



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Phillip Leyshan

v

Wyndham City Council
(U2013/7274)

COMMISSIONER CRIBB

MELBOURNE, 14 OCTOBER 2013

Application for relief from unfair dismissal - valid reason

[1] This decision concerns an application by Mr Phillip Leyshan (the Applicant), under section 394 of the Fair Work Act 2009 (the Act), for an unfair dismissal remedy in respect of his summary dismissal by Wyndham City Council (the Council, the Respondent).

[2] Mr Leyshan gave evidence as did Mr B Parkinson, Branch Secretary, Australian Services Union (ASU) and Mr D Stewart, Team Leader Horticulture, on his behalf.

[3] For the Council, evidence was given by Mr M Boyle, Parks Coordinator; Mr S Walden, Manager Parks; Mr S Lambert, Director Corporate Services; Ms A Dixon, Manager Organisational Development; Ms K Thompson, Chief Executive Officer; Mr M Stabb, Director of Infrastructure and Witness X, the private investigator who undertook the investigation for the LKA Group.

THE ISSUES

Introduction

[4] Mr Leyshan was summarily dismissed for deliberate and wilful conduct (misconduct)¹, for three reasons:

- for making the Statement, on 27 December 2012, to the effect of “I don’t care what you do, just don’t get caught, don’t make me have to explain why you are doing nothing.” (the Statement).²
- for not effectively monitoring and supervising the work output of Mr Walker, one of his subordinates, which resulted in Mr Walker ignoring or failing to perform his duties and responsibilities as an employee.³

¹ Exhibit A1 at Attachment PL-4

² Exhibit R13 at paragraph 1 (b) and Exhibit A1 at Attachment PL-4

³ Exhibit R13 at paragraph 1(a)

- for breaches of the Council’s Procurement policy in that he had purchased goods or engaged external contractors without raising and obtaining a purchase order beforehand.⁴

[5] The first two reasons were given to Mr Leyshan before he was dismissed. These allegations were set out in a Memorandum dated 22 February 2013.⁵ There was also a letter of termination, dated 1 March 2013, which set out the allegation which had been found. This was that Mr Leyshan, contrary to his role as a supervisor, had actively encouraged and enabled employees under his direct supervision to disregard of the requirements of their employment.⁶

[6] The third reason for his dismissal was not put to Mr Leyshan as part of the disciplinary process as the Council only became aware of the alleged breaches of the Procurement policy following his dismissal.⁷

[7] It is settled authority that:

“When the reason for termination is based on the conduct of the employee, the Commission must, if it is an issue in the proceedings challenging the termination, determine whether the conduct occurred. The obligation to make such a determination flows from s170CG(3)(a). The Commission must determine whether the alleged conduct took place and what it involved.”⁸

[8] Therefore, in the first instance, the Commission is required to determine whether or not Mr Leyshan made the Statement as alleged.

1. First issue - the Statement

(a) Introduction

[9] It was common ground that, present at the time Mr Leyshan allegedly made the Statement, was Mr Walker and Witness X. Mr Walker was not called to give evidence. Mr Moore stated, during his opening submissions, that the Applicant was unable to call Mr Walker as a witness. This was due to Mr Walker being in Queensland and also being too unwell to give evidence.⁹ This explanation is accepted. Both parties made comprehensive submissions about whether or not Mr Walker not being called as a witness by the Applicant invoked the principles in *Jones v Dunkel*. As I have accepted the explanation given for why Mr Walker is not giving evidence, I decline to draw the *Jones v Dunkel* inferences as a result.

[10] There is a dispute between the evidence of Mr Leyshan and that of Witness X as to whether the alleged Statement was made. Mr Leyshan stated that the conversation did not occur at all and said that he did not know why Witness X took a photo of him at the Hoppers Crossing cricket oval. Witness X said that Mr Leyshan made the Statement in the depot on his

⁴ Exhibit R13 at paragraph 2

⁵ Exhibit A1 at Attachment PL-1

⁶ Exhibit A1 at Attachment PL-4

⁷ Exhibit R13 at paragraph 2

⁸ *King v Freshmore (Vic) Pty Ltd* Print S4213 at paragraph 23

⁹ Transcript PN 23

first working day in the furniture crew. Mr Leyshan was said to have been standing on the porch in front of the office with himself and Mr Walker standing on the tarmac.

[11] A third version of the incident was contained in the LKA Report where it was stated that the Statement was made by Mr Leyshan in the afternoon at the soccer oval in Hoppers Crossing.

[12] The evidence before the Commission, in relation to this incident was given by Mr Leyshan and Witness X.

(b) Mr Leyshan

[13] Mr Leyshan's evidence was that:

- Mr Walker and Witness X pulled up next to him whilst he was at the Grange Reserve soccer oval.¹⁰ This was said to be purely accidental and not something that he (Mr Leyshan) had initiated.¹¹
- He was with a representative from City West Water changing the sporting ground from potable to recycled water.¹² They had just switched off the water meters before going back into the pavilions to ensure there were no crossed pipes.¹³
- The City West Water representative was standing next to him just outside of the photo - on the other side of the path.¹⁴
- He presumed that Mr Walker and Witness X were at the oval to check the barbecues at the Grange Reserve.¹⁵
- Mr Walker asked him what he was doing out of the office.¹⁶
- He had leaned over in front of the vehicle window and said what he was doing.¹⁷
- He had not asked Mr Walker what he was doing that day or what he had done. This was because it was a passing visit by them and he was walking back to the pavilion when they drove up.¹⁸
- Mr Walker and Witness X then left 45 seconds – 1 minute later.¹⁹
- Each morning and afternoon, he spoke to his staff at his desk in the office.²⁰ He said that he was not always behind his desk in the office when he spoke to his subordinates.²¹
- His staff are required/expected to speak to him at the beginning of each day.²²
- He does not ever stand on the porch to talk to his staff.²³

¹⁰ Transcript PN 129 and 752 – 753 and 921 and Exhibit A1 at paragraph 21

¹¹ Transcript PN 776 – 777

¹² Transcript PN 129

¹³ Transcript PN 152 – 153 and Exhibit A1 at paragraph 21

¹⁴ Transcript PN 154 and 167

¹⁵ Transcript PN 129

¹⁶ Transcript PN 129, 754, 756 and 921

¹⁷ Transcript PN 130 and 921

¹⁸ Transcript PN 755, 757 and 918 – 921

¹⁹ transcript PN 129

²⁰ Transcript PN 142 – 147 and 815 – 817

²¹ Transcript PN 819 – 820

²² Transcript PN 146

- He had told Mr Walker, when Witness X was not present, that Witness X would be working with him for the Christmas/New Year break.²⁴ He did not say this directly to Witness X.²⁵
- He denied then saying to Mr Walker or Witness X words to the effect of the Statement.²⁶ He also denied making the Statement on any other occasion or to anyone else.²⁷

(c) Witness X

(i) The Statement - 27 December 2012

[14] Witness X gave the following evidence:

- He never worked with the target of the surveillance during the period of 5 December 2012 to 23 January 2013.²⁸
- He saw Mr Leyshan as an obstacle to getting close to the target.²⁹ Witness X believed that Mr Leyshan had stalled him from working with the target. He could not work out why and was suspicious.³⁰
- Mr Leyshan spoke sharply and rudely to him and he felt intimidated by the way Mr Leyshan looked at him and interacted with him. He felt that Mr Leyshan did not want him to be part of his crew.³¹
- He and Mr Walker had arrived at the oval in the ute and Mr Leyshan was there.³²
- They had pulled up beside Mr Leyshan and had got out. The three of them stood around in a group.³³ Mr Leyshan had spoken to Mr Walker but had ignored Witness X.³⁴
- Mr Leyshan and Mr Walker had then walked off and chatted privately.³⁵
- When they ran into Mr Leyshan at the oval, Witness X did not see anyone with him. It was stated that Mr Leyshan was standing by himself and that there was nobody else there.³⁶
- He took a photograph of Mr Leyshan at the oval at about 3pm on 27 December 2012.
- There was an error in the LKA Report (on page 10) in respect of Mr Leyshan having made the Statement at about 3pm at the oval. It was said to have been made in the

²³ Transcript PN 140, 148, 823 – 825 and 907 – 908

²⁴ Transcript PN 826 and 829 – 833 and 880

²⁵ Transcript PN 139

²⁶ Transcript PN 149, 836 – 837, 841 – 842 and 845 – 846 and Exhibit A1 at paragraph 21

²⁷ Transcript PN 149 – 151 and 847

²⁸ Transcript PN 1216 – 1217

²⁹ Transcript PN 1273

³⁰ Transcript PN 1580 – 1582

³¹ Transcript PN 1238 - 1252 and Exhibit R3 at paragraph 31

³² Transcript PN 1218 – 1219

³³ Transcript PN 1220 – 1223

³⁴ Transcript PN 1223 – 1227

³⁵ Transcript PN 1540

³⁶ Transcript PN 1551 – 1561

depot in the morning before they left for the day's work and not at the oval in the afternoon.³⁷

- On the morning of 27 December 2012, Mr Leyshan said words to the effect that he did not care what they did, just don't get caught, don't make me have to explain why you are doing nothing.³⁸
- Mr Leyshan had further said to Mr Walker words to the effect of that he did not care if we did no work during the day.³⁹
- With respect to the two different versions in his statement and also a further one in the LKA Report, of what Mr Leyshan had said, he stated that Mr Leyshan had said additional words to the effect of "Don't have to make me explain why you were doing nothing."⁴⁰
- The LKA Report was incorrect (hearsay) in relation to what Mr Leyshan had said in that it did not include "Don't have to make me explain why you were doing nothing."⁴¹
- In the end, Witness X said that Mr Leyshan had walked out of his office, stood on the porch and he and Mr Walker had had a bit of a chat. Mr Leyshan had then said to Mr Walker that he did not care what they did, don't get caught, he did not want to have to explain himself.⁴²
- Witness X said that Mr Leyshan may have handed out instructions in the office. However, the conversation between he and Mr Walker, from the porch, was a general conversation.⁴³
- The reason Witness X had taken a photograph of Mr Leyshan, on 27 December 2012, was to prove that he had been on the oval at that time and that Mr Leyshan was there. This would have helped with writing a report if required.⁴⁴

(ii) The LKA Report

[15] Witness X also gave evidence about the LKA Report, as follows:

- The LKA Report contains his weekly surveillance observations for the period from 5 December 2012 until 23 January 2013.⁴⁵
- LKA instructed him not to take notes recording each day's events. He therefore took photographs and videos.⁴⁶
- A verbal update was provided to LKA over the phone at the end of each day – typically once or twice a day. In addition, there was further contact during the day if Witness X had seen something important - two – three contracts a day.⁴⁷
- The LKA Report was derived from the photographs and videos and what he had told them over the phone.⁴⁸

³⁷ Exhibit R3 at paragraph 36 and transcript PN 1417 – 1418, 1427 – 1431, 1533 – 1536, 1539, 1541 – 1542 and 1627

³⁸ Transcript PN 1479 – 1480 and 1487

³⁹ Transcript PN 1513

⁴⁰ Transcript PN 1523 and Exhibit R3 at paragraphs 36 and 44

⁴¹ Transcript PN 1523 – 1526

⁴² Transcript PN 1500 – 1502, 1530 – 1532, 1534 and 1571 and Exhibit R3 at paragraph 44

⁴³ Transcript PN 1544

⁴⁴ Transcript PN 1562 – 1564 and 1569 – 1570

⁴⁵ Transcript PN 1213 – 1215

⁴⁶ Transcript PN 1277 – 1284 and Exhibit R3 at paragraph 16

⁴⁷ Transcript PN 1285 – 1287 and 1290 – 1294 and exhibit R3 at paragraph 16

- Each telephone contact was about 1 – 2 minutes but it depended on where Witness X was at the time and what was happening over the course of the day.⁴⁹
- There was one final brief update telephone call to LKA at the end of the day and the photographs/videos were then sent through. There was one contact point at LKA for the assignment.⁵⁰
- The brief for the assignment was to report on matters about the target of the investigation, particularly allegations of criminal activity.⁵¹
- Everything in the LKA Report was outside the task that Witness X was engaged for.⁵²
- There were occasions where the behaviour Witness X witnessed was unacceptable in his mind. Witness X decided to film and report it as he believed someone should know about it.⁵³
- Witness X's camera was rolling from day 1 of the assignment.⁵⁴ It was agreed that no one told him to take the photographs but said that they were taken so that Council could be aware of what was going on.⁵⁵ Witness X said that the photographs were taken of his own accord.⁵⁶
- It was confirmed that the report that was produced did not deal with the allegations that Witness X was asked to investigate.⁵⁷
- Witness X had only read part of the LKA Report and did not agree with its contents. Not all of the report was read and Witness X did not write to report.⁵⁸
- When Witness X had seen a couple of errors like the oval one, he had glanced through it and then put it aside. It was stated that there was no use reading the report if it was wrong. It was stated that Witness X wanted to teach LKA a lesson about how to do a proper professional job.⁵⁹
- Witness X corrected the error on page 10 of the report where it said that Mr Leyshan had made the Statement at about 3pm at the oval. Rather, the Statement was made in the depot in the morning.⁶⁰
- It was stated by Witness X that the LKA Report was not a reliable account of his investigation - "it's wrong."⁶¹
- With respect to the alleged sale of marijuana by Mr Walker to Witness X⁶², Witness X said that there was no sale. It was stated that Mr Walker had never sold Witness X marijuana.⁶³

⁴⁸ Transcript PN 1288

⁴⁹ Transcript PN 1295 – 1298

⁵⁰ Transcript PN 1299 – 1305

⁵¹ Transcript PN 1306 and exhibit R3 at paragraph 8

⁵² Transcript PN 1307

⁵³ Transcript PN 1308 – 1309

⁵⁴ Transcript PN 1313

⁵⁵ Transcript PN 1323 – 1335, 1351 and 1376

⁵⁶ Transcript PN 1376

⁵⁷ Transcript PN 1348 – 1350

⁵⁸ Transcript PN 1410

⁵⁹ Transcript PN 1419 – 1425 and 1432

⁶⁰ Transcript PN 1417 – 1418, 1427 – 1431, 1533 – 1536, 1539, 1541 – 1542 and 1627 and exhibit as R3 at paragraph 36

⁶¹ Transcript PN 1433

⁶² As set out on page 15 of the LKA Report

⁶³ Transcript PN 1437 – 1447

- Witness X denied setting Mr Walker up and then videoing the scene.⁶⁴
- The LKA Report⁶⁵ had also not recorded Witness X's claimed that Mr Walker had said to him "Not as much as I take home" and had told Witness X that if he needed any cleaning products, to help himself.⁶⁶
- In terms of the difference between Witness X's evidence regarding the cleaning products issue and the LKA Report, Witness X said that what was in his statement was correct⁶⁷ - that Mr Walker had said words to the effect of "Not as much as I take home. If you need some, help yourself."⁶⁸
- Another inaccuracy in the LKA Report⁶⁹ concerned Mr Walker attending a house on 28 December 2012. Witness X's evidence was that Mr Walker had told him that he was attending the house to smoke marijuana. The LKA Report stated that Mr Walker was at the house to purchase a marijuana joint. Witness X stated that his version of events was correct.⁷⁰

(d) Consideration and Conclusions

(i) Mr Leyshan

[16] It was common ground between the Applicant and the Respondent that, if Mr Leyshan as found to have made the Statement, this would constitute serious misconduct.⁷¹

[17] On behalf of the Applicant, it was argued that, due to critical doubts about Witness X's credibility and that Mr Leyshan's evidence was unimpeached in terms of his credit, there was no sound basis to accept Witness X's word over that of Mr Leyshan's.⁷² The doubts regarding Witness X's credibility were said to concern:

- His inconsistency about what Mr Leyshan allegedly said to himself and Mr Walker - not just during cross examination but also in his evidence-in-chief.⁷³
- The difference in locations, at which Mr Leyshan allegedly made the Statement between Witness X's evidence and where the LKA Report located the Statement, including a photograph of Mr Leyshan at the oval.⁷⁴
- The spurious reason given for taking the photograph of Mr Leyshan at the oval. This was said to have been "because I could" and also to prove that he was at the oval.⁷⁵
- Witness X's attempt to relocate the place where the Statement was allegedly made was said to be to avoid a risk that there could be a witness (a City West Water representative) who may contradict his evidence.⁷⁶

⁶⁴ Transcript PN 1464 – 1469

⁶⁵ As set out on page 11 of the LKA Report

⁶⁶ Transcript PN 1590 – 1595

⁶⁷ Transcript PN 1590 – 1599

⁶⁸ Transcript PN 1599 and Exhibit R3 at paragraph 46

⁶⁹ As set out on page 11 of the LKA Report

⁷⁰ Transcript PN 1602 – 1609 and exhibit R3 at paragraph 47

⁷¹ Transcript PN 3762 and 3962

⁷² Transcript PN 3798

⁷³ Transcript PN 3769 - 3778

⁷⁴ Transcript PN 3779 - 3782

⁷⁵ Transcript PN 3784

- Witness X's claim that he was offended by Mr Leyshan's treatment of him and felt intimidated. This was said to be fanciful and lacking in credibility when Witness X's age, build and work history were taken into account.⁷⁷
- Witness X saw Mr Leyshan as an obstacle to him carrying out his brief and believed that Mr Leyshan was stalling him from getting close to the target for an unknown reason of which he was suspicious.⁷⁸
- The false allegation that Mr Walker had sold Mr Leyshan marijuana heads.⁷⁹
- Given that Witness X did not feel confined by his specific brief, he decided to embark on a frolic of his own. He also was said to have decided to impugn the credibility of the person whom he saw as suspicious and whom he disliked.⁸⁰

(ii) The Council

[18] On the other hand, the Council submitted that it accepted the evidence of Witness X that Mr Leyshan had made the Statement to Mr Walker.⁸¹

[19] It was stated that the making of the Statement directly amounts to Mr Leyshan encouraging Mr Walker to ignore his duties. This was said to be misconduct justifying summary dismissal and a valid reason for the dismissal.⁸²

[20] It was argued that the test to be applied was "the balance of probabilities" rather than "beyond reasonable doubt".⁸³

[21] The Council also contended that it then came down to an issue of credit between Mr Leyshan and Witness X.⁸⁴

[22] With respect to the credibility of Witness X, it was contended that:

- In terms of the words actually said by Mr Leyshan, Witness X had stated a number of times that the comment or words to that effect were made.⁸⁵
- Witness X was a direct and forthright witness who had criticised a number of aspects of the LKA Report as being inaccurate. He was said to be a person of integrity who was genuinely appalled by the misbehaviour of a number of then Council employees - so much so that he had reported those activities to the LKA Group. Therefore, it would be highly improbable that he had fabricated his evidence.⁸⁶
- There was no reason for Witness X to lie or fabricate evidence. This was because he was not an employee of the Council, but a contractor engaged by another contractor.

⁷⁶ Transcript PN 3788

⁷⁷ Transcript PN 3789 - 3791

⁷⁸ Transcript PN 3792 - 3796

⁷⁹ Transcript PN 3795 - 3795

⁸⁰ Transcript PN 3797

⁸¹ Exhibit R13 at paragraph 21

⁸² Transcript PN 3963 and Exhibit R13 at paragraph 21, 24 and 26

⁸³ Transcript PN 3964 - 3965

⁸⁴ Transcript PN 3964 -3965 and Exhibit R134 at paragraph 22

⁸⁵ Transcript PN 3695 and Exhibit R13 at paragraph 22

⁸⁶ Transcript PN 3967 and Exhibit R13 at paragraph 22

Witness X was not going to gain any personal advantage by informing the LKA Group or giving evidence about the Statement if it were untrue.⁸⁷

- When Witness X said that the LKA Report was not accurate, this was with respect to where the alleged Statement was made - not the words that were said.⁸⁸
- It was acknowledged by the Respondent that the LKA Report was incorrect in terms of the location of the alleged Statement. However, the Council argued that it was more what was said, rather than where it was said that was important. It was to Witness X's credit that he had corrected the location, as there was no advantage to him for doing that.⁸⁹
- Witness X's taking of the photograph of Mr Leyshan in the park was said to have been consistent with Witness X's practice during investigations.⁹⁰
- Witness X had denied, fairly and squarely, the proposition that he had changed the location of the Statement to exclude the possibility of other witnesses.⁹¹ Therefore the conspiracy proposition was unsupportable.

[23] The Council acknowledged that, at all times, Mr Leyshan had denied that he had made the Statement.⁹² However, it was argued that Mr Leyshan, unlike Witness X, had every reason to deny he made the Statement. If he had admitted to it at any time, it would have been fatal to his continued employment and to this application proceeding.⁹³

(iii) Conclusions

[24] I have carefully considered all of the material before me and I find that it is most probable that Mr Leyshan did not say the words attributed to him by Witness X (the Statement). Mr Leyshan has been consistent in denying that he had said those words to Mr Walker. As part of his written response to the allegations, Mr Leyshan offered to provide a statutory declaration to that effect.

[25] With respect to Witness X, I have seen him and heard his evidence. Normally, it could be assumed that an investigator, such as Witness X, would be impartial with no axe to grind and nothing to gain by not telling the truth. Therefore, where there is a direct conflict between the employee's and the investigator's account of events, it would follow that that the investigator's account should be preferred over that of the employee's. However, on the basis of Witness X's evidence, it cannot be said that he had nothing to gain out of maligning Mr Leyshan or that he was impartial. He was clear that the LKA Report was not a reliable account of his investigation and that he wanted to teach LKA a lesson in how to do a professional job. Further, Witness X said that he was disgusted by the behaviour that he witnessed and believed that the Council should be made aware of it. He acknowledged that what he had filmed and reported was outside the task he had been engaged for. In addition, Witness X stated that he felt intimidated by Mr Leyshan. He also saw Mr Leyshan as an obstacle to him getting close to the target and was suspicious of the reason why.

⁸⁷ Transcript PN 3968 and Exhibit R13 at paragraph 22

⁸⁸ Transcript PN 3972 - 3973

⁸⁹ Transcript PN 3975

⁹⁰ Transcript PN 2975

⁹¹ Transcript PN 3976

⁹² Transcript PN 3964 and Exhibit R13 at paragraph 22.

⁹³ Transcript PN 3978 and Exhibit R13 at paragraph 23.

[26] Therefore, in determining on the balance of probabilities, whether or not Mr Leyshan made the Statement as alleged, it is not possible to accept Witness X's version of events over that of Mr Leyshan's. This is on the basis that Witness X was not impartial and appeared to have an axe to grind in respect of Mr Leyshan. On the other hand, Mr Leyshan has consistently denied making the Statement and offered, early in the process, to provide a statutory declaration to this effect.

[27] Further, in reaching this conclusion, I have also considered the issue of where Mr Leyshan allegedly made the Statement. It was Witness X's evidence that Mr Leyshan had made the Statement from the porch in the depot in the morning on 27 December 2012. He said that the LKA Report, which stated that the Statement had been made at the oval in the afternoon 27 December 2012 was wrong. Mr Leyshan was very clear in his evidence, that it was not his practice to talk with his employees in the morning/allocate their duties, from the porch. Rather, he was very firm about him doing this from his desk in the office. I have also considered Witness X's evidence on this issue. However, on the balance of probabilities, I accept Mr Leyshan's evidence that it was not his practice to give his crew their instructions from the porch.

[28] Accordingly, I find that, on the balance of probabilities, Mr Leyshan did not make the alleged Statement on 27 December 2012 either from the porch in the depot in the morning or at the oval in the afternoon.

2. Second issue - Failure to Discharge his Supervisory Responsibilities by not effectively monitoring and supervising Walker

[29] It was common ground that all of the allegations regarding Mr Walker, except for the allegations of potential illegal activity, were made out.

(a) Mr Leyshan

[30] It was Mr Leyshan's evidence that:

- At the end of each week, each employee's work is scheduled for the coming week.⁹⁴
- He spent his work days, 50/50, either in the office doing paperwork or out checking sites. This varied each day.⁹⁵
- He exercised his supervisory responsibilities by going out, unannounced to the field to see what his employees are up to.⁹⁶
- When he is out of the office, he does spot checks on whichever grounds he is on to make sure they are clean or if anything needs to be done.⁹⁷
- He gets to look at three to four grounds a day except when his workload is heavy and he might not get out of the office at all in that week.⁹⁸
- Every month, he did a safety audit with his seven employees by standing and watching them do a particular task.⁹⁹

⁹⁴ Transcript PN 112 - 116

⁹⁵ Transcript PN 133 - 134

⁹⁶ Transcript PN702 - 703 and 727

⁹⁷ Transcript PN 50 and Exhibit A1 at paragraph 6

⁹⁸ Transcript PN 51

⁹⁹ Transcript PN 53 - 55

- He was never told that he had to do additional auditing beyond his spot checks and safety audits.¹⁰⁰ He recalled a meeting with Mr Walden in late December 2012/early January 2013 about the requirements regarding supervisors visiting their employees in the field. He did not recall Mr Walden stating that all supervisors had to meet their crews out in the fields at least twice a week.¹⁰¹
- His employees are required/expected to speak with him at the start of each day and of an afternoon at his desk.¹⁰²
- He saw Mr Walker twice a day at the depot or in the office - in the morning and in the afternoon. He agreed that, if he was just relying in those two occasions each day, he would not have much of an idea about what Mr Walker was actually doing out in the field.¹⁰³
- He was a Team Leader, Parks for 8 years (supervising about 60 employees) and had been Parks Project Officer for about 2 years prior to his dismissal.¹⁰⁴
- He had had many years of practical experience as a supervisor as well as having undertaken a training course in supervision.¹⁰⁵
- He had visited Mr Walker at least twice a week out in the field.¹⁰⁶ He had not visited Witness X in the same basis even though he was one of his employees.¹⁰⁷
- Later he said that he had not visited Mr Walker at least twice a week out in the field.¹⁰⁸ He explained that he saw Mr Walker very rarely in the field. He stated that he supervised the work Mr Walker did by doing spot checks with other officers. Mr Leyshan explained that the spot checks might be in one particular area with Mr Walker somewhere else completely. It was also explained that, since his promotion into his last position, he had commenced supervising his employees work by going out, unannounced, into the field to look at their work.¹⁰⁹

[31] In terms of the first allegation against Mr Walker (28 December 2012 - an extended and unauthorised break), Mr Leyshan explained that:

- The only time he saw Mr Walker on that day was when Mr Walker came upon him at the oval.¹¹⁰
- During their conversation, Mr Walker had asked him what he was doing. He had not asked Mr Walker what he was doing at the park. He had not asked Mr Walker what he had been doing prior to coming to the park or what work he would be doing after the park.¹¹¹ This was said to be because it was a passing visit by Mr Walker as he (Mr Leyshan) was walking back to the pavilion.¹¹²

¹⁰⁰ Transcript PN 56

¹⁰¹ Transcript PN 722 - 726

¹⁰² Transcript PN 142 - 147 and 815 - 820

¹⁰³ Transcript PN 794 - 797

¹⁰⁴ Transcript PN 693 - 698

¹⁰⁵ Transcript PN 699 and 704 - 721

¹⁰⁶ Transcript PN 729

¹⁰⁷ Transcript PN 730 - 731 and 734 - 735

¹⁰⁸ Transcript PN 739 and 922

¹⁰⁹ Transcript PN 923 - 927

¹¹⁰ Transcript PN 752 - 753

¹¹¹ Transcript PN 754 - 759

¹¹² Transcript PN 918 - 921

[32] With respect to the second allegation against Mr Walker (18 January 2013 - an extended and unauthorised break), it was Mr Leyshan's evidence that he did not visit Mr Walker or Witness X out in the field that day. He agreed that these were two out of his eleven direct reports whom he did not visit on 18 January 2013.¹¹³

[33] The next allegation against Mr Walker was said to have been Mr Walker taking an extended and unauthorised two hour break on 22 January 2013. Mr Leyshan confirmed that he had not visited Mr Leyshan and Witness X out in the field on that day.¹¹⁴

[34] In terms of the allegations against Mr Walker concerning his failure to perform his duties as a barbecue cleaner (and therefore Mr Leyshan's failure to properly exercise his supervisory responsibilities), Mr Leyshan stated the following:

- Regarding the allegation that on 27 December 2012, Mr Walker did not perform any work duties at all - he did not visit Mr Walker or Witness X in the field on that day as he was in a kindergarten. He agreed that he only had two employees out in the field.¹¹⁵ He stated that he was not their babysitter but agreed he was their supervisor.¹¹⁶
- Regarding the allegation that, on 28 December 2012, Mr Walker visited various parks with dirty barbecues but did not clean them as required - he agreed that, if true, this was a complete abdication by Mr Walker of his duties. Mr Leyshan confirmed that, when he saw Mr Walker and Witness X on that day, it was purely accidental on their part and not something he had initiated.¹¹⁷
- In terms of the allegation that, on 21 December 2012, Mr Walker and Witness X did not collect any of the rubbish strewn around the barbecue in various parks - it was said that it was Mr Walker's responsibility to do this, if the rubbish was in the immediate vicinity of a barbecue or around adjoining picnic tables. He confirmed that he did not visit Mr Walker and Witness X on that day.¹¹⁸
- With respect to the allegation that, on 21 January 2013, Mr Walker and Witness X looked at a number of barbecues but did not do anything - he agreed that, if this was the case, it was an abdication of their duties and responsibilities. Mr Leyshan stated that he had done spot checks on that day but did not bump into Mr Walker or Witness X.¹¹⁹

[35] Mr Leyshan disagreed that only going out into the field on one of the seven days referred to in the allegations against Mr Walker was a total abdication of his responsibilities as a supervisor.¹²⁰ He stated that he preferred doing spot checks to make sure that all of the reserves were clean. He said that he had not done surprise visits on any of the three days it was alleged that Mr Walker did very little. This was partly because he was not their babysitter and because he was also out there looking at other sites as well. It was explained that he was

¹¹³ Transcript PN 758 - 763

¹¹⁴ Transcript PN 764 - 766

¹¹⁵ Transcript PN 768 - 771

¹¹⁶ Transcript PN 772 - 773

¹¹⁷ Transcript PN 775 - 777

¹¹⁸ Transcript PN 778 - 782

¹¹⁹ Transcript PN 788 - 793

¹²⁰ Transcript PN 798 - 800

responsible for over 400 reserves, 70 of which have barbecues, and that he trusted his staff. Mr Leyshan acknowledged that trust was reposed in him that he would properly and adequately supervise his subordinates.¹²¹

[36] It was also said that, if Witness X had a problem with what he observed, he should have told him and he would have rectified the situation.¹²² It was also stated by Mr Leyshan that he understood that, as a responsible and experienced supervisor, he should have been proactive and gone out and supervised his employees rather than just relying on complaints. However, he explained that his remit was broader than just supervising his seven staff. This was because in December and January, he had about 80 kindergartens he had to maintain and 170 playgrounds to check with only three staff. He agreed that, if there were any failings as a supervisor on his part, it was because he had too much on his plate.¹²³

[37] He recounted that he had been asking Mr Boyle for the past four years, just before budget time, for a team leader for his park furniture crews.¹²⁴

(b) Mr Boyle

[38] Mr Boyle confirmed that, for the past three to four years, Mr Leyshan had asked for additional resources for his group.¹²⁵

(c) Mr Walden

[39] It was Mr Walden's evidence that:

- In late January 2013, the Council commenced implementation of a phased restructure of the Parks Department. This was described as involving a strengthening of the supervisory layer to improve productivity, quality, etc.¹²⁶
- November to December 2012 were the early planning stages but nothing had been formally presented at that time.¹²⁷ He was the architect of the restructuring.¹²⁸
- To this end, he held a meeting with supervisors and also one including team members on 5 February 2013. The supervisors were told that he was looking for a lift in the standards of supervision and work quality and output.¹²⁹
- At the time of his dismissal, Mr Leyshan was said to have had seven direct reports and four (sports turf) that he was overseeing, eleven in total. He stood by his statement although it differed from Mr Leyshan's understanding of how many employees he supervised.¹³⁰

¹²¹ Transcript PN 801 - 805

¹²² Transcript PN 806

¹²³ Transcript PN 807 - 810 and 909 - 911

¹²⁴ Transcript PN 811 - 814 and 912 - 917

¹²⁵ Transcript PN 2813

¹²⁶ Exhibit R5 at paragraph 16

¹²⁷ Transcript PN 2161

¹²⁸ Transcript PN 2163

¹²⁹ Exhibit R5 at paragraph 17

¹³⁰ Transcript PN 2167 - 2169 and Exhibit R5 at paragraphs 20 - 22

- In forming the view that Mr Leyshan should be dismissed he had regard to not only the Statement but also Mr Leyshan's inadequate supervision.¹³¹
- He had no evidence that, prior to 22 January 2013, Mr Leyshan had been provided with negative feedback or criticism about his work. He stated that he had not given any and did not wish to speculate on what might have happened prior to his arrival.¹³²
- He agreed that Mr Walker falling asleep at the traffic lights, on 27 December 2012, had nothing to do with Mr Leyshan's alleged inadequate supervision or otherwise.¹³³ However it was stated that Mr Leyshan had a responsibility to ensure that his staff turned up in a fit state for work.¹³⁴
- In terms of Mr Walker's alleged extended and unauthorised break on 22 January 2013, he did not agree that it was not a product of inadequate supervision by Mr Leyshan. There would have been less likelihood of this happening if Mr Leyshan had created the right culture in the work group. This culture should be based on the supervisor ensuring that their staff did not feel that they could take this extra time by visiting them in the field, measuring the quality and quantity of their work and by having an open dialogue between the supervisor and their employees.¹³⁵
- With respect to the allegations that Mr Walker failed to collect rubbish on 31 December 2012, it was stated that perhaps Mr Leyshan did not follow Mr Walker up at appropriate intervals to make sure that he was looking after the whole of the presentation of the area.¹³⁶
- He did not think that Mr Leyshan should follow his crew members around permanently. However, Mr Leyshan's role was said to include ensuring that the work is completed at the required quality standard. Mr Leyshan, as responsible for the output of his group, was culpable for Mr Walker not picking up the rubbish. It was stated that Mr Leyshan needed, through auditing and a visiting regime, to be comfortable that the work was being done in a reliable manner.¹³⁷
- He said there was no direction which required Mr Leyshan to visit each of his crew each day in the field.¹³⁸ He did not expect Mr Leyshan to have visited all of the playgrounds, parks and barbecues in the facility fortnightly. It was agreed that Mr Leyshan may not, quite reasonably, get to all of the facilities more than once a month or longer.¹³⁹
- The allegations that Mr Leyshan inadequately or inappropriately supervised Mr Walker were said to fit within the procedure for managing poor performance.¹⁴⁰
- Prior to Mr Leyshan's dismissal he had not been issued with a warning and no performance improvement plan had been implemented.¹⁴¹

¹³¹ Transcript PN 2371

¹³² Transcript PN 2265 - 2267

¹³³ Transcript PN 2395 - 2396

¹³⁴ Transcript PN 2392

¹³⁵ Transcript PN 2400 - 2403

¹³⁶ Transcript PN 2404 - 2406

¹³⁷ Transcript PN 2407 - 2408, 2410 - 2411 and 2421

¹³⁸ Transcript PN 2409

¹³⁹ Transcript PN 2412 - 2429

¹⁴⁰ Transcript PN 2384

¹⁴¹ Transcript PN 2387 - 2388

(d) Mr Lambert

[40] Mr Lambert's evidence was that:

- In relation to the allegations of misconduct by the employees in the LKA Report, he was seriously troubled as they suggested that Mr Leyshan had neglected his duties by failing to properly supervise the work of those employees.¹⁴²
- The most significant issue, among others, in terms of the decision to dismiss Mr Leyshan was him allegedly making the Statement. This had particularly troubled him. Regard was also had to Mr Leyshan's lack of adequate supervision.¹⁴³
- He determined that the conduct of Mr Walker (other than the alleged illegal activities) was one of the factors that established that Mr Leyshan was managing his subordinates in an inappropriate manner.¹⁴⁴
- A performance improvement plan had not been implemented in respect of Mr Leyshan. He was not aware of any warnings having been given to Mr Leyshan.¹⁴⁵
- Mr Leyshan's alleged lack of supervision was an issue of poor performance, not misconduct.¹⁴⁶
- In relation to the allegation that on 27 December 2012, Mr Walker did not perform any work, it was stated that, as Mr Walker's supervisor, Mr Leyshan should have been actively checking on his work. This did not include Mr Leyshan sitting behind Mr Walker's shoulder on that day. Rather, it meant checking his work periodically and meeting him at sites. If Mr Walker had been actively supervised, not doing any work would not have been allowed to take place. He was not aware of anything that Mr Leyshan did or did not do relative to the events of 27 December 2012.¹⁴⁷
- In terms of Mr Walker's alleged failure to properly clean barbecues on 28 December 2012; his alleged failure to collect rubbish on 31 December 2012 and alleged failure to clean barbecues on 2 and 21 January 2013, it was explained that it was not about specific instances, but rather, a pattern of behaviour. He had formed the view that Mr Walker was not being actively supervised by Mr Leyshan which allowed things to not occur, such as those contained in the allegations against Mr Walker.¹⁴⁸
- With respect to the alleged extended and unauthorised break taken by Mr Walker on 22 January 2013, it was stated that approval should have been sought from Mr Leyshan. As Mr Leyshan had not given such approval, this was said to have been a failure to supervise and also a failure on Mr Walker's part.¹⁴⁹ If there was active supervision by Mr Leyshan, Mr Lambert was sure that this incident would not have occurred. However, trailing Mr Walker around all day was said by Mr Lambert not to be his idea of supervision. Rather, Mr Leyshan should have regularly checked that the work schedule was being done correctly. If the work was not being done on time, Mr Leyshan would have asked Mr Walker why not. It was stated that Mr Leyshan should have regularly checked up on his employees. Over time, this would have

¹⁴² Transcript PN 1732

¹⁴³ Transcript PN 1731 - 1232, 1803 - 1806 and 1848

¹⁴⁴ Transcript PN 1849 - 1850 and 1998

¹⁴⁵ Transcript PN 1858 - 1859

¹⁴⁶ Transcript PN 1851

¹⁴⁷ Transcript PN 1863 - 1868

¹⁴⁸ Transcript PN 1869, 1875 and 1878

¹⁴⁹ Transcript PN 1880 - 1882

revealed what work was not being done or that employees were not at the sites where they were supposed to be.¹⁵⁰

(e) Mr Stabb

[41] Mr Stabb gave evidence that:

- His initial impression of the LKA Report was that Mr Leyshan had seriously neglected his duties by failing to properly supervise the other employees. Having undertaken the disciplinary process, this impression was confirmed. It was said to have been a decisive matter in his mind in deciding that Mr Leyshan should be dismissed.¹⁵¹
- The aspect of the LKA Report that most concerned him was Mr Leyshan's alleged making of the Statement. However, in deciding that dismissal was appropriate, he also had regard to Mr Leyshan's alleged lack of adequate supervision.¹⁵²
- He decided that the conduct of the employees contained in the LKA Report established that Mr Leyshan was managing his in subordinate (Mr Walker) in an inappropriate manner. He drew a distinction between the three staff members in the report who were Mr Leyshan's direct reports and those that were not. Account was only taken of the direct reports.¹⁵³
- He did not agree that Mr Leyshan's alleged lack of supervision was an issue of poor performance and not misconduct. Rather, it was said to be a combination of both.¹⁵⁴ The making of the Statement was said to be misconduct whilst the alleged lack of supervision was an issue of inadequate performance.¹⁵⁵
- He was not aware of any warnings having been issued to Mr Leyshan.¹⁵⁶
- It was agreed that there was nothing specific that Mr Leyshan did/did not do which rendered him responsible for Mr Walker falling asleep on 27 December 2012 or for his failure to perform any work on that day.¹⁵⁷
- In terms of Mr Walker's alleged failure to properly clean barbecues on 28 December 2012, it was stated that Mr Leyshan was expected to follow up, and on a random basis, inspect the quality of the work of his in subordinates. He was not aware of whether or not Mr Leyshan did this on that day.¹⁵⁸
- This was also Mr Stabb's response in terms of the allegations that Mr Walker failed to collect rubbish on 31 December 2012, failed to clean barbecues on 2 and 21 January 2013 and took an extended and unauthorised break on 22 January 2013.¹⁵⁹
- However it was stated that Mr Leyshan was responsible for the performance of tasks given to Mr Walker on any work day. The expectation was that, at the end of the day, Mr Walker would have performed all of the assigned tasks. The Council's expectation was that supervisors, on any day, would be out in the field randomly

¹⁵⁰ Transcript PN 1883 - 1888

¹⁵¹ Transcript PN 2924 - 2927

¹⁵² Transcript PN 3015

¹⁵³ Transcript PN 3015 - 3020

¹⁵⁴ Transcript PN 3021 and 3034 - 3036

¹⁵⁵ Transcript PN 3037 - 3038

¹⁵⁶ Transcript PN 3042

¹⁵⁷ Transcript PN 3044 - 3048

¹⁵⁸ Transcript PN 3049 - 3051

¹⁵⁹ Transcript PN 3052 - 3058

observing the tasks their teams were performing and ensuring the required standard of work.¹⁶⁰

(f) Ms Dixon

[42] It was Ms Dixon's evidence that:

- Mr Leyshan's conduct, in allegedly making the Statement in the LKA Report, was of most concern to her.¹⁶¹
- Her conclusion that Mr Leyshan should be dismissed was also on the basis of his alleged lack of adequate supervision.¹⁶²
- Mr Leyshan's alleged making of the Statement was stated to be misconduct. Also seen as misconduct was Mr Leyshan's alleged lack of supervision. This was because it had to do with Mr Leyshan's attitude (misconduct) as a supervisor rather than his performance or skills as a supervisor.¹⁶³ She had formed the view that Mr Leyshan had an attitude which constituted gross misconduct on the basis that he had made the Statement as alleged in the LKA Report.¹⁶⁴
- The Statement was said to demonstrate an attitude of non active supervision in that Mr Leyshan chose not to put his supervisory skills into practice. The basis for this view was that he was not out on site regularly in his job as a supervisor. Mr Leyshan was said to have demonstrated a deficient attitude and an absence of active supervision by making the alleged Statement and his actions by not being on site regularly.¹⁶⁵
- It could not be recalled if there had been an analysis of Mr Leyshan's frequency in attending sites or consideration of such. It was agreed that the conclusion that Mr Leyshan was not actively supervising was based on the LKA Report which contained only a number of incidents without an analysis of where Mr Leyshan should have been at any point in time. She was not aware of how many occasions, during the six week period of the investigation, Mr Leyshan failed to be on site when he should have been.¹⁶⁶
- It was confirmed that Mr Leyshan's alleged lack of adequate supervision was based on the conduct of Mr Walker.¹⁶⁷
- With respect to the allegation that Mr Walker had fallen asleep on 27 December 2012, it was agreed that there was nothing that Mr Leyshan did or did not do which rendered him responsible for this.¹⁶⁸
- In terms of Mr Walker allegedly performing no work on 27 December 2012, failing to clean barbecues properly the next day and failing to collect rubbish on 31 December 2012, it was stated that Mr Leyshan had not created an environment where regular supervision was part of the regime, whereby he was present on site

¹⁶⁰ Transcript PN 3182

¹⁶¹ Transcript PN 3250

¹⁶² Transcript PN 3304

¹⁶³ Transcript PN 3306 - 3306, 3346 and 3354

¹⁶⁴ Transcript PN 3317 - 3318

¹⁶⁵ Transcript PN 3323 - 3331

¹⁶⁶ Transcript PN 3332 - 3344, 3355 and 3380 - 3381

¹⁶⁷ Transcript PN 2261

¹⁶⁸ Transcript PN 3364

regularly.¹⁶⁹ It was agreed that she had nothing before her which suggested that Mr Leyshan knew that Mr Walker did not do any work on 27 December 2012.¹⁷⁰

(g) Ms Thompson

[43] Ms Thompson gave evidence that:

- The Statement allegedly made by Mr Leyshan was a significant matter in her mind when deciding to dismiss Mr Leyshan.¹⁷¹
- In addition to concluding that Mr Leyshan had actively encouraged/enabled employees to disregard the requirements of their employment (the Statement), she had also concluded that Mr Leyshan had demonstrated an established pattern of poor work performance and inadequate supervision of his subordinates.¹⁷²
- Mr Leyshan's unacceptable performance in managing subordinate employees in an inappropriate manner was viewed as serious misconduct.¹⁷³
- She had asked if a warning had been issued to Mr Leyshan (no) but did not exactly ask if a performance improvement plan had been implemented in relation to him.¹⁷⁴
- In terms of the allegation that Mr Walker fell asleep at the wheel on 27 December 2012, it was said to be part of a pattern of behaviour by Mr Walker of not performing his duties. It was then acknowledged that there was no basis for making Mr Leyshan responsible for Mr Walker falling asleep at the wheel or for failing to collect rubbish on 31 December 2012.¹⁷⁵
- Mr Leyshan should have made sure that Mr Walker had cleaned the barbecues by supervising him as he knew what was on Mr Walker's work schedule and therefore what he should have been doing. Mr Leyshan should have been following systems and processes to ensure that the barbecues were being cleaned.¹⁷⁶ Mr Leyshan should have been following up with employees after they had cleaned the barbecues that day. He should also have visited them on site when they were cleaning barbecues to check that they were being cleaned and to the required standard.¹⁷⁷
- She did not know, as the decision maker, that Mr Leyshan did not check with Mr Walker when Mr Walker came back to the depot in the afternoon. There was said to not have been any evidence, one way or the other, as to whether Mr Leyshan had checked.¹⁷⁸ She did not request a report on the audit process that Mr Leyshan followed. She agreed that her conclusion that Mr Leyshan did not have a proper process in place for supervising his subordinates was not based on any substantial examination of what process he actually followed and what he was required to do.¹⁷⁹

¹⁶⁹ Transcript PN 3370 - 3371, 3376 - 3379 and 3382 - 3383

¹⁷⁰ Transcript PN 3374

¹⁷¹ Transcript PN 3551

¹⁷² Transcript PN 3577 - 3578

¹⁷³ Transcript PN 3591 - 3591

¹⁷⁴ Transcript PN 3587 - 3590

¹⁷⁵ Transcript PN 3649, 3653 - 3654 and 3639 - 3640

¹⁷⁶ Transcript PN 3655 - 3659

¹⁷⁷ Transcript PN 3660 - 3661

¹⁷⁸ Transcript PN 3662

¹⁷⁹ Transcript PN 3672 - 3674

She was not aware as to whether or not Mr Leyshan had such a process.¹⁸⁰

- Her conclusion that Mr Leyshan did not have a process or adequate process in place to properly supervise his subordinates was based solely on the contents of the LKA Report.¹⁸¹
- Based on the LKA Report, there was a pattern of poor performance by Mr Walker and, through the words of the Statement, an attitude on the part of Mr Leyshan that encouraged or did not address Mr Walker's failings.¹⁸²

(h) Considerations and Conclusions

(i) Mr Leyshan

[44] On behalf of the Applicant, it was submitted that this issue did not establish that there was a valid reason for Mr Leyshan's dismissal for three reasons. The first reason was that, as a matter of fact, there is no proper basis on which to visit responsibility to Mr Leyshan for each of the alleged instances of misconduct or inadequate performance by Mr Walker.¹⁸³

[45] In terms of the first incident on 27 December 2012 (falling asleep at the traffic lights), it was argued that Ms Thompson, Ms Dixon and Mr Stabb accepted that there was no basis for making Mr Leyshan responsible for that incident.¹⁸⁴

[46] The second was said to have been that Mr Walker took excessive and unauthorised breaks to attend to personal matters on three occasions. As two of these involved alleged criminal activity, the Applicant put them to one side. The remaining allegation was that, on 22 January 2013, Mr Walker took a two hour break and went out with his wife. It was argued that there was nothing which, on any view, could make Mr Leyshan responsible for Mr Walker taking an extended break. Mr Stabb was said to have accepted this as the case.¹⁸⁵

[47] In terms of the allegations that Mr Walker did not perform any work or particular work, it was contended that the Respondent's witnesses generally accepted that there was nothing that Mr Leyshan did or did not do that rendered him responsible for these allegations.¹⁸⁶

[48] The second reason why this was not a valid reason for the dismissal was that the Council has sought to reframe or explain Mr Leyshan's responsibility for Mr Walker's failings. This was said to have been attempted by Ms Thompson who raised the notion that Mr Leyshan needed to have a process in place to check on Mr Walker's work. However, Ms Thompson was recalled to have not known whether or not Mr Leyshan had such a process in place. Her conclusion about the absence of an adequate process was based solely on what was in the LKA Report. This was said to simply be a set of claimed observations of what people did on certain days.¹⁸⁷ It was stated that Ms Thompson was unaware that Mr Leyshan had

¹⁸⁰ Transcript PN 3663 and 3666 - 3669

¹⁸¹ Transcript PN 3671

¹⁸² Transcript PN 3670

¹⁸³ Transcript PN 3799 and 3804

¹⁸⁴ Transcript PN 3800 - 3801

¹⁸⁵ Transcript PN 3802 - 3802

¹⁸⁶ Transcript PN 3803 - 3804

¹⁸⁷ Transcript PN 3805 and 3807

said, during the investigation, that he regularly conducted on the spot checks as part of his auditing. The Applicant contended that, at no time, did the Council direct itself to what supervisory process he followed and whether it was sufficient. The evidence before the Commission was described as establishing that Mr Leyshan had adequate supervisory procedures.¹⁸⁸

[49] Mr Walden's evidence was also highlighted in terms of the number of playgrounds (160), parks (500) and barbecues (60) in the municipality. His evidence was recalled to have been that, even if the Applicant did not get to all of the facilities every month or even longer, that would not have been unreasonable. Further, it was contended that there was no evidence that Mr Leyshan was told that he had to do additional auditing.¹⁸⁹

[50] Reference was also made to Mr Boyle's and Mr Walden's evidence regarding the municipality being the largest and fastest growing one in the State. This had resulted in stretched Parks Department staff. Mr Boyle had also confirmed that Mr Leyshan had sought additional staff.¹⁹⁰

[51] The third proposition put on behalf of the Applicant was that, even if the Commission found some failing in Mr Leyshan's supervisory duties, it did not constitute a valid reason for the dismissal. It was noted that all of the Council's witnesses agreed that Mr Leyshan was "managing subordinate employees in an inappropriate manner". This phrase was said to have been taken from the Council's Conduct and Performance Management policy. A number of these witnesses were recalled to have agreed that the allegation that Mr Leyshan was inadequately or inappropriately supervising Mr Walker was a matter that fell within the managing of poor performance. It was also agreed that this policy does not provide for summary dismissal for inadequate performance unless a performance improvement plan has been implemented or the employee has received a warning.¹⁹¹

[52] As neither of these preconditions had been met, it was submitted that Mr Leyshan could not be summarily dismissed. Therefore, there could not be a valid reason.¹⁹²

(ii) The Council

[53] For its part, the Council contended that the principal reason for Mr Leyshan's dismissal was his abject failure to properly monitor and supervise the work performance and output of one of his subordinates, Mr Walker.¹⁹³

[54] It was acknowledged that, as Mr Walker worked in the field, it was not possible for Mr Leyshan to be actively supervising him in the field. However, Mr Leyshan was responsible for visiting his employees on a regular basis in the field.¹⁹⁴

¹⁸⁸ Transcript PN 3806 - 3809

¹⁸⁹ Transcript PN 3810 - 3812

¹⁹⁰ Transcript PN 3811

¹⁹¹ Transcript PN 3813 - 3814

¹⁹² Transcript PN 3815

¹⁹³ Transcript PN 3939 and Exhibit R13 at paragraph 9

¹⁹⁴ Transcript PN 3942 - 3943 and Exhibit R13 at paragraph 11

[55] It was stated that Mr Walden had issued a directive, in January 2013, to his subordinates that they visit their employees out in the field at least twice a week. Mr Leyshan was recalled to have not denied that this directive was issued. In addition, it was stated that Mr Leyshan was responsible for monitoring the quality and quantity of his employees' work and to have a constant dialogue with them so that behaviour such as Mr Walker's did not occur. Further, Mr Leyshan was said to be responsible for fostering a work environment where regular active supervision was normal and expected by the employees.¹⁹⁵ The Council submitted that, if Mr Leyshan had created such a working environment, Mr Walker would not have been tempted to behave as he did. Or, at the very least, Mr Leyshan would have been able to identify that Mr Walker was not fulfilling his role and could have acted to remedy the situation. It was recalled that Mr Leyshan's evidence did not include undertaking regular or programmed visits to see his employees in the field and it was said, therefore, that he did not do this.¹⁹⁶

[56] Mr Leyshan's evidence was stated to have been that:

- He prepared the working schedule for his employees each week and knew, on any given day, the tasks they had been allocated.¹⁹⁷
- He had many years' practical experience as a supervisor and had been trained in how to perform his supervisory duties.¹⁹⁸
- During cross examination, Mr Leyshan conceded that he had not visited Mr Walker at least twice a week in the field.¹⁹⁹
- He saw Mr Walker twice a day - morning and afternoon - in the depot but rarely saw him in the field.²⁰⁰
- He would not have much idea of what Mr Walker was doing in the field.²⁰¹
- On seven different days when Mr Walker was not performing his duties as required, Mr Leyshan did not visit Mr Walker in the field. However, during the period in question, there were two employees that Mr Leyshan was responsible for - Mr Walker and Witness X.²⁰²

[57] It was argued that the Commission was entitled to conclude that, apart from drawing up the weekly work schedules and undertaking various spot checks, that was the extent of Mr Leyshan's supervisory duties. This was said to represent a general disregard, by Mr Leyshan, of the importance of those responsibilities. The Applicant's supervisory behaviour was contrasted with that of Mr Stewart, another supervisor.²⁰³

[58] Illustrative of Mr Leyshan's general abdication of a process whereby employees would expect that, at any point in time, their supervisor would visit them, was said to be the

¹⁹⁵ Transcript PN 3943 - 3947 and Exhibit R13 at paragraphs 11 - 12

¹⁹⁶ Transcript PN 3948 - 3950 and Exhibit R13 at paragraphs 12 - 13

¹⁹⁷ Transcript PN 3950 and Exhibit R13 at paragraph 13

¹⁹⁸ Transcript PN 3950 and Exhibit R13 at paragraph 14

¹⁹⁹ Transcript PN 3951 and Exhibit R 13 at paragraph 14

²⁰⁰ Transcript PN 3951 and Exhibit R 13 at paragraphs 14 - 15

²⁰¹ Transcript PN 3952 and Exhibit R13 at paragraph 14

²⁰² Ibid

²⁰³ Transcript PN 3953 - 3954 and Exhibit R13 at paragraph 16

events at the Grange Reserve Soccer oval on 27 December 2012 (when the Statement was allegedly made).²⁰⁴ This was because:

- It was Mr Walker who came up to him and asked him what he was doing.²⁰⁵
- Mr Leyshan did not go to the oval to visit Mr Walker and Witness X.²⁰⁶
- Mr Leyshan did not ask Mr Walker what work he and Witness X were doing or where they were going after the oval.²⁰⁷

[59] With respect to Mr Leyshan's comment that he was not their (his employees) babysitter, the Council argued the following:

- The comment completely disregards any obligation to proactively monitor and supervise employees out in the field by visiting them at least twice a week.²⁰⁸
- It equates supervision with babysitting which shows Mr Leyshan's contempt and disdain for that requirement. It was also said to reveal Mr Leyshan's rejection of his supervisory responsibilities. The comment was stated to characterise Mr Leyshan's former and current attitude to supervisory matters.²⁰⁹

[60] Finally, it was argued that Mr Leyshan's attitude set the background for Mr Walker's behaviour together with Mr Leyshan's failure to actively monitor and supervise Mr Walker.²¹⁰

(iii) Conclusions

[61] Having considered all of the material and submissions before me, I have formed the view that Mr Leyshan, as Mr Walker's direct supervisor, was responsible for the completion by Mr Walker of his allocated work to the required standard. That was Mr Leyshan's role in his position as Parks Project Officer. Therefore, in terms of the failure by Mr Walker to perform his duties appropriately, as his supervisor, Mr Leyshan did not adequately fulfil his responsibility for ensuring that Mr Walker performed his work appropriately and to the required standard.

[62] The Commission views Mr Walker's activities as very serious matters and in no way condones such behaviour by an employee. The Council's reaction to the contents of the LKA Report is understandable.

[63] However, the LKA Report, which forms the basis of the decision to dismiss Mr Leyshan, is a one-dimensional snapshot of a six-week period through December 2012/January 2013. The Report is based on the observations of a private investigator, Witness X. The evidence before me is that the Council took the Report on face value and accepted it as if it was gospel. The Council, therefore, did not attempt to "colour in" the details regarding Mr Leyshan's supervisory approach and practice which is, naturally, not captured by a set of observations made over a six-week period. The Council did not go behind the Report and

²⁰⁴ Transcript PN 3955

²⁰⁵ Transcript PN 3955 and Exhibit R13 at paragraph 17

²⁰⁶ Transcript PN 3956 and Exhibit R13 at paragraph 18

²⁰⁷ Ibid

²⁰⁸ Transcript PN 3959 - 3960 and Exhibit R13 at paragraphs 15 - 19

²⁰⁹ Transcript PN 3960 - 3961 and Exhibit R13 at paragraph 19

²¹⁰ Transcript PN 3962 and Exhibit R13 at paragraph 19

ascertain, for example, Mr Leyshan's supervisory practices; how often he visited his employees in the field; what auditing and checking processes he had established and was this a particularly busy period and therefore not representative of what he normally did as a supervisor?

[64] Further, the information contained in the LKA Report was the result of a covert investigation into another employee (not Mr Leyshan). Witness X took it upon himself to record the activities of employees who were not the subject of his brief.

[65] In addition, Mr Leyshan had been in his position of Parks Project Officer for about two years at the time of his dismissal. Presumably, Mr Leyshan had been performing as a supervisor in the same or similar way over that period as he was during the period of the covert investigation. Mr Leyshan's supervisor was responsible for the way Mr Leyshan performed his role as a supervisor. No issues had been raised with Mr Leyshan in respect of his supervisory performance during his time in this role and no warnings had been issued to him either.

[66] If the information about Mr Walker's activities had come to light as part of the Council's normal management processes, under the Conduct and Performance Management policy, the Council would have been required to take a more rounded approach to the issues (including conducting their own investigation), rather than the narrow-cast pathway of simply taking the LKA Report at face value and not looking behind it.

[67] Therefore, although it has been found that Mr Leyshan was responsible for Mr Walker's failure to fulfil the responsibilities of his role, for all of these reasons, it is not possible to find that this reason constitutes a valid reason for Mr Leyshan's dismissal.

3. Third issue - Breaches of the Procurement Policy

[68] Mr Leyshan, Mr Boyle and Mr Walden gave evidence in respect of this issue.

(a) Operation of the Procurement policy

(i) Mr Leyshan

[69] With respect to his understanding of how the Procurement policy operated, it was Mr Leyshan's evidence that:

- He was aware of the Procurement policy and had browsed through it during the training.²¹¹
- He was provided with basic training by the Finance Department in 2011.²¹²
- When the Procurement policy was introduced in 2011, there was a meeting between Mr Wilson and Mr Collins from the Finance Department and Mr Leyshan. An outcome of the discussion was said to have been that, for urgent jobs that needed to be done before a purchase order could be raised, he was told that he was allowed to do the emergency jobs and raise an order number after that. This was what he had been doing with his emergency jobs. Even though Specialised Road Maintenance

²¹¹ Transcript PN 187 and 356-357

²¹² Transcript PN 188 – 189

(SRM) was not on the list of preferred suppliers, he was also given permission to get the urgent job done and then raise an order number in respect of their services.²¹³

- He admitted that the A&K Landscaping purchase orders were raised after the work had been done. However, this was because the Conservation Department was supposed to have raised the purchase order.
- An important aspect of his role was to purchase goods and services. It was his responsibility to generate a purchase order for approval by Mr Boyle.²¹⁴ He was unaware of his budget.²¹⁵
- He understood that a verbal quote only was required for works valued at less than \$2000.
- The process was to firstly obtain a quote (either verbal or written depending on the cost). The next step was to create a purchase order which set out the supplier/contractor, the goods or services and the cost. The purchase order was then electronically submitted for approval by the appropriate manager (Mr Boyle). Once he was notified that the purchase order was approved, he was then authorised to engage the contractor/buy the goods.²¹⁶
- Mr Boyle was responsible for approving the purchase orders he drew up. It was not uncommon for Mr Boyle to take a week to approve them.²¹⁷
- Mr Boyle had raised a question about/rejected his purchase orders on about three occasions in the seven years Mr Boyle had been there. One rejection was due to insufficient funds in the budget.²¹⁸

[70] He was not aware that 62% of works under his control were completed before a purchase order had been generated.²¹⁹

(ii) Mr Walden

[71] It was stated by Mr Walden that the Procurement policy provides that the situation, for reasons of security, safety or health, may be made safe and that, as soon as possible, a purchase order is raised to cover the costs of those works. If there are any further planned works, approval has to be placed for those as well. He explained that “as soon as possible” meant that, on return to the office, a purchase would be entered into the system and that the Co-ordinator (Mr Boyle) would be informed that emergency works had to be undertaken. It was said that, to his knowledge, such information had not been provided by Mr Leyshan to Mr Boyle regarding the anomalies raised in his second witness statement.²²⁰

[72] Mr Walden agreed that, where there is a standing contract and there is a reliable amount of work that is done each month against budget, a work order can be raised to capture the works throughout the month.²²¹

²¹³ Transcript PN 521-522

²¹⁴ Transcript PN 359-360 and 375

²¹⁵ Transcript PN 360 and 369-371

²¹⁶ Transcript PN 193 – 196, 389-395 and 399

²¹⁷ Transcript PN 195 and 342 – 344

²¹⁸ Transcript PN 198 – 200

²¹⁹ Transcript PN 345

²²⁰ Transcript PN 2116 – 2121 and 2644

²²¹ Transcript PN 2131

[73] It was confirmed by Mr Walden that the Procurement policy provides for certain exceptions to the requirement to follow the purchasing order method including for matters of emergency in respect of public health, safety or security as a consequence of an unseen event or occurrence. He expected Mr Leyshan to be diligent in attending to matters of emergency and that, to do so, Mr Leyshan would have to exercise judgement and discretion.²²² Mr Walden agreed that, where works relate to matters of emergency, including public health, security or safety, if the risk has immediacy, those works have to be done urgently. In those circumstances, it was stated that the works would be done before a purchase order had been approved. He confirmed that the Procurement policy did not require a supervisor's approval prior to engaging in works for matters of emergency.²²³

[74] It was agreed that he had never told Mr Leyshan directly nor told Mr Boyle to tell Mr Leyshan that Mr Leyshan had to check with Mr Boyle first when deciding whether to make purchases for matters of emergency, including public health, safety or security. Further, he had never issued Mr Leyshan with any guidelines regarding how to determine whether a particular purchase was a matter of urgency. Mr Walden also confirmed that he had never told Mr Leyshan that he had to specifically notify either himself or Mr Boyle after he had made purchases for matters of emergency. What was required when making such purchases was to put in a purchase order after the purchase had been made for that purpose.²²⁴

[75] Mr Walden agreed that the Procurement policy recognises that there may be situations where insufficient quotations are received to satisfy the requirements regarding the obtaining of quotes. These included where insufficient quotes are actually received, where there are few suppliers of the goods or works or where the work is highly specialised.²²⁵ He indicated that he was unaware that some of the purchases proposed by Mr Leyshan were in circumstances where insufficient quotations were unable to be obtained e.g. water meters can only be obtained from the relevant authority.²²⁶

[76] It was Mr Walden's evidence that 62% of all works performed under Mr Leyshan's control over the previous two years were completed before a purchase order had been generated. Mr Walden's view was that this was an unacceptable situation that should not have been permitted to occur.²²⁷ With respect to the report, Mr Walden indicated that he had not checked each of the order numbers to confirm the report's accuracy. Further, he said that he had not checked as to what proportion of the 62% were purchases for matters of emergency. However, he did not accept that all of the 62% were for emergency purposes.²²⁸

[77] Mr Walden explained that the Finance Department had provided him with this information from the Council's financial system and that the financial system had held that information over the past two years.²²⁹ It was Mr Walden's understanding that there were annual audit reviews of purchasing patterns undertaken by a combination of an internal and

²²² Transcript PN 2468 – 2472

²²³ Transcript PN 2503 – 2505

²²⁴ Transcript PN 2473 – 2477

²²⁵ Transcript PN 2494 – 2498

²²⁶ Transcript PN 2499 – 2502

²²⁷ Transcript PN 2441 – 2443 and Exhibit R6 at paragraph 16

²²⁸ Transcript PN 2456 and 2514-2516

²²⁹ Transcript PN 2444

external auditor.²³⁰ He confirmed that the internal audit process was the internal control used to detect the timing of work performed and purchase order requests. It was agreed that this process did not detect the alleged breaches in this regard.²³¹

[78] With respect to the report regarding the timing of work performed and purchase order requests by Mr Leyshan, it was Mr Walden's evidence that he had requested Finance to provide him with that report. He further explained that, when they had someone take over Mr Leyshan's activities, it was found that there were some works which were under way which contractors were asking for purchase orders for. Then, it was further understood that there were works that had been requested that had no purchase order allocated to these works. It was also indicated that he was having difficulty recollecting whether he made a direct request or whether, as part of discussing the procurement processes, when he had found that were not in accordance with the policy, that it was offered.²³²

[79] The purpose of the request was said to have been to assist in preparing his statement in this proceeding. It was stated that he had not requested Finance to prepare a similar report dealing with any other of his subordinate employees.²³³ Mr Walden stated that he was not aware that he could have asked Finance to prepare such a report at any time during Mr Leyshan's employment. He said that no one from Finance had advised him that he could get such a report and he was not aware that Finance had this type of information. He was not aware as to whether the Council had engaged an external auditor to audit Mr Leyshan's procurement activities either before or after his dismissal.²³⁴

[80] Mr Walden indicated that Mr Boyle had responsibility for approving the majority of Mr Leyshan's purchase orders. It was stated that Mr Boyle had responsibility for ensuring that Mr Leyshan went about his purchases in a manner that complied with the Procurement policy.²³⁵

[81] It was agreed by Mr Walden that there was a practice whereby a purchase order for preferred suppliers could be created at the start of each month for a certain amount to be spent with the supplier as needs arose over the course of the month. He confirmed Mr Lambert's evidence that Specialised Road Maintenance (SRM) is not a designated preferred supplier for the Parks Department. He agreed that there are no preferred suppliers who only provide services to the Council in the maintenance area of the Parks Department. This was said to include the area of turf.²³⁶

[82] With respect to a purchase order for \$10,000 that he had approved on 3 January 2013²³⁷, Mr Walden agreed that all he was told when he approved this expenditure was that it was for 'various works' but knew that up to \$10,000 would go to SRM. He stated that the requirement for such a standing purchase order was understood and Mr Leyshan's previous history indicated that it would be about \$10,000. It was indicated that he did not speak to Mr

²³⁰ Transcript PN 2462 – 2466

²³¹ Transcript PN 2506 – 2508

²³² Transcript PN 2545 and 2610-2611

²³³ Transcript PN 2546 – 2547 and 2616

²³⁴ Transcript PN 2617-2623

²³⁵ Transcript PN 2457 and 2460

²³⁶ Transcript PN 2558-2568

²³⁷ Exhibit R6 at Attachment SW-25

Leyshan about this particular purchase order.²³⁸ Mr Walden confirmed that SRM has a contract with the Council and that it is a recognised or established provider of services. He understood that SRM was engaged by Mr Leyshan to attend to and deal with urgent works, including matters of emergency going to public health, safety or secure security, as required.²³⁹ Mr Walden indicated that he had probably received five purchase orders from Mr Leyshan and that he had approved all of them.²⁴⁰

(iii) Mr Boyle

[83] It was confirmed by Mr Boyle that he had only queried a handful of purchase orders submitted by Mr Leyshan. This was because he either wanted more information about a purchase order or because there were budgetary issues. Mr Boyle agreed that there had only been a couple of purchase orders in the last couple of years submitted by Mr Leyshan that he had not approved - for budgetary reasons.²⁴¹

[84] Mr Boyle agreed that there was an exception to the purchasing policy, which required a purchase order following a competitive quotation process, and that it was in matters of emergency, including public health, safety and security.²⁴² As his supervisor, Mr Boyle agreed that he expected Mr Leyshan to act promptly in such situations. This was said to, because of necessity, result in the works being done before a purchase order was approved.²⁴³ He stated that he had not told Mr Leyshan that he had to check with him before deciding to make purchases for matters of emergency including public health, safety or security or to advise when he had made such purchases.²⁴⁴ Mr Boyle indicated that he had not issued Mr Leyshan with any guidelines as to how to determine whether a particular purchase issue was a matter of emergency.²⁴⁵

[85] It was confirmed by Mr Boyle that there were certain exceptions to the requirements in the purchasing policy for obtaining quotes before goods and services are purchased.²⁴⁶ He agreed that, having worked with Mr Leyshan, there were, from time to time, purchase orders where there were insufficient quotes because the right number of quotes were unable to be obtained.²⁴⁷

[86] When he had received the purchase orders in question from Mr Leyshan, except for Williams Landing and the recycled water meters, Mr Boyle stated that he was not aware that these works had already been completed.²⁴⁸

²³⁸ Transcript PN 2518 – 2531

²³⁹ Transcript PN 2533-2540

²⁴⁰ Transcript PN 2541 – 2544

²⁴¹ Transcript PN 2701-2704

²⁴² Transcript PN 2705-2708

²⁴³ Transcript PN 2712-2713 and 2744-2745

²⁴⁴ Transcript PN 2716-2717 and 2720

²⁴⁵ Transcript PN2718

²⁴⁶ Transcript PN 2736-2741

²⁴⁷ Transcript PN 2742

²⁴⁸ Exhibit R7 at paragraph 6

(iv) Mr Stabb

[87] It was stated by Mr Stabb that the normal presumption was that the paperwork precedes the actual execution or delivery of the goods and services. He indicated that he would be concerned if the 62% of the work performed under Mr Leyshan's control over the past two years was not emergency works. It was explained that the Council have been running a system to identify breaches of the policy and have been going through the organisation providing training and support to ensure that employees understand their obligations. The intention was said to be that there would be more vigorous monitoring of purchase orders with appropriate action being taken when there were breaches of the policy. Mr Stabb confirmed that Mr Boyle was responsible for Mr Leyshan's compliance with the procurement policy.²⁴⁹

(v) Mr Lambert

[88] With respect to the report regarding Mr Leyshan's purchase order history²⁵⁰, Mr Lambert stated that such a report is capable of being produced from the electronic financial system. He confirmed that the report was based on information held by the Finance Department over the previous years.²⁵¹

[89] He was not aware of similar reports having been produced for other employees.²⁵²

[90] He agreed that Mr Boyle had responsibility for approval of My Leyshan's purchase orders. No disciplinary action was said to have been taken against Mr Boyle.²⁵³

[91] It was Mr Lambert's evidence that he understood that, following Mr Leyshan's dismissal, one of Mr Walden's officers raised concerns about some specific purchase orders and requested more detailed information.²⁵⁴

[92] He was not aware of reports, such as the one generated in respect of Mr Leyshan, having been provided to management in the past regarding any other employee.²⁵⁵

(b) Specialised Road Maintenance

(i) Mr Leyshan

[93] With respect to the various occasions when he had SRM perform works for the Council, Mr Leyshan agreed that, at the time he directed them to perform those services, he had not raised a purchase order. He confirmed that, in those circumstances, he was required to raise a formal purchase order as soon as possible.²⁵⁶

²⁴⁹ Transcript PN 3157-3164

²⁵⁰ Exhibit R6 at attachment SW-34

²⁵¹ Transcript PN 1926-1930

²⁵² Transcript PN 1971 and 1935

²⁵³ Transcript PN 1937 and 1939

²⁵⁴ Transcript PN 1973

²⁵⁵ Transcript PN 2011-2012

²⁵⁶ Transcript PN 637-639

[94] It was explained by Mr Leyshan that he raised purchase orders following receipt of written quotes. Contractors provided him with a verbal quote at the time and then followed up with written quotes. For the works completed by SRM in December 2012 and January 2013, Mr Leyshan explained that he did not raise the purchase orders until he had received the written quotes.²⁵⁷ He stated that, generally, he would raise one purchase order at the start of the month that ran for the duration of the month. However, for the works done before Christmas/New Year, he had not done this. This was because it had slipped his mind as there were other things on his mind, for example, over the Christmas month, he spent a lot of time in kindergartens and child care centres as they were shut down for the Christmas/New Year break. Maintenance is performed by contractors on all of their playgrounds and whatever else has been requested over November to January.²⁵⁸

[95] Mr Leyshan said that, if one went back months, one would see a purchase order for \$2000 for small jobs like SRM. This was said to be what Mr Collins and Mr Wilson had instructed him to do.²⁵⁹

(ii) Mr Boyle

[96] Mr Boyle indicated that he was aware that there was a standing contract between the Council and SRM. He agreed that SRM was often engaged by Mr Leyshan to undertake emergency works and that this was because they did a good job and in a timely way.²⁶⁰ It was stated that he understood that Mr Leyshan, from time to time, would raise a purchase order in favour of SRM for various jobs to be undertaken over an upcoming month.²⁶¹

[97] It was said by Mr Boyle that he encouraged Mr Leyshan to raise an order before the works were done. He stated that, if suppliers or contractors had a contract, he would ask his officers to raise a blanket order at the start of the month. The purpose of this was to pick up small jobs that arose across the month.²⁶² It was Mr Boyle's evidence that there were no preferred contractors for maintenance or turf in the Parks area.²⁶³

[98] Mr Boyle indicated that, because of the increased work pressures, it may take him a couple of days to approve a purchase order.²⁶⁴

(c) Specific purchasing order anomalies

[99] In terms of the specific anomalies identified by Mr Walden²⁶⁵, the evidence was as follows:

²⁵⁷ Transcript PN 681 - 685 and 690

²⁵⁸ Transcript PN 686 - 687

²⁵⁹ Transcript PN 686

²⁶⁰ Transcript PN 2781 - 2783

²⁶¹ Transcript PN 2784

²⁶² Transcript PN 2784 - 2790

²⁶³ Transcript PN 2795 - 2796

²⁶⁴ Transcript PN 2815-2816

²⁶⁵ Exhibit R7 at paragraph 15

(i) *Williams Landing - VRC Landscapes*

A. Mr Leyshan

[100] It was Mr Leyshan's evidence that:

- A quote had been received from VRC Landscapes (VRC), dated 10 December 2012, for \$3500 per month for the slashing of grass.²⁶⁶
- He denied asking Adam Trainon to also quote for this work or that he had seen his quote for \$3200 per month.²⁶⁷
- Mr Trainon's quote was not addressed to him but to Mr Boyle and Mr Brooks.²⁶⁸
- He had asked the company who had previously done the work to quote but they had declined.²⁶⁹
- He and Mr Stewart had shown Mr Boyle the VRC quote and had advised him that the other company had withdrawn. Mr Boyle then gave the go-ahead to the VRC quote.²⁷⁰ No issue had been raised subsequently with him regarding the work having been given to VRC.²⁷¹
- What was required for this job was landscaping and not just grass cutting. VRC had previously undertaken this type of work for the Council whereas Mr Trainon had not.²⁷²
- He confirmed that, under the terms of the Procurement policy, he was required to obtain a written quote before the work was undertaken.²⁷³ He also agreed that the work had been performed on 7 December 2012, 3 days prior to receipt of the quote.²⁷⁴
- Under the direction of the Conservation Department, he had authorised VRC to do the work.²⁷⁵ The work had been done prior to the raising of a purchase order due to the Conservation Department not doing that.²⁷⁶
- He was asked by the Conservation Department to find a contractor who could do this work. He obtained a verbal quote for the work from VRC which he gave to the Conservation Department and told them to raise the order number because it was their job and the cost was coming out of their budget. By the time he asked for a copy of the quote, the job had been done but he raised an order number.²⁷⁷
- He had personally shown VRC the site as they were already down there doing some mowing.²⁷⁸

²⁶⁶ Transcript PN 205 – 207, 218 and 402 -403 and exhibit R7 at paragraph 15 (a) and Attachment SW-9

²⁶⁷ Transcript PN 209-210 and Exhibit R7 at paragraph 15(a) and Attachment SW-8

²⁶⁸ Transcript PN 216-217

²⁶⁹ Transcript PN 219-220

²⁷⁰ Transcript PN 221 – 224

²⁷¹ Transcript PN 225

²⁷² Transcript PN 208, 215 and 227

²⁷³ Transcript PN 405

²⁷⁴ Transcript PN 405-407

²⁷⁵ Transcript PN 408-409 and 412 and 416 – 419

²⁷⁶ Transcript PN 410)

²⁷⁷ Transcript PN 411 – 414 and 420

²⁷⁸ Transcript PN 414 – 415

B. Mr Walden

[101] Mr Waldon indicated that, despite a lower quote having been received from Mr Trainon, and the Council having used both Mr Trainon and VRC previously, Mr Leyshan had awarded the work to VRC. This was said to be in breach of the Procurement policy as the work was not allocated to the contractor who offered the best value.²⁷⁹

C. Mr Boyle

[102] It was recalled by Mr Boyle that, in October/November 2012, he spoke to Mr Leyshan and told him that he wanted to get a contractor in on a temporary basis to provide mowing and horticultural services at Williams Landing until he had drawn up a tender.²⁸⁰ He had asked Mr Leyshan to make sure that any contractor who quoted on the work was shown the full scope of the work required and understood it. It was recalled that Mr Leyshan had assured him that he had done that.²⁸¹ He confirmed that Mr Leyshan had shown him the quote from VRC.²⁸² He did not remember Mr Leyshan telling him that the other company that was going to supply a quote had pulled out and the reasons why.²⁸³ Mr Boyle did not recall Mr Leyshan showing him the quotation or him giving Mr Leyshan the go-ahead to give the work to VRC.²⁸⁴

[103] With respect to the quotation from Adam Trainon, dated 12 December 2011, Mr Boyle stated that it had not been handed to him by Adam Trainon and that he had not seen it until very recently.²⁸⁵ He had found it in a manila folder just to the side of Mr Leyshan's desk.²⁸⁶ He had never spoken to Mr Leyshan about it.²⁸⁷

[104] Mr Boyle agreed that the work that Mr Trainon does is more cutting and mowing whereas VRC do the full suite of landscaping and gardening work. However, he said that Mr Trainon has had some experience in landscaping and has previously performed landscaping works for the Council.²⁸⁸

(ii) Gleeson's Road Extension and Mouyong Road Extension, Little River - A & K Landscaping

²⁷⁹ Exhibit R6 at paragraph 15 (a)

²⁸⁰ Transcript PN 2747

²⁸¹ Exhibit R7 at paragraph 4

²⁸² Transcript PN 2754

²⁸³ Transcript PN 2755 – 2757

²⁸⁴ Transcript PN 2758 – 2759

²⁸⁵ Transcript PN 2660-2770

²⁸⁶ Transcript PN 2825-2829

²⁸⁷ Transcript PN 2771- 2772

²⁸⁸ Transcript PN 2773 – 2775 and Exhibit R7 at paragraph 4

A. Mr Leyshan

[105] Mr Leyshan's evidence was that:

- The Conservation Department had asked him to get some grass slashing done at Gleeson's Road and Mouyong Road.²⁸⁹
- He told the Conservation Department that he would ask A&K Landscaping (A&K) to give a price as they were doing other grass cutting at Little River for the Council. He obtained a verbal price which he gave to the Conservation Department and asked them to raise an order number.²⁹⁰ He had authorised A&K to do the work at Gleeson's Road.²⁹¹ A verbal quote had come in before he had authorised the work but there was no purchase order raised beforehand.²⁹²
- When this was not done, he had asked A&K to send him a copy of the quote. He had then raised an order number. However, the quotes had come in after the work was completed at both locations.²⁹³
- He confirmed that, under the Procurement policy, a purchase order must be approved before the work is undertaken.²⁹⁴ He did not contact Mr Boyle and tell him that the work had already been performed.²⁹⁵
- Even though it was not Mr Leyshan's responsibility, the Team Leader Conservation had given him the go-ahead to get the grass slashed as it was high fire season and the grass was very tall.²⁹⁶

B. Mr Walden

[106] Mr Walden stated that both these works were carried out before the expenditure was approved all the cost was known. Mr Leyshan had raised purchase orders after the council had effectively been committed to the expenditure.²⁹⁷

(iii) *Meter cages - Werribee Tow Bars*

A. Mr Leyshan

[107] It was Mr Leyshan's evidence that:

- He instructed Paul Ryan Plumbing (PRP) (a Council contract plumber) to organise recycled water meters from City West Water and to arrange for some meter cages to be made. Mr Ryan engaged Werribee Tow Bars to design and make the meter cages.²⁹⁸

²⁸⁹ Transcript PN 233 and 241 – 242

²⁹⁰ Transcript PN 231 – 233

²⁹¹ Transcript PN 441-442

²⁹² Transcript PN 443-444

²⁹³ Transcript PN 233-234, 428-429, 434 and 440

²⁹⁴ Transcript PN 435

²⁹⁵ Transcript PN 436

²⁹⁶ Transcript PN 235, 237 and 241-242

²⁹⁷ Exhibit R6 at paragraphs 15 (b) and (c)

²⁹⁸ Transcript PN 253

- The quote of \$3927 for 6 meter cages was said to be reasonable compared with two previous quotes for \$1100 and \$900 per cage respectively.²⁹⁹
- The cages were urgent because they were from sites where the water meters had been stolen.³⁰⁰
- He had spoken to Mr Boyle and told him that water meters had been stolen but that, before they could get replacements, there needed to be water meter cages in place. He also said that they needed to get a supplier and so PRP was engaged and he, in turn, engaged Werribee Tow Bars.³⁰¹
- It was agreed that he still needed to raise a purchase order and to have it formally approved. He said that a purchase order was not raised until after the cages had been supplied because he was not aware that they were being constructed so quickly.³⁰²
- Mr Leyshan's Team Leader had directed that the cages be constructed and, although he has the authority to do the purchase order, he asked Mr Leyshan to raise one.³⁰³

(iv) Installation of recycled water meters

A. Mr Leyshan

[108] Mr Leyshan's evidence was as follows:

- A plumber was required to fill in the documentation to obtain water meters from City West Water.³⁰⁴ He engaged PRP for this purpose.³⁰⁵ He did not obtain a quote for Paul Ryan's filling in of the paperwork (\$400) because he is a preferred supplier.³⁰⁶
- The specific cost of the water meters depended on the size of the meter and would not be known until City West Water sent the Council the invoice.³⁰⁷ It was therefore not possible to obtain a quote.³⁰⁸
- He said that he had no idea what the cost might be of installing the recycled water meters.³⁰⁹
- With respect to installing the meters, quotes were to be obtained for this. He said that Paul Ryan would not get this job as he only does jobs at an hourly rate for emergency work. Installation of water meters was not emergency work.³¹⁰
- With respect to Mr Walden's statement that he was told by Mr Boyle that Paul Ryan had said to him that he was not required to provide a quote before he commenced, as Mr Leyshan had told him to complete the works at the hourly rate, Mr Leyshan responded that Paul Ryan does not give quotes on urgent/small jobs. Rather, he

²⁹⁹ Transcript PN 257 – 259

³⁰⁰ Transcript PN 459

³⁰¹ Transcript PN 460 – 462

³⁰² Transcript PN 463 – 464

³⁰³ Transcript PN 465 – 469

³⁰⁴ Transcript PN 252, 254 and 264 – 266

³⁰⁵ Transcript PN 478

³⁰⁶ Transcript PN 484 – 485

³⁰⁷ Transcript PN 266 – 269

³⁰⁸ Transcript PN 269

³⁰⁹ Transcript PN 471 – 476

³¹⁰ Transcript PN 481 – 483

worked on the basis of his hourly rate as one of the preferred suppliers. However, Mr Ryan would have to quote on the installation of the water meters.³¹¹

[109] He denied telling Paul Ryan, at the time of requesting him to install the water meters, that he was to do it at his hourly rate.³¹²

B. Mr Walden

[110] With respect to the remaining work at President's Park, Galvin Park and Watton Street, Mr Walden indicated that this work had not been awarded at or before Mr Leyshan's dismissal.³¹³ In terms of Mr Leyshan having told PRP that he could do these works at his hourly rate, Mr Walden stated that this information was based on what Mr Boyle had told him.³¹⁴

C. Mr Boyle

[111] Mr Boyle confirmed that he had spoken to Mr Ryan of Paul Ryan Plumbing about his dealings with Mr Leyshan in connection with the installation of recycled water meters. Mr Ryan had said that he had sourced the PIC numbers from City West Water on Mr Leyshan's instruction. He did not know whether Mr Leyshan told Mr Ryan that he could get the PIC number at an hourly rate.³¹⁵

(iv) Riversdale Drive footbridge - Specialised Road Maintenance

A. Mr Leyshan

[112] Mr Leyshan stated that:

- He had used SRM previously for a lot of emergency jobs as they could go out on that day and make the site safe.³¹⁶
- He had gone out to the site and had ascertained that it was dangerous in relation to rotten boards and holes. This was said to be emergency job.³¹⁷
- He had then sent out SRM who provided a verbal quote. As it was an emergency job, he had given the go-ahead. SRM had sent him the invoice after the job had been done. This was consistent with his practice of getting a lot of the urgent jobs done before he raises an order number.³¹⁸
- He had raised the purchase order after SRM had provided a verbal quote. The order number would have been drawn up the next day.³¹⁹ He confirmed that a written quote, dated 19 December 2012, was received on 1 January 2013 and that he had

³¹¹ Transcript PN 273 – 274

³¹² Transcript PN 477

³¹³ Transcript PN 2576 and Exhibit R6 at paragraph 15 (e)

³¹⁴ Transcript PN 2577-2579

³¹⁵ Transcript PN 2777 – 2780

³¹⁶ Transcript PN 276 – 277 and 286

³¹⁷ Transcript PN 279 – 280 and 284 – 285 and 504 and 507

³¹⁸ Transcript PN 282 – 283 and 517

³¹⁹ Transcript PN 288

raised a purchase order on 2 January 2013.³²⁰ The repair works were undertaken on 20 December 2013.³²¹ With respect to the delay between when the work was undertaken (20 December 2012) and when he had raised a purchase order (27 January 2013) Mr Leyshan said that he was human and that if he did make a mistake - he made a mistake.³²²

- He was unsure as to whether he had raised another purchase order prior to the date of the quote. This was because the purchase order on 2 January 2013 may have been for jobs in January to the start of February 2013 as, for some companies, he did all of the purchase orders at the beginning of the month for that month.³²³
- He did not think he advised Mr Boyle about this particular urgent job although he did for most of them.³²⁴ He did not advise Mr Walden either.³²⁵
- He said that he generally raised a purchase order the day after receiving a verbal quote. However, this had not occurred with respect to this quote.³²⁶

B. Mr Walden

[113] Mr Walden stated that Mr Leyshan had raised a purchase order on 2 January 2013, well after the work was completed on 20 December 2012. This was said to be a breach of policy as the works were undertaken before the expenditure was approved. This resulted in the Council effectively being committed to the expenditure.³²⁷

(v) Posts and rails on a handrail at Convent Drive - Specialised Road Maintenance

A. Mr Leyshan

[114] It was Mr Leyshan's evidence that this related to a handrail that goes down along the Werribee River which kids had removed overnight.³²⁸ If a person took a tumble, they would have ended up in the river.³²⁹

[115] Mr Leyshan had requested SRM to replace the handrail. They gave him a verbal quote and Mr Leyshan instructed them to do the work there and then. This was because SRM was able to do this.³³⁰ He confirmed that he had received a written quote, dated 19 December 2012, on 1 January 2013 and that, at that point in time, the work had already been performed. He had authorised payment of the quote on 3 January 2013.³³¹ Mr Leyshan also indicated that he had not advised Mr Boyle that the work was urgent.³³²

³²⁰ Transcript PN 503, 505 and 647

³²¹ Transcript PN 646

³²² Transcript PN 648

³²³ Transcript PN 508-510

³²⁴ Transcript PN 524-525

³²⁵ Transcript PN 526

³²⁶ Transcript PN 527-528

³²⁷ Exhibit R6 at paragraph 15 (f)

³²⁸ Transcript PN 293 – 294

³²⁹ Transcript PN 295

³³⁰ Transcript PN 295 – 296 and 531

³³¹ Transcript PN 530-535

³³² Transcript PN 536-537

[116] It was agreed by Mr Leyshan that there was a substantial delay between when the works were done (20 December 2012) and when a purchase order was raised (2 January 2013).³³³

B. Mr Walden

[117] Mr Walden's evidence was that these works were not of an emergency nature because the situation was made safe firstly by Council staff. The contractor had then followed up with planned works to complete the repair.³³⁴ He could not say from his own knowledge what had been done to secure the site.³³⁵ He said that he had been advised by Mr Boyle that it was not urgent work.³³⁶

[118] It was stated that the works had been ordered before the expenditure was approved. Further, the purchase order was raised after the Council had been committed to the expenditure.³³⁷

(vi) Dunnings Road Reserve - Specialised Road Maintenance

A. Mr Leyshan

[119] Mr Leyshan gave evidence that bollards had been removed at the Dunnings Road oval and cars were doing wheelies on the turf and doing costly damage to the surface.³³⁸ He had telephoned SRM and Mr Thompson had gone out and given him a verbal quote to replace the bollards. This was done on that day.³³⁹

[120] It was agreed by Mr Leyshan that there was a delay between the works having been completed (23 December 2012) and the raising of a purchase order (2 January 2013).³⁴⁰

B. Mr Walden

[121] Mr Walden's evidence was that it was his understanding that these were not of an emergency nature. This was because the works were to create an improvement to the fence that was there and as such they were planned as the works were stipulated.³⁴¹ He also said that the works were ordered before the expenditure was approved, thereby committing the Council to this expenditure.³⁴²

³³³ Transcript PN 652

³³⁴ Transcript PN 2092 – 2094

³³⁵ Transcript PN 2584

³³⁶ Transcript PN 2588

³³⁷ Exhibit R6 at paragraph 15(g)

³³⁸ Transcript PN 300 – 301

³³⁹ Transcript PN 302 – 303

³⁴⁰ Transcript PN 657

³⁴¹ Transcript PN 2097 – 2098

³⁴² Exhibit R6 at paragraph 15(h)

(vii) Broken locks on sheds at President's Park - Specialised Road Maintenance

A. Mr Leyshan

[122] Mr Leyshan gave evidence that:

- The shed at President's Park had been broken into overnight and the roller door needed to be replaced.³⁴³
- He had engaged SRM to make the shed safe until the roller door was replaced.³⁴⁴
- He had rung SRM who had gone there later in the day and had given him a verbal quote. Mr Thompson had fixed the door on a temporary basis so that the shed would not get broken into again that night.³⁴⁵
- At the time he directed SRM to do the work, he had not raised a purchase order or obtained approval for that work.³⁴⁶
- He agreed that there was a substantial delay between when the works were completed (22 December 2012) and when he raised a purchase order (2 January 2013).³⁴⁷
- He had not spoken to Mr Boyle but believed that the Turf team Leader had told him.³⁴⁸

B. Mr Walden

[123] Mr Walden's evidence was that it was his understanding that these works were not of an emergency nature. This was because the works referred to were attended to by Council staff in the first instance who had re-secured the door. There were then follow up works the next day to deal with the situation properly.³⁴⁹ It was stated that the works were ordered before the expenditure was approved. This meant that the Council was effectively committed to this expenditure.³⁵⁰

[124] It was also Mr Walden's evidence that he did not know from his own observation that the shed had been secured overnight by Council staff but because Mr Boyle had told him that this was not urgent work.³⁵¹

³⁴³ Transcript PN 304 – 305 and 658

³⁴⁴ Transcript PN 308

³⁴⁵ Transcript PN 309 – 310 and 543

³⁴⁶ Transcript PN 544-545

³⁴⁷ Transcript PN 659-661

³⁴⁸ Transcript PN 546-547

³⁴⁹ Transcript PN 2101 – 2103

³⁵⁰ Exhibit R6 at paragraph 15(i)

³⁵¹ Transcript PN 2587 and 2588

(viii) Removal of a bollard base – Specialised Road Maintenance

A. Mr Leyshan

[125] Mr Leyshan stated that a resident had tripped over the bollard base. He had engaged SRM to grind it down and had been given a verbal quote on site.³⁵² He confirmed that the work had been undertaken on 24 December 2012 and that a purchase order had not been raised until 2 January 2013. It was agreed that this was a substantial delay.³⁵³

[126] At the time he had given SRM the go-ahead, Mr Leyshan stated that he had not raised a purchase order nor had one approved. He had not spoken to Mr Boyle and advised him that the work was urgent.³⁵⁴

[127] Mr Leyshan also indicated that the work had been approved after it had been completed as it was a trip hazard.³⁵⁵

B. Mr Walden

[128] Mr Walden stated that, it was his opinion that, these works were not of an emergency nature as he was not aware that the bollard base posed a risk. It was his view that these were works that could have been planned.³⁵⁶ Mr Walden said that the works were ordered before the expenditure was approved. Therefore, the Council was effectively committed to the expenditure.³⁵⁷

[129] It was indicated by Mr Walden that damaged bollard bases may pose a threat to public safety.³⁵⁸ He also said that Mr Boyle had advised him that the work was not urgent.³⁵⁹

(ix) Fence repair at Grange soccer field - Specialised Road Maintenance

A. Mr Leyshan

[130] It was Mr Leyshan's evidence that a stolen car had gone through the fence and onto the ground. He had telephoned SRM who gave him a verbal quote over the phone and had fixed it there and then (24 December 2012).³⁶⁰

[131] It was stated that, at the time he had directed SRM to do the work, he had not had a purchase order approved nor had he sought approval from Mr Boyle for the work.³⁶¹ Mr

³⁵² Transcript PN 312 – 314 and 562

³⁵³ Transcript PN 663-666

³⁵⁴ Transcript PN 563-565

³⁵⁵ Transcript PN 561

³⁵⁶ Transcript PN 2107 – 2109

³⁵⁷ Exhibit R6 at paragraph 15(j)

³⁵⁸ Transcript PN 2489 and 2586

³⁵⁹ Transcript PN 2588

³⁶⁰ Transcript PN 315 – 318 and 571 and 669

³⁶¹ Transcript PN 574-576

Leyshan agreed that there was a substantial delay between the date the works were completed (24 December 2012) and the date a purchase order was raised (2 January 2013).³⁶²

B. Mr Walden

[132] It was Mr Walden's evidence that Mr Leyshan had not raised a purchase order until after the works had been completed. Therefore, the Council was effectively committed to that expenditure.³⁶³

(x) Manufacture of the bollard at Carly Terrace – Specialised Road Maintenance

A. Mr Leyshan

[133] Mr Leyshan gave evidence that cars were taking a short cut through the park into Railway Avenue.³⁶⁴ Mr Thompson was asked for the cost of installing a bollard to prevent cars driving across. This was done on that day.³⁶⁵

[134] It was confirmed by Mr Leyshan that he had received the quote, dated 7 January 2013, from SRM on 20 January 2013. He had then raised the purchase order on 21 January 2013, after the work had been completed on 17 January 2013.³⁶⁶ Mr Leyshan had stated that there was some urgency about this work but that he had not raised it with Mr Boyle.³⁶⁷ It was agreed that he had authorised the work to be done without having raised a purchase order or had it approved.³⁶⁸

B. Mr Walden

[135] Mr Walden said the works involved requesting the manufacture of a timber bollard, removal of a broken post and fencing and then concreting the new bollard. It was stated that the first part of the works may have been emergency but that there was nothing that he had been made aware of to indicate that it was.³⁶⁹ Mr Walden indicated that the works were completed before the expenditure was approved. The purchase order request was raised after the Council had effectively been committed to the expenditure.³⁷⁰

(xi) Replacement of bollards at Niagara Way - Specialised Road Maintenance

A. Mr Leyshan

[136] It was Mr Leyshan's evidence that cars were accessing the park next to the playgrounds. He therefore engaged SRM to provide a quote to put the bollards back.³⁷¹

³⁶² Transcript PN 669-671

³⁶³ Exhibit R6 at paragraph 15(i)

³⁶⁴ Transcript PN 319 – 324

³⁶⁵ Transcript PN 324 and 331

³⁶⁶ Transcript PN 600 - 603 and 606

³⁶⁷ Transcript PN 607 - 608

³⁶⁸ Transcript PN 609 - 610

³⁶⁹ Transcript PN 2111 – 2112

³⁷⁰ Exhibit R6 at paragraph 15(l)

³⁷¹ Transcript PN 331

[137] Mr Leyshan confirmed that he had received a quote, dated 8 January 2013, on 20 January 2013 and that the work had been undertaken on 15 January 2013.³⁷² He confirmed that the work was performed before he had raised a purchase order (21 January 2013) or had one approved.³⁷³ It was agreed that there was a delay in raising the purchase order.³⁷⁴

B. Mr Walden

[138] Mr Walden stated that this was not work of emergency nature but rather something that would normally get reported through and then be part of a planned set of work.³⁷⁵ It was said that this work had been ordered before the expenditure was approved. Council, therefore, had been committed to the expenditure prior to the purchase order being raised.³⁷⁶

(xii) Work to a shed at Galvin Park – Specialised Road Maintenance

A. Mr Leyshan

[139] It was stated by Mr Leyshan that the roller door on the shed had been broken into. He was instructed to fix the door until a replacement door could be installed. SRM provided a quote over the phone and made the shed safe on 12 January 2013.³⁷⁷ A purchase order was raised on 21 January 2013.³⁷⁸

[140] Mr Leyshan agreed that there was a substantial delay in raising the purchase order.³⁷⁹

[141] Mr Leyshan acknowledged that the work had been performed prior to receiving a written quote or raising a purchase order or having had one approved. He stated that there was a degree of urgency as the shed had been broken into. He did not raise the urgency of the work with Mr Boyle but said that he believed that the turf crew had advised Mr Boyle.³⁸⁰

B. Mr Walden

[142] Mr Walden's evidence was that the works had been completed on 12 January 2013 but that Mr Leyshan did not raise a purchase order until 21 January 2013. The Council had thereby been committed to the expenditure as the works had been undertaken before the expenditure was approved.³⁸¹

³⁷² Transcript PN 611 - 614 and 673

³⁷³ Transcript PN 615 - 617 and 674

³⁷⁴ Transcript PN 675

³⁷⁵ Transcript PN 2114 – 2115

³⁷⁶ Exhibit R6 at paragraph (m)

³⁷⁷ Transcript PN 332 – 340, 620, 623 and 676

³⁷⁸ transcript PN 677

³⁷⁹ Transcript PN 678

³⁸⁰ Transcript PN 626-628

³⁸¹ Exhibit R6 at paragraph (n)

(d) Considerations and Conclusions*(i) Mr Leyshan*

[143] It was submitted that the Council should not be allowed to rely on these alleged breaches to justify Mr Leyshan's dismissal. This was because the material, now relied on by the Council, was available to it prior to the dismissal and was not acted on by the Council. Reference was made to the decision in *Lane v Arrowcrest Group*³⁸² (*Arrowcrest*) and to the majority in the Full Bench decision in *B, C and D v Australia Postal Corporation*^{383 384}.

[144] With respect to the Council's reliance on the report which showed that 62% of all works performed under Mr Leyshan's control over the previous two years were completed before a purchase order was generated, it was stated that it was the Council's own evidence that this information had been held by the Finance Department over the previous two years. Mr Walden's evidence was referred to where he indicated that the Finance Department's computer system automatically records when purchase orders are issued, the date of approval and when payment is made.³⁸⁵

[145] Further, it was stated that there are annual internal audit reviews of purchasing patterns. Mr Lambert was recalled to have said that he expected that practices, such as Mr Leyshan's, would have been detected and remedied by those audits. However, the Applicant argued that the Council had failed to make inquiries before his dismissal which would have brought the existing facts to its knowledge. What was now relied on was available from the electronic financial system but that nothing had been done previously to generate such a report. Further, it was contended that there was a clear failure by the Council to monitor or enforce compliance with its Procurement policy.³⁸⁶

[146] In the alternative, the Applicant submitted that the evidence does not establish that Mr Leyshan's actions constituted a breach of the Procurement policy. In the further alternative, it was argued that, if there were breaches, those breaches did not provide a valid reason for dismissal.³⁸⁷

[147] The Commission was reminded that the policy provides that the prescribed procedures do not apply in matters of emergency, including public health, security or safety, as a consequence of an unforeseen event or occurrence or an absence of competition for technical reasons.³⁸⁸

[148] It was argued that Mr Leyshan had provided credible and commonsense answers to each of the instances of alleged non compliance. In addition, the following aspects of the evidence were highlighted:

³⁸² (1999) 27 FCR 427

³⁸³ [2013] FWC 6191

³⁸⁴ Transcript PN 2816 - 3824

³⁸⁵ Transcript PN 3824 - 3825

³⁸⁶ Transcript PN 3826 - 3827

³⁸⁷ Transcript PN 3827 - 3828

³⁸⁸ Transcript PN3828 - 3829

- It could take Mr Boyle up to a week to approve purchase orders.³⁸⁹
- Mr Leyshan had been taking the same approach to purchase orders and the undertaking of works for eleven years.³⁹⁰
- Mr Wilson and Mr Collins had given Mr Leyshan permission to get urgent/emergency work done before raising a purchase order even where the supplier was not a preferred supplier.³⁹¹
- The specific incidents relate to a very busy period when all of the maintenance on the child care centres was to be completed.³⁹²
- Mr Leyshan was told that he could raise a purchase order for \$2,000 to \$5,000 for emergency jobs per month.³⁹³
- Mr Lambert and Mr Walden accepted that, for emergency work, there was an exception to the requirement to raise a purchase order before the work is performed.³⁹⁴
- Mr Walden agreed that a number of the alleged breaches of the Procurement policy could fall into the exceptions.³⁹⁵
- Mr Walden approved a purchase order for \$10,000 for SRM for “various works”, without knowing what it was for. He also knew that there are no preferred suppliers in the maintenance area of the Parks Department.³⁹⁶
- Mr Boyle knew that SRM was used for emergency work and that Mr Leyshan would usually submit a purchase order for SRM in advance to cover various jobs for that month.³⁹⁷

[149] It was submitted that the evidence does not disclose that Mr Leyshan breached the policy in that, if his practices were not in accordance with the letter of the policy, they were known by, and acquiesced to, the Council. Further, any issues of non compliance with the policy are matters of work performance. These were never raised with Mr Leyshan and cannot justify his dismissal.³⁹⁸

[150] Further, it was argued that there were a number of contradictions:

- Between the procurement practices and the newly required strict observance of the policy.
- Between the demand to follow the Procurement policy and the Council’s failure to comply with another of its policies - the Conduct and Performance Management Policy.³⁹⁹

³⁸⁹ Transcript PN 3840

³⁹⁰ Ibid

³⁹¹ Ibid

³⁹² Transcript PN 3841

³⁹³ Ibid

³⁹⁴ Transcript PN 3841 - 3842

³⁹⁵ Transcript PN 3843

³⁹⁶ Transcript PN 3845

³⁹⁷ Transcript PN 3846

³⁹⁸ Transcript PN 3848

³⁹⁹ Transcript PN 3849

(ii) The Council

[151] On behalf of the Council, it was submitted that the Procurement policy matters only came to Mr Walden's attention following Mr Leyshan's dismissal. It was stated that there was a regular audit process but, unfortunately, it did not pick up the infractions of the policy. Given the rapid growth of the Council, it was argued that this could explain as to why discovery of the anomalies did not occur earlier. In these circumstances, it was said to not follow that the Commission should not have regard to this evidence.⁴⁰⁰

[152] With respect to the anomalies highlighted by Mr Walden, it was stated that, even if they were of an emergency nature, Mr Leyshan did not advise his supervisor that he had arranged for such works prior to raising a purchase order. Mr Walden's evidence was said to dispute whether five of the anomalies were emergency works.⁴⁰¹

[153] Further, it was argued that the purchase orders were not raised until well after the works were required.⁴⁰²

[154] In terms of the works undertaken by Specialised Road Maintenance in December 2012 and January 2013, the Council argued that:

- Mr Leyshan had conceded that he had made a mistake and there was a substantial delay between when the works were done and when he raised the purchase order.⁴⁰³
- Mr Leyshan did not do anything about the purchase orders until the quotes were received.⁴⁰⁴
- Mr Leyshan did not inform his supervisor that, at the time of raising the purchase order, the work had already been completed.⁴⁰⁵

[155] With regard to A&K Landscaping, it was contended that:

- Under the policy, the person who engaged the supplier had the responsibility of raising the purchase order prior to engagement.⁴⁰⁶
- Mr Leyshan was therefore responsible for raising the purchase order as he had engaged A&K Landscaping to do the works.⁴⁰⁷

[156] In respect of the water meter cages, the Council stated that this was a clear example of expenditure being undertaken without a purchase order. It was said that this was not an urgent issue as the installation of the water meters was part of the regular programmed works. The Council argued that there was nothing which prevented Mr Leyshan from raising a purchase order at that point in time.⁴⁰⁸

⁴⁰⁰ Transcript PN 4011 - 4015

⁴⁰¹ Transcript PN 4016 and Exhibit R13 at paragraph 31(a)

⁴⁰² Transcript PN 4016 and Exhibit R13 at paragraph 31(b)

⁴⁰³ 4017 and Exhibit R13 at paragraph 31(c)

⁴⁰⁴ Transcript PN 4017 and Exhibit R13 at paragraph 31(c)

⁴⁰⁵ Transcript PN 4018 and Exhibit R13 at paragraph 31(a)

⁴⁰⁶ Transcript PN 4019 and Exhibit R13 at paragraph 32

⁴⁰⁷ Ibid

⁴⁰⁸ Transcript PN 4020 - 4021 and Exhibit R13 at paragraph 33

[157] The work undertaken at Williams Landing by VRC Landscapes was described as a example of Mr Leyshan not obtaining the best value for the Council's purchases. This was on the basis that, as Mr Boyle had found Mr Trainon's quote in a folder on Mr Leyshan's desk, Mr Leyshan was aware of the quote. He had, however, decided to award the work to the more expensive quote.⁴⁰⁹

(iii) Conclusions

[158] I have considered the Applicant's submission that the Commission should not have regard to this reason for the dismissal on the basis that the material relied upon was available to the Council prior to the dismissal but was not acted upon by it. It may well be that it was the case that this information had been in the Council's Finance Department's electronic records for the previous two years. Mr Walden and Mr Lambert gave evidence to this effect. Therefore, on the basis of *Arrowcrest*, the alleged breaches of the Procurement policy cannot be relied on to justify Mr Leyshan's dismissal.

[159] Out of an abundance of caution, and in the event that I may be wrong on this point, I will deal with the alleged breaches of the Procurement policy by Mr Leyshan. The Council relied on fourteen alleged breaches of the Procurement policy as providing a valid reason for Mr Leyshan's dismissal. I do not plan to deal with each of the alleged breaches specifically in detail except to make the observation that maybe not all of the breaches fit within the emergency exception of the policy (going to public safety, health and security). Some certainly do, such as missing handrails near the river at Convent Drive, rotten boards on the Riversdale Drive footbridge, replacing broken locks on sheds at President's Park and Galvin Park, the removal of a bollard base, manufacture of bollards at Carly Terrace and replacement of bollards at Dunnings Road Reserve. Others relate to there being only one supplier, for example City West Water, for the recycled water meters and the limited availability of quotes (VRC at Williams Landing). In considering this alleged anomaly, I accept Mr Leyshan's evidence that he had not seen Mr Trainon's quote. As well, in terms of the grass slashing at Gleeson's Road and Mouyong Road extensions, I accept Mr Leyshan's evidence that he understood that the Conservation Department was going to raise these particular purchase orders.

[160] Further, it may also be that Mr Leyshan was not as timely in raising purchase orders as he should have been on the basis that he waited before the written quote came in before he raised it. However, whatever Mr Leyshan's practices were, these had been known to his supervisor for a number of years. In that time, Mr Boyle had only refused a couple of purchase order requests from Mr Leyshan, one of them for budgetary reasons. Mr Walden, as well as Mr Brooks and Mr Binnie had also approved purchase requests from Mr Leyshan in Mr Boyle's absence.⁴¹⁰

[161] Secondly, Mr Boyle (and Mr Walden on one occasion)⁴¹¹ had approved a blanket purchase order for particular suppliers even though there were no preferred suppliers for maintenance in the Parks Department. As well, there was no evidence brought which directly challenged Mr Leyshan's contention that Mr Wilson and Mr Collins, from the Finance

⁴⁰⁹ Transcript PN 4021 - 4022 and Exhibit R13 at paragraph 33

⁴¹⁰ Exhibit R6 at attachment SW-34

⁴¹¹ Exhibit R6 at attachment SW-25

Department, gave him permission to get urgent (emergency) work done before raising a purchase order, even where the provider was not a preferred provider.

[162] Further, it was Mr Boyle’s evidence that Mr Leyshan was not required to obtain his approval before getting emergency work done. In addition, Mr Leyshan’s supervisor was responsible for ensuring that Mr Leyshan fulfilled his role in accordance with the Procurement policy. Mr Boyle had the opportunity over several years to correct Mr Leyshan’s approach in this area but failed to do so. As well, it appears that Mr Boyle’s supervisor, Mr Walden, was aware, from August 2012, of Mr Leyshan’s practices as he approved a number of Mr Leyshan’s purchase order requests between then and the date of his dismissal.⁴¹²

[163] However, despite taking into account Mr Leyshan’s practices, the exceptions to the normal process and the permission given to him regarding urgent/emergency jobs, it would be seem that, on the information before me, that the manufacture of a bollard at Carly Terrace and the repair of a fence at the Grange soccer field do not fall within the urgent/emergency category. Therefore, I find that Mr Leyshan made two minor technical breaches of the Procurement policy by not first obtaining approval of a purchase order prior to the work being undertaken and the expenditure committed.

CONCLUSIONS

[164] Section 396 of the Act sets out four matters which must be decided in applications of this kind before the merits are considered. These matters are:

- “(a) whether the application was made within the period required in subsection 394(2);
- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
- (d) whether the dismissal was a case of genuine redundancy.”

[165] The application was made seven days after Mr Leyshan’s dismissal. This is within the period required in subsection 394(2).

[166] Mr Leyshan was covered by an enterprise agreement and therefore was protected from unfair dismissal (s.396(b)).

[167] Subsections 396(c) and (d) have no relevance in this matter.

[168] Section 385 of the Act provides that a person has been unfairly dismissed in the Fair Work Commission is satisfied that:

- “(a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

⁴¹² Exhibit R6 at attachment SW-34

(d) the dismissal was not a case of genuine redundancy.”

[169] In this matter s.385(a) has been met. Subsections 385(c) and (d) have no relevance.

[170] Therefore, what remains to be determined is whether or not Mr Leyshan’s summary dismissal was harsh, unjust or unreasonable (s.385(b))

Was the dismissal harsh, unjust or unreasonable?

[171] In order to determine whether Mr Leyshan’s summary dismissal was harsh, unjust or unreasonable, the Commission is required to take into account the factors set out in s.387 of the Act.

[172] Those factors are as follows:

“387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.”

[173] I will deal with each of the factors in turn.

Valid reason - s387(3)(a)

[174] With respect to the three reasons for Mr Leyshan’s dismissal, I have previously found that:

- It is most probable that Mr Leyshan did not say the words attributed to him by Witness X contained in the LKA Report.
- Although it was found that Mr Leyshan was responsible for Mr Walker not performing his duties properly, a number of factors resulted in a finding that this reason was not a valid reason for Mr Leyshan’s dismissal.
- Mr Leyshan technically breached the Council’s Procurement policy in respect of two of the alleged anomalies raised by the Council. This was with regard to the replacement of bollards at Niagara Way and of a fence at the Grange soccer field.

[175] On the basis of the above findings, I find that, on its own, the two minor breaches of the Procurement policy do not constitute a valid reason for Mr Leyshan’s dismissal. Therefore, I find that there was not a valid reason for Mr Leyshan’s dismissal.

Notified of the reason – s387(3)(b)

(a) Mr Leyshan

[176] It was argued on behalf of the Applicant that he was not notified of the reason for his dismissal as the dismissal letter, dated 28 February 2013, was vague as to what allegations had been found to be substantiated and the reasons why.⁴¹³ It was contended that it is not readily apparent from the dismissal letter as to precisely what conduct was being referred to. It was noted, also, that the letter did not use the word “misconduct”. Therefore, the Applicant submitted that section 387(b) has not been complied with as it is not apparent from the letter of dismissal as to what the Council was saying was the valid reason for Mr Leyshan’s dismissal.⁴¹⁴

(b) The Council

[177] On the other hand, the Council contended that Mr Leyshan was notified of the allegations against him in writing on 22 February 2013.⁴¹⁵ The allegations had been put to Mr Leyshan verbally as well at a meeting on the same day.⁴¹⁶ The meeting was attended by Mr Stabb, Mr Walden and Mr Leyshan and his support person, Mr Monaghan. It was indicated that, during the meeting, Mr Leyshan was provided with the Memorandum and the attached photographs and that Mr Stabb read out the allegations. The Council stated that Mr Leyshan was invited to respond to the allegations but that he elected to say nothing.⁴¹⁷

[178] It was submitted that the letter of termination simply captured and summarised all of the detailed allegations set out in the written Memorandum dated 22 February 2013. It was

⁴¹³ Transcript PN 3851 and Exhibit A 10 at paragraphs 37 – 38

⁴¹⁴ Transcript PN 3852 – 3853

⁴¹⁵ Exhibit A1 at attachment PL –1

⁴¹⁶ Transcript PN 4026 and Exhibit R11 at paragraph 18 and Exhibit R13 at paragraph 38

⁴¹⁷ Transcript PN 4023 and Exhibit R13 at paragraph 37

argued that there was no doubt in Mr Leyshan's mind about the allegations as he had provided a detailed response to each of them.⁴¹⁸

(c) Considerations and Conclusions

[179] The Memorandum, with photographs attached, dated 22 February 2013⁴¹⁹, was provided to Mr Leyshan at a meeting on 22 February 2013. The Memorandum set out a number of allegations. These included the alleged making of the Statement and the particular allegations concerning Mr Walker. The latter allegations were preceded by the statement that the Council was concerned that Mr Leyshan had failed to satisfactorily perform the requirement of his role to effectively manage the performance, behaviour and productivity of his crews. This was said to have been evidenced by the regular engagement in unacceptable behaviours by the furniture crews by reference to a number of incidents concerning Mr Walker.

[180] It was also stated in the Memorandum that such wilful and deliberate neglect of duty was considered to be serious misconduct. Mr Leyshan was forewarned that, if the allegations were substantiated, termination of his employment was a possibility.⁴²⁰

[181] The letter of termination, dated by March 2013,⁴²¹ confirmed Mr Leyshan's summary dismissal and stated that, at the meeting on 22 February 2013, Mr Leyshan had been presented with the following allegation:

*“contrary to the specific purpose of your role, you have actively encouraged and enabled employees under your direct supervision to disregard the requirements of their employment.”*⁴²²

[182] It was then stated in the letter that the Council had considered his responses and decided that they did not satisfactorily explain his conduct. Council was therefore satisfied that:

*“... the nature and seriousness of your conduct was awful and deliberate behaviour that is inconsistent with the employment being able to continue and is so contrary to the employment contract as to indicate that you have rejected the terms and conditions under which you were employed.”*⁴²³

[183] The respondent's submission, that the allegation in the dismissal letter is a summary of all of the allegations set out in the Memorandum, is accepted. However, given that the Memorandum contained a number of detailed specific allegations, a dismissal letter that contains one 'rolled up' allegation does not provide clarity as to which of the specific allegations were found to be made out nor as to what conduct was found to be wilful and deliberate behaviour.

⁴¹⁸ Transcript PN 4049 – 4051

⁴¹⁹ Exhibit A1 at attachment PL –1

⁴²⁰ Exhibit A1 at attachment PL –1

⁴²¹ Exhibit A1 at attachment PL –4

⁴²² Ibid

⁴²³ Ibid

[184] Therefore, although the Memorandum of 22 February 2013 is very detailed and specific, when the letter of termination, dated 1 March 2013, is taken into account, it is not possible to find that the requirements of this subsection have been met in full.

Opportunity to respond - s387(3)(c)

(a) Mr Leyshan

[185] It was submitted that it may be accepted that the Council undertook a process which, by its appearance, would suggest that Mr Leyshan had an opportunity to respond to any reason for his dismissal. However, it was argued that there are real and substantial concerns about the genuineness and bona fide nature of that process. It was said that, in substance, Mr Leyshan had not been afforded an opportunity to respond.⁴²⁴ This was on the basis that Mr Leyshan's fate was said to have been pre-determined before the end of the disciplinary process and that, all the Council wanted to do, was to choreograph the process so that it appeared that procedural fairness had been afforded to Mr Leyshan.⁴²⁵

[186] This argument was founded on six bases:

1. The failure of the Council to agree to any of the requests for information and documents from the ASU, as set out in a letter dated 27 February 2013.⁴²⁶ Account was to be taken of the fact that the Council's witnesses understood that, in dealing with the allegations against Mr Leyshan, the credibility and reliability of Witness X's observations were central to their deliberations. Ms Thompson's evidence was highlighted in this regard.⁴²⁷ It was stated that, in its letter, the union had clearly raised questions of probity and appropriateness in terms of Witness X's conduct. However, it was said that none of the information sought was provided, some of which had the potential to bear upon Witness X's conduct and credibility. The Applicant also contended that, given the nature of the case and the allegations against Mr Leyshan (which were based on Witness X's observations), these were documents which should have been provided.⁴²⁸

2. The Applicant submitted that, the Council's failure to properly investigate the allegations or to consider and further investigate Mr Leyshan's response to the allegations, also points to pre-determination by the Council of the Applicant's fate and also a failure to genuinely afford him an opportunity to respond. It was stated that the other person who was present when Mr Leyshan allegedly made the Statement was Mr Walker. The Council was said to have made a judgement that Mr Walker was unreliable and so did not ask him about the Statement. The Applicant argued that the Council should have simply asked Mr Walker the question.⁴²⁹

Likewise, it was stated that the Council made no enquiries about the City West Water representatives that Mr Leyshan said were with him at the time of the alleged

⁴²⁴ Transcript PN 3854 – 3855

⁴²⁵ Transcript PN 3855

⁴²⁶ Exhibit A1 at attachment PL –2

⁴²⁷ Transcript PN 3855 – 3856

⁴²⁸ Transcript PN 3856-3865

⁴²⁹ Transcript PN 3866

Statement. Further, the Applicant argued that the Council did not invite Mr Leyshan to provide a statutory declaration despite his express willingness to do so. In addition, in the face of the direct conflict between Witness X's claim and Mr Leyshan's denial, the Council did not go back to Witness X and double check his observation.⁴³⁰

The preceding failures by the Council were described as serious flaws and were said to be strong indicators that the Council had closed itself off to Mr Leyshan's response. It was submitted that significant weight should be attributed to these failures, particularly in light of the Council's obligation, as part of its own process for investigating allegations of misconduct, to further investigate the matter in light of Mr Leyshan's response. Step 10 of the Council's process, in respect of further investigating whether there are potential crucial witnesses, was highlighted.⁴³¹

3. It was argued that the way in which the decision was made to take disciplinary action against all five employees, in one meeting, was inappropriate. This was because the Council did not ensure impartiality in its decision making because it failed to "quarantine" the facts and circumstances of each employee from their deliberations in respect of the other employees. The approach adopted by the Council was described as dealing with them all (the five employees) as a batch. In addition, the Applicant submitted that, at the meeting when whether or not to take disciplinary action against the five employees was discussed, it was Mr Lambert's evidence that the question of dismissal as a likely consequence may have arisen.⁴³²

4. The fourth basis for the Applicant's submission was the unseemly and inappropriate haste with which the Council was said to have planned and then executed the process on 28 February 2013. Ms Dixon's evidence about planning, on 27 February 2013, for 21 meetings or discussions the next day was highlighted. It was contended that, as of 27 February 2013 (the day before all of the meetings), the Council had not yet been provided with any responses from the employees. However, Ms Dixon was said to have gone ahead and choreographed 21 meetings in relation to the five employees.⁴³³

Further, it was argued that what was to take place on 28 February 2013 included the need for deliberative discussions by management about whether or not disciplinary action should be taken and, if so, what that should be. The planning and the conduct of the 28 February 2013 meetings was said to support the proposition that the Council's actions resulted in a process which appeared to be procedurally fair. It was also contended that the Council's meeting process was inconsistent with the notion that the Council's managers brought an independent and non-predetermined mind to each employee's circumstances.⁴³⁴

5. A further ground for arguing that Mr Leyshan was not afforded genuine procedural fairness was that Mr Stabb had read a script to Mr Leyshan which contained statements that had nothing to do with him eg. that he had falsely charged

⁴³⁰ Transcript PN 3867

⁴³¹ Transcript PN 3868 – 3870

⁴³² Transcript PN 3871

⁴³³ Transcript PN 3872

⁴³⁴ Transcript PN 3874

tip fees to the Council. That Mr Stabb and Mr Walden (in Mr Leyshan's case) had read these out was said to mean that the relevant managers were acting as automatons in the decision-making process.⁴³⁵

6. The final basis of the Applicant's contention was that one of the main decision-makers, Mr Stabb, was said to have proceeded on an erroneous and misconceived basis in recommending Mr Leyshan's dismissal. It was stated that Mr Stabb was one of the two most senior managers involved in recommending Mr Leyshan's dismissal. The Applicant said that, unlike the other Council witnesses, Mr Stabb was not prepared to concede that the unrelated matters contained in the option 2 script were not relevant to Mr Leyshan. This led to Mr Stabb's evidence that the allegation of falsely charging tip visits formed part of his decision-making process in deciding to dismiss Mr Leyshan. This was said to show that there was no real or genuine consideration of Mr Leyshan's circumstances or his response to the allegations. Further, it was argued that one of the decision-makers formed the view that dismissal was appropriate by reference to matters which were clearly irrelevant and misconceived.

(b) The Council

[187] It was submitted that, when Mr Stabb and Mr Walden met with Mr Leyshan and his representative, on 22 January 2013, he was provided with a detailed written Memorandum which was also read aloud to him. The Applicant was then asked to respond but chose not to. A further meeting was scheduled for 28 February 2013 to allow Mr Leyshan to respond. No verbal response was said to have been provided by Mr Leyshan at this meeting, rather a written response.⁴³⁶

[188] Following this meeting, Mr Stabb, Mr Walden, Mr Lambert and Ms Dixon met to read the Applicant's response. This was then discussed with Ms Thompson and it was decided that it was appropriate for disciplinary action to be taken. Mr Stabb and Mr Walden then met with Mr Leyshan again and advised him and his representative that a decision had been made that disciplinary action was required. Mr Leyshan was said to have been asked if there was anything further he wished to say. The senior management team met again with Ms Thompson and after further detailed discussions, Ms Thompson made the decision to dismiss the Applicant.⁴³⁷

[189] The Council stated that all of the material that was before the Council regarding the allegations against Mr Leyshan was put to Mr Leyshan. This was said to have occurred on 22 February 2013 when Mr Leyshan was handed the relevant photographs and passages from the LKA Report, including the allegations involving Mr Walker.⁴³⁸

[190] With respect to the Applicant's submission that Mr Walker's misconduct should not be visited upon Mr Leyshan, it was argued that, if accepted by the Commission, this would mean that no supervisor could be held responsible for the activities of subordinates who work in a different location to the supervisor. It was also stated that a supervisor is to be held

⁴³⁵ Transcript PN 3874 – 3875

⁴³⁶ Transcript PN 4023 and Exhibit R11 at paragraph 18 and Exhibit R13 at paragraph 37

⁴³⁷ Transcript PN 4024 – 4025 and Exhibit R11 at paragraph 19 and Exhibit R13 paragraph 37

⁴³⁸ Transcript PN 4024 and 4054 and Exhibit R13 at paragraph 37

responsible for the work output of subordinates even if they work in a different location to the supervisor.⁴³⁹

[191] In terms of the particular examples of Mr Walker's misconduct, it was indicated that the respondent does not press the instance when Mr Walker fell asleep at the traffic lights. Mr Leyshan was also not being held responsible for Mr Walker's illegal activities. However, it was stated by the Council that it held Mr Leyshan accountable for Mr Walker's two lengthy, unauthorised breaks. This was because Mr Leyshan had failed to proactively monitor and supervise Mr Walker and had allowed and fostered an environment in which Mr Walker formed the view that he could take drugs with impunity without any consequences as a result. If Mr Leyshan was visiting his crew out in the field at least twice a week, any of the lengthy breaks by Mr Walker would have been detected and remedied.⁴⁴⁰

[192] The Council acknowledged that Mr Leyshan's position was a challenging one in terms of the growing population and increased number of playgrounds, parks etc that needed to be maintained. It was stated, however, that, notwithstanding those challenges, Mr Leyshan did not take the initiative and rise to those challenges. Mr Leyshan was described as not being a proactive supervisor which, it was said, he should have been given his training and years of experience.⁴⁴¹ The Council submitted that Mr Leyshan did not exercise discretion or judgement appropriately in discharging his duties as a supervisor.⁴⁴²

[193] With respect to the Applicant's submissions that the Council had failed to accede to the request from the ASU's solicitors for further information, it was contended that the information sought was not going to assist Mr Leyshan to have an opportunity to respond to the allegations. Details about the engagement of Witness X and his qualifications for employment were said to not be of assistance in helping Mr Leyshan respond to the allegations. This submission was characterised by the Council as a red herring.⁴⁴³

[194] It was acknowledged by the Council that Mr Walker should have been asked as to whether Mr Leyshan had made the Statement as alleged. However, it was stated that the Commission must have regard to the weight and probity of any response by Mr Walker, given the allegations that had been made against him. If there was a defect in this regard in the process, it was contended that it was not of such magnitude as to render the termination process procedurally unfair.⁴⁴⁴

[195] In terms of the Applicant's submission that the Council should have gone back to Witness X when it was clear there was conflict between the Applicant's version of events and those of Witness X, the Council argued that nothing was going to be achieved except what had happened with Witness X in the witness box ie. he confirmed that the Statement had been made.⁴⁴⁵

⁴³⁹ Transcript PN 4040 – 4041

⁴⁴⁰ Transcript PN 4041 – 4043

⁴⁴¹ Transcript PN 4044

⁴⁴² Transcript PN 4045

⁴⁴³ Transcript PN 4054

⁴⁴⁴ Transcript PN 4055

⁴⁴⁵ Transcript PN 4056

[196] With regard to the number of meetings held on 28 February 2013, the Council explained that the responsibility for meeting with the various employees was divided between management representatives – Mr Stabb and Mr Walden met with Mr Leyshan whilst Ms Dixon and Mr Lambert met with three of the other employees. It was stated that very little was said during the meetings - just the tabling of the written responses. It was said that the evidence was that the management representatives had then read, discussed and considered the responses. These were then further discussed with the CEO. Ms Dixon's evidence that meetings could have been adjourned or postponed for further investigations was referred to in this regard.⁴⁴⁶

[197] The Council acknowledged that there were errors in the script that Mr Lambert read out. However, it was argued that the allegations that the Council relied on were put to Mr Leyshan - to which he had responded. It was stated that the allegations that were erroneously in the script were not relied upon. Further, it was argued that, even though Mr Stabb's evidence may be construed that he had held Mr Leyshan responsible for the activities of all four employees, the evidence of all of the other witnesses was stated to have been clear that Mr Leyshan was responsible for the activities of Mr Walker only. Further, it was recalled that Mr Stabb had corrected himself during cross examination on this point.⁴⁴⁷

(c) Considerations and Conclusions

[198] It was acknowledged by the Council that Mr Walker should have been asked as to whether Mr Leyshan had made the Statement, as alleged, on 27 December 2012. However, the Council argued that, given the allegations against Mr Walker himself, there would be probity concerns about his response. Further, it was contended that, if this was found to be a flaw, it should not amount to being a fatal flaw in terms of the process being procedurally fair.

[199] Once Mr Leyshan's written responses to the allegations were received, it was clear to the Council though that there was a direct conflict between Mr Leyshan's account of what happened in the park, on 27 December 2012, and that of Witness X's. It should have been apparent that there were other people who were present at the time Mr Leyshan allegedly made the Statement - Mr Walker, Witness X and possibly City West Water representatives.

[200] Given the conflict between the two accounts, it was incumbent on the Council to further investigate what was said by Mr Leyshan on 27 December 2012. It is in my view unacceptable for the Council not to have further investigated whether or not Mr Leyshan had said what was alleged. This is particularly so given the evidence of the Council's witnesses that Mr Leyshan's alleged Statement was a major concern for them although it was not the only issue of concern. The fact that Mr Walker was also the subject of allegations does not negate the Council's responsibility to have asked him about what was said by Mr Leyshan on that day. In addition, it was the Council's responsibility to follow-up Mr Leyshan's written response in terms of potential witnesses in the form of City West Water employees.

[201] As well, it was incumbent on the Council to have sought further information from Witness X about what happened at the oval on the day in question and whether there were City West Water employees in the vicinity at the time. Given Witness X's evidence before the Commission when these questions were asked, it was necessary for the Council to have asked

⁴⁴⁶ Transcript PN 4057 – 4058

⁴⁴⁷ Transcript PN 4059 – 4061

these questions/received the answers prior to dismissing Mr Leyshan rather than this occurring after the fact and in the Commission.

[202] Of greater concern is that, in proceeding in the manner they did in respect of the Statement allegation, the Council contravened their Conduct and Performance Management policy - paragraph 10 specifically.⁴⁴⁸

[203] Paragraph 10 of the policy states as follows:

“10. If either the allegations and/or the employee’s response require further investigation (for example, if there are potential witnesses who could substantiate either the allegations or the employee’s response) then those matters should be fully investigated. The Manager/Supervisor, or Manager Organisational Development (or someone nominated by either of them, who may be a third party external to Council) should conduct this further investigation.”⁴⁴⁹

[204] On the basis of the material before the Council at the time, there clearly were potential witnesses, Mr Walker and possibly City West Water employees. Further, Mr Leyshan’s response, which put him directly at odds with Witness X’s observations, required further investigation in this regard. It is noted that, in his written response, Mr Leyshan stated that he was prepared to sign a statutory declaration, in effect, to back up his version of events. However, the observations of the private investigator, as set out in the LKA Report, were accepted over a potential sworn statement by an employee, without any follow-up or investigation by the Council itself.

[205] Further, as indicated earlier in my decision at paragraph [61], Mr Leyshan, as his supervisor, had inadequately ensured that Mr Walker performed his duties effectively and appropriately. Given that this is a work performance issue and not a conduct related issue, Part A of the Council’s Conduct and Performance Management policy should have been followed. The evidence before the Commission is that the requirements of Part A of the policy were not undertaken. A Performance Improvement Plan was not developed for Mr Leyshan and he had not been given any warnings regarding poor performance. Because the terms of the Council’s policy for managing poor performance were not followed, Mr Leyshan was denied the opportunity to improve his performance as a supervisor.

[206] The evidence of all of the Council’s witnesses was to the effect that they were most troubled by what Witness X’s investigation had uncovered. This is accepted and understood. However, this does not absolve the Council from following their own policy concerning conduct and performance management.

[207] It is also apparent from the evidence before me, that the LKA Report was not only accepted at face value and uncritically by management but was also solely relied upon in making the decision to dismiss Mr Leyshan. There does not appear to have been any attempt to conduct its own investigation when the Council was faced with a conflict between Mr Leyshan’s and Witness X’s respective accounts of the one event. Further, the Council did not go behind the LKA Report which was, in the end, a set of observations by the investigator.

⁴⁴⁸ Exhibit R9 at attachment AD –1

⁴⁴⁹ Ibid

[208] Further, it is acknowledged by the Council that there were some errors in the script that was read by Mr Stabb to Mr Leyshan at the meeting on 28 February 2013 when Mr Leyshan was being advised that disciplinary action was to be taken against him. The conduct that was said to have constituted a breach of the Code of Conduct included that Mr Leyshan had not achieved a satisfactory level of output that he had not accurately recorded time worked by himself and others and that he had falsely charged tip visits to the Council.

[209] Mr Stabb agreed in his evidence that, prior to the meeting, it had not been put to Mr Leyshan that he had failed to achieve a satisfactory level of output.⁴⁵⁰ He confirmed that no allegation was made against Mr Leyshan that he had failed to accurately record his work time or the time worked by anyone else.⁴⁵¹ In addition, he was not aware of the allegation concerning tip visits being falsely charged to the Council, having been raised with Mr Leyshan. Mr Stabb could not recall the details of the allegation but stated that it had formed part of his decision-making.⁴⁵²

[210] Finally, on 27 February 2013, Ms Dixon arranged for a schedule of meetings to be held the next day, with each of the five employees, regarding the allegations against them. At the point in time when Ms Dixon made these arrangements, Mr Leyshan (and the other employees) had not provided their responses to the allegations. Given that Ms Dixon did not know what was going to be provided to the Council the next day, it appears that the meeting schedule did not provide for the potential requirement for some time for discussion with the employees or amongst the management team. It is acknowledged that Ms Dixon's evidence was that the meetings could be rescheduled to allow for further investigation. However, the setting of 21 meetings on one day in itself would appear to mitigate against this. Also, the possible need for the Council to conduct its own further investigation, as a result of the employees' responses, does not appear to have been on the radar at all.

[211] Therefore, putting all of this together and considering it as a whole, I am inclined to accept the Applicant's submission that, on the surface, the process has the appearance of procedural fairness but that it was not fair in substance. It would seem that, because the contents of the LKA Report were taken as gospel by the Council, there was little capacity by the senior management team to genuinely consider Mr Leyshan's response to the allegations; to deal appropriately with conflicts in the evidence by undertaking their own investigation and to ensure that important parts of the process e.g. the allegations contained in the script, were accurate. Further, the meeting schedule, on 28 February 2013, would appear to have been more designed to get to the end of the process than to have been a genuine attempt to hear Mr Leyshan's responses, consider them and then reach a conclusion. I was not convinced that any of the meetings organised for that day would have been willingly re-scheduled.

[212] Accordingly, I am not satisfied that the process followed by the Council accorded Mr Leyshan procedural fairness in substance, although it had the superficial appearance of being fair.

⁴⁵⁰ Transcript PN 3089

⁴⁵¹ Transcript PN 3095 and 3098 and 3102 – 3103 and 3105

⁴⁵² Transcript PN 3107 – 3114

Refusal to allow a support person - s387(3)(d)

[213] There was no refusal by the Council to allow Mr Leyshan to have a support person with him at any of the meetings on 22 February 2013 and 28 February 2013. Mr Leyshan was accompanied by representatives of the ASU at the meetings on both days.

Warnings for unsatisfactory performance - s387(3)(e)

(a) Mr Leyshan

[214] It was submitted that the Applicant's dismissal could be said to be related to claimed unsatisfactory work performance in failing to properly supervise Mr Walker and the alleged breaches of the Procurement policy. The Commission was referred to the decision in *Annetta v Ansett Australia*⁴⁵³ where scope for an overlap between the concept of unsatisfactory performance and the concept of misconduct was identified. It was argued that this was the situation in this matter where there is a hybrid - an inspect of alleged conduct (the making of the Statement) and the issues of performance (alleged breaches of the Procurement policy and the alleged failure to adequately supervise Mr Walker). Therefore, it was contended that, in respect of the poor performance aspects, Mr Leyshan was never warned about any unsatisfactory performance.⁴⁵⁴

(b) The Council

[215] On the other hand, as has been indicated earlier, the Council contended that Mr Leyshan's dismissal was for misconduct which covered both the alleged making of the Statement and his failure to effectively monitor the work output of Mr Walker. Those were said to be inextricably linked.⁴⁵⁵

(c) Considerations and Conclusions

[216] As has been indicated earlier in the decision, I am of the view that the alleged making of the Statement by Mr Leyshan relates to his conduct whilst the other issues (breaches of the Procurement policy and the failure to properly supervise Mr Walker) are unsatisfactory performance issues. Mr Leyshan's job was that of a supervisor. If he was not supervising his subordinate, Mr Walker, properly, he was therefore failing to perform his role as a supervisor satisfactorily. This issue, therefore, together with the minor technical breaches of the Procurement policy, are issues relating to Mr Leyshan's work performance and not his conduct.

[217] It was common ground that Mr Leyshan had never been warned about any unsatisfactory performance. Therefore, I am not satisfied that Mr Leyshan was warned about any unsatisfactory performance.

⁴⁵³ (2000) 98 IR 233 at paragraph 16

⁴⁵⁴ Transcript PN 3877 – 3881

⁴⁵⁵ Exhibit R11 at paragraph 27

Size of the employer's undertaking and absence of dedicated human resources specialists - s387(3)(f) and (g)

[218] It was common ground that the Council is a substantial organisation with 1200 employees and that it also has a dedicated human resources area. It was not in dispute that these considerations are ones which would not have impacted on the procedures followed in dismissing Mr Leyshan.⁴⁵⁶

Any other matters considered relevant - s387(3)(h)

(a) Mr Leyshan

[219] It was submitted that there were two sets of relevant other matters which militated strongly in favour of a finding that Mr Leyshan's dismissal was harsh, unjust or unreasonable. The first set related to Mr Leyshan himself whilst the second to the manner in which the Council took the steps which resulted in his dismissal.

[220] In terms of the first set of matters which related to Mr Leyshan's circumstances, these were explained as:

- Mr Leyshan was a long-standing employee with 25 years' service with the Council.⁴⁵⁷
- It was not disputed that, over that period, Mr Leyshan was never disciplined or warned in respect of his work performance.⁴⁵⁸
- Mr Leyshan is 49 years of age which means that he may encounter some difficulties in finding alternate comparable employment.⁴⁵⁹
- Mr Leyshan's expectation was that he would have continued in employment with the Council until his retirement.⁴⁶⁰
- Mr Leyshan is experiencing financial stresses because of his dismissal. These include a significant loss of benefits associated with his membership of a defined benefits scheme.⁴⁶¹
- Therefore, in addition to the ordinary consequences of dismissal - the loss of income attached to a job - there is a particular adverse consequence for Mr Leyshan - the loss of additional and superior benefits from his membership of a defined benefit superannuation fund.⁴⁶²

[221] With respect to the matters pertaining to the Council, the first one was stated to concern the defects in the process which resulted in Mr Leyshan not being afforded the substance of procedural fairness.⁴⁶³ The second matter centred on the alleged critical reliance by the Council on the contents of the LKA Report, in its decision to dismiss Mr Leyshan. It was said that the respondent's witnesses had given evidence that they decided to dismiss Mr

⁴⁵⁶ Transcript PN 3882 and Exhibit R11 at paragraphs 28 – 29 and Exhibit A 10 at paragraphs 44 – 46

⁴⁵⁷ Transcript PN 3883 and Exhibit A10 at paragraph 47

⁴⁵⁸ Ibid

⁴⁵⁹ Transcript PN 3884 and Exhibit A10 at paragraph 47

⁴⁶⁰ Transcript PN 3884

⁴⁶¹ Transcript PN 3885 and Exhibit A10 at paragraph 47

⁴⁶² Transcript PN 3885 – 3886 and Exhibit A10 at paragraph 47

⁴⁶³ Transcript PN 3887

Leyshan on the basis of accepting the contents of the LKA Report on face value, without any proper testing as to what Witness X had alleged. This was said to include Ms Thompson who had said that she had taken the Report on face value without going behind it. She had understood that the soundness of the decision to dismiss Mr Leyshan depended fundamentally on the contents of the report being reliable.⁴⁶⁴

[222] Witness X's evidence was referred to in regard to his view that the investigation should have been conducted in a more professional way e.g. logs and run sheets. Also, Witness X's evidence was stated to have been that the contents of the Report were wrong and that it was not a reliable account of his investigation.⁴⁶⁵ Ms Thompson's evidence was also highlighted where she said that, if she had known that the investigator believed that the surveillance should have been conducted more professionally and that the Report was wrong and not reliable, she would not have decided to dismiss Mr Leyshan on the basis of the report.⁴⁶⁶

[223] A further matter was said to be that Ms Thompson's evidence was that she had not read Mr Leyshan's written response at the time she made the decision to terminate his employment.⁴⁶⁷

[224] In addition, it was argued that the Commission should have regard to the fact that Mr Leyshan's dismissal was a product of covert surveillance by an employer of its employees. The surveillance was said to have been undertaken with an indifference towards the interests of the employees and in a manner which was injurious to Mr Leyshan's interests. Covert surveillance by an employer of its employees was described as conduct which is likely to be destructive of the trust and confidence which must exist between employer and employee.⁴⁶⁸ It was stated that all of the Council's witnesses had accepted that undertaking covert surveillance was a serious step due to its capacity to infringe on the privacy of employees.⁴⁶⁹

[225] There was said to be two extraordinary features in the way in which the surveillance was undertaken. The first one was that, over the six weeks of the investigation, Witness X never worked with the target. However, despite this, it was stated that the Council had permitted it to continue because, at some point, Witness X had advised the Council that he was obtaining information about unspecified matters which might be of interest to it. The Council was therefore said to have been prepared to tolerate the investigator engaging in a frolic of his own in recording whatever he wanted to record.⁴⁷⁰

[226] The second extraordinary feature was said to be that Witness X was recording what he saw in the workplace from Day1. It was argued that, although Witness X had a specific brief, he disregarded it. He was described as displaying flagrant indifference towards the privacy of other employees and was given licence by the Council to record whatever he wanted. This reckless indifference was said to have crystallised in Mr Leyshan's dismissal.⁴⁷¹

⁴⁶⁴ Transcript PN 3887-3889

⁴⁶⁵ Transcript PN 3889

⁴⁶⁶ Transcript PN 3890

⁴⁶⁷ Transcript PN 3891

⁴⁶⁸ Transcript PN 3891

⁴⁶⁹ Transcript PN 3893

⁴⁷⁰ Transcript PN 3894 and Exhibit A 10 at paragraph 47

⁴⁷¹ Transcript PN 3895 – 3896

[227] It was stated that a further additional relevant matter was the differential treatment between Mr Leyshan and other employees in a like or comparable situation, namely Mr Dodson. It was explained that the supervisor of three of the other employees named in the LKA Report was Mr Dodson but that no disciplinary action had been commenced in relation to him. It was acknowledged that there was no allegation that Mr Dodson had made a statement to the effect that is alleged against Mr Leyshan. However, it was contended that the allegation that Mr Leyshan had encouraged and enabled employees under his direct supervision to disregard the requirements of their employment could equally be made against Mr Dodson as he supervised three of the four employees. This was said to be an apple with an apple comparison which should have resulted in a disciplinary process commencing in relation to Mr Dodson.⁴⁷²

[228] In terms of Mr Boyle, it was submitted that, on the one hand, Mr Leyshan was alleged to have been deficient because 62% of works performed on his watch were in breach of the Procurement policy. However, no disciplinary action has been taken against Mr Boyle who was responsible for ensuring that Mr Leyshan complied with the policy. It was argued that, in terms of the treatment of Mr Dodson and Mr Boyle, it is Mr Leyshan who has been unfairly singled out by the Council.⁴⁷³

(b) The Council

[229] It was stated that the Council did not challenge the submissions of the Applicant regarding his length of service, clean employment record and the financial impact of his dismissal. However, it was submitted that these matters did not outweigh the valid reasons for Mr Leyshan's dismissal which were sound, defensible or well founded.⁴⁷⁴ Further, it was argued that Mr Leyshan's length of service and work history may have some significance if he had been dismissed for performance reasons. However, these are not as significant because Mr Leyshan was summarily dismissed for serious misconduct.⁴⁷⁵

[230] In terms of the Applicant's submission in relation to the alleged differential treatment between himself and Mr Dodson, it was argued that Mr Walden's evidence was that Mr Dodson had been aware or had been made aware of issues in relation to Mr Sumner's and Mr Butler's work performance. Mr Walden had indicated that Mr Dodson had met with the two employees in relation to the adequacy of their work performance prior to Witness X raising the specific concerns in the LKA Report. It was argued that there was no evidence of there being any appreciation of Mr Walker's misdeeds or actions taken to remedy them on the part of Mr Leyshan.⁴⁷⁶

[231] With respect to the submissions by the Applicant about the covert surveillance, it was submitted that the purpose of the surveillance was not to monitor employees in the performance of their regular duties. Rather, it was stated to have been to substantiate or otherwise reports of drug-related activity being undertaken by Council employees during working hours. The Council argued that employees have a right to privacy but that it did not

⁴⁷² Transcript PN 3897 – 3898

⁴⁷³ Transcript PN 3899

⁴⁷⁴ Transcript PN 4062 – 4063 and Exhibit R11 at paragraph 31

⁴⁷⁵ Exhibit R11 at paragraph 33

⁴⁷⁶ Transcript PN 4064

extend to employees being permitted to engage in activities which are contrary to their duties and responsibilities as employees. Further, it was stated that, in terms of the length of the investigation, what the Council was trying to do was to enable the investigator to work with the target. A thorough process needed to be adopted as the allegations were serious. The fact that the investigator did not work with the target was said to not reflect poorly on the Council.⁴⁷⁷

(c) Considerations and Conclusions

[232] I have taken account of all of the material before me and I find that the following are relevant in this case:

- Mr Leyshan's dismissal was the result of covert surveillance of another employee, with whom the investigator did not ever work with during the six-week investigation period. The investigator made the decision, off his own bat, to act outside his brief and to record the activities of employees who were not the target of the surveillance.
- Despite advice to the Council that the investigator had been unable to work with the target but that he had found matters of interest to the Council, the Council continued with the covert surveillance.
- Mr Boyle, Mr Leyshan's supervisor, does not appear to have been the subject of any disciplinary action in terms of his responsibility for ensuring that Mr Leyshan complied with the Procurement policy.
- Differential treatment between Mr Dodson (supervisor of three of the employees) and Mr Leyshan (supervisor of one of the employees) in that there does not appear to have been any disciplinary action taken against Mr Dodson for a seemingly similar failure to adequately supervise his subordinates.
- The Council's unquestioning and uncritical reliance on the LKA Report as the basis for the allegations without going behind it or conducting their own investigation as required by their Conduct and Performance Management policy.
- Ms Thompson's evidence that she had not read Mr Leyshan's written response at the time she made the decision to dismiss him.
- The personal matters relating to Mr Leyshan's age; 25 years of service; clean record and the particular financial consequences due to his membership of a defined benefit superannuation fund.

CONCLUSIONS

[233] In all of the circumstances of this matter, and having taken account of each of the factors in section 387(3) of the Act, I determine that, that Mr Leyshan's summary dismissal was harsh, unjust or unreasonable.

[234] It is noted, on the one hand, that it was found that Mr Leyshan, as Mr Walker's supervisor, had inadequately ensured that he performed his duties properly and to the required standard. Further, it was found that Mr Leyshan had made two minor, technical breaches of the Procurement policy.

[235] On the other hand, it was found that there was no valid reason for Mr Leyshan's dismissal. Further, I have taken account of the procedural flaws in the process, including the

⁴⁷⁷ Transcript PN 4067-4068

Council's uncritical reliance solely on the contents of the LKA Report. I have also taken into account the differential treatment between Mr Leyshan and that of Mr Boyle and Mr Dodson; the fact that Mr Leyshan's dismissal was "collateral damage" arising out of a covert investigation into a matter totally unrelated to him and the personal and financial consequences of the dismissal for Mr Leyshan.

[236] Therefore, balancing all of these factors, I find that Mr Leyshan's summary dismissal was harsh, unjust or unreasonable.

[237] Accordingly, it follows that, pursuant to section 385 of the Act, Mr Leyshan has been unfairly dismissed.

REMEDY

[238] Section 390 of the Act sets out when the Fair Work Commission may order a person's reinstatement or payment of compensation for unfair dismissal. It is as follows:

"390 When the FWC may order remedy for unfair dismissal

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

(a) The FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:

(a) The FWC is satisfied that reinstatement of the person is inappropriate; and

(b) The FWC considers an order for payment of compensation is appropriate in all the circumstances of the case."

[239] With respect to the requirements of s.390, I am satisfied that Mr Leyshan was protected from unfair dismissal at the time of his dismissal (s.390(1)(a)) and that he has been unfairly dismissed (s.390(1)(b)). Further, Mr Leyshan has made an application under s.394 of the Act (s.390(2)).

[240] Section 390(3) states that the Fair Work Commission must not order the payment of compensation unless two conditions have been met. The first condition is that the Fair Work Commission is satisfied that reinstatement is inappropriate (s.390(3)(a)). The primary remedy sought by Mr Leyshan was reinstatement.

[241] It was submitted, on behalf of the Applicant, that this is a compelling case for reinstatement and that there is no evidence before the Commission which would satisfy it that reinstatement to Mr Leyshan's former position is inappropriate. It was argued that there was

no proper basis for visiting Mr Walker's conduct on Mr Leyshan. Further, it was contended that, if the Commission found that there was no valid reason either on the basis of making the Statement or by failures in supervisory performance, the Council's claim about a breakdown in the trust and confidence falls apart.⁴⁷⁸ Continuity of employment and an order for the remuneration lost because of the dismissal were also sought.

[242] On the other hand, the Council argued that it would be inappropriate to reinstate Mr Leyshan to his former position as he was/is totally unsuited to the role. This was because his position required him to proactively monitor and supervise his subordinates out in the field which he failed to do. Further, it was stated that Mr Leyshan had never conceded any failure on his part or accept that he had a responsibility to create an environment which obliged Mr Walker to perform the requirements of his role. Mr Leyshan's comment: "I'm not their babysitter" was said to encapsulate his attitude to his position.⁴⁷⁹

[243] In addition, it was stated that Ms Thompson, Ms Stabb, Mr Walden and Ms Dixon have all lost trust and confidence in Mr Leyshan's ability to perform the responsibilities of his former position. This provides a proper and reasonable basis for the loss of trust on the part of the Respondent.⁴⁸⁰

[244] It was submitted that, if the Commission was contemplating returning Mr Leyshan to the Council, the only appropriate position would be one which did not require any supervisory responsibilities. However, it was stated that any order to this effect must be on no less favourable terms and conditions than his former position as the Commission has no power to simply order re-employment *simpliciter*.⁴⁸¹

[245] I have carefully considered the submissions of the parties on this issue. Section 390(3) of the Act states that payment of compensation must not be ordered unless the Tribunal is satisfied that reinstatement is inappropriate. Reinstatement is therefore the primary remedy.

[246] Taking all of the circumstances of this case into account, I find that I am not satisfied that the reinstatement of Mr Leyshan is inappropriate. It was clear that Mr Leyshan wanted to return to work for the Council in his former position. There was no evidence before me of any previous warnings or other disciplinary issues in respect of Mr Leyshan. In addition, because of the manner in which this matter was handled by the Council, Mr Leyshan was never given an opportunity to improve his performance as a supervisor. However, given the finding that Mr Leyshan had inadequately performed his duties as a supervisor in relation to ensuring that Mr Walker fulfilled his responsibilities as an employee, I am not inclined to reappoint Mr Leyshan to his former position as Parks Project Officer.

[247] However, I am prepared to reappoint Mr Leyshan to a non supervisory position in the Parks Department of the Council on terms and conditions no less favourable than when he was the Parks Project Officer. The Council's witnesses gave evidence that they had lost all trust and confidence in Mr Leyshan's ability to perform his former role as a supervisor. However, there is nothing before me that would suggest that this would necessarily be the case if Mr Leyshan was reinstated to another position which was not a supervisory role.

⁴⁷⁸ Transcript PN 3903 - 3912 and Exhibit A10 at paragraph 50.

⁴⁷⁹ Transcript PN 4029 - 4030 and Exhibit R11 at paragraph 37 and Exhibit R13 at paragraphs 40 - 43

⁴⁸⁰ Transcript PN 4030 and Exhibit R13 at paragraph 44

⁴⁸¹ Transcript PN 4031 and Exhibit R13 at paragraph 45 and Exhibit R11 at paragraph 38

[248] Therefore, taking all of this into account, I am satisfied that it is appropriate to order reinstatement of Mr Leyshan, albeit on the terms outlined in the paragraph above.

[249] Section 391(2) of the Act provides that the Tribunal may make an order to maintain continuity of a person's employment and/or the period of a person's continuous service with the employer. Having considered all of the material before me, I consider it appropriate to issue an order maintaining Mr Leyshan's continuity of employment and the period of his continuous service with the City of Wyndham.

[250] Section 391(3) of the Act allows the Tribunal to make an order for remuneration lost or likely to have been lost because of the dismissal. The criteria for determining the amount are set out in 391(4) of the Act, and require the Tribunal to take into account the amount of any remuneration earned or reasonably likely to be earned from employment or other work during the period:

- Between the dismissal and the making of the order, and
- Between the making of the order for reinstatement and the actual reinstatement.

[251] I consider it appropriate to order the City of Wyndham to pay to Mr Leyshan an amount for remuneration for the two periods set out in the paragraph above, less any remuneration earned from employment or other work for the same two periods.

[252] At the time of the hearing, the evidence before the Commission was that Mr Leyshan had been unsuccessful in obtaining alternative employment.

[253] Mr Leyshan is, therefore, requested to provide an update (and details, if necessary) of any income earned since his dismissal, to the Commission and to the Council, further, the Commission does not appear to have any evidence in respect of Mr Leyshan's salary at the time of his dismissal. Mr Leyshan and the Council are requested to confer and agree on what Mr Leyshan's salary was at the time of his dismissal.

[254] The information sought is to be provided by close of business on Monday, 21 October 2013. Once this information is to hand, an order will be issued with regard to Mr Leyshan's continuity of employment and the period of his continuous service with the City of Wyndham together with an amount for the remuneration lost or likely to have been lost.



Appearances:

Mr S. Moore of Maurice Blackburn Lawyers for the Applicant
Mr J. D'Abaco of counsel for the Respondent

Hearing details:

2013

Melbourne.

5, 11 September.

24, 25, 26 June.

16 May.

Printed by authority of the Commonwealth Government Printer

<Price code J, PR541935>