

CITATION: *FMA v Chief Executive Officer, Public Safety Business Agency* [2016] QCAT 210

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

APPLICATION NUMBER: CML103-16

MATTER TYPE: Childrens matters

HEARING DATE: 24 June 2016

HEARD AT: Brisbane

DECISION OF: **Member Howard**

DELIVERED ON: 15 July 2016

DELIVERED AT: Brisbane

ORDERS MADE:

1. **The decision of the Chief Executive Officer, Public Safety Business Agency is set aside and the following decision is substituted:**
 - (i) I declare that FMA's case is not an exceptional case under s 221(2) of the *Working with Children (Risk Management and Screening) Act 2000* (Qld).
 - (ii) I reserve the making of such further orders as I may consider appropriate pending further hearing of the proceeding following receipt of the parties further submissions as directed in these orders.
2.
 - (i) I direct that Public Safety Business Agency file and serve its further submissions within 14 days of these orders;
 - (ii) I direct that FMA file and serve any further submissions, or advise that he does not intend to make any, within 14 days of receiving the

- further submissions of the Public Safety Business Agency; and
- (iii) Unless either party requests a further oral hearing, the further hearing of the matter will be conducted on the papers.
3. (i) Publication is prohibited of evidence given before the Tribunal which may identify any children named in material in the proceeding;
- (iii) These reasons may be published, other than to the parties, only in a de-identified format.

CATCHWORDS:

GENERAL ADMINISTRATIVE REVIEW- BLUE CARD – EXCEPTIONAL CASE – where no serious offences – where history of several charges for breach of domestic violence protection orders – where applicant has history of anxiety and depression – where applicant has had extended period of psychological treatment – whether exceptional case in all the circumstances

GENERAL ADMINISTRATIVE REVIEW – BLUE CARD – STATUTORY INTERPRETATION – substance of review-orders that may be made by Tribunal – whether orders may be made about the issue of a positive notice and/or blue card

Acts Interpretation Act 1954 (Qld) s 14A
Penalties and Sentences Act 1992 (Qld) s 9
Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 19, 20, 24
Working with Children (Risk Management and Screening) Act 2000 (Qld) ss 6, 167, 221, 237, 353, 354, 360

Ax v Commissioner for Children and Young People and Child Guardian (No 2) [2012] QCATA 248
Commissioner for Children and Young People and Child Guardian v Maher & Anor [2004] QCA 492
Commissioner for Children & Young People v Ram [2014] QCATA 27
In the marriage of Sandrk (1991) 104 FLR 394
Kent v Wilson [2000] VSC 98

*Re: Imperial Chemical Industries Ltd's patent extension petitions [1983] VR 1
Schwerin v Equal Opportunity Board (1994) VR 279*

APPEARANCES:

APPLICANT: FMA appeared on his own behalf

RESPONDENT: Mr JJ Thompson, In-House Legal Officer
appeared for the Public Safety Business Agency

REASONS FOR DECISION

- [1] FMA made application to the Chief Executive, Public Safety Business Agency ('PSBA') for a positive notice under the *Working with Children (Risk Management and Screening) Act 2000* (Qld) ('WWC Act'). PSBA records that the positive notice (and the blue card it entitled him to) was renewed on 6 May 2015, following an application made by FMA in March 2015.
- [2] However, on 16 October 2015, PSBA was notified by the Queensland Police Service ('QPS') that his police information had changed and his eligibility was reassessed. Following that reassessment, a negative notice issued to FMA on 8 April 2016.
- [3] FMA is a final year social work student, who cannot complete his placement unless he holds a blue card. He also wishes to return to work as a mental health support worker and cannot do so unless he holds a blue card. He has applied to the Tribunal for a review of the decision to issue a negative notice to him.
- [4] By way of background, it is uncontroversial that FMA had been issued with a positive notice and blue card on 31 January 2005, and on 30 March 2012. The QPS notified that his police information had changed on XXX 2013 and XXX 2014. After PSBA undertook reassessments of the positive notice and blue card, they were continued on both 25 July 2013 and 26 November 2014.

The review process

- [5] The paramount consideration in employment screening decisions under the WWC Act is a child's entitlement to be cared for in a manner that protects the child from harm and promotes the child's wellbeing.¹
- [6] The PSBA may cancel a positive notice and substitute a negative notice if it is satisfied it is appropriate to cancel it having regard to a decision of a court made after the positive notice was issued and satisfied that a

¹ WWC Act ss 6, 360.

negative notice should be issued to the person.² In making the decision, the PSBA must effectively make the decision as if it was a decision about an application for a positive notice.³

- [7] It is uncontroversial that FMA has not been convicted of a serious offence.⁴ Accordingly, under s 221 of the WWC Act, the PSBA must issue a positive notice,⁵ unless it is satisfied it is an *exceptional case* in which the best interests of children would be harmed if a positive notice was issued.⁶ If the PSBA is satisfied that it is an exceptional case, then the PSBA must issue a negative notice.⁷
- [8] ‘*Exceptional case*’ is not defined in the WWC Act. What constitutes an exceptional case is a matter of fact and degree.⁸ It is settled law that it is a broad discretion considering the merits in each case.⁹ Hardship or prejudice suffered by an applicant is irrelevant.¹⁰ What amounts to an exceptional case must ‘*take it out and beyond the ordinary circumstances reasonably expected to occur*’.¹¹ It must be ‘*of the nature of or forming an exception; out of the ordinary course, unusual, special*’.¹² The passage of time alone is not determinative of whether or not a case is an exceptional case. Allegations and convictions may relate to events a number of years ago, but the passage of time alone does not detract from their seriousness. The decision-maker may consider relevant risk and protective factors.¹³
- [9] Section 226 of the WWC Act sets out a non-exclusive list of matters which must be considered in deciding whether an exceptional case exists in circumstances of a conviction or charge for an offence. Relevantly, consideration must be given to whether it is a conviction or a charge; whether the offence is a serious offence and if it is, whether it is a disqualifying offence; when the offence was committed; the nature of the offence and its relevance to employment that may involve children; and in the case of a conviction, the penalty imposed by the court and the court’s reasons for its decision.¹⁴ Further, consideration must be given to anything

² Ibid s 237(1).

³ Ibid s 237(2).

⁴ Ibid s 167, sch 2.

⁵ Ibid s 221(1).

⁶ Ibid s 221(2).

⁷ Ibid.

⁸ *Re: Imperial Chemical Industries Ltd’s patent extension petitions* [1983] VR 1; *Kent v Wilson* [2000] VSC 98; and *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492.

⁹ *Commissioner for Children & Young People v Ram* [2014] QCATA 27.

¹⁰ *Ax v Commissioner for Children and Young People and Child Guardian (No 2)* [2012] QCATA 248.

¹¹ *In the marriage of Sandrk* (1991) 104 FLR 394, at 399-400.

¹² *Schwerin v Equal Opportunity Board* (1994) VR 279 at 287–288.

¹³ *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492.

¹⁴ WWC Act s 226(2)(a).

else relating to the commission of the offence that is reasonably relevant to the assessment.¹⁵

- [10] Chapter 8 Division 3 provides for reviews in QCAT under the WWC Act. Section 353 relevantly provides as follows:

Chapter 8 reviewable decision, about a person, means—

- (a) a decision of the chief executive as to whether or not there is an exceptional case for the person if, because of the decision, the chief executive—
- (i) issued a negative notice or negative exemption notice to the person; or
 - (ii) refused to cancel a negative notice or negative exemption notice issued to the person; or

.....

- [11] Section 354 then provides that a person¹⁶ may apply to QCAT for review of a chapter 8 reviewable decision.¹⁷ Section 354(3) then declares that there is no review of a PSBA decision to issue, or refuse to cancel, a negative notice about a person *other than because of a chapter 8 reviewable decision*.

- [12] It is uncontroversial that in previous similar reviews, PSBA has accepted that if the Tribunal finds that there is not an exceptional case in conducting the review, it may make orders to the effect that a notice is issued. PSBA now submits that, as a matter of statutory interpretation, QCAT has no jurisdiction to issue a notice. It submits that under the WWC Act, the Tribunal's review is limited to whether it is an exceptional case.

- [13] Although the submission is said to be made as a matter of law, it has come to light as part of PSBA's submissions that if a person is successful in their QCAT review, PSBA (as was the case apparently with its predecessor agency) requires a further application form from a person before a positive notice will be issued. This is apparently considered necessary by PSBA for administrative reasons to enable it to check for any further relevant information that may emerge between the date of the hearing and the delivery of the decision by QCAT.

- [14] In conducting its review in accordance with the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act'), the Tribunal has all of the functions of the decision-maker (in this case, the PSBA) for the review of the reviewable decision.¹⁸ The purpose of the review is to produce the '*correct and preferable decision*'.¹⁹ The Tribunal must hear and decide the

¹⁵ Ibid s 226(2)(e).

¹⁶ The person must not be a disqualified person. It is uncontroversial here that FMA is not a disqualified person.

¹⁷ WWC Act s 354(1).

¹⁸ QCAT Act s 19(c).

¹⁹ Ibid s 20(1).

review by way of a fresh hearing on the merits of the application.²⁰ Accordingly, it is a hearing *de novo*, and the Tribunal effectively stands in the shoes of the original decision-maker and makes its own decision, based on the evidence before it and the applicable law.

[15] In a review proceeding, the Tribunal may (under s 24(1)(a) of the QCAT Act) confirm or amend the decision; (under s 24(1)(b) of the QCAT Act) set aside the decision and substitute its own decision; or set it aside and return the matter to the (original) decision-maker with any directions it considers appropriate. Section 24(2) of the QCAT Act provides:

(2) The tribunal's decision under subsection (1)(a) or (b) for a reviewable decision—

(a) is taken to be a decision of the decision-maker for the reviewable decision except for the tribunal's review jurisdiction or an appeal under part 8; and

(b) subject to any contrary order of the tribunal, has effect from when the reviewable decision takes or took effect.

[16] The Tribunal may also make written recommendations to the chief executive of the entity which made the reviewable decision about its policies, practices and procedures applying to reviewable decisions of the same kind: QCAT Act s 24(3).

What is the reviewable decision and what orders can be made by the Tribunal?

[17] I do not have written or any detailed oral submissions from PSBA about this issue. However, PSBA submits that under the WWC Act, the reviewable decision is whether there is an exceptional case, and that the Tribunal's orders can only deal with that issue. As I understand the argument, PSBA says that s 354(3) makes it clear that there is no review other than on the limited issue as to whether there is an exceptional case. That is, it submits that it is impermissible for the Tribunal to make an order to the effect that a positive notice issue, because it argues, the Tribunal has no power to do so.

[18] The sections in question are, perhaps, clumsily drafted. Section 353(1)(a) and s 354(1), read together, provide *inter alia* for QCAT to review a decision of PSBA about a person, *as to whether or not there is an exceptional case for the person if*, as a consequence of the decision, PSBA issued a negative notice. Section 354(3) declares *inter alia* that there is no review of a decision by PSBA to issue a negative notice about a person other than because of a *chapter 8 reviewable decision* as defined in s 353(1)(a).

[19] On a plain reading, it seems to me that s 354(3) does not assist in the manner submitted by PSBA. The sub-section states that there is no review of a decision to issue a negative notice other than because of a chapter 8

²⁰ Ibid s 20(2).

reviewable decision. The inference from this appears to be that the legislature intended that when a decision to issue a negative notice is reviewed because of a chapter 8 reviewable decision, it is a review of the decision to issue the negative notice, not merely a review of whether or not there is an exceptional case. Section 353(1)(a), (in providing for the review as to whether there is an exceptional case if a negative notice has issued) can be read as supporting this interpretation.

- [20] Alternatively, as PSBA contends, s 353(1)(a) could be construed as limiting the review to whether or not there is an exceptional case. To read it in this way, the words in s 353(1)(a)(i) and (ii), must be read as limiting the review of an exceptional case, to circumstances where because of the decision that it is exceptional case, PSBA issued a negative notice. This interpretation arguably requires some reading down of s 353(1)(a)(i) and (ii) in favour of the words that preface them, rather than reading s 353(1)(a) in its entirety, (such that the decision reviewable is a review of an exceptional case if a negative notice has issued). Whereas a reading of s 353(1)(a) in its entirety would appear to support an interpretation that it is a review of the issue of a negative notice where it resulted from PSBA's decision that there is an exceptional case. The latter would seem to fit more comfortably with the wording in s 354(3), which by inference, appears to acknowledge that some decisions of PSBA to issue a negative notice are reviewable.
- [21] An interpretation of a provision which will best achieve the purpose of the Act concerned is to be preferred to another.²¹ The object of the WWC Act is to promote and protect the rights, interests and well-being of children through risk management strategies and employment screening for particular businesses. Here, neither possible interpretation better meets the object than the other.
- [22] It is a fundamental tenet of statutory interpretation that a provision must be interpreted in its context. Does either construction sit more comfortably within the broader legislative scheme? Chapter 8, Part 4, Division 9, is entitled '*Deciding prescribed notice application*'. It contains the provisions which bind PSBA in deciding an application to issue a prescribed (positive or negative) notice: s 219, s 220. Section 220 is in the following terms:

220 Positive notice or negative notice to be issued

The chief executive must *decide*²² the prescribed notice application²³ *by issuing*²⁴ either of the following to the person—

²¹ *Acts Interpretation Act* 1954 (Qld) s 14A.

²² Emphasis added.

²³ WWC Act, Schedule 7, Dictionary, *prescribed notice application* is an application for a prescribed notice under Chapter 8, Part 4, Divisions 7 and 8 (which refer to prescribed notices for regulated employment and regulated businesses). As to regulated employment and regulated businesses, see WWC Act s 156, and Schedule 1 Parts 1 and 2.

²⁴ Emphasis added.

- (a) a notice declaring the application is approved (a **positive notice**);²⁵
- (b) a notice declaring the application is refused (a **negative notice**).²⁶

- [23] As discussed earlier, s 221 provides that the PSBA must issue a positive notice in certain circumstances, (including when a person has a conviction for an offence which is not a serious offence: s 221(1)(c)), unless in some specified cases, including when s 221(1)(c) applies, and PSBA is satisfied it is an exceptional case in which it would not be in the best interests of children to issue a positive notice, in which case PSBA must issue a negative notice. On the other hand, s 225 provides that a negative notice must issue if PSBA is aware that the person applying has *inter alia* been convicted of a serious offence (s 225(1)(c)), unless in some specified cases including when s 225(1)(c) applies, and PSBA is satisfied it is an exceptional case in which it would not harm the best interests of children to issue a positive notice, in which case PSBA must issue a positive notice. Division 9 also makes provision about deciding an exceptional case if the person has convictions or charges (s 226), investigative information (s 227) and disciplinary information (s 228). Division 11 then provides for cancellation or suspension of prescribed notices.
- [24] It is clear from s 220 that PSBA must decide a prescribed notice application by issuing a positive or negative notice. Under s 221 and s 225, PSBA must issue a positive notice or a negative notice in the circumstances provided for by the WWC Act respectively, unless it is satisfied that it is an exceptional case. If it is so satisfied, it is once again obliged to issue either a negative or positive notice, respectively. That is, the only area of decision-making for PSBA under s 221 and s 225 is *as to whether there is an exceptional case*. Otherwise, the legislation provides for the outcome and prescribes that the relevant notice must issue. Accordingly, it appears that the decision of PSBA referred to in s 220, is the decision about whether there is an exceptional case because it is not empowered to make any other decision. The legislation otherwise provides for the outcome. Although that is the case, s 220 of the WWC Act provides that PSBA must decide the application by issuing either a positive or negative notice. It is consequent upon the decision as to whether it is an exceptional case which results in the requirement to issue either the positive or negative notice.
- [25] This, together with s 354(3), by its declaration that there is no review of a negative notice other than because of a chapter 8 reviewable decision, tends to support an interpretation of s 353(a), such that the review in QCAT extends to making an order for the issuing of a positive notice, if the Tribunal concludes that the PSBA's decision about whether there is an exceptional case is in error and is not the correct and preferable decision.
- [26] In addition, s 19(3) of the QCAT Act provides that in exercising its review jurisdiction, the Tribunal has all of the functions of the decision-maker (that is, here, PSBA) for the reviewable decision being reviewed. As discussed,

²⁵ Ibid.

²⁶ Ibid.

the only decision made by PSBA is as to whether there is an exceptional case, but as a result of that decision, it is obliged to issue the relevant notice. That is, in performing its function of deciding whether there is an exceptional case, PSBA must issue the relevant notice. Accordingly, the operation of s 19(3) tends to support an interpretation that the Tribunal, in determining the review, is empowered to exercise the function of PSBA to issue the relevant notice.

- [27] Further, if the review is limited to reviewing whether it is an exceptional case in the manner PSBA submits, this appears to create at least potential difficulties in making orders in compliance with s 24 of the QCAT Act. If PSBA's submission is correct, the result would be that if the Tribunal considered the PSBA decision concerning an exceptional case is not the correct and preferable decision and set aside PSBA's finding that it is, or is not, an exceptional case, then it would appear that QCAT could not make any other orders under s 24 (other than setting PSBA's decision aside). (That said, under s 60, the Tribunal could arguably make a declaration that it is, or is not, an exceptional case. This is discussed further later). However, it is clear that s 24 anticipates that if a decision is set aside by the Tribunal, another one will be made by it. Further, if PSBA is correct, this would leave the positive or negative notice that had been issued by PSBA before the review, in place, notwithstanding the Tribunal review. It makes more sense that, standing in the shoes of the decision-maker and exercising its functions, QCAT can substitute the decision contemplated in s 220, which is arguably the decision which flows from the Tribunal exercising the function of PSBA in making the decision about whether there is an exceptional case.
- [28] That said, it is also of note that under the QCAT Act, the Tribunal may make a declaration about a matter in the proceeding, instead of or as well as, making any other order it could make (s 60(1)); and may make an order to give effect to a declaration (s 60(2)). A declaration is binding on the parties: s 60(3). QCAT also has power to make ancillary orders appropriate to achieving the purpose for which the Tribunal may exercise its primary power.
- [29] Even if the review in QCAT is limited to deciding whether it is an exceptional case (and making a finding and/or declaration about this), it appears that it may, in any event, be open to the Tribunal to make a declaration under s 60 of the QCAT Act that a positive notice must be issued by PSBA to give effect to the review, or to make an order or declaration under s 114, to achieve the purpose for which its primary power may be exercised, that is, to review the decision of PSBA about an exceptional case to issue either a positive or negative notice in accordance with s 220.
- [30] That said, in light of the paucity of submissions about this issue, and that my consideration traverses matters outside of those on which submissions were made by the parties or invited by me at the hearing, I do not make any final conclusions at this stage about the issue.

- [31] However, there is no controversy that in conducting the review, I must determine whether there is an exceptional case. I am satisfied that I can proceed to determine that substantive issue as to whether there is an exceptional case. Further, there can be no controversy that under s 60, I may make a declaration, about whether there is an exceptional case.
- [32] For reasons to be explained, I am satisfied that there is not an exceptional case. In the circumstances, I make my determination about the exceptional case while reserving such further orders as I may consider appropriate, pending further hearing on the point about the scope of the Tribunal's review and its power to make orders about the issue of a positive notice.
- [33] I now set out my reasons for deciding that FMA's is not an exceptional case under s 221.

FMA's criminal history

- [34] FMA has been charged with several contraventions of domestic violence orders. Each of these is discussed below.

Charge relating to XXX 2008

- [35] FMA was not legally represented at the hearing. He entered a plea of guilty. He was convicted and fined \$150.00 in respect of this breach.
- [36] The charge concerned the forwarding by FMA of two text messages to his then estranged wife. The domestic violence protection order prohibited him from having contact or communication with her through any means.²⁷ At the time of the breach, he says he had just received the order and not read it closely and as far as he can recall, just reacted.

Charge relating to XXX 2013

- [37] No conviction was recorded and FMA was fined \$750.00 in relation to this charge.
- [38] In relation to the 2013 breach, FMA's ex-partner (his then de-facto partner) alleged that whilst he was intoxicated he grabbed her by the wrist and twisted it, while threatening to '*knock her out if she touched him again*'.²⁸
- [39] FMA says that he was intoxicated as a result of taking prescription medication and drinking wine. He has at no time had a recollection of the incident. However, he accepted responsibility and entered a plea of guilty. Again, he was not legally represented.

Charge relating to XXX 2014

²⁷ PSBA 014.

²⁸ PSBA 017.

- [40] This charge did not proceed and was dismissed.
- [41] FMA's (same) former de-facto partner made allegations of a heated argument between them while she was holding their 12 month old daughter. She alleged that FMA raised his fist at her and she blocked it with her hand. She called 000 after he had left the dwelling.
- [42] She later changed her statement to police. No evidence was offered by the police and the charge was dismissed.

Charges relating to events in 2015

- [43] FMA was charged with two counts of contravening a domestic violence protection order on separate dates in 2015. On this occasion he was legally represented. He again entered pleas of guilty. No conviction was recorded and he was fined \$800.00.
- [44] The 2015 charges involved allegations made by his (same) former de-facto partner. The most recent charge related to her complaint that he was prohibited from emailing her except about arranging contact to his daughter. The Parenting Plan also authorised communication with her only for the purposes of arranging contact with his daughter. However, according to FMA, the communication book was not returned to him by his former de-facto. Hence, he emailed her. She alleged that several of his emails included content not relating to contact.
- [45] The events several months earlier relating to the other charge related to a number of emails which involved derogatory name calling by FMA towards his ex-partner. FMA acknowledges engaging in this conduct. He explains that he responded to his former partner's derogatory emails to him. Having said that, he takes full responsibility for his own actions.

Child protection history

- [46] Child Safety material was obtained pursuant to a Notice to Produce. It was received into evidence before the Tribunal.²⁹
- [47] The child protection information reveals a variety of allegations made at different times. Some contacts did not reach the threshold for a notification and no action was taken. Two notifications appear to relate to his relationship with his former wife. He was the notifier in one, which was uncompleted. In 2007, FMA's former wife told Child Safety that he was diagnosed with 'bipolar', that he goes through depression stages and uses speed and ice when he is off his medication. It appears that no action was taken because the children were living with her. FMA was not contacted or interviewed and was not aware of the allegations until these proceedings.
- [48] He was not able to offer any explanation about why his former wife said these things. His evidence is that he has not used illicit drugs (other than trying marijuana on two occasions in his early twenties). He has not been

²⁹ Exhibit 3.

diagnosed at any time with bipolar disorder, although he acknowledges a history of anxiety and depression.

- [49] One of the now adult children of the marriage, XX, a full-time university student, has provided an affidavit in the proceeding.³⁰ He is aware of the allegations made by his mother in 2007. He says that his mother diagnosed bipolar disorder, although she has no relevant qualifications to do so. He further says that he and his brother, YY, spent significant amounts of time with their father who always cared well for them. He says he did not see signs of illicit drug-taking by his father at any time.
- [50] There are a number of more recent contacts with Child Safety concerning his relationship with his former de-facto partner. FMA reported concern about the behaviour of his ex-partner on some of these occasions. His former partner also appears to have made several notifications about his actions from time to time. In relation to concerns raised about him, FMA was largely not aware of them, except as far as they relate to breaches of the domestic violence protection order (as earlier discussed), and an occasion on which his ex-partner alleged that he had touched his daughter, ZZ, on the vagina (which the Police contacted him about).
- [51] He denies the other allegations. In relation to the allegation made by his former de-facto partner of sexual touching, FMA strongly denies these allegations. His evidence is that the allegations coincided with him (briefly) re-partnering. Once it became clear to his ex-partner that the police did not consider the allegations were probable or intend to take any action in respect of them, the allegations have not been raised again. Subsequently (including on the very next day), his ex-partner has regularly made the child available to spend time with him, apparently with no further safety concerns. Because of the timing of the allegations and his ex-partner's subsequent conduct, FMA believes that the allegations were made vindictively and vexatiously because he had re-partnered.
- [52] In response to a record in the Child Safety documents that he disclosed recreational use of amphetamines,³¹ FMA denies this. He recalls saying that he tried marijuana twice when he was in his early twenties. A Child Safety employee asked him whether he used methamphetamine recreationally, which he denied. However, he told them that he was prescribed an appetite suppressant at one time (because of weight gain due to other prescribed medications) which he understood was an amphetamine, but he did not say he took it or any other amphetamines recreationally. He believes his comments were incorrectly recorded.

FMA's history of anxiety, depression and self-medication

- [53] FMA has a history of diagnosis of anxiety and depression. It was because of this that he was prescribed the medications that he was taking at the time of the alleged domestic violence order breach in 2013. He explains

³⁰ Exhibit 10.

³¹ Exhibit 3 at p 121.

that he was very anxious at that stage about his relationship with his former partner.

- [54] From his perspective, their relationship was problematic. He was working as a personal trainer. As his then partner, he says that she made constant unfounded allegations that he was having affairs with various of his female clients. However, she fell pregnant with their daughter and he was determined to make the relationship work. Nevertheless, he acknowledges the relationship was not in good health. He told her at some stage that he was going to leave her, but she told him that if he did she would not allow him to see their child.
- [55] This led to medication, for depression and anxiety, being prescribed for him. At the time of the alleged 2013 incident he was being transitioned from one anti-depressant to another. He admits that he was self-medicating with alcohol, as well as taking his medication, and that he had during the relationship, prior to the prescription of anti-depressants and anti-anxiety medication, been self-medicating with alcohol.
- [56] In 2013, he spent the night in the watch-house when he was charged with the breach of the domestic violence protection order. He considers this was a turning point for him. Upon release from the watch-house, he went straight to a hospital. He was extremely upset. He asked to see a social worker. He did not like the way in which his self-medicating with alcohol while taking his medication was affecting him. He was determined to make change in his life.
- [57] In 2014, when FMA was still taking his prescription medication, he accidentally overdosed on the medication in an attempt to sleep and get away from his life. He is emphatic that it was not an attempt at self-harm. He was experiencing anxiety regarding his former de-facto partner's threats. He was also very concerned that she would make false allegations that he had breached the domestic violence protection order and refuse to allow him to see his child.
- [58] FMA explains that the only time he has used alcohol to excess was to self-medicate during his turbulent relationship with his former partner. He has not experienced any other issues with alcohol. He now seldom drinks alcohol.

Psychological Treatment

- [59] FMA was referred to a clinical psychologist, Catherine Jane Till, in about September 2014.
- [60] Ms Till provided several reports and gave oral evidence at the hearing. She reports a lengthy history of anxiety and depression and of past use of medication for them, as well as self-medication with alcohol (consistent with FMA's account). She considers that when she saw FMA initially, he was very anxious and catastrophizing about the possibility of his ex-partner making false allegations of breaches of the domestic violence

orders and refusing to allow him to see and spend time with ZZ. Ms Till has treated FMA over 2015 and 2016.

- [61] In her opinion, FMA's behaviours in breach of the domestic violence orders most likely resulted from him experiencing loss of control to immediate stressors at those times. She considers that the breaches of the domestic violence orders were manifestations of his depression and anxiety, and represent the highest points of his inappropriate verbal or written behaviour. She considers that in 2015 when he sent the emails which led to charges, he had not quite grasped reigning in his emotions and things got the better of him. He had not put some of his new skills into practice.
- [62] However, she has seen improvements over the time that she has been treating him. She considers he is now much calmer and has learned strategies to manage his anxiety. Over the last 12 months particularly, he has learned not to catastrophize and he has embraced mechanisms for coping with, and managing, his stress.
- [63] She reports that over that period he has been dealing with Family Court proceedings, and subsequently these proceedings. She says (and FMA gives consistent evidence) that he has become more open, both with her and his colleagues over time. He now seeks support and advice when he requires it. She also considers he has developed more insight into the need to improve his relationship with his former de-facto partner for the sake of his ongoing relationship with his daughter.
- [64] In treating him, Ms Till has used, and considers FMA now employs strategies including cognitive behaviour therapy; reality testing against the evidence; mindfulness and other lifestyle factors (such as diet, exercise and good sleep hygiene and timetabling). She opines that this has resulted in a change in his thinking style. She considers that he has, this year, been under considerable stress and had many opportunities to respond inappropriately, but she is not aware of any issues.
- [65] Ms Till does not consider FMA seeks to minimise his wrong-doings. In her view, nor did he do so in the past, although going back in time his insight was not as good as it currently is and he could not see the impact of his actions. Over the last 12 months, she considers he has a much clearer understanding about why his actions were inappropriate. She considers his social work studies and placement have assisted in this process of self-development.
- [66] She is confident that through his greater insight and better communication with people, he understands that he has to be in control if he is to be taken seriously and if he wants to co-parent. She has observed that he seeks to be consistently ethical and appropriate, in his personal life as well as in his professional life. She considers his relationship with ZZ and his desire to co-parent her is an extremely motivating factor for him. Ms Till also considers he is very motivated by his social work study and the positive feedback he has received there. Further, she considers he is motivated by

his sense of doing the right thing in front of his family. He has improved his relationships with them. He wants to be a good social worker. These factors highly motivate FMA to control his anxiety and behave appropriately.

- [67] Ms Till also identifies risk factors for him. In particular, he continues to have a poor relationship with his former de-facto partner, although she considers he has been managing it better. Another risk factor for him would be not having access to his daughter. She considers he has his own children's best interests at heart and does not think that he would intentionally harm any child. In this regard, she observes that the behaviours of concern arise out of poor romantic interpersonal relationships.

Other relevant history

- [68] FMA reports a stable, happy and relatively privileged childhood. He has ongoing close relationships with his parents, his brothers and their families. He acknowledges challenges during the transitional period after his marriage breakdown, but subsequently developed a good co-parenting relationship with his former wife. YY and XX both achieved academic excellence and are full-time university students.
- [69] He describes his relationship with his former de-facto partner as turbulent. He says she was often abusive and on occasions aggressive towards him.³² XX's evidence supports this. He says he usually consented to the making of the domestic violence orders, he explains in order to be amiable and because he felt intimidated and threatened. His daughter has been withheld if he does not acquiesce. He does not accept that the breaches of the domestic violence orders demonstrate a pattern of recidivism. He says they arose from his anxiety. He is ashamed of them. He is remorseful about disrespecting his former partner and the law in this manner. He says he is now in control of his anxiety.
- [70] Following his brief re-partnering (and the allegations of sexual abuse of ZZ discussed earlier), FMA ended the new relationship. His former partner still refuses to allow him to have ZZ stay overnight, although he has regular daytime contact. He believes that his former de-facto partner is very bitter towards him.
- [71] He has dealt with the stress placed on him by the allegations, limited contact with ZZ, the ongoing Family Court proceedings, and the loss of the blue card and these associated proceedings, by seeking support from Ms Till, and his close friends and colleagues, and his family members. He is open with them. He explains why he is upset and seeks support. He reports that it has been his ongoing desire to mediate the Family Court

³² His reports to Child Safety record some allegations he made to this effect: Exhibit 3. XX deposes to observing her acting abusively towards FMA: Exhibit 10.

dispute but his former partner would not agree to do so and she also failed to attend counselling. He is pleased that his former partner has recently agreed to mediate after a recent court attendance. He now accepts that he must work through the process. He is working towards building a better relationship with her and having more contact time with ZZ.

- [72] FMA reports good relationships with his two adult children from his previous marriage. As discussed, XX filed an affidavit in support of his review application.³³ He reports a positive, supportive past and current relationship with his father, describing him as a wonderful and caring father. He also deposes to his father's good relationship (and his own) with ZZ, describing her as adoring her father. He also speaks of ZZ and his father as sharing a special bond. He confirms close family relationships.
- [73] FMA is attaining High Distinctions in his social work studies. He was able to do this, even while completing practical placement and working full-time. He attributes this to his healthy lifestyle and regular exercise.
- [74] As discussed earlier, he reports actively seeking treatment from self-medicating behaviour in 2013 and says he has had no ongoing alcohol issues. Now he occasionally has an alcoholic drink on a social basis, but some weeks has no alcohol at all. He has not been given a script for medication for his anxiety/depression since about April 2015. He exercises regularly. He says he is very remorseful about his offending behaviour and takes full responsibility for it. He believes that he now has many protective factors.³⁴ These include ongoing therapy; a large support network; strong motivating factors not to re-offend; and well-developed insight.

Other Referees

- [75] Mr F provided a witness statement to the Tribunal and gave oral evidence. He holds a Bachelor of Counselling and a Bachelor of Human Services. He works for an organisation that employed FMA as a peer mental health support worker. He was FMA's direct supervisor. FMA worked with, supported and mentored persons seeking support from the service. Mr F explained that FMA gave them tools to survive. He worked for the service from about May or June 2015 until the negative notice issued when they had had to terminate his services.
- [76] Mr F holds FMA's work in very high regard. The persons he supported have missed the skills he brought to the service. He explained that FMA has the ability to connect with people without judgement, and to help them problem solve for themselves and to help them to do so for the next time. He described FMA as very reflective, and explained that this came through both in his work and in the supervisions that Mr F conducted with him. He described FMA as empowering the persons he supported to be responsible for themselves.

³³ Exhibit 10.

³⁴ Exhibit 6 at p 2-3.

- [77] Mr F considers FMA's personal attributes have enabled him to do high quality work, including that he is very honest, very reflective, non-judgemental and very human in his responses. His observations are that FMA treats every person in that manner, not just service users. He described him as planning ahead, being inclusive and open in accessing support from others. He has seen FMA working under stress. Working in mental health has the potential to be very stressful every day. He recalls a particular occasion when sexual allegations were made concerning the grandchild of one of FMA's clients. He explained the manner in which FMA was able to support her and follow the correct procedures in making sure the allegations were appropriately dealt with and referred.
- [78] Mr F explained that FMA had been very upfront from day 1 in his interviews and the professional supervisions that Mr F has conducted with FMA. He describes him as being open about the impacts of his relationship difficulties with his daughter's mother and violations of the domestic violence orders, as well as the Family Court proceedings. He explained to Mr F that he had behaved inappropriately previously. In Mr F's view, there is no evidence through his work of any difficulties. His work has not been affected, and he demonstrates an appropriate degree of control in the workplace, even at times of significant personal stress.
- [79] He is also aware that FMA is very remorseful about his previous behaviours. He understands it was not his intention to breach the orders, but that he behaved badly at the time. He says that FMA is strongly invited to reapply for his position should he regain a blue card. He also described him as showing leadership regarding peer work. In the situations where Mr F has seen FMA deal with issues involving children, he has considered he has acted very appropriately and professionally and does not have any concerns about him holding a blue card.
- [80] Ms E also provided two witness statements and provided oral evidence. She is a social worker who has a private practice, but also works four days per week at the organisation where FMA worked. She supervised FMA's university placement for some months. She speaks very highly of FMA and his professional skills in social work. She considers he practices critical reflection, and as a result has become aware of his experiences. She has experienced him as being embarrassed and remorseful about his issues with his ex-partner and his own behaviours. She described him as wanting to be there for his daughter.
- [81] She was aware of his contraventions of the domestic violence protection orders, but had not read the documents. She knew they related to communication issues, rather than physical violence. She had seen him under stress and considered his work was extremely meritorious, and that he had learned how to calm himself in a crisis situation, as well as how to calm others in a crisis. She has no concerns about his ability to act in the best interests and welfare of children, having observed him on limited occasions with children. She also considers that his self-development has been significantly aided by his study of social work and that has been very

protective for him. She observes that he also seeks support from others and has a strong connection to his other children.

[82] The only risk factor that she identifies for him is working through the relationship issues with his ex-partner.

[83] FMA's landlord provided a statement to the effect that he has not seen FMA behave as though he is under the influence of alcohol or drugs.³⁵ Further, he deposes to the good relationship between FMA and ZZ.

³⁵ Exhibit 5 attached affidavit of AA.

Is FMA's case an exceptional case?

- [84] PSBA decided, in effect,³⁶ that FMA's case was an exceptional one in which the best interests of children would be harmed if a positive notice issued.
- [85] PSBA submitted that, on its face, FMA's review application faces difficulties. It submits that the evidence suggests a persistent disregard for domestic violence orders. However, as was properly conceded in submissions, the oral evidence at the hearing was helpful to his application, especially the evidence of Ms Till.
- [86] As set out earlier, I am satisfied that FMA's case is not exceptional under s 221 of the WWC Act.
- [87] I was generally impressed by the manner in which FMA gave his oral evidence. He appeared to be open and honest. He was at pains to identify events he did not recall, and, in relation to events which occurred a number of years ago to be clear about the details he was sure about and those he could not recall with certainty. Ms Till's evidence about his openness, honesty and ethical behaviour generally was consistent with my observations and impressions about his honesty. I accept his evidence generally and his account of events.
- [88] Further, I accept the evidence of Ms Till. She gave considered and thoughtful responses in oral evidence that were consistent with her reports. Although she is not an independent expert report writer in the sense that she was not engaged for the purpose of preparing a forensic report for the proceedings and she has an ongoing therapeutic relationship with FMA, she exhibited professional detachment.
- [89] The only witnesses required for examination by PSBA were Mr F and Ms E. They were both impressive witnesses who gave consistent evidence. They are professional colleagues and friends of FMA, who hold him in high personal regard, as well as regarding his professional and interpersonal skills he has displayed as a social work student and mental health peer worker as highly developed. They confirm his honesty and ethical behaviour, including his frank disclosure of personal details (which could be perceived as against his interests) in his employment situation. I accept their evidence.
- [90] XX was available if required to give oral evidence, but PSBA had no questions for him. He confirms the good and supportive role his father has played in his life and the life of his sibling. He also attests to the close relationship and bond between FMA and ZZ. His evidence tends to confirm Ms Till's evidence to the effect that FMA's relationship with ZZ is a priority for him and that he is a caring father who has the best interests of

³⁶ The reasons for decision refer to the decision-maker as being satisfied that issuing a blue card is not in the best interests of children, rather than to whether there is an exceptional case: Exhibit 2, page PSBA 210.

his children at heart. It is also consistent with FMA's own evidence about the turbulent nature of the relationship between FMA and his former de-facto partner, and confirms the picture of her somewhat erratic and volatile behaviour which emerges to an extent from FMA's account of the relationship. In saying this, FMA made no attempt to blame her for his actions and reactions. Indeed, he was contrite and remorseful for treating her as he has done.

- [91] Under the WWC Act, FMA has not been convicted of a serious or disqualifying offence. However, he has been charged with breaching domestic violence protection orders on several occasions.
- [92] An alleged threat of violence is contained in the 2014 allegations. But, in respect of those allegations, his ex-partner changed her story such that the police did not proceed with the charge. Given that his ex-partner changed her evidence about the 2014 events, I give no weight to those allegations.
- [93] Save for the 2013 alleged breach, of which FMA has no recollection, none of the incidents involved actual physical violence. FMA entered a plea of guilty based on his lack of memory of the night in question. That said, he does not seek to go behind the allegation or to rebut the presumption of guilt which a conviction otherwise carries in civil proceedings.³⁷ However, it is out of keeping with the nature of his other transgressions when not under the influence of substances.
- [94] FMA's actions leading to the charges do not reflect well on him. However, he says he is contrite and remorseful. He entered pleas of guilty in respect of four breaches of domestic violence orders. Having regard to s 9 of the *Penalties and Sentences Act 1992* (Qld) and the penalties imposed, for the breaches, PSBA's representative conceded that the Tribunal could reasonably conclude that the Magistrates who dealt with the charges considered them to be minor. Without diminishing the gravity of any breach of an order, I am satisfied that FMA's breaches were, in each case, on the continuum of breaches of domestic violence orders which may occur from the least to the most serious, towards the low end of those of the least serious nature.
- [95] Three of the breaches are for sending text messages and emails in contravention of the orders. The other and the most serious breach involved (an entirely inappropriate and unacceptable) but still relatively minor physical interaction, and a concerning threat. However, at the time of those actions, which on the evidence are inconsistent with the nature of FMA's other breaches, I accept that FMA was under the influence of a combination of prescription medications and alcohol. He does not recall the events. It appears from the manner in which the Magistrate disposed of the charge, that even this more serious breach was considered minor.

³⁷ *Evidence Act 1977* (Qld) s 79. Although the Tribunal is not bound by the rules of evidence, there are sound reasons for the usual presumption to apply. In any event, FMA does not challenge them.

He received minor penalties in respect of each of the charges. No convictions were recorded for three of them. It is reasonable to infer, and I draw the inference, that the Magistrates dealing with the charges in each case considered them minor.

- [96] In Ms Till's opinion, FMA's anxiety and depression and past inability to deal with emotional turmoil, were instrumental in his breaches of the orders. As discussed, the most serious of the breaches is undoubtedly, if it occurred as alleged, related to the events on XXX 2013, which involved the only act of physical violence. However, the relatively minor actions he took to breach the orders do appear however to have been the most serious actions he has taken.
- [97] I am satisfied that FMA is remorseful and ashamed of his offending behaviour, and that he now has good insight into the causes of it and the impact on others. FMA, Ms Till, Mr F and Ms E all attest to FMA's remorse and shame about his past offending behaviour. Ms Till says that he has developed good insight. Although in the past she does not think he intended to minimise his wrong-doing (I am satisfied that this is consistent with his guilty pleas), she believes he was then less able to see the impact of his actions on others. Over the last year, she says he has developed a much clearer understanding. She attributes this to his ongoing commitment to therapy and his work and social work placement experiences. Consistently, Ms E and Mr F both describe FMA as having a well-developed ability for critical self-reflection.
- [98] The most serious breach of the domestic violence orders occurred while FMA was under the influence of a mixture of prescription medication and alcohol taken to deal with his anxiety and depression. After spending a night in the watch-house following his former partner reporting the allegations of the breach of the order, he immediately sought professional assistance. He considers that this was a turning point for him. He was subsequently, although not immediately, referred for psychological treatment. He has subsequently engaged in still ongoing therapy. I accept that he has benefited from it.
- [99] He has developed multiple strategies to deal with his anxiety and depression. He no longer needs medication for anxiety and depression he suffered. I am satisfied that as Ms Till's opines, and FMA and Ms E and Mr F attest, that he now has his anxiety under control. Further, as FMA has developed strategies to deal with his anxiety, he no longer needs prescription medication for anxiety/depression.
- [100] I am further satisfied that he no longer self-medicates with alcohol. Indeed, he only occasionally drinks alcohol. On the basis of the evidence, FMA does not otherwise have a history of physical violence leading to offending. There are no recent allegations of the more serious type of behaviour as occurred in 2013.
- [101] That said, the most recent breaches occurred in 2015, which is not that long ago. Ms Till's evidence is that at that stage FMA had not quite fully

grasped the reigning in of his emotions and had not put some of his new skills into practice. She has since seen significant improvements. I accept that this is so.

- [102] As he now has strategies for dealing with his anxiety (which according to Ms Till resulted in the breaches more generally), I am satisfied that the risk of FMA further behaving in a manner which could be offending or domestic violence behaviour is very minimal. I am also satisfied that even if he did, (given that the 2015 events involved sending emails to his former partner, notwithstanding that some included derogatory name-calling), that although highly undesirable and inappropriate if there was a reoccurrence of this type of behaviour, it is most unlikely to involve behaviour towards a child or children. Clearly, if it occurred it could however indirectly impact ZZ through her mother's reactions.
- [103] That said, as Ms Till opined the concerning behaviours arise from poor romantic relationships. The high point for tension between parties experiencing relationship breakdown is usually greatest shortly before and shortly after their separation. Although the allegations of sexual abuse (in respect of which I accept FMA's denials and likely explanation for, having regard to the subsequent events) are quite recent, there are now some early signs of tensions easing and relationship improvement with his former de-facto agreeing to mediation. FMA has learned strategies for dealing with his anxiety and stress.
- [104] FMA now has diverse strategies for dealing with his anxiety. They include CBT; the development of strong open and supportive relationships; reality testing; mindfulness; and good diet, exercise and sleep hygiene. I am satisfied, as Ms Till's reports, that he is highly motivated to co-parent ZZ; to be a good social worker; and to do the right thing in front of his family and that these are strong motivating protective factors for him.
- [105] I accept that his ongoing poor relationship with his former partner is a risk factor for inappropriate behaviour, as would be the impact of his former partner withholding ZZ from having contact with him. However, I am satisfied that the evidence supports a finding that he has dealt admirably with the stress of the recent spurious allegations of sexual touching and the ongoing withdrawal of overnight contact with ZZ without incident. He is also working on improving the relationship for the sake of co-parenting ZZ. This appears to have reaped benefits in that there are some early and tentative signs of improvement in that his former partner is now prepared to mediate.
- [106] FMA's risk factors are now minimised, whereas he has many protective factors as a result of his commitment and motivation to continue his personal development.
- [107] In all of the circumstances, I am not satisfied that it is an exceptional case in which it would not be in the best interests of children for a positive notice to issue. I am satisfied that the correct and preferable decision is

that FMA's case is not an exceptional case under s 221(2) of the WWC Act.

Orders and directions

- [108] For the moment, pending further submissions, I make orders as though the Tribunal is limited on review to deciding whether there is an exceptional case.
- [109] Accordingly, I make orders setting aside the decision of PSBA that FMA's case is an exceptional case. Further, as I am entitled to do under s 60(1) of the QCAT Act, I declare that FMA's case is not an exceptional case under s 221(2). Pending further hearing of the review, I reserve the making of such further orders as I may consider appropriate.
- [110] Further, I make directions for the filing of further submissions about the scope of the reviewable decision and the orders that may be made so that the parties may canvas the additional issues I have discussed in these reasons for decision before I decide that point. PSBA may file and serve its further submissions within 14 days of these orders. FMA may respond, if he wishes, within a further 14 days. Unless either party requests a further oral hearing, I will then make my determination on that issue on the papers, and make such further orders as I consider appropriate, which depending on the outcome of my further determination, may include orders that a positive notice issue.
- [111] Under s 24(2) of the QCAT Act, my decision is taken to be a decision of PSBA. It is my expectation that the declaration made in these orders will be given effect forthwith.
- [112] I make no formal recommendations to the Chief Executive at this stage under s 24(3). However, I note that the procedure of PSBA to require a further application before issuing a positive notice after a QCAT review. I make the observation that failure to implement a Tribunal decision in a timely manner flies in the face of the review process.
- [113] Short of evidence which founds a reopening application or the filing of an appeal (and any application to stay the Tribunal's decision), there appears to be no reasonable basis for PSBA to delay giving effect to the decision of the Tribunal by issuing a positive notice. If it subsequently transpires that a person successful in a QCAT review has, since the hearing, accumulated further charges or other negative information has emerged which was not before the Tribunal, the more appropriate course would be for the PSBA to make a new decision cancelling the positive notice, rather than ignoring properly made Tribunal orders. To act otherwise would affect public confidence in the review system laid down by Parliament.

Non-publication orders

- [114] FMA seeks orders for non-publication. The application is not opposed by PSBA.
- [115] The material before the Tribunal contains allegations of child sexual abuse and references to information in Child Safety records. I am satisfied that it

would be contrary to the public interest for the identity of any children referred to in the material before the Tribunal to be publicly disclosed, or any other information which may identify them, and for reasons for the decision to be published other than in de-identified format, except to the parties. This means that the parents cannot be identified either, including FMA.

[116] I make orders accordingly for non-publication.