

CITATION: *Flori v State of Queensland & Ors* [2016] QCAT 80

PARTIES: Rick Flori
(Applicant)
v
State of Queensland
(First Respondent)

Clement O'Regan
(Second Respondent)

Michael Niland
(Third Respondent)

Stephan Gollschewski
(Fourth Respondent)

Steven Hollands
(Fifth Respondent)

APPLICATION NUMBER: ADL039-15

MATTER TYPE: Anti-discrimination matters

HEARING DATE: 9 November 2015

HEARD AT: Brisbane

DECISION OF: **Dr Cullen, Member**

DELIVERED ON: 15 June 2016

DELIVERED AT: Brisbane

ORDERS MADE: **1. The application is dismissed.**

CATCHWORDS: Public Interest Disclosure – Police officer/whistleblower alleges transfer is reprisal – no evidence that respondents were aware of whistleblowing activity at time of transfer – application dismissed.

Anti-Discrimination Act 1991 (Qld), s 166, s 204
Police Service Administration Act 1990 (Qld), s 10.2
Public Interest Disclosure Act 2010 (Qld), s 5, s 20, s 40, s 44, s 45

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 6

Briginshaw v Briginshaw (1938) 60 CLR 336
Gordon v State of Queensland & Ors [2013] QCAT 564
Gurnett v Macquarie Stevedoring Co Pty Ltd (1955) 72 WN (NSW) 261

APPEARANCES:

APPLICANT: Mr Rick Flori represented himself

RESPONDENT: S. Mcleod of Counsel, instructed by EBA Legal Services

- [1] The Applicant in this matter is Sergeant Rick Flori, who is an officer within the Queensland Police Service ('QPS') who was assigned to the Gold Coast District, within the South Eastern Police Region. Sergeant Flori worked at the Surfers Paradise Police Station, before being transferred to work at the Beenleigh¹ Police Communications Centre.
- [2] In February 2010, Sergeant Flori had reported concerns regarding the conduct of some fellow officers at the Surfers Paradise Police Station to the (then) Queensland Crime and Misconduct Commission ('CMC'). This complaint was made by him anonymously, thereby obtaining the benefit of the protection afforded by the *Whistleblower Protection Act 1994*.
- [3] Those concerns were investigated, and eventually led to disciplinary action being taken against another Surfers Paradise police officer.
- [4] In March 2012, and because of a '*management-initiated deployment*', Sergeant Flori was sent to work at the Beenleigh Police Communications Centre, outside the Gold Coast Police District, yet still within the South Eastern Police Region.
- [5] In the proceedings now before QCAT, Sergeant Flori alleges that the Respondents have taken '*reprisal action*' against him, in contravention of s 40 of the *Public Interest Disclosure Act 2010 (Qld)* ('PID Act'). Relevantly, s 40 of the PID Act provides:

40 Reprisal and grounds for reprisal

- (1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that—

¹ At the time known as the Logan Police Communications Centre, yet referred to throughout these reasons for decision as the 'Beenleigh Police Communications Centre', as it is currently styled. See paragraph 3 of Exhibit 3, Affidavit of Steven Hollands, sworn on 30 September 2015.

- (a) the other person or someone else has made, or intends to make, a public interest disclosure; or
 - (b) the other person or someone else is, has been, or intends to be, involved in a proceeding under the Act against any person.
- (2) An attempt to cause detriment includes an attempt to induce a person to cause detriment.
 - (3) A contravention of subsection (1) is a reprisal or the taking of a reprisal.
 - (4) A ground mentioned in subsection (1) as the ground for a reprisal is the unlawful ground for the reprisal.
 - (5) For the contravention mentioned in subsection (3) to happen, it is sufficient if the unlawful ground is a substantial ground for the act or omission that is the reprisal, even if there is another ground for the act or omission.
- [6] Sergeant Flori says that the reprisal action is constituted by a directive given on 6 November 2014, requiring that he cease working at the Beenleigh Police Communications Centre, and report for duty back in the Gold Coast Police District, from whence he had come. Sergeant Flori alleges that this reprisal action arises in consequence of his whistle-blowing, in 2010, and contends that *'[the] QPS are unhappy with the manner in which I went about reporting the misconduct and I am currently subject to discipline proceedings. There is no doubt that I am a whistle blower and I am seeking some protection.'*²
- [7] Although Sergeant Flori complains that the reprisal action has been taken in consequence of his 2010 whistle-blowing, the predominating focus of the evidence and submissions received from him related to his alleged involvement in the unauthorised release to the media of police CCTV footage, pertaining to the arrest of a Mr Noa Begic. This event occurred much later, in February 2012.
- [8] The PID Act only protects whistle-blowers for reprisal action taken in circumstances where their disclosure has been made to a *'Proper Authority,'* as defined in section 5 of the PID Act, to mean:

5 Meaning of *proper authority*

A *proper authority* is—

- (a) a public sector entity; or
 - (b) a member of the Legislative Assembly.
- [9] Whilst the CMC (now Crime and Corruption Commission, or 'CCC') is a *'proper authority,'* there is no protection afforded by the PID Act in the case of unauthorised disclosures to the media, unless the putative whistle-blower has first complied with s 20 of the PID Act. Section 20(1) of the PID Act provides that disclosures may be made to journalists, in circumstances where:

² Letter dated 18 November 2014 from Sergeant Flori to Assistant Commissioner South Eastern Region, paragraph 3.

- (a) a person has made a public interest disclosure under this chapter; and
- (b) the entity to which the disclosure was made or, if the disclosure was referred under section 31 or 34, the entity to which the disclosure was referred—
 - (i) decided not to investigate or deal with the disclosure; or
 - (ii) investigated the disclosure but did not recommend the taking of any action in relation to the disclosure; or
 - (iii) did not notify the person, within 6 months after the date the disclosure was made, whether or not the disclosure was to be investigated or dealt with.

- [10] Yet, here before QCAT, Sergeant Flori does *not* seek to argue that s.20 of the PID Act is applicable. Similarly, Sergeant Flori does not seek to contend that he made any disclosure regarding the circumstances of Mr Begic's arrest in February 2012 to any '*proper authority*', as defined.
- [11] The upshot of this is, that in order to demonstrate that the Respondents have taken reprisal action, Sergeant Flori must establish that the reprisal action was specifically taken in relation to his prior 2010 whistle-blowing, and *not* in consequence of any alleged involvement in the unauthorised³ release to the media of the Noa Begic-arrest CCTV footage.
- [12] In essence, Sergeant Flori's case before QCAT is that in the aftermath of his 2010 whistle-blowing, he had been transferred away from the Gold Coast District (and hence away from the officers against whom he had 'blown the whistle'), and into a relative safe haven, working at the Police Communications Centre, at Beenleigh.⁴ Next, the senior QPS officers, each of whom are now named as the Second, Third, Fourth and Fifth Respondents, became aware of his 2010 whistle-blowing and effectuated a reprisal, in the form of their taking administrative steps to ensure that Sergeant Flori was transferred back to the Gold Coast District, and thus '*once more into the lion's den*'. Although not articulated precisely in these terms, it seems clear that Sergeant Flori contends that this transfer was a decision that was deliberately taken so as to be detrimental to him, and thus '*reprisal action*' for the purposes of s 40 of the PID Act.
- [13] Next, Sergeant Flori contends that each of the Second, Third, Fourth and Fifth Respondents learned that he was a CMC whistle-blower either:
- (a) in March 2012, at the stage when his home was entered and searched by police investigators pursuant to a search warrant referable to the Noa Begic-arrest CCTV footage leak (or at least in

³ It is important to pause and record that it is *not* the role of this Tribunal to consider whether Sergeant Flori inappropriately released the CCTV footage of Mr Begic's arrest to the media.

⁴ Although this was a collateral consequence of Sergeant Flori's management initiated deployment to Beenleigh, the expressed purpose of that transfer was to ensure that the investigation of the unauthorised leak of the CCTV footage to the media was not compromised by the continued presence of Sergeant Flori, if left working on the Gold Coast.

consequence of information obtained at the time that the search warrant was executed); or

- (b) at the point when his Anti-Discrimination Commission Queensland complaint (disclosing his 2010 whistle-blowing) was made known to the Respondents, sometime around early November, 2014.

- [14] For the reasons that follow, the Tribunal finds that Applicant has not established that any of the Second, Third, Fourth or Fifth Respondents were aware that the Applicant was an anonymous whistle-blower prior to the decision to transfer Sergeant Flori back to the Gold Coast Police District. In those circumstances it is just not possible to categorise the decision as an instance of reprisal.
- [15] Equally, and for reasons that shall also be elaborated, it cannot be established that the First Respondent engaged in reprisal action either, as the corporate culpability of the Queensland Police Service - as the First Respondent – ultimately depends on vicarious liability, under s.43 of the PID, for the actions of the named individual respondents. In all events, the decision to send Sergeant Flori back to the Gold Coast Police District constitutes an instance of reasonable management action,⁵ which cannot be reprisal action under the PID Act.

Noa Begic's arrest, and its aftermath

- [16] Noa Begic was arrested at Surfers Paradise in the early hours of 29 January 2012, for instances of public nuisance, and obstructing police.
- [17] The arresting officers initially transported Mr Begic in an unmarked police car. However, whilst en-route to the Southport Watch House, a decision was made to transfer him into a marked '*drunks van*', then known to be parked, unused, in the basement of the Surfers Paradise Police Station. In the context of what is to follow it becomes important to understand that the basement of the Surfers Paradise Police Station is an area that is subject to CCTV surveillance.
- [18] In the process of effectuating Mr Begic's transfer into the drunks van, police actions were captured by means of the CCTV recording. On that same evening, the Duty Officer at the Surfers Paradise Police Station, Senior Sergeant David Joachim, made routine access to the CCTV recording device, and preserved a copy of the footage, in order that it might be later used by the arresting officers when completing arrest documentation and, if necessary, for use as evidence in any subsequent court proceedings.
- [19] Eight days later, on 6 February 2012, Mr Begic returned to the Surfers Paradise Police Station and complained that the officers whom had arrested him had used excessive force, thereby unlawfully assaulting him. As is required in these circumstances, Mr Begic's complaint was

⁵ PID Act, s 45.

immediately referred to the QPS Ethical Standards Command. Officers from the internal investigations branch then went to the Surfers Paradise Police Station to commence an investigation of Mr Begic's complaint, on 8 February 2012.

- [20] On 15 February 2015, reports appeared in both the *Courier Mail*, and on commercial television news, containing excerpts from the CCTV recording of Mr Begic's arrest. The QPS expressed surprise, given that the CCTV footage had not been authorised for release pursuant to s.10.2 of the *Police Service Administration Act 1990 (Qld)*; and in circumstances where the investigation of Mr Begic's alleged assault was still only at an early stage.
- [21] The leaked footage depicted a number of officers - including Senior Sergeant Joachim - involved in various aspects of what might be neutrally termed as questionable conduct. Another internal investigation was commenced in order to ascertain the identity of the person (or persons) whom had obtained access to the CCTV recording, and then leaked it to the media. In the process, Sergeant Flori became a suspect.
- [22] On 16 March 2012, officers from the Ethical Standards Command executed a search warrant on Sergeant Flori's home on the Gold Coast. Whilst that investigation was ongoing, and whilst he remained a suspect, Sergeant Flori was subject to a '*management initiated deployment*'⁶, and was given a directive by (then) Acting Assistant Commissioner Stephen Hollands restraining his further presence at the Surfers Paradise Police Station, and directing that he report for alternate duties, at the Beenleigh Police Communications Centre.
- [23] Sergeant Flori commenced work at Beenleigh on 19 March 2012. In an e-mail dated 1 May 2012 he acknowledged to a Senior Sergeant Madonna Pringle that he was willing to remain working at Beenleigh, without the benefit of any travel allowance entitlements.

Sergeant Flori alleges reprisal action by the QPS

- [24] On 30 July 2013, Sergeant Flori was issued with a disciplinary notice, referable to the leaking of the CCTV footage of Noa Begic's arrest.
- [25] Thereafter, on 8 October 2013, Sergeant Flori filed a complaint in the Anti-Discrimination Commission Queensland ('ADCQ') alleging that the State of Queensland and a number of Senior Sergeants within the South Eastern Region with whom he had worked had taken 'reprisal action' against him, within the meaning of s.40 of the PID Act.
- [26] On 7 November 2013, Sergeant Flori wrote to the ADCQ and asked that his complaint be enlarged, to include Deputy Commissioner Stephan Gollschewski (now, the Fourth Respondent).

⁶ Paragraphs 3 & 4, Exhibit 2.

- [27] On 31 October 2014, the ADCQ wrote to the QPS - via the 'Public Safety Business Agency' - advising that it had decided to accept Sergeant Flori's complaint. This correspondence was received by the Public Safety Business Agency⁷ on 3 November 2014.
- [28] In order to understand the allegation of reprisal levelled against each respondent, it is important to understand the substantive positions held by each of them, at the point of decision-making regarding Sergeant's Flori's return to the Gold Coast Police District:

Officer	Role held at time of Sergeant Flori's to the Gold Coast District
Clement O'Regan (Second Respondent)	Assistant Commissioner, Ethical Standards Command – responsible for day-to-day operations of that Command ⁸
Michael Niland (Third Respondent)	Ordinarily a Chief Superintendent in the South Eastern Region, yet temporarily Acting Assistant Commissioner for the South Eastern Police Region (which includes the Beenleigh Police Communications Centre and the Gold Coast Police District), ⁹ during the absence of Acting Assistant Commissioner Steven Hollands.
Stephan Gollschewski (Fourth Respondent)	Deputy Commissioner for Strategy, Policy and Performance – thereby responsible for management of various strategic, policy and performance commands, including the legal services division and the Ethical Standards Command ¹⁰
Steven Hollands (Fifth Respondent)	Usually Acting Assistant Commissioner for the South Eastern Region, ¹¹ yet at the time of the decision to return Sergeant Flori to the Gold Coast seconded (only for two weeks), to work on security arrangements at the G20 meeting, in Brisbane.

⁷ Section 7 of the *Public Safety Business Agency Act 2014* provides that the Public Safety Business Agency exists in order to provide 'support services' to "public safety entities", including the Queensland Police Service.

⁸ Affidavit of Clement O'Regan, sworn to 6 October 2015.

⁹ Exhibit 2, Affidavit of Michael Niland, Sworn to 29 October 2015.

¹⁰ Exhibit 4, Affidavit of Stephan Gollschewski, Sworn to 2 October 2015.

¹¹ Exhibit 3, Affidavit of Stephan Hollands, Sworn to 30 September 2015.

- [29] On 4 November 2014, Michael Niland, whilst temporarily acting as the Acting Assistant Commissioner for the South Eastern Police Region¹², made a decision to return Sergeant Flori to the Gold Coast Police District, issuing a direction to that effect, on 6 November 2014.
- [30] The case theory now advanced by Sergeant Flori is that this was a set-up, whereby Niland would '*push the button*' for the administrative arrangements necessary to shift Sergeant Flori '*back into the lion's den*,' conveniently whilst Steven Hollands was away from his usual position, in charge of the South Eastern Police Region. Sergeant Flori submits that there was considerable animus towards him, by both Niland and Hollands, thus (presumably) affording them a motive.
- [31] Chief Superintendent Niland was the Acting Assistant Commissioner for the South Eastern Police Region for only 2-weeks, during the G20 meeting. He performed that role in lieu of Steven Hollands, whilst Hollands had been seconded to work in Brisbane on security arrangements for the G20. Niland then returned to his substantive role as Chief Superintendent, and Hollands returned to his substantive position as the Acting Assistant Commissioner in charge of the South Eastern Police Region (and thus to a role as Niland's immediate superior), following the conclusion of the G20.
- [32] Also on 4 November 2014, Sergeant Flori submitted a travel entitlements claim, seeking recompense for all the costs associated with his daily travel to the Beenleigh Police Communications Centre for the period between 4 May 2012, and 31 October 2014. This claim was for \$31,180.27.
- [33] On 18 November 2014, Sergeant Flori submitted a request to Hollands (whom had, by now, returned to his substantive role),¹³ requesting that he be allowed to remain at the Beenleigh Police Communications Centre, indefinitely. This was refused by Hollands, on 20 November 2014.
- [34] On 28 November 2014, Mr Gary Patterson, Director of Employee Relations for the Public Safety Business Agency, authored a memoranda determining that Sergeant Flori was not entitled to any of the travel expenses that had been claimed by him. This resulted in Sergeant Flori commencing separate proceedings in the Queensland Industrial Relations Commission ('QIRC'), seeking reimbursement of his travel costs, to and from Beenleigh.
- [35] On 5 January 2015, Sergeant Flori lodged another complaint with the ADCQ, alleging that each of the Second, Third, Fourth, and Fifth Respondents had engaged in reprisal action against him, pursuant to the PID Act.
- [36] On 1 February 2015, Sergeant Flori commenced a graduated return to work program, following a surgical hernia repair. This was undertaken in

¹² Now the Third Respondent, in these proceedings

¹³ Now the Fifth Respondent in these proceedings.

an administrative role at the Southport Watch House, and was completed on 15 March 2015.

- [37] On 11 February 2015, Hollands issued a directive rescinding the direction that had been issued on 16 March 2012, whereby Sergeant Flori had been directed to report for duty at the Beenleigh Police Communications Centre. This directive also required Sergeant Flori to return to his substantive position at the Surfers Paradise Police Station, immediately upon completion of the graduated return to work program that had been arranged at the Southport Watch House.

Referral of the 5 January 2015 ADCQ complaint to QCAT

- [38] The ADCQ determined that Sergeant Flori's complaint was incapable of conciliation and, on 20 April 2015, referred it directly to QCAT, in accordance with s 166 of the *Anti-Discrimination Act* 1991 (Qld) ('Anti-Discrimination Act').
- [39] The Tribunal has jurisdiction to deal with matters that specifically arise as a matter of original jurisdiction under the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act'), or via conferral of jurisdiction, via an 'enabling' Act: see QCAT Act, s 6.
- [40] Although the *Public Interest Disclosure Act* is not *itself* an enabling Act, s 44 of the PID Act provides that complaints of reprisal are to be made to the ADCQ. Section 44(2) of the PID Act then provides that complaints of reprisal are to be progressed through the ADCQ on the same footing as if they were a complaint made under the *Anti-Discrimination Act*. The *Anti-Discrimination Act* is an enabling Act within the meaning of s 6(2) of the QCAT Act, thereby conferring QCAT with original jurisdiction in regards to complaints of discrimination.

Burden of proof

- [41] The PID Act is silent as regards the question of who bears the onus of proving a complaint of reprisal. Yet, because reprisal complaints are to be taken in the first instance to the ADCQ, and are then to be progressed through the ADCQ on the same footing as if they were a complaint under the *Anti-Discrimination Act*, guidance may be taken from s.204 of the *Anti-Discrimination Act*, which provides:

204 Burden of proof—general principle

It is for the complainant to prove, on the balance of probabilities, that the respondent contravened the Act, subject to the requirements in sections 205 and 206.

- [42] Further, the Tribunal accepts, given the seriousness of the allegations now made against the Respondents, that the *Briginshaw*¹⁴ standard needs to be applied, before the Tribunal can be comfortably satisfied that the onus of proof has been discharged.

¹⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

[43] Accordingly, the onus is now upon Sergeant Flori - as the Complainant/Applicant alleging reprisal action - to establish that, in respect of each Respondent, they:

- (a) knew or believed that Sergeant Flori had made a public interest disclosure, in 2010¹⁵; and
- (b) had, and in consequence of their knowing that Sergeant Flori had made a public interest disclosure in 2010, caused (or attempted to cause) Sergeant Flori a detriment, by their taking steps to transfer Sergeant Flori back to work in the Gold Coast Police District.¹⁶

[44] The case advanced by Sergeant Flori is one in which QCAT is asked to draw inferences, from circumstantial evidence. In their submissions, the Respondents point to the decision of Member Roney QC, in *Gordon v State of Queensland & Ors*,¹⁷ - a decision made with respect to a claim of discrimination or victimisation under the *Anti-Discrimination Act* - as one that should now govern an assessment of circumstantial evidence in this claim of reprisal. I accept that the approach taken by the Tribunal in a reprisal claim based on circumstantial evidence should be the same as that taken in respect of in a claim of discrimination or victimisation under the *Anti-Discrimination Act* that is based on circumstantial evidence.

[45] At paragraph [17] in *Gordon*, Member Roney QC explains the process for the assessment of circumstantial evidence in these terms:

[17] As per the issue of drawing inferences from the facts, according to oft approved dicta of Street CJ in *Gurnett v Macquarie Stevedoring Co Pty Ltd* (1955) 72 WN (NSW) 261 at [264]:

... the plaintiff must prove his case; and although he may establish a state of facts which lead one to think that his version is quite a possible version of what took place, he must do something more than show a state of facts which is consistent with one view or with another view ... A guess is a mere opinion or judgment formed at random and based on slight or uncertain grounds. In contradistinction to such a conjectural opinion, an inference is a reasonable conclusion drawn as a matter of strict logical deduction from known or assumed facts. It must be something which follows from given premises as certainly or probably true, and the mere possibility of truth is not sufficient to justify an inference to that effect'.

The evidence before the Tribunal

[46] In preparing these reasons, the Tribunal has had the benefit of a transcript obtained by the parties from Auscript and filed in the Tribunal, as well as written submissions from each of Sergeant Flori, and the Respondents.

[47] Sergeant Flori contends that the reprisal action here is comprised by the decision to transfer him back into the Gold Coast Police District, (initially to

¹⁵ PID Act, s 40(1)(a).

¹⁶ PID Act, s 40(2) – (4).

¹⁷ [2013] QCAT 564.

the Southport Watch House and then to the Surfers Paradise Police Station), in consequence of his 2010 whistle-blowing, to the CMC.

- [48] Although Sergeant Flori may well genuinely hold that opinion, it is not enough to merely assert reprisal in these (or any other) terms. The contention of reprisal action having been taken must be a reasonable conclusion that is capable of being drawn as a matter of strict, logical deduction, from previously established facts. Here, the Applicant's case falls at that first hurdle, as it has *not* been satisfactorily established that any of the Respondents knew of the Applicant's prior whistle-blowing (in 2010), at the time when the decision was made that he be sent back to Surfers Paradise.
- [49] The Respondents submit that Sergeant Flori was returned to the Gold Coast Police District for routine reasons, following the commencement of legislative amendments, on 1 October 2014, seeing the commencement of 'Safe Night' Precincts on the Gold Coast. This was a legislative response to public disquiet about alcohol-fuelled violence in various entertainment precincts around the State, and one that had consequences for the deployment of law enforcement resources, including police officers.
- [50] The evidence from the Third Respondent, Michael Niland, was that between 31 October 2013 and 17 November 2013, he was the Acting Assistant Commissioner for the South Eastern Police Region. During this period Niland says that he had been approached by Acting Chief Superintendent Lacy who inquired regarding the availability of additional officers at the rank of sergeant to work on the Gold Coast, as more sergeants were thought to be needed in order to issue the predicted number of so-called '*banning orders*',¹⁸ in the newly created Safe Night Precincts.
- [51] The Respondents submit that the evidence reveals that the decision to have Sergeant Flori report for duty back in the Gold Coast Police District arose in that context. Specifically, Niland gave evidence that Acting Chief Superintendent Lacy '*...was aware that there were a number of staff shortages throughout the Gold Coast, and this was a – an opportunity to officers to ...return officers to their substantive position to assist with policing on the Gold Coast District.*'¹⁹
- [52] Niland also said in his evidence that, before advising Sergeant Flori (in writing on 6 November 2014), that he was to return to the Southport Watch House, that he had checked with both Chief Superintendent Brian Codd, and with the Superintendent, Community Contact Command, as to whether there were any disciplinary reasons that might act as an impediment to returning Sergeant Flori (together with one other officer) to

¹⁸ As the name infers, 'Banning Orders' are intended to prevent persons who have previously engaged in disorderly or violent conduct from again entering defined public entertainment precincts. These must be issued by a police officer of at least the rank of Sergeant.

¹⁹ Transcript of Proceedings, Cross-Examination of Michael Niland, at 1-17, lines 30-35.

the Gold Coast. Niland's evidence then was that he was told there were no impediments to returning either Sergeant Flori, or the other officer.

- [53] Fundamentally, there is no satisfactory evidence before the Tribunal that Niland was aware that Sergeant Flori had made any public interest disclosures in 2010. Niland's evidence was that he did not have any discussion with any other persons, including any of the other officers named as Respondents, in relation to any public interest disclosure(s) by Sergeant Flori. Niland says that he was not even aware that Sergeant Flori had made a complaint to the ADCQ against the Fourth Respondent, Stephan Gollschewski. There is no evidence, beyond speculation, now available before the Tribunal to refute any of this.
- [54] Gollschewski gave evidence that he only became aware of the matters raised in Sergeant Flori's ADCQ complaint on 7 November 2014, when he was served with the Notice. Importantly, this was not until after Niland - in his temporary role as Acting Assistant Commissioner for the South Eastern Police Region - had already taken the decision to return Sergeant Flori to the Gold Coast.
- [55] In cross-examination, Gollschewski denied the assertion that he had received the ADCQ notice (revealing the fact that Sergeant Flori had been an anonymous whistleblower in 2010), and then put the wheels in motion to transfer Sergeant Flori, in retaliation. There is no satisfactory evidence capable of demonstrating that Gollschewski had received the notice before the transfer; nor that he had any role in the decision to transfer Sergeant Flori. Gollschewski's evidence was that decisions relating to Beenleigh and the South Eastern Region fell entirely outside his portfolios of responsibility.
- [56] As has been discussed above (and as is critical to the case theory advanced by Sergeant Flori), at the time of making the decision to transfer him back into the Gold Coast Police District, Niland temporarily occupied the position usually held by Hollands. Yet, Hollands gave evidence that he had no role in the decision. Other than speculation, there is no satisfactory evidence to suggest that he did. Hollands' evidence was that he had been acting in a role relating to the G20 meeting in Brisbane, and that Chief Superintendent Niland had assumed all responsibilities relating to the role of Assistant Commissioner for the South Eastern Region, and that Niland was not obliged to consult with him before making the decision to transfer Sergeant Flori; and nor did Niland seek to consult with him before determining that Flori should be transferred back to the Gold Coast. Sergeant Flori's case theory requires for the Tribunal to assume that there must have been some Machiavellian collaboration between Hollands and Niland, because of the animus that Sergeant Flori submits that each of them has for him. In light of *Gurnett v Macquarie Stevedoring Co Pty Ltd*,²⁰ it is improper for the Tribunal to engage in such speculation, in the absence of proper evidence.

²⁰ Ibid, at paragraph [45], above.

- [57] Whilst he did not appear before the Tribunal in person, in his affidavit evidence, Assistant Commissioner Clement O'Regan swore that, between 31 October 2014 and 20 November 2014, he had been the Assistant Commissioner for the Ethical Standards Command. In that role he became aware that Deputy Commissioner Gollchewski had been issued with an ADCQ notice, alleging that he committed an act of reprisal against Sergeant Flori. Yet, there is no evidence linking Assistant Commissioner O'Regan to the decision, made by Niland, to transfer Sergeant Flori back to the Gold Coast.
- [58] On 11 November 2014 Sergeant Flori had sent an e-mail to Acting Inspector Kim Jenkins, (a Corruption Prevention Officer working within O'Regan's Ethical Standards Command), expressing his concern that his transfer from the Beenleigh Police Communications Centre back to the Gold Coast District was an act of reprisal.²¹ The Tribunal attaches no significance to this e-mail either, as that is not evidence *per se*, but rather an instance of *ex post facto* categorisation, by Sergeant Flori, which takes no account of the necessary elements that must be made out before actions can be categorised as reprisal action. Merely describing something as reprisal action is not enough, for the elements required by s 40 of the PID must first be properly made out, before the categorisation can be attached to it.

Reasonable management action not prevented

- [59] Even if the Tribunal could find that Sergeant Flori had established that the individually named Respondents knew that he had made a public interest disclosure prior to the decision the transfer him back to the Gold Coast, the Tribunal finds that the transfer was an instance of '*reasonable management action*' not prevented by virtue of s 45 of the PID Act. Section 45 of the PID Act provides:

45 Reasonable management action not prevented

- (1) Nothing in this part is intended to prevent a manager from taking reasonable management action in relation to an employee who has made a public interest disclosure.
- (2) However, a manager may take reasonable management action in relation to an employee who has made a public interest disclosure only if the manager's reasons for taking the action do not include the fact that the person has made the public interest disclosure.
- (3) In this section—

manager, of an employee, means a person to whom the employee reports or a person who directly or indirectly supervises the employee in the performance of the employee's functions as an employee.

reasonable management action, taken by a manager in relation to an employee, includes any of the following taken by the manager—

- (a) a reasonable appraisal of the employee's work performance;

²¹ Affidavit of Ricky Anthony Flori, Sworn to 18 July 2015, Appendix 18.

- (b) a reasonable requirement that the employee undertake counselling;
- (c) a reasonable suspension of the employee from the employment workplace;
- (d) a reasonable disciplinary action;
- (e) a reasonable action to transfer or deploy the employee;
- (f) a reasonable action to end the employee's employment by way of redundancy or retrenchment;
- (g) a reasonable action in relation to an action mentioned in paragraphs (a) to (f);
- (h) a reasonable action in relation to the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in relation to the employee's employment.

[60] The preponderance of the evidence before the Tribunal supports a finding that there was a legitimate police business purpose underpinning the decision to return Sergeant Flori to the Gold Coast Police District – that being a purported need for more sergeants to issue “banning orders” within the newly created Safe Night Precincts. Sergeant Flori contests the legitimacy of this, submitting that both Hollands and Niland, in their evidence, demonstrated inaccurate knowledge regarding staffing numbers in the Gold Coast District. Sergeant Flori says that he was, in fact, surplus to need.

[61] Sergeant Flori attacks the credibility of the Respondents on the basis of their poor knowledge of staff numbers, and further asserts that it is not credible to suggest that he would even have been available to assist in the issuing of banning orders if, as it transpired, he was sequestered away from the action, deep in the bowels of the Watch House. Yet, the Tribunal does not consider that any importance can be placed upon the evidence about precise police numbers on the Gold Coast, and nor can the Tribunal go much beyond the expressed broad intent to make more sergeants available on the Gold Coast for the envisioned increase in work for sergeants, referable to the new banning orders. The evidence before the Tribunal was that Niland had been advised by Acting Chief Superintendent Lacy that there were staff shortages, on the Gold Coast. Niland obviously accepted that advice and, in response, made the decision to return Sergeant Flori to the Gold Coast. Hollands has given evidence that he was not involved in making the 4 November 2014 transfer decision. When asked during his cross-examination what staffing levels were like at the relevant time, Hollands responded that:²²

That's like asking how long a piece of string is because people are moving in and out all the time. There's 555 officers so it could fluctuate. Sometimes you might be down to about 530. Other times you might be up to, you know, about 550 or something like that so it varies.

²² Transcript of Proceedings, Cross-Examination of Steven Hollands, at 1-43, lines 5-10.

- [62] Niland was not required to independently confirm that the information provided to him by Lacy was correct. When asked during his cross-examination if he could provide the number of police working on the Gold Coast, Niland initially responded that he *'couldn't give you that figure'*. Upon being pressed to estimate/guess, (and despite the Tribunal's indication that knowing precise staffing numbers was unlikely to be helpful to the Tribunal when making this decision), Niland responded with, *'I'd say a thousand'*.²³
- [63] The Tribunal cannot infer nefarious intent from the fact that Niland and Hollands gave wildly different estimates of police numbers. Sergeant Flori's point seems to be that, as one of many officers, it was not necessary for him to be transferred. This argument is however not to the point. The Respondents are not required to demonstrate that Sergeant Flori's transfer was necessary. Rather, they are permitted to take reasonable management action. On the face of it, the decision to have Sergeant Flori returned to his substantive post, on the Gold Coast, on the presumed basis that it was thought he might be needed, and even if ultimately he were not, amounts to reasonable management action.
- [64] Sergeant Flori also argues that he was not returned to his substantive post, as he was initially sent to the Southport Watch House. This is a problematic argument, however, as the actual evidence from Hollands is that Sergeant Flori was sent to the Southport Watch House as part of a rehabilitation plan, in the aftermath of surgery, with the intention being that Sergeant Flori would not be at risk of further physical injury whilst working in the Watch House control room. Hollands indicated that following this period of rehabilitation, Sergeant Flori was then to move back to *'Surfers Paradise Police Station to do your job'*.²⁴
- [65] Again, the decision to initially place Sergeant Flori at the Southport Watchhouse, (particularly in circumstances where the employer owes a duty to ensure a safe workplace), amounts to reasonable management action.
- [66] There is no evidence, save for speculation, capable of founding the basis for Sergeant Flori's case theory that he has been intentionally returned to the *'lion's den'* in reprisal for his 2010 whistle blowing activities. The Tribunal cannot make a decision in Sergeant Flori's favour when confronted with the evidence of the Respondents. The Respondents evidence, when viewed via an objective lens undistorted by conjecture, suggests that the decision to return Sergeant Flori's to the Gold Coast was reasonable, in all the circumstances.
- [67] The Application is dismissed.

²³ Transcript of Proceedings, Cross-Examination of Michael Niland, at 1-35, lines 15-40.

²⁴ Transcript of Proceedings, Cross-Examination of Michael Niland, at 1-48, lines 38-42.