

CITATION: *KF v Chief Executive Officer, Public Safety Business Agency* [2016] QCAT 165

PARTIES: KF
(Applicant)
v
Chief Executive Officer, Public Safety Business Agency
(Respondent)

APPLICATION NUMBER: CML224-15

MATTER TYPE: Childrens matters

HEARING DATE: 3 December 2015

HEARD AT: Brisbane

DECISION OF: **Member Ford**

DELIVERED ON: 29 February 2016

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The decision of the Public Safety Business Agency to issue a negative notice is confirmed.**
- 2. The Tribunal prohibits publication of any information which identifies or could lead to the identification of a child, pursuant to s 66 of the *Queensland Civil and Administrative Tribunal Act 2009*.**

CATCHWORDS: WORKING WITH CHILDREN – BLUE CARD – where convictions not serious offences – whether exceptional case – whether risk factors outweigh protective factors

Child Protection Act 1999 (Qld) ss 189, 194
Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 20, 24, 66
Working with Children (Risk Management and Screening) Act 2000 (Qld) ss 5, 6, 221, 353, 360

Briginshaw v Briginshaw & Anor (1938) HCA 34
Commissioner for Children and Young People and Child Guardian v FGC [2011] QCATA 291

*Commissioner for Children and Young People
and Child Guardian v Maher & Anor* [2004]
QCA 492
Kent v Wilson [2000] VSC 98

APPEARANCES:

APPLICANT: KF

RESPONDENT: Kylie Heath for the Public Safety Business
Agency

REASONS FOR DECISION

- [1] KF is seeking a Blue Card to continue her work at an early childhood and pre-school centre and to do placement work for her education degree. She was issued with a negative notice by the Public Safety Business Agency after a criminal history check disclosed convictions (unrecorded) for drug offences. The Agency found KF's case was exceptional and that she was not suitable to work with children nor should she be issued with a positive notice (a Blue Card).
- [2] KF sought a review of this decision to the Tribunal. KF is passionate about her work and wants the Agency's decision to be overturned.
- [3] The Tribunal must consider whether KF's case is exceptional. The same legislation must be applied in my review of this matter.¹ Her offences are not classified as 'serious' offences for the purposes of this hearing. The Agency is required to issue a positive notice, unless otherwise satisfied an exceptional case exists.²
- [4] KF was fined in 2003 for possession of dangerous drugs. She had further charges of dangerous drug possession and possessing property suspected of being used for the purpose of committing a drug offence on 13 May 2014. She was fined \$500 with no conviction recorded on 27 June 2014. On 10 November 2014, KF is fined (with no conviction recorded) for further drug related charges on 17 October 2014.
- [5] The Agency considered the recency of these charges constituted a significant risk factor regarding KF's eligibility to hold a Blue Card.

What is an exceptional case?

- [6] Exceptional case is not defined in the *Working with Children (Risk Management and Screening) Act* 2000 (Qld) (the Act). To be exceptional the case needs to be out of the ordinary, unusual or special and it is a matter of discretion considering the merits of each case.³ I am also guided

¹ *Working with Children (Risk Management and Screening Act* 2000 (Qld) ('the Act').

² The Act s 221.

³ *Kent v Wilson* [2000] VSC 98, at [29].

by the Act's focus on the paramount principle that, in employment screening decisions, a child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing.⁴

[7] Whether or not there is an adverse effect on the applicant's employment or prospects is not my paramount consideration.

[8] The Appeal Tribunal has stated that:⁵

Phrases like exceptional case must be considered in the context of the legislation which contains them, the intent and purpose of that legislation, and the interests of the persons whom it is here, quite obviously, designed to protect: children.

[9] In order to issue a positive notice, I must be satisfied, on the balance of probabilities and, bearing in mind the gravity of the consequences involved, that an exceptional case does not exist.⁶ In doing so, I will consider the approach endorsed by the Court of Appeal in identifying and balancing the relevant risk and protective factors arising from the circumstances of this particular case.⁷

Why KF should have a Blue Card – her view of protective factors

[10] KF is a mother with two children aged 18 and 16 years old. The children have different fathers. She currently lives with her partner who is a security guard. She works at a hotel and her children live with her as well. Her daughter works night shifts in a club and her son is completing high school.

[11] KF states she was first exposed to illegal drugs in 2002 when she experienced stress over a challenge regarding the identity of the father of one of her two children. To manage the stress she started smoking marijuana. An anonymous tip off led to her being charged for possession in December 2002. She attended two drug diversion sessions through her own efforts and was then working as a paid teacher's aide and voluntarily at the local school.

[12] KF did not use marijuana for a further 12 years until the death of her father in November 2013. She found him dead of a prescription drug overdose in his home and she had the responsibility of telling the family. She experienced a period of anxiety and depression. Her treating doctor gave her a script for the same medication that her father had used, and she could not take this medication. She turned to marijuana to help her sleep instead.

⁴ The Act ss 6, 360.

⁵ *Commissioner for Children and Young People and Child Guardian v FGC* [2011] QCATA 291 (citing *Kent v Wilson* [2000] VSC 98 per Hedigan J at [22]).

⁶ Cited *Briginshaw v Briginshaw & Anor* (1938) HCA 34.

⁷ *Commissioner for Children and Young People and Child Guardian v Maher and Anor* [2004] QCA 492.

- [13] In December 2013, she resigned three weeks later after returning to work, not being able to manage. She felt overwhelmed, with finding her deceased father '*really too much*'. In February 2014, she commenced counselling sessions with Dr Schmidt, having eight sessions all up over a period of time. The focus of the counselling was on her anxiety originating from not being able to have questions answered about why her father took his life. She had visited him every day for several months before his death.
- [14] KF again smoked marijuana in October 2014, being the first year of the anniversary of her father's death. She acknowledged she also had a '*puff*' on New Year's Eve 2014. She was open with the Agency, informing them in two phone calls in August 2014 and in February 2015 that she had been slowly weaning herself off cannabis (before the second charge in October 2014) and she has only smoked cannabis for personal use, not selling it, even though the police had found a set of scales.
- [15] Anxiety medication is now taken daily, with this regime commencing in November 2014, after she accepted that self-medicating was not the answer. She now appreciates that medication won't make her a '*zombie*', nor will it adversely affect her the way it did her father.
- [16] KF has a sister who is a heavy drug user, her sister's children have been taken into care and she does not want to become like her sister.
- [17] KF is currently enrolled in a Bachelor of Education, having gained a Certificate III in Education Support in December 2012 and a Diploma of Early Childhood Education and Care in June 2015. She also holds a Certificate 111 in Children's Services, awarded in February 2014. She has been a manager of an under 15 junior league team for a local football club. KF counts her family as her support network and she relies on relaxation and breathing techniques now to cope with stressors.
- [18] KF realises she was on the wrong path and wanted to better herself. She was achieving this through improving her education and did not want to throw the past three years away.
- [19] KF's witnesses confirmed she is a valued person in their communities. HJ, Director of the early childhood centre spoke of a respected colleague who never worked under the influence of drugs or any other illicit substances. She considered KF to be an absolutely fantastic educator and that the children adored her.
- [20] Mr G, President of the junior football league confirmed she was a good person, kind and generous to others, with a strong sense of duty, striving to make sure she was doing the right thing. She is the kind of person around whom people rally. He has seen no evidence of her being under the influence at the club, was very respected and never showed signs of aggression. He was surprised to hear of her offences.
- [21] A personal friend, Ms R found KF to be an organised, responsible, easy going woman who committed to improving her and her family's wellbeing.

She volunteered her time and skills with numerous events and fundraising for her children's sports and hobbies on a regular basis. She is respected for trying to amend certain negative situations and decisions of her past. She is a good person with an open honest and helpful heart.

- [22] Dr C has known KF for over 15 years. She presents as a caring mother and sensible parent, using the illicit drug for a brief time to cope with the grief of losing her father. The doctor thought the charge was a one off incident.
- [23] Ms SH, psychologist originally saw KF in February 2015 for three sessions. Therapy focussed on grief, psych-education around management of panic symptoms and building positive coping mechanisms. From September 2015 she was focussing on relapse prevention, following QCAT processes. SH reported KF as quite remorseful for her actions, feeling guilty and embarrassed, particularly as she counselled her own children against drug taking.
- [24] KF could identify risk factors associated with drug use through counselling. They included socialising with drug users, using marijuana as a coping mechanism and minimising the effects of drug use to herself and others.
- [25] KF identified her protective factors, being remorse for her actions, improved motivation to stay abstinent, more understanding for her behaviour, improved consequential thinking, support from her partner and two close (non-drug using) friends and community supports. SH gave no opinion about recidivism other than an acknowledgement of KF's protective factors.

Why KF should not have a Blue Card - the Agency's view of risk factors

- [26] The Agency finds this case is exceptional and guided the Tribunal to s 221 of the Act. Raised in their final submission was the issue of the Tribunal needing to find on the balance of probabilities, while bearing in mind the paramount principle behind the Act, which is that children are entitled to be protected from harm. A Blue Card is transferable across any area involving children, and if KF holds any special talent working with children, this is not relevant to the issues of this case. Determining what is exceptional is a matter of discretion, considering the merits of this particular case.
- [27] The Agency had balanced the risk and protective factors, finding the recency of KF's offending particularly worrisome. The risk factors outweighed the protective factors. KF's offending occurred between the ages of 23 and 35 years, therefore her offending cannot be mitigated on the basis of youth or lack of maturity.
- [28] The risk factors included the fact that her son, at age 15, was living in the home while she had possession of the drug and that he had access to the living areas in which it was found. KF continued to use marijuana even

after the first charge in May 2014. She subsequently acknowledged using marijuana again on New Year's Eve 2014, after being charged a second time. Of note, is that her second offence in October 2014 occurred even after she had been attending counselling.

- [29] The Agency was not satisfied that KF adequately demonstrated the capacity to prevent a relapse if she was under peer pressure, as she was on New Year's Eve when she had a 'puff'. Her recreational involvement raises concerns for her judgement and in her capacity to be a positive role model.
- [30] A further concern is that KF self-medicated with cannabis, instead of the original prescribed medication. She chose an illegal drug over one medically prescribed. Again, this demonstrates poor judgement in managing her health in times of difficulty.
- [31] The Agency considered her oral evidence suggested more of a pattern of illegal usage than what is reflected in her criminal history.
- [32] While acknowledging she was using appropriate medication now, she had changed her friends and was studying to further her career, KF had not proven she could maintain abstinence over a prolonged period of time.
- [33] The witnesses failed to impress. The weight to be placed on their views should be tempered as they did not have a full knowledge of her drug use.
- [34] KF can apply for the negative notice to be overturned in July 2017. If she remains drug free until that time she may have a better case.

The Tribunal's view

- [35] It is fair to say that KF has tried to address her past lifestyle issues in recent times and to improve her educational aspirations. She has demonstrated remorse for her actions. She has achieved qualifications over the last few years to work with children. She wants to teach children and this is a worthy goal. It is also incumbent on KF to be mindful of the responsibilities of being a member of the teaching profession.
- [36] Even while studying to work with children, KF relied on illegal drugs to cope with life stressors. She did so with teenage children in her home. Even after being charged with illicit drug use, KF continued to smoke cannabis, being charged for a further offence in the same year. Her evidence that she was 'weaning' herself off the drug, and getting down to smoking once a week, suggests a pattern of drug usage greater than that reflected in her criminal history.
- [37] It is tragic that KF's father took his own life and more so that she found him. These tragic circumstances warrant serious consideration in my deliberations. It is understandable that KF became depressed and found it difficult to cope. It is also understandable that she would be reluctant to take the very medication that led to her father's death. However, another

medication could have been prescribed. Choosing to rely on marijuana, a known illegal drug, was KF's undoing. The fact that she continued to use it after the charge in May 2014 does adversely reflect on her judgement.

- [38] I accept that KF has benefitted from ongoing counselling to address her anxieties and tragic life events. Again, however she relied on illegal drugs even after receiving this counselling. She took chances that she would not be caught again. However this did not occur and her home was raided again. At the time, her counselling sessions were seemingly not so effective. KF only returned to counselling after a recommendation from the QCAT review process.
- [39] It is commendable that KF has support from a range of people within her community and that they see her in such a positive light. However, I am not satisfied that all of her witnesses have a comprehensive nor correct picture of the extent of her illegal drug usage. As such, I cannot place significant weight on their evidence.
- [40] KF was challenged about her drug usage through her process to get a Blue Card in order to meet placement requirements of her current course. Even after the first notification by the Agency as to her criminal history, she continued to use cannabis. This reflects poorly on KF and on her insight into the gravity of her actions. She is addressing her coping strategies more seriously now, against a background of being issued a negative notice. Demonstrated prolonged abstinence from illegal drug use remains of concern to the Agency. I agree with this concern.

Conclusion

- [41] I must make the correct and preferable decision having regard to ensuring children are protected from harm. I must determine whether KF's case is exceptional or not.
- [42] Upon weighing up the risk factors and protective factors I have determined that this is an exceptional case and the Agency's decision is confirmed. I am satisfied that the recency of the offending remains of concern against a background of KF undertaking studies that would directly imply abstinence from illicit drug use is essential for one pursuing a teaching career with children. It is fair to say that it is out of the ordinary, unusual, for a prospective teacher to continue taking drugs after being charged for a second time in the one year, even against a background of tragic circumstances influencing her offending.
- [43] I am not satisfied that KF has demonstrated sound judgement or demonstrated adequate coping strategies, sufficient to overturn the Agency's decision. KF can apply again in July 2017 for her negative notice to be revoked. I encourage her to take that course of action.

Non publication of identifying information

[44] KF has a child in her care. Identifying information could prove damaging to this child. I have the power to prohibit publication of information that may identify persons affected by this proceeding. Under section 66 of the QCAT Act I prohibit the publication of any information that could lead to the identification of a child. The public interest is served with the publication of these reasons, albeit in a de-identified format.