IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2024 00151

MURRAY GENTNER — Plaintiff

v

POLICE REGISTRATION AND SERVICES BOARD — First Defendant

and

CHIEF COMMISSIONER OF POLICE — Second Defendant

JUDGE:	McDonald J
WHERE HELD:	Melbourne
DATE OF HEARING:	12 August 2024
DATE OF JUDGMENT:	28 August 2024
CASE MAY BE CITED AS:	Gentner v Police Registration and Services Board & Anor
MEDIUM NEUTRAL CITATION:	[2024] VSC 507

ADMINISTRATIVE LAW – Judicial review – Police officer dismissed from Victoria Police after a finding that a charge of disgraceful conduct was proven – Inquiry officer who found the charge proven amended the charge – Inquiry officer had no power to amend charge – Police Registration and Services Board affirmed the decision to dismiss the police officer – Error of law on face of record – Decision to dismiss police officer unjust because inquiry officer failed to comply with a statutory precondition for the valid exercise of power of dismissal – Police Registration and Services Board decision quashed – Application for review of dismissal decision remitted for hearing by differently constituted Board.

Victoria Police Act 2013 ss 125, 126, 127, 128, 129, 130, 131, 132, 146, 151, 152.

Interpretation of Legislation Act 1984 s 41A.

Victoria Police Regulations 2014 regs 51, 52, 53.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr C Carr SC with Mr M Nguyen	Tony Hargreaves & Partners Lawyers
For the First Defendant	No appearance	Russell Kennedy Lawyers
For the Second Defendant	Ms E Bennett SC with Mr M Garozzo	Clayton Utz

HIS HONOUR:

Introduction

1 Part 7 of the *Victoria Police Act 2013* ('the Act') prescribes procedures which must be followed to lawfully dismiss a police officer on the grounds of a breach of discipline. The procedures are highly prescriptive and are apt to be described as quasi criminal. The procedures require a preliminary investigation, the laying of a charge in accordance with prescribed formalities, followed by the Chief Commissioner or a person authorised by the Chief Commissioner inquiring into and determining the charge.

2 The plaintiff is a former Detective Leading Senior Constable of Victoria Police. On 23 January 2023 the plaintiff was charged with a breach of discipline under s 127(1) of the Act for engaging in a course of disgraceful or improper conduct within the meaning of s 125(1)(j) of the Act ('the Charge'). The Charge was amended on 29 June 2023. On 24 July 2023 a Disciplinary Inquiry Officer ('DIO') appointed by the Chief Commissioner of Police found the Charge proven and determined that the plaintiff should be dismissed from Victoria Police ('the determination'). On an application for review under Division 2 of Part 8 of the Act, the first defendant, the Police Registration and Services Board ('the Board') affirmed the DIO's decision. The plaintiff seeks orders in the nature of certiorari and mandamus pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules 2015* to quash the Board's decision and to remit the plaintiff's application for a review of the determination to a differently constituted Board for rehearing in accordance with law.[1]

3 The allegations which underpinned the charge against the plaintiff of disgraceful or improper conduct are extremely serious. The findings of the DIO which were subsequently affirmed by the Board were damning of the plaintiff. The present proceeding, which is an application for judicial review, does not involve any consideration of the merits of the adverse findings against the plaintiff made by the

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1 Originating Motion dated 15 January 2024.

DIO or the Board. Rather, consistent with the well-recognised constraints of judicial review, the issues for determination in the present proceeding involve consideration of the powers of a DIO appointed by the Chief Commissioner to inquire into and determine a charge of breach of discipline.

4 The primary question for determination is whether the DIO who inquired into and determined the Charge that the plaintiff committed a breach of discipline had the power to amend the Charge. I have concluded that this question must be answered in the negative. As the DIO did not have power to amend the Charge, the decision to dismiss the plaintiff was based on finding a charge proven which had not been laid in accordance with the provisions of Part 7 of the Act. The DIO failed to comply with a substantive statutory precondition for the making of a valid decision to dismiss the plaintiff. Consequently, the dismissal decision was unjust. Further, the Board's decision that the dismissal was not harsh, unjust or unreasonable constitutes an error of law on the face of the record. Discretionary considerations do not justify the withholding of an order quashing the Board's decision. The decision and order of the Board affirming the DIO's dismissal decision will be quashed. The plaintiff's application for a review of the DIO's dismissal decision will be remitted to a differently constituted Board for rehearing.

Statutory framework

5 Division 1 of Part 7 of the Act governs how breaches of discipline by members of Victoria Police are to be dealt with. Section 125(1)(j) provides that a police officer commits a breach of discipline if he or she is guilty of disgraceful or improper conduct (whether in his or her official capacity or otherwise).

6 Section 126(1) provides that if the Chief Commissioner reasonably believes that a police officer may have committed a breach of discipline, the Chief Commissioner may begin an investigation of the matter.

7 Section 127(1) provides that if after conducting a preliminary investigation, the person

authorised to conduct an inquiry reasonably believes that a police officer has committed a breach of discipline, the person may charge the officer with the commission of that breach of discipline.

8 Section 128 prescribes that the charge must be in writing and conform with the requirements of s 128.

9 Section 129 provides that the Chief Commissioner or a person authorised by the Chief Commissioner to conduct an inquiry must inquire into and determine a charge.

10 Section 130 provides that the Chief Commissioner may authorise any police officer or any person employed under the *Public Administration Act 2004* to inquire into and determine a charge and provides:

> (1) The Chief Commissioner may authorise any police officer or any person employed under the **Public Administration Act 2004** to—
>
> (a) charge a police officer or protective services officer under section 127; or
>
> (b) inquire into and determine a charge under section 129.
>
> (2) A person can be authorised under subsection (1)(a) or (b) or both, but the same authorised person cannot inquire into and determine a charge that he or she has laid.[2]

11 Section 131 sets out the procedure for the inquiry. Section 131(1) provides that a police officer who is charged with a breach of discipline may appear at the inquiry into the charge or may be represented by a person other than a legal practitioner.

12 Section 131(3) provides:

> (3) At an inquiry—
>
> (a) subject to this section, the procedure of the inquiry is at the discretion of the person conducting it; and
>
> (b) the proceedings must be conducted with as little formality and technicality as the requirements of this Act and the proper

[2] (Emphasis in original).

consideration of the matter permit; and

(c) the person conducting the inquiry is not bound by the rules of evidence but may inform himself or herself in any way he or she sees fit; and

(d) the person conducting the inquiry is bound by the rules of natural justice.

13 Section 132(1) provides:

> (1) If, after considering all the submissions made at an inquiry, the person conducting the inquiry finds that the charge has been proved, the person conducting the inquiry may make one or more of the following determinations—
>
> (a) to reprimand the police officer or protective services officer;
>
> (b) to adjourn the hearing of the inquiry into the charge—
>
> (i) on the condition that the officer be of good behaviour for a period not exceeding 12 months; and
>
> (ii) on any other conditions specified in the determination in accordance with section 132A;
>
> (c) to impose a fine not exceeding an amount that is 40 times the value of a penalty unit fixed by the Treasurer under section 5(3) of the **Monetary Units Act 2004**;
>
> (d) to impose a period, not exceeding 2 years, during which the officer will not be eligible for promotion or transfer;
>
> (e) to reduce the officer's rank or seniority;
>
> (f) to reduce the officer's remuneration;
>
> (g) to transfer the officer to other duties;
>
> (h) to dismiss the officer.[3]

14 Part 8 of the Act deals with appeals and reviews, with Division 2 setting out the process for reviews. Section 146 prescribes what decisions are reviewable by the Board. Section 146(1) provides that a police officer may apply to the Board for review of a decision by the Chief Commissioner, or a person authorised by the Chief

[3] (Emphasis in original).

Commissioner, including the decision to dismiss the officer.[4]

15 Section 151 requires the Board on review to have regard to the public interest and the interests of the applicant as follows:

> (1) In a review, the PRS Board must have regard to—
>
> (a) the public interest; and
>
> (b) the interests of the applicant for review.
>
> (2) Subsection (1) does not limit the matters to which the PRS Board is otherwise required or permitted to have regard in a review.
>
> (3) In this section—
>
> ***public interest*** includes the interest of maintaining the integrity of, and community confidence in, Victoria Police.[5]

16 Section 152 sets out the powers of the Board on review of a dismissal decision and relevantly provides:

> (1) This section applies to a review of a decision—
>
> (a) to terminate the appointment of a police officer or protective services officer; or
>
> (b) to dismiss a police officer or protective services officer.
>
> (2) On the review, the PRS Board must affirm the decision unless the PRS Board is satisfied that the decision is harsh, unjust or unreasonable.
>
> (3) If the PRS Board is satisfied that the decision is harsh, unjust or unreasonable, the PRS Board may—
>
> …
>
> (b) in any other case—
>
> (i) set aside the decision and, in substitution for it, make any other decision or determination that the person who made the decision could have made; or
>
> (ii) set aside the decision and refer the matter for determination by the Chief Commissioner in accordance with any directions or recommendations of the PRS

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4 *Victoria Police Act 2013* (Vic) s 146(1)(m).

5 (Emphasis in original).

Board; or

(iii) order the Chief Commissioner to reinstate the applicant as a police officer or protective services officer; or

(iv) if the PRS Board considers that it would be impracticable to reinstate the applicant, order the Chief Commissioner to pay to the applicant an amount of compensation not exceeding the amount of remuneration of the applicant during the period of 12 months immediately before the termination or dismissal.

…

17 Section 155 of the Act provides that the Board is bound by the rules of natural justice in all reviews. In accordance with s 156(1) the Board must conduct all reviews 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.

18 Part 6 of the *Victoria Police Regulations 2014* (Vic) ('the Regulations') is concerned with 'discipline' with reg 51 providing:

(1) If a police officer or protective services officer is charged with a breach of discipline under Part 7 of the Act, the Chief Commissioner or authorised person must give the officer at least 7 days notice of the inquiry into the charge.

(2) The Chief Commissioner or authorised person may determine whether any person making a complaint against a police officer or protective services officer which leads to a charge being laid may make a submission at the inquiry.

(3) The Chief Commissioner or authorised person may determine that an inquiry is not open to the public.

19 Regulation 52 governs the amendment of a charge:

(1) The Chief Commissioner or authorised person may amend a charge under Part 7 of the Act.

(2) If a charge is amended by the Chief Commissioner or authorised person, the police officer or protective services officer charged must be given reasonable notice to allow the officer adequate time to respond to the amended charge.

Background

20 The plaintiff is a former Detective Leading Senior Constable of Victoria Police. He joined Victoria Police on 11 September 2000 and graduated from the Police Academy in February 2001.[6] The plaintiff was promoted to the role of Detective Senior Constable at the St Kilda Crime Investigation Unit in December 2007.[7] He held this rank until he was dismissed on 24 July 2023.

21 In early May 2020 the plaintiff was identified as being involved in breaching the privacy of, and engaging in derogatory commentary about, a high profile individual in police custody ('first disciplinary matter').

22 On 4 May 2020 the plaintiff's mobile phone and other devices were seized pursuant to a search warrant executed as part of a criminal investigation connected to the plaintiff's first disciplinary matter ('the criminal investigation'). Forensic extraction of the plaintiff's mobile phone was undertaken as part of the criminal investigation. Analysis of the plaintiff's mobile phone demonstrated he had participated in SMS text messages with other members of Victoria Police.

23 On 8 May 2020 the plaintiff was suspended from active duty due to matters connected with the first disciplinary matter.[8]

24 On 4 December 2020 an Independent Broad-based Anti-corruption Commission ('IBAC') Investigation commenced in relation to the conduct of the plaintiff.[9] On 9 December 2020 the plaintiff was charged with a criminal offence in relation to the first disciplinary matter. On 8 March 2022 the criminal charges against the plaintiff were dismissed after the plaintiff made a successful no case to answer submission in the

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6 Letter from the Police Association of Victoria to the DIO dated 23 June 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 81.

7 Ibid at 82.

8 Discipline Inquiry Report dated 24 July 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 101 ('Disciplinary Inquiry Report').

9 Decision of the Board dated 15 November 2023, Affidavit of Fiona Michelle Jenkins sworn 23 May 2024, Exhibit FMJ-1 at 36 [174] ('Decision').

Magistrates' Court.[10]

25 On 23 January 2023 Mick Frewen, an Assistant Commissioner of Victoria Police, charged the plaintiff with a breach of discipline under s 127(1) of the Act. The plaintiff was charged with a breach of discipline within the meaning of s 125(1)(j) for his involvement in a series of group SMS messages with other Victoria Police officers between 20 May 2016 and September 2019, which were alleged to amount to a course of improper or disgraceful conduct. The original Charge detailed two parts to the plaintiff's conduct:

(a) conversations captured on the plaintiff's phone as text messages, or chats after analysis which occurred at the conclusion of the criminal investigation between 20 May 2016 and September 2019;[11] and

(b) conversations captured on the plaintiff's phone as part of the IBAC Investigation which occurred post the conclusion of the criminal investigation between 13 January 2021 and 20 April 2021.[12]

26 The particulars of the Charge are as follows:

> **Conduct relating to analysis of phone**
>
> 9.0 Between 20 May 2016 and September 2019 during various chats with the participants as detailed at particular 6.0, you or one of the participants:
>
> 9.1 Introduced police information in the form of images that included sex toys (taken at warrant addresses), offenders, deceased persons, Victoria Police Systems information including LEAP and other police personnel.
>
> 9.2 These images were introduced whilst participants were on and off duty.
>
> 9.3 Made comments on the images relating to particular 9.1 that

[10] Chief Commissioner's written submissions to the Board dated 8 September 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 177 [9].

[11] The dates related to this limb of misconduct were later amended by the DIO on 29 June 2023.

[12] Discipline Charge Notice dated 23 January 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 8.

included language that was:

9.3.1 Derogatory and sexist.

9.3.2 Homophobic and vilifying.

9.3.3 Unprofessional and disrespectful.

9.3.4 Discriminatory and prejudiced.

9.4 Separate to the chats involving the images (particular 9.1), you also participated in chats that included comments only such as:

9.4.1 Seeking or providing police information for private interests.

9.4.2 Gossip about colleagues and their sexual orientation.

9.4.3 Language as set out at 9.2.

10.0 The sharing of the images and the nature of the comments breached the privacy of the individuals concerned.

Conduct relating to the IBAC investigation

11.0 You were suspended on 8 May 2020 from active duty which required you to provide your supervisor your accoutrements and removed your access to police information, systems and police premises. It also required members who wished to remain in contact with you to submit a declarable association.

12.0 Between 13 January 2021 and 20 April 2021, you had contact with Burnett on your phone and discussed:

12.1 Current homicide investigations.

12.2 Individuals in witness security.

13.0 Language with these conversations included language that was:

13.1 Derogatory and sexist.

13.2 Homophobic, racist and vilifying.

13.3 Unprofessional and disrespectful.

13.4 Discriminatory and prejudiced.

14.0 You were not entitled to the information and were not part of any of the investigations discussed.

15.0 Your conduct failed to recognise the conflict of interest relating to your friendship with Burnett and your status as a suspended officer when discussing the investigations.

Conclusion

16.0 Your conduct is a course of conduct that amounts to a breach of discipline as defined by the Victoria Police Act 2013 as improper or disgraceful pursuant to section 125(j). In [sic] that you contravened the following policies.

17.0 **VPM** - Bullying, discrimination and harassment in that you:

17.1 Engaged in prohibited conduct.

18.0 **VPM** - Conflict of interest - Employee responsibilities & **VPMP** - Managing Conflict of interest.

19.0 **VPM** - Social media and online engagement in that you:

19.1 Breached the behavioural standards and expectations.

20.0 **VPM** - Deceased persons -Photographs & release of information.

21.0 **VPM** - Appropriate use of information, in relation to the particulars of the charge, in totality or part, in that you:

21.1 Used police information for private purposes.

21.2 Did not have a legitimate business need.

21.3 Had no regard for the privacy of the individuals concerned.

22.0 **VPM** - Information Privacy, in that you:

22.1 Used police information without a legitimate policing purpose.

23.0 **VPM** - Professional and ethical standards namely:

24.0 The code of ethics in that you failed to consider.

24.1 The Organisational Values - Professionalism, leadership, respect and integrity. In that you:

24.1.1 Participated in disrespectful, discriminating, vilifying and inappropriate behaviour.

24.1.2 Failed to address with your colleagues their information breach and inappropriate comments.

24.1.3 Failed to report the misconduct of the other police members involved in the various communications.

24.1.4 Took no action to restrict the release of police information beyond the initial communications.

24.1.5 Participated in the communications without regard to the welfare, privacy and reputation of the individuals

involved.

24.2 **Employee's responsibilities** - Performance and conduct

24.3 The SELF test in that you failed to apply.

25.0 **VPM** - Witness Protection - Operational Members, Information management and disclosure and handling in that you failed to appreciate the potential harm of sharing the information.[13]

27 On 30 January 2023 the plaintiff was served with the brief of evidence relating to the Charge and disciplinary inquiry ('the brief').[14] On 23 March 2023 Russell Barrett, Acting Deputy Commissioner, appointed Mr Shaun Le Grand as the DIO to conduct the inquiry and determine the Charge against the plaintiff pursuant to s 130(1)(b) of the Act.[15] The hearing of the Charge was initially scheduled for 26 April 2023 but was 'adjourned administratively' to 17 May 2023.[16]

28 On 16 May 2023 the Disciplinary Inquiry Office contacted the plaintiff to notify him that the hearing on 17 May 2023 was to be adjourned to allow for the particulars in the Charge to be listed in tabular form cross referencing exhibits in a matrices format to identify which exhibits in the brief related to which of the particulars ('the matrices document'). [17] The matrices document was then shared with the plaintiff and his representative by email on 19 May 2023.[18] In the same email, the DIO notified the plaintiff that the hearing had been relisted for 29 May 2023 to allow the plaintiff seven days to consider the matrices document and to prepare a response.[19]

29 On 19 May 2023 Inspector Maskell, Officer in Charge, Discipline Advisory Unit informed the DIO that the Discipline Advisory Unit had located additional material

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13 Ibid at 8-12 (emphasis in original).

14 Transcript of Disciplinary Hearing of 29 May 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, AH-1 at 22 L 16 ('Transcript of Disciplinary Hearing').

15 Appointment of person to inquire into and determine charge, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 13.

16 Transcript of Disciplinary Hearing at 15 L 29.

17 Email from the Disciplinary Inquiry Office to the Police Association of Victoria dated 16 May 2023 Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 59; Transcript of Disciplinary Hearing at 19 L 1-16.

18 Email from the DIO to the Police Association of Victoria dated 19 May 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 63.

19 Ibid.

by way of six images involving deceased persons on the plaintiff's mobile phone ('the additional material').[20] At the time the DIO instructed that the additional material was a matter to be raised in the inquiry.[21] The conversation between Inspector Maskell and the DIO did not include the plaintiff or his representative.[22] The plaintiff was notified of the additional material following Inspector Maskell's notification to the DIO.[23]

30 The Charge was heard by the DIO on 29 May 2023, 16 June 2023 and 29 June 2023 ('the disciplinary inquiry'). The plaintiff was represented by the Victoria Police Association of Victoria. Transcripts of the hearing on 29 May 2023 and 16 June 2023 as well as an incomplete transcript of the hearing on 29 June 2023 are in evidence.

31 At the beginning of the hearing on 29 May 2023 the DIO explained the framework instructing the procedure of the inquiry. During this introduction, the DIO stated:

> … I can amend the charge and the inquiry officer - that's myself – and representatives appearing, witnesses and any report of this inquiry are covered by the same privileges and immunities as apply to an action in the Supreme Court of Victoria or a report of any such action.[24]

32 Shortly after his introduction, the DIO confirmed he had received contact from Inspector Maskell who had informed him of the additional material.[25] The DIO confirmed he had not seen the additional material but was aware of an 'overview of what it [was]'.[26] Further, the DIO confirmed the additional material was not in the brief and proposed that Inspector Maskell produce the images and that the matter be adjourned to allow the parties time to consider the additional material and whether it should be added to the brief.[27]

33 Later at the hearing on 29 May 2023 the plaintiff entered a not guilty plea on the basis

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20 Discipline Inquiry Report at 102; Transcript of Disciplinary Hearing at 20 L 19-30.
21 Discipline Inquiry Report at 102.
22 Transcript of Disciplinary Hearing at 43 L 17-30.
23 Ibid.
24 Ibid at 17 L 7-12.
25 Ibid at 20 L 19-30.
26 Ibid at 21 L 2.
27 Ibid at 21 L 20 – 22 L 3.

of a 'threshold submission' relating to the validity of the search warrant used in the criminal investigation.[28] The plaintiff submitted to the DIO that the search warrant executed on 4 May 2020 was unlawfully issued and therefore all particulars of the Charge relating to information seized under the warrant should be struck out due to the inadmissibility of the evidence ('the search warrant submission').[29] The main focus of the search warrant submission was that the form and content of the warrant failed to comply with s 268 of the Act rendering the warrant unlawful. As a result the plaintiff's representative submitted that all aspects of the Charge should be dismissed and all particulars struck out.[30] The hearing was adjourned until 16 June 2023 for the DIO to consider the threshold search warrant submission.

34 On 30 May 2023 by way of email to the plaintiff's representative, the DIO rejected the plaintiff's search warrant submission considering he was 'not obliged or required to delve into the technical legal requirements pertaining to the issue of the search warrant'.[31] The DIO went on to state that 'any action or finding in relation to the legality of the search warrant must occur in a court of law and is not able to be dealt with in this inquiry'.[32] On this basis, the DIO considered it reasonable to treat the material seized under the search warrant as material which may lawfully be received as evidence in the brief.[33]

35 On 16 June 2023 when the hearing reconvened the DIO informed the plaintiff that he had reviewed the additional material as previously discussed.[34] The DIO had determined that the additional material was largely irrelevant and that he proposed to deal only with the exhibits that were part of the original brief.[35] During this discussion it was made clear that the additional material had been described to the

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28 Ibid at 23 L 12-13.
29 Transcript of Disciplinary Hearing at 26-31.
30 Ibid at 31 L 14-19.
31 Email from the DIO to the Police Association of Victoria dated 30 May 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 77.
32 Ibid at 78.
33 Ibid.
34 See Transcript of Disciplinary Hearing at 42 L 24.
35 Ibid at 39 L 18-23.

DIO by Inspector Maskell prior to any discussion with the plaintiff's representative.[36] The plaintiff's representative submitted that any reliance on the additional material would be procedurally unfair because it was outside of the scope of the Charge that was issued. The plaintiff's representative went on to submit that the plaintiff had a real concern that the DIO had been influenced by the existence of the additional material and whether, as a result, a perception of bias had arisen.[37]

36 The plaintiff's representative went on to submit that the DIO should recuse himself on the basis of apprehended bias by virtue of an 'ex parte' conversation between the DIO and Inspector Maskell in relation to the additional material whereby the plaintiff was not privy to what was discussed.[38] The plaintiff submitted that the communication with Inspector Maskell availed the DIO to access prejudicial material, not properly put before the plaintiff, which created an apprehended or actual bias including additional material that did not form part of the discipline brief therefore tainting the inquiry ('the bias submission').[39]

37 When asked by the plaintiff's representative whether the DIO's review of the additional material may influence his decision making process in the inquiry, the DIO responded 'No, because it seems to me that [the additional material is] broadly irrelevant'.[40] Regardless, the plaintiff's representative submitted the 'ex parte' conversation between the DIO and Inspector Maskell had tainted the running of the inquiry in that the DIO had been alerted to additional material that was not part of the disciplinary brief or within the 'four corners' of the Charge.[41] The hearing was then adjourned for the DIO to consider the bias submission.[42]

38 On 19 June 2023, by way of email to the plaintiff's representative, the DIO advised the

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36 Ibid at 41 L 8 – 43, 29 L 25-29.
37 Ibid at 41 L 22-25.
38 Ibid at 44 L 9-23.
39 Transcript of Disciplinary Hearing at 45 L 3-4; Email from the DIO to the Police Association of Victoria dated 19 June 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 79.
40 Transcript of Disciplinary Hearing at 42 L 27-28.
41 Ibid at 45 L 3-4, L 6-10.
42 Ibid at 46 L 21-24.

plaintiff that the bias submission was rejected and determined that 'no exhibits or materials [had been] put before [the DIO] that were not contained within the originating brief of evidence' therefore the DIO did not consider himself biased.[43] In support of this contention the DIO noted:

(a) he did not consider the conversation with Inspector Maskell to be 'ex parte' as the Disciplinary Advisory Unit was not a separate party to the inquiry but an 'internal advisor' to the DIO on matters in connection with the inquiry. Further, the purpose of the conversation between the DIO and Inspector Maskell was 'merely to forecast the provision of additional printed material' from an existing exhibit already within the brief;

(b) Inspector Maskell notified the plaintiff's representative of the additional material at a time proximate to the notification to the DIO; and

(c) if the additional material was deemed not relevant, the DIO proposed to have no regard to it in the course of the remainder of the inquiry.[44]

39 On 23 June 2023, by way of letter, the plaintiff's representative notified the DIO that in light of the DIO's decision regarding the plaintiff's initial threshold submissions (the search warrant submission and the bias submission) the plaintiff accepted the particulars of the Charge and foreshadowed that the plaintiff would formally enter a guilty plea upon resumption of the inquiry on 29 June 2023.[45] Attached to this letter were the plaintiff's written submissions to the DIO.

40 On 29 June 2023 at 9:54 am, by way of email to the plaintiff's representative, the DIO notified his intention to amend the Charge as follows:[46]

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43 Email from the DIO to the Police Association of Victoria dated 19 June 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 79.

44 Ibid.

45 Letter from the Police Association of Victoria to the DIO dated 23 June 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 81.

46 Email from the DIO to the Police Association of Victoria dated 29 June 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 92 (emphasis in original).

> Ahead of the further hearing of this inquiry at 2 pm today, I wanted to notify you of some corrective amendments to the [Charge] that I propose to make in the inquiry …
>
> **Amendments to DCN**
>
> I propose to make the following corrective amendments:
>
> - Particular 9.0: delete '20 May 2016 and September 2019' and replace with '28 October 2015 and 15 January 2020'. These dates correctly capture the dates of communications captured in the relevant exhibits in the discipline brief which have been notified in the Exhibit and Policy matrices.
>
> - Particular 9.4.3: delete '9.2' and replace with '9.3'. Corrects typo.

41 Attached to the DIO's email was the amended Charge.[47] The Charge was amended as follows:

> 9.0 Between ~~20 May 2016~~ 28 October 2015 and ~~September 2019~~ 15 January 2020 during various chats with the participants as detailed at particular 6.0, you or one of the participants:
>
> …
>
> 9.4.3 Language as set out at ~~9.2~~ 9.3

('the Amended Charge').

42 In the same email, the DIO notified the plaintiff of additional information he had obtained regarding the deceased person in Exhibit 29 to the brief. The DIO informed the plaintiff that he had obtained the additional information from the disciplinary brief of another police member and stated:

> To assist in my understanding of the general operational circumstances relating to, and the identity of, the deceased discussed and photographed in Exhibit 29, I have obtained two documents from Exhibit 31 in D/LSC Burnett's discipline brief of evidence namely an Incident Report dated 11/10/2018 and D/LSC Burnett's diary entries dated 11/10/2018 detailing his attendance at the scene where the deceased was located.

With this information the DIO had then located the death and funeral notices for the deceased person which he attached to the email for the plaintiff's attention.[48] The DIO

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47 Ibid at 94-98.
48 Ibid at 92.

invited the plaintiff to make submissions on the matters referred to in his email.

43 On 29 June 2023, when the hearing resumed at 2:00 pm, the plaintiff's representative stated that there was no issue with either amendment to the Charge.[49] During the inquiry the plaintiff confirmed with the DIO that he admitted the amended Charge.[50] At the hearing the DIO found the amended Charge proven.[51]

44 On 24 July 2023 the DIO determined the amended Charge proven and that the plaintiff was to be dismissed from Victoria Police as of that date pursuant to s 132(1)(h) of the Act.[52] The DIO set out his reasons and findings in the Discipline Inquiry Report of the same date.[53] In relation to both the search warrant submission and the bias submission, the DIO repeated his findings expressed to the plaintiff by way of emails dated 30 May 2023 and 19 June 2023. Under the heading 'determination reasons' the DIO analysed the evidence as captured in messages retained on the plaintiff's devices alongside the plaintiff's submissions to the inquiry. The telephone communications covertly recorded by IBAC, the second limb of misconduct, were considered separately.

45 The Discipline Inquiry Report detailed the DIO's reasons as follows:

> At the hearing on 29 June 2023, I stated that after considering the Police Officer's admissions and all of the evidence, I was comfortably satisfied that all of the facts alleged in the particulars of the charge as amended had been proved except for particulars 9.3.1, 9.3.2 and 9.3.4 insofar as they relate to the images relating to particular 9.1. Particulars 9.3.1, 9.3.2, 9.3.3 and 9.3.4 were all found to have been proved insofar as they relate to particular 9.4.3.[54]
>
> …
>
> Having regard to my finding on the facts as stated, I stated at the hearing that I am comfortably satisfied that the charge of a course of disgraceful or improper conduct under s 125(1)(j) of the VP Act has been proved and that I am satisfied

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49 Transcript of Disciplinary Hearing at 49-50.
50 Disciplinary Inquiry Report at 107.
51 Transcript of Disciplinary Hearing at 50.
52 Notice of Determination dated 24 July 2024, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 99.
53 Disciplinary Inquiry Report at 100-140.
54 Ibid at 107.

that the conduct may be characterised as disgraceful.[55]

…

The breach of discipline involves a course of conduct over five-and-a-half years (October 2015 to April 2021) during which time the Police Officer serially and blatantly breached mandatory Victoria Police policies with respect to the appropriate use of information, inappropriate behaviours (inappropriate comments about others), conflict of interest, witness protection and failing to report the misconduct of other police officers. All of the misconduct is captured in **WhatsApp messages** with one or more of seven other police officers in intercepted **telephone conversations** with one other police officer.[56]

…

WhatsApp messages

Over a period of four years (October 2015 to January 2020), the Police Officer communicated in chat groups with up to seven certain other police officers using the messaging service WhatsApp to send and receive messages (variously containing text, images, and videos) which involved the Police Officer:

- Disclosing police information in WhatsApp messages (9.1)
- Making inappropriate comments in WhatsApp messages about police information disclosed in WhatsApp messages by other police officers (9.3.3)
- Seeking or providing police information in WhatsApp messages for private interests (9.4.1)
- Making inappropriate comments in WhatsApp messages about the sexual orientation of other members of Victoria Police personnel (9.4.2)
- Making inappropriate comments in WhatsApp messages about other members of Victoria Police personnel (9.4.3)
- Failing to report the misconduct committed by other police officers in WhatsApp messages (24)

Telephone conversations

Eliciting and receiving from Burnett sensitive police information regarding homicide investigations and individuals in witness security while suspended from duty

Over a period of four months (January 2021 to April 2021), while suspended from duty, the Police Officer engaged in telephone conversations with a police member attached to the Homicide Squad (LSC Adam Burnett) in which the

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55 Ibid at 109.

56 Ibid at 111-112 (emphasis in original).

Police Officer elicited and discussed **current homicide investigations (12.1)** and **individuals involved in witness security (12.2)** for his own personal interest (edification, curiosity) and without any legitimate and demonstrable need related to the performance of his current duties (whether as a suspended member or otherwise). This conduct was in breach of mandatory Victoria Police policies with respect to; appropriate use of information [and legislation (s 227 of the Victoria Police Act 2013)], conflict of interest (private interests in conflict with professional obligation to ensure the confidentiality of sensitive and protected information); and professional and ethical standards by failing to report suspected misconduct.[57]

…

CONCLUSION

…

In part, the conduct the subject of this charge and inquiry involves gross and arbitrary interferences to the personal privacy and dignity of private citizens and police colleagues over an extended period spanning five years. For example, the potential harm to the family of the deceased photographed on Parkdale Beach and the subject of disgusting comments, depriving him of dignity in death, is incalculable. Even if the family does not learn of this dreadful event, the harm to Victoria Police's reputation and the loss of community confidence in it will be significant even if the identity of the deceased is unknown. The idea that Victoria Police officers (detectives) would treat a deceased person who died in tragic circumstances like this would be a shock to the majority of the community. Some may see some aspects of the behaviour as being sadly similar to some of the behaviour to which deceased and dying police officers were subjected in the Eastern Freeway tragedy. I accept that it is not the same but also see that there is a basis for comparison of some aspects. The fact that a recently deceased person who dies in tragic circumstances would be subjected to sexually depraved ridicule by police officers in possession of a graphic photo taken of the deceased by a detective attending the scene is disturbing and an affront to public decency.

A completely different but equally serious aspect of this matter involves the disgracefully abusive, objectifying and dehumanising commentary made by the Police Officer about his supervisor. It could be reasonably expected that a person who is made aware of being discussed in this way would be deeply impacted including being offended, humiliated, intimidated and unsafe in a Victoria Police workplace. The Police Officer's behaviour has risked these eventualities with respect to his supervisor but others as well.[58]

…

Commentary around photos of sex toys and a gun located and paraded by police in three separate warrant premises and posted in WhatsApp chats is shocking. As the legal principles concerning the construction of search

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57 Ibid at 112 (emphasis in original).

58 Ibid at 137.

warrants and the extent of the police powers given under them recognises, a person's home is their castle, and the privacy of the home must not be interfered with by agents of the state unless a magistrate or judge certifies and gives written approval for the search having regard to specific criteria. The breaches to personal privacy would be treated very seriously by the courts, if brought before them, but that has not happened with respect to the photos involved in this matter. Moreover, I expect the community would be greatly dismayed and many outraged by such cavalier behaviour by police.

The Police Officer's involvement in discussing with a Homicide Squad detective ongoing homicide investigations and witness security issues related to them is a significant integrity failing by the Police Officer. The unauthorised and uncontrolled disclosure of details of this kind presents risks to the integrity of the investigations and risks to the personal safety of vulnerable witnesses and the police officers working to protect them. More broadly, public awareness that sensitive police information of this kind has been mistreated by police tends to deter vulnerable witnesses from assisting police and from engaging in witness protection in the future. This conduct therefore represents a risk to the force's capability and effectiveness in this important aspect of criminal investigation. The Police Officer is sufficiently experienced in police investigations to know these risks but took no action in any of these conversations to mitigate them in any way.

A police officer of the Police Officer's skill and 20-years' experience would have been sufficiently aware of his obligations with respect to appropriate information handling and appropriate behaviour to know that his written communications on WhatsApp which involved the disclosure of police information, disgraceful commentary about it and about police colleagues and others, was taking a risk – but he did it anyway, over many years. The Police Officer has his own explanations and reasons, but they do not accord with the policies and values of the organisation, nor with the statutory duty on him under s 61 of the VP Act to comply with the Chief Commissioner's instructions. The Police Officer has, over an extended period of five years, consistently acted outside the rules (instructions, policies, and values) applicable to him as if they did not apply to him. He has consistently placed his own interests ahead of the faithful discharge of the duties legally imposed on him, which is contrary to his oath of office.[59]

…

The Police Officer's extensive course of misconduct is in contradiction to the mandatory policies and values of the force but, consequentially, and more significantly, undermines the maintenance of public confidence in Victoria Police. It negatively impacts the integrity of the organisation and has caused actual individual and reputational harm and has created significant risk of further individual and reputational harm.[60]

…

[59] Ibid at 138.
[60] Ibid at 139.

> A less punitive determination such as reduction in rank, or a good behaviour bond as proposed on behalf of the Police Officer, would not adequately address the purpose of police discipline. In my estimation there would be a loss of public confidence in Victoria Police and a diminution in the esteem of its membership if the Police Officer were not dismissed for his egregious behaviour over so many years. It is equally necessary to ensure that the determination is a potent deterrent to such harmful conduct as well as an encouragement to increased reporting of it.[61]

46 Further, the DIO noted in his decision that prior to the hearing on 29 June 2023, the DIO provided a copy of the death notice of the deceased referred to in Exhibit 29 of the brief to the plaintiff's representative. The DIO stated this was 'to see if it might raise some reflection about the nature, severity and impact of his behaviour'. The DIO went on to state: 'At [the] hearing however, the Police Officer did not refer specifically to this issue or the death notice and what he thought about the matter now'.[62]

47 The DIO determined:

> …for the purposes of maintaining the integrity of, and community confidence in Victoria Police and in protection of the community, the determination of this inquiry is that the [plaintiff] is dismissed from Victoria Police under s.132(1)(h) of the VP Act effective 24 July 2023.[63]

48 Later on 24 July 2023 the plaintiff applied to the Board for review of the DIO's decision under s 146(1)(m) of the Act.[64]

49 The Board heard the review of the decision on 22 September 2023. On 15 November 2023 the Board affirmed the DIO's decision on the basis that it was not satisfied that the decision was harsh, unjust or unreasonable within the meaning of s 152(2) of the Act.

50 By originating motion dated 15 January 2024 the plaintiff seeks the following orders:

> 1. An order in the nature of certiorari, quashing the decision of the first defendant made on 15 November 2023, affirming a decision made by Inquiry Officer Shaun Le Grand on 24 July 2023, to dismiss the plaintiff

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61 Ibid at 140.
62 Ibid at 119.
63 Ibid at 140.
64 Application for Review of a Disciplinary or Termination of Appointment Decision dated 24 July 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 141-146.

from his employment as a member of Victoria Police.

2. An order in the nature of mandamus, remitting the plaintiff's application to review the Inquiry Officer's decision to a differently constituted Police Registration and Services Board, to be determined according to law.

3. The defendants to pay the plaintiff's costs.

4. Such further or other orders as the Court sees fit.

51 The originating motion contains three grounds:

[a] The first defendant had no power to affirm the dismissal decision, and or made an error of law on the face of the record in purporting to affirm the dismissal decision.

…

[b] The first defendant made an error of law on the face of the record and or a jurisdictional error in that the first defendant failed to apply the correct test to the determination of the plaintiff's application for review under s 152(2) of the VPA.

…

[c] The first defendant made an error of law on the face of the record and or a jurisdictional error in that the first defendant failed to take into account a relevant consideration, namely the role of other members of Victoria Police in the misconduct the subject of the plaintiff's disciplinary charge.

52 Before considering the plaintiff's grounds of review I shall first address the decision of the Board. Once a decision of an inquiry officer to dismiss a police officer is affirmed under s 152(2) of the Act, it is the decision of the Board that gives legal effect to the determination to dismiss the police officer and it is the decision of the Board that invokes the Court's jurisdiction. The decision of the inquiry officer then has no continuing legal operation.[65]

Decision of the Board

53 As set out above, s 152(2) provides that, on a review of a decision to dismiss a police officer, 'the PRS Board must affirm the decision unless the PRS Board is satisfied that

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65 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 241-242 [70] (Gageler, Keane and Nettle JJ); *Chou v Minister for Immigration and Border Protection* (2021) 286 FCR 459 at 491 [143] (Griffiths and Abraham JJ, with Lee J agreeing).

the decision is harsh, unjust or unreasonable'. If the Board is satisfied that the decision is harsh, unjust or unreasonable, the Board may take one of the steps set out in s 152(3), including: setting aside the decision and either substituting any other decision or determination or referring the matter for determination by the Chief Commissioner; ordering that the police officer be reinstated; or ordering the payment of compensation.

54 In relation to the misconduct found proven by the DIO, the Board considered it unnecessary to repeat the DIO's findings as to the particulars of the Charge as the plaintiff had admitted each particular.[66] Further, the Board noted that there was no challenge to the admissibility of the evidence obtained from the covertly recorded telephone calls forming the second limb of the plaintiff's course of misconduct involving discussions of current investigations and individuals in witness security whilst suspended from duty.[67] The Board stated:

> 50. If the SMS messages and photographs extracted from the Applicant's iPhone between 28 October 2015 and 15 January 2021 were admissible as evidence in the disciplinary proceedings, then it is entirely clear from the circumstances of this case that there is very little, if any dispute either that the Applicant sent, shared or accepted the relevant messages, images and photographs or that such conduct was disgraceful or improper.
>
> 51. There is no challenge to the admissibility of the material emerging from the covertly recorded telephone conversations and the Applicant admits that between 13 January 2021 and 20 April 2021, while suspended from duty he discussed current homicide investigations and individuals in witness security. The relevant particulars allege that the Applicant used language that was; derogatory and sexist; homophobic, racist and vilifying; unprofessional and disrespectful; and discriminatory and prejudiced.
>
> 52. Having regard to the available materials, there is no dispute then, (regardless of whether the SMS messages and photographs from the Applicant's iPhone were (or are) admissible in the disciplinary or review proceedings), that the available and admitted facts demonstrate the Applicant engaged in disgraceful or improper conduct. Because the Board has earlier provided an overview of the relevant conduct (assessed by the Review Officer as disgraceful conduct), it is not

66 Decision at [49].
67 Ibid at [51].

necessary to repeat that conduct here but we will now turn to the Inquiry Officer's assessment of its nature.

53. The Inquiry Officer identified a range of SMS messages (that the Applicant admitted sending, receiving or sharing) which were considered by the Inquiry Officer to relate to the Applicant's employment as a Victorian Police officer. Those messages related to:

- A photograph covertly taken of a colleague wearing civilian clothes in a police car park;
- A photograph of a police detective laying across the couch in an OMCG club house;
- Messages encouraging the introduction of LEAP check information conducted by a police detective pertinent to a named civilian female;
- Inappropriate comments about; a photograph of a police member holding a sex toy during the execution of a warrant; an image of an offender; a criminal brief of evidence; an image of a police member holding a sex toy at a separate warrant; a photograph of a police member holding a pistol being pointed toward another police member during the execution of a warrant, a photograph of a deceased male at a potential crime scene; and an image of police members performing duties at a cricket game;
- The Applicant checking the Second-Hand Dealers database based on the suspicion of a friend of a police member colleague;
- The Applicant requesting the identity of a complainant who had made a complaint against a colleague of the Applicant;
- Inappropriate comments in SMS messages about the sexual orientation and promotion of other Victoria Police members;
- Disparaging, harmful and disgraceful comments about a female supervisor;
- Failing to report the misconduct of other police members who improperly disclosed police information in SMS messages; and
- Eliciting and receiving from a colleague sensitive police information while suspended from duty, including in relation to a homicide investigation and about witness security.[68]

Findings of the Board

55 The Board expressed 'great concerns' about the DIO's failure to address the validity

[68] (Citations omitted).

of the search warrant:

> 130. …In the circumstances of such obvious deficiencies, we were greatly concerned that no further analysis was applied to the validity of the warrant by the Inquiry Officer and that Victoria Police regarded the issue as not to be relevant to the Inquiry Officer's task.
>
> …
>
> 132. In our view, it was not necessary for the Inquiry Officer to have made any formal determination that the warrant was valid or otherwise before considering the issue further. That is because the deficiency was so patently obvious that he needed only to observe that the warrant lacked the mandatory information required by s.268(2)(c) of the Act as he was being urged to do by TPAV.[69]

56 The Board noted that the DIO was not bound by rules of evidence, but, could have been guided by s 138 of the *Evidence Act 2008*.[70] The Board then undertook its own consideration of whether the material obtained pursuant to the warrant was admissible under s 138 of the *Evidence Act 2008*. The Board determined 'to admit and accept the evidence which emerged from the execution of a warrant even though it clearly did not contain all of the mandatory particulars required by s.268(2)(c) of the Act'.[71] The Board considered that had the evidence been less probative as to the serious misconduct committed by the plaintiff, then it would have been minded to reject the evidence entirely.[72]

57 The Board considered it was not necessary for it to 'substantively resolve' each competing submission in relation to procedural fairness and natural justice. In this respect the Board noted that should unfairness in process be found, that unfairness is merely one factor relevant to the question of whether the decision was harsh, unjust or unreasonable.[73] Nonetheless the Board assessed each submission of the parties[74] and determined:

> 177. We were concerned about what we have earlier described as the

69 (Citations omitted).
70 Decision at [134].
71 Ibid at [146].
72 Ibid at [147].
73 Ibid at [172].
74 Ibid at [173].

> unfortunate and unusual step taken by the Inquiry Officer in sourcing new evidence from a separate discipline brief and obtaining public death notices and then providing those documents to the Applicant on the morning of the hearing on 29 June 2023. The Inquiry Officer of course has power under s.131(3) of the Act to inform himself of 'in any way he sees fit' but he is bound by the rules of natural justice. In the circumstance that the DCN had been issued many months earlier, the approach taken by the Inquiry Officer on the day of the hearing was almost inexplicable and always bound to attract the procedural unfairness argument. Regardless, we considered the materiality of this argument, among other relevant factors and took it into account.
>
> 178. We also took into account the argument made about Inspector Maskell from the Disciplinary Advisory Unit engaging 'ex-parte' with the Inquiry Officer who later viewed additional photographs of deceased persons which had been downloaded from the Applicant s devices but which were not included in the discipline brief. We were not persuaded that there was any material breach of natural justice and even though those photographs were provided to the Applicant, they were considered by the Inquiry Officer to be irrelevant to the matter and were therefore not relied upon.
>
> 179. Having carefully assessed each of the individual arguments raised by and on behalf of the Applicant and the facts and circumstances surrounding them, on balance we were not persuaded that any of the procedural fairness or natural justice arguments, either singularly or collectively, rendered the Inquiry Officer's decision to be 'harsh, unjust or unreasonable'.[75]

58 The Board's decision notes that the Charge was amended by consent on 29 June 2023. At paragraph 47 of its decision, the PRS Board states:

> 47. We will refer later in this decision to the argument now advanced in the written TPAV submissions dated 1 September 2023 that the Inquiry Officer fell into error by introducing new evidence on the day of the hearing and amending the charge.[76]

However, the Board did not address the question of whether the DIO had power to amend the Charge on 29 June 2023. The written submissions filed on behalf of the plaintiff before the Board expressly contended that the DIO had no power to amend the charge.[77]

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75 (Emphasis omitted).

76 (Citations omitted).

77 Plaintiff's written submissions to the Board dated 1 September 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 159 [52]-[54].

59 The Board went on to acknowledge the public interest in retaining the services of suitable and highly skilled police officers. The Board tempered this consideration with the public interest in ensuring the community can expect police officers to conduct themselves with a high degree of integrity.[78] The Board was highly critical of the SMS messages the plaintiff and his colleagues had engaged in, labelling the messages 'of an extreme and appalling discriminatory nature which were shocking and distressing to read…[and] were not a "one off".'[79] The Board went on to cite its conclusions in a previous matter, stating that retaining the plaintiff would:

> undermine the trust of the community in its police force;
>
> present a real risk to the community that the police officer would perform their duties and exercise their discretions in a discriminatory manner; and
>
> undermine the trust of the Chief Commissioner in that police officer's capacity to properly perform his duties.[80]

60 The Board discussed the interests of the plaintiff and effect of the disciplinary proceeding on the plaintiff noting his genuine display of remorse.[81] It is in this section of the decision that the Board acknowledged the plaintiff's 'level of culpability' submission:

> 189. Notwithstanding his remorseful response, the Applicant draws a distinction between breaching Victoria Police 'procedures and guidelines' as compared to breaching formal VPM's which themselves amount to breaches of discipline. We have taken the Applicants interests into account in this regard. **We have also taken into account what the Applicant described as his '*Level of Culpability* without needing to repeat the authorship of individual messages here** and we had particular regard to issues raised by the Applicant about his role in and the impact of the horrific Bourke Street massacres. We also noted and considered in detail the nature, content and strength of the range of referee statements filed in support of the Applicant.[82]

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78 Decision at [184].
79 Ibid at [185].
80 Ibid at [186] (emphasis omitted).
81 Ibid at [188].
82 Ibid at [189] (emphasis added) (citations omitted).

Conclusion of the Board

61 The Board sets out its conclusion from [195] to [199] of its decision:

> 195. There should no longer be any dispute that the Applicant admits the truth of the discipline charge of disgraceful or improper conduct under s.125(1)(j) of the Act and so the decision now for the Board is whether the decision to dismiss him made by the Inquiry Officer on 24 July 2023 was '*harsh, unjust or unreasonable*'.
>
> 196. After careful consideration, and notwithstanding our observations and concerns above about some aspects of the Inquiry Officer's decision, the Board has ultimately not been not persuaded that the determination by the Inquiry Officer to dismiss the Applicant was in all the circumstances "*harsh, unjust or unreasonable*".
>
> 197. The key reasons for the Board's decision are:
>
> - We accept the Applicant was involved '*gross and arbitrary interferences' to the personal privacy and dignity of private citizens and police colleagues over an extended period spanning five years*.'
>
> - We agree that extensive parts of the content of the workplace themed SMS messages and covertly recorded conversations were '*abhorrent and despicable*' and occurred over an extended period of time, and it is that material which points towards the Applicant being a homophobic, sexist, racist, bully who, despite being an experienced investigator, was prepared to elicit sensitive police information for his own personal interest.
>
> - We accept, that over an extended period, the Applicant had been involved in twenty-two '*de-humanising, degrading, desultory and abhorrent comments*' in a '*sustained, systemic, serial attack on a person, a colleague*'.
>
> - We accept that over a five-year period, the Applicant consistently and wilfully acted outside the relevant instructions, policies, laws and values applicable to him and that he consistently placed his own interests ahead of the faithful discharge of the duties legally imposed on him, contrary to his oath of office.
>
> - We find that the Applicant's strong discriminatory beliefs and attitudes represent an ongoing risk to his ability to deliver non-discriminatory policing services in the future. The Board made a similar observation in Staffieri, and we agree with the Chief Commissioner's submission in this case that in essence, '*There is no place in Victoria Police for the Applicant*'.
>
> 198. Taking into account and balancing the competing public interests and the interests of the Applicant, we have no difficulty concluding that the public interest considerations outweighed those of the Applicant and that in order to maintain the integrity of and confidence in Victoria

> Police and the protection of the community, the decision to dismiss the Applicant was not '*harsh, unjust or unreasonable*'. We acknowledge other aspects of the Applicant's contributions and service, including his skills and diligence as an investigator. However, we consider that dismissal was the only possible outcome given the serious nature of the misconduct found proven.
>
> 199. Section 153(2) of the Act requires the Board to affirm the decision under review unless satisfied it was *harsh, unjust or unreasonable*. We are not satisfied the decision was '*harsh, unjust or unreasonable*' therefore we must affirm the decision.[83]

Did the DIO have the power to amend the charge?

62 The primary issue in the present proceeding is whether the DIO had power to amend the charge. If as contended by the plaintiff, the DIO did not have power to amend the charge, the DIO did not have power to dismiss the plaintiff. A statutory precondition to the exercise of the DIO's power of dismissal is a finding that the charge laid against a police officer under s 127 of the Act has been proven. If the DIO did not have power to amend the charge, it follows that the charge which the DIO found proven was not the charge laid under s 127.

63 The plaintiff submits that the Board erred in affirming the dismissal decision in circumstances where the DIO had purported, without authority, to amend the charge and to determine the charge as amended. The Chief Commissioner submits that the DIO had power to amend the charge with the consequence that the alleged error on the part of the Board is without substance.

64 Section 127(1) of the Act is the source of power to charge a police officer with a breach of discipline. If the Chief Commissioner or a person authorised by the Chief Commissioner under s 130(1)(a) reasonably believes that a police officer has committed a breach of discipline, the Chief Commissioner or authorised person may charge the officer with the commission of that breach of discipline.

65 Section 130(a) provides that the Chief Commissioner may authorise any police officer

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83 (Emphasis in original).

or any person employed under the *Public Administration Act 2004* to:

(a) Charge a police officer under s 127, or

(b) To inquire into and determine a charge under s 129.

Section 130(2) provides that the same authorised person cannot inquire into and determine a charge that he or she has laid.

66 The Act does not expressly confer a power to amend a charge which has been laid under s 127. However, subject to the Act manifesting a contrary intention, s 41A of the *Interpretation of Legislation Act 1984* confers power on the Chief Commissioner or an authorised person who has laid a charge, to amend the charge. Section 41A provides:

> If an Act or subordinate instrument confers power to make, issue or grant an instrument (not being a subordinate instrument) the power shall, unless the contrary intention appears, be construed as including a power, exercisable in the same manner and subject to the same conditions or limitations (if any), to repeal, revoke, rescind, amend, alter or vary an instrument made in the exercise of that power.

67 A charge laid under s 127 must comply with the requirements prescribed by s 128(1). A charge laid under s 127(1) is an instrument within the meaning of s 41A because it enlivens the power of the Chief Commissioner or authorised person to inquire into and determine the charge.[84] Subject to the Act manifesting a contrary intention, which it does not, the power conferred by s 127 upon the Chief Commissioner or authorised person to lay a charge includes a power to amend the charge.

68 Regulation 52 of the *Victoria Police Regulations 2014* is set out earlier in this judgment. Regulation 52 provides an express power of amendment of a charge. The Chief Commissioner submits that the 'authorised person' referred to in reg 52 is the person authorised under s 130(1)(b) to inquire into and determine the charge, as distinct from the person authorised under s 130(1)(a) to lay a charge. In his written submissions the

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84 Cf *X v Australian Crime Commission* (2004) 139 FCR 413 at 421 [29] (Finn J).

Chief Commissioner advances four submissions in support of this contention. First, the Chief Commissioner submits that the power to lay a charge is spent once the charge has been laid and that the power to amend the charge vests in the person conducting the inquiry.[85] I reject this submission. It was not pressed during the hearing on 12 August 2024. Ms Bennett SC, who appeared with Mr Garozzo, for the Chief Commissioner, accepted that both the Chief Commissioner and the person authorised under s 130(1)(a) to lay a charge have power to amend the charge pursuant to reg 52(1).[86] It would be inconsistent with the text of reg 52(1) to conclude that the sole repository of the power to amend a charge is the person who has been authorised to inquire into and determine the charge. The question of construction under reg 52(1) is whether, in addition to the Chief Commissioner and the person authorised to lay the charge, the person authorised to inquire into the charge has power to amend the charge.

69 Second, the Chief Commissioner submits that as regs 51 and 53 specifically deal with the powers of the authorised person conducting an inquiry, it would be illogical if the authorised person referred to in reg 52 is the person who has laid the charge as distinct from the person who is inquiring into and determining the charge.[87] I reject this submission. It is inconsistent with Ms Bennett's concession during the hearing that the authorised person who has laid the charge has power under reg 52 to amend the charge. This concession is plainly correct. Regulations 51 and 53 do make specific provision in respect of the powers of the authorised person conducting an inquiry. However, this does not mandate a conclusion that the authorised person referred to in reg 52 is not the authorised person who has laid the charge.

70 Third, the Chief Commissioner submits that s 131(3)(a) and (b) support a finding that the reference to 'authorised person' in reg 52 includes the person who has been authorised to conduct the inquiry. Section 131(3)(a) provides that the procedure of

85 Second defendant's outline of submissions dated 25 June 2024 at [33].
86 Transcript of proceedings, 18 July 2024, T 44 L 15–30.
87 Second defendant's outline of submissions dated 25 June 2024 at [34] and [35].

the inquiry is at the discretion of the person conducting it. Section 131(3)(b) provides that the proceedings must be conducted with as little formality and technicality as the requirements of the Act and the proper consideration of the matter permit.

71 The power to amend the charge is expressly regulated by reg 52 and s 127 of the Act read in conjunction with s 41A of the *Interpretation of Legislation Act 1984*. I do not understand Ms Bennett to have submitted that s 131(3)(a) and (b) is an express source of power for a DIO to amend the charge. Rather, I understood her to submit that s 131(3)(a) and (b) are contextual matters which support a finding that the 'authorised person' referred to in reg 52(1) includes the authorised person who is conducting an inquiry.

72 Sections 131(3)(a) and (b) do not support the Chief Commissioner's submission that the 'authorised person' in reg 52(1) includes the person authorised to conduct the inquiry. The charge as laid and/or amended is the subject matter of the inquiry. The amendment of a charge is not a matter which falls within 'the procedure of an inquiry' for the purposes of s 131(3)(a). Section 131(3)(a) confers a discretionary power upon the inquiry officer to determine the procedure of the inquiry into the charge. It does not confer a discretion to amend the charge. Section 131(3)(a) does not support the Chief Commissioner's construction of reg 52(1).

73 Section 131(3)(b) is concerned with the nature of the proceedings to inquire into a charge, not with the content of the charge which is the subject of the inquiry. Further, s 131(3)(b) is subject to 'the requirements of this Act'. If the power of amendment under reg 52(1) is conferred only on the Chief Commissioner and the authorised person who has laid the charge this is a requirement of the Act which qualifies the operation of s 131(3)(b). Further, the requirements of the Act do not permit non-compliance with the requirements of s 128 as to the form of an amended charge. When s 127 is read in conjunction with s 41A of the *Interpretation of Legislation Act 1984*, the power of amendment conferred on the Chief Commissioner or the person authorised under s 130(1)(a) to lay a charge is exercisable in the same manner and subject to the

same conditions or limitations as the power to lay a charge. This means that the amended charge must comply with s 128(1).

74 None of the matters relied upon by the Chief Commissioner support a finding that the reference to 'authorised person' in reg 52(1) includes the person authorised to conduct the inquiry into the charge. There are a number of matters which support a finding that the 'authorised person' in reg 52(1) is the person authorised to lay the charge. First, reg 52(1) refers to '*the* Chief Commissioner or authorised person', rather than *an* authorised person. The Act prescribes two classes of authorised person: the person who lays a charge of breach of discipline (s 130(1)(a)); and the person who inquires into and determines the charge (s 130(1)(b)).

75 The Chief Commissioner has an express power of amendment under reg 52(1). The Chief Commissioner has power to lay a charge under s 127. This is a contextual matter which supports a finding that the power of amendment under reg 52(1) is conferred upon the individuals who have power to lay a charge under s 127, namely, the Chief Commissioner and the person authorised under s 130(1)(a).

76 Section 130(2) is a further contextual matter which supports a finding that a DIO does not have power to amend a charge. Section 130(2) provides that a person who has been authorised under s 130(1)(a) to lay a charge cannot inquire into and determine the charge. There is a clear demarcation between the power to lay a charge and the power to inquire into the charge. This demarcation is necessary because s 127(1) provides that a precondition to the laying of a charge by the Chief Commissioner or a person authorised under s 130(1)(a) is a reasonable belief that a police officer the subject of the charge has committed a breach of discipline. If the Chief Commissioner or authorised person, having laid the charge, could then inquire into and determine the charge, this would give rise to the actuality or appearance of disqualifying bias.[88]

77 Ms Bennett submitted that the operation of s 130(2) is limited to precluding an

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88 *Isbester v Knox City Council* (2015) 255 CLR 135 at 154 [55] (Gageler J).

authorised person who has laid a charge from also inquiry into and determining a charge. Ms Bennett submitted that s 130(2) does not prevent an authorised person who is conducting an inquiry into a charge laid by a person authorised under s 130(1)(a), from amending that charge and proceeding to inquire into and determine the amended charge.

78 The express prohibition under s 130(2) is that a person who has laid a charge cannot inquire into and determine the charge. I accept Ms Bennett's submission that s 130(2) does not expressly prohibit an authorised person inquiring into a charge laid by a person authorised under s 130(1)(a) from amending the charge. However, as a contextual matter, s 130(2) supports a finding that there is a clear demarcation under Part 7 of the Act between:

(i) The prosecutorial function of laying and amending a charge; and

(ii) The adjudicative function of inquiring into and determining the charge.

This demarcation is necessary because a statutory precondition to the laying of a charge under s 127 is that the Chief Commissioner or person authorised under s 130(1)(a) holds a reasonable belief that the police officer has committed the breach of discipline with which they are charged. This statutory precondition applies equally to any amendment of the charge by the Chief Commissioner or a person authorised under s 130(1)(a) to lay a charge. It would be an absurd outcome if the Chief Commissioner or person authorised under s 130(1)(a) are required to have a reasonable belief that a breach of discipline has occurred when laying a charge but could subsequently amend the charge without having a reasonable belief that the officer has committed the breach of discipline as set out in the amended change. Further, and in any event, when s 127 is read in conjunction with s 41A of the *Interpretation of Legislation Act 1984* the power of amendment under s 127 is expressly subject to the same statutory precondition of reasonable belief which applies to the power to lay a charge.

79 If, as contended by the Chief Commissioner, the DIO has a power to amend a charge laid under s 127 by the Chief Commissioner or a person authorised under s 130(1)(a) that power of amendment would also need to be subject to a statutory precondition of reasonable belief that the officer had committed the breach of discipline in the charge as amended. If reg 52(1) confers a power of amendment on both the authorised person laying the charge and the authorised person inquiring into the charge, the power of amendment must be construed consistently with any power of amendment conferred upon the Chief Commissioner or a person authorised under s 130(1)(a). So construed, any power of amendment conferred on a DIO under reg 52(1) is subject to a statutory precondition that the DIO have a reasonable belief that the officer has committed the breach of discipline in the amended charge. The amendment of a charge by a DIO subject to this statutory precondition would be inconsistent with the requirement under s 131(3)(d) that the person conducting an inquiry is bound by the rules of natural justice. The ordinary incidents of natural justice include the absence of the actuality or appearance of disqualifying bias.[89]

80 A further contextual matter which supports the demarcation between the laying/amending of a charge and the inquiry/determination of a charge, is the inquisitorial nature of an inquiry into a charge laid under s 127. The ordinary meaning of 'inquisitorial' is 'having or exercising the function of an inquisitor, one whose official duty is to inquire, examine or investigate'.[90] The ordinary meaning of 'inquisitorial' is apt to describe the nature of an inquiry into a charge laid under s 127. The proceedings before a DIO are not adversarial. Unlike an appeal or review under Part 8 of the Act, the Chief Commissioner has no right of appearance before a DIO. A DIO does not rule upon competing contentions advanced in an adversarial context. The DIO may inform himself or herself in any way he or she sees fit: s 130(3)(c). It would be an odd outcome if a DIO cannot inquire into and determine a charge that he

89 *Isbester v Knox City Council* (2015) 255 CLR 135 at 154 [55] (Gageler J).

90 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1127 [18] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

or she has laid (s 130(2)) yet is free to inquire into and determine a charge which he or she has amended. As is demonstrated by the facts of the present case, an amendment to a charge may significantly expand the matters which are the subject of the charge and which the DIO must inquire into and determine.

81 Ms Bennett submitted that there is potential for delay and inconvenience if a DIO does not have the power to amend a charge. The Chief Commissioner and/or the person authorised by the Chief Commissioner under s 130(1)(a) to lay a charge clearly have power to amend the charge. There is much to be said in favour of Victoria Police using its best endeavours to ensure the charges have been properly formulated prior to the commencement of an inquiry into the charge. The strictures imposed by s 128(1) are plainly directed to achieving this result as well ensuring that a police officer is provided with full particulars of the alleged breach of discipline. If there is potential for delay in the conduct of an inquiry if a DIO does not have power to amend a charge this is simply a consequence of a statutory framework which confines the power of amendment to the Chief Commissioner or the person authorised by the Chief Commissioner under s 130(1)(a) to lay a charge.

82 The DIO did not have power to amend the charge for breach of discipline by the plaintiff. The absence of power to amend the charge has the following consequences. First, the DIO did not inquire into and determine the charge which had been laid under s 127. Second, the DIO did not comply with the statutory precondition under s 129 for the valid exercise of the power of dismissal under s 132(1)(h) because he determined a charge other than that which had been laid. The obligation imposed on a DIO under s 129 to inquire into and determine a charge is central to the statutory scheme regulating disciplinary action which may be taken against a police officer for a breach of discipline. The DIO's failure to comply with a substantive statutory precondition to the exercise of the power of dismissal has the consequence that the

dismissal was unjust.[91] This in turn has the consequence that the Board's decision affirming the dismissal decision was erroneous. Pursuant to s 152(2) the Board was required to affirm the DIO's dismissal decision unless satisfied that the decision was harsh, unjust or unreasonable. The Board was not satisfied that the decision was harsh, unjust or unreasonable.

83 The Board's finding that the dismissal decision was not harsh, unjust or unreasonable is an error of law on the face of the record which enlivens the Court's power to grant certiorari and quash the Board's decision and order.[92] In a recent decision, *Chief Commissioner of Police v HDB & Anor*,[93] I made the following finding as to the discretionary nature of certiorari:

> 56 The Court's power to make orders in the nature of certiorari is discretionary.[94] The basis for denying certiorari on discretionary grounds must be strong since 'there is a basic presumption that appropriate relief should follow upon a finding of unlawfulness'[95] against a public body. Relief may be refused if the identified error could not undermine the essential legal basis that underpins the decision.[96]

84 The Board erred in concluding that the dismissal decision was not harsh, unjust or unreasonable. This error undermines the essential legal basis of the Board's decision which was to affirm the DIO's dismissal decision on the basis that the decision was not harsh, unjust or unreasonable. As the Board's error undermines the essential legal basis of its decision it is not appropriate to withhold the grant of certiorari on discretionary grounds.

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91 *Chief Commissioner of Police v HDB & Anor* [2024] VSC 465 at [63]–[64]; *Kirkham v Industrial Relations Commissioner & Anor* (2015) 121 SASR 471 at 483 [38] (Kourakis CJ).

92 *Wingfoot v Kocak* (2013) 252 CLR 480 at 492 [26] (French CJ, Crennan, Bell, Gageler and Keane JJ).

93 [2024] VSC 465.

94 *Re Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 82 at 89 [5] (Gleeson CJ), 105–109 [49]–[58] (Gaudron and Gummow JJ), 136–137 [145]–[150] (Kirby J) and 144 [171]–[172] (Hayne J); *Re McBain; Ex Parte Australia Catholic Bishops Conference* (2002) 209 CLR 372 at 394 [21] (Gleeson CJ), 410 [80] (Gaudron and Gummow JJ), 415–423 [95]–[113] (McHugh J), 454 [223]–[224] (Kirby J) and 465–466 [262]–[265] (Hayne J); *Mann v Medical Practitioners Boards* [2004] VSCA 148 at [17].

95 *Essendon Football Club v Chief Executive Officer of the Australian Sports Antidoping Authority* (2014) 227 FCR 1 at 92 [476] (Middleton J).

96 *SZBYR v Minister for Immigration & Citizenship* (2007) 81 ALJR 1190 at [29] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), [88]–[89] (Kirby J).

85 I have taken into account the findings of the Board which are highly critical of the conduct of the plaintiff. The Board considered that 'dismissal was the only possible outcome given the serious nature of the misconduct found proven'.[97] Notwithstanding this finding, the Board should have concluded that the DIO's dismissal decision was unjust because the DIO inquired into and determined a charge other than that which had been laid under s 127 by reason of the purported amendment of the charge by the DIO. If the Board had made a finding that the dismissal was unjust it would not have been open to the Board to affirm the DIO's dismissal decision.

86 The Board's decision and orders will be quashed and the plaintiff's application under s 146(1)(m) for a review of the dismissal decision will be remitted for rehearing. The Board, acting according to law, will be required to make an order under s 152(3)(b). This may include an order for reinstatement of the plaintiff under s 152(3)(b)(iii). Alternatively, the Board may refer the charge of breach of discipline as laid against the plaintiff by Assistant Commissioner Mick Frewen on 23 January 2023 to the Chief Commissioner for determination in accordance with any directions or recommendations of the Board.

87 The plaintiff seeks an order that upon remittal his application for review of the DIO's dismissal decision be heard by a differently constituted board. The power to direct a rehearing by a different judge or differently constituted tribunal should be exercised sparingly.[98] Such an order should be made where the interests of justice require it.[99]

88 Where a judgment gives rise to a reasonable apprehension of bias, this will usually be a basis for making such an order.[100] Having regard to the Board's statement that dismissal was the only possible outcome it is appropriate to order that the plaintiff's

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97 Decision at [198].

98 *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 at [12]–[17] (Mason P), [141]–[142] (Ipp JA), [237]–[239] (Basten JA).

99 *Murphy v State of Victoria & Anor* (2014) 45 VR 119 at 152 [109] (Nettle AP, Santamaria and Beach JJA).

100 Ibid.

application for a review of the DIO's dismissal decision be heard by a differently constituted board.

Ground 2: Whether the Board erred by concluding that the material obtained pursuant to the invalid search warrant was admissible pursuant to s 138 *Evidence Act 2008 (Vic)*

89 The plaintiff contends that the Board erred in its approach to the evaluation of whether the DIO's dismissal decision was harsh, unjust or unreasonable. The plaintiff contends that the DIO's failure to make a finding as to the validity of the search warrant pursuant to which the plaintiff's mobile phone was seized, had the consequence that the Board should have concluded that the DIO's dismissal decision was harsh, unjust or unreasonable. The plaintiff contends that it was not open to the Board to consider for itself whether the material obtained pursuant to the invalid warrant was admissible pursuant to s 138 of the *Evidence Act*. I reject each of these contentions.

90 The plaintiff submits that, 'the statutory function of the PRS Board is not to consider a disciplinary matter afresh and reach what it regards to be the correct of preferable decision. Rather, its statutory function is to determine whether the decision under review is harsh, unjust or unreasonable'.[101]

91 The statutory function of the Board was to review the DIO's decision to dismiss the plaintiff. In conducting the review the Board was permitted to inform itself on any matter as it sees fit: s 159(1). A precondition to the exercise of the Board's power to either affirm the decision of the DIO, or alternatively, to make orders pursuant to s 152(3)(b), is satisfaction that the dismissal decision was, or was not, harsh, unjust or unreasonable.

92 If the effect of the invalidity of the warrant was such that the material obtained pursuant to it could not properly have been admitted into evidence, this would have supported a finding by the Board that the dismissal was harsh, unjust or unreasonable.

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101 Plaintiff's outline of submissions dated 27 May 2024 at [44] (citations omitted) (emphasis in original).

However, as s 138 of the *Evidence Act* provided a legitimate basis for the material obtained pursuant to the warrant to be admitted into evidence, it was appropriate for the Board to address for itself the question of whether that material should be admitted into evidence. It was necessary for the Board to do so in order to address the question it was required to address by ss 152(2) and (3), namely, whether it was satisfied that the dismissal was harsh, unjust or unreasonable. The Board's finding that the material obtained pursuant to the invalid warrant was admissible pursuant to s 138 of the *Evidence Act* did not involve jurisdictional error or error of law on the face of the record.

Ground 3: Failure to deal with the role of other members of Victoria Police

93 In his submissions before the Board the plaintiff submitted that his culpability should be reduced by the fact that 'of the 39 text threads proffered as evidence of his wrongdoing [the plaintiff] was the initiator of only six'. The plaintiff submitted that the level of culpability ascribed to him by the DIO was excessive and that the sanction of dismissal imposed was harsh.[102] The plaintiff submits that his 'levels of culpability submission' was substantial and clearly articulated. He submits that the Board failed to address the submission and that this constituted jurisdictional error. I reject this submission. At [189] of its decision the Board addressed the plaintiff's 'level of culpability submission', as follows:

> We have also taken into account what the Applicant described as his 'Level of Culpability' without needing to repeat the authorship of individual messages here…[103]

In his written submissions the plaintiff conceded that he had 'engaged in messaging that was puerile, offensive and demeaning'.[104] The Board dealt with this submission as follows:

> The Board does not agree with the Applicant's characterisation of the relevant

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102 Plaintiff's written submissions to the Board dated 1 September 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 168–171 [97]–[102].

103 (Emphasis omitted).

104 Plaintiff's written submissions to the Board dated 1 September 2023, Affidavit of Anthony Hargreaves sworn 15 January 2024, Exhibit AH-1 at 170 [99].

> SMS messaging as being no more than 'puerile, offensive and demeaning' or that they were no more than an exercise of his basic human rights to privacy, reputation and freedom of thought and conscience.[105]

94 I do not accept the plaintiff's contention that the Board failed to address a substantial and clearly articulated submission. The Board did address the submission. Further, I do not accept that the submission, even if clearly articulated, was substantial. Paragraph 9 of the particulars of charge, prior to amendment on 29 June 2023, states: 'Between 20 May 2016 and September 2019 during various chats with the participants as detailed at particular 6.0, you or one of the participants…' Thereafter, paragraph 9.1 to 9.4 of the particulars set out a description of the subject matter of the chats. The plaintiff was not charged with initiating the chats. Rather, he was charged with *participating* in chats which he initiated or received. The Board described the subject of the charge and inquiry as involving 'gross and arbitrary interferences to the personal privacy and dignity of private citizens and police colleagues over an extended period spanning five years'.[106] The Board also stated:

> We agree that extensive parts of the content of the workplace themed SMS messages and covertly recorded conversations were '*abhorrent and despicable*' and occurred over an extended period of time, and it is that material which points towards the Applicant being a homophobic, sexist, racist, bully who, despite being an experienced investigator, was prepared to illicit sensitive police information for his own personal interest.[107]

The Board also stated:

> We accept, that over an extended period, the Applicant has been involved in twenty-two '*dehumanising, degrading, desultory and abhorrent comments*' in a '*sustained, systemic, serial attack on a person, a colleague*'.[108]

95 The plaintiff does not submit that these findings constitute an error of law on the face of the record or involve jurisdictional error by reason of legal unreasonableness or irrationality. The findings against the plaintiff are damning. The plaintiff's contention that the text messages and group chats in which he was involved comprised the acts

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105 Decision at [194], see also [96] and [175].
106 Ibid at [197].
107 Ibid (emphasis in original).
108 Ibid (emphasis in original).

of numerous other members of Victoria Police is not a substantial argument in support of a contention that the sanction of dismissal was harsh. Any involvement by the plaintiff in conduct of the type identified in the Board's decision provides a legitimate basis for the Board to be satisfied that the sanction of dismissal was not harsh.

Conclusion

96 I uphold Ground 1 in support of the plaintiff's application for an order quashing the decision and order of the Board. I reject Grounds 2 and 3. I shall make an order remitting the plaintiff's application for a review of the DIO's dismissal decision to be heard and determined by a differently constituted board. I shall provide the parties with an opportunity to make submissions on the costs of the proceeding. My provisional view is that the second defendant should pay the plaintiff's costs on a standard basis to be taxed in default of agreement.

CERTIFICATE

I certify that this and the 41 preceding pages are a true copy of the reasons for judgment of the Honourable Justice McDonald of the Supreme Court of Victoria delivered on 28 August 2024.

DATED this twenty eighth day of August 2024.

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Associate