

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *TS v Assistant Commissioner Chelepy* [2020] QCAT 279

PARTIES: TS
(applicant)

v

ASSISTANT COMMISSIONER SHANE CHELEPY
(respondent)

APPLICATION NO/S: OCR017-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 20 July 2020

HEARING DATE: 18 March 2020

HEARD AT: Brisbane

DECISION OF: Member Paratz AM

ORDERS: **1. The decision of Assistant Commissioner Shane Chelepy, made on 12 December 2018, that a disciplinary charge is substantiated in both Matter 1 and Matter 2, and both amounted to misconduct, is confirmed.**

2. Publication is prohibited of:

(a) all material filed by Assistant Commissioner Shane Chelepy in accordance with Section 21(2) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), and

(b) any other document, decision or exhibit in the proceedings relating to the personal details (address, contact phone numbers etc) of the Applicant, and of any Third Parties

pursuant to Section 66(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

POLICE – INTERNAL ADMINISTRATION – DISCIPLINE AND DISMISSAL FOR MISCONDUCT –

QUEENSLAND – where disciplinary charges were brought in relation to use of a Police Citizens Youth Club vehicle and as to statements and documents given to investigators – where the officer denied using the vehicle for personal use – whether log books and FBT records in relation to the vehicle were incorrect as a result of fabrication or poor bookkeeping – where the plausibility of the officer’s statements and submissions were discussed

Crime and Corruption Act 2001 (Qld), s 219H
Police Service Administration Act 1990 (Qld), s 1.4, s 4.9

Police Service (Discipline) Regulations 1990 (Qld), s 9(1) (f)

Australian Competition and Consumer Commission v Ultra Tune Australia Pty Ltd [2019] FCA 12
Barry Robert Binnie v Andrew Kidcaff (in the Misconduct Tribunal, exercising appellate jurisdiction, Criminal Justice Commission Queensland) Appeal No 2 of 1996
Gee v Assistant Commissioner Stewart [2012] QCAT 33

APPEARANCES & REPRESENTATION:

Applicant: R Tierney, Solicitor, Gilshenan and Luton
 Respondent: M Nicolson of Counsel, instructed by Queensland Police Legal Unit

REASONS FOR DECISION

- [1] TS (‘the officer’) was a police officer stationed at a regional town in Queensland at the relevant times. Two disciplinary matters were brought against him in relation to the use of a Queensland Police-Citizens Youth Welfare Association (‘QPCYWA’) vehicle in 2016, and as to his answers in related discipline interviews. The QPCYWA administers the Police-Citizens Youth Clubs (‘PCYC’) in Queensland.
- [2] A finding was made by Assistant Commissioner Shane Chelepy (‘the Assistant Commissioner’) on 12 December 2018, that a disciplinary charge was substantiated in each matter, and amounted to misconduct, and penalties were imposed.
- [3] An application to review the decision, as to substantiation of each matter, was filed on 8 January 2019.
- [4] I heard the matter in an oral hearing by way of submissions, without oral evidence, on 18 March 2020.
- [5] At the start of the hearing, an application was made by the officer for leave to adduce new evidence, consisting of a statement by a person dated 14 May 2018.¹

¹ Pursuant to s 219H of the *Crime and Corruption Act 2001 (Qld)*.

After hearing submissions, I refused the application for leave, having regard to the relevance of the statement as to the time period in question, and as to whether special circumstances for its admission were shown. The hearing then proceeded on the basis of the evidence before the original decision-maker.

[6] I reserved my decision. This is the decision on the matters.

The matters

[7] Matter 1 is as follows:

That between the 17th of June 2016 and 12 July 2016 at (regional town) your conduct did not meet the standard of conduct the community reasonably expects of a police officer in that you:

used a vehicle allocated to the (regional town) Queensland Police Citizens Youth Club in contravention of policy whilst you were on leave.

(Section 1.4 of the *Police Service Administration Act* 1990 and s. 9(1)(f) of the *Police Service (Discipline) Regulations* 1990)

Further and better particulars:

- you were the PCYC Branch Manager at the (regional town) PCYC;
- you were on leave between the 18th of June 2016 and 11 July 2016;
- you did not leave the PCYC vehicle at the branch during this vacation period as required by QPCYWA policy;
- you did not provide the correct odometer reading whilst purchasing fuel with the fleet card in contravention of QPCYWA policy; and
- you used an estimated 63 litres of fuel and travelled an estimated 527 kilometres

[8] Matter 2 is as follows:

That on the 20th of February 2017 and the 22nd of March 2017 at (regional town) your conduct was unbecoming of an officer in that you:

failed to truthfully, completely and promptly answer questions directed to you in two discipline interviews

(Section 1.4 and 4.9 of the *Police Service Administration Act* 1990 and s.9(1)(f) of the *Police Service (Discipline) Regulations* 1990)

Further and better particulars:

- During a discipline interview with Senior Sergeant (redacted) on the 20th of February 2017, you stated that you took the PCYC vehicle to your home address for safe storage whilst you were on leave between 18th of June 2016 and the 11th of July 2016, however you did not drive it;
- During this discipline interview you produced a FBT log book that was created without request, for an incorrect FBT, with information that did not correlate with your ITAS log, nor the odometer readings you provided when purchasing fuel;

- During a discipline interview with Senior Sergeant (redacted) on 22nd of March 2017 you again stated that you did not drive the PCYC vehicle whilst you were on leave, you also stated that the contents of previously produced FBT log were true and correct

Agreed facts

[9] A statement of agreed facts was filed by the parties on 4 June 2019. It set out details of the officer's work history; and set out the following points:²

- a white Toyota Hi Lux, dual cab, (registration stated) is registered to the QPCYWA
- this vehicle was assigned to the (regional town) PCYC at the time of this matter in 2016
- the vehicle was available to all employees at the (regional town) PCYC during business hours, and was available for the applicant to commute to and from work when he was rostered on
- QPCYWA policy stipulates that this vehicle was not available for the applicant to use whilst on leave, and must be returned to the PCYC branch during vacation periods
- the applicant was on recreational leave on 20 June 2016 until 11 July 2016
- the applicant did not leave the vehicle at the PCYC branch during his recreational leave as required by QPCYWA policy
- the applicant did not obtain permission from a supervisor to utilise the vehicle whilst he was on leave
- the applicant resides at (address given)
- (regional town) PCYC is located at (address given)
- The QPYCWA has a Caltex fuel card for this vehicle and records indicate it was refuelled on all occasions at the (regional town) Woolworths Caltex Service Station located at (address given)
- the distance from the applicant's residence to the PCYC is 3.85 km
- the distance from the applicant's residence to the Caltex Service Station is 2.8 km
- the distance from the Caltex Service Station to the PCYC is 1.1 km
- the applicant had a rest day on 19 June 2016
- the applicant refuelled the PCYC vehicle at the (regional town) Caltex Service Station on 9 June 2016 with 59.61 L of fuel; on 18 June 2016 with 46.33 L of fuel; and later, on 25 July 2016 with 63.11 L of fuel.
- At some point prior to 19 June 2016, the applicant drove the PCYC vehicle to his home address
- at that time, the applicant and his wife had one vehicle between them

² Statement of agreed facts filed 4 June 2019, [11].

- the applicant's mother-in-law resides in a granny flat at the applicant's residence and she also has a vehicle
- during this time, the applicant travelled to (another regional town) with his family for a soccer tournament in his personal vehicle
- he departed on 1 July 2016, and returned on 6 July 2016
- the applicant was contacted by Zone Manager, Ms (redacted) on 6 July 2016 and asked if he had taken the PCYC vehicle home on his leave. The applicant advised her that he had taken it home, however he had not driven it
- Ms (redacted) requested the applicant return it to the PCYC, and the applicant did so that afternoon
- the applicant received an email from Acting Sergeant (redacted) requiring him to complete a FBT log for the PCYC vehicle for 1 April 2016 to 30 June 2016
- the applicant completed the log book to 31 July 2016, however never submitted it
- the applicant completed and submitted Quarterly Take Home Motor Vehicle Returns for the periods between 1 April 2016 - 1 August 2016 (submitted on 25 August 2016); and 1 July 2016 - 30 September 2016 (submitted on 14 November 2016).

Submissions of the officer

- [10] The officer agreed that he did take the QPYCWA motor-vehicle home during his leave.³ He submits that the context of his doing so was as follows:⁴
- a) (The officer) checked with the branch manager who was filling in for him during his leave (Sergeant (redacted)) that he did not require the vehicle;
 - b) (The officer) was new to (regional town) and did not know the area, so thought it prudent to take the motor-vehicle home for safe storage; and
 - c) if it remained at the PCYC it would have been parked at the side of the PCYC which borders the (regional town) Showgrounds. (The officer) did not know the area well enough to be certain it would be safe there.
- [11] It is submitted for the officer that he took the vehicle home in the context where he was concerned about its safe storage at the PCYC, and there is no allegation that the vehicle was damaged, or that QPS or PCYC functions were hindered by the safe storage of the vehicle at the officer's home.⁵
- [12] The officer submits that the conduct of taking the vehicle home was not 'improper' in the sense of being so 'morally and socially blameworthy' that nothing short of a

³ Applicant's outline of submissions regarding substantiation, filed 2 July 2019, [33].

⁴ Ibid, [35].

⁵ Ibid, [40].

‘misconduct’ finding is called for, and this particular should be found to be unsubstantiated as misconduct.⁶

- [13] The officer notes that he was on leave between 19 June 2016 to 11 July 2016; was in (another regional town) between 1 July 2016 to 6 July 2016 in his personal vehicle; returned the vehicle to the PCYC and left the keys at the PCYC front counter on 6 July 2016; and the vehicle was parked at the front of the PCYC until 11 July 2016 when he returned to work. He notes that this leaves the period in question, when the vehicle was under his control, as being between 19 June 2016 and 30 June 2016.⁷
- [14] The officer denies the evidence provided by a witness, (redacted), that he told her he intended to use the QPCYWA vehicle to ‘run around town’. He says that (redacted) had made a number of other complaints against him which were unsubstantiated and has an acrimonious relationship with him, which should be considered in assessing the weight of her evidence.⁸
- [15] The officer contends that the Assistant Commissioner’s conclusion that 63 litres of fuel, or 527 kilometres, is unaccounted for; and the conclusion that the officer drove the vehicle around for ‘multiple weeks and for hundreds of kilometres’ is unsustainable. He notes that the distance from his house to town is such that if he conducted a return trip into town each day, the kilometres involved would have totalled 48 km over the 12 days, and the proposition that he would have driven 43.91 km per day for each of the 12 days is implausible.⁹
- [16] The officer suggests that an alternative explanation, that other members of staff may have used the vehicle after he handed in the keys, between 6 July 2016 to 11 July 2016, was not explored by investigators.¹⁰
- [17] The officer notes that there were no witnesses to his driving the motor vehicle around (regional town) in his leave, and that there are 44 CCTV cameras positioned around (regional town), but no footage from those cameras was reviewed by investigators.¹¹
- [18] The officer submits that the Assistant Commissioner’s conclusions in regard to Matter 1 are therefore unsustainable.¹²
- [19] As to the first part of Matter 2, that he lied in a discipline interview on 20 February 2017 by stating that he took the QPCYWA vehicle to his home address for safe storage whilst he was on leave between 18 June 2016 and 11 July 2016, however did not drive it; the officer says that this charge is in tandem with the allegation in Matter 1 that he drove the matter vehicle whilst on leave, which is not substantiated, and that charge must then fail.¹³
- [20] The officer also notes that the bringing of an untruthfulness charge in relation to a denial of another allegation is inherently unfair, and makes a minor case into a major

⁶ Ibid, [37].

⁷ Ibid, [44]-[45].

⁸ Ibid, [46].

⁹ Ibid, [47].

¹⁰ Ibid, [49].

¹¹ Ibid, [50].

¹² Ibid, [51].

¹³ Ibid, [55].

one simply because of the officer's denial, and refers to comments of Dr Forbes¹⁴ that the tribunal should not promote such a view.

- [21] As to the allegations as to his giving misleading and untruthful answers in his disciplinary interviews, the officer submits that the interview was upsetting in nature, occurred seven months after the alleged incident, that he was having a particularly difficult personal time, and that he mentioned that the logbooks may contain incorrect entries.¹⁵
- [22] It is submitted by the officer that it is not shown that the officer was knowingly misleading or making a false statement, and there is insufficient evidence to conclude that the officer fabricated the FBT log book and produced it to deliberately deceive the investigator, and that there were errors throughout the log book which are indicative of bad recordkeeping, rather than a fabrication.¹⁶
- [23] Reference is also made by the officer to an email received regarding the FBT log book which was unclear as to whether the logbook was required every 12 weeks from 1 April or for a one-off 12 week period from 1 April, and that the officer continued to fill the log book out, believing that was in line with that email.¹⁷
- [24] The officer submits that it is unaddressed that he signed and submitted a return on 25 August 2016 in relation to the period between 1 April 2016 to 1 August 2016, which contains the same odometer reading that appears in the FBT log book that is said to have been falsified, but these returns were sent prior to the complaint about him driving the motor vehicle on leave even being made. The officer submits this is powerful evidence that the logbooks were not falsified, and that the errors were simply the result of bad bookkeeping.¹⁸
- [25] It is noted for the officer that a further return was signed and submitted on 14 November 2016, prior to the interview on 20 February 2017, to rectify the additional month in the previous return.¹⁹
- [26] The officer submits that he has offered a plausible reason for the large gap in entries, or the inaccuracy of logbooks, being as a result of bad record keeping at a time where the keeping of an accurate FBT log book was unfortunately not his priority.²⁰
- [27] Overall, the officer submits that the material before the Tribunal fails to establish the allegations of 'misconduct', and that the Tribunal should set aside the decision of the Assistant Commissioner, and substitute a decision that Matters 1 and 2 are unsubstantiated.²¹

Submissions by the Assistant Commissioner

- [28] The Assistant Commissioner contends as to Matter 1(a) (taking the QPCYWA vehicle home whilst on leave) that the officer's conduct in taking the vehicle home

¹⁴ *Barry Robert Binnie v Andrew Kidcaff* (in the Misconduct Tribunal, exercising appellate jurisdiction, Criminal Justice Commission Queensland) Appeal No 2 of 1996.

¹⁵ Applicant's outline of submissions regarding substantiation, filed 2 July 2019, [60] – [61]].

¹⁶ *Ibid*, [62]-[63].

¹⁷ *Ibid*, [65].

¹⁸ *Ibid*, [67].

¹⁹ *Ibid*, [68].

²⁰ *Ibid*, [69].

²¹ *Ibid*, [71].

necessarily involved him driving the vehicle from the PCYC to his home at a time when he had no lawful authority to do so.²²

- [29] The Assistant Commissioner submits that the proper course for the officer, on finishing his shift at the PCYC on the afternoon of 17 June 2016, was to leave the keys behind in the office, and obtain some other means of getting home rather than using the vehicle, or alternatively should have returned the vehicle to the PCYC on 19 June 2016.²³
- [30] The Assistant Commissioner submits that the conduct of the officer in taking the vehicle home did not merely involve a failure to comply with QPCYWA policy, but involved the use of the vehicle to obtain a private benefit in circumstances in which he was not entitled to do so, and that such conduct is properly characterised as misconduct.²⁴
- [31] As to Matter 1(b) (driving the vehicle whilst on leave), the Assistant Commissioner accepts that apart from the officer's admissions to driving the vehicle to his home on the afternoon of 17 June 2016, there is no direct evidence that the officer drove the vehicle whilst on leave, however submits that the finding was available on circumstantial evidence.²⁵
- [32] The Assistant Commissioner notes that the officer admitted raising and discussing with his replacement, Sergeant (redacted), the need for Sergeant (redacted) to use the vehicle whilst relieving in the officer's position, while the officer was absent on leave, and that the officer's statement that he probably would have refuelled with 46.33 L of fuel in the vehicle on Saturday, 18 June 2016 'ready to go for Sergeant (redacted)' is inconsistent with an earlier statement that he had taken the vehicle home for security reasons after Sergeant (redacted) said that he did not need it.²⁶
- [33] The Assistant Commissioner describes the officer's explanation that he took the vehicle home because of concerns over security of the vehicle when stored on PCYC premises as implausible, as the officer knew that his family were away from 1 to 6 July 2016 and therefore not in a position to monitor the security of the vehicle, thereby placing it at even greater risk than if he had left the vehicle on PCYC premises.²⁷
- [34] The Assistant Commissioner notes the evidence of (redacted) that the officer had told her that he intended to use the vehicle whilst on leave.²⁸
- [35] The Assistant Commissioner also notes the excessive and unexplained fuel usage for the period between 18 June 2016 and 25 July 2016, and the inconsistent odometer and fuel records, ITAS logs and fringe benefits tax entries.²⁹
- [36] As to Matter 2, the Assistant Commissioner concedes that the allegation of false statements concerning the usage of the vehicle will fall away if the evidence is

²² Respondent's submissions filed 2 August 2009, [25].

²³ Ibid, [25].

²⁴ Ibid, [25]-[26].

²⁵ Ibid, [28].

²⁶ Ibid, [30].

²⁷ Ibid, [30].

²⁸ Ibid, [30].

²⁹ Ibid, [30].

insufficient to substantiate the charge that the officer used the vehicle for personal use whilst he was on leave.³⁰

[37] However, the Assistant Commissioner submits that should the Tribunal find that the charge in Matter 2 is not proved on the evidence, that in the alternative, the evidence does establish significant failings by the officer in accurately completing the Fringe Benefits Tax Log, specifically:³¹

(a) failing to complete entries between 6 June 2016 and 18 June 2016 despite driving the vehicle;

(b) failing to ensure that entries accurately recorded odometer readings;

and that the officer further:³²

(c) failed to identify discrepancies which could indicate misuse and undertake enquiries to ascertain the reasons for the discrepancies.

[38] The Assistant Commissioner submits that such failings constitute misconduct, rather than mere inadvertence, and submits as follows:³³

35. ... A Fringe Benefits Tax log is an accountable document which is used to calculate the taxation liability of organisations which provide benefits to staff. If the contentions of the (officer) are accepted, the conclusion available to the tribunal is that he tendered an inaccurate document with the intention that it be relied upon to calculate PCYC taxation liabilities. The consequences for PCYC as a charitable body of incorrect taxation records could be significant.

36. The (officer) is a Sergeant of Police and occupied a position of trust as manager of the (regional town) PCYC. In that role he was responsible for significant human and material resources. It is the submission of the (Assistant Commissioner) that if the tribunal accepts the (officer's) contention that incorrect entries were through inadvertence and his failure to properly manage his administrative responsibilities because of personal issues, it is open to find that the (officer) did not meet the standard of conduct that the community reasonably expects of a police officer and that his conduct, accordingly, constitutes misconduct.

Discussion

Matter 1

[39] The officer contends that he did not use the QPCYWA vehicle for private purposes during his leave, whereas the Assistant Commissioner contends that the officer used the vehicle for private purposes.

[40] The officer finished his last shift before going on leave on 17 June 2016, and was on leave from 20 June 2016 to 11 July 2016. The PCYC vehicle was removed from the PCYC premises before 19 June 2016. It is agreed that he went to (another regional town), in his personal vehicle, between 1 July and 6 July 2016. The QPCYWA vehicle was returned to the PCYC premises on 6 July 2016.

³⁰ Ibid, [31].

³¹ Ibid, [33].

³² Ibid, [34].

³³ Ibid, [35]-[36].

- [41] The period in which the QPCYWA vehicle may have been used without authorisation is therefore between the end of shift on 17 June 2016 and 1 July 2016 ('the relevant period').
- [42] The Assistant Commissioner contends that 63 litres of fuel are unaccounted for in the relevant period, having regard to the odometer readings of the PCYC vehicle, and that this is calculated as corresponding to having travelled a distance of 527 km.
- [43] The PCYC vehicle was filled with fuel by the officer, according to the service station records, as follows:
- (a) 9 June 2016 – 59.61 L
 - (b) 18 June 2016 – 46.33 L
 - (c) 25 July 2016 – 63.11 L
- [44] It is not identified in the evidence as to what the fuel capacity of the PCYC vehicle is, or whether it is established that on each occasion it was filled to capacity. The fuel capacity must be at least 63.11 litres, as that was provided on 25 July 2016.
- [45] The records of the service station show fuel being provided eight days before the period in question, and again 24 days after the period in question. There is only one fuel record of the service station which falls within the relevant period, which is the 46.33 litres provided on 18 June 2016.
- [46] The fuel records are not determinative in themselves in relation to the relevant period, as there may have been fuel remaining from the supply on 9 June 2016, and also remaining after the vehicle was returned on 6 July 2016.
- [47] In the ordinary course of events, it would be expected that the FBT logbook kept in relation to the vehicle would indicate the fuel use of the vehicle, and would reveal a consecutive link of odometer readings.
- [48] In the findings and reasons of the disciplinary hearing dated 12 December 2018, the Assistant Commissioner makes the following comments as to the FBT logbook, as to use of the vehicle and fabrication of entries:³⁴
- The FBT logbook indicates an end odometer of 121,259 km on 6 June 2016. This reading is in sequence with the proceeding (sic) entries and believed to be correct, based on the odometer reading of 121,537 km when you refuelled on 9 June 2016. 35 days later on 11 July 2016, the FBT the start odometer is still 121,529 km. This indicates you did not travel any kms during this time, even though based on your submissions you drove it home, to the service station and back. On 18 June 2016 you refuelled the vehicle with 46.33 litres, which based on an average efficiency of 8.4 km/l would indicate you travelled 389.17 kms. You were not on leave from 6 to 18 of June 2016, however although you were rostered on duty there are no FBT log entries for these 12 days. In my opinion, the key observation is there is no possible way the odometer reading on 11 July 2016 of 121,529 kms is correct. This is the key entry of the fabricated evidence designed to mislead. The entry was not an error, because the following 19 entries run in sequence, which in my opinion indicates they are all fabricated.

³⁴ Findings and reasons of discipline hearing, p. 11.

In your interview you stated that you completed the FBT logbook daily (p. 116):

- On 18 June 2018, the day prior to your leave, you put 46.33 L of fuel in the vehicle although it still had at least 20 L of useable fuel in it. You did this even though you state that you intended to leave it parked at your house for security reasons and not drive it. When asked why you refuelled the vehicle on this day you replied, “OK, so it does say that I probably would have refuelled it on the Saturday ready to go for the new Sergeant” (p 120). However, you had not intent to leave it at the PCYC for him, and in fact you did not. In my opinion you refuelled on your last shift because you intended to drive it whilst you were on leave. Further to this, it is not plausible that you would park the vehicle at your home address for security reasons when there are other PCYC employees that may be able to utilise it, and there is the PCYC or local police station where it could be secured;
- On 25 July 2016 you refuelled the vehicle with 63.11 litres, this would indicate that based on average efficiency of 8.4 km/l the vehicle travelled 530.12 kms. However, the logbook entries from 11 July 2016 when you returned to work until 25 July 2016, indicate you only travelled 192 kms (121,529 km - 121,721 km). This leaves 337.88 kms unaccounted for from when the vehicle was refuelled on 18 June 2016, which was the day before you went on leave, until 1 July 2016 which was the day you drove your personal vehicle to (another regional town). The odometer reading from refuelling on 25 July 2016 was 122,383 kms and is believed to be correct based on average fuel usage. This also indicates to me that your FBT log book entries between 11 – 25 July 2016 were fabricated as the readings are out by 664 kms.

[49] The Assistant Commissioner also refers to the quarterly returns in relation to the odometer readings in his Reasons:³⁵

- The Quarterly Vehicle Take-Home Returns have odometer readings that aligned with the FBT log for the start and end of July 2016. However, the April to June 2016 return was incorrectly extended to include July 2016. You deliberately altered the dates in one location on the form, however they remain correct on another part of the form. I do not accept these as being an accurate record, and in any event, they cause no doubt or lower my level of satisfaction based on the aforementioned findings; and
- You have not offered any plausible reason for the large gap in entries or the gross inaccuracy of the entries in the FBT log book after 6 June 2016. You have had the opportunity to do this in two interviews and your written submission.

[50] The officer was asked by Senior Sergeant (redacted) at an interview on 20 February 2017 about the entries in the FBT log book prior to his taking leave, and said he had made a mistake:³⁶

Q: Can you explain why the logbook was not completed from 6/6 until you took the vehicle home on 18/6/16 before your leave?

³⁵ Ibid, p. 13.

³⁶ Transcript of interview, 20 February 2017, p 4. line 106 to p. 5 line 125.

A: I have made a mistake in the logbook. I didn't complete it.

Q: Can you explain why you didn't complete it?

A: No, I can't.

Q: So is it the case that the logbook cannot be correct considering that the last odometer reading on 6/6/16 is 121,529 and you drove the vehicle for the next 10 shifts which would have far exceeded the next odometer reading on 11/7 of 1527. Is that correct?

A: Yeah, that's correct. That'd be correct.

Q: Can you offer me any explanations as to how that could be?

A: No. At the time, I was going through personal issues and I have no explanation as to why I would have done that. No.

Q: So is it the case that you filled this logbook at a later date to cover up the period in question which relates to the use of the PCYC vehicle during your rec leave from 18/6 to 11/7/16.

A: No.

Q: Do you agree...

A: I admit that I obviously filled it in from 11/7 but I've not done that to cover-up anything, I've just made a mistake.

[51] At the conclusion of the interview, the officer agreed that the FBT log had not been completed as required, but denied that he had driven the vehicle on his holidays:³⁷

Q: Do you agree that the FBT log has not been completed as required?

A: Yes, I would say that.

Q: All right, I've no further questions to ask it. Is there anything else you wish to say before this interview is concluded?

A: Um, yes I would, I'd like to state that at no time did I use that vehicle on my holidays. Yes, I understand where you're coming from Senior and I have no problems with that whatsoever. I don't have an explanation for it but I know I didn't drive the vehicle physically, so, that's the way it is. No, I've got nothing else to say.

Q: Is everything you told me in this interview the truth?

A: Yes.

Q: Do know of any other matters related to this investigation that you have not brought to my attention during this interview?

A: No.

[52] Whilst there is no direct evidence of observation of the police officer using the vehicle, the Assistant Commissioner submits that there is circumstantial evidence which indicates fuel having been used in the vehicle in the relevant period. The officer can offer no cogent explanation for the alleged fuel use.

³⁷ Ibid, p. 11 line 302 to 315.

- [53] The officer points to the short distance between his home and town, and the lack of observation of him using the vehicle from large number of CCTV cameras situated around (regional town), as making the conclusion that the vehicle was driven hundreds of kilometres unsustainable. However, this overlooks the possibility that the vehicle was driven from his home away from the town, and into the surrounding country, where large distances could be covered in relatively remote areas.
- [54] There is evidence from a person, (redacted), that she was told by the officer that he intended to use the vehicle to ‘run around town’ in his leave, but this conversation is denied by the officer.
- [55] The officer suggests that he filled the vehicle with fuel at the commencement of his leave, before taking it to his home, so it was available for another officer. It is inconsistent that the officer would be preparing the vehicle for use by another officer during his leave, whilst simultaneously removing the vehicle from the PCYC premises.
- [56] The officer’s submissions are also inconsistent, as he says he checked with Sergeant (redacted) that he did not require the vehicle whilst the officer was on leave – why would the officer then put fuel in the vehicle if he had been told by Sergeant (redacted) that he did not want to use it?
- [57] The officer denied in his interview that he ‘drove the vehicle physically’ on his holidays. If it is accepted that the vehicle was driven in the relevant period, this gives rise to several possibilities:
- (a) someone else who the officer is unaware of, drove the vehicle, without his knowledge; or
 - (b) someone else, who the officer is aware of, drove the vehicle, and he phrased his answer to say that he did not drive the vehicle physically, without identifying who the person who drove the vehicle was (whether they were a family member, acquaintance, or other known person); or
 - (c) the officer did drive the vehicle in the relevant period, and was untruthful in the interview.
- [58] The officer suggests that the investigators did not look into the possible use of the vehicle by other PCYC staff in the period after he returned it on 6 June 2016 until he returned to work on 11 July 2016. A query arises that if that had occurred, then the officer would be expected to have noticed there had been a substantial use of fuel since he returned the vehicle, when he presumably began using the vehicle again himself to commute after 11 July 2016, as the agreed statement of facts sets out that the vehicle ‘was available for the applicant to commute to and from work when he was rostered on’, but he makes no such observation.
- [59] The officer cannot explain the obvious irregularities and inconsistencies in the FBT log book, and quarterly take-home returns. He says that he made a mistake in filling them out.
- [60] The officer points to a return he filed on 25 August 2016, prior to the complaint being made, which contained the same odometer readings that appear in the FBT logbook which is said to have been falsified, as evidence of simply bad bookkeeping. That argument relies on the making of a complaint as being an event that would cause the officer to falsify the record in an attempt to explain the fuel use

and odometer readings – however, the officer was effectively on notice from 6 July 2016, when he was asked to return the vehicle, that his conduct was under scrutiny, and would have had reason to seek to create favourable entries from any time then on.

- [61] I do not find it plausible that the officer simply made a mistake in filling out the logbook and quarterly returns, and that the vehicle was not used at all during the relevant period.
- [62] I find it to be more plausible that the officer did use the vehicle in the relevant period, and attempted to construct the documents so as to cover-up that use of the vehicle.
- [63] I am satisfied that the vehicle was used in the relevant period, based upon the fuel usage and the surrounding circumstances.
- [64] Whilst it cannot be established who used the vehicle in the relevant period whilst the vehicle was kept at the officer's house, the vehicle was in the care of the officer in that period. There is no suggestion that the vehicle was stolen, or unlawfully used, or missing, in the relevant period. The use therefore must have been with the knowledge of the officer, whether that was by himself, a family member, or an acquaintance, whilst the vehicle was in the care of the officer – such a use would still be properly described as a use by the officer, in this context.
- [65] Matter 1 alleges that the officer 'used a vehicle allocated to the (regional town) Queensland Police Citizens Youth Club in contravention of policy whilst you were on leave'. That expression refers to any use of the vehicle. The journey made by the officer, which is not contested, in driving the vehicle from the PCYC premises to the petrol station, then to his house, and then from his house back to the PCYC premises, is in itself a 'use of the vehicle'. That expression is not limited to the time whilst the vehicle was at the officer's house.
- [66] It is apparent that the clear intent of the policy was for the vehicle to be available for use by PCYC staff, and was not to be kept at all at the officer's home whilst he was on leave. This is reinforced by the request by the Zone Manager that he return the vehicle to the PCYC on 6 July 2016, which he then did.
- [67] The taking home of the vehicle by the officer was a deliberate act, and a breach of clear policy, for which no plausible explanation has been given. The clear implication is that the officer was using PCYC resources for his personal benefit.
- [68] The use of PCYC resources for personal benefit was discussed in *Gee v Assistant Commissioner Stewart*,³⁸ where an officer adopted a donated personal refrigerator for personal use. The Hon James Thomas AM QC and Member Howard held that such conduct constitutes misconduct:³⁹

[31] In our opinion the Management Committee Policy Rule cited above does not afford any justification for the applicant's actions. At material times the fridge was simply appropriated to the domestic benefit of Kennedy and the applicant despite their knowledge that it belonged to the Mt Isa PCYC. The above rule does not authorise or justify any actions on her part contrary to the purposes of the gift of which both she and Kennedy were well aware.

³⁸ [2012] QCAT 33.

³⁹ Ibid, [31] – [33].

[32] She knew it was donated for the sole benefit of the PCYC. Whether their use of it, and Kennedy's use as authorised by her, is characterised as temporary misappropriation, illegal use, trespass to goods or plain commandeering for personal use, it was plainly improper conduct for any member of the Police Force.

[33] In our opinion the applicant's conduct and dealings with the fridge fails to meet the standard of conduct that the community reasonably expects of a Police Officer. It in our opinion amounts to "misconduct" within the definition of that term in section 1.4 of the Police Service Administration Act 1990.

- [69] I consider that the actions of the officer in taking the vehicle home, and keeping it there under his control, in the relevant period, is a use of the vehicle, and constitutes misconduct, irrespective of whether he was the person who 'drove the vehicle physically' in the relevant period.
- [70] I am satisfied that Matter 1 is substantiated and constitutes misconduct.
- [71] Matter 2 alleges that the officer engaged in conduct that was unbecoming in relation to truthfully, completely and promptly, answering questions directed to him in two discipline interviews, and produced constructed documents.
- [72] I note the submissions made on behalf of the officer that secondary charges should not be brought in relation to a principal breach, as this may give rise to dual sanction for the one transgression. It was submitted there was an inherent unfairness in bringing such a secondary charge:⁴⁰

55. As above, our submission is that the second allegation in Matter 1, driving the vehicle around town, is incapable of being substantiated. That being so, this charge must fail. Above and beyond this, however, there is an inherent unfairness associated with bringing an untruthfulness charge in relation to the applicant's denials or protestations in relation to another allegation ('piggybacking' Matter 2 on Matter 1).

56. Case law is clear on the appropriateness of this:⁴¹

... It does not follow that a contingent, supplementary charge of untruthfulness should normally be added if the officer denies the original allegations....This Tribunal should not promote the view that a minor case automatically becomes a major one if the defendant tells investigators that he is innocent, and they, holding the opinion that is protestations are untrue, pile an "untruthfulness" mountain on a molehill of some minor dereliction of duty".

57. Further, it is obvious from the sanction imposed (a reprimand in relation to Matter 1, and a reduction of two pay points for Matter 2) that the process adopted here has involved precisely the outcome Dr Forbes spoke against, namely that a minor case has become a major one, simply because of the officer's denial.

- [73] The conduct of the police officer, in taking the vehicle to his home during his leave, and keeping it there, which was in breach of the policy as to use of vehicles, and afterwards constructing logbook and quarterly entries, strongly suggests that the

⁴⁰ Applicant's outline of submissions regarding substantiation, filed 2 July 2019.

⁴¹ *Barry Robert Binney v Andrew Kidcaff* (in the Misconduct Tribunal, exercising appellate jurisdiction, Criminal Justice Commission Queensland) Appeal No 2 of 1996.

officer has a greater awareness of what caused the fuel use than he has disclosed or admitted to.

- [74] The officer denied in his interview, as quoted above, that there were any other matters related to the investigation that he did not bring to the investigator's attention during the interview. The full explanation as to the use of vehicle in the relevant period would be a matter related to the investigation.
- [75] The officer's response that he made a mistake as to completing the documentation, does not explain why he took the vehicle home at all during this leave period in contravention of the policy, the fuel use, or who used the vehicle in the relevant period. The compelling conclusion is that the officer did not truthfully, completely and promptly, answer questions directed to him.
- [76] An allegation that the officer manufactured evidence is contained in the second particular of Matter 2:

During this discipline interview you produced a FBT log book that was created without request, for an incorrect FBT, with information that did not correlate with your ITAS log, nor the odometer readings you provided when purchasing fuel;

- [77] In this matter, the failure to provide truthful, complete and prompt answers, and to construct evidence, is indicative of a further offence, that is distinct from Matter 1. Put simply, Matter 1 is an allegation that something in breach of proper conduct was done, and Matter 2 is an allegation that the officer knows more about the whole issue than he is revealing, and took active steps to construct evidence in an attempt to conceal his breach of proper conduct. Matter 2 therefore is an allegation which goes further than a simple denial or protestation of Matter 1. Another way of expressing this is that a 'cover-up' is an offence in itself, which can be as bad as, or worse than, the principal offence.
- [78] The Federal Court, in a recent case, commented on the seriousness of a 'cover-up' in a regulatory context, when considering a fine against a franchisor. That situation is analogous to a disciplinary proceeding. Bromwich J, noted that care must be taken to sanction the conduct rather than the separate and subsequent conduct of covering up what had taken place, in the absence of a separate cause of action:⁴²

339. The cover-up that Ultra Tune attempted reflects a significantly heightened need for deterrence, in relation to conduct that was already a most serious and fundamental breach of the *Franchising Code* in taking the deposit in the first place, reflecting as it does Ultra Tune's attitude in relation to its contravening conduct. A condign sanction is required for the contravening conduct that was sought to be hidden, to dissuade both Ultra Tune and any other franchisor similarly tempted not just to engage in such transgressions, but also to hide them by fraudulent means in the future.

340. There must be no tolerance for manufacturing evidence to deceive a regulator, and even less when the deception is maintained in this Court. Care must none-the-less be taken to sanction the pleaded conduct, rather than the separate and subsequent conduct of covering up what had taken place, in the absence of a separate cause of action. The use of the conduct in covering up what had taken place must be confined to the assessment of the seriousness of

⁴² *Australian Competition and Consumer Commission v Ultra Tune Australia Pty Ltd* [2019] FCA 12, [339], [340].

the contravening conduct and of the heightened need for specific and general deterrence. It is a matter for the ACCC as to whether any separate proceeding, in this Court, or in a State court exercising federal criminal jurisdiction, is to be commenced to sanction, in its own right, any aspect of the cover-up conduct.

[79] Matter 2 constitutes a ‘separate cause of action’ relevant to the construction of evidence, and is not merely a ‘piggy-back’ on Matter 1 on the basis of the officer’s denials or protestations.

[80] I therefore do not consider that it is inappropriate that Matter 2 was brought in this situation.

[81] Section 1.4 of the *Police Service Administration Act 1990 (Qld)* defines misconduct as follows:

Misconduct means conduct that -

(a) is disgraceful, improper or unbecoming an officer; or

(b) shows unfitness to be or continue as an officer; or

(c) does not meet the standard of conduct that the community reasonably expects of a police officer

[82] The action of a police officer in giving a statement that is not truthful, complete and prompt, and constructing evidence, is action that is improper and unbecoming an officer, and which members of the public would consider to be below the standard that the community reasonably expects of a police officer, and would constitute misconduct.

[83] I am satisfied that Matter 2 is substantiated, and constitutes misconduct.

[84] I confirm the decisions of Assistant Commissioner Shane Chelepy, made on 12 December 2018, that a disciplinary charge is substantiated in both Matter 1 and Matter 2, and amounted to misconduct.

Non-publication order

[85] In the course of the hearing, an issue was raised as to the making of a non-publication order in this matter. I invited the parties to submit a draft order in that regard.

[86] On 19 March 2020 an email was received by the Registry from the Solicitors for the officer, attaching an Application for miscellaneous matters – application for non-publication order. The email noted that the application was sent with the consent of the Assistant Commissioner, and that the application was made jointly.

[87] The matters in issue occurred in a regional town where parties are easily identified, and there are references in the material to personal issues affecting the behaviour of the officer.

[88] I am satisfied that the publication of the material filed by the Assistant Commissioner, and of the identities of persons involved, may endanger the mental health of a person, as referred to in section 66(2)(b) of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*, and make the following non—publication order as jointly applied for by the parties:-

Publication is prohibited of:

- (a) all material filed by Assistant Commissioner Shane Chelepy in accordance with Section 21(2) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), and
- (b) any other document, decision or exhibit in the proceedings relating to the personal details (address, contact phone numbers etc) of the Applicant, and of any Third Parties

pursuant to Section 66(1) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).