

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Lewis v Deputy Commissioner Linford & Anor (No 2)*
[2020] QCAT 311

PARTIES: **MATTHEW LEWIS**
(applicant)

v

DEPUTY COMMISSIONER TRACY LINFORD
(first respondent)

CRIME AND CORRUPTION COMMISSION
(second respondent)

APPLICATION NO/S: OCR159-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 17 August 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Howe

ORDERS: **The decision of the Deputy Commissioner that Matthew Shawn Lewis be dismissed from the Queensland Police Service is confirmed.**

CATCHWORDS: POLICE – INTERNAL ADMINISTRATION – DISCIPLINE AND DISMISSAL FOR MISCONDUCT – QUEENSLAND – where a police officer engaged in misconduct whilst on operational duties – where the officer did not accept his behaviour amounted to misconduct - where the officer was transferred to watchhouse duties – where the officer committed an assault on a prisoner at the watchhouse – where the assault occurred during the investigation into the first matter of misconduct – where dismissal from the Police Service the appropriate sanction – where suspension of the dismissal not appropriate

Aldrich v Ross [2000] QCA 501
Cameron v R [2002] HCA 6
Crime and Corruption Commission v Assistant Commissioner Dawson & Anor [2017] QCAT 37
Crime and Misconduct Commission v Swindells & Gardiner [2010] QCAT 490
DA v Deputy Commissioner Stewart (No 2) [2013] QCATA 162
Legal Services Commissioner v Fellows [2017] QCAT

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McKenzie v Acting Assistant Commissioner Wright
[2011] QCATA 309

Minns v Deputy Commissioner Martin [2018] QCAT 213
Police Service Board v Morris (1985) 156 CLR 397

REPRESENTATION:

Applicant: L J Marshall instructed by Gilshenan & Luton
First Respondent: M Nicholson instructed by QPS Legal Unit
Second Respondent: D Caughlin, Legal Counsel for Crime and Corruption Commission

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

- [1] Mr Lewis was a Senior Constable of Police when he was dismissed from the Queensland Police Service by Deputy Commissioner Linford on 7 August 2019 for misconduct.
- [2] There were two matters of improper behaviour alleged. The first concerned an incident on 17 July 2016 and the second on 1 January 2017.

Matter 1

- [3] The charge - that on 17 July 2016 at Toowoomba Mr Lewis's conduct was improper in that whilst on duty you used inappropriate force against a person ('TT').

Further and better particulars:

- [4] Investigations identified at approximately 1.50 p.m. you attended (an address) after there had been a report of a male person attempting to break into a car. Shortly after arriving at the above-mentioned address:
- (a) You approached TT who was in the front yard of the address;
 - (b) After drawing and presenting a service issued taser towards TT you attempted to deploy the taser, but it failed to discharge;
 - (c) You then reloaded and deployed the taser in probe mode, temporarily incapacitating TT who fell into a rose bush;
 - (d) You did not verbally warn TT in circumstances where it was reasonably practicable to do so;
 - (e) You used the taser against TT at a time it was not clear if he was offering passive resistance;
 - (f) You applied your right foot to the back of TT's head; and
 - (g) TT was restrained and handcuffed.

Matter 2

[5] The charge – that on 1 January 2017 at Toowoomba, your conduct was improper in that whilst on duty you:

- (a) Used excessive force against ('PB')
- (b) Failed to treat PB with dignity and respect.

Further and better particulars:

[6] Investigations identified that PB had been arrested in relation to other matters and was in police custody at the Toowoomba Watchhouse. PB was granted watchhouse bail and you were escorting him to the external exit door to be released when:

- (a) Near the watchhouse exit door, you used your closed right-hand to strike PB to the head area;
- (b) You then pushed PB out of the watchhouse exit door;
- (c) While PB was on the ground, you used your closed right-hand to strike him in the head area;
- (d) You then left PB lying on the footpath outside the watchhouse door and threw PB's property on the ground;
- (e) On 20 July 2017 you pleaded guilty to an offence of common assault pursuant to s 335 of the *Criminal Code* and were placed on a good behaviour bond for 12 months, with a recognisance of \$1,500.

[7] The Deputy Commissioner found both charges of improper behaviour substantiated and that the behaviour amounted to misconduct.

[8] Mr Lewis did not challenge a finding by the Deputy Commissioner that his behaviour on 1 January 2017 ('Matter 2') was misconduct but did challenge the finding of misconduct with respect to his behaviour on 17 July 2016 ('Matter 1') and to that end sought review in the Tribunal.

[9] On 11 March 2020, after a hearing, I determined his behaviour in Matter 1 did amount to misconduct.

[10] All parties have made submissions on penalty.

[11] Both respondents submit the appropriate penalty is that Mr Lewis be dismissed from the police service. Mr Lewis submits a sanction less than dismissal properly serves disciplinary purposes.

[12] In *DA v Deputy Commissioner Stewart (No 2)*¹ the Appeal Tribunal noted:

Dismissal is the most serious sanction that may be imposed. It indicates the officer does not have the requisite character and personal qualities to serve in the police force.²

[13] In *Police Service Board v Morris* (1985) 156 CLR 397 however Brennan J explained:

¹ [2013] QCATA 162.

² *Ibid*, [27].

The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force, upon their assiduous performance of duty and upon the judicious exercise of their powers. Internal disciplinary authority over members of the police force is a means — the primary and usual means — of ensuring that individual police officers do not jeopardize public confidence by their conduct, nor neglect the performance of their police duty, nor abuse their powers. The purpose of police discipline is the maintenance of public confidence in the police force, of the self-esteem of police officers and of efficiency.³

- [14] The Court of Appeal, following *Morris* and other like decisions, in *Aldrich v Ross* [2000] QCA 501 confirmed that the primary purposes of police disciplinary proceedings are:

... protection of the public, the maintenance of public confidence in the Service and the maintenance of integrity in the performance of police duties⁴

- [15] More recently in *Crime and Corruption Commission v Assistant Commissioner Dawson & Anor*⁵ it was noted:

[9] The purpose of police disciplinary proceedings in Queensland encompasses deterrence, protection of the public, maintenance of proper standards and public confidence in the police service. The sanction imposed must reflect appropriate disapproval. As the High Court has said, the effectiveness of police in protecting the public relies upon public confidence in the integrity of its members, and that internal discipline is the primary means of ensuring individuals do not jeopardise public confidence.⁶

The circumstances of Matter 1

- [16] Prior to Mr Lewis arriving at the property a motorcycle officer had been first on the scene and been confronted by TT on the footpath. TT was clearly either drunk or drugged. TT advanced on the officer in a threatening way. TT was of solid build and larger than the officer. Despite that, the officer managed to control the situation without resorting to physical constraint. He told TT to return into the yard and TT did. At that stage the situation was well contained.
- [17] Then Mr Lewis arrived. Instead of discussing the situation with the officer already present, Mr Lewis advanced directly towards TT. There had been time and opportunity for Mr Lewis to consult with the other officer which would have enabled them to formulate the best tactical approach to resolve the situation. However Mr Lewis in large part ignored the other officer. The failure to consult was surprising and a significant error of judgment on the part of Mr Lewis, who was no inexperienced novice at the time.
- [18] When Mr Lewis first tried to discharge the taser TT had been walking towards him but had stopped and was stationary with his arms outstretched. TT remained stationary, arms outspread, long enough to allow Mr Lewis, also standing stationary

³ (1985) 156 CLR 397, 412.

⁴ [2000] QCA 501, [42].

⁵ [2017] QCAT 37.

⁶ *Ibid*, [9].

in front of him, to reload the taser, present it and discharge it properly on the second attempt.

- [19] There was no tactical necessity for the discharge of the taser in the circumstances. The only resistance being offered at the time by TT was passive resistance. That should have been clear to Mr Lewis given his experience and training.
- [20] TT fell, incapacitated. He presented no significant threat to Mr Lewis at that stage yet Mr Lewis put his foot on the man's head in the course of handcuffing him. He did not ask the other officer for assistance. It is unclear what downward pressure was applied to the head from the body wear camera footage available, but doing it was unnecessary and demeaning to the individual.
- [21] Administration of an electric shock from a taser can be dangerous. It can result in serious injury or even, potentially, death. Mr Lewis should have been aware of that given he was a qualified taser instructor at the time.
- [22] Since the time of this incident through to the misconduct hearing earlier this year Mr Lewis has never resiled from his position that his assessment and behaviour on the day in Matter 1 was reasonable and appropriate. This claim he bases on his claimed finely tuned capacity to read a situation as a result of prior military experience.⁷ Remorse for his behaviour in Matter 1 has never been raised.

The circumstances of Matter 2

- [23] Within six months of Matter 1, after being transferred to Toowoomba Watchhouse, the Matter 2 incident occurred.
- [24] On 1 January 2017, PB, a prisoner at the watchhouse, had been bailed and Mr Lewis was tasked with escorting him out. Mr Lewis says PB called him a coward and in angry reaction he struck the prisoner about the head before pushing him out of the watchhouse door. The man fell down outside the watchhouse on the footpath. Mr Lewis advanced towards outside the watchhouse door and struck him about the head again whilst he was lying on the ground.
- [25] Mr Lewis returned inside the watchhouse, then came back out, took hold of the prisoner's property that another officer had placed just outside the door in a plastic bag, and threw the bag on the ground near the prisoner.
- [26] Mr Lewis said in an interview after that that he assaulted PB because PB had called him a coward which triggered certain stressors affecting him at the time.
- [27] He identified the stressors as problems at home, stress from his military service of two tours in East Timor and losing good friends who had served in Afghanistan and Iraq amongst other things. He also said he was angry and frustrated by his transfer to the watchhouse.
- [28] More specifically, he was angry about being transferred to the watchhouse on the complaint of the officer involved in Matter 1 about his use of force.⁸
- [29] The incident at the watchhouse was captured on CCTV. Mr Lewis was charged with common assault in consequence of that incident and pleaded guilty in the

⁷ Applicant's submissions filed 18 October 2019, [119].

⁸ Transcript 1 of interview 10 January 2017 Page 38 of 39 Lines 1254-1261.

Magistrates Court on 20 July 2017. He did not challenge the disciplinary charge concerning Matter 2.

Mitigation

- [30] Mr Lewis suggested a number of mitigating factors.
- [31] He had no previous disciplinary history in over a decade of service before the first incident.
- [32] He had served his country well through his previous military service in East Timor.
- [33] He had significant personal stressors operating on him at the time associated with his home life.
- [34] He has references from senior officers with whom he has worked over the years commenting on his dedicated performance, leadership and demonstrated professionalism.
- [35] He also submits he has demonstrated insight and remorse. He pleaded guilty to the charges arising out of Matter 2 in the Magistrates Court. An early plea is usually a matter offered in mitigation. That is because it is usually evidence of some remorse. Additionally it shows a willingness to facilitate the course of justice.⁹
- [36] That same claim to mitigation is not available to him with respect to Matter 1 however, save that he has cooperated with the internal investigation officers during the disciplinary proceedings which does show a willingness to facilitate the course of justice.
- [37] He also refers to the financial detriment caused him by the delay in finalising the disciplinary proceedings, ongoing since July 2016. From January 2017, after Matter 2, he was on non-operational desk duties until his dismissal on 7 August 2019.
- [38] The significance of delay in disciplinary matters in the context of legal professionals was explained in *Legal Services Commissioner v Fellows* [2017] QCAT 337:
- The true significance of delay as a mitigating feature is not so much that the respondent has been under a cloud for so long as the application remained unresolved, it is that the Tribunal is afforded an opportunity to see what the practitioner has done (or not done) to modify his or her professional behaviour over the intervening period (see the discussion on this point in the context of sentencing for criminal offences in *R v L*; Ex parte Attorney-General for Queensland [1996] 2 Qd R 63). To the point, the practitioner's behaviour over the period of the delay may serve to aggravate, mitigate or have no effect on the end sanction. Here, for the reasons that immediately follow, the delay operates in his favour.¹⁰
- [39] Those comments are also relevant by analogy to police disciplinary proceedings.
- [40] Matter 2 occurred within six months of the Matter 1 incident. He had been transferred to Toowoomba Watchhouse whilst Matter 1 was being investigated. He knew he should have been on his best behaviour, yet despite that was unable to exercise physical control when verbally provoked by a prisoner. This is a factor of aggravation when considering sanction.

⁹ *Cameron v R* [2002] HCA 6, [11].

¹⁰ [2017] QCAT 337, [27].

- [41] Mr Lewis also says he has voluntarily undergone counselling sessions, attending six sessions at Toowoomba and a further three sessions at Ipswich. He says he sought counselling with a view to helping him control his temper and stress in difficult situations.
- [42] I note in an interview with officers investigating Matter 2 he said he had attended three sessions of an early intervention program in Toowoomba offered by the police service in September 2016 but told the officers that he took that program to assist him to cope with his reassignment to the watchhouse.¹¹ It is not clear whether his reference to six counselling sessions in Toowoomba included the three early intervention program attendances.

Remorse and insight with respect to Matter 1

- [43] Remorse and responsibility can be very significant and influential factors on penalty.¹²
- [44] Mr Lewis refuses to accept his behaviour in Matter 1 was misconduct. That in turn suggests a significant lack of insight into what is and is not acceptable practice and conduct by police officers. Instead he focuses on and blames the other officer present that day for his inaction and reporting him for his misconduct in Matter 1. That viewpoint is not justified on the evidence, as I found in determining that Mr Lewis' behaviour in Matter 1 was improper and amounted to misconduct.
- [45] In large part what happened in Matter 2 was a continuation of his anger and frustration over what he perceived to be unfair treatment after Matter 1.
- [46] I conclude Mr Lewis has no insight into or remorse over his misconduct in Matter 1.
- [47] Worryingly, Matter 2 occurred when Mr Lewis knew he had been sent to the watchhouse as a holding strategy pending resolution of Matter 1.¹³
- [48] As previously stated, Mr Lewis was no inexperienced novice at the time of the misconduct events. He had spent nine years stationed in Brisbane, over 18 months of that with the G20 Planning Group and six months relieving as (Acting) Sergeant in Brisbane before being transferred to the busy one-man station south of Toowoomba as officer-in-charge, which is where he was stationed at the time of Matter 1.

Comparable cases

- [49] The parties have suggested a number of comparable decisions that may assist in establishing the appropriate penalty. None are entirely comparable but the following appear closest.
- [50] In *Crime and Misconduct Commission v Swindells & Gardiner* [2010] QCAT 490 disciplinary proceedings were brought against Constable Gardiner alleging he had used excessive force against a number of people in police custody and enticed another to fight him.

¹¹ Transcript 3 of interview 10 January 2017 Page 43 of 46 Lines 1433-1435.

¹² *McKenzie v Acting Assistant Commissioner Wright* [2011] QCATA 309, [24].

¹³ Transcript 2 of interview 10 January 2017 Page 19 of 24 Lines 601-605; Transcript 3 of interview 10 January 2017 Page 38 of 46 Lines 1257-1260.

- [51] Assistant Commissioner Swindells conducted a disciplinary hearing as a result of which he dismissed charges one and two but found charge three proven. He imposed no sanction for charge three however.
- [52] After judicial review in the Supreme Court the matter was remitted to the Tribunal.
- [53] The particulars of charge one were that over a period of approximately three months Gardiner had used excessive force against four people so held in police custody and restrained by handcuffs.
- [54] The particulars of charge two were that Gardiner had used excessive force against another two people at about the same time whilst they were held in police custody, including punches and a kick to the body and forcing a prisoner's face into a wall.
- [55] The particulars of charge three were that during that period Gardiner had engaged in improper conduct in removing the handcuffs from a prisoner and inviting him to engage in a fight.
- [56] The joint submission of the CMC and Gardiner was that Gardiner be dismissed from the police service but that that sanction be suspended for three years.
- [57] The Tribunal said Gardiner's actions justified dismissal. The Tribunal was persuaded to suspend the order however. A cogent consideration was that Gardiner's conduct since the investigation commenced had suffered long delay which delay afforded the opportunity to assess what he had learned from the salutary experience of the disciplinary proceedings. It had been approximately six years since the incidents and he had remained in the service and not been the subject of any complaint. By the end of the operational period of the three year suspended sentence it would be almost nine years since the conduct occurred. The constable was a relatively inexperienced officer at the time. Removed from the harsh environment of working at a City Beat station his conduct had been without reproach.
- [58] In *Crime and Corruption Commission v Assistant Commissioner Dawson & Anor* [2017] QCAT 37 Constable Bayley was assisting another officer moving an abusive but compliant prisoner to a cell. They were withdrawing from the cell but as the doors were closing the prisoner lunged forward and spat out of the doorway. The spittle struck the other officer in the face and Bayley on the arm. Bayley entered the cell and struck the prisoner in the face with his closed fist. A scuffle ensued before Constable Bayley could be separated from the prisoner.
- [59] In the Tribunal the decision of Assistant Commissioner Dawson to impose a sanction of two penalty units on Bayley for the misconduct was set aside and he was sanctioned by having his pay-point reduced from 1.4 to 1.2 for a period of 12 months.
- [60] Bayley had no prior substantiated disciplinary complaints and it was accepted he was a relatively junior officer at the time having entered the police service two years prior to the incident.
- [61] In *Minns v Deputy Commissioner Martin* [2018] QCAT 213 Senior Constable Minns used excessive force on men who were restrained in handcuffs. There were three incidents which occurred in late 2014, early 2015. He was prosecuted for assaults in relation to some matters but found not guilty in 2016. Subsequently a police disciplinary investigation commenced and Deputy Commissioner Martin found Minns had engaged in misconduct on three occasions.

- [62] In the Tribunal, on a review of the Deputy Commissioner's decision to demote Minns from Senior Constable pay-point 2.2 to Constable pay-point 1.6 and his progression to Senior Constable deferred for five years, the sanction was set aside and substituted with demotion from Senior Constable pay point 2.2 to Constable pay point 1.6 with his progression to Senior Constable deferred for only one year.
- [63] At the time of the misconduct Minns had been in the police force for some six years.
- [64] The circumstances of Minns' misconduct were that the first incident involved the arrest of a man. When the man was in custody and restrained by handcuffs behind his back Minns kned the man in the chest believing he had spat at him, which was apparently conceded by the man at his criminal trial.
- [65] The second incident involved the arrest of a man who was in custody and restrained by handcuffs, who was struck by Minns with his fist in the back of the head and neck area. Minns pushed the man into the back of a police vehicle causing his face to strike the vehicle. The background to this incident was that the man had resisted arrest and made a "distasteful comment" about Minns' appearance.
- [66] The third incident happened when Minns was involved in executing a search warrant at the man's home. The man was in custody and restrained by handcuffs but Minns rushed past the other officers who had physical control of the man, grabbed one of his wrists, and dragged him to the floor, then struck him with a closed fist on the back of the head.
- [67] Queensland police intelligence had categorised the last individual as high risk and Minns understood him to be a dangerous person. It was suggested that his motivation for dragging the man to the floor was Minns' concern that the man could be attempting to destroy evidence of dangerous drugs, however Member Kanowski found his conduct was also motivated by a desire for retaliation.
- [68] In a joint submission between Minns and the Police Service it was accepted that Minns had demonstrated remorse and insight and he was a suitable person to continue to serve as a police officer. The incidents all involved stressful and dynamic circumstances.

Consideration

- [69] *Dawson* and *Gardiner* are of limited assistance. Neither of those gentlemen were experienced police officers and Gardiner took advantage of the delay associated with investigation of the misconduct proceedings to learn a salutary lesson, with no complaint against him for six years, which was not the case with respect to Mr Lewis.
- [70] In *Minns* the officer had some six years' experience at the time of his misconduct but he had demonstrated remorse and insight and was considered a suitable person to continue to serve as a police officer. Further, the incidents of misconduct in *Minns* all involved stressful and dynamic circumstances.
- [71] By comparison Mr Lewis was a far more experienced officer than any of those officers.
- [72] He has not shown remorse or insight concerning his behaviour in Matter 1. He does not accept his behaviour in Matter 1 was misconduct regardless that his actions were clear failures to comply with the Police Operational Procedures Manual and Taser Good Practice Guide.

- [73] Instead he deflected responsibility for his misconduct in Matter 1 to the officer present on the day. He also ascribes partial responsibility for his behaviour in Matter 2 to ongoing anger and frustration directed at the other officer observed from time to time at the Toowoomba Watchhouse.
- [74] It is submitted for Mr Lewis that further professional counselling and training with superior officers providing direction and guidance would make repetition of his misconduct highly unlikely, particularly if dismissal is the consequence of any further breach.
- [75] Given Mr Lewis was an experienced officer at the time of Matters 1 and 2 and given he has never accepted his conduct in Matter 1 involved error on his part, I am not persuaded that he would accept or benefit from advice or guidance from other senior and experienced officers.
- [76] Mr Lewis had an opportunity to show the misconduct of Matter 1, though very serious, was an aberration and would not be repeated by his subsequent conduct during the investigation into Matter 1. Instead he committed the assault on the prisoner at the watchhouse.
- [77] I am not convinced that further mentoring, retraining or additional counselling would ensure no further misconduct would occur and thereby ensure the protection of the public.
- [78] As stated in *Aldrich v Ross*, the primary purposes of police disciplinary proceedings, in addition to the protection of the public, are the maintenance of public confidence in the police and the maintenance of integrity in the performance of police duties.
- [79] I conclude that allowing Mr Lewis to remain a serving police officer would not maintain public confidence in the police service nor serve as a useful guide to other serving police officers who must understand that misconduct such as occurred here will not be tolerated.
- [80] His squandered second chance with the criminal behaviour of Matter 2, coupled with the lack of remorse for his conduct in Matter 1 ousts suspension of dismissal from the service as an appropriate sanction.
- [81] The decision of the Deputy Commissioner dismissing Mr Lewis from the police service is confirmed.