



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Belinda Ayres

v

City of Kingston T/A Kingston City Council
(U2018/330)

COMMISSIONER GREGORY

MELBOURNE, 20 JULY 2018

Application for an unfair dismissal remedy – misconduct – valid reason – application dismissed.

Introduction

[1] Ms Belinda Ayres was employed by the Kingston City Council (“the Council”) as the Manager, People and Culture on 16 December 2009. She was initially employed on a five year fixed-term contract, and this was then renewed for a further five year term in 2014 with an expiry date of 15 December 2019. However, she was dismissed from her employment on 20 December last year for reasons set out in a letter given to her on the same day. She then lodged an unfair dismissal application and this decision deals with that application.

[2] Mr T. Borgeest of Counsel appeared on behalf of Ms Ayres. Mr M. Minucci of Counsel appeared on behalf of the Council. Both were given permission to appear under s.596(2)(a) of the *Fair Work Act 2009* (Cth) (the “Act”) as the matter involves significant complexity and their involvement might enable it to be dealt with more efficiently.

The Issue to be Determined

[3] Section 385 of the Act states that a person has been unfairly dismissed if the Commission is satisfied “the dismissal was harsh, unjust or unreasonable.”¹ Section 387 continues to provide that the Commission must take into account the following considerations in determining whether the dismissal was “harsh, unjust or unreasonable.” It states:

“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.”²

[4] The Commission is now required to decide whether Ms Ayres’ dismissal was “harsh, unjust or unreasonable” taking into account the matters in s.387 it must have regard to.

The Applicant’s Evidence and Submissions

Ms Belinda Ayres

[5] Ms Ayres commenced employment with the Council as the Manager, People and Culture in December 2009 and was employed on a five year fixed-term agreement. Her contract was renewed for a further five year term in 2014 with an expiry date of 15 December 2019. However, she was dismissed from her employment on 20 December 2017.

[6] She was provided with a termination letter on that day from the Council’s Chief Executive Officer, Mr John Nevins, which detailed the various allegations made about her, and the findings made in response. The correspondence concluded by indicating:

“8. On the basis of Council’s findings in relation to Allegations 1-4, Council’s view is that you have engaged in conduct that is contrary to Council’s interests and completely inconsistent with your position as the senior representative of Council in human resources matters.

9. This conduct is contrary to your responsibility under Council’s Code of Conduct to behave in a professional and ethical manner at all times. Council also finds that in denying Allegations 1-4, you have not been honest in providing your Responses. This also constitutes a breach of the Code of Conduct, as set out above.

Termination of Employment

10. Council has considered all of the information available to it and has made a final decision to terminate your employment effective today, for the reasons set out above.

11. In your Responses, you have not provided any reasons that would warrant Council not terminating your employment, given the seriousness of the misconduct that Council has found you have engaged in, particularly given your role as Council's Manager, People and Culture. Council is of the view that as you engaged in serious and wilful misconduct when your duty was to act in Council's interests, and you were the senior officer charged with responsibility for Council's human resources function, there has been an irreconcilable breakdown of trust and confidence and your employment with Council cannot continue.

12. Further, Council has also taken into account what it considers to be your lack of contrition and honesty, as you have continued to deny Allegations 1-4.

Next Steps

13. While your conduct constitutes serious misconduct justifying summary dismissal, you will receive a payment in lieu of notice of termination given your length of service with Council as well as payment for your outstanding wages and leave entitlements as at 20 December 2017. This payment will be processed in the next pay run.

14. I would also like to take this opportunity to remind you that notwithstanding the termination of your employment, you will continue to be subject to post-employment obligations pursuant to your contract of employment and at common law, including your obligation not to disclose or misuse Council's confidential information."³

[7] Ms Ayres reported to the Manager, Corporate Services, Mr Paul Franklin, who in turn reported to the Chief Executive Officer. She also had three direct reports, and 14 employees in total were employed in the People and Culture team.

[8] Ms Ayres was told on 8 June last year that she was being suspended from her employment and given a letter on the same day from the Chief Executive Officer setting out six allegations made against her. They were prefaced with the statement that "... the alleged conduct concerns members of Council's People and Culture team actively acting against the Council's interests, as well as other types of inappropriate conduct."⁴ Ms Ayres rejects these claims but does acknowledge she "... had significant issues with my General Manager, Mr Franklin, Mr Nevins, Mr Bolin and two managers, Darren Paspas and Steve Lewis."⁵ Those issues related, in particular, to:

- The management of OH&S issues involving Council contractors;
- The management of soil contaminated asbestos on Council land; and
- My support for the WorkCover claim made by Mr Foley in relation to inappropriate workplace behaviour."⁶

[9] Ms Ayres' witness statement provided further detail about each of these matters. In October 2015 she was given management responsibility for implementing a centralised contractor OH&S management system at the Council. She subsequently became aware that Mr Paspa and Mr Lewis "...were aggrieved..."⁷ that she had been given this responsibility, and from this point they "... behaved aggressively towards me and members of the Risk and Safety Team and obstructed us in the performance of our work."⁸ Mr Franklin also did little to discourage this behaviour. In late 2016 she sought medical treatment in regard to the impact on her health of the behaviour she was experiencing and subsequently took a period of personal leave in April 2017. She also discussed these issues with Mr Nevins and Mr Franklin, but claims that despite, the assurances she received, the bullying behaviour worsened.

[10] On 11 January 2017, Ms Ayres attended a meeting with Mr Nevins and Mr Franklin where concerns were raised about two members of her staff, Mr Bob Impey and Mr Laurie Foley. It was alleged they said the Council had put public health and safety at risk by knowingly authorising the transportation of contaminated soil to a public area. Mr Impey's employment was then terminated, and shortly after Ms Ayres was informed by Mr Franklin that the contractor management role was being restructured to the Procurement and Contracts Department. This took effect on 10 April 2017.

[11] On 20 March 2017, the Council received an anonymous email which included allegations about Ms Ayres and two of her direct reports, Mr Foley and Mr Berry. It included claims that Ms Ayres and Mr Foley had made fraudulent WorkCover claims and were intending to sue the Council. The email was referred to the Independent Broad-based Anti-corruption Commission (IBAC), which advised the Council that it considered it was a matter that could be dealt with by the Council internally. Ms Ayres also understood Mr Franklin had received similar complaints from Mr McMahon and Mr Donovan.

[12] In March of last year Ms Ayres was engaged to undertake an internal investigation into the involvement of an employee from the Council in the transportation of potentially hazardous asbestos materials to a playground area in one of the Council's parks. The General Manager, Community Sustainability, Mr Mauro Bolin, then sought to involve himself in this investigation, however, Ms Ayres did not believe this was appropriate as some staff in his Department were potentially involved in what had occurred. She considered his behaviour "... towards me was rude, aggressive and undermined my role. His obtrusive and obstructionist behaviour prevented me from carrying out the investigation independently."⁹

[13] She subsequently complained to Mr Franklin in March and April last year about Mr Bolin's behaviour, but was not aware of any steps taken by him to prevent this behaviour from occurring.

[14] Ms Ayres also said she was aware Mr Foley had made a WorkCover claim in April last year relating to a psychological injury. He had worked closely with her on the contractor management and asbestos issues, and she was aware of the pressure he was under, and the way he had been treated by Mr Franklin, Mr Paspa, Mr Bolin and Mr Lewis. As Mr Foley's Manager she was contacted by an investigator engaged by the claims agent in regard to his WorkCover claim and she gave "... a truthful account of the incidents, and the people involved to the investigator."¹⁰ She understood the claim was subsequently accepted.

[15] Ms Ayres witness statement continued to provide the following chronology of events that occurred in the 6 months prior to the termination of her employment.

- 8 June 2017 – Ms Ayres met with representatives from the Council regarding the allegations made against her and was informed she would be stood down pending an investigation into these allegations.
- 9 June 2017 – Ms Ayres’ lawyers wrote to the Council and lodged a complaint about workplace bullying and the adverse treatment she was being subjected to by senior management. The Council subsequently engaged a barrister, Ms Catherine Symons, to undertake an initial assessment of her complaint.
- 4 July 2017 – Ms Ayres received a letter from the Chief Executive Officer of the Council advising that six allegations had been made against her and requesting a response.
- 11 July 2017 – Ms Ayres’ lawyers wrote to the Council advising that the allegations “were insufficiently particularised”¹¹ and requested additional particulars.
- 18 July 2017 – lawyers acting for the Council refused to provide further particulars.
- 26 July 2017 – Ms Ayres’ lawyers lodged a dispute with the Fair Work Commission and on 5 September a conference was conducted at the Commission.
- 14 September 2017 – the Council’s lawyers wrote to her lawyers offering the opportunity to meet with Ms Symons to provide further information about her complaint.
- 18 September 2017 – Ms Ayres’ lawyers wrote to the Council’s lawyers outlining Ms Ayres concerns about the investigation report, and that she would meet with Ms Symons when she was fit to do so.
- 11 October 2017 – Ms Ayres provided a written statement to the Council in response to the allegations. She also indicated that she could not respond to many of them because she had not been provided with the documents and other additional information that had been requested. However, she also denied each of the allegations.
- 13 October 2017 – a second conference was held in the Fair Work Commission.
- 23 October 2017 – Ms Ayres’ lawyers provided her response to the investigation report and three days later they advised the Council’s lawyers that Ms Ayres was content to rely on her written statement and did not wish to meet with Ms Symons.
- 13 November 2017 – the Council provided further particulars about some aspects of the allegations.
- 23 November 2017 – Ms Ayres’ lawyers sought a further conference at the Commission and it was scheduled for 20 December 2017. Ms Ayres sought further materials in advance of this conference but these were not provided by the Council.

- 20 December 2017 – Ms Ayres attended the Commission again but after the conference concluded her solicitors was given the letter from Mr Nevins, dated 20 December, advising her employment had been terminated with immediate effect.

[16] Ms Ayres' witness statement then continued to provide responses to both the substantiated and unsubstantiated allegations contained in the termination letter. She denies having made a number of the alleged statements, and provided detailed reasons about why "it is inherently unlikely that I would have used the words attributed to me."¹² She also denied taking action in any way to support Mr Impey's claim he made against the Council, or that she provided any advice or information to him about that matter.

[17] She also denied encouraging Mr McMahon to make a bullying complaint against Mr Paspas, despite being aware Mr McMahon was frustrated about the number of meetings he was being required to attend with Mr Paspas as part of the handover of the contractor management responsibilities.

[18] She indicated, in conclusion, that the events surrounding her dismissal have significantly damaged her reputation at the Council and more broadly within the local government sector. She now finds it difficult to comprehend why she was subjected to this behaviour, and it has had an impact on her health and required ongoing medical treatment.

[19] Ms Ayres also confirmed in cross-examination that there was a high turnover of staff in the People and Culture team, with 15 employees leaving in the space of less than two years.¹³ However, she rejected the suggestion that this meant poor choices were being made when people were being hired, or that there were underlying issues within the team that meant people didn't want to work there. She also said the results of the employee engagement survey carried out in 2015 confirmed there was clearly room for improvement, however, she denied the results suggested there was something seriously wrong with the culture of the team. She also indicated in response to the suggestion that Mr Berry was a difficult person to work with that he "had a unique style."¹⁴ She was also aware that other employees considered him to be difficult to work with.

[20] She also said in response to whether she had used the phrase around the office "ching ching," "I don't believe so."¹⁵ She also denied making statements about pursuing claims for compensation against the Council after leaving her employment. She acknowledged that she was unhappy about Mr Impey being dismissed from his employment at the Council, but denied she had then made comments at work criticising the decision and suggesting he "deserved justice."¹⁶ She also denied being involved in downloading and printing documents from the Council's internal computer system to support Mr Impey's claims against the Council. She also acknowledged in cross-examination she had been involved in instructing solicitors to provide her with legal advice about various issues associated with her work at the Council, and this had occurred well before the time she was stood down from her employment on 9 July last year. However, she denied encouraging Mr Foley to also seek advice from the same firm of solicitors in order to pursue his own claims against the Council.

Mr Laurie Foley

[21] Mr Foley is employed by the Council as Program Leader, Risk and Safety and reported to Ms Ayres until her employment was terminated. He commenced employment in August 2015, but has been on leave since 17 March last year.

[22] He indicated in his witness statement that he has no knowledge of Ms Ayres acting in any way to disparage the Council, or senior Council employees. He was also not aware of her talking about pursuing opportunities to receive a financial pay-out from the Council, and has never heard her use the expression “ching ching.” He also cannot recall her telling Mr McMahan his position was redundant, and the only discussions he was aware of with him were about changes to his role as a consequence of the transfer of the contractor management responsibilities to the Procurement Department. He stated instead that Mr McMahan raised the possibility of being made redundant after he was told his role was being transferred to Mr Paspas’s Department.¹⁷

[23] He also did not meet with Mr Impey between the time he was terminated and Mr Foley commencing his leave. He had also not heard of anything to suggest Ms Ayres was assisting Mr Impey with the claim he had made to the Fair Work Commission.

[24] He was also not aware of Ms Ayres speaking openly about bringing a claim against the Council, or that she had paid a retainer to her solicitors to assist her in preparing such claims. He was also not aware of Ms Ayres having what was described as a “pink lever arch folder” containing evidence of her mistreatment by Kingston.¹⁸ He was also not present at the alleged meeting in Charman Road with Ms Ayres, Mr Berry and Mr Impey.

[25] He also takes issue with the witness evidence of Mr McMahan when he states he was not provided with a position description and not given any work to do. However, he was involved in a meeting with Ms Ayres and Mr McMahan in November 2016 when Mr McMahan was told he needed to become familiar with the Council’s policies and procedures before getting “out on the road.” He also rejects Mr McMahan’s evidence about Ms Ayres using the expression “ching ching,” and he never heard her use this expression. He also denied other suggestions by Mr McMahan about Ms Ayres allegedly providing assistance to Mr Impey with his claim in the Fair Work Commission.

[26] He also indicated in his evidence that he had first sought advice earlier this year from the solicitors who were also advising Ms Ayres. However, he subsequently indicated in cross-examination that this was incorrect, and he had actually first sought this advice at a much earlier point in time, sometime around mid – 2017,¹⁹ and he had simply got the year wrong. He said his change of mind had nothing to do with the fact that a letter was produced to him in cross-examination confirming that he had in fact obtained advice at a much earlier point.

Mr Robert Impey

[27] Mr Impey was employed by the Council as a Program Leader for Risk Management and Workplace Safety from September 2009 until March 2012. He was then engaged as an independent contractor in August 2016, but was employed again in January 2017 to work on the contractor management project. His employment was terminated on 12 January 2018, and he then made a claim in the Fair Work Commission, which has since been settled.

[28] He met with Ms Ayres in the week after her employment was terminated in December last year, and this was the first time he had met with her since his employment was terminated. He denies Ms Ayres provided him with documentation in support of his application to the Fair Work Commission, and the only time he spoke to her following his termination, and prior to the conciliation conference, was when he was contacted by her after she was seeking to locate a document on the Council's computer system. He also denies any suggestion that Ms Ayres advised him about the amount of compensation he should seek from the Council. He also denies hearing Ms Ayres encourage other employees to pursue claims against the Council.

[29] He also states that during the time he worked with Mr McMahon he had serious concerns about his competence and attitude. He also denies being involved in discussions with him about whether Mr Lewis would lose his job, or any reference to Ms Ayres using words to the effect of "putting another nail in the Council's coffin." He also recalls Mr McMahon making regular references to his contacts at WorkSafe, and that he would be pursuing those contacts in regard to what was occurring at the Council. However, he was not aware of Ms Ayres encouraging Mr McMahon to pursue those contacts.

[30] Mr Impey also denied in cross-examination that he had written to the local paper outlining allegations that the Council was in breach of its OHS and EPA guidelines. He indicated instead that Mr McMahon had told him he had done this.²⁰

Mr Andrew Berry

[31] Mr Berry was employed by the Council in May 2016 as Program Leader, Employee Relations and reported to Ms Ayres. He also acted in her role when she was on leave.

[32] In June last year Mr Berry was suspended from his employment and told his "... presence posed a serious and imminent risk to health and safety."²¹ His employment was then terminated on the 19 October 2017 and he proceeded to lodge an unfair dismissal application in the Fair Work Commission.

[33] He indicated in his witness statement that during the time he was employed he could not recall hearing Ms Ayres speak about making a claim for compensation against the Council or speaking about any of the other matters alleged by the Council.²² He also denied attending the meeting with Mr Impey, Ms Ayres and Ms Foley in Charman Road, Cheltenham immediately prior to Mr Impey's hearing in the Fair Work Commission in March last year. However, he acknowledged in cross-examination that he had discussions with Mr Foley, Mr Impey and Ms Ayres on a number of occasions prior to these proceedings. He estimated that he had spoken to Ms Ayres between 10 and 15 times since October last year and they had discussed these proceedings, as well as his unfair dismissal application. He said he had probably spoken to Mr Foley on around 10 occasions and had spoken to Mr Impey on at least 5 occasions. He had also met together with Ms Ayres and Mr Foley on probably 5 occasions and they had discussed, "the reasons for my termination, how wrong Kingston got it."²³

[34] He thought the culture within the People and Culture team when he was employed was "a fine culture,"²⁴ and he had a very good and close working relationship with Ms Ayres. She also told him "that she wasn't happy that Bob was terminated,"²⁵ and "she was disappointed that John had not followed her advice in relation to the matter."²⁶ He also denied he attended a meeting in which Ms Ayres indicated she was going to try and maximise Mr Impey's pay out

in his claim in the Fair Work Commission, or that she was attempting to assist him in that matter. He also denies he had been involved in bullying Mr Donovan, and notes this allegation was not found to have been substantiated in the investigation process. He also believed the complaints made about him by Mr Donovan had more to do with the breakdown in their relationship at a personal level.

The Applicant's Submissions

[35] Ms Ayres submits that her dismissal was unfair because the misconduct that is said to have warranted her termination did not occur. She denies the allegations made about her and maintains those denials. She also claims she was not afforded procedural fairness in the processes gone through in terminating her employment.

[36] In regard to whether the Council had a valid reason to dismiss her she denies that the events it relies on occurred, and submits it has relied on false evidence, particularly that provided by Mr Donovan and Mr McMahan. She continues to submit that there was no valid reason for her termination because the allegations were concocted, and it was unfair of the decision maker to have relied on them.

[37] In submitting that the allegations were concocted Ms Ayres states that there are four issues to be considered in this context. Firstly, "... the allegations were inherently implausible."²⁷ Secondly, they were found on a very narrow base, being the evidence of Mr Donovan and Mr McMahan. Thirdly, they both "... carried an animus ... to take a dim view of the applicant,"²⁸ and this explains why the allegations were concocted. She finally points to the absence of any corroboration of their allegations, in circumstances where it should have been available if the allegations were well founded. She continues to submit that she was a senior employee of long-standing, who had a five-year contract renewed in 2014, and she was "... an assured, confident professional giving responsive and careful and respectful evidence."²⁹ Against this background the allegations made about her are implausible.

[38] In regard to the allegations she submits, firstly, that they are outlandish, given her length of service with the Council. In regard to the evidence of Mr McMahan, who was only employed by the Council for a relatively short period, she submits that the sequence of his allegations "... shouted out for the most sceptical examination."³⁰ She also submits that the evidence suggests both Mr Donovan and Mr McMahan co – operated in preparing the claims made about her. It was also Mr McMahan who first raised the issue of him being made redundant, and he was disappointed when told he was not going to be paid out.

[39] She also submits that Mr Donovan was disappointed about not being reclassified from Band 7 to Band 8 when he sought a reclassification. When that application was refused he considered Ms Ayres to be responsible. It follows in her submission that both he and Mr McMahan had an "axe to grind" in respect of her. She finally submits that Mr McMahan's evidence about her building a complaint against the Council was not able to be corroborated.

[40] She submits instead that she had been critical of the Council's management of Occupational Health & Safety issues and the Council reacted in the face of this criticism by terminating her employment.

[41] She also submits that the Council did not follow a fair procedure in dismissing her, and she was not provided with the witness statements of Mr Donovan and Mr McMahan to

enable her to properly understand the allegations made against her, and to enable to her to put a position in response.³¹ Her requests for those particulars were made on a number of occasions, and the allegations and supporting particulars put at different times were inconsistent and imprecise about when the alleged conduct and statements were made. The Council also failed to interview relevant witnesses during the course of its investigations.

[42] She was also provided with the termination letter during a conference at the Fair Work Commission, without being put on notice that this would occur. She was therefore again denied the opportunity to make formal submissions in response to the material given to her. She also submits that the allegations were not put to her in a detailed way and she was again unable to respond appropriately.

[43] In addition, Mr Nevins, who was the principal decision-maker, did not bring an open mind to his consideration of the matter because he had been the subject of a previous grievance brought against him and others by Ms Ayres. She submits in conclusion that the allegations are inherently implausible, and it was unfair for Mr Nevins to have accepted them as true. The Council, and Mr Nevin in particular, simply accepted “holus bolus”³² the evidence of Mr Donovan and Mr McMahon, while simply rejecting her evidence.

[44] She continues to submit that while Mr Nevins gave the appearance in the witness box of objectivity and of being open-minded there was a real “... detachment and a lack of curiosity evident ...”³³ on his part, and he ultimately accepted the allegations without testing in any way whether they were actually made out. For example, Mr Foley was not interviewed in circumstances where he was available to provide evidence about what occurred, and his views should have been obtained. In addition, the evidence of Mr McMahon about Ms Ayres openly bragging about pursuing claims against the Council was not tested with other staff in the People and Culture team. She submits, in conclusion, that there was “no grappling”³⁴ by Mr Nevins with contrary explanations; he simply initiated an investigation into the allegations and then decided to accept what was presented to him in response, without testing those findings in any way. In summary, “... his decision making was unfair because he was detached, it did not grapple with the real difficulties, in particular, with the implausibility of what McMahon had to say - considered, those elements considered separately and in sequence and in the chronology and that he didn’t cause a proper testing of the allegation to be made by asking questions of available people.”³⁵ While his decision might not necessarily have been the wrong one the process adopted was unfair, given what was at stake.

[45] Ms Ayres also rejects the suggestion that the 17 page letter sent by her solicitors to the Council on the day after she was stood down was evidence of her building a case against the Council. She had instead sought advice previously because of the significance of some of the matters she was involved in, particularly those to do with contractor management issue. She also submits that her termination was harsh, given she had been in the role for eight years and had consistently received positive performance reviews during that time. The decision to terminate her employment was accordingly a disproportionate response.

[46] Ms Ayres submits, in conclusion, that the allegations are exaggerated and her relationships with those involved can be restored and re-established. She therefore seeks to be reinstated to her former position. She also notes that she had two years of her five-year contract remaining at the time she was dismissed and could therefore have expected to work with the Council for at least that time if not for her employment being terminated. In the event

the Commission decides that reinstatement is not appropriate, and compensation should be awarded, then she seeks to have an order made for the maximum period of 26 weeks.

The Respondent's Submissions and Evidence

Ms Megan O'Halloran

[47] Megan O'Halloran is the Manager – Communications and Community Relations at the Council and from 15 June until 1 December was the Acting Manager – People and Culture while Ms Ayres was suspended during the investigation into her alleged misconduct.

[48] Ms O'Halloran and Ms Ayres were both Managers at the Council, and both reported to the same General Manager. Ms O'Halloran considered that Ms Ayres did not have a good understanding of many of the fundamental aspects of her job and did not adequately manage employees in her team. It was also common knowledge at the Council that the culture of the team was poor and there were a number of concerns about the standard of Ms Ayres' work. Ms O'Halloran was also aware that a number of complaints had been made by various members of Ms Ayres' team about her management style and behaviour. She was also aware that between July 2015 and May 2017 there had been significant staff turnover and 15 employees from the People and Culture team had resigned or otherwise left in that period. She considered this to be an unusually high turnover in a relatively small team of 14 employees.

[49] She also attached a copy of an employee engagement survey, which was conducted in 2015 and indicated that the results for the People and Culture team "... were poor and the team's unhappiness was made clear by the results."³⁶

[50] On 8 June 2017, Ms O'Halloran was asked by the Chief Executive Officer, Mr Nevins, to attend a meeting in his office. The meeting was also attended by the General Managers and other staff. Mr Nevins told the meeting he had reason to believe Ms Ayres, Mr Berry and another employee had engaged in serious misconduct, and he had decided to stand them down immediately while these matters were investigated. Ms O'Halloran then offered to step into the role of Acting Manager – People and Culture.

[51] On 4 July, Ms O'Halloran prepared a letter for Mr Nevins, which set out the allegations made in regard to Ms Ayres. The letter was given to Ms Ayres later that day. It stated in part:

"32.1 undermined Council's trust and confidence in her as its People and Culture Manager, by engaging in a course of conduct of:

32.1.1 openly and repeatedly disparaging Council and Council management to other Council employees, in the workplace (**Allegation 1(a)**);

32.1.2 openly and repeatedly informing other Council employees in the workplace that she was actively seeking opportunities to receive a financial payment from Council, in the event that her employment with Council ended (**Allegation 1(b)**); and

32.1.3 engaging in conduct outside of her authority by telling, now former People and Culture employee, Mr McMahan, that his position was redundant

and his employment would be terminated without cause or approval (**Allegation 1(c)**).

32.2 engaged in conduct contrary to the interests of Council and inconsistent with her position as a representative of Council in human resources matters, by:

32.2.1 supporting a former employee of Council, Mr Impey, in relation to his claim against Council, while she was directly involved in representing Council's interests in relation to Mr Impey's claim (**Allegation 2(a)**); and

32.2.2 openly stating in Council's workplace that she would assist Mr Impey's claim against Council, including by providing Mr Impey with evidence that was in Council's possession (**Allegation 2(b)**).

32.3 asked Mr McMahon to make a bullying complaint against Mr Paspas, in circumstances where Mr McMahon had already informed her that that he was not being bullied by Mr Paspas and had no reason to make such a complaint (**Allegation 3**).

32.4 engaged in conduct contrary to the interests of Council by repeatedly asking Mr McMahon to contact a friend of his at WorkSafe, for the purpose of encouraging Mr McMahon's friend to facilitate legal proceedings by WorkSafe against Council, outside of the normal processes for Council to communicate with WorkSafe (**Allegation 4**).

32.5 engaged in conduct contrary to the interests of Council and inconsistent with her position as a representative of Council in human resources matters, by failing to take appropriate action upon becoming aware that her direct report, Mr Berry was in a personal relationship with a contract worker (Marilyn Hurst) reporting directly to him (**Allegation 5**).

32.6 failed to comply with the complaint procedure required by Council's Workplace Bullying Policy when responding to a formal written complaint filed directly with her on 11 April 2017, by now former People and Culture employee, James Donovan, alleging bullying and harassment by Mr Berry (**Allegation 6**).

(together, the **Allegations**).³⁷

[52] The correspondence also indicated that it was proposed to meet with Ms Ayres on 17 July to provide her with an opportunity to respond to the allegations. It also indicated that she could have a support person present. On 24 July 2017 the Council was informed that Ms Ayres was unfit to participate in the process until 18 August and medical certificates were provided in support. On 26 July Ms Ayres filed an application in the Fair Work Commission under s.739. The Council was then advised that Ms Ayres was unfit to participate in the disciplinary process until 4 September 2017. The Council also appointed a barrister, Ms Catherine Symons, to conduct an initial assessment of complaints made by Ms Ayres. A series of further exchanges then continued between solicitors acting on behalf of Ms Ayres and the Council regarding the various processes that were in train.

Mr John Nevins

[53] Mr Nevins is the Chief Executive Officer of the Council and has been in that position since 2005. Ms Ayres commenced employment with the Council in the position of Manager – People and Culture in December 2009 and following a restructure in 2014 she reported to the Manager – Corporate Services, Mr Paul Franklin.

[54] In 2016 the Council was in the process of centralising contractor OHS compliance and Ms Ayres supported criticisms being made at the time by Mr Foley about the way contractor management had been handled by other Departments. An external expert was contracted to provide advice and concluded that Mr Foley’s criticisms did not have substance. However, Mr Nevins was concerned that Ms Ayres continued to support Mr Foley’s intense criticism of other Council staff even though “their approach had now been found to be legitimate.”³⁸ Mr Nevins also denied there had been any discussions about allegations of workplace bullying in a meeting on 21 September 2016 he attended with Ms Ayres and Mr Foley and, if any such allegations had been made, he would have actioned them immediately because he had no tolerance for bullying behaviour. The discussion was instead about the Council’s OHS policies which needed to be updated.

[55] In January 2017, Mr Nevins attended a meeting with Ms Ayres and Mr Franklin in the context of allegations made by Mr Impey about unauthorised dumping of asbestos contaminated soil in a Council park by a Council employee. Mr Nevins made enquiries with Mr Lewis, the Manager – Community Buildings, and asked him to investigate. Mr Lewis subsequently demonstrated there was no basis for the allegation and Mr Nevins told Ms Ayres he could no longer trust Mr Impey. Mr Impey was then dismissed from his employment on 12 January 2017.

[56] He subsequently brought a general protections application against the Council. Mr Nevins said, “During that time, I had a meeting with the Applicant and Mr Franklin where information regarding Mr Impey’s legal claim was discussed. This included settlement options. The way in which the claim was ultimately resolved led me to suspect that the Applicant may have communicated confidential information to Mr Impey, contrary to Council’s best interests.”³⁹

[57] On 20 March 2017, Mr Nevins and Mr Franklin received an anonymous email entitled “HIGH IMPORTANCE: Serious Issues in People & Culture,”⁴⁰ which made the following allegations about corrupt behaviour within the People and Culture team:

“19. Relevantly, the Anonymous Email stated, among other things, that:

19.1 the Applicant and Mr Foley were trying to build a case to sue Council, had engaged lawyers for that purpose and were intending to submit WorkCover claims;

19.2 the Applicant met and had lunch with Mr Impey and Mr Berry, prior to a Fair Work Commission (Commission) hearing involving Mr Impey and Council, to discuss tactics;

19.3 The Applicant and Mr Impey had been receiving legal advice from Mr Berry, with respect to possible claims against Council;

19.4 the Applicant was trying to sabotage Council in various ways, including in relation to its contractor management work force; and

19.5 the Applicant was knowingly ignoring and not taking action with respect to a relationship between Mr Berry and Marilyn Hurst, a contractor in the P&C Team, who reported directly to Mr Berry.”⁴¹

[58] Mr Nevin said the content of the email was kept confidential but given it raised issues concerning potential corrupt behaviour within Council he immediately reported the matter to IBAC and waited for directions from it. At around the same time he was told by Mr Franklin that Mr Donovan and Mr McMahon had raised similar issues with him. The Council was subsequently advised by IBAC that it was appropriate for the matters to be investigated internally and the Council then engaged lawyers to advise it about these matters.

[59] Mr Nevins then decided in May 2017 that it was necessary to appoint an independent investigator to investigate the various complaints, and whether specific allegations should be formulated in regard to any Council employees. It was also decided that several employees, including Ms Ayres, should be stood down while the investigation took place, and this occurred on 8 June 2017. On the following day Mr Nevins received a detailed letter from her solicitors outlining a number of complaints of bullying and adverse treatment by the Council and various Council employees in regard to Ms Ayres.

[60] Mr Nevin said that after reading the investigation reports he came to the view that “... the evidence of Mr McMahon and Mr Donovan was more credible than the evidence of the Applicant, and should be preferred.”⁴² He trusted Mr Donovan and Mr McMahon and considered they had the best interests of Council at heart. He also noted that Mr Donovan had resigned from his employment and consequently had a reduced investment in the outcome. They were also both “... candid, consistent and corroborative,”⁴³ whereas Ms Ayres simply provided blanket denials, and had not provided any further evidence that warranted consideration. The investigator had also found that four of the allegations were substantiated and this added weight to his conclusions. However, he did not accept the findings of the investigations “uncritically.”⁴⁴

[61] On 19 December, he instructed the Council’s solicitors to prepare a letter advising Ms Ayres that her employment was terminated, effective immediately, and this letter was given to Ms Ayres after the conciliation conference at the Fair Work Commission on that day.

Mr Shaun McMahon

[62] Mr McMahon was employed by the Council from October 2016 until February 2017 in the position of Safety Officer as part of the People and Culture team and reported to Mr Foley. After Mr Foley commenced a period of extended leave on 16 March last year Mr McMahon took on the position of Program Leader – Risk and Safety until August 2017. Ms Ayres managed the People and Culture team throughout this period.

[63] Mr McMahon considered Ms Ayres to be an extremely poor Manager and after joining the team he was not given a position description and did not have any work to do. He confronted Ms Ayres about this in November 2016 and continued to send emails to her and Mr Foley during the early part of 2017 inquiring about his position description. He

acknowledged in cross-examination that Ms Ayres was irritated by his constant requests seeking clarification of his role.

[64] He also told Ms Ayres on numerous occasions that the team was dysfunctional and she would respond by placing the blame on the “idiots upstairs,”⁴⁵ referring to the Chief Executive Officer and other senior Managers. Ms Ayres would regularly walk around the office and make reference to the pay-out she was going to receive when she left the Council, and would often use words to the effect of “ching ching – here comes the money.”⁴⁶ She also claimed she would be “... up for at least \$500,000 to \$700,000”⁴⁷ in reference to claims she was going to make against the Council.

[65] He also indicated in his evidence-in-chief that he was sitting in Ms Ayres office on one occasion when Mr Foley walked past the door and Ms Ayres called him into the room. She told him she had paid her solicitors that morning and he also needed to do so. Mr Foley indicated in response that he was going to do this tomorrow.

[66] Media reports then appeared in November 2016 about the alleged movement of soil containing asbestos on Council sites and Mr McMahon was surprised by the level of detail in those reports. On one occasion he asked Mr Impey about why the media knew so much about the issue and he told him that he had sent a letter to the local paper detailing the allegations. He also said he heard Ms Ayres and Mr Impey discussing the issue and Ms Ayres saying words to the effect of “my pink folder is getting bigger by the minute.”⁴⁸

[67] He also denied Mr Impey’s suggestion that he had contacted the local media about the OHS issues, and in response to claims by Mr Impey about him contacting Neil Mitchell he indicated in response that he did not know who Neal Mitchell was.

[68] Mr McMahon said he subsequently prepared a report into what occurred, which he provided to Ms Ayres and Mr Foley. He also gave a copy to Mr Lewis. He was aware Mr Foley then gave a copy to Mr Impey, who removed some of the recommendations and highlighted the most negative aspects. He was also told around this time by Ms Ayres and Mr Foley that he needed to help them get evidence to “nail [the Council] to the wall.”⁴⁹

[69] He also heard Ms Ayres and Ms Foley having discussions about whether they had paid their legal fees to the solicitors acting on their behalf. He told Mr Paspas about this, and about the fact he was aware Ms Ayres had been downloading documents from the Council’s system onto a USB drive.

[70] Mr McMahon was then told by Mr Donovan that Mr Impey had lodged a general protections claim with the Fair Work Commission following his dismissal. Ms Ayres also told him she was responsible for acting on behalf of the Council in dealing with Mr Impey’s claim. However, he subsequently heard Ms Ayres talking on the phone to Mr Impey and indicating she was obtaining documents for him from the Council’s internal system, and arranging to meet to give him these documents. He also understood that Ms Ayres and Mr Foley were both meeting with Mr Impey.

[71] He also heard Ms Ayres say words to the effect of “... [she] shouldn’t be representing the Council ... because [she had] a direct involvement, but no one else wanted to do it ... [she] told Bob to go for maximum dollar.”⁵⁰ He also told Mr Paspas on multiple occasions of his concerns about Ms Ayres’ conflicted position.

[72] On 10 March 2017 Mr McMahon was asked to attend a meeting on 14 March with Ms Ayres and Mr Foley. He was not told what the meeting was about, but was then told in the meeting that his position had been made redundant and he was entitled to a \$7,000 pay out. He was also told this decision had been made by Mr Franklin. He immediately went and spoke with Mr Franklin, who told him he did not know anything about the matter, and he still had a job with the Council. He understood Ms Ayres then met with Mr Franklin, and when she returned she said words to the effect of “[he had] got [her] into a lot of trouble.”⁵¹

[73] Mr McMahon was also involved in discussions with Ms Ayres and Mr Impey about the asbestos issue and both indicated that Mr Lewis was in trouble about this. Mr McMahon said Ms Ayres often asked him to follow-up with a contact he had at WorkSafe to see what it was doing about the matter. He was also concerned that a Council employee claimed to have signed a WorkCover claim on Mr Foley’s behalf after he went on leave in March last year. He subsequently told Mr Franklin and the insurer about his concerns.

[74] Mr McMahon was also involved in discussions with Ms Ayres about transfer of the contract management responsibilities after Mr Foley had gone on leave. Mr McMahon had been meeting with Mr Paspas on several occasions, and Ms Ayres then told him to make a workplace bullying complaint against him, and to say Mr Paspas was harassing him. She also said words to the effect of “just put one in anyway, I can use it.”⁵² Mr McMahon took this to mean she intended to use it as the basis of a future complaint against the Council.

[75] Mr McMahon resigned from his employment with the Council in August last year because he considered the culture of the People and Culture team “to be toxic and poorly managed,”⁵³ and he was tired of working in that environment. There was also a very high rate of staff turnover and this made it a difficult and uncertain environment to work in. He also felt he had no support from management and was frustrated by the way he was treated.

Mr Paul Franklin

[76] Mr Franklin is the General Manager – Corporate Services and has been in this position since July 2003. Ms Ayres reported to Mr Franklin from January 2015 after Council underwent a restructure and reporting lines changed. He was aware from the staff engagement survey conducted in 2015 that the People and Culture team was in the lowest ten percent at the Council in terms of the results obtained, and there was a very high rate of staff turnover.

[77] Mr Franklin dealt with Ms Ayres in regard to a number of matters after that time and came to the view that there was a willingness in her team, which was driven by her, “to try to find fault in seemingly innocent interactions with other Council employees and teams.”⁵⁴ However, his evidence also provided other examples of circumstances in which he considered that the advice Ms Ayres was providing was entirely appropriate.

Mr Darren Paspas

[78] Mr Paspas is the Manager of Procurement and Contracts at the Council and has been in this position since August 2010. He worked with Ms Ayres in the course of performing his management functions and found her difficult at times to deal with. For example, there were times when he made considered recommendations but these would be ignored and she would choose another option without any explanation or rationale being provided.⁵⁵ He also said it

was very difficult to work on a collaborative basis with some members of the People and Culture team. However, the culture in the team has changed dramatically since she had left and it was now much more supportive and cooperative.

Mr James Donovan

[79] Mr Donovan was employed by the Council from March 2015 until May 2017 as a Team Leader – People and Culture and reported to Ms Ayres during this time. He considered that the People and Culture team were disjointed and lacked direction and there was a very high turnover of staff which affected morale and placed the remaining members of the team under increased pressure. He found Ms Ayres to be “antagonistic, disengaged and unproductive,”⁵⁶ particularly with the younger members of the team.

[80] Her attitude towards management at the Council changed and became angry and resentful after Mr Impey’s dismissal. He was also aware that from around February 2017 Ms Ayres was compiling a case against the Council with the intention of bringing a claim against it in the future. He said she openly made mention of this, and that she had paid a retainer to a law firm. She often used the phrase “ching ching”⁵⁷ in reference to the money she anticipated being awarded as compensation from claims made against the Council. She also asked him on occasions to download documents from the Council’s computer system because she did not want her access to the documents to be recorded.

[81] After Mr Impey’s dismissal Ms Ayres made it clear to the rest of the People and Culture team that she was not happy about what had happened and often mentioned that it was unfair. He also heard Ms Ayres talk about getting significant amounts of compensation for Mr Impey in response to the general protections claim he made to the Fair Work Commission following his termination.

[82] In February 2017 Mr Donovan went outside at lunchtime to call his wife and walked away from the Council officers while doing so. He then saw Ms Ayres, Mr Berry, Mr Foley and Mr Impey on the corner of Charman and Railway Road. He was still talking to his wife on the phone and made mention to her about this. This was the only occasion when he saw them together, but he often heard Ms Ayres talking about meeting with Mr Impey.

[83] In April last year Mr Donovan met with Mr Franklin and made a complaint about aspects of Ms Ayres’ conduct, which he “considered to be corrupt and contrary to the interests of Council.”⁵⁸ He said there was not one particular event which prompted him to do so and it was instead the sum total of what was going on at the time. He spoke to Mr Franklin about the level of dysfunction that existed in the team and the disjointed way in which it was operating, together with his concerns about Ms Ayres. Mr Franklin told him he would speak to Mr Nevins and consider what should be done. Mr Donovan subsequently met with the independent investigator and detailed his concerns in those discussions.

[84] Mr Donovan resigned from his employment on 10 May 2017 for various reasons, including the circumstances involving Ms Ayres and her treatment of the employees in her Department, and what he considered to be corrupt behaviour involving her and some members of the team.

[85] He also acknowledged in cross-examination that he was disappointed when his position was not reclassified, particularly given there had been significant staff turnover and

he had picked up and additional workload to cover the shortfall. He also acknowledged that in these circumstances he felt his contribution was not being recognised by Ms Ayres.⁵⁹ He was also critical of her for what he perceived to be a lack of direction in the team, and for a number of shortcomings associated with her management abilities. However, he denied in cross-examination that he and Mr McMahon had both decided to make the allegations against Ms Ayres, and he had instead spoken independently to Mr Franklin.⁶⁰ He also denied being the author of the anonymous email.

Mr Felice De Losa

[86] Mr De Losa is the Manager – Governance at the Council and previously held the role of Program Leader – Governance. He was aware from other members of staff, and from his own team, that there were several staff members in the People and Culture team who had expressed dissatisfaction with the way Ms Ayres was managing the team. On 19 May 2017 he was approached by Ms Ros Van Greunan, a consultant in the People and Culture team, who expressed concern about the behaviour of Ms Ayres and Mr Berry, and the effect it was having on others in the team. She said she was being targeted by them and considered the behaviour to involve bullying. He asked her to keep him informed while it was decided how it would be dealt with. He said she was also concerned because there were other team members who were experiencing what they described as bullying.

[87] Around a week later he was approached by four other employees from the team who expressed concerns about their employment and their welfare. They indicated that they felt the People and Culture team was characterised by a bullying culture, and it was not a good place to work. They were particularly concerned about Ms Ayres behaviour, and how it was impacting on junior staff in the team. Mr McMahon also attended and appeared distressed about the lack of clarity in his role. Mr De Losa subsequently spoke to both Mr Franklin and Mr Nevins about these matters.⁶¹

Ms Jodi Huggan

[88] Ms Huggan is a Consultant in the People and Culture team and has been in this position since May last year. She has previously been employed in various positions at the Council within the People and Culture team since 2011.

[89] She considered there was a very negative culture in the People and Culture team and there was a constant turnover of staff. She found it extremely difficult to work with Ms Ayres. She was not approachable and it was very difficult to obtain directions or guidance from her. She would also be very critical in team meetings if a suggestion was made by a team member that she did not agree with. However, Ms Ayres appeared to have a very different relationship with some staff, including Mr Berry and Mr Foley. Mr Berry appeared to be able to get away with things that other staff were not able to, and appeared to be able to attend work when he chose. He often arrived at work at around 10 a.m.

[90] After Mr Impey was dismissed Ms Huggan heard Ms Ayres make a number of comments about the fact that she did not agree with Council’s decision to dismiss him, and “that’s not what [she] advised.”⁶² Ms Ayres’ also indicated that she had kept in touch with Mr Impey after he had been dismissed, and made comments on occasions that he had a good case against the Council. Ms Ayres also made comments which suggested she did not expect to

remain working at the Council for long.⁶³ Ms Huggan also said that the culture of the team had improved significantly since Ms Ayres had left.

The Council's Submissions

[91] The Council denies that Ms Ayres was unfairly dismissed, and she was terminated after she contravened its Code of Conduct by –

“(a) failing to act in a professional and ethical manner that fostered the trust, confidence and goodwill of her colleagues;

(b) failing to act in the best interests of the Respondent; and

(c) failing to be honest in her dealings with the Respondent”⁶⁴

[92] It submits that the People and Culture Team experienced significant difficulty under her management. This was evidenced by the employee engagement survey in 2015 which indicated that team morale was at 5%, supportive leadership at 6%, individual distress and team distress at 18%, with a number of other indicators registering below 5%.⁶⁵ It also submits that Ms Ayres did nothing to address these outcomes.

[93] It also points to a number of examples in the evidence of the difficulties employees had working with Ms Ayres, and she was generally considered to be difficult to work with. However, she had a different relationship with some employees, including Mr Berry, Mr Foley and Mr Impey. However, other employees also considered each of them to be difficult to work with as well.

[94] It continues to submit that Ms Ayres was generally critical of how contractor management had been handled by the Council, but after it obtained legal advice indicating that her criticisms were without substance, she continued to be intensely critical of other employees at the Council about this issue.

[95] The Council also formed the view that, after the dismissal of Mr Impey, and after he commenced proceedings against the Council, that Ms Ayres was communicating with him about his claim in a manner that was clearly contrary to the Council's interests.

[96] It also refers to the other examples of her misconduct, such as disparaging the Council, making Mr McMahon redundant without authority, continuing to support Mr Impey after he had been dismissed, encouraging a bullying complaint to be made against Mr Paspas, and requesting WorkSafe be contacted about the asbestos issues.

[97] In terms of the events leading to Ms Ayres termination, the Council points to the investigator being appointed on 3 May 2017, following the anonymous complaint and the subsequent complaints made by Mr Donovan and Mr McMahon. Then, on 22 May, four employees approached Mr De Losa and made further complaints about the culture of the People and Culture Team. Ms Ayres was then suspended on 8 June 2017 while an investigation into the allegations of misconduct took place. She was then provided with a letter on 4 July setting out the allegations and proposing a further meeting to obtain her response. The evidence continues to set out the array of exchanges that took place between the parties and their representatives after this time.

[98] The Council continues to submit that it had a valid reason to dismiss Ms Ayres and the case turns on the question of witness credibility. It continues to submit that if its witness evidence is accepted in regard to the allegations of misconduct about Ms Ayres, then that constitutes a valid reason for her dismissal. It submits in this context that Ms Ayres has simply provided bare denials in regard to her conduct, and has attempted to rely on matters that do not relate to the allegations. She has also sought to make various allegations against other employees in an attempt to undermine their credibility.

[99] It also submits that the witness statements provided in support of Ms Ayres have been provided by witnesses with a vested interest in the outcome of these proceedings. For example, Mr Berry is pursuing an unfair dismissal claim in the Fair Work Commission against the Council and he, together with Mr Impey and Mr Foley, directly contributed to the environment existing in the People and Culture team.

[100] The Council also submits that the evidence demonstrates that it went through an extensive process before finally coming to a decision to terminate her employment, and it cannot be said there was any denial of procedural fairness.

[101] It continues to submit that if the Commission finds Ms Ayres has been unfairly dismissed then reinstatement cannot be “a practical or appropriate remedy”⁶⁶ where “there has been an irrevocable breakdown in trust between Ms Ayres and the Respondent.”⁶⁷ It also submits that any award of compensation should be significantly reduced given her behaviour.

[102] The Council submits that the Commission has only to be satisfied on the balance of probabilities that the alleged events concerning Ms Ayres occurred. Her case is put on an “all or nothing”⁶⁸ basis, being that the Council’s witnesses are all lying. It submits in response that there is no evidence to support this.

[103] It continues to submit that Ms Ayres should not be considered to be a credible witness and her demeanour in the witness box and, in particular, her failure to answer questions on numerous occasions was entirely consistent with the description of her by the Council’s witnesses. The level of staff turnover in the People and Culture team and the results of the staff engagement survey in 2015, were also entirely consistent with the evidence of the Council’s witnesses in regard to the failure of Ms Ayres in terms of her management of the team.

[104] It next refers to the letter from her solicitors that was sent on the day after she was stood down, and submits that Ms Ayres was clearly prepared for what she was confronted with at the time. This was also well known to others at the Council. For example, Mr McMahon was aware Ms Ayres had obtained detailed legal advice prior to this time because he had openly heard her discussing it when he worked with the People and Culture team. There was no other way he could have been aware of this apart from having heard about it from Ms Ayres.

[105] The Council continues to submit that the evidence of its witnesses should be considered to be credible and accurate. When they indicated that they had heard Ms Ayres openly discussing in the workplace that she was compiling a dossier of claims against the Council, the 17 page letter from her solicitors, which landed on the day after she had been stood down, established that this was what she had been doing. It also submits that the fact Mr

McMahon's and Mr Donovan's evidence about her frequent use of the expression "ching ching" was not corroborated does not mean that their evidence should not be believed, albeit that it might have been somewhat embellished by the passage of time in terms of how often this happened.

[106] The Council continues to submit that the evidence of Ms Ayres, Mr Berry, Mr Foley and Mr Impey, suggesting they had no contact or relationship with each other, should be rejected and they have all demonstrated by their attendance at the Commission proceedings that they were cooperating, or were at the very least providing support to each other. For example, Mr Berry said he had spoken to Ms Ayres between 10 and 15 times prior to giving his evidence in the Commission. He had also spoken to Mr Foley on around 10 occasions and he had also spoken to Mr Impey. He also acknowledged he had met Mr Foley and Ms Ayres together, and had discussed the case with them. In addition, each had claims of one kind or another against the Council, and each accordingly had an "axe to grind."

[107] In regard to Mr Berry, it submits he had a "motive to be untruthful,"⁶⁹ because he was also dismissed by the Council. In addition, his aggressive and belligerent demeanour in the witness box demonstrated precisely the behaviour complained of when he was employed in the People and Culture department. He also admitted he had spoken to Ms Ayres, Mr Foley, and Mr Impey on several occasions in the lead up to the proceedings. He also refused, or claimed not to understand, simple questions put to him.

[108] The Council also submits that Mr Foley was not a witness of truth and his evidence about when he engaged lawyers to act on his behalf makes this clear. He was adamant initially that he only did so in 2018 after he had left work at the Council due to a medical condition. However, a letter dated 24 August 2017 from his solicitors to the Council, which was then produced to him, clearly refuted any suggestion he had not sought legal advice until a point earlier this year. The Council also submits that there should be no adverse inferences drawn about Mr Foley not being interviewed as part of the investigations into Ms Ayres because at the time he was not at work, and he has not been at work since that time.

[109] The Council also submits that Ms Ayres had numerous opportunities to provide responses to the allegations, but on each occasion simply provided "bare denials."⁷⁰ She had not spoken to the investigator throughout the process and had consistently declined to do so.

[110] It next submits that Mr Impey had a reason to give evidence against the Council as his employment was also terminated and he subsequently commenced general protections proceedings against the Council. That matter was settled on a confidential basis. He also acknowledged in cross-examination that he appeared to have breached the terms of that settlement when he provided a statement in these proceedings. It also points to the evidence from Mr McMahon about Mr Impey's disclosures to the local paper as further evidence of his preparedness to act against the interest of the Council.

[111] It continues to submit by way of contrast that the Council's witnesses had no motive to concoct their evidence and any suggestion they have done so should be given little weight by the Commission. The fact that they may have given evidence that they didn't like Ms Ayres, and were critical of her in her role as Manager of the People and Culture team, does not lead to a conclusion they have lied under oath or have concocted their evidence.

[112] It also notes that the evidence of Mr Paspas and Mr De Losa was not subject to cross-examination and must be accepted in its entirety as a consequence. In addition, the cross-examination of the remaining witnesses did not assist Ms Ayres, and each provided consistent responses. There was nothing to suggest any of them had concocted their evidence, and instead it painted a clear and consistent picture about Ms Ayres and her conduct.

[113] In regard to the various allegations made against Ms Ayres the Council submits that the Commission should find on the balance of probabilities that each has been made out. In regard to her disparagement of the Council it submits the evidence of Mr McMahon and Mr Donovan has not been undermined, and Ms Ayres often talked openly at work about bringing a claim against the Council.

[114] It also submits that the evidence makes clear Ms Ayres attempted to make Mr McMahon redundant without having the authority to do so. This is highlighted by the fact that prior to him attending the meeting she informed him that he could bring a support person if he wished to do so. There was no evidence of it being common practice for a support person to attend meetings, and Mr McMahon's subsequent complaint to Mr Franklin is entirely consistent with him being told in the meeting with Ms Ayres that he was to be made redundant.

[115] It continues to submit that there is nothing provided in the proceedings to undermine the evidence given by Mr McMahon and Mr Donovan about Mr Impey. Both said they heard Ms Ayres indicate she was assisting Mr Impey with his claim, and that she considered he had a good case, and had remained in contact with him after his dismissal. Mr Donovan's evidence about the meeting in Charman Road was not seriously contested either, apart from bare denials. In its submission the evidence makes clear Ms Ayres was continuing to support Mr Impey in his general protections claim, and this was again entirely inconsistent with her obligation to the Council.

[116] It makes the same submissions in regard to the bullying complaint that was encouraged to be made against Mr Paspas, and the urging of Mr McMahon to contact WorkSafe about what was happening at the Council. It also notes the number of consistent complaints made at different times by employees working in the People and Culture department to other employees about the behaviour and conduct of Ms Ayres, and submits that this provides further evidence to establish the credibility of those witnesses in regard to their evidence, and again confirms that the Council had a valid reason to dismiss Ms Ayres.

[117] It also rejects any suggestion that her dismissal was not procedurally fair, and she was instead given numerous opportunities to respond to the allegations that ultimately led to her dismissal. She was also given the opportunity to have a support person at various stages throughout the process. It also submits that Mr Nevins brought a fair and impartial mind to his decision-making, and there is nothing to suggest he was anything but fair and impartial in terms of the decision that was ultimately made.

[118] It also submits that Ms Ayres conceded in cross-examination that she was given four opportunities to respond during the various processes of investigation to the allegations made against her, and she ultimately did so by simply providing blanket denials.

Consideration

[119] As indicated at the outset in coming to a decision in this matter the Commission is required to consider whether Ms Ayres' dismissal was 'harsh, unjust or unreasonable.' What is required in that context was considered in the often quoted decision in *Byrne v Australian Airlines Ltd*⁷¹ when McHugh and Gummow JJ held:

"...It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."⁷²

[120] Vice President Ross, as he then was, in *Rose*⁷³ restated the above proposition, and also added (references omitted):

"In my view whether there has been a '*fair go all round*' is a matter which I think is relevant and hence I am to have regard to it determining whether the termination was harsh, unjust or unreasonable. It is not necessarily determinative but it is a factor to be taken into account."⁷⁴

[121] I have had regard to these authorities in coming to a decision in this matter. The Commission is also required to take into account each of the considerations in s.387. I now turn to deal with the application having regard to each of those matters.

(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)

[122] It is noted at the outset that the judgement of Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*⁷⁵ is often referred to in considering what constitutes a "valid reason." His Honour came to the following conclusions:

"The reasons of an employer for terminating the employment of an employee are solely within the knowledge of the employer. The employer may state a reason but that reason need not be the actual reason nor need it be the only reason. This is the rationale for the onus of proof provisions contained in s 170EDA.

Section 170DE(1) refers to "a valid reason, or valid reasons", but the Act does not give a meaning to those phrases or the adjective "valid". A reference to dictionaries shows that the word "valid" has a number of different meanings depending on the context in which it is used. In the *Shorter Oxford Dictionary*, the relevant meaning given is: "2. Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value." In the *Macquarie Dictionary* the relevant meaning is "sound, just, or well founded; a valid reason"

In its context in s 170DE(1), the adjective ‘valid’ should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee’s capacity or conduct or based upon the operational requirements of the employer’s business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must ‘be applied in a practical, commonsense way to ensure that’ the employer and employee are each treated fairly...”⁷⁶

[123] In addition, in *Parmalat Food Products Pty Ltd v Wililo*⁷⁷ the Full Bench came to the following conclusion:

“The existence of a valid reason is a very important consideration in any unfair dismissal case. The absence of a valid reason will almost invariably render the termination unfair. The finding of a valid reason is a very important consideration in establishing the fairness of a termination. Having found a valid reason for termination amounting to serious misconduct and compliance with the statutory requirements for procedural fairness it would only be if significant mitigating factors are present that a conclusion of harshness is open.”⁷⁸

[124] The Full Bench majority in *B, C and D v Australian Postal Corporation T/A Australia Post*⁷⁹ (*Australian Postal Corporation*) also provides a useful summary of the approach to be taken in weighing the factors to be considered:

“Reaching an overall determination of whether a given dismissal was “harsh, unjust or unreasonable” notwithstanding the existence of a “valid reason” involves a weighing process. The Commission is required to consider all of the circumstances of the case, having particular regard to the matters specified in s.387, and then weigh:

(i) the gravity of the misconduct and other circumstances weighing in favour of the dismissal not being harsh, unjust or unreasonable;

against

(ii) the mitigating circumstances and other relevant matters that may properly be brought to account as weighing against a finding that dismissal was a fair and proportionate response to the particular misconduct.”⁸⁰

[125] It follows from these authorities that a “valid reason” is one that is “sound, defensible and well founded,” as opposed to one that is capricious, spiteful or prejudiced. It must also be “valid” in the context of both the employee’s capacity or conduct and the operational requirements of the business. The test must also be applied in a practical, common sense way to ensure the parties are treated fairly in circumstances where each has rights and privileges, but duties and obligations as well.

[126] As the decision in *Australian Postal Corporation* also makes clear consideration of “valid reason” inevitably involves weighing different considerations, including the conduct

involved and any other mitigating or other relevant matters. I have sought to adopt the approach of these authorities in coming to a decision in this matter.

[127] In considering whether the Council had a valid reason to dismiss Ms Ayres, it is evident that this is not a matter that involves “shades of grey,” which the Commission must consider and then come to a conclusion about. The respective positions of the parties are instead black and white. The Council relies on the evidence of its witnesses, which it submits substantiates the allegations made against Ms Ayres. However, Ms Ayres has consistently denied those allegations, although at various stages made requests for further particulars to be provided before she was able to provide a response. However, she ultimately denied, and continues to deny, each of the allegations made against her. The evidence of the witnesses who gave evidence on her behalf also provide support for this position. The Commission is therefore required to decide whose evidence is to be preferred. If it accepts that the evidence provided on behalf of the Council is to be preferred then the nature and the significance of the allegations made against Ms Ayres would suggest she has not been unfairly dismissed. However, if the Commission concludes that the evidence does not substantiate those allegations then it is likely her unfair dismissal claim should be upheld because the Council did not have a valid reason to dismiss her.

[128] I have sought to evaluate the evidence with a view to highlighting those aspects that tend to support the evidence of one party or the other, as well as those matters that call into question the evidence relied upon.

[129] Before coming specifically to each of the allegations one matter can be noted at the outset in the overall context of this matter. Ms Ayres indicated in her evidence that she is an experienced professional, who had been in a senior management position within the Council since 2009. In 2014 she entered into a second five year contract. She describes herself as being a person who has long experience in human resources management, both at the Council and prior to being employed by the Council. She also indicates that she consistently received favourable performance reviews from the various General Managers she worked with, and had a high standing within the Council. She was also well regarded by each of her direct reports. She also indicated in cross-examination that she believed a strong culture existed within the People and Culture Team. This evidence is obviously called into question by a number of the Council’s witnesses including two current employees, Ms O’Halloran and Ms Huggins, and two former employees, Mr Donovan and Mr McMahan.

[130] There are two pieces of evidence that would also appear to challenge the evidence of Ms Ayres about the “state of play” in the People and Culture team. The first concerns the level of staff turnover in the team. There were apparently 14 employees in total in the team, however, in the period between July 2015 and May 2017, 15 employees resigned or otherwise left the team. This would appear to be an extraordinary level of staff turnover by any measure and, in the absence of any other evidence, suggests that a significant number of those employees were not happy about working in that team.

[131] The second piece of evidence concerns the employee engagement survey carried out in 2015 and the results collated in 2016. The survey results for the People and Culture team were again very poor, and at the lowest level in terms of the various Departments within the Council. This again would suggest that all was not well within the People and Culture team, and that the evidence of Ms Ayres does not necessarily provide an accurate view about how others in her team were feeling.

[132] The first of the allegations made about Ms Ayres is that she undermined the Council's trust and confidence in her by engaging in conduct which involved her openly and repeatedly disparaging the Council and Council management to other employees, as well as repeatedly indicating she was seeking to take on the Council in the event that her employment ended. It was also alleged that she had engaged in conduct outside of her authority by telling Mr McMahon his position had been made redundant. The Council relies, in particular, on the evidence of two former employees, Mr McMahon and Mr Donovan, in regard to these matters. Ms Ayres denies these allegations and relies on the evidence of her former direct reports, Mr Andrew Berry, Mr Laurie Foley and Mr Bob Impey.

[133] As indicated, Ms Ayres denies she was acting against the Council's interests, or that she was actively preparing to take action against the Council of some kind or another. She dismisses the evidence of Mr Donovan and Mr McMahon as witnesses with an "axe to grind." She states that it was Mr McMahon who first raised the possibility of him being given a pay out to leave his employment, and he was disappointed when this suggestion was rejected. She also points to the fact Mr Donovan missed out on being reclassified to a higher grade and suggests he attributed this outcome to her. She also submits that Mr Donovan and Mr McMahon acted in cooperation in preparing and making the allegations against her, and those allegations were not able to be corroborated by other witnesses. She also submits that the evidence of her witnesses should be preferred.

[134] It is accepted in response that Mr Donovan and Mr McMahon clearly did not like Ms Ayres and were critical of her abilities. It also appears that both were of the view that their skills and abilities could have been better utilised during the time they were employed by the Council. Both have now left the Council to pursue other opportunities and it is clear that each were frustrated and disappointed by what they experienced during the time they were employed by the Council. However, I am not satisfied that there evidence should necessarily be dismissed or discounted as a consequence of these factors alone.

[135] There evidence can also be contrasted with that of Ms Ayres and the various witnesses who gave evidence on her behalf, and their motivations for doing so. Firstly, it is noted that each have pursued a claim of one kind or another against the Council. Both Ms Ayres and Mr Berry have pursued unfair dismissal claims against the Council, and Mr Berry's evidence indicated that his claim was still being dealt with at the time this matter was heard. Mr Impey also brought a general protections claim against the Council, although that matter was apparently settled on some mutually agreed basis. Mr Foley is currently employed, but has been a long-term absentee from the workplace after making a workers' compensation claim. This apparently occurred in circumstances where he did not acknowledge a pre-existing injury prior to being employed by the Council. It can be concluded from these circumstances that evidently Ms Ayres, Mr Berry and Mr Impey were not happy about the circumstances that led to their employment at the Council coming to an end, and each can clearly be said to have also had an "axe to grind" with Council and some of its employees as a consequence.

[136] It also appears from the evidence of Mr Berry that they had all had at least some involvement with each other prior to the hearing. Mr Berry acknowledged that he had spoken to Ms Ayres on between 10 and 15 occasions prior to giving evidence. He had also spoken to Mr Foley on around 10 occasions, and had spoken to Mr Impey. He also acknowledged that he had met Mr Foley and Ms Ayres together, and had discussed the case with them. However, it is also noted that they each specifically denied having been involved in the meeting Mr

Donovan claims to have observed on 2017. Regardless of the degree of cooperation that might have resulted from these various meetings and discussions I am nevertheless satisfied that Ms Ayres and each of the witnesses relied on by her can be said to have had “scores to settle” with the Council, and demonstrated this in giving their evidence.

[137] In terms of general observations about the witnesses, Ms Ayres appeared evasive and non-committal at times in cross-examination. Mr Berry appeared as he was described in the evidence of other witnesses, being aggressive and uncooperative. Mr Foley was at best a hesitant witness, and clearly appeared to have attempted to mislead when he suggested he had only sought to obtain legal advice in regard to the matters involving him at a point earlier this year. He accordingly rejected any suggestion that he and Ms Ayres could have been heard to be discussing obtaining legal advice in the way described by Mr McMahon. However, a copy of a letter provided to Mr Foley during the course of cross-examination made clear that his reference to first obtaining legal advice in 2018 was clearly incorrect, and he had in fact obtained that advice at least 6 months earlier.

[138] The circumstances involving Mr Impey were also somewhat unusual in that it appears he had previously entered into some form of deed of settlement with the Council, which committed him to confidentiality and non-disparagement, and yet he still agreed to give evidence against the Council in these proceedings. He was at least prepared to acknowledge during the course of the proceedings that in doing so he had likely acted in breach of his previous agreement with the Council.

[139] As indicated, the Council relies on the evidence of Mr Donovan and Mr McMahon in support of the allegations that Ms Ayres was openly and repeatedly disparaging the Council, and senior management at the Council. It alleges that she also spoke on numerous occasions about pursuing a claim against the Council at some point in the future. There are a number of references to these matters in the evidence of Mr McMahon and Mr Donovan. The most notorious of these concern Ms Ayres regular “ching ching” references, and the alleged pink folder in which she was accumulating information and materials to use against the Council at some point in the future.

[140] Ms Ayres and the witness evidence she relies upon deny any of this ever occurred, and she submits in response that it is implausible that she would act in this way. She also points to the lack of any corroboration of the evidence of Mr McMahon and Mr Donovan. The Council submits in response that it is equally implausible that Mr Donovan and Mr McMahon would invent or make up this evidence.

[141] It is accepted in response that there was no collaborating evidence provided in support of the evidence of Mr McMahon or Mr Donovan, although their evidence in large part corroborates the evidence of each other. The nature of their evidence was not significantly challenged or contradicted in any way in cross-examination, although it is accepted there might be some question about the number of occasions on which the alleged comments attributed to Ms Ayres were made.

[142] I am satisfied, on balance, that the evidence of Mr McMahon and Mr Donovan in this context is to be preferred, and that Ms Ayres was involved in making disparaging comments about the Council and its management, and that she had foreshadowed the possibility of initiating future action against the Council, and was in the business of collecting materials that might assist in this regard.

[143] I am also satisfied that these conclusions are fortified by the letter of 9 July 2017 that was received by the Council from Ms Ayres' solicitors on the day after she was stood down. The letter runs to 17 pages and sets out in extraordinary detail a series of issues Ms Ayres was concerned about. It also makes a number of claims and concludes that the Council's behaviour amounts to a fundamental breach of Ms Ayres contract of employment. As indicated, the letter was provided to the Council on the day after Ms Ayres was stood down from her employment while the investigation into her behaviour and conduct took place.

[144] In terms of attempting to decide whose evidence should be preferred, I am satisfied that this letter does provide a clear indication, which was not refuted during the course of the proceedings, that Ms Ayres had for some time been obtaining legal advice about issues concerning the Council and her employment at the Council. This is not to suggest that there is anything improper or unlawful about this, and Ms Ayres indicated that she had sought this advice primarily because of her concerns about the controversies associated with the contractor management issue. However, the correspondence clearly goes to a broader range of issues as well.

[145] As indicated, it is, by any standard an extraordinary piece of correspondence. While Ms Ayres claims she only obtained legal advice because of the sensitivities associated with the contractor management issue, the letter from her solicitors suggests otherwise. It is directed to the Council's CEO, Mr Nevins, and starts out by alleging at paragraph 2:

“Ms Ayres has been the subject of workplace bullying and adverse treatment by persons including you, Mr Paul Franklin (General Manager Corporate Services), Mr Darryn Paspas (Manager Procurement and Contracts) and Mr Mauro Bolin (General Manager Community Sustainability) since at least October 2015. We consider these matters to be very serious.”⁸¹

[146] It then continues to state at paragraph 3:

“In addition to the obvious personal impact suffered by our client as a result of the behaviour detailed below, the described behaviour has prevented our client from carrying out her duties under contract and enactment.”⁸²

[147] It then makes reference to the unlawful behaviour Ms Ayres has been subjected to and proposes “a without prejudice conference to resolve these issues.”⁸³ The content of the letter appears to provide confirmation of the claims made about Ms Ayres that she was involved over an extended period of time in endeavouring to build a claim against the Council that would lead to a claim for financial compensation and result in a compensation pay out.

[148] The letter then goes on to detail in “chapter and verse” an extraordinary array of claims accompanied by an extensive amount of detail. Again, this appears to confirm what Ms Ayres was alleged to have been doing; building a claim against her employer.

[149] In terms of the detail in the correspondence it deals firstly with “Kingston City Council Occupational Health & Safety Risk.” It then reviews a series of events under this heading dating back to July 2009.⁸⁴ It next deals with “Our Client's Employment at the Council,” and notes in the paragraph under that heading that “...our client's efforts to carry out her duties were repeatedly undermined and thwarted in a manner designed to minimise

her standing in the Council and otherwise degrade her employment.”⁸⁵ The letter then continues to set out in intimate detail a range of issues dating back to 2013.

[150] The letter concludes at page 17 by stating at paragraphs 106 and 107:

“The Council’s failure to takes steps to, after numerous warnings and a significant period of time, effectively correct the behaviour that prevented our client from carrying out her duties shows that the Council did not and does not intend to not be bound by our client’s contract of employment. We consider that behaviour to be a fundamental breach of the Contract.

Without Prejudice Discussions

Our client has instructed us to participate in a without prejudice conference with you in order to see whether the matters set out in this letter may be resolved. Please indicate by 4pm on Friday 16 June 2017 whether you are agreeable to participate in a without prejudice conference during the week commencing Monday 19 June 2017.”⁸⁶

[151] There have been allegations made in these proceedings that Ms Ayres was involved in compiling a so-called “dossier”⁸⁷ of information and materials that would be used to pursue a claim for financial compensation against her employer at some point. It is also alleged that she spoke openly about this at work. The content of the letter sent by her solicitors to the Council on 9 July last year does not confirm or deny what Ms Ayres was talking about or saying in the workplace. However, it patently makes clear that Ms Ayres had been building a case against her employer over a long period of time and that, in doing so, she was intending to pursue a compensation claim against the Council.

[152] Ms Ayres is clearly entitled to obtain legal advice about matters of concern to her. However, the letter from her solicitors provides evidence of much more than this. It provides evidence of a concerted campaign that was clearly in prospect over an extended period of time in which she was looking for opportunities to build her case rather than acting in the best interest of the Council. I am satisfied that this is entirely inappropriate given her responsibilities as a senior manager within the organisation. I am also satisfied that the content of the letter, and what it says about her motivation, calls into question the credibility of much of her evidence.

[153] As indicated, I am satisfied that, at one level, there is nothing improper about her actions. However, it is at the very least highly unusual for an employee to have sought such detailed advice about issues related to their employment during the course of their employment. While it is not necessarily conclusive, the fact that Ms Ayres had obtained legal advice at some point prior to her being stood down does mean she was in a position at least to tell other employees that she had obtained that advice with the intention of initiating some form of action against the Council at some point in the future.

[154] The second leg that is relied on by the Council in regard to the initial allegation made against Ms Ayres is that she exceeded her authority by seeking to make Mr McMahon redundant. This is alleged to have occurred in a discussion in which Ms Ayres offered to make Mr McMahon’s position redundant, and to provide him with a payment of \$7,000 in conjunction with this decision. Mr McMahon also indicated that Ms Ayres said the decision had been made by Mr Franklin. Ms Ayres states in response that none of this occurred and Mr

McMahon raised the possibility of him being made redundant, and was disappointed when this possibility was rejected.

[155] The Commission is again confronted with starkly contrasting evidence. However, Mr McMahon was clearly unhappy at the time. His evidence indicates he had not been provided with a job description, and believed he was being given little or nothing to do. This appears to be a most unusual circumstance in and of itself. However, in these circumstances, it might be likely that he was contemplating moving on from his employment at the Council and looking to negotiate some form of departure package in doing so. However, he had only been employed for a relatively short period of time at that point, and presumably had only a relatively limited expectation about the amount of any redundancy or other form of payment that might be made to him. However, these are simply matters of speculation. There is one apparently solid piece of evidence which does arise from the evidence that would appear to assist in determining whose evidence should be preferred in this case.

[156] The evidence of Mr McMahon and Mr Franklin makes clear that after the discussions with Ms Ayres on 14 March last year, Mr McMahon immediately went and spoke with Mr Franklin, who told him he did not know anything about the matter and he still had a job with the Council. Mr McMahon said he also understood that Ms Ayres was then called into a meeting with Mr Franklin and when she returned told Mr McMahon that he had got her into a lot of trouble.

[157] I am satisfied in response that Mr Franklin's corroboration of the discussions he had with Mr McMahon on this day quite clearly provides confirmation, in the absence of anything else, that Mr McMahon's version of what occurred on the day is to be preferred, and that Ms Ayres did initiate a discussion with him about his position being made redundant, despite not having the authority to do so.

[158] I am satisfied, in conclusion, that on the balance of probabilities the matters contained in the first allegation made about Ms Ayres can be said to have been substantiated.

[159] The second allegation made about Ms Ayres is that she acted contrary to the interests of the Council, and in a manner inconsistent with her position, by supporting Mr Impey in his claim being pursued against the Council in the Fair Work Commission, and openly stating in the workplace that this was what she was doing. These are significant allegations in that Ms Ayres was given responsibility at the time for dealing with the matter on behalf of the Council. Ms Ayres again denies the allegation, although she acknowledged in cross-examination that she did not agree with the decision to dismiss him,⁸⁸ but in fairness it is also acknowledged that she made this known to Mr Nevins at the time he told her that he was considering dismissing Mr Impey and asked her for her opinion about that matter. However, Mr Nevins decided that Mr Impey's employment should be terminated

[160] The Council also relied on the evidence of Mr McMahon and Mr Donovan in regard to this matter. Mr Donovan said he had seen Ms Ayres in a meeting with Mr Impey prior to the conference at the Fair Work Commission that related to his claim. Mr McMahon also states that Ms Ayres told him she was printing documents from the Council system to assist Mr Impey, and that she had given him advice about the amount of compensation that he should seek from the Council.

[161] While it was not referred to in the termination letter given to Ms Ayres, it is noted that the evidence of Ms Huggan makes clear that, after Mr Impey was dismissed, she heard Ms Ayres make a number of comments in the office that she did not agree with the Council's decision to dismiss him, and that was not what she had advised Mr Nevins to do. She also heard Ms Ayres state she was in contact with Mr Impey after the time his employment was terminated, and had heard her make comments on occasions that he would have a good case against the Council.

[162] I am satisfied that the evidence of Ms Huggan provides important corroboration of the evidence of Mr Donovan and Mr McMahon in circumstances where there is apparently nothing to suggest she had any ulterior or other motive for wanting to provide such evidence. It is also noted that Mr Berry's evidence makes reference to the ongoing contact Ms Ayres had with Mr Impey, although it is not clear when this precisely occurred.

[163] Nevertheless, I am again satisfied on the balance of probabilities, and particularly having regard to the separate evidence of Ms Huggan, that the evidence of Mr Donovan and Mr McMahon is to be preferred in regard to the second allegation made against Ms Ayres, and it can also be said to have been substantiated.

[164] The final two allegations that were found to have been substantiated against Ms Ayres are also both reliant on the evidence of Mr McMahon. The first involves an allegation that Ms Ayres urged Mr McMahon to make a bullying complaint against Mr Paspas, despite Mr McMahon indicating he was not being bullied or harassed by him. Ms Ayres is alleged to have responded with words to the effect of, "Just put one in any way, I can use it."⁸⁹

[165] The second matter alleges that in January last year Ms Ayres was urging Mr McMahon to make contact with someone he knew at WorkSafe in order to encourage WorkSafe to take action against the Council. It is alleged that her behaviour in this context was particularly aimed at another Council employee, Mr Steve Lewis.

[166] As indicated, the Council relies on the evidence of Mr McMahon as to these matters and Ms Ayres denies anything of the kind occurred. Leaving aside their respective claims and denials, I am not able to find anything else in the evidence that assists in terms of determining whose version of events should be preferred. However, it would seem unlikely for Mr McMahon to be fabricating claims of this kind in such specific detail. I have also indicated previously, that I have generally found him to be a credible witness, who was endeavouring to act in the Council's best interests while he was employed. In summary, I am unable to conclude that these allegations have not been substantiated based on the available evidence.

[167] Ms Ayres was in a senior position at the Council as Manager of People & Culture. Someone in that position is required to have a relationship with the Chief Executive Officer and other senior staff that is based on trust and confidentiality, given their dealings with and access to sensitive and confidential information concerning the staff within the organisation. The evidence does not demonstrate that Ms Ayres acted in a manner consistent with these expectations. I am also satisfied that the allegations that provided the basis for her termination can be said to have been substantiated, based on the evidence before the Commission in these proceedings. I am accordingly satisfied that in all the circumstances the Council had a valid reason to dismiss Ms Ayres in that it was sound, defensible and well founded.

(b) whether the person was notified of that reason

[168] I am satisfied that Ms Ayres was notified of the reason for her termination. It was clearly set out in the five-page letter provided to her on 20 December 2017. She had also been put on notice about the allegations in the five months leading up to this point during the time she was stood down while an investigation into her behaviour and conduct was carried out.

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

[169] I am satisfied that Ms Ayres was given an opportunity to respond to the reasons related to her capacity or conduct. She has made much of the fact that, on a number of occasions, she had not been provided with sufficient particulars to enable her to provide a considered response, and I refer in particular to the statement of 11 October 2017 in which she indicated she could not properly respond because she had not been provided with the documents and information she had sought. She was then provided with further particulars on 13 November 2017, however, her responses essentially related to denials of the allegations. This is not to imply any criticism of her for adopting this course, but I am satisfied she was given every opportunity over an extended period of time to respond to the reasons related to her capacity or conduct.

(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

[170] This does not appear to have been raised as an issue in the proceedings and there is nothing to suggest it was an issue of any consequence.

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

[171] The letter of termination provided to Ms Ayres indicates that her “... conduct constitutes serious misconduct justifying summary dismissal...”⁹⁰ and the question of her being provided with a warning is not relevant in this context.

(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

(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

[172] The above two considerations can be dealt with together. The Council is obviously a large organisation which has access to the relevant expertise. It can be expected to have been aware of the procedures to be followed in terminating a person’s employment.

(h) any other matters that the FWC considers relevant

[173] I am not aware of anything out of the ordinary course that should be considered in this context. Ms Ayres has obviously sustained damage to her reputation and her financial circumstances as a consequence of the Council’s decision to terminate her employment.

However, this can normally be expected in such circumstances and I am not aware of anything that needs to be considered, in particular, in this context.

Conclusion

[174] I have had regard to all of the submissions and evidence provided by the parties in these proceedings. I have also had regard to each of the matters in section 387 that the Commission must take into account in determining whether an employee's dismissal was "harsh, unjust or unreasonable."

[175] I am not satisfied, in conclusion, that Ms Ayres can be said to have been unfairly dismissed. In coming to this decision I have had particular regard to whether the Council can be said to have had a valid reason to dismiss Ms Ayres, and whether she was given an adequate opportunity to respond to the reasons for her dismissal. Her application is accordingly dismissed.



COMMISSIONER

Appearances:

T Borgeest of Counsel for the Applicant.

M Minucci of Counsel for the Respondent.

Hearing details:

2018.

Melbourne:

May 9 to 11, 29.

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¹ *Fair Work Act 2009* (Cth) s 385.

² *Fair Work Act 2009* (Cth) s 387.

³ Exhibit BA1, Attachment BAA-14, [8]-[14].

⁴ Applicant's submissions, filed 29 March 2018, [7].

⁵ Ibid.

⁶ Ibid.

⁷ Ibid, [10].

⁸ Ibid.

⁹ Ibid, [35].

¹⁰ Ibid, [37].

¹¹ Ibid, [43].

¹² Ibid, [84].

¹³ Transcript, 9 May 2018, PN 271.

¹⁴ Ibid, PN303.

¹⁵ Ibid, PN602.

¹⁶ Ibid, PN672.

¹⁷ Transcript, 10 May 2018, PN1204.

¹⁸ Transcript, 9 May 2018, PN 155.

¹⁹ Transcript, 10 May 2018, PN1164.

²⁰ Ibid, PN 1381.

²¹ Exhibit BA2, [6].

²² Ibid, [12].

²³ Transcript, 9 May 2018, PN 886.

²⁴ Ibid, PN 915.

²⁵ Ibid, PN 940.

²⁶ Ibid, PN 942.

²⁷ Transcript, 29 May 2018, PN 2517.

²⁸ Ibid, PN 2519.

²⁹ Ibid, PN 2531.

³⁰ Ibid, PN 2597.

³¹ Applicant's submissions, filed 29 March 2018, [34].

³² Transcript, 29 May 2018, PN 2494.

³³ Ibid, PN 2627.

³⁴ Ibid, PN 2634.

³⁵ Ibid, PN 2638.

³⁶ Exhibit KCC9, [19].

³⁷ Ibid, [32].

³⁸ Exhibit KCC10, [14].

³⁹ Ibid, [17].

⁴⁰ Exhibit KCC10, [18].

⁴¹ Ibid, [19].

⁴² Ibid, [68].

⁴³ Ibid, [69.3].

⁴⁴ Ibid, [70].

⁴⁵ Exhibit KCC3, [13].

⁴⁶ Ibid, [14].

⁴⁷ Ibid.

⁴⁸ Ibid, [16].

⁴⁹ Ibid, [21].

⁵⁰ Ibid, [28].

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- ⁵¹ Ibid, [34].
- ⁵² Ibid, [47].
- ⁵³ Ibid, [54.1].
- ⁵⁴ Exhibit KCC8, [31].
- ⁵⁵ Exhibit KCC4, [10].
- ⁵⁶ Exhibit KCC6, [9].
- ⁵⁷ Ibid, [15].
- ⁵⁸ Ibid, [38].
- ⁵⁹ Transcript, 11 May 2018, PN 1814.
- ⁶⁰ Ibid, PN 1848.
- ⁶¹ Exhibit KCC5, [19].
- ⁶² Exhibit KCC7, [23].
- ⁶³ Ibid, [29].
- ⁶⁴ Respondent's submissions, dated 19 April 2018, [1].
- ⁶⁵ Ibid, [5].
- ⁶⁶ Ibid, [79].
- ⁶⁷ Ibid, [80].
- ⁶⁸ Respondent's closing submissions, dated 28 May 2018, [2].
- ⁶⁹ Transcript, 29 May 2018, PN 2709.
- ⁷⁰ Ibid, PN 2739.
- ⁷¹ (1995) 185 CLR 410.
- ⁷² Ibid, 465.
- ⁷³ Print Q9292 [1998] AIRC 1592 (4 December 1998).
- ⁷⁴ Ibid.
- ⁷⁵ (1995) 62 IR 371.
- ⁷⁶ Ibid, 373.
- ⁷⁷ [2011] FWAFB 1166.
- ⁷⁸ Ibid, [24].
- ⁷⁹ [2013] FWCFB 6191.
- ⁸⁰ Ibid, [58].
- ⁸¹ Exhibit BA1, Attachment BAA-3, [2].
- ⁸² Ibid, [3].
- ⁸³ Ibid, [5c].
- ⁸⁴ Ibid, [11].
- ⁸⁵ Ibid, [12].
- ⁸⁶ Ibid, [106]-[107].
- ⁸⁷ Transcript, 29 May 2018, PN 2697.
- ⁸⁸ Transcript, 9 May 2018, PN 670.
- ⁸⁹ Exhibit KCC3, [47].
- ⁹⁰ Exhibit BA1, Attachment BAA-14, [13].