

SUPREME COURT OF QUEENSLAND

CITATION: *Flanagan v Stewart & Anor* [2016] QSC 155

PARTIES: **STEPHEN FLANAGAN**
(applicant)
v
IAN STEWART (COMMISSIONER OF POLICE)
(first respondent)
and
ASSISTANT COMMISSIONER CLEM O'REGAN
(second respondent)

FILE NO: 1315 of 2016

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 15 July 2016

DELIVERED AT: Brisbane

HEARING DATE: 5 May 2016

JUDGE: Boddice J

ORDER: **The application for review is dismissed.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – where the applicant is a police officer in the Queensland Police Service – where a complaint was made against the applicant arising out of his conduct during a traffic intercept – where the complainant was speeding and the applicant mistakenly believed the complainant was driving a stolen vehicle – where, during the course of that traffic intercept, the applicant directed his firearm towards the complainant and handcuffed him – where the second respondent stood down the applicant from the QPS, pending the resolution of the investigation of that complaint – where the applicant was subsequently charged with offences of deprivation of liberty and common assault, arising out of his conduct during the traffic intercept – where the second respondent suspended the applicant from the QPS and invited the applicant to show cause as to why that suspension ought not to be without salary and allowances – where the second respondent subsequently suspended the applicant without salary and allowances pending the resolution of the criminal charges, and any resultant disciplinary proceedings – where the second respondent had regard to numerous factors,

including the financial impact on the applicant of any decision to suspend him without salary and allowances – where the applicant argues the decisions to suspend the applicant and to suspend him without pay and allowances were each an improper exercise of power in that they were so unreasonable that no reasonable decision maker could so exercise the powers – whether the decisions were so unreasonable that no reasonable person could so exercise the power to make either decision

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – EXCLUSION OF PROCEDURAL FAIRNESS – GENERALLY – where the applicant was previously the subject of a complaint in 2013 – where the second respondent determined the present complaint and the 2013 incident had significant similarities – where the applicant alleges the second respondent had regard to the 2013 incident in reaching the decision to suspend the applicant without salary and allowances – where the applicant alleges that he was given no prior notice of the second respondent’s intention to have regard to the 2013 incident – where the applicant alleges that the second respondent’s conduct therefore breached the rules of natural justice and denied the applicant procedural fairness – whether the second respondent breached the rules of natural justice in reaching the decision to suspend the applicant without salary and allowances

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88; [2005] HCA 72, cited

Attorney-General (NSW) v Quin (1990) 170 CLR 1; [1990] HCA 21, cited

Eaton v Dental Board of Australia [2012] VSC 510, cited
Kioa v West (1985) 159 CLR 550; [1985] HCA 81

Minister for Immigration and Border Protection v Stretton (2016) 237 FCR 1; [2016] FCAFC 11, cited

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18, cited

Police Service Administration Act 1990 (Qld), ss 6.1, 6.2, 6.3

COUNSEL: W Sofronoff QC, with A Scott, for the applicant
S Brown QC, with S McLeod, for the respondents

SOLICITORS: QPU Legal Group for the applicant
PSBA Legal Division for the respondents

[1] On 15 January 2016 the second respondent, as delegate for the first respondent, made a decision under s 6.1 of the *Police Service Administration Act 1990* (“the Act”) to suspend the applicant from duty as a police officer in the Queensland Police Service. On 4

February 2016 the second respondent, as delegate for the first respondent, made a decision under s 6.3 of the Act that the applicant was not entitled to his salary and allowances while suspended from duty as a police officer.

- [2] By application, filed 5 February 2016, the applicant seeks a statutory order of review and order of review in respect of each decision. There are two grounds of review advanced by the applicant. First, the decisions were so unreasonable that no reasonable person exercising the power could so decide. Second, that in making the decision on 4 February 2016, there was a breach of the rules of natural justice.

Background

- [3] The applicant has been a member of the Queensland Police Service for many years, having joined it aged 19 years. His most recent position was as officer in charge of the Ilfracombe police station in the Longreach patrol group. He possesses no other qualifications or skills to assist in gaining employment outside the Queensland Police Service.
- [4] The applicant is married with two dependent teenage children. He is the primary money earner in the family unit. His wife has recently started her own business but it presently has a very low annual turnover. He has significant personal financial commitments, including responsibility for repayment of a personal loan.
- [5] The first respondent is the Commissioner of Police. The second respondent is an Assistant Commissioner of Police, responsible for management of the Ethical Standards Command. That command has responsibility for the investigation of complaints of misconduct and corruption, including disciplinary matters.
- [6] On 22 May 2015, the second respondent issued a stand down notice in respect of the applicant. That notice was issued following information, provided to the second respondent in an Executive Briefing Note, of an investigation into a traffic intercept on 5 May 2015. During that traffic intercept, the applicant is alleged to have used excessive force and failed to treat the driver of the vehicle with appropriate dignity and respect.
- [7] On 14 January 2016, the second respondent received an updated Executive Briefing Note, containing further information. Relevantly, it advised the applicant had been served with a notice to appear in relation to criminal charges of deprivation of liberty and assault, arising out of the incident on 5 May 2015.
- [8] On 15 January 2016, the second respondent made the decision to suspend the applicant. On that same day, the second respondent gave the applicant a notice informing him of his suspension and asking him to show cause as to why that suspension ought not to be without salary and allowances.
- [9] On 29 January 2016, the applicant, through his legal representatives, supplied written submissions in response to the show cause notice. On 4 February 2016, the second respondent determined to suspend the applicant without salary and allowances. The applicant was served with a notice to that effect shortly thereafter.

Relevant statutory provisions

“6.1 Power to stand down and suspend

- (1) If—
- (a) it appears to the commissioner, on reasonable grounds that—
 - (i) an officer is liable to be dealt with for corrupt conduct; or
 - (ii) an officer is liable to disciplinary action under section 7.4; or
 - (iii) the efficient and proper discharge of the prescribed responsibility might be prejudiced, if the officer's employment is continued; or
 - (b) an officer is charged with an indictable offence; or
 - (c) an officer is unfit for reasons of health to such an extent that the officer should not be subject to the duties of a constable;
- the commissioner may—
- (d) stand down the officer from duty as an officer and direct the person stood down to perform such duties as the commissioner thinks fit; or
 - (e) suspend the officer from duty.
- (2) The commissioner may at any time revoke a standing down or suspension imposed under subsection (1).

6.2 Salary entitlement if stood down

An officer who is stood down from duty under section 6.1 is entitled to be paid salary and allowances at the rate at which the officer would have received salary and allowances had the standing down not occurred.

6.3 Salary entitlement if suspended

- (1) An officer suspended from duty under section 6.1 is entitled to be paid salary and allowances at the rate at which the officer would have received salary and allowances had the suspension not occurred, unless the commissioner otherwise determines in a particular case.
- (1A) Except that an officer suspended under section 6.1(1)(c) is to be entitled to the salary and allowances to which that officer was previously entitled.
- (2) An officer suspended from duty who is not entitled to be paid salary during the suspension—
- (a) may receive and retain salary, wages, fees or other remuneration from any lawful source during the suspension, unless the commissioner otherwise determines in a particular case; and
 - (b) if the officer resumes duty as an officer on the revocation of the suspension—is entitled to receive a sum equivalent to the amount of salary and allowances the officer would have received had the suspension not occurred, reduced by a sum equivalent to the amount of salary, wages, fees and other remuneration to which the officer became entitled from any other source during the

suspension, unless the commissioner otherwise determines in a particular case.

- (3) An officer suspended from duty without salary who enters into employment whereby the officer will become entitled to salary, wages, fees or other remuneration is to inform the commissioner immediately of the particulars of the employment.
- (4) An officer suspended from duty who during the suspension becomes entitled to salary, wages, fees or other remuneration from a source incompatible with assessment of the officer as a fit and proper person to be an officer and who fails to satisfy the commissioner that there are reasonable grounds for not dismissing the officer, may be dismissed from the service.”

The decisions

[10] Relevantly, the notice to suspend (issued on 15 January 2016) stated:

“It has been brought to my notice by the Chief Superintendent, Ethical Standards Command that investigations have been conducted into allegations that you:

- Used excessive force during a traffic intercept; and
- Failed to treat [the complainant] with dignity and respect.

Having considered the contents of the attached Executive Briefing Note, I am satisfied the investigation of this matter is now complete and it is intended that you will be issued with a notice to appear for offences of deprivation of liberty and common assault. It therefore appears to me on reasonable grounds that you are liable for disciplinary action under Section 7.4 of the *Police Service Administration Act 1990* (the Act).

After considering relevant factors, in particular the serious nature of the alleged conduct and the direct conflict between the alleged conduct and your functions as a police officer, and the need to protect the reputation of the Service, I have decided to take suspension action under the Act. Under Section 6.1 of the Act and the Human Resources Delegation and Approval Authorities, I revoke the stand down action imposed on 22 May 2015 and you are **suspended from duty** without the loss of salary and allowances.”

[11] Relevantly, the notice of suspension without salary and allowances stated:

“On 15 January 2016, you were suspended from duty by virtue of Section 6.1 of the *Police Service Administration Act 1990* (the Act) and invited to respond in writing to show cause why your salary and allowances should continue while you are suspended from duty. Your show cause submissions were received on 29 January 2016.

Having considered your submissions and the video footage of the conduct in question, I have determined the allegations against you are, if proven, of such a serious nature to justify your disentanglement to salary and allowances during the period of your suspension from duty.”

Evidence

- [12] Calvin Gnech, the applicant's solicitor, provided affidavits enclosing a transcript of the applicant's disciplinary interview, together with details of an earlier incident in 2013 which had resulted in disciplinary action against the applicant. An earlier affidavit set out the consequences of a suspension without salary and allowances generally, and its effects on the applicant in particular. The applicant's personal circumstances and financial responsibilities were detailed in this affidavit.
- [13] Mr Gnech's affidavit also contained statements detailing the police disciplinary process. The respondent objected to those statements on the basis they contained opinion or comment or were irrelevant. Whilst there are statements in that affidavit in the nature of opinion or comment and parts of the affidavit are of marginal relevance I am not satisfied those statements are inadmissible. However, I have afforded little weight to the opinions or comments of Mr Gnech.
- [14] The applicant provided an affidavit confirming the accuracy of Mr Gnech's affidavit as to the financial consequences for the applicant following his suspension without salary and allowances. In short, the family unit had difficulty meeting its living expenses due to the loss of its primary source of income. Those consequences impact not only upon the applicant and his wife's ability to meet their financial circumstances, but also upon their accommodation and the choice of schools for their daughter.
- [15] The second respondent provided an affidavit setting out the circumstances in which he made the respective decisions. The second respondent said the factors relevant to the decision whether or not to exercise a discretion to suspend an officer without pay included but were not necessarily limited to:
- The possibility of suspending with salary and allowances;
 - The nature of the alleged conduct, including whether the alleged conduct could constitute criminal behaviour, and the conflict of the alleged conduct with the objectives of the Queensland Police Service;
 - The objective seriousness of the alleged misconduct or corrupt conduct, including a general assessment of the weight of evidence available and the likely sanctions available to the prescribed officer (if substantiated);
 - The relevant disciplinary history of the relevant officer, including whether the officer has been subject to discipline for similar conduct previously, or disciplined for unrelated matters which suggest the officer's conduct is escalating or previous measures to address the conduct have failed to remedy the issues;
 - The potential risk of compromising the reputation of the Queensland Police Service, including the community's expectation that misconduct or corrupt conduct by police officers will not be tolerated;
 - The potential risk of the officer's conduct and presence in the workplace adversely affecting the emotional well-being of any employee or clients of the Queensland Police Service;

- The potential impact on the effective operation of Departmental policies, and programs, of suspending the officer as opposed to standing the officer down or transferring the officer to alternate duties;
- The likely period of time that will pass before any relevant criminal and/or disciplinary investigations or proceedings will conclude;
- The personal interests for the officer maintaining their salary and allowances; and
- The public interest.

[16] In respect of the decision itself the second respondent said:

- “11. On 22 May 2015, I received information by way of an ‘Executive Briefing Note’ regarding the investigation into the Applicant’s conduct regarding allegations [he] had used excessive force during a traffic intercept and failed to treat the driver of the vehicle with appropriate dignity and respect.
12. Annexed to the Executive Briefing Note was a DVD containing video footage obtained from the police vehicle dashboard camera in addition to video obtained from the driver’s partner....
13. I was aware that the Applicant had been subject of similar complaints previously and had been subject of a demotion relating to an earlier complaint of a similar nature in relation to a traffic intercept in 2013 where the Applicant had also failed to treat the driver of the vehicle with appropriate dignity and respect. In this regard, I reviewed a video recording from the Applicant’s helmet camera and determined the two incidents had significant similarities. ...
14. I determined that, if proven, the allegations rendered the Applicant liable to disciplinary action. Further, I was satisfied the nature of the alleged conduct was sufficiently serious that immediate action was required to protect the safety of the public, and to maintain the reputation of, and the community confidence in, the Queensland Police Service. Accordingly, I stood the Applicant down from duties as a police officer pending the resolution of the investigation and any resultant disciplinary process. ...
15. On 14 January 2016 I received further information, by way of an updated ‘Executive Briefing Note’, regarding the completion of the investigation into the Applicant’s alleged unlawful conduct during the course of the traffic intercept. This Executive Briefing Note contained the 22 May 2015 briefing, however additional information (included in bold) noted that the Applicant had been served with a Notice to Appear in relation to criminal charges of ‘*Deprivation of Liberty*’ and ‘*Assault*’ arising from the incident. ...
16. Having regard to the seriousness of the allegations against the Applicant, the fact that the allegedly unlawful conduct occurred whilst the officer was in the execution of his duties, a history of similar complaints and a continuation of similar conduct despite previous sanctions, I determined that the Applicant’s alleged conduct was

sufficiently serious that it was likely that a prescribed officer would consider dismissal of the Applicant from the Queensland Police Service.

17. On 15 January 2016, I determined that sufficient cause existed to suspend the Applicant without pay pending the resolution of the criminal proceedings and any resultant disciplinary process and issued a suspension notice to the Applicant, and invited him to show cause within 14 days why I should not proceed to suspend him without salary and allowances. ...
18. On 29 January 2016, the Applicant's legal representative furnished me with submissions on the Applicant's behalf in response to the show cause notice. ...
19. After careful consideration of all of the relevant factors outlined above, including the submissions furnished by the Applicant regarding the allegations and the financial impact of any decision to suspend him without salary and allowances, I confirmed my preliminary view that the Applicant should be suspended without salary and allowances pending the resolution of any criminal and/or disciplinary proceedings.
20. On 4 February 2016 I provided the Applicant's legal representative with a Notice of suspension without salary and allowances directed to the Applicant. ... ”

Applicant's submissions

- [17] The statutory scheme of the Act provides for three actions that may be taken where there are unresolved allegations against a police officer: the officer may be stood down, suspended or suspended without salary and allowances. The applicant submits the purpose of each action is evident from the Act. Standing an officer down is the lowest level of action; a suspension is to be used when it is inappropriate for the officer to perform any role as a police officer, even without the common law and statutory powers ordinarily afforded to a police officer; and suspension without salary and allowances is for circumstances where the allegations are such that suspension is insufficient for some identified reason.
- [18] The applicant accepts there are no express limitations on the Commissioner's discretion to suspend an officer, rather than merely stand him down, or to suspend without salary and allowances, rather than with them. This absence of an express limitation does not mean the Commissioner's discretion is unfettered. The discretion cannot be exercised arbitrarily or illegally. There must be a logical, evidential basis for the exercise of the particular discretion.
- [19] The applicant submits there were less drastic options open to the respondents. Standing the applicant down, or suspending him with salary and allowances would not have resulted in the applicant and his family suffering severe consequences and financial hardship. The second respondent provided no explanation or justification as to why it was necessary to take the action, which will result in those consequences.
- [20] The applicant submits that no reasonable person would have reached such a decision. There was only one fact that changed between the decision to stand down the applicant

and the decision to suspend him without salary and allowances: the applicant was charged with criminal offences arising out of the same incident that resulted in the applicant being stood down. This was not an adequate justification for the applicant to be suspended, instead of simply continuing to be stood down. Even if it were accepted suspension was reasonable, the applicant submits there was no justification for the additional step of withholding salary and allowances.

- [21] The applicant submits the second respondent breached the rules of natural justice in reaching his decision to suspend the applicant without salary and allowances. That decision relied on the applicant's history of similar complaints. The applicant submits he was not given an opportunity to address that history as he was never notified the second respondent would rely on that incident in reaching his decision. Accordingly, the decision must be set aside, and the applicant given an opportunity to make submissions on the relevance of his history to whether he ought to be stood down without salary and allowances.
- [22] In response to the respondents' submission that the application ought to be dismissed because the applicant has not pursued merits review before the Commissioner of Reviews, the applicant submits he pursued the present application because he needed to obtain interim relief to stay the decision withholding his salary and allowances. That interim relief was only available in this Court.

Respondents' submissions

- [23] The respondents submit this Court ought not to determine the application for review. The decisions are subject to merits review before the Commissioner of Reviews. The existence of that right of review renders s 13 of the *Judicial Review Act 1991* (Qld) relevant. The interests of justice support dismissal of the current application as the Commissioner of Reviews is the very body designated by Parliament to consider such complaints. The applicant should be required to pursue that process.
- [24] The respondents submit that should this Court consider the application for review, the application would be dismissed as no legal unreasonableness has been established in respect of either decision. The second respondent set out his reasoning. On the evidence, that reasoning is neither illogical nor irrational. Whilst financial hardship is a relevant matter for consideration, another relevant factor is the public interest in maintaining public confidence in the administration and management of the Queensland Police Service.
- [25] It cannot be concluded that a decision to suspend the applicant without salary and allowances is so unreasonable that no reasonable person could make it. The laying of criminal charges was a sufficient change to provide reasonable grounds for a decision that standing down was no longer appropriate, and that suspension without salary and allowances was appropriate in all the circumstances.
- [26] The respondents further submit that there has been no breach of the rules of natural justice in respect of the decision made on 4 February 2016. The notices given to the applicant on 15 January 2016 and 4 February 2016 afforded the applicant procedural fairness. The updated Executive Briefing Note, a copy of which was supplied to the applicant, expressly referred to previous complaints involving excessive force when interacting with members of the community. The report from the Risk Analysis and Intelligence Section,

Ethical Standards Command, was a document specifically referred to at the time of the decision to stand the applicant down on 22 May 2015. In any event, that document did not form part of the materials taken into account by the second respondent in the decision of 4 February 2016.

Applicable principles

- [27] In determining legal unreasonableness, a court is to evaluate the decision by reference to the scope and purpose of the relevant statute and its real object.¹ Guidance may be derived from the principles applicable to an appellate review of a judicial discretion. If the result is, upon the facts, unreasonable or plainly unjust, an inference of unreasonableness may properly be drawn from those facts and from the matters falling for consideration in the exercise of the statutory power. Such an inference may be drawn even where there is provision of reasons. Legal unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.²
- [28] Where a decision-maker's reasons provide an evident and intelligible justification for the decision, legal unreasonableness is unlikely to be established by an applicant.³ However, if the decision maker may be regarded "by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision maker has been unreasonable in a legal sense".⁴
- [29] Legal unreasonableness does not involve a court reviewing the merits of the decision or substituting its own view as to how the discretion should be exercised by a decision-maker.⁵ The relevant principle was enunciated by Allsop CJ in *Minister for Immigration and Border Protection v Stretton*:⁶

"This concept of legal unreasonableness is not amenable to minute and rigidly defined categorisation or a precise textual formulae ... The plurality's discussion of unreasonableness in *Li* should be read as a whole – as a discussion of the sources and lineage of the concept, of the limits of the concept of reasonableness given the supervisory role of the courts, of the fundamental necessity to look to the scope and purpose of the statute conferring the power to find its limits, of the various ways the concept has been described, of the relationship between unreasonableness derived from a specific error and unreasonableness from a logical or rational reasoning, of the place of proportionality or disproportion in the evaluation, of the guidance capable of being obtained from recognising the close analogy between judicial review of administrative action and appellate review of judicial discretion." (citations omitted)

¹ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 349 [24] (French CJ); 363-364 [67] (Hayne, Kiefel and Bell JJ).

² *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 367 [76] (Hayne, Kiefel and Bell JJ).

³ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 367 [76] (Hayne, Kiefel and Bell JJ).

⁴ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 366 [72] (Hayne, Kiefel and Bell JJ).

⁵ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 363 [66].

⁶ (2016) 237 FCR 1 at 5 [10] (Allsop CJ).

Discussion

Jurisdiction

- [30] The decisions the subject of this application are decisions that could properly be dealt with by the Commissioner of Reviews. However, the applicant sought and obtained interim relief, specifically an order staying the decision to suspend him without salary and allowances pending determination of this application. The Commissioner of Reviews could not have provided that interim relief to the applicant. It was reasonable for the applicant to seek such relief in this Court. Having commenced proceedings in this Court to obtain that relief, it was also appropriate that the applicant have the review of the decisions finally determined by this Court. I am satisfied that notwithstanding the availability of another review mechanism, it is in the interests of justice that the application for statutory review be determined by this Court.

Decision to suspend

- [31] The decision to suspend the applicant was made not as a consequence of the applicant having engaged in any further allegedly unlawful conduct since being stood down in May 2015. The only change in circumstance was that the applicant had been charged with serious criminal offences arising out of that incident.
- [32] Whilst the applicant's conduct was initially viewed by the second respondent as not requiring his suspension as a member of the Queensland Police Service, the fact the applicant was now charged with serious criminal offences as a consequence of that incident was a material change of circumstance justifying a consideration of whether it was appropriate to suspend him from duty as a member of the Queensland Police Service.
- [33] Once the applicant had been charged with criminal offences, it was appropriate to give consideration to whether there was an incompatibility between his continuation as a member of the Queensland Police Service, albeit while stood down, and the public interest in maintaining public confidence in the administration of the Queensland Police Service and in its officers.
- [34] A consideration of the Notice of Suspension reveals the second respondent gave consideration to the significance of the applicant now having been charged with criminal offences, following an incident involving a member of the public, and its incompatibility with the maintenance of public confidence in the Queensland Police Service and its members. The second respondent concluded the circumstances warranted the applicant's suspension from duty as a police officer.
- [35] Such a conclusion was reasonably open on the material, particularly having regard to the nature and circumstances of the applicant's alleged criminal conduct. The maintenance of public confidence outweighed other factors. The decision does not lack any evidentiary basis and is neither illogical nor unintelligible. No legal unreasonableness has been shown in respect of that decision.

Decision to suspend without salary and allowances

- [36] Once it is determined the applicant could properly be suspended, a consideration of the factors identified by the second respondent as being relevant to a decision whether it was

appropriate to suspend the applicant without salary and allowances also supports a conclusion that there was a logical and coherent basis for a conclusion that the incompatibility between the applicant's conduct and the maintenance of confidence in the Queensland Police Service required that the applicant be suspended from duty without salary and allowances.

- [37] The applicant had been charged with serious criminal offences as a consequence of aggressive and inappropriate behaviour towards a driver who had been intercepted for speeding. The applicant's behaviour included directing his firearm towards the driver and handcuffing him. Having regard to the nature and circumstances of those allegations, as evidenced in the recording of the incident, it was open to the second respondent to conclude there was an incompatibility between the applicant continuing to receive salary and allowances while suspended, and the maintenance of public confidence in the administration of the Queensland Police Service and in its members. Public confidence in the administration of the Queensland Police Service includes members of the public being assured those administering that Service do not continue to allow officers charged with serious criminal conduct, allegedly committed whilst on duty, to continue to receive the salary and allowances of members of that Service.
- [38] The applicant's contention that even if the circumstances provided a basis to suspend, there was no basis to suspend without salary and allowances, misunderstands the process undertaken by the second respondent. The circumstances caused the second respondent to revise the decision to stand down the applicant. At that time, he formed a preliminary view there was sufficient cause to suspend the applicant without salary and allowances. Whilst a notice was initially issued, suspending the applicant with salary and allowances, that notice was not indicative of the second respondent's ultimate decision. It was done to provide the applicant with an opportunity to show cause as to why he ought not be suspended without salary and allowances. The second respondent was unpersuaded by those submissions and affirmed his preliminary view by the notice issued on 4 February 2016.
- [39] Whilst another decision maker may have reached a different conclusion, the decision reached by the second respondent is neither illogical nor unintelligible. It did not involve an obvious failure to have regard to relevant factors or having given undue weight to one factor over another such as to support a conclusion there was legal unreasonableness.
- [40] The second ground of review relied upon by the applicant in respect of this decision is a breach of natural justice. Natural justice requires the provision of a reasonable opportunity to address material to be relied upon by the decision maker in support of a decision.⁷ What is a reasonable opportunity will vary depending on the nature of the allegations and the consequences of a decision.⁸
- [41] The second respondent's decision to suspend the applicant without salary and allowances was based not only on the seriousness of the subsequent criminal offences, in the context of the incident. The second respondent also had regard to a history of similar complaints. That plainly was a reference to the Executive Briefing Note, which referred to "a

⁷ *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 95 [15] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); *Kioa v West* (1985) 159 CLR 550 at 628 – 9 (Brennan J).

⁸ *Kioa v West* (1985) 159 CLR 550 at 584 – 5 (Mason J). See also: *Eaton v Dental Board of Australia* [2012] VSC 510 at [26] (Kyrou J).

concerning and consistent complaint history involving excessive force when interacting with members of the community” in the part of the initial note relied upon to found the decision to stand the applicant down.

- [42] The applicant submits he was given no notice of the fact that previous behaviour was being relied upon by the second respondent. However, a copy of the updated Executive Briefing Note was provided to the applicant at the time he was given the Notice of Suspension and Show Cause Notice. To the extent there was reliance on the earlier disciplinary proceeding, the applicant had notice of that fact. That notice was given in the context of an opportunity to make submissions on a decision to suspend him without salary and allowances. In the circumstances, there was no breach of the rules of natural justice.
- [43] The applicant further submits that the second respondent wrongly concluded that the earlier incident was similar in nature, and wrongly believed the applicant had been demoted following that incident. The second aspect was plainly wrong. The applicant had been disciplined but not demoted at that time. However, that error was an error of fact within jurisdiction.⁹
- [44] The first matter is one of impression. To the extent the first incident showed a willingness on the part of the applicant to use his powers inappropriately, in a traffic matter, and to treat a driver without dignity and respect, there was force in the second respondent’s conclusion that the earlier incident was similar. There is no basis to find that the second respondent’s conclusion on that issue constituted an error amenable to review in the present application.
- [45] There is also no basis to conclude the applicant was denied natural justice in respect of the report from the Risk Analysis and Intelligence Section, Ethical Standards Command, referred to in the earlier decision to stand down the applicant. That report did not form part of the material considered in the decision to suspend the applicant without salary and allowances.

Conclusion

- [46] The decisions in question have logical, coherent, intelligible bases. No legal unreasonableness has been shown. There also has been no denial of natural justice.

Orders

- [47] The application is dismissed.

⁹ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–36 (Brennan J).