SUPREME COURT OF QUEENSLAND

CITATION:	*Butler v Commissioner of Queensland Police Service & Anor* [2015] QSC 225
PARTIES:	**SCOTT ANDREW BUTLER** (applicant) **v** **COMMISSIONER OF THE QUEENSLAND POLICE SERVICE** (first respondent) and **PATRICK MULLINS** (second respondent)
FILE NO:	12277 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	7 May 2015 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	7 May 2015
JUDGE:	Daubney J
ORDERS:	**1. The decision of the second respondent made on 24 November 2014 is set aside.** **2. The decision of the first respondent made on 28 November 2014 is set aside.** **3. The matter to which the second respondent's decision relates is referred to the second respondent for re-consideration according to law.** **4. The first respondent is to pay the applicant's costs of and incidental to this application.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – GENERALLY – where the applicant is a Sergeant in the Queensland Police Service – where a decision was made by the second respondent recommending the first respondent affirm a decision to suspend the applicant under s 6.1(1)(c) of the *Police Service Administration Act* 1990 – where the first respondent subsequently accepted the recommendation of the second respondent to affirm the suspension of the applicant – where the decisions of both the first and second respondent led to the applicant's suspension – whether the decisions of both

	the first respondent and second respondent involved an improper exercise of power – whether the decisions of both the first respondent and second respondent were authorised under the *Police Service Administration Act* 1990 – whether the decisions of both the first respondent and second respondent were contrary to law.
	Police Service Administration Act 1990, s 6.1, s 9.3, s 9.4, s 9.5 *Police Service Administration (Review of Decisions) Regulation* 1990, s 8
	Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259, cited. *Rucker v Stewart & Ors* [2014] QCA 32, cited.
COUNSEL:	M Black for the Applicant S A McLeod for the First Respondent
SOLICITORS:	Gilshenan & Luton Legal Practice for the Applicant Legal Services, Public Safety Business Agency for the First Respondent

[1] The applicant, Scott Andrew Butler, was first sworn in as a police officer on 12 December 1991. In November 2009, he sustained a head injury. Thereafter, he returned to operational duties, but has suffered varying health issues since that time.

[2] Relevant for today's purposes is a decision that was made by the first respondent and communicated to the applicant by letter dated 4 August 2014, by which the applicant was advised that he had been suspended from duty pursuant to s 6.1(1)(c) of the *Police Service Administration Act* 1990 ("*PSA*"). The applicant subsequently applied to the second respondent, who is the "review commissioner" for review of that decision to suspend. Both the applicant and the Queensland Police Service lodged submissions with the second respondent.

[3] The hearing took place before the second respondent on 1 October 2014, and on 24 November 2014 the second respondent published a decision by which he relevantly determined that he was going to recommend to the first respondent that the decision to suspend the applicant be affirmed. Subsequently, on 28 November 2014, the first respondent accepted that recommendation and affirmed the decision to suspend the applicant. Both of those decisions, that is, the determination of the review commissioner

on 24 November 2014 and the consequential decision by the first respondent on 28 November 2014, are now the subject of this application for judicial review by the applicant.

[4] The first respondent's decision to suspend the applicant was, as I have said, made under s 6.1(1) of the *PSA*. That section relevantly provides that if an officer is unfit for reasons of health to such an extent that the officer should not be subject to the duties of a constable, the commissioner may, *inter alia*, suspend the officer from duty; see s 6.1(1)(c) and (e).

[5] Under s 9.3 of the *PSA*, an officer aggrieved by a decision about suspension may apply to have the decision reviewed by a commissioner for police service reviews. Section 9.3(3) provides:

> "*Authority is hereby conferred on a commissioner for police service reviews –*
>
> *(a) to hear and consider all applications for review under this part duly made;*
>
> *(b) to make recommendations relating to any matters relevant to a review under this part*."

[6] The *Police Service Administration (Review of Decisions) Regulation* 1990 ("the Regulation") provides, in s 8:

> "*The functions of a Review Commissioner are to –*
>
> - *conduct a review of all material provided by the parties to the review and relevant to the case at the time the case was decided, whether or not it was submitted for the consideration of the person making the decision under review;*
> - *hear such submissions at such places as the Review Commissioner considers necessary;*
> - *make such recommendation to the commissioner as the Review Commissioner thinks fit in respect of the case*."

[7] Section 9.4 of the *PSA* provides that the review commissioner's review is an administrative proceeding of a non-adversarial nature, and that the proceedings should be informal and simple. By s 9.5, the review commissioner, upon conclusion of a review, is to make such recommendations as he or she considers appropriate to the matter under review. The first respondent is then, having regard to those recommendations, to take such action as appears fair and just – s 9.5.

[8] In the present case, the applicant has submitted:

> "*(a) The Review Commissioner was bound to conduct a review of the Suspension Decision "on the merits", including determining for himself whether the Applicant should be suspended under s 6.1(1) of the PSA Act.*
>
> *(b) The Review Commissioner impermissibly restricted himself to reviewing "the decision making process" of the Suspension Decision was made, thereby falling into reviewable error within s 20 (2)(d) or (e) of the Judicial Review Act 1991*."

[9] The first respondent resisted the application arguing that, when read as a whole, the review commissioner's decision reveals that he was cognisant of the issue on review and of the arguments that were advanced by the applicant on the review hearing. In particular, it was said the review commissioner noted the applicant's concerns about the state of various aspects of the evidence. Counsel for the first respondent argued that the reasons demonstrate that the review commissioner had regard to and considered medical and other expert evidence. It was argued that it must be concluded that the review commissioner was satisfied that, on the evidence before him, it was appropriate to suspend the applicant. Moreover, it was said that the review commissioner was satisfied that there was no legal flaw in the process adopted by the first respondent, and therefore, the decision was one which was open to the first respondent.

[10] Clearly enough, determination of the issues presented to me on this application for judicial review turn on an examination of the reasons given by the review commissioner and a discernment from those reasons as to the nature of the review that the review commissioner undertook. The nature of the task to be undertaken by a review commissioner in the position of the second respondent was considered by the Court of Appeal in *Rucker v Stewart & Ors* [2014] QCA 32. In that case, the Chief Justice, with whom Fraser and Morrison JJA agreed, said:

> "*The [Review Commissioner] was required to "review" the determination of the first respondent [Commissioner of Police]. In conducting that review, the [Review Commissioner] was to have to regard to all relevant material presented to him, whether or not presented at the earlier stage, and he was obliged to make a recommendation. But the review process was nevertheless borne of the original stand down decision. The reviewing Commissioner's task was to decide whether that was the correct decision, having regard to the material before the [Police Commissioner] and any new material placed before [the Reviewing Commissioner]*."

[11] In the context of the present case, therefore, it is necessary for me to look at the review commissioner's reasons to discern whether or not he completed the legislatively-imposed task of deciding whether the first respondent's decision was the correct decision. In doing so, I am conscious of the need to look fairly at the review commissioner's reasons. A decision-maker's reasons:

> "*… are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.*" (Citation omitted).

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 at 272.

[12] Counsel for the first respondent argued before me that, upon a review of the second respondent's reasons, I could glean that the review commissioner's review led to him forming his own view of the correctness of the decision. It was said that the review commissioner had looked at the merits of the complaint, had gone through the medical evidence and that he had reached his own conclusion, and therefore, formed a view by looking at the merits and come to a conclusion to enable him to make a recommendation.

[13] Having myself reviewed the review commissioner's reasons, however, it is clear to me that, whilst he may have conducted a procedural review and determined that the decision was open to the first respondent, the review commissioner did not fulfil the task required of him, namely, himself to decide whether the first respondent's decision was correct.

[14] So much is clear from the way in which the review commissioner himself described the review that he was undertaking. At paragraph 13, he said:

> "*The task I have as the Commissioner for Police Service Reviews, is to review the decision making process of the Commissioner when the Commissioner actually made the decision to suspend on medical grounds.*"

[15] Further, in paragraph 17, he said that it was necessary for him:

> "*… to review the expert evidence to determine whether it was open to the Commissioner to make a finding that the Applicant was unfit for reasons of health to such an extent that the Officer should not be subject to the duties of a Constable.*"

[16] Even those two quotes make it clear, in my view, that the approach adopted by the review commissioner was limited to reviewing the process that had been undertaken by the first respondent, rather than, as he was required to do, and as is apparent from the judgment of the Court of Appeal in *Rucker*, forming his own opinion as to the correctness of the decision. Later in his reasons, after reviewing competing elements of the expert medical evidence, the review commissioner said:

> "*It seems to me that on the evidence of Mr Perros from a neuropsychological perspective that there was a proper basis and indeed proper expert evidence available to the Commissioner. This expert evidence was before the Commissioner made the decision to suspend. In my view this expert evidence was of a kind which could and did justify the making of a decision to suspend the applicant.*"

[17] This is the closest that the review commissioner goes to expressing some view as to the correctness of the decision. Read properly in context, however, it is clear that he was here referring to the evidence as a matter of process justifying the decision that was made rather than an analysis of his own of the evidence to form an independent view of the correctness of the decision. That this is the approach that he adopted is made clear by his comments in the following paragraph, namely paragraph 29, in which he noted that it was not necessary for the Commissioner of Police to "sit in judgment", and determine which of the contradicting doctors was expressing a correct opinion. The review commissioner said:

> "*Rather, it seems to me that it was perfectly open to the Commissioner in weighing the expert evidence before him to come to a view that the Applicant was unfit for reasons of health to such an extent that he should not be subject to the duties of Constable and that this unfitness was a continuing unfitness. It is the risk identified by Mr Perros which I think means that it was open to the Commissioner to come to the view that the Applicant should not be subject to the duties of a Constable.*"

[18] Again, this highlights the fact that the approach being taken by the review commissioner was to determine whether procedurally the decision was open to the Commissioner of Police rather than himself making an assessment of the material before him as to the correctness or otherwise of the decision.

[19] The reasons continued with further reference to the medical reports, and the review commissioner said, at paragraph 34, that on his reading of the medical report:

> "*… it was properly open to the Commissioner to determine that the Applicant was unfit and continued to be unfit for reasons of health to such an extent that the Officer should not be subject to the duties of a Constable.*"

[20] Again, there is the reference there to the review commissioner considering whether a decision was "open to" the Commissioner rather than himself determining the correctness.

[21] In paragraph 35 the review commissioner expressly referred to the process saying:

> "*In terms of the process followed, is apparent to me that the Commissioner has properly considered the expert medical and other expert opinions which were available to him prior to the making of the decision. The decision made was <u>one open to the Commissioner</u>.*" (Underlining added).

[22] The conclusion then expressed by the review commissioner was:

> "*Having come to that view, I conclude that the process leading to the suspension of this Applicant was <u>not flawed in any procedural way</u> and I would therefore recommend to the Commissioner that the decision to suspend the Applicant…be affirmed.*" (Underlining added).

[23] The second respondent review commissioner may well have been correct in concluding, as he did, that the process leading to the applicant's suspension was not flawed in any procedural way. As I have said, however, his task was to conduct a review and himself decide whether, on the material, the first respondent's decision was the correct decision. He did not do so and limited himself, rather, to expressing a view as to whether the decision that was made was merely one which was open to the first respondent. It follows that the second respondent's decision of 24 November 2014, and the first respondent's decision on 28 November 2014 made in consequence, ought be set aside. I will hear the parties as to the necessary orders and as to costs.