SUPREME COURT OF QUEENSLAND

CITATION:	*Francis v Crime and Corruption Commission & Anor* [2015] QCA 218
PARTIES:	**ANTHONY RICHARD FRANCIS** (applicant) **v** **CRIME AND CORRUPTION COMMISSION** (first respondent) **DEPUTY COMMISSIONER ROSS BARNETT** (second respondent)
FILE NO/S:	Appeal No 2450 of 2015 QCAT No 412 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal – [2015] QCATA 15
DELIVERED ON:	6 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	17 August 2015
JUDGES:	Fraser and Morrison JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Refuse the application for leave to appeal with costs.**
CATCHWORDS:	JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – where the applicant seeks to appeal the decision of the appeal tribunal of the Queensland Civil and Administrative Tribunal ("QCAT") dismissing him from the Queensland Police Service – where the appeal tribunal held that no reasonable tribunal could have concluded that the sanction of dismissal should be suspended – where the applicant contends that the appeal tribunal misconstrued the QCAT member's reasons – where the applicant contends that the appeal tribunal failed to take into account the applicant's conduct and post-suspension performance – whether the QCAT member's decision was so unreasonable that it lacked an evident and intelligible justification POLICE – INTERNAL ADMINISTRATION – DISCIPLINE AND DISMISSAL FOR MISCONDUCT – QUEENSLAND – where the applicant was formerly a member of the Queensland Police Service – where the applicant had engaged in improper conduct on multiple occasions – where the second respondent imposed the sanction of reduction in salary for Matters 1 and 3 and

suspension from the Police Service for 12 months with no entitlement to salary, entitlement or accumulation of leave for Matter 2 – where the first respondent applied to the Queensland Civil and Administrative Tribunal ("QCAT") for a review of this decision – where a QCAT member confirmed the sanction in relation to Matters 1 and 3, but set aside the sanction imposed for Matter 2, and instead imposed a 12 month suspension, reduction in rank and dismissal suspended for a period of three years – where the first respondent appealed to the QCAT appeal tribunal – where the appeal tribunal concluded that as a matter of law, the QCAT member's decision was unreasonable – where the appeal tribunal confirmed the sanction in relation to Matters 1 and 3, but set aside the sanction imposed for Matter 2 and instead imposed the sanction of dismissal – whether the purposes of police discipline would be defeated by a decision to allow the applicant to remain in the police force

Crime and Misconduct Act 2001 (Qld), s 50, s 219B, s 219BA, s 219G, s 219J, s 219L
Police Service Administration Act 1990 (Qld), s 1.4, s 7.4
Police Service (Discipline) Regulations 1990 (Qld), reg 3, reg 10, reg 12
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 142, s 150

Aldrich v Ross [2001] 2 Qd R 235; [2000] QCA 501, cited
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; [1947] EWCA Civ 1, followed
Attorney-General (NSW) v Quin (1990) 170 CLR 1; [1990] HCA 21, cited
Crime and Misconduct Commission v McLennan & Ors [2008] QSC 23, cited
Flegg v Crime and Misconduct Commission & Anor [2013] QCA 376, followed
Flegg v Crime and Misconduct Commission & Anor [2014] QCA 42, cited
Mellifont v The Queensland Law Society Incorporated [1981] Qd R 17, cited
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18, cited
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611; [1999] HCA 21, cited
Police Service Board v Morris (1985) 156 CLR 397; [1985] HCA 9, cited
Re Bowen [1996] 2 Qd R 8; [1995] QSC 284, cited

COUNSEL: M D Hinson QC, with S W Zillman, for the applicant
M J Copley QC for the first respondent
M D Nicolson for the second respondent

SOLICITORS: Queensland Police Union Legal Group for the applicant
Crime and Corruption Commission for the first respondent
Public Safety Business Agency for the second respondent

[1] **FRASER JA:** The applicant applies for leave to appeal against a decision of the appeal tribunal of the Queensland Civil and Administrative Tribunal ordering that the applicant be dismissed from the Queensland Police Service with effect from 5 February 2015. Such an appeal may be brought only with the leave of the Court and only on a question of law.[1]

Statutory provisions, factual background, and procedural history

[2] On 14 October 2011, the second respondent directed the applicant to appear before him for consideration of what action in the interests of the discipline of the Police Service should be taken under provisions of the *Police Service Administration Act* 1990 (Qld) ("the PSA Act") and the *Police Service (Discipline) Regulations* 1990 (Qld) ("the Regulation") in relation to three matters. The objects of the Regulation are to "provide for a system of guiding, correcting, chastising and disciplining subordinate officers" and to "ensure the appropriate standards of discipline within the Queensland Police Service are maintained so as to protect the public; to uphold ethical standards within the Queensland Police Service; and to promote and maintain public confidence in the Queensland Police Service."[2] The applicant was liable to be disciplined if he engaged in "misconduct", being conduct that is "disgraceful, improper or unbecoming an officer", or "shows unfitness to be or continue to be an officer" or "does not meet the standard of conduct the community reasonably expects of a police officer".[3]

[3] "Matter 1" concerned improper conduct relating to the applicant's inappropriate use of Police Service vehicles on 7 and 11 November 2009 and inappropriate requests to use Police Service vehicles on 1 May 2010. The applicant, whilst on duty, used a Police Service vehicle to collect people from an airport and drive them to their residence. On another occasion the applicant, other officers and a member of the public were transported in a Police Service vehicle from the Burleigh Heads Police Station to various residences. When the vehicle stopped at one residence, the applicant and another officer urinated onto the back of the vehicle and on the following day they joked about that incident. Some months later, after the applicant was advised by an Inspector that such conduct was not acceptable, the applicant twice asked a police officer for a "blue light taxi" into town whilst he was off duty. The applicant conceded that Matter 1 could be substantiated.

[4] "Matter 2" involved improper conduct falling within four different categories and occurring on many occasions between July 2006 and April 2010. In relation to Matter 2(a), in response to a report by the employee of a Gold Coast nightclub where the applicant was an acquaintance of the owner and received free entry and drinks, the applicant reported as stolen a vehicle the subject of a civil dispute between the nightclub owner and a third party who had leased the vehicle. When as a consequence of this report the vehicle was seized, the applicant, against advice, returned the vehicle to the nightclub owner without complying with the Police Service policy relating to disputed property. The applicant asked the third party to participate in an interview but did not finalise the investigation. In relation to Matter 2(b), after the applicant's own residence

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1 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), ss 150(2) and 150(3).
2 Regulation 3.
3 PSA Act, s 7.4(2), s 1.4 (definition of "misconduct").

was broken into and property belonging to a flatmate was stolen, the applicant investigated the matter, located the suspect, entered a dwelling, searched for stolen property, seized property, arrested the suspect, charged him with breaking into the applicant's residence, and assisted in the arrest of the suspect for other alleged offences. The substance of Matter 2(c) was that the applicant both searched and accessed records relating to various people for purposes unrelated to his official duties, and improperly released information to people otherwise than for any reason related to his official duties. Matter 2(d) involved allegations that the applicant discussed with another officer, in the presence of a civilian, questions which that other officer might face in a CMC hearing in relation to which there was a non-publication order and, after the hearing, the applicant and the other officer discussed "the need to get [their] stories straight". The respondent conceded that one category of the improper conduct in Matter 2 (inappropriately accessing or releasing Queensland Police Service information on various dates between March 2009 and January 2010) could be substantiated.

[5] "Matter 3" concerned improper conduct in two different categories occurring in November 2006 and October 2009 respectively. In relation to Matter 3(a), the applicant engaged in an act of reprisal against another officer. The applicant believed that the officer had reported him to senior officers for suspected misconduct. The applicant purchased a can of dog food and a dog bowl, gift wrapped them, and arranged for the gift to be given to the other officer during a Christmas party attended by numerous police officers and their partners. During a disciplinary interview the applicant stated that he did not have "a lot of sympathy for [the other officer] in light of the allegations that he's made against me". Matter 3(b) was based upon an intercepted telephone call between the applicant and another officer ("ER"). ER told the applicant that Constable D had given ER details of someone's criminal history; Constable D had read details of the complaint which confirmed in ER's mind that the person had supplied drug information which led to a search warrant being executed on ER's premises. The applicant improperly took no action to report the suspected misconduct by D relating to disclosure of information and identification of informants.

[6] On 4 April 2012, the second respondent found that all the allegations were substantiated and that the applicant's conduct in every particular of the three matters was improper and amounted to misconduct. In relation to Matter 1 and Matter 3, the second respondent imposed the sanction of reduction in salary from Constable pay point 1.5 to pay point 1.1 (effective immediately), transfer to the Logan District in a uniform position and placement into the First Year Constable Program with eligibility to progress one pay point every six months dependent on obtaining a satisfactory Performance Planning and Assessment Report ("PPA") for each period.[4] In relation to Matter 2, the second respondent imposed the sanction of suspension from the Police Service for a period of 12 months with no entitlement to salary, entitlements, or accumulation of leave, the period of suspension being from 20 August 2010 to 19 August 2011; otherwise the second respondent imposed the same sanction as for Matters 1 and 3. The applicant had been suspended from duty on 19 August 2010. He therefore returned to duty on 4 April 2012, on pay point 1.1.

[7] On 19 April 2012, the first respondent applied to the Queensland Civil and Administrative Tribunal ("QCAT") for a review of the second respondent's decision. A person who is a member of the Police Service is "a prescribed person" as defined in the *Crime*

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[4] The second respondent found that the reduction in salary and the effect of the subsequent progression in pay points up to pay point 1.5 would amount to approximately $5,600 and $8,400 respectively if, as occurred, the applicant successfully progressed every six months.

and Misconduct Act 2001 (Qld) ("CM Act").[5] Accordingly, the second respondent's decision constituted a "reviewable decision" within the meaning of s 219BA(1) of the CM Act.[6] Section 219G of that Act empowered the first respondent to apply to QCAT to review that decision. The proceeding in QCAT was itself a "disciplinary proceeding" for the purposes of Ch 5, Pt 2, Division 1 of the same Act, being a "proceeding under s 219G for a reviewable decision".[7] Section 219H provides that such a proceeding is a review by way of rehearing on the evidence given in the proceeding before the original decision-maker or, if (as occurred in this case) QCAT gives leave to adduce "fresh, additional or substituted evidence", a review is by way of rehearing on the original evidence and on the new evidence. The *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) described QCAT's function in conducting the review as being to hold a fresh hearing on the merits and to make the correct and preferable decision.[8] QCAT was obliged "to make its own decision on the evidence before it."[9]

[8] After a hearing, a QCAT member confirmed the sanction imposed by the second respondent for Matters 1 and 3, set aside the sanction imposed by the second respondent for Matter 2, and instead imposed as the sanction for that Matter the 12 month suspension and the reduction in rank which the second respondent had imposed, together with an additional sanction:

> "Dismissal from the Queensland Police Service effective 4 April 2012 with the sanction of dismissal suspended for a period of 3 years, to be implemented in the event of any further finding against [the applicant] of misconduct committed during the 3 year period of suspension."

[9] Section 7.4(3) of the PSA Act sets out an inclusive list of the sanctions that may be imposed by way of disciplinary action: "dismissal; demotion in rank; reprimand; reduction in an officer's level of salary; forfeiture or deferment of a salary increment or increase; deduction from an officer's salary payment of a sum equivalent to a fine of two penalty units." Regulation 10 of the Regulations sets out a similar inclusive list of sanctions. Regulation 12(1) provides for the suspension of sanctions subject to the sanctioned officer agreeing to perform voluntary community service or undergoing voluntary counselling, treatment, or some other program designed to correct or rehabilitate. The effect of regulation 12(2) is that if the officer fulfils the designated agreement, the sanction "is rescinded and it is to be taken that the sanction was never imposed", but if the officer fails to fulfil the agreement the disciplinary sanction takes effect. That does not apply in this case, in which the suspension of dismissal imposed by the QCAT member was not made subject to the applicant agreeing to perform voluntary community service or undergoing voluntary counselling, treatment, or some other program designed to correct or rehabilitate.

[10] Nevertheless, suspension of the dismissal was within the range of sanctions available to the QCAT member. Both the PSA Act (by s 7.4(3)) and the Regulation (by regulations 5 and 10) make it plain that the sanctions which are expressed to be available are not

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5 *Crime and Misconduct Act* 2001 (Qld), s 50(4)(a)(i). (References in these reasons to the *Crime and Misconduct Act* 2001 are to Reprint 5B of that Act.)

6 The term "misconduct' is defined in that Act to mean "official misconduct or police misconduct". The definition of "police misconduct" mirrors the definition "misconduct" in the PSA Act, save that it excludes "official misconduct" (which may also be reviewed under that Act).

7 See *Crime and Misconduct Act* 2001 (Qld), s 219B ("disciplinary proceeding", para (b)) and "reviewable decision"; s 219BA(1)(b).

8 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 18 and s 20.

9 *Aldrich v Ross* [2001] 2 Qd R 235 at 254-255 [37].

comprehensive.[10] Regulation 5 relevantly provides that, "where the commissioner or a deputy commissioner has formed the opinion that an officer should be disciplined, the commissioner or deputy commissioner may order that the officer be disciplined in a manner that appears to the commissioner or deputy commissioner to be warranted." Section 219J(2) of the *Crime and Misconduct Act* 2001 (Qld) empowered QCAT to impose upon the applicant "any discipline provided for on a finding of misconduct being proved".[11] Furthermore, s 219L(2) expressly authorised QCAT to "suspend the order or discipline if it considers it is appropriate to do so in the circumstances". If QCAT suspends an order or discipline, it must state an operational period for the suspension and the suspension may be given on conditions: s 219L(3). The effect of such a suspension is expressed in s 219L:

> "(4) If the person who is subject to the order or discipline is found to have committed an act of misconduct or to have contravened a condition during the operational period, on the finding—
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> (a) the suspension is revoked; and
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> (b) the order or discipline has immediate effect.
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> (5) If the person is not found to have committed an act of misconduct or to have contravened a condition during the operational period, the order or discipline is taken to have been discharged or satisfied."

[11] The first respondent appealed to the QCAT appeal tribunal, contending that the applicant should have been dismissed without any suspension of that dismissal. Because the first respondent did not obtain leave to appeal, the appeal could be made only on a question of law.[12] The ground of the first respondent's appeal was that QCAT had "erred in that no reasonable tribunal could have concluded that the sanction of dismissal should be suspended." That ground raised the question of law whether the decision of QCAT at first instance was unreasonable in the sense identified in *Associated Provincial Picture Ltd v Wednesbury Corporation*[13] and *Attorney-General (NSW) v Quin.*[14]

[12] The confined nature of an appeal to the appeal tribunal upon that question of law was described by Gotterson JA in *Flegg v Crime and Misconduct Commission & Anor*[15]:

> "[28] The sole ground of appeal to the appeal tribunal defined the appeal as being one on a question of law only for which leave to appeal from the appeal tribunal was not required. Ordinarily, where a statute confers a right of appeal on a question of law, the ambit of the appeal is confined to a determination of the question. The ambit is not a broader one in the nature of a full rehearing of the matter with the demonstrated error of law being merely an entry pass to it.

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10 See *Crime and Misconduct Commission v McLennan & Ors* [2008] QSC 23 at [41]-[44].

11 That subsection applied if, as was the case here, "after reviewing a reviewable decision, QCAT finds misconduct has been proved against a person and sets aside the decision and substitutes another decision": s 219J(1).

12 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 142(1), s 142(3)(b).

13 [1948] 1 KB 223.

14 (1990) 170 CLR 1 at 36-37.

15 [2013] QCA 376 at [28]-[31] (citations omitted) McMurdo P (at [4]) and Margaret Wilson J (at [51]) agreed with Gotterson JA's reasons.

> [29] Significantly also, in such an appeal where findings of fact are not challenged, the ambit does not extend to the finding of facts anew. The appellate body may not engage in fact finding on the merits of the case. That this is so was explained by Brennan J in *Waterford v The Commonwealth* in relation to a provision that allowed an appeal from a decision of the Repatriation Review Tribunal "on a question of law". His Honour observed:
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> "A finding by the AAT on a matter of fact cannot be reviewed on appeal unless the finding is vitiated by an error of law. Section 44 of the AAT Act confers on a party to a proceeding before the AAT a right of appeal to the Federal Court of Australia 'from any decision of the Tribunal in that proceeding' but only 'on a question of law'. The error of law which the appellant must rely on to succeed must arise on the facts as the AAT has found them to be or it must vitiate the findings made or it must have led the AAT to omit to make a finding it was legally required to make. There is no error of law simply in making a wrong finding of fact. Therefore an appellant cannot supplement the record by adducing fresh evidence merely in order to demonstrate an error of fact."
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> [30] In my view, an appeal to the appeal tribunal of QCAT on a question of law is of the same ambit as an appeal that may be brought on a question of law only. Neither s 142 nor other provisions relating to appeals to the appeal tribunal in the QCAT Act suggest that some wider ambit than that which applies to an appeal on errors of law in ordinary concepts is to apply to an appeal on a question of law to the QCAT appeal tribunal.
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> [31] Further, the nature of the ground of appeal here as one of unreasonableness in a *Wednesbury* sense, necessarily posits as the relevant frame of reference, the facts as found by the senior member. It is against those facts that the alleged unreasonableness of his decision is to be assessed. With this ground of appeal, there could be no scope for fact finding anew by the appellate tribunal."

[13] The appeal tribunal concluded that the *Wednesbury* test was satisfied; no reasonable tribunal member, "apprised of the detailed circumstances of [the applicant's] misconduct and in the necessary context of the significant public confidence requirements in the proper administration of the [Queensland Police Service], could have suspended [the applicant's] dismissal."[16] The appeal tribunal therefore upheld the appeal, confirmed the sanction imposed for Matters 1 and 3, set aside the sanction imposed for Matter 2, and ordered that the applicant was dismissed with effect from the date of the appeal tribunal's decision.

Grounds of the proposed appeal and summary of the arguments

[14] The applicant's draft notice of appeal from the appeal tribunal's decision contends that the appeal tribunal erred in law in ordering the dismissal of the applicant, in reaching the conclusion quoted in [13], and in misapplying the test of unreasonableness in considering the ground of appeal to the appeal tribunal. The errors of law for which the applicant contends are:

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16 [2015] QCATA 15 at [52].

"(a) misconstruing and misstating the QCAT member's approach as essentially dismissing as insufficiently persuasive the mitigating factors placed before her, when the member expressly found that she was persuaded in light of the mitigating factors to suspend the sanction of dismissal;

(b) misconstruing and misstating the QCAT member's approach in describing that approach as surprising given the context of the member's reasoning, when the member's approach was the orthodox and legally sound approach of balancing the mitigating factors against the seriousness of the misconduct;

(c) misconstruing and misstating the QCAT member's examination of the mitigating factors as running counter to her findings as to the seriousness of the misconduct, when the member's approach was the orthodox and legally sound approach of balancing the mitigating factors against the seriousness of the misconduct;

(d) giving such little weight to the applicant's conduct and performance of duties since April 2012 as to amount to a failure to take those matters into account as a relevant consideration."

[15] The applicant's argument focussed upon the concluding paragraphs of the appeal tribunal's reasons:

> "[51] Was the decision to suspend the dismissal unsupported by the mitigating factors? It is the observation of this tribunal that the learned Member essentially dismissed as insufficiently persuasive the mitigating factors that were placed before her yet she still suspended the dismissal contrary to her own reasoning. Her decision to suspend the dismissal was surprising given the context of her reasoning.
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> [52] The circumstances of Mr Francis' misconduct are so serious and over such an extended period of time that they overwhelm any mitigating factor and emphasise the unreasonableness of the suspension of the dismissal. The learned Member's examination of the mitigating factors leading to her decision to suspend dismissal runs counter to all her preceding, appropriate findings as to the seriousness of the misconduct and the erosion of public confidence. No Member, apprised of the detailed circumstances of Mr Francis' misconduct and in the necessary context of the significant public confidence requirements in the proper administration of the QPS, could have suspended his dismissal."

[16] The applicant's main argument was that those paragraphs evidenced a misconstruction or misunderstanding of the QCAT member's reasons; the appeal tribunal wrongly characterised the member's approach as lacking an evident and intelligible justification and, as a consequence of that error, substituted its own views about the appropriate sanction for the views of the member without the necessary identification of any legal error. The applicant also argued that the appeal tribunal wrongly failed to take into account as a mitigating factor some facts found by the member. The first respondent argued that the appeal tribunal correctly concluded that the member's decision to suspend lacked an apparent and intelligible justification. It also argued that the member's finding that dismissal of the applicant was necessary to maintain public confidence in the Police Service[17] was irreconcilable with the decision to suspend that

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17 [2013] QCAT 477 at [90], [92].

sanction "in light of the mitigating factors which are now properly taken into account";[18] the member's reliance upon mitigating factors to suspend the dismissal was inconsistent with the member's findings about those mitigating factors.

The QCAT member's reasons

[17] Consideration of the proposed grounds of appeal and the parties' arguments requires reference to the QCAT member's reasons. After considering preliminary and procedural matters, the member considered the three misconduct matters in detail and concluded as follows:

(1) Matter 1 demonstrated "disregard for the proper use of police service resources", Matter 1(b) revealed "some troubling attitudes which are inappropriate in a serving officer and may tend to diminish public confidence in the police service", and Matter 1(c) suggests "a disregard for the authority of Sergeant D and [Queensland Police Service] requirements".[19]

(2) Matter 2 was more serious, and each of (a) – (d) of Matter 2 "has significant potential to undermine public confidence in the police service" and also has potential to undermine "internal police service confidence".[20]

(3) Matter 3(a) demonstrated "an archaic and now unacceptable attitude towards covering up misconduct of colleagues" and the applicant's failure to take full responsibility for it indicated his attitude towards misconduct matters.[21]

(4) Matter 3(b) was "a particularly serious example of misconduct" in that, although the applicant was an experienced constable with more than 10 years' service, he did not turn his mind to the possibility of misconduct but was oblivious to what should have been obvious to a reasonable officer with his background and experience.[22]

[18] The member discussed the competing submissions about whether or not dismissal was an appropriate sanction[23] and gave reasons for concluding that the circumstance that organisational issues within the Queensland Police Service at the Gold Coast did not support appropriate behaviours could not influence the appropriate sanction.[24] Under the heading "Mitigating Factors", the member discussed the issues in mitigation raised by the applicant. The member accepted that it could be taken into account that the applicant admitted some charges and did not challenge the facts of remaining charges, and that he had no other findings of misconduct against him, but the member placed little weight on the lack of previous findings of misconduct because the charges spanned some four years.[25] The member accepted that the disciplinary process and suspension from duty led to the applicant gaining insight in conceding charges and facts, "demonstrating significant remorse and expressing his commitment to the police service and the responsibilities of a serving officer",[26] but noted that the applicant did not admit most of the more serious charges in Matter 2 and that, although he had admitted Matter 3(b), it was apparent from an interview in which he participated that

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18 [2013] QCAT 477 at [93].
19 [2013] QCAT 477 at [39].
20 [2013] QCAT 477 at [49].
21 [2013] QCAT 477 at [52].
22 [2013] QCAT 477 at [54]-[56].
23 [2013] QCAT 477 at [57]-[70].
24 [2013] QCAT 477 at [72]-[77].
25 [2013] QCAT 477 at [80].
26 [2013] QCAT 477 at [81].

he had not appreciated misconduct in another officer when it should have been apparent. The member also stated that although it was said in later written submissions that upon reflection the applicant admitted that he should have been aware, "concerns remain for [her] about his ability to identify appropriate conduct in the future for himself and in others when he is 'on the spot' and involved in a situation."[27]

[19] At the hearing before the member a documentary overview of the First Year Constable Program which the applicant undertook as required by the second respondent's decision was admitted in evidence. That program included an eight week "Mentor Phase" in which an experienced officer mentored each first year constable during all shifts and reported daily on the constable's performance. The first year constable was also required to attend three training days and two comprehensive evaluation reviews to ensure that the development of the constable was suitable and appropriate considering the length of service. In the "General Phase" each first year constable was required to work with an experienced officer for a minimum period of 50 per cent of shifts, conduct various workplace activities, and attend monthly training days, the constable was also required to attend an in-service course conducted by members of the Field Training Unit, and there was provision for comprehensive evaluation reviews every second month. The final part of the program was the "Exit Phase". It was scheduled to occur at approximately the 10 month mark. It was to include a recommendation whether or not the officer should be confirmed. There was a requirement that all Field Development Reviews be satisfactory, that all training days be completed, that there be no adverse comments, that the constable's performance be vetted, and that the professional standards assessment must be completed satisfactorily.

[20] Evidence of the applicant's completion of the program was also admitted. It included a letter referring to the second respondent's expectation that the applicant would exit the program after six months if his participation and performance was satisfactory, but would remain in the program if his performance was not satisfactory. A letter dated 6 September 2012 from an Inspector in the Field Training Unit revealed that the applicant had by then completed the majority of workplace activities, with only three activities yet to be completed. It was expected that upon completion of those remaining activities the applicant would exit the program, subject to the approval of an Assistant Commissioner upon the recommendation of the Field Training Unit Inspector. The letter recorded that up to that date the applicant had progressed favourably.

[21] The applicant was also given leave to adduce further evidence in the form of references by senior police officers. Each officer referred to the applicant's conduct after he was disciplined by the second respondent. Sergeant Lewis described the applicant as "upbeat, keen and conscientious" and expressed opinions that the applicant had had his "last brush with disciplinary breaches/misconduct and that he has resolved to get on with the productive contribution as an effective police officer." Senior Sergeant Sheehan spoke highly of the applicant's conduct after he was disciplined. Inspector Nevin stated that the applicant had "performed his duties in a professional and diligent manner with positive attitude and ha[d] demonstrated his commitment to performing his operational policing role"; the applicant had performed "a high standard of operational policing". Under the heading "Constable Francis' References", the member found that the senior police officers "speak among other things of his positive attitude, professionalism, sound policing knowledge and diligence, suggesting that he has performed to a high standard".[28] The member observed that it was pleasing that the

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27 [2013] QCAT 477 at [82].

28 [2013] QCAT 477 at [84].

applicant had responded well to his second chance, but concluded that this "is not of itself a mitigating factor."[29]

[22] The member expressed the following "conclusions about sanction":

> "[87] I acknowledge the personal difficulty of Constable Francis' situation. His life has been on hold effectively for 3 years following his suspension and the ongoing disciplinary process thereafter. By all accounts, he has made admirable efforts and has approached his duties in a positive and enthusiastic manner since returning to duty following his suspension.
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> [88] However, the transgressions made by Constable Francis are numerous and span a considerable period. Some are relatively minor of themselves. I consider, as my earlier discussion concerning them reveals, some of them more serious than the decision-maker did, and in respect of some, more-so than the CMC did, in making its submissions.
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> [89] Against that, considerable investment has been made by the QPS in Constable Francis over the period of his service. It is not in the interests of the public to discard that investment if it is possible to achieve the purpose of disciplinary proceedings in another way.
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> [90] The decision-maker considered dismissal was not required to achieve the purposes of the disciplinary process. In my view, having regard to the charges, the purpose of maintaining public confidence in the police service can not be achieved if the sanction of dismissal is not imposed.
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> [91] In respect of Matter 3(b), although I do not accept that Constable Francis was aware of a serious breach of the law by another officer, I consider the charge a serious matter. I also take a more serious view than did the decision-maker and the CMC to Matters 1(b) and (1)(c). That said, I would not disturb the sanctions imposed in respect of Matters 1 and 3.
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> [92] I consider the charges in Matter 2 very serious indeed. In light of the seriousness with which I regard the charges in Matter 2, I consider that to maintain public confidence in the police service, Constable Francis must be dismissed…
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> [93] However, I am persuaded in light of the mitigating factors which I may properly take into account, to suspend that sanction. In particular, in mitigation, Constable Francis took a co-operative approach in the disciplinary proceedings to accepting substantiation of numerous charges (demonstrating honesty and a willingness to face up to obligations) and not seriously challenging the facts in relation to the others (again indicating honesty). He has also demonstrated development of some considerably greater insight as a result of the proceedings as displayed in his submissions.

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29 [2013] QCAT 477 at [85].

> [94] I am also conscious of the investment which the QPS and therefore the Queensland community has invested in his officer training and skills development.
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> [95] The dismissal will be suspended for a period of 3 years from the date of recommencement of duty by Constable Francis, that is from 4 April 2012."

Appeal grounds (a) – (c): did the appeal tribunal misconstrue the QCAT member's reasons?

[23] The regulatory scheme allows for the suspension of any of the available disciplinary sanctions, including dismissal. The QCAT member's references to the "sanction of dismissal" and "dismissal" in [90] and [92] do not connote dismissal without any possibility of suspension of that sanction. The member's reasons instead convey that the seriousness of the applicant's transgressions warranted selection of the sanction of dismissal from the list of available sanctions and that the mitigating factors justified suspension of the dismissal for three years. That is indicated by a combination of matters: the reference to mitigating factors in [87], the confirmation in [91] of the sanctions imposed by the second respondent for Matters 1 and 3 (which are consistent with the applicant's dismissal only if that dismissal is suspended), the absence of any statement before [93] that the mitigating factors were wholly taken into account in selecting the sanction of dismissal from the available range of sanctions, and the explanation in [93] that the mitigating factors were taken into account in the decision to suspend the sanction of dismissal. It follows that the member's finding that dismissal was required to maintain public confidence was not irreconcilable with the member's decision to suspend dismissal.

[24] Contrary to the applicant's arguments, however, although the appeal tribunal referred to what it considered were surprising and inconsistent reasons given by the member, the appeal tribunal's reasons reveal that its decision was not based upon a conclusion that the member's reasons lacked internal logic. Rather, the appeal tribunal decided for itself that, on the facts found by the member, the misconduct of the applicant was "so serious and over such an extended period of time" as to "overwhelm any mitigating factor" such that "[n]o Member, apprised of the detailed circumstances of [the applicant's] misconduct and in the necessary context of the significant public confidence requirements in the proper administration of the QPS, could have suspended his dismissal".[30] That decision did not turn upon a misconstruction or misstatement of the member's reasons such as is asserted in (a) – (c) of the applicant's draft notice of appeal.

Appeal ground (d): did the appeal tribunal fail to take into account the applicant's conduct and performance of duties since April 2012?

[25] The QCAT member's justification for suspending the termination included reference to three mitigating factors. The first mitigating factor was the co-operative approach taken by the applicant in pleading guilty to some of the disciplinary charges and otherwise not seriously challenging the facts on the remaining charges.[31] The first respondent argued that this contradicted the QCAT member's earlier findings that the applicant did not admit Matter 2(d) and that he did not admit most of the more serious charges in Matter 2.[32] Whilst I do not accept that there was a complete contradiction

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30 [2015] QCATA 15 at [52].
31 [2013] QCAT 477 at [80], [93].
32 [2013] QCAT 477 at [47]-[48], [82].

– there was some co-operation – the appeal tribunal gave reasons which justified a conclusion that a reasonable tribunal could attribute little, if any, weight, to this factor:[33]

> "[34] All of these charges [Matters 1(a), 1(b), 2(c), 3(a) and 3(b), which the applicant conceded] could be substantiated by independent evidence. They were not the most serious charges [the applicant] faced. As the learned Member later observed, [the applicant] did not admit most of the more serious charges. The learned Member also observed that, while [the applicant] admitted the facts of some charges, he did not admit that the facts amounted to misconduct.
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> [35] The learned Member noted that [the applicant] did not recall conversations from his superiors directing him not to use [Queensland Police Service] vehicles for private transportation. She observed that these were conversations he should have recalled in light of the CMC investigations at the time.
>
> [36] [The applicant] did not admit a charge of discussing CMC proceedings with another witness in the face of a non-publication order. Although not all elements of the charge were proven, the learned Member found that [the applicant's] non-admission showed a lack of insight into the appropriateness of his conduct.
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> [37] In relation to the secret Santa incident, the learned Member found that [the applicant] attempted to downplay his role in the organisation of the gift.
>
> [38] The learned Member's conclusion that [the applicant's] admissions showed cooperation, honesty and a willingness to face up to his obligations sit uncomfortably with these findings. In an officer of [the applicant's] more than 10 years of service, it is surprising indeed that his responsiveness to the ethical and integrity obligations required by the [Queensland Police Service] remained so limited."

[26] The second mitigating factor upon which the member relied was that the applicant had no previous findings of misconduct against him and none after he was disciplined.[34] The member placed little weight on the lack of previous findings of misconduct because the misconduct occurred during some four years. The absence of any finding of misconduct after the applicant was suspended was related to the third mitigating factor upon which the member relied, that "the disciplinary process and the suspension from duty led to a reflective process which resulted in [the applicant] gaining insight in conceding charges and facts, demonstrating significant remorse and expressing his commitment to the police service and the responsibilities of a serving officer".[35] As the first respondent argued, the member's conclusion that the proceedings had led to the applicant gaining "considerably greater insight"[36] is not easily reconciled with the member's acknowledgement that the applicant had not admitted most of the more serious charges in Matter 2;[37] in any event the member appreciated that the applicant had

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33 [2015] QCATA 15 at [34]-[38].
34 [2013] QCAT 477 at [80].
35 [2013] QCAT 477 at [81], [93].
36 [2013] QCAT 477 at [93].
37 [2013] QCAT 477 at [82].

demonstrated development of only "some" improvement in his insight as a result of the proceedings.[38]

[27] In relation to ground (d) in the draft notice of appeal, the applicant argued that the appeal tribunal should have taken into account in the applicant's favour the evidence which was accepted in the member's remarks that the applicant had "responded well to the second chance afforded to him by the decision-maker"[39] and "he [had] made admirable efforts and [had] approached his duties in a positive and enthusiastic matter since returning to duty following his suspension".[40] Because the applicant was given leave to adduce the new evidence, the review by the member was to be conducted both upon the evidence before the second respondent and upon that new evidence.[41] Gotterson JA's reasons in *Flegg v Crime and Misconduct Commission*[42] confirm that in an appeal to the appeal tribunal upon the ground invoked in this case there is no scope for fact finding anew, but the applicant does not argue that the appeal tribunal should have taken into account any fact not found by the member. Rather, he seeks to rely upon evidence of the applicant's response to the disciplinary proceedings which the member accepted.

[28] Contrary to the applicant's argument, the appeal tribunal took that evidence into account. The appeal tribunal noted that the applicant relied upon the references which "spoke of [the applicant's] positive attitude, professionalism, sound policing knowledge and diligence", but the appeal tribunal also noted, accurately, that the member did not find that the references attested to the applicant having insight into his misconduct.[43] The appeal tribunal quoted Sergeant Lewis' opinions that the disciplinary proceedings were the applicant's "last brush with disciplinary breaches/misconduct and that he has resolved to get on with a productive contribution as an effective police officer" and observed that it would be surprising if the applicant had not done so in the face of the continuing disciplinary proceedings and the "spectre of dismissal", and that, as was the case, the member had doubted the extent of the applicant's insight.[44] There was no error of law in those observations. They are consistent with the member's statement that "…concerns remain for me about his ability to identify appropriate conduct in the future for himself and in others when he is 'on the spot' and involved in a situation."[45] The same passage of the appeal tribunal's reasons also includes a statement that the member had "discounted" the value of the applicant's references in declining to treat his response to the second chance as a mitigating factor. That is consistent only with the appeal tribunal having taken the references into account but attributing little weight to them.

[29] The evidence before the QCAT member of the applicant's conduct as a police officer after he was disciplined by the second respondent, including the references, was in the applicant's favour, but it was not of such significance as to require the appeal tribunal to conclude that a reasonable tribunal would mitigate the sanction of dismissal by suspension of that sanction. It remained open to the appeal tribunal to conclude, as it did, that the member's findings "do not readily support a conclusion that [the applicant's] newly gained insight is a proper ground for mitigation."[46]

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38 [2013] QCAT 477 at [93].
39 [2013] QCAT 477 at [85].
40 [2013] QCAT 477 at [87].
41 *Crime and Misconduct Act* 2001 (Qld), s 219H(3).
42 [2013] QCA 376.
43 [2015] QCATA 15 at [41].
44 [2015] QCATA 15 at [42]-[44].
45 [2013] QCAT 477 at [82].
46 [2015] QCATA 15 at [45].

Other arguments

[30] The applicant submitted that neither the second respondent nor the member found that the applicant's misconduct showed permanent unfitness to continue to be a police officer. I would accept that the member's reasons are consistent with a conclusion that, as at the date of the hearing before the member, the applicant's misconduct manifested a temporary, rather than permanent, absence of the necessary character and fitness to be a police officer. If so, suspension of dismissal might be warranted. That is the approach which has been taken in relation to the discipline of legal practitioners,[47] and an order for suspension in disciplinary proceedings against a police officer has some analogies with such a proceeding.[48] However, the appeal tribunal's conclusion necessarily implies that the applicant's misconduct did reveal permanent unfitness to continue to be a police officer.

[31] The appeal tribunal quoted the following judicial statement about the purposes of police discipline:

> "The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force, upon their assiduous performance of duty and upon the judicious exercise of their powers. Internal disciplinary authority over members of the police force is a means - the primary and usual means - of ensuring that individual police officers do not jeopardize public confidence by their conduct, nor neglect the performance of their police duty, nor abuse their powers. The purpose of police discipline is the maintenance of public confidence in the police force, of the self-esteem of police officers and of efficiency."[49]

[32] As is apparent from that statement, and as the appeal tribunal noted,[50] the purposes of disciplinary proceedings in the Police Service encompass the need to maintain the confidence of the community in the Police Service. Taking into account the limitations upon the weight capable of being given to the mitigating factors for which the applicant contended, the conclusion was open, upon the facts found by the member, that the purposes of police discipline would be defeated by the member's decision to allow the applicant to remain in the police force despite the seriousness, variety and persistence of his misconduct during some four years.

Conclusion and proposed order

[33] The ground of appeal that no reasonable tribunal would have suspended the dismissal involved a stringent test.[51] It is rarely established. It does not sanction a review on the merits.[52] It is not made out merely if an appeal court disagrees with an evaluative decision or with the weight attributed to a factor taken into account in the decision.[53] The appeal tribunal nevertheless concluded that the ground was established in this case. The appeal tribunal accurately observed that in *Flegg v Crime and Misconduct Commission*[54] the President expressed the test, with reference to *Minister for Immigration*

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47 See *Mellifont v Queensland Law Society Inc* [1981] Qd R 17 at 31 (Andrews J, with whose reasons Connolly J agreed).

48 See *Re Bowen* [1996] 2 Qd R 8 at 9.

49 *Police Service Board v Morris* (1985) 156 CLR 397 at 412 (Brennan J), quoted by the appeal tribunal at [2015] QCATA 15 at [25].

50 *Aldrich v Ross* [2001] 2 Qd R 235 at 247, referred by the appeal tribunal at [2015] QCATA 15, [27].

51 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 376 [108] (Gageler J).

52 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 363 [66] (Hayne, Kiefel and Bell JJ).

53 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [30] (French CJ).

54 [2014] QCA 42 at [3] and [16].

and Citizenship v Li,[55] as being "whether the … decision was so unreasonable that it lacked an evident and intelligible justification when all relevant matters were considered" and Gotterson JA (Margaret Wilson J agreeing) noted that the *Wednesbury* principles did not allow a challenge to a decision "on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which the [appellate tribunal] disagrees". As the appeal tribunal also observed, the case on appeal must be "overwhelming".[56] The appeal tribunal correctly stated its task as being "to examine the learned member's reasoning to determine whether it was a decision that can be justified even though '…reasonable minds could reasonably differ' or whether the decision was so unreasonable that it lacked an evident and intelligible justification".[57]

[34] There was no error in the test which the appeal tribunal applied in upholding the appeal to it from the member's decision and the applicant has not established any of the errors of law in the appeal tribunal's decision for which he contended. Accordingly the proposed appeal could not succeed.

[35] I would refuse the application for leave to appeal with costs.

[36] **MORRISON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[37] **MULLINS J:** I agree with Fraser JA.

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55 (2013) 249 CLR 332.

56 [2015] QCATA 15 at [8].

57 [2015] QCATA 15 at [12], quoting Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 654 [137].