

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *WDE v Director-General, Department of Justice and Attorney-General* [2020] QCAT 301

PARTIES: **WDE**  
(applicant)  
  
v  
  
**DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL**  
(respondent)

APPLICATION NO/S: CML219-19

MATTER TYPE: Childrens matters

DELIVERED ON: 4 August 2020

HEARING DATE: 24 July 2020

HEARD AT: Ipswich

DECISION OF: Member McDonnell

ORDERS: **The decision of the Director-General, Department of Justice and Attorney-General to issue a negative notice to the applicant is confirmed.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where review of decision by respondent to issue a negative notice

FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – OTHER MATTERS – blue card – where issue of negative notice – where application for review – where applicant has convictions for offences – where applicant has conviction for a serious offence under the *Working with Children (Risk Management and Screening) Act* 2000 (Qld) – whether an ‘exceptional case’ – application of factors in s 226 of the *Working With Children (Risk Management and Screening) Act* 2000 (Qld)

*Human Rights Act* 2019 (Qld), s 13, 48, 58  
*Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 19, s 20, s 24, s 66  
*Working with Children (Risk Management and Screening) Act* 2000 (Qld), s 5, s 6, s 225, s 226, s 353, s 354, s 360  
*Commissioner for Children and Young People and Child Guardian v FGC* [2011] QCATA 291

*Commissioner for Children and Young People and Child Guardian v Lister (No 2)* [2011] QCATA 87

*Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492

*Commissioner for Children and Young People and Child Guardian v Ram* [2014] QCATA 27

*Commissioner for Children and Young People and Child Guardian v Storrs* [2011] QCATA 28

*FMA v Chief Executive Officer, Public Safety Business Agency* [2016] QCAT 210

*Re TAA* [2006] QCST 11

*WJ v Chief Executive Officer, Public Safety Business Agency* [2015] QCATA 190

#### APPEARANCES & REPRESENTATION:

Applicant: Self-represented

Respondent: S Jayatilaka

#### REASONS FOR DECISION

##### Background

- [1] The applicant, a 32-year-old woman, was issued a positive notice and blue card on 19 June 2013. In April 2014, following a change in her police information, she elected to cancel her card. She has now applied to be issued a positive notice and blue card under the *Working with Children (Risk Management and Screening) Act 2000 (Qld)* ('WWC Act').
- [2] The applicant's criminal history includes a conviction for a serious offence<sup>1</sup> under the WWC Act.
- [3] Where a person has been convicted of a serious offence as defined in the WWC Act, the chief executive must issue a negative notice unless the chief executive is satisfied it is an exceptional case in which it would not harm the best interests of children for the applicant to be issued with a positive notice.<sup>2</sup> The chief executive was not satisfied the case was exceptional within the meaning of the WWC Act.
- [4] The respondent issued a negative notice on 24 May 2019 and WDE seeks a review of the decision that the applicant's case is not an exceptional case within the meaning of s 225 of the WWC Act.
- [5] Section 354(1) of the WWC Act provides that a person who is not a 'disqualified person'<sup>3</sup> is entitled to apply for a review of a 'chapter 8 reviewable decision'<sup>4</sup> within the prescribed 28 day period.<sup>5</sup> This includes a decision as to whether or not there is

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<sup>1</sup> WWC Act, Schedule 2.

<sup>2</sup> WWC Act, s 225.

<sup>3</sup> WWC Act, s 169.

<sup>4</sup> WWC Act, s 353 (definition of 'chapter 8 reviewable decision').

<sup>5</sup> *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* ('QCAT Act'), s 33(3).

an exceptional case if, because of the decision, the respondent issued a negative notice.<sup>6</sup>

- [6] The applicant is not a disqualified person and sought review of the decision within the prescribed period.

### **The legislative framework**

- [7] The Tribunal is required to decide the review in accordance with the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') and the WWC Act.<sup>7</sup> The purpose of the Tribunal's review is to produce the correct and preferable decision,<sup>8</sup> on the evidence before it and according to law. For the review, the Tribunal stands in the shoes of the decision maker and makes the decision following a fresh hearing on the merits.<sup>9</sup> The review is to be undertaken under the principle that the welfare and the best interests of a child are paramount.<sup>10</sup> On review, the Tribunal may confirm or amend the decision, set the decision aside and substitute its own decision, or set aside the decision and return the matter for reconsideration to the decision-maker for the decision, with or without directions.<sup>11</sup>
- [8] The object of the WWC Act is to promote and protect the rights, interests and wellbeing of children and young people in Queensland.<sup>12</sup> The principles under which the WWC Act is to be administered are:
- (a) the welfare and best interests of a child are paramount;
  - (b) every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing.<sup>13</sup>
- [9] It is not the intention of the WWC Act to impose additional punishment on a person who has police or disciplinary information, but rather is intended to put gates around employment to protect children from harm.<sup>14</sup>
- [10] For the present purposes, a negative notice must be issued unless the Tribunal is satisfied it is an exceptional case in which it would not harm the best interests of children if a positive was notice issued.<sup>15</sup>
- [11] The term 'exceptional case' is not defined in the WWC Act. Thus, what might be an exceptional case is a question of fact and degree, to be decided in each case on its own facts having regard to:

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<sup>6</sup> WWC Act, s 353 (definition of 'chapter 8 reviewable decision').

<sup>7</sup> QCAT Act, s 19(a).

<sup>8</sup> Ibid, s 20.

<sup>9</sup> Ibid.

<sup>10</sup> WWC Act, s 360.

<sup>11</sup> QCAT Act, s 24(1).

<sup>12</sup> WWC Act, s 5.

<sup>13</sup> Ibid, s 6.

<sup>14</sup> As stated in Queensland, *Parliamentary Debates*, Queensland Parliament, *Commission for Children and Young People Bill* Second Reading Speech, 14 November 2000, 4391 (Anna Bligh).

<sup>15</sup> WWC Act, s 225.

...the context of the legislation which contains them, the intent and purpose of that legislation, and the interests of the persons whom it is here, quite obviously, designed to protect: children.<sup>16</sup>

- [12] The Appeal Tribunal has taken the approach that changes in a person's circumstances that simply amount to them living in a law abiding manner as society expects and functioning at a level expected of a person at their stage and age in life, are generally considered to be the 'ordinary course' and not exceptional.<sup>17</sup>
- [13] In determining whether there is an exceptional case when a person has been convicted of an offence the Tribunal must have regard to the matters set out in s 226(2) of the WWC Act. The matters listed in s 226 are not exhaustive. Rather, s 226 'merely specifies certain particular matters which the [Tribunal] is obliged to consider in deciding the application.'<sup>18</sup>
- [14] 'Conviction' is defined in Schedule 7 of the WWC Act to mean 'a finding of guilt by a court, or the acceptance of a plea of guilty by a court, whether or not a conviction is recorded'.
- [15] In determining whether there is an exceptional case the Tribunal must be satisfied on the balance of probabilities, bearing in mind the gravity of the consequences involved.<sup>19</sup> The Tribunal has a broad discretion to exercise when considering the merits in each case. Neither party bears an onus in determining whether an exceptional case exists.<sup>20</sup>

#### **Consideration of s 226(2) of the WWC Act**

- [16] The matters listed in s 226(2) of the WWC Act must be considered by the Tribunal and are addressed below.

#### *Whether the offence is a conviction or a charge*

- [17] The applicant has convictions for the following offences:
- (a) Stealing by persons in the public service;
  - (b) Enter dwelling with intent by breaking whilst armed;
  - (c) Unlawful assault occasioning bodily harm whilst armed; and
  - (d) Common assault.
- [18] The applicant also has a finalised charge for stealing on her criminal history. The prosecution entered a *nolle prosequi* in relation to the charge and the applicant was discharged.

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<sup>16</sup> *Commissioner for Children and Young People and Child Guardian v FGC* [2011] QCATA 291, [31], citing *Kent v Wilson* [2000] VSC 98, [22].

<sup>17</sup> *Commissioner for Children and Young People and Child Guardian v Ram* [2014] QCATA 27, [47].

<sup>18</sup> *Commissioner for Children and Young People and Child Guardian v Maher and Anor* [2004] QCA 492, [42].

<sup>19</sup> *Ibid*, [30], citing with authority the test prescribed in *Briginshaw v Briginshaw & Anor* (1938) 60 CLR 336.

<sup>20</sup> *Commissioner for Children and Young People and Child Guardian v Storrs* [2011] QCATA 28.

*Whether the offence is a serious offence and, if it is whether it is a disqualifying offence*

- [19] The applicant's conviction for 'enter dwelling with intent by break whilst armed' is defined as a serious offence under the WWC Act.
- [20] The other offences on her criminal history are not defined as serious or disqualifying offences under the WWC Act. However, Parliament intended that all offences on a person's criminal history be able to be taken into account in assessing their eligibility to hold a blue card.

*When the offence was committed or is alleged to have been committed*

- [21] The applicant's offending and alleged offending occurred in 2012 and 2014, with the most recent offending having occurred over six years ago. The commission of these offences remains relevant to the assessment of the applicant's eligibility to hold a positive notice and blue card.<sup>21</sup> The passage of time is not itself an exceptional circumstance, nor does it diminish the seriousness of the applicant's offending behaviour.

*The nature of the offence and its relevance to employment, or carrying on a business, that involves or may involve children*

- [22] On 3 November 2012, the applicant was employed as a paramedic of the Queensland Ambulance Service and was in authorised possession of an ambulance at her home overnight. In anticipation of her duties the following day, she had stocked the ambulance with a standard drug kit, which contained various S4 drugs including methoxyflurane (known as the 'green whistle'). As part of her duties as a paramedic the applicant was authorised to administer methoxyflurane to patients requiring acute pain relief. Upon arrival at work the following day, the applicant spoke to a QAS supervisor, admitting she had self-administered four vials of methoxyflurane contained in the drug kit in the ambulance. A formal complaint was made to the Queensland Police Service.
- [23] By self-administering the drug, the applicant breached her employment obligations. Such behaviour raises concerns about WDE's ability to make appropriate decisions to promote and protect children's best interests.
- [24] The police brief indicates that, when interviewed, the applicant said she took the drugs due to emotional stress she was suffering as a result of witnessing trauma in the course of her employment and workplace conflicts with her supervisor. Further, it indicates the applicant's high level of cooperation with QAS and QPS in the investigations, that she was highly remorseful for her conduct, had resigned and had sought professional assistance in respect of her stress.<sup>22</sup>
- [25] The police brief in relation to the 2014 offences says the applicant knocked on the door of her friend's house and as the occupant started to open the door, WDE pushed open the door. She then grabbed the neck of one of the complainants, applying pressure which restricted her breathing and caused pain and discomfort. The applicant grabbed the occupants' cat by the throat and began choking it. The

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<sup>21</sup> WWC Act, s 157.

<sup>22</sup> Ex 11, BCS 54.

applicant produced a knife from her pocket and began punching the cat, at which time the second complainant sought to intervene. Whilst still holding the knife, the applicant began punching the second complainant. The first complainant said she was going to call police and the applicant tried to grab the mobile telephone from the first complainant. They struggled and the applicant stopped when the complainant released the telephone. The applicant left the house.

- [26] The applicant told the Tribunal that the complainants had been friends of hers and she had lent them money. They had blocked her from social media, were saying things about the applicant which were untrue and had failed to repay the money. She said she went to their house to discuss these matters.
- [27] While she pleaded guilty, the applicant told the Tribunal she disputes some of the facts as contained in the police brief. In particular, she told the Tribunal she denied driving to the house, taking a knife with her (although she acknowledged a knife was involved) strangling the cat (although she acknowledged she held the cat by the back of the neck) and strangling the complainant. Later in evidence, WDE said that while her hands were around the complainant's neck the intention was to push her away, not to strangle her. Further, she said that she was let into the house by one of the complainants and that there was conversation before the fight. She said she did not intend to harm the cat but had grabbed it knowing the cat to be important to the complainants, as she wanted to get out of the house and she was unable to do so as the complainants had locked the house after her entry.
- [28] The Tribunal cannot go beyond convictions and must accept them as they are.<sup>23</sup> The Tribunal cannot now, in relation to the offences, accept a different version of events in relation to the facts concerning the commission of the offence.<sup>24</sup>
- [29] The applicant's violent offending behaviour, including the serious offence, raises concerns about her ability to manage her anger and utilise appropriate conflict resolution strategies and therefore raises concerns about her suitability to hold a blue card. The applicant's behaviour is inconsistent with the behaviour expected of a person entrusted with the care of children. Those engaged in child related employment must act in a controlled and rational manner and conduct themselves in a manner that protects and promotes a child's safety and physical and psychological wellbeing.

*In the case of a conviction – the penalty imposed by the court and, if the court decided not to impose an imprisonment order for the offence or not to make a disqualification order under section 357, the court's reasons for its decision*

- [30] The applicant was convicted of the 2012 stealing offence and ordered to pay \$600 recognisance and to be of good behaviour for 12 months. No conviction was recorded.

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<sup>23</sup> *Pritchard v Chief Executive Officer, Public Safety Business Agency* [2015] QCAT 25, [36], citing with approval *Drinkwater v Commissioner for Children and Young People and Child Guardian* [2010] QCAT 293, [19]; *Stitt v Chief Executive Officer, Public Safety Business Agency* [2015] QCAT 257, [37].

<sup>24</sup> *Minister for Immigration & Ethnic Affairs v Gungor* [1982] FCA 99; *Jackson v Commissioner for Children and Young People and Child Guardian* [2014] QCAT 186, [23], [24].

- [31] The applicant was convicted of the three 2014 offences and was sentenced to terms of imprisonment of 6, 12 and 18 months. Convictions were recorded. All sentences were served concurrently, and WDE was immediately released on parole. The terms of imprisonment reflect the gravity with which the court viewed her offending, particularly when the applicant's limited prior criminal history is considered.
- [32] In sentencing, His Honour Judge Durward QC accepted that the applicant was experiencing post-traumatic stress disorder and a depressive illness during and after the offences occurred, had recently ended a relationship and was experiencing financial hardship. His Honour acknowledged that aggravating features of the offending included the fact that she was armed, her violent and frightening behaviour and that she mistreated a pet cat. While late and following a period of unsatisfactory cooperation, the applicant's late plea and late cooperation were considered in her favour. His Honour considered the applicant's prospects of reoffending were 'not very great'.

*Any information about the person given to the chief executive under section 318 or 319*

- [33] No information was given under s 318 or s 319 of the WWC Act.

*Any report about the person's mental health given to the chief executive under section 335*

- [34] No information was given under s 335 of the WWC Act.

*Any information about the person given to the chief executive under section 337 or 338*

- [35] No information was given under s 337 or s 338 of the WWC Act.

*Anything else relating to the commission, or alleged commission, of the offence that the chief executive reasonably considers to be relevant to the assessment of the person*

- [36] Other factors relevant to the offending or alleged offending reasonably considered to be relevant are discussed below.

### **The material and the evidence**

- [37] The applicant provided the Tribunal with two life stories, one dated 30 November 2019<sup>25</sup> and the other received on 24 July 2019,<sup>26</sup> statements from her GP DR,<sup>27</sup> her psychologists DK<sup>28</sup> and DA,<sup>29</sup> her partner KM<sup>30</sup> (a mental health worker), her mother NL<sup>31</sup> and a friend AK.<sup>32</sup> In the course of her application to the respondent

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<sup>25</sup> Ex 1.  
<sup>26</sup> Ex 2.  
<sup>27</sup> Ex 10.  
<sup>28</sup> Ex 7.  
<sup>29</sup> Ex 5.  
<sup>30</sup> Ex 6.  
<sup>31</sup> Ex 8.  
<sup>32</sup> Ex 9.

she made written submissions dated 29 November 2018<sup>33</sup> and 13 April 2019<sup>34</sup> and provided statements from GG<sup>35</sup> and GH.<sup>36</sup> The applicant made oral submissions.

- [38] The respondent provided the Tribunal with a bundle of documents paginated BCS-1 to BCS-55 including the reasons for its decision. The respondent had the opportunity to cross-examine WDE, KM, NL, and AK. Her psychologists were not made available for cross examination. The respondent provided written and oral submissions.
- [39] WDE was an only child raised by her mother and stepfather. Upon completion of high school, she joined the Queensland Ambulance Service where she worked for seven year, firstly as an emergency call taker and later as a paramedic. She said that in 2013 she resigned from the QAS as a result of sexual harassment and exposure to traumatic events in the course of her employment.
- [40] In 2017, WDE relocated with her partner and had her first child. Having undertaken some training, she became a lifeguard at a local pool. She is now undertaking full time study to become a personal trainer while she works as a gym instructor.
- [41] In her submissions, WDE suggests that her 2012 offending occurred when she was experiencing a stress related breakdown and that she was unaware at the time that she was suffering from post-traumatic stress.<sup>37</sup>
- [42] WDE said she was depressed and anxious and suffering from post-traumatic stress disorder at the time of the 2014 offending. She told the Tribunal that she did not agree with the entirety of the police brief regarding this offending. Those matters are discussed above. The Tribunal cannot go beyond the convictions and must accept them as they are.
- [43] When asked about the distress her actions may have caused the complainants, WDE's first response was to reflect upon her own feelings at the time. She later accepted that it would not have been a pleasant experience for the complainants and that if children had witnessed the events it would have caused them distress.
- [44] WDE acknowledged that her mental health was a significant contributing factor to her offending behaviour.
- [45] The applicant told the Tribunal that at the time of her 2012 offending she did not continue counselling, despite the sentencing judge indicating that she should do so (she had undertaken presentence counselling). Around that time, upon resignation from the QAS, she undertook seven sessions of mandatory counselling. The QAS counsellor also suggested she continue counselling but WDE did not.
- [46] WDE did not seek to engage in counselling again until after her 2014 offending, at which time she undertook four sessions with DK, ending in March 2014.
- [47] To assist in her return to the workforce WDE engaged in counselling with DA, with whom she has consulted on about 14 occasions since June 2019. WDE told the Tribunal that in these sessions she has learnt strategies to deal with stressors and

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<sup>33</sup> Ex 3.

<sup>34</sup> Ex 4.

<sup>35</sup> Ex 11, BCS 5.

<sup>36</sup> Ex 11, BCS 38.

<sup>37</sup> Ex 3.

triggers, including acknowledging the feelings, relaxing by meditating or exercising, having an awareness of her own well-being and ensuring she has a positive support network. She said that she will continue to engage in counselling.

- [48] WDE said that since her offending more than five years ago, she has undergone counselling, implemented a mental health care plan and a social and emotional wellbeing plan, taken medication for her mental health, put in place a positive support network and experienced high personal growth since becoming a mother.<sup>38</sup> WDE said she now meditates and exercises regularly and that with the support of her partner, mother, and sisters she ‘has become aware of the contributing factors’<sup>39</sup> which led to her convictions, and remains emotionally stable. She said that as result of ongoing counselling, her support network, her self-awareness, and skills she has developed, she is now able to cope with her anxiety and depression and ‘acknowledge any mental health changes or deterioration.’<sup>40</sup>
- [49] The applicant said she took medication to support her mental health on and off over the years but ceased all such medication about 15 months ago. She said that she now has a support networks including her partner, her family, and friends and if confronted with the same situation again would handle the stress differently today as she now has better coping skills.
- [50] KM, who has worked in mental health services for about 20 years, provided a report to the Tribunal. KM, WDE’s partner and the father of her child, purported to give evidence as a mental health professional, saying the applicant consulted with him as his client. He was unable to articulate his professional obligations in this regard and indicated that his employer was not aware that he had provided a report for WDE on its letterhead. In his report, he said that he considered her offending behaviour to be out of character and believed WDE to be remorseful for that behaviour. In oral evidence, KM said he was not aware of WDE’s 2012 offending behaviour. He said that she was experiencing anxiety when they first met but that he has assisted her to implement a social and emotional wellbeing plan.
- [51] It is apparent to the Tribunal that the applicant has the benefit of a supportive partner. However, due to KM’s conflicting interests the Tribunal places no weight on KM’s evidence.
- [52] DK, a psychologist, was not called to give evidence and his report<sup>41</sup> merely indicates that the applicant consulted with him for a month in about March 2014. There is no evidence to indicate the applicant’s level of engagement or the treatment plan provided during these sessions. The Tribunal accepts that the applicant consulted with DK for about a month in 2014.
- [53] The applicant lived next door to GG, an elderly gentleman, for a period of time, helping him with daily chores as well as shopping and cleaning. She resided with him for about 18 months in 2015 to 2016 when she needed somewhere to live. In that time, she assisted him with the care of his teenaged boys on weekends and with the care of his pets. He considers WDE to be ‘polite, very well-mannered and a trustworthy person’<sup>42</sup> for whom the convictions were out of character. GG was not

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38 Ex 2.

39 Ex 1.

40 Ex 1 and 2.

41 Ex 7.

42 Ex 11, BCS 39.

available for cross-examination and for this reason the Tribunal places limited weight on his evidence.

- [54] AK has been a friend of WDE's since 2016. She has been friends with KM for over 10 years, having worked with him in the past. She considers WDE to be 'extremely kind, caring and nurturing towards [AK], her son and others.'<sup>43</sup> AK had not read the respondent's reasons and had limited knowledge of the applicant's criminal history. She observed that obtaining a blue card will enable WDE to continue her employment as a lifeguard, which employment is 'part of her rehabilitation process of returning to work after a serious accident'. She expressed the opinion that this will boost WDE's confidence and self-esteem, provide her with financial stability for her son and demonstrate positive behaviours to him to model. She was aware the applicant was engaged in counselling in about 2014 but had no knowledge of any more recent engagement. She observed that KM provided WDE with support.
- [55] NL, the applicant's mother, was aware of her daughter's criminal history and the respondent's reasons. She spoke of the applicant's 'understanding, care and dedication' towards the patients and clients while at the QAS and in other employment. She noted the 'great strength of character and responsibility' in taking on the role of primary carer for her two half-sisters, then in their teens, for 12 months.<sup>44</sup> NL spoke well of WDE's positive interactions with children, including her son and her half-sisters.
- [56] She observed first-hand the stress the applicant experienced as result of workplace bullying and sexual harassment and considers that WDE would have benefitted from more counselling at that time. NL observed that WDE's mental health improved significantly as a result of counselling and medication after her offending. She said that WDE now seems more stable, is positive about life and has started setting goals again. She considered that WDE is now more open and able to talk about her stress and anxiety than at the time of her offending. She confirmed that there have been no further 'behavioural incidents' since that offending.
- [57] The Tribunal finds that NL was a reliable witness and considers her well placed to give evidence of the applicant's positive lifestyle factors.
- [58] DA, a psychologist, consulted with the applicant for about four sessions in about June 2019. At the time of writing her report (perhaps in July 2019) she indicated that further appointments were scheduled. The applicant told the Tribunal she consulted DA for about 14 sessions. DA said that WDE consulted with her to assist to manage her transition from study to employment, having described to her low mood, stress and worry, relationship conflict and self-doubt in the context of returning to work.<sup>45</sup>
- [59] DA described the applicant as engaging well with treatment since her initial consultation and working towards her treatment goals of managing her mood and her anxiety. At the time of writing her report she said that the applicant reported 'stable mood, a reduction in stress and worry, and increase in healthy coping behaviours and utilisation of skills taught throughout sessions.' She concluded that she could not see any reason why WDE cannot obtain a blue card.

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<sup>43</sup> Ex 9.

<sup>44</sup> Ex 8.

<sup>45</sup> Ex 5.

- [60] DA's report does not address the matters suggested in the Tribunal's directions. While DA's report indicates awareness that WDE is seeking a blue card, it is not apparent that she had read the respondent's reasons for issuing a negative notice or had knowledge of the applicant's offending behaviours. As DA was not available for cross examination these matters could not be explored with her and the impact of this information upon her opinions could not be explored. Accordingly, the Tribunal affords DA's report very limited weight.
- [61] While the applicant told the Tribunal she continued to engage with DA for over 12 months there is no updated report before the Tribunal in relation to this.
- [62] Two reports were provided in relation to the applicant's medication. GH said the applicant was prescribed medication to assist with depression and anxiety in 2016.<sup>46</sup> DR's report<sup>47</sup> indicates that the applicant was, at the time of the referral to DA in June 2019, on medication which WDE said was for pain management. Neither of these witnesses were called to give evidence. The Tribunal accepts that the applicant was prescribed medication to address her mental health in 2016.
- [63] The respondent acknowledged the applicant's recent engagement with counselling, that the applicant has not offended since 2014 and now has the benefit of a positive support network. However, it contended that as the applicant's previous engagement with counselling has been sporadic, and in the absence of independent evidence of her current progress and strategies to mitigate further risk, as the applicant's mental health was a significant contributing factor to her offending behaviour, the applicant's case is not an exceptional case and the respondent's decision should be confirmed.

### **Consideration**

- [64] In undertaking this review and determining the correct and preferable decision, the welfare and the best interests of a child are paramount.<sup>48</sup>
- [65] What constitutes an exceptional case is a matter of discretion. In exercising this discretion, the Tribunal must take into account all information before it and consider the merits of the case subject to the paramount consideration being the welfare and best interests of children.
- [66] In *Commissioner for Children and Young People and Child Guardian v Ram*<sup>49</sup> the Appeal Tribunal considered that changes in a person's circumstances which simply amount to them living in a law abiding manner as society expects, and functioning at a level expected of a person at their stage and age in life are generally considered to be the ordinary course and not exceptional.
- [67] The possession of insight is recognised as an important protective factor, as noted by the former Children's Services Tribunal in *Re TAA*:

The issue of insight into the harm caused in these incidents is a critical matter for the Tribunal. The Tribunal is of the view that good insight into the harm that has been caused is a protective factor. A person aware of the consequences of his actions on others is less likely to re-offend than a person

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<sup>46</sup> Ex 11, BCS 38.

<sup>47</sup> Ex 10.

<sup>48</sup> WWC Act, s 360.

<sup>49</sup> [2014] QCATA 27.

who has no insight into the effect of his actions on others. This is particularly important with children because they are entirely dependent on the adults around them having insight into their actions and the likely effect on children.<sup>50</sup>

- [68] The police brief in relation to the 2012 offending indicates that the applicant was highly remorseful for her actions. It is likely that the 2014 incident caused emotional and psychological distress to the complainants. WDE sought to explain her 2014 offending behaviour saying she was ‘experiencing depression and anxiety due to job loss, homelessness, financial hardship and Post Traumatic Stress Disorder’.<sup>51</sup> While NL and AK both told the Tribunal that WDE was remorseful for her past conduct, the remorse the applicant expressed for the effect of her actions upon the complainants was limited.
- [69] It is not apparent to the Tribunal that the applicant has developed genuine insight about the impact of her unlawful and violent behaviour on those persons who were the subject of her behaviour. Similarly, the Tribunal is not able to reach a finding that she has insight into the impact that such behaviour would have on vulnerable persons in need of protection. Nor does a consideration of the evidence support a finding that the applicant is genuinely remorseful for her offending behaviour.
- [70] The Tribunal accepts that the applicant now appreciates that her mental health was a significant contributing factor to her behaviour. The applicant’s previous engagement in counselling has been sporadic and raises concerns about her understanding of the need to seek such assistance during periods of psychological difficulty. It is only in the last 12 months that she has made a regular commitment to counselling to support her mental health.
- [71] For the reasons indicated above the Tribunal affords very limited weight to the report of DA and no weight to the report of KM. Thus, there is limited independent medical evidence which addresses risk factors, triggers, positive factors or preventative strategies implemented to reduce the applicant’s risk of further offending or the present status of the applicant’s mental health.
- [72] Given the significance of the applicant’s mental health to her conduct, in the absence of independent evidence of her current progress and the strategies she has implemented to mitigate further risk, the Tribunal cannot be satisfied that the applicant’s mental health is effectively managed.
- [73] The Tribunal accepts the evidence of NL and AK in relation to their observations of the applicant’s positive interactions with children.
- [74] The Tribunal accepts that the offences noted are the only entries recorded on the applicant’s criminal history. The applicant has not engaged in any concerning or offending behaviour since the offending behaviour more than four years ago. However, the passage of time is not determinative of whether or not a case is an exceptional case.<sup>52</sup> This risk factor must be considered in the context of all the relevant circumstances.

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<sup>50</sup> [2006] QCST 11, [97]. See also *Commissioner for Children and Young People and Child Guardian v Lister (No 2)* [2011] QCATA 87.

<sup>51</sup> Ex 1.

<sup>52</sup> *FMA v Chief Executive Officer, Public Safety Business Agency* [2016] QCAT 210, [8].

- [75] WDE, to her credit, has made changes to her life and is now living a life absent of crime and offending behaviour. She is living a normal life and wishes to participate in normal activities. The evidence indicates that WDE is functioning in the community at a level expected of a person at her age and stage in life. This does not make the applicant's case exceptional.
- [76] In undertaking this review the Tribunal is acting in an administrative capacity and consequently is a 'public entity' of the purposes of the *Human Rights Act 2019* (Qld) ('HR Act'). Thus, pursuant to s 48 of the HR Act, the Tribunal must interpret statutory provisions in a way that is compatible with human rights, and in undertaking this review is required to conduct itself in accordance with s 58 of the HR Act.
- [77] As observed above, it is not the purpose of this review and decision to impose additional punishment on the applicant for her past conduct, but rather to protect children.
- [78] This review does not constitute a retrial as the Tribunal's role is not to determine the Applicant's guilt. Rather, the Tribunal's function is to review the respondent's decision that the applicant's case was not an 'exceptional case' in which it would not harm the best interests of children for the applicant to be issued a positive notice and blue card. The object of the WWC Act is to promote and protect the rights, interests and wellbeing of children in Queensland through a scheme '...to screen persons who work, or wish to work with children, to ensure that they are suitable persons to do so'.<sup>53</sup>
- [79] As required by s 361(1) WWC Act, the hearing was held in private, which the Tribunal considers to be compatible with the human rights set out in s 31 of the HR Act.
- [80] WDE's human rights, in particular WDE's rights to a fair hearing<sup>54</sup> and not to be tried or punished more than once<sup>55</sup> were considered by the Tribunal. The Tribunal has also considered the right of every child to 'the protection that is needed by the child, and is in the child's best interests, because of being a child'.<sup>56</sup> The Tribunal is satisfied that this decision is compatible with human rights and that to the extent that there are any limitations on those rights, those limitations are reasonable and justifiable in accordance with s 13 of the HR Act.
- [81] In making this decision the Tribunal is mindful that the effect of issuing a blue card is that the applicant is able to work in any child related employment or conduct any child related business regulated by the WWC Act, not just for the reasons the applicant has sought the card. Conditions cannot be imposed on a blue card and once issued it is unconditional and fully transferable across all areas of regulated employment and business.
- [82] On balance, after consideration of all of the evidence, the findings of fact, considering the risk and protective factors, and the relevant matters in the WWC Act, including

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<sup>53</sup> *WJ v Chief Executive Officer, Public Safety Business Agency* [2015] QCATA 190, [17] (Thomas J).

<sup>54</sup> HR Act, s 31.

<sup>55</sup> HR Act, s 34.

<sup>56</sup> HR Act, s 26(2).

s 226(2), in exercising its discretion the Tribunal cannot be satisfied, on the balance of probabilities, that this is an exceptional case for the purposes of exercising discretion under s 225 WWC Act.

[83] The decision of the respondent is confirmed.

**Non-publication**

[84] The Tribunal may make orders to ensure a person cannot be identified for reasons including to avoid endangering the mental health of a person. In light of the concerns expressed regarding the applicant's mental health, pursuant to s 66 of the QCAT Act the Tribunal prohibits the publication of the names of the applicant and any witnesses appearing for the applicant.

[85] Accordingly, these reasons have been de-identified.