SUPREME COURT OF QUEENSLAND

CITATION:	*Flegg v Crime and Misconduct Commission and Anor* [2013] QCA 376
PARTIES:	**WARREN FLEGG** (applicant) **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*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	13 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2013
JUDGES:	Margaret McMurdo P and Gotterson JA and Margaret Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal.** **2. Allow the appeal.** **3. Set aside the decisions of the appeal tribunal of the Queensland Civil and Administrative Tribunal delivered on 20 February and 1 May 2013.** **4. Direct that the applicant and the first respondent file written submissions conformably with paragraph 48 of these reasons and not to exceed five pages, on or before 7 February 2014.** **5. First respondent to pay the applicant's costs of the application for leave and of the appeal on the standard basis.**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the applicant failed to take appropriate and required action in his role as search and rescue mission coordinator in relation to a vessel that sank in the Torres

Strait – where disciplinary proceedings were brought against the applicant – where the second respondent conducted disciplinary proceedings and determined sanction – where applicant was demoted from Sergeant 3.5 to Senior Constable 2.9 – where second respondent ordered that the sanction be suspended subject to the applicant completing training programs on proper professional practice – where the first respondent filed an application for review in Queensland Civil and Administrative Tribunal of the reviewable decision and the second respondent's decision was upheld – where the first respondent successfully appealed that decision to the QCAT appellate tribunal on a question of law only on the basis that the sanction was unreasonably or plainly unjust – where the applicant contends that the appellate tribunal contradicted the findings of fact made by QCAT at first instance – whether the applicant has demonstrated an error of law which may have tainted the QCAT appellate tribunal's ultimate conclusion that no reasonable tribunal could have upheld the Assistant Commissioner's sanction

Crime and Misconduct Act 2001 (Qld), s 153(2), s 219
Police Service Administration Act 1990 (Qld), s 7.4(2)
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 142(1), s 150, s 153(2)(c)

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, cited
Attorney-General (NSW) v Quin (1990) 170 CLR 1; [1990] HCA 21, cited
B & L Linings Pty Ltd v Chief Commissioner of State Revenue (2008) 74 NSWLR 481; [2008] NSWCA 187, cited
Crime & Misconduct Commission v Flegg & Anor [2012] QCAT 74, cited
Crime and Misconduct Commission v Flegg & Anor (No 2) Unreported, Queensland Civil and Administrative Tribunal, Appeal No APL092-12, 1 May 2013, cited
Dental Board of Queensland v B [2004] 1 Qd R 254; [2003] QCA 294, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
In re Chennell; Jones v Chennell (1878) 8 Ch D 492, cited
Phillips v Commissioner for Superannuation [2005] FCAFC 2, cited
Real Estate and Business Agents Supervisory Board v Carey [2010] WASCA 109, cited
Sevos v Repatriation Commission (1995) 56 FCR (1995) 129 ALR 509; [1995] FCA 1137, cited
Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73; [1931] HCA 34, cited
Waterford v The Commonwealth (1987) 163 CLR 54; [1987] HCA 25, applied

COUNSEL:	M J Burns QC, with M Black, for the applicant M J Copley QC for the first respondent S A McLeod for the second respondent
SOLICITORS:	Gilshenan & Luton Legal Practice for the applicant Official Solicitor, Crime and Misconduct Commission for the first respondent Queensland Police Service Solicitor for the second respondent

[1] **MARGARET McMURDO P:** On or about 15 October 2005, the vessel *Malu Sara*, owned by the Commonwealth Department of Immigration and Multicultural and Indigenous Affairs, sank on a voyage between Saibai Island and Badu Island in the Torres Strait. Tragically, all five people on board drowned. The applicant, Sergeant Warren Flegg, was the search and rescue mission coordinator, having been recalled to duty at 7.40 pm on 14 October 2005. He continued in that role until the following morning. The inquest published its findings on 12 February 2009. The Queensland Police Service investigated the applicant's conduct as search and rescue coordinator. The second respondent, Assistant Commissioner O'Regan, held a disciplinary hearing on 9 March 2011. The applicant accepted that the charge against him, that he failed to take appropriate and required action in carrying out his role,[1] was substantiated. Assistant Commissioner O'Regan ordered that the applicant be demoted from the rank of Sergeant 3.5 to rank of Senior Constable 2.9 for a period of 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 to at least the "met" level. This order, however, was suspended for two years on the condition that he undertook specified courses.

[2] The first respondent, the Crime and Misconduct Commission ("CMC"), appealed against that sanction to the Queensland Civil and Administrative Tribunal ("QCAT")[2] on the ground that it was inadequate having regard to the seriousness of the applicant's conduct. At first instance, QCAT confirmed the Assistant Commissioner's decision: see *Crime & Misconduct Commission v Flegg & Anor*.[3]

[3] The CMC appealed from that decision to the QCAT appellate tribunal.[4] It is common ground that this second appeal solely concerned an alleged error of law and was an appeal in the strict sense so that leave to appeal was unnecessary.[5] The single ground of appeal was "The Tribunal erred in that no reasonable Tribunal could have concluded that the decision reviewed should be confirmed." The QCAT appellate tribunal allowed the appeal: see *Crime and Misconduct Commission v Flegg & Anor*.[6] It subsequently ordered that the applicant be 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 that he be eligible after two years from 20 February 2013 to apply for the position of Sergeant subject to his having

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1 The complete charge is set out in Gotterson JA's reasons at [10].
2 *Crime and Misconduct Act* 2001 (Qld), s 219G.
3 [2012] QCAT 74.
4 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 142(1).
5 *Crime and Misconduct Act*, s 219M(1); *Queensland Civil and Administrative Tribunal Act*, s 142(1).
6 [2013] QCATA 29.

been of good conduct and achieving satisfactory performance planning and appraisals: see *Crime and Misconduct Commission v Flegg & Anor (No 2)*.[7]

[4] The applicant has applied for leave to appeal from that decision so that there can be a third appeal. For the reasons given by Gotterson JA, I agree that this application for leave should be granted and the appeal allowed. As I have noted, the appeal from the decision of QCAT at first instance to the QCAT appellate tribunal was on a question of law only. The QCAT appellate tribunal, however, at [18] to [20] of its reasons,[8] contradicted the findings of fact made by QCAT at first instance at [25] and [33] to [37] of its reasons[9] as to whether it was reasonable for the applicant to conclude that the vessel was seaworthy and whether he wrongly assumed the search was at "the convenience of the vessel's crew and not one of real urgency". It may be that the QCAT appellate tribunal at [18] to [20] of its reasons was intending to convey that no reasonable tribunal of fact could have made the factual findings of QCAT at first instance at [25] and [33] to [37] of its reasons, and that as a result the decision of QCAT at first instance upholding the Assistant Commissioner's decision was unreasonable in the sense discussed in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[10] and *Attorney-General (NSW) v Quin*.[11] But that was not the effect of the impugned reasons. The applicant has demonstrated an error of law which may have tainted the QCAT appellate tribunal's ultimate conclusion that no reasonable tribunal could have upheld the Assistant Commissioner's sanction. It follows that the application for leave to appeal must be granted and the appeal allowed.

[5] Ordinarily, this Court would remit the matter to QCAT under s 153(2)(c) *Queensland Civil and Administrative Tribunal Act* 2009 (Qld). But this matter concerns conduct which occurred over eight years ago and it is high time it is finalised. The best interests of all parties, the families of the deceased and the community require this Court, after considering the relevant submissions, to now substitute its own decision for that of the QCAT appellate tribunal under s 153(2)(b).

[6] I agree with the orders proposed by Gotterson JA.

[7] **GOTTERSON JA**: The applicant, Warren Flegg, seeks leave to appeal to this Court under s 150(3) of the *Queensland Civil and Administrative Tribunal Act* 2009 ("QCAT Act") against decisions of an appeal tribunal of QCAT delivered on 20 February and 1 May 2013 respectively. In the first of these decisions, the appeal tribunal allowed an appeal to it from a decision of a senior member of QCAT delivered on 24 February 2012 and directed that written submissions on sanction be filed and exchanged. The later decision on sanction was given after consideration of these submissions.

Circumstances giving rise to the QCAT proceeding

[8] The applicant is a member of the Queensland Police Service ("QPS"). In 2005, he held the rank of sergeant and the appointment of Officer in Charge of the Thursday Island Water Police. The circumstances giving rise to the QCAT proceeding are concisely outlined in the reasons of the senior member as follows:

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7 Unreported, Queensland Civil and Administrative Tribunal, Appeal No APL092-12, 1 May 2013.
8 [2013] QCATA 29.
9 [2012] QCAT 74.
10 [1948] 1 KB 223.
11 (1990) 170 CLR 1, 36-37.

> "[1] A little after midday on 14 October 2005, the vessel *Malu Sara*, owned by Department of Immigration and Multicultural and Indigenous Affairs, set off from Saibai Island sailing to Badu Island with five people on board. At about 4.00pm the skipper of the vessel advised Mr Stephen, of DIMIA, that they were lost in poor visibility. Mr Stephen notified the Queensland Police Service of the situation at 7:15pm that evening.
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> [2] At about 7:40pm [the applicant] was recalled to duty, having signed off earlier that afternoon, and assumed control of the search and rescue of the vessel *Malu Sara* as Search and Rescue Mission Coordinator. He continued as search and rescue coordinator until the following morning. The *Malu Sara* was never found and all those on board perished at sea.
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> [3] [The applicant's] conduct as search and rescue coordinator was investigated by the QPS. Ultimately he was charged with improper conduct in that he failed to take appropriate and required action in his role as Search and Rescue Mission Coordinator for the *Malu Sara*.
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> [4] At a disciplinary hearing conducted on 9 March 2011 [the applicant] accepted that the charge against him was substantiated. Assistant Commissioner O'Regan imposed a sanction that [the applicant] be demoted from rank of Sergeant 3.5 to rank of Senior Constable 2.9 for a period of two years from 31 March 2011 to 31 March 2013. It was also ordered that he be eligible to apply for the position of sergeant upon being of good conduct and completing two Performance Planning and Appraisal periods to at least the "met" level. The penalty was suspended for a period of two years on the condition that [the applicant] undertook certain competency courses."[12]

[9] The disciplinary proceeding against the applicant had been preceded by a coronial finding that it was open to a prescribed officer to conclude that the applicant's conduct amounted to misconduct for which he was liable to disciplinary action pursuant to s 7.4(2) of the *Police Service Administration Act* 1990 ("PSA Act") in that he:

> "
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> - failed to keep an accurate log of the search and rescue incident concerning the *Malu Sara;*
> - failed to adequately respond in a timely manner as the seriousness of the incident escalated throughout Friday evening and Saturday morning; and
> - failed to pass onto AusSAR information he well knew was crucial to its assessment of and response to the incident."[13]

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12 Reasons published 24 February 2012.

13 AB 179.

This finding was published on 12 February 2009 after an inquest which had taken place over a substantial number of days during 2007 and 2008.

[10] Disciplinary action was commenced against the applicant in 2010. It was alleged against him by way of charge that between 14 and 17 October 2005 at Thursday Island his conduct was improper in that he failed to take appropriate and required action in his role as Search and Rescue Mission Coordinator in relation to the missing vessel *Malu Sara*. The further particulars of the charge alleged that as the designated Coordinator he failed to:

> "(a) Keep an accurate and contemporaneous log of the events, actions, conversations and decisions concerning [his] role as required by section 17.5.3 of the Queensland Police Service Operational Procedures Manual and section 1.3.11 of the National Search and Rescue Manual, including:
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> - Recording advice from Mr Jerry Stephen that the vessel was taking water and sinking at 0221hrs and 0228hrs on 15 October 2005; and
> - Recording that [he] had advised the Cairns Communication Coordinator that the vessel was taking water and sinking at 0232hrs on 15 October 2005.
>
> (b) Take appropriate action as a result of information known at that time including:
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> - Considering the degree of danger for the people aboard the Malu Sara between 1930hrs on 14 October 2005 and 0240hrs on 15 October 2005;
> - Utilising assets to assist in the search, particularly available aircraft;
> - Seeking greater assistance from Australian Maritime Safety Authority Rescue Coordination Centre particularly after receiving advice from Mr Jerry Stephen at 0221hrs and 0228hrs on 15 October 2005 that the vessel was sinking;
> - Dispatching water borne assets to provide assistance prior to the activation of the Thursday Island Volunteer Marine Rescue vessel at approximately 0230hrs on 15 October 2005; and
> - Gaining further information about the Malu Sara and its sea keeping and performance capability for the purposes of providing further assistance and taking appropriate action,
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> (c) Provide full and appropriate advice to the Australian Maritime Safety Authority Rescue Coordination Centre, including:
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> - Failing to advise during [his] communications at 0226hrs on 15 October 2005 that the vessel had reported it was sinking; and
> - Failing to advise of this relevant information until 0600hrs on 15 October 2005."[14]

[14] AB 201-202.

[11] It was to this charge so particularised that the applicant supplied a written admission of guilt at a Disciplinary Hearing on 30 September 2010. Improper conduct is a species of misconduct as defined in s 1.4 of the PSA Act. Whilst the applicant's acceptance that the charge was substantiated alone arguably would have justified a finding by the second respondent, Assistant Commissioner O'Regan, that misconduct was proved against him,[15] the second respondent underwent a process of considering also evidence before, and findings of, the coroner, evidence of witnesses, reports from the Australian Transport Safety Bureau investigation, interviews of the applicant by police officers and submissions on behalf of the applicant for the purpose of deciding whether he was satisfied to the requisite standard that the charge of misconduct was substantiated. A finding of misconduct was made.[16]

[12] The making of this finding rendered the applicant liable to disciplinary action.[17] The second respondent then proceeded to determine the appropriate disciplinary action. He decided that the sanctions set out in paragraph 4 of the senior member's reasons be imposed. This decision was a reviewable decision for the purposes of Chapter 5 Part 2 (ss 219A-219M) of the *Crime and Misconduct Act* 2001 ("CM Act").[18]

The QCAT review

[13] As it was entitled to do pursuant to s 219G of the CM Act, on 23 March 2011, the first respondent, Crime and Misconduct Commission, filed an application for review in QCAT of the reviewable decision. The sole ground of review was that the penalty imposed was inadequate having regard to the seriousness of the applicant's conduct. The first respondent submitted that the appropriate penalty was that the applicant be dismissed from the QPS without any suspension of the dismissal.

[14] The senior member decided that the decision of the second respondent be confirmed. It is necessary for the purposes of this application to have regard to the process by which he reached that decision.

[15] The senior member understood, correctly, that the review he was conducting was a rehearing requiring a fresh hearing on the merits.[19] By virtue of s 219H(3) of the CM Act, the rehearing was on the evidence given in the proceeding before the second respondent and on any new evidence that may have been adduced before the senior member pursuant to s 219H(2).

[16] By its nature a rehearing required the senior member to undertake a real review of the evidence, to make findings of fact based upon it including findings made by inference, and to draw from them conclusions necessary to make a decision on the review. It was appropriate in making up his own mind to give considerable weight to the view of the second respondent given his expertise in police force administration.[20] The reasons of the senior member display that he understood that

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15 Second respondent's report dated 9 March 2011 p 27.

16 Second respondent's Notice of Formal Finding dated 9 March 2011.

17 PSA Act s 7.4(2).

18 See s 219BA(1)(a).

19 Reasons [7]; AB 200. See CM Act s 219H(1). In *In re Chennell; Jones v Chennell* (1878) 8 Ch D 492, Jessell MR pithily described a rehearing as a "trial over again on the evidence used in the Court below; but there is special power to receive further evidence": at p 505; cited by Dixon J in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 107.

20 *Aldrich v Ross* [2001] 2 Qd R 235 at [43], per Thomas JA, Pincus JA and Muir J concurring.

this was required. Specifically, he noted that whilst he could have regard to evidence which had been considered by the coroner, the coroner's findings and comments were not evidence in the review.[21]

[17] The ground of review advanced did not require the senior member to decide whether there had been misconduct on the applicant's part. The senior member's reasons indicate that the first respondent invited him to draw a number of inferences of fact for the purpose of discrediting further the conduct and character of the applicant and thereby developing its argument of inadequacy in the sanction.[22] It pointed to specific factual matters which, it submitted, warranted a more severe sentence.

[18] The senior member analysed the first respondent's submissions in support of the respective inferences and those specific factual matters under the heading "The timeline of relevant misconduct".[23] He expressed conclusions with respect to them.[24] One inference, namely, that the applicant behaved and acted on the basis that the skipper of the *Malu Sara* was motivated by personal convenience, he rejected rather emphatically.[25]

[19] In summarising the thrust of the first respondent's case before him, the senior member observed:

> "Essentially, what [the first respondent] submits is that the [the second respondent] placed too much weight on the mitigating factors in coming to his decision on sanction. It is submitted for a number of reasons that this Tribunal should consider those mitigating factors in a different light and come to a different conclusion. I will deal with the submission sequentially.[26]

The senior member then proceeded to consider the submissions sequentially under the heading "Mitigating factors".[27]

[20] In the course of so doing, the senior member made the following material findings of fact:[28]

(a) The applicant commenced work at 8 am on 14 October 2005 and then, after finishing work that afternoon, was recalled to duty to at about 7.40 pm to assume control of the search and rescue of the *Malu Sara*.[29]

(b) The *Malu Sara* was new, was owned by the Commonwealth Government, and was commissioned to operate in and around the islands of the Torres Strait in all weather conditions.[30] It was reasonable for the applicant to have proceeded on the assumption that the *Malu Sara* was seaworthy.[31]

(c) The applicant was "overtasked in coordinating the search and rescue alone" and the (QPS) should have made available at least another officer to assist

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21 Reasons [8]-[10].
22 Reasons [13], [14]; AB 202.
23 Reasons [15]-[31]; AB 202-206.
24 *Ibid*.
25 Reasons [25]; AB 204-205.
26 Reasons [32]; AB 206.
27 Reasons [33]-[53]; AB 206-210.
28 Drawn from the applicant's amended outline of argument paragraph 10.
29 Reasons [2], [33]; AB 200, 206.
30 Reasons [36], [37]; AB 207.
31 Reasons [34], [36], [37]; AB 206, 207.

him.[32] Subsequently, the QPS mandated that an officer in the applicant's position is not to operate alone.[33]

(d) Fatigue was certainly a factor in the applicant's performance while coordinating the search and rescue mission and when the situation deteriorated in the early hours of the morning of 15 October 2005, his judgment was likely to have been impaired on that account.[34]

(e) The applicant was not offered any relief during his work as Search and Rescue Mission Coordinator, nor was any available.[35]

(f) There was "extraordinary delay in finalising the disciplinary proceedings", and the incident "stalled" the applicant's career and "left him with anxiety and uncertainty".[36]

(g) The applicant had a "good service record", and since the incident "his conduct has been exemplary and he has acted up into the positions of Senior Sergeant which signifies the confidence his superiors have in him and the improbability that he is likely to engage in misconduct in the future".[37]

(h) There had "been a significant financial impact" on the applicant after his transfer from Thursday Island.[38]

(i) The applicant had accepted the charge against him was substantiated, and had "insight into his conduct and his failings" during the search and rescue mission.[39]

(j) The applicant's conduct fell short of what was expected of an officer with his experience and knowledge in the circumstances that prevailed on the night in question, and the applicant accepted that to be so.[40]

[21] The senior member concluded that he was "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 (QPS)".[41] On the basis of that conclusion, the senior member confirmed the second respondent's decision.

The appeal to the QCAT tribunal

[22] On 22 March 2012, the first respondent appealed to the appeal tribunal of QCAT against the decision of the senior member pursuant to s 142(1) of the CM Act. The sole ground of appeal stated in the Application[42] was that no reasonable tribunal could have concluded that the decision of the second respondent should be confirmed. In administrative law parlance, this ground is an expression of *Wednesbury* unreasonableness. As the Application correctly noted, this ground raised a question of law only and hence leave to appeal was not required. Significantly, the first respondent did not seek leave to appeal against any of the findings of fact made by the senior member, nor to appeal on the basis that any of

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32 Reasons [38], [41]; AB 207, 208.
33 Reasons [38]; AB 207.
34 Reasons [33], [35]; AB 206, 207.
35 Reasons [33]; AB 206.
36 Reasons [50]; AB 209.
37 Reasons [42], [50]; AB 208, 209.
38 Reasons [51]; AB 209.
39 Reasons [43], [44]; AB 208.
40 Reasons [47]; AB 209.
41 Reasons [53]; AB 210.
42 AB 23-28.

them was an irrelevant consideration or on the basis that the senior member failed to take into account a relevant consideration.

[23] The appeal tribunal conducted a hearing on 16 November 2012 at which all parties were legally represented. In its decision delivered on 20 February 2013, the appeal tribunal referred particularly to one of the categories of legal error which would justify interfering with the exercise of a discretion involving a sanction articulated in *House v The King*,[43] namely, where the sanction is unreasonable or plainly unjust. It stated the question posed for it as "whether the sanction was so obviously unreasonable and unjust that it should not be allowed to stand."[44] The appeal tribunal answered that question in the affirmative, stating that "[i]t is inescapable that no reasonable Tribunal could have concluded that [the second respondent's] decision would be effective in promoting and maintaining public confidence in the [QPS] or, proper standards of conduct within it. The misconduct called for the imposition of a sanction commensurate with the seriousness of it".[45]

[24] The process by which the appeal tribunal reached this conclusion is central to the application before this Court. It is explained and examined in the course of a consideration of the proposed ground of appeal.

[25] As noted, the appeal tribunal directed that written submissions on an appropriate substitute sanction be filed. These submissions were considered on the papers. On 1 May 2013, the appeal tribunal delivered its decision which ordered that the applicant be 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 with eligibility thereafter to apply for the position of sergeant subject to his having been of good conduct and achieving satisfactory performance planning and appraisals.

The application for leave to appeal to this court

[26] On 21 March 2013, the applicant filed an Application for leave to appeal to this Court from the decision of the appeal tribunal delivered on 20 February 2013.[46] The Application was subsequently amended to include an appeal against the decision delivered on 1 May 2013.[47] The material read by the applicant on the hearing of the application for leave included an Amended Notice of Appeal dated 6 May 2013 which sets out the applicant's proposed grounds of appeal.[48]

[27] Three grounds of appeal are proposed. They all are developed from an underlying principle that, as a matter of law, the appeal tribunal was constrained to decide the appeal to it on the facts as found by the senior member. That is to say, the appeal tribunal was not at liberty to make findings of fact anew. Each ground of appeal specifies a way in which the applicant contends the appeal tribunal did not adhere to this principle. This application for leave therefore satisfies the requirement of paragraph (a) of s 150(3) of the QCAT Act that the appeal to this Court be on a question of law. Leave to appeal is required under paragraph (b) thereof.

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43 (1936) 55 CLR 499, per Dixon, Evatt and McTiernan JJ at 505.
44 Reasons [42]; AB 64.
45 Reasons [48]; AB 64.
46 AB 183-187.
47 AB 229-233. Leave to amend accordingly was granted at the hearing of the Application.
48 AB 224-228; Exhibit ACB-6 to the affidavit of A C Braithwaite sworn 6 May 2013.

The underlying principle of law

[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.[49]

[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.[50] That this is so was explained by Brennan J in *Waterford v The Commonwealth*[51] 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:

> "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."[52]

[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.

[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.[53]

[32] I am therefore of the view that the underlying principle of law articulated by the applicant is correct. I next turn to consider the applicant's second proposition, namely, that this principle was not adhered to by the appeal tribunal.

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49 *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* (2008) 74 NSWLR 481, per Allsop P at [39], Giles and Basten JJA concurring; *Dental Board of Queensland v B* [2003] QCA 294; [2004] 1 Qd R 254 at [43].

50 *B & L Linings* at [75], [78].

51 (1987) 163 CLR 54.

52 At 77-78. For examples of the adoption of these observations, see *Phillips v Commissioner for Superannuation* [2005] FCAFC 2 at [41] and *Sevos v Repatriation Commission* (1995) 129 ALR 509 at 517.

53 Cf *Real Estate and Business Agents Supervisory Board v Carey* [2010] WASCA 109 per Owen JA at [58], Buss and Newnes JJA concurring.

Adherence to the underlying principle of law

[33] The grounds of appeal contend that the appeal tribunal failed to adhere to the underlying principle in three broad respects, namely:

> Ground 1: treating the findings and comments of the coroner and of the second respondent:
> (a) as facts on which it could rely when determining the appeal;
> (b) in the case of the coroner's findings, as evidence which could be acted upon by it.
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> Ground 2: relying on facts contrary to those found by the senior member.
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> Ground 3: failing to have regard to other facts found by the senior member which were material to the sanction.

It is convenient to address each of these grounds separately.

[34] **Ground 1**: at paragraph 16 of its reasons, the appeal tribunal set out certain findings of the coroner as findings that had been accepted by the second respondent. Then, at paragraph 17, it listed a number of findings made by the second respondent. The factual findings referred to in both of these paragraphs went to aspects of the applicant's conduct which contributed to the characterisation of his conduct overall as misconduct. As noted, there was no issue before the senior member that the applicant had been guilty of misconduct. The hearing before him focused upon the first respondent's invitation that he draw a number of inferences of fact for the purpose of discrediting further the conduct and character of the applicant and thereby developing its argument of inadequacy of the sanction.

[35] The senior member therefore did not make findings afresh in a detailed chronological way of the applicant's conduct. It is evident from his reasons that to a very considerable degree, he adopted the findings made by the second respondent, and, understandably, concentrated upon the inferences which he was being invited to draw. What is set out in paragraphs 16 and 17 by the appeal tribunal is substantially a record of findings which had been adopted by the senior member as his findings. It was quite in order for the appeal tribunal to have had reference to them.

[36] However, paragraphs 18 to 20 of the reasons do reveal that the appeal tribunal also had reference to two significant conclusions of fact which it attributed to the second respondent. The applicant submits that these facts are contradictory to those found by the senior member. The contradictions are identified in the analysis of Ground 2.

[37] **Ground 2**: the appeal tribunal made the following observations:[54]

> "[18] [The applicant] was a very experienced and knowledgeable water police officer.[55] [The second respondent] concluded that [the applicant's] misconduct was the product of two entirely unjustified assumptions. They were, first, that because the *Malu Sara* was a brand new Commonwealth

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54 AB 60.

55 *Report on Decision of Disciplinary Hearing*, Assistant Commissioner C D O'Regan, 9 March 2011 at 24.

> Patrol vessel with an experienced crew, it was seaworthy. [The second respondent] also concluded that, in light of the information [the applicant] received during the time he was on duty, this assumption provided neither a defence nor a satisfactory explanation for the (sic) his conduct.[56]
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> [19] That conclusion is compelling. Continuing reports of increasing problems with the boat ought, by themselves, have persuaded [the applicant] that the assumption was wrong, or irrelevant. Even if it was maintained, the increasingly worrying circumstances piling up during the night, summarised by the State Coroner, dictated something more than a '*passive*'[57] response. To ignore them was, whatever the strengths or weaknesses of the vessel itself, an unsustainable conclusion.
>
> [20] Secondly, [the second respondent] concluded that [the applicant] had wrongly assumed from the outset that the very nature of this search '... *was one of the convenience* of *the vessel's crew and not one of real urgency*'[58] and that the [applicant], as a result, '... *took this matter too lightly*'.[59] This conclusion arose, the [second respondent] determined, because the officer's previous experience had left him wary, or dubious, about claims of distress from vessels in the Torres Strait."[60]

[38] It is apparent that the appeal tribunal proceeded on the footing that the factual conclusions of the second respondent referred to in paragraphs 18 and 20 respectively were facts against which the reasonableness of the decision of the senior member was to be assessed. In so doing, it failed to have regard to factual findings made by the senior member on those matters.

[39] Specifically, in regard to the reasonableness of the applicant's belief that the *Malu Sara* was seaworthy, it failed to have regard to the finding of the senior member "that it was reasonable for [the applicant] to assume the vessel would be seaworthy".[61] Secondly, in regard to the convenience of the vessel's crew, the appeal tribunal did not have regard to the rejection by the senior member of the invitation to infer that the applicant considered that as having motivated the calls for assistance.[62]

[40] In failing to have regard to these findings of fact by the senior member, the appeal tribunal failed to have regard to the underlying principle. This ground of appeal is made out. Also, Ground 1 is made out insofar as the appeal tribunal had reference to the factual findings of the second respondent inconsistent with the senior member's findings.

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56 *Ibid* 33.
57 *Ibid* 24.
58 *Ibid* 15.
59 *Ibid* 25.
60 *Ibid* 24.
61 Reasons [37]; AB 207.
62 See [12] *ante*.

[41] **Ground 3**: In its consideration of mitigating circumstances, the appeal tribunal mentioned only three of them, namely:

- that the applicant did not have adequate support and could not properly perform all the functions of coordinating and managing a search and rescue operation on his own;[63]
- that the applicant did not have proper supervision because he could not properly liaise and discuss decisions and assumptions with his Regional Duty Officer;[64] and
- that the applicant was suffering from fatigue.[65]

[42] The appeal tribunal made no reference to, and apparently had no regard for, other mitigating factors found by the senior member. These findings are those elaborated in paragraph 14(f) – (i) of these reasons concerning:

- the extraordinary delay in finalising the disciplinary proceedings;
- the applicant's good service record since the incident;
- the significant financial impact upon him since the incident; and
- the insight shown by him into his misconduct.

[43] In failing to have regard to these findings, the appeal tribunal also failed to have regard to the underlying principle. This ground of appeal too, is made out.

Conclusion

[44] For these reasons, I consider that the proceedings before the appeal tribunal miscarried. Given the relevance of the ground of appeal to appellate tribunal procedure generally, there is strong reason to grant leave to appeal. This appeal must succeed.

[45] I would add by way of observation that the appeal tribunal appears to have proceeded on the basis that it was open to it to assess the reasonableness of the decision of the senior member against findings of fact that had been made during the course of the disciplinary proceedings, not limited to those made by the senior member. During the course of argument of the appeal, it was candidly conceded that the appeal tribunal may have been drawn to that course by the way in which the first respondent's case was presented to it.

Remedy

[46] The applicant seeks an order that the matter be returned to the appeal tribunal for redetermination under s 153(2)(c) of the QCAT Act. I am not persuaded that that is the most practical course to take. It need be said that these disciplinary proceedings have taken altogether too long now and it is desirable that they be finalised as soon as reasonably possible.

[47] I consider it preferable that this Court proceed under s 153(2)(b) with a view to substituting its own decision. Counsel for the first respondent conceded correctly

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63 Reasons [22]; AB 60.
64 Reasons [23]; AB 61.
65 Reasons [24]; AB 61.

that this Court should set aside the decision of the senior member only if it concluded that that decision could not have been reasonably made on the facts as found by the senior member.

[48] The applicant asked for the opportunity to present written submissions should this course be taken. That opportunity should be afforded both the applicant and the first respondent. The submissions are to deal with whether this Court should conclude that the decision of the senior member could not have been reasonably made on the facts as found by him and the substitute order this Court should make.

Costs

[49] The applicant should have his costs of the application for leave and of the appeal on the standard basis. Those costs should be paid by the first respondent. Since the second respondent did not seek to justify the decision of the appeal tribunal, no costs order should be made for or against it.

Orders

[50] I would propose the following orders:

1. Grant leave to appeal.
2. Allow the appeal.
3. Set aside the decisions of the appeal tribunal of the Queensland Civil and Administrative Tribunal delivered on 20 February and 1 May 2013.
4. Direct that the applicant and the first respondent file written submissions conformably with paragraph 48 of these reasons and not to exceed five pages, on or before 7 February 2014.
5. First respondent to pay the applicant's costs of the application for leave and of the appeal on the standard basis.

[51] **MARGARET WILSON J:** I have read the reasons for judgment of Gotterson JA and those of the President. I agree with what their Honours have written, and with the orders proposed by Gotterson JA.