QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Jones v Acting Assistant Commissioner Horton* [2020] QCAT 304
PARTIES:	**LYNETTE JONES** (applicant) **v** **ACTING ASSISTANT COMMISSIONER GLENN HORTON** (respondent)
APPLICATION NO/S:	OCR214-20
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	6 August 2020
HEARING DATE:	5 August 2020
HEARD AT:	Brisbane
DECISION OF:	Member Richard Oliver
ORDERS:	**Application for a stay is dismissed**
CATCHWORDS:	POLICE – INTERNAL ADMINISTRATION – DISCIPLINARY PROCEEDINGS – APPLICATION TO STAY A DECISION – where applicant found to have engaged in misconduct in workplace relations with co-workers – where conduct negatively impacted co-workers – where misconduct substantiated – where sanction imposed including local transfer from Forensic Services Group – where applicant currently engaged in accreditation within Forensic Services Group to advance to rank of Sergeant – whether the local transfer will prevent the applicant from completing the accreditation – whether prejudice to the applicant if stay not granted – whether arguable case on the merits – whether balance of convenience favours a stay. *Queensland Civil and Administrative Tribunal Act* 2009 s 22 *Police Administration Act* 1990 ss 7.35, 7.38, 11.20 and 11.22 *Police Service Administration (Discipline reform)and Other Legislation Amendment Act* 2019 *Jones v State of Queensland (Queensland Police Service* (no 3) [2020] QIRC 047 *Erathnage v Medical Board of Australia* [2016] QCAT 418.

APPEARANCES & REPRESENTATION:

Applicant:	Mr Black of counsel instructed by Maurice Blackburn Lawyers
Respondent:	Mr Nicholson of counsel instructed by Mr Capper of the Queensland Police Legal Unit

REASONS FOR DECISION

[1] The applicant is a Senior Constable with in excess of 30 years service as a sworn police officer. She was the subject of disciplinary charges brought against her for engaging in negative workplace behaviour between 1 December 2013 and 30 April 2018. The particulars of the behaviour are wide ranging and form part of the complaint in Matter 1 and set out in some detail in the respondent's decision on sanction made on 24 June 2020.

[2] Earlier the respondent found that the allegations of negative workplace behaviour were substantiated in his decision on 18 May 2020. Subsequently, and after receiving submissions from the applicant on the level of sanction that should be imposed, he made the following decision:

> 1. You are demoted from Senior Constable Paypoint 10 to Constable Paypoint 6 for a period of three (3) months.
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> Your demotion is suspended on the following conditions:
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> (a) You have no further allegations of misconduct substantiated against you for a six (6) month period; and
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> (b) You satisfactorily complete a Performance Development Assessment within six (6) months of commencement in a new position;
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> and
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> 2. You are locally transferred from Forensic Services Group to another position at the determination of the Assistant Commissioner, Operations Support Command.

[3] On 21 June 2020, the applicant filed an application to review the respondent's decision on the following grounds:

> 1. The respondent had no power or authority to make the decision under review.
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> 2. Alternatively, the respondent should have found on the merits that the disciplinary charge was not proved.
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> 3. Alternatively, the only disciplinary sanction that the respondent should have imposed was a local transfer (combined with a professional development strategy).

[4] Soon after on 27 July 2020, the applicant filed an application to stay the respondent's decision on the sanction principally on the ground that she would be significantly prejudiced in her career if the sanction with respect to local transfer was put into effect. The applicant has filed a brief submission which is annexed to the application for a stay and has also filed a further affidavit on 3 August 2020 addressing the circumstances that have prevailed in the last week with respect to the local transfer from the Forensic Services Group (FSG) to the Railway Squad. Although both these documents address the balance of convenience and prejudice to the applicant if the transfer proceeds, they do not address, in any significant way, whether the applicant has prospects of success or an arguable case on the substantive application setting aside the respondent's decision on substantiation. If the review application is dismissed the sanction will remain in place, it has not been challenged. The question of whether the review application has merit is relevant in considering whether to stay the respondent's decision. However, as set out below this was addressed to some extent in oral argument by counsel for the applicant.

[5] In respect of the prejudice, the applicant contends that:

(a) she has been attached to the Forensic Imaging Section of the FSG as a photographic officer since March 2016;

(b) since April 2018, and as a consequence of the disciplinary proceedings brought against her, she has been temporarily attached to the Coronial Support Unit which prevents her from attending the FSG;

(c) her current appointment as a photographic officer in the FSG has continued despite this redeployment;

(d) as a consequence of a decision in the Queensland Industrial Relations Commission of 13 March 2020,[1] the applicant has been permitted to attend the forensic section every Tuesday and Thursday evenings between 6pm and 10pm to undertake necessary theoretical accreditations to progress to the rank of Sergeant;

(e) on 22 July 2020 the applicant was informed that she was being transferred from the FSG to the Railway Squad where she is to undertake general duties;

(f) the transfer would prevent her from continuing her accreditation in the FSG and she will no longer hold the position as a photographic officer;

(g) She retires form the QPS in September 2021 and if she is successful in her review application there may be insufficient time for her to complete the requirements for promotion to sergeant before retirement.

[6] The applicant submits that in the absence of a stay, her permanent position in the FSG will come to an end and she will not be able to have access to the forensic facilities and those resources necessary for accreditation. Then of course if she is successful on the review application she would return to the to the FSG but time will have marched on with irretrievable consequences at this late stage of her career. Without attempting to predict a time frame for the final decision in the substantive

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1 *Jones v State of Queensland (Queensland Police Service* (no 3) [2020] QIRC 047.

application the reasonable expectation is that it will be at least the latter part of 2020 if not early 2021 before the review application is determined.

[7] In considering whether to grant a stay, the Tribunal must have regard to s. 22 of the *Queensland Civil and Administrative Tribunal Act* which, under sub-section 3, permits the Tribunal to stay the operation of all or part of a reviewable decision if a proceeding for the review of the decision has started under the Act. The only part of the sanction sought to be stayed is the 'local transfer'. That the applicant has accepted part of the sanction by participating in the professional development strategy as directed. The demotion of course is suspended. In considering whether to impose a stay, the Tribunal can have regard to the following:

(a) the interests of any person whose interests may be affected by the making of the order or the order not being made;

(b) any submission made to the Tribunal by the decisionmaker for the reviewable decision;

(c) the public interest.

[8] In *Erathnage v Medical Board of Australia*[2], the Deputy President said:

> The words of sub-section (4) give the Tribunal a broad discretion, taking into account those matters therein referred to. These are the matters to which any application for a stay should address. It may be that in addressing those matters, questions of the utility of any application and whether there is an arguable case must also be considered. They are matters which one would expect to be encompassed by the requirement that the Tribunal consider the submissions made by the decisionmaker for the reviewable decision and the public interest.

[9] In considering the interests of the person who may be affected by making of the stay orders, plainly the applicant's interest will be affected if not made but that is a consequence of the finding of misconduct. This is also relevant when considering the balance of convenience. The respondent's interest are also affected because there is a need to ensure that the disciplinary processes are seen to be transparent and effective in the administration of the QPS and there is a harmonious workplace.

[10] The history of the matter indicates that the complaints the subject of the charge are numerous and involve the personal relationship between the applicant and other officers in the FSG. The complaints range over a number of years. The first notice of the disciplinary proceedings first occurred in 2018. Then there was some delay for a variety of reasons set out below. Ultimately the original prescribed officer, Acting Assistant Commissioner Nicholson, had to handover the investigation to the current respondent. Since 2018, the applicant has been assigned to the Coronial Support Unit and has continued there on a re-deployment without any adverse consequences to the QPS. If this were to remain the case and save for what is said above, it is difficult to see how a stay would cause any adverse prejudice or impact the interests of the respondent. But the fundamental reason for the stay is so the applicant can continue her accreditation to progress to sergeant and this will inevitably involve her return to the FSG for practical work. Given what has occurred this potentially will

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2 [2016] QCAT 418.

have an adverse impact on the workplace and therefore the interests of the QPS are impacted.

[11] The tribunal must also take into account the submissions of the respondent. Written submissions have been filed which address the history of the matter and importantly, that the sanction imposed reflects the sanction the applicant submitted ought be imposed if substantiation of Matter 1 was found by the respondent. The respondent submits that for the applicant to now seek a stay on the sanction she actually sought to be imposed is inconsistent. However, as the applicant contested the charge in the disciplinary hearing and now seeks a review of the substantiation of the charge, the concession made in respect of sanction seems irrelevant to this application.

[12] As for public interest considerations, this is an important feature of police disciplinary proceedings. However, here this matter is an internal disciplinary proceeding and although public confidence in the QPS is a very important consideration in any disciplinary proceeding, and in considering whether to grant the stay, here the public interest will not be adversely impacted if a stay was granted.

[13] Aside from s 22(4) there are other considerations, which to some degree overlap with those matters. In *Deputy Commissioner Ian Stewart v Kennedy*[3] Member Thomas reiterated the fundamental questions that also have to be asked in a stay application that is whether the applicant has an arguable case and does the balance of convenience favour the granting of a stay.[4]

[14] Whether there is an arguable case on the substantiation of the allegations made against the applicant, and as found by the respondent in his decision of 18 May 2020 requires a consideration of a substantial body of material, with numerous complainants over an extensive period of time. It is difficult on this stay application to make an informed determination as to whether there is an arguable case, which was acknowledged by counsel for the applicant. What the applicant did rely upon was reference to a number of the particulars in support of Matter 1, particulars 1(i), 1(vii) and 1(xii). It is submitted that when considering those particulars and the respondent's findings in respect of them, the factual basis as found could not, on their face, amount to misconduct. Even accepting the argument that the respondent did not discharge the onus of establishing that there was misconduct in respect of these particulars, there were numerous other particulars of conduct between 2013 and 2018 that were relied upon to substantiate Matter 1. I am not satisfied that the applicant has established that she has an arguable case in respect of substantive charge of improper conduct and negative workplace behaviour.

[15] The second basis upon which the applicant contends she has an arguable case is that the respondent lacked the legislative power to undertake the disciplinary proceeding and impose the sanction.

[16] Part 7 Division 1 of the *Police Administration Act* 1990 was amended in October 2019 by the *Police Service Administration (Discipline reform)and Other Legislation Amendment Act* 2019. These two Acts have been described in the submissions as the 'Old Police Act' and the 'New Police Act'. I will adopt that description.

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3 [QCATA] 254

4 Ibid [17].

[17] The New Police Act included transitional provisions for disciplinary proceedings that had been commenced under the Old Police Act but not finalised before the commencement of the New Police Act. The applicant contends that the proceeding before the respondent was not one that was picked up in the transitional provisions, particularly s 11.22 because subsection (1) has not been satisfied:

> (1) This section applies if-
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> (a) Misconduct or a breach of discipline is alleged to have occurred before the commencement; and
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> (b) A disciplinary proceeding for the alleged misconduct or breach of discipline-
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> (i) has not been started before the commencement; or
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> (ii) was started before the commencement but has been or is withdrawn with the officer's consent.

[18] A Disciplinary Proceeding Notice had been issued by AAC Mickelson on 22 August 2019. After this the applicant sought to have the proceeding dealt with by way of an Abbreviated Disciplinary Process. That process was put in train but then on 8 November 2019 after the commencement of the New Police Act, the applicant declined to participate in that process. Then on 9 January 2020, a new Disciplinary Proceeding Notice was issued by AAC Mickelson. However, because of his imminent retirement, the process had to be reallocated to another prescribed officer, the respondent, who then issued a further Disciplinary Proceeding Notice to the applicant on 14 February 2020.

[19] The applicant submits that because a disciplinary proceeding had been started before the commencement of the New Police Act the transitional provision does not apply. However, even if this is correct the respondent argues that s 11.20 applies because under that section the disciplinary proceeding had started and had not been finally dealt with prior to the commencement of the New Police Act. There is some considerable force to this argument.

[20] It is not for me to finally determine the issue of the applicability of the transitional provisions to this matter on this application, but only to decide if there is an arguable case. It does seem reasonably clear that the transitional provisions, particularly s 11.20 are designed to cover the circumstances involved here. Another feature is that the applicant was content to rely on the New Police Act in her submissions on sanction by asking for a local transfer, as defined in s 7.38 and as one of the actions the respondent was authorised to take under s 7.35.

[21] Having regard to all of these matters I am not satisfied that there is an arguable case on the merits and in respect of the applicability of the transitional provisions in the applicant's review application. On this basis the sanction of a local transfer is consistent with what the applicant submitted was appropriate if the charge was substantiated.

[22] That then leads me to the balance of convenience which is an important consideration in any stay application. The applicant submits that she is not seeking to return to the FSG, but that she should remain where she is currently deployed but continue as a permanent member of the FSG so she can continue the accreditation as

directed by the QIRC. If a stay is not granted then the decision of the QIRC becomes redundant.

[23] Generally the balance of convenience favours the applicant in this case because her career progression, on the evidence submitted, will be impacted if the stay is not granted. But, there are also practical considerations to take into account. Although there is no direct evidence before the Tribunal about the practicalities of the applicant finishing her accreditation in the FSG, I have been referred to the reasons of Commissioner Thompson in the QIRC decision[5], where he sets out in some detail the evidence of the officer in charge of the FSG, which details the difficulty of including the applicant in the workplace 'without exposing the staff to risk'. What he describes is a toxic workplace with the applicant on staff having regard to the history of complaints against her as particularised in the respondent's decision. In addition to attending the theory part of the accreditation, the applicant is also required to undertake practical work as well, which will involve interaction with those who have made complaints against her. It seems to me that the only way there can be a successful re-integration to the FSG is if her review application is successful.

[24] Given the applicant's years of service, and although there is no direct evidence of this other than an assertion in the submissions, the applicant can apply for advertised sergeant's positions in her new role in the usual way.

[25] I am also mindful of what was said in *Kennedy* that cogent reasons are needed before staying and order following a regular investigation and determination.[6] That has occurred here and has been ongoing for some years.

[26] Given the circumstances of this case I am not satisfied that the balance of convenience does favour the applicant. There is clear potential prejudice to the QPS in the workplace having regard to the history of conduct over an extensive period of time.

[27] The granting of a stay is discretionary but the discretion must be exercised on the usual principles and also having regard to s 22 of the QCAT Act. There are some aspects of the application which favour the granting of a stay particularly if the applicant remains where she is in the Coronial Support Unit. However, that redeployment is a matter for the Commissioner and not the tribunal. More importantly, I am not satisfied that here is an arguable case on the merits and that the balance of convenience warrants the granting of a stay. The better course is to have this review application determined at the earliest opportunity.

[28] The application for a stay is dismissed.

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5 Paragraphs [140] – [145].

6 Noting of course that *Kennedy* involved a dismissal.