

# SUPREME COURT OF QUEENSLAND

CITATION: *Spencer v Baulch & Ors* [2004] QCA 234

PARTIES: **MARK JEFFREY SPENCER**  
(applicant/appellant)  
v  
**JOHN RICHARD BAULCH**  
(first respondent/first respondent)  
**CRIME AND MISCONDUCT COMMISSION**  
(second respondent/second respondent)  
**GEORGE ANTHONY NOLAN**  
(third respondent/third respondent)

FILE NO/S: Appeal No 2334 of 2004  
SC No 6212 of 2003

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 13 July 2004

DELIVERED AT: Brisbane

HEARING DATE: 13 July 2004

JUDGES: Davies and McPherson JJA and Mullins J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Appeal allowed**  
**2. That the order of Philippides J of 16 February 2004 be set aside**  
**3. That in lieu, the following orders be made:**  
**(a) that the decision of the Tribunal of 13 June 2003 that the appellant be dismissed from the Queensland Police Service with immediate effect be set aside**  
**(b) that the matter be remitted to the Misconduct Tribunal to determine according to law the question whether the order for dismissal should be suspended**  
**4. That the second respondent pay the appellant's costs of this appeal to be assessed**  
**5. That the second respondent pay the appellant's costs of the hearing before Philippides J**

CATCHWORDS: POLICE - TRIBUNALS AND OTHER AUTHORITIES - where applicant was a police officer who had amongst other

acts unjustifiably discharged his service firearm and was dismissed - where appeal from decision of a Supreme Court judge dismissing an application to review a decision of the Misconduct Tribunal - where the Tribunal considered whether it should suspend the order for dismissal previously made - where it decided not to suspend the order - whether the Tribunal applied the wrong test in deciding whether or not to suspend the order

*Misconduct Tribunals Act 1997 (Qld), s 28*

COUNSEL: M J Byrne QC for the appellant  
J W Fenton for first respondent  
A J Rafter SC for second respondent  
No appearance on behalf of third respondent

SOLICITORS: Gilshenan & Luton for appellant  
C W Lohe, Crown Solicitor for first respondent  
Crime and Misconduct Commission for second respondent  
No appearance on behalf of third respondent

DAVIES JA: This is an appeal from a decision of a Supreme Court judge dismissing an application to review a decision of the Misconduct Tribunal, constituted under the *Misconduct Tribunals Act 1997*, dismissing the applicant from the Queensland Police Service. In arriving at its decision, the Tribunal considered whether it should but refused to suspend the order for dismissal.

The application for review to the learned primary judge was on a number of grounds only one of which is relevant to this appeal. That is ground 7 which contended that in determining that the sanction of dismissal should not be suspended, the Tribunal erred in law in applying the wrong test. The appellant's sole contention in this Court is that the learned primary judge erred in her conclusion that the Tribunal did not apply the wrong test and that, consequently, there was no

error in its conclusion that the order for dismissal should not be suspended.

It is conceded by the appellant that the order for dismissal must remain.

The orders which the appellant seeks are that this Court:

1. set aside the decision not to suspend the dismissal; and
2. remit the matter back to the Tribunal to determine that question according to law.

The principal respondent in this appeal is the Crime & Misconduct Commission which was the successful appellant before the Tribunal. The other respondents are the Tribunal constituted by Mr Baulch, who, quite properly, sought to take no part in these proceedings except on the question of costs, and Mr Nolan, an Acting Deputy Commissioner of Police who conducted the disciplinary hearing from which the Crime & Misconduct Commission appealed to the Misconduct Tribunal who similarly did not seek to take any part in this appeal. No question of costs arises for or against them.

There are a number of acts of the appellant which, together, the Misconduct Tribunal held justified his dismissal from the Queensland Police Service. These consisted of the following:

Driving a vehicle at a speed exceeding the speed limit by 45 kilometres an hour and driving a vehicle in a way that caused unnecessary noise in a park;

unjustified discharge of a service firearm in circumstances in which he had consumed alcohol before it was produced and used and in which members of the public were present when it was discharged;

the discharge of a firearm in similar circumstances causing concern to neighbours and after a complaint had been made; and

permitting others, including a youth of 16, to discharge his firearm in similar circumstances.

The question in issue in the appeal involves the construction and application of section 28 of the Misconduct Tribunals Act 1997. That section provides:

"(1) This section applies if punishment has been imposed on a prescribed person by-

(a) a misconduct tribunal exercising original or appellate jurisdiction; or

(b) the decision-maker of a reviewable decision.

(2) A misconduct tribunal may order that punishment imposed on the prescribed person be suspended if the tribunal considers it is appropriate to do so in the circumstances.

(3) The tribunal must state an operational period for the period of suspension and the suspension may be given on conditions.

(4) If the prescribed person is found to have committed an act of misconduct or official misconduct or to have contravened a condition during the operational period, on the finding-

(a) the suspension on the punishment is revoked; and

(b) the punishment imposed has immediate effect.

(5) If the prescribed person is not found to commit an act of misconduct or official misconduct or

contravene a condition during the operational period, the punishment imposed on the person is taken to have been satisfied.

(6) Subsection (4) does not limit the person's liability to punishment for the further act of misconduct or official misconduct."

The question in issue is whether the Misconduct Tribunal correctly construed and applied section 28.2 and, in particular, the phrase "if the Tribunal considers it is appropriate to do so in the circumstances".

The Tribunal opened its discussion of the question whether the punishment should be suspended by saying the following:

"It seems to be that matters which might justify suspension of the penalty of dismissal as evidencing special or exceptional circumstances might include:

(a) a long and distinguished career in the police force, or

(b) an exceptionally high community regard for the officer notwithstanding the matters proved, or

(c) the fact that the conduct was an isolated and out of character event."

The Tribunal then referred to some other Tribunal decisions in one of which the Tribunal was particularly mindful of the fact that the appellant's conduct related to a single incident and that she had otherwise had an unblemished record. The Tribunal went on:

"In the present case:

(a) the [appellant] does not have an unblemished record;

(b) the misconduct is not a single incident which can appropriately be described as an aberration.

Against that, he is highly regarded in the police service and outside the service. That is clear from the large number of references tendered on his behalf at the hearing before the [third] respondent.

Further, it is likely that the [appellant's] conduct was conduct which did not indicate general unsuitability for responsible employment but should be seen as contributed to by his unhappy posting at Agnes Waters.

...

After weighing all of the competing factors, I have come to the view that it is not appropriate to suspend the dismissal. I reached that conclusion because:

- (a) public confidence in the service and its members must be preserved;
- (b) the breaches of discipline were both serious and repeated;
- (c) knowledge of the initial complaint did not cause the conduct to cease;
- (d) even at the hearing the [appellant] demonstrated no understanding of the reasonable fears held by his neighbours when the firearm was being discharged."

As I understand the argument for the appellant, it is not contended that in the passage which I last quoted the Tribunal omitted consideration of any relevant factor or took into account any irrelevant factors. The appellant's contention is that the Tribunal was considering whether those factors constituted special or exceptional circumstances on the basis that, unless they did, the order for dismissal should not be suspended.

It is common ground that if the Tribunal did that, it erred. Section 28 does not require special or exceptional circumstances before a Misconduct Tribunal may suspend an order, including one for dismissal. The discretion under that Act may be exercised whenever "the tribunal considered it appropriate to do in the circumstances".

The learned primary judge held that, notwithstanding the first passage which I have quoted from the Tribunal's judgment, the second passage was not applying the test of special or exceptional circumstances stated in the first passage. It was, her Honour thought, applying the test stated in section 28. There is some support for her Honour's view in the concluding paragraph in that second passage in which the Tribunal said that it was "not appropriate" to suspend the dismissal.

The difficulty which I have with that conclusion is that in discussing the question whether the order for dismissal should be suspended the Tribunal did not state as justifying suspension any test other than one of special or exceptional circumstances. Indeed, it is difficult to see why the Tribunal referred to special or exceptional circumstances unless it intended to require proof of one or other of them before an order for suspension could be made.

I would therefore read the Tribunal's reasons as a failure to be satisfied that there were special or exceptional circumstances justifying the suspension and a consequent

refusal to order that the order for dismissal be suspended. As already mentioned, that was to apply the wrong test. The exercise of the Tribunal's discretion in this respect therefore miscarried.

It was not contended for the respondent that if the Tribunal had applied the correct test it must have reached the same conclusion and I cannot be satisfied that that would be so. The Tribunal's error could have affected its decision whether or not to suspend the dismissal. It will therefore be necessary, in my opinion, to remit the matter back to the Tribunal to decide the question afresh by applying the correct test.

I would therefore make the following orders:

1. Allow the appeal;
2. That the order of Philippides J of 16 February 2004 be set aside;
3. That in lieu I would make the following orders:
  - a. that the decision of the Tribunal of 13 June 2003 that the appellant be dismissed from the Queensland Police Service with immediate effect be set aside;
  - b. that the matter be remitted to the Misconduct Tribunal to determine according to law the question whether the order for dismissal should be suspended;

4. That the respondent pay the appellant's costs of this appeal to be assessed.
5. That the respondent pay the appellant's costs of the hearing before Philippides J.

I should add that Mr Rafter for the respondent seeks an order that a certificate be granted to his client under the Appeal Costs Fund Act. I do not think it is an appropriate case in which to grant such a certificate.

McPHERSON JA: I agree.

MULLINS J: I agree.

DAVIES JA: The orders are as I have indicated. Mullins J has just brought to my attention the costs of the hearing before Philippides J. I should order also that the appellant have those costs, unless you say to the contrary, Mr Rafter.

MR RAFTER: No.

DAVIES JA: I will add that to the orders. The orders are as I have indicated.