SUPREME COURT OF QUEENSLAND

CITATION:	*Serratore v Director-General DJAG* [2013] QSC 328
PARTIES:	**CARMELA SERRATORE** (applicant) v **DIRECTOR-GENERAL THE DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL** (respondent)
FILE NO/S:	BS 8505 of 2013
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	29 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2013
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The application is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – GENERALLY – where the respondent made a finding that if the evidence of an allegation were accepted then, on the balance of probabilities, the allegation may be found to be capable of substantiation – where the respondent recommended not to take further action and no further action was taken – whether decision was made under enactment – whether the decision is reviewable ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – REASONS FOR ADMINISTRATIVE DECISIONS – OBLIGATION TO GIVE REASONS – where the respondent made a recommendation and decision not to take further disciplinary action – whether the respondent should be required as a matter of discretion to provide a written statement in relation to the decision made *Acts Interpretation Act* 1954 (Qld), s 27B *Judicial Review Act* 1991 (Qld), s 4, s 5, s 6, s 7(1)(b), s 20, s 30, 32, s 34, s 38, s 39, s 187 *Public Service Act* 2008 (Qld), s 187, s 188, s 188A *Ainsworth v Criminal Justice Commission* [1992] HCA 10;

(1992) 175 CLR 564, cited
Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) 170 CLR 321, cited
Griffith University v Tang [2005] HCA 7; (2005) 221 CLR 99, cited
Henderson v Williams, Delegate of Director-General of the Department of Justice and Attorney-General [2006] QSC 306, cited
Nohna v Ahmat [2012] QCA 346, cited
SZQDZ v Minister for Immigration and Citizenship [2012] FCAFC 26; (2012) 286 ALR 331, cited

COUNSEL: R Haddrick for the applicant
K Mellifont QC for the respondent

SOLICITORS: Hall Payne Lawyers for the applicant
Crown Solicitor for the respondent

[1] **JACKSON J:** Carmela Serratore applies for an order under s 38 of the *Judicial Review Act* 1991 (Qld) ("JR Act") that the respondent Director-General give a written statement of reasons in relation to each of two decisions. Under s 32 of the JR Act "if a person makes a decision to which [Part 4] applies a person who is entitled to make an application to the court under section 20 in relation to the decision may request the person to provide a written statement in relation to the decision". Under s 34, "the statement must contain the reasons for the decision".[1] Under s 38(1), if a requestor makes a request under s 32 but the decision maker does not comply with the request or apply to the court for an order under s 39 declaring that the requestor was not entitled to make the request, the requestor may apply to the court for an order that the decision maker give the statement. The power of the court is expressed in s 38(2) as follows:

> "If the court considers that the requestor was entitled to make the request **the court may order** the decision maker to give the statement within a specified period." (emphasis added)

[2] As stated above, it is a person "who is entitled to make an application to the court under s 20 in relation the decision" who is "entitled to make the request" for a statement of reasons: s 32(1). An application under s 20 is made "for a statutory order or review in relation to [a] decision". That is an application which may be made by "**a person who is aggrieved** by **a decision to which this Act applies**": s 20(1). (emphasis added)

[3] The first question in the present case is whether either of the decisions made by the respondent is "a decision to which this act applies" within the meaning of s 4 of the JR Act. In particular, the dispute is whether either of the decisions was "a decision of administrative character made … under an enactment …".

[4] The second question is whether the applicant is "a person who is aggrieved" by either of the respondent's decisions. The respondent contends that the applicant is

---

[1] The content requirements for reasons are set out in s 27B of the *Acts Interpretation Act* 1954 (Qld).

not "a person whose interests are adversely affected by the decision" within the meaning of s 7(1) of the JR Act.

[5] If those questions are resolved in the applicant's favour the third question is whether an order should be made in exercising the discretion under s 38.[2]

Factual background

[6] The applicant was an employee of the Department of Justice and Attorney-General.

[7] From April 2009 until February 2012, the applicant was appointed special counsel from Crown Law to the Major Infrastructure and Projects Unit (MIP) Department of Transport and Main Roads. In February 2012, she suffered an injury which interfered with her ability to work and resulted in a graduated return to work until June 2012. During that period she was to be available to manage matters in progress until July 2012. The allegations the subject of the respondent's decisions arose in that period of time.

[8] On 31 January 2013, the applicant ceased employment by the Department of Justice and Attorney-General. However, under the *Public Service Act* 2008 (Qld) ("PS Act") if a disciplinary ground arises in relation to a public service employee it may be dealt with after the employment ends.

[9] On 25 February 2013, the Executive Director, Ethical Standards Unit, of the Department provided a memorandum containing a report and recommendations to the respondent. They considered allegations that the applicant:

(a) failed to comply with lawful official instructions relating to the provision of a response regarding matters in progress for the Department of Transport and Main Roads (DTMR) and in submitting an invoice for payment to DTMR ("Allegation 1"); and

(b) failed to undertake her duties with diligence care and attention regarding a response for matters in progress to DTMR ("Allegation 2").

[10] The report and recommendations provided, in part:

> "…
>
> **Finding – Allegation 1**
>
> If the evidence is accepted then, on the balance of probabilities, this allegation may be found to be unsubstantiated.
>
> …
>
> **Allegation 2**
>
> …
>
> The evidence gathered appears to support the conclusion that Ms Serratore failed to satisfactorily respond to repeated requests for more and better particulars of the work she was performing for DTMR.

---

[2] *Henderson v Williams, Delegate of Director-General of the Department of Justice and Attorney-General* [2006] QSC 306.

Finding – Allegation 2

If the evidence is accepted then, on the balance of probabilities, the allegation may be found to be capable of substantiation.
…

Additional issues

Once a public servant ceases employment, a disciplinary declaration can only be made where a disciplinary ground has been established and the conduct would have warranted dismissal or reduction in classification had the person remained a public service employee.

In my view, the alleged conduct that may be capable of substantiation in relation to Allegation 2 would not cause you to consider initiating a post-separation disciplinary process with Ms Serratore.

Recommendation

It is recommended that you consider all the information relating to the investigation and determine whether to:

1. Find **Allegation 1** to be unsubstantiated. Yes / No (*please circle*)

2. Find **Allegation 2** to be potentially capable of substantiation but determine to take no further action as a result of Ms Serratore no longer being a departmental employee. Yes / No (*please circle*); or

3. Determine alternative path. Yes / No (*please circle and advise*)."

[11] The respondent circled "Yes" for 1 and 2 and noted the recommendation "approved". He thereby made a decision by way of finding that Allegation 1 was unsubstantiated (and impliedly to take no further action) ("Decision 1") and a decision by way of finding that Allegation 2 was potentially capable of substantiation but to take no further action ("Decision 2").

[12] The question raised by Allegation 2 was whether the applicant's response to a request to provide a response to a request as to the status of matters in progress was sufficiently timely or sufficiently full and proper given the competing priorities of the tasks she was undertaking. According to the report, the applicant was interviewed and provided responses to the subject matter of Allegation 2 before the report and recommendation not to proceed further was made to the respondent.

Relevant provisions of the PS Act

[13] Section 188A of the PS Act provides:

"**188A Disciplinary action that may be taken against a former public service employee**

(1) This section applies if—
(a) a disciplinary ground arises in relation to a public service employee; and

(b) after the disciplinary ground arises the employee's employment as a public service employee ends for any reason.

(2) However, this section does not apply if—

(a) the former public service employee is an ambulance service officer and the ambulance service chief executive has taken, is taking, or intends to take disciplinary action against the employee in relation to the disciplinary ground under the *Ambulance Service Act 1991*, part 2, division 4, subdivision 2; or

(b) the former public service employee is a fire service officer and the fire service chief executive has taken, is taking, or intends to take disciplinary action against the employee in relation to the disciplinary ground under the *Fire and Rescue Service Act 1990*, part 4, division 3, subdivision 2.

(3) The previous chief executive may make a disciplinary finding or take or continue to take disciplinary action against the former public service employee in relation to the disciplinary ground.

(4) The disciplinary finding or disciplinary action must be made or taken within a period of 2 years after the end of the employee's employment.

(5) However, subsection (4) does not stop disciplinary action being taken following an appeal or review.

(6) Subsection (4) does not affect—

(a) an investigation of a suspected criminal offence; or

(b) an investigation of a matter for the purpose of notifying the Crime and Misconduct Commission of suspected official misconduct under the *Crime and Misconduct Act 2001*.

(7) In disciplining the former public service employee, the previous chief executive may make a disciplinary declaration and may not take any other disciplinary action.

(8) The previous chief executive may only make a disciplinary declaration if the disciplinary action that would have been taken against the employee if the employee's employment had not ended would have been—

(a) termination of employment; or

(b) reduction of classification level.

(9) The making of the disciplinary declaration does not affect the way in which the employee's employment ended, or any benefits, rights or liabilities arising because the employment ended.

(10) In this section—

disciplinary declaration means a declaration of—

(a) the disciplinary finding against the former public service employee; and

(b) the disciplinary action that would have been taken against the employee if the employee's employment had not ended."

[14] The Dictionary to the PS Act defines terms as follows:

"***disciplinary declaration*** -

(a) for a disciplinary declaration made under a public sector disciplinary law, means -

(i) a disciplinary declaration made under -

(A) section 188A(7); or

(B) the *Police Service Administration Act 1990*, section 7A.2(2); or

(C) the *Misconduct Tribunals Act 1997* or QCAT Act; or

(ii) a declaration under another public sector disciplinary law that states the disciplinary action that would have been taken against the person if the person's employment had not ended; or

(b) otherwise, means a disciplinary declaration made under section 188A(7).

disciplinary finding means a finding that a disciplinary ground exists.

disciplinary ground means a ground for disciplining a public service officer under section 187."

[15] It should be noted at the outset that the provision of the report and recommendation on which the respondent acted is not itself a matter provided for under the PS Act as part of the statutory process for a disciplinary matter. Thus, this is not a case where the report itself is a decision under s 6 of the JR Act,[3] nor does it raise a question whether the applicant is a person aggrieved because of the contents of such a report under s 7(1)(b) of the JR Act.

[16] Section 188A of the PS Act is carefully structured. It is only engaged if a disciplinary ground arises. The definition of "disciplinary ground" is directed to the grounds under s 187. A disciplinary ground arises under s 187(2) and for the purposes of s 188A when the act or omission constituting the ground is done or made. When a disciplinary ground arises, the power to make a disciplinary finding (ie that the disciplinary ground exists) or to take disciplinary action is engaged under s 188A. The only disciplinary action permitted is a disciplinary declaration which is permitted if the case is serious enough to have warranted termination or reduction in classification had the employment continued.

[17] Thus, s 188A contemplates possible outcomes of a disciplinary finding or a disciplinary declaration and decisions whether or not to make them.

Was Decision 1 or Decision 2 a decision to which the JR Act applies?

[18] The applicant contends that Decision 1 is a "disciplinary finding" under s 188A. In my view, that contention must be rejected. A "disciplinary finding", as defined, is a finding that a disciplinary ground exists. A finding that an allegation of conduct that may constitute a disciplinary ground is unsubstantiated cannot be a finding that a disciplinary ground exists.

[19] However, that conclusion does not answer the question whether Decision 1 is a decision to which the JR Act applies. The power to make a "disciplinary finding" under an enactment necessarily confers a power to make a decision that no finding can or should be made. As a matter of ordinary meaning, that decision is capable of being characterised as a decision under the enactment.

[20] The respondent contends, however, that Decision 1 is not such a decision under s 188A, because it is not a decision to make a "disciplinary finding" and is otherwise not made under an enactment. He relies on a passage taken from

---

[3] Neither the report nor the recommendation is otherwise a decision made under an enactment - see *SZQDZ v Minister for Immigration and Citizenship and Anor* (2012) 286 ALR 331 at [31]-[41].

Mason CJ's reasons in *Australian Broadcasting Tribunal v Bond*[4] including the following:

> "Nonetheless other considerations point to the word having a relatively limited field of operation. First, the reference in the definition in s. 3(1) to 'a decision of an administrative character made ... under an enactment' indicates that a reviewable decision is a decision which a statute requires or authorizes rather than merely a step taken in the course of reasoning on the way to the making of the ultimate decision. Secondly, the examples of decision listed in the extended definition contained in s. 3(2) are also indicative of a decision having the character or quality of finality, an outcome reflecting something in the nature of a determination of an application, inquiry or dispute or, in the words of Deane J., 'a determination effectively resolving an actual substantive issue'. Thirdly, s. 3(3), in extending the concept of 'decision' to include 'the making of a report or recommendation before a decision is made in the exercise of a power', to that extent qualifies the characteristic of finality. Such a provision would have been unnecessary had the Parliament intended that 'decision' comprehend every decision, or every substantive decision, made in the course of reaching a conclusive determination. Finally, s. 3(5) suggests that acts done preparatory to the making of a 'decision' are not to be regarded as constituting 'decisions' for, if they were, there would be little, if any, point in providing for judicial review of "conduct" as well as of a 'decision'."[5]

[21] In my view that passage is inapt to resolve the question whether Decision 1 was a decision to which the JR Act applies. That is because the passage is largely concerned with how a decision is distinguished from anterior conduct which does not amount to a decision.[6] Decision 1 is not concerned with conduct that lies at some point along the continuum from commencement of a process by investigation to the making of a final decision. It is in effect a final decision that a disciplinary finding should not be made on Allegation 1 and that the process of investigation or further consideration is terminated.

[22] The respondent also relied on *Nohna v Ahmat*.[7] In some respects, the discussion in that case of other cases relating to what is a "decision" may not be clear. But the conclusion that the unexpressed view of a Coroner that there are no grounds to refer a matter to the Director of Prosecutions is not a decision is clear enough – it is neither a finding, nor a determination nor a decision. As well, *Nohna* left open whether there could be a decision which sufficiently affected the legal rights or obligations of the parties to constitute a decision to which the JR Act applies where the only substantive effect of the decision is to create an obligation in the decision-maker to give information to a third party.[8]

[23] In my view, by way of contrast, a final decision not to make a disciplinary finding under s 188A is a decision to which the JR Act applies. The basis of that conclusion appears in the following passage from *Griffith University v Tang*:[9]

---

4 [1990] HCA 33; (1990) 170 CLR 321 at 335-338.
5 At 336.
6 I leave to one side the provision in s 21 of the JR Act for review of conduct related to making a decision.
7 [2012] QCA 346.
8 At [23].
9 [2005] HCA 7; (2005) 221 CLR 99 at [85]-[86].

> "The legal rights and obligations which are affected by the authority of the decision derived from the enactment in question may be those rights and obligations founded in the general or unwritten law…
>
> However, that which is affected in the fashion required by the statutory definition may also be statutory rights and obligations. An example is that given by Toohey and Gaudron JJ in *Bond* of a requirement, as a condition precedent to the exercise of a substantive statutory power to confer or withdraw rights (eg, a licence), that a particular finding be made. **The decision to make or not to make that finding controls the coming into existence or continuation of the statutory licence and itself is a decision under an enactment**." (footnotes omitted) (emphasis added)

[24] As well, the definition of "making of a decision" in s 5 of the JR Act informs the conclusion that to refuse to make a finding authorised to be made under a statute is to make a decision within the meaning of s 4.

[25] In my view, it follows that Decision 1 is a decision to which the JR Act applies.

[26] In my view, it also follows that Decision 2 is a decision to which the JR Act applies. Although couched in the language of a finding that Allegation 2 is potentially capable of substantiation, it too is not a disciplinary finding because there is no finding that the matters which constitute a disciplinary ground do exist. Instead, the respondent's decision was that although the allegation was potentially capable of substantiation, no further action should be taken. This is not gainsaid by the prior statement that the evidence gathered "appears to support" the conclusion that the applicant failed to satisfactorily respond to repeated requests for information as to the work she was performing. Action could have been taken to proceed further, but it was not. The investigation might have continued, observing the requirements of procedural fairness, to a determination whether to make a disciplinary finding or, possibly, a disciplinary declaration,[10] but it did not. The decision actually made was a decision to do neither of those things and it was intended to be final.

Is the applicant a person aggrieved?

[27] The applicant contends that she is a person aggrieved under s 7 of the JR Act because her interests are adversely affected.

[28] In relation to Decision 1, in my view that is an impossible contention. The outcome of a successful application for a statutory order for review of a decision under s 20 of the JR Act is an order under s 30 to quash or set aside the decision, or declaring the rights of the parties, or for further consideration of the decision, or for consequential relief to do justice. The JR Act identifies a person who is aggrieved by and whose interests are affected by a decision as the person who may apply for a statutory order for review. There is no apparent reason to suppose that the intention is that a person who could not obtain an order under s 30 is a person aggrieved.

[29] In oral argument, I asked what order under s 30 the applicant could obtain if she were to make an application for a statutory order for review of Decision 1. It will be recalled that Decision 1 is a decision in the applicant's favour on the merits that

---

[10] One suspects that this was not a realistic possibility but it is mentioned for the purposes of the discussion.

Allegation 1 is not substantiated (and impliedly that there should be no further action). It was also, in effect, a decision that a disciplinary finding should not be made against the applicant. What order could be made under s 30 which would improve her position, so that it can be said that the decision presently adversely affects her interests? The applicant offered no suggestion as to what that order might be.

[30] In my view, the applicant is not a person aggrieved in relation to Decision 1. It follows that she is not a person entitled to make an application under s 20 of the JR Act.

[31] The position in relation to Decision 2 is not as clear. The applicant referred to two public service directives as to disclosure of information, on the footing that disclosure of the fact of Decision 2 might adversely affect her in the future. The sting in her contention lies in the proposition that Decision 2 does not resolve Allegation 2, in contrast to Decision 1 which resolves Allegation 1 in her favour. Instead, Decision 2 is a decision not to take further action because it is not warranted, even if Allegation 2 might have been resolved against her.

[32] In some cases, such a decision may be capable of adversely affecting the interests of a person against whom an allegation of unprofessional conduct is made. Reputation is an interest capable of protection by judicial review.[11] Still, it does not necessarily follow in every case that failing to resolve an allegation which, if true, could damage a person's professional reputation means that the person's interests are adversely affected.

[33] In the present case, the applicant did not identify any order she might be able to obtain under s 30 of the JR Act. In the case of an unresolved allegation of unprofessional conduct an applicant might in some rare cases be able to obtain an order declaring that he or she had not failed to undertake her duties with diligence care and attention. However, it must be remembered that judicial review is not normally concerned with making an order as to the merits of that kind. It is more likely that it might be possible in some cases for an applicant to obtain an order remitting the matter for further consideration. In effect, that would be an order requiring the decision maker to proceed towards resolution of the allegation. But turning to the circumstances of the present case, even if the respondent made some reviewable error in reaching the conclusions the subject of Decision 2, it seems unlikely that he is obliged to conduct further investigations and to make further findings in order to decide that he will not take further action under s 188A. These matters were not explored in argument. Nevertheless, for the purpose of deciding this application, it is convenient to proceed by assuming, without finally deciding, that the applicant is a person aggrieved by Decision 2 in the circumstances of this case.

Conclusions

[34] One would hope that the circumstances where this Court would interfere in an administrative decision not to proceed upon an employment disciplinary matter where no adverse finding is made against the employee would be rare.

---

[11] *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 578.

[35] Recognising the statutory context of the applicant's employment, it is also important not to lose sight of the context of a complaint or decision about conduct and discipline in relation to an employee's conduct. A complaint or matter may be raised in relatively minor or trivial circumstances. For good reason, the employer may not wish to engage in further consideration of or a hearing of the complaint or matter, because it is not in the employer's interests or considered by the employer to be in the employee's interests. The complaint or matter is simply dismissed or a decision is made not to proceed. Such a decision may disappoint a complainant who considers the matter to be more important than does the employer. It may also disappoint the employee because they do not feel wholly or sufficiently vindicated. But it is not necessarily in the employer's interests to undergo the delay, expense or other possible consequences of further consideration or hearing of the matter, just because the employee does not feel vindicated.

[36] Against that background, I return to s 38 of the JR Act and the discretionary power to make an order that the respondent give a statement of reasons. For the reasons previously given, in my view, Decision 2 was a decision to which the JR Act applies and the applicant may be a person aggrieved by that decision. Nevertheless, in exercising the discretion to make an order under s 38, in my view, it is important to keep in mind that Decision 2 was a decision not to proceed adversely to the applicant. Although the respondent dealt with the matter without finding that Allegation 2 was not substantiated, on the evidence presently before the Court there is no reason to think that decision to take no further action was an inappropriate manner of resolving a minor matter in the circumstances of this case. The applicant has had disclosed to her the report on which the respondent appears to have made Decision 2, in accordance with the recommendation in that report, and which bears the physical notation of the respondent's approval of the recommendations and notation of his decision.

[37] Further, the applicant has the benefit of some additional information as to the circumstances in which the decisions were made in the material that has been informally supplied by the respondent or on his behalf, including correspondence from the respondent. In short, the applicant has a significant amount of information about the circumstances under which Decision 2 was made.

[38] In those circumstances, in my view, the appropriate exercise of the discretionary power to make an order under s 38 is to refuse the application, thereby avoiding further costs or expense in relation to a minor matter.