SUPREME COURT OF QUEENSLAND

CITATION:	*Sleat v Loof* [2008] QSC 286
PARTIES:	**ANNE SLEAT** **(applicant)** **AND** **JEFF LOOF** **(first respondent)** **AND** **STATE OF QUEENSLAND** **(second respondent)**
FILE NO/S:	BS11859/07
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	19 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	16 July 2008
JUDGE:	Atkinson J
ORDER:	**The application is dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – where applicant was a nurse – where an internal hospital investigation found that the applicant had contravened a direction without reasonable excuse – where applicant claimed she was seeking clarification of the direction – where first appeal decided the applicant was liable for discipline under s 87(1)(d) of the *Public Service Act* 1996 (Qld) (PS Act) for contravening a direction – where decision of first appeal was reopened – where the second disciplinary hearing dismissed the applicant's appeal against the decision that she was liable to disciplinary action pursuant to s 87(1)(d) of the PS Act – whether there was an error of law in the decision not to reopen the second discipline appeal decision ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where

application was brought pursuant to s 20(1) and s 20(2)(f) of the *Judicial Review Act* 1991 (Qld) – where ground for review was that a decision made under s 105 of PS Act involved an error of law – whether the applicant's submissions about having a reasonable excuse had been taken into consideration

ADMINISTRATIVE LAW – JUDICIAL REVIEW – ADMINISTRATIVE TRIBUNALS – STATUTORY APPEALS FROM ADMINISTRATIVE AUTHORITIES TO COURT – where applicant had previously had two appeals about the same matter – where application was brought for statutory order of review of a decision made under delegated powers of the PS Act – where decision made under PS Act s 105 was not to reopen an appeal that had been decided – whether there were compelling reasons for hearing and deciding the previous appeal again

Judicial Review Act 1991 (Qld) s 20

Public Service Act 1996 (Qld) s 87, s 105

Public Service Act 2008 (Qld) s 210

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, considered

Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280, cited

Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 198 ALR 59, cited

Minister for Immigration and Multicultural Affairs v Rajamanikkam (2002) 210 CLR 222, cited

Paduano v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 211, applied

Politis v FCT (1988) 16 ALD 707, cited

Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Jansen [2008] FCAFC 48, cited

COUNSEL: G Rebetzke for the applicant

A Horneman-Wren for the respondents

SOLICITORS: Carne Reidy Herd Lawyers for the applicant

Crown Law for the respondents

[1] The applicant, Anne Sleat, is a nurse employed by Queensland Health. She brought an application for a statutory order of review of a decision by the first respondent, Jeff Loof, which he made exercising the delegated powers of the Public Service Commissioner under the *Public Service Act* 1996 (the "PS Act").

[2] Mr Loof's decision, made under s 105 of the PS Act, was a decision not to reopen an appeal that had been decided. Section 105 of the PS Act provides that "the commissioner may reopen an appeal that has been decided if the commissioner is satisfied there are compelling reasons for hearing and deciding it again." It has since been replaced by s 210 of the *Public Service Act* 2008, which is in substantially the same terms.

[3] The application was brought pursuant to s 20(1) and s 20(2)(f) of the *Judicial Review Act* 1991 (the "JR Act"), on the ground that the decision involved an error of law. In order to succeed, the applicant must therefore show that there was an error of law in Mr Loof's decision not to reopen the appeal in circumstances where he could only decide to reopen the appeal if he was satisfied there were compelling reasons for hearing and deciding it again.

[4] The following were the particulars of the two alleged errors of law which were articulated by the applicant at the conclusion of the hearing of this application:

> "(1) The first respondent wrongly concluded that the Appeal decision dated 1 October 2007 (which the applicant had applied to reopen) was unaffected by an error of law in that:
>
> (a) The decision of 1 October 2007 contained a finding that Ms Sleat failed to follow a lawful direction given to her.
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> (b) The decision failed to address the issue of whether Ms Sleat had a 'reasonable excuse' for failing to follow the lawful direction.
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> (c) The decision of 1 October 2007 erred in law in finding Ms Sleat liable to disciplinary action pursuant to section 87(1)(d) [of the PS Act] for failure to follow a lawful direction given to her when section 87(1)(d) refers to contravention, without reasonable excuse, of directions given.
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> (d) The decision of 1 October 2007 failed to demonstrate an identification of the elements of the disciplinary charge and an application of found facts to each of the elements of the disciplinary charge.
>
> (e) It is obvious the First Respondent misunderstood the law in a relevant particular, namely that '*without reasonable excuse'* is a separate and distinct element of the disciplinary charge from the element of contravention (which element was found).
>
> (f) The making of the conclusion that the decision of 1 October 2007 was unaffected by an error of law was an error.
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> (g) If the First Respondent had concluded the decision of 1 October 2007 was affected by an error of law, the First Respondent might have found differently upon the question whether the Applicant had compelling reasons to reopen her appeal.
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> Further or in the alternative:
>
> (2) The decision involved an error of law in that:
>
> (a) The First Respondent made factual findings that:

(i) the Applicant had made submissions to Mr Jeppesen claiming that a direction was not refused, but she was seeking clarification.

(ii) this submission was considered by Mr Jeppesen and he found that the Applicant did in fact fail to follow a lawful direction.

(b) The First Respondent illogically inferred ('the inference'): *"Therefore* [the Applicant's] a*rgument of 'reasonable excuse' has been submitted and considered'*.

(c) The First Respondent could not have made such an inference from the found facts referred to in paragraph (2)(a) above because the making of the inference was illogical.

(d) It is obvious the First Respondent misunderstood the law in a relevant particular, namely, that '*without reasonable excuse'* is a separate and distinct element of the disciplinary charge from the element of contravention (which element was found).

(e) The making of the inference was an error of law.

(f) If the First Respondent had not made the inference then the First Respondent might have found differently upon the question whether the Applicant had compelling reasons to reopen her appeal."

[5] The respondents did not object to the late amendment of the particulars of the alleged error of law.

[6] In order to understand the application, it is necessary to recite some of the long history of the events which led up to it. The original incident was quite confined. The procedural history which followed turned this relatively small incident into a major battle.

The original incident

[7] On 20 August 2006 at about 3.15 pm Ms Sleat, a paediatric nurse, commenced her shift on the Robertson Ward at the Royal Children's Hospital as the Level 2 Shift Coordinator. Five other registered nurses were rostered on at that time. The ward included a six bed cubicle which was designated as clean, meaning that babies with infections were not routinely admitted to this area.[1] It was usually known as the "babies' cubicle". It was close to the nurses' station and so was easily able to be monitored. On that day only one child was admitted as a patient to the babies' cubicle. She was seven years old and had been admitted for a blood transfusion. She was expected to go home later that evening.

[8] At approximately 3.33 pm a baby, O, arrived at Emergency/Outpatients Department for an elective admission. The child's file contained an Admission Plan for elective patients that had been completed by a medical officer on 23 June 2006. The medical officer wrote under the "Infectious Status" heading, "will need single room - immuno-compromised planned procedure for lymphocyte function tests."

[9] Between approximately 3.33 pm and 3.45 pm, one of the registered nurses, RN Devcich, received a phone call from Emergency/Outpatients advising that baby

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1 Investigation Report by Susan Gower (doc 9, p 766).

O had arrived for admission. Ms Devcich told the applicant, Ms Sleat, who was standing nearby. As Ms Sleat did not know about the admission, both nurses looked in the ward diary and saw that baby O was to be admitted into a single room as the child was immuno-compromised.[2] There was, however, no single room available. On Ms Sleat's instructions, Ms Devcich rang Outpatients to delay the admission but was told that the baby and his family were already on the way to the ward.

[10] At 3.45 pm Judy Grant, the after hours nurse unit manager, received a page from Ms Devcich who informed her that there was no single room available in the ward and asking whether the baby could be "outlied" to another area. Ms Grant, whose responsibility it was to decide where the baby should be admitted, told Ms Devcich to admit the baby to the babies' cubicle and said she would reassess the situation shortly. She based her decision on the fact that baby O was not infectious and required protective isolation and there was only one other patient in the babies' cubicle who was non-infectious when admitted.[3]

[11] Ms Devcich passed on Ms Grant's instruction to Ms Sleat. At around 3.54 pm the baby arrived on the ward with his mother and grandfather. Ms Sleat, however, contrary to Ms Grant's instruction, instructed Ms Devcich to take baby O and his family to the parents' room because Ms Sleat did not want to admit baby O to the babies' cubicle. The parents' room is a recreation and rest area about 20 metres from the entry to Robertson ward.

[12] Ms Sleat paged both Dr Muir, the registrar on call, to discuss the admission and Ms Grant to "clarify" the directions. At approximately 3.54 pm Ms Grant received the page and spoke to Ms Sleat, confirming that the baby should be admitted to the babies' cubicle, have a set of observations taken and a medical review. Ms Sleat conceded that when she was instructed to admit the child by Ms Grant, there was little infection risk to the child. During the investigation she said that her concern was with future infection risk.[4] Ms Grant did not want the baby in the parents' room as it was unsafe from an infection point of view and medical observations were not able to be taken there.

[13] At about the same time Dr Muir telephoned and said that baby O needed a single room but was informed that there was not one available. There is conflicting evidence as to whether Ms Devcich passed a note about Dr Muir's phone message to Ms Sleat while she was on the phone to Ms Grant or whether Ms Sleat was informed after her phone call had finished.

[14] Contrary to Ms Grant's instruction, Ms Sleat told another nurse, RN Bourne, to keep the baby in the parents' room and to stay with the family there. By then the child and family had been in the parents' room for approximately 15 minutes. Ms Bourne stayed with the family in the parents' room for another 20 minutes.[5] No medical observations were carried out. Around 4.00 pm Ms Grant contacted Dr Muir to inform him that there was no single room available and confirm her placement direction. Dr Muir said he would check with Dr Clark and sometime later rang back to say that Dr Clark agreed that baby O could be admitted to the babies' cubicle.

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2 Ibid p 767.
3 Ibid p 767.
4 Ibid p 775.
5 Ibid p 770.

[15] Around 4.15 to 4.35 pm Ms Grant again confirmed with Ms Devcich that baby O was to be admitted to the babies' cubicle.[6]

The investigation

[16] After the incident on 20 August 2006 a series of memos were sent by senior nursing personnel about Ms Sleat's behaviour,[7] culminating in a letter being sent to Ms Sleat on 21 September 2006 by Dr Alan Isles, District Manager, Royal Children's Hospital & Health Service District, informing her he was in receipt of serious allegations concerning her workplace behaviour, notifying her of an independent investigation relating to these behaviours and enclosing the terms of reference and information about principles of natural justice.

[17] On 21 September 2006 Dr Isles sent a letter to Susan Gower, Investigations Officer, containing the investigation's terms of reference and associated documentation. The investigation was carried out by Ms Gower from 21 September to 27 October 2006 and a number of findings were made. Ms Gower recommended that consideration should be given as to whether the evidence in her report demonstrated sufficient grounds on which to institute disciplinary action or performance management action.[8]

[18] On 6 November 2006 Doug Brown, Acting District Manager, Royal Children's Hospital & Health Service District, issued a show cause notice to Ms Sleat stating that she may be liable for disciplinary action pursuant to s 87(1) of the PS Act.[9] He found, inter alia, that she failed to follow the instruction to admit the baby to the babies' cubicle and that there were inadequate clinical grounds for her not to follow the instruction. He found that by not admitting baby O to the babies' cubicle as instructed, she had slightly increased the infection risk to the child, delayed his admission to the ward, decreased his safety by placing him with his family in an area away from the ward, although she had arranged for a staff member to stay with him, but by doing so she required a staff member to be away from the ward for 15 to 35 minutes (the "first findings"). Other findings were made about inappropriate communication with other hospital staff (the "second findings"). On 18 November 2006 Ms Sleat provided a detailed response to this first show cause notice, denying the allegations and offering a range of mitigating factors for his consideration.[10]

[19] On 27 November 2006 Mr Brown issued a further notice to Ms Sleat ("second show cause notice") confirming a finding that on the balance of probabilities Ms Sleat

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6 Ibid p 772.

7 On 20 August 2006 Ms Grant sent a memo to Lynda Briggs (Acting On-Call Nursing Director) reporting the Anne Sleat incident (doc 8, p 481); 20 August 2006 Ms Briggs sent a memo to Juliana Buys (Nursing Director, Medical Services) about the same incident and notifying her level of concern about Ms Sleat (doc 8, p 482); Ms Sleat completed a Prime Clinical Incident Report about the events of 20 August 2006 at 5.55 pm (doc 8, pp 485-490); 26 August 2006 Ms Grant requested a copy of the Prime Clinical Incident Report from Ms Sleat (referred to in Ms Sleat's letter to Doug Brown, Acting District Manager, Royal Children's Hospital & Health Service District (doc 9, p 832); 7 September 2006 Ms Buys sent a memo to Ms Helen Woollett (District Director of Nursing Services) and to Dr Alan Isles about the current status of workplace behaviours of Ms Sleat, noting that the Manager of Human Resource Management had recommended consideration of whether the complaints about Ms Sleat should be formally investigated by an independent team not associated with the District (doc 8, pp 479-480).

8 Doc 9, p 755.

9 Doc 10, pp 1016-1017. With this letter Mr Brown included a full report from the Investigator.

10 Doc 10, pp 1019-1044.

was liable for disciplinary action under s 87(1)(d) and (f) of the PS Act. The second show cause notice invited a response on the proposed penalty.[11] On 10 December 2006 Ms Sleat responded to Mr Brown again offering mitigating factors for consideration.[12]

[20] On 18 December 2006, Ms Sleat received the final decision from Mr Brown. She had been found liable to disciplinary action under s 87(1)(d) of the PS Act for contravening a direction without reasonable excuse in relation to the first findings, and contravening the Code of Conduct in relation to the second findings.[13]

The Appeal history

[21] On 5 January 2007 Ms Sleat submitted a Notice of Appeal against Disciplinary Action.[14] That appeal was concluded by a decision made in March 2007 by Taresa Rosten, Delegate of the Public Service Commission. Ms Rosten confirmed the first findings that Ms Sleat had failed to follow a direction on inadequate clinical grounds and that Ms Sleat was liable for discipline under s 87(1)(d) of the Act for contravening a direction.[15] With regard to the question of whether or not the contravention of a direction was "without reasonable excuse" Ms Rosten held that "the Tribunal is satisfied that the decision maker took into consideration whether or not there was a reasonable excuse for the appellant's contravention of the direction in determining the appellant was liable for discipline under s 87(1)(d)."[16] Ms Rosten did, however, set aside the second findings. They will not be further considered.

[22] On 10 April 2007, Ms Sleat applied to the Public Service Commissioner under s 105 of the PS Act for re-opening of Ms Rosten's decision, putting forward what she submitted were seven compelling reasons to do so.[17] The issue of whether the matters upon which she relied potentially gave rise to a conclusion that Ms Sleat had reasonable excuse to contravene the direction given to her was not directly raised in those submissions, rather they proceeded on the basis that Ms Sleat had not contravened a direction.

[23] On 7 August 2007 Kate O'Donnell, Delegate of the Public Service Commissioner, published her decision on the application for reopening and concluded that there were compelling reasons for reopening the decision, including that matters raised "give rise to a potential argument (not yet heard) about whether it not there was a reasonable excuse for your failure to follow the direction given by Ms Grant."[18]

[24] On 1 October 2007 a second appeal decision by Mark Jeppeson, Delegate of the Public Service Commissioner, was published, again dismissing Ms Sleat's appeal against the decision that she was liable to disciplinary action pursuant to s 87(1)(d) of the PS Act.[19] That appeal had been brought pursuant to s 94(1)(b) of the PS Act. His decision considered a number of mitigating circumstances raised by Ms Sleat at

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11 Doc 10, p 1159.
12 Ibid, pp 1161-1162.
13 Doc 4, AS1, pp 5-7.
14 Doc 8, JL-35, pp 363-365.
15 Doc 4, AS2, at [89] p 25.
16 Ibid, AS2 at [52], p 19.
17 Doc 7, JL-14, pp 110-115.
18 Doc 4, AS3, p 33.
19 Doc 4, AS4, pp 36-47.

her appeal and the agency's case at appeal.[20] Mr Jeppesen said that the Tribunal had considered the submissions of the appellant and the agency in making its findings and accepted the views of the agency in three key areas,[21] and was satisfied that, on the balance of probabilities, Ms Sleat failed to follow a lawful direction given to her.[22]

[25] At paragraph 3 of his decision of 1 October 2007, Mr Jeppeson referred to the decision of Ms O'Donnell and the grounds to be considered by him on his re-determining the appeal as found by Ms O'Donnell. From that it is clear that Mr Jeppeson was aware of the issues which were before him in the reopened appeal, including the issue of whether Ms Sleat had contravened a direction without reasonable excuse.[23] He canvassed the reasons given by Ms Sleat for not following Ms Grant's direction such as Ms Sleat's assertions that she was given conflicting directions and that her concern was for the welfare of the child. He dismissed her appeal against the finding that she was liable to disciplinary action for contravening a direction and, *inter alia*, confirmed the penalty of a formal warning for contravening a direction and breaching s 87(1)(d) of the PS Act, ie contravening a direction without reasonable excuse.

[26] On 24 October 2007, Ms Sleat made a request to the Public Service Commissioner, James Purtill, to reopen the second appeal decision of 1 October 2007 for the reason, amongst others, that the decision ignored the question of reasonable excuse that had been identified in the decision by Ms O'Donnell on 7 August 2007.[24]

[27] On 5 December 2007, the respondent, Mr Loof, Delegate of the Public Service Commissioner wrote to Ms Sleat with the outcome of her submission of 24 October 2007 to Mr Purtill.[25] Mr Loof defined what a "compelling reason" might be,[26] noted the grounds to reopen the appeal identified by Ms Sleat,[27] and summarised the compelling reasons identified by Ms Sleat in her submission.[28] Mr Loof found that each of her grounds of appeal lacked substance.[29]

[28] Mr Loof then turned his attention to the compelling reasons submitted by Ms Sleat. With regard to the "reasonable excuse not explored", Mr Loof noted the submissions that Ms Sleat made to the Tribunal claiming that she was seeking clarification rather than refusing a direction, noted that the Tribunal had considered this submission and found that Ms Sleat had failed to follow a lawful direction, and concluded that "therefore your argument of 'reasonable excuse' has been submitted and considered."[30]

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20 Ibid [11]-[26], pp 38-40 and [27]-[41] pp 41-43.
21 Ibid [46]- [48], pp 43- 44.
22 Ibid [48], p 44.
23 Doc 7, JL-3, p 11.
24 Doc 7, JL-2, pp 2-8.
25 Doc 12, JL-38, pp 1707-1713.
26 "To be compelling, a reason must produce an irresistible pressure to undertake the course of action proposed or sought" ibid p 1707.
27 (i) That the delegate in his decision ignored Ms O'Donnell's decision and is fundamentally flawed as it ignores the role of the Registered Nurse/Clinical Nurse in patient care and shift coordination, and (ii) ignored s 100 of the PS Act, and more particularly did not observe the principles of natural justice- ibid at p 1708.
28 Ibid p 1708-the first being that the decision of the investigator, the agency and delegates of the tribunal do not explore 'reasonable excuse' as required under s 87 the PS Act.
29 Ibid pp 1709-1710.
30 Ibid p 1710.

[29] On 21 December 2007 an application for statutory order of review was filed in this Court by Ms Sleat.

PS Act s 105 - "compelling reasons for hearing and deciding it again"

[30] The PS Act[31] was introduced into the Queensland Parliament as the *Public Service Bill* 1996. In the Second Reading Speech the Minister[32] stated:

> "Principles of merit selection and grievance and appeal rights will continue to apply to those classes of employee for which coverage currently exists. Some important changes to the current appeals system have been incorporated into the Bill. Appellants in promotional appeals will need to satisfy the commissioner that they have an arguable case for the appeal to proceed, that is, that a prima facie case exists. The same principle may apply in other appeals if the commissioner believes the appeal is frivolous, vexatious, mischievous, or lacks substance. Appeals will be by way of review rather than another decision making process. Review of the original decision will be restricted to consideration of the evidence available to the decision maker at the time when the decision was made."[33]

[31] The Minister's Second Reading Speech did not address the power vested in the Commissioner, pursuant to clause 105 of the Bill, to reopen appeals if satisfied there were compelling reasons.

[32] Neither does the Explanatory Memorandum to the Bill provide guidance as to the intended meaning of what is now s 105, as it simply restates the provision in the following terms:

> "Clause 105 enables an appeal to be reopened, where the Commissioner is satisfied that there are compelling reasons."

[33] The power to reopen an appeal is not otherwise referred to more generally in any other part of the Explanatory Memorandum.

[34] Whilst a judge of the Federal Court, Crennan J, in construing the word "compelling" in relation to a decision of the Migration Review Tribunal, reviewed common dictionary definitions of the words "compel" and "compelling". Her Honour found that these are ordinary English words which have several connotations, having in common a Latin origin *pello/pellere* meaning "to force" or "to drive", with the wide ordinary meaning of "compelling" being "forceful".[34]

[35] The Oxford English Dictionary defines "compelling" to include the meaning "irresistible" and as "that which compels". "Compel" is relevantly defined to include the meaning "to urge irresistibly, to constrain, oblige, force".

[36] Mr Loof noted in his decision of 5 December 2007 that "Courts and other Tribunals have previously contemplated what a 'compelling reason' may be and have formed the view that, to be compelling, a reason must produce an irresistible pressure to

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31 Act No. 37 of 1996.

32 The Minister, the Honourable R E Borbidge, Hansard of 25 July 1996, pp 1954-1957.

33 Ibid at p 1956.

34 *Paduano v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 211 at [30]-[37]. This was applied by the Full Court in *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Jansen* [2008] FCAFC 48 at [31]-[34].

undertake the course of action proposed or sought."[35] Mr Loof demonstrated an appropriate understanding of the meaning of "compelling reasons". A compelling reason is one which is irresistible or in the statutory context, one which obliges or forces the appeal to be re-opened.

The arguments of the applicant

[37] The applicant argued that Mr Loof made an error by wrongly concluding that the appeal decision of 1 October 2007 made by Mr Jeppeson, was unaffected by an error of law on the basis that the 1 October 2007 decision found that Ms Sleat had failed to follow a lawful direction given to her, but the decision did not address whether or not Ms Sleat had a reasonable excuse for failing to follow the lawful direction. Further, the applicant submitted that the decision by Mr Jeppeson failed to demonstrate an identification of the elements of the disciplinary charge and an application of the found facts to each of these elements, and demonstrated that Mr Loof misunderstood that "without reasonable excuse" is a separate and distinct element of the disciplinary charge from the element of contravention.

[38] In the alternative, the applicant argued that Mr Loof made an error of law in that he made factual findings that the applicant had made submission to Mr Jeppeson claiming that the direction was not refused, but she was seeking clarification, and Mr Jeppeson had considered this submission, finding that the applicant did fail to follow a lawful direction. The applicant argued that Mr Loof illogically inferred "therefore [the applicant's] argument of 'reasonable excuse' has been submitted and considered" and this inference is illogical, further demonstrating a misunderstanding of the law namely that "without reasonable excuse" is a distinct element of the disciplinary charge from the element of contravention. The making of the inference was an error of law.

The arguments of the respondents

[39] The respondents argued that the applicant must demonstrate an error of law within the decision made by Mr Loof under s 105 of the PS Act. The decision under review is not Mr Jeppeson's decision of 1 October 2007.

[40] Further, the respondents submitted that Mr Loof clearly understood his function was to decide whether or not he was satisfied that there were compelling reasons for the reopening of the appeal of Mr Jeppeson.

[41] The respondents argued that the applicant sought to exclude the overall substance of the decision of 1 October 2007, rather seeking to construe both that decision and the decision under review "minutely and finely and with an eye keenly attuned to the perception of error."[36]

[42] Further the respondents argued that even if the applicant were correct in her submission that the first respondent erroneously equated a finding in paragraph 48 of the second appeal decision that the applicant failed to follow a lawful direction with the conclusion that the Commissioner had properly applied the facts to find the "without reasonable excuse" element of the disciplinary element of the disciplinary

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35 Doc 4, AS6 p 52.

36 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287 citing *Politas v FCT* (1988) 16 ALD 707 at 708 per Lockhart J.

ground proven, this would not constitute a reviewable error of law, but would, in the context of a judicial review of a s 105 decision, be simply a non-reviewable error of fact.

Was there an error of law in Mr Loof's decision not to reopen the appeal?

[43] Mr Loof could only reopen the appeal decided by Mr Jeppeson if he was satisfied that there were compelling reasons for hearing and deciding it again. If Mr Jeppeson had made an error of law in his decision of 1 October 2007, that would be a compelling reason to reopen the appeal.

[44] The applicant submitted that the fact that Mr Jeppeson's decision failed to address the issue of whether Ms Sleat had reasonable excuse for failing to follow a lawful direction was an error of law.

[45] The grounds for the appeal heard by Mr Jeppeson were related to the liability to disciplinary action under s 87(1)(d)[37] and the penalty relating to that action.[38] Ms Sleat had outlined several reasons why she should not be liable to disciplinary action. That she had a reasonable excuse was not a specific reason raised. It could, however, be implied from the reasons advanced by Ms Sleat that "she did not refuse to follow the directions", "there were conflicting directions", "she followed the processes required of her" and "her prime concern was for the welfare of the child and their family".[39]

[46] Mr Jeppeson specifically considered each of these reasons under separate headings, considering both Ms Sleat's case and the agency's case. Mr Jeppeson decided that Ms Sleat failed to follow a lawful direction given to her. In considering the specific reasons raised by Ms Sleat, Mr Jeppeson decided that the directions given to Ms Sleat by the treating doctor and the direction from the Nurse Unit Manager were not conflicting, and that the situation did not create an ethical dilemma for Ms Sleat. Mr Jepperson accepted the view of the agency that Ms Sleat's actions in not following the direction given by Ms Grant had the potential to harm the welfare of the child.

[47] Therefore Mr Jeppeson specifically considered the factors raised by Ms Sleat at the appeal, most of which had been previously raised by Ms Sleat, which constituted her defence of a reasonable excuse. Although the term "without reasonable excuse" was not a specific heading, the factors contributing to that defence were so identified, and it could not be said, therefore, that Mr Jeppeson failed to address the issue of whether Ms Sleat had a reasonable excuse for failing to follow a lawful direction given to her.

[48] The applicant also submitted Mr Jeppeson made an error of law when he did not specifically identify the elements of the disciplinary charge and then apply the facts to each of the elements of s 87(1)(d).[40] Section 87(1)(d) relevantly provided:

> "contravened, without reasonable excuse, a direction given to the officer as an officer by a person with authority to give the direction (whether the authority derives from this Act or otherwise);"

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37 PS Act.
38 Doc 4, p37.
39 Ibid pp 38- 39.
40 PS Act.

[49] Mr Jeppeson summarised the sections of the PS Act that were the basis for the initial appeal heard by Ms Rosten on 1 February 2007, detailed the results of that appeal, and clearly recorded that the basis of the appeal he was hearing was s 87(1)(d) of the PS Act. There was no need to identify the elements in terms, as these were clearly set out in s 87(1)(d) and were covered by him.

[50] Although not specified in terms, Mr Jepperson's decision clearly took into account all the issues raised by Ms Sleat and the agency,[41] these included factors that effectively made up Ms Sleat's submissions related to reasonable excuse. Mr Jeppeson's decision did not demonstrate a misunderstanding of the law in this regard as submitted by the applicant. Mr Jeppeson identified the section that was the basis of the appeal, and contained within that section were the "elements" as discussed by the applicant. Mr Jeppeson systematically examined the submissions by Ms Sleat and the agency, using Ms Sleat's submission headings, many of which were factors raised by Ms Sleat as her "reasonable excuse".

[51] The applicant also submitted that in his decision of 5 December 2007, Mr Loof made an error of law in that he made an illogical inference when he inferred "therefore [the applicant's] argument of 'reasonable excuse' has been submitted and considered."[42]

[52] The respondent submitted that the key aspects of this paragraph are that Mr Loof noted the fact that Ms Sleat made submissions to the Tribunal, claiming that a direction was not refused but she was seeking clarification. Mr Loof noted additionally (using the word "also") that the Tribunal considered that submission and found that Ms Sleat did fail to follow a lawful direction. The final sentence in that paragraph namely "Therefore, your argument of 'reasonable excuse' has been submitted and considered" should be understood in light of both the matters already referred to in that paragraph. Given that Mr Jeppeson did in fact consider Ms Sleat's submissions regarding the factors that make up her reasonable excuse, it would be illogical to ignore that fact when reading the paragraph under consideration in Mr Loof's decision.[43]

[53] Even if the illogicality submitted by the applicant were present, illogicality or irrationality must be of sufficiently significant degree before it can form the basis for judicial review of an administrative decision.

[54] The respondents referred to a passage in *Australian Broadcasting Tribunal v Bond*,[44] where Mason CJ said:

> "Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is *some* basis for an inference – in other words, the particular inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place."

[55] The respondents submitted that as an absolute statement that passage may now be doubted,[45] however, noted that what would be needed for the court to intervene in

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41 Doc 4, pp 38-42.
42 Ibid p 55.
43 Ibid p 55.
44 (1990) 170 CLR 321 at 356.

"extreme circumstances" would be "extreme irrationality" or "serious illogicality",[46] not demonstrated in the passage above upon which the applicant bases her case of illogicality.

[56] In a case where the focus was on particular language said to demonstrate that an inference had been drawn from a particular fact rather than on consideration of the evidence as a whole,[47] Gleeson CJ said:

> "[13] Upon analysis, the complaint is that the tribunal member did not have regard to the whole of the evidence before deciding whether she believed the applicant/appellant, and did not properly assess the significance of the evidence of the corroborating witness. I am not persuaded that this criticism is justified.
>
> [14] Decision-makers commonly express their reasons sequentially; but that does not mean that they decide each factual issue in isolation from the others. Ordinarily they review the whole of the evidence, and consider all issues of fact, before they write anything. Expression of conclusions in certain sequence does not indicate a failure to consider the evidence as a whole."

[57] Such reasoning can be applied to the applicant's focus on one sentence in a paragraph of Mr Loof's decision. A review of Mr Jeppeson's decision as a whole demonstrates that he considered the question of whether or not Ms Sleat had a reasonable excuse for failing to follow a lawful direction given to her and that there was no error of law in Mr Loof so finding.

Conclusion

[58] The applicant has failed to demonstrate that Mr Loof's decision of 5 December 2007 involved an error of law. His conclusion that there was no compelling reason to reopen the appeal which had already been decided was clearly open to him and, indeed, amply justified.

Order

[59] The application should be dismissed for the reasons I have given. I will hear submissions as to costs.

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45 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at 238-239; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant* S20/2002 (2003) 198 ALR 59 per McHugh and Gummow JJ at [59].

46 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant* S20/2002 (2003) 198 ALR 59 per Kirby J at [161].

47 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant* S20/2002 (2003) 198 ALR 59.