

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999* - s. 74 - application for reinstatement

**Bernardus Prange AND Brisbane City Council (TD/2010/17)**

VICE PRESIDENT LINNANE

9 June 2011

Unfair dismissal application - Applicant dismissed following a performance management plan - Applicant dismissed for failure to follow lawful and reasonable directions, poor performance and inappropriate behaviour and conduct - Respondent had a valid reason for termination of Applicant's employment - Respondent did not provide Applicant with sufficient time to provide a meaningful response to the Show Cause - Denial of procedural fairness - Reinstatement and re-employment found impracticable - Compensation ordered - *Industrial Relations Act 1999* ss. 77, 78 and 79.

DECISION

- [1] This is an application by Bernardus Prange (Applicant) seeking reinstatement to his former position as a Technical Consultant (Band 5) in the Capability Branch of iDivision (the internal information technology provider) of the Brisbane City Council (Respondent). The Applicant's employment with the Respondent was terminated on 17 February 2010. Whilst the Applicant alleges that he was "instantaneously dismissed" he was in fact paid thirteen weeks' pay in lieu of notice on termination (a statutory entitlement). It was thus not a summary dismissal.
- [2] The Application for Reinstatement was filed on 24 March 2010 i.e. fourteen days out of the time period provided for in s. 74(2)(a) of the *Industrial Relations Act 1999* (the Act). An application was made pursuant to s. 74(2)(b) of the Act to extend that time to 24 March 2010. The Applicant had inadvertently lodged his application with Fair Work Australia and thus the Respondent was not disadvantaged by the delay. The Respondent neither consented to, nor opposed, the application to extend time. An order was issued extending the time within which to appeal to 24 March 2010.

[3] **Evidence**

The Applicant relied on his own evidence (Exhibits 1 and 2). The Respondent relied upon the evidence of the following witnesses:

- Ian Maynard, the Divisional Manager of the Corporate Services Division of the Respondent, who made the decision to terminate the Applicant's employment (Exhibit 6);
- Dr Matthew Foley, a Medical Practitioner working in the field of Occupational Medicine (Exhibit 5);
- Sarah Holmes, an Organisational Change Management Team Leader in the Corporate Services Division of the Respondent (Exhibit 9); and
- Joanne Prasser, the Applicant's Manager/Team Leader in what was then the Capability Branch of the Respondent's iDivision (Exhibit 7).

[4] The following matters are not in dispute:

- the Applicant commenced employment with the Respondent on 12 January 1987 and, at the time of the termination of his employment, he had been employed by the Respondent for 23 years;
- at the time of termination of his employment the Applicant was 57 years of age;
- on termination of his employment the Applicant was paid 13 weeks' pay in lieu of notice (a statutory entitlement);
- Ms Prasser commenced as the Applicant's Manager/Team Leader on 31 March 2009. In this capacity Ms Prasser was responsible for the management of staff including the undertaking of reviews of the performance of staff in her particular unit;
- as at 31 March 2009, the Applicant was assigned to perform 50% of his work for Service Delivery which entailed work on the City Web (the Respondent's internal web-site) where he reported to the Service

Operations Manager, Andrew Culpepper. The remaining 50% of his work was in the area of small changes where he reported to a Project Manager, Tania Bessinger;

- the Respondent's procedures for managing poor performance is contained in a document titled *Managing Poor Performance and Misconduct Handbook* (Attachment SH-C to Exhibit 9);
- at some time in or about May 2009, Ms Prasser had an informal discussion with the Applicant concerning his work performance. In this regard Ms Prasser brought to the Applicant's attention unsatisfactory aspects of his performance in what was described as a Planning for Performance meeting;
- on or about 24 August 2009 the Applicant was provided with a "Please Explain" letter (Attachment SH-D to Exhibit 9);
- in meetings between the Applicant and Respondent representatives leading up to the "Please Explain" letter and in his Response to the "Please Explain" letter, the Applicant was represented by a full-time Australian Services Union (ASU) official, Craig Dunn;
- the Applicant provided a Response to that "Please Explain" letter which was received by the Respondent on or about 7 September 2009 (Attachment SH-E to Exhibit 9);
- following this, the Respondent in correspondence dated 15 September 2009 issued the Applicant with a Final Warning (Attachment SH-F to Exhibit 9). That correspondence was to serve as a formal and final warning to the Applicant and advised him that his continued employment with the Respondent was dependent upon him:
  - (i) adhering to the Respondent's Code of Conduct and Values and Behaviours at all times;
  - (ii) attendance at one-on-one Code of Conduct training with a member of the iDivision's Human Resource Management Team;
  - (iii) completion of a formal performance management plan, demonstrating consistent achievement of all performance and behavioural standards; and
  - (iv) fulfilment of all of the requirements of his substantive Band 5 Technical Consultant role and any Assignment Brief provided to him;
- at this time the Applicant continued to be represented by the ASU;
- the Applicant did not appeal the disciplinary action being taken against him in the Final Warning letter either pursuant to the provisions of the *City of Brisbane Act 2010* or the procedures for appeal provided for in the *Brisbane City Council Enterprise Bargaining Certified Agreement 2010*;
- a Work Performance Plan (PMP) was drawn up on or about 25 September 2009 (Exhibit 3) with the purpose of the Plan being to firstly, institute a three month formal performance management plan in accordance with the Final Warning letter dated 15 September 2009, and secondly, to identify appropriate mechanisms and supports to improve the Applicant's performance to an acceptable standard within the three months. The Applicant agreed in cross examination that at a meeting around this time Ms Holmes took him through the details of the PMP. The Applicant, Ms Prasser and Ms Holmes signed the Plan on 29 September 2009;
- during the course of the PMP the Applicant was performing work in the Capability Branch of iDivision on the City Web. The Applicant's duties during this period included:
  - making changes as directed by his supervisor to the content of the City Web;
  - developing a proposal for a workplace health and safety site on the City Web specifically for the iDivision (i.e. a Microsoft Word document); and
  - completion of Skillport training as provided for in a training plan to be developed by Ms Prasser;
- as part of that PMP there was to be fortnightly meetings between the Applicant, Ms Prasser and Carlos Chavez, the Applicant's Senior Technical Consultant, and monthly meetings where Ms Holmes and Mr Dunn were to attend;

- the following meetings were held as part of the PMP:
  - (i) a meeting on 8 October 2009 attended by the Applicant, Ms Prasser and Mr Chavez, a summary of which is attached to Exhibit 4;
  - (ii) a meeting on 15 October 2009 attended by the Applicant, Ms Prasser and Mr Chavez, a summary of which is attached to Exhibit 4;
  - (iii) the First Progress Review of the PMP was held on 4 November 2009 and was attended by the Applicant, Ms Prasser, Ms Holmes and Mr Dunn, a summary of which is attached to Exhibit 4;
  - (iv) a meeting on 12 November 2009 attended by the Applicant, Ms Prasser and Mr Chavez, a summary of which is attached to Exhibit 4; and
  - (v) a meeting on 26 November 2009 attended by the Applicant, Ms Prasser and Mr Chavez, a summary of which is attached to Exhibit 4;
- the Applicant was on leave during the period 5 December 2009 to 6 January 2010;
- a Show Cause letter dated 8 January 2010 was provided to the Applicant around noon (or shortly thereafter) on 11 January 2010 requiring a response by noon on 13 January 2010 (Attachment SH-H to Exhibit 9). The Applicant was directed not to attend work during the period to enable him sufficient time to prepare a Response to the Show Cause. During this time the Applicant remained on full pay;
- the Applicant was without a computer at home at this time;
- the Applicant had a previously arranged medical appointment for the morning of 12 January 2010;
- on 12 January 2010 Mr Dunn, on behalf of the Applicant, sought an extension of one day within which to respond to the Show Cause given the Applicant's previously arranged medical appointment. This request was apparently granted by the Respondent although the Applicant appeared unaware of the extension of time until the morning on which he was to present, and did in fact present, his Response;
- the Applicant provided his Response to the Show Cause in handwritten form by the original time of noon on 13 January 2010 (Attachment SH-I to Exhibit 9);
- on 17 February 2010 a meeting occurred between the Applicant, Mr Maynard, Ms Holmes and Mr Dunn in which the letter of termination was read to the Applicant and then he was provided with the letter (Attachment SH-K to Exhibit 9); and
- the Applicant ceased employment with the Respondent on 17 February 2010.

**Letter of Termination:**

- [5] The Respondent in its letter of termination relied upon the following five areas of the Applicant's performance (previously outlined in the Show Cause) to terminate the Applicant's employment:
- (i) failure to follow lawful and reasonable directions and instructions;
  - (ii) poor performance on assigned work;
  - (iii) inappropriate behaviour and conduct;
  - (iv) lack of responsibility for contributing to his professional development; and
  - (v) poor written communication skills.
- [6] There were a couple of further areas of the Applicant's performance, outlined in the Show Cause, where the Respondent found that the Applicant had improved his performance following the issuing of the Show Cause and these were not relied upon by the Respondent to terminate the Applicant's employment.
- [7] The evidence of Ms Prasser, in particular, and that of Ms Holmes went to establish the basis for the performance issues relied upon by the Respondent to terminate the employment of the Applicant. I intend to deal with each of those performance issues in detail and whilst I may not refer specifically to the actual evidence of Ms Prasser and/or Ms Holmes I have taken all of their evidence into consideration. There is also some overlapping of the Applicant's conduct relied upon by the Respondent to support the allegations of poor performance in the abovementioned five areas and thus some overlapping in the Applicant's Response and in his evidence.

- [8] **(i) Failure to follow lawful and reasonable directions and instructions:** In this regard reliance was placed by the Respondent on instructions provided to the Applicant by Ms Prasser in the meeting of 8 October 2009 that the Applicant was not to commence training until he had met with her to develop a training plan. It was alleged that the Applicant had commenced training on the Skillport system despite information from Ms Prasser that the courses allocated to him on the online system required changes as he was, under the PMP, no longer performing work in the ICT testing area.
- [9] The Respondent further relied on an email forwarded to the Applicant at 4.10 pm on 6 October 2009 instructing the Applicant to commence work on the iDivision Workplace Health and Safety website. This task was not commenced until after the PMP meeting on 8 October 2009. Whilst it was acknowledged that the Applicant had a half flex day on 7 October 2009 the complaint was that the Applicant had not promptly actioned Ms Prasser's instruction. On Ms Prasser's evidence the Applicant had no other work of a higher priority to complete and there was no other reasonable justification for the Applicant not commencing this assigned work promptly.
- [10] A further ground relied upon under this heading was that at the PMP meeting on 29 October 2009 the Applicant was instructed to ensure code changes made to production were updated in Source Code Control System (PVCS).
- [11] In the PMP meeting on 4 November 2009 the Applicant was again informed that he was to seek clarification from and/or guidance from and/or to raise issues or concerns promptly with Ms Prasser or Mr Chavez. It was asserted that the Applicant had:
- raised issues or concerns relating to his assigned work with others; or
  - did not promptly resolve questions or concerns with Ms Prasser or Mr Chavez particularly in the use of PVCS where Mr Chavez had emailed him with further information on 26 November 2009. Mr Chavez advised the Applicant that he was to focus on how he used PVCS rather than how his colleagues used the system. Despite this instruction it was asserted that the Applicant raised the use of PVCS by his colleagues with both Ms Holmes and Mr Dunn in an email of 30 November 2009. It was alleged that in sending this email the Applicant displayed disregard for the advice consistently provided to him by Ms Prasser and Mr Chavez.
- [12] The Respondent alleged that the Applicant's actions in failing to follow lawful and reasonable instructions and directions had resulted in:
- the Applicant distracting other Respondent officers from their work; and
  - the Applicant being more concerned with the actions and behaviours of others rather than being focussed on improving his own work performance and conduct when it was his work performance and conduct that required improvement.
- [13] As the Applicant's evidence-in-chief does not specifically deal with his responses to the various allegations outlined in the Show Cause, I have considered the Applicant's actual Response to the Show Cause as being his response to the allegations and will quote them as if they provided the Applicant's evidence with respect to the various allegations.
- [14] The Applicant in his Response to the Show Cause (Exhibit 1 is the typed version of the Response) on this allegation responded as follows:
- "I discovered that there were more jsp pages or information published in Production (PROD) compared with what was in Source Code Control System (PVCS), when I received iDivision website change requests CRQ36153 + 36073. I received no reply when I asked the team, including Technical Coordinator (TCO), about this.
- When I discovered that requestor (Josie Furlan) was available to do the User Acceptance Testing (UAT), I decided to only publish jsp pages and images in Stage because of the mismatch of source code between PVCS and PROD.
- Project Management contacted Josie Furlan for this UAT and when I received the message that it was OK, I deployed jsp pages and images into PROD and checked changes into PVCS.
- After this I planned to look further into this mismatch between PVCS and PROD. But I was told that helping the customer first had been wrong. And I was also told that I had not received a reply because the team did not understand the reason I did question them about difference in source code.

The next opportunity to look into this iDivision website PVCS and PROD mismatch was when change request CRQ36275 was assigned. Also with this change request I published a jsp page from Development to Stage in order to get that UAT process underway. I was resolving issues with source code while Change Manager was looking after Testing.

I talked to TCO Carlos Chavez about this mismatch of pages in PVCS and PROD on Monday 02/11/2009 and I was told that Nick Cartacai would help me with building an iDivision website war file the next day.

After some delay on Tuesday morning I showed Nick how I did build a war file from PVCS. And Nick told me that I was correct. But this meeting at my desk got funny when I wanted to find out why PROD was different.

Nick Cartacai told me that this mismatch was there because the pages were archived in PVCS after the war file was build [sic] for that previous change request. When I told Nick that the reason he provided could be an assumption, Nick (whispered typo error) whispered in my right ear that the TCO needed to be kept outside this issue. I tried to correct Nick Cartacai and asked again for a valid reason.

While Nick Cartacai kept on whispering in my right ear, I even wrote on a piece [sic] of paper for Nick to say something like: "Just tell me that you don't know the reason why there is this mismatch between PVCS and PROD". But Nick continued telling me that the jsp pages had been archived in PVCS recently.

I had a closer look at iDivision website war files or revisions since July on Thursday 05/11/2009. And I discovered a pattern in that when one team member worked on an [sic] change request, the archived pages were missing as it should be. And when another team member worked on an iDivision website change request, the archived pages reappeared and were included in war file.

After this discovery I did build an iDivision website from PVCS and included in this build that change request for CRQ36275. This war file was published from Development to Stage and further used during that UAT.

Later when I approached Carlos Chavez with this additional information and showed the TCO this pattern, Nick Cartacai was called over again. Maybe I also should have informed or told Carlos that I had been fobbed off by Nick on the Tuesday morning.

Now Nick Cartacai told me or Carlos that the issue had been resolved. And in a few words Nick was able to explain to me where the other team member had gone wrong. I still wonder if the TCO received the explanation what went wrong with those iDivision website war file builds.

Attachment 6 has information under Timeliness and Quality of Work column that CRQ36275 was "Delayed due to issue with PVCS which BP did not resolve timely". But that mismatch of source code in PVCS and PROD was resolved on Thursday 05/11/2009, while Change Manager was still looking after that UAT testing. I do recall that CRQ36275 was delayed because requester was not available to do testing.

Next in above column there is this: "Also issues that due to a process issue, the change disappeared and had to be repeated". The explanation I can provide is that another team member received and started working on an [sic] change request for that iDivision website on Tuesday 10/11/2009.

In verbal communication I told the other team member to include my CRQ36275 in his war file build also. And he did tell me how to do this or where to find my amended jsp page. But I discovered later that CRQ36275 for Josie Furlan had been excluded.

This has always been a problem when doing a change request when following that standard process, building a war file and publishing an [sic] complete website. When there is a major change request or revamp of website, it can be in that test area for weeks/months.

When another team member gets an urgent change request for that same website and is not allowed to interfere with that UAT of major change request or revamp, that other team member can work on that minor change request by publishing a jsp page only. In the past I have advised or asked to change this standard process. But this was ignored and not implemented.

Change request CRQ36275 was not repeated. All I had to do was to rebuild war file again and publish this in Stage for that UAT process to continue. I had been assigned 1 hour for this minor change request. This change request was migrated to PROD on Wednesday 25/11/2009 and I closed CRQ36275 in ITSM7 on Thursday 26/11/2009.

Sometime later the Requester or Change Manager noticed this MDF typo error. This typo error was already in WebWise Request 10439 from Josie Furlan. And I followed the instructions as specified in CRQ36275 and also that Task 23389.

But this typo error was fixed in a timely manner by verbal communication with another team member, who was working on a new change request for iDivision website.

Please note that there is some misinformation under Timeliness/Quality of Work for that CRQ35753 in Attachment 6. When I did this change request, there was no mismatch of source code between PVCS and PROD.

I could not follow standard process when I worked on this urgent change request CRQ35753 because somebody else or other team member was working on a major change request for CEO Office website.

Also CRQ35642 was affected by this same major CEO Office website change request. But I was able to do these 2 very urgent change requests using verbal communication.

This verbal communication would not be necessary when Project or Change Managers assign urgent change requests to the same team member working on major change."

- [15] **Letter of Termination on (i):** In the letter of termination dated 17 February 2010, the Respondent denied that the Applicant was told "that helping the customer first was wrong". The Respondent stated that the Applicant was advised to follow the standard processes outlined in the online support documents. Instead, according to the Respondent, the Applicant sent an email to his whole team regarding a technical question when, on many occasions during the timeframe of the PMP, he was directed to seek advice and direction from either Ms Prasser or Mr Chavez.
- [16] The Respondent also stated that its comments in relation to CRQ36275 in the Show Cause were accurate, that the job had been assigned to the Applicant on Friday 30 October 2009 at 9.59 a.m. and he did not complete the job until 26 November 2009. The Respondent acknowledged that in respect of this job whilst the customer was not available for some of the time it could not accept this as justification for the duration of time taken by the Applicant to complete the job. The Respondent, in stating that the Applicant's performance on this job was below the standards expected of Technical Consultants (Band 5), particularised a number of issues it had with the Applicant's performance on this job.
- [17] The Applicant was further advised that, in respect of his allegation that simple and straightforward jobs become difficult and complex when other team members are working on the same websites, other team members did not appear to experience the same difficulties as he did and their work did not result in the extensive delays and re-working that he experienced.
- [18] **Applicant's Evidence on (i):** On the issue of whether the Applicant disobeyed a directive from Ms Prasser that he not commence training until a training plan had been proposed by her, the Applicant in re-examination stated that it was not until he had undertaken the first Skillport training that he became aware of Ms Prasser's directive. His evidence was that once he became aware of the directive he ceased any Skillport training until the training plan was provided by Ms Prasser. The difficulty for the Applicant is that in the minutes of the PMP meeting of 8 October 2010 the following appears:

"Joanne advised Bennie that it was a requirement of the plan and his role that he followed all lawful and reasonable directions and instructions. Joanne advised that some improvement had been achieved in this area, but further improvement was still required.

Joanne provided Bennie with the example of the Skillport training that Bennie had commenced, despite being previously advised that the training plan currently allocated was incorrect. Bennie commented that he thought in the introduction session, it had been explained that there was a personal training section as well as a section where the training plan as agreed in the PFP was documented. Joanne advised that this was incorrect, and that there was no personal training section. Joanne questioned whether Bennie was referring to the MyPlan section at the top where you could drag courses. Bennie confirmed that this was what he was referring to. Joanne advised Bennie that he had misunderstood this, and that the training had explained that only courses that had been agreed in the training plan would be made available to the employee.

Bennie also commented that when he had attended the introduction session that he had the testing courses allocated, [sic] as well as from talking to Amy Wang discovered that he should have the Business Analysis courses. Joanne advised Bennie that on two previous occasions within the last fortnight, she had advised Bennie that she would need to sit down with him to agree a training plan because the courses currently allocated were not correct as they were allocated when he was on the testing assignment. Joanne then added

that despite of [sic] this Bennie had continued to commence the training which is not following a lawful and reasonable direction. Carlos asked to clarify what actions Bennie should now take in terms of the training. Joanne advised Bennie that he should not undertake any further training in the Skillport until a training plan had been agreed."

- [19] It was also the evidence of the Applicant that he saw his failure as consisting "mainly of communicating with staff other than my two immediate superiors and incorrectly commencing a particular on-site training course". The Applicant's explanation was that firstly, a "strictly limited working communication" was "impractical" as the two supervisors were not always available and secondly, the training error was due to a misunderstanding and it was of no consequence as the intended training plan was not then in place.
- [20] As for the allegation concerning the iDivision Workplace Health and Safety (WHS) website, the Applicant in cross-examination said that he received an email from Ms Prasser at about 4.00 pm on Tuesday 6 October 2009 directing him to commence working on a proposal for the site on the City Web. On the following day the Applicant had a half day flex leave. He agreed that he did not start work on the site prior to the PMP meeting on 8 October 2009 where his failure to commence work on the site was raised with him. The Applicant's evidence was that he had not previously had to develop a website from the start. His previous work was simply to maintain web sites.
- [21] As for the issue with the PVCS, the Applicant explained that the PVCS was a system for storing the Respondent's computer codes for computer applications. It was designed to ensure that when codes are changed the most recent code is actually stored on the PVCS. Whilst working on the City Web during the PMP the Applicant said that he would discover that there had been changes made to applications on the City Web where the code stored in the PVCS was not the most recent code that had been changed. The Applicant disagreed with the suggestion put to him that he would then spend hours investigating why the PVCS code did not match the code that was currently used in production for a particular application. The Applicant did however agree that he was directed, on 29 October 2009, that if he discovered this he was to store the current code in the PVCS. In cross-examination he responded that such a direction was not always the correct way to do it. The Applicant however agreed that that was what Ms Prasser had instructed him to do. The Applicant also agreed that Ms Prasser had also instructed him to inform Mr Chavez as and when such things occurred and that it was for Mr Chavez to do any investigations.
- [22] As at the meeting on 4 November the Applicant was still raising issues about his colleagues not using the PVCS correctly. This was in disobedience of the directive that Ms Prasser had issued to him of not wasting time concerning himself with why other people were not complying with the correct codes e.g. the PMP Minutes of 4 November 2009 meeting where it is stated that:

"Bennie advised that he had found out the team was not following procedures. Sarah asked Bennie what he meant by the team not following procedures. Bennie advised that he had found out the team were not following procedures in terms of using PVCS. Sarah advised that this could be discussed further, but he needed to focus on his performance and not the work process/performance of others".

- [23] In evidence the Applicant responded by saying that he had just tried to escalate the problem. In cross-examination the Applicant was also referred to his email of 26 November 2009 to Ms Prasser and Mr Chavez asking for a meeting ostensibly to discuss why other team members were not using the PVCS correctly. Mr Chavez responded by advising the Applicant that "I suggest you don't waste time looking [sic] 'what other [sic] are not going' and concentrate how you do it, just get it done". In cross-examination the Applicant said that Mr Chavez, as a Technical Co-ordinator, should be "worried" or concerned to ensure that all IT employees follow the standards. The Applicant also did not agree that raising such issues with Ms Prasser and/or Mr Chavez was wasting time.
- [24] On this point the Applicant's email of 30 November 2009 to Ms Holmes was raised with him in evidence. His email was in response to an email from Ms Holmes asking him how he went in a PMP review meeting that morning. In cross-examination it was suggested to the Applicant that in his email the Applicant was trying to bring to Ms Holmes attention that there were other employees in the Capability Branch who were not following correct procedures in relation to the use of PVCS. The Applicant denied this however the email to Ms Holmes contained quite specific technical information which Ms Holmes, as a Human Resources operative, had no expertise in and thus she had no need to know anything about the technical information. Indeed Ms Holmes' reply to the Applicant stated:

"I don't have the technical knowledge to fully understand this situation.

My advice to you is that if you are unclear or do not understand something, you need to take this information to Carlos Chavez and Joanne Prasser so that they can review it with you and to provide you with feedback &

guidance. Given that your email discusses your use of war files versus publishing jsp pages, you should put this email to Joanne and Carlos if you wish to get clarification."

- [25] There was nothing in that email to Ms Holmes about the review meeting. When it was suggested to the Applicant that the email was a waste of time, the Applicant responded by saying that the email was a record of his concerns and that he had sent the information to Ms Holmes in the hope that she would send it on to others.
- [26] The Applicant denied that he was wasting his time when he went off and did work contrary to the directions he was given by Ms Prasser.
- [27] Conclusion on (i): Based on the evidence before me I have formed the view that the Applicant has failed to show that the Respondent's findings that:
- (i) he had not improved his performance to an acceptable level despite intensive effort and resources invested by iDivision;
  - (ii) he had continued to disobey lawful and reasonable instructions e.g. in failing to raise issues promptly with Ms Prasser and/or Mr Chavez; and
  - (iii) his behaviour throughout the PMP and in his Response to the Show Cause demonstrated a disregard for the feedback provided to him;

were without justification although some of the issues raised may have been minor in nature.

- [28] **(ii) Poor performance on assigned work:** The Respondent alleged that the Applicant had been assigned to work in the ICT testing area as a trial arrangement commencing 6 July 2009 and that his work performance and productivity during this time did not reach an acceptable standard and that his conduct towards colleagues in that area was inappropriate. These issues were detailed in the Please Explain letter of 24 August 2009 and resulted in the work trial being ceased. Subsequently, the Applicant was provided with the PMP and items of work to complete in his substantive role to give him an opportunity to improve his work performance to an acceptable level.
- [29] In the PMP, which he signed, the Applicant agreed and understood that areas of his work performance had not reached an acceptable standard. In the PMP the Applicant also indicated that he understood the requirements of the PMP that he was required to meet. When the Show Cause was issued the Respondent asserted that the Applicant had not performed his assigned work and in this regard relied upon Attachment 6 to Exhibit 4. It was alleged that the work assigned to the Applicant was at a low to moderate level of complexity which other Technical Consultants at Band 5 level could perform to a high standard of quality and timeliness. It was alleged that the Applicant could not complete some work to an acceptable standard of quality and timeliness. The Respondent further asserted that the Applicant had received feedback, guidance and coaching in this area during the fortnightly feedback meetings.
- [30] It was further alleged that the Applicant's level of work productivity was low as measured by the amount of work allocated to him and the time that he required to complete this work. In the PMP meeting of 26 November 2009 it is alleged that the Applicant indicated that he was busy however the Respondent asserted that, with the exception of the Workplace Health and Safety website assignment, the jobs assigned to him were simple and straightforward requiring minimal time and effort. Essentially it was alleged by the Respondent that the Applicant had not reached a standard of work performance and productivity that was acceptable for a Technical Consultant Band 5.
- [31] The Applicant's Response to this allegation was as follows:

"I agree that some jobs assigned to me were simple and straightforward, requiring minimal time and effort. But I hope that my response to the first issue has revealed that it can become more difficult and complex when different team members are working on change requests for same website at the same time in different content or jsp pages.

I have requested in the past to make that standard process more flexible. And also a little more than 13 months ago I did show the Acting TCO an easy and simple way to check if content in PVCS and PROD are the same. But my recommendations were not implemented in the procedures.

Therefore working on simple and straightforward change requests can still be exciting. When my recommendations had been implemented than [sic] maybe working on small simple change requests would become boring. And also I would have no response to that first specific issue.

I do agree that quality of work is important and that the Customer gets value for money. And getting things done can be by working together.

Further I would like to comment on that very poor quality of my iDivision WHS website proposal document. In order to create this document, a sample document was provided as template. When I contacted Project Manager Tania Bessinger, she told me that she would organise meetings with Jan Corcut.

Before first meeting I had a look at the provided spreadsheet what [sic] contained a draft site structure. And I also made myself familiar with the current iDivision WHS website.

Tania Bessinger organised the first meeting but Customer or Requester was not available. Project Manager told me to develop this website similar to the Dynamic Content Pages (DCP) websites what [sic] had been rolled out lately. I told Tania that I had analysed current iDivision WHS spreadsheet system and expressed concerns that new website could not be done as DCP website.

Principal Consultant Joanne Prasser had provided a medium dynamic website document for me to use as base document. And I started to write a proposal document to have only some info dynamic like FAQ for Employees and Superiors.

Tania Bessinger organised a second meeting on 13/10/2009 and again Jan Corcut was unavailable. Because writing of this new iDivision WHS proposal document was part of my performance action plan, I told Project Manager that I knew what I had to do. I finished this proposal document on 14/10/2009 as requested by Joanne Prasser in an email with Subject: "Assignment and Work Allocation".

My intention was to have my proposal WHS website ready for testing during November and in Production towards the end of November last year. Tania Bessinger organised a meeting again on 15/10/2009 and on that date I was told that my first proposal was rejected.

Customer wanted to have all content dynamic and Tania Bessinger told me to search for similar proposal documents in Project Folder in order to rewrite my first iDivision WHS website proposal document.

I found a few similar proposals and because I have to improve my typing skills also, there was a lot of Cutting from previous proposals what [sic] was Pasted in my new WHS website proposal document. This first draft was finished on 19/10/2009 and emailed to Principal Consultant for feedback according to the PMP.

Both Carlos Chavez and Tania Bessinger had corrections on 21/10/2009 and some of these corrections were applied to text that had been Cut and Pasted from another proposal document. Next, the Customer reviewed the proposal for some time and maybe organised extra funding.

Suddenly there were amendments from the Customer while I was at that Quality Customer Focus Correspondence training course on 17 and 18/11/2009. The amendments were emailed to me as Track Changes and that new proposal had to be done before Close of Business (COB) on 18/11/2009.

Somehow this document with Track Changes looked strange on my work station. And I decided that late afternoon to apply the changes to my own version and to complete as much as possible. I do recall that GroupWise was offline when I planned to email the document back.

The other major amendments [sic] Jan Corcut requested was to move a Definitions and Acronyms page from the bottom of the document towards the top. This change was only cosmetic but needed to be done to make it more user friendly and/or have it according to the latest standards. Maybe I could have worked on this while waiting for GroupWise to come back and improve my situation.

This iDivision WHS website proposal document was transmitted a couple of times between myself and Jan Corcut on 24 and 25/11/2009 in order to resolve issues about static or dynamic content on the home page. With this 'Show Cause' letter I have received that Summary of Formal Performance Management Plan Review Meeting from Thursday 26/11/2009 and I now notice that my performance has become even worse.

In attachment 6 at CRQ35942 under Timeliness/Quality of Work it is mentioned that the quality was very poor. But it was more user friendly with that Definition and Acronyms page towards the top of that document. Proposal documents I did see in the Project Folder had this page towards the bottom of document.

And under Complexity of Work it is specified that Developers are familiar with this document as it is also the spec for the site. But I cannot remember when there was a proposal document on my desk for a new website.

The only specifications I am familiar with are recorded in WebWise Requests for Change Requests and Incidents and associated Tasks in ITSM7 System."

- [32] **Letter of Termination on (ii):** As for the Applicant's response in respect of the WHS website document, the Respondent in its letter of termination stated that the PMP should have been a reminder to him that his work on the WHS website would need to reflect an overall significant improvement in his work performance. The Respondent also expressed concern that as an information technology professional he needed to improve basic skills such as typing and use of "track changes" functionality. The Respondent did not accept the Applicant's response that the WHS website proposal required sudden changes, stating that given the Applicant's workload he had ample time to complete such changes. Further, in stating that the changes to the WHS website proposal were for minor or cosmetic reasons, the Respondent alleged that the Applicant did not appear to understand the feedback from the customer that these changes were important and required his prompt attention.
- [33] **Applicant's Evidence on (ii):** The Applicant's evidence-in-chief on this allegation was that the Respondent's displeasure was centred mainly on "somewhat minor delays in completing certain tasks" which he alleged were caused largely by his attendance at training sessions and/or "requestor unavailability". The evidence did not suggest that the Applicant spent a substantial period of time in the training required by the PMP. As I understand the evidence the Applicant attended two one-on-one training sessions on the Respondent's Code of Conduct on 22 and 29 October 2009. There may have been other training undertaken by the Applicant in respect of new tasks he was asked to perform (e.g. training courses to improve written communication skills and/or customer focus skills) however the evidence does not suggest that such training prevented the Applicant from completing his assigned tasks promptly. Some of the Applicant's evidence outlined under (i) was also relevant to this performance area.
- [34] **Conclusion on (ii):** Based on the evidence before me I find that the Applicant has failed to convince me that the Respondent's findings that:
- his performance had not improved to an acceptable level despite the extent of the Respondent's resources that had been applied in assisting him to improve his poor performance;
  - he continued to disobey lawful and reasonable instructions by failing to raise issues promptly with his supervisors i.e. Ms Prasser or Mr Chavez;
  - his performance throughout the PMP and his Response to the Show Cause demonstrated a disregard for the feedback provided to him particularly during the PMP; and
  - he had failed to provide reasonable justification as to why he had not completed the tasks specified in the PMP, such as delivering presentations to Ms Prasser about learning from the training courses that he had completed;
- were not substantiated.
- [35] **(iii) Inappropriate behaviour and conduct and (v) Poor Written Communication Skills:** The Applicant attended two one-on-one training sessions on the Respondent's Code of Conduct conducted by Human Resource Consultant Cherie Patterson on 22 and 29 October 2009. The purpose of these training sessions was to assist the Applicant in meeting two requirements in the Final Warning letter i.e.:
- the Applicant was required to adhere to the Respondent's Code of Conduct and the values and behaviours outlined in that document at all times; and
  - the Applicant was required to attend the Code of Conduct training.
- [36] The Respondent acknowledged that the Applicant attended the training sessions. The Respondent however was of the view that the Applicant had not been able to meet the requirements of the Code of Conduct and the values and behaviours outlined in that document. In this regard the Respondent relied upon Ms Patterson's report that the Applicant appeared to be critiquing the Code of Conduct itself rather than learning about his obligations under the Code of Conduct. The Respondent indicated that Ms Patterson's view was supported by the Applicant's feedback provided to Ms Prasser in correspondence dated 22 and 29 October 2009 (Attachment 4 to Exhibit 4). In this correspondence the Applicant identified changes that could be made to include new links in the Code of Conduct and broken links that needed rectification. This was seen by the Respondent to give the appearance that the Applicant was focussed on the behaviour and conduct of others rather than the improvement that was required in his own behaviour and conduct.
- [37] The Respondent also raised the issue of the Applicant's expected standard of performance in the PMP that "you are responsible for ensuring that your email communication does not result in confusion or concern". It was

asserted that the Applicant had been advised to raise any concerns or issues about his assigned work with Ms Prasser or Mr Chavez. In this regard the Respondent identified in Attachment 5 to Exhibit 4 a number of examples where the Applicant had raised issues and concerns with persons other than Ms Prasser or Mr Chavez. As a result it was alleged that the Applicant had distracted other officers from their work. Once again it was pointed out to the Applicant that he had previously received feedback that his email communications had created confusion and/or were not warranted as the issues should have been referred to Ms Prasser or Mr Chavez in the first instance.

[38] The Respondent also raised the fact that it did not appear that the Applicant accepted or acted upon performance feedback and his supervisor's instructions and that during the PMP the Applicant appeared to have focused on the work and conduct of others to the detriment of improving his own work performance. In this regard the Respondent identified the following:

- in the meeting of 26 November 2009 the Applicant refused to accept Ms Prasser's feedback when he said that he disagreed with the feedback i.e. despite Ms Prasser's attempt to discuss the feedback with the Applicant;
- in the summaries provided following PMP meetings the Applicant had made corrections to grammar and wording and yet he had failed to follow the advice and feedback provided to him during the course of such meetings the details of which were contained in the summaries. Whilst Ms Prasser had asked the Applicant to ensure that his own work was of a high standard or quality and without errors he had not achieved an acceptable standard of written communication;
- Ms Prasser perceived the Appellant's action in providing grammatical corrections to the summaries but not applying these standards to his own communications, to be disrespectful of her advice and feedback. Although Ms Prasser had provided the Applicant with support, direction and guidance in an effort to assist the Applicant improve his work performance it appeared that he did not follow the instructions and advice of Ms Prasser;
- the written feedback on the Code of Conduct training consisted of formal letters to Ms Prasser which focussed on changing the Code of Conduct website rather than the provision of an overview of the respective courses with emphasis on how the knowledge and skills would be applied in the work environment which was required by the PMP. Predominately this correspondence from the Applicant identified typing errors and additional links to be inserted in the Code of Conduct website.

[39] The PMP had stated that:

"You are required to practice these [communication] skills by providing written and verbal overviews of each training course to your Principal Consultant after completion of each training course. You are required to use your initiative to prepare a short presentation and to book the meeting at a time that is convenient to your Principal Consultant.

Your approach and performance in relation to learning new tasks and improving your performance through training programs will be measured by your ability to apply these in your role. This feedback will be provided to you in fortnightly meetings with your Principal Consultant and Technical Coordinator."

[40] It is apparent that the Applicant did not undertake the specific requirement of the PMP i.e. to use his initiative to prepare a short presentation and to book the meeting at a time that was convenient to his Principal Consultant. These presentations did not occur.

[41] The Applicant's Response to this allegation (Exhibit 1) is as follows:

"This is to let you know that I wrote the two updates about Code of Conduct training sessions in order to improve my writing skills. Just like that letter about my experiences when Typing that Testing module on Online Training.

I can not remember that I ever put a hyperlink in a Word Document and I therefore took the opportunity to also advice [sic] to include additional hyperlinks in that Code of Conduct Online Document itself.

The Code of Conduct mentions that superiors have to be an example or model the values and principles outlined in this Code. I have not discussed the 3 dot points with Ms Patterson in detail. And I therefore would like to provide the following information or clarifications"

- 'when superiors don't like the news, they first turn it around and next you have to correct it again'

The last couple of years I noticed that when I discover and report that something is not working properly, first iDivision tries to put the blame on me. And it is very difficult to correct this situation and get the focus back on what doesn't work properly.

Maybe some iDivision customers feel the same way because I remember that a Project Manager told the team on 03/07/2009 that when the customer can not tell you during an Incident what he or she did do wrong, then you don't help them.

- 'when superiors have accused you of something and they were wrong, they never correct this'

This is a reminder that I was called into a quiet room on 27/11/2008 at around 8.00AM by the Technical Coordinator. I was told that an [sic] Task for a Major Incident had been sitting in my Remedy Queue and that I had not actioned or worked on this. Also I was told that this Task had been reassigned to another team member the day before while I had an [sic] flex afternoon. I told the TCO (Mr Carlos Chavez) that I had never seen that Task in my Queue.

Somebody in Service Delivery has since confirmed that this Task had never arrived in my Remedy Queue. But the TCO or somebody else in iDivision never said sorry for this incident.

- 'when taking a decision we have to use Courier Mail test, but it appears superiors ignore the test'

The last day of July in 2002 I was called into a Manager's Office to talk about role expectations while working on Microsoft Access systems. I reminded the Manager that java + jsp training had been promised in early 2001 and that these training expectations had not been met.

Next in August 2002 I had a meeting with the team leader who told me that he had heard many stories about me from the past. But next the team leader told me that he was not going to discuss them with me and check my side of the stories. The team leader also (mention or said) [sic] mentioned something else what [sic] I am not going to reveal now.

We both agreed and decided to move forward and work towards the future. But I still can not see how the hurdles and barriers which I experienced only a few months later could pass the Media Test.

The CEO Office had this Global Cities Project and employees searched the internet to look for support programs for homeless people. I was assigned the Netherlands and in team meeting on 30/07/2002 a contractual employee did ask me if it was value for money that I was looking after the homeless people in Amsterdam.

Regarding that Working with Children information, maybe I should have told Ms Patterson that I had just attended a Child Safe training course because I am involved in volunteer work with children.

Another volunteer is employed by the Queensland Police Service and he did advise us to always report Child Abuse to Child Protection and/or the Police. He told us that all we had to do was listen carefully, record this and report it.

I also remember reading about this in the Child Safe training manual under reporting procedures when there is reasonable grounds that child abuse or neglect is happening. We do not have to prove that abuse or neglect is happening.

I think that Working with Children and reporting child abuse can be a grey area. For instance you are a council employee who works with children and a child reveals abuse what [sic] is not related to Council.

Maybe that employee first wants to notify the proper authorities so it is reported. And next, when necessary, report this abuse also to the Ethical Standards Unit.

Hopefully this page does not appear critique [sic] again. But is seen as input so the Code works."

- [42] **Letter of Termination on (iii) and (v):** The Applicant's response in this regard was not accepted by the Respondent given the amount of support offered and feedback given to him to improve his performance. It is further alleged that the Applicant did not appear to accept feedback or advice provided to him and that he continued to insist that his view of a situation or event was correct even when provided with information to the contrary. This ongoing disregard for the feedback and advice provided to the Applicant was not acceptable to the Respondent. The Respondent also had difficulties in the Applicant referring back to events in 2001 when circumstances and events had changed in that time.

- [43] The Respondent also found that the Applicant had provided inappropriate responses to the Code of Conduct training when relating it to his volunteer work. Having been directed to attend Code of Conduct training as part of the PMP, the Respondent saw this as an opportunity for the Applicant to better understand his employee obligations. However, the Applicant continued to fail to understand the valid and serious work performance and conduct deficiencies that had been raised with him. The Respondent saw the Applicant's response in this regard as not providing any justification for his failure to meet expected performance standards as defined in the PMP and his role statement.
- [44] As for the Applicant's written communication skills, the Respondent relied upon the Applicant's Response to the Show Cause letter to demonstrate that there had been no improvement in his written communication skills.
- [45] **Applicant's Evidence on (iii) and (v):** The Applicant's evidence-in-chief on this particular allegation was that the Respondent was essentially displeased "with my, admittedly, rather flippant criticisms of the official Code of Conduct" which resulted in an "unsound assumption" that he was therefore not observing Code of Conduct requirements. I have also had regard to the Applicant's response to performance area (i) which has some relevance in this performance area.
- [46] **Conclusion on (iii) and (v):** In taking account all of the evidence, I find that the Applicant has failed to show that the Respondent was not justified in making the following findings:
- the Applicant's performance had not improved to an acceptable level despite the additional Respondent resources invested in him during the PMP;
  - the Applicant's behaviour throughout the PMP and his Response to the Show Cause demonstrated a disregard for the feedback provided to him;
  - the Applicant had not achieved the standard of work performance and conduct required by the Respondent; and
  - the Applicant had demonstrated no improvement in his written communications.
- [47] **(iv) Lack of responsibility for contributing to your professional development:** In this regard the Respondent asserts that the standard for this area of performance was as follows:
- "You are required to undertake your official duties including learning new functions and tasks. This includes
- identify issues that may prevent you from effectively undertaking your work, identify possible solutions, and discuss these with your Principal Consultant or Technical Coordinator.
- Attendance at approved training courses to improve written communication skills, and customer focus skills.
- After attendance at each course, a written and verbal overview of the course is to be provided to the Principal Consultant, with emphasis on how the knowledge and skills will be applied within the work environment.
- Demonstrated implementation of the knowledge and skills you have gained from training and learning."
- [48] The Respondent asserted that the Applicant had failed to identify issues that may prevent him from undertaking his work or identify possible solutions and then to discuss these with his Principal Consultant or Technical Coordinator. It was alleged that the Applicant's approach to raising these issues:
- had not been prompt;
  - had not provided possible solutions; and
  - had not raised issues, as he was instructed to do, promptly with his Principal Consultant or Technical Coordinator. In this regard it was asserted that the Applicant had emailed other persons who did not have the technical skill or knowledge to adequately answer his questions or provide the Applicant with guidance. As an example the Respondent relied upon the emails contained in Attachment 5 to Exhibit 4. The Applicant's actions in raising matters with Ms Holmes or Mr Dunn had not been an efficient or effective approach to gaining a prompt resolution to the issues he raised and had in fact distracted and confused those persons.

[49] The Applicant's Response to this allegation in the Show Cause letter (Exhibit 1) was as follows:

"This is to let you know that I have written overviews of the 3 training courses I attended last year. I planned to book the meetings with Principal Consultant Joanne Prasser this month in order to provide also a verbal overview. But I now realise that maybe I need to rewrite the written overviews. Because the style is not conversational and there are a lot [sic] dot points.

This is also to let you know that I visited Corporate Services last year November. I had a talk with an employee in that Division when I found myself correcting issues within the team and correcting summary reports after the First Progress Review of PMP on 04/11/2009.

And the advice I received when this Poor Performance Management Plan was not working for me was to raise issues or concerns with iDivision HR Manager Ms Sarah Holmes. Further advice I received was to also keep the union representative Mr Craig Dunn informed. I have already decided to stop doing this as a New Year's resolution when I realised that this approach would never work.

It was a senior staff member in Corporate Services Division who did provide me with this advice. And I found it not necessary to check this with the Manager Employment Arrangements. I now realise that the situation could have been better when I had looked for a more formal advice.

I have addressed that Email communication under this fourth issue and I hope that the examples in Attachment 5 have contributed to my professional development and/or communications skills.

Regarding Skillport training under the first issue, I noticed that Testing module was assigned to me before attending that introduction session on 01/10/2009. And at the end of that introduction session, the course presenter or administrator went through a list and I was told that also Analysis and Design module was assigned.

I can remember that Joanne Prasser told me that the online courses allocated to me required changes. But I did not realise that we were not allowed to have a look at other training modules outside the plan.

This confusion could have been avoided when the administrator was told to remove that Testing module at the end of that introduction session. Or always have that introduction after that training plan or agreement is signed.

I have always been customer focussed in the past and looked for smart solutions to problems while maintaining websites and/or applications. But thinking customer focused gets difficult since we are not allowed to have contact with customers."

[50] **Letter of Termination on (iv):** In the letter of termination, the Respondent noted that in the PMP the Applicant had been clearly informed of the requirement to provide verbal and written overviews to Ms Prasser of the training courses which he attended.

[51] **Applicant's Evidence on (iv):** The Applicant's evidence-in-chief on this allegation is that he had a commitment to his professional development which was illustrated in his emails of 4 December 2009 and 8 February 2010 wherein he reported upon his success in the training he had been directed to undertake by the PMP. The email of 4 December 2009 to Ms Prasser advised her that he had finished the first Online Training Course and that his score was just below 90%. It further advised Ms Prasser that he would undertake the "Best Practices for Software Programming Online Training Course" in January of the following year. In the email of 8 February 2010 to Ms Prasser, the Applicant sought authorisation to write two overviews of Online Training courses outside working hours. It also advised Ms Prasser that the Applicant had to repeat the "Refactoring Techniques Topic" in the "Maintaining Quality Code Course" as he had not achieved the required 80% on that topic. On the second occasion the Applicant achieved 97.5% for the topic. The Applicant also advised Ms Prasser of his results in the other three topics. However, the email of 8 February 2010 was sent at a time well after the Show Cause was issued and after the Applicant's Response to the Show Cause was received.

[52] **Conclusion on (iv):** It was clear that the Applicant did not provide any written or verbal overviews of the training courses that he undertook as part of the PMP. The emails sent to Ms Prasser could not fall into the category of a written overview of the training course. The Applicant's Response to the Show Cause and his evidence did not adequately answer the allegations raised in this performance area.

#### **Was the Dismissal Unfair?**

[53] At all times from the receipt of the "Please Explain" letter on or about 24 August 2009 the Applicant was on notice that he could be the subject of a formal performance management plan and/or disciplinary action. In the

Final Warning letter the Applicant was on notice that if he failed to obey a lawful direction or behaved towards others in an inappropriate way, that the PMP would immediately cease and formal disciplinary action would be undertaken. The Applicant was further advised that any further instances of poor performance or misconduct would result in the termination of his employment.

- [54] In cross-examination the Applicant confirmed that on receipt of this letter he understood that this was a final warning and that his performance had to improve and that if it did not improve then his employment would be brought to an end.
- [55] Both in his Response to the Show Cause and in his evidence the Applicant has failed to satisfy me that the Respondent did not have a valid reason for the termination of his employment. On each of the five performance areas relied upon by the Respondent to terminate the Applicant's employment the findings made by the Respondent were open to it. The Applicant did not appear to grasp the seriousness of his situation as and from the issuing of the "Please Explain" letter i.e. 24 August 2009. Further it appeared that the Applicant failed to apply himself to addressing the matters raised in the PMP.
- [56] In all the circumstances I find that the Respondent had a valid reason to terminate the Applicant's employment.
- [57] In deciding whether a dismissal is unfair the Queensland Industrial Relations Commission must consider the matters outlined in s. 77 of the Act. Section 77 provides as follows:

**"77 Matters to be considered in deciding an application**

In deciding whether a dismissal was harsh, unjust or unreasonable, the commission must consider -

- (a) Whether the employee was notified of the reason for dismissal; and
- (b) Whether the dismissal related to -
  - (i) The operational 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 an employee was given an opportunity to respond to the allegation about the conduct, capacity or performance; and
  - (iii) Any other matters the commission considers relevant."

- [58] In this matter the Applicant was certainly notified of the reasons for his dismissal. It is clear that the dismissal related to the Applicant's conduct, capacity and performance. The Applicant was certainly warned about the particular conduct, capacity and performance relied upon to terminate his employment. The issue then is whether the Applicant was given an opportunity to respond to the allegations concerning his conduct, capacity and performance as provided for in s. 77(c)(ii) of the Act i.e. was the Applicant provided with procedural fairness.
- [59] In terms of the process undertaken (excluding the time to respond to the Show Cause letter) by the Respondent it would appear that the Applicant was provided with procedural fairness e.g.:
- Ms Prasser had an informal discussion (Planning and Performance meeting) with the Applicant in May 2009 where she raised with the Applicant certain unsatisfactory aspects of his work performance;
  - on or about 24 August 2009 the Applicant was provided with the "Please Explain" letter (an eight page letter);
  - the Applicant was given an opportunity to respond to that "Please Explain" letter which he did on or about 7 September 2009 (a sixteen page letter);
  - the Respondent issued the Applicant with a Final Warning on or about 15 September 2009;
  - the Respondent then implemented a Work Performance Plan (PMP) for a three month period which was signed by the Applicant on 29 September 2009;

- five meetings were held with the Applicant during the period 8 October 2009 to 26 November 2009 as part of the PMP. Minutes of those meetings were provided to the Applicant and his responses were either incorporated into the summaries or the reasons why they were not incorporated are outlined in the summaries. The minutes of the meeting on 26 November 2009 was only provided to the Applicant with the Show Cause letter; and
- a Show Cause letter dated 8 January 2011 was provided to the Applicant on 11 January 2011.

- [60] The only procedural difficulty with the process undertaken by the Respondent was in respect of the Show Cause letter. This letter was signed by Mr Maynard on 8 January 2010 and was of nine pages in length with the attachments to the Show Cause letter being fifty-nine pages in length. The evidence is that the Applicant did not receive the Show Cause letter until sometime around noon on 11 January 2010. The Show Cause letter gave the Applicant until midday on 13 January 2010 to respond to the sixty-eight page document. It became known to the Respondent that the Applicant had a medical appointment on the morning of 12 January 2010. The Applicant was directed to remain absent from work until midday on 13 January 2010 "[i]n order to ensure you have appropriate time to respond to this letter".
- [61] It is apparent that Mr Dunn, on behalf of the Applicant, sought an extension of time of one day for the Applicant to provide his response and this apparently was granted. The difficulty is that it was also apparent that the Applicant was not made aware of the granting of the extension of time as he had his hand-written response with the Respondent by midday on 13 January 2010. At least he was not made aware of the granting of the extension of time until the morning of 13 January 2010 after he had completed his Response to the Show Cause.
- [62] Whilst the Applicant had previously seen most of the documentation that was attached to the Show Cause letter it was not a document that could have been responded to in any detail in only one and a-half days. Even with the extension of a further day in which to respond the task appeared to be well beyond the Applicant to appropriately respond to the Show Cause in that timeframe. Whether the Applicant's Response to the Show Cause would have been any different had he been given a more appropriate timeframe within which to respond is unknown. Given the Applicant's evidence it is very doubtful that a more appropriate timeframe would have greatly assisted the Applicant.
- [63] The other issue raised by the Applicant is that a lot of the information he required to appropriately respond to the Show Cause was in his office (e.g. emails and other documentation) and he had no access to that information when he was directed to remain absent from work until midday on 13 January 2010. It is however noted that the Applicant did not seek access to that documentation prior to providing his Response to the Respondent.
- [64] The failure to give the Applicant sufficient time within which to respond to the Show Cause has resulted in a dismissal that was harsh, unjust or unreasonable i.e. it was unfair.

### **Remedy**

- [65] Throughout his evidence the Applicant said that he performed certain work because he was of the view that it was not a waste of time. That work however was not work that he had been directed to perform. I am not satisfied that if the Applicant were reinstated that he would perform work as directed by his supervisors. Given his Response to the Show Cause and his evidence I am of the view that the Applicant would continue to perform work that he thought should be performed and would thus continue to waste time on areas of work that was not required by the Respondent.
- [66] I have formed the view that if the Applicant were to be reinstated he would not change his ways - he would continue performing work that he thought should be done as opposed to performing work that his supervisors wanted him to perform. At one point in his evidence when questioned about this the Applicant responded that the Respondent had asked him to perform customer service and that is what he provided i.e. regardless of whether that work was required of him by his supervisors. At no time did the Applicant give me the impression that he had learnt much from the processes undertaken by the Respondent during 2009 and early 2010.
- [67] There is also the relationship between the Applicant and Ms Prasser, his immediate supervisor. The Applicant attempted to get Ms Holmes involved in matters outside of her expertise rather than raise the issues with the most appropriate person i.e. Ms Prasser. This is in circumstances where the Applicant had been directed to raise such matters promptly with Ms Prasser or Mr Chavez. The evidence indicates either a lack of confidence in, or a lack of respect for, his supervisor which would make Ms Prasser's role in supervising the Applicant were he to be reinstated exceedingly difficult, if not almost impossible.
- [68] In those circumstances I find that reinstatement is impracticable.

- [69] Whilst I have not considered this in reaching the conclusion that reinstatement would be impracticable I also note the evidence of Mr Maynard that the Respondent has, since the termination of the Applicant's employment, moved to a new information and communication technology in the area where the Applicant was previously employed. It was Mr Maynard's evidence that the Applicant was engaged in completing small content change requests on City Web and that that service had significantly diminished to the extent that there are now only a small number of requests per month. Whilst the Applicant was employed there were three to five (including the Applicant) Respondent employees assigned to web site changes across the Respondent's business whereas currently that work is undertaken by a duty desk person as a component of a wider role.
- [70] On the issue of re-employment it was stressed that the Applicant was engaged in work of a specialised area. The Applicant's response to the efforts of Respondent employees during the PMP would suggest that the Applicant resisted any attempts to expand his skills and so re-employment would also be impracticable. In any event there was no re-employment options presented during the hearing.
- [71] One must then consider the issue of compensation under s. 79 of the Act. The matters that I have considered in this regard are as follows:
- the Applicant had been employed by the Respondent for 23 years;
  - the Applicant at the time of termination was 57 years of age;
  - the Applicant was paid thirteen weeks' pay in lieu of notice on termination i.e. his statutory entitlement;
  - the Applicant was employed in a rather specialised area of the Respondent's business;
  - the efforts taken by Respondent employees to assist the Applicant to remedy the defects in his performance; and
  - the Applicant's failure to embrace the opportunities provided to him to improve his performance.
- [72] Whilst I doubt that the Applicant's Response to the Show Cause letter would have substantially improved his position given the content of the summaries of the PMP meetings and his evidence in this hearing, he should have been given with more time to provide his Response to the Show Cause. Whilst the Show Cause letter was dated 8 January 2010 it was not provided to the Applicant until around noon on 11 January 2010. The lack of time provided to the Applicant to respond did not appear to be intentional on the part of the Respondent but rather there was delay in providing the Show Cause to the Applicant.
- [73] In the circumstances, I order that the Respondent pay to the Applicant an amount equivalent to five weeks' pay at the rate of pay the Applicant was being paid on the termination of his employment. That amount is to be paid within twenty-one days of the release of this decision.

Order accordingly,

D.M LINNANE, Vice President.

*Hearing Details:*

2010 25 October

2011 8 February

11 - 14 April

*Appearances:*

Mr B. Steinitz for the Applicant

Mr J. Merrell of Counsel instructed by Brisbane City Council  
Legal for the Respondent.

Released: 9 June 2011