QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Kereama v State of Queensland (Queensland Health)* [2021] QIRC 343
PARTIES:	**Kereama, Jacob** (Appellant) v **State of Queensland (Queensland Health)** (Respondent)
CASE NO:	PSA/2021/304
PROCEEDING:	Public Service Appeal – Disciplinary Decision
DELIVERED ON:	8 October 2021
MEMBER:	McLennan IC
HEARD AT:	On the papers
ORDERS:	**1. Pursuant to s 562A(3)(b)(iii) of the *Industrial Relations Act 2016*, I decline to hear the appeal against the Disciplinary Finding Decision.** **2. Pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016*, the Disciplinary Action Decision appealed against is confirmed.**
CATCHWORDS:	PUBLIC SERVICE – EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY – disciplinary decision – where conduct allegation substantiated – where appeal against disciplinary finding decision was filed out of time – whether appeal against disciplinary finding decision should be heard out of time – where disciplinary action imposed – whether disciplinary action decision was fair and reasonable – whether disciplinary action was appropriate and proportionate
LEGISLATION & OTHER	

INSTRUMENTS:

Crime and Corruption Act 2001 (Qld) s 15

Industrial Relations Act 2016 (Qld) s 451, s 562, s 562A, s 562B, s 562C, s 564, s 567

Public Service Act 2008 (Qld) s 3, s 187, s 188, s 194

Directive 14/20 Discipline cl 4, cl 5, cl 7, cl 8

Queensland Health, Human Resources Policy: Discipline E10 (QH-POL-124) (June 2021) cl 4

CASES:

Breust v Qantas Airways Ltd (1995) 149 QGIG 777

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541

Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298

Bruce Anthony Piggott v State of Queensland [2010] ICQ 35

Geoffrey John Erhardt v Goodman Fielder Food Services Limited (1999) 163 QGIG 20

Gilmour v Waddell & Ors [2019] QSC 170

Goodall v State of Queensland (Supreme Court of Queensland, Dalton J, 10 October 2018)

House v The King (1936) 55 CLR 499

Megan Reimers v Aramaki Company (Australia) t/a Camira Child Care Centre [2002] 170 QGIG 1010

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332

Roger Carter Paterson v Medical Benefits Fund of Australia Limited (1998) 159 QGIG 232

Reasons for Decision

[1] In his Appeal Notice filed 25 August 2021, Mr Jacob Kereama (the Appellant) states he has been employed as a Protective Services Officer at QEII Hospital by Queensland Health, State of Queensland (the Department; the Respondent) since February 2017.

[2] The Department contends that Mr Kereama is currently employed as a Security Team Leader with a designation of Operational Officer Level 4 (OO4) and has been an employee of the Department since 20 August 2018.[1]

[3] On 20 May 2021, the Department issued Mr Kereama with a show cause notice (the Show Cause Notice) pertaining to an incident that occurred on 9 April 2021 (the Incident).[2] The allegation that arose from the Incident was articulated as follows:

> **Allegation one**
> It is alleged on 9 April 2021, you subjected patient UR7050400, to inappropriate and excessive use of physical force in the Emergency Department of QEII.[3]

[4] Mr Kereama provided a written response to the Show Cause Notice on 7 June 2021.[4]

[5] On 25 June 2021, the Department advised the following:[5]

- The "allegation is substantiated on the balance of probabilities";
- There are grounds for Mr Kereama to be disciplined pursuant to s 187(1)(b) of the *Public Service Act 2008* (Qld) (the PS Act) in that he has been guilty of misconduct, in that his conduct may have been inappropriate or improper conduct in an official capacity within the meaning of s 187(4)(a); and
- Serious consideration is being given to the disciplinary action of a reprimand.

(the Disciplinary Finding Decision).

[6] Mr Kereama provided a written response to the proposed disciplinary action on 22 July 2021.[6]

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[1] Respondent's submissions, 9 September 2021, [3].
[2] Letter from Dr B. Kingswell (A/Executive Director, QEII Jubilee Hospital) to Mr J. Kereama, 20 May 2021.
[3] Letter from Dr B. Kingswell (A/Executive Director, QEII Jubilee Hospital) to Mr J. Kereama, 20 May 2021, 2.
[4] Letter from Mr J. Shepherd (Southern District Organiser of the Australian Workers' Union) to Mr A. Riddell (Manager, Human Resources, Metro South HR) 7 June 2021.
[5] Letter from Dr B. Kingswell (A/Executive Director, QEII Jubilee Hospital) to Mr J. Kereama, 25 June 2021.
[6] Letter from Mr J. Shepherd (Southern District Organiser of the Australian Workers' Union) to Mr A. Riddell (Manager, Human Resources, Metro South HR) 22 July 2021.

[7] On 5 August 2021, the decision-maker advised Mr Kereama of his decision to impose a reprimand as the disciplinary action under s 188(1) of the PS Act (the Disciplinary Action Decision).

[8] In addition to imposing a reprimand, the Disciplinary Action Decision stated the following:

> A record of this action will be retained on a separate confidential disciplinary file and may be a factor in the consideration of any future disciplinary processes initiated against you. Your personnel file will contain only a notation that a separate disciplinary file exists.
>
> Please be aware that the disciplinary finding/s and the disciplinary action taken in this matter, may be considered by the decision maker in any future disciplinary processes when determining what, if any, disciplinary action should be taken in that case.[7]

[9] On 25 August 2021, Mr Kereama filed an Appeal Notice in which he submitted "that the proposed disciplinary action against him is harsh and unreasonable and therefore should be set aside by the Commission." On the face of that submission, it appeared that the Appeal Notice pertained solely to the Disciplinary Action Decision. However, in his submissions filed 2 September 2021, Mr Kereama outlines arguments regarding why "the Respondent's decision to substantiate the allegation was unreasonable" and sought the following orders:

> 22. Pursuant to s562(1) of the *Industrial Relations Act* 2016, the Respondent (sic) decision to substantiate the claims against the Appellant be set aside completely; or
>
> 23. Alternatively, Respondent's decision be set aside and substituted with another decision to undertake management action as the appropriate course to address MSHHS's concerns.

[10] Out of fairness to Mr Kereama, I will accept the Appeal Notice as an appeal of both the Disciplinary Finding Decision and Disciplinary Action Decision, however for reasons that follow, I will decline to hear the appeal against the Disciplinary Finding Decision.

[11] On 26 August 2021, I issued a Directions Order that stayed the Disciplinary Action Decision until the determination of this appeal or further order of the Commission.

Jurisdiction

[12] Section 194 of the PS Act identifies the categories of decisions against which an appeal may be made. Section 194(1)(b)(i) of the PS Act provides that an appeal may be made "against a decision under a disciplinary law to discipline – a person (other than by termination of employment), including the action taken in disciplining the person."

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[7] Letter from Dr B. Kingswell (A/Executive Director, QEII Jubilee Hospital) to Mr J. Kereama, 5 August 2021, 3.

[13] Mr Kereama has been an employee of the Respondent at all times relevant to this appeal.

[14] I am satisfied that the Disciplinary Finding Decision and Disciplinary Action Decision can be appealed.

Timeframe to Appeal

[15] Section 564(3) of the *Industrial Relations Act 2016* (Qld) (the IR Act) requires that an appeal be lodged within 21 days after the day the decision appealed against is given.

[16] The Disciplinary Action Decision was given to Mr Kereama on 5 August 2021 and the Appeal Notice was filed with the Industrial Registry on 25 August 2021. Therefore, I am satisfied that the Appeal Notice, as it pertains to the Disciplinary Action Decision, was filed by Mr Kereama within the required timeframe.

[17] However, the Disciplinary Finding Decision was given to Mr Kereama on 25 June 2021. In accordance with s 564(3) of the IR Act, an appeal of the Disciplinary Finding Decision should have been filed on or by 16 July 2021. Therefore, the Appeal Notice, as it pertains to the Disciplinary Finding Decision, was filed 40 days out of time.

Should the appeal against the Disciplinary Finding Decision be heard out of time?

[18] I am empowered by the IR Act to extend the time for filing an Appeal Notice.[8] The IR Act does not provide any criteria against which I am to determine whether or not to extend time.

[19] Mr Kereama bears the positive burden of demonstrating that the justice of the case requires the indulgence of an extension of time to file the appeal.[9] However, this issue has not been raised by Mr Kereama or the Department.

[20] The question of whether to extend the time for filing an application under the IR Act is fundamentally an exercise of discretion. Such an exercise must be undertaken judicially and according to the rules of reason and justice, not arbitrarily or capriciously or according to private opinion.[10] Several factors inform the exercise of my discretion.

[21] In *Breust v Qantas Airways Ltd*, Hall P set out the following considerations:[11]

- The length of the delay;

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[8] *Industrial Relations Act 2016* (Qld) s 564(2).
[9] *Megan Reimers v Aramaki Company (Australia) t/a Camira Child Care Centre* [2002] 170 QGIG 1010; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 547.
[10] *House v The King* (1936) 55 CLR 499, [2].
[11] (1995) 149 QGIG 777.

- The explanation for the delay;
- The prejudice to the Appellant if the extension of time is not granted;
- The prejudice to the Respondent if the extension of time is granted; and
- Any relevant conduct of the Respondent.

Length of delay

[22] The appeal was filed 40 days out of time. The 21-day appeal period has been determined by the legislature to be the appropriate period for a person to file an appeal. That is clearly stated in the IR Act. I consider 40 days to be a substantial amount of time.

Explanation for the delay

[23] Mr Kereama has not provided a reason for the delay in filing his Appeal Notice.

[24] In the Disciplinary Finding Decision, the Department relevantly stated the following (emphasis added):

> You are entitled to appeal this decision on disciplinary findings by lodging an application with the Queensland Industrial Relations Commission within 21 days of receipt of this letter.[12]

[25] Mr Kereama ought to have known there is a 21-day time limit within which he needed to file an appeal with the QIRC - that was clearly explained to him. Therefore, in the absence of Mr Kereama's own explanation, I conclude there is no reasonable explanation for the delay.

Prejudice to Mr Kereama

[26] The obvious prejudice is that Mr Kereama would lose the opportunity for an independent review of the Disciplinary Finding Decision, and any subsequent relief. I appreciate that outcome is not an insubstantial detriment.

Prejudice to the Respondent

[27] I note the Department did not put forward submissions with respect to prejudice. Notwithstanding, delay itself is considered to give rise to a general presumption of prejudice to the Respondent.[13] Furthermore, minimal additional prejudice to the Respondent in and of itself is an insufficient basis to grant an extension of time.[14]

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[12] Letter from Dr B. Kingswell (A/Executive Director, QEII Jubilee Hospital) to Mr J. Kereama, 25 June 2021.
[13] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 556.
[14] *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, 300.

[28] When Mr Kereama responded to the Disciplinary Finding Decision that contained the proposed disciplinary action, he did not indicate an intention to appeal the Disciplinary Finding Decision.[15] Rather, Mr Kereama proceeded to respond to the proposed disciplinary action. By not appealing the Disciplinary Finding Decision within the required timeframe, Mr Kereama may have indicated to the Department that he intended to proceed with the disciplinary process. Had Mr Kereama appealed the Disciplinary Finding Decision within the required timeframe, it is likely the Department would have stopped the disciplinary process and would not have considered the penalty until after that appeal had been determined. The Department has now taken the time to review Mr Kereama's response, consider an appropriate disciplinary action and communicate that accordingly.

[29] For those reasons, I find the Respondent would suffer prejudice should I decide to exercise my discretion to hear the appeal out of time.

Conduct of the Respondent

[30] The Department's conduct appropriately comprised advising Mr Kereama of his appeal rights. There is nothing in the filed materials that suggests the Department's conduct contributed to the delay.

Prospects of success

[31] Mr Kereama's prospects of success at a substantive hearing are a relevant consideration.[16] However, I note the guidance on this factor provided by President Hall in *Bruce Anthony Piggott v State of Queensland* (emphasis added, citations removed):

> In addition to these factors, the prospects of an application succeeding at a substantive hearing are also relevant, so that where it appears that an applicant has no, or very limited, prospects of success, the Commission should not grant an extension of time. However, the occasions for rejecting an application for an extension of time on the ground that the applicant has poor prospects of success will be few, and generally, the merits of an application are part of the general consideration of all relevant factors. In assessing the prospects of the substantive application succeeding, in the context of deciding an application to extend time, the merits or lack thereof of the substantive application must be clear cut, and will usually flow from formation of a view that there is an obstacle that no amount of evidence can overcome. Cases where a view may be formed so adverse to the applicant as to justify the refusal to extend time on that ground, will be rare.[17]

[32] In my preliminary view of the substantive matter, the merits (or lack thereof) are not clear cut at this stage. However, the factors outlined above, coupled with Mr Kereama's lack of explanation for the delay lead to my conclusion that this appeal, as it pertains to the Disciplinary Finding Decision, should not be heard out of time.

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[15] Letter from Mr J. Shepherd (Southern District Organiser, the Australian Workers' Union) to Mr A. Riddell (Manager, Human Resources, Metro South HR), 22 July 2021.
[16] *Geoffrey John Erhardt v Goodman Fielder Food Services Limited* (1999) 163 QGIG 20; *Roger Carter Paterson v Medical Benefits Fund of Australia Limited* (1998) 159 QGIG 232.
[17] [2010] ICQ 35, [6].

Conclusion

[33] Section 562A(3)(b)(iii) of the IR Act provides:

> **562A Commission may decide not to hear particular public service appeals**
>
> …
>
> (3) The commission may decide it will not hear a public service appeal against a decision if—
> …
>
> (b) The commission reasonably believes, after asking the appellant to establish by oral or written submissions that the appellant has an arguable case for the appeal, that the appeal-
> …
>
> (iii) should not be heard for another compelling reason.

[34] The reasons outlined above, being noncompliance with the statutory timeframe coupled with no reasonable grounds to extend that time, are sufficiently compelling reasons to refrain from hearing the appeal as it pertains to the Disciplinary Finding Decision pursuant to s 562A(3)(b)(iii) of the IR Act.

[35] I will now proceed to consider the appeal as it pertains to the Disciplinary Action Decision.

Appeal principles

[36] Section 562B(3) of the IR Act provides that the purpose of a public service appeal is "to decide whether the decision appealed against was fair and reasonable."[18] This is the key
issue for my determination. Subsection (4) provides that for an appeal against a decision about disciplinary action, the commission:

> (a) must decide the appeal having regard to the evidence available to the decision maker when the decision was made; but
>
> (b) may allow other evidence to be taken into account if the commission considers it appropriate.

[37] A public service appeal under the IR Act is not by way of rehearing,[19] but involves a review of the decision arrived at and the decision–making process associated therewith.

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[18] *Industrial Relations Act 2016* (Qld) s 562B(3).
[19] *Goodall v State of Queensland* (Supreme Court of Queensland, Dalton J, 10 October 2018), 5 as to the former, equivalent provisions in s 201 of the *Public Service Act 2008* (Qld).

[38] Findings made by the Department, which are reasonably open to it, should not be disturbed on appeal. Even so, in reviewing the decision appealed against, the QIRC member may allow other evidence to be taken into account.[20]

[39] Pursuant to s 451(1) of the IR Act, this matter has been decided without a hearing.

What decisions can the Industrial Commissioner make?

[40] In deciding this appeal, s 562C of the IR Act provides that the Industrial Commissioner may:

(a) confirm the decision appealed against; or

(b) set the decision aside and substitute another decision; or

(c) set the decision aside and return the matter to the decision maker with a copy of the decision on appeal and any directions considered appropriate.

[41] At this juncture it is appropriate to address Mr Kereama's request that the following order be granted:

> Pursuant to s562(1) of the *Industrial Relations Act* 2016, the Respondent (sic) decision to substantiate the claims against the Appellant be set aside completely…[21]

[42] Section 562 of the IR Act pertains to appeals "against stand-downs" and s 562(1) of the IR Act states that "An employee stood down by an employer under section 333, may appeal to the commission against the stand-down." I cannot draw any relevance from that section to this matter and it appears to have been referenced in error.

[43] As I have concluded that the Disciplinary Action Decision is the subject of this appeal, that is the only decision that my final orders will be concerned with. The powers under s 562C of the PS Act are confined to "the decision" appealed against. Therefore, the order sought above cannot be granted as it pertains to a decision other than the Disciplinary Action Decision.

Submissions

[44] The parties filed written submissions in accordance with the Directions Order issued on 26 August 2021.

[45] I have carefully considered all submissions and materials. I have determined not to approach the writing of this decision by summarising the entirety of those submissions

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[20] *Industrial Relations Act 2016* (Qld) s 567(2).
[21] Appellant's Submissions, 2 September 2021, [22].

and attachments but will instead refer to the parties' key positions in my consideration of each question to be decided.

Relevant provisions of the PS Act

[46] Section 3 of the PS Act provides (emphasis added):

> **3 Main purposes of Act and their achievement**
>
> (1) The main purposes of this Act are to—
>
> (a) establish a high performing apolitical public service that is—
> (i) responsive to Government priorities; and
> (ii) **focused on the delivery of services in a professional and non–partisan way**; and
>
> (b) **promote the effectiveness and efficiency of government entities**; and
>
> (c) provide for the administration of the public service and the employment and management of public service employees; and
>
> (d) **provide for the rights and obligations of public service employees**; and
>
> (e) promote equality of employment opportunity in the public service and in other particular agencies in the public sector.
>
> (2) To help achieve the main purposes, this Act—
>
> (a) fixes principles to guide public service management, public service employment and the work performance and personal conduct of public service employees; and
>
> …

[47] Section 187 of the PS Act relevantly provides as follows (emphasis added):

> (1) A public service employee's chief executive **may** discipline the employee if the chief executive is reasonably satisfied the employee has—
> …
> (b) **been guilty of misconduct**; or
> …
> (4) In this section—
>
> ***misconduct*** means—
> (a) inappropriate or improper conduct in an official capacity; or
> …

[48] Section 188 of the PS Act relevantly provides:

> **188 Disciplinary action that may be taken against a public service employee**
>
> (1) In disciplining a public service employee, the employee's chief executive may take the action, or order the action be taken, (***disciplinary action***) that the chief executive considers reasonable in the circumstances.
>
> *Examples of disciplinary action—*

- termination of employment
- reduction of classification level and a consequential change of duties
- transfer or redeployment to other public service employment
- forfeiture or deferment of a remuneration increment or increase
- reduction of remuneration level
- imposition of a monetary penalty
- if a penalty is imposed, a direction that the amount of the penalty be deducted from the employee's periodic remuneration payments
- a reprimand

Relevant provisions of the Directive

[49] *Directive 14/20 Discipline* (Directive 14/20) relevantly provides:

> 7. Discipline for conduct
>
> 7.1 Section 187 of the PS Act provides a chief executive may discipline an employee if they are reasonably satisfied a ground for discipline arises.
>
> 7.2 The circumstances in which a contravention of a relevant standard of conduct under section 187(1)(g) of the PS Act is likely to be considered sufficiently serious to warrant disciplinary action are where the chief executive forms a view that management action is not likely to address and/or resolve the work performance matter.
>
> 7.3 In forming a view under clause 7.2, the chief executive must consider whether there are more proactive strategies than disciplinary action to manage the personal and professional development of employees, including through training and development. Additionally, the chief executive must consider:
>
> (a) whether the matter has been assessed as meeting the definition of corrupt conduct and has been referred to the Crime and Corruption Commission, or has been referred to the Queensland Police Service as a potential criminal offence
>
> (b) whether management action is an appropriate response based on the nature of the alleged conduct (for example, management action is not appropriate for matters involving theft, fraud, sexual harassment, negligence, or maladministration)
>
> (c) whether implementing management action would eliminate or effectively control the risk to the health and safety of employees, or other people, posed by the alleged conduct
>
> (d) whether management action would alleviate or mitigate the impact of the alleged conduct on the employee, their colleagues, the workplace, the complainant, and the reputation of the public sector
>
> (e) whether management action has recently been taken for previous similar instance/s of inappropriate conduct, and the management action did not result in sustained correction of the employee's conduct
>
> (f) if the contravention is of a more serious nature, but is a single and/or isolated incident of poor conduct (that is, not a pattern of unreasonable behaviours), whether the chief executive has reasonable concerns about the employee's potential for modified

behaviour through management action that clarifies the expected standards of conduct and provides the opportunity and support for the employee to demonstrate sustained correction of their conduct.

8. Discipline process

8.1 Section 190 of the PS Act provides that in disciplining a public service employee or former public service employee, a chief executive must comply with the PS Act, this directive, and the principles of natural justice.

8.2 The chief executive must demonstrate consideration of conflicts of interest and ensure conflicts of interest are declared, monitored and appropriately managed by all parties to the disciplinary process.

8.3 Show cause process for disciplinary finding

(a) The chief executive is to provide the employee with written details of each allegation and invite the employee to show cause why a disciplinary finding should not be made in relation to each allegation (a show cause notice on disciplinary finding):

(b) Written details of each allegation in clause 8.3(a) must include:
(i) the allegation
(ii) the particulars of the facts considered by the chief executive for the allegation
(iii) the disciplinary ground under section 187 of the PS Act that applies to the allegation.

(c) A copy of all evidence relevant to the facts considered by the chief executive for each allegation in clause 8.3(a) must be provided to the employee, including, where relevant, specific reference to page or paragraph numbers that comprise the relevant evidence.

(d) The chief executive must provide the employee with a minimum of 14 days from the date of receipt of a show cause notice on disciplinary finding to consider and respond to the notice, having regard to the volume of material and complexity of the matter. The chief executive may grant, and must consider any request for, an extension of time to respond to a show cause notice on disciplinary finding if there are reasonable grounds for extension.

(e) If the employee does not respond to a show cause notice on disciplinary finding, or does not respond within the nominated timeframe in clause 8.3(d) and has not been granted an extension of time to respond, the chief executive may make a decision on grounds based on the information available to them.

8.4 Decision on grounds (disciplinary finding)

(a) A chief executive must review all relevant material, including any submissions from the employee, and make a decision on the disciplinary finding on the balance of probabilities.

(b) The chief executive must advise the employee of the chief executive's finding in relation to each allegation included in the show cause notice on disciplinary finding.

(c) For each finding in clause 8.4(a) the chief executive must clearly explain their finding of fact on the balance of probabilities, including the evidence relied on to reach the finding, and state if the disciplinary ground to which the allegation was applied has been established.

(d) The employee is to be informed of the finding and explanation of the finding in writing, including information that the employee may appeal the disciplinary finding.

(e) If the chief executive determines that discipline ground/s have been established, the chief executive may consider whether disciplinary action should be proposed (clause 8.5) and/or management action implemented, or to take no further action.

If the chief executive determines that no ground/s for discipline have been established, the chief executive may consider whether any management action is required and advise the employee in writing.

8.5 Show cause process for proposed disciplinary action

(a) The chief executive is to provide the employee with written details of the proposed disciplinary action and invite the employee to show cause why the proposed disciplinary action should not be taken (a show cause notice on disciplinary action).

(b) The chief executive may propose more than one type of disciplinary action, and if relevant, detail any management action to be implemented.

(c) The disciplinary action the chief executive may propose is not limited to the examples of disciplinary action listed in section 188 of the PS Act.

(d) In proposing appropriate and proportionate disciplinary action, the chief executive should consider:

(i) the seriousness of the disciplinary finding
(ii) the employee's classification level and/or expected level of awareness about their performance or conduct obligations
(iii) whether extenuating or mitigating circumstances applied to the employee's actions
(iv) the employee's overall work record including previous management interventions and/or disciplinary proceedings
(v) the employee's explanation (if any)
(vi) the degree of risk to the health and safety of employees, customers and members of the public
(vii) the impact on the employee's ability to perform the duties of their position
(viii) the employee's potential for modified behaviour in the work unit or elsewhere
(ix) the impact a financial penalty may have on the employee
(x) the cumulative impact that a reduction in classification and/or pay-point may have on the employee

(xi) the likely impact the disciplinary action will have on public and customer confidence in the unit/agency and its proportionality to the gravity of the disciplinary finding.

(e) A show cause notice on disciplinary action must only state the employee is liable for termination of employment if the chief executive reasonably believes that the employee might, in the circumstances, have their employment terminated.

(f) The chief executive must provide the employee with a minimum of 7 days from the date of receipt of a show cause notice on disciplinary action to consider and respond to the notice, having regard to the volume of material and complexity of the matter. The chief executive may grant, and must consider any request for, an extension of time to respond to a show cause notice on disciplinary action if there are reasonable grounds for extension.

(g) If the employee does not respond to a show cause notice on disciplinary action, or does not respond within the nominated timeframe in clause 8.5(f) and has not been granted an extension of time to respond, the chief executive may make a decision on disciplinary action based on the information available to them.

8.6 Decision on disciplinary action

(a) A chief executive must review all relevant material, including any submissions from the employee in response to a show cause notice, and make a final decision on the disciplinary action to be taken.

(b) The chief executive must inform the employee of the decision in writing, including:

(i) the reasons for the decision, including consideration of any information provided by the employee in response to a show cause notice
(ii) excluding a termination decision, information that the employee may appeal the decision on disciplinary action
(iii) for a termination decision, information that the employee may lodge an application for reinstatement under the *Industrial Relations Act 2016*.

(c) A chief executive may decide to impose disciplinary action different to the disciplinary action proposed in the show cause notice on disciplinary action, provided that:

(i) the revised disciplinary action is objectively less onerous than the original action proposed, or
(ii) the employee is given a further opportunity to comment on the appropriateness of the new proposed action, before a final decision on the disciplinary action is made and communicated to the employee, or
(iii) the employee has suggested the disciplinary action as an appropriate alternative penalty.

(d) Disciplinary action (other than a termination decision) is not to be implemented until the period for an appeal against the decision to discipline the public service employee has expired or any appeal lodged is finalised.

Grounds of Appeal

[50] Mr Kereama's appeal is brought on the basis that:

- Mr Kereama's conduct was not sufficiently serious to warrant disciplinary action;[22]
- "the proposed disciplinary action against him is harsh and unreasonable and therefore should be set aside by the Commission";[23] and
- The disciplinary action has been imposed prematurely.[24]

[51] I note there is overlap between the issues, but for completeness I will deal with each of the issues in turn.

Was Mr Kereama's conduct sufficiently serious to warrant disciplinary action?

[52] As outlined above, I decline to hear the appeal against the Disciplinary Finding Decision. Therefore, I am proceeding on the basis that the allegation has been substantiated and will consider whether it was fair and reasonable for the Department to impose disciplinary action.

[53] Clause 4.2 of the *Discipline HR Policy E10* (the Policy) provides that:

> If the delegate determines that discipline ground/s have been established, the delegate may consider:
>
> - whether disciplinary action should be proposed (refer to section 4.3 of the Attachment); and/or
> - management action implemented; or
> - to take no further action.[25]

[54] Clause 4.2 of the Policy makes it clear that the delegate is not obligated to take action in response to a substantiated allegation.

[55] Mr Kereama and the Department referred to cls 7.2 and 7.3 of Directive 14/20 as being relevant in determining whether conduct is sufficiently serious to warrant disciplinary action. Clause 7.2 pertains to "circumstances in which a contravention of a relevant standard of conduct under section 187(1)(g) of the PS Act is likely to be considered sufficiently serious to warrant disciplinary action…" Clause 7.3 outlines considerations "in forming a view under clause 7.2…"

[56] The decision-maker decided to discipline Mr Kereama because he was satisfied that Mr Kereama had "been guilty of misconduct" pursuant to s 187(1)(b) of the PS Act - not

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[22] Appellant's Submissions, 2 September 2021.
[23] Appeal Notice, 25 August 2021.
[24] Appellant's Submissions, 2 September 2021.
[25] Attachment One - Discipline Process.

pursuant to s 187(1)(g) of the PS Act. Therefore, I am unconvinced as to the relevance of cls 7.2 and 7.3 of Directive 14/20.

[57] Further, s 188 of the PS Act provides that (emphasis added):

> In disciplining a public service employee, the employee's chief executive may take the action, or order the action be taken, (***disciplinary action***) that the chief executive considers reasonable in the circumstances.

[58] There is no requirement that Mr Kereama's conduct must be "sufficiently serious" to warrant the disciplinary action that arose from s 187(1)(b) of the PS Act. Rather, the chief executive must be satisfied that the disciplinary action is "reasonable in the circumstances".

[59] The seriousness of Mr Kereama's conduct is one of a few relevant considerations to determine whether to *commence* a disciplinary process pursuant to cl 5.1 of Directive 14/20. However, as there is no requirement for conduct to be "sufficiently serious" before a disciplinary action is imposed, I reject that basis of appeal. Notwithstanding, I will proceed to consider the parties' submissions to determine whether the disciplinary action was "reasonable in the circumstances".

Is the disciplinary action reasonable in the circumstances?

[60] The relevant principles in considering whether a decision is 'unreasonable' were enunciated by Ryan J in *Gilmour v Waddell & Ors* (emphasis added, citations removed):[26]

> The focus of a review of the reasonableness, or unreasonableness, of a decision is on **whether the decision is so unreasonable that it lacks intelligent justification in all of the relevant circumstances**.
>
> The legal standard of unreasonableness is to be considered by reference to the subject matter, scope and purpose of the statute conferring the power.
>
> A court considering an argument that a decision is unreasonable is not undertaking a merits review. **If a decision may be reasonably justified, then it is not an unreasonable decision, even if a reviewing court might disagree with it**.
>
> The pluarity in *Li* said:
>
> > … when something is to be done within the discretion of an authority, it is to be done according to the rules of reason and justice. That is what is meant by 'according to law'. It is to be legal and regular, not vague and fanciful …
> >
> > … **there is an area within which a decision maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness.** The courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise

[26] [2019] QSC 170, [207]-[210], citing *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [63]-[76].

> of discretionary power. Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be applied for that of a decision maker …
>
> … it is necessary to look to the scope and purpose of the statute conferring the discretionary power and its real object … The legal standard of reasonableness must be the standard indicated by the true construction of the statute. **It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.**
>
> … Unreasonableness is a conclusion which may be applied to **a decision which lacks an evidence and intelligible justification**.

[61] Clause 8.5(d) of Directive 14/20 contains the factors to be considered in "proposing appropriate and proportionate disciplinary action."[27] Those factors are as follows:

> (i) the seriousness of the disciplinary finding
> (ii) the employee's classification level and/or expected level of awareness about their performance or conduct obligations
> (iii) whether extenuating or mitigating circumstances applied to the employee's actions
> (iv) the employee's overall work record including previous management interventions and/or disciplinary proceedings
> (v) the employee's explanation (if any)
> (vi) the degree of risk to the health and safety of employees, customers and members of the public
> (vii) the impact on the employee's ability to perform the duties of their position
> (viii) the employee's potential for modified behaviour in the work unit or elsewhere
> (ix) the impact a financial penalty may have on the employee
> (x) the cumulative impact that a reduction in classification and/or pay-point may have on the employee
> (xi) the likely impact the disciplinary action will have on public and customer confidence in the unit/agency and its proportionality to the gravity of the disciplinary finding.

[62] In consideration of the Incident itself, I acknowledge that Mr Kereama had first been assaulted by the patient without provocation and that the patient had been expressing volatile and unpredictable behaviour. The Department does not dispute those facts.

[63] Mr Kereama alleges that the uttering of statements such as "you threw a punch at the wrong person" prior to pushing the patient into a cubicle, was minor conduct, rather than serious.[28] I disagree for the reasons that follow.

[64] The patient was a 69-year-old man with dementia. Mr Kereama contends that his use of the words "you threw a punch at the wrong person" was intended to alert the patient that Mr Kereama was security personnel and that he had authority to ensure the patient complied with the clinical instructions he had been given by medical staff. That explanation is inconsistent considering that the intended message cannot reasonably be drawn from the plain reading of the words.

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[27] *Directive 14/20 Discipline* cl 8.5(d).
[28] Appellant's Submissions, 2 September 2021, [12].

[65] The Department alleges that the footage captured by Mr Kereama's body worn camera showed a period of approximately 20 seconds from the moment Mr Kereama was struck by the patient to when Mr Kereama forcefully pushed the patient into the cubicle. Mr Kereama did not object to that commentary in his submissions. I agree with the Department that the 20 second window was sufficient opportunity for Mr Kereama to de-escalate the interaction, regain composure and await the arrival of assistance.

[66] Fortunately, the patient was not injured as a result of the Incident, however that does not negate the need to deter similar behaviour in the future. Mr Kereama argues that his actions achieved the intended outcome in that the situation resolved quickly and the clinical staff were able to attend to the patient without injuries being sustained. Those factors alone do not mean the response was proportionate. The Department has zero tolerance for conduct that brings, or may bring, unnecessary harm or distress to patients and holds an expectation that all patients be treated with respect and dignity. Pushing an elderly patient clearly carries a risk of harm and for that reason, I reject Mr Kereama's contention that the conduct was minor.

[67] Although I have a strong appreciation for the difficulty of the role Mr Kereama undertakes, I find it improbable that such challenges would be unique to Mr Kereama in that context. Mr Kereama has worked in his role for approximately three years and his appointment in a supervisory position evidences a requisite degree of skill. Mr Kereama ought to be aware that patients present to hospital with certain behaviours that are a manifestation of the condition for which they require medical attention. I accept that Mr Kereama is experienced and trained in the management of aggressive behaviour and ought to have been able to show sufficient skill and composure in the management of the patient.

[68] Mr Kereama had undertaken training in the Queensland Health MAYBO Violence Prevention Programme (the MAYBO Protocols) on 16 December 2020 and 22 January 2021. The MAYBO Protocols include information pertaining to de-escalation of situations. Mr Kereama contends that the MAYBO Protocols inadequately deal with situations in which an employee has been assaulted and as he could not successfully apply the MAYBO Protocols, it was reasonable for him to use the force that he did. Mr Kereama has appropriately raised his concerns as to the adequacy of the MAYBO training through his union. It is unclear on the materials before me whether those concerns were raised prior to or following the Incident. Nonetheless, considering that Mr Kereama is in a supervisory position, understanding the MAYBO Protocols clearly forms an integral part of his responsibilities. At the very least, Mr Kereama ought to have sought clarification from the Department with respect to dealing with circumstances involving assault. A sweeping statement that the MAYBO Protocols are inadequate is unacceptable.

[69] Mr Kereama contended "that it is not just nor reasonable for the Respondent to expect that the Appellant (who has just been assaulted) not to have some sort of reaction to this particular patient."[29] I accept that respect and dignity is owed to both the patients and

[29] Appellant's Submissions in Reply, 16 September 2021, [6].

staff members. Mr Kereama is in a role that requires that he evaluate and reasonably react to events that unfold - being physically assaulted does not justify the use of excessive force in response.

[70] There was only one conduct allegation and with respect to his overall work record and disciplinary history, Mr Kereama submits that he has a completely unblemished service record and the Department did not raise prior issues. In that sense, it can be said to be an isolated incident of poor conduct (that is, not a pattern of unreasonable behaviours). However, in circumstances where Mr Kereama resisted the opportunity to make sensible concessions with respect to the substance of the allegation throughout the process and "vehemently denies any wrongdoing in the circumstances",[30] the Department may well have had reasonable concerns that if faced with a similar situation, even with the benefit of additional training or clarification of expectations, Mr Kereama is at risk of behaving in a similar way. In light of that factor and in consideration of the nature of the Incident, Mr Kereama's recent undertaking of training and ostensible knowledge, I find that the Department's decision to impose disciplinary action is warranted and reasonable in this case.

[71] The 20 May 2021 correspondence states that the Crime and Corruption Commission had referred Mr Kereama's matter back to the Department to deal with. Mr Kereama argues that "the lack of a conclusive decision from the CCC is unfairly prejudicial to the Appellant."[31] Mr Kereama contends this indicates there were insufficient grounds to pursue the matter with respect to s 15 of the *Crime and Corruption Act 2001* (Cth). Whether or not the conduct in question meets the definition of corrupt conduct is not a determinative factor as to whether an employee can or should be disciplined.

[72] Mr Kereama did not make submissions with specific regard to the reasonableness of a reprimand, rather the submissions broadly refer to disciplinary action. On that point, I note that a reprimand is a form of disciplinary action that does not affect an employee's remuneration, classification level or duties. Although the reprimand will be marked against Mr Kereama's name, the Disciplinary Action Decision states that it "may be a factor in the consideration of any future disciplinary processes initiated against you" but that Mr Kereama's "personnel file will contain only a notation that a separate disciplinary file exists." In light of the nature of the substantiated allegation, I accept the imposition of a reprimand to be a fair and reasonably proportionate and necessary disciplinary action with a view to deterring similar behaviour in the future.

Did the Department fail to consider Mr Kereama's safety and wellbeing?

[73] Mr Kereama submits that the Department did not give due consideration to s 3(d) of the PS Act which stipulates the purpose to "provide for the rights and obligations of public service employees". Mr Kereama argues the Department had no regard or concern for Mr Kereama's safety and wellbeing throughout the disciplinary process.

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[30] Letter from Mr J. Shepherd (Southern District Organiser, the Australian Workers' Union) to Mr A. Riddell (Manager, Human Resources, Metro South HR), 22 July 2021.
[31] Appellant's Submissions in Reply, 16 September 2021, [8].

[74] In response, the Department contends that Mr Kereama has not sought any support from the Department in relation to the Incident, the Department has not been advised of an injury sustained and Mr Kereama has been provided with the details of free and confidential counselling through the employee assistance service. I do not draw negative inferences from the fact Mr Kereama did not access the employee assistance program, but rather note that those details were provided to Mr Kereama by the Department, likely out of consideration for his safety and wellbeing.

[75] The Department accepted the patient was volatile and aggressive during the Incident. Although what Mr Kereama experienced was very unfortunate, the Department determined that his subsequent actions were disproportionate and unnecessary. Upon substantiating the allegation, the Department's focus turned to a reasonable disciplinary action. Mr Kereama has not convinced me that the Department failed to consider his safety and wellbeing and further, that any failure to do so constitutes unreasonableness in light of the totality of factors that support the imposition of a disciplinary action.

Has the disciplinary action been prematurely imposed?

[76] Mr Kereama's argument that the disciplinary action has been prematurely imposed is based on the following grounds:

- Although this matter pertains to "conduct related issues and not performance", the Department failed to consider pursuing more proactive strategies other than disciplinary action to manage the personal and professional development of employees, including through training and education.

- As the MAYBO Protocols inadequately deal with situations in which an employee has been assaulted, management action would have been a more appropriate response to "eliminate or effectively control the risk to health and safety" posed by Mr Kereama's conduct in the future and to alleviate or mitigate the impact of the conduct on Mr Kereama, the workplace and reputation of the public sector.

- The Department "failed to adequately follow the steps under the relevant directives" and on that basis, the imposition of a reprimand is both unnecessary and premature.

[77] Directive 14/20 contains the principles that (emphasis added):

> 4.1 Disciplinary process is not a substitute for management action and the need for managers to undertake early intervention to address unacceptable conduct. Early intervention, even in the context of a likely disciplinary process, provides the best hope for:
>
> - the cessation of unacceptable conduct
> - early resolution
> - preserving working relationships, and
> - avoiding an unnecessary and disproportionately protracted dispute.

> 4.2 Discipline is not appropriate for matters that may be dealt with:
>
> (a) through management action, which may include use of alternative dispute resolution (ADR), use of warnings, or other management action that is reasonable in the circumstances
>
> (b) under the directive on positive performance management.

[78] Further, the Policy states:

> Management action should not be considered as disciplinary by its nature, but can be undertaken in conjunction with, or instead of, the imposition of a disciplinary penalty in conduct or performance matters. In most circumstances, it is preferable that management action is considered as the first step in managing conduct or performance matters in the workplace.[32]
>
> …
>
> On receipt of an allegation, a preliminary assessment of the matter should be undertaken to:
> …
> - assess whether management action could more appropriately address the concerns...[33]

[79] With respect to those considerations, I recognise that the Show Cause Notice does not contain any particular reasoning for the Department's determination that the substantiated allegation be addressed through a disciplinary process - rather than by local management action exclusively. However, I do note that the Show Cause Notice states that:

> After giving full and careful consideration to the material available to me, I am of the view that you may be liable for disciplinary action pursuant to sections 187 and 188 of the *Public Services Act 2008* (the Act).[34]
>
> …
>
> The allegation, if proved, could be a criminal offence under section 335 of the Criminal Code Act 1899 'Common Assault' where the force used by the subject office was not justified, reasonable or appropriate under the circumstances.[35]

[80] For the reasons outlined above, I have concluded that disciplinary action was the appropriate course to take in the circumstances. Mr Kereama was advised as early as the Show Cause Notice that the allegation against him could be a criminal offence if proved. It is clear from the outset that the nature of the Incident warranted proportionate action.

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[32] Queensland Health, *Human Resources Policy 'Discipline' E10 (QH-POL-124)* p 9.
[33] Queensland Health, *Human Resources Policy 'Discipline' E10 (QH-POL-124): Attachment One - Discipline process,* p 1.
[34] Letter from Dr B. Kingswell to Mr J. Kereama, 20 May 2021, 1.
[35] Letter from Dr B. Kingswell to Mr J. Kereama, 20 May 2021, 3.

[81] Mr Kereama contends there are no factors that would give the chief executive reasonable concerns about his potential for modified behaviour through management action and additional training. However, Mr Kereama denies wrongdoing in the Incident and argues that his use of force was reasonable.[36] Further, Mr Kereama underwent recent MAYBO Protocols training sessions that ultimately did not deter his behaviour in the Incident. I consider that Mr Kereama's failure to recognise the inappropriateness of his conduct is persuasive of a need for a disciplinary action to deter future behaviour of a similar kind and to aid in the potential for modified behaviour. I agree that training would serve to assist Mr Kereama in dealing with assault scenarios, but something more is warranted in light of the circumstances.

[82] Further to the above, Mr Kereama's role as a supervisor and expected level of awareness are relevant considerations that support the imposition of a disciplinary action rather than management action.

[83] Clause 4.3 of the Policy provides that the delegate considers the degree of risk to the health and safety of employees, customers and members of the public in determining an appropriate disciplinary action. Mr Kereama's actions clearly disregarded the health and safety of the patient involved in the Incident. The nature of the Incident further supports the imposition of a disciplinary action.

[84] Mr Kereama broadly submitted the Department "failed to adequately follow the steps under the relevant directives". Mr Kereama did not refer to specific steps nor which directives and I do not believe this particular complaint to be borne out on the evidence before me. There is no apparent requirement that the Department must evidence reasoning of why management action was rejected prior to considering disciplinary action. Notwithstanding, based on the reasoning above, I am convinced that the Department was reasonable to consider the materials available prior to forming the view that management action should be rejected in the first instance and proceeding to disciplinary action.

Conclusion

[85] As the appeal against the Disciplinary Finding Decision was filed 40 days out of time with no explanation, I have declined to hear that aspect of the appeal.

[86] I find that the Disciplinary Action Decision to impose a reprimand is appropriate and proportionate in the particular circumstances. I find the Disciplinary Action Decision to be fair and reasonable.

[87] I order accordingly.

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[36] Letter from Mr J. Shepherd (AWU) to Mr A. Riddell (Manager, Human Resources, Queensland Health), 22 July 2021.

Orders:

1. **Pursuant to s 562A(3)(b)(iii) of the *Industrial Relations Act 2016*, I decline to hear the appeal against the Disciplinary Finding Decision.**

2. **Pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016*, the Disciplinary Action Decision appealed against is confirmed.**