubstantiated*” finding does not require a positive finding that the complaint is wholly baseless;
- (c) having regard to the text and context of clause (a)(5)(C), in assessing whether a complaint is founded or “*unfounded*”, the correct focus is the probative value of available evidence as distinct from the existence or non-existence of evidence; and
- (d) understood in this way, an “*unsubstantiated*” finding does not carry a finding that that the complaint is wholly baseless or false; and

¹⁰³ In paragraph 41 of the ASFC [TB 2102], the Respondent contended as follows: “... an ‘*unsubstantiated*’ finding, in accordance with the MPP, requires a positive finding that, on the balance of probabilities, the allegation is without basis in fact.”

¹⁰⁴ This argument is developed in paragraphs 41 to 51 of the ASFC [TB 2102].

- (e) an “*unsubstantiated*” finding carries a finding that the available evidence has insufficient probative value for the purpose of substantiating the complaint.
145. For the following reasons, on balance, I prefer the interpretation for which the Applicant contends. Obviously, the word “*unfounded*” carries different meanings. In this case, though, one or two matters demonstrate that the Applicant’s interpretation is the correct one. The starting point is the Tribunal’s decision in respect of sub-issue 1.1. It was made on the balance of probabilities; and it is consistent with the Concession. Having regard to this decision, it would require contortions of logic to find that “*there is insufficient evidence either way*”. If the “*unsubstantiated*” category is inapt, there is no other category into which one could rationally and logically slot this complaint. This would amount to an absurd and illogical outcome, being one that weighs heavily against the interpretation for which the Respondent contends. The authors of the Attachment C3 could not have intended to produce such an outcome.
146. In light of such matters, “*unfounded*” in clause (a)(5)(C) cannot mean wholly baseless, as the Respondent contends. It is far more likely, in my view, that “*unfounded*” is a reference to the absence of sufficient probative evidence to substantiate the complaint. This interpretation acknowledges that, whilst there is some evidence supporting the complaint, such evidence carries insufficient probative value to substantiate the complaint. When read in this way, an “*unsubstantiated*” does not carry a finding that the supportive evidence is baseless or false. Indeed, if one reads clause (a)(5)(C) in this way, each category covers a separate, and distinct result, and there is no need for any contortions of logic of the sort described above.
147. In summary, I find that this complaint falls into the “*unsubstantiated*” category in clause (a)(5) of Attachment C3 of the MPP. This finding rests on my assessment of the probative value of the evidence supporting this complaint. The probative value of that evidence is extremely low. In that sense, the complaint is unfounded. In the circumstances, I will make a declaration to the effect that this complaint falls into the “*unsubstantiated*” category.

B Issue 2 – Complaint 3

148. The Respondent contends that the alleged conduct of the Applicant contravened the MPP and the relevant codes of conduct.¹⁰⁵
149. In short, in respect of this issue, the following sub-questions arise for determination:
- (a) **Sub-issue 2.1:** Looking at the allegations, and looking at the available evidence, what is the alleged conduct on which this complaint rests?

¹⁰⁵ See pp. 1 and 2 of the SIA’s letter to the Applicant dated 11 August 2021 [TB 1705]. In this letter, the Respondent identified the provisions the subject of the contravention allegations.

- (b) **Sub-issue 2.2:** For each relevant incident, does the alleged conduct enable the Tribunal to make any contravention findings?
- (c) **Sub-issue 2.3:** Looking at the available evidence, for each relevant incident, did the Applicant engage in the conduct as alleged?
- (d) **Sub-issue 2.4:** For each relevant incident, if the evidence does enable the Tribunal to make any contravention findings, did the relevant conduct contravene the 2014 MPP, the MPP and/or any relevant code of conduct?

B.1 My decision on Issue 2

150. For the reasons set out below, I have decided as follows.
151. As to sub-issue 2.1, looking at the direct evidence of AB and XT, I have identified different allegations concerning relevant conduct on the part of the Applicant.
152. As to sub-issue 2.2, I find as follows:
- (a) the form of each allegation bears on the question of contravention;
 - (b) in some instances, the form of the allegation does not permit a finding that the conduct was contravening conduct;
 - (c) accordingly, in each of these cases, I reject the allegation that the Applicant contravened the 2014 MPP, the MPP or any relevant code of conduct as alleged.
153. As to sub-issue 2.2, in relation to specific allegations, I find as follows:

Conduct	Summary of the alleged conduct	Conclusion on sub-issue 2.3	Reasons
Conduct A	[redacted]	The evidence is sufficiently detailed.	[redacted]
Conduct B.1(i)	[redacted]	The evidence is sufficiently detailed.	[redacted]
Conduct B.1(ii)	[redacted]	The state of the evidence does not permit contravention findings.	[redacted]
Conduct B.2	[redacted]	The evidence is sufficiently detailed.	[redacted]
Conduct C	[redacted]	The evidence is sufficiently detailed.	[redacted]
Conduct D	[redacted]	The state of the evidence does not permit contravention findings.	[redacted]
Conduct E	[redacted]	The state of the evidence does not permit contravention findings.	[redacted]
Conduct F	[redacted]	The state of the evidence does not permit contravention findings.	[redacted]

154. As to sub-issue 2.3, on the balance of probabilities, I find as follows:
- (a) the Applicant engaged in Conduct A, and he did so in the manner explained in paragraph 64 of his first statement.¹⁰⁶

¹⁰⁶ See the Applicant's statement dated 16 September 2021 [TB 548].

- (b) A few weeks after the Applicant engaged in Conduct A, the Applicant engaged in the conduct described in paragraph 66 of his first statement.¹⁰⁷
- (c) The Applicant engaged in Conduct B.1(i). However, contrary to AB's evidence, he did not make these comments on a constant or frequent basis.
- (d) The Applicant did not engage in Conduct B.1(ii).
- (e) The Applicant engaged in Conduct B.2, and he did so in the manner alleged in XT's evidence.
- (f) The Applicant did not engage in Conduct C.
- (g) The Applicant did not engage in Conduct D, Conduct E or Conduct F.

155. As to sub-issue 2.4, I find as follows:

- (a) as to Conduct A, such conduct did not contravene the MPP or the relevant codes of conduct as alleged;
- (b) as to the conduct described in the previous paragraph (b) above, such conduct did not contravene the MPP or the relevant codes of conduct as alleged;
- (c) as to the conduct described in the previous paragraph (c) above, such conduct did not contravene the MPP or the relevant codes of conduct as alleged; and
- (d) as to Conduct B.2, such conduct did not contravene the MPP or the relevant codes of conduct as alleged.

156. In light of these findings, I will dismiss Complaint 3. Further, I will make a declaration that this complaint is "*unsubstantiated*" within the meaning of the MPP. It is "*unsubstantiated*" because, notwithstanding the findings to the effect that the Applicant engaged in some of the conduct as alleged, there is no real basis in fact to find any contraventions of the relevant policies or codes of conduct.

B.2 Discussion of Issue 2

157. This complaint relates to the Applicant's conduct towards AB. It does not relate to the Applicant's conduct towards other athletes, none of whom have made formal complaints against him in respect of related comments. In respect of AB's complaint, however, the Respondent relies on the Applicant's conduct towards female athletes as "*tendency*" evidence.

158. [paragraphs redacted]

¹⁰⁷ [TB 548, 549].

159. In broad terms, the disputed matters are as follows: (1) whether the Applicant engaged in some of the conduct as alleged; (2) whether the admitted conduct contravened the MPP and/or any relevant codes of conduct; and (3) if the Applicant engaged in the disputed conduct, whether such conduct contravened the MPP and/or any relevant codes of conduct.
160. There is also a question whether, in some instances, the form of the allegations prevents the Tribunal from making contravention findings.

B.2.1 Sub-issue 2.1

161. In order to deal with this sub-issue, it is necessary to look at the following: (1) the terms of this complaint; (2) the particulars provided in respect of this complaint; and (3) the available evidence in respect of this complaint.
162. [paragraphs redacted]

B.2.2 Sub-issue 2.2

163. The issue is whether, in respect of each allegation, the evidence provides an sufficient basis to support a finding of contravention. In respect of this issue, my findings are recorded in the table above.
164. As a result of these findings, the question of contravention does not arise in respect of the following conduct as alleged: Conduct B.1(ii); Conduct D; Conduct E; and Conduct F.
165. In the balance of this section, I have outlined the reasons for these findings.
166. Absent evidence disclosing the words spoken, acting fairly and reasonably, and avoiding speculation, I cannot make any findings in respect of the Applicant's conduct.¹⁰⁸ Inexact proofs, indefinite testimony, or indirect inferences are incapable of making out the allegations for which the Respondent contends. There is no sound basis to conclude, for example, that the unidentified conduct was unprofessional, abusive, compromising or inappropriate.
167. **Conduct B.1(ii)**: The general, high-level evidence does not identify specific words that the Applicant used. For example, AB gave evidence to the effect that the Applicant made comments "*constantly*", but that evidence does not identify the words that he used on any relevant occasion.¹⁰⁹ Such evidence is inexact and indefinite testimony of the sort to which

¹⁰⁸ See the NST's decision in *Liddick and Gymnastics Australia*, NST-E21-148532 ('**Liddick**') at [213]. The reasoning recorded in this paragraph is similar to the reasoning recorded in *Watson v Foxman* (1995) 49 NSWLR 315 at 318, 319 (McClelland CJ in Eq).

¹⁰⁹ See AB's answer to question no. 36, as set out in the extract from Transcript no. 1 under paragraph 222 above.

Dixon J referred in *Briginshaw*.¹¹⁰ It follows that such evidence cannot establish the relevant allegations to the reasonable satisfaction of the Tribunal.

168. **Conduct D:** The alleged conduct was articulated in response to a leading question; the allegations do not identify the words used; and the allegations do not identify the context in which the words were used. Such vague and imprecise evidence cannot establish the allegations to the reasonable satisfaction of the Tribunal.
169. **Conduct E:** The relevant evidence of XT evidence cannot establish the allegations to the reasonable satisfaction of the Tribunal. There is no sound basis to conclude, for example, that the unidentified conduct was compromising.
170. **Conduct F:** The evidence in question does not identify the words that the Applicant used on any relevant occasion. Nor does AB's evidence identify the following: (1) the date on which the Applicant uttered the relevant words; or (2) the context in which the Applicant uttered the relevant words. In the circumstances, the relevant evidence of AB evidence cannot establish the allegations to the reasonable satisfaction of the Tribunal.

B.2.3 Sub-issue 2.3

171. Against this background, I turn to the question whether the alleged conduct occurred.
172. **Conduct A:** [redacted]
173. Although there was no contest in respect of the nature and character of Conduct A, it is important for the Tribunal to address these matters. They provide important context for assessing the other alleged conduct underpinning this complaint. Indeed, they provide a prism through which to view and assess such other conduct.
174. **Conduct B.1(i):** [redacted] I make a finding the Applicant did not make these comments on a frequent, regular or constant basis.
175. **Conduct B.1(ii):** For reasons similar to those outlined in the preceding paragraph, I do not accept that the Applicant engaged in this alleged conduct.
176. **Conduct B.2:** As to this conduct, I accept without hesitation the relevant evidence of XT. Thus I find that, on one occasion only, the Applicant made the comment to which XT referred.
177. This finding is contrary to the Applicant's evidence. In my view, this does not detract from the general credibility of his evidence.
178. **Conduct C:** [redacted]
179. I find that the Applicant did not engage in Conduct C as alleged.

¹¹⁰ See *Briginshaw* at 362; and see also *Liddick* at [213].

180. In any event, assuming without accepting that the Applicant did engage in the conduct as alleged, I do not accept that such conduct constituted contravening conduct. First, absent details concerning the immediate context in which the conduct occurred, applying the *Briginshaw* principle, I could not have found that the alleged conduct was unprofessional, abusive, compromising or inappropriate. In other words, it is impossible to make any finding of contravention. Absent such details, it is entirely possible that: (1) the Applicant engaged in the alleged conduct with a view to helping AB, as he did on the previous occasion (see the evidence concerning Conduct A); and (2) his conduct was respectful and sensitive, as it was on that previous occasion.

181. **Conduct D:** I do not accept that the Applicant engaged in this alleged conduct.

[paragraphs redacted]

182. **Conduct E:** In terms of what the Applicant said, and in terms of the context in which he said things, the evidence is wholly bereft of detail. Absent evidence disclosing the words spoken, acting fairly and reasonably, and avoiding speculation, I cannot find that such conduct occurred. Nor can I find that the disclosed conduct was conduct in contravention of the MPP or the relevant codes.

183. **Conduct F:** I find that this alleged conduct did not occur. [redacted]

B.2.4 Sub-issue 2.4

184. The Respondent characterised the alleged conduct of the Applicant as glib, inappropriate, overly familiar, overly inquisitive and unprofessional.

185. According to the Respondent, by reason of his "actions", the Applicant:

- (a) failed to respect the rights, dignity and worth of AB, thereby contravening item (a) of the General Code of Conduct;¹¹¹
- (b) acted in an unprofessional manner, and failed to accept responsibility for his conduct, thereby contravening item (c) of the General Code of Conduct;¹¹²
- (c) harassed AB, thereby contravening item (j) of the General Code of Conduct and clause 8(a)(4) of the MPP;¹¹³
- (d) failed to provide a safe environment for AB, thereby contravening item (l) of the General Code of Conduct;¹¹⁴

¹¹¹ [TB 276].

¹¹² [TB 276].

¹¹³ [TB 276] (item (j) of the General Code of Conduct); [TB 253] (clause 8(a)(4) of the MPP).

¹¹⁴ [TB 276].

(e) created a situation that could be construed as compromising, thereby breaching item (j) of the Coach Code of Conduct.¹¹⁵

186. I have carefully considered the extent to which, if at all, the Applicant's conduct contravened the MPP and the relevant codes as alleged. Ultimately, I cannot conclude that any relevant conduct contravened these policies or codes as alleged.

187. [paragraphs redacted]

C Issue 3: Complaint 4

188. At the main hearing, as to this complaint, the Respondent identified two forms of conduct as contravening conduct. First, the Respondent identified three text messages that the Applicant sent to AB and XT on 11 June 2020 ('**Text messages**' and '**Text message conduct**', respectively). Second, the Respondent identified the Applicant's use of nicknames for AB and others ('**Nick name conduct**').

189. In the course of the hearing, through Mr Knowles, the Applicant objected to the Respondent's reliance upon the Nick name conduct as contravening conduct. This objection was based on the following matters: (1) AB never complained about the Nick name conduct; (2) this alleged conduct did not feature in the investigation; and (3) as a result of these matters, the Applicant did not provide evidence or make submissions in respect of this alleged conduct; and (4) he would suffer prejudice if the Respondent were permitted to advance a contravention case based on this alleged conduct. In the course of the debate that ensued, and after Mr Griscti had accepted that this alleged conduct had not featured in the complaint or the investigation, he abandoned the relevant case. In the circumstances, and in the absence of allegations or evidence relating to other conduct, this particular complaint rested solely on the Text message conduct.

190. In respect of this complaint, the Respondent also relied upon tendency evidence provided by Witness H, Witness G and Witness F.¹¹⁶ According to the Respondent, this evidence demonstrated a pattern of unprofessional, overly familiar and "*unliked behaviours*", and the existence of this pattern was probative of AB's evidence in respect of the complaints.

In relation to this complaint, there was no dispute concerning the content of the Text messages. Screenshots of these messages are annexed to the statutory declaration of Witness C.¹¹⁷ AB also provided a screenshot of the Text messages as they appeared on her mobile telephone.

¹¹⁵ [TB 277]. This point was not developed in great detail. The Respondent appeared to contend as follows: by his "*actions*", the Applicant had embarrassed and humiliated AB, thereby compromising her dignity and damaging her reputation.

¹¹⁶ See paragraphs 49 to 52 of the ASFC [TB 2029].

¹¹⁷ See Annexure C of [REDACTED] statutory declaration [TB 1494, 1495]; and see also the screenshot of these messages annexed to the Applicant's statutory declaration [TB 827].

191. It was also common ground that, prior to the Text message conduct, the Applicant had participated in other text message communications with the members of the Group. In its submissions, written and oral, the Respondent did not refer to these earlier messages. In my view, these earlier messages help to place the Text message conduct in its correct context, and this context is important for the purpose of dealing fairly with Issue 3.
192. In respect of Issue 3, the essential question is this: having regard to the Text message conduct, did such conduct constitute a contravention of the MPP the relevant code of conduct?
193. As to the contraventions, the Respondent submits that:
- (a) By reason of the Text message conduct, the Applicant created a situation that could be construed as compromising, thereby contravening item (j) of the Coach Code of Conduct.¹¹⁸
 - (b) By reason of the Text message conduct, and by refusing to accept responsibility for such conduct, the Applicant breached item (c) of the General Code of Conduct.¹¹⁹
 - (c) By reason of the Text message conduct, the Applicant also breached items (a), (j) and (l) of the General Code of Conduct.¹²⁰
 - (d) By reason of the Text message conduct, the Applicant also breached clause 8(a)(4) of the MPP.¹²¹
194. By way of contrast, in summary, the Applicant contends as follows:
- (a) As to the relevant tendency evidence, it is not corroborative of this complaint. It does not establish a relevant pattern; and it is prejudicial. As to evidence summarised in paragraphs 49 to 51 of the ASFC, as a result of its vagueness and imprecision, it is incapable of establishing that the prior conduct in question was contravening conduct. In the circumstances, the probative value of the evidence was non-existent.
 - (b) The Text messages were informal and “*familiar*”. However, it is necessary to view these messages in their correct context. That context involved a coach encouraging

¹¹⁸ [TB 277]. The Respondent has not explained how the situation was compromising. Presumably, the Respondent contends as follows. By sending the “*twerking*” message to the other members of the Group, the Applicant compromised AB’s dignity and reputation because (1) he suggested that AB commonly engaged in that sort of dancing, thereby compromising her dignity and damaging her reputation and/or (2) he suggested that, when she returned to in-person training at the Centre, she would engage in that sort of dancing, thereby compromising her dignity and damaging her reputation.

¹¹⁹ [TB 276].

¹²⁰ [TB 276].

¹²¹ [TB 253]. According to this clause, it is a breach of the MPP for any person to whom the APP applies to do anything that is contrary to the MPP including but not limited to “*discriminating against, harassing or bullying (including cyber-bullying) any person*”.

athletes to increase their home-based fitness training in anticipation of their return to the sport and gym-based training at the Centre. In light of such matters, there is no sound basis to characterise the Text message conduct as contravening conduct.

- (c) Further, it is incorrect to read the reference as a sexualised reference. Rather, it was a reference to non-sexual activity designed to increase AB's fitness. So much is clear from the surrounding messages and earlier messages.
- (d) Further, the Text message conduct did not amount to harassment within the meaning of the MPP. It is clear that this message did not cause offense or humiliation. Rather, the reaction was one of amusement.

C.1 My decision on Issue 3

195. For the reasons outlined below, I do not consider that the Text message conduct was conduct in contravention of the MPP or any relevant code of conduct. I will make a declaration to the effect that, by engaging in the Text message conduct, the Applicant did not contravene the MPP or the two codes of conduct as alleged. Further, I will make a declaration that this complaint is "*unsubstantiated*" within the meaning of the MPP. It is "*unsubstantiated*" because, notwithstanding the findings to the effect that the Applicant engaged in the Text message conduct, there is no real basis in fact to find any contraventions of the relevant policies or codes of conduct.

C.2 Discussion of Issue 3

196. In its written and oral submissions, the Respondent did not address the question of the context in which the Text message conduct occurred. Nor did it address the significance of the context in which this conduct occurred.
197. By way of contrast, the Applicant gave detailed evidence in respect of such matters.
198. [paragraphs redacted]
199. I accept the relevant evidence of the Applicant without reservation. Similarly, I accept the relevant evidence of Witness C without reservation. For reasons explained in Part VIII above, I see no reason to discount Witness C's evidence.
200. As to the tendency evidence on which the Respondent relies, for present purposes, I do not accept that this evidence has significant probative value (or any real probative value, for that matter).
201. I return to the requirement for the Applicant to accept responsibility for his conduct. As the Applicant did not contravene any other policy-based or code-based requirements, there was no contravening conduct for which he could have been expected to accept responsibility.

202. In light of these findings, I shall dismiss Complaint 4. Put simply, the evidence does not substantiate this complaint. Further, I shall make a declaration that this complaint is unsubstantiated within the meaning of Attachment C3 of the MPP.

D Issue 4

203. I have discussed this issue in the preceding sections. In summary, in respect of the relevant conduct of the Applicant (that is, the conduct as found or admitted), he did not contravene the 2014 MPP, the MPP or any relevant code of conduct.

E Issue 5

204. This issue does not arise for determination.

X Disposition

205. As noted above, prior to the main hearing, I made the following orders:

- (a) On 19 June 2023, with the consent of the parties, I made an order repealing the decisions of the MPP Committee in respect of the Second complaint, being the decisions identified in paragraph 37 above.
- (b) On the same day, with the consent of the parties, I made a declaration that the Second complaint did not constitute a complaint for the purposes of the MPP
- (c) On 18 July 2023, with the consent of the parties, I made an order repealing the decisions of the MPP Committee in respect of the loitering complaint.
- (d) On the same day, I made a declaration that there is insufficient evidence to substantiate the loitering complaint.
- (e) On the same day, with the consent of the parties, I made an order repealing all other decisions of the MPP Committee.

206. In relation to the issues arising for determination at this point in time:

- (a) I have read the written evidence;
- (b) I have read the parties' submissions and other documents;
- (c) I have heard their oral submissions; and
- (d) I have carefully considered these things.

207. For the reasons stated above:

- (a) I **DISMISS** the First complaint in its entirety.

- (b) In relation to Complaint 1, I **DECLARE** that:
- (i) The Applicant did not touch ABAs alleged.
 - (ii) This complaint is unsubstantiated within the meaning of the MPP.
- (c) In relation to Complaint 3, I **DECLARE** that:
- (i) The Applicant engaged in the conduct identified in paragraphs 207(a), (b), (c) and (e) above.
 - (ii) By engaging in that conduct, the Applicant did not contravene the MPP or the two codes of conduct as alleged.
 - (iii) This complaint is unsubstantiated within the meaning of the MPP.
- (d) In relation to Complaint 4, I **DECLARE** that:
- (a) The Applicant engaged in the Text message conduct.
 - (b) By engaging in the Text message conduct, the Applicant did not contravene the MPP or the two codes of conduct as alleged.
 - (c) This complaint is unsubstantiated within the meaning of the MPP.

208. I refer to the Amendment application and the Document production application. If necessary, I shall hear from the parties in respect of those applications, including the future management of those applications. In relation to these applications, I make the following direction: on or by 4.00pm on **21 August 2023**, the parties shall inform the NST Registry whether the Tribunal is required to hear and determine these applications.

Signed:



Robert Heath

7 August 2023