**QUEENSLAND INDUSTRIAL RELATIONS COMMISSION**

CITATION:

*Erian v State of Queensland (Department of Agriculture and Fisheries)(No. 2)* [2019] QIRC 202

PARTIES:

**Erian, Ihab**

(Appellant)

v

**State of Queensland (Department of Agriculture and Fisheries)**

(Respondent)

CASE NO:

TD/2018/127

PROCEEDING:

Application for reinstatement

DELIVERED ON:

20 December 2019

HEARING DATE:

14 & 15 November 2019

MEMBER:

HEARD AT:

Pidgeon IC

Brisbane

ORDER:

**The application is dismissed.**

CATCHWORDS:

INDUSTRIAL LAW - where the Applicant seeks reinstatement - where the Applicant was subject to IME - where the Applicant was ill-health retired - where the Applicant failed to participate in the return to work process - where the Applicant produced medical reports after decision to terminate.

LEGISLATION:

CASES

*Industrial Relations Act 2016* (Qld), s 316, s 317, s 320.

*Public Service 2008* (Qld), s 178.

*Blows v Townsville City Council* [2016] QIRC 066

*Gibson v Bosmac Pty Ltd* (1995)60 IR 1

*Glover v Education Queensland [2005] QGIG 180*

*Gold Coast District Health Service v Walker* (2001) 168 QGIG 258

*Laegal v Scenic Rim Regional Council* [2018] QIRC 136

APPEARANCES:

Mr S Hogg of counsel instructed by Alexander Law for the Applicant

Ms C Laird for the Respondent

**Decision**

***Background***

[1] Mr Ihab Erian ("the Applicant"), Senior Inspector – Biosecurity ("the Fire Ant Unit"), was employed by the State of Queensland (Department of Agriculture and Fisheries) ("the Department") from 25 August 2001 to 10 October 2018, when his employment was terminated by way of ill health retirement.

[2] Mr Erian lodged an application for reinstatement and/or compensation under s 317 of the *Industrial Relations Act* 2016 ("the IR Act") challenging the decision to terminate his employment on the basis of an ill health retirement saying that the termination is unfair, that is it is harsh, unjust or unreasonable.

[3] Essentially, Mr Erian's application calls into question the finding of the decision maker that he was unable to return to work due to ill health and states that he was able to return to work and should have been redeployed.

***Onus of Proof***

[4] The onus is on the Applicant to demonstrate that the termination (ill health retirement) was harsh, unjust or unreasonable.

***The legislative scheme***

[5] Section 320 of the IR Act sets out the matters to be considered by the Commission in hearing an application under s 317.

**320 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 the employee was given an opportunity to respond to the claim about the conduct, capacity or performance; and

(d) any other matters the commission considers relevant.

[6] The words harsh, unjust or unreasonable are to be given their plain and ordinary meaning.

***The Applicant's Case***

[7] The Mr Erian's case in summary is as follows:

• The Department has failed to consider the requirements of s 178 of the *Public Service Act* 2008 ("the PS Act"). Section 178(1)(a) provides that the chief executive may transfer or redeploy the employee.

• A previous report provided by Dr Theodoros had recommended that Mr Erian be redeployed to another work area.

• The Department had been in contact with Mr Erian's treating psychiatrist well before the decision to direct him to be examined by Dr Murphy ("the IME").

• In fact, the Department's Rehabilitation and Return to Work Advisor had been working with Mr Erian and his treating doctor for a pathway to return to work.

• The evidence of Dr Theodoros and Dr Taylor demonstrates that Dr Murphy's report cannot be relied upon as being definitive and should be treated as a fallacy. On that basis alone the dismissal on ill health was harsh, unjust or unreasonable.

• The Department did not adequately consider the long history of the Applicant's issues with his work area and his attempts for redeployment as supported by his doctor.

• In the case of *Gleeson v State of Queensland (Department of Justice and Attorney-General)* [2015] QIRC 148, a dismissal was found to be harsh, unjust or unreasonable as the employer failed to consider a graduated return to work or alternative employment despite recommendations to do so.

***The Department's Case***

[8] The Department's case in summary is as follows:

• It is denied that the termination by way of ill health is unfair, unjust or unreasonable.

• Mr Erian was notified of the reason for termination.

• The termination is an ill health retirement and the medical evidence available to the Department at the time they made their decision supported that Mr Erian could not return to work in his previous role, nor in any other role within the Queensland Public Service.

• The medical evidence was that the employee no longer had a capacity to be employed in the Department nor elsewhere in the Queensland Public Service.

• Mr Erian was 'warned' to the extent relevant in the circumstances of an ill health retirement via notice provided by written correspondence to his solicitors on 8 August 2018.

• The process which led to the termination of employment due to ill health retirement was conducted in accordance with Part 7 of the PS Act.

• The correspondence of 8 August 2018 invited Mr Erian to provide a response to the proposal to ill health retire him.

• Mr Erian did not ever respond nor request an extension of time to provide a response.

• In the absence of any communication from Mr Erian, the Department had no way of knowing that he did not agree with the course of action proposed and made a decision as is required under s 178 of the PS Act.

• The medical evidence was inconsistent with transfer or redeployment of Mr Erian.

• The Department only became aware of concerns with the ill health retirement when a dispute was notified to the Queensland Industrial Relations Commission ("QIRC").

• On 22 November 2018, during a conference at the QIRC, Mr Erian presented a medical report from his treating psychiatrist. The report is dated 24 September 2018. At no time had Mr Erian indicated to the Department that he intended to obtain a further medical report.

• At the time of decision making, the Department had no awareness that the report existed.

• A further report dated 12 November 2018, from another psychiatrist was listed with Mr Erian's documents for these proceedings. That document had never been provided to the Department and was not considered by the chief executive in determining if Mr Erian should be ill health retired.

• Mr Erian was afforded natural justice, albeit he failed to provide a response to the Respondent in relation to the proposal to ill health retire him. Natural justice is met by providing an opportunity to respond, there is no obligation on the Respondent to force the Applicant to take advantage of the opportunity provided to them.

***Reasons for decision***

*Matters to be considered in deciding an application for reinstatement*

[9] The evidence before me demonstrates that Mr Erian was notified of the reason for dismissal and that it related to the Department's decision that he was incapable of returning to work as evidenced by his ongoing absence from the workplace and the outcomes of an IME report regarding his ability to return to work.

[10] I find that the letter notifying Mr Erian of the decision to ill-health retire him served as a 'warning' within s 320(c)(i) of the IR Act in that it told him of the decision and when it would take effect.

[11] The letter notifying Mr Erian of the decision to ill-health retire him also contained advice that the IME report was available to his treating practitioner and provided an invitation for him to respond and provide any information he thought was relevant. The evidence demonstrated that while Mr Erian's representatives sought for the IME report to be provided to Mr Erian's doctor, they took no other action to respond to the letter informing the Department that he was to be ill-health retired.

[12] While it is clear that Mr Erian's representatives took steps to seek alternate psychiatrist reports, at no time did they communicate with the Department to inform them that they were seeking such reports or that they would require an extension of time to respond to the proposal to ill-health retire Mr Erian.

[13] There can be no doubt that the letter was clear and unambiguous about the proposal to ill-health retire Mr Erian and the required date by which any opposition to that proposal should be provided.

[14] Rather than serving as advice that the ill-health retirement would be opposed, in my view, the request that the IME report be released to Mr Erian's treating psychiatrist demonstrated that Mr Erian's representatives had read the letter.

[15] In circumstances were Mr Erian had requested communication be made to him via his representatives, and the representatives had received and taken steps to follow up on the correspondence, I think it was entirely acceptable for the Department to consider that the communication had been received.

[16] There is no onus on the Department to follow up and ask Mr Erian if he intends to oppose the decision. I find this particularly the case where the Applicant was legally represented.

[17] I am satisfied that the Department has complied with s 320(c)(ii) of the IR Act.

*Other matters the Commission considers relevant*

[18] Mr Erian argues that while the Department says that he was incapacitated for work, he was in fact able to work and was seeking to return. He says that the Department did not properly consider other positions he could return to and was in error in determining that he should be retired on grounds of ill-health.

[19] Given my determination that the Department has complied with the procedural requirements of s 320 of the IR Act, it seems to me that there are two key questions to be considered in determining whether the dismissal was harsh, unjust or unreasonable:

1. Did the Department properly consider redeployment before moving to ill-health retirement?

2. Was it fair for the decision maker to determine that Mr Erian was incapacitated for work?

***Was redeployment considered?***

[20] Section 178 of the PS Act states:

**178 Action following report**

(1) If, after considering the report of the medical examination, the chief executive is reasonably satisfied the employee's absence or unsatisfactory performance is caused by mental or physical illness or disability, the chief executive may –

(a) transfer or redeploy the employee; or

(b) if it is not reasonably practicable to transfer or redeploy the employee – retire the employee from the public service.

(2) Subsection (1) does not limit the action that may be taken relating to the employee.

[21] The evidence of Mr Erian was that it was his desire to be transferred to another part of the Department other than the Fire Ant Unit as he was unhappy where he was.

[22] Mr Erian agreed that following the departure of the two people he had made allegations against from the Fire Ant Unit, the Department spoke with his doctor about him returning to work in that Unit.

[23] Mr Erian stated that he could not return because "the culture is still there. The culture is still Fire Ant. The culture who don't accept me anymore…".

[24] The Applicant gave evidence that the Department had insisted on him returning to the Fire Ant Unit and had demonstrated a "take it or leave it attitude".

[25] It was suggested to Mr Erian that the Department's rehabilitation section had sought authority to speak to his treating doctor regarding his return to work but that he had refused to give them permission. Mr Erian agreed that following a discussion between the parties prior to a QIRC conciliation conference the Department requested authority to contact his doctor and that he had agreed and signed his consent for this to happen.

[26] Mr Erian gave evidence that the Department had asked him to go to see an exercise physiologist as a part of his return to work program and had made an appointment for him to do this but he refused to attend. He said:

I haven't been – what is the outcome? That's, again, the Department, in my view – in my belief, was looking for any mistakes for the health, whether physical or mental, to keep me out. Yes.

[27] Dr Elizabeth Woods, Director-General of the Department gave evidence that it is normal practice of the Department to seek to return people to work in the role they substantively perform. She explained that

We…attempted to follow the normal process that would be followed if a person was going to be returned to a different position, that is, a skills and capabilities assessment, because if you're going to shift somebody to a different position, you actually have to understand what they're going to be able to do so that you get an appropriate fit between the person and the position. At any given time, we only have a certain number of positions vacant.

[28] Dr Woods gave evidence that given the people Mr Erian had had problems with had moved on from the Department, she thought a return to his substantive role was a worthwhile option to explore given that he was originally selected for the role and had been in it for some time.

[29] She said that the advice that was provided to her was that the Department had explored a return to work and asked Mr Erian to participate in an assessment of his capabilities and skills with a view to considering whether there were other possibilities.

[30] Ms Faux, senior human resources consultant with the Department said that following Mr Erian's treating medication practitioner advising that he was able to return to work but not in the Fire Ant Unit "steps were taken to undertake a functional capability and skills assessment so that we could determine what area of the Department would be best suited for Mr Erian until such time as when he did rehabilitate back into the workplace".

[31] The Director-General agreed that the letter instructing Dr Murphy to conduct the IME stated that the ultimate aim was to return Mr Erian to his substantive position but pointed out that it also said that: "attempts to identify suitable alternative positions have been complicated by a lack of medical and occupational information regarding any limitations which need to be accommodated in a return to work plan".

[32] Dr Woods said that it would be very hard to identify other positions for Mr Erian to be redeployed to without knowledge of what he was capable of doing:

Hogg: But there were – there were no actual enquiries within the Department about whether or not Mr – there were spaces available to put Mr Erian into?

Woods: Well, since we didn't have an assessment of skills and capabilities, that would be very hard to do. You need to know what the person is able to do on the day that they're going to return to work to be able to get a clear idea of what would be appropriate. As I said, it's generally a matching proposition in a relatively small Department. You don't have vacancies across the Department in all roles, and so what you would be looking for is, what has this person got skills and capabilities to do? What possibilities do I have at the moment that would fit? It's difficult to do if you don't have a timely assessment, and at this point, as you've pointed out, Mr Erian had not been at work in the Department for almost 18 months.

[33] It is clear to me from the evidence, that following the advice of Mr Erian's treating medical practitioner that he was ready to return to work but not to the Fire Ant Unit, the Department commenced steps to identify a different role for him. This is not inconsistent with their stated eventual plan that, as is case generally, the ultimate aim was to return him to his substantive position.

[34] It was Mr Erian's own actions in refusing to participate in this assessment which stymied the return to work process the Department attempted to commence in response to the advice from the Mr Erian's treating medical practitioner.

[35] I am satisfied that the Department did give consideration to s 178(1)(a) of the PS Act prior to commencing the process leading to the ill-health retirement.

***Was it fair to determine that Mr Irian was unable to return to work?***

[36] The Department's position is that the decision to ill-health retire Mr Erian was made based on the medical evidence available to the decision maker at the time.

[37] The sequence of events as I understand it is that Mr Erian commenced a period of sick leave following some issues he was having in the workplace. Following a period of leave, his treating medical practitioner recommended a return to work program and advised the Department that it would not be appropriate to return Mr Erian to the Fire Ant Unit. The Department then sought to have Mr Erian attend a capability assessment as explored above. When Mr Erian refused to participate in this process, the Department directed him to undertake an IME.

[38] Dr Woods said that the IME report prepared by Dr Murphy was 'quite clear and unequivocal' in saying that he did not believe a return to work was likely to have a successful outcome for either Mr Erian or, for the employer. This was because he had come to a conclusion that any position that required a performance review or improvement process was likely to be a cause of concern for Mr Erian.

[39] When asked if she relied only on Dr Murphy's report when making the decision to ill-health retire Mr Erian, Dr Woods said that the letter informing Mr Erian of the intention to ill-health retire him advised him of the opportunity to provide additional information to disagree.

[40] Dr Woods also gave evidence that 'the principle piece of relevant information'was the IME report and that in the report, Dr Murphy commented that Mr Erian would not be able to return to the Fire Ant Unit, or any public service position.

[41] It was suggested to Dr Woods under cross-examination that medical reports commissioned by the Department would have to be reviewed with a critical eye and not just accepted at face value. Dr Woods said:

We have a panel of specialist advisors. I have no qualifications on which to question the opinion of a psychiatrist. If I am provided with an opinion by a highly trained expert that something is going to be dangerous to a person who's a potential employee, I would have to take that advice very seriously.

[42] Dr Woods was asked about whether, if she had received the report of Dr Taylor, in a timely manner, that report would have changed her view. Dr Woods was clear in her response that the report was unavailable to her at the time that she made her decision and so she was not in a position to say what impact it may have had on her decision.

[43] Dr Woods also said that had any additional reports been provided at the time the process was being undertaken, that they would have been carefully considered.

*Dr Murphy's Report*

[44] Dr Murphy gave evidence that at the outset of the assessment, Mr Erian handed him a letter and requested that he read it before the consultation commenced.

[45] Dr Murphy said that in coming to his diagnosis, he considered the document Mr Erian had handed him, the instructions from the Department, the face-to-face session including what was said, but also non-verbal communication.

[46] Dr Murphy gave evidence that he came to a view that Mr Erian would be unable to work for the Queensland Government as it was his understanding that wherever he went, he would need to participate in a Performance Improvement Plan.

[47] Dr Murphy said that he formed a view that Mr Erian could return to work, but it would have to be with a different employer. With regard to Mr Erian's capacity to return to work with the Department, in summary Dr Murphy said:

• He said he wouldn't go back to the Fire Ant Unit, and he also said he wouldn't do a performance improvement plan.

• According to his notes, Mr Erian was emphatic that he would not do a performance improvement plan. Dr Murphy wrote and underlined "not a PIP" and said that this was him quoting Mr Erian.

• Mr Erian said 'The Department is setting me up to fail' Dr Murphy's impression was that Mr Erian was referring to the whole Department was at other times he referred to the Fire Ant Section rather than the Department.

• Dr Murphy wrote in his report: "Mr Erian's mistrust and paranoia will quickly spread to any new manager who comments on his work performance".When questioned about whether this referred to the Department or the Fire Ant Section, Dr Murphy said it referred to the Department.

• Mr Erian had said he was 'dying to go back to work' and Dr Murphy was being asked to consider if it was safe for him to return to work.

• Mr Erian was functioning well in a lot of other contexts and referred to the letter of Dr Theodoros saying that Mr Erian was living a normal life, however:

…My concern was that on specific subjects, the quality of his thinking began to break down, and he had lost the capacity for effective thought and problem solving. All very specific issues. That certainly included the Fire Ant Unit. That certainly included the performance improvement plan. But there were other comments he made that made me think that his thinking was also very distorted around the Department was a whole, and the way he behaved with me during the assessment also concerned me.

• Mr Erian's body language was very unusual and suggested that he was not able to think calmly about the interview.

• It is very unusual for Dr Murphy to decide to stop people from going back to work if they want to. He said that he did it out of genuine concern for Mr Erian's well-being.

• Mr Erian appeared to not only be concerned about the two people in the Fire Ant Unit he had had problems with.

It also included the Department. He made several comments saying the Department was out to – was trying to set him up to fail, and it also included me.

• Compared to people he deals with day in day out, Mr Erian's behaviour was very different and it worried him.

*Mr Erian's evidence*

[48] It is not disputed that Mr Erian had some concerns in his workplace and with two of his line managers in particular.

[49] Mr Erian had made a formal complaint regarding treatment he alleged he was experiencing at the hands of two of his line managers. This matter was investigated, and it was found that Mr Erian had been subject to reasonable management taken in a reasonable way and the allegations he had made against the individuals were unable to be substantiated.

[50] Under cross-examination, it was clear that Mr Erian does not accept that finding and maintains his position that the investigation was flawed

[51] With reference to his mistrust of particular people in the workplace, Mr Erian said he didn't trust the 'top ranks' of the Fire Ant Unit.

[52] Mr Erian appeared to be defensive and uncooperative under cross-examination. His answers were inconsistent and at times it was difficult to determine whether he was answering questions about factual matters truthfully or answering these questions with his opinion regarding those facts.

[53] On occasion, Mr Erian gave answers to questions and when shown a document or presented with a set of facts, changed his answer.

[54] Initially Mr Erian said that he never found out the outcome of the investigation into his complaint and that he was never contacted about it. However, further questioning evinced a response that he was aware of the outcome of the investigation and had received correspondence regarding it.

[55] This was also the case when asked about whether he had been subject to a performance improvement plan prior to commencing sick leave. Mr Erian initially said that he was not participating in a performance improvement plan, but following further questioning, admitted that he was.

[56] The Applicant denied ever saying to Dr Murphy that he would never participate in a performance improvement process anywhere.

*Evidence of Dr Taylor*

[57] Dr Taylor saw Mr Erian on 12 November 2018, after his employment had come to an end.

[58] At the time of Dr Taylor's assessment of Mr Erian, he was not concerned about his mental health or mental state.

[59] Dr Taylor said that based on his conversations with Mr Erian's treating psychiatrist, Mr Erian's brother and the review of other material, he was persuaded on the balance of probabilities that there had been an adjustment disorder 'earlier in the piece'.

[60] When asked if it would concern him that Mr Erian still thought it was inappropriate or unfair to have to attend an assessment with an occupational therapist, he answered: "Well, that would worry me a little if he was still thinking that that was right to do that. Yeah. You'd wonder why he's held on to this belief for so long".

[61] Dr Taylor said that he thought that Mr Erian's problem was with the Fire Ant Unit specifically and that if he'd been relocated to some other Department that would've facilitated his return.

*Evidence of Dr Theodoros*

[62] Dr Theodoros said that he saw a rehabilitation expert from the department on 29 January 2018 and subsequent to that, he cleared Mr Erian to return to work on the condition that he be deployed to another part of the Department of Agriculture Fisheries and Forestry.

[63] He also agreed that following this, he provided medical certificates that Mr Erian was incapacitated and unable to return to work until 26 February 2018 as the return to work program had not been accepted.

[64] Dr Theodoros was asked about the comments made in his report regarding his recommended return to work plan not being accepted:

[MS LAIRD] I suppose it's – you've said on a couple of occasions in your report that your recommendations were not accepted?

[DR THEODOROS] Yeah, okay.

[MS LAIRD] Do you accept that it was – that your recommendations – that there is no evidence that your recommendations were not accepted

[DR THEODOROS] Okay?

[MS LAIRD] because they were proceeding until Mr Erian refused to cooperate with the process?

[DR THEODOROS] Yeah. I-I-I'd agree with that.

[65] Dr Theodoros said that he did not think that Mr Erian should have been dismissed on the grounds of a mental illness and that any mental health problem had resolved by the end of 2017. He continued to give him medical certificates until February of 2018 because the Department had not at that point accepted a graduated return to work.

*Consideration of evidence: Mr Erian's incapacity for work*

[66] The evidence of Dr Woods makes it clear that the decision that Mr Erian would be ill-health retired was made based on the material available to her at that time.

[67] The process was followed such that Mr Erian was told the ill-health retirement decision had been made and he was given the opportunity to access the IME report via his treating medical practitioner. He was also invited to provide a response to the decision if he disagreed with it.

[68] Mr Erian's representatives requested that the IME report be made available to Mr Erian's treating medical practitioner and in fact took steps to get reports from both Mr Erian's treating medical practitioner and also from another expert, Dr Taylor.

[69] However, none of these reports were provided in response to the ill-health retirement notification letter.

[70] At no point did Mr Erian or his representatives inform the Department that they disputed the ill-health retirement or ask for an extension of time to be able to furnish the Department with medical opinions which differed to Dr Murphy's.

[71] In circumstances were the Department had confirmation that the ill-health retirement letter had been received by virtue of the request for the IME report to be released to Mr Erian's treating medical practitioner, and where a clear timeline for any response had been established in the letter, I find that it was reasonable for the Department to form a view that the ill-health retirement was not opposed by Mr Erian when they received no further contact regarding the matter.

[72] The Department were under no obligation to make the Applicant take up the opportunity to respond to the ill health retirement letter. The natural justice was afforded to the Applicant by virtue of being given the opportunity to respond.

[73] For whatever reason, Mr Erian and his representatives chose not to provide the differing medical opinions until well after the ill-health retirement had been effected.

[74] Dr Taylor provided an opinion that he believed Mr Erian could return to work, however, he saw Dr Taylor only after the medical retirement had been put in place.

[75] Dr Theodoros gave evidence that was not inconsistent with his view previously expressed to the Department that Mr Erian could return to work if redeployed.

[76] However, the reports of Dr Theodoros and Dr Taylor only became available after the medical retirement. In *Glover v Education Queensland* [2005] QGIG 180, the matter of reports being provided after the decision to ill-health retire was considered:

But the real issue was that having been presented with such a report on 2 August, some seven months after it was determined Ms Glover was able to be ill-health retired and more than three months after the employment came to an end, what was the department to do? The decision to ill-health retire could not be undone, and Ms Glover was asked on 12 January to provide reasons why ill-health retirement should not proceed. Even if Dr Larder's opinion was not accepted, it could not change what had occurred as from the 22nd of April 2005.

[77] With consideration to that decision, it is my view that Dr Woods cannot be expected to give consideration to reports she had no knowledge of or access to at the time of making her decision and, in the case of Dr Taylor's report, were undertaken at a time after the IME assessment and following the ill-health retirement.

[78] It was put to the Commission that the medical evidence called by Mr Erian would demonstrate that at the time of the ill-health retirement, Mr Erian was well enough to return to work.

[79] The problem I have is that the medical evidence I consider relevant to that matter must be the medical evidence that was available to the Department and not some other reports which, while they may have been in existence around the same time, were unknown to the Department.

*Conclusion and decision*

[80] Having considered all of the evidence and the sequence of events leading to the decision to ill-health retire Mr Erian, I am satisfied that the dismissal was not harsh, unjust or unreasonable.

[81] The Department has at all times followed the appropriate process in receiving advice from Mr Erian's treating practitioner, seeking to undertake a functional assessment with a view to redeployment and following Mr Erian's refusal to participate in that assessment, to direct him to undertake the IME.

[82] The Director-General relied upon the report of the doctor conducting the IME and the Department followed the appropriate process in providing Mr Erian with an opportunity to access the report and provide a response to the proposal to ill-health retire him.

[83] Mr Erian did not avail himself of the opportunity to object to the IME or to provide the Department with any other medical report.

[84] In *Laegal v Scenic Rim Regional Council* [2018] QIRC 136, O'Connor DP (as his honour then was) referred to *Stark v P&O Resorts (Heron Island)* where Chief Commissioner Hall (as his honour then was) said:

Where… an application… is advanced on the basis that a dismissal was harsh, unreasonable or unfair, the task for the Commission is to assess where it should intervene to protect the applicant against a decision which is fundamentally one for the employer to make. Ordinarily intervention will be justified only where the employer has abused the right to dismiss. Ordinarily where an employer conducts a full and extensive investigation and gives the employee a reasonable opportunity to respond to allegations being made against him, an honest decision of the employer that misconduct warranting dismissal has occurred will, if formed on reasonable grounds, will be held immune from interference by the Commission. ..

[85] While that decision referred to termination on the grounds of misconduct, the view regarding the appropriate process being followed and the honest decision making of the employer based on the information before them are applicable in this matter.

[86] Having considered the factors the Commission is required to consider under s 320 of the IR Act, the Applicant has failed to discharge the onus of establishing that the dismissal was hash, unjust or unreasonable.

[87] I find that the dismissal was not unfair and the application is dismissed.

I certify that the preceding [87] paragraphs are a true copy of the Reasons for Decision of Industrial Commissioner Pidgeon

S C PIDGEON IC ………………………………

(Signature)

Dated: 20 December 2019

**NOTE: THIS CERTIFICATION IS TO BE REMOVED FROM THE DECISION BEFORE IT IS RELEASED TO THE PARTIES**