

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *McGinn v Condon* [2019] QCAT 15

PARTIES: **LINDSAY GORDON McGINN**
(applicant)
v
ASSISTANT COMMISSIONER MIKE CONDON
(respondent)

APPLICATION NO/S: OCR025-17

MATTER TYPE: General administrative review matters

DELIVERED ON: 29 January 2019

HEARING DATE: 29 August 2018

HEARD AT: Brisbane

DECISION OF: Member Barlow QC

ORDERS: **1. The respondent's decision be set aside.**
2. The disciplinary matters be dismissed.

CATCHWORDS: POLICE – INTERNAL ADMINISTRATION –
DISCIPLINE AND DISMISSAL FOR MISCONDUCT
– QUEENSLAND – Whether conduct of police sergeant
instructor at and concerning recruit driving course was
police misconduct

Crime and Corruption Act 2001 (Qld), s 219A,
schedule 2
Police Service Administration Act 1990 (Qld), s 7.4, s 14

DA v Deputy Commissioner Stewart [2011] QCATA 359
applied

APPEARANCES &
REPRESENTATION:

Applicant: Self-represented

Respondent: S McLeod, instructed by Ms B Wadley

REASONS FOR DECISION

Introduction

- [1] The applicant is a Sergeant in the Queensland Police Service (**QPS**). In December 2014 and January 2015 he was stationed at the service's Driving Skills Section as a facilitator and coordinator of police recruit driver training.

- [2] The respondent is Assistant Commissioner, Operations Support Command, in the QPS. In September 2016, Asst Cmmr Condon directed Sgt McGinn to attend a disciplinary hearing on a matter of misconduct. It was alleged that he had designed and delivered a recruit driver training course that was too difficult for the majority of recruits to pass and that he had inappropriately attempted to influence the feedback provided by recruits in their course critiques.
- [3] At the conclusion of the disciplinary process, Asst Cmmr Condon decided that Sgt McGinn had engaged in misconduct, as charged, and formally reprimanded him.
- [4] In this tribunal, Sgt McGinn seeks review of that decision. He contends that some of the conduct alleged was not proved, the conduct that was proved does not amount to misconduct and the sanction was excessive.

Jurisdiction, relevant legislative terms and the tribunal's role

- [5] The tribunal's jurisdiction to review Asst Cmmr Condon's decision is conferred on it by s 219G of the *Crime and Corruption Act 2001 (Qld) (CC Act)* and s 17(1) of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld) (QCAT Act)*. The former section gives a right to a "prescribed person" (which includes a member of the police service – see dictionary and s 50(3)(a)(i)) to apply to QCAT for review of a reviewable decision. "Reviewable decision" is relevantly defined, in s 219BA of the CC Act, as "a finding mentioned in the *Police Service Administration Act 1990 [PSA Act]*, section 7.4(2A)(b) that corruption is proved against an officer". The dictionary to the CC Act defines "corruption" as "corrupt conduct or police misconduct". "Police misconduct" is in turn relevantly defined as "conduct, other than corrupt conduct, of a police officer that ... is disgraceful, improper or unbecoming a police officer; or ... does not meet the standard of conduct the community reasonably expects of a police officer".¹
- [6] At this juncture I emphasise that, despite the tribunal's jurisdiction deriving from the CC Act, it is not alleged or suggested, in this matter, that Sgt McGinn has been "corrupt" in the sense that that word might be generally understood in the community. Rather, the allegations and the findings against him are that he has engaged in misconduct, in the sense that his conduct was improper.
- [7] Section 7.4 of the PSA Act relevantly provides that:

- (1) **prescribed officer** means an officer authorised by the regulations to take disciplinary action in the circumstances of any case in question;

QCAT information notice means a notice complying with the QCAT Act, section 157(2).

- (2) An officer is liable to disciplinary action in respect of the officer's conduct, which the prescribed officer considers to be misconduct or a breach of discipline on such grounds as are prescribed by the regulations.

¹ That definition is identical to the definition of "misconduct" in the PSA Act, s 1.4.

(2A) If the prescribed officer –

- (a) decides an allegation of misconduct brought against the officer; or
- (b) when deciding an allegation of breach of discipline brought against the officer, finds that misconduct is proved against the officer;

the commissioner must give a QCAT information notice to the officer

- [8] Finally, under the *Police Service Discipline Regulation 1990 (Qld) (PSDR)*, sections 4(2), 6, 9 and 10, an assistant commissioner may order that a police officer be disciplined, including for misconduct, by a reprimand.
- [9] The result of all these provisions is that a decision to reprimand a police officer for misconduct is reviewable by the tribunal.
- [10] The purposes of disciplinary proceedings are, relevantly, to protect the public, to uphold ethical standards within the police service and to promote and maintain public confidence in the police.² They are not punitive.
- [11] A review by the tribunal is undertaken by way of a fresh hearing on the merits. The purpose of the review is to produce the correct and preferable decision: QCAT Act, s 20. It is not necessary for the applicant to establish any error in the process or the reasoning of the original decision maker and there is no presumption that the original decision is correct.³ The tribunal must reach its own decision, on the material before the original decision maker (subject to the tribunal allowing further material to be put in evidence before it) and is not bound by the latter's findings or conclusions. However, in police disciplinary matters the tribunal should pay considerable respect to the perceptions of the decision maker and should give considerable weight to the view of the decision maker, who might be thought to have particular expertise in the managerial requirements of the police force.⁴

The allegations of misconduct

- [12] The misconduct alleged against Sgt McGinn was that, between 1 December 2014 and 16 January 2015 his conduct was improper, in that:
- (a) he designed and delivered a recruit driver training course that was too difficult for the majority of recruits to pass; and
 - (b) he inappropriately attempted to influence the feedback provided by recruits in their course critique.
- [13] Particulars were given of each of these allegations. As to the first, most relevantly it was alleged that he was responsible for the design and layout of the slow speed assessment course; he included in it a reverse right angle manoeuvre that was too

² *Crime and Corruption Act 2001*, s 219A.

³ *Kehl v Board of Professional Engineers of Queensland* [2010] QCATA 58, 3 [9].

⁴ *Aldrich v Ross* [2001] 2 Qd R 235, 257 [43] (Thomas JA, with whom Pincus JA and Muir J agreed).

hard for the level of skill of the average recruit; a senior constable called on to demonstrate the course early in the recruits' training failed it, yet Sgt McGinn did not check, reassess or adjust the course layout; 11 recruits failed the slow speed assessment and then, after he altered the course on a remedial day, they all passed it.

[14] As to the second matter, it was alleged that, at the conclusion of the last day of the course, Sgt McGinn instructed the recruits on how to complete the course critique and, in doing so:

- (a) he told them not to include personal attacks on instructors and that the QPS has handwriting experts to identify recruits and they could get a bad reputation that could follow them; and
- (b) he encouraged them to write that the course should be longer than seven days.

The parties' approach

[15] As this review constitutes a fresh hearing on the merits, one might have expected the parties to concentrate on the evidence that was before Asst Cmmr Condon and the additional evidence that was tendered to the tribunal (with my leave and without opposition) and to seek to demonstrate whether that evidence did or did not prove that Sgt McGinn had engaged in the alleged misconduct.

[16] However, both parties, to a greater or lesser degree, spent much of their submissions criticising or supporting Asst Cmmr Condon's findings and reasons and the process of the investigation leading to his decision.

[17] Part of Sgt McGinn's submission was that the manner in which the investigation was conducted involved a lack of procedural fairness, particularly as the investigators, on whose report (and the documents that accompanied it) Asst Cmmr Condon substantially relied, did not interview a number of officers who were involved in the development or conduct of the relevant course and were therefore in the nature of eye witnesses to the events, and some of whom were (Sgt McGinn asserted) experts in the field of driver education. Sgt McGinn made those points to Asst Cmmr Condon in his submissions, but they did not persuade him.

[18] In his oral submissions, Sgt McGinn explained, by reference to the evidence, why he submitted that misconduct had not been proved, including (in some instances) why it should not be accepted without the evidence that the investigators did not obtain.

[19] Counsel for Asst Cmmr Condon did not directly engage with Sgt McGinn's approach to the evidence. He submitted that there was sufficient evidence for Asst Cmmr Condon to make the findings and to reach the conclusions that he did and that Sgt McGinn had not demonstrated that Asst Cmmr Condon had adopted an incorrect approach. I understood the effect of his submission to be, relying on Asst Cmmr Condon's findings and conclusions and the evidence before him and before the tribunal, that I should reach the same factual and legal conclusions as Asst Cmmr Condon. He submitted that Sgt McGinn had not demonstrated that those findings and conclusions were wrong, including by not himself obtaining evidence from the witnesses whose evidence he contended was wrongly not obtained by the investigators.

The relevant standard of proof

- [20] The appeal tribunal, constituted by then Deputy President Kingham and Member Browne, said the following about the standard of proof required on review of a police disciplinary matter.⁵ I respectfully adopt their summary, upon which Sgt McGinn specifically relied in his submissions.

[35] The Tribunal must be satisfied the alleged conduct occurred, on the balance of probabilities. Although the purpose of a disciplinary proceeding is not punitive, disciplinary orders may operate as a penalty on the individual, including, as here, preventing the individual from pursuing their occupation. The Tribunal must bear in mind that factor when deciding whether it is satisfied the conduct alleged against a person subject to disciplinary proceedings has been proved.

- [36] Justice Dixon, as he then was, stated the approach to be adopted:

Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.⁶

[37] His Honour's reference to inexact proofs, indefinite testimony or indirect inferences has particular resonance in this case. Where the evidence on critical points has been untested before the Tribunal, particular care should be taken to properly weigh the evidence, such as it is.

First matter - consideration

- [21] The relevant recruit driver training course was a seven day course (to which I shall refer as the principal course). Recruits who failed the principal course were entitled to attend a remedial day in an attempt to pass the segments that they had failed. Relevantly, by way of background, the length of the course had changed from time to time. This was the first time that the principal course was delivered. It was alleged against Sgt McGinn that he considered that seven days were inadequate to train recruits sufficiently well, that he wanted the course length increased and that he was therefore motivated to demonstrate the inadequacy of seven days by initially failing a large proportion of recruits undertaking that course and then passing them after a remedial day.
- [22] It is alleged that Sgt McGinn designed the principal course and, in particular, was responsible for the design and layout of the slow speed manoeuvring (**SSM**) part of the course. He did not identify any issues with the course notwithstanding that one

⁵ *DA v Deputy Commissioner Stewart* [2011] QCATA 359.

⁶ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361.

of the instructors, when demonstrating the course to the recruits, himself failed it. After several recruits failed the course, Sgt McGinn noticed issues with its physical layout but did not rectify them. Eleven recruits failed SSM and three recruits failed other parts of the training course. On the remediation day, Sgt McGinn changed the SSM course layout and all recruits passed it.

[23] Twenty recruits undertook the course. Their assessment booklets (part of exhibit 2) show that 11 of them failed the SSM course, while nine passed. Nine of the 11 who originally failed passed the altered course on the remediation day, but (contrary to the allegation set out above) two failed it again.

[24] Much of the case against Sgt McGinn in this respect was circumstantial. In support of the proposition that he had designed and delivered a seven day course that was too difficult for the majority of recruits to pass, Asst Cmmr Condon made findings that:

- (a) in a curriculum committee meeting at around the time that the course was planned, Sgt McGinn had said, "I don't hope a lot of them fail, I hope they all fail;"
- (b) at a dinner with the recruits, Sergeant Allcock (one of the course instructors) told recruits something to the effect that the course had been shortened from eight days to seven and if a number of recruits failed the seven day course it may be used to justify extending it to eight days;
- (c) in a briefing to the recruits at the beginning of the course, Sgt McGinn said that the recruits had "eight days to tick all the boxes";
- (d) the SSM included a reverse right angle parking manoeuvre that had not been tested and was too difficult for recruits;
- (e) the police officer who demonstrated the course himself failed it, but Sgt McGinn did not alter it after that occurred;
- (f) Sgt McGinn walked the course after some recruits failed, noticed a damaged bollard, but did not rectify it or alter the course;
- (g) the recruits who failed the SSM originally, passed it when the reverse right angle manoeuvre was removed from the course on the remediation day.

[25] In my view, the first two those matters are not relevant to whether Sgt McGinn designed and delivered a course that was too hard for a majority of recruits to pass. Rather, they go to whether Sgt McGinn had an intention and a motive to design such a course. Asst Cmmr Condon was not satisfied that Sgt McGinn had intentionally designed such a course,⁷ a conclusion with which I agree. Rather, he found that he did design such a course and, although he was not wholly responsible for its design, he had a very large portion of that responsibility.⁸ Asst Cmmr Condon found that to

⁷ Exhibit 1, pages 142, 148.

⁸ Exhibit 1, page 148.

design such a course, and also Sgt McGinn's delivery of the course, were unprofessional and constituted misconduct.⁹

[26] At the hearing before me, counsel for Asst Cmmr Condon did not seek to persuade me that Sgt McGinn had intended to design a hard course that would result in a large proportion of recruits failing. Nor was the allegation that Sgt McGinn intentionally designed such a course. Therefore, in my view, the evidence and findings about Sgt McGinn's alleged stated desire that all the recruits fail is not relevant. Sgt McGinn contested the allegation on a number of grounds, but as it is not relevant I need not determine that contest.

[27] Similarly, the evidence of Mr Allcock's statement is not relevant to the charges, as pressed before me. Indeed, in my view that evidence, if accepted, says nothing about Sgt McGinn's state of mind. It was Mr Allcock who expressed or relayed that view, without attribution to Sgt McGinn. It was evidence of nothing against Sgt McGinn.

Design of course

[28] I shall consider first the question whether Sgt McGinn designed a course that was too hard for the majority of recruits to pass.

[29] While the allegation against Sgt McGinn was not limited to the SSM part of the principal course, that was the sole focus of the evidence and consideration of the matter. It was only the SSM that was alleged to be too hard for the majority of recruits to pass.

[30] It is correct that 11 of the 20 recruits failed the SSM assessment during the principal course. However, the particulars were wrong in saying that all recruits passed the SSM on the remediation day, as two of them failed then too (Cook and Edwards). That indicates to me that they would not have passed a simpler SSM course if it had been available during the principal course. Thus, disregarding those two, nine of the 18 (that is, 50%) who ultimately passed the course passed the SSM assessment during the principal course.

[31] The SSM course was obviously hard, but the fact that half of the recruits passed it indicates that it was not too hard for competent and careful recruits to pass. However, it clearly had aspects (particularly the right angle reverse park) that were hard to perform correctly.

[32] The real issues, then, concern the SSM course and are:

- (a) whether Sgt McGinn designed that course; and
- (b) whether the course was clearly too difficult for recruits to pass, so that it was improper for it to be designed that way, resulting in the use or management of human and material resources inefficiently and ineffectively.¹⁰

⁹ Exhibit 1, pages 142, 145.

¹⁰ I take this last phrase from s 13(a) of the Queensland Police Service Standard of Practice. While not in evidence, it was quoted and relied on by Asst Cmmr Condon in his reasons: exhibit 1, page 144.

- [33] Sgt McGinn contends that he cannot be held solely responsible for the SSM course design, as:
- (a) both he and Sgt Deakes – a highly experienced recruit driving instructor - designed the course, in consultation with other instructors;
 - (b) the design was submitted to and approved by a course curriculum committee comprising himself, Sgt Deakes and other competent officers; and
 - (c) the Officer in Charge of the Driving Skills Section, Snr Sgt Jenkin, saw the course, was ultimately responsible for it, and did not oppose or find fault with it.
- [34] It is also relevant, in my opinion, that Snr Sgt Jenkin, after the principal course was concluded, considered the SSM course to be a good layout that was realistic and worked well.¹¹
- [35] Whether the course was so hard that it might be expected that a majority of recruits would be unable to pass it seems to me to have been a matter of judgment, especially at the time the course was designed and before it had ever been implemented. In determining that question, the opinions of experienced police recruit driving instructors would be most relevant. Asst Cmmr Condon himself does not have that expertise.
- [36] Sergeant Stanley was a member of the recruit curriculum committee for the course, but was not involved in delivering this particular course. He had been delivering or assessing such courses for about eight years. He told investigators that he had expressed concerns that undertaking all assessment on the last day of the course may lead to many recruits failing due to fatigue.¹² He did not express any particular concern about the SSM course itself. However, he did say to investigators that, in his experience, there was generally a high rate of recruits failing SSM after only two attempts, but passing after four attempts, although the initial failure rate was not, in his impression, as high as 50% of recruits.¹³
- [37] Sergeant Stanley also said, in answer to questions from an investigator, that if a facilitator demonstrating an SSM course failed it, that would be embarrassing; and if a facilitator and the first six recruits being assessed on a course failed it, that would indicate a problem with the course, but he would not change the SSM course during the principal course; rather, he would reassess the SSM course after the principal course had been completed and make appropriate changes. He also said that he would not make any changes to a course without obtaining Snr Sgt Jenkin's approval, as Snr Sgt Jenkin was the Officer in Charge and had the final say on any course.¹⁴
- [38] I note here that, in interviewing Sgt Stanley, the investigator expressed (quite strongly) his personal view that, if he had been a course instructor and a number of people failed part of a course that he was running, he would stop that part of the

¹¹ Exhibit 1, page 76.

¹² Exhibit 1, pages 864-865.

¹³ Exhibit 1, pages 868-869.

¹⁴ Exhibit 1, pages 870-871.

course and reassess it before allowing it to continue. In my view, it was quite improper for an investigator to express his opinions in this fashion when interviewing a witness. He appeared to be attempting to influence the witness in giving his evidence, where the evidence given did not accord with the investigator's own views. Even worse, he did so even though he expressly acknowledged that he had no expertise in the matter.

- [39] Senior Sergeant Jenkin was interviewed by the investigators. He said that he watched the course to ensure that it was fairly conducted and assessed and was satisfied that it was.¹⁵ He also said that usually, when a new course was designed, it was tested before being utilised in training recruits, by having recent recruits drive the course to identify any aspects of it that might be too hard. However, that was not possible on this occasion (apparently due to timing and the unavailability of recent recruits to test it). So when he watched the course, he noticed some areas that appeared to be too hard and, after the course was completed, he discussed them with members of the curriculum committee (including Sgt Deakes and Sgt McGinn) and they decided to change a couple of areas. That was done for the remedial day, when all but two of the recruits passed.¹⁶
- [40] Senior Sergeant Jenkin went on to say that, having tested the course using facilitators (because no recruits were available), they added some bollards to try to help recruits, but until he saw recruits do it he could not say whether it was too hard.¹⁷ One might ask, if that was the case, how another person such as Sgt McGinn could say whether it was too hard until then. He also said that it was intended that each recruit would have an opportunity to make four, rather than two, attempts at the SSM (and other) parts of the course, which had been the usual process, but without trialling the whole course (which was new) he could not tell whether there was time to do so. As it turned out, there was only time for two attempts, which made it necessary to schedule a remedial day later for those who failed in two attempts.¹⁸
- [41] Other than Snr Sgt Jenkin and Sgt Stanley, the investigators did not interview any of the curriculum committee members or the instructors who delivered the principal course. In particular, as Sgt McGinn pointed out in his submissions, they did not interview any of the other officers concerned who were experts in driving tuition and assessment: particularly Sergeants Deakes, Duell, Hardcastle and Sparey, all of whom (particularly Sgt Deakes) were highly experienced in the area.
- [42] In my opinion, the evidence of the experienced people who were interviewed supports the proposition that the course as originally designed was not obviously too difficult for the majority of recruits to pass. It was designed and approved by a committee and the Officer in Charge (most or all of whom had considerable expertise in the area) in unusual circumstances, where it could not be tested by recent recruits before being implemented. Before it was conducted, nobody involved in its design and approval identified any relevant problems with it. The fact that it was perhaps too difficult became apparent during the course and changes

¹⁵ Exhibit 1, pages 609, 618-619.

¹⁶ Exhibit 1, page 611.

¹⁷ Exhibit 1, pages 612-613.

¹⁸ Exhibit 1, pages 614-616.

were made to it after the course and before the remedial day. Apart from the inability to test it, none of this process was unusual.

- [43] The absence of evidence from most of the persons with relevant expertise is also concerning. I would have thought that it behoved the investigators to interview all relevant people – particularly those with relevant expertise. Their failure to do so – and Asst Cmmr Condon’s refusal to require them to interview Sgt Deakes (as Sgt McGinn had requested) – was very unfair to Sgt McGinn and did not assist Asst Cmmr Condon or this tribunal.
- [44] In the circumstances, in my view the responsibility for the design of the course cannot be placed solely (if at all) on Sgt McGinn. Nor does the evidence demonstrate that Sgt McGinn (or anyone else) was in any way acting improperly in designing the course.
- [45] I consider that the first part of matter one is not proven.

Unprofessional delivery

- [46] The second part of matter one is the allegation that Sgt McGinn delivered (as opposed to designed) a course that was too difficult. In a real sense, that has been determined by my dismissal of the case that the course was too difficult. However, the particulars of the matter appear to include not just the difficulty of the course but the manner in which Sgt McGinn delivered it. Asst Cmmr Condon appears to have taken the view that the matter incorporates such an element and he found that Sgt McGinn was unprofessional in his delivery in a number of respects. I shall therefore examine those aspects of the matter.
- [47] The first issue concerns evidence that Sgt McGinn told recruits that they had “eight days to tick all the boxes”. I accept (as Asst Cmmr Condon found) that Sgt McGinn did say something to that effect on the first day of the course. However, it is clear from the evidence of the recruits, as well as that of Sgt McGinn, that the context was that he was telling the recruits that the course was seven days, but that there was an eighth day available if needed to “tick all the boxes” (ie, pass all the necessary assessments). That was, in fact, correct. Recruits were entitled to further training and re-assessment on an eighth (remedial) day, in any part of the course that they had not passed during the principal course.
- [48] In my opinion, it cannot be said that it was improper or unprofessional, let alone misconduct, for Sgt McGinn to describe the course in that fashion. Rather, it was accurate, although colloquially stated. While I accept that Asst Cmmr Condon might be thought to have particular expertise in the managerial requirements of the police force, I do not accept that he has correctly applied those requirements in this case, particularly when one disregards the evidence to the effect summarised above at paragraphs [24](a) and [24](b) above.
- [49] Also relevant to the delivery of the course is that one instructor failed it when demonstrating it, but Sgt McGinn did not check, reassess or adjust the course layout. That is correct, but Sgt McGinn says that:
- (a) at the time, he and the Officer in Charge (Senior Sergeant Jenkin, who was present) agreed that that was the instructor’s fault and neither Snr Sgt Jenkin

nor any other instructor suggested that the course layout should be checked, reassessed or altered;

- (b) another, very experienced, instructor - Sergeant Deakes – then took each recruit through the course, while a passenger, giving individual feedback to them;
 - (c) it was unnecessary in the circumstances to reassess or alter the course.
- [50] This seems to be consistent with the evidence of Snr Sgt Jenkin that any difficulties with the course could really only be properly identified by having recruits drive it.
- [51] The next part of the “delivery” of the course was that Sgt McGinn did not alter the course after a number of recruits had failed it and he became aware of a damaged bollard on the course.
- [52] I would not have thought that the mere fact that a significant proportion of recruits had failed the course would necessarily require that the course be altered, when an equally significant proportion had demonstrated that it could be passed. Nor can I understand the relevance of the damaged bollard. Asst Cmmr Condon did not attribute any particular significance to that item, stating in his reasons, “This is a minor consideration”¹⁹ In particular, there is no evidence to which my attention has been drawn, nor that I have found, that the damaged bollard caused any recruit to fail the SSM part of the course.
- [53] Sgt McGinn also points to an email that he received from Snr Sgt Jenkin in the week after the course was conducted (before the remedial day), in which Snr Sgt Jenkin wrote:
- “The slow speed assessment is a good layout and is more realistic and worked well as did UUD2. Did you get any feedback from the recruits on how they found the day? The ones that passed would be jumping for joy but the ones that failed might not be ...”
- and
- “The course ran well and I must congratulate you on the work you did.”
- [54] Snr Sgt Jenkin had in fact attended the course from time to time, in particular to review Sgt McGinn’s conduct of the course and to ensure that it was conducted fairly. His views on Sgt McGinn’s performance, as well as his failure to make any suggestion, during the course, that it was too hard for the recruits, are significant, especially given his position as Officer in Charge and his apparent expertise in driver instruction.
- [55] In my view, Snr Sgt Jenkin’s presence at the demonstration and at other times during the course and his subsequent comments demonstrate that there was nothing improper in the manner in which Sgt McGinn delivered the course.
- [56] Asst Cmmr Condon also appears to have considered that Sgt McGinn was unprofessional in the manner in which he conducted curriculum committee

¹⁹ Exhibit 1, page 141.

meetings, as they were conducted informally without any minutes or recording of decisions. That appears to have contributed to his decision on sanction, if not on liability. In my opinion, that was both irrelevant (as it was not part of the matters charged) and unfair to Sgt McGinn. While Sgt McGinn had substantial input into the committee and clearly expressed his opinions forcefully, Snr Sgt Jenkin was the senior officer on, or associated with, the committee and was the Officer in Charge of the Driving Skills Section. It would surely have been Snr Sgt Jenkin's responsibility to decide how curricula should be determined and how curriculum committee meetings and associated matters should be documented.

[57] I consider that it has not been demonstrated that Sgt McGinn delivered the course in an improper manner.

[58] In my view, therefore, matter one has not been made out.

Second matter - consideration

[59] The second matter concerns the actions of Sgt McGinn on the last day of the principal course, when recruits were asked to provide written feedback (referred to as critiques) about the course.

[60] There is not much dispute about what Sgt McGinn said about the critiques. His evidence, which largely accords with that of the recruits who were interviewed, is that he said words to the effect of "don't put things that are unrealistic. ... It might be your first QPS critique and as such it is not the forum to take anonymous cheap shots at instructors who you think may have failed you. Instructors here are police doing the best they can with what they've got so discriminatory remarks are not appreciated. Some will identify you with our handwriting experts where you do. I've seen it happen in the past."

[61] The recruits mostly said that Sgt McGinn said similar words. For example, Recruit Laing said, in a statement, that Sgt McGinn had said words to the effect of "if you failed don't make a personal attack on the form about anyone, by all means make comments. The Queensland Police is a small family and if you do make a personal attack on anyone we have handwriting specialists to see whose writing and if we find out who it is there will be consequences."

[62] Some recruits, but not all, also said Sgt McGinn suggested that they make a comment in their critique that the course should be longer.

[63] It is clear to me that Sgt McGinn made a comment to the effect that the recruits should not make personal attacks on individual instructors, but should comment on the course. I do not consider a comment to that effect to be in any way improper. The principal purpose of a course critique is no doubt to assist QPS to improve the course.

[64] It is also undisputed that Sgt McGinn made a statement that the QPS has handwriting experts who could identify who wrote something. He says he made that comment in jest. I should have thought that most people would take that as a joke. However, in the context of the QPS, the inexperience of the recruits, and where the senior officer present makes such a joke to a group of recruits, I consider it to have been inappropriate. It could be taken seriously by some people and should not have been made.

- [65] I am also satisfied that Sgt McGinn made a statement to the effect that, in commenting on the course, if the recruits considered it should be longer they should say so. I do not consider such a comment to be inappropriate. Sgt McGinn and several officers (including Snr Sgt Jenkin) considered – to greater or lesser degrees – that seven days were too few to fit the curriculum and assessment comfortably. The fact that recruits could only be given the opportunity to make two, rather than four, attempts at the SSM assessment, was itself indicative that there was insufficient time to complete everything comfortably. This was the first time that this seven day course – shortened from eight days – had been undertaken and it was necessary and appropriate for the service to assess whether or not it was successful. Therefore I do not consider that Sgt McGinn was unprofessional or acted inappropriately in making such a comment. While I acknowledge Asst Cmmr Condon’s expertise and experience in the managerial requirements of the QPS, I respectfully disagree with him that, in the circumstances, this comment was inappropriate.
- [66] Therefore, in respect of matter 2, I consider that Sgt McGinn acted inappropriately in one respect, namely making the comment about handwriting experts and consequences.
- [67] However, the allegation is not that Sgt McGinn’s conduct was improper in that he made inappropriate or “unprofessional” statements. It is that he acted improperly in that he inappropriately attempted to influence the feedback provided by recruits in their course critique.
- [68] Sgt McGinn’s comment was made in the course of advising the recruits about the nature of appropriate feedback – namely, that they should not make personal attacks on individual instructors, but should comment on the course content and structure. In that sense, he was attempting to influence the nature of the feedback provided but, as I have said above, to give such advice was not inappropriate.
- [69] Sgt McGinn made the inappropriate comment in association with that advice. However, I do not consider that he said it intending that it be taken seriously and that therefore recruits may not make valid criticisms of the course. He gave clear evidence to the investigators, and submitted to Asst Cmmr Condon and to this tribunal, that he did not make this statement intending that it would influence the recruits even though, in hindsight, it could be seen as such an attempt, but rather as what he thought was an obvious joke. His evidence in this respect was not discredited, in my opinion. Particularly in light of the standard of proof in such cases,²⁰ his evidence in that respect should be accepted. Therefore, in making it, he was not attempting to influence the recruits’ feedback. One can only attempt something with an intention to do it. With respect, I consider that Asst Cmmr Condon has failed to appreciate the distinction between an inappropriate statement and an attempt (which must be intended) at achieving a result by making that statement.
- [70] Therefore, I do not consider that the comment, although inappropriate, was made in an attempt to influence the recruits’ feedback. Matter two has not been made out.

²⁰ See paragraph [20] above.

Conclusions

- [71] I have found that neither matter is substantiated. It is therefore unnecessary for me to go on to consider the remaining questions that would have arisen had I found either matter proved: namely, whether the conduct amounted to misconduct and what, if any, sanction should be imposed.
- [72] The appropriate orders are that Asst Cmmr Condon's decision be set aside and the disciplinary matters be dismissed.