SUPREME COURT OF QUEENSLAND

CITATION:	*Jones v Dawson APM, Assistant Commissioner & Ors* [2015] QSC 147
PARTIES:	**LYNETTE JONES** (applicant) **v** **ALISTAIR DAWSON APM, ASSISTANT COMMISSIONER** (first respondent) **COMMISSIONER OF THE QUEENSLAND POLICE SERVICE** (second respondent) **DINA BROWNE, REVIEW COMMISSIONER** (third respondent)
FILE NO:	BS 7295/14
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	4 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGE:	Bond J
ORDER:	**No order as to costs.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – where the first respondent refused to authorise a transfer of the applicant – where the applicant sought to have the third respondent conduct a merits review of that decision – where the third respondent declined to exercise its jurisdiction – where the applicant brought a successful application for a statutory order of review of the third respondent's decision – where the third respondent "abided" the order of the Court at the hearing – where the applicant sought an order that the third respondent pay its costs – where the third respondent was an administrative decision-maker – whether the general rule that costs would not be awarded against a Magistrate or inferior Court on an application for judicial review in the absence of exceptional circumstance ought be applied *Judicial Review Act* 1991 (Qld), ss 13, 20, 49 *Police Service Administration Act* 1990 (Qld), ss 9.3, 9.4, 9.5 *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421, considered *El Deeb v Magistrates Court of South Australia* (1999) 72

SASR 596; [1999] SASC 113, cited
Kingham v Yorkston [2002] 2 Qd R 595; [2002] QSC 059, cited
The Queen v Australian Broadcasting Tribunal; ex parte Hardiman (1980) 144 CLR 13; [1980] HCA 13, cited

COUNSEL: P Davis QC, with M Black, for the applicant
P McCafferty for the first and second respondents
S McLeod for the third respondent

SOLICITORS: Robert & Faith Legal Practice for the applicant
Legal Services of the Public Safety Business Agency for the first and second respondents
Police Service Review Commissioner for the third respondent

[1] **BOND J:** The applicant is a senior constable with the Queensland Police Service.

[2] On 7 July 2014 the first respondent made a decision to refuse to authorise a management initiated transfer of the applicant to Kawana Waters Scenes of Crime unit.

[3] By notice of application to review dated 15 July 2014, the applicant sought to have the third respondent exercise jurisdiction conferred on her by s 9.3(3) of the *Police Service Administration Act* 1990 (Qld) to conduct a merits review of the first respondent's decision.

[4] On 24 July 2014, the third respondent declined to exercise that jurisdiction, essentially because she formed the view that the first respondent's decision was not relevantly final and, accordingly, her jurisdiction under the *Police Service Administration Act* was not engaged.

[5] On 30 July 2014, the applicant's solicitors sent a letter by email to the Commissioner for Police Service Reviews. The following observations may be made about that letter:

(a) It referred to the decision by which the third respondent declined jurisdiction.

(b) It summarized salient aspects of the facts and adverted to the relevant section of the *Police Service Administration Act*, namely s 9.3(1)(b), noted that a reviewable decision could include a decision to refuse to do the thing in question, and submitted that the facts revealed a final and operative decision about the transfer in question.

(c) It submitted that the decision was in fact reviewable by a Commissioner for Police Service Reviews under Part 9 of the *Police Service Administration Act* and concluded with a request that the applicant be informed by no later than 3:00pm, on 6 August 2014 whether the Commissioner would proceed to review the decision.

(d) Notably the letter was sent under the heading "Without prejudice save as to costs" and stated that the applicant reserved her rights to apply for appropriate relief under the *Judicial Review Act* 1991 (Qld) ("the JR Act") and to refer to the letter if necessary.

[6] There was a response from the office of the Commissioner for Police Service Reviews on 7 August 2014. The request had been referred to Mr Mullins – who was another Commissioner - and he had declined to deal with it. The author of the response referred to the third respondent's earlier finding that she had no jurisdiction, expressed a personal view consistent with the decision which the third respondent had reached and noted that "it may be that [the applicant] has the option to seek a Judicial Review".

[7] By application for a statutory order for review the applicant filed on 7 August 2014, the applicant sought –

(a) judicial review of the decision of the first respondent pursuant to s 20 of the JR Act; and

(b) judicial review of "the decisions of [Mr Mullins] dated 24 July 2014 and 7 August 2014 that denied there was jurisdiction to hear an Application for Review filed with the Commissioner for Police Service Reviews on 15 July 2014."

[8] On 28 August 2014, and with the consent of Mr Mullins personally and of the third respondent by her solicitors, the third respondent was substituted for Mr Mullins and directions were made for filing and service of an amended application by the applicant and otherwise for the applicant and the respondents to file affidavit material and written submissions.

[9] By an amended application filed 28 August 2014, the applicant claimed:

(a) an order quashing or setting aside the decision of the first respondent;

(b) an order referring the matter to which the decision relates to the first respondent for further consideration;

(c) an order that the Commissioner for Police Service Reviews carry out the requested review or a declaration that it has jurisdiction to do so; and

(d) costs.

[10] The applicant filed written submissions on 27 March 2015. The submissions clarified that the application for judicial review of the decision of the first respondent and the application for judicial review of the decision of the third respondent were alternatives.

[11] On 2 April 2015, the application came before me for hearing. The first and second respondents and, separately, the third respondent filed written submissions by leave on that day.

[12] The written submissions from the first and second respondents opposed the application so far as it related to the first respondent and did not advance any submissions in relation to the application so far as it related to the third respondent. The third respondent's written submissions did not seek to support her decision to refuse to exercise jurisdiction. Instead they relevantly stated:

> Consistent with the established practice set out in *The Queen v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13 at 35-36, as further discussed in *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [44] – [45], the third respondent will abide by the order of the Court and seeks to be heard on the question of costs, should it arise.

[13] The reference to *Hardiman* was a reference to this passage:

> There is one final matter. Mr. Hughes was instructed by the Tribunal to take the unusual course of contesting the prosecutors' case for relief and this he did by presenting a substantive argument. In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this Court is not one which we would wish to encourage. If a tribunal becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this Court by a tribunal should

> be regarded as exceptional and, where it occurs should, in genera be limited to submissions going to the powers and procedures of the Tribunal.

[14] The reference to *Cunneen* was a reference to this passage:

> One other matter should be noted at the outset, namely that the Commission appeared as the active respondent in these proceedings. The Commission is certainly not a court, nor a tribunal in the usual understanding of that term. Rather, it is an investigative body which can hold inquiries and make reports to Parliament, amongst other functions. To the extent that it is required to exercise these functions, as it must do, impartially and without interest in the conduct or result of the investigations, it is undesirable that it become engaged in adversary proceedings with persons whose conduct is subject to investigation: see *The Queen v The Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13 at 35-36. As the High Court stated, "[i]f a tribunal becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted."
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> There is a qualification to that principle (although itself regarded as "exceptional") where the submissions to be made are limited to the powers and procedures of the tribunal. These principles should apply to the Commission. At least in so far as the matters to be dealt with are limited to statutory gateway to the exercise of its investigative functions, no issue arises as to the propriety of the Commission itself appearing and presenting legal argument as to the scope of its authority.

[15] At the hearing I acceded to the applicant's submission that I should hear the application in relation to the third respondent's decision first. The applicant submitted that if I allowed the application, and determined that that the matter should be remitted to the third respondent to exercise jurisdiction to review on the merits, it would be unnecessary to proceed with the application to review the decision of the first respondent. Indeed the fact of my finding concerning the availability of that remedy would arguably support dismissal of that part of the application pursuant to s 13 of the JR Act.

[16] In an *ex tempore* judgment on 2 April 2015 I concluded that the decision of the first respondent was a decision within the meaning of s 9.3(1)(b) of the *Police Service Administration Act* and that the third respondent erred in law when she declined to exercise the review jurisdiction conferred on her by s 9.3(3) because she thought the decision was not relevantly final. I made appropriate declarations and remitted the matter to the third respondent for review according to law.

[17] The parties agreed that otherwise I should –

(a) adjourn the application as between the applicant and the first and second respondents to a date to be fixed;

(b) reserve costs as between the applicant and the first and second respondents; and

(c) grant the applicant and the third respondent leave to file written submissions in respect of costs,

and I so ordered. The contemplation was that I would rule on the disputed costs issue on the papers.

[18] By written submissions dated 15 April 2015, the applicant sought an order that the third respondent pay the applicant's costs of and incidental to the amended application for a statutory order of review up to and including the hearing on 2 April 2015. By written submissions dated 24 April 2015, the third respondent opposed any such order.

[19] The applicant acknowledged that the general rule was that costs would not be awarded against a Magistrate or inferior Court on an application for judicial review in the absence of exceptional circumstances, but submitted that there was no such rule in respect of administrative decision-makers such as the third respondent.

[20] The third respondent disputed the applicant's contention that the general rule did not apply in respect of administrative decision-makers such as the third respondent. She submitted that having regard to the functions and role exercised by her, that general rule should still apply.

[21] In order to determine this aspect of the contest it is necessary to examine the basis of the general rule.

[22] In *Kingham v Yorkston* [2002] 2 Qd R 595, Mullins J made the following observation:

> [16] The discretion to order costs on an application for review against the party against whom the applicant has successfully obtained a prerogative order is wide. In exercising that discretion, it is in order, however, to consider the practice that has been followed in other cases where the decision of a magistrate or other similar officer has been set aside by way of judicial review or similar proceeding: *El Deeb v Magistrates Court of South Australia* (1999) 72 SASR 596, 599.

[23] In *El Deeb*, Doyle CJ referred with approval to the well-established practice not to award costs against a court or tribunal whose decision is set aside by way of judicial review, merely on the basis that the court or tribunal has erred. His Honour referred to the cases establishing that practice which were cited by Professor Enid Campbell in her article 'Appearances of Courts and Tribunals as Respondents to Applications for Judicial Review' (1982) 56 ALJ 293 and concluded that the cases indicate that an order for costs will usually only be made if something like misconduct, corruption or perversity is established. Notably his Honour also thought that one of the justifications for the practice was that it would seem inappropriate to award costs against the court or tribunal on an issue on which it was firmly discouraged from defending its own decision.

[24] The third respondent is established under s 9.2A of the *Police Service Administration Act.* Section 9.3 details the nature of the matters a police officer, who is aggrieved by a decision, may apply to have reviewed by a Commissioner for Police Service Reviews. The procedures for making an application for review are detailed in s 9.4. Upon conclusion of a review, a Commissioner for Police Service Reviews is to make such recommendations that are considered appropriate to the matter under review to the Commissioner of the Police Service: s 9.5(1). The Commissioner of the Police Service, upon consideration of the matter reviewed and having regard to the recommendations made by the Commissioner for Police Service Reviews, is to take such action as appears to be just and fair: s 9.5(2).

[25] It is true that the Commissioner for Police Service Reviews is neither a Court nor a Tribunal. But neither was the Commission considered in *Cunneen*, yet the New South Wales Court of Appeal held that to the extent that the Commission was required to exercise its functions impartially and without interest in the conduct or result of the investigations, it was undesirable that it become engaged in adversary proceedings with persons whose conduct

was subject to investigation. It seems to me that the similar observations may be made in relation to the review functions of the Commissioner for Police Service Reviews.

[26] In my view the general practice identified in *Kingham v Yorkston* and *El Deeb* must be regarded to apply in relation to the discretion to order costs against a Commissioner for Police Service Reviews in the present circumstances. Accordingly it seems to me that the approach I should take is that an order for costs will usually only be made if something like misconduct, corruption or perversity is established.

[27] Nothing of that nature has been established in this case.

[28] The applicant submitted that even if the general rule did apply to the third respondent, a costs order in favour of the applicant was justified, essentially for the following reasons:

(a) First, she pointed to the fact that it was the third respondent's wrongful denial of jurisdiction that necessitated the application. The applicant had sought to avoid the need for an application under the JR Act but the response to her solicitors' letter of 30 July 2014 left her with little option.

(b) Second, she submitted that there was no reason why the third respondent could not and should not have taken a position, one way or the other, regarding the question of its jurisdiction. She pointed to the exception acknowledged in *Hardiman* that a tribunal or decision-maker could limit itself to submissions in respect of its own powers and procedures. She suggested the third respondent could have assisted the Court as a contradictor or could have conceded that the Applicant's matter was within its jurisdiction and facilitated a resolution of the proceeding without the need for a contested hearing.

(c) Third, even if it was proper for the third respondent to "abide" the order of the Court, she should have given notice of her intention to do so at an early stage, rather than on the day of the hearing.

(d) Finally, the applicant submitted that I should form the view that the application involved an issue that affected a "public interest" beyond the personal right or interest of the applicant within the meaning of s 49(2)(b) of the JR Act because the outcome of my *ex tempore* decision will have a broader impact upon the third respondent's procedures and the administration of the Queensland Police Service.

[29] As to the first point, this consideration will apply in any case where a decision is set aside by way of judicial review on the basis that the court or tribunal has erred. It does not provide a reason for departing from the general practice.

[30] As to the second point:

(a) In my view the *Hardiman* discouragement from entering into the arena did apply to the third respondent. Given the nature of her functions, it was undesirable that the third respondent become engaged in adversary proceedings with the applicant.

(b) The exception to which reference is made is not an exception which would justify defending the decision that there was no jurisdiction to exercise the powers conferred on the third respondent by statute.

[31] As to the third point:

(a) I agree that the third respondent should have given notification of her intention to abide the order of the Court earlier than she did.

(b) However even if she had, it would still have been necessary for the applicant to persuade a judge to made the declarations which I made, and to remit the matter back to the third respondent for determination according to law.

(c) In terms of costs, the real issue in this case seems to be that there was not an early enough appreciation that a determination of the application as against the third respondent might render unnecessary the need to develop fully the application as against the first and second respondents. If that had been appreciated earlier, then directions could have been made which might have avoided some of the costs which the applicant no doubt incurred.

(d) However the applicant has not persuaded me that the fault for that outcome should be sheeted home to the third respondent because she failed to give notice earlier of her intention to abide the order of the Court.

[32] As to the fourth point, it does not seem to me that the applicant has established any circumstances of public interest beyond the element of public interest which will always be present when an individual takes steps to see that statutory obligations of a statutory body are fulfilled so that the individual's personal rights are not adversely affected: cf *Sharples v Council of the Queensland Law Society Incorporated* [2000] QSC 392 per Mullins J at [30]. That does not seem to me to be enough to engage s 49(2)(b) of the JR Act.

[33] I do note that s 49 requires that I have regard also to the financial resources of the applicant and whether a reasonable basis for the review application was disclosed. There was no evidence addressing the former consideration and no submissions addressed to it by the applicant. It is obvious from the applicant's success in the review application that I found there was a reasonable basis for her application. Neither of these considerations advance her argument on the costs application that I should not follow the general practice.

[34] The result is that I do not think that any of the considerations advanced by the applicant are sufficient to justify not following the general practice to which I have referred. In the exercise of my discretion I refuse to make the order which the applicant has sought.

[35] For completeness I should mention that the third respondent developed a submission which had these elements:

(a) although the amended application for a statutory order of review sought an order for "costs", it could not be regarded as having advanced an application for costs pursuant to s 49 of the JR Act;

(b) the first time the applicant made a costs application pursuant to s 49(1)(d) was on the occasion it delivered its written submissions on costs submissions dated 15 April 2015; and

(c) as an order was sought under s 49(1)(d), any such order could only relate to costs incurred after the application being made, namely, from 15 April 2015.

[36] I have some difficulty with (at least) the first step of that argument. However in light of the decision I have made above, it is unnecessary to express a view on this submission.

[37] I order that there be no order as to costs.