SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCI 2020 0106

CHIEF COMMISSIONER OF POLICE — Applicant

v

IHF — First Respondent

and

POLICE REGISTRATION AND SERVICES BOARD — Second Respondent

JUDGES:	KYROU, EMERTON and KENNEDY JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	29 April 2021
DATE OF JUDGMENT:	3 June 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 147
JUDGMENT APPEALED FROM:	[2020] VSC 608 (Macaulay J)

ADMINISTRATIVE LAW – Judicial review – Police officer dismissed from Victoria Police after finding of 'disgraceful conduct' – Day spa therapist complained police officer had exposed himself during waxing treatment while off duty – Police Registration and Services Board set aside dismissal decision, finding charge not proven – Board investigated 'inadvertent exposure hypothesis' not advanced by police officer –Chief Commissioner of Police sought judicial review of Board's decision alleging jurisdictional error – Primary judge dismissed application for judicial review – Whether primary judge erred in concluding Board's decision not unreasonable or seriously illogical or irrational – Whether primary judge erred in concluding Board's decision did not deny Chief Commissioner procedural fairness – Application for leave to appeal allowed – Appeal dismissed – *Victoria Police Act 2013* ss 125, 146, 152.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr R Dalton QC with Mr M Minucci	Clayton Utz
For the First Respondent	Mr E White	Tony Hargreaves & Partners
For the Second Respondent	No appearance	

KYROU JA
EMERTON JA
KENNEDY JA:

Introduction

1 The first respondent, 'IHF', was a senior constable of Victoria Police. On 25 February 2019, he was dismissed from Victoria Police, having been found guilty of 'disgraceful conduct' following an inquiry conducted by an 'Inquiry Officer' authorised by the Chief Commissioner under s 130(1)(b) of the *Victoria Police Act 2013* ('Act'). The conduct in question was alleged to have occurred on 27 March 2017 while IHF was off-duty and having his groin waxed at a day spa. The day spa therapist who provided the service complained the following day to her manager that while she was carrying out the waxing treatment, IHF had exposed his erect penis to her. The manager later reported the complaint to Victoria Police.

2 IHF denied that he had exposed his penis to the day spa therapist and stated that there was no possibility that this could have occurred because of the manner in which he had protected his privacy throughout the waxing treatment.

3 IHF sought review of the Inquiry Officer's decision by the second respondent, the Police Registration and Services Board ('Board'). The Board conducted a hearing in late 2019 and overturned the Inquiry Officer's decision, stating it was satisfied that the decision of the Inquiry Officer was 'harsh, unjust and unreasonable' because the charge had not been proven to the requisite standard. In particular, the Board considered that no sufficient inquiry had been conducted into the possibility of inadvertent exposure.

4 The Chief Commissioner of Victoria Police sought judicial review of the Board's decision, alleging jurisdictional error. Such error was said to arise in two ways. First, from the Board basing its decision on the possibility of inadvertent exposure in circumstances where there was no evidentiary foundation for any such possibility, it being inconsistent with IHF's evidence about how he protected his privacy and with the day spa therapist's evidence. Secondly, from the fact that, in any event, having regard to the evidence given to the Inquiry Officer and the 'prism' through which the Inquiry had been conducted, the Chief

Commissioner was not on notice that in prosecuting the charge he had to establish the absence of inadvertent exposure.

5 The primary judge dismissed the Chief Commissioner's application for judicial review, holding that the grounds for review advanced were not made out.

6 The Chief Commissioner now seeks leave to appeal the decision of the primary judge, on the basis that the primary judge erred in rejecting the Chief Commissioner's allegations of jurisdictional error by the Board.

7 For the reasons which follow, leave to appeal will be granted but the appeal will be dismissed. The grounds of appeal advanced by the Chief Commissioner have not been made out.

Statutory framework

8 Section 8 of the Act provides that it is the role of Victoria Police to serve the Victorian community and uphold the law so as to promote a safe, secure and orderly society.[1] The Chief Commissioner of Police is responsible for the management and control of Victoria Police.[2] The Chief Commissioner fulfils that responsibility by, among other things, investigating and sanctioning 'breaches of discipline' by police officers under pt 7 of the Act (titled 'Discipline').

Charge and inquiry into breach of discipline

9 Under pt 7 of the Act, there will be a 'breach of discipline' where a police officer is found to be 'guilty of disgraceful or improper conduct', whether in their professional capacity or otherwise.[3]

10 If the Chief Commissioner reasonably believes that a police officer may have committed a breach of discipline, he may begin a preliminary investigation of the matter.[4] If,

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1 Act, s 8.

2 Ibid s 16(1)(b).

3 Ibid s 125(1)(j).

following that preliminary investigation, the Chief Commissioner reasonably believes that the police officer has committed a breach of discipline, the Chief Commissioner may charge the officer with that breach.[5] The Chief Commissioner must then inquire into and determine the charge.[6]

11 The Chief Commissioner may authorise another police officer (or any person employed under the *Public Administration Act 2004*) to either lay the charge against the police officer, or to inquire into and determine the charge, but not both.[7] In the present case, the Chief Commissioner brought the charge against IHF, but authorised another police officer (the Inquiry Officer) to inquire into and determine the charge under s 130(1)(b) of the Act.

12 A police officer charged with a breach of discipline may appear at the inquiry in person or by representative.[8] The inquiry procedure is at the discretion of the person conducting the inquiry, subject to the requirement that (among other things) the proceedings are conducted with as little formality and technicality as the Act and the proper consideration of the matter permit.[9] The person conducting the inquiry is bound by the rules of natural justice.[10] They are not bound by the rules of evidence but may inform themselves in any way they see fit.[11]

13 If, after considering all the submissions made at an inquiry, the person conducting the inquiry finds that the charge has been proved, that person may determine the charge in a number of ways — including a reprimand of the police officer, a reduction in rank or seniority, or a dismissal.[12]

Review of a dismissal decision by the Board

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4 Ibid s 126(1).

5 Ibid s 127(1). Section 128 provides for the form of a charge.

6 Ibid s 129.

7 Ibid s 130.

8 Ibid ss 131(1) and (2).

9 Ibid s 131(3).

10 Ibid s 131(3)(d).

11 Ibid s 131(3)(c).

12 Ibid s 132.

14 Part 8 of the Act provides for appeals and reviews. Relevantly, a police officer who has been dismissed by the Chief Commissioner (or a person authorised by the Chief Commissioner) on the basis of a breach of discipline, may apply to the Board for a review of that decision under s 146 of the Act.[13]

15 The Board is established under pt 12 of the Act and has a number of divisions, one of which is the Review Division.[14] For the purpose of conducting a review of a decision to dismiss a police officer, the Board must be constituted by three members of the Review Division, at least one of whom must be the President or a Deputy President of the Division, and another must be a legal practitioner of at least five years' standing.[15]

16 In conducting a review, the Board must have regard to the public interest and the interests of the applicant for review.[16] In this context, the 'public interest' includes the interest in maintaining the integrity of, and community confidence in, Victoria Police.[17]

17 When reviewing a decision to dismiss a police officer (as in the present case), s 152 of the Act relevantly provides:

> (2) On the review, the Board must affirm the decision unless the Board is satisfied that the decision is harsh, unjust or unreasonable.

18 If the Board is satisfied that the decision is harsh, unjust or unreasonable, it may set aside the decision to dismiss the police officer and, in its place, make any other decision or determination that the person who made the decision could have made. Alternatively, the Board may, among other things, refer the matter to the Chief Commissioner (in accordance with any other directions or recommendations the Board may give), or order the Chief Commissioner to reinstate the dismissed police officer.[18] The Chief Commissioner must give effect to an order or decision of the Board on a review.[19]

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13 In particular, s 146(1)(m).

14 Ibid ss 203(c) and 208.

15 Ibid s 148(1).

16 Ibid s 151(1).

17 Ibid s 151(3).

18 Ibid s 152(3).

19 Ibid s 165.

19 In all appeals and reviews, the Board is bound by the rules of natural justice.[20] Both the applicant and the Chief Commissioner may appear and may be represented by any person other than a legal practitioner.[21] The Board must publish a statement of reasons for its decision on review, unless satisfied that the publication of the statement would not be in the public interest.[22]

20 As to its procedure, the Board must conduct the review with as little formality and technicality, and as much speed, as the requirements of the Act and the proper consideration of the subject matter permit.[23] Otherwise, and subject to the requirements of the Act, the Board may regulate its own procedure. It is not bound by the rules of evidence and may inform itself on any matter as it sees fit.[24] The Board can summon a person to attend to give evidence or produce documents[25] and may require evidence to be given on oath or affirmation.[26]

Procedural background and evidence

Police investigation and charge

21 The offending conduct allegedly occurred on 27 March 2017.

22 The day spa therapist and the manager made statements to police some months later. The day spa therapist made two statements: the first on 5 September 2017; the second on 17 October 2017. In her first statement, the day spa therapist described the offending conduct as follows:

> At the beginning of the waxing session I asked [IHF] to keep his underwear on I always do this with clients both men and women. He removed them after I had asked him not to. I decided just to keep going and just do it. He placed a towel over his genitals. As I was waxing him he asked if I could go a little further and lifted the

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20 Ibid s 155.

21 Ibid s 158(2).

22 Ibid s 154A.

23 Ibid s 156.

24 Ibid s 159(1).

25 Ibid s 160.

26 Ibid s 159(2).

> towel to reveal that his penis was erect. He was staring at me strangely and I felt disgusted, I said 'No' and turned my back on him towards the waxing pot for a few seconds hoping he would put the towel back. When I turned around again a few seconds later he was still exposed. I pulled the towel back over him. He said 'ok'. I didn't say anything to him until I had finished. I was angry and felt that he had targeted me because I was the youngest at the centre.

23 In her second statement, the day spa therapist again described having instructed IHF at the outset to keep his underwear on and to put a towel over himself for privacy. She then left the room to allow him to change. When she came back into the room she observed that his underpants were hanging over the chair.

24 The manager made a statement to police on 27 September 2017 in which she stated that clients of the day spa were always offered a bath towel for privacy. She gave the dates on which she had provided back and shoulders waxing treatments to IHF. She stated that she had had 'no issue' with him, but that she was 'disgusted to hear what happened' and that the centre had stopped offering male waxing in order to avoid putting any staff member 'in that position again'. However, the manager did not describe the event that disgusted her.

25 On 27 October 2017, IHF was interviewed by a police officer under s 171 of the Act. In the course of questioning:

(a) the interviewer asked IHF what he would normally wear during a 'speedo wax' — IHF said that he would normally remove his underwear, and cover himself with a towel;

(b) the interviewer asked IHF what he had been wearing at the appointment for a speedo wax on 27 March 2017 — IHF answered that he had his 'bottom half off';

(c) the interviewer asked IHF whether, at that appointment, he had been asked to keep his underwear on — IHF responded, 'no';

(d) the interviewer put to IHF that the day spa therapist had directed or requested him to leave his underwear on, and said that she would place a towel over him for privacy, and asked whether IHF recalled that being said — IHF responded 'No, I don't, sorry';

(e) the interviewer asked IHF whether, during the waxing procedure, IHF had asked the day spa therapist if she could 'wax a little further than what she was actually doing' — IHF responded 'That is correct, yes';

(f) the interviewer asked IHF 'So did you lift your towel and expose yourself to her?' — IHF answered 'Definitely not';

(g) the interviewer then asked IHF 'Was your penis erect?' — IHF answered 'No';

(h) the interviewer asked IHF 'Did you do anything to cover yourself?' — IHF responded 'well, the towel was on me the whole time, so…';

(i) the interviewer put to IHF the day spa therapist's allegation that IHF had an erection — IHF responded 'No';

(j) the interviewer put to IHF that the day spa therapist 'turned her back and that — well, she's asked you to — to cover yourself, you haven't. When she's turned around you were still exposed to her and you smiled at her and said "O.K." She then says that she put the towel back on you to cover yourself. Anything you want to say about that[?]' — IHF responded, 'I never had an erection, I never exposed myself. The towel was on me the whole time'.

26 We interpolate that the version of the alleged offending put to IHF in the s 171 interview was not an accurate representation of the day spa therapist's account.

27 During the s 171 interview, IHF demonstrated with his hands and body how the towel was placed over his groin and how he had tilted his body slightly to the side so the therapist could get access to the side to be waxed, while he had his hand cupped and placed over his genitals.

28 On 9 August 2018, a delegate of the Chief Commissioner charged IHF with a 'breach of discipline' under s 127(1) of the Act, the alleged breach constituting 'disgraceful conduct' within the meaning of s 125(1)(j) of the Act. The charge was as follows:

> 1.1 You are a Senior Constable attached to the Melbourne Highway Patrol.
>
> 1.2 You attended [the Centre] on six separate occasions in 2016 and 2017. You were off duty on these occasions.
>
> 1.3 On your third attendance at the Centre you were served by [the day spa therapist] for the first time. [The day spa therapist] was aware you were a serving member of Victoria Police.
>
> 1.3.1 [The day spa therapist] is a 23 year-old female and the youngest employee at the Centre.

1.3.2 On all future attendances at the Centre you specifically requested to be served by [the day spa therapist].

1.4 You made an appointment at the Centre on 27 March 2017 and requested a 'male wax, speedo line'.

1.5 Prior to the commencement of the waxing service [the day spa therapist] told you to keep your underwear on and use a towel for privacy.

1.6 While [the day spa therapist] was outside the room, allowing you to change, you removed your underwear and placed it over a chair.

1.7 You then covered your genital region with a towel.

1.8 While [the day spa therapist] was performing the waxing service you:

1.8.1 Asked if she could go a little further,

1.8.2 Stared directly at her,

1.8.3 Lifted the towel to reveal your erect penis.

1.9 [The day spa therapist] told you 'no' and turned her back on you.

1.9.1 This gave you ample opportunity to reposition the towel to cover your penis but you left it exposed.

1.9.2 You placed [the day spa therapist] in a position where she was forced to cover your penis with a towel.

1.10 Your inappropriate and sexualised conduct had the following effect on [the day spa therapist]:

1.10.1 She felt angry and disgusted,

1.10.2 She felt as if you targeted her because of her young age.

1.11 As a result of your conduct, the Centre ceased all male waxing after the incident.

Inquiry and dismissal

29 The charge was investigated by the Inquiry Officer appointed under s 130(1)(b) of the Act in a series of hearings conducted over five days in and between October and December 2018. IHF was represented at the hearings by a representative from the Police Association, Mr Elliot.

30 The day spa therapist, the manager and IHF each gave evidence at the Inquiry hearing, but not in the presence of one another. Mr Elliot was present throughout, but there was no opportunity for cross-examination.

31 It was common ground that IHF had attended the day spa for the purpose of having a 'speedo wax' and that the day spa therapist provided that treatment. It was also common ground that IHF removed his underwear and covered his genitals with a towel, and that he asked the day spa therapist to 'go further' or to 'go further in' when she had finished waxing the first side.

32 IHF gave evidence in which he again denied that he was asked to keep his underwear on. As to how he maintained his privacy, he said:

> [the day spa therapist] told me to hold my bits through the towel so she could get my legs to where she wanted it. So I'm holding …
>
> So I'm holding myself, okay, and then she's got my legs in the position they need to be, so one leg's straight and one leg's, I suppose, at an angle like that, and then she's adjusted the towel where she needs it to be to perform the wax.
>
> She's just grabbed the towel and moved it while I'm still …

33 IHF told the Inquiry Officer that the words 'hold your bits' were the day spa therapist's. He said that he definitely did not lift the towel at any stage, that his penis was definitely not erect at any stage and that he was 'never exposed'.

34 Later, he said (to the same effect):

> The entire time my direction has been to hold my bits and I've held my bits through the towel.

35 IHF described his hands covering his genitals in the same way as a cricket box. He said, 'the towel was always on me', 'I was always holding myself' and 'I had my hand on the towel the entire time'.

36 IHF confirmed that he had asked the day spa therapist if she 'could go a little further'. When asked 'further where?', IHF said:

> Well, compared to what I shave, compared to what it ended up being, the strip that was taken off, that was, I suppose my misunderstanding of what — how much comes off in a Speedo line.
>
> …
>
> And then she's — I think she asked if I was happy with it or not, and that's when I've asked, 'Can you go further?' Then she's explained, 'Well, that becomes a Brazilian,' which I didn't want , so that's where we've moved to the next site.

37 When asked whether he was looking down to see what the therapist was doing, IHF said:

> Well, I'm on my back so I can't really see where she is.

38 The day spa therapist gave evidence that she asked IHF to keep his underwear on, but he did not do so. He put a towel over himself. She did not say anything to IHF about covering himself with his hand. She bent his leg to the side so she could get into the groin underwear line and then she 'literally just folded the towel so I can just see, like, his leg but I seen nothing at the start'. That's when IHF asked if she could go further in. She responded that she did not do Brazilians and he would have to go elsewhere. She said:

> That's when he took over, hold his — held his balls, took the towel off and that's when he exposed himself with an erection and I just turned around and said 'No', went to my wax pots and then that's when I had to think, therapist, I took over and literally held the towel so tight so he — I couldn't see anything and he was still uncovered when I turned around at that stage … and I said 'I'll do the other side of your bikini wax and you can go.' So then that's when — the other side, I did that quick because I just wanted to get out of the room.

39 Describing the alleged exposure later in her evidence, the day spa therapist said:

> So when he took the towel off it was — he was there in front of me and then that's when I turned and I just said, 'No'.

40 IHF submitted a three page document in response to the day spa therapist's evidence and gave further evidence on oath. He repeated his categorical denial of the allegations, saying, 'Well, the towel was always on me, sir, so I've never — I never had an erection' and 'I was always holding myself'. He added, 'I know it didn't happen so I don't know where she's coming from or why she's actually targeting me in this way'. He alleged that the day spa therapist had made a 'false, malicious, derogatory and defamatory accusation'.

41 The manager gave evidence to the Inquiry Officer about what the day spa therapist told her about the alleged incident the day after it allegedly occurred. The manager recounted what she was told by the day spa therapist as follows:

> He was in there under the towel and she'd pulled his knee out to do, like we do for the bikini line for females, and she said as she moved the towel she realised he didn't have jocks on because she saw the end of his penis a little bit and so she just sort of pushed the towel — so push it to sort of hide it, and she did his bikini line and then when she … she said 'Yeah that's done' he said 'no I want further in' and she said 'No, no we don't go further in' and he lifted the towel and he said 'No I want the

> whole lot off'; And she's like, 'No, we don't do that here.' She grabbed the towel and she pushed it down and she said 'we don't do that here' and yeah that was it. He didn't — he wasn't forceful in any other way but it wasn't nice.

42 The manager also said that the day spa therapist had told her that IHF had a 'stiffy':

> It was actually in the first instance that she said it. That's the part that was upsetting for her.
>
> Yeah. The fact he didn't wear his jocks when he was told to, and the fact that he had a stiffy, that was really confronting for her. That upset her.
>
> … and the fact that, yeah, he pulled the towel up and said 'no I want you to take it all off'.

43 The manager gave evidence that she checked the story with the day spa therapist a few days later and it was still the same.

44 On 19 December 2018, the Inquiry Officer found the charge of 'disgraceful conduct' proven and gave oral reasons for his decision. Included in his oral reasons was the observation that the manager's evidence of the report that she received from the day spa therapist was 'startlingly close' to the evidence that the day spa therapist gave to the Inquiry.

45 On 25 February 2019, the Inquiry Officer published written reasons for finding that the charge was proven, together with his decision to dismiss IHF from Victoria Police pursuant to s 132(1)(h) of the Act.

46 In his written reasons for decision, the Inquiry Officer stated:

> The Police Officer has denied in his discipline interview and on oath and in submissions to this Inquiry that his penis was ever exposed to the Affected Person [the day spa therapist]. He does not leave open the possibility of any accidental exposure or anything similar that may have led the Affected Person to misinterpret events.

47 Elsewhere in his written reasons, the Inquiry Officer opined:

> … the Police Officer's defence of the discipline charge is that it did not happen. He does not leave open the possibility of an accidental exposure or some misunderstanding. In rejecting his denial there can be no doubt the Police Officer's behaviour was deliberate, sexual in nature, exploitative of the power imbalance in his favour and predatory.

48 IHF subsequently applied to the Board for a review of the Inquiry Officer's decision under s 146 of the Act.

Board hearing and determination

49 The Board conducted its hearing on 28 May 2019, at which IHF was represented by Mr Elliott and the Commissioner was represented by Sergeant Kennedy. The Board did not call any evidence but based its findings on the evidence and materials already in existence.

50 At the outset, the Board raised concerns about the clarity of the evidence given at the Inquiry hearing and, by extension, the findings made by the Inquiry Officer:

> We've identified a range of issues to be explored in relation to assessing the reliability and soundness of the factual findings made by the inquiry officer, and just for the sake of scoping that out, the issues include the clarity and particularity with which the allegations were elicited and then presented to [IHF] for his response. And I just want to flag here, for example, that it's not entirely clear to the Board what precisely was found proven in relation to the physical movements of the towel referred to which resulted in the alleged exposure of [IHF's] penis, and that's a significant issue in this matter which we will intend to seek to explore in some detail. And then there's a range of other factual findings relevant to an overall assessment of credibility or [reliability], and those issues touch on internal consistency of accounts, consistency of accounts between [the day spa therapist], the manager and [IHF], corroborating material and so on.

51 The Board then told the parties that it usually conducted reviews by considering all of the material presented to the Inquiry Officer, including the video recordings and transcripts of evidence. The parties were asked whether they would seek to call witnesses. They confirmed that they did not wish to call any witnesses. The Board stated, and the parties agreed, that there were four elements of the alleged disgraceful conduct that needed to be proven: first, that IHF's penis was erect during the waxing treatment; secondly, that the day spa therapist saw IHF's uncovered erect penis during the waxing treatment; thirdly, that IHF intended the day spa therapist to see his uncovered erect penis; and, fourthly, that the exposure was a deliberate exposure undertaken with the intention of causing distress, embarrassment or humiliation to the day spa therapist.

52 The Board made it clear to the parties that it considered the third element, intention, to be squarely in issue. The Board said it was 'uncomfortable about' whether there had been a proper interrogation of the possibility that IHF was unaware that his penis had become exposed. The Board expressed doubt about whether the manager's evidence of what she was told by the day spa therapist could be reconciled with the day spa therapist's own account as, on the manager's account, the day spa therapist saw IHF's penis at two points in time: once at

the beginning of the treatment when she moved the towel and 'saw the end of it a little bit'; and the second occasion when the towel was lifted and IHF said 'I want it all off'. This was 'significantly inconsistent' with the day spa therapist's account of events in a few different ways.

53 Having regard to the concerns expressed by the Board, Sergeant Kennedy submitted that, as the Board was 'finding holes' in what was or was not covered by the Inquiry Officer, the only way to remedy the problem would be to interrogate the day spa therapist. Sergeant Kennedy asked that the day spa therapist be called to give evidence in order to 'touch on' the points that had been raised by the Board. Mr Elliot responded that he would not reject the opportunity to have the day spa therapist provide evidence. He said:

> there were some relevant issues that we wanted to canvass by the inquiry officer and he denied us that opportunity.

54 The Board ruled on the application to call the day spa therapist, stating that it was not satisfied that calling the day spa therapist to give evidence at that stage would cure what the Board considered to be 'the fundamental defect that had infected the whole process', namely, the way in which the allegations were originally elicited from the day spa therapist in her witness statement and put to IHF in the interview for his response which then found their way into the particulars of the charge forming the foundation for the Inquiry process. The Board characterised the request to call the day spa therapist as 'a request to go back to square one and elicit with some precision what the actual allegations were' and held that if it were to do that, it would effectively be reformulating the charge in circumstances where it had no power to lay or amend a charge. The Board expressed concern that it was an essential part of the process that the accused person had charges put to him or her in writing with sufficient particularity to be able to respond to them in a meaningful way. To go back at that point to address the lack of sufficient particularity would fail to remedy the procedural unfairness.

55 The Board published an interim decision on 11 July 2018, stating that it was satisfied that the decision to dismiss IHF was 'harsh, unjust and unreasonable' on the basis that the charge was not proven to the required standard of proof.

56 On 7 August 2019, the Board published its reasons for decision, and ordered as

follows:

> Pursuant to section 152(3)(b)(i) of the *Victoria Police Act 2013* (the Act) the Police Registration and Services Board sets aside the determination made on 25 February 2019 under section 132(1)(h) of the Act to dismiss [IHF] and, in substitution for it, decides (pursuant to section 132(1)) that the charge of breach of discipline (disgraceful conduct) laid against [IHF] under section 124 of the Act is found not proven.[27]

57 In its reasons, the Board explained that at the beginning of the hearing, it had noted that there were significant differences in the accounts given by each of IHF, the day spa therapist and the manager. As was common in 'word on word' sexual harassment matters, this was a case where the events took place between two people in a closed room and where they said different things happened. The Board continued:

> The Board's review starts with the question of whether the dismissal was 'harsh, unjust or unreasonable'. This includes giving consideration to whether the findings of fact were soundly made and support the finding that the charge (disgraceful conduct) was proven, which then provides the basis for the decision to dismiss. If the Board finds the factual basis for the charge was not proven to the required evidentiary standard, then it would follow that the dismissal was harsh, unreasonable and unjust. The Board indicated that it had identified a range of issues to be explored in relation to assessing the reliability and soundness of the factual findings made by the Inquiry [officer].[28]

58 The Board went on to identify the issues to be explored to include the clarity and particularity with which the allegations were elicited and then presented to IHF for his response and other factual findings relevant to whose account ought to be preferred. In relation to the former, the Board said:

> The Board flagged that it was not clear to us what precisely was found proven in relation to the physical movement of the towel which resulted in the alleged exposure of [IHF's] penis, noting various terms were used (removed, lifted etc). We indicated this was a significant issue which we intended to explore in detail with the parties.[29]

59 The Board described the key issue for its determination to be whether intentional and knowing exposure of IHF's erect penis had been proven.[30] Elsewhere, the Board said:

> Proving intentionality is critical to proving the charge of breach of discipline (disgraceful conduct), but at no time was the [day spa therapist] asked whether, and if so how, she was sure that [IHF] *deliberately* exposed himself to her. The possibility

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27 Police Registration and Services Board Decision A23/2019 (27 May 2019), [221] ('Board's reasons').

28 Ibid [19].

29 Ibid.

30 Ibid [35].

that [IHF] wasn't aware his penis was exposed was not put to her at any time.[31]

60 While the Board acknowledged that it was open to the Inquiry Officer not to allow the day spa therapist to be questioned directly by IHF or his representative, it stated that it was incumbent on the Inquiry Officer to: rigorously test the evidence; explore all of the exculpatory possibilities with an open mind; ensure the allegations were elicited and presented clearly and accurately; and ensure contradictory evidence was properly put to the relevant witness for their response, including by recalling the witness when necessary.[32]

61 The Board went on to analyse in detail the manner in which the allegations were elicited from the day spa therapist and presented to IHF, concluding:

> There appears to have been reluctance to explore the allegations in detail with [the day spa therapist] to avoid her distress. We note and support Victoria Police's commitment to providing a victim-centric process which is supportive and understanding of victims, especially in sexualised behaviour matters, and which does not cause harm by the process. On the other hand, the police officer's reputation and career are at stake, and this goal simply cannot come at the expense of providing a fair process. We are not suggesting that [the day spa therapist] ought to have been disbelieved or challenged, but it was essential that her allegations were properly elicited (respectfully) to include detail, and then tested, even if this caused discomfort.[33]

62 In that context, the Board said:

> We conclude the lack of clarity and the inaccuracies in the way the allegations have been elicited from [the day spa therapist] and presented in this matter means the evidence is simply not sufficiently strong and exact enough to allow us to reach a state of comfortable and reasonable satisfaction that the charge is proven on the balance of probabilities, in particular, proving intentional (as opposed to inadvertent and unknowing exposure) and sexualised exposure (that is, we are not satisfied that his penis was erect).[34]

63 An important part of the Board's reasoning was that, on the evidence available, it remained possible that IHF had 'unintentionally and unknowingly' exposed his penis to the day spa therapist — which, if true, would not have constituted disgraceful conduct. In the Board's view, the Inquiry Officer's failure to consider and investigate the possibility of 'inadvertent exposure' meant that that possibility was not the subject of any direct evidence or questioning, and so remained open on the evidence. The Board said:

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31 Ibid [98].

32 Ibid [97].

33 Ibid [109].

34 Ibid [110].

> We have concluded … that the evidence as a whole is capable of supporting an account of events which involves inadvertent and unknowing exposure, as follows:
>
> - The towel remained in substantial contact with the [IHF's] body;
> - A part or side of the towel was lifted up or across (either by his action, by the movement of his body under the towel, or possibly — noting the report given by the Manager, by [the day spa therapist's] action) as he asked her to wax 'further in';
> - That she saw a part or all of his penis ('glimpsed the end of his penis, a little bit') as he did this and that [the day spa therapist] believed it to be erect;
> - That [IHF] continued to hold his genitals (scrotum) over the top of the towel; and
> - That a part of [IHF's] penis was exposed to [the day spa therapist] unintentionally, without his knowledge, as he lay on his back.[35]

64 The Board considered in detail whether there was consistency between and within the accounts given, along with IHF's behaviour before and after the incident. It noted that there had been no previous incidents despite numerous therapy appointments and there were no reported previous incidents of inappropriate behaviour towards women in IHF's personal or work life. While the Board accepted that the day spa therapist did see at least some part of IHF's penis in the course of providing him with the waxing treatment and was distressed by it, the Board concluded that the factors that it had considered weighed in favour of IHF's credibility, and against a finding that he had knowingly and intentionally exposed his erect penis to the day spa therapist. The Board continued:

> The Board is required to consider only the question of whether the Chief Commissioner has discharged the onus of proving the state of facts required to prove the charge, namely that there was intentional and knowing exposure to the [day spa therapist] of [IHF's] erect penis. As outlined previously, this state of facts need to be proved on the balance of probabilities (more likely than not), and with the strength and exactness of the evidence required given the serious nature of the allegations, and such that the Inquiry Officer (and on review, the Board) could reach a state of 'comfortable and reasonable satisfaction' as to the state of those facts.
>
> Having regard to all of the matters as discussed above, and applying the approach to the evidence outlined previously, the Board concludes (in summary):
>
> - We find that the [day spa therapist] did see at least a part of [IHF's] penis during the waxing treatment and was distressed by this.
> - We find the allegation that his penis was erect has not been proven to the required standard of proof.
> - We find that it is not proven to the required standard of proof that [IHF]

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35 Ibid [112].

intended to reveal his penis to the [day spa therapist], or did so knowingly.

Accordingly, we find the charge of breach of discipline (disgraceful conduct) under section 125 of the *Victoria Police Act 2013* has not been proven to the required standard of proof, and that therefore the dismissal of [IHF] was harsh, unjust and unreasonable.[36]

65 Finally, in summarising its reasons for finding IHF's dismissal to be harsh, unjust and unreasonable, the Board said, relevantly:

(a) That the allegations were elicited and presented by investigators and during the Inquiry with insufficient detail and clarity, such that [IHF] could not meaningfully and accurately respond to them.

(b) Allegations were put to [IHF] and findings were made by the Inquiry Officer, of matters which were never alleged by the [day spa therapist].

(c) There was a failure in the investigation and the Inquiry to properly explore exculpatory explanations, including the possibility of inadvertent and unknowing exposure.

(d) In particular, there was a failure to explore the Manager's evidence of first complaint (inadvertent exposure of the 'end of the penis' caused by the [day spa therapist's] own movement of the towel) which was potentially completely exculpatory.

(e) That there was a significant error in finding there was a 'startling similarity' between the accounts given by the [day spa therapist] and the Manager, when those accounts were significantly different in crucial respects.

…

(n) While the state of the evidence supports a finding that the [day spa therapist] saw some or all of [IHF's] penis during the waxing treatment and was distressed by this, essential elements ('points of proof') of the charge of breach of discipline (disgraceful conduct) have not been proven to the required standard. The Board is not satisfied that the evidence supports a finding that [IHF] intended to expose his penis (intentional exposure) and that [IHF] had an erection (sexualised exposure).[37]

Application for judicial review of Board's decision

66 On 7 October 2019, the Chief Commissioner applied to the Supreme Court for an order that the Board's decision be quashed, and that IHF's review application be remitted to the Board (differently constituted) for rehearing.

67 The Chief Commissioner advanced two grounds alleging jurisdictional error by the

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36 Ibid [201]–[203].

37 Ibid [213].

Board:

> (a) Ground 1. The Board constructively failed to form the satisfaction necessary for its exercise of power, namely that the Inquiry Decision was harsh, unjust or unreasonable. In particular: by inquiring into an inadvertent exposure hypothesis that was excluded on [IHF's] evidence at the Inquiry Hearing, and confining that inquiry to the evidence of the incident adduced in the Inquiry, the Board undertook a free-ranging review of whether the Charge was proven, disconnected from the evidence. Such an inquiry was incapable of grounding any rational basis for a satisfaction that the Inquiry Decision was harsh, unjust [or] unreasonable. In so doing, the Board misconceived the nature of its statutory task, conducting a review other than one contemplated by s 152 of the [Act]. Further, the Board exercised the power in a manner that was legally unreasonable and failed to take into account required considerations.
>
> (b) Ground 2. Further and alternatively, the Board denied the [Chief Commissioner] procedural fairness, in that it did not afford the [Chief Commissioner] a reasonable opportunity to be heard and to lead evidence with respect to the inadvertent exposure hypothesis.[38]

68 On 21 September 2020, the primary judge dismissed the Chief Commissioner's application to quash the Board's decision for jurisdictional error, on the basis that neither of the two grounds of jurisdictional error advanced by the Chief Commissioner had been made out.[39]

Reasons of the primary judge

69 The primary judge characterised the first ground of jurisdictional error advanced by the Chief Commissioner as being either several grounds rolled into one or a single ground expressed a number of ways. His Honour continued:

> The fundamental premise of the Chief Commissioner's argument is that the Board did not actually achieve any state of satisfaction as to whether the Inquiry Officer's decision was harsh, unjust or unreasonable. It failed to achieve that satisfaction, so he argued, because the Board enquired into a version of events which was not only not raised before the Inquiry Officer, but excluded, and it did so by confining itself to the evidence before the Inquiry Officer without allowing for additional evidence relevant to the new version of events.[40]

70 The primary judge accepted the premise that a decision-maker could constructively fail to reach the required state of satisfaction that was the 'jurisdictional gateway' to its

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38 *Chief Commissioner of Police v IHF* [2020] VSC 608, [5] ('Judge's reasons').

39 Ibid [6].

40 Ibid [39].

exercise of power,[41] but concluded that the Board had not done so in this case. The Board's inquiry into the 'inadvertent exposure hypothesis' was not inappropriate or incapable of founding a rational basis for its satisfaction that the dismissal had been harsh, unjust or unreasonable — to the contrary, the Board's inquiry into the possibility of inadvertent exposure provided it with a 'perfectly rational basis' to reach that state of satisfaction.[42]

71 The primary judge did not accept the submission that the Board had conducted the 'wrong review' by conducting a review other than that contemplated by s 152 of the Act. That submission implied that the Board was only permitted to inquire into an account of events that was agitated by one of the other parties, or that had been considered by the Inquiry Officer, but the Board was entitled to take a different view of the facts, as long as that different view was available or open on the evidence.[43]

72 The primary judge also rejected the argument that the Board had failed to reach the required state of satisfaction because it only considered evidence before the Inquiry Officer (instead of calling for additional evidence with respect to the possibility of inadvertent exposure). His Honour said:

> the Board considered that to do otherwise would have required the entire process, commencing with the preliminary investigation and laying the charge, to have been repeated. For good reason, it did not think that could or should occur.[44]

73 In considering whether, by inquiring into the possibility of inadvertent exposure, the Board undertook 'a free ranging review of whether the charge was proven, disconnected from the evidence' and 'an inquiry incapable of grounding any rational basis for a satisfaction that the inquiry decision was harsh, unjust or unreasonable', the primary judge said the following:

> Rather than being disconnected from the evidence, in my opinion the review was solidly rooted in the evidence. The Chief Commissioner's argument appears to align the concept of 'evidence' with the different interpretations or perspectives of the events given by the two protagonists. The Board may have gone beyond the two binary positions framed by the Inquiry Officer to another position that it discerned as emerging from the whole of the evidence, but that is not the same thing as the Board's inquiry being *disconnected* from the evidence.

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41 Ibid [56].

42 Ibid [57]–[67].

43 Ibid [68]–[76].

44 Ibid [80].

> The Board explored a version which was not put forward by either of the two protagonists. But that is not an uncommon experience. It is often the case that none of the witnesses to an event give the account that the decision-maker ultimately prefers. Witnesses to an event can give an account that is skewed by their individual perspective on the occasion, perspectives which might be unreliable for a host of reasons. A decision-maker required to adjudicate on these accounts is not bound to accept one or the other, but may rationally and logically find an alternative perspective which accords with the facts as it finds them, but does not completely accord with either view. That is precisely what the Board did in this case.
>
> The Chief Commissioner's argument appears to limit the possible outcomes of the factual inquiry as if the accounts of the two protagonists were pleadings in a civil case which framed the issue for determination in a particular, limited way. But, as identified by the Board, the key inquiry was whether the *whole* of the evidence established, on the balance of probabilities, that IHF intentionally and knowingly exposed his erect penis — not which account to accept.[45]

74 The judge went on to describe as 'plausible' the Board's reasons as to why such binary accounts appeared to have emerged from the two protagonists.[46]

75 As to whether IHF's account excluded the possibility of inadvertent exposure, the primary judge referred to the Board's finding that IHF had been forced to deny allegations that may not have accurately represented the day spa therapist's fully considered account, given the imprecision and lack of clarity surrounding the way in which details had been taken from her. Moreover, by definition IHF could not be expected to have known about having inadvertently and unknowingly exposed himself. The judge explained:

> There is no doubt that some versions of events logically exclude a particular alternative. For example, an account given by an accused in a shooting-murder case that he was not present at the time of the shooting logically excludes accidental shooting. But the present case is not analogous to the case of *R v Baden-Clay*, cited by the Chief Commissioner, where the accused's evidence actually excluded the alternative version of events which the Court of Appeal nevertheless conjectured may have occurred, with the result that it substituted a manslaughter conviction for a murder conviction. The High Court restored the murder conviction.
>
> By contrast, IHF's denial of what was put to him could not exclude something which he could not have known. Moreover, the Board considered that what had been put to him may not have accurately represented what the day spa therapist actually observed. Perhaps for these reasons, the Board concluded that IHF's evidence, including his denials, could be reconciled with an inadvertent exposure version of events. Additionally, the Board drew upon evidence which did not come from IHF as part of the evidence from which it found that the possibility of inadvertent exposure arose. In that regard, this case is more akin to *Knight v The Queen* which was distinguished by the High Court in *Baden-Clay*.[47]

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45 Ibid [58]–[60] (emphasis in original).

46 Ibid [62].

47 Ibid [64]–[65] (citations omitted).

76 The judge observed that rather than it being inappropriate for the Board to have explored an inadvertent exposure hypothesis, it might well have been appropriate for the Board to make the finding that the Inquiry Officer's decision was harsh, unjust and unreasonable simply because he had failed to properly investigate an exculpatory possibility. Instead of doing that, the Board went further, analysed the whole of the evidence and came to its conclusions.[48]

77 The judge concluded that far from being incapable of founding a rational basis for its satisfaction, the Board's inquiry provided a perfectly rational basis.[49]

78 Overall, the primary judge concluded:

> In answer to the whole of ground 1 generally and in all of its parts, I agree with the submissions that were advanced by IHF in the proceeding which may be summarised as follows:
>
> (a) The Board *was* obliged to conduct a merits review of the Inquiry Officer's decision.
>
> (b) The scope of the Board's merits review of the 'decision' was not to be artificially constrained in the way predicated by the Chief Commissioner, that is by the particular accounts given by the two witnesses.
>
> (c) Plainly, whether or not IHF's conduct amounted to disgraceful conduct depended upon whether it was intentional. Thus, the Board was obliged to consider for itself whether the evidence showed to the requisite degree of satisfaction that the conduct was intentional.
>
> (d) It was entitled to look at all of the evidence. A thorough review of its reasons for decision demonstrates that it performed a comprehensive review of the evidence and formed its own view on that evidence about whether intentional conduct had been proven to the requisite standard. The Chief Commissioner has failed to grapple with all the evidence preferring to take a 'high level' approach of attacking the logic of the process.
>
> (e) The Board found that intentional exposure had not been so proven because the possibility of unintentional, inadvertent exposure had not been properly explored and excluded by the Inquiry Officer. There were gaps and inconsistencies in the day spa therapist's account which left room for the possibility that her account could be reconciled with IHF's account, leaving open the possibility of inadvertent exposure.
>
> (f) Because the possibility of inadvertent exposure had not been adequately explored and rejected, the Board could not be satisfied to the requisite standard that IHF had intentionally exposed his penis to the day spa therapist.

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48 Ibid [66].

49 Ibid [67].

(g) That being the case, the Board reasonably and logically concluded that [the] decision to dismiss him was harsh, unjust and unreasonable. The charge not being proven, it was appropriate to set aside the dismissal.[50]

79 In relation to the ground of jurisdictional error alleging a denial of procedural fairness, the primary judge found that the Chief Commissioner had been given a reasonable opportunity to present his case, and there was no lack of procedural fairness towards him in the Board refusing his application to have the day spa therapist called to give evidence in relation to the 'inadvertent exposure hypothesis'.[51] The primary judge said:

> Importantly, the Board did not refuse the Chief Commissioner's application [to call the day spa therapist to give evidence] merely because he had been given a chance earlier in the proceeding to call additional evidence, although that may have been a factor. More fundamentally, the Board considered that it was too late to 'fill the gaps' in the evidence without causing significant procedural unfairness to IHF. In its view, the failures it had identified in the eliciting of accurate and detailed allegations from the day spa therapist on what had occurred in the waxing treatment infected the whole process from charging, to inquiry, to decision, and then to the review. Additionally, to fill the gaps would, in its view, have required not merely the calling of the day spa therapist, as the Commissioner sought, but also the manager and IHF. Crucially, curing the defect could not be achieved by filling the gaps at the *end* of the process; it could only have been cured, being fair to IHF, by restarting the process afresh. Being a review body, the Board considered it was not empowered to recommence the process.
>
> In short, the Board considered that calling the day spa therapist could not cure the defects it had identified and doing so would involve significant procedural unfairness to IHF.[52]

Proposed grounds of appeal

80 The Chief Commissioner seeks leave to appeal the primary judge's decision on the following grounds:

(a) In rejecting the Chief Commissioner's Ground 1 of judicial review, the learned primary judge erred in making the following findings foundational to his conclusions that there was no jurisdictional error:

1) that IHF's evidence did not exclude the possibility of inadvertent exposure;

2) that it was open to the Review Board to conclude that there was the possibility of common ground between the accounts of IHF and the [day spa therapist] based on the possibility of inadvertent exposure;

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50 Ibid [83] (emphasis in original).

51 Ibid [107].

52 Ibid [101]–[102] (emphasis in original).

3) that it was open to the Review Board to conclude that the possibility of inadvertent exposure was open on the whole of the evidence;

4) that it was open to the Review Board to conclude that the Inquiry Officer had not properly explored and excluded the possibility of inadvertent exposure.

(b) Further and alternatively, in rejecting the Chief Commissioner's Ground 2 of judicial review, the primary judge erred in failing to find that the Review Board failed to afford the Chief Commissioner procedural fairness. In particular:

1) contrary to the primary judge's findings, the Review Board did not provide the Chief Commissioner with a reasonable opportunity to be heard and to lead evidence on the inadvertent exposure hypothesis, given that:

i. IHF had not raised it as an issue, and the Review Board did not advert to the possibility of pursuing that particular line of inquiry until later in the hearing;

ii. the Chief Commissioner applied for leave to call the [day spa therapist] at the earliest opportunity after it became clear where the Review Board was headed;

iii. at the start of the hearing the Review Board had asked the parties whether they wanted to call further evidence, and nothing transpired in the hearing to justify closing off that option;

iv. there was no objection from IHF to the Chief Commissioner recalling the day spa therapist;

2) contrary to the primary judge's findings, allowing the Chief Commissioner to re-call the day spa therapist would not have risked significant procedural unfairness toward IHF, given that:

i. the Review Board was of its own motion exploring a hypothesis not raised by the parties in the Inquiry hearing or in the Review hearing;

ii. IHF did not object to the re-call of the day spa therapist;

iii. there were no changes to the particulars of charge, and IHF had not made any complaint about the adequacy of the particulars;

iv. IHF had at all times denied any erection or any exposure;

3) the primary judge erred in finding (PJ [99] and [105]) that any prejudice to the Chief Commissioner was of his own making.

Ground 1

81 Ground 1 is, in substance, that the primary judge erred in concluding that the Board's decision was lawful based on his own erroneous findings that IHF's evidence did not exclude the possibility of inadvertent exposure, and that it was open to the Board to conclude that:

(a) there was the possibility of common ground between the accounts of IHF and the day spa therapist;

(b) the possibility of inadvertent exposure was open on the whole of the evidence; and

(c) the Inquiry Officer had not properly explored and excluded the possibility of inadvertent exposure.

82 Ground 1 therefore essentially attacks what the Board and the primary judge held could reasonably be drawn from the evidence.

Chief Commissioner's submissions

83 The Chief Commissioner complains, in substance, about the Board's investigation and use (and the judge's acceptance of the Board's investigation and use) of the 'inadvertent exposure hypothesis', and makes three submissions as to why it is untenable:

(k) the evidence of the day spa therapist was only consistent with deliberate exposure by IHF;

(l) IHF advanced a positive case that excluded the possibility of inadvertent exposure; and

(m) the allegations against IHF were sufficiently clear and were repudiated by IHF, regardless of the precise movements of the towel.

84 In support of the proposition that the evidence of the day spa therapist was only consistent with IHF deliberately exposing his penis, the Chief Commissioner submits that:

(n) the day spa therapist's evidence that IHF 'lifted' the towel or 'took the towel off' his genitals was inconsistent with accidental or incidental exposure;

(o) the day spa therapist's evidence described IHF's conduct in a way that could not be construed as being accidental or incidental;

(p) the day spa therapist's evidence of observing IHF's exposed penis as being erect is probative of intentional exposure; and

(q) the day spa therapist's evidence that despite her saying 'No' and turning away, IHF continued to expose himself to her until she put the towel back over his genitals, is also inconsistent with inadvertent exposure.

85 In this context, the Commissioner complains about the way in which the Board used the manager's evidence of 'first complaint' as corroborative of the day spa therapist's account only 'insofar as it confirms that an incident happened which upset [the day spa therapist] during [IHF's] treatment, and this involved his not wearing underpants when [the day spa therapist] believed she had instructed him to do so and involved seeing his erect penis'. The Commissioner submits that the Board was entitled to evaluate the manager's evidence in terms of its corroborative value. However, he says that in going beyond that — to explore the inadvertent exposure hypothesis that was inconsistent with the day spa therapist's evidence and excluded on IHF's evidence — the Board committed jurisdictional error.

86 As to his submission that IHF's account excluded inadvertent exposure, the Commissioner points not only to IHF's evidence about how he cupped his hands over the towel he had placed over his genitals but, more generally, to his unequivocal assertion that his penis was never exposed. IHF's evidence to the Inquiry Officer was that the towel always covered him, that he never lifted the towel and was never exposed, and that he held his 'bits' through the towel the entire time. Accordingly, so the Commissioner submits, IHF's evidence went beyond mere denial to present a positive version of events that, if accepted, excluded the possibility of inadvertent exposure. Furthermore, IHF sought to impugn the credit of the day spa therapist, accusing her of making false and malicious accusations against him. This left no room for the Inquiry Officer to explore any 'common ground' based on something 'unknowable' to IHF.

87 As to the charge and the nature of the allegations against IHF, the Commissioner submits that the allegations were clear, and IHF made no complaint about the particulars. IHF had denied the conduct alleged against him and said that his penis could not have been exposed, given the way he was holding himself the entire time. In these circumstances, the Board's view that details were 'poorly and imprecisely elicited from the day spa therapist' provided no justification for looking behind and beyond IHF's defence and evidence to

explore the inadvertent exposure hypothesis.

88 In conclusion, the Chief Commissioner submits that although intentionality was an element of the charge that he had to establish, the alleged misconduct was adequately particularised, and the element of intentionality would be established if the day spa therapist's version of events was accepted. Conversely, on IHF's version of events, there was no erection or exposure of his penis, and there could have been no exposure, inadvertent or otherwise. Hence, the possibility of inadvertent exposure was not 'in the prism' of the Inquiry hearing. Despite this, the Board explored the inadvertent exposure hypothesis by reference to the evidence given at the Inquiry hearing and did not call further evidence.

89 In so doing, the Chief Commissioner submits, the Board undertook the logically impossible task of reconciling the accounts of the day spa therapist and IHF while at the same time avoiding any adverse credibility finding against either of them. Such analysis was legally unreasonable, disconnected from the evidence given to the Inquiry Officer and lacking a rational or intelligible foundation. The Board's analysis could be characterised as a specific class of jurisdictional error such as taking into account an irrelevant consideration or misconceiving the nature of the task. However characterised, the satisfaction required by s 152(2) of the Act was not properly formed, with the consequence that the Board exercised its powers under s 152(3) without jurisdiction.

Analysis of ground 1

90 In contending that the Board's analysis was 'legally unreasonable, disconnected from the evidence given in the Inquiry and lacking a rational or intelligible foundation', the Commissioner relies on the type of unreasonableness identified in *Minister for Immigration and Citizenship v Li*.[53] In that case, a majority of the High Court held that legal unreasonableness is not confined to 'irrational' or 'bizarre' decisions. A decision may be unreasonable if, by reference to the scope and purpose of the relevant statutory provision, the decision-maker has committed a particular error in reasoning, or given disproportionate

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53 (2013) 249 CLR 332; [2013] HCA 18 ('*Li*').

weight to some factor, or reasoned illogically or irrationally.[54] Further, as was the case in *Li*, the exercise of a statutory discretion may be unreasonable where the decision reached 'lacks an evident and intelligible justification'[55] such that 'the result itself bespeaks error'.[56]

91 In *Li*, the applicant had been denied a skills visa by the Minister's delegate, and applied for review to the Migration Review Tribunal. The applicant asked the Tribunal to adjourn the scheduled review hearing to allow her to address errors in a skills assessment by the assessing authority. The relevant statute gave the Tribunal the discretion to adjourn the review hearing. However, the Tribunal refused the request and, a week later, confirmed the delegate's decision to refuse the applicant's request for a visa, stating that the applicant had been provided with enough opportunities to present her case. The Tribunal was not prepared to delay the hearing any further. The High Court held that the refusal to adjourn the hearing was, in the circumstances, unreasonable. While the Tribunal was not obliged to give the applicant 'every opportunity' to present her 'best possible case and improve upon the evidence',[57] a reasonable decision refusing an adjournment required 'evident and intelligible' justification. The Tribunal did not provide any such justification for its refusal in that case.

92 There is, in our view, no similarity between the conduct of the Tribunal in *Li* and that of the Board in this case.

93 There is no question that it was open to the Board to be satisfied that the decision of the Inquiry Officer to dismiss IHF was harsh, unjust or unreasonable if the charge of disgraceful conduct was not proven. The charge would not be proven if the Chief Commissioner failed to establish that IHF intentionally exposed his penis to the day spa therapist. The question is whether it was open to the Board to find on the evidence that the Chief Commissioner had not discharged the onus of proving intentional exposure to the requisite standard.

94 A decision may be regarded as unreasonable if, as the High Court stated in *SZMDS*,

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54 Ibid 364 [68] (Hayne, Kiefel and Bell JJ).

55 Ibid 367 [76]; see also 349 [25] (French CJ); 375 [105] (Gageler J).

56 Ibid 369 [85] (Hayne, Kiefel and Bell JJ).

57 Ibid 368 [82] (Hayne, Kiefel and Bell JJ).

'only one conclusion is open on the evidence, and the decision-maker does not come to that conclusion, or if the decision to which the decision-maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn'.[58] However, a decision will not be unreasonable if it lies within the scope of rational decision-making: in other words, 'if there is room for a logical or rational person to reach the same decision on the material before the decision maker'.[59]

95 In *SZMDS*, the Refugee Review Tribunal had refused an applicant a protection visa, on the basis that it was not satisfied that the applicant feared persecution in his home country of Pakistan because he was homosexual. The Tribunal rejected the applicant's claim that he was homosexual, reasoning, among other things, that his claimed fear of persecution was inconsistent with his having previously returned to Pakistan voluntarily. On judicial review, the applicant contended that the Tribunal's decision was based on an illogical process of reasoning. The High Court accepted the submission that illogicality or irrationality in a finding of a jurisdictional fact amounts to jurisdictional error, and will result in the decision under review being set aside. Justices Crennan and Bell elaborated:

> In the context of the Tribunal's decision here, 'illogicality' or 'irrationality' sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words … it is an allegation of the same order as a complaint that a decision is 'clearly unjust' or 'arbitrary' or 'capricious' or 'unreasonable' in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.
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> … If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.[60]

96 The majority of the Court ultimately held that the Tribunal's findings concerning the

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58 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 649–50 [135]; [2010] HCA 16 (Crennan and Bell JJ) ('*SZMDS*'). See further *Secretary, Department of Education and Training v Paul* [2020] VSCA 280, [102] (Tate and Niall JJA).

59 *SZMDS* (2010) 240 CLR 611, 649 [135]; [2010] HCA 16 (Crennan and Bell JJ).

60 Ibid 647–8 [130] (Crennan and Bell JJ).

applicant's claims were open to it on the evidence, such that there was no jurisdictional error. Whether the applicant's claims of fearing persecution on the basis of homosexuality were to be believed, were matters on which 'rational minds might differ'.[61]

97 In this case, the Board's reasons show that it comprehensively reviewed the evidence and found it wanting. The Board formed the view that the day spa therapist was not adequately interrogated about what — precisely — occurred, and that her evidence was concerningly inexact. In particular, evidence that was potentially exculpatory was not adequately explored. The manager's account of what the day spa therapist told her the following day was not on all fours with the day spa therapist's later accounts of what occurred, and it allowed for the possibility of inadvertent exposure.

98 As the primary judge found,[62] it was open to the Board to find the charge unproven simply for the reason given in para 110 of the Board's reasons, namely, that the evidence was simply not sufficiently strong and exact to allow the Board to reach a state of comfortable and reasonable satisfaction that the charge was proven on the balance of probabilities, in particular, that intentional exposure was proved (as opposed to inadvertent exposure).[63] It reflected the quality of the evidence-gathering by the police and the Inquiry Officer and, as a consequence, the strength of the evidence relied upon by the Inquiry Officer to find the charge proven.

99 The Chief Commissioner sought to characterise the Board's inquiry into whether the element of intention was made out on the evidence as involving the single-minded pursuit of a hypothesis not advanced by either party and therefore outside the 'prism' though which the Board was required to conduct its review. We reject this framing of the issues. As the primary judge held, the Board was not constrained by the manner in which the parties conducted the hearing before the Inquiry Officer. The Board was entitled to look at all of the evidence in conducting its review. Having done so, the Board, in considering the positive proof required for the charge to be proven, found the evidence to be insufficient to establish

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61 Ibid 649 [135] (Crennan and Bell JJ).

62 Judge's reasons, [37].

63 Board's reasons, [110].

intentional exposure, that being a necessary ingredient of disgraceful conduct.

100 The so-called 'unintended exposure hypothesis' amounts to no more than the Board's finding that the day spa therapist's evidence was deficient and insufficient to support a finding of intentional exposure, and its conclusion that the possibility of inadvertent exposure had not been adequately explored. A finding that there was an exposure which was not, on the balance of probabilities, intentional, was open to the Board, having regard to its identification of the deficiencies in the day spa therapist's evidence and the manager's evidence about what she was told by the day spa therapist at the time. The Board was prepared to accept the day spa therapist's evidence that she saw IHF's penis and became upset, giving rise to inadvertent exposure as a reasonable possibility.

101 In our view, there was an 'evident and intelligible' justification for the Board's decision. Its reasoning, on the basis of the material before it, was not illogical or irrational.

102 We do not accept that a finding of unintentional exposure was precluded by IHF's own evidence. Although IHF was emphatic that there could have been no exposure of his penis and explained that he held his cupped hand over the towel covering his genitals throughout the whole treatment, it is the case, as the primary judge explained, that IHF's denial of what was put to him could not exclude something which he could not have known. Moreover, the Board considered that what had been put to IHF in the s 171 interview did not accurately represent the allegations made by the day spa therapist and may have distorted his responses. IHF's unequivocal responses to the allegations made against him may be explicable, as the Board found, having regard to 'the lack of clarity and the inaccuracies in the way that the allegations were put to him.'

103 We therefore reject the proposition that the Board's analysis involved findings disconnected from the evidence. The possibility of inadvertent exposure was raised by the evidence of the day spa therapist and the manager and a finding of inadvertent exposure was open, given the assessment of the day spa therapist's evidence as imprecise and lacking in clarity, and the content of the manager's evidence. Rather than being disconnected from the evidence, the Board's review was solidly rooted in the evidence, as the primary judge found.

We agree with the primary judge that the Chief Commissioner failed to grapple with all the evidence, preferring instead to take a 'high level' approach of attacking the logic of the process.

104 In our view, the Board's conclusion that the charge was not proven was the result of a process of reasoning based on the nature and quality of the evidence, and the manner in which allegations were put to IHF. While logical, rational or reasonable minds might differ on the conclusions to be drawn from the evidence, the Board's decision could not be said by a reviewing court to be illogical, irrational or unreasonable, simply because one conclusion was preferred over another possible conclusion. This would be so, even if the reviewing court might have come to a different conclusion on its own consideration of the evidence: a standard of legal reasonableness, properly applied, 'does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker'.[64]

105 There was no error in the primary judge rejecting the submission that the Board made a jurisdictional error in considering the whole of the evidence and finding that the charge had not been proven to the requisite standard, so as to justify its satisfaction that IHF's dismissal was harsh, unjust or unreasonable.

106 Ground 1 is not made out.

Ground 2

107 Ground 2 is that the primary judge erred in not finding that the Chief Commissioner was denied a reasonable opportunity to be heard and to lead evidence on the inadvertent exposure hypothesis, in circumstances where:

(a) IHF had not raised it as an issue, and the Board did not advert to the possibility of pursuing that particular line of inquiry until later in the hearing;

(b) the Chief Commissioner sought leave to call the day spa therapist at the

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64 *Li* (2013) 249 CLR 332; 363 [66] (Hayne, Kiefel and Bell JJ); see also 351–2 [30] (French CJ), 375 [106] (Gageler J); [2013] HCA 18. See further *Stretton v Minister for Immigration and Border Protection* (2016) 237 FCR 1; [2016] FCAFC 11; *Eden v Minister for Immigration and Border Protection* (2016) 240 FCR 158; [2016] FCAFC 28.

earliest opportunity after it became clear where the Board was headed;

(c) at the start of the hearing the Board had asked the parties whether they wanted to call further evidence, and nothing transpired in the hearing to justify closing off that option; and

(d) there was no objection from IHF to the Chief Commissioner calling the day spa therapist.

108 The Chief Commissioner says further that the primary judge erred in finding that allowing him to re-call the day spa therapist would have risked significant procedural unfairness to IHF and erred in finding that any prejudice to the Chief Commissioner was of his own making.

Chief Commissioner's submissions

109 The Chief Commissioner submits that the inadvertent exposure hypothesis was raised by the Board of its own motion, despite IHF not having agitated the issue at any stage, and turned out to be the decisive consideration for the Board disposing of the review adversely to the Chief Commissioner. In those circumstances, procedural fairness required a sufficient opportunity for the Chief Commissioner to adduce evidence and make submissions about that issue. Contrary to the view of the primary judge, the Chief Commissioner's predicament was not of his own making.

110 According to the Chief Commissioner, the Board did not flag at the outset of the hearing that it was disposed to go down a path of an own motion inquiry into a hypothesis not in issue at the Inquiry hearing. When the Board made it clear later in the review hearing that this was its intended course, the Chief Commissioner sought an opportunity to adduce further evidence from the day spa therapist. IHF did not object to the day spa therapist being recalled, yet the Board denied the request. A second request was made towards the end of the hearing and was similarly denied.

111 The Chief Commissioner submits that to the extent that the Board relied on having

asked the parties earlier on whether they intended to call evidence, this had a 'hollow ring' to it. The Board had asked the parties whether they wanted to adduce further evidence at the very beginning of the hearing, before the Chief Commissioner became aware of the Board's intended course. Nothing transpired in the course of the hearing to justify a change to that position. Moreover, the calling of further evidence would not have prejudiced IHF in the conduct of his review (and the primary judge erred in accepting that reason). IHF's representative did not oppose the day spa therapist being recalled and it would not have involved any 'unscrambling' of the misconduct allegation. The gist of the allegation was clear. Any narrowing of the range of hypotheses reasonably open was a consequence of IHF's own evidence — as early as the s 171 interview (before the charge).

Analysis of ground 2

112 At the heart of this complaint is the Board's refusal to give the Chief Commissioner leave to call the day spa therapist, it having become evident that the Board considered that there were gaps in the evidence, giving rise to the possibility of inadvertent exposure.

113 Ordinarily, procedural fairness does not require a decision-maker to disclose their provisional views or proposed conclusions.[65] Nor is there a general obligation for a decision-maker to disclose their mental process, in the sense of providing a 'running commentary' that gives the applicant 'forewarning of all possible reasons for failure'.[66] To the contrary, adopting such a course 'would be likely to run a serious risk of conveying an impression of prejudgment'.[67] However, in some cases procedural fairness may require that a decision-maker disclose, for instance, a particular path of reasoning that the parties could not reasonably have anticipated; or forewarn of a proposed conclusion that is likely to take the

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65 See, eg, *Ansett Transport Industries Ltd v Minister for Aviation* (1987) 72 ALR 469, 499 (Lockhart J).

66 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 69 [31]; [2001] HCA 22 (Gleeson CJ and Hayne J). See also *F Hoffman-La Roche and Co AG v Secretary of State for Trade and Industry* [1975] AC 295; [1974] 2 All ER 1128, where Lord Diplock stated 'the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If that were a rule of natural justice only the most talkative of judges would satisfy it…': at 369.

67 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 166 [48]; [2006] HCA 63 (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ) ('*SZBEL*').

parties by surprise.[68] Similarly, procedural fairness may require disclosure that a decision-maker proposes to reject an issue that the parties had agreed on,[69] or if the decision-maker changes their view on an argument that they had earlier indicated would be accepted or rejected.[70] Ultimately, the question is whether procedural fairness — assessed by reference to the particular statutory scheme[71] — requires disclosure in order for the person affected by a decision to have the opportunity to be heard.[72]

114 The principles were set out by the Full Federal Court in *Australian Capital Territory Revenue v Alphaone Pty Ltd*:[73]

> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision maker. It also extends to require the decision maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.[74]

115 As this passage suggests, the opportunity to be heard would ordinarily require a party affected by a decision to have the opportunity to ascertain and address the issues relevant for determination (that is, issues that are 'in the ring').[75]

116 This was the issue before the High Court in *SZBEL*.[76] In that case, the Refugee Review Tribunal had affirmed a decision by the delegate of the Minister, to refuse the

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68 *Habib v Director-General of Security* (2009) 175 FCR 411; [2009] FCAFC 48.

69 *Stead v State Government insurance Commission* (1986) 161 CLR 141; [1986] HCA 54.

70 See, eg, *Pantorno v The Queen* (1989) 166 CLR 466; [1989] HCA 18.

71 *SZBEL* (2006) 228 CLR 152, 162; [2006] HCA 63 (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

72 See, eg, *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100, and in particular at 100–4 (Keely J).

73 (1994) 49 FCR 576; [1994] FCA 1074 ('*Alphaone*').

74 Ibid 591–2 (Northrop, Miles and French JJ).

75 *Victims Compensation Fund Corporation v Nguyen* (2001) 52 NSWLR 213, 220–1 [44]; [2001] NSWCA 264 (Mason P, Handley and Powell JJA).

76 (2006) 228 CLR 152; [2006] HCA 63.

applicant a protection visa. While the Tribunal affirmed the delegate's decision, it did so on a different basis, finding that aspects of the applicant's evidence, which had not been doubted by the delegate, were 'implausible'. The High Court held that the Tribunal had denied the applicant natural justice, because it had not indicated to the applicant that the 'issues arising in relation to the decision under review' (the focus of the review under the relevant statutory provision) were not those that the delegate had considered determinative against the applicant. As a result, the applicant did not have the opportunity to address or lead further evidence on the 'live issues' before the Tribunal on review.[77]

117 In this case, however, the situation is quite different. The issue of intentional exposure was always necessarily 'in the ring'. Considering whether the element of intention was made out on the evidence did not involve the Board following a particular path of reasoning that the parties could not reasonably have anticipated. This is highlighted by the fact that the Chief Commissioner agreed with the Board's suggestion at the outset that intentional exposure was a necessary element in order to find the charge proven.

118 The Board also made it clear to the parties at the very beginning of its review hearing that it had doubts about the soundness of the factual findings made by the Inquiry Officer and that it was unclear what precisely was found proven in relation to the physical movements of the towel resulting in the alleged exposure of IHF's penis. The Board informed the parties that this was a significant issue which it intended to explore in some detail. The Board also expressed concern about the clarity and particularity with which the allegations were elicited from the day spa therapist and then presented to IHF for his response.

119 This was an unambiguous signal to the Chief Commissioner that the Board had doubts about the reliability (or 'exactness') of the day spa therapist's account of events, on which the Chief Commissioner relied to establish intentional exposure. Intentional exposure was dependent on her evidence being accepted. Nonetheless, the Chief Commissioner's representative, when asked, confirmed that he did not wish to call the day spa therapist to give further evidence. The application to call the day spa therapist was only made some time

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77 Ibid 165 [43] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

later when it became obvious from the quite protracted exchanges between the Chief Commissioner's representative and members of the Board that there were 'holes in what was or was not covered by the [Inquiry Officer]'. In other words, the Chief Commissioner only sought to supplement the evidence against IHF once it was evident that there were problems with the evidence upon which he had chosen to rely.

120 Given the consequences for IHF of a finding that he intentionally exposed himself to the day spa therapist, it was imperative that there be no prejudice to him in the change of course proposed by the Chief Commissioner.

121 In our view, there was an inherent problem with calling the day spa therapist to supplement her earlier evidence, which was, as the primary judge explained, that it was too late to 'fill the gaps' in the evidence without causing significant procedural unfairness to IHF. We agree with the Board (and the primary judge) that it would have required the manager and IHF to give further evidence, and it might also have required the particulars of the charge to be amended and the whole disciplinary process to be re-commenced. The Board correctly identified problems with the way in which the day spa therapist's allegations were put to IHF in the s 171 interview, which occurred at the very beginning of the disciplinary process. In our view, the Board was entitled to form the view that the failures that it had identified in eliciting accurate and detailed allegations from the day spa therapist infected the whole process — from charging, to inquiry, to decision, and then to the review.

122 We see no error in the primary judge's assessment that the Chief Commissioner's assumption that the only conclusion available on all of the evidence was that there was intentional exposure or none at all was erroneous.[78] For the reasons we have given, a finding of unintentional exposure was open on the evidence, and the Board made it clear at the outset that it intended to carefully examine all of the evidence, particularly on the question of intention.

123 Accordingly, the primary judge did not err in holding that the Board did not deny the Chief Commissioner procedural fairness by refusing to allow him to lead supplementary

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[78] Judge's reasons, [99] and [105].

evidence from the day spa therapist, or by holding that to allow the day spa therapist to give supplementary evidence at the Board hearing would risk significant procedural unfairness toward IHF.

124 Ground 2 is not made out.

Disposition

125 Neither ground of appeal has been made out. Leave to appeal will be granted, but the appeal will be dismissed.