

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *SMA v Director General, Department of Justice and Attorney General* [2020] QCAT 430

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

APPLICATION NO: CML038-19

MATTER TYPE: Childrens matters

DELIVERED ON: 9 November 2020

HEARING DATE: 23 March 2020

HEARD AT: Townsville

DECISION OF: Member Pennell

ORDERS:

- 1. The decision of the Director General, Department of Justice and Attorney-General dated 17 December 2018 that the applicant's case is 'exceptional' within the meaning of section 221(2) of the *Working with Children (Risk Management and Screening) Act 2000 (Qld)* is confirmed.**
- 2. The publication of the contents of any document or thing filed in or produced to the Tribunal and any evidence given to the Tribunal by any witness is prohibited to the extent that it could lead to the identity of the applicant or any member of the applicant's family or any non-party to the proceedings.**

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – GENERALLY – the applicant was previously issued with a positive notice and a blue card – the applicant was concerned with the management of a child care centre – the applicant was previously issued with a positive exemption notice and an exemption card – complaints against the applicant with regard to her inappropriate discipline of children and behaviour within the child care centre – discipline action taken by the Department of Education – prohibition notice issued to the applicant – applicant underwent

counselling and mentoring process – whether the protective factors negate the risk factors – whether an exception case exists

EVIDENCE – MISCELLANEOUS MATTERS – NON PUBLICATION OF EVIDENCE – ORDERS – NON-PUBLICATION OF IDENTITY – de-identifying of the proceedings undertaken by the Tribunal on its own initiative – the publication of the identity of the applicant, witnesses and non-parties would be contrary to public interest and would lead to the identity of children

Education and Care Services National Law (Queensland), ss 182(1) and 185(1).

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 18, s 20(1), s 24(1), s 66, s 66(2)

Working with Children (Risk Management and Screening) Act 2000 (Qld), s, 5, s 6, s 221(2), s 228, s 353, s 354, s 360

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

Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577

Kent v Wilson [2000] VSC 98

Perry and Brown Patents (1930) 48 RPC 200

Re Imperial Chemical Industries Ltd's Patent Extension Petitions [1983] 1 VR 1

Re TAA [2006] QCST 11

APPEARANCES & REPRESENTATIONS:

Applicant: Self represented

Respondent: M Jago, in-house solicitor

REASONS FOR DECISION

Introduction

- [1] The applicant ('SMA') had direct involvement in the management of and was the sole director of an early childhood learning centre. On numerous occasions between 2003 and 2015, she was issued with positive notices and blue cards.¹ She was also twice issued with a positive exemption notice and an exemption card.²

¹ In 2003, 2006, 2007, 2011, 2012 and 2015.

- [2] On 12 July 2017, SMA was advised by the Department of Education ('the regulator') that discipline action was to be taken against her, and later issued her with a show cause notice.³ That action was taken because of an investigation by the regulator returned a positive finding that SMA had used inappropriate physical discipline on children in her care; made inappropriate comments to children within her care; used a chemical compound (acid) as a cleaning substance without taking all reasonable steps to ensure children were not exposed to the substance; and lit a cigarette in the yard where children were present.
- [3] The regulator determined that the appropriate action was to issue SMA with a prohibition notice.⁴ SMA later unsuccessfully applied to the regulator to have the prohibition notice cancelled. The regulator notified the respondent of the action taken.
- [4] Subsequent to the regulator's advice, the respondent undertook an assessment of SMA's eligibility to be issued with a positive exemption notice. After the assessment, the respondent cancelled SMA's positive exemption notice and exemption card pursuant to the provision of the *Working with Children (Risk Management and Screening) Act 2000* (Qld) ('*Working with Children Act*').⁵ Upon reaching that decision, the respondent placed significant emphasis upon the information provided by the regulator and determined that the regulator's findings raised concerns about SMA's ability to act protectively of children and appropriately care for the wellbeing of children and young people.⁶

The Tribunal's role

- [5] Because SMA exercised her discretion to review the respondent's decision, the Tribunal must hear and decide the matter by way of a fresh hearing. The decision under review is whether SMA's case is an 'exceptional case'⁷ and the Tribunal's role and function is quite distinct from that of a court.
- [6] The Tribunal's task involves an analysis and evaluation of risk; it is not concerned with the proof of offences. Nor is it concerned with establishing SMA'S guilt or innocence with regard to the discipline action taken by the regulator; its focus is on the protection of children from future harm within places of employment, not the placing of additional punishment upon SMA because she has acquired a disciplinary record. That approach would otherwise punish her twice.⁸
- [7] When undertaking the review process, the Tribunal should be mindful that each matter is entitled to be judged on its own merits. The principle laid down in *Commissioner for Children and Young People and Child Guardian v Maher & Anor*

² In 2012 and 2016.

³ The show cause notice was issued on 14 May 2018.

⁴ Issued on 12 June 2018.

⁵ Decision made 17 December 2018.

⁶ Respondent's statement of reasons at BCS-20.

⁷ *Working with Children (Risk Management and Screening) Act 2000* (Qld), ss 353–354. *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 18.

⁸ *Commissioner for Children and Young People Bill 2000* (Qld), second reading speech, Queensland Parliament Hansard, 14 November 2000 at page 4391.

(‘*Maheer*’)⁹ requires this as there is no general rule to be applied as to what is an exceptional case. Notwithstanding that, the overarching consideration for the Tribunal is the welfare and best interests of children¹⁰ as every child is entitled to be cared for in a way that protects them from harm.

- [8] The purpose of the Tribunal’s role is to produce the correct and preferable decision based on the merits of SMA’s application and the evidence before the Tribunal at the time of the hearing.¹¹ When reaching a determination of what is the correct and preferable decision, the Tribunal is afforded a discretion to either confirm or amend the respondent’s original decision; or it could set aside the respondent’s original decision and substitute that decision with its own decision. A third option available is to set aside the respondent’s original decision and return the matter to the original decision maker for further consideration with directions the Tribunal considers appropriate.¹²

An ‘exceptional case’

- [9] In following the legislative objective, the Tribunal’s focus is to promote and protect the rights, interests and wellbeing of children from future harm. The paramount consideration is the welfare and best interests of children.¹³ The *Working with Children Act* gives no decisive description of the term ‘exceptional case’. The term has been found by the courts to mean unusual, special and out of the ordinary course.¹⁴ Various courts have established and adopted the principle that it would be unwise to lay down any general rule about what an exceptional case is; discretion should be always be used and each case should be considered on its own merits and facts¹⁵ and examined in the light of the legislation, the legislative intention and the interests of the parties involved.¹⁶

The applicant’s police information

- [10] SMA has very limited police information and the only entry relates to interstate traffic related offences from 2014, which were withdrawn. I am satisfied those offences are not classified within the *Working with Children Act* as serious or disqualifying offences and there is no information to suggest the nature of the alleged offending involved children, or the alleged circumstances related in any way to her role within any child regulated employment. The police information is not determinative in the ultimate decision reached.

The respondent’s case

⁹ [2004] QCA 492, [34] per Philippides J endorsing the approach taken by Fullagar J in *Re Imperial Chemical Industries Ltd’s Patent Extension Petitions* [1983] 1 VR 1 in adopting the warning of Luxmore J in *Perry and Brown Patents* (1930) 48 RPC 200.

¹⁰ *Working with Children (Risk Management and Screening) Act* 2000 (Qld), s 6.

¹¹ *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 20(1); *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589.

¹² *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 24(1).

¹³ *Working with Children (Risk Management and Screening) Act* 2000 (Qld), s 5, s 6, s 360.

¹⁴ *Kent v Wilson* [2000] VSC 98, [22] referencing the Oxford English Dictionary.

¹⁵ *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492, [34] per Philippides J endorsing the approach taken by Fullagar J in *Re Imperial Chemical Industries Ltd’s Patent Extension Petitions* [1983] 1 VR 1 in adopting the warning of Luxmore J in *Perry and Brown Patents* (1930) 48 RPC 200.

¹⁶ *Kent v Wilson* [2000] VSC 98, [22].

- [11] The decision, which is the subject of SMA's application, arose because the regulator provided discipline information to the respondent relating to SMA. Where there is disciplinary information, the respondent, and ultimately the Tribunal when undertaking a review, must have regard to a number of factors including the discipline decision and the reason for that decision. Another consideration is the relevance of the disciplinary information to SMA's employment, or her carrying on a business that involves children.¹⁷
- [12] Contained within the respondent's reasons document is a detailed description of the allegations raised against SMA, and the findings of the regulator that ultimately culminated in a prohibition notice being issued to her. It is not necessary to repeat the specifics of the allegations, as an overall description is contained paragraph [2] of these reasons.
- [13] The regulator's findings were that SMA posed an unacceptable risk of harm to the safety, health and well-being of children. She was issued with a prohibition notice. This meant she was prohibited from providing education or care of children or be engaged with the management of any educational or care service premises.¹⁸ Several months after the regulator issued her with the prohibition notice, SMA applied to the regulator to have the notice cancelled. In her submissions, she said the complainant child for whom she was disciplined was her own child. The regulator's view was that this type of behaviour was inappropriate, regardless of her relationship to that child.¹⁹
- [14] The regulator found the particulars of the allegations relating to SMA swearing at, and striking her own child was consistent with other evidence gathered in relation to her interactions with children, in particular CCTV footage identifying her disciplining her own child with an open hand to his buttocks.²⁰ The regulator further found that SMA failed to recognise that disciplining children by the use of physical intervention can have an adverse effect on the safety and well-being of not only the child that is disciplined, but also other children who witnessed this activity.

The applicant

- [15] SMA had an unremarkable upbringing. Her father was employed in the resource industry and throughout the early part of her life, her family moved around to various localities for work. She has a close bond with her family, in particular her older sibling. She was educated to Grade 12 and has maintained regular employment throughout her adult life.
- [16] Almost 20 years ago, she was tragically struck and injured by a motor vehicle. She suffered significant and life changing injuries and spent nine months in hospital. She was never to walk again, although her injuries and the trauma have never held her back. Since that time, she has achieved many things, including selection for Australia in the Commonwealth Games Paralympic Team, where she won a bronze medal. She also represented Australia at the World Para Athletics Championships.

¹⁷ *Working with Children (Risk Management and Screening) Act 2000 (Qld)*, s 228.

¹⁸ Pursuant to the *Education and Care Services National Law (Queensland)*, ss 182(1) and 185(1).

¹⁹ Respondent's statement of reasons at BCS-177.

²⁰ Respondent's statement of reasons at BCS-178. This incident took place on 19 April 2018.

- [17] In 2007, she met her husband and they now have two children. She began studying a Bachelor of Education, which she completed over a period of six years as she was raising her young children at the same time.
- [18] She later saw a business opportunity and built her early childhood learning centre. Because she had no experience or knowledge in early childhood learning, she employed a service manager/centre director to manage the day-to-day operations of the centre while she continued to work as a teacher at various schools.
- [19] Her life at that time was extremely busy, both personally and professionally. At some point prior to the allegations being raised against her, she realised that she needed to spend more time at the early childhood learning centre because unfavourable reports were received from some parents of the children at the centre. The operational part of the management of the centre was not appropriately handled, compliance issues were not addressed, and she was not being informed of those issues.
- [20] She started to spend more time at the centre. She began to understand why the parents were complaining. This contributed to more stress for her because she relied upon and trusted the service manager/centre director and other staff to undertake their duties appropriately and keep her informed of concerning issues. She said that because that was not occurring, she began to question the practices and procedures of the centre and in turn a number of the staff resigned. It was sometime after this that unfavourable and unsavoury comments were made on social media about SMA and her early childhood learning centre by those former employees who had resigned. Some of those former employees provided evidence against SMA in the regulator's discipline proceedings.
- [21] In response to the suggestion she does not display insight into her behaviour and the effect of what that might have on children, SMA said she never intentionally compromised the safety and well-being of children entrusted in her care. She went on to say that no other child was physically disciplined, except her own child. She was extremely remorseful for the incident and said she has gained insight into how that could impact upon the confidence in her to be suitable for the role of caring for children.
- [22] She acknowledged that she had made mistakes throughout her first year in the industry, however those mistakes occurred because of her lack of knowledge within the industry. Since being issued with a prohibition order, she has undertaken further studies towards a diploma of early childhood, along with familiarising herself with the national regulations and quality framework. She has networked with other owners of early childhood learning centres to learn from them the skills of how to appropriately manage her staff and her relationships the parents of children who attend the centre. She has also developed a mentor/student type relationship with the manager of another early childhood learning centre who has guided her throughout this process.
- [23] In support of her position, SMA provided a number of personal references. Each of those referees spoke positively about her and about her positive interactions with children. Although none of the referees gave evidence at the Tribunal, I have considered the weight of the contents of their references. Although I do not intend

to repeat the comments contained within the references, I acknowledge the individual comments relating to SMA's caring nature and overall good character.

Discussion

- [24] For the correct and preferable decision to be reached in this matter, I have to be satisfied that protective factors exist which satisfactorily mitigates any concerns of a risk to children.
- [25] The regulator's investigation and its findings were a significant influencing factor in the respondent's decision to issue SMA with a negative notice and to cancel her positive exemption notice and exemption card.
- [26] SMA's disciplinary information relates to conduct that occurred over a relatively short period of time between January and April 2018. The concerns raised by the regulator was a significant risk factor in the assessment of SMA. She was the sole director with the management and control of an early childhood learning centre, of which she is now prohibited from engaging in education and care services. She was responsible for the management of staff and ensuring adherence with procedures and requirements designed to protect children and keep them safe.
- [27] During the regulator's investigation, it was established that SMA exhibited inappropriate behaviour in the presence of, and towards children which compromised the safety and well-being of those children entrusted to her early childhood learning centre. SMA's actions and risk to children was sufficiently serious enough for the regulator to prohibit her from engaging with early childhood related education. That prohibition raised serious concerns about her ability to ensure the safety, health and well-being of children, which in turn strongly suggested that she was not an appropriate person to be eligible for a positive exemption notice.
- [28] Careful consideration has been given to SMA's submissions, including the positive personal references in her favour. Notwithstanding that, it is noted that she apportions blame for any failure to abide by appropriate policies and procedures on other staff members, despite her being at the sole director of the early childhood learning centre at that time. By SMA apportioning blame and deflecting responsibility upon others, she minimises her own role and displays a lack of insight into her own actions and responsibilities.
- [29] Insight is an important factor in the determination of SMA's suitability and eligibility. For awareness of inappropriate actions to exist, an individual has to be able to recognise their own foibles and the subsequent consequences, and how this can impact upon others.
- [30] Helpfully, in *Re TAA*, the former Children Services Tribunal reached an appropriate position in regard to insight. In that matter, it was determined that –

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 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.²¹

- [31] With insight being a protective factor, I am mindful that when reviewing any matter involving child related employment, there should be evidence of protective factors which satisfies the Tribunal that an applicant has appropriately mitigated any concerns of a risk to children. The Tribunal is entitled to know what, if any, is the risk of the repetition of the concerning behaviour which led to SMA being disciplined by the regulator. This is important for the assessment as to whether there was little or no likelihood of a risk to children.
- [32] SMA told the Tribunal of the steps she has undertaken to help alleviate any future concerns of risk to children. She cited examples which included a mentoring program with a manager of another early childhood learning centre and working with a counsellor who had equipped her with new personal and professional skills to use within her own home, as well as in the workforce.
- [33] In my view, it is not sufficient for SMA to rely upon a proposition that she has attended counselling or mentoring to address any concerns. She has to demonstrate, by the use of some tangible evidence, that counselling and/or mentoring greatly reduced any risk and enabled her to identify the triggers relating to that concerning behaviour, along with identifying that she is able to cope with and overcome any urge to act in an aggressive or inappropriate manner.

Decision

- [34] The applicant told the Tribunal she was extremely remorseful for the mistakes that she had made in the management and operation of the early childhood learning centre that gave rise to the action taken by the regulator and the respondent. She went on to say that those mistakes were made because she did not have the complete knowledge and understanding of the childcare centre industry. She said she had suffered enough, and her personal reputation and the reputation of her early childhood learning centre had been tarnished as a result of what had occurred. I accept that she is extremely remorseful for what has taken place.²² I also accept that she has suffered significant embarrassment and damage to her personal and professional reputation, and she has already received a disciplinary punishment from the regulator.
- [35] Upon reflection of the principle earlier discussed from the decision of *Maher*, a great deal of consideration has been given to the facts, circumstances and current evidence of this matter, in particular the determinations reached by the respondent that there is a finding that SMA did not currently possess the ability to act protectively of children.
- [36] Having considered all the evidence in this matter, I am of the view that in the absence of tangible evidence to support a SMA's assertion that her counselling and mentoring has reduced those concerns raised, there still remains an apprehension whether it would be in the best interests of children for a positive exemption notice and an exemption card to be issued to SMA at this particular time.

²¹ [2006] QCST 11, [97].

²² Applicant's submissions dated 4 April 2020 at page 4.

- [37] In reaching that conclusion just outlined, I acknowledge that SMA has taken steps to address those concerns raised. However, notwithstanding the approaches she has already undertaken, I am not satisfied that those steps have reached the appropriate threshold to address the concerns which led to the decision being made. Perhaps at some indeterminate time in the future, SMA might be better placed to reinvigorate her application with the assistance of further evidence of a therapeutic reduction of the risks identified.
- [38] Therefore, I am satisfied the correct and preferable decision is to confirm the Director General, Department of Justice and Attorney-General's decision dated 17 December 2018 that SMA's case was 'exceptional' within the meaning of section 221(2) of the *Working with Children Act*.

Non-publication decision

- [39] Pursuant to the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) a discretion is afforded to the Tribunal to de-identity a party, along with the contents of a document, or another person affected by the proceedings.²³ That discretion can be exercised if the Tribunal considers the making of a de-identifying order is necessary for a number of reasons, including to avoid the publication of confidential information or information whose publication would be contrary to the public interest; or for any other reason in the interests of justice.²⁴
- [40] SMA is involved with the management and operation of an early childhood learning centre where numerous children attend. In that regard, I am satisfied the only appropriate step is to prohibit the publication of the contents of any document or other thing filed in or produced to the Tribunal and any evidence given to the Tribunal by any witness to the extent that it could lead to the identity of SMA, or any member of her family or any non-party to the proceedings.

²³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 66.

²⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 66(2).