

CITATION: *Officer JGB v Deputy Commissioner Gollschewski and Anor* [2016] QCAT 348

PARTIES: Officer JGB
(Applicant)
v
Deputy Commissioner Stephen Gollschewski
(First Respondent)

Crime and Corruption Commission
(Second Respondent)

APPLICATION NUMBER: OCR176-15

MATTER TYPE: Occupational regulation matters

HEARING DATES: 10 March 2016 and 12 September 2016

HEARD AT: Brisbane

DECISION OF: **Member Howard**

DELIVERED ON: 26 September 2016

DELIVERED AT: Brisbane

ORDERS MADE:

1. (i) **The Crime and Corruption Commission is joined as the second respondent in these proceedings;**

(ii) **Unless otherwise ordered, the Crime and Corruption Commission must not actively participate in the proceeding.**
2. **The decision of Deputy Commissioner Stephen Gollschewski is set aside except as to some aspects of substantiation as follows:**
 - (a) **Matter 1(b), which he found is misconduct;**
 - (b) **Matter 1(c), which he found is misconduct;**
 - (c) **Matter 1(h), which he found is a breach of discipline; and**
 - (d) **Matter 1(i), which he found is a breach of discipline.**
3. **The following decision is substituted in relation to substantiation:**

(i) The following aspects of the disciplinary charges are unsubstantiated:

- (a) Matter 1(a), dot points 2 to 6, and 9;
- (b) Matter 1(e);
- (c) Matter 1(f); and
- (d) Matter 1(g).

(ii) The following aspects of the disciplinary charges are substantiated:

- (a) Matter 1(a), dot points 1, 7 (in part), 8, 10, 11 (in part), and 12;
- (b) Other than dot points 1 and 12, the conduct is misconduct.

4. Deputy Commissioner Stephen Gollschewski must file in the Tribunal and serve on Officer JGB his written outline of submissions about sanction by:

4:00pm on 18 October 2016;

5. Officer JGB must file in the Tribunal and serve on Deputy Commissioner Stephen Gollschewski his written outline of submissions about sanction by:

4:00pm on 15 November 2016;

6. The proceeding is listed for further oral hearing on the issue of sanction on a date to be fixed as soon after 18 November 2016 as available.

7. (i) Unless otherwise ordered, publication is prohibited of any information which may identify Officer JGB, members of his family and all other persons named in the material before the Tribunal who are not police officers acting in their official capacity;

(ii) unless otherwise ordered, other than to the parties, these reasons for decision may be published in de-identified format only.

CATCHWORDS:

POLICE – INTERNAL ADMINISTRATION – DISCIPLINE AND DISMISSAL FOR MISCONDUCT – QUEENSLAND - Whether disciplining officer bears onus of proof – where review proceeding – weight to be given to

findings of Magistrate in domestic violence proceedings – whether disciplinary charges substantiated – where various, inconsistent versions of events by officer’s spouse – where Tribunal constrained by charges as framed

ACT Civil and Administrative Tribunal Act 2008 (ACT)

Crime and Corruption Act 2001 (Qld), s 33, s 34, s 47, s 219A, s 219BA, s 219G, s 219H, Schedule 2

Domestic and Family Violence Protection Act 2012 (Qld), s 8, s 10, s 11

Police Service Administration Act 1990 (Qld), s 7.4

Police Service (Discipline) Regulations 1990 (Qld), reg 3

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 17, s 18, s 19, s 20, s 24

Aldrich v Ross (2001) 2 Qd R 235

Briginshaw v Briginshaw (1938) 60 CLR 336

Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd (1976) 135 CLR 616

Chapman v Wilson and Anor [2011] QCAT 400

Compton v Deputy Commissioner Ian Stewart Queensland Police Service [2010] QCAT 384

Crime and Misconduct Commission v Assistant Commissioner Ross Barnett [2010] QCAT 690

Crime and Misconduct Commission v Deputy Commissioner Barnett & Anor [2013] QCAT 443

Crime and Misconduct Commission v Deputy Commissioner Queensland Police Service & Chapman [2010] QCAT 564

Crime and Misconduct Commission v Wilson [2012] QCA 314

Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588

Deputy Commissioner Stewart v Dark [2012] QCA 228

Disley v Queensland Police Service [2010] QCAT 530

Garth v Queensland Police Service [2012] QCAT 261

GKE v EUT [2014] QDC 248

Hardcastle v Commissioner of Police (1984) 53 ALR 593

Kostas v HIA Insurance Services Pty Ltd (2010)

241 CLR 390
Laidlaw v Queensland Building Services Authority [2010] QCAT 70
Lee v Crime and Corruption Commission [2014] QCATA 326
Legal Practitioner "M" v Council of the Law Society of the Australian Capital Territory [2015] ATSC 312
McKenzie v Acting Assistant Commissioner Wright [2011] QCATA 309
Newman v Commissioner for Police [2013] QCAT 152
Nugent v Stewart (Commissioner of Police) & Anor. [2016] QCA 223
O'Keefe v Deputy Commissioner Pointing [2016] QCAT 312
Owen v Menzies [2013] 2 Qd R 327
Police Service Board v Morris (1985) 156 CLR 397
Queensland Building and Construction Commission v Mudri [2015] QCATA 78
Secretary, Department of Social Security v Willee (1990) 96 ALR 211
Soliman v University of Technology, Sydney (2012) 207 FCR 277
Tolsher v Commissioner of Police Ian Stewart (No 2) [2013] QCAT 590

APPEARANCES:

APPLICANT: Mr M Black of Counsel, instructed by Gilshenan and Luton Solicitors appeared for Officer JGB

RESPONDENT: Mr JW Merrell, instructed by the Public Safety Business Agency appeared for Deputy Commissioner Gollschewski

REASONS FOR DECISION

- [1] Officer JGB was a Senior Constable in the Queensland Police Service ('QPS'). On 11 September 2015, Deputy Commissioner Stephen Gollschewski ('the Deputy Commissioner') decided that a disciplinary charge (Matter 1) brought against Officer JGB was substantiated, and in respect of Matter 1(a) to 1(g) was misconduct and in respect of Matter 1(h) and 1(i) was a breach of discipline. He dismissed Officer JGB from the QPS.
- [2] Although only one charge was raised, it raises numerous issues and the particulars are lengthy.

- [3] In brief, the charge is that between 4 October 2009 and 3 November 2012 at the Gold Coast or elsewhere, Officer JGB's conduct was improper in that he:
- a) committed a number of acts of domestic violence against his spouse ALB;
 - b) made abusive and threatening telephone calls to DC;
 - c) without an official purpose related to the performance of his duties accessed confidential QPS information;
 - d) failed to treat ALB, Constable Murat Oztan and Constable Darko Radovanovic with respect and dignity;
 - e) failed to demonstrate appropriate dignity and respect towards the Court, Magistrate Ehrich, and persons in attendance at the Beenleigh Magistrates Court;
 - f) conducted unauthorised investigations regarding an application for a domestic violence protection order;
 - g) inappropriately involved himself in communications with persons including his aggrieved spouse, ALB, prior to the withdrawal of the police initiated application for a domestic violence protection order, in which he was the nominated respondent spouse;
 - h) accessed and used QPS email to send personal external emails and used a QPS facsimile machine to send a personal facsimile; and
 - i) submitted an application for recreation leave when two days of the application related to sick leave.
- [4] All of the particulars of matters 1(b),(c),(h), and (i) were accepted and the findings of, in respect of 1(b) and (c), of misconduct, and in respect of 1(h) and (i), of breach of discipline, are not challenged on review.
- [5] In respect of Matter 1(a), dot points 1, 8 and 12 of the particulars are accepted by Officer JGB and parts of dot points 7 and 11. He seeks a finding that Matter 1(a) is unsubstantiated.
- [6] In respect of matter 1(d), the particulars are admitted by Officer JGB but he disputes the conduct is misconduct and seeks a finding that it is unsubstantiated, or, in the alternative, that it is a breach of discipline.
- [7] In respect of matter 1(e), the particulars are partly admitted by Officer JGB and partly denied, but Officer JGB submits that Matter 1(e) is not misconduct.
- [8] In respect of Matter 1(f), the particulars are admitted but Officer JGB submits that the conduct is not misconduct and is not substantiated, or, in the alternative, that it is a breach of discipline only.
- [9] In respect of Matter 1(g), the allegation is denied.

- [10] Given the complexity of the factual issues on substantiation, the parties propose, and I agree, that in these circumstances it is appropriate for review of substantiation to be completed, and then for further submissions to be made in relation to the question of sanction.

1. The aspects of the disciplinary charge which are not in contention between the parties

- [11] The unchallenged findings of the Deputy Commissioner are set out in the following paragraphs.

1.1 Matter One (b) that Officer JGB made abusive and threatening phone calls to DC

- [12] The particulars specified in the charge are as follows:

- a) On 14 February 2012 you contacted [DC] by phone and identified yourself as a police officer;
- b) On 14 February 2012 you intimidated and threatened [DC] by stating *"I know a lot of bad people", "Watch your back", "You don't want to run into me down an alley way", "Watch yourself in carparks" and "No shut up you little cunt I'm speaking now"*;
- c) On 14 February 2012 on more than one occasion you threatened to kill [DC] by stating, *"I'm going to kill you"*;
- d) On 14 February 2012 you called [DC] *"a little cunt"*;
- e) On 15 February 2012 you re-contacted [DC] by phone and intimidated and threatened him by stating *"You've destroyed my family. You should still watch your back"*; and
- f) On 15 February 2012 you called [DC] a *"cunt"*.

- [13] Officer JGB admits the events and accepts that it is misconduct.

1.2 Matter One (c) without official purpose related to the performance of his duties, Officer JGB accessed confidential Queensland Police Service information

- [14] The particulars specified are as follows:

- a) you access (sic) the Queensland Police Service QPRIME Computer System and conducted searches and accessed information in relation to:
 - i) [GM] on 5 October 2009, 9 March 2010, 5 October 2010, 24 August 2010, 20 September 2010, 27 September 2010, 22 February 2011, 1 November 2011 and 24 November 2011;
 - ii) [AM] on 7 January 2010;
 - iii) [DC] on 17 February 2012, 20 February 2012, 27 March 2012, 22 April 2012 and 14 July 2012;
 - iv) [PW] on 29 April 2011 and 5 January 2012;
 - v) [AW] on 26 December 2011;

- vi) [EL] on 30 September 2010, 1 October 2010, 18 October 2010, 14 April 2011, 24 September 2011, 23 October 2010, 30 January 2012 and 1 March 2012;
- vii) [SL] on 31 January 2010, 18 October 2010, 26 January 2011 and 1 May 2012;
- viii) [GB] on 11 October 2012 and 2 November 2012;
- ix) [WA] on 23 November 2011, 17 November 2011, 19 December 2011, 28 December 2011 and 14 July 2012;
- x) [MD] on 14 July 2012;
- xi) [HD] on 14 July 2012;
- xii) [WY] on 31 January 2010; and
- xiii) [ALB] on 25 July 2012.

[15] Officer JGB admits the events and accepts that it is misconduct.

1.3 Matter One (h) Officer JGB accessed and used QPS email to send personal external emails and used a QPS facsimile machine to send a personal facsimile

[16] The particulars specified are as follows:

- a) on [sic] 30 April 2012 you sent an email using the Queensland Police Service external email service from [Officer JGB]@police.qld.gov.au to [ALB's] solicitor at email address [email address redacted] regarding personal family law related matters and you did not have an emergent reason for doing so; and
- b) on 8 August 2012 you sent an email using the Queensland Police Service external email service from [Officer JGB]@police.qld.gov.au to [ALB's] solicitor at email address [email address redacted] regarding personal family law related matters and you did not have an emergent reason for doing so;
- c) the email sent by you on 8 August 2012 included an email sent to you internally on 27 July 2012 by Inspector Gary Pettiford; and
- d) you used a Queensland Police Service facsimile machine to send a facsimile to [ALB's solicitor] relating to a parenting plan.

[17] This conduct was accepted by the Deputy Commissioner and found to be a breach of discipline. Officer JGB does not seek to review that aspect of the decision.

1.4 Matter One (i) Officer JGB submitted an application for recreation leave when two days of the application related to sick leave

[18] The particulars specified are as follows:

- a) on 8 May 2012 after a conversation with Detective Senior Sergeant Mark Proctor you made application through ESS for a block of recreation leave commencing 7 May 2012 up to an [sic] including 18 May 2012 which was approved;
- b) your absence on 7 May 2012 was related to sick leave, specifically carer's leave; and

c) your absence on 8 May 2012 was related to personal sick leave.

[19] This conduct was accepted by the Deputy Commissioner and found to be a breach of discipline. Officer JGB does not review that aspect of the decision.

2. The review process and the preliminary legal issues

[20] Before turning to consider the contested allegations, there are two preliminary legal questions arising on the parties submissions as follows:

- a) Does the Deputy Commissioner bear the onus of proving the disciplinary charge?
- b) What weight should be accorded in these proceedings to the findings of the Magistrates Court in the domestic violence family protection application?

2.1 Does the Deputy Commissioner bear the onus of proof?

[21] In summary, Officer JGB submits that the current proceedings are a fresh hearing on the merits in a disciplinary proceeding. He submits that the Deputy Commissioner bears the ultimate onus of proof to establish that the allegations made, as far as they are disputed in the review, are positively substantiated on the evidence. He further submits that if the Tribunal *'is left in a state of uncertainty in relation to any part of the allegation, it follows that the Tribunal is not positively satisfied and so that part of the allegation is not substantiated'*.¹

[22] The Deputy Commissioner submits that there is no ultimate onus of proof on him, in essence, because these are review proceedings, in which the purpose of the review is to produce the correct and preferable decision following a fresh hearing on the merits.

[23] This is a question of general importance for the conduct of police disciplinary reviews. The arguments advanced in support of both submissions deserve close consideration.

Should the Crime & Corruption Committee be joined as a party?

[24] The Crime and Corruption Commission ('CCC') has a general oversight role in police misconduct proceedings. This derives from its statutory functions under s 33 of the CCC Act *'to raise standards of integrity and conduct in units of public administration'*² and *'to ensure a complaint about, or information or matter involving, corruption is dealt with in an appropriate way'* in light of prescribed legislative principles.³ Further, the CCC Act provides for a monitoring role in respect of the Police Commissioner's management of police misconduct.⁴

¹ Submissions of Officer JGB, filed on 29 January 2016, [13].

² CCC Act s 33(a).

³ CCC Act s 33(b). The principles are set out in s 34.

⁴ CCC Act s 47.

- [25] Belatedly, it occurred to me that it may be an appropriate case in which to join the CCC as a party in order to reserve its appeal rights. I made directions seeking submissions from the parties and listing the proceeding for further oral hearing about this issue.
- [26] Officer JGB submits that there is no relevant circumstance sufficient to call for the exercise of the discretion to join the CCC. He does not consider he should be required to face prosecution by two parties in the proceedings. He is also concerned about further delay and the utility of joinder. The Deputy Commissioner does not oppose the joinder of the CCC, considering it would be a proper exercise of discretion to do so, having regard to the general significance of the question of whether the Deputy Commissioner bears a formal onus of proof.
- [27] As Officer JGB submitted, the CCC could only appeal if it took issue with the decision itself. That is so. However, that is not a strong argument against exercising the discretion. The concern about facing two independent and well-resourced opponents in any appeal proceeding, or on the determination of sanction, is a potential prejudice to Officer JGB. However, as I did in *O'Keefe v Deputy Commissioner Pointing*,⁵ a direction could be made to the effect that, unless otherwise ordered, the CCC must not actively participate in the proceeding. Those concerns can then be considered, and perhaps addressed through further directions, if the CCC seeks to actively participate at a future time.
- [28] I am satisfied that to reserve the CCC's appeal rights, in case it considers my conclusions on the law about this issue are incorrect and that my orders are therefore in error, I make orders joining the CCC to the proceeding as second respondent: (as occurred in QCAT proceedings⁶ and was considered by the Queensland Court of Appeal in *Crime and Misconduct Commission v Wilson*⁷). I direct that, unless otherwise ordered, the CCC must not actively participate in the proceeding.
- [29] In hindsight, this step would preferably have occurred at or before the hearing on 10 March. That said, in other proceedings when the CCC has been joined to reserve its appeal rights, it has been on the basis that it will not play an active role.⁸

Submissions made on Officer JGB's behalf

- [30] For Officer JGB, it is submitted that the starting point is a consideration of s 7.4(2) of the *Police Service Administration Act* 1990 (Qld) ('PSA Act'). It provides, in essence, that an officer is liable to disciplinary action for conduct, which the '*prescribed officer*'⁹ (namely, in this case, the Deputy

⁵ *O'Keefe v Deputy Commissioner Pointing* [2016] QCAT 312.

⁶ *Chapman v Wilson & Anor* [2011] QCAT 400.

⁷ [2012] QCA 314.

⁸ *Chapman v Wilson & Anor* [2011] QCAT 400; *O'Keefe v Deputy Commissioner Pointing* [2016] QCAT 312.

⁹ PSA Act, s 7.4(1) – "**prescribed officer** means an officer authorised by the regulations to take disciplinary action in the circumstances of any case in question".

Commissioner) considers is misconduct or a breach of discipline. If the prescribed officer '*decides an allegation of misconduct brought against the officer*'¹⁰, or in deciding an allegation of breach of discipline, finds misconduct proved against the officer, the Commissioner must give a QCAT information notice to the officer and the CCC for the decision: s7.4(2A). Section 7.4(3) provides for the range of disciplines that may be imposed.

- [31] Further, under the CCC Act, the officer disciplined may apply to the Tribunal for review of a reviewable decision. Reviewable decision is relevantly defined in s 219BA as '*a decision made in relation to an allegation of corruption against a prescribed person, other than a decision made by a court or QCAT...*' Corruption is defined to include police misconduct.¹¹ In this role, under s 219G of the CCC Act, the Tribunal hears and determines the review by way of fresh hearing on the merits.¹² In essence, he submits that it is a new hearing about the allegations or disciplinary charges brought against the officer and accordingly, they must be established.
- [32] On Officer JGB's behalf, it is submitted that in decisions involving disciplinary proceedings, the High Court of Australia, the Federal Court of Australia and the ACT Supreme Court have considered the prosecuting authority bears the onus of proof.
- [33] He submits that the High Court's decision in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (Sperway)*¹³ is of considerable persuasive value. In that case, an administrative Board found improper conduct by a builder in disciplinary proceedings. An appeal against the decision was '*by way of rehearing*'. The High Court found that this was a hearing *de novo* and that the Board bore the onus of proof.
- [34] Reliance is placed upon *Secretary, Department of Social Security v Willee* ('*Willee*').¹⁴ In that case, the disciplinary charge involved an officer of the Department of Social Security alleged to have improperly disclosed confidential information. The Secretary found the allegation substantiated and imposed a sanction (namely dismissal). The officer applied to a disciplinary appeals committee for review which was to be conducted by way of a *hearing de novo*.¹⁵
- [35] Foster J observed that the committee had broad powers to make enquiries it considered necessary, was not bound by the rules of evidence, and procedure was within its discretion.¹⁶ However, he held that the Department bore the '*general onus... of establishing its case against an*

¹⁰ Ibid, s 7.4(2A).

¹¹ CCC Act, sch 2 – definition of corruption '*means corrupt conduct or police misconduct*'.

¹² *Crime and Misconduct Commission v Deputy Commissioner Queensland Police Service & Chapman* [2010] QCAT 564, [12].

¹³ (1976) 135 CLR 616.

¹⁴ (1990) 96 ALR 211.

¹⁵ Ibid, p 219.

¹⁶ Ibid, p 218.

officer who has been the subject of disciplinary action'.¹⁷ He said, in particular:¹⁸

There is no warrant, in my opinion, for asserting a general proposition that the concept of an ultimate onus of proof is inappropriate to proceedings before an administrative tribunal where that tribunal is to determine whether a charge brought against an officer has been proved, and, if so, what, if any, is the appropriate penalty to be imposed. In such circumstances common fairness would require the casting of the customary onus upon the prosecution to prove its case. Such a situation is, in my opinion, significantly different from one where a mere inquiry or investigation of an administrative character is being undertaken.

[36] A similar conclusion was reached by the ACT Supreme Court in *Legal Practitioner "M" v Council of the Law Society of the Australian Capital Territory (Legal Practitioner "M")*.¹⁹ The Council of the Law Society had made a summary finding of unsatisfactory professional conduct against a legal practitioner. It issued a caution.²⁰ The practitioner appealed to the ACT Civil and Administrative Tribunal ('ACAT'). The Court noted that '*although described as an "appeal"... it is, in reality, an administrative review of the decision of the Council...*'²¹ The Court noted that the ACAT proceeding was more in the nature of a *hearing de novo*.²²

[37] The Court discussed onus of proof. It observed that '*a party must discharge an evidential onus of satisfying the ACAT of the existence of facts that justify the decision sought to be made*'.²³ The Court drew conclusions including the following:²⁴

7. The ultimate onus of proof in proceedings for discipline of lawyers is on the professional association which brings the proceedings.

[38] On behalf of Officer JGB, it is submitted that the legislative context in QCAT is similar. He submits that the prosecuting officer of the Queensland Police Service (QPS) bringing a disciplinary charge similarly bears the ultimate onus of proving the allegations of misconduct. He argues that this is supported by the reasoning in *Sperway, Willee, Legal Practitioner "M,"* and the Tribunal's earlier decision, in *Disley v Queensland Police Service (Disley)*.²⁵

The Deputy Commissioner's submissions

[39] The Deputy Commissioner submits that he bears no ultimate onus of proof.

¹⁷ Ibid.

¹⁸ Ibid, p 220.

¹⁹ [2015] ACTSC 312.

²⁰ Ibid, [74].

²¹ Ibid, [75].

²² Ibid, [94].

²³ *Legal Practitioner "M" v Council of the Law Society of the Australian Capital Territory* [2015] ATSC 312, [98].

²⁴ Ibid, [105].

²⁵ [2010] QCAT 530.

- [40] He says that the decisions in the cases of *Willee* and *Legal Practitioner "M"* are distinguishable on the basis that *Willee* involved an appeal against the decision of the inquiry.²⁶ Further, in respect of *Legal Practitioner "M,"* he argues that the provisions of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) are different to the provisions in the QCAT Act. The Deputy Commissioner did not make submissions at the hearing concerning any material differences between the relevant legislative provisions here and in the cases of *Willee* or *Legal Practitioner "M."* He provided further written submissions following the hearing, but they do not address that issue. That said, it was submitted at hearing that he did not believe it was a requirement in either case to produce the correct and preferable decision, as QCAT is obliged to do in its review jurisdiction, acting administratively.
- [41] Similarly, in relation to the High Court's decision in *Sperway*, he submits (while acknowledging that the proceeding concerned an appeal by way of hearing *de novo*, from an administrative Board to the NSW District Court) that the proceeding was completely different.²⁷ The distinction drawn by the Deputy Commissioner is that the District Court in *Sperway*, unlike the Tribunal, was not required to produce the correct and preferable decision.
- [42] In essence, the argument of the Deputy Commissioner is that under s 20 of the QCAT Act, the purpose of the Tribunal's review is to produce the correct and preferable decision, and that pursuant to s 24(2) of the QCAT Act, the decision is taken to be the decision of the original decision maker.
- [43] He relies upon the decision in *Aldrich v Ross*.²⁸ *Aldrich v Ross* is a decision of the Queensland Court of Appeal. The Court of Appeal held that the former Misconduct Tribunal (in hearing and deciding an appeal against a finding of misconduct from a prescribed officer²⁹) was required to make its own decision on the available evidence (rather than determine the correctness of the original decision in the more limited manner that would be the case in an appeal in the strict sense against the exercise of a discretion).³⁰ It supports the proposition that the Misconduct Tribunal was required to make up its own mind as to the facts that were proved by the evidence, and the inferences to be drawn from those facts.³¹
- [44] Subsequently, in decisions including *Compton v Deputy Commissioner Ian Stewart Queensland Police Service*,³² and *CMC v Deputy Commissioner & Chapman*,³³ this Tribunal has accepted that the nature of police disciplinary proceedings before QCAT had not materially changed (following the abolition of the Misconduct Tribunal and establishment of

²⁶ *Secretary, Department of Social Security v Willee* (1990) 96 ALR 211, 213-214.

²⁷ Deputy Commissioner's submissions filed 14 March 2016, at para 7 and see generally, paras 3-7.

²⁸ [2001] 2 Qd R 235.

²⁹ *Ibid.*, [16].

³⁰ *Aldrich v Ross* [2001] 2 Qd R 235, [41] per Thomas JA.

³¹ *Aldrich v Ross* [2001] 2 Qd R 235, [45] per Thomas JA.

³² [2010] QCAT 384.

³³ [2010] QCAT 564.

QCAT).³⁴ The Presiding Tribunal Member in those two decisions considered that the interpretation of the nature, powers and functions of the Tribunal referred to in *Aldrich v Ross* was fortified by s 20 of the QCAT Act. This was referred to with approval in *Disley*.³⁵ For these reasons, the Deputy Commissioner submits that there is no ultimate onus of proof, because of the provisions of s 20 of the QCAT Act.

- [45] He submits that there is no onus of proof, because the Tribunal acting administratively is, as I understand the argument, sitting as the decision-maker. He argues that the Tribunal's function, acting administratively, (rather than judicially), in deciding police disciplinary matters, is only to ultimately produce the correct and preferable decision following a fresh determination.
- [46] This said, the Deputy Commissioner does not dispute that there is an evidential burden, but rather submits that there is no ultimate onus. The consequence of this, he submits, is that because there is only an evidential burden, it is simply for the Tribunal to decide whether or not substantiation is made out on the evidence. He further submits that this is a long way from a formal onus of proof.

Discussion and my conclusions

- [47] As was identified in *Aldrich v Ross*,³⁶ the nature of the review depends upon the relevant legislation.³⁷ In this case, the provisions of the CCC Act, the PSA Act and the QCAT Act are relevant. The *Police Service (Discipline) Regulations 1990* (Qld) (the Police Discipline Regulations) are also relevant.
- [48] In keeping with the Deputy Commissioner's submissions, construction of some aspects of the legislative regime are settled. QCAT has held that the nature of police disciplinary proceedings are not materially changed since the establishment of QCAT.³⁸ Key provisions are found in s 219G and s 219H of the CCC Act and ss 17-20 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act'). The purpose of the Tribunal's review is to produce the correct and preferable decision.³⁹ The Tribunal's decision must be made by way of rehearing, on the evidence before the decision-maker and any new evidence, allowed with leave by

³⁴ Although the decision was appealed, see *Queensland Police Service v Compton* (No 2) [2011] QCATA 246, the nature of the proceedings was not the subject of appeal, and has been subsequently confirmed on many occasions by the Tribunal: see e.g. *Newman v Commissioner for Police* [2013] QCAT 152; *Crime and Misconduct Commission v Deputy Commissioner Barnett & Anor* [2013] QCAT 443.

³⁵ [2010] QCAT 530, [17].

³⁶ [2001] 2 Qd R 235.

³⁷ *Aldrich v Ross* [2001] 2 Qd R 235, [11].

³⁸ See for example, *Compton v Deputy Commissioner Ian Stewart Queensland Police Service* [2010] QCAT 384; *CMC v Deputy Commissioner & Chapman* [2010] QCAT 564.

³⁹ *Ibid* and QCAT Act s 20(1).

the Tribunal.⁴⁰ It is a fresh hearing on the merits:⁴¹ the Tribunal must reach its own decision on the review according to law.⁴²

- [49] It is uncontroversial that the purpose of police disciplinary proceedings in Queensland encompasses deterrence, protection of the public,⁴³ maintenance of proper standards,⁴⁴ and promoting and maintaining public confidence in the police service.⁴⁵ The sanction imposed must signify the disapproval with which the conduct is viewed.⁴⁶ It plays a role in specific (in respect of the officer concerned) and general (in respect of other officers) deterrence.⁴⁷ As the High Court has said, the effectiveness of police in protecting the public relies upon public confidence in the integrity of its members, and internal discipline is the primary means of ensuring that individuals do not jeopardise public confidence.⁴⁸
- [50] If the Tribunal has the same view of the facts and inferences to be drawn, it may have due regard to the decision-maker's perceptions about what is required for internal discipline: however, it brings the public perspective to bear on the disciplinary process.⁴⁹
- [51] The Tribunal must consider only the charges as brought: *Lee v Crime and Corruption Commission*⁵⁰ ('Lee'). It may not consider evidence which is not relevant to the charges as framed by the regulatory body or person.⁵¹
- [52] Onus of proof was not discussed in *Aldrich v Ross* or the subsequent decisions of QCAT confirming that review in the Tribunal is a rehearing *de novo*. However, in the former Misconduct Tribunal and now in QCAT, the proceedings were found to be in the nature of a fresh hearing or on the merits or a hearing *de novo*, irrespective that the process in the former Misconduct Tribunal was called an 'appeal' in the relevant legislation, whereas under the current legislative scheme, it is a 'review' in this Tribunal.

40 CCC Act s 219H(3).

41 QCAT Act s 20(2).

42 *Tolsher v Commissioner of Police Ian Stewart (No 2)* [2013] QCAT 590 at [15].

43 *Aldrich v Ross* [2001] 2 Qd R 235, 247; see also CCC Act s 219A and *Police Service (Discipline) Regulations 1990* (Qld), reg 3.

44 *Hardcastle v Commissioner of Police* (1984) 53 ALR 593, 597; see also CCC Act s 219A and *Police Service (Discipline) Regulations 1990*, reg 3.

45 *Aldrich v Ross* [2001] 2 Qd R 235, 247, see also CCC Act s 219A and *Police Service (Discipline) Regulations 1990*, reg 3.

46 *Police Service Board v Morris* (1985) 156 CLR 397; *Queensland Police Service v Compton (No 2)* [2011] QCATA 246, [25].

47 *Ibid.*

48 *Police Service Board v Morris* (1985) 156 CLR 397 at 412.

49 *Aldrich v Ross* [2001] 2 Qd R 235; *Compton v Deputy Commissioner Ian Stewart* [2010] QCAT 384, esp at [28]-[29]; *CMC v Deputy Commissioner & Chapman* [2010] QCAT 564 at [12]; *McKenzie v Acting Assistant Commissioner Wright* [2011] QCATA 309, esp. at [42]; *Tolsher v Commissioner of Police Ian Stewart (No 2)* [2013] QCAT 590 at [15].

50 *Lee v Crime and Corruption Commission* [2014] QCATA 326, [63].

51 *Ibid.*, [110].

- [53] In *Disley*, the Tribunal was deciding the order in which submissions were to be filed by the parties to a police disciplinary review. Both parties relied on the nature of the proceedings and the decision in *Aldrich* to assert that the other party should file first. In that instance, the Commissioner seemed to concede that judicial comment acknowledged that, in disciplinary proceedings, the accuser bears the onus to prove the charge, even though that may not be generally so in administrative proceedings.⁵² This accords with the decisions in *Sperway*, *Willee*, and *Legal Practitioner M*. Ultimately, the Tribunal decided that the Commissioner should make his case against the officer (before the officer was required to make submissions) to discharge his burden of proof, and that this would better assist the Tribunal to perform its function and reach the correct and preferable decision. Further, the Tribunal observed that it may be somewhat '*artificial and unhelpful*' to draw a distinction between disciplinary proceedings in the Tribunal's original and review jurisdictions.⁵³ Both involve a hearing (or a rehearing) on the merits. Essentially, the Tribunal made the observation that the person accused of disciplinary charges is entitled to have the accuser substantiate the charges.⁵⁴
- [54] That aside, I am aware that as a matter of practice, directions are frequently made in police disciplinary reviews for the officer to file his submissions before the Commissioner or other prescribed officer. However, the question of whether the decision-maker bears the legal onus of proof does not appear to have been raised again until now.
- [55] I make the observation that the Tribunal has accepted in (some) disciplinary proceedings in original jurisdiction, concerning teachers and health professionals, that the regulator bears the onus of proof,⁵⁵ which judicial decisions recognise exist in disciplinary proceedings.
- [56] In a review, as here, the officer may choose not to put some aspects of substantiation of the charges in issue. That does not seem to me to bear on the question of onus of proof at all in respect of those charges that are contested.
- [57] Forbes, in his seminal text, *Justice in Tribunals*⁵⁶ says under the topic of Onus of Proof,⁵⁷ in relation to what he describes as a primary tribunal (by

⁵² *Disley v Queensland Police Service* [2010] QCAT 530, [9].

⁵³ *Disley v Queensland Police Service* [2010] QCAT 530, [22-23]. Note in *Aldrich v Ross* [2001] 2 Qd R 235 at [37] and [40-41], the submission had been made that it was an appeal in the nature of original jurisdiction, rather than an appeal limited by the principles in *House v The King*: following discussion about the nature of the proceeding before the former Misconduct Tribunal, Thomas J concluded that the tribunal was required to make its own decision on the evidence, rather than the proceeding being an appeal in the strict sense.

⁵⁴ *Disley v Queensland Police Service* [2010] QCAT 530, [23].

⁵⁵ See, for example, [2015] QCAT 426, [17] and although that decision was appealed, the appeal did not concern this issue see *QCT v CSK* [2016] QCATA 125; *Physiotherapy Board of Australia v Lazarus* [2014] QCAT 477, [82].

⁵⁶ J R S Forbes, *Justice in Tribunals* (Federation Press, 4th ed, 2014).

⁵⁷ *Ibid*, p 174-177.

which, in context, it appears he refers to original jurisdiction),⁵⁸ he says as follows:

But in a disciplinary case it is clear that the onus is on the complainant,^[87] or the authority with the carriage of the matter,^[88] which may be the tribunal itself.^[89]

It is radically wrong to suppose that the mere making of a complaint requires the person charged to discredit it.^[90]

[Footnotes]

87 *Re Appeals of Johnson and Anderson* [1967] 2 NSW 357; *Secretary, Department of Security v Willee* (1990) 96 ALR 211; *McDonald v Director-General of Social Security* (1983) 6 ALD 6 at 9; see also *Minister for Health v Thomson* (1985) 60 ALR 701 at 712 per Beaumont J: “[W]here a breach of discipline, or something analogous, is alleged, the onus of proving such a breach lies upon the accuser”. But see also *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 (no formal onus of proof in football disciplinary tribunal).

88 *Ciechanowski v Pharmacy Board of Victoria* [1995] ACL Rep 280 (VSC); *Shields v Commissioner of Police* (2008) 60 ALR 250-013; [2008] VSC 2. He acknowledges that the onus of proof could be reversed by special rules⁵⁹ and that lay tribunals may be allowed some latitude.

89 See paragraph [12.7], above.⁶⁰

⁵⁸ Although Forbes appears to refer to original jurisdiction, he does rely in part upon *Willee* (which, as discussed above, was an appeal by way of rehearing *de novo*) as authority for the proposition that there is an onus of proof in a primary tribunal, as opposed to drawing the distinction between original and review jurisdiction.

⁵⁹ J R S Forbes, *Justice in Tribunals* (Federation Press, 4th ed, 2014), p 175.

⁶⁰ *Ibid*, p 175. J R S Forbes, *Justice in Tribunals* (Federation Press, 4th ed, 2014), p 170, at Paragraph [12.7] is quoted as follows (including footnotes):

[12.7] In the courts, evidence in support of a claim or charge is led by counsel for claimant or prosecutor. Some tribunals have an assistant in a similar role, sparing the tribunal the difficult task of acting as proponent and adjudicator.³⁸ But otherwise the tribunal must do its best to elicit evidence without incurring the stigma of prosecutor-and-judge, or evincing bias in other ways. This is hardly an ideal method of investigating and deciding vexed questions.³⁹ It is submitted that there is an implicit power to appoint a “counsel assisting”, provided that this person is not (and does not appear to be) a *de facto* member of the tribunal.⁴⁰ There is a danger of this occurring when a panel of non-lawyers is assisted by a professional advocate.

“Counsel assisting” is no less entitled to natural justice than other persons involved.⁴¹

[Footnotes]

38 As to a tribunal which is prosecutor in *substance*, see paragraph [15.46], below.

39 *Steward v Secretary; Department of Health* (unreported, NSWCA, 6 August 1986).

40 *R v Essex Justices; Ex parte Perkins* [1927] 2 KB 475; *Dale v New South Wales Trotting club Ltd* [1978] 1 NSWLR 551 (allegation rejected); *Wislang v*

- [58] In paragraph [12.7], he refers to the procedure in courts for a prosecutor to lead evidence in support of a charge, in particular, noting that some tribunals have an assistant in a similar role. This avoids the Tribunal being both proponent and adjudicator. Relevantly, in QCAT, the decision-maker in a disciplinary review must assist the Tribunal to make its decision on the review.⁶¹
- [59] Forbes goes on to consider the situation of an internal appeal or application to a court (and by analogy a tribunal). He says that *unless* it is an appeal by way of rehearing *de novo*, the onus will be on the person the subject of the discipline to show that the original decision is wrong. If it is a rehearing *de novo*, he says the onus is once again on the initiating party.⁶² That is, the accuser.
- [60] Consistently, in a Misconduct Tribunal appeal decision, Dr Forbes who constituted the tribunal in *Melling v O'Reilly*,⁶³ held that the onus of proof remained with the party alleging misconduct.
- [61] In QCAT, the limitations on the rehearing on review in its police disciplinary jurisdiction under the relevant legislative framework, has been the subject of observations as follows:

[15] It is also relevant to notice the peculiarities of the current system of determination of police misconduct. In the original proceeding before Deputy Commissioner Rynders there was no prosecutor, and no witnesses were seen or heard. The material was assembled by an investigator with power to require members of the police service to answer his questions; that material was sent to his superiors and in due course Sergeant Chapman was directed to appear before Deputy-Commissioner Rynders, which he did with counsel; she indicated that she would hear submissions in respect of these matters and would then adjourn the proceedings; he pleaded "not guilty" to the charges; his counsel thereupon proceeded to make multiple criticisms of the material, having previously supplied extensive written submissions to similar effect; he concluded his submissions by asking his client "Is there anything you want to add?" to which Sergeant Chapman replied "Not really, you've described everything". Deputy Commissioner Rynders then said, "Thank you, Damien, is there anything further that you'd like to add?" to which he replied, "No not at all thanks". The hearing was then adjourned. No witnesses were sworn or tested and Sergeant Chapman was not further interrogated.

Medical Practitioners Disciplinary Committee [1975] 1 NZLR 29. As to the risk of apparent bias, see paragraph [15.66], below.

41 *Dental Board of Queensland v B* [2004] 1 Qd R 254; [2003] QCA 294.

⁶¹ QCAT Act s 21(1).

⁶² *Ibid*, p 177. Consistently, in *Melling v O'Reilly* [1991] Misconduct Tribunal Appeal (Unreported Appeal 6 of 1991), before Dr Forbes, he held that the onus of proof remained with the party alleging misconduct.

⁶³ [1991] Misconduct Tribunal Appeal (Unreported Appeal 6 of 1991).

[16] This procedure is a relic of earlier armed service orderly room procedure. It may be satisfactory for dealing with minor disciplinary infringements, but it leaves much to be desired in more serious matters like the present.

[17] The review in this Tribunal suffers from some similar limitations, in that we have been given essentially the same written material and have not seen or heard any witnesses. But at least we have had the benefit of an adversarial procedure and have received submissions from both sides.

[18] We have mentioned these concerns because there are direct conflicts in the witness statements, and there has been no conventional trial to resolve them. Both of the proceedings (before Deputy Commissioner Rynders and before this Tribunal) are tantamount to decisions on the papers.

[19] Of course questions of credibility can be properly addressed through such procedures, especially through assessments of inherent probabilities, but there appear to be serious limitations in the present system under which police misconduct matters are determined. These can only be addressed by the legislature.⁶⁴

[62] The limitations arise because of the provision in the CCC Act to the effect that the rehearing in police disciplinary reviews must be conducted on the evidence which was before the decision-maker (unless leave is granted for new evidence to also be relied upon).⁶⁵

[63] The impracticality of seeking to classify the nature of a hearing by a particular category, although it occurs regularly, because it cannot be comprehensive, has frequently been the subject of judicial comment, as indeed it was in *Aldrich v Ross*.⁶⁶ The particular legislative scheme in each case governs the nature of the process. That said, I have concluded that there is no material difference between the *nature* of the hearings in *Sperway*, *Willee*, and *Legal Practitioner "M"*, and here in police disciplinary reviews before QCAT. In each instance, the legislative scheme (irrespective of the name that may have attached by the parliament, that is, an appeal or a review) provided for a rehearing on the merits, by way of a hearing *de novo*. The provision that the rehearing in police disciplinary proceedings in QCAT must generally be conducted on the evidence before the original decision-maker does not alter the nature of the rehearing: it is a rehearing *de novo*. The Tribunal must form its own conclusions. There is no requirement for the police officer who faces disciplinary charges to establish an error in the decision-maker's reasoning in order for the Tribunal to reach a different decision.

[64] The Deputy Commissioner's submission, to the effect that because the Tribunal's function on review is to produce the correct and preferable

⁶⁴ *CMC v Deputy Commissioner & Chapman* [2010] QCAT 564, [15]-[19].

⁶⁵ CCC Act s 219H.

⁶⁶ [2001] 2 Qd R 235, especially at [18]-[20].

decision there is not an onus of proof, does not seem to me to assist. Further, I do not accept that the Tribunal is sitting as the decision-maker in review proceedings.

- [65] Disciplinary charges against police officers are brought and decided at first instance by their superior officers, who are prescribed officers under the Police Discipline Regulations.⁶⁷ As the Tribunal observed in *Chapman* as referred to earlier, the charges follow an internal investigation.⁶⁸ The prescribed officer directs the officer subject to the charges to appear before him/her for a disciplinary hearing on the charges.⁶⁹ Upon review of the decision by either the police officer subject to the charges or the CCC, the decision-maker is a party to the proceedings.⁷⁰ The decision-maker is obliged to assist the Tribunal in the proceedings so that it can make its decision on the review.⁷¹ The Tribunal, in producing the correct and preferable decision, exercises its functions on review in accordance with s 24 of the QCAT Act and the CCC Act. In particular, under s 24(1), it may confirm or amend the decision; set it aside and substitute its own decision; or set the decision aside and return the matter for reconsideration to the decision-maker. In producing the correct and preferable decision, it must do so on the evidence before it and according to law. The decision of the Tribunal is then taken to be a decision of the decision-maker for the reviewable decision.⁷²
- [66] Although the Tribunal in its review jurisdiction is often said to stand in the shoes of the decision-maker, this is a reference to the review being conducted by way of a hearing *de novo* and the Tribunal being entitled to exercise the powers of the original decision-maker. (That is, it is not an appeal and it is not necessary for error in the decision-maker's reasons for decision to be established for a different decision to be made by the tribunal in determining the review). Further, the Tribunal's decision effectively becomes the decision of the decision maker for implementation purposes.⁷³ None of these matters indicate whether there is an onus of proof, and certainly, none precludes an onus of proof. The Tribunal does not effectively become the decision-maker bringing the charges against the officer. Indeed, as discussed earlier, in *Lee* the Tribunal held that on review it is constrained by the charges as brought.
- [67] The Tribunal's role on review is plainly an adjudicative one only. It has no role in bringing or prosecuting charges against a police officer. The Tribunal makes its decision following a hearing based on the evidence presented and according to law. It is not investigative. It does not take responsibility for conducting proceedings for the parties, or take on the

⁶⁷ Section 7.4(2) and Police Discipline Regulations s 4, s5-8..

⁶⁸ Although it is noted that under the CCC Act, s 47, the Crime and Corruption Commission may assume responsibility for and complete an investigation of the Commissioner of Police into police misconduct.

⁶⁹ For example, see Exhibit 1, Part A, p 1-7.

⁷⁰ CCC Act s 219G(3).

⁷¹ QCAT Act s 21(1).

⁷² QCAT Act s 24(2).

⁷³ QCAT Act s 24(2).

role of the decision-maker to establish the disciplinary charges against an officer. Although the Tribunal may allow further evidence subject to the statutory restrictions, the decision-maker effectively controls the investigation against the officer, and (although an officer subject to discipline is invited to provide additional submissions and material), largely therefore, the material which comes before the Tribunal in the review.

- [68] The reference to making the correct decision on review refers to the requirement to make a decision which is correct according to law on the evidence available to the Tribunal.⁷⁴ Reference to the preferable decision on review refers to the requirement that when an exercise of discretion is necessary in deciding (that is, there is not one correct decision), then the decision of the Tribunal must be the preferable decision.⁷⁵
- [69] In summary, although the Tribunal has the functions of the decision-maker for the decision being reviewed, it performs the functions conferred on it by the QCAT Act and the enabling Act, by hearing and deciding the review by way of fresh hearing on the merits. In review proceedings, it is assisted to perform its functions by the decision-maker. None of these matters preclude or exclude an onus of proof in police disciplinary proceedings. Indeed, in a disciplinary review, arguably assisting the Tribunal to make the correct and preferable decision may reasonably include establishing the charges brought.
- [70] In police disciplinary proceedings, because the review is determined in the Tribunal's review jurisdiction, (rather than its original jurisdiction), the officer has already been required to respond to the charges and findings have been made by the original decision-maker. Indeed, the Queensland Court of Appeal recently held that in a disciplinary interview, a police officer's right to claim self-incrimination has been impliedly abrogated.⁷⁶ In contrast, in an original jurisdiction disciplinary proceeding, a regulator files the evidence relied upon to support charges before the person facing charges is required to do so. The practical effect would appear to be that in a disciplinary review, the opportunity for a police officer to seek dismissal of the charges on the basis that there is no case to answer is lost. By contrast, in original proceedings, a person facing disciplinary charges may, once the regulator has filed its evidence (or following cross-examination of its witnesses), apply for dismissal of the disciplinary referral on the basis of no case to answer.
- [71] However, this is not a basis for concluding that the accuser does not bear what was described in *Willee* as the '*customary onus on the prosecution*

⁷⁴ For example, see *Queensland Building Authority v Meredith* [2010] QCATA 50, [5]; *Kehl v Board of Professional Engineers of Queensland* [2010] QCATA 58, [12]. For the development of the concepts of 'correct' and 'preferable' in the Administrative Appeals Tribunal, see for example, *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 636 (per Brennan J); *Shi v Migration Agents Registration Authority* (2008) 248 ALR 390.

⁷⁵ *Ibid.*

⁷⁶ *Nugent v Stewart (Commissioner of Police) & Anor.* [2016] QCA 223.

to prove its case.⁷⁷ Some of the cases discussed concern regulation of professional persons,⁷⁸ but others, persons with a trade qualification,⁷⁹ and in *Willee*, a clerical public servant. I have concluded that none of the submissions made reveal that the police disciplinary legislative regime suggests that the customary onus does not apply here.

- [72] Of course, a well-functioning police service is necessary if it is to command and maintain public confidence, having regard to the significant powers entrusted in police officers. This makes internal discipline very important. That said, police officers are entitled to the customary rigor in the determination of disciplinary charges against them. Charges may result in a variety of disciplines, including demotion, or more significantly as occurred here, in dismissal.
- [73] The Commissioner's arguments seem to rely in part on the usual position in administrative review proceedings (that are not disciplinary proceedings) that there is no onus of proof, although failure of a party to discharge the evidential burden may result in the Tribunal being unable to make the orders they seek.⁸⁰ But, the principles flowing from the judicial decisions about the onus of proof in disciplinary proceedings (absent any contra-indication in the legislative regime) suggest the position is otherwise in disciplinary proceedings. In general, the decisions considered support the proposition that in disciplinary proceedings, where the legislative scheme provides for a hearing (or rehearing) *de novo*, there is a legal onus of proof which must be discharged by the regulator/accuser.
- [74] I am satisfied that in police disciplinary review proceedings, the decision-maker bears the onus of proof.
- [75] It is uncontroversial between the parties that the standard of proof is what is commonly referred to as the *Briginshaw* standard.⁸¹ That is, this is civil litigation and the standard of proof is the on the balance of probabilities. In disciplinary proceedings capable of resulting in serious consequences, reasonable satisfaction is not to be lightly reached or on flimsy evidence.
- [76] Further, I make the observation that even if I am wrong about the decision-maker bearing a formal onus of proof in this matter, my findings about the allegations made on the charges would be unchanged. This is because, having regard to the evidential burden which would remain, and applying the *Briginshaw* standard, the evidence of ALB in particular,

⁷⁷ (1990) 96 ALR 211, p 220.

⁷⁸ *Legal Practitioner "M" v Council of the Law Society of the Australian Capital Territory* [2015] ATSC 312.

⁷⁹ *Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd* (1976) 14 ALR 174.

⁸⁰ *Queensland Building and Construction Commission v Mudri* [2015] QCATA 78; *Laidlaw v Queensland Building Services Authority* [2010] QCAT 70.

⁸¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 to 362 as clarified by cases including *Rejfeek v McElroy* (1964-5) 112 CLR 517, 521 and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170,171.

contains such inconsistencies that I would not in any event be reasonably satisfied about a significant number of the allegations which are reliant upon her evidence for substantiation.

2.2 What weight should be accorded to the findings of the Magistrates Court in the domestic violence family protection application?

- [77] Findings were made by a Magistrate following a contested hearing in an application for a domestic violence protection order (DVPO) involving Officer JGB and his estranged wife. The Magistrate made findings of credit and fact, and proceeded to make an order in favour of ALB. The parties agree that in domestic violence proceedings, the *Briginshaw* standard *may* be applied, depending upon the gravity of the consequences to flow from a finding of fact.⁸² However, in this case, the Magistrate did not state that she did so. The Deputy Commissioner argues that it cannot be assumed she did not because she found a '*strong likelihood*'⁸³ of future violence. However, fairly read, this is not a comment on the standard of proof, but rather a conclusion drawn on the basis of her findings.
- [78] Both parties make submissions concerning the rules of evidence, observing that they do not apply. The Deputy Commissioner says that because of this, the Tribunal may give consideration to the findings and urges me to give significant weight to them,⁸⁴ because some five of the particulars in matter 1(a) were issues in the contested oral hearing before the Magistrate.
- [79] Officer JGB submits that, as has often been observed by courts,⁸⁵ whilst the rules of evidence do not apply in the Tribunal, it does not follow that they are not relevant. For Officer JGB, it is argued that the Magistrate's findings should carry no weight in this disciplinary review. In particular, it is argued that although the Tribunal is not bound by the rules of evidence, that it may be useful to consider statements of courts, which he says support his contention that it is not appropriate to take them into account. In particular, in *Dasreef Pty Ltd v Hawchar*,⁸⁶ the High Court of Australia said that the rules of evidence '*do not permit the Tribunal to take into account, in deciding one case, evidence given in other cases between different parties or findings of fact made in other cases between different parties*'.⁸⁷ In other Tribunal cases, the Tribunal has considered that the rules of evidence may afford useful guidance, even though they are not binding.⁸⁸

⁸² Commissioner's further submissions filed on 14 March 2016 and Officer JGB's further submissions in reply filed on 16 March 2016, relying upon *GKE v EUT* [2014] QDC 248. Exhibit 1, Volume 2, p 434.

⁸⁴ Relying upon *Crime and Misconduct Commission v Assistant Commissioner Ross Barnett* [2010] QCAT 690, at [31]-[33].

⁸⁵ *Soliman v University of Technology, Sydney* (2012) 207 FCR 277, [25]; *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390. (2011) 243 CLR 588.

⁸⁷ *Ibid*, [44].

⁸⁸ *Crime and Misconduct Commission v Assistant Commissioner Ross Barnett* [2010] QCAT 690, per Hon J B Thomas QC.

- [80] In particular, Officer JGB argues that findings of fact made by a Magistrate in proceedings between different parties (in this case, Officer JGB and his estranged wife, concerned a contest between two private citizens decided on different and more limited evidence); and that the Court's assessment of credit cannot fetter the Tribunal. Officer JGB submits that the Magistrate's findings show no more than that she preferred the evidence of ALB on the evidence before her. He submits that the Tribunal must make its own assessment of the facts based on the evidence before it. He argues that the Magistrates findings and decision provide no more than part of the background to the disciplinary proceedings.
- [81] The findings of the Magistrate form part of the material or evidence that was before the Deputy Commissioner, and are before the Tribunal. There can be no doubt that I can consider them. However, it is a matter for me to determine the weight they are given. I have concluded that the findings and reasons of the Magistrate in the domestic violence proceeding are evidence only that she made the findings and her reasons for doing so. Further, I am satisfied that it is irrelevant whether the Magistrate applied the *Briginshaw* standard or not. I must, in conducting the rehearing and determining the review, form my own conclusions about credibility and the weight to be attributed to evidence and ultimately the facts and inferences to be drawn from them.
- [82] The Magistrate did not have before her either the range of evidence about matters relevant to the allegations made, nor the various versions of ALB's account of events which are before me, discussed below. She heard no cross-examination of any witnesses supporting ALB's account (indeed, none were present), and although Officer JGB's witnesses were made available for cross-examination, none were cross-examined before her. Her findings relate to a different application on the evidence she had.
- [83] I must make my own findings as to the establishment, or not, of each of the of the particulars of alleged domestic violence which form part of the disciplinary charge, based on my assessment of the evidence. As I have already discussed, this process is made difficult by the significant restrictions placed in the review hearing process by the CCC Act. However, I do have before me transcripts of interviews and other documents, including a chronology prepared by ALB, in addition to evidence which was before the Magistrate.

3. The contested allegations

3.1 Matter One (a) that Officer JGB committed a number of acts of violence against ALB between 4 October 2009 and 3 November 2012

[84] Further and better particulars are as follows:

- [Dot point 1]: You were married to [ALB] on 21 November 1998;
- [Dot point 2]: On one occasion in approximately October 2010, when visiting family in Melbourne, following her request for your mobile phone

you became aggressive toward [ALB] and caused bruising to her left arm and upper body;

- [Dot point 3] On one occasion between November 2010 and March 2011 at your home at [...] you became aggressive toward [ALB], grabbing her around the throat, lifting her off the ground, firming your grip around her throat, stating “*I could kill you now*”;
- [Dot point 4] On occasions between November 2010 and March 2011 at your home at [...] you became aggressive toward [ALB] pushing her down onto the leather couch in the family/kitchen room;
- [Dot point 5] On occasions between November 2010 and March 2011 at your home at [...] you caused damage to walls in the master bedroom and hallway next to the master bedroom;
- [Dot point 6] On one occasion between November 2010 and March 2011 at your home at [...] you threw a glass of water over [ALB] while she was lying in bed;
- [Dot point 7] On one occasion in approximately October 2011 at your home at [...] you became angry and smashed a disco ball before knocking over the bar stool on which [ALB] was sitting causing her to fall to the ground;
- [Dot point 8] On 14 February 2012 at your home at [...] you caused damage to the master bedroom door and a bedroom wall;
- [Dot point 9] On 15 February 2012 at your home at [...] you threw orange juice on [ALB];
- [Dot point 10] On 15 February 2012 at your home at [...] you referred to [ALB] as a “*slut*” to your children;
- [Dot point 11] On 15 February 2012 at your home at [...] you put your arm around [ALB]’s neck, lifter her up off the ground and then pushed her down onto the floor and placed pressure on her chest with one foot, while wearing shoes; and
- [Dot point 12] On 15 February 2012, following your departure, Senior Constables Boswell, Batten, Oliphant and Everding attended at the address whereby Senior Constable Boswell then completed an application for a domestic violence protection order nominating [ALB] as the aggrieved spouse and you as the respondent spouse.

[85] As discussed earlier, the particulars in Matter 1(a) are denied, except dot points 1, 8, and 12 and parts of dot points 7 and 11. In respect of dot points 7 and 11, Officer JGB admits only part of the allegations as discussed later.

The reliability of ALB’s evidence

[86] Officer JGB generally submits that caution should be exercised in assessing the credibility of ALB’s evidence because of her perceptions. These are said to arise because of the somewhat acrimonious breakdown of the relationship; her jealousy about EL (Officer JGB and ALB engaged in a ‘*partner swap*’ arrangement with SL and EL at various times between

September 2010 and September 2011); her jealousy about a person with whom he was in a relationship after separation; and family law related disputes between ALB and himself.

- [87] The Deputy Commissioner says that this is an unfair characterisation, because she had accepted the breakdown of the marriage from early 2012. Separation occurred on 14 February 2012. In response, it is argued for Officer JGB that it is not for him to show ALB's reliability or otherwise, it simply points out that the evidence is given in the context of a somewhat acrimonious marriage breakdown.
- [88] However, in the Magistrates Court on 18 July 2012, ALB gave evidence (eventually after some evasive answers) that she was upset about the marriage breakdown⁸⁹ and that there was an ongoing family law dispute.⁹⁰ More tellingly, even at the time of the disciplinary interview in October 2012, with the Investigating Officer, in response to his question about what she wants to achieve, she acknowledges that *'he's just got a big thorn in his side and its hurting him so much'* and says that *'he wants his kids and he's not ready to have the kids in that manner because he's got issues he needs to work on'*.⁹¹ She continues, later *'plus the deal is I was the carer just because he chose to change all the rules.... I'm still the provider and carer for the kids, I know what's good for my kids...'*⁹² Later, she says, *'...I wasn't ready now and I asked for him to give me time I said it constantly and he wasn't willing to do that there was no respect...'*⁹³
- [89] It is reasonable to infer that ALB's evidence, and memories and perceptions are coloured by her feelings and apparent opposition to the marriage breakup, the effect separation has had on her own desires for the marriage to continue and her role in parenting their children.
- [90] Further, before considering the evidence more closely, it is appropriate to remark upon the significant inconsistencies in the various accounts of events given by ALB.
- [91] The accounts include a *'written chronology of her recollection of acts of domestic violence occurring in her relationship with Officer JGB'* compiled (it appears at the request of the Investigating Officer) on 14 December 2012⁹⁴ by ALB (ALB's chronology);⁹⁵ her affidavit filed in support of her application for a domestic violence order;⁹⁶ a transcript of the evidence given before the Magistrate;⁹⁷ and the evidence given by her when interviewed by the Investigating Officer.⁹⁸ There are also accounts she has

89 Exhibit 1, Part B, p 988.

90 Ibid, p 966-970.

91 Ibid, p 555

92 Ibid, p 556.

93 Ibid, p 556.

94 Exhibit 1, Part B, Report of The Investigating Officer pp. 1-151, at paragraph 4.396.

95 Exhibit 1, Part B, pp. 152-159.

96 Exhibit 1, Part A, pp. 70-80.

97 Exhibit 1, Part B, pp. 948-988.

98 Exhibit 1, Part B, pp 507- 557.

given to police officers, including Senior Constable Boswell, recorded contemporaneously in police records. For example, in ALB's chronology, she states that the violence commenced in her marriage for the first time in November 2010.⁹⁹ In her affidavit in the domestic violence proceedings (and when giving her oral evidence before the Magistrate), she asserts that her affidavit in the application only covers '*the most recent domestic violence after 2010. There were many incidents before this time.*'¹⁰⁰ Many more inconsistencies are discussed in the paragraphs below.

- [92] Although I would not expect any truthful account to be given in entirely identical terms on each occasion, the significant inconsistencies which emerge affect my assessment of the reliability of ALB's uncorroborated evidence and whether the allegations have been established to the requisite standard.
- [93] Although corroboration is not required for evidence to establish facts, generally I do not accept that ALB's evidence is clear and cogent given the inconsistencies in it. I have concluded that it is generally unreliable and lacking in credit, for the reasons discussed.

Issues of credit and the onus of proof

- [94] The Tribunal must resolve issues of credit. Officer JGB submits that it is appropriate to compare the evidence and to have regard to discrepancies in different versions of events provided, having regard to the onus of proof. Further, he submits that where there are gaps in evidence, these are ultimately gaps in the Deputy Commissioner's case against Officer JGB.
- [95] Further, Officer JGB submits that the Deputy Commissioner controls the available evidence. An internal investigation was conducted by the QPS. Where there are inconsistencies in the evidence of ALB, they were not put to her when they could and should have been. For whatever reason, the QPS Investigating Officer decided not to test her evidence and not to obtain witness statements from other witnesses who could reasonably corroborate (or otherwise) some of her statements. These shortcomings, Officer JGB submits, cannot be relied upon to draw conclusions against him.
- [96] Officer JGB's representative argues that the Deputy Commissioner's submission that Officer JGB's admissions of some facts support the inherent probability that he also did the other alleged acts is an unfair submission which assumes guilt of a person charged with disciplinary charges. On the contrary, he says admissions made where Officer JGB could have remained silent, are to his credit and support a finding of his honesty.

⁹⁹ Exhibit 1, Part B, pp. 152-153.

¹⁰⁰ Exhibit 1, Part A, p 71 at paragraph 10. That said, in paragraphs 17 and 19 she makes two allegations about incidents in 2009 and 2002 respectively.

- [97] The Deputy Commissioner submits that the majority of the admissions made by Officer JGB are for occurrences when other persons (other than Officer JGB and ALB) were present which Officer JGB could not deny because of third party corroboration.
- [98] On my analysis, Officer JGB's admissions largely, but not invariably, coincide with other persons being able to corroborate ALB's evidence. Further, corroboration was not sought in circumstances when it reasonably could have been sought in the investigation process to test ALB's allegations. I accept, as Officer JGB submits, that gaps in the evidence are gaps in the case against Officer JGB.
- [99] I make the observation that it seems to me essential that the investigation process should be rigorously conducted from an impartial perspective, with a view to gathering and testing evidence as far as possible. Corroboration should be sought where possible in circumstances where the evidence appears unsatisfactory.

What actions constitute domestic violence?

- [100] At the outset, I observe that emotional, physical, and financial domestic violence is well-recognised as a scourge that insidiously permeates a significant number of domestic relationships. All allegations of domestic violence are treated seriously.
- [101] There is no definition of domestic violence in the legislative scheme for police discipline. However, the *Domestic and Family Violence Protection Act 2012 (Qld)* (Domestic Violence Act) defines it. It is broadly defined to include physical, sexual, emotional, psychological,¹⁰¹ threatening behaviour, or behaviour which in another way controls or dominates a person.¹⁰² It includes causing or threatening to cause personal injury; and damaging a person's property; depriving a person of their liberty or threatening to do so.¹⁰³ Emotional and psychological abuse includes repeated derogatory taunts.¹⁰⁴ A child is exposed to domestic violence if, for example, the child sees or hears an assault or overhears repeated derogatory taunts.¹⁰⁵
- [102] Police officers play a significant role in the administration of the Domestic Violence Act. For example, they attend domestic violence incidents, support victims of domestic violence by making applications for DVPOs, and charge and prosecute persons who breach DVPOs. Therefore, allegations of domestic violence committed by an officer are very serious allegations.
- [103] In this disciplinary proceeding, in considering the charge as far as it includes allegations of domestic violence, I must be reasonably satisfied

¹⁰¹ Emotion and psychological abuse is defined: Domestic Violence Act s 11.

¹⁰² Domestic Violence Act s 8(1).

¹⁰³ Domestic Violence Act s 8.

¹⁰⁴ Ibid, s 11.

¹⁰⁵ Domestic Violence Act s 10.

that the particulars alleged occurred based on the evidence presented, before the charge will be established. In some instances, I have not been so satisfied. This in no way downplays the seriousness of the allegations made and nor does it establish that the events did not occur. But the evidence before me does not satisfy me that they did occur.

Dot Point 2: On one occasion in approximately October 2010, when visiting family in Melbourne, following her request for your mobile phone you became aggressive toward [ALB] and caused bruising to her left arm and upper body.

[104] Officer JGB says that the allegations are untrue.

[105] Various versions of the event emerge from ALB's evidence. In ALB's chronology for a period recorded as '*End of Oct->Nov 2010*',¹⁰⁶ she says that when in Melbourne for her sister's wedding, Officer JGB was frequently texting EL, and that when they went to bed '*at night*' she asked him to stop texting EL '*as he was all day, when visiting family members.*'¹⁰⁷ She says that he told her to '*fuck off etc.*'¹⁰⁸ She says he texted her again when they were in bed. She asked for the '*mobile he said no and became quiet (sic) aggressive towards me. -Using his arms hands and body to keep me from having his phone.*'¹⁰⁹ She says that in the morning, she noticed bruising on her left arm and shoulder/collarbone area, due to '*his physical contact the night prior.*'¹¹⁰ She records this as the first time that Officer JGB had become '*physical*' towards her when he was angry or argumentative.¹¹¹ I accept, as Officer JGB submits, that it is implicit in this version of events that she attempted to take his phone and he resisted. Interestingly, ALB's chronology was prepared after her interviews with the Investigating Officer on 14 December 2012.¹¹²

[106] In another version of the events, given orally by ALB to Senior Constable Boswell and as recorded in his police notebook on 15 February 2012,¹¹³ she says of this incident that Officer JGB '*pushed me down on the bed and pinned me down with his forearm,*' resulting in bruising to her shoulder. In the police application for a domestic violence protection order (DVPO) initiated following this report (the first DVPO application), the same incident is described as resulting in bruising to her biceps area.¹¹⁴ This seems somewhat at odds with her chronology description that he resisted her physical attempts to take his phone from him. Both of these record her as saying that, from September 2010, arguments between

¹⁰⁶ Exhibit 1, Part B, pp. 152-153.

¹⁰⁷ Exhibit 1, Part B, p 152.

¹⁰⁸ Exhibit 1, Part B, p 152.

¹⁰⁹ Exhibit 1, Part B, p 152.

¹¹⁰ Exhibit 1, Part B, p 153.

¹¹¹ Exhibit 1, Part B, p 153.

¹¹² Exhibit 1, Part B, p 81, para 4.396 and pp. 152-159.

¹¹³ Exhibit 1, Part B, pp. 195- 197.

¹¹⁴ Exhibit 1, Part B, p 178 (final paragraph).

them escalated into minor physical arguments *'with pushing and shoving.'*¹¹⁵

- [107] In an affidavit sworn on 9 July 2012 for her second DVPO application, ALB describes the same incident as Officer JGB *'forcibly held me on a bed by choking me. He also used his elbow and forearm to hit my upper torso.'*¹¹⁶ In her oral evidence before the Magistrate on the domestic violence application, she said, referring to November 2010:¹¹⁷

...there's three major events in my life that I do recall, and my sister's wedding, the first time that he ever grabbed me around the throat and lifted me up against the wall, and then February 14th and 15th.

- [108] In cross-examination before the Magistrate, in denying that the allegations were untrue, ALB asserted that she had photos from her sister's wedding which showed the bruising. When asked why she had not placed them in evidence before the court, she asserted that they were attached to the first DVPO application, (which was withdrawn on her request). However, I have the first DVPO application,¹¹⁸ but the only photographs be attached to that copy are of alleged property damage.¹¹⁹
- [109] ALB was subsequently interviewed during the disciplinary investigation. Despite the incident being one of the three major incidents as described to the Magistrate in July 2012, when asked about violence in the relationship, she did not mention this incident to the Investigating Officer at all,¹²⁰ although she later referred to it in the chronology she prepared on 14 December 2012.
- [110] It is apparent from ALB's descriptions of the event, that in her mind, the incident became more violent and Officer JGB's actions became more aggressive, at least until the time of second DVPO hearing. Following that, she did not recount the alleged events when she was interviewed by the Investigating Officer on 23 October, 2012, but it again found its way into her chronology in December 2012, albeit in a milder version.
- [111] It is difficult to reconcile ALB's various descriptions of this alleged event. The version contained in ALB's chronology bears no resemblance to the events described either to Senior Constable Boswell or in her affidavit filed in the Magistrates Court. If the chronology version was accepted, it is unlikely that it could be considered that Officer JGB was violent on this occasion. On ALB's description, although she describes it as a physical interaction, all she alleges is that Officer JGB *'used his body'* to prevent her from taking his mobile phone. If the Magistrates Court affidavit version was accepted, he forcibly held her down on the bed by choking her. If the events occurred as described by ALB in her affidavit dated July 2012 for the Magistrates Court and were as she said in her oral evidence before

¹¹⁵ Ibid, p 178 (second last paragraph) and p 196.

¹¹⁶ Exhibit 1, Part A, pp. 70-80 and p 72, paragraph 18.

¹¹⁷ Exhibit 1, Part B, p 952.

¹¹⁸ Exhibit 1, Part B, pp. 174-189.

¹¹⁹ Exhibit 1, Part B, pp 172-173.

¹²⁰ Exhibit 1, Part B, pp. 507-560.

the Court on 18 July 2012, a major event in her life, it is inherently improbable that she would not think to mention it in her lengthy interview with the Investigating Officer or that her chronology would be couched in the terms it was.

- [112] Her descriptions of the bruising allegedly occasioned is also the subject of some inconsistency, although the descriptions are all said to involve roughly the same parts of the body. Further, although ALB asserted there are photographs which show the bruising, they are not in evidence before me, although according to ALB's evidence she gave them to Police to attach to the first DVPO application. They are not attached to the copy in the material before me. I cannot identify that the Investigating Officer requested that she provide them to him.
- [113] Given the state of the evidence, and the unexplained and irreconcilable inconsistencies in ALB's evidence, the evidence does not satisfy me that events occurred as alleged which amounted to Officer JGB being 'aggressive' to ALB and causing bruising to her. The onus of proof has not been discharged.
- [114] I am not satisfied that Dot point 2 is substantiated.

Dot Point 3: On one occasion between November 2010 and March 2011 at your home at [...] you became aggressive toward [ALB], grabbing her around the throat, lifting her off the ground, firming your grip around her throat, stating "I could kill you now"

- [115] Officer JGB denies the allegation.
- [116] Again, there are inconsistencies in the various versions of the alleged event which emerge from ALB's evidence. In the chronology version, she alleges that in about March 2011, she told Officer JGB:¹²¹

'you have gone crazy, you have a screw lose(sic), don't sleep in this room (master room) tonight. With that [Officer JGB] came up to me and grabbed me around the throat and picked me up off the ground. I told him 'I couldn't breathe, let go'. Hes (sic) reply was to the words of 'I could kill you now' with firming his grip.

- [117] In her affidavit in July 2012, she alleged:

In late 2011 the Respondent held me up against the wall by my throat, restricting my airway and movement.

- [118] At the Magistrates Court hearing, she did not alter any part of the affidavit, when offered the opportunity to do so.¹²²
- [119] In the disciplinary interview, ALB agreed (with the Investigating Officer's description) that Officer JGB grabbed her by the throat, and she says he

¹²¹ Exhibit 1, Part B, p 155.

¹²² Exhibit 1, Part B, p 949.

then *'pulled me off the ground.'*¹²³ She continues, *'then just put me back down'*¹²⁴, when she indicated she couldn't breathe. Then, she says she walked away and ignored him. However, she refers to having handprints on her neck the following day.¹²⁵ In relation to some vagueness, she then says that *'it got to the point where look I can't remember which fight is which fight.'*¹²⁶ However, she says with respect to the description she gives at that point, that *'it could have been the third fight'*¹²⁷ which was *'a significant turning point to the relationship.'*¹²⁸ Indeed, the transcript of her interview with the Investigating Officer, suggests a general incoherency and uncertainty about which events are alleged to have occurred in relation to particular occasions, even in relation to the *'three major events'* in her life, as she described them to the Magistrate.

[120] This is, at least, surprising. The reasonable inference is that the event in Melbourne in Dot point 2 was on her evidence, the first incident of violence (or, at the very least depending on which version of events is considered, it seems, the first incident she considered significant, see later discussion) and the event in Dot point 3 was the second.

[121] This allegedly violent change in Officer JGB's behaviour towards her might reasonably be expected to have been very significant to her. If there had been a 10 year history of violence on a regular basis, it might well be explicable if particulars of individual events were more difficult to distinguish in hindsight. However, following a dramatic, violent and still relatively recent change in the relationship, it seems more likely than not that the events, if they occurred, would have some degree of clarity in the mind of a person who experienced them. This is particularly so of the earlier allegations which would reasonably be expected to have come as quite a shock, in a relationship in which she had not experienced historical violence, (or as noted, any significant historical violence from her perspective, depending upon which of her accounts of events is considered).

[122] Indeed, as discussed, in the Magistrates Court hearing, she described it as one of the three major events in her life, *'the first time that he ever grabbed me around the throat and lifted me up against the wall.'*¹²⁹ Again, there was no allegation in that hearing that he had threatened to kill her, or of any visible handprints on her neck the next day.

[123] That said, in her affidavit sworn 9 July 2012, she deposes that there have been other and it seems earlier incidents,¹³⁰ likewise in the Magistrates

123 Exhibit 1, Part B, p 521.

124 Ibid.

125 Ibid.

126 Ibid.

127 Exhibit 1, Part B, p 521.

128 Ibid.

129 Exhibit 1, Part B, p 952.

130 Exhibit 1, Part A, pp. 71-73, esp paragraphs 10, 16, 17 and 19.

Court on 18 July, 2012, she alleges that although she didn't tell police, he has struck her '*....on many occasions just in our home....*'.¹³¹

[124] Officer JGB submits that the inconsistencies go to the heart of the allegation and to ALB's credibility. He says the alleged threat to kill and the handprints are not merely collateral details. I agree. In a domestic violence application, a threat to kill while holding a person up by the neck would seem to be of undoubted significance, if it had occurred.

[125] As with the allegation in Dot point 2, because of significant inconsistencies between the various versions of the allegations recorded, made or given by ALB, I am not reasonably satisfied that the events alleged occurred.

[126] The allegations in dot point 3 are not substantiated.

Dot Point 4: On occasions between November 2010 and March 2011 at your home at [...] you became aggressive toward [ALB] pushing her down onto the leather couch in the family/kitchen room

[127] The evidence relevant to this allegation is contained in various documents. She told Senior Constable Boswell on 15 February 2012, that in December 2010 to January 2011, '*the physical violence escalated, to once a week, fortnight, [Officer JGB] would push me to the ground, push me onto a chair or couch*'.¹³² In the chronology, ALB alleges that '*During these months [Officer JGB] would push me down on the leather couch in the family/kitchen room.*'¹³³ Her July 2012 affidavit says he used both hands to push her on the chest backwards onto the couch or bed '*on at least 2 occasions.*'¹³⁴ She told the Investigating Officer that probably in about mid-2011:¹³⁵

Yeah because I told him that I would never forgive him for that now um the other things that he's pushed me down, this one happened after that one where he was drinking he came in my face and he pushed me down on the couch in the family room I got up he pushed me back down I got back up and as I got up he was walking towards the sliding door... and I walked up to him and said I'm not going to be intimidated by you anymore...I probably would've rung [SL] up or someone I rang [SL] a couple of times...

[128] SL was not interviewed for the disciplinary investigation.

[129] Officer JGB says this is flimsy evidence. The Deputy Commissioner says it is a consistent account of the event and that given the responsibilities of a police officer to uphold the law, that it is clearly misconduct.

[130] The particular allegation is that, on occasions during November 2010 to March 2011, Officer JGB pushed ALB down onto the couch in the family/kitchen room. The evidence which best fits with that description, is

¹³¹ Exhibit 1, Part B, p 950.

¹³² Exhibit 1, Part B, p 197.

¹³³ Exhibit 1, Part B, p 155.

¹³⁴ Exhibit 1, Part A, p 71.

¹³⁵ Exhibit 1, Part B, pp. 521-522.

contained in her chronology¹³⁶ and in the transcript of her interview with the Investigating Officer, except she told him the events occurred in Mid-2011.

[131] I cannot go behind the charge, or reframe it.¹³⁷ The timeframe nominated is broad, encompassing some months. The acts alleged to have occurred are limited to pushing ALB onto the leather couch. The number of occasions on which the act is alleged to have occurred is not specified. However, the charge is that the alleged acts are specified to have occurred '*in the family/kitchen room.*'

[132] Does the evidence establish (to the requisite standard) a finding that the act/s occurred as alleged? The allegation is that Officer JGB became aggressive and pushed ALB down. However, in the various versions of her evidence, it is concerning that the item that she was pushed onto changes, sometimes, the couch, a chair, the bed or the ground. The timeframes nominated by ALB are non-specific but they vary from report to report. There is some consistency (as far as she says she was pushed by Officer JGB), but much inconsistency (as to when and where and onto what she was pushed). That said, each of ALB's statements includes reference to pushing her onto the couch, sometimes alone, or sometimes as one of the possibilities. The affidavit alleges that the pushing happened on at least two occasions. The chronology version suggests it happened weekly or fortnightly over some two months.

[133] If an allegation was true, it would not be reported in precisely the same terms on each occasion it is relayed, but the item onto which a person was pushed might reasonably be expected to be consistent if it occurred infrequently (that is, perhaps on two occasions) as her affidavit says. In other versions, it occurred every week or fortnight over a period of months. If it happened on no more than two discrete occasions, it would be reasonable to expect ALB might recall whether she was pushed onto the couch or the bed or the ground. If it happened many times, she might reasonably not recall onto what she was pushed at any particular time. Although SL may have been able to confirm (or otherwise) instances of recent report of pushing relayed to him by ALB, he was not interviewed.

[134] In the end result, the onus of proof is not discharged. The evidence does not satisfy me that the events occurred as alleged.

[135] Dot point 4 is not substantiated.

Dot point 5: On occasions between November 2010 and March 2011 at your home at [...] you caused damage to walls in the master bedroom and hallway next to the master bedroom

[136] Officer JGB denies the allegation.

¹³⁶ Exhibit 1, Part B, p 155.

¹³⁷ *Lee v Crime and Corruption Commission* [2014] QCATA 326, [63].

- [137] Again, the available evidence is drawn from ALB's various statements. She told Senior Constable Boswell in February 2012 that during December and January, Officer JGB punched two holes in the wall, one in the hallway and one in the bedroom.¹³⁸ In her affidavit of July 2012, she alleges that in early 2011, Officer JGB intentionally punched holes in the wall of their bedroom, and in approximately mid-July 2011, put his fist through a hallway wall.¹³⁹
- [138] In cross-examination at the domestic violence hearing, she confirmed that she said there were two incidents when Officer JGB punched holes in the wall, *'One in the bedroom and one in the hallway. The one in the bedroom did not go through the plaster, maybe because it hit a stud or something, I have no idea. I'm not a builder.'*¹⁴⁰
- [139] She also told the Investigating Officer in her October 2012 interview, that:¹⁴¹
- Well there's been times that he's punched like cause I had my head um no he would just be so angry we'd be at the bedroom door cranky and then he would just like so this is our bedroom door here and there's a wall there and our bed faces there and he would face me and he would be saying whatever you just get me so angry and then he'd punch the wall.
- [140] FS, a friend of ALB, told the Investigating Officer that ALB told her about an incident when Officer JGB came home and punched the wall, following which ALB called the police. That said, ALB does not herself suggest that she called the police following these alleged events (although ALB does refer to an incident on 15 February 2012, following which she called the police as discussed later).
- [141] Accordingly, either FS is mistaken about the year in which ALB told her about the incident, or ALB told her something different from what she reported about the 2011 events in her various versions of events which are in evidence. FS' subsequent comments in her interview with the Investigating Officer suggest she believed from what she was told by ALB there were two separate incidents of Officer JGB punching walls and ALB calling the police. However, the other evidence does not suggest that the police were called in 2011.
- [142] If the photographs taken by the police when they were called on 15 February 2012 are said to depict holes caused by Officer JGB on 14-15 February 2012, and at earlier times, that is not apparent (see discussion of matter 1(a) dot point 8).
- [143] Once again, I am left with inconsistent versions of ALB's account of the events alleged. Here, there are also either apparently inconsistent contemporaneous accounts of events as relayed by ALB to FS, or, alternatively, FS' memory of what she was told is poor.

¹³⁸ Exhibit 1, Part B, p 198.

¹³⁹ Exhibit 1, Part A, p 73

¹⁴⁰ Exhibit 1, Part B, p 961, L28-32.

¹⁴¹ Exhibit 1, Part B, p 520.

[144] As discussed earlier, although I would not expect ALB's evidence to be identical on each occasion, a degree of consistency (over and above that '*he punched the wall*,') as to timeframe and events leading to and subsequent to the incident/s would tend to suggest reliability. None of the versions presented seem inherently more probable than any other. The inconsistencies suggest to me that ALB's evidence is unreliable. FS' evidence on this point does not assist to clarify.

[145] Again, I am not satisfied on the evidence that events occurred which meet the allegation in Dot Point 5.

[146] In case I am wrong, I address other submissions made about this point. Officer JGB's representative submits that, even if the allegation was accepted as established, such conduct does not amount to misconduct, because not all misbehaviour in an officer's private life will amount to misconduct for the PSA Act.¹⁴² The Queensland Court of Appeal has said:

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It may be accepted that not every act of dishonesty in a police officer's private life will constitute misconduct. The nature of the act and the circumstances in which it took place must be considered with a view to determining whether the conduct reveals such a lack of integrity or want of character as to substantially erode the trust and confidence that the officer's colleagues and/or members of the public are entitled to repose in him or her.

[147] He argues that the allegation does not allege that the damage was deliberate; caused in anger; or even, that it occurred in ALB's presence. Although the conduct may be wrongful, it could not be considered to engender a lack of trust in other officers or the public.

[148] The Deputy Commissioner points out, and I accept, that the prefacing words of matter 1(a) must be read with the dot point, such that the allegation is one of domestic violence by Officer JGB against ALB. However, as Officer JGB argues, that does not import some unspecified aggression towards ALB beyond the allegation made. The Tribunal is not at liberty to reformulate the charges or review the formulation of the charges.¹⁴⁴

[149] The charge is poorly framed. If the charge does not include an allegation that Officer JGB was aggressive towards ALB, I am not at liberty to impose the added allegation of aggressive behaviour towards her. Although it must be read under the preamble of domestic violence, that does not import an imputation that ALB was present or that Officer JGB's anger, if the allegation was established, was directed at her. Nevertheless, it concerns damage to the family home. If the events occurred, it would be reasonable to infer that such conduct is a show of power intended to intimidate or uncontrolled anger resulting in damage to the joint home,

¹⁴² *Deputy Commissioner Stewart v Dark* [2012] QCA 228.

¹⁴³ *Ibid*, [33] per Muir J.

¹⁴⁴ *Lee v Crime and Corruption Commission* [2014] QCATA 326, [63].

whether or not ALB was present, and accordingly, within the broad ambit of domestic violence.

- [150] If the allegation was established, it is an act of domestic violence. As discussed, police officers are responsible, among other things, to attend at domestic disputes, to bring DVPO applications before Magistrates, and in appropriate circumstances, to prefer charges against an offending party when a DVPO has been breached. Given these responsibilities, I would be satisfied that private acts of domestic violence committed by a police officer, demonstrates a want of character which would substantially erode the trust and confidence of other officers and the public. It demonstrates a lack of regard for the domestic violence laws for which police officers have a significant responsibility in administering.
- [151] Accordingly, if the allegation was established, I would be satisfied that the conduct is capable of being misconduct.

Dot Point 6: On one occasion between November 2010 and March 2011 at your home at [...] you threw a glass of water over [ALB] while she was lying in bed

- [152] Once again, Officer JGB's representative submits that even if the conduct was established, it is not capable of being misconduct because it does not indicate a lack of integrity or want of character. I disagree that it cannot be misconduct, if it is established as an act of domestic violence, although it may be at the lower end of the scale of physical violence. Further, if established, the event would not be considered in isolation, but in the context of all of the established particulars within matters 1(a). In the overall context, I would consider it capable of being characterised as misconduct for the reasons explained earlier relating to police responsibilities to uphold, make applications under for members of the public, and prosecute breaches of the Domestic Violence Act.
- [153] Again, there are a variety of statements made by ALB about the alleged event.
- [154] Her affidavit relied upon in the Magistrates Court did not refer to this alleged incident, unless it is the event referred to in paragraph 11, wherein she says he '*intentionally threw a full bottle of water*' at her and her youngest child.¹⁴⁵ In her oral evidence, under cross-examination, she said he had told her to go to bed and '*let him be*, but that didn't work, and he had, amongst other things '*thrown a cup of water*' at her.¹⁴⁶ She refers to this as part of what she describes as his allegedly intimidating, controlling, erratic behaviour.¹⁴⁷ She said this wasn't in her affidavit because she '*cannot explain every single incident*'.¹⁴⁸

¹⁴⁵ Exhibit 1, Part A, p71.

¹⁴⁶ Exhibit 1, Part B, p 961, L45-51.

¹⁴⁷ Exhibit 1, Part B, p 961, L53-60.

¹⁴⁸ Exhibit 1, Part B, p 962.

[155] In her interview with the Investigating Officer, she told him that:¹⁴⁹

So I just really would just ignore it just cop whatever was coming my way verbally whatever um you know he would just come along not this time but another he'd come along and just get a glass of water and throw water at me in bed just to get my reaction or whatever it may be.

[156] In her later chronology, she said that between November 2010 and March 2011, Officer JGB '*became aggressive on nights*' and she went into the bedroom and ignored him '*to diffuse any tension*', but he followed her and did various things, including throwing '*a glass of water at me whilst lying in bed ignoring him*.'¹⁵⁰

[157] Once again, although I would not expect multiple reports to be in precisely the same terms, there are concerning inconsistencies. It seems that the first mention of this alleged behaviour emerged during the Magistrates Court hearing. It was not referred to in her report as to the history of violence to Senior Constable Boswell in February 2012. It was not referred to in either of the DVPO applications. It was not referred to in the affidavit in July 2012, unless it was the events alleged in different terms in paragraph 11. In the Magistrates Court, it was reported that Officer JGB told her to go to bed as part of his allegedly controlling behaviour and the alleged event followed. Her report to the Investigating Officer does not suggest this same context. Then the written chronology prepared in December 2012, reports that she went to bed to diffuse the situation, and he followed her and then threw water.

[158] Some of the reported versions also tend to suggest that there were multiple incidents of water thrown by Officer JGB, but others, although vague, appear to refer to an incident. The allegation made is of one incident. Some versions refer to a glass of water and some to a cup of water. Her affidavit refers to throwing a full bottle of water.

[159] Whether ALB alleges one or multiple incidents, her evidence does not appear to be that there were many incidents of this nature when Officer JGB threw water at her while she was in bed. If there were many, it may be difficult to separate the memories of one event from others. Accordingly, it is once again troubling that the alleged incident was not initially reported at all and since its report in the Magistrates Court proceedings, it has been inconsistently reported. Indeed, the context in which the alleged event is said to have occurred has varied in each of the three available reports. I find ALB's inconsistent reports unreliable and her evidence lacking in credibility.

[160] I am not satisfied that ALB's evidence supports a finding that the event specified in matter 1(a), dot point 6 occurred.

[161] Dot point 6 is unsubstantiated.

¹⁴⁹ Exhibit 1, Part B, p 529.

¹⁵⁰ Exhibit 1, Part B, p 154.

Dot point 7: On one occasion in approximately October 2011 at your home at [...] you became angry and smashed a disco ball before knocking over the bar stool on which [ALB] was sitting causing her to fall to the ground

[162] Officer JGB concedes that he smashed the disco ball. Once again, he argues that the allegation, even if found substantiated, is not capable of constituting misconduct. For the reasons discussed earlier, if the action is accepted as an act of domestic violence, I would consider it would be misconduct.

[163] Officer JGB denies that he knocked over the barstool on which ALB was sitting causing it to fall to the ground. The Deputy Commissioner points out that the Magistrate specifically found that Officer JGB knocked over the bar stool on which ALB was sitting, causing her to fall to the ground.¹⁵¹ For the reasons explained above, I give no weight to this finding in determining whether the event occurred.

[164] In her July affidavit filed in the Magistrates Court, ALB said:

14. On 1 October 2011 while I was sitting on a kitchen barstool, the Respondent intentionally and forcefully kicked the stool from underneath me, resulting in me falling to the floor. This was in the presence of [SL].¹⁵²...

35. In approximately September 2011 the Respondent punched and threw an outdoor disco ball. He was intoxicated at the time and this was in the presence of [SL].¹⁵³

[165] She added little to those statements in cross-examination, but did not say anything inconsistent with her affidavit.¹⁵⁴

[166] She told Senior Constable Boswell that in September 2011, Officer JGB smashed her *'disco ball onto the ground, by punching the ball, then ripped it from the fan and smashed'* it.¹⁵⁵ However, she did not make an allegation that he kicked her chair away.

[167] I cannot find reference to the alleged incident/s in the transcript of her interview with the Investigating Officer (and the parties submissions do not refer me to it).

[168] In her chronology, she said:¹⁵⁶

That night [Officer JGB] went to bed but he apparently laid there listening to [SL] and I talking in the kitchen. When [SL] and I began to kiss he came out and smashed the disco ball, yelling. I was sitting on the kitchen bar stool at the time where he pushed/kicked the base of the chair and made me land on the floor...[SL] was there present. I asked him not to leave as I was worried of his behaviour. [SL] agreed and stayed until he calmed down.

¹⁵¹ Exhibit 1, Part B, p 432.

¹⁵² Exhibit 1, Part A, p 71, paragraph 14.

¹⁵³ Exhibit 1, Part A, p 173.

¹⁵⁴ Exhibit 1, Part B, pp. 950-952 and 962.

¹⁵⁵ Exhibit 1, Part B, p 198.

¹⁵⁶ Exhibit 1, Part B, p 156.

- [169] Unfortunately, once again, ALB gives inconsistent versions of events. She told Senior Constable Boswell only about the disco ball, and made no allegation about the barstool. In her July 2012 affidavit, she alleges two separate events, one (the disco ball incident) in September 2011 and one (kicking the stool away) on 1 October 2011. Her chronology then alleges that both events occurred at the one time. In the affidavit version, she says Officer JGB punched and smashed the disco ball. The version given to Senior Constable Boswell seems reasonably consistent in this regard. The chronology version is that he smashed it, 'yelling' and then kicked her stool from under her.
- [170] SL did not provide an affidavit in the Magistrates Court proceedings and nor was he interviewed in the disciplinary investigation.
- [171] Officer JGB admits to smashing the disco ball. He says, and ALB acknowledged in the Magistrates Court,¹⁵⁷ that he walked into the kitchen and found ALB and SL kissing. He says that he became upset and grabbed the disco ball and threw it outside where it smashed on the ground.¹⁵⁸ On his evidence, this was the end of the incident. He claims that he is regretful and wished he had better controlled his feelings. However, he accepts that the behaviour was not reasonable or acceptable.
- [172] On the basis of Officer JGB's admissions, I am satisfied that he grabbed the disco ball and threw it outside where it smashed on the ground. On the basis of ALB's inconsistent and uncorroborated evidence, I am not satisfied that Officer JGB knocked over a bar stool out from under her, causing ALB to fall to the ground. If it occurred, it would have represented a significant escalation between Officer JGB and ALB, I consider it inherently improbable that she would not consistently recall whether the events happened at the same time, if the allegations were true. Further, if they were true, I consider it inherently improbable that when interviewed by Senior Constable Boswell and the Investigating Officer, she would fail to recount the incident.
- [173] Although not physically directed at ALB, I am further satisfied that Officer JGB's actions in smashing the disco ball represent an act of domestic violence. It is reasonable to infer from Officer JGB's own description that his actions were a demonstration of uncontrolled physical anger and power. It is irrelevant that ALB was kissing SL. The actions amounted to domestic violence likely to cause significant fear and apprehension in ALB, as well as destruction of their property.
- [174] I am satisfied that the conduct of smashing the disco ball is substantiated. Further, as damage to property, it falls within the broad definition of domestic violence.

¹⁵⁷ Exhibit 1, Part B, p 962.

¹⁵⁸ Exhibit 1, Part A, p 28.

Dot point 8: On 14 February 2012 at your home at [...] you caused damage to the master bedroom door and a bedroom wall

[175] Officer JGB admits the conduct alleged.

[176] He says he became aware of private Facebook messages being exchanged between ALB and DC with whom she worked which he thought were suggestive of a sexual relationship between them.¹⁵⁹ He was drinking alcohol and continued to do so until ALB arrived home. There was then a heated argument between Officer JGB and ALB and he punched the bedroom door three times, causing holes in it. He further says that he does not recall punching the bedhead and bedroom wall but accepts that it occurred. Again, he says he acted out of hurt and anger.

[177] Senior Constable Boswell photographed the holes the next morning, when he attended at the home of Officer JGB.¹⁶⁰

[178] I am satisfied that the events occurred as alleged and were domestic violence.

[179] Officer JGB's representative again argues that it is not capable of being misconduct. I disagree for the reasons previously explained concerning police responsibilities for the administration of the Domestic Violence Act.

Dot point 9: On 15 February 2012 at your home at [...] you threw orange juice on [ALB]

[180] Officer JGB says that following the events of 14 February 2012, he and ALB continued to argue about the matters from the previous night. He had a glass of orange juice which he was consuming. He was 'animated' and he says he spilt the juice on ALB.¹⁶¹

[181] ALB has given several versions of events. She told Senior Constable Boswell that:¹⁶²

...[Officer JGB] came into the lounge room and threw orange juice over me also covering the kids. [Officer JGB] then threw the cup down the hallway.

[182] She did not directly refer to the event in her July 2012 affidavit (although her February DVPO application prepared by police which did refer to it was attached), nor her chronology. However, when interviewed by the Investigating Officer, she said that Officer JGB '*threw the cup and juice at us.*'¹⁶³

[183] The Deputy Commissioner submits that this does not represent a change or inconsistency in her evidence, and points to Magistrate White's finding

¹⁵⁹ Exhibit 1, Part A, p 29.

¹⁶⁰ Exhibit 1, Part B, pp.172-173, see also generally, pp 172- 210.

¹⁶¹ Exhibit 1, Part A, p 30.

¹⁶² Exhibit 1, Part B, p 202.

¹⁶³ Exhibit 1, Part B, p 530.

that it occurred.¹⁶⁴ Of course, the Magistrate did not have the multiple versions of events in evidence from ALB, as I do. I must form my own conclusions.

- [184] The evidence of both Officer JGB and ALB is that ALB had orange juice deposited on her. On this occasion, ALB's evidence is inconsistent in that in her earlier version, Officer JGB threw the cup down the hallway, whereas in the disciplinary interview she says he threw it at her and the children.
- [185] There is no doubt that even on Officer JGB's version of events that he was extremely upset. It is possible that in a highly animated state he spilt the juice while gesticulating as he spoke. It is also possible that because he was extremely upset and animated that he threw it. If he also threw the cup, then it is inherently unlikely that he spilt the juice. He says it was a glass of juice. ALB says it was a cup, and variously, that was thrown down the hallway or at her.
- [186] Although the disciplinary allegation does not include the throwing of the cup, in determining whether ALB's evidence should be relied upon as establishing the facts of what occurred, it is useful to consider this inconsistency. I do not consider it a trivial or inconsequential detail in determining credit. Throwing a cup at a person is potentially likely to cause physical injury. She spoke with Senior Constable Boswell shortly after the events and he recorded them in his notebook as she relayed them at that time. I am inclined to the view that the contemporaneous version she gave to Senior Constable Boswell is more likely to reflect whether the cup was thrown at her. She did not report to him that it was (although she said it was thrown down the hallway). Accordingly, I would not be satisfied that the cup was thrown at her and/or the children. That would mean that consistent with Officer JGB's evidence, he did not throw a cup at her.
- [187] It is reasonable to infer that both parties were in a highly charged, excitable state. Their marriage had been under stress and these events culminated in their final separation. Even if Officer JGB spilt the orange juice, ALB may have perceived what occurred as Officer JGB throwing the juice. I am not persuaded on the evidence before me that ALB's version of events is more reliable than Officer JGB's version. Indeed, I have found her evidence generally to contain inconsistencies and to be unreliable. I am not satisfied that the event alleged occurred.
- [188] Dot point 9 is not substantiated.

Dot point 10: On 15 February 2012 at your home at [...] you referred to [ALB] as a "slut" to your children

- [189] Officer JGB concedes that he may have called ALB a slut, but denies that this occurred in front of the children.¹⁶⁵ ALB told Senior Constable Boswell

¹⁶⁴ Exhibit 1, Part B, p 432.

¹⁶⁵ Exhibit 1, Part A, pp. 17-18.

on 15 February that he told the children 'You're (sic) mum is a slut guts' and then called her a 'slut'.¹⁶⁶

[190] It is common ground that the alleged events occurred early in the morning when the children were in the house. Officer JGB acknowledges that the argument from the previous evening continued and that he was an animated participant during the argument. It is reasonable to infer that his voice was raised and that the words exchanged between him and ALB were, from all accounts, very heated.

[191] Accordingly, whether or not Officer JGB directly told the children that ALB was a 'slut', it is inherently probable that they heard what he said; that he knew the children would hear; and that it is reasonable to infer that that they heard him refer to her in this manner. I am satisfied on the evidence that he did refer to her as a slut and that the children heard it. I am satisfied that this amounts to referring to ALB as a slut to the children. I am satisfied that it is an act of referring to ALB in a derogatory manner, which falls within the broad ambit of domestic violence, exposing the children to domestic violence.

[192] Once again, Officer JGB's representatives submit that the allegation cannot amount to misconduct. I disagree, for the reasons earlier explained: the allegation must be viewed with the other allegations under 1(a), which are substantiated. When considered in this context, it is an act of domestic violence (albeit, that it may be of a lesser individual seriousness than some other acts which are established and accepted by me as constituting acts of domestic violence).

[193] The allegation is substantiated.

Dot point 11: On 15 February 2012 at your home at [...] you put your arm around [ALB]'s neck, lifted her up off the ground and then pushed her down onto the floor and placed pressure on her chest with one foot, while wearing shoes

[194] Officer JGB denies putting his arm around ALB's neck and lifting her off the ground. That said, he admits that he '*grabbed her and placed her onto the ground*' and '*placed one of (his) feet on her chest to try and calm her down*'.¹⁶⁷ He says that after he spilt the orange juice, she was calling him names, was extremely aggressive and was '*starting to get out of control*'.¹⁶⁸ In his disciplinary interview, he describes ALB as:¹⁶⁹

basically charging at me...I remember grabbing her by one arm and I remember I dragged her onto the ground um put her on her back on the ground and I remember I held her down with my foot... and I said calm down this is ridiculous...as soon as you calm down I'm leaving

¹⁶⁶ Exhibit 1, Part B, p 201

¹⁶⁷ Exhibit 1, Part A, p 31

¹⁶⁸ Exhibit 1, Part A, p 31.

¹⁶⁹ Exhibit 1, Part B, pp. 780-781.

[195] In his affidavit of 21 March 2012, Officer JGB said:¹⁷⁰

...[ALB] approached me very aggressively.... Yelling at me to get out of the house. I grabbed [ALB] by, from my recollection, her left hand and dragged her onto the ground and laid her on her back, I then put my foot on her chest to hold her on the ground and repeatedly told her to calm down I'll leave the house.

[196] He says he did this to create distance between them so that he could leave the house.

[197] ALB told Senior Constable Boswell that he wrapped his arms around her neck and picked her up off the ground causing her to struggle for breath.¹⁷¹ She did not mention it directly in her July 2012 affidavit (as noted before, it was referred to in the attached earlier DVPO application). When she was interviewed by the Investigating Officer in the disciplinary process, she said she could not recall how she came to be on the ground.¹⁷²

[198] When she spoke with the Investigating Officer, ALB said:

[Officer JGB] came and said where are the numbers...and I've said I got rid of them and that's when I cannot recall how but next I know I'm on the ground with his foot on me ...¹⁷³

....[Officer JGB] came back and walked in the other entrance...just walked in grabbed my arm reached trying to grab my phone because he's thoughtSo um he's done like a police move on me I'm assuming, he's tried to bring force for me to let go of the phone...¹⁷⁴

[199] The Deputy Commissioner submits that Officer JGB's version is inherently improbable, because he gave no evidence that ALB attempted to hit or assault him. That is not so. He says that she charged at him and approached him very aggressively. His evidence was consistent in this regard.

[200] Against that, the Deputy Commissioner says that ALB's consistent evidence is that Officer JGB came back into the house wanting three telephone numbers on a piece of paper. Further, he says she made the complaint contemporaneously to Senior Constable Boswell, and told three other persons, FS,¹⁷⁵ SR,¹⁷⁶ and CT,¹⁷⁷ of the incident. FS reports seeing some bruising (although '*not really really bad bruises*') on ALB's neck shortly after the 15th of February.¹⁷⁸ However, FS reports being told by ALB of separate events during which she said Officer JGB '*put her up against the wall*' by her neck and another separate occasion when he

¹⁷⁰ Exhibit 1, Part B, p 406.

¹⁷¹ Exhibit 1, Part B, pp. 202-203.

¹⁷² Exhibit 1, Part B, p 531.

¹⁷³ Exhibit 1, Part B, p 531.

¹⁷⁴ Exhibit 1, Part B, p 532.

¹⁷⁵ Exhibit 1, Part B, pp. 598-599.

¹⁷⁶ Exhibit 1, Part B, p 589.

¹⁷⁷ Exhibit 1, Part B, p 619.

¹⁷⁸ Exhibit 1, Part B, p 599.

'stepped on her chest.'¹⁷⁹ SR also reports being told by ALB that on one occasion he 'stomped on her chest' and she had to have her breast implants X-rayed.¹⁸⁰ Magistrate White accepted that the events occurred as ALB describes.¹⁸¹ However, again, I must form my own conclusions based on the totality of the evidence before me.

- [201] As I have found in relation to the allegation in dot point 9, both parties were in a highly charged state. ALB does not disclose any actions on her part in the alleged events, other than disposing of the phone numbers. Officer JGB says she charged at him. She may or may not have been a passive participant as events unfolded between them. Whether she was or was not may indicate the inherent probability that events occurred as alleged by either ALB or Officer JGB. There is a contemporaneous report by ALB to Senior Constable Boswell of being grabbed by the neck.
- [202] That said, other than FS, who is a close friend of ALB whose evidence has not been tested, no-one deposes to seeing markings or injuries on ALB which would be consistent with being grabbed by the neck. If Officer JGB had lifted ALB by the neck off the ground, a significant degree of force would have been exerted on her neck. Bruising would take some time to come out, but some markings and redness would reasonably be expected to be present on ALB's neck following the event. There is no evidence of this from any of the police officers who attended that morning, or anyone else. Senior Constable Oliphant who attended the home that morning said he did not observe any injuries.¹⁸² Senior Constable Boswell does not record any markings or injuries in his notebook or his statement.¹⁸³
- [203] Once again, the evidence is far from satisfactory about the very serious allegations of Officer JGB lifting ALB by her neck. However, on ALB's report to the Investigating Officer, there was a scuffle over the telephone numbers and then Officer JGB executed a manoeuvre as a result of which she found herself on the ground. Officer JGB speaks of *placing* her on the ground. Both of these versions involve Officer JGB grabbing one of ALB's arms, she says because Officer JGB was trying to get the phone she was holding. Officer JGB does not mention the telephone. However, there is reasonable consistency between these versions. I am satisfied based on Officer JGB's evidence, that this is how the event occurred.
- [204] That being so, I am satisfied that Officer JGB did execute, what sounds like, a (police style) take-down manoeuvre resulting in ALB lying on the floor. Officer JGB then admits placing his foot on her chest. However, on the basis of ALB's inconsistent evidence, I am not satisfied that Officer JGB lifted ALB up off the ground by her neck during this incident.
- [205] Officer JGB's explanation is that he tried to calm ALB. I do not accept that. If he sought only to calm her down and diffuse the situation, he could

¹⁷⁹ Exhibit 1, Part B, p 599.

¹⁸⁰ Exhibit 1, Part B, p 589.

¹⁸¹ Exhibit 1, Part B, p 432.

¹⁸² Exhibit 1, Part B, p 208.

¹⁸³ Exhibit 1, Part B, pp. 194-204 and 109-193.

simply have left. He need not have stood over her with his foot on her chest. It is reasonable to infer that ALB was surprised by the take-down. She was at a disadvantage. After executing the move, he had the opportunity to leave the house if he chose: she was on the floor and he was standing. This makes it inherently more probable, and reasonable, to infer that those actions of standing over her with a foot on her chest, (as well as, the take-down manoeuvre itself) were calculated by Officer JGB to exert power over and intimidate, not simply intended to calm, ALB.

[206] I am satisfied that the actions of Officer JGB as found by me constitute an act of domestic violence.

Dot point 12: On 15 February 2012, following your departure, Senior Constables Boswell, Batten, Oliphant and Everding attended at the address whereby Senior Constable Boswell then completed an application for a domestic violence protection order nominating [ALB] as the aggrieved spouse and you as the respondent spouse.

[207] The facts of this allegation are admitted by Officer JGB. However, the allegation does not of itself allege further conduct of Officer JGB.

[208] It does not disclose a separate act of conduct capable of constituting misconduct or a breach of discipline.

Conclusions about Matter 1(a)

[209] In summary, I have found a number of the alleged particulars substantiated in whole or in part and that they are acts of domestic violence.

[210] For the reasons explained concerning the role of police officers in the administration of the Domestic Violence Act, I am satisfied that these acts demonstrate a lack of integrity and want of character that would substantially erode the trust and confidence of colleagues and members of the public. Therefore, I am satisfied that they are collectively misconduct.

3.2 Matter One (d) that Officer JGB failed to treat ALB, Constable Murat Oztan and Constable Darko Radovanovic with respect and dignity

[211] Further and better particulars were provided as follows:

- On 8 May 2012 you and your spouse separately called for police to attend at [...], the home in which only [ALB] was now residing;
- On the arrival of Constable Murat Oztan and Constable Darko Radovanovic you informed them that you were a police officer, told them about your marital separation and that *“(t)hrough it all but she’s just being a cunt mate and she’s just fucking, just a fucking lying cunt and she’ll say and do whatever she can to fucking manipulate people”* in relation to [ALB];
- You stated to the two officers that you were only there to collect property which was mainly paperwork;

- While looking at documents stated in an intimidating manner to [ALB] in the presence of two officer, “*Now that I’m here I might just move back in [ALB]. You’ve got no right to kick me out*”... “*Maybe just put it all back in the file there ‘cause we both live here now*”;
- While in the house grabbed paperwork out of [ALB]’s hand and slammed it onto the table, frightening [ALB] and causing Constable Murat Oztan to physically move you away from her;
- Used your physical size, height and body language in a way that was indicative of “*shaping up*” to Constable Murat Oztan causing both officers to anticipate a physical outburst from you;
- Were warned by Constable Murat Oztan that you may be handcuffed if you did not calm down; and
- Stated, “*Mate that, that psycho bitch right*” to Constable Murat Oztan and Constable Darko Radvanovic [sic] in the presence of [ALB].

[212] The facts of this allegation are admitted by Officer JGB. Accordingly, I do not intend to traverse the material which supports finding that the alleged events occurred, but observe that there is evidence to support the finding that the events occurred.

[213] However, he submits that the acts are not capable of constituting misconduct. In essence, he submits that he himself called the police. He was, at the time, off-duty and acting in a private capacity. There were heightened tensions between him and ALB because of ongoing conflict between them. Further, he says, as observed by the attending officers, he was suffering emotionally.

[214] He submits that these factors explain, without excusing, the lack of respect and dignity he displayed. As a consequence, he says that this private behaviour does not establish the lack of integrity or want of character required to substantially erode the trust and confidence of colleagues and the public and cannot establish misconduct. In the alternative, he says that his rudeness and attitude or demeanour is a breach of discipline rather than misconduct relying upon *Garth v Queensland Police Service*.¹⁸⁴

[215] The Deputy Commissioner argues that reliance on *Garth* is misplaced. The conduct concerned in that case there did not relate to rudeness or attitude. The relevant discussion in the decision referred to the contents of an Ethical Standards Command training manual and does not, in any event, constitute endorsement of them.¹⁸⁵

[216] Further, the Deputy Commissioner submits that the circumstances of Officer JGB’s attendance at the home on that day are relevant. However, as Officer JGB argues, the submissions and circumstances relied upon by the Deputy Commissioner in the hearing before me go well beyond the charge alleged against him. I am constrained by the disciplinary charge as framed. Further, the Deputy Commissioner submits that Officer JGB’s

¹⁸⁴ [2012] QCAT 261.

¹⁸⁵ *Ibid*, [27]-[31].

emotional distress does not exempt the conduct from establishing misconduct.

[217] In *Deputy Commissioner Stewart v Dark*,¹⁸⁶ Justice Muir on the Queensland Court of Appeal said:¹⁸⁷

The fact that the conduct occurred when the respondent was suffering from stress may engender some understanding of his conduct and sympathy for him, but it does not bear strongly on the conclusions capable of being drawn about his character and integrity. The great majority of people behave with propriety and integrity in the absence of stress, adversity or temptation. However, it is often when a person is tested by such conditions and circumstances that his or her character is fully revealed. Police officers are commonly placed in situations of considerable stress and may also be subjected to strong temptation from time to time. The expectation of the QPS and the public is that officers will resist any such temptation and will continue to behave with due propriety regardless of stress.

[218] The alleged acts if done in an official capacity by a police officer would clearly constitute misconduct. However, Officer JGB was not acting in his capacity as a police officer at the time of the alleged events. Does his off-duty failure to treat ALB, and Constables Oztan and Radovanovic with respect and dignity during the events establish misconduct or breach of discipline?

[219] The allegation is admitted and the particulars include Officer JGB speaking in an intimidating manner to ALB. Further, Officer JGB's admission includes an admission that he told the other officers that he was a police officer, then as a private citizen, he used his physical size, height and body language in a way indicative of shaping up to the police officers. Constable Murat physically moved ALB away from him, and warned him that he may be handcuffed if he did not calm down.

[220] In front of other officers, he acted in a way that was frightening for his estranged wife. He admits that this was a failure to accord ALB respect and dignity. Further, Officer JGB shaped up to other officers.

[221] Notwithstanding that this was private conduct by an off-duty officer, and notwithstanding that Officer JGB was emotional around the time as a result of conflict following the separation from ALB, I am satisfied that it establishes misconduct. This is not behaviour which the public expects or would consider acceptable from an officer, no matter how upset he may be. I am satisfied that it establishes a want of character which erodes the trust and confidence in colleagues and members of the public.

[222] Matter 1(d) is substantiated. I am satisfied that it is misconduct.

¹⁸⁶ [2012] QCA 228, per Muir J with whom Gotterson JA at [51] and Mullins J at [52] agreed.

¹⁸⁷ *Ibid*, [35].

3.3 Matter One (e) Officer JGB failed to demonstrate appropriate dignity and respect to the Court, Magistrates and persons at Beenleigh Magistrates Court

[223] Further and better particulars were provided as follows:

- On 30 May 2012 you attended a courtroom in the Beenleigh Magistrates Court regarding a mention for an private application for a domestic violence protection order made by [ALB], nominating you as the respondent spouse;
- You were seated at the bar table at this time with your solicitor Mr Matt Maloy and Barrister at law, Mr Andrew Christie, representing the aggrieved spouse, was also present at the bar table;
- When presiding Magistrate Erich upheld the existing Temporary Domestic Violence Protection Order you used obscene language namely "*That's fucking bullshit*" which was heard by Mr Andrew Christie and [AM], who was present to support [ALB]; and
- When Magistrate Erich disagreed with you regarding [AM]'s apparent suitability to facilitate you seeing your three children you replied, "*Yes but everyone looks good in court don't they*" which was heard by Mr Andrew Christie and [AM].

[224] Officer JGB admits saying as alleged in dot point 4, saying '*Yes but everyone looks good in court don't they*'. He denies saying as alleged in dot point 3, '*That's fucking bullshit*.'

[225] In relation to dot point 3, the transcript does not record Officer JGB saying the words alleged.¹⁸⁸ Mr Christie, Counsel appearing for ALB, and AM in emails¹⁸⁹ each say they heard Officer JGB say words to the effect alleged, although in AM's email she records the words as '*This is fucking bullshit*.'. They have not provided sworn statements to that effect. Nor have their assertions been tested. However, there is a consistency in their emails about what they heard.

[226] Officer JGB denies it. However, it is reasonable to infer that, if he said the words, it was more likely than not an off-hand comment of little consequence to him, and so there would be no particular reason that he would recall it significantly after the event when it was raised in the disciplinary process. On balance, I accept the event occurred as alleged in dot point 3, heard by Mr Christie and AM.

[227] However, I do not accept that it establishes a failure to demonstrate appropriate dignity and respect to the Court, the Magistrate and persons at the Beenleigh Court. It is not recorded on the transcript. It is reasonable to infer that the comment was made *sotto voce* by Officer JGB, either to himself or his lawyer. If the Magistrate had heard it, it is reasonable to infer that he or she would have warned Officer JGB about his language. Mr Christie and AM were closer, seated at the bar table, next to Officer JGB and his lawyer. But even the sensitive court recording equipment did not

¹⁸⁸ Exhibit 1, Part B, pp. 444-454.

¹⁸⁹ Exhibit 1, Part B, p 427 (Christie) and p 443 (AM).

pick it up. The evidence does not establish that the comment was directed towards the court. I am not satisfied on the evidence that Officer JGB failed to accord dignity and respect to the Court.

- [228] In relation to dot point 4, although Officer JGB admits saying the words, he denies that it demonstrated a failure to accord dignity and respect as alleged. When the Court indicated an intention to involve ALB's sister, he first said to the Magistrate, *'I don't want her sister involved in the matter.'*¹⁹⁰ The Magistrate responded that someone had to be involved to facilitate, suggesting that it would get things started so that he could see his children and commenting that ALB's sister looked like she was responsible. Officer JGB says he then made the comment alleged (although, I observe that, the transcript did not record it either). This is supported by the Magistrate's next words when he or she said, *'Well, we hope she's all right. I think you've got to put up with a few things.'*¹⁹¹
- [229] The transcript does not suggest, from the Magistrate's response, that the Magistrate found the comments disrespectful or otherwise inappropriate.
- [230] The Deputy Commissioner submits that Officer JGB did not show appropriate respect in making the 'unsolicited comment' about ALB's sister.¹⁹² I do not agree. There is nothing unusual or disrespectful about a party to highly conflictual separation expressing a view in proceedings about a proposed facilitator of contact who is related to the other party. It might perhaps have been usual for Officer JGB's lawyer to have made the submission on his behalf. However, as I have said, the Magistrate's responses do not suggest any concerns about Officer JGB addressing the issue directly.
- [231] In summary, I accept the events occurred. The course of events was certainly not optimal: police officers hold the front line in upholding the law and must be respectful of the courts. Of course, it is inappropriate for an officer to swear as Officer JGB did, whether attending in a personal or official capacity, and even swearing *sotto voce* is undoubtedly regrettable. But, it has not been established that it was directed at the Court. As a police officer, Officer JGB should, perhaps, have known that the usual protocols would require that he direct his comments about ALB's sister through his lawyer to the Court. However, in context, the Magistrate did not find Officer JGB's comments in dot point 4 disrespectful.
- [232] I am not satisfied that the events establish that Officer JGB failed to demonstrate appropriate dignity and respect to the Court, the Magistrate, and persons at the Beenleigh Court.
- [233] Matter 1(e) is unsubstantiated.

¹⁹⁰ Exhibit 1, Part B, p 453.

¹⁹¹ Exhibit 1, Part B, p 453.

¹⁹² Submissions of Deputy Commissioner filed on 7 March 2016 at paragraph 372.

3.4 Matter One (f) Officer JGB conducted unauthorised investigations regarding application for domestic violence protection order.

[234] Further and better particulars were provided as follows:

- Your new partner [AK] filed an application for a domestic violence protection order nominating her ex-husband [SE] as the respondent spouse;
- You were a witness in this matter and completed an affidavit;
- You read an affidavit in relation to this application provided by [BN], [SE]'s new partner;
- Uninvited and unannounced you attended [...] the home address of [EH], who knew [BN];
- You recorded the conversation with [EH] using a digital recorder;
- You identified yourself as a police officer in the conversation; and
- The way in which you conducted these enquiries with [EH] made her feel uncomfortable.

[235] Officer JGB admits that the events set out in the dot points occurred. However, he denies that in doing these things he conducted unauthorised investigations regarding a domestic violence protection order.

[236] His evidence is that at the time he spoke with EH, he lived in the same street. He was wearing a singlet and thongs. He began the conversation by saying he lived in the street. He did not introduce himself as a police officer, although he did tell her later in the conversation that he was a police officer. When EH asked him why his questions were relevant, he said that he said: '*...we're just having some personal issues with...*' the person the subject of his questions.¹⁹³ Officer JGB recorded the conversation, although he did not tell EH he was recording it.

[237] Officer JGB says he spoke with EH to assist his partner, AK, with her private DVPO application. EH was interviewed for the disciplinary investigation. She understood that the discussion related to a domestic issue.¹⁹⁴ However, she wondered if she was dealing with a crazy person¹⁹⁵ and wondered why the information he sought was relevant.¹⁹⁶

[238] The Deputy Commissioner says that having regard to the totality of the evidence, Officer JGB was conducting an investigation using QPS equipment and techniques (using his knowledge as a police officer), in circumstances that he was unauthorised to do so. The recording was transcribed by the QPS.¹⁹⁷ Officer JGB intended to attach the recording to an affidavit for filing in support of AK's application.¹⁹⁸

¹⁹³ Exhibit 1, Part B, p 559.

¹⁹⁴ Exhibit 1, Part B, p 572.

¹⁹⁵ Exhibit 1, Part B, p 571.

¹⁹⁶ Exhibit 1, Part B, p 559.

¹⁹⁷ Exhibit 1, Part B, pp. 558-560.

¹⁹⁸ Exhibit 1, Part B, p 829.

- [239] Officer JGB says the allegation implies that he conducted the interview in his capacity as a police officer, when he was not authorised to do so. The Deputy Commissioner submits that the manner and process of conducting the interview which is important.
- [240] This allegation is that Officer JGB conducted unauthorised investigations regarding a DVPO application. As a matter of construction of the disciplinary charge, it is clearly the '*investigations*' which are alleged to have been unauthorised. It seems to me that the investigations must be the interviewing of EH by Officer JGB. The essence of the charge must, by implication, be that Officer JGB conducted an official but unauthorised police investigation.
- [241] Does, as the Deputy Commissioner seems to argue, the recording of the interview on police equipment and the transcription of the recording, form part of the investigation or transform a private enquiry into a police investigation? Although these are steps that may routinely be done when a matter is being investigated by police, it seems to me that they are not the investigation.
- [242] Officer JGB disclosed that he was a police officer midway through the discussion with EH. Can this fact support a finding that he was conducting investigations? He had clearly told her that he was making a private enquiry. That said, it is clear from reading the transcript that he told her that he was a police officer after she asked why the enquiries he made were relevant. He said again that he just lived up the street and wanted to prove or disprove some allegations the person the subject of his enquiry had made, in proceedings that 'we're' going through personally. EH was interviewed. She was under no illusion that he was asking the questions for domestic reasons.¹⁹⁹
- [243] Whereas Officer JGB may arguably have improperly used police resources to make and obtain a record of a private enquiry, he is not charged with that.
- [244] I am not satisfied that he conducted or purported to conduct an unauthorised but official police investigation.
- [245] I find that the charge in matter 1(f) is unsubstantiated.

3.5 Matter One (g) Officer JGB inappropriately involved himself in communications with persons including his aggrieved spouse, ALB, prior to the withdrawal of the police initiated application for domestic violence protection order, in which he was the nominated respondent spouse

[246] Further and better particulars were provided as follows:

- [Dot point 1] On 17 February 2012 you spoke with [CT] about her asking [ALB] to discontinue the application for a domestic violence protection

¹⁹⁹ Exhibit 1, Part B, p 574.

order initiated on 15 February 2012 by Senior Constable Boswell in which [ALB] was nominated as the aggrieved spouse and you the respondent spouse;

- [Dot point 2] On 18 February 2012 you argued with [ALB] about the affect a domestic violence protection order would have on your employment;
- [Dot point 3] On 7 March 2012 you attended [...] to fix a damaged door and discuss with [ALB] her completing an affidavit in relation to the application for a domestic violence protection order initiated on 15 February 2012 by Senior Constable Boswell in which [ALB] was nominated as the aggrieved spouse and you the respondent spouse;
- [Dot point 4] you [sic] stated to [ALB] that you had commenced the affidavit on her behalf on the computer;
- [Dot point 5] [ALB] stated to you she would not lie in any affidavit; and
- [Dot point 6] you [sic] stopped what you were doing, advised [ALB] to contact your solicitor and later texted his name and contact phone number to her.

[247] Dot point 1 alleges that Officer JGB spoke with CT, a friend of ALB, asking her to ask ALB to discontinue the domestic violence application. He denies this occurred.

[248] In her interview with the Investigating Officer, CT said that Officer JGB walked into the kitchen and said to her:

you've got to get [ALB] to drop the IVO because it wrecks..... it's going to wreck my job and carrying on about his job how (sic) he can't um his going to lose money...'200

...he kept carrying on about the money and loosing (sic) 25% wage...'201

[249] ALB said in her interview with the Investigating Officer that while CT was staying at the house, she told ALB that Officer JGB's mother came around and suggested to CT that she needed to speak with ALB about dropping the allegations because otherwise he would lose his job and or pay and they wouldn't be able to keep the house.²⁰² She then added that '*...then like [Officer JGB] would come around and on the Saturday mention it to [CT].*'²⁰³

[250] Officer JGB submits that CT is not independent, as she is a close friend of ALB. The Deputy Commissioner says ALB corroborates that CT told her (relying on the final quote in the preceding paragraph) that Officer JGB had spoken with CT about discontinuing the application. Further, he submits that the operational shift allowance was at that time approximately 21%.²⁰⁴ He suggests that CT evidence that Officer JGB said he would lose

²⁰⁰ Exhibit 1, Part B, pp. 620-621.

²⁰¹ Exhibit 1, Part B, p 621.

²⁰² Exhibit 1, Part B, p 553.

²⁰³ Ibid.

²⁰⁴ Queensland Police Service-Determination 2010 (CA/2010/12) Determination – <http://qirc.qld.gov.au>, Schedule 1, clause 3.3(13).

25% of his wage adds weight to her evidence, as the reality and the alleged statement are consistent with CT truthfulness and accuracy in relating the events.

[251] CT is a friend of ALB. However, knowledge of the rough percentage was gained from a source. I accept that it was from Officer JGB, during a conversation between them. Although it is the case that Officer JGB's mother (as opposed to Officer JGB himself) could have mentioned the figure of 25%, there is no evidence to suggest that his mother spoke of a percentage. In light of the specific mention by CT of the reduction in wage of 25%, which is close to the reality, I am satisfied to the requisite standard by her evidence on this point.

[252] Dot point 1 is substantiated.

[253] Dot point 2 is admitted by Officer JGB.

[254] The Deputy Commissioner relies upon evidence of CT²⁰⁵ to submit that the argument occurred at the home, and that Officer JGB was present in person. That is not the charge as framed.

[255] Dot points 3-6 are denied by Officer JGB.

[256] ALB told the Investigating Officer that she rang Officer JGB and told him that the police had issued her with court paperwork. She says he told her that he was at the home fixing the door when she rang and asked her when they could talk about doing the affidavit and that he'd start it for her.²⁰⁶ She says she responded:²⁰⁷

...I said well im not lying about it but I'll be there... on my way I rung up Ian Frame and I said...I've just spoken to [Officer JGB] he wants me to do the affidavit but im not lying on an affidavit... and he goes no don't lie on an affidavit...

[257] She says that after she arrived home:

[Officer JGB]'s said ok do you want to start this, I've started this affidavit do you wanna read what I've started, I said yeahas I was saying im not going to lie on it [Officer JGB] and that's when he's gone well we're just fucked then...

... he's at the computer ...And I said its going to be fine don't worry about it and that's when he goes you know what don't even talk to me I will send his um sms number to you his solicitor you can speak to him... I want nothing don't even correspond with me unless it's something to do with the kids...²⁰⁸

²⁰⁵ Exhibit 1, Part B, p 622.

²⁰⁶ Exhibit 1, Part B, p 537.

²⁰⁷ Exhibit 1, Part B, p 537.

²⁰⁸ Exhibit 1, Part B, pp. 537-538.

[258] The Deputy Commissioner refers to this as clear and cogent evidence that the matters specified in these dot points occurred. Further, he relies upon the evidence of ALB in the Magistrates Court about the events.²⁰⁹

[259] Officer JGB submits that if he had typed a draft affidavit on her computer, a copy of the document should be available, but no such document is in evidence. Also, ALB does not complain about this event in her complaint to the QPS dated 15 August 2012.²¹⁰ In the complaint, she says only that it was withdrawn because Officer JGB advised her it would be detrimental to his career. It contains no complaint that he attempted to either prepare an affidavit or pressure her to withdraw the application.

[260] Further, Inspector Ian Frame attended her home soon after 15 February 2012. He says that when he spoke with her, ALB:²¹¹

...indicated that ah she didn't really want to proceed with the domestic violence order and that she'd rather try and come to some sort of amicable working relationship between the 2 of themshe was still um had deep feelings for [Officer JGB] and that she wanted to try to make their marriage work for the sake of the children...

[261] Inspector Frame further recalled a couple of subsequent telephone calls with ALB, including in March as follows:²¹²

I remember one particular phone call made about um [Officer JGB] had hired a solicitor Matt Malloy.... Who used to be an ex police officer um and that they wanted her to sign an affidavit for which she didn't feel comfortable with because there were certain untruths in that and I gave her advice that she shouldn't sign any document that um contained any lies....

[262] It is not controversial that on 7 March 2012, Officer JGB did send ALB a text message giving her Mr Maloy's contact details.²¹³ Mr Maloy did then draft an affidavit for her.²¹⁴ She did, in responding to him, say that she wanted a line removed because she alleged it was untrue, also adding '*I do wish to drop and help to drop this DVO action.*'²¹⁵

[263] ALB's report to the Investigating Officer refers specifically to her phone call with Inspector Frame about Officer JGB wanting her to do an affidavit but that she was not prepared to lie in it. Mr Frame confirms that discussion took place about the affidavit Mr Matt Maloy had drafted, not an affidavit Officer JGB was drafting or had drafted. On her version of events, ALB says that when she phoned Inspector Frame, she had not seen a draft affidavit or any proposed content, as none had been prepared. Mr Frame's report relates a phone call after she had seen a draft, in relation to some contents, which she did not consider true. His recollection suggests that she spoke to him about the draft affidavit prepared by Mr Maloy. Based on

²⁰⁹ Exhibit 1, Part B, p 953.

²¹⁰ Exhibit 1, Part B, p 458.

²¹¹ Exhibit 1, Part B, p 672.

²¹² Exhibit 1, Part B, p 672.

²¹³ Exhibit 1, Part B, p 392.

²¹⁴ Exhibit 1, Part B, pp. 398-399.

²¹⁵ Exhibit 1, Part B, p 398.

his recollections, she does not appear to have suggested any involvement of Officer JGB in drafting the affidavit.

- [264] Based on the independent evidence of Inspector Frame, I am satisfied that ALB spoke to Officer JGB about the draft affidavit which Mr Maloy prepared, which contained a comment/s with which she disagreed. She was entitled, as she did, to ask Mr Maloy to amend the draft.
- [265] This being so, I am not satisfied that Officer JGB was involved in drafting an affidavit for ALB on her computer. I accept that ALB did not want to lie in her affidavit. She told both Inspector Frame and Mr Maloy this. I am not satisfied on the evidence presented that she directly told Officer JGB during events as alleged in dot points 3-6, although even if she did so, that would not affect my conclusions.
- [266] In summary, I accept dot points 1 and 2, and that part of dot point 6 which alleges that Officer JGB texted his solicitors name and contact details to ALB. I am not satisfied that the events as accepted by me substantiate the charge that Officer JGB '*inappropriately*' involved himself in communications with persons including ALB prior to withdrawal of the QPS initiated DVPO application.
- [267] Accordingly, matter 1(g) is not substantiated.

Orders

- [268] I make orders in accordance with my findings.
- [269] It is appropriate now for the parties to consider the issue of sanction in light of my findings about substantiation. To facilitate their consideration, I make directions for the filing of submissions, and for a further oral hearing on sanction. Directions are made to facilitate the further submissions and hearing.

Non-publication order

- [270] In light of the allegations, evidence and my findings of domestic violence, I consider it is not in the public interest for information to be published which would or may disclose the identity of ALB and the children. Similarly, in light of the arguably salacious nature of the circumstances of the partner swap arrangement, I consider it is not in the public interest for the third parties involved in that arrangement to be publicly named in these proceedings in which they have not participated.
- [271] Although there is significant deterrent value in naming officers subject to substantiated disciplinary action, the only way to avoid identification of ALB, the children, and SL and EL is to also prohibit publication of Officer JGB's name, as well as other friends who were interviewed or referred to.
- [272] Unless otherwise ordered, publication is prohibited of any information which may identify Officer JGB, members of his family, and all other persons in the material before the Tribunal who are not police officers

acting in their official capacity. Other than to the parties, these reasons for decision may only be published in de-identified format.