

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BOND J

No. 7295 of 2014

LYNETTE JONES

Applicant

v

ALISTAIR DAWSON APM

First Respondent

COMMISSIONER OF THE QLD POLICE SERVICE

Second Respondent

DINA BROWNE, REVIEW COMMISSIONER

Third Respondent

BRISBANE

THURSDAY, 2 APRIL 2015

JUDGMENT

BOND J: The applicant is a senior constable with the Queensland Police Service which I'll refer to as the QPS. On 5 November 2013, a QPS Superintendent recommended that the applicant be transferred to a position at the Kawana Waters scenes of crime unit. The QPS transfer advisory committee supported that recommendation. In the following months there

was a dispute between the applicant and the QPS regarding what the QPS described as mandatory psychometric testing that it required prior to allowing the recommended transfer.

Ultimately, by letter dated 7 July 2014, the first respondent advised the applicant in these terms:

Dear Ms Jones

As you are aware, consideration of the progression of your transfer to the position of scenes of crime officer (SOC) Kawana Waters has been awaiting the outcome of your psychological assessment in accordance with the Queensland Police Service (QPS) "Selection Psychological Assessments for 'High Risk' Positions" process.

I am now in receipt of Human Resources advice to the effect that they cannot confirm that you have undertaken a psychological assessment consistent with the QPS process, a prerequisite for a transfer to a SOC position. On this basis, I cannot authorise your transfer to the position of SOC, Kawana Waters.

You will receive correspondence soon in respect of your transfer position.

By notice of application to review, dated 15 July 2014, the applicant applied for review of that decision on the following grounds:

I seek to review the decision of Assistant Commission[er] Dawson dated 7 July 2014, declining to authorise the management initiated transfer to Kawana Waters SOC on grounds that the decision is (inter alia), unreasonable.

Further detail was set out in the annexure to the application.

The response to the application was by email in these terms. There was a covering email from Melissa, who I infer is an administrative staff member within the QPS, addressed to the applicant:

Hi Lyn,

I have received advice in relation to your review matter ... from the Police Service Review Commissioner. I have tried to contact you by phone unfortunately I was unable to get through to you.

As per advice from the Review Commissioner (below), we are unable to progress this matter due to Police Service Reviews not having Jurisdiction of the matter.

The reference to "Review Commissioner (below)" was apparently a reference to an email sent by Dina, who I infer is the third respondent in this matter. It stated:

I have read the material relating to the review of decision sought by Senior Constable Lynette Jones. It is my view that we do not have jurisdiction to hear this review because the decision not to authorise the transfer is based on SC Jones's choice not to follow

what appears to be a reasonable course of action (that is, the independent assessment by Mr Palk). It seems that the final decision is still contingent on the outcome of SC Jones complying with the required process.

The applicant applies for judicial review under s 20 of the *Judicial Review Act 1991* (Qld), which I'll refer to as the JR Act, of the decision of the first respondent made on 7 July 2014, to which I have earlier referred. I will refer to this as the first application. In the alternative, the applicant seeks to review the separate decision made by the third respondent, declining jurisdiction to review the decision, that is, the emailed decision to which I have earlier referred. I will refer to this as the second application.

Mr Davis QC, for the applicant, submitted that I should hear argument on the second application to review first. The basis for that submission was that if I acceded to that application, and determined that an error had been made, and that the matter should be remitted to the third respondent to exercise jurisdiction to review on the merits, that would mean that it would be unnecessary to proceed with the application to review the decision of the first respondent. Indeed, if I so determined in relation to the third respondent, that would provide a basis for dismissal of the first application under s 13 of the JR Act, on the basis that the requirements of s 13 (b) were satisfied. I accepted the applicant's proposal, and proceeded to hear the applicant's argument on the second application.

The third respondent's decision was challenged under s 20(2)(f) of the JR Act. Mr Davis submitted that the applicant was a person aggrieved, within the meaning of s 20(1), and that the decision of the third respondent was attended by error, bringing it within the ambit of s 20(2)(f), which ground provides:

that the decision involved an error of law (whether or not the error appears on the record of decision).

The argument that the decision to decline jurisdiction involved an error of law was as follows.

First, the applicant drew my attention to the relevant sections from the *Police Service Administration Act 1990* (Qld) which I'll refer to as the PSA Act. . Part 9 of the PSA Act provides for a right of review of certain decisions by a Commissioner for Police Service Reviews. The third respondent is such a person. Section 9.3(1) provides relevantly:

A police officer who is aggrieved by a decision about --

...

(b) the selection of an officer for transfer to a police officer position, if the selection procedures mentioned in section 5.2(2)(a) were not required to be complied with ...

The jurisdiction conferred on the respondent is conferred by s 9.3 (3).

The second element of the applicant's argument was that the applicant submitted I could be satisfied that the selection procedures mentioned in s 5.2(2)(a) were not required to be complied with, having regard to the provisions of s 5.2 of the PSA Act, Regulation 4.2A of

the *Public Service Administration and Regulation* 1990 (Qld) and Exhibit MOJ-1 to the affidavit of Ms Johnston, which exhibited the relevant industrial agreement. I interpolate that I am so satisfied.

The third element of the applicant's argument was that the decision of 7 July 2014 by the first respondent should be regarded as a decision about the selection of an officer for transfer to a police officer position because the applicant had essentially been contending that she should be transferred to the Kawana Waters SOC position and that she satisfied all criteria for that transfer. The first respondent's decision of 7 July 2014 determined the substance of that dispute because he declined to authorise the proposed transfer.

In support of the proposition that these decisions should be so regarded, the applicant drew my attention to the decision of *Simpson v Queensland Police Service* (2002) 171 QGIG 181. In that case, President Hall - although directly considering the definition of "matter" as it is used in s 9.1A of the PSA Act - said about part 9 of that Act more generally:

...if Part 9 of the Police Service Administration Act 1990 is read as a whole it is plain that all that may be reviewed are final and determinative decisions upon various matters nominated at s 9.3.

The applicant's case was that I should be satisfied that the first respondent's decision was a final and determinative decision about the selection of an officer for transfer to a police officer position. If so, then the third respondent had made an error of law.

I agree that the third respondent's assessment that there had been no final and determinative decision and that the jurisdiction to review had not been engaged was erroneous. It seems to me that when one has regard to the course of events which had transpired, the decision should be so regarded and that it should be regarded as a decision within the meaning of s 9.3(1)(b).

When one has regard to the language used in the decision of the third respondent to which I've referred, it seems that the third respondent reached the view that there was no decision because the first respondent's decision was not final and determinative in that the applicant might still comply with the required process. I reject that view and agree with what I have described as the third element of the applicant's argument.

I've already mentioned that, in the months after there had been a recommendation that the applicant be transferred to a position at the Kawana Waters Scenes of Crime Unit a dispute arose concerning what the QPS described as mandatory psychometric testing that it required the applicant to undertake before allowing the recommended transfer.

There was no relevant dispute about the facts which I briefly summarise in the following way:

As I've mentioned, the applicant disputed the requirement that she undertake psychometric testing. On 6 January 2014, the applicant by her solicitors notified the QPS that she was willing to undertake psychometric testing by the QPS Psychological Assessment Unit. Subsequently, on 16 January 2014, the applicant attended at that unit and undertook psychological assessment. Unfortunately, because during the assessment the applicant had indicated that she did not regard her attendance to be voluntary, the psychologist who

conducted the assessment formed the view that, as a matter of ethics, the result of the interview should be regarded to be invalid.

The applicant's solicitors submitted to the contrary and submitted that the results of the assessment should be used without the need for any reassessment. It seems that the QPS then took the position that it would nevertheless be necessary to have a reassessment by QPS psychologists. The applicant agreed. There was then some delay and the applicant proceeded to have her own assessment done by Dr Menkes, consultant psychiatrist, which assessment concluded favourably to the applicant's suitability to do the work which she would be required to do if transferred in the way she sought to be.

There followed a dispute as to whether Dr Menkes' assessment would be satisfactory to the QPS. The first respondent wrote to the applicant's solicitors on 28 March 2014 saying:

While I received a copy of the report of Dr David Menkes from your client, this was forwarded to the attention of Mr Paul Casey, Director, WorkForce Management as your client's psychological assessment is not a matter for my determination.

I reiterate that consideration cannot be given to the progression of your client's transfer to Kawana Waters, Scenes of Crime until I am advised by human resources of the outcome of your client's psychological assessment.

The upshot of the concern about Dr Menkes' assessment was that the Human Resources section sought further expert advice as to the adequacy of Dr Menke's assessment. The advice which Human Resources sought and the advice which they then gave to the first respondent is set out in the letter to the first respondent dated 30 June 2014, which is exhibited to the affidavit of the applicant. The letter stated:

I have received the response from Dr Palk –
and I interpolate here that Dr Palk was the psychologist whose advice had been sought in relation to the report of Dr Menkes. I'll continue with the quote:

...advising that:

and here the letter quotes from Dr Palk:

"Firstly, I note that I'm not in a position to comment on Dr Menkes' psychiatric opinion, as my expertise is in the field of forensic psychology. It is more appropriate for another Psychiatrist to be commenting on the suitability of the process that Dr Menkes has used."

The letter continued:

In relation to the report, Dr Palk states: "It appears from the report Dr Menkes has had some dealings with Constable Jones in the past. The report also appears confined to commenting on the psychiatric status of Constable Jones."

An independent forensic psychologist assessment would most likely include a face-to-face clinical interview, as well as having Constable Jones complete some psychometric tests to discount any type of personality disorder, psychiatric or psychological condition or a stress-related disorder that might impact on her ability to carry out scenes for [sic] crime work.

...Hence the psychological assessment that provides information about the individual's psychological profile and temperament is essential in order to assess suitability for potential stressful or hazardous work.

The appropriate tests that would be used are likely to be the –”

and after a redaction.

“If concerns are identified relating to memory function or perceptual reasoning skills, it may also be necessary to administer the –”

and after a further redaction.

“The psychological assessment should be independent and not influenced by someone who has previously provided treatment.”

The Human Resources letter to the first respondent went on to conclude:

As I'm not qualified to comment on Dr Menkes' assessment or report that I'm guided by the report provided to me by Dr Gavin Palk. Based on the information I have available, I cannot confirm that Senior Constable Jones has undertaken a psychological assessment consistent with the Queensland Police Service (QPS) “Selection Psychological Assessments for ‘High Risk’ Positions”.

That letter was the advice referred to in the first respondent's decision of 7 July 2014, to which I have earlier referred.

I agree with the submission put to me by Mr Davis QC that the decision of 7 July 2014 was a decision on the facts that then existed and that it was final in the relevant respects. That differs from the view reached by the third respondent. It seems to me that I should regard the decision of the third respondent that there was no decision within the meaning of the section which conferred jurisdiction on her to be a decision on a question of law: cf. *Collector of Customs v Agfa-Gevaert Limited* (1996) 186 CLR 389 in which the High Court referred with approval to some general propositions as to the distinction between questions of fact and questions of law. Amongst other things, the High Court referred with approval to a proposition in these terms:

The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law.

It follows that I conclude that the impugned decision of the first respondent of 7 July 2014 was a decision within the meaning of s 9.3(1)(b) of the PSA Act and that the third respondent

wrongly declined to exercise the review jurisdiction that she had. I'll hear the parties on the form of order which I should make based on that conclusion.

MR DAVIS: Thank you, your Honour. Could I hand up two copies of a draft order? All parties at the bar table are agreed in these terms, your Honour.

HIS HONOUR: Thank you.

MR DAVIS: As to orders 5 and 6, we've not yet made submissions to your Honour about that and we hope that meets your convenience.

HIS HONOUR: If I knew what my calendar was like – let me just think about that. When does my – Madam Associate, when does my period in Civil finish?

MR DAVIS: I'm sorry, your Honour. We were contemplating that your Honour just decide that on the papers once the - - -

HIS HONOUR: I know. I know.

MR DAVIS: Sorry.

HIS HONOUR: Yes, I – it's really just – if I'm in the middle of my first stint in Crime - - -

MR DAVIS: I understand.

HIS HONOUR: - - - then I'm probably not going – as you might imagine. Okay. That'll be fine. I order as per draft, which I will initial and place with the papers.

MR DAVIS: Thank you, your Honour.

HIS HONOUR: Madam Associate. Thank you for your assistance, Mr Davis. Gentlemen.

MR DAVIS: Thank you, your Honour.

HIS HONOUR: Adjourn the Court.