SUPREME COURT OF QUEENSLAND

CITATION:	*Flegg v CMC & Anor* [2014] QCA 42
PARTIES:	**WARREN FLEGG** (applicant/appellant) **v** **CRIME AND MISCONDUCT COMMISSION** (first respondent) **ASSISTANT COMMISSIONER CLEMENT DAVID O'REGAN** (second respondent)
FILE NO/S:	Appeal No 2707 of 2013 QCAT No 92 of 2012 QCAT No 55 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act* – Further Order
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	11 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2013
JUDGES:	Margaret McMurdo P, Gotterson JA and Margaret Wilson J Separate reasons for judgment of each member of the Court, Gotterson JA and Margaret Wilson J concurring as to the order made, Margaret McMurdo P dissenting
ORDER:	**The appeal to the appeal tribunal against the decision of the senior member delivered on 24 February 2012 be dismissed.**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the applicant sought to appeal the decision of the appeal tribunal of QCAT – where the Court granted and allowed the appeal – where the Court exercised its power under s 153(2)(c) of the *QCAT Act* to set aside the decision and substitute its own decision – whether the decision of the senior member was reasonably made *Police Service Administration Act* 1990 (Qld), s 2.3(g) *Police Service (Discipline) Regulations* 1990 (Qld), s 3(g), s 12(1) *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; [1947] EWCA Civ 1, cited

Crime & Misconduct Commission v Flegg & Anor [2012] QCAT 74, related
Flegg v Crime and Misconduct Commission & Anor [2013] QCA 376, related
House v The King (1936) 55 CLR 499, [1936] HCA 40, cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, [1986] HCA 40, cited
Minister for Immigration and Citizenship v Li (2013) 87 ALJR 618; (2013) 297 ALR 225, [2013] HCA 18, applied
R v H (1993) 66 A Crim R 505; [1993] QCA 240, cited
R v JCE (2000) 120 A Crim R 18, [2000] NSWCCA 498, cited
Spencer v Baulch [2004] QCA 234, cited

COUNSEL: No appearance by the appellant, the appellant's submissions were heard on the papers
No appearance by the respondents, the respondents' submissions were heard on the papers

SOLICITORS: Gilshenan & Luton Legal Practice for the appellant
Official Solicitor, Crime and Misconduct Commission for the first respondent

[1] **MARGARET McMURDO P:** This is the latest and hopefully the final chapter in the appellant's lengthy disciplinary saga following the death of five people when the *Malu Sara* sank on a voyage between Saibai and Badu Islands in the Torres Strait in October 2005. A Queensland Police Service investigation of the appellant's conduct as search and rescue co-ordinator resulted in him being charged with failing to take appropriate and required action in carrying out his role. To his credit, he accepted that the charge was made out and in March 2011 an assistant commissioner ordered that he be demoted from the rank of Sergeant 3.5 to Senior Constable 2.9 for two years from 31 March 2011 to 31 March 2013 and that he be eligible to apply for the position of Sergeant upon being of good conduct after completing two performance planning and appraisal periods. The order was wholly suspended, however, for two years on condition that he undertook specified courses.

[2] The respondent, the Crime and Misconduct Commission (CMC), appealed against that sanction to the Queensland Civil and Administrative Tribunal (QCAT)[1] contending that the penalty was inadequate having regard to the seriousness of the appellant's conduct. The CMC contended that the appellant should be dismissed from the QPS. A senior member of QCAT, whose task was to review the assistant commissioner's decision on the merits, confirmed the decision.[2] The CMC appealed to the QCAT appellate tribunal, contending that no reasonable tribunal could have confirmed the assistant commissioner's decision. The CMC moderated its position in this appeal, contending only that the assistant commissioner's order of suspension be removed. The appellate tribunal allowed the appeal[3] and made orders effectively setting aside the suspension of the assistant commissioner's decision, with the demotion effective for two years from 20 February 2013.[4] That order has been

1 *Crime and Misconduct Act* 2001 (Qld), s 219G.
2 *Crime & Misconduct Commission v Flegg & Anor* [2012] QCAT 74.
3 *Crime and Misconduct Commission v Flegg & Anor* [2013] QCATA 29.
4 Unreported, Queensland Civil and Administrative Tribunal, Appeal No APL 092/12, 1 May 2013.

operative since that date. On 13 December 2013, this Court gave leave to appeal, allowed the appeal, set aside the decision of the QCAT appellate tribunal and directed the parties to file written submissions as to whether this Court should conclude that the decision of the senior member could not have been reasonably made on the facts found by him and as to the orders this Court should now make.[5]

[3] The question which this Court must now determine, placing itself in the position of the QCAT appellate tribunal, is whether the QCAT senior member's decision was so unreasonable that it lacked an evident and intelligible justification when all relevant matters were considered: *Minister for Immigration v Li*.[6]

[4] The matters which I consider relevant to that determination are as follows. The skipper of the *Malu Sara* advised the Commonwealth Department of Immigration and Multicultural and Indigenous Affairs at about 4.00 pm on 14 October 2005 that the vessel was lost in poor visibility. At 7.15 pm, the Department advised the Queensland Police Service (QPS). At about 7.40 pm, the appellant was recalled to duty and, until the following morning, was in control of the search and rescue mission.

[5] The senior member found that in the early hours of 15 October 2005, the appellant's judgment was likely to have been impaired by fatigue as he commenced duty at 8.00 am on 14 October, was recalled to duty at 7.40 pm and then worked through the night and into the next day. Co-ordinating the search and rescue mission alone was too onerous a task and he needed the assistance of another police officer. He was not offered any relief because none was available. It was reasonable for him to have assumed the *Malu Sara* was seaworthy as it was a new Commonwealth-owned vessel commissioned for duty in the Torres Strait. The appellant had demonstrated insight into his failings, had a good service record, his subsequent conduct had been exemplary, he had acted in higher positions and he was unlikely to engage in such misconduct again. He had suffered a significant financial impact following his transfer from Thursday Island. The lengthy delay in completing the disciplinary proceeding stalled his career and had left him anxious and uncertain. His conduct, however, fell well short of what was expected of a police officer with his experience and knowledge in the circumstances which prevailed at the time and he accepted this.[7]

[6] The CMC rightly emphasised the gravest of the particulars of the charge brought against the appellant, namely, his failure in the early hours of 15 October 2005 to convey to the Australian Maritime Safety Authority (AMSA) that at 2.26 am someone on the *Malu Sara* had reported that it was sinking. This was a shocking omission for a police officer performing duty as a search and rescue co-ordinator. That serious error was compounded by his failure to pass that information onto AMSA until 6.00 am on 15 October 2005.

[7] A central function of the QPS is to render help "reasonably sought, in an emergency … by members of the community".[8] That function is no less important where an emergency arises in remote areas. Once the appellant received the report that the *Malu Sara* was sinking, his earlier reasonable assumption that the vessel was sea-

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5 *Flegg v Crime & Misconduct Commission and Anor* [2013] QCA 376, [6], [48], [50], [51].

6 [2013] HCA 18, (2013) 87 ALJR 618, Hayne, Kiefel and Bell JJ, [63]-[76].

7 See *Flegg v Crime and Misconduct Commissioner & Anor* [2013] QCA 376, [20].

8 *Police Service Administration Act* 1990 (Qld), s 2.3(g).

worthy was no longer reasonable. His prolonged failure to convey to AMSA the report from the *Malu Sara* that the vessel was sinking was a serious dereliction of the onerous duty he carried as search and rescue co-ordinator. Five lives were lost and the many lives of those who loved the deceased have been forever diminished.

[8] It is impossible not to feel sympathy for the appellant who has demonstrated remorse for and insight into his shortcomings and who has had these disciplinary proceedings hanging over his head for many years. But, the objects of the *Police Service (Discipline) Regulations* 1990 (Qld) include providing a system of guiding, correcting, chastising and disciplining officers; ensuring appropriate standards of discipline within QPS are maintained so as to protect the public; upholding ethical standards within the QPS; and promoting and maintaining public confidence in the QPS.[9] This meant that the assistant commissioner was required to impose a stern sanction on the appellant to demonstrate to other police officers involved in search and rescue work the gravity of their duties and to reassure the public that police officers receiving emergency calls will give all reasonable assistance available, even in remote areas. Despite the appellant's fatigue brought on by the necessity to work excessive hours in this emergency, and the many mitigating features to which the senior member referred, I consider that his breach of his professional responsibilities was so grave that to fully suspend the sanction imposed was unreasonable. It was inadequate as a disciplinary measure in that it was apt to undermine QPS ethical standards and public confidence in the QPS. After weighing up all relevant competing considerations, I am persuaded that the full suspension of the demotion resulted in the sanction being so lenient as to lack evident and intelligible justification.

[9] For those reasons, I have reached a different conclusion to my colleagues. I would make the following orders:

1. The appeal to the appellate tribunal of the Queensland Civil and Administrative Tribunal is allowed, and the orders of the Queensland Civil and Administrative Tribunal of 24 February 2012 are set aside.

2. Instead, it is ordered that:

   (a) the decision of Assistant Commissioner O'Regan is set aside;

   (b) the appellant is demoted from the rank of Sergeant 3.5 to the rank of Senior Constable 2.9 for a period of two years from 20 February 2013; and

   (c) the appellant is eligible after two years from 20 February 2013 to apply for the position of Sergeant subject to his having been of good conduct and achieving satisfactory performance planning and appraisals.

[10] **GOTTERSON JA:** On 13 December 2013, this Court gave judgment in these proceedings. The decisions of the appeal tribunal of the Queensland Civil and Administrative Tribunal delivered on 20 February and 1 May 2013 in appellate proceedings instituted by the first respondent against the appellant and the second respondent, were set aside. The judgment also directed the parties to make written submissions with respect to the course that this Court should now take, such submissions to deal with whether the Court should conclude that the decision of the

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[9] Reg 3(a) and (b).

senior member could not have reasonably been made on the facts as found by the senior member and the substitute orders that should be made.

[11] The parties have made such submissions. In summary, the appellant submits that this Court should conclude that the decision of the senior member was one that could have been reasonably made by him and that therefore the substitute order that ought to be made is that the appeal to the appeal tribunal be dismissed. On the other hand, the first respondent submits that the conclusion that should be reached is that the senior member's decision was not one that could reasonably have been made by him and that in addition to allowing the appeal to the appeal tribunal and setting aside the decision of the senior member, the additional substitute orders ought to be made:

1. The appellant is demoted from the rank of Sergeant 3.5 to the rank of Senior Constable 2.9 for a period of two years from 20 February 2013.

2. The appellant is eligible after two years from 20 February 2013 to apply for the position of Sergeant subject to his having been of good conduct and achieving satisfactory performance planning and appraisals.

It may be noted that these substitute orders are the same as those that the appeal tribunal had made on 1 May 2013.

[12] The submissions from both parties proceed on the footing that the first task for the Court now is to decide whether the decision reached by the senior member was one that was reasonably open to him on the facts as found by him and which he took into account. The relevance of that issue derives from the circumstance that the first respondent's sole ground of appeal to the appeal tribunal was that no reasonable tribunal could have concluded that the decision reviewed by the senior member should be confirmed.

[13] As noted in the reasons for judgment published by this Court,[10] this ground of appeal is akin to an expression of unreasonableness in the sense discussed in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[11] In *Minister for Immigration and Citizenship v Li*,[12] the High Court was required to consider whether a decision of the Migration Review Tribunal to refuse an adjournment was unreasonable. The adjournment requested was of a review of a refusal to grant a skilled persons visa. A necessary condition of the grant was a favourable skills assessment which had not been given. The basis of the request was that an internal review of the decision not to grant the assessment was underway. The request was supported by details of alleged errors in the assessment decision. All members of the Court agreed that the refusal decision was unreasonable.

[14] The separate reasons for judgment contain observations on the ambit of unreasonableness as a ground of review. In a joint judgment, Hayne, Kiefel and Bell JJ observed that *Wednesbury* is not the starting point for the standard of unreasonableness, nor should it be considered the end point.[13] Their Honours continued:

> "The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision −

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10 [2013] QCA 376, at [4], [22].
11 [1948] 1 KB 223 at 230.
12 [2013] HCA 18; (2013) 297 ALR 225.
13 At [68].

> which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified. This is recognised by the principles governing the review of a judicial discretion, which, it may be observed, were settled in Australia by *House v The King*,[14] before *Wednesbury* was decided… In *Wednesbury*, Lord Greene MR discussed the various grounds upon which an exercise of statutory power may be abused. His Lordship foreshadowed defining those grounds under a single head of unreasonableness, stating that it was 'perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty... unreasonableness, attention given to extraneous circumstances, disregard of public policy' were all relevant to the question of whether a statutory discretion was exercised reasonably[15]."[16]

[15] After referring to the close analogy between judicial review of administrative action and appellate review of a judicial discretion identified by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[17] in the context of unreasonableness and to the principles governing the review of judicial discretion articulated in *House v The King*[18] concerning inference of unreasonableness, their Honours said:

> "…The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification."[19]

[16] In separate reasons in *Li*, French CJ[20] reminded that the ground was not a vehicle for challenging 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 Court disagrees even though that judgment is rationally open to the decision-maker. Gageler J[21] described the test for unreasonableness as stringent, noting that judicial determination of *Wednesbury* unreasonableness in Australia has in practice been rare.

[17] Although the ground of appeal to the appeal tribunal was cast in terminology adapted from *Wednesbury*, in my view, it should be seen as invoking the ground of review of unreasonableness as explained in *Li*. The appellant's submissions have approached the issue in that way. Given that it was the first respondent which

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14 (1936) 55 CLR 499.
15 At 229.
16 At [68]-[69].
17 (1986) 162 CLR 24 at 41.
18 (1936) 55 CLR 499.
19 At [76].
20 At [30].
21 At [113].

submitted to the appeal tribunal that the decision was unreasonable, I propose to set out its argument on this issue first.

The first respondent's argument – unreasonableness

[18] The first respondent highlights the finding that the appellant failed to convey to the Australian Maritime Safety Authority ("AMSA") at 2.26 am on 15 October 2005, information that an occupant of the *Malu Sara* (Mr Stevens) had said that it was sinking.[22] This, it is submitted, was "as serious an omission as could be imagined by a police officer performing duty as a search and rescue coordinator". The seriousness of this failure was compounded by the appellant's failure to pass on the information to AMSA until 6.00 am that day. It was a seriousness which, in the words of the senior member, "can not be understated".[23]

[19] Reference is made by the first respondent to the function of the Queensland Police Service ("QPS") to render help "reasonably sought, in an emergency … by members of the community",[24] and to the object of the *Police Service (Discipline) Regulations* 1990, namely, to:

> "(a) provide for a system of guiding, correcting, chastising and disciplining subordinate officers;
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> (b) ensure the appropriate standards of discipline within the Queensland Police Service are maintained so as to –
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> (i) to protect the public; and
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> (ii) to uphold ethical standards within the Queensland Police Service; and
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> (iii) to promote and maintain public confidence in the Queensland Police Service."[25]

[20] The first respondent submits that the only conclusion reasonably open to the senior member was that a sanction more onerous than a suspended sanction had to be imposed if the confidence in the QPS of the public, especially those who reside in the Torres Strait and who necessarily depend upon maritime transport, was to be promoted and maintained. A stern sanction was needed to reassure the sea-going public that members of the QPS had every incentive to render help reasonably sought in an emergency.

[21] In a criticism of the manner in which the senior member relied upon mitigating factors, the first respondent submits that those factors did not operate "to any meaningful extent, to mitigate misconduct which was not momentary but prolonged and which involved failures to pass on vital information, take appropriate actions and keep accurate records events, actions, conversations and discussions".

The appellant's argument – unreasonableness

[22] Consistently with the judgment of this Court, the appellant submits that the material findings of fact made by the senior member set the framework for the exercise of the discretion. Particular reference is made by the appellant to the mitigating factors as found by the senior member which are summarised at paragraph 20 of the reasons of this Court.

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22 Reasons of the senior member ("Reasons") [21]; AB 203.

23 Reasons [29]; AB 205.

24 *Police Service Administration Act* 1990, s 2.3(g).

25 s 3.

[23] The appellant submits that his conduct did not involve conscious dereliction. It was found that his failure to activate the "available search and rescue assets" at an earlier point in time constituted "serious lack of [judgment] on his part".[26] However, the senior member found that the appellant's judgment was likely to have been impaired by fatigue;[27] that he was proceeding under the reasonable assumption that the *Malu Sara* was seaworthy;[28] that he was "overtasked in coordinating the search and rescue alone";[29] and that he was not offered any relief and that none was available.[30]

[24] The senior member took into account as mitigating factors the following additional circumstances extraneous to the incident itself – the extraordinary delay in prosecuting the disciplinary proceedings;[31] the stalling of the appellant's career leaving him with "anxiety and uncertainty";[32] his good service record;[33] his exemplary conduct since the incident;[34] the significant financial impact upon him;[35] his acceptance of the charge;[36] and his insight into "his conduct and his failings".[37] The senior member concluded:

> "I am reasonably satisfied that when taking into account all of the mitigating factors the sanction imposed by the [second respondent] sufficiently had regard to the seriousness of the misconduct, the public interest and the need to maintain proper standards and protect the reputation of the Queensland Police Service."[38]

The appellant submits that this conclusion was reasonably open to the senior member.

Discussion

[25] The first respondent identifies the suspension of the demotion as the element of the sanction which renders the senior member's decision to confirm it unreasonable. To succeed in impugning the decision on this basis, the first respondent must establish that by virtue of the element of suspension, the confirmation decision, to adopt the words of the plurality in *Li*, lacks an evident and intelligible justification.

[26] The discretionary power to suspend a disciplinary sanction is a broad one conditioned upon the agreement of the officer being disciplined to perform voluntary community service or, as occurred here, to undergo voluntary counselling, treatment or some other program designed to correct or rehabilitate.[39] There is no requirement that special or exceptional circumstances be demonstrated before a suspension may be ordered.[40]

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26 Reasons [20]; AB 203.
27 Reasons [33]; AB 206.
28 Reasons [34], [36], [37]; AB 206–207.
29 Reasons [38], [41]; AB 207–208.
30 Reasons [33]; AB 206.
31 Reasons [50]; AB 209.
32 *Ibid*.
33 Reasons [42]; AB 208.
34 Reasons [50]; AB 209.
35 Reasons [51]; AB 209.
36 Reasons [43]; AB 208.
37 Reasons [44]; AB 208.
38 Reasons [53]; AB 210.
39 *Police Service (Discipline) Regulations* 1990, s 12(1).
40 *Spencer v Baulch* [2004] QCA 234.

[27] A suspended sanction is a sanction. A comparison may be made with a suspended sentence of imprisonment as to which this Court has reminded that "of course, [it] is not a mere formality and may be regarded as 'significant punishment'"[41] and of which Fitzgerald JA said that it "is punishment".[42]

[28] That it was open to the senior member to have regard to the mitigating factors to which he did is not put in question by the ground of appeal. That is so for both those germane, and those extraneous, to the incident.

[29] The first respondent's submissions do not refer to the decision in *Li* or to the lack of an evident and intelligible justification criterion in it. They do not, therefore, identify, in terms, a feature or features of the suspension, which it is said, inform a conclusion that the decision to confirm a sanction which incorporates it, lacks an evident and intelligible justification. Notwithstanding, it may, I think, be fairly inferred from the first respondent's further submissions that it contends that the senior member's reliance on factors germane to the incident as meaningfully mitigating the seriousness of the misconduct in order to make the decision, was unjustified.

[30] Those submissions refer to one such factor only, namely, the finding that the appellant reasonably believed that the vessel was seaworthy. It is argued that once he had been told that the vessel was sinking, any such belief became irrelevant. In my view, this submission overlooks the circumstance that the charge against the appellant particularised conduct on his part over a time span beginning at 7.40 pm on 14 October 2005. The information about the vessel sinking was not given to him until almost seven hours into that period of time. Therefore, in assessing the appellant's conduct until that point at least, it was not irrelevant that he reasonably believed that the vessel was seaworthy.

[31] Moreover, other mitigating factors found by the senior member were ones that operated during the whole of the time span particularised in the charge. I refer specifically to the fatigue that the appellant was suffering having worked a full shift on 14 October and having been recalled to duty from 7.40 pm that day;[43] and also to his being overtasked in coordinating the search and rescue on his own and without support.[44] Neither of those factors was irrelevant or insignificant to an assessment of the appellant's conduct.

[32] Having regard to what I have said with respect to these three factors, I cannot accept the first respondent's submission that the mitigating factors as found by the senior member did not operate to any meaningful extent on the seriousness of the appellant's misconduct. In my view, it was rationally open to the senior member to proceed on the basis that they did.

Disposition

[33] For these reasons, I am not persuaded that the manner in which the senior member took into account mitigating factors lacked justification with the consequence that his decision to confirm the sanction which incorporated a suspension was

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41 *R v H ex-parte Attorney-General* (1993) 66 A Crim R 505 per Davies and McPherson JJA and Thomas J at 510.

42 *R v JCE* [2000] NSWCCA 498 at [25].

43 Reasons [33]; AB 206.

44 Reasons [38]-[41]; AB 207-208.

unreasonable in the relevant sense. It follows that the appropriate further order that this Court ought make is to dismiss the appeal to the appeal tribunal.

Order

[34] I would propose the following further order:

1. The appeal to the appeal tribunal against the decision of the senior member delivered on 24 February 2012 be dismissed.

[35] **MARGARET WILSON J:** I agree with the reasons for judgment of Gotterson JA, and with the order he proposes.