QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Ball v State of Queensland* (*Queensland Corrective Services*) [2021] QIRC 116
PARTIES:	**Ball, Frederick** (Applicant) **v** **State of Queensland (Queensland Corrective Services)** (Respondent)
CASE NO:	TD/2017/10
PROCEEDING:	Application for Reinstatement
DELIVERED ON:	1 April 2021
HEARING DATES:	21 February 2020 15-19 June 2020 inclusive 22 September 2020
HEARD AT:	Brisbane
MEMBER:	O'Connor VP
ORDER:	**1. The Application is dismissed.**
CATCHWORDS:	INDUSTRIAL LAW - APPLICATION FOR REINSTATEMENT - where application determined by Commission and refused - where appeal to Industrial Court allowed - where application remitted to the Commission to be determined according to law - where applicant required to show cause - where applicant's conduct constituted breaches of procedures, policies and statutory obligations - where applicant's employment was terminated - whether the disciplinary process undertaken was compliant with legislative and policy procedures - whether applicant was afforded

	procedural fairness and natural justice - where applicant bears the onus of establishing, on the balance of probabilities, that his dismissal was unfair - whether respondent's decision to terminate was harsh, unjust or unreasonable.
LEGISLATION:	*Industrial Relations Act 1999,* s 73, s 77, s 78, s 79 *Industrial Relations Act 2016*, s 1023 *Corrective Services Act 2006,* s 20 *Public Service Act 2008,* s 187, s 188, s 189 *Public Service Ethics Act 1994* *Acts Interpretation Act 1954,* s 27A, s 27B *Medical Practitioners Act 1938* (NSW) *Workplace Relations Act 1996,* s 170CG
CASES:	*Barclay v Nylex Corporation Pty Ltd* [2003] AIRC 593 *Blows v Townville City Council* [2016] QIRC 066 *Byrne v Australian Airlines* (1995) 185 CLR 410 *Coleman v State of Queensland (Department of Education)* [2020] QIRC 032 *Gold Coast District Health Service v Walker* (2001) 168 QGIG 186 *Mathieu v Higgins* [2008] QSC 209 *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 *Pillai v Messiter* (No.2) (1989) 16 NSWLR 197 *Stark v P & O Resorts (Heron Island)* [1993] 144 QGIG 914 *Stewart v University of Melbourne* [2000] AIRC 779 *Toms v Harbour City Ferries Pty Limited* [2015] FCAFC 35 *Wadey v YMCA, Canberra* [1996] IRCA 568 *White v State of Queensland (Central Queensland Hospital and Health Service)* [2017] QIRC 041
APPEARANCES:	Ms S. Moody of Counsel, instructed directly by the Applicant. Mr C. Murdoch QC and Ms M. Brooks of Counsel, instructed by Crown Law, for the Respondent.

Reasons for Decision

Background

[1] On 2 May 2006 Mr Frederick Ball ('the Applicant') commenced employment with the State of Queensland, (Department of Justice and Attorney-General, Queensland Corrective Services) (QCS). From 2 May 2006 to 16 June 2006 the Applicant was employed to undertake the 'Entry Level Training Program (Custodial Services)' and as from June 2006 to 19 January 2017 was employed as a Custodial Correctional Officer ('CCO') at the Woodford Correctional Centre ('WCC').[1]

[2] Following *Public Service Departmental Arrangements Notices* (Nos 4 and 5) *2020* made by the Governor in Council on 12 and 19 November 2020 respectively under the *Public Service Act 2008* ('PS Act'), Queensland Corrective Services was declared a department of Government as from 12 November 2020.

[3] WCC is a high security prison located 100 kilometres north of Brisbane. The prison includes various high security areas known as units and blocks, which are staffed by CCOs.

[4] The termination of the Applicant's employment followed a disciplinary procedure commenced by the Respondent pursuant to the PS Act.

[5] On 5 July 2016 information was provided to the Applicant regarding an investigative report in which he participated, prepared by the Department of Justice and Attorney-General, Ethical Standards Unit ('ESU').

[6] The Applicant was required to show cause, pursuant to the PS Act why he should not be disciplined in relation to the following allegations said to be capable of substantiation:

> ***Allegation 1***
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> That between 18 January 2016 and 25 February 2016, you were derelict in the performance of your duties, namely on:
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> (a) the afternoon of 19 January 2016, you were asleep on two occasions whilst seated at the officers' station desk inside N3 Unit;
> (b) 29 January 2016, during the officers' afternoon meal break, you were asleep in a chair in the walkway around the Tardis, facing the Lexan window of the N3 Unit, when you should have been maintaining prisoner observations;
> (c) 2 February 2016, you were asleep whilst seated at the officers' station desk inside the N3 Unit; and

[1] Exhibit 1 - Affidavit of Frederick Ball filed 19 May 2017, [12].

(d) 24 February 2016, you were asleep on six occasions whilst seated at the officers' station desk and rostered as the P Movement Control officer.

Allegation 2

That on 29 January 2016, without authority, you inappropriately secured prisoners in their cell.

Allegation 3

That between 18 January 2016 and 25 February 2016, you communicated and behaved in an inappropriate manner towards prisoners at WCC, in particular on:

(a) 19 January 2016;
(b) 29 January 2016; and
(c) 8 February 2016.

[7] On 24 October 2016 correspondence was forwarded to the Applicant from Ms Kerrith McDermott, then Deputy Commissioner, QCS in which he was informed that all the allegations were substantiated on the balance of probabilities.

[8] It is not in contention that Ms McDermott was at all relevant times the Deputy Commissioner, QCS[2] and as such the authorised delegate to approve formal disciplinary action to be taken against an employee as per the HR Delegations Manual.[3]

[9] On 19 January 2017, the Applicant's employment was terminated. At the time of termination, the Applicant was covered by an Award, Certified Agreement and various policies and procedures including a Code of Conduct for the Queensland Public Service ('the Code of Conduct').

[10] The Applicant filed an application for reinstatement pursuant to s 74 of the (now repealed) *Industrial Relations Act 1999* (Qld) ('the IR Act 1999'), claiming unfair dismissal under s 73(1)(a) of the IR Act 1999.

[11] Chapter 18 of the *Industrial Relations Act 2016* ('the IR Act 2016') provides for Repeal and transitional provisions of which s 1023 states:

1023 Existing proceedings

(1) This section applies if -
  (a) before the commencement, a person started a proceeding under the repealed Act; and
  (b) immediately before the commencement, the proceeding had not ended.
(2) The repealed Act continues to apply to the proceeding, and the proceeding must be heard and decided, as if the *Industrial Relations Act 2016* had not commenced.

[12] Accordingly, the IR Act 1999 continues to apply to his application.

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[2] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, [2].
[3] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, [5].

Application

[13] The Applicant contends that the termination of his employment was harsh, unjust and unreasonable within the meaning of s 77 of the IR Act 1999 which states:

> **77 Matters to be considered in deciding an application**
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> In deciding whether a dismissal was harsh, unjust or unreasonable, the commission must consider -
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> (a) whether the employee was notified of the reason for dismissal; and
>
> (b) whether the dismissal related to -
>
> (i) the operational requirements of the employer's undertaking, establishment or service; or
>
> (ii) the employee's conduct, capacity or performance; and
>
> (c) if the dismissal relates to the employee's conduct, capacity or performance -
>
> (i) whether the employee had been warned about the conduct, capacity or performance; or
>
> (ii) whether the employee was given an opportunity to respond to the allegation about the conduct, capacity or performance; and
>
> (d) any other matters the commission considers relevant.

[14] The Applicant seeks reinstatement to his former position without loss of service and compensation (being remuneration lost because of the dismissal) pursuant to s 78 of the IR Act 1999. Section 78 states:

> **78 Remedies - reinstatement or re-employment**
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> (1) This section applies if the commission is satisfied an employee was unfairly dismissed.
>
> (2) The commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.
>
> (3) If the commission considers reinstatement would be impracticable, the commission may order the employer to re-employ the employee in another position that the employer has available and that the commission considers suitable.
>
> (4) The commission may also -
>
> (a) make an order it considers necessary to maintain the continuity of the employee's employment or service; and
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> (b) order the employee to repay any amount paid to the employee by, or for, the employer on the dismissal; and
>
> (c) order the employer to pay the employee the remuneration lost, or likely to have been lost, by the employee because of the dismissal, after taking into account any employment benefits or wages received by the employee since the dismissal.
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> (5) This section does not limit the commission's power to make an interim or interlocutory order.

Onus of proof

[15] The Applicant carries the onus of proving that the dismissal was harsh, unjust or unreasonable.[4] However, in circumstances where the Applicant was dismissed following a disciplinary procedure under the PS Act, it will fall upon the Respondent to establish, to the reasonable satisfaction of the Commission, that the Applicant was guilty of the conduct as alleged.

[16] In reliance on *White v State of Queensland* (*Central Queensland Hospital and Health Service*)[5] it was submitted by the Applicant that:

> Ordinarily, the Applicant bears the evidentiary onus of roving that the dismissal was harsh, unjust or unreasonable. However, where a dismissal was on the grounds of serious misconduct, the onus of proof to be applied by the Commission shifts from the Applicant to the respondent employer.[6]

[17] In *Stark v P & O Resorts (Heron Island*), Chief Commissioner Hall (as his Honour then was) considered the appropriate standard of proof to be applied in an unfair dismissal case. He wrote:

> For myself, I would add, though it is not a proposition which is necessary to the decision in this matter, that whomsoever it is who the ultimate onus of proof in an unfair dismissal case, on a grave allegation of criminal misconduct the onus must inevitably shift to the proponent of the allegation and, equally inevitably, the higher onus described in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 and *M v M* (1988) 166 CLR 69 at 76 to 77 must be applied, compare *Byrne and Another v Australian Airlines Ltd*. (1992)192 per Hill J.[7]

[18] Whilst it is correct that the standard of proof to be applied is on the balance of probabilities, it is not, in my view, correct for the Applicant to submit that the nature of the allegations is such that this is a case which requires a reversal of the onus.

Parties' submissions on objections to certain evidence

[19] The Applicant objected to allegations contained in the Statements and Affidavits relied on by the Respondent on the basis that those allegations refer to supposed instances of poor conduct or performance on the part of the Applicant, which did not form part of the reasons for which the Applicant was dismissed ('the Historical and Irrelevant Allegations').

[20] In dismissing the Applicant, the decision maker, Ms McDermott did not rely on any of the Historical and Irrelevant Allegations. The Applicant submits many of the

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[4] *Gold Coast District Health Service v Walker* (2001) 168 QGIG 186, 259 (Hall P).
[5] [2017] QIRC 041, [91].
[6] Applicant's submissions dated 18 September 2020, [162].
[7] [1993] 144 QGIG 914, 916.

allegations are extremely old and irrelevant to any issue touching on the question of reinstatement.[8]

[21] In response, the Respondent provided the names of proposed witnesses no longer to be called to give evidence. Many of the paragraphs of one of those affidavits related to Historical and Irrelevant Allegations. Further, the Respondent indicated it no longer relied upon certain paragraphs of the affidavits of Ms Juffs and Mr Henderson.

[22] The Respondent submitted the Commission is not required to limit itself to the information before the decision maker when considering whether a dismissal is harsh, unjust or unreasonable. It may consider past performance, other incidents relevant to whether termination of employment is harsh, unjust or unreasonable and past discussions with management about the need for an employee to improve his or her performance.[9]

The allegations

[23] The Applicant was alleged in **Allegation 1** to have been derelict in the performance of his duties between 18 January 2016 and 25 February 2016 in that he was asleep on ten occasions. The Respondent submits this very concerning behaviour occurred repeatedly over a period of one month. It was not an isolated occurrence.[10]

[24] In relation to **Allegation 1(a)** the Applicant denies he fell asleep at any time during his shift with Mr Harries, CCO at WCC, on 19 January 2016 whilst seated at the officers' station desk inside N3 Unit. The N3 Unit houses approximately 50 prisoners. The Applicant states this incident has not been particularised as to time and this lack of particularity has disadvantaged him in responding to the allegation.

[25] The role of the Applicant on 19 January 2016 was to act as the Alpha officer which required using a computer. He conceded that this involved movement, including typing, using a mouse, and that even when using the computer, the officer ought to be looking up, scanning what is going on around them. The Respondent submits that none of the actions Mr Ball accepted he should have been doing can be reconciled with what CCO Harries saw. Further, if the Applicant was nodding off, self-evidently, he would not be as well placed as CCO Harries to give evidence as to what he observed.[11]

[26] The Applicant agreed during cross-examination that both officers need to be paying attention to what is going on while on shift, and it was possible, that should one officer not be alert to what is going on around them, the remaining officer would be exposed to danger of assault.[12] However, in his response to the second Show Cause Notice, the

[8] Applicant's submissions dated 12 June 2020, [9], [14].
[9] Respondent's submissions dated 15 June 2020, [11].
[10] Respondent's submissions dated 17 September 2020, [58].
[11] Respondent's submissions dated 17 September 2020, [68]-[70].
[12] TR1-16, LL23-31.

Applicant submitted that the allegations against him, including the allegations that he was asleep in the N3 Unit were 'not of a serious nature'.[13]

[27] CCO Harries in evidence said he saw some prisoners sitting in the common room laughing and that when he turned to look at the Applicant, he observed that, 'Mr Ball was sitting at the computer in the officers' station, which faces towards the door to the exercise yard. He looked to be asleep because, from where I was sitting, I could see the left side of Mr Ball's face and could see Mr Ball's left eye was closed. I was sitting at the desk which faces the common area of the unit and is around a metre away from Mr Ball'.[14]

[28] During cross-examination and in his statement to Mr Verrall, the ESU Investigator, at paragraph 86, CCO Harries said, '[a]nd I glanced out to see CCO Ball with his head resting on his hands, elbow resting on the desk and he appeared to be asleep, eyes appeared closed, you know, almost looked like he was nodding'. CCO Harries agreed with what he said in his Affidavit, 'that he was doing the nodding dog' and while it is slightly different wording, the context is the same. CCO Harries said the 'nodding dog' was an expression he uses for the repeated motion of a person nodding their head down as they start to fall asleep and then raising their head as they try to resist sleep.[15]

[29] There was lengthy examination regarding whether CCO Harries' evidence was that the Applicant's head was only jerking upwards as he 'nodded' or whether it moved up and down. In cross-examination, it was suggested to CCO Harries that, 'if Mr Ball was conducting a scan of the exercise unit he might also bob his head up from time to time?'. He responded by saying, 'bobbing your head up to look around a unit and having a nodding dog effect from falling asleep are two completely different movements in my opinion'.[16] CCO Harries explained in re-examination that raising your head to scan the unit was a smooth movement and doing the 'nodding dog' was a jerky movement.[17]

[30] The Respondent submitted CCO Harries' evidence demonstrates he was quite adamant that there was a nodding movement going on, as opposed to not being able to say if the Applicant's head moved up or down.[18]

[31] CCO Harries in evidence said that it appeared to him that the Applicant was asleep at the desk of the officers' station on two occasions on 19 January 2016 and that by doing so he considered that the Applicant had put his own life in danger. CCO Harries repeatedly denied he was overstating his fear and in re-examination explained:

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[13] Exhibit 5, Affidavit Kerrith McDermott affirmed 13 June 2017, Attachment 6.
[14] Exhibit 10, Affidavit Timothy Harries affirmed 14 June 2017, [20]; TR4-22, LL22 - TR4-34, L10.
[15] TR4-28, L31-33; Exhibit 10, Affidavit Timothy Harries affirmed 14 June 2017, [21].
[16] TR4-35, LL42-45.
[17] TR4-55, LL11-14.
[18] TR6-76, LL7-10.

> So, as I'm sure you're all aware, prison's a very dangerous place. In the last 24 hours you've had three officers assaulted around the State. If you haven't got full faith in the officer you're with, that they're watching your back, whether you like them personally or not, it doesn't matter. But you need to have faith in, (a), they're watching your back and, (b), they're able to respond if something was happening.[19]

[32] CCO Harries agreed he spoke to Mr Crichton, CCO at WCC, in the movement control station in P-block about Mr Ball being asleep on duty before he himself made a written complaint to Ms Juffs at 9.37 am on 10 February 2016[20]. CCO Crichton sent his complaint to her some minutes after CCO Harries at 9.52 am. CCO Harries said he was motivated to make a written complaint against the Applicant, 'after hearing other officers had experienced similar behaviour, I think it was important to report Mr Ball … and also incidents of falling asleep in the unit'.[21]

[33] The Applicant submitted that all CCO Harries can say is that he saw the Applicant's left eye appear to be closed and this is consistent with the Applicant being awake and merely looking down. He could have been engaged in a work task or taking a pause and either way there is no credible evidence the Applicant was asleep.[22]

[34] The Applicant submits that CCO Crichton's complaints, that the Applicant put him at risk, are exaggerated and simply not to be believed as the length of time an officer would be left alone while their fellow officer was in the kitchen making a cup of coffee or went to the toilet is far greater than the length of time CCO Harries says he observed the Applicant with his left eye closed.[23]

[35] The second occasion, part of **Allegation 1(a)**, occurred around 40 minutes after the initial incident on 19 January 2016 when CCO Harries again observed the Applicant to be asleep.[24] The Applicant denies this allegation.

[36] In evidence, CCO Harries said he again noticed prisoners looking in the direction of the officers station laughing and he assumed they were laughing at the Applicant, even though in cross-examination he agreed he did not know what they were laughing at.[25] He raised the lid of his desk and let it drop as he did on the first occasion whereupon it made a noise and in the ESU Interview, CCO Harries described the Applicant as having, '…the reaction of somebody who has been woken up … not a massive startled jump, but he had the sort of little twitch…' in response to the noise.[26]

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[19] TR4-54, LL15-20.
[20] Exhibit 10, Affidavit Timothy Harries affirmed 14 June 2017, TH02.
[21] TR4-52, LL27-31; Exhibit 10, Affidavit Timothy Harries affirmed 14 June 2017, [35].
[22] Applicant's submissions dated 18 September 2020, [28]-[29].
[23] Applicant's submissions dated 18 September 2020, [30].
[24] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, Attachment 6, ESU Interview T Harries, [92].
[25] Exhibit 10 - Affidavit of Timothy Harries affirmed 14 June 2017, [23]; TR4-40, LL36-45.
[26] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, Attachment 6, ESU Interview T Harries, [412], [414].

[37] In his affidavit CCO Harries stated that '[a]t this stage, I started to think that I was not safe in the unit with Mr Ball'.[27]

[38] During cross-examination, CCO Harries agreed that the opinion he had formed that the Applicant had been asleep earlier in the day also caused him to think the Applicant was asleep on this second occasion.[28] CCO Harries refused to concede the Applicant simply raised his head to scan the unit as he had made a 'slight jumping movement' when he heard the noise of the desk lid dropping.[29]

[39] The Applicant submitted that Ms McDermott refused to accept that if the Applicant was sitting in a manner which had him leaning into the alcove of the Alpha desk, then prisoners sitting at tables in the common room could not have seen his face. Ms McDermott said it was possible that other prisoners who were standing and moving about the common room could have seen him.

[40] It was the evidence of Ms McDermott that it was possible CCO Harries had been mistaken about seeing the Applicant's left eye closed and that perhaps he could have been merely looking down at the desk. However, she said that CCO Harries' belief the Applicant was asleep together with the other evidence about the prisoners' behaviour, led her to believe that it was more than a 'positional' issue. She refused to accept any possibility that the prisoners did not see the Applicant or that they had not been laughing at the Applicant.[30]

[41] Simply put, the allegation against the Applicant is that he was asleep whilst on duty on 19 January 2016. The relevance of the prisoners laughing is that it caused CCO Harries to direct his attention towards the Applicant. On doing so, CCO Harries again observed Mr Ball asleep.[31]

[42] In my view, there was a clear evidentiary basis upon which Ms McDermott could be reasonably satisfied that the Applicant was guilty of misconduct, that is inappropriate or improper conduct in an official capacity within the meaning of s 187(4)(a) of the PS Act.

[43] In relation to **Allegation 1(b)** the Applicant denies being asleep at any time on 29 January 2016 during the officers' afternoon meal break and provided evidence in response to this allegation in his First Affidavit.[32] He also denied he was giving the prisoners the finger, but says that if he was doing a hand signal it was probably a 'B'

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[27] Exhibit 10 - Affidavit of Timothy Harries affirmed 14 June 2017, [23].
[28] TR4-42, LL1-4.
[29] Exhibit 10 - Affidavit of Timothy Harries affirmed 14 June 2017, [23].
[30] TR2-95, LL3-18; TR2-96, LL10-14, 19-41; TR2-97, LL16-18.
[31] TR6-64, LL20-24.
[32] Exhibit 1 - Affidavit of Frederick Ball filed 19 May 2017, [288]-[310]; Annexures RB2, RB3.

which he uses to warn prisoners that he will breach them if they continue their behaviour.[33]

[44] CCO Crichton provided evidence that he was rostered to work with the Applicant in N3 Unit, the Applicant as the Alpha officer and himself as the Beta officer. On his return from his meal break while he was talking to Mr Beaumont, CCO at WCC, and Mr Bracher, CCO at WCC, in front of the N4 exercise yard, he saw prisoners banging on the N3 exercise yard window, laugh and then run away. He observed the Applicant sitting in his chair against the Movement Control Station wall with his legs stretched out and crossed, arms folded, and head dipped forwards. The Applicant was wearing glasses and he could not see his eyes. He 'appeared' to be asleep. This observation was based on the Applicant's posture and body language.[34]

[45] In evidence, CCO Beaumont observed, 'seeing Mr Ball sitting in the Tardis facing in the direction of the N3 Unit. It appeared he was asleep'. CCO Beaumont continued, '[w]hen the prisoners banged on the window, I recall seeing Mr Ball startle as if he had just woken. He would then go back to his original position and appear to fall back asleep'.[35] During cross-examination CCO Beaumont said he could not see Mr Ball's eyes, but it was his opinion Mr Ball was asleep.[36]

[46] CCO Crichton agreed officers were allowed to sit down while carrying out their observational duties around the Tardis. In his interview with the ESU, CCO Crichton said he observed an exchange between the Applicant and prisoners whereby, 'when they would wake him up, he'd sort of like raise his right arm a bit from his folded arms and give them the finger, then put it back, and his head would dip back down again'.[37] In his Affidavit, CCO Crichton said, 'as the prisoners banged on the window, Mr Ball would wake up, give them the finger and then the prisoners would run away from the window. When the prisoners ran away, and the banging stopped, Mr Ball would then go back to sleep'.[38]

[47] CCO Beaumont said that during the afternoon shift on 29 January 2016, he was sitting with CCO Bracher in the Tardis observing the N4 exercise yard. He saw prisoners sitting on the bench seat in front of the window of the N3 exercise yard, laughing and banging on the window when he observed the Applicant who appeared to be asleep. During cross-examination CCO Beaumont said that CCO Crichton approached the N4 officers and said, '[h]ey, you guys gotta check this out'. CCO Beaumont and CCO

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[33] Exhibit 1 - Affidavit of Frederick Ball filed 19 May 2017, [297].
[34] Exhibit 8 - Affidavit of Stuart Crichton filed 14 June 2017, [11], [43], [44]; Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, Attachment 6, ESU Interview Stuart Crichton, [733]; TR3-19, LL3-20; TR3-29, LL20-22; TR3-31, LL24-25.
[35] Exhibit 14 - Affidavit of Jason Beaumont affirmed 14 June 2017, [21], [22].
[36] TR5-29, LL11-12; 14-16.
[37] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, Attachment 6, ESU Interview Stuart Crichton, [735].
[38] Exhibit 8 - Affidavit of Stuart Crichton filed 16 June 2017, [45].

Bracher immediately wheeled around and had a look. CCO Beaumont said the prisoners were, 'sort of tapping on it and looking away, and that's when I had sort of seen him startle and yeah'.[39]

[48] In response to a question from the Bench as to whether CCO Crichton actually said he was asleep, CCO Beaumont said, '… I don't believe he said the word "asleep". He said, "[y]ou guys got to come and have a look at this". So, we wheeled around and then we witnessed what we witnessed'.[40]

[49] The Respondent submitted the Applicant's suggestion of conflicting evidence in respect of CCO Beaumont's affidavit where he referred to seeing prisoners sitting on the bench seat, causing him to look to where the N3 officers were sitting, is totally consistent with the evidence in terms of what he saw on both occasions. He saw the prisoners banging on the window and then saw the Applicant, who appeared to be asleep.[41]

[50] The Applicant attempted to suggest to witnesses that, given the hexagonal shape of the Tardis area, officers observing N4 could not see the officer who was supposed to be observing N3. The Respondent rejected this assertion stating, firstly, the officers called by the Respondent gave evidence as to what they saw; secondly, officers are not static and move around the area; thirdly, the photographs[42] make it tolerably clear that the area is wide enough that one area can be seen from part of the other; and fourthly, the Applicant conceded they can be seen if they move. However, the Applicant finally stated, '[w]ell if I can't see them, they can't see me'.[43]

[51] In evidence, Ms McDermott agreed that when standing in front of N4 the officers could not have seen the Applicant seated in front of N3 without moving. She had no knowledge of where they had moved but she imagined they moved to somewhere they could see the Applicant otherwise they would not have made the allegation.[44]

[52] The Respondent submits the evidence of CCO Beaumont and CCO Crichton should be accepted and the Commission should find that the Applicant was asleep as alleged on 29 January 2016. I agree. As already submitted, if the Applicant was asleep, the officers who observed him are in a better position to observe what occurred than the Applicant himself.[45]

[53] In **Allegation 1(c)** the Applicant was alleged to have been asleep at the Bravo desk in the officers' station on 2 February 2016 in the N3 Unit. This was the next sleeping allegation by CCO Crichton and the next time he worked with the Applicant. CCO

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[39] Exhibit 14 - Affidavit of Jason Beaumont affirmed 14 June 2017, [18]-[22]; TR5-31, LL23-45.
[40] TR5-33, LL8-22.
[41] TR6-77, LL18-36.
[42] Exhibit 1 - Affidavit of Frederick Ball filed 19 May 2017, Annexure RB3.
[43] TR1-45, L9-TR1-47, L41.
[44] TR2-99, LL12-16, LL23-40.
[45] Respondent's submissions dated 17 September 2020, [95].

Crichton confirmed that he had noted in his logbook on 2 February 2016, 'Cougar asleep - officer station – wtf'.[46]

[54] CCO Crichton gave evidence that he saw Prisoner Georgetown standing in front of the Applicant at the officer's desk and laughing. The view he had of the Applicant was from behind and he did not see the Applicant's face however observed, 'he had his pen in hand as if he's been writing in the logbook and nodded off' and was not moving or reacting to Prisoner Georgetown. The Applicant's head was in a 'little dip position'.[47]

[55] The Respondent submits that even though CCO Crichton's view of the Applicant was from behind, the whole of CCO Crichton's evidence provides an explanation of not just that he saw him from behind, but of the context of what he saw.[48]

[56] In his Affidavit, CCO Crichton said 'I didn't see Mr Ball's eyes but I could see that he had a pen in his hand; his head was slumped downwards towards the logbook. It looked like he was mid-way through writing an entry in the logbook when he had fallen asleep'.[49]

[57] In cross-examination, CCO Crichton said the Applicant's head was a 'little dipped'.[50] He believed the Applicant was asleep and recalled:

> I knew it. You know the body language of your other officer that nothing was happening. He didn't even acknowledge that the prisoner had approached. There was nothing. There was no verbal to me to let me know that there's a prisoner right here at our desk. There was nothing. It was just by luck I'd caught it.[51]

[58] Ms McDermott in evidence said that within a 25 second period an officer should respond, 'in that there should have been some presentation of a different posture, something to acknowledge that there's a prisoner there. If in that 25 seconds there had been some difference in the behaviour of Mr Ball, then I would suggest no, he wasn't asleep but there wasn't'.[52]

[59] The Applicant in his evidence in chief said he had 'no recollection of keeping Prisoner Georgetown waiting', but if he did that would not have been an unusual occurrence or an unreasonable one.[53]

[60] The Applicant accepted that the Bravo role at the officers' desk involved prisoners approaching to collect and hand in forms, scanning the area, acknowledging prisoners

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[46] TR3-41, LL33-44.
[47] Exhibit 5, Affidavit Kerrith McDermott affirmed 13 June 2017, Attachment 6, ESU Interview Stuart Crichton, [789],[795], [801], [821].
[48] TR6-77, LL38-44.
[49] Exhibit 8, Affidavit Stuart Crichton filed 16 June 2017, [57].
[50] TR3-38, LL33.
[51] TR3-39, LL17-22.
[52] TR2-100, LL16-18; TR 2-100, LL32-33.
[53] Exhibit 1 - Affidavit of Frederick Ball filed 19 May 2017, [308]-[310].

who approach the desk, writing in the log book, picking up, turning over forms, shuffling through paperwork and associated hand movement.[54] The Respondent submits all of this is inconsistent with what CCO Crichton observed of the Applicant.

[61] In cross-examination, the following exchange occurred between Counsel for the Applicant and CCO Crichton:

MS MOODY:	I suggest to you that your allegation is in substance that you saw Prisoner Georgetown - observed him to be silently laughing by the looks of it. Correct? You say that he was laughing without noise?
CCO CRICHTON:	I think that's what I said roughly.
MS MOODY:	And that you then looked at Mr Ball, and on your evidence, you could see him from behind; is that correct?
CCO CRICHTON:	Yes.
MS MOODY:	And you didn't see his face?
CCO CRICHTON:	No, I was behind.
MS MOODY:	Correct. And you then said to Mr Ball, words to the effect that he should help you take Prisoner Georgetown to the laundry?
CCO CRICHTON:	I'm not sure if that is exactly what I said, but what it was to the effect of "come on, let's go do your laundry".
MS MOODY:	Yes, well, words to that effect, of course. And it's the case, isn't it, that Mr Ball then got up?
CCO CRICHTON:	He reanimated himself, yes.
MS MOODY:	He got up?
CCO CRICHTON:	He woke up, and then got up.
MS MOODY:	He got up. You said let's go do laundry, or words to that effect, and Mr Ball then got up?
CCO CRICHTON:	There's a difference when you say to someone, let's go do laundry and they swivel in their chair and they're off. There's a difference then when that pregnant pause of waiting as this person suddenly wakes up from their sleep, and then gets up to come do the laundry.
MS MOODY:	You'd agree with me, wouldn't you, that you asked Mr Ball a question and he did the very thing that you'd asked him to do?
CCO CRICHTON:	Eventually.[55]

[62] I accept the evidence of CCO Crichton that he observed the Applicant asleep whilst on duty at the Bravo desk at the officers' station on 2 February 2016.

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[54] TR1-23, L32 - TR1-24, L37.
[55] TR3-37, LL1-27.

[63] In relation to **Allegation 1(d)** it is alleged the Applicant was asleep on six occasions on 24 February 2016 whilst seated at the officers' desk and rostered as the P Movement Control Officer. The Applicant denies being asleep.[56]

[64] The movement control station in P Block controls the airlocks and movement in and out of the units in P Block.[57] It also controls the front door to the block.[58] The Movement Control Officer is also responsible for monitoring, via multiple monitors, the cameras in P Block, and the detention unit. The P Block monitor vision can be changed by the officer.[59] P Block houses prisoners with special needs.[60] The Movement Control Officer is responsible for providing a high level of visual security for staff and prisoners by looking at and checking the monitors, by checking and looking at the doors and checking and looking at the monitor in front of them to control the doors.[61] It is imperative to keep prisoners moving through P Block as smoothly as possible.[62] Officers need to be let out of an airlock into the Tardis by the Movement Control Officer.[63] It is imperative that the Movement Control Officer maximises his or her opportunities to be observing and seeing who is coming to what door etc. to get them through as quickly as possible.[64]

[65] The Respondent submits Mr Gray, CCO at WCC, said in his evidence in chief that on 24 February 2016 he was rostered as the P Movement Support Officer and Mr Ball was the P Movement Control Officer. CCO Gray agreed that the Movement Support Officer was there because the Movement Control Officer might miss a call.[65]

[66] Mr Ball's role on the day involved 'the operation of the air locks and controlling review of the CCTV footage generated by the four CCTV cameras in each unit within P Block'.[66] CCO Gray accepted that the event took place after he had heard rumours about other officers making complaints about Mr Ball falling asleep.[67]

[67] The Applicant submits that CCO Gray in his initial complaint, ESU record of interview and affidavit stated he did not know if the Applicant was asleep or whether he simply had his eyes closed.[68] During cross-examination, CCO Gray agreed that his complaint

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[56] Exhibit 1, Affidavit Frederick Ball filed 19 May 2017, [311]-[318], Annexures RB2 and RB3.
[57] TR1-56, LL28-44.
[58] TR1-57, LL1-4.
[59] TR1-57, L9 - TR1-58, L30.
[60] TR1-59, L27.
[61] TR1-61, LL9-15.
[62] TR1-65, LL6-7.
[63] TR1-65, L28-30.
[64] TR1-69, LL38-40.
[65] TR3-79, LL34-37.
[66] Exhibit 9 - Affidavit of Mitchell Gray filed 14 June 2017, [10], [14].
[67] TR3-72, LL30-43.
[68] Applicant's submissions dated 18 September 2020, [63](a).

was that the Applicant was not paying attention, not that he had been asleep, and that he had no idea if the Applicant had been asleep.[69] He said:

> I saw Mr Ball sitting at his desk with both palms on his forehead, looking down at his desk. And it was clear that he was not writing or looking at the computer screen because of the way his head was positioned downwards and both hands were holding his head.[70]
>
> It was always a delayed response, and I asked several times some of - like, so I wouldn't just ask once and he'd respond. I'd have to ask the same thing multiple times.[71]

[68] The Applicant submitted it was the evidence of CCO Gray that on every occasion when he observed the Applicant to have his head in his hands, and CCO Gray asked the Applicant a question, or made a comment, the Applicant replied in a responsive manner.[72] However, in cross-examination CCO Gray said:

MS MOODY:	And you say, as I understand it, that on those occasions where you saw him with his head in his hands, you would speak to him?
CCO GRAY:	Yes, because I'd be calling outdoors.
MS MOODY:	Yes. And on those occasions that you would speak to him, Mr Ball - and, again, you say on some occasions there was a delay, but Mr Ball would respond?
CCO GRAY:	Not every time, no.[73]

[69] The Applicant says that CCO Gray, 'could not possibly have seen his face, much less his eyes'. CCO Gray said in response:

> When I was walking around the unit, I had a side-on view of Mr Ball's face and at times I could see his face was facing down towards the desk. There were some occasions where I saw Mr Ball's eyes were closed. I could not always tell if Mr Ball was asleep or just had his eyes closed. Even if Mr Ball was not asleep, he wasn't paying attention.[74]

[70] During cross-examination CCO Gray agreed he did not know what else Mr Ball was doing but he was certain he was not able to write in his logbook or pay attention to the monitors because his face was down and his head was in his hands.[75]

[71] In response to a proposition that his complaint regarding Mr Ball actually was that he took longer than he should have to respond, CCO Gray said:

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[69] TR3-43, LL30-35.
[70] TR3-75, LL4-7.
[71] TR3-76, LL31-32.
[72] Applicant's submissions dated 18 September 2020, [67].
[73] TR3-76, LL21-26.
[74] Exhibit 9 - Affidavit of Mitchell Gray filed 14 June 2017, [51](d).
[75] TR3-76, LL35-45; TR3-77, LL20-27.

> Yes, after a radio call from a unit, they're standing at the door, then I would prompt him again in case he missed the radio call, prompt him a second time, sometimes even a third time. That's not a normal occurrence, no.[76]

[72] CCO Gray went on to say, '[i]t was throughout the entire shift, yep'[77] and he could not think of any good reason at the time why Mr Ball might have kept someone at a gate, and that P Movement was the quietest control room in the centre.[78] When questioned why he wrote an email to Martin Kennedy, Supervisor at the time, that Mr Ball was purposefully leaving both prisoners and staff at doors and in airlocks, his evidence was that he said because he could not think of any other reason for Mr Ball to do so.[79]

[73] The Applicant alleged that CCO Gray, 'colluded with others' in this allegation. The Applicant said that CCO Gray had fabricated an allegation that he had unnecessarily delayed prisoners and staff waiting at doors. Also, that 'CCO Gray I submit does not make for a reliable witness and his evidence is tainted'.[80]

[74] The Respondent submits CCO Gray is a reliable witness and his evidence should be preferred to that of the Applicant. There is no reliable evidence to suggest that CCO Gray colluded with anyone, let alone fabricated his evidence.

[75] Correctional Supervisor Adele Juffs said that she, 'had found Mr Ball dozing off during his shift and [she] had told him to wake up' and that he 'would always deny that he was asleep and say that his eyes were open. However, if he had been awake, he would have seen or felt me standing in front of him'.[81] In cross-examination, Ms Juffs said that when she approached the Applicant '... he never looked up. Never moved.'.[82]

Allegation 1 - Consideration

[76] Ms McDermott, having considered the Applicant's responses and the evidence before her, concluded on the balance of probabilities that between 18 January 2016 and 25 February 2016 the Applicant was derelict in the performance of his duties. As a consequence, allegation 1 was substantiated and it was determined that pursuant to s 187(1)(b) of the *Public Service* Act *2008* (the PS Act) the Applicant was guilty of misconduct.

[77] For the purposes of s 187(1)(b) of the PS Act, *misconduct* is defined in s187(4) as:

> (a) inappropriate or improper conduct in an official capacity; or
> (b) inappropriate or improper conduct in a private capacity that reflects seriously and adversely on the public service.

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[76] TR3-78, LL33-36.
[77] TR3-79, LL25-26.
[78] TR3-79, LL2-8.
[79] TR3-80, L30 - TR3-81, L5.
[80] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, KM-07.
[81] Exhibit 11 - Affidavit of Adele Juffs affirmed 14 June 2017, [15].
[82] TD4-72, LL10-11.

[78] Section 187(4)(a) of the PS Act has application to the current proceedings. It is this formulation of 'misconduct' which must be borne in mind in determining whether or not the conduct alleged against the Applicant can be properly regarded as misconduct.

[79] Apart from the definition of misconduct in s 187(4), the PS Act does not provide guidance as to what is meant by 'inappropriate' or 'improper' conduct.

[80] In *Mathieu v Higgins & Anor,*[83] Daubney J was called upon to determine whether the conduct of a Paramedic in the performance of his duties constituted misconduct as defined in s 10(a) of the Queensland Ambulance Service ('QAS') Policy. The term 'misconduct' is defined as 'disgraceful or improper conduct in an official capacity'.[84]

[81] In that case, the Applicant was, at the time of the conduct to which the decision related, employed as an Acute Care Paramedic by the QAS. The Applicant and a student paramedic attended at the residential address where a violent and potentially suicidal psychiatric patient resided. It was decided that the patient, who had reported having trouble breathing, should be moved to the Gold Coast Hospital. While the ambulance officers were walking him from his bedroom towards the ambulance, he collapsed. Subsequently, the patient was placed on a stretcher and conveyed to the Gold Coast Hospital where he died soon after. An autopsy later performed on the patient reported that the cause of his death was ischaemic heart disease due to coronary atherosclerosis. For the bulk of the attendance at the patient's residence, and the journey from the residence to the hospital, the student paramedic served as the patient's primary caregiver. The Department of Emergency Services commissioned an investigation report which ultimately concluded that the Applicant had failed to demonstrate an appropriate standard of care in treating the patient but that there was not sufficient evidence available to sustain a conclusion that the Applicant's conduct contributed to his death. The Applicant was issued with a 'notice to show cause why disciplinary action should not be taken against you in accordance with the Queensland Ambulance Service (QAS) Discipline Policy'.[85]

[82] After the disciplinary process, the Applicant's conduct was found to be conduct which amounted to misconduct.

[83] Daubney J, in considering s10(a) of the QAS Policy, was of the view that it is not appropriate to rigidly separate the definition into its component parts; the words 'disgraceful' and 'improper' are included in the definition as alternatives, but nonetheless should not be regarded as wholly independent. Rather, each term should be read as giving colour to the other.[86] His Honour held that:

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[83] [2008] QSC 209.
[84] Ibid [18].
[85] [2008] QSC 209, [7].
[86] Ibid [17].

> '[M]isconduct', as used in the policy, contemplates something more than mere incompetence, or a failure to attain the established standards of conduct. As the policy stands, 'misconduct', to adapt the words of Kirby P (as his Honour then was), requires a deliberate departure from accepted standards, serious negligence to the point of indifference, or an abuse of the privilege and confidence enjoyed by ambulance officers.[87]

[84] Daubney J cited, with approval, the reasoning of Kirby P (as his Honour then was) in *Pillai v Messiter* (No.2)[88] which addressed the meaning of the expression, 'misconduct in a professional respect' in the *Medical Practitioners Act 1938* (NSW). Kirby P said:

> But the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner.[89]

[85] *Coleman v State of Queensland (Department of Education)*[90] was a case involving ten allegations against a Principal employed by the State of Queensland through the Department of Education arising out of allegations that he had behaved in an inappropriate and unprofessional manner towards two students. The Department determined that the ten allegations were substantiated and that, by his conduct, Mr Coleman was guilty of misconduct within the meaning of s 187(1)(b) and s 187(4)(a) and (b) of the PS Act.

[86] Merrell DP held that:

> In my view, the definition of 'misconduct' contained in s 187(4)(a) contemplates a deliberate departure from accepted standards, serious negligence to the point of indifference, or an abuse of the privilege and confidence enjoyed by a public service employee.[91]

[87] Mr Ball's substantiated conduct in respect of Allegations 1 meets the test of misconduct within the meaning of s 187(1)(b) of the PS Act. For these reasons, his dismissal was substantively fair.

[88] **Allegation 2** states that on 29 January 2016 the Applicant, without authority, inappropriately secured prisoners in their cells.

[89] In evidence CCO Crichton said there are three prescribed access times, at 9.00 am, 12.45 pm and 3.00 pm when prisoners generally stand by their cell door while they wait for the unit officers to come and unlock their cell so that prisoners can quickly get their belongings or change clothes.[92]

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[87] Ibid [26].
[88] (1989) 16 NSWLR 197.
[89] (1989) 16 NSWLR 197, 200.
[90] [2020] QIRC 032.
[91] Ibid [64].
[92] Exhibit 8 - Affidavit of Stuart Crichton filed 16 June 2017, [22].

[90] He said, during the 12.45pm cell access on 29 January 2016 the Applicant seemed to take pleasure in slamming cell doors behind prisoners who were given access to their cells. There were three or four prisoners whom he locked in their cells for no apparent reason, in that he did not then go back and unlock the cell to let those prisoners out.[93] In his lengthy response to Ms McDermott[94] the Applicant does not say why he secured the prisoners in their cells on these particular occasions.

[91] The Respondent submits for this reason, the Applicant's explanation about time-outs is irrelevant. Further, rather than address the allegation, he contends that the allegation is 'contrived' and that 'it would seem that CCO Crichton has commenced a personal vendetta against me for some reason'.[95]

[92] The Applicant was adamant that it was within his discretion to give the prisoner the choice to be either minor breached or to have a time out.[96] He denied Mr Henderson directed him to not lock a prisoner in their cell unless it was for de-escalation or at the prisoner's request,[97] and he denied that Ms Juffs had told him he could not put a prisoner in their cell without proper cause.[98]

[93] The Applicant accepted in cross-examination that an officer could not put a prisoner in their cell without proper cause.[99]

[94] The Respondent submitted while it is not possible to point to a written procedure or document that was given to the Applicant, it would seem on the evidence, he was certainly apprised of what the expectations of his supervisor were in respect of securing prisoners in cells.[100]

[95] Prisoner Hounslow was one of the prisoners seeking access to his cell at the 12.45 pm muster. After Prisoner Hounslow entered his cell, the Applicant slammed the door shut behind him and conducted the rest of the access without letting Prisoner Hounslow out. Prisoner Hounslow was not released until the 2:30 muster. When CCO Crichton asked the Applicant if he was going to minor breach Prisoner Hounslow, the Applicant said no.[101]

[96] The Applicant's evidence is that Prisoner Hounslow indicated he wanted to stay in his cell to get changed from industries.[102] This would be a brief task and hardly a reason to slam the door behind him and lock him in his cell until muster. There was no reason to lock prisoners in their cells on that particular day.

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[93] Exhibit 8 - Affidavit of Stuart Crichton filed 16 June 2017, [23].
[94] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, KM-5.
[95] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, KM-5.
[96] TR1-73, LL4-15.
[97] TR1-74, LL41-42.
[98] TR1-75, LL5-6.
[99] TR1-74, LL24-29.
[100] TR6-72, LL16-19; Exhibit 13 - Statement of David Henderson affirmed 15 June 2017, [34].
[101] Exhibit 8 - Affidavit of Stuart Crichton filed 16 June 2017, [24]-[27].
[102] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, KM-5.

[97] The Applicant denies the allegations of improper conduct[103] and shutting prisoners in their cells during cell access for no reason when he was on duty with CCO Crichton and that the evidence of CCO Crichton was a fabrication.[104]

[98] The Applicant submits that no evidence was given about any information, instruction, training, supervision, policy, or procedure given by the Respondent in relation to the issue of minor breaching, time outs, and conducting cell access and musters. The submission ignores the instructions given by Mr Henderson and Ms Juffs to the Applicant.[105]

[99] The Applicant submits the practice of time outs was permitted at WCC and also that it was not unusual for an officer to close the cell door behind a prisoner during access if the prisoner took too long, or was known to be in his cell for some time, and further that in such a case it was common practice to leave the prisoner in their cell until the next muster. The practice of opening one cell door at a time during cell access was permitted.

[100] The Respondent submits this was an example of the Applicant acting indiscriminately with the consequent risk of adverse prisoner reaction. This was confirmed by the statement to CCO Crichton by Prisoner Bronzin.[106]

[101] CCO Crichton told the Commission that he was approached by Prisoner Bronzin, one of the 'heavies' of the unit who said words to the effect of, 'You need to settle him down, chief, he's getting way too full on'.[107] CCO Crichton said that he knew what the comment meant. In his oral evidence he said:

> I already knew the dynamics of the unit, I knew the dynamics of the prisoner. It was a healthy warning given by one of the heavies of the unit who never speaks to officers. very, very, very rarely, including to say good morning in the morning when we unlock his cell. So I knew what he was getting at and I told him.[108]

[102] CCO Crichton agreed with counsel for the Applicant that Prisoner Bronzin was warning that there was a problem 'with the good order of the unit'; he said, 'we were going to get flogged'.[109]

[103] The evidence of CCO Crichton was that he chose not to tell Mr Ball of the warning given by Prisoner Bronzin. He did so because he believed that Mr Ball was trying to

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[103] Exhibit 1 - Affidavit of Frederick Ball filed 19 May 2017, [319]-[354].
[104] TR1-79, LL4-34.
[105] Exhibit 11 - Affidavit of Adele Juffs affirmed 14 June 2017, [15]; Exhibit 13 - Statement of David Henderson affirmed 15 June 2017, [34].
[106] Exhibit 8 - Affidavit of Stuart Crichton filed 16 June 2017, [33]-[35].
[107] Exhibit 8 - Affidavit of Stuart Crichton filed 16 June 2017, [33]-[35].
[108] TR3-49, L47 - TR3-50, L4.
[109] TR3-49, LL39-41.

incite the unit. He said, 'By this stage of the afternoon, the day had already gone so badly, the last thing I needed to do was - as he [the Applicant] had the keys, is to further incite the rest of the unit to actually carry out any sort of threat. I was trying to keep a lid on it as much as we could on the day'.[110]

[104] I accept the evidence of CCO Crichton that Prisoner Hounslow entered his cell for a short period in order to change out of his industries clothes. The Applicant slammed the door after Prisoner Hounslow entered the cell and was not released until the 2:30 pm muster. The evidence does not suggest that Prisoner Hounslow was elevated or required time-out. There was no basis to confine Prisoner Hounslow in his cell until muster unless he was to be minor breached. The Applicant did not breach him.

[105] Mr Ball's substantiated conduct in respect of Allegations Two meets the test of misconduct within the meaning of s 187(1)(b) of the PS Act. For these reasons, his dismissal was substantively fair.

[106] **Allegation 3(a)** states that on 19 January 2016 in the N3 Unit, the Applicant communicated and behaved in an inappropriate manner towards Prisoner Tati.

[107] CCO Harries in cross-examination agreed that on 19 January 2016, 'Mr Ball made a comment on that morning to Mr Tati . . . words to the effect of, "[t]his is Adolf. He is our resident old man"'.[111] CCO Harries said, 'I don't know why he was unimpressed. But my interpretation of the events at the time was that it was because of the comment'.[112]

[108] Further, CCO Harries heard the Applicant say, about various prisoners, words to the effect, 'Oh he's pissing me off, I'm just going to lock him in his cell for the rest of the day. I've had enough of him'.[113]

[109] In cross-examination, CCO Harries conceded that the Applicant did not, in fact, lock up prisoners for no reason on that shift. His evidence was that he was concerned that Mr Ball was threatening to lock up prisoners for the rest of the day for no reason, and that he showed no indication he was going to go through the minor breach process before doing so.[114]

[110] However, after muster was complete on 19 January 2016 CCO Harries' evidence in chief was that the Applicant allowed two prisoners to return to their cells but denied access to a third prisoner for no apparent reason.[115] The problem with this was that it

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[110] TR3-50, LL24-30.
[111] Exhibit10 - Affidavit of Timothy Harries affirmed 14 June 2017, [12]; TR4-9, LL35-37.
[112] TR4-10, LL5-41.
[113] Exhibit 10 - Affidavit of Timothy Harries affirmed 14 June 2017, [13].
[114] TR4-12, LL5-39.
[115] Exhibit 10 - Affidavit of Timothy Harries affirmed 14 June 2017, [14]-[16].

gave the impression prisoners were being treated inconsistently,[116] which can give rise to jealousy on the part of the other prisoners.[117] The Applicant denies saying the words attributed to him by CCO Harries and denies acting inconsistently.

[111] The Applicant denies this allegation[118] and submits that even if the Commission should find the words were spoken, the conduct was part of an accepted environment within WCC wherein swearing between officers and prisoners was tacitly and/or expressly permitted.[119] In response to a question about swearing being a part of the workplace culture at the WCC, CCO Harries stated, 'Yes. Unfortunately, it's passed'.[120]

[112] I do not accept the submission that the Applicant's conduct was part of an accepted environment within WCC wherein swearing between officers and prisoners was condoned. The evidence was to the contrary - that the conduct alleged against the Applicant was not condoned nor was it acceptable.

[113] **Allegation 3(b),** particular 13, states that on 29 January 2016 the Applicant communicated and behaved in an inappropriate manner towards Prisoner Tati.

[114] The substance of the allegation is that when the Applicant unlocked Prisoner Tati's cell, the Applicant said words to the effect 'oh, you're still here, you old bitch'. Further, throughout the day, the Applicant was observed making the following comments in response to prisoner requests for access to their cells: 'fuck off' and 'no, fuck off'. As particularised, the concern was that the Applicant's conduct had the potential to cause unrest amongst the prisoners and place the Applicant and fellow officers at risk.

[115] The Applicant submitted that:

> At best, the Commission should draw a conclusion that Mr Crichton is careless in his evidence. At worst, the Commission is entitled to find that Mr Crichton fabricated his initial evidence that the applicant called multiple prisoners an 'old bitch' or similar.[121]

[116] The Applicant provided his response to this allegation.[122] He admits he said the words to the effect of that alleged, however it was a consensual joking exchange with a prisoner (Tati) with whom he had built up a great deal of rapport over nearly a decade.[123]

[117] It was never put to CCO Crichton that his initial evidence was fabricated. What was put to CCO Crichton was the following:

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[116] TR1-88, L42 - TR1-89, L25.
[117] TR1-89, LL1-6.
[118] Exhibit 1 - Affidavit of Frederick Ball filed 19 May 2017, [355]-[370].
[119] Applicant's submissions dated 18 September 2020, [90].
[120] TR4-7, LL10-12.
[121] Applicant's submissions dated 18 September 2020, [102].
[122] Exhibit 1 - Affidavit of Frederick Ball filed 19 May 2017, [371]-[387].
[123] Applicant's submissions dated 18 September 2020, [95].

MS MOODY: And your evidence at paragraph 15 of your affidavit is that Mr Ball said words to the effect of, "What are you still doing here, you old bitch?"

CCO CRICHTON: Yes.

MS MOODY: And I suggest to you, that Mr Ball did not say those words in anger?

CCO CRICHTON: I don't think I've ever said they were said in anger.

MS MOODY: He said them in a normal conversational tone of voice; didn't he?

CCO CRICHTON: No.

MS MOODY: And I suggest to you that Prisoner Tati then replied by saying words to the effect of "fuck off"?

CCO CRICHTON: I can't recall if Prisoner Tati did say "fuck off".

MS MOODY: And he also said those words in a good-natured conversational manner?

CCO CRICHTON: I don't Tati responded, did he? No. I don't think Tati did respond. If I look back at my affidavit - did he respond?

MS MOODY: Mr Crichton, I'm not here to answer your questions?

CCO CRICHTON: Okay, well he didn't respond.

MS MOODY: Now, I suggest to you that Mr Ball had a longstanding relationship with Prisoner Tati, from his years of working at the prison?

CCO CRICHTON: No chance. No way.

MS MOODY: You don't know one way or the other, though do you?

CCO CRICHTON: Guaranteed not.[124]

[118] CCO Crichton in cross-examination said that he knew that the Applicant did not have any such relationship with Prisoner Tati.[125] He explained that the comment was extremely stupid and dangerous. In re-examination, he outlined why:

MR MURDOCH: Why did you regard what you say Mr Ball said to Mr Tati as being extremely stupid and dangerous?

CCO CRICHTON: Well, on unlock in a morning, you generally wouldn't deliver any sort of derogatory comment regardless of relationship with a prisoner. You don't know what their night has been like, you don't know if they've had a really bad phone call [indistinct] the night before where their wife or girlfriend said

[124] TR3-42, LL19-39.
[125] TR3-42, LL42-46; TR3-43, LL8-12.

> that's it, it's all over and he stewed on it all night and he's ready - and I've had prisoners come out swinging in the morning. I was assaulted myself. Opened up cell and he come out swinging and got me. So you try and be cautious by saying good morning or something relatively positive, but you don't really care about what their morning is, you gauge a response to the ones that will come out and say good morning, morning, morning, chief, or the ones who never talk to you like Bronzin would never say good morning at all, so you knew that was normal. But, suddenly, if you get the ones that are not responding that usually respond with anything, you know something is not right in the unit. So to open up a cell door and say anything derogatory is just very stupid. And it's dangerous because that prisoner only has the two of you to hit and that's it. And I thought that was going to be myself that day.[126]

[119] I accept that given the Applicant's response to this allegation, as well as his admissions to the ESU Investigator, Ms McDermott was correct to find this allegation substantiated.

[120] In **Allegation 3(b)**, particular 14, on 29 January 2016 in the N3 Unit, the Applicant used inappropriate language in response to prisoner requests for cell access throughout the day.

[121] In evidence, CCO Crichton said, 'I recall him telling prisoners to "fuck off" on a number of occasions throughout the shift, including in response to various requests from prisoners for access to their cells'.[127]

[122] The Applicant submits that in her Findings Letter, Ms McDermott acknowledged that CCO Crichton himself admits to using inappropriate language on occasion however, stated, '…this does not detract from the seriousness of your conduct in using inappropriate language towards prisoners'.[128]

[123] The Applicant denies this allegation.[129] The Applicant submits that should the Commission find he said the alleged words, then the Commission ought to find no relevant misconduct by the Applicant given the culture of swearing at WCC.[130]

[124] Whilst Ms McDermott agreed that there was a culture of swearing at WCC[131] she did not accept that it was the correct thing to do or that it was approved of.[132]

[125] With respect, the Applicant's submission appears to me to miss the mark. The issue being dealt with in the disciplinary process is not one purely of swearing in the workplace but rather one of context. The context in which the Applicant swore was such that it had the potential to cause unrest amongst the prisoners and place the

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[126] TR3-62, LL20-35.
[127] Exhibit 8 - Affidavit of Stuart Crichton filed 14 June 2017, [19].
[128] Applicant's submissions dated 18 September 2020, [107].
[129] Exhibit 1 - Affidavit of Frederick Ball filed 19 May 2017, [378]-[379].
[130] Applicant's submissions dated 18 September 2020, [111].
[131] TR2-105, LL20-21.
[132] TR2-106, LL41-43.

Applicant and fellow officers at risk. The evidence of CCO Crichton and the warning given by Prisoner Bronzin are illustrative of the potential danger that the Applicant's conduct posed for the safety and good order of the unit.

[126] **Allegation 3(b)**, particular 15, states that on 29 January 2016 at the 12.45 pm muster, the Applicant made prisoners wait 'excessive periods of time' whilst he key opened one cell at a time.

[127] The Applicant admits he opened cell doors one at a time during the 12.45 pm muster and this necessarily involves that some prisoners be kept waiting, but he denies that he unnecessarily delayed the process. The Applicant states the Respondent has not explained why they say it was wrong to open cell doors one at a time.[133]

[128] The Applicant submitted that in cross-examination Ms Juffs said, '[t]here is no written direction which requires that access is conducted as five cells at a time. If Mr Ball wants to open one cell at a time, he can open one cell at a time'.[134] The Applicant said that his custom and practice is to open one cell door at a time and that conducting cell access in this fashion clearly involves that some prisoners be kept waiting.[135]

[129] In cross-examination, Ms Juffs said that the manager's direction at the time was five cells would be opened at a time, however there being no written policy, opening one cell at a time could be done, but would be unadvisable.[136]

[130] In the affidavit of 20 April 2020, Ms Juffs deposes that opening one cell at a time during an access is incredibly time consuming and can be irritating for prisoners in the unit, particularly if there are a number of prisoners who require access to their cell.[137]

[131] I accept the evidence of CCO Crichton that it was the permitted practice at the time for five cells to be opened at a time, not just one only at a time.[138] He told the Commission that '...you would open cells 1 to 5 and when cell 2 and 3 shut their door you can do 6 and 7, but only five at a time open. As you went round the bottom [indistinct] everyone had to be locked on the bottom and you do the same at the top.'[139]

[132] The final **Allegation 3(c)** states that on 8 February 2016 the Applicant communicated and behaved in an inappropriate manner towards Prisoner Rough.

[133] In response to Ms McDermott on 31 August 2016, the Applicant stated he was tasked with the responsibility of escorting five prisoners, 'who were being secured in what is

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[133] Applicant's submissions dated 18 September 2020, [117].
[134] Exhibit 11 - Affidavit of Adele Juffs affirmed 14 June 2017, [32].
[135] Exhibit 1 - Affidavit of Frederick Ball filed 19 May 2017, [76], [79], [328].
[136] TR4-61, LL30-35.
[137] Exhibit 12 - Affidavit of Adele Juffs affirmed 20 April 2020, [37].
[138] TR3-53, LL1-2.
[139] TR3-53, LL10-12.

known as the gym in M Block following an apparent suicide'. He said that he was instructed that the prisoners were not to talk to each other. One prisoner, Prisoner Rough, was talking freely to the other prisoners. Mr Ball states he told him to cease talking several times, to no effect.[140] After a period of silence, Prisoner Rough started talking again.

[134] The Applicant admits he said, 'Finally exasperated I stated to him "Shut the fuck up and don't say anything to anybody"'.[141]

[135] The Applicant submits that other than his evidence there is no other evidence about this allegation, or any specific direction given to the Applicant prior to escorting Prisoner Rough.[142]

[136] During cross-examination, the Applicant denied losing control of the situation with Prisoner Rough.[143] He admits speaking the words as alleged however he denied acting inappropriately.[144]

[137] The Applicant admits the relevant conduct such as using particular language are trivial and do not either on their own or collectively justify the Applicant's summary dismissal for misconduct. Also, as to the use of allegedly inappropriate language, there was an entrenched culture of swearing and banter between officers and prisoners in the workplace at WCC which was actively tolerated and participated in by officers, managers and prisoners alike.[145]

[138] In response, the Respondent referred to the cross-examination of Mr Hay, CCO at WCC, called by the Applicant, as to swearing in the prison and the way in which prison officers ought to behave:

> MR MURDOCH: Now, you've also given some evidence in respect of swearing in the prison generally?
>
> CCO HAY: Mmm.
>
> MR MURDOCH: I've asked you about escalation and de-escalation. Can I suggest to you that the most effective way to try and deal with a prisoner is to be polite but firm to them?
>
> CCO HAY: Under most courses, yes, firm and polite, yeah.
>
> MR MURDOCH: Yes. And that if a prisoner's behaviour doesn't moderate, there are a range of options open to officers to try and moderate that behaviour, aren't there?

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[140] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, KM-5.
[141] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, KM-5.
[142] Applicant's submissions dated 18 September 2020, [129], [134].
[143] TR1-94, LL44-45.
[144] Applicant's submissions dated 18 September 2020, [135].
[145] Applicant's submissions dated 18 September 2020, [171]-[172].

CCO HAY: That's correct.

MR MURDOCH: Yes. The prisoner can be given a direction, can't they?

CCO HAY: They can be given a direction.

MR MURDOCH: They can be breached, can't they?

CCO HAY: They can be breached.

MR MURDOCH: Yes, and as you say you would do, in your circumstance at least, you can - you would put them in their cell for a little while to calm down?

CCO HAY: It depends what they're doing.

MR MURDOCH: So what I suggest to you is that there really is no need to be using swear words towards prisoners, is there?

CCO HAY: It is part of their communication.

MR MURDOCH: But it need not be part of the officers' communication?

CCO HAY: But unfortunately it is, because the officers are human. And the prisoners are human, and this is how people talk.

MR MURDOCH: And I suggest to that by using foul language to prisoners, that gives rise to a risk of the prisoner reacting negatively?

CCO HAY: No, I can't agree with that. I can't agree with that, because if you've got something going down and you come charging in, and you've got all these prisoners, and they will - they're all milling around.

MR MURDOCH: Yes?

CCO HAY: You need to get control really, really, really quickly.

…

CCO HAY: Yeah. And you need to get control really, really quickly. And the way to do - if you want them to get on a wall - and a lot of them and just stand there and try and provoke you, so you would tell them to get on the effing wall.

MR MURDOCH: Right. So that's an example of where there's some particular incident going on and you wanted to shut it down quickly?

CCO HAY: Yes.

MR MURDOCH: Because there's an imminent danger if you don’t?

CCO HAY: That's right.

MR MURDOCH: Yes. But you're not suggesting, though, that an officer can simply, absent a situation like that, tell prisoners to fuck off, for example, if they asked them for something?

CCO HAY: Well, if I heard an officer doing that, I would certainly have words with him. It happens but.

MR MURDOCH: But it shouldn't, should it?

CCO HAY: It shouldn't, no.

MR MURDOCH: No?

CCO HAY: I agree with you there. [146]

[139] CCO Hay accepted that swearing in the prison was not the appropriate way to behave or the appropriate way to speak to prisoners. He admits the prisoner can be given a direction, they can be breached, they can be told firmly and politely as to what to do. Swearing should be the last resort in situations of imminent danger or emergency, as opposed to being simply part of the vernacular.[147]

[140] Given the Applicant's admissions, Ms McDermott correctly substantiated this allegation. Ms McDermott agreed in cross-examination that it was not uncommon in heightened circumstances that an officer might say something like, 'Shut the fuck up' to a prisoner,[148] and that swearing was commonplace within Woodford. Nevertheless, her evidence was that, 'it can be part of a culture but that doesn't mean everything of a culture is given tacit approval by general managers etcetera'.[149]

[141] When it was put to the Applicant that using language of that nature to a prisoner has the potential to rile the prisoner up, Mr Ball disagreed, and gave evidence that he had simply, 'come down to their level, to the language they understand'.[150]

[142] The Applicant's evidence in respect of his own conduct contradicts his evidence about what behaviour is generally acceptable from an officer. He gave evidence that being aggressive, speaking in an angry tone of voice and saying words like, 'go away fuckwit, not interested' was not appropriate conduct for an officer. Further, he accepted that it was important for an officer not to engage in actions which might escalate a prisoner's behaviour.[151]

[143] The Respondent submits the Applicant communicated and behaved in a manner with Prisoner Rough that even on Mr Ball's own evidence was inappropriate. I agree.

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[146] TR2-65, L25 - TR2-66, L33.
[147] TR6-74, LL32-42.
[148] TR2-106, LL21-25.
[149] TR2-106, LL42-44.
[150] TR1-94, LL10-28.
[151] TR1-31, LL40-46; TR1-32, LL1-44.

[144] Of concern is the fact that the Applicant did not appear to appreciate or have an understanding of his obligations under the Code of Conduct or indeed the seriousness of the allegation against him. He attempted to justify his conduct by arguing that the only verbal communication one could have with a prisoner in that situation is to come down to their level.

[145] I accept that in respect of Allegation 3, the evidence is such that the Commission could be reasonably satisfied that pursuant to s 187(1)(f)(ii) of the PS Act the Applicant has contravened without reasonable excuse an approved code of conduct under the *Public Service Ethics Act 1994*, namely principle 1.5 of the Code of Conduct of the Queensland Public Service.

Matters to be considered in deciding whether the dismissal was harsh, unjust or unreasonable: IR Act 1999 s 77

[146] The phrase 'harsh, unjust or unreasonable' was considered by the High Court in *Byrne v Australian Airlines*[152] (*'Byrne'*) where McHugh and Gummow JJ wrote:

> In *Bostik (Aust) Pty Ltd v Gorgevski* (No 1)(174), a decision of the Full Federal Court, Sheppard and Heerey JJ said of the phrase 'harsh, unjust or unreasonable' as it appeared in the Manufacturing Grocers Award 1985:
>
> > These are ordinary non-technical words which are intended to apply to an infinite variety of situations where employment is terminated. We do not think any redefinition or paraphrase of the expression is desirable. We agree with the learned trial judge's view that a court must decide whether the decision of the employer to dismiss was, viewed objectively, harsh, unjust or unreasonable. Relevant to this are the circumstances which led to the decision to dismiss and also the effect of that decision on the employer. Any harsh effect on the individual employee is clearly relevant but of course not conclusive. Other matters have to be considered such as the gravity of the employee's misconduct.[153]

[147] In *Stewart v University of Melbourne*[154] Ross VP (as his Honour then was) considered s 170CG(3) of the *Workplace Relations Act 1996* (Cth) in which he followed the joint judgment of McHugh and Gummow JJ in *Byrne*. Ross VP wrote:

> … a termination of employment may be:
>
> - Harsh, because of its consequence for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct;
> - Unjust, because the employee was not guilty of misconduct on which the employer acted; and/or

[152] (1995) 185 CLR 410, 465-468.
[153] Ibid 467.
[154] [2000] AIRC 779.

- Unreasonable, because it was decided on inferences which would not reasonably have been drawn from the material before the employer.[155]

Whether Applicant notified of reason for dismissal

[148] Mr Ball was notified of the reasons for his termination by correspondence from Ms McDermott dated 19 January 2017.

Did the dismissal relate to operational requirements or the Applicant's conduct, capacity or performance?

[149] It is not in dispute between the parties that the dismissal did not relate to operational requirements of the Respondent but rather to the Applicant's conduct, capacity or performance.

[150] For the reasons advanced above, each of the allegations were found to be substantiated and met the criteria of s 187 of the PS Act.

[151] In respect of allegations 1 and 2, pursuant to s 187(1)(b) of the PS Act, the Applicant was guilty of misconduct, that is inappropriate or improper conduct in an official capacity within the meaning of s 187(4)(a) of the PS Act, as the allegations involved conduct that was at least serious negligence to the point of indifference.[156]

[152] Allegation 3 is a contravention of s 187(1)(f)(ii) of the PS Act because of a failure to treat prisoners with courtesy and respect was in breach of the approved Code of Conduct.

Had the Applicant been warned about the conduct, capacity or performance; or was he given an opportunity to respond to the allegation about the conduct, capacity or performance?

[153] The Applicant submits that in the termination letter Ms McDermott relied on the following previous disciplinary matters:

(a) a "formal warning" dated 24 February 2014 in relation to an alleged incident on 14 December 2014 (the First Warning);
(b) a "formal warning" dated 23 September 2015 in relation to the removal of clothing searches incident on 29 October 2014 (the Second Warning); and
(c) a "formal warning" dated 29 October 2015 in relation to the "riding on the back of the truck incident" in May 2015 (the Third Warning).[157]

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[155] Ibid [74].
[156] *Mathieu v Higgins* [2008] QSC 209, [26].
[157] Exhibit 5, Affidavit Kerrith McDermott affirmed 13 June 2017, KM-14, KM-15, KM-16.

[154] Ms McDermott agreed in cross-examination that the First[158] and Third[159] Warnings were not issued pursuant to the PS Act and that she ought not to have been relied on them.

[155] During cross-examination the Applicant responded as follows in relation to the incident referred to in the Second Warning:

> *Should substantiated allegations arise again concerning the removal-of-clothing searches, your continued employment with Queensland Corrective Services may be in jeopardy.*
>
> MR MURDOCH: Now, you knew from that statement that should there be further substantiated allegations in respect to a removal-of-clothing search, that your employment may be in jeopardy, didn't you?
>
> MR BALL: That's correct because, as I said, prior to doing the removal-of-clothing search, I was unaware of the procedures change. So, yes, I was at fault. I was negligent. I should have read the email.
>
> MR MURDOCH: And ---?
> MR BALL: That was my fault.[160]
>
> MR MURDOCH: And notwithstanding the fact that the final warning was in respect of substantiated allegations concerning the removal-of-clothing searches, you understood, I suggest, after receiving this letter that you had to focus going forward on performing your duties to the required standard, didn't you?
>
> MR BALL: No, I had to make sure that I kept up with the new policies and procedure changes.[161]

[156] The Applicant submits the Respondent erred in taking the Second Warning Letter into account because it is clearly expressed on its face to operate as a warning letter only in relation to a limited matter, i.e. removal of clothing searches.[162] Also, that Ms McDermott should not have taken into account the three warning letters because of their age particularly as he was dismissed in January 2017.[163]

[157] The Respondent submitted that the Applicant was put on notice by the three warning letters as to what the expectations were of his employer and what the consequences for him might be if his conduct and performance in the workplace didn't meet the required standard. I note there was an objection raised in relation to reliance upon two of those letters. However, the Applicant was cross-examined on the fact, which he accepted, that he really had to ensure within the workplace that he was behaving to the required

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[158] TR2-86, LL11-20.
[159] TR2-90, LL14-23.
[160] TR2-14, LL33-43.
[161] TR2-14, LL33-TR2-15, L2.
[162] Applicant's submissions dated 18 September 2020, [150].
[163] Applicant's submissions dated 18 September 2020, [158], [159].

standard and there would be adverse consequences for his employment if he failed to behave in the required standard, including termination.[164]

[158] Whilst the first and the third warning letters did not constitute a formal warning for the purposes of the PS Act and ought not to be relied upon, they nevertheless did put the Applicant on notice in respect of his conduct as the following exchange illustrates:

> MR MURDOCH: You accept that you were told by Ms McDermott to perform your duties in compliance with the code of conduct?
> MR BALL: Ms McDermott told me to do that, yes, but, as I say, I have never had training in the code of conduct.
>
> MR MURDOCH: Do we see - - -?
>
> MR BALL: So I wouldn't know what the code of conduct would say.
>
> MR MURDOCH: Do we see anywhere in your evidence any evidence of you asking anybody about the code of conduct and how you might be able to find out what it says?
>
> MR BALL: I – probably after this letter, I probably went to the computer and found it myself.
> MR MURDOCH: Okay. So that - we can accept, then, that after you received this letter in February 2014, you went and found it, had a look at it and understood what the expectations were?
>
> MR BALL: Yes.
>
> MR MURDOCH: Thank you. Now, you knew, didn't you, I suggest, as a result of receiving this letter in February 2014 that you had to comply with the code of conduct going forward?
>
> MR BALL: Yes.[165]

[159] The purpose of a warning was considered by Commissioner Bissett in *McCarron v Commercial Facilities Management Pty Ltd* where it was stated:

> The purpose of a warning about unsatisfactory performance must be to identify the performance that is of concern and must make it clear that a failure to heed the warning places the Applicant's employment at risk. Such a warning gives an employee an opportunity to improve in those areas identified as requiring improvement. An integral part of such a warning must be to clearly identify the areas of deficiency, the assistance or training that might be provided, the standards required and a reasonable timeframe within which the employee is required to meet such standards.[166]

[160] Whilst it is not necessary for me to decide, it seems to be accepted by Ms McDermott that the warnings were not issued in accordance with the PS Act. Irrespective, I am not

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[164] TR2-17, LL41-47.
[165] TR2-12, LL32-44.
[166] *McCarron v Commercial Facilities Management Pty Ltd* [2013] FWC 3034 [32].

of the view that in the present circumstances the failure to warn Mr Ball about his conduct can or should materially contribute to a finding that his dismissal was unfair as he was afforded an opportunity to respond to the allegations against him.

[161] The Respondent submits the dismissal related to the Applicant's conduct[167] and the allegations were fully particularised.[168] The Respondent through its ESU carried out a full investigation into the allegations, the Applicant was interviewed by the ESU and he was given an opportunity to respond to the allegations.

[162] He was also given an opportunity to respond to the first show cause notice and the second show cause notice.[169] The Applicant responded to the first show cause notice by letters dated 31 August 2016[170] and 13 September 2016.[171] The Applicant responded to the second show cause notice on 14 November 2016[172] and knew that Ms McDermott was considering terminating his employment.[173]

[163] The Applicant submits that a public service employee will not have been given an opportunity to respond when in substance a firm decision to terminate has already been made which would be adhered to irrespective of anything the employee might say in their defence.[174] Ms McDermott was never cross-examined in respect of this assertion and no evidence was adduced to support the contention.

[164] It was asserted by the Applicant that Ms McDermott's Finding Letter and Termination Letter reveal a present disposition against the Applicant and in favour of the Respondent who failed to give the Applicant a proper opportunity to respond. It has never been fully articulated by the Applicant how it is asserted that he was not given a reasonable opportunity to respond.

[165] Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*,[175] in discussing the manner in which procedural fairness cases are approached by the courts, said:

> Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.

[166] As evidenced above, the Applicant was given a reasonable opportunity to respond both in regard to the ESU investigation and the show cause process.

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[167] IR Act 1999 s 77(b)(ii).
[168] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, KM-04.
[169] IR Act 1999 s 77(c)(ii).
[170] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, KM-05.
[171] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, KM-07.
[172] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, KM-11.
[173] TR2-18, LL1-5.
[174] *Blows v Townville City Council* [2016] QIRC 066, where O'Connor then DP quoted from the decision of Moore J in *Wadey v YMCA, Canberra*, [1996] IRCA 568.
[175] [2003] HCA 6, [37].

[167] I am of the view having considered the evidence and in accordance with s 77(c)(ii) that, the Applicant has been given an opportunity to respond to the allegations against him.

Did the Applicant's conduct warrant dismissal?

[168] Having regard to their nature, the allegations against the Applicant particularised in the show cause correspondence are, in my view, sufficiently serious enough to warrant disciplinary action resulting in termination.

[169] The Respondent submits there has been no evidence from the Applicant that would question any of the findings made by Ms McDermott in respect of the allegations. The Applicant has not established that Ms McDermott did not make an honest decision when making her findings or when making her decision to dismiss him. The evidence and cross-examination of Mr Ball support her findings and her decision on penalty.

[170] The Applicant states this is not a case in which the employer has conducted a full and proper investigation; given the employee a reasonable opportunity to respond; and made an honest decision formed on reasonable grounds that misconduct warranting dismissal has occurred.[176]

[171] I cannot find on the evidence any basis why the Commission would seek to disturb Ms McDermott's findings. As I observed in *White v State of Queensland (Central Queensland Hospital and Health Service)*, citing, *Stark v P & O Resorts (Heron Island)*:[177]

> An employer who undertakes a full and extensive investigation; gives the employee a reasonable opportunity to respond to allegations; and makes an honest decision that misconduct warranting dismissal has occurred will, if formed on reasonable grounds, be immune from interference by the Commission.[178]

[172] The Applicant submits that Ms McDermott did not fully consider the impact termination would have on him and had not given due consideration to the alternatives available to her under s 188 of the PS Act.

[173] Each of the allegations found to be substantiated by Ms McDermott were done so on reasonable grounds, and only after the Applicant had an opportunity to respond. Ms McDermott's evidence, which I accept, is that she properly considered the serious consequences that termination would have for the Applicant given his age, the financial consequences and the ill-health of his wife.[179]

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[176] Applicant's submissions dated 18 September 2020, [177]; *White v State of Queensland (Central Queensland Hospital and Health Service)* [2017] QIRC 41, [56].
[177] [1993] 144 QGIG 914, 915.
[178] [2017] QIRC 41, [56].
[179] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, [31](j),(k).

[174] Ms McDermott in her letter of termination dated 19 January 2017 considered in some detail why she believed that the termination of employment was an appropriate disciplinary outcome. In particular, she relevantly wrote:

> - I have had regard to the admissions made in relation to your communication with certain prisoners, in particular Prisoner Tati, and that you admitted securing prisoners in their cells as an alternative to commencing minor breach proceedings. While I accept you have admitted this conduct, you do not appear to understand how or why this conduct is appropriate and that it is not acceptable behaviour for a CCO.
>
> - I note you have made admissions that you were aware of the relevant legislation supporting the breach of discipline proceedings for prisoners and that securing prisoners in their cells as an alternative to commencing minor breach proceedings may not have been an authorised practice. However, you appear to maintain that your conduct was not inappropriate or a contravention of the Corrective Services Act 2006 and related regulation. I am concerned that you lack insight into your conduct and that your actions were inconsistent with your obligations as a CCO.
>
> - I have considered your submissions that there was no risk to the health and safety of fellow officers or prisoners due to your conduct falling asleep and your communication style. I do not accept that there was no health and safety risk posed by you falling asleep whilst on duty. As outlined above, your actions in falling asleep whilst on duty meant you failed to appropriately supervise prisoners in your care, including prisoners in close proximity to you and another officer, and your ability to respond to any potential security risk or emergency situation was, significantly reduced. Further, your conduct in inappropriately securing prisoners in their cells and using inappropriate language towards prisoners could have resulted in prisoner retaliation against you or another CCO and/or could have caused conflict within the respective units of the centre.
>
> - I have considered your 10 years of service as a CCO and you trained as a Trainer and Workplace Assessor. Given your experience and training, I consider that you should have known the potential risks of failing asleep whilst on duty and ought to have taken steps to avoid this from happening. Further, you should have been aware and/or understood your obligations in relation to securing prisoners in their cells and treating prisoners with courtesy and respect. I am particularly concerned that a Trainer and Workplace Assessor would not understand and/or appreciate the seriousness of the alleged conduct.
>
> ....
>
> - I have given careful consideration to your submissions regarding the financial impact that the imposition of the proposed penalty will have on you and your family. In particular, I note your submissions that your wife is in frail health and requires constant medical attention and that you are the sole income earner in your family. I have also given consideration to your submissions that termination of your employment would cause extreme financial stress and hardship and there are limited prospects of future employment due to your age.

[175] Due to the conduct giving rise to his suspension in March 2016 and the findings ultimately made by Ms McDermott, it was open to Ms McDermott to conclude that, 'Mr

Ball had engaged in a pattern of behaviour that did not meet the standard of conduct required by the QCS'.[180]

[176] Of particular concern are the numerous allegations of sleeping on duty. As Ms Juffs said in her affidavit of 20th April 2020, '...officers who are on duty are expected to be fit for duty, this includes being alert and able to respond if and when is necessary. Falling asleep on duty impacts upon an officer's fitness and ability to respond to situations in the prison'.[181]

[177] In *Barclay v Nylex Corporation Pty Ltd,*[182] Mr Barclay was dismissed as a night shift supervisor with Nylex in Melbourne after it was found Mr Barclay slept at work at least twice a week in the year before a meeting with management in March 2002, after which he undertook not to sleep on duty. He was caught sleeping several times in April and July and was terminated.

[178] Ross VP (as his Honour then was) found that the circumstances dictated whether sleeping on the job was a valid reason for dismissal, including the frequency and duration of naps, the nature of work and the employee's responsibilities. His Honour wrote:

> In reply the respondent relied on a number of authorities in support of its contention that sleeping at work constitutes a valid reason for termination, and made reference to the introductory words in chapter 6 of The Law of Employment, namely:
>
> > 'Unless an employee has a job as a mattress tester or a similar occupation, sleeping on duty is neglect of duty.'
>
> In my view the question of whether sleeping at work constitutes a valid reason for termination depends on the circumstances. The relevant factual matrix must be considered. Issues such as the frequency and duration of sleeping, the nature of the work being performed and the responsibilities of the employee concerned, will all be relevant. In certain circumstances a single instance of sleeping has been found to be sufficient to constitute a valid reason for termination. For example, where the applicant was a security officer on duty at Kirribilli House or an emergency services officer at a mine site who was required to 'maintain a state of alertness on duty and conduct themselves in a manner which ensures their ability to respond to emergencies for the full twelve hours of their shift'.[183]

[179] At the relevant time, the Applicant was a CCO at WCC, a high security prison. What was alleged against the Applicant is more than a single episode of sleeping whilst on duty. On the afternoon of 19 January 2016, the Applicant was asleep on two occasions whilst seated at the officers' station desk inside N3 Unit; on 29 January 2016, during the officers' afternoon meal break, he was asleep in a chair in the walkway around the Tardis, facing the Lexan window of the N3 Unit, when he should have been maintaining prisoner observations; on 2 February 2016, he was asleep whilst seated at the

[180] Exhibit 5, Affidavit Kerrith McDermott affirmed 13 June 2017, [31](i).
[181] Exhibit 12, Affidavit of Adele Juffs dated 20 April 2020, [58].
[182] [2003] AIRC 593.
[183] [2003] AIRC 593 [196]-[197].

officers' station desk inside the N3 Unit; and on 24 February 2016, he was asleep on six occasions whilst seated at the officers' station desk and rostered as the P Movement Control officer.

[180] The Applicant was required to maintain at all times a state of alertness in order to respond to the demands of a wide range of exigencies that may arise.[184] He failed to do so.

[181] During cross-examination, the Applicant gave evidence in relation to prison security and the safety of officers including the requirement for two officers to be assigned to supervise each unit:

> MR MURDOCH: Now, there are concepts that one hears about in respect of prison security. Static security, do you understand that concept?
>
> MR BALL: Yes, I do.
>
> MR MURDOCH: And what do you understand, broadly, static security to go to?
>
> MR BALL: Static security is observation of the prisoners, giving prisoners directions to follow, etcetera, etcetera.
>
> MR MURDOCH: And are you aware of the concept dynamic security?
>
> MR BALL: Dynamic, yes.
>
> MR MURDOCH: And what do you define dynamic security as?
>
> MR BALL: Well, dynamic security is basically a show of presence of uniformed officers if the behaviour of a certain unit or residential area was becoming unstable.
>
> MR MURDOCH: - also Now, just going back to static security, you'd also agree with me, would you and if you don't agree, please, say so, that static security in a jail includes the infrastructure?
> MR BALL: That's right.
>
> MR MURDOCH: The cells, the cameras ---?
>
> MR BALL: Yep.
>
> MR MURDOCH: --- things of that nature?
>
> MR BALL: Yes, barbed wire, cameras, everything.
>
> MR MURDOCH: that That's right. That's right. And you mentioned observation and direction, and please, I can assure you this is not a test for you in respect of the language applies in respect of prisons, but is it also the case that in respect of dynamic security, that includes the need to be using the infrastructure that's provided,

[184] See: *Mr Gregory Adams v Western Mining Corporation* [1996] WAIR Comm 230 (6 December 1996).

such as cameras, to be keeping an eye on, to be observing, to be noting the actions of the prisoners?

MR BALL: Yes.

MR MURDOCH: Yes. So it doesn't really matter, does it, can I suggest to you, what degree of infrastructure you have in terms of cells, bars, barbed wire, and cameras. There also needs to be, on top of that in order to make it work, observation and vigilance towards the actions of the prisoners. Correct?

MR BALL: This is correct.

MR MURDOCH: Now, in terms of N Block and P Block, it's the case, is it not, that in respect of each of the units, there are - during the day shift, at least, two officers assigned to supervise each unit?

MR BALL: Yes.

MR MURDOCH: Yes. And do you know why it is that it's two officers assigned as opposed to one?

MR BALL: It's basically a buddy system.

MR MURDOCH: Right?

MR BALL: Each officer looks after each - each other.

MR MURDOCH: Yes. And - - -?
MR BALL: And obviously for security and safety of the officers.

MR MURDOCH: Right. And why obviously?

MR BALL: Well, you're standing in a unit with 52 other people ---

MR MURDOCH: Yes?

MR BALL: Prisoners.

MR MURDOCH: Yes?
MR BALL: They can become violent, volatile at a moment's notice.[185]

…

MR MURDOCH: And it's the case, is it not, noting what you've said before about the need for two officers, that the practice is for the officers to, as much as they can, stay together and not be separated when they're in the unit?

MR BALL: Yes, that's correct.[186]

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[185] TR1-13, L43 - TR1-14, L43.
[186] TR1-15, LL23-25.

[182] The Applicant belatedly attempted to explain his posture, while others observed him sleeping, as attributable to arthritis of his neck. He informed his employer of his osteoarthritis for the first time on 13 September 2016 in a further response to the first show cause when he attached a medical certificate dated 13 July 2016.[187] The Respondent submits that this reflects poorly on his credibility. I agree.

[183] In his Affidavit in Reply, the Applicant, for the first time says he remembers that between November 2015 and early 2016 he felt exhausted all the time.[188] This was never raised by the Applicant during the show cause process.[189]

[184] The Applicant agreed in cross-examination that sleeping on duty was something that should not occur,[190] and that, if an officer was found to be sleeping on duty, he would consider them derelict in their duties.[191] However, in his response to Ms McDermott dated 14 November 2016 the Applicant said, '[b]y themselves I would submit that these alleged offences are not of a serious nature'.[192] In making this submission, the Applicant failed to understand or appreciate the gravity of the allegations against him.

[185] The Respondent submits the Applicant was obstinate in the face of clear evidence he had been counselled regarding his conduct on multiple occasions since 2013.[193] He denied being spoken to by his Correctional Supervisor, Ms Juffs in respect of his conduct during a Code Yellow on 29 April 2014[194] and about sending prisoners to medical without letting medical know first,[195] but then proceeded to give evidence why the conduct complained of was, in his view, completely appropriate.[196]

[186] I accept the Respondent's submission that the Applicant is an unreliable witness and his evidence that he was not asleep as alleged ought not be accepted by the Commission.[197] The evidence of CCO Hay for the Applicant is of limited direct relevance as CCO Hay was not present to observe any of the conduct for which the Applicant was dismissed.[198]

[187] Notwithstanding the proven grounds of sleeping whilst on duty, which alone in my view would constitute a valid reason for termination, compounding factors are the further grounds as expressed in allegations 2 and 3. Whilst the conduct was such as to breach the Code of Conduct, in particular, Principle 1.5, the evidence further suggested the Applicant's conduct had the capacity to affect the operation and good order of the unit.

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[187] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, KM-07.
[188] Exhibit 2 - Affidavit of Frederick Ball filed 26 June 2017, [244].
[189] Respondent's submissions dated 17 September 2020, [20].
[190] TR1-30, LL22-26.
[191] TR1-30, LL32-33.
[192] Exhibit 5 - Affidavit of Kerrith McDermott affirmed 13 June 2017, KM-11.
[193] TR2-21, LL27-34.
[194] TR2-19, LL42-43.
[195] TR2-18, LL15-17.
[196] TR2-19, LL1-5; TR2-19, LL29-36.
[197] Respondent's submissions dated 17 September 2020, [27].
[198] Respondent's submissions dated 17 September 2020, [30].

[188] Notwithstanding the protestations about not being trained in the Code of Conduct, the Applicant said in cross-examination:

> MR MURDOCH: You accept that you were told by Ms McDermott to perform your duties in compliance with the code of conduct?
>
> MR BALL: Ms McDermott told me to do that, yes, but, as I say, I have never had training in the code of conduct.
>
> MR MURDOCH: Do we see --- ?
>
> MR BALL: So I wouldn't know what the code of conduct would say.
>
> MR MURDOCH: Do we see anywhere in your evidence any evidence of you asking anybody about the code of conduct and how you might be able to find out what it says?
>
> MR BALL: I - probably after this letter, I probably went to the computer and found it myself.
>
> MR MURDOCH: Okay. So that - we can accept, then, that after you received this letter in February 2014, you went and found it, had a look at it and understood what the expectations were?
>
> MR BALL: Yes.[199]

[189] Ms McDermott considered the impact of a decision to terminate the Applicant's employment would have on him and noted that the proven allegations against him involved both misconduct and breaches of the Code of Conduct. The Applicant's dismissal was not disproportionate to the substantiated conduct.

[190] The Applicant submits that having regard to the seriousness of the allegations and the significant consequences for the Applicant's employment, Ms McDermott should have taken greater care to ensure she attained the necessary standard of satisfaction that the facts in dispute were more probable than not to exist.[200] There is no force in this submission and the evidence before the Commission would not support any such conclusion.

[191] It is the submission of the Respondent that the Applicant has not established that Ms McDermott did not make an honest decision when making her findings and indeed the evidence before the Commission, including the evidence and cross-examination of the Applicant, supports her findings and her decision on penalty.[201] However, in his

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[199] TR2-12, LL32-44.
[200] Applicant's submissions dated 18 September 2020, [178]; *White v State of Queensland (Central Queensland Hospital and Health Service)* [2017] QIRC 41, [57].
[201] Respondent's submissions dated 17 September 2020, [47].

oral submissions before the Commission, the Applicant withdrew 'honest' and only submitted that the decision ultimately reached by Ms McDermott was flawed.[202]

[192] The Respondent submits Ms McDermott was also cross-examined extensively about the allegations made against the Applicant and there was no evidence lead that indicates she ought not to have found the allegations to be substantiated.[203]

[193] I am reasonably satisfied based upon the evidence before the Commission that the Applicant has been guilty of misconduct and has contravened, without reasonable excuse, a standard of conduct under the Code of Conduct. Moreover, having regard to the nature of the allegations, termination was an appropriate disciplinary outcome.

Reinstatement impracticable

[194] Even if I had formed the view that the Applicant's dismissal was unfair, I would not have ordered that the Applicant be reinstated.

[195] The Respondent submits that in the event the Commission decides that the Applicant's dismissal was unfair, which is denied, that reinstatement is impracticable. In evidence, the Applicant agrees that prisoners are unpredictable and opportunistic and there was a constant risk of assault from a prisoner towards an officer[204] and each officer must look after the other.[205] In order to perform their role safely and effectively, officers must have trust and confidence in one another.

[196] The relationship between the Applicant and the Respondent has irretrievably broken down. The Applicant has lost trust and confidence in his employer and his employer has lost trust and confidence in him. In addition, the Applicant has made a range of concerning allegations against his co-workers.[206] Further, the supervisors, his peers have given evidence that they do not consider it is safe to be on duty with him.[207]

[197] In *Perkins v Grace Worldwide (Aust) Pty Ltd,*[208] the Full Court of the NSW Industrial Relations Court considered the effect of a loss of trust and confidence on the question of the 'practicability' of a reinstatement remedy and said:

> **Trust and confidence is a necessary ingredient in any employment relationship... So we accept that the question whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based.**

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[202] TR6-86, LL11-19.
[203] Respondent's submissions dated 17 September 2020, [44].
[204] TR1-13, LL30-38.
[205] TR1-14, LL34-36.
[206] TR6-80, LL16-17.
[207] TR6-81, LL11-12.
[208] (1997) 72 IR 186.

> At the same time, it must be recognised that, where an employer, or a senior officer of an employer, accuses an employee of wrongdoing justifying the summary termination of the employee's employment, the accuser will often be reluctant to shift from the view that such wrongdoing has occurred, irrespective of the Court's finding on that question in the resolution of an application under Division 3 of Part VIA of the Act.
>
> If the Court were to adopt a general attitude that such a reluctance destroyed the relationship of trust and confidence between employer and employee, and so made reinstatement impracticable, an employee who was terminated after an accusation of wrongdoing but later succeeded in an application under the Division would be denied access to the primary remedy provided by the legislation. Compensation, which is subject to a statutory limit, would be the only available remedy. Consequently, it is important that the Court carefully scrutinise any claim by an employer that reinstatement is impracticable because of a loss of confidence in the employee.
>
> Each case must be decided on its own merits. There may be cases where any ripple on the surface of the employment relationship will destroy its viability. For example the life of the employer, or some other person or persons, might depend on the reliability of the terminated employee, and the employer has a reasonable doubt about that reliability. There may be a case where there is a question about the discretion of an employee who is required to handle highly confidential information. But those are relatively uncommon situations. In most cases, the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree. It is rare for any human being to have total trust in another. **What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive.** Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party.
>
> It may be difficult or embarrassing for an employer to be required to re-employ a person the employer believed to have been guilty of wrongdoing. The requirement may cause inconvenience to the employer. But if there is such a requirement, it will be because the employee's employment was earlier terminated without a valid reason or without extending procedural fairness to the employee. The problems will be of the employer's own making. If the employer is of even average fair-mindedness, they are likely to prove short-lived. Problems such as this do not necessarily indicate such a loss of confidence as to make the restoration of the employment relationship impracticable.[209]
> (Emphasis added).

[198] Ms McDermott's evidence is that:

> I am of the view that Mr Ball is likely to engage in similar conduct in future and I would have no confidence that if Mr Ball were to be reinstated that he would perform his role as CCO ethically, honestly and in accordance with his obligations as a CCO and public service employee.[210]

[199] The Respondent submits these observations are consistent with the evidence provided and Ms McDermott was not challenged during cross-examination as to her view. I agree.

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[209] (1997) 72 IR 186, 191.
[210] Exhibit 1, Affidavit Kerrith McDermott affirmed 13 June 2017, [44].

[200] For the reasons advanced above, reinstatement would not, in the circumstances, be an appropriate remedy.

Conclusion

[201] Having weighed all the evidence and considered the matters that the Commission is required to consider under s 77 of the Act, I have come to the conclusion that the Applicant's dismissal was not harsh, unjust or unreasonable. The dismissal was therefore not 'unfair' within the meaning of s 73 of the Act.

[202] The Applicant has failed to demonstrate that the dismissal was 'unfair'. It must follow therefore that the application be dismissed.

Order

1. The Application is dismissed.