`QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Laegal v Scenic Rim Regional Council* [2018] QIRC 136
PARTIES:	**Laegel, Dean** (Applicant) v **Scenic Rim Regional Council** (Respondent)
CASE NO:	TD/2017/104
PROCEEDING:	Application for reinstatement
DELIVERED ON:	15 November 2018
HEARING DATES:	23, 24, 25 July 2018
MEMBER:	O'Connor DP
HEARD AT:	Brisbane
ORDER:	**The application is dismissed.**
CATCHWORDS:	INDUSTRIAL LAW – APPLICATION FOR REINSTATEMENT – where employee was dismissed for damaging Council property – where employee was dishonest as to how the damage occurred – where employee failed to take appropriate care and attention – whether dismissal was harsh, unjust or unreasonable
LEGISLATION:	*Industrial Relations Act 2016* (Qld) s 316, s 317 *Public Sector Ethics Act 1994* (Qld) s 4 *Local Government Act 2009 (Qld) s 197* *Local Government Regulation 2012 (Qld) s 278, s 279, s 280, s 283*

CASES:	*Arnott's Ltd v TPC* (1990) 97 ALR 555
	Bostik (Australia) Pty Ltd v Gorgevski (No 1) (1992) 36 FCR 20
	Byrne v Australian Airlines Limited (1995) 185 CLR 410
	Clark v Ryan (1960) 103 CLR 488
	Dasreef v Hawchar (2011) 243 CLR 588
	G A Stewart v University of Melbourne [2000] AIRC 779
	Gold Coast District Health Service v Walker (2001) 168 QGIG 258
	Harris Scarfe v Ernst & Young (No 6) [2006] SASC 148
	Jones v Brite Services [2013] FWC 3392
	Makita v Sprowles (2001) 52 NSWLR 705
	Moreton Bay Regional Council v Moorhead [2014] ICQ 013
	R v Fowler (1985) 39 SASR 440
	Stark v P&O Resorts (Heron Island) (1993) 144 QGIG 914
	TPC v Arnott's Ltd (No 5) (1990) 92 ALR 527
	Universal Music v Sharman (2005) 220 ALR 1
APPEARANCES:	Mr T Egglestone, agent for the applicant
	Ms C Brattey of Corrs Chambers Westgarth, for the respondent

Reasons for Decision

[1] The applicant commenced employment with the respondent on 29 May 1995, his employment was terminated on 1 November 2017. At the time of his dismissal, the applicant was employed as a horticultural ganger reporting directly to his foreman, Mr Rawn Mitchell. The applicant lodged an application for reinstatement on 15 November 2017 contending that the dismissal was harsh, unjust and unreasonable and claiming that it was an "unfortunate accident". An internal investigation and show cause process was undertaken by the respondent which concluded that the allegations were substantiated. The applicant rejected the outcome of the investigation and claimed tangentially in his application for reinstatement that the investigative process adopted by the respondent was somehow biased or lack procedural fairness by suggesting that it was a "cover up". It was claimed that notwithstanding what the applicant had to say, it would not be listened to, and instead the respondent would prefer the evidence of others as to how the incident occurred.

Onus of proof

[2] Prima facie, it is accepted that an applicant carries the onus of proving that the dismissal was harsh, unjust or unreasonable.[1]

The legislative scheme

[3] The principles governing unfair dismissals are well established. In order to succeed in a matter of this nature the applicant must demonstrate that the dismissal was unfair. A dismissal will be unfair if it is harsh, unjust or unreasonable.[2] The words "harsh", "unjust", and "unreasonable" are to be given their plain and ordinary meaning. The matters which this Commission must consider when deciding whether a dismissal was unfair are set out in s 320 of the *Industrial Relations Act 2016* (Qld) as follows:

> **320 Matters to be considered in deciding an application**
> In deciding whether a dismissal as harsh, unjust or unreasonable, the commission must consider:
> (a) whether the employee was notified of the reason for dismissal; and
> (b) whether the dismissal related to—
> (i) the operational requirement of the employer's undertaking, establishment or service; or
> (ii) the employee's conduct, capacity or performance; and
> (c) if the dismissal relates to the employee's conduct, capacity or performance -
> (i) whether the employee had been warned about the conduct, capacity or performance; or
> (ii) whether the employee was given an opportunity to respond to the allegation about the conduct, capacity or performance; and

[1] *Gold Coast District Health Service v Walker* (2001) 168 QGIG 258, 259.
[2] *Industrial Relations Act 2016* s 316.

(d) any other matters the commission considers relevant.

[4] For the following reasons the applicant has failed to discharge the onus of demonstrating that the dismissal was unfair. Accordingly, the application must be dismissed.

The facts

[5] The applicant commenced work for the then Boonah Shire Council on 29 May 1995. That local government was absorbed by the newly created Scenic Rim Regional Council in 2008. The applicant maintained his continuity of service with the new council and remained in its employ until his dismissal. During the periods relevant to this matter the applicant's conditions of employment were set out in the *Queensland Local Government Officers' Award 1998* and the *Scenic Rim Regional Council Enterprise Bargaining Certified Agreement 2012 to 2014*.

[6] Clause 1.8(a) of the Certified Agreement is in the following terms:

> Council and its employees are committed to an awareness of the workplace Values and to ensure that they are adhered to.

[7] The respondent's workplace values are reflected in its Code of Conduct.[3] That Code is informed by s 4 of the *Public Sector Ethics Act 1994* (Qld) which sets out the "ethics principles" as being fundamental to good public administration. Those principles are:

> integrity and impartiality
> promoting the public good
> commitment to the system of government
> accountability and transparency

[8] The sentiment of those principles is echoed in the *Local Government Act 2009* (Qld).[4] The values in the respondent's code of conduct which are of particular relevance to this matter are "Honesty" and "Accountability". Those values are, respectively, explained in the code as:

> We act with integrity and when we ask an honest question, we get an honest answer.
>
> We accept ownership of our role and responsibility for our actions.

The code later goes on to expand on those values.

[9] For managers the code also makes additional provision:

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[3] Ex. 8.
[4] Section 4(2).

> … if you're responsible for managing or supervising others, you must ensure that you model the values and principles outlined in this code and ensure that employees within your area of responsibility understand and comply with the code;

[10] These additional requirements were relevant to the applicant as he was a ganger who oversaw two other labourers.

[11] It is clear that the applicant was trained appropriately;[5] completed a refresher on 23 June 2017;[6] was aware of the expectations of his managers; acknowledged that the code of conduct applied to his employment and that a breach of it may result in disciplinary action, including termination of his employment;[7] and, he had a responsibility under workplace health and safety obligations to make sure he reported incidents correctly and properly.[8] Moreover, the applicant was aware that as much information as possible should be provided on the form reporting an incident.[9]

[12] On 24 August 2017 an incident occurred at the Boonah Cemetery involving a truck and water trailer belonging to the respondent. After the incident the trailer was moved to a shed at the Cemetery, but the truck remained in service. A few days later it was noticed that a toolbox attached to the truck by brackets was damaged, it was sent to a workshop for repair. The trailer was later sent to the same workshop for repair where it was noticed that the damage to the truck was more extensive than just the toolbox.

[13] Two conflicting accounts of what caused the damage emerged. The first, set out by the applicant in an incident report provided on the same day, attributed the event to a hairline fracture in the drawbar of the trailer. The second account, which points to the trailer jack-knifing into the truck, is a based on the conclusions drawn from a survey of the damage to the truck and trailer. The two inconsistent accounts triggered further investigation, the commencement of a disciplinary process and, on 1 November 2017, the applicant's dismissal. The applicant now seeks to be reinstated to his former position. The respondent resists the application.

The applicant's account

[14] The applicant denies that he jack-knifed the trailer into the truck. He told the Commission that on the morning of the incident, the trailer was already attached to the truck. He conducted a pre-start inspection of the truck and trailer and did not detect any damage. He drove the truck during the morning without incident. Sometime around noon, he arrived at the Boonah Cemetery. He reversed the truck about one metre and then drove forward when he heard a bang. He got out of the truck and discovered that the hitch point

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[5] T1-29 Ll 14-17.
[6] T1-29 L 43; T1-30 Ll 17-18.
[7] T1-26 Ll 26-28.
[8] T1-81 Ll 39-43.
[9] T1-31 Ll 21-23.

had broken and was on the ground. He says he examined the hitch point and noticed a hairline fracture. Apart from damage to the electrical sockets there was no other observable damage.

[15] The applicant denied that he was responsible for the damage. He could not explain how the damage occurred. He told the Commission:

> HIS HONOUR: Did you do a visual inspection of the trailer – the truck, rather, in the morning? Is that your normal practice, to look at it?
>
> MR LAEGEL: Yes, there – yep.
>
> HIS HONOUR: And you noticed none of these things?
>
> MR LAEGEL: No. No.
>
> HIS HONOUR: So how do you explain between the time that you did a visual inspection in the morning and the damage that's obviously there, because it's in the photos, only a short time thereafter?
>
> MR LAEGEL: I could not tell you that, sorry, but, yeah, it wasn't from me, so I know that much.
>
> HIS HONOUR: Pardon me?
>
> MR LAEGEL: Wasn't from me doing the damage, so yes.

[16] The applicant told the Commission that following the incident he attempted to speak with Mr Mitchell, his immediate supervisor, without success. His statement which was tendered into evidence records:

> MR LAEGEL DID TRY AND CALL MR RAWN MITCHELL BUT HE NEVER ANSWERED HIS PHONE MR LAEGEL THEN PHONED THE OFFICE WHEN HE COULD NOT CONTACT RAWN MITCHELL, RAWN MITCHELL DID NOT KNOW THAT THERE WAS AN INCIDENT AT THE BOONAH CEMETRY, (sic) UNLESS THE OFFICE TOLD HIM.[10]

[17] However, in cross-examination, the applicant admitted that the statement was incorrect and that he had spoken with Mr Mitchell following the incident.

[18] The applicant was under an obligation to complete an Incident Report Form and the Damage or Loss of Vehicle, Plant or Property form. The incident form was meant to be completed within 24 hours of the reportable event including the section on how to prevent a reoccurrence. In the Incident Report, the applicant recorded: "Water Tanker 490. Drawbar broken going up to Cemetery Boonah." In cross-examination the applicant accepted that the description of where the incident occurred was misleading. He also

[10] Ex. 4.

accepted that whilst he had an obligation to complete the Damage or Loss of Vehicle, Plant or Property form he did not do so because he was not given a copy of it to complete.

The respondent's account

[19] On 4 September 2017 the truck and trailer were both brought to the Beaudesert workshop for maintenance and repair. Mr Rodney Stephens was, at the relevant time, the Fleet Workshop Supervisor for the respondent and has held that role for 10 years. He is a qualified fitter and turner with approximately 45 years of experience working with steel and is responsible for all of the respondent's vehicles (both heavy and light fleet) including repairs and maintenance. He was not of the view that the tow hitch had just broken. From his experience and after examining the break it was not possible, in his view, for the tow hitch to just break.

[20] While the truck and trailer were in the Beaudesert yard at the same time, Mr Stephens said that he could see that the damage to both vehicles matched up and observed that the dent in the trailers A-frame lined up with the towbar frame at the back of the truck; and, the damage to the trucks' toolbox was consistent with the tyre of the trailer being pushed up against it in a jack-knife situation. As the toolboxes are fixed to the truck with metal brackets it takes a great deal of force to move them.

[21] The broken tow hitch had no signs of fatigue and he did not believe that it had simply broken off. Mr Stephens observed that the break was clean with no rust where the tow point had broken off. In his view, the break was consistent with a great deal of force being applied which caused it to shear off the tow hitch. This was caused by the trailer being severely jack-knifed into the truck while the truck was being reversed.

[22] Mr Stephens said that the type of damage present was not consistent with a hairline fracture as suggested by the applicant. In particular, the paint work on the tow-bar was consistent with the tow point being twisted to the point of breaking. Mr Stephens suggested that had the damage been as a consequence of a hairline fracture there would not be the same damage to the paint work.

[23] During his working life, Mr Stephens has seen a number of damaged vehicles and equipment caused by jack-knife situations. Based on that experience, Mr Stephens expressed the view that metal does not just break without extreme force. It was therefore reasonable to conclude that the break was caused by a jack-knife.

[24] Mr Stephens' evidence was that when incidents are not reported correctly it effects his team as they have to determine why the part broke and how it can be prevented from happening again. Moreover, the repair to the vehicle can be impacted because the damage may not be correctly identified.

The investigation

[25] The investigation was undertaken by Mr Hugh Dunne the respondent's Manager of Property and Operations. As part of the investigation, Mr Dunne spoke with Mr Joel Gillett, a passenger in the vehicle at the time of the incident. The report records that Mr Gillett informed Mr Dunne that the damage was incurred when the truck jack-knifed as it was being reversed. After considering the evidence gathered through the investigation and having regard to the applicant's response to the disciplinary interview on 28 September 2017 the report concluded that:

> 1. Mr LAEGEL failed to report significant damage to Council property.
> 2. Mr LAEGEL deliberately lied and was dishonest as part of Council's investigation into how the damage occurred to the truck and trailer he was driving on 24 August 2017.
> 3. Mr LAEGEL failed to take appropriate care and attention when driving a Council truck and trailer on 24 August 2017.
> 4. Mr LAEGEL has failed to take accountability for his actions by not admitting responsibility for the damage to the Council truck and trailer.

The show cause process

[26] On 18 October 2017 the Show Cause process was initiated by Mr Barke following a memorandum from the Director of Infrastructure, Mr Patrick Murphy. The applicant was required to respond by 30 October 2017 to the show cause letter. The allegations were as follows:

> Allegation 1
>
> It is alleged that you failed to report significant damage to Council property.
>
> Allegation 2
>
> It is alleged that you have deliberately lied and been dishonest as part of Council's investigation into how the damage occurred to the truck and trailer you were driving on 24 August 2017.
>
> Allegation 3
>
> It is alleged that you failed to take appropriate care and attention when driving a Council truck and trailer on 24 August 2017.
>
> Allegation 4
>
> It is alleged that you failed to take accountability for your actions by not admitting responsibility for the damage to the Council truck and trailer.

[27] The applicant was informed that he was required to attend a disciplinary interview to respond to those allegations. The allegations subsequently formed part of the show cause process.

The applicant's case

[28] In addition to his own evidence, the applicant sought to rely on the evidence of Mr Craig Pollard, a horticulturalist, and on the "expert report" prepared by Mr Alan Lyle Marburg.

[29] Mr Pollard gave evidence by telephone. On the Incident Report Form the applicant has recorded that Mr Craig Pollard was a witness. At the time of the incident Mr Pollard was some 15 to 20 metres away and was using a loader to spread soil. He did not witness the incident. He told the Commission that he did not see or hear the incident. The statement of Mr Pollard records:

> I noticed that the tow hitch of the trailer had snapped and was now sitting on the ground directly behind the truck. I picked up the tow hitch to examine it. What I noticed was corrosion on each side of the fracture suggesting to me that there had been a previous incident with the trailer prior to Dean's incident.[11]

[30] Mr Pollard did not give evidence that he saw a hairline fracture but rather observed corrosion on either side of the fracture. As he told the Commission, "I'm not a mechanic."[12]

[31] The applicant called Mr Marburg, an engineer, to provide expert evidence against the contention that the accident was as a consequence of a jack-knife. Mr Marburg prepared a report dated 5 June 2018. The report was not tendered into evidence by the representative of the applicant. Irrespective, the report is of little probative value as it concludes:

> Without the apparent damaged components of the trailer being available for examination, a definitive cause of the failure of the Tow Coupling cannot be determined[13]

[32] Furthermore, during the hearing the following exchange occurred:

> HIS HONOUR: So it – could it possibly be consistent with – as they say there, in E14 – a jack-knife – that sort of damage could be incurred?
>
> MR MARBURG: It – that is indicative – the damage is indicative of a – a jack-knife situation.
>
> HIS HONOUR: Yes?
>
> MR MARBURG: But I couldn't see how, based on the measurements I took, that the damage – correlating the damage on the drawbar with the damage on the truck under the given area where that incident happened, I couldn't see that

[11] Ex. 13.
[12] T1-45 L 47.
[13] Report of Alan Lyle Marburg, p 7.

HIS HONOUR: And when you say that, it's from what you were told about what had happened and you rely on that information, as well?

MR MARBURG: I have, yes.

[33] Mr Marburg was also cross-examined on the report. In cross-examination he was asked:

MS BRATTEY: So just one final question for you, Mr Marburg, thank you. I just want to confirm your summary at page 7. I think his Honour has already put the question to you. You can't determine the definitive cause for the failure of the tow – tow coupling?

MR MARBURG: No, I cannot.

MS BRATTEY: Okay?

MR MARBURG: Not without physically sighting it and inspecting it.

[34] *Clark v Ryan*[14] involved a debate about the admissibility of the expert evidence of a Mr Foster Joy relating to the way in which articulated vehicles jack-knife on corners. As Dixon CJ explained:

> If it had been desired to prove how in fact semi-trailers of the kind driven by the defendant Clark do in practice behave, perhaps a witness or witnesses experienced in their actual use might have given admissible evidence, not of opinion, but of the fact. But Mr. Foster Joy did not possess that experience. If it had been desired to give technical evidence of the physics involved and of any relevant opinions deduced therefrom, possibly that might have been done by a qualified witness although one may doubt how intelligible to the jury the evidence would have been and what useful purpose it would have served. But it certainly does not appear that Mr. Foster Joy was qualified to give such testimony and in fact he did not essay to do so. What in truth occurred was to use the witness to argue the plaintiff's case and present it more vividly and cogently before the jury.

[35] The report of Mr Marburg does not disclose the factual basis and assumptions on which his opinions were based. Moreover, expert opinion is not usually admissible unless the constituent facts on which it is based are properly proved by admissible evidence.[15]

[36] Mr Marburg was not provided with a complete copy of the Investigation Report prepared by the respondent. Relevantly, Mr Marburg did not have access to the email between Mr Dunne and Mr Stephens dated 29 September 2017. That email sets out the damage as observed by Mr Stephens. Moreover, photographs showing the twist in the trailer and drawbar had not been provided to Mr Marburg. The applicant's representative, Mr Eggleston, appears to have been the main source of information.

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[14] (1960) 103 CLR 488, 492.

[15] See: Heydon J in *Makita v Sprowles* (2001) 52 NSWLR 705; *Dasreef v Hawchar* (2011) 243 CLR 588; *TPC v Arnott's Ltd (No 5)* (1990) 92 ALR 527; *Arnott's Ltd v TPC* (1990) 97 ALR 555, 589-598; *R v Fowler* (1985) 39 SASR 440, 443 per King CJ.

[37] In an attempt to ascertain the exact nature of the instructions given to Mr Marburg, the respondent's solicitors wrote to Mr Eggleston on 7 June 2018. In that correspondence, the solicitors for the respondent sought disclosure of the instructions given by Mr Eggleston. The Commission issued a Directions Order on 13 June 2018 compelling compliance with the letter of 7 June 2018.

[38] Mr Eggleston, in what can only be described as an extraordinary reply to the solicitors for the respondent, wrote:

> ITEM 1 THE EMAILS THAT YOU REQUESTED IS LIMITED TO WHAT YOU ALREADY HAVE FROM ME.
>
> MY FIRST CONTACT WITH ALLAN WAS BY PHONE TO SEE IF HE COULD DO THE INSPECTION
>
> MY SECOND PHONE CALL WAS TO ORGANISE A DATE FOR THE INSPECTION
>
> MY THIRD PHONE CONVERSATION WAS TO GIVE MR ALLAN MARBUG (sic) DIRECTIONS TO SITE
>
> EMAILS APART FROM WHAT YOU HAVE I HAVE NEVER KEPT THE EMAILS FROM ALLAN MARBURG
>
> EXCEPT FOR THE EMAILS YOU HAVE A ONE-OF LIKE ALLAN MARBURG I WOULD NOT HAVE KEPT COPIES ON MY COMPUTER THEY ARE USUALY (sic) DELETED
>
> I HAVE ATTACHED SOME EMAILS WHERE I HAVE EMAILED DATES TO ALLAN MARBURG FOR INSPECTION REFER ATTACHMENT 7 MISS BRATTEY I CANNOT GIVE YOU WHAT I DON'T HAVE

[39] On 11 July 2018 a Notice of Non-Party Disclosure was served on Mr Marburg. At the time of hearing this matter the notice had not been complied with.

[40] The evidence before the Commission was that Mr Marburg relied on the information supplied by Mr Eggleston, the exact nature and extent of which is unknown. Mr Marburg did not speak with the applicant or Mr Pollard. He did not speak with anyone connected with the investigation of the incident. Mr Marburg was given a copy of a diagram prepared by Mr Eggleston. According to the applicant, the diagram was prepared by Mr Eggleston consequent upon a telephone conversation and a site inspection. The applicant's evidence was that he had never seen the diagram before. It was on the basis of the diagram that Mr Marburg concluded that the applicant reversed the truck in an anti-clockwise direction and accordingly the trailer could not have jack-knifed against the truck on the passenger side.

[41] In *Universal Music v Sharman*[16] Wilcox J rejected the evidence of a computer expert because the solicitors instructing him had, by their emailed instructions, shaped not merely the expression but also the content and course of the opinion.

[42] Bleby J in *Harris Scarfe v Ernst & Young (No 6)*[17] ordered the production of draft audit negligence reports, which had been destroyed, even if it was necessary to recreate them from computer metadata. Whilst the decision refers to the procedural rules of the Supreme Court of South Australia it is nevertheless instructive as it deals with a consideration of some of the factors which ought to be considered in assessing expert reports:

> [19] The history of r 38.01 and judicial comments on the purpose of that Rule were referred to by Gray J in *Kenneally v Pouras*…. It is evident from that history, the content of r 38.01, the Practice Direction which accompanied it, the subsequent enactment of r 38.01A and Practice Direction 46A and their content that the Rule and Practice Directions have a number of purposes. One is to ensure full and effective disclosure of an expert's opinion and of the material on which it is based well before trial. Another is to emphasise that experts are not engaged for the purpose of moulding their opinion to suit the needs of the client, but that they are there to assist the Court and to provide an independent opinion based solely on the proper exercise of their professional or other expertise. Another is to ensure that where an expert has changed or qualified his or her opinion, that change or qualification is made known to all interested parties. Yet another is to ensure transparency between experts and those instructing them so that where a client or their solicitors may have made some suggestion or questioned the opinion, resulting in some change or qualification, that change or qualification and the reason for it is revealed. Another purpose of the Rule was to effect a change of culture among some groups of experts and those instructing them who perceived the function of the expert to be to act solely in the interests of and for the benefit of the client in forming and moulding their opinion.
>
> [20] It was for those reasons that, not only were experts then required to state the factual basis and assumptions on which their opinions were based, thereby reflecting their instructions, but that they and their instructors were thenceforth required to list and supply copies of all documents referred to or prepared by or at the direction of the expert ... Among other things, the Rule was designed to expose the type of change to or formulation of an expert's opinion exposed in the course of cross-examination in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*.
>
> …
>
> [24] It also follows that, if the Rule is complied with, the grounds of successfully challenging an expert's opinion may, in some cases, be expanded. In others, where the expert has maintained true independence and integrity in forming the opinion, the wider requirements of disclosure may well reinforce the strength of the opinion, even where that has resulted in some change of or qualification to the original opinion.

[16] (2005) 220 ALR 1, [226].
[17] [2006] SASC 148, [44].

The respondent's case

[43] The respondent submits that the applicant knew that he had jack-knifed the trailer and deliberately tried to cover up his conduct. He did not correctly complete the Incident Report; he failed to complete a Damage or Loss to Vehicle, Plant or Property Form; was evasive in his answers during a meeting with Mr Mitchell and Mr Luke Volger, Coordinator Parks Gardens and Cemeteries, on 12 September 2017; and, blamed his colleagues for his own misconduct.

[44] To support its case the respondent relied on the unchallenged evidence of Mr Stephens and Mr Mitchell.

Termination procedures

[45] Mr Barke, the respondent's Chief Executive, identified the following factors in arriving at his decision to terminate the applicant's employment:

(a) The seriousness of the allegations that had been substantiated against the applicant; the applicant's response at the disciplinary interview on 28 September 2017;

(b) The applicant's written response dated 24 October 2017;

(c) The extent to which the applicant had breached Council's procedures, Council's code of conduct and Council's values;

(d) The extent to which the applicant had been found to have lied and been dishonest, deceitful and uncooperative in Council's investigation process, despite being given numerous opportunities to tell the truth and despite being reminded of his responsibility to be honest and truthful;

(e) The applicant had stated in his written response that he took no responsibility for the damage to the truck and the trailer. This confirmed in Mr Barke's view that the applicant lacked accountability in his role as a ganger. As a ganger it was his responsibility to model Council's code of conduct for employees and corporate values and to follow Council's policies and procedures; and

(f) The applicant's previous written warning in 2014 for failing to perform all work safely, failing to follow safe work practices and failing to report a condition that may have impeded his ability to perform work safely.[18]

[46] Mr Barke said that central to his decision to terminate the applicant's employment was the finding that the applicant had been dishonest during the investigation. This was conduct that he regarded as completely unacceptable and inconsistent with Council's values which was something he thought needed to be addressed to reinforce Council's expectations about standards of behaviour.

[18] Ex. 21, [24].

[47] The Commission must determine whether or not the applicant's conduct was, in fact, such as to destroy the relationship of trust and confidence between the employer and the employee.[19]

[48] Mr Barke was of the view that the relationship between employee and employer had been irreparably damaged.[20] In a similar vein, Mr Mitchell's evidence was that his team was small and comprised two gangers and four labourers. Mr Mitchell did not want the applicant as part of that team as he no longer trusted him.

[49] The evidence before the Commission is that the applicant lied during the investigation of the incident. He told the investigators that the draw bar was broken going up to the Boonah cemetery. He recorded on the incident report that Mr Pollard was a witness to the accident. He failed to record in the incident report that Mr Gillet was a passenger in the vehicle at the time of the incident. In the applicant's response to the Show Cause letter he asserts: "The fleet supervisor is guilty of getting rid of the evidence of the hitch point. This can also be verified" and further, "I cannot believe the fleet supervisor's statement after destroying the evidence and I completely reject his statement." In cross-examination, the applicant accepted that he did not think that the evidence was deliberately destroyed by his supervisor.

[50] Martin J in *Moreton Bay Regional Council v Morehead* wrote:

> It may be the case that many, if not most, lies told to an investigation into employee misconduct will indeed destroy any relationship of trust and confidence that may have existed. In each case, however, such a determination must be made in the light of all of the circumstances, in the manner provided for by law.

[51] The assertion by the applicant that the evidence was destroyed by his supervisor was a serious one. It had no basis in fact and this false assertion was maintained until trial. It served only to further damage the relationship of trust and confidence between the applicant and his employer.

[52] In *Jones v Brite Services*,[21] Deputy President Gostencnik said:

> [57] A failure by an employee to honestly answer reasonable questions put to the employee by the employer about alleged workplace or work related conduct will be a valid reason for dismissal if the failure to answer honestly destroys the relationship of trust and confidence between the employer and employee.

Matters to be considered in deciding the application

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[19] *Moreton Bay Regional Council v Moorhead* [2014] ICQ 013, [24].
[20] Ex. 21, [26].
[21] [2013] FWC 3392.

[53] It is convenient to turn at this point to the matters which s 320 of the Act requires the Commission to consider in determining whether a dismissal was harsh, unjust or unreasonable:

(a) Was the applicant notified of the reasons for his dismissal?

[54] The evidence before the Commission shows that the termination letter of 2 November 2017 from Mr Barke clearly, and in some detail, notified the applicant of the reasons for his dismissal.

[55] Accordingly, for the purpose of satisfying s 320(a), I conclude that the applicant was notified of the reasons for his dismissal.

(b) Did the dismissal relate to operational requirements of the applicant's conduct, capacity or performance?

[56] For the purpose of satisfying s 320(b), I conclude that, as the termination letter of 2 November 2017 made clear, the applicant's dismissal related to his conduct as an employee of the respondent.

(c) Had the applicant been warned about the conduct, capacity or performance, or was the applicant given an opportunity to respond to the claim about the conduct, capacity or performance?

[57] The applicant has not argued, nor does the evidence before the Commission suggest, that he was denied procedural fairness. The applicant was given an opportunity by his supervisor to explain the circumstances surrounding the incident of 24 August 2017; he was sent a show cause letter on 20 September 2017 particularising the allegations against him and given an opportunity to respond; the applicant attended a disciplinary interview on 28 September 2017 accompanied by his union representative, Mr Kurt Neumann of the Australian Workers' Union Queensland; on 18 October 2017 he was invited through a show cause process to demonstrate why his employment should not be terminated; and on 1 November 2017, his employment was terminated with four weeks' pay in lieu of notice.

(d) Any other matters that the Commission considers relevant

[58] Mr Barke as the Chief Executive Officer is authorised to take disciplinary action (including termination) against the applicant (a local government employee) in accordance with the power contained in s 197 of the *Local Government Act 2009* and the provisions of Chapter 8, Part 3, Division 1 of the *Local Government Regulation 2012*.

[59] Section 197 provides as follows:

197 Disciplinary action against local government employees

(1) The chief executive officer may take disciplinary action against a local government employee.

(2) A regulation may prescribe—

(a) when disciplinary action may be taken against a local government employee; and

(b) the types of disciplinary action that may be taken against a local government employee.

[60] Chapter 8, Part 3, Division 1 of the *Local Government Regulation 2012* relevantly provides:

278 What div 1 is about

This division prescribes, for section 197(2) of the Act, when the chief executive officer may take, and the types of, disciplinary action.

279 When disciplinary action may be taken

The chief executive officer may take disciplinary action against a local government employee if the chief executive officer is satisfied the employee has—

(a) failed to perform their responsibilities under the Act; or

(b) failed to perform a responsibility under the Act in accordance with the local government principles; or

(c) taken action under the Act in a way that is not consistent with the local government principles.

280 Types of disciplinary action

(1) The disciplinary action taken by the chief executive officer against a local government employee may be 1 or more of the following—

(a) dismissal;

(b) demotion, including a reduction in remuneration;

Examples of demotion of a local government employee—

- a reduction in the classification level of the local government employee's employment and a corresponding change in the employees duties
- a reduction in the local government employee's level of remuneration within the classification level of the employee's employment

(c) a deduction from salary or wages of an amount of not more than 2 penalty units;

(d) a written reprimand or warning.

Note—

If the disciplinary action to be taken is dismissal, the dismissal must comply with the requirements that apply in relation to the local government employee under the *Industrial Relations Act 1999*, chapter 2A or 3.

(2) A written reprimand or warning—

(a) must state the following—

(i) the employee's conduct that is disapproved of;

(ii) the remedial action needed to rectify the conduct;

(iii) the period within which the remedial action is to be taken;

(iv) the possible consequences for a repeat of the conduct by the employee; and

(b) is part of a local government employee's employment record.

…

283 Employee to be given notice of grounds for disciplinary action

(1) Before the chief executive officer takes disciplinary action against a local government employee, the chief executive officer must give the employee—

(a) written notice of the following—

(i) the disciplinary action to be taken;

(ii) the grounds on which the disciplinary action is taken;

(iii) the particulars of conduct claimed to support the grounds; and

(b) a reasonable opportunity to respond to the information contained in the written notice.

(2) The grounds and particulars are taken to be the only grounds and particulars for the disciplinary action taken, and no other ground or particular of conduct can be advanced in any proceeding about the disciplinary action taken against the local government employee.

[61] The question of whether the respondent had complied with the provisions of the *Local Government Act 2009* or the *Local Government Regulation 2012* was not argued before the Commission. Nevertheless, I am satisfied that letter of 18 October 2017 is sufficient to comply with section 283 of the Regulations. The allegations leading to the applicant's dismissal were put to him in a letter from the Chief Executive dated 18 October 2017. The allegations were set out in clear terms and particularised. It set out the disciplinary action to be taken; the grounds on which the disciplinary action was taken; and, gave the applicant a reasonable opportunity to respond to the information contained in the written notice.

Conclusion

[62] The role of the Commission in an application such as this is to consider whether the dismissal was harsh, unjust, or unreasonable, or done for an invalid reason. There is no suggestion in this matter that the dismissal occurred as the result of an invalid reason.

[63] Accordingly, it is only necessary for me to examine whether the applicant's dismissal was unfair as the result of it being harsh, unjust, or unreasonable. The words "harsh, unjust or unreasonable" have their ordinary meaning. In *Bostik (Australia) Pty Ltd v Gorgevski (No 1)*, Sheppard and Heerey JJ said of the phrase "harsh, unjust or unreasonable" as it appeared in the *Manufacturing Grocers Award 1985*:

> These are ordinary non-technical words which are intended to apply to an infinite variety of situations where employment is terminated. We do not think any redefinition or paraphrase of the expression is desirable. We agree with the learned trial judge's view that a court must decide whether the decision of the employer to dismiss was, viewed objectively, harsh, unjust or unreasonable.

> Relevant to this are the circumstances which led to the decision to dismiss and also the effect of that decision on the employer. Any harsh effect on the individual employee is clearly relevant but of course not conclusive. Other matters have to be considered such as the gravity of the employee's misconduct.[22]

[64] Guidance on what might be considered "harsh, unjust, or unreasonable" can also be found in the judgment of McHugh and Gummow JJ in *Byrne v Australian Airlines Limited*:

> … It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."[23]

[65] In *Stewart v University of Melbourne*, Ross VP considered s 170CG(3) of the *Workplace Relations Act 1996* (Cth) in which he followed the joint judgment of McHugh and Gummow JJ in *Byrne*.[24] Ross VP wrote:

> … a termination of employment may be:
>
> - Harsh, because of its consequence for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct;
> - Unjust, because the employee was not guilty of misconduct on which the employer acted; and/or
> - Unreasonable, because it was decided on inferences which would not reasonably have been drawn from the material before the employer. [25]

[66] In *Stark v P&O Resorts (Heron Island),*[26] Chief Commissioner Hall (as his Honour then was) wrote:

> Where… an application... is advanced on the basis that a dismissal was harsh, unreasonable or unfair, the task of the Commission is to assess whether it should intervene to protect the applicant against a decision which is fundamentally one for the employer to make. Ordinarily intervention will be justified only where the employer has abused the right to dismiss. Ordinarily where an employer conducts a full and extensive investigation and gives the employee a reasonable opportunity to respond to allegations being made against him, an honest decision of the employer that misconduct warranting dismissal has occurred will, if formed on reasonable grounds, will be held immune from interference by the Commission….

[67] The respondent was entitled on the evidence before it to come to the conclusion that the incident on 24 August 2017 was caused by a jack-knife. The conclusion of the respondent

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[22] *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* (1992) 36 FCR 20, 28.
[23] *Byrne v Australian Airlines Limited* (1995) 185 CLR 410, 465.
[24] *Byrne v Australian Airlines Limited* (1995) 185 CLR 410.
[25] *G A Stewart v University of Melbourne* [2000] AIRC 779, [74].
[26] *Stark v P&O Resorts (Heron Island)* (1993) 144 QGIG 914, 916.

to dismiss the applicant was formed on reasonable grounds and followed an internal investigation and extensive show cause process.

[68] Having regard to the factors that the Commission must consider in s 320 of the Act, the case advanced by the applicant has failed to discharge the onus of establishing that the dismissal was harsh, unjust or unreasonable. It was not, therefore, unfair.

Order

The application is dismissed.