

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *JB v Director-General Department of Justice and Attorney-General* [2021] QCAT 433

PARTIES: **JB**
(applicant)
v
DIRECTOR-GENERAL DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL
(respondent)

APPLICATION NO/S: CML386-20

MATTER TYPE: Childrens matters

DELIVERED ON: 21 December 2021

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Traves

ORDERS: **1. The decision of the Director-General, Department of Justice and Attorney-General made on 10 September 2020 that this is an “exceptional case” within the meaning of s 221(2) of the *Working with Children (Risk Management and Screening) Act 2000* (Qld) is set aside and replaced with the Tribunal’s decision that there is no exceptional case.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – review of decision by respondent to issue a negative notice

FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – OTHER MATTERS – blue card – application for review of decision to issue negative notice – where applicant has several convictions and charges arising out of a single event – where the offences were not serious or disqualifying offences under the *Working with Children (Risk Management and Screening) Act 2000* (Qld) – where applicant discharged - whether this is an exceptional case in which it would not be in the best interests of children for the applicant to be given a working with children

clearance.

Human Rights Act 2019 (Qld), s 12, s 23, s 26(2), s 27, s 28, s 36(2), s 58

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 19, s 20, s 24, s 66

Working with Children (Risk Management and Screening) Act 2000 (Qld), s 221, s 226

Commissioner for Children and Young People and Child Guardian v FGC [2011] QCATA 291 *Commissioner for Children and Young People and Child Guardian v Maher* [2004] QCA 492

DAW v Director-General, Department of Justice and Attorney-General [2020] QCAT 137

APPEARANCES & REPRESENTATION:

Applicant: Self-represented

Respondent: Ms CA Davis, Blue Card Services, Department of Justice and Attorney-General

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*

REASONS FOR DECISION

- [1] The applicant, JB, is a qualified early childhood teacher. JB held a blue card in Queensland from 10 August 2016 to 10 August 2019 and holds a working with children clearance in New South Wales, which expires on 13 July 2026.
- [2] On 5 October 2019 JB was with two other women on a night out in Surfers Paradise. They were all intoxicated. JB became aggressive and abusive towards members of the public, security guards and police officers. JB's violent and unruly behaviour that night resulted in convictions of several offences: commit public nuisance within licensed premises or in the vicinity of licensed premises; assault offences and offences involving police officers. JB also has a conviction for possessing dangerous drugs on 6 October 2019. I have summarised the nature of JB's offending behaviour below.
- [3] The respondent department proposed to issue JB with a negative notice and so invited her to make submissions about whether or not hers was an 'exceptional case'.
- [4] On 10 September 2020 a decision was made to issue JB a negative notice on the basis hers was an 'exceptional case' in which it would not be in the best interests of children for her to be issued with a blue card.
- [5] On 25 September 2020 JB filed an application for review of that decision that hers' was an 'exceptional case'.

Overview of relevant statutory provisions

- [6] The Tribunal must decide the review in accordance with the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') and the *Working with Children (Risk Management and Screening) Act 2000* (Qld) (WWC Act).¹ The purpose of the review is to produce the correct and preferable decision,² on the evidence before it and according to law.
- [7] In meeting that purpose the Tribunal must hear and decide the review by way of a fresh hearing on the merits.³ On review, the Tribunal may confirm or amend the decision, set the decision aside and substitute its own decision, or set aside the decision and return the matter for reconsideration to the original decision-maker.⁴
- [8] The object of the WWC Act is to promote and protect the rights, interests and wellbeing of children by, in effect, screening persons engaged in employment or businesses that may involve working with children. It is protective legislation.
- [9] A child related employment decision, which is defined to include a 'chapter 8 reviewable decision', is to be reviewed under the principle that the welfare and best interests of a child are paramount.⁵ The overriding concern is the potential for future harm to children.
- [10] Pursuant to s 221(2) of the WWC Act, given the nature of the offences of which JB has been convicted, a working with children clearance must be issued unless the Tribunal is satisfied an exceptional case exists in which it would not be in the best interests of children to do so.
- [11] The term 'exceptional case' is not defined in the WWC Act. It has been observed, by the Queensland Court of Appeal in *Commissioner for Children and Young People and Child Guardian v Maher*⁶ that:
- ... it would be most unwise to lay down any general rule with regard to what is an exceptional case All these matters are matters of discretion.⁷
- [12] Thus, what might be an exceptional case is a question of fact and degree, to be decided in each individual case having regard to:
- ...the context of the legislation which contains them, the intent and purpose of that legislation, and the interests of the persons whom it is here, quite obviously, designed to protect: children.⁸
- [13] The object of the WWC Act is, as set out in s 5, to promote and protect the rights, interests and wellbeing of children and young people in Queensland through, relevantly, screening persons employed in particular employment. The principles under which the Act is to be administered are:
- (a) the welfare and best interests of a child are paramount;

¹ QCAT Act, s 19(a).

² QCAT Act, s 20(1).

³ QCAT Act, s 20(2).

⁴ QCAT Act, s 24(1).

⁵ WC Act, s 6(a); s 360.

⁶ [2004] QCA 492.

⁷ Ibid at [34]; applied in *Commissioner for Children and Young People and Child Guardian v FGC* [2011] QCATA 291 at [33].

⁸ *Commissioner for Children and Young People and Child Guardian v FGC* [2011] QCATA 291 at [31].

(b) every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing.⁹

- [14] In deciding whether there is an exceptional case in circumstances where the applicant has been convicted of, or charged with, an offence, the Tribunal must have regard to the criteria in s 226(2) of the WWC Act.¹⁰ They are not, however, an exhaustive list of considerations.
- [15] It has been held that in determining whether an 'exceptional case' exists that "the Tribunal [is] required to be satisfied on the balance of probabilities, bearing in mind the gravity of consequences involved, that there [is] an exceptional case".¹¹
- [16] The Tribunal, when conducting a review of a child-related employment decision, is a 'public entity' and, as such, subject to the *Human Rights Act* 2019 (Qld) (HRA). Under s 58, it is unlawful for a public entity to make a decision in a way that is not compatible with human rights or without giving proper consideration to a human right relevant to the decision. Human rights relevant to JB would include: the right to privacy (HRA, s 21); the right to take part in public life (HRA, s 23); the right to further vocational education and training (HRA s 36(2) and JB's cultural rights (HRA, ss 27-28).
- [17] The human rights of children are also engaged by this review. They are the right of every child to "the protection that is needed by the child, and is in the child's best interests, because of being a child" as provided for in s 26(2) of the HRA.

Is this an exceptional case?

- [18] In deciding whether there is an 'exceptional case' in circumstances where the applicant has been convicted of, or charged with, an offence the Tribunal is obliged to consider the factors in s 226(2) of the WWC Act.

Consideration of s 226 factors

Whether the offence is a conviction or charge: s 226(2)(a)(i)

- [19] JB has convictions arising out of her conduct on 5 October 2019 for:
- (a) unlawful assault occasioning bodily harm whilst armed (x2);
 - (b) assaults occasioning bodily harm;
 - (c) serious assault (police officer);
 - (d) commit public nuisance; and
 - (e) obstruct police officer (x3).
- [20] JB also has a conviction for possessing dangerous drugs on 6 October 2019.
- [21] JB also has charges for the following offences arising out of her conduct on 5 October 2019:
- (a) assaults occasioning bodily harm whilst armed/in company (x2); and
 - (b) assaults occasioning bodily harm.

⁹ WWC Act, s 6.

¹⁰ WWC Act, s 226(1).

¹¹ *Maher* at [30].

- [22] The prosecution offered no evidence in relation to the charges and JB was discharged.

Whether the offence is a serious or disqualifying offence: s 226(2)(a)(ii)

- [23] The offences with which JB has been convicted and charged are neither serious offences or disqualifying offences within the meaning of the WWC Act.

When the offences were committed or allegedly committed: s 226(2)(a)(iii)

- [24] All bar one of the offences were committed on 5 and 6 October 2019 during JB's night out in Surfers Paradise. JB is subject to a probation order until February 2022.

- [25] I accept the respondent's submission that the recency of JB's offending supports a finding that there is an exceptional case.

The nature of the offence and its relevance to employment, or carrying on a business that involves or may involve children: s 226(2)(a)(iv).

- [26] JB was convicted of several offences arising out of her conduct on the 5 and 6 October 2019.

(a) Assault offences: charges 2, 3 and 4

- [27] JB was one of 3 women that tried to gain re-entry at a nightclub. Security denied them entry and asked them to leave. They refused to leave and barged past security heading towards the entry/exit glass sliding door. A security officer offered to take JB upstairs to reception to check if her mobile phone had been handed in. As JB was taken upstairs she started ranting, swearing and became abusive.

- [28] She was told that, due to her behaviour, she had to leave immediately whereupon she became argumentative towards the security officer and suddenly attacked him while they were on the stairs by removing her shoe and striking him with the stiletto heel. The security officer defended himself by blocking the heel with his arm, breaking the skin.

- [29] When they got downstairs JB's female friend re-entered the foyer entrance. The security officer tried to remove her and while he was doing so, JB ran and jumped on his back, causing him to fall. JB also kicked another security officer in the knee.

- [30] The melee continued outside the hotel, when the female manager on duty picked up JB's shoe and handed it to her. JB used the shoe to strike her with the stiletto heel, injuring her forearm.

- [31] JB then refused to co-operate with police and was arrested.

(b) Offences involving police officers: charges 5, 6, 7 and 8

- [32] Police attempted to take up with JB who was walking away from police. Police called out to her but she continued walking and then stopped to say "don't touch me". When told she was under arrest she swore and resisted arrest by screaming, kicking an officer in the shin and biting another officer on the thigh. JB also continued to drop her weight when being removed from the roadway, despite being instructed to stop.

(c) Public nuisance: charge 1

- [33] A patron informed security that a woman in a green dress (JB) was “fighting people in the driveway” and that she should not be let into the hotel because she was “quite violent”.
- [34] JB had confronted a woman on a chair waiting for an Uber. JB approached her, grabbed her by the hair and pulled her from the chair by her hair, causing the woman and the chair to fall to the ground. JB attempted to assault the woman again but was restrained by a male person. JB then used her shoe to strike the window of an Uber containing passengers.
- [35] JB then attended a licensed venue a short distance away and took a large wooden pepper mill shaker from a table. She went back to the hotel where she had assaulted security officers and threw the pepper shaker at security. The pepper shaker hit a sign on the wall.

(d) Possessing dangerous drugs: charge 9

- [36] Upon arriving at the watchhouse after the incidents referred to above, JB was searched. Staff located 3 grams of cannabis wrapped in silver foil tucked in a corner pocket of her purse.

The nature of the offences generally

- [37] JB’s offending as summarised above involved the possession of cannabis together with violent, aggressive and abusive behaviour directed at members of the public, security staff and police. The respondent submitted in relation to JB’s offending:
- (a) that it occurred in public and at a time when it was reasonably foreseeable that children would be in the vicinity;
 - (b) that children have a right to be protected from exposure to drug involvement and to be cared for by persons who are not impaired by drug use;
 - (c) that JB’s violent and aggressive behaviour raises concerns about her ability to manage her anger and frustration when faced with difficult or stressful situations and suggests she was unable to exercise restraint and judgment. These skills are important when working in areas of regulated employment as they contribute to the creation of a safe and protective environment for children.
 - (d) that, overall, JB’s behaviour raises concerns about her ability to judge appropriate behaviour and present as a positive role model.

The penalty imposed: s 226(2)(a)(v).

- [38] In respect of the drug charge, although found guilty, no conviction was recorded and JB was ordered to attend drug diversion; to be of good behaviour for six months and to pay a recognisance of \$500.
- [39] In respect of the offences *commit public nuisance* and *obstruct a police officer* (3 charges), no conviction was recorded and JB was not punished further.
- [40] In respect of the offences of unlawful assault occasioning bodily harm whilst armed (2 charges), assaults occasioning bodily harm and serious assault (police officer by biting, spitting etc), no conviction was recorded and JB was sentenced to:
- (a) 18 months’ probation ending in or about February 2022; and

(b) 120 hours of community service.

Any information provided pursuant to provisions of the WWC Act: s 226(2)(b)(d).

- [41] I note that no information was requested or received pursuant to ss 318, 319, 335, 337 or 338 of the WWC Act.

Other relevant matters: s 226(2)(e)

- [42] JB relied on five character references, a report of Ms Catherine Cockburn, psychologist dated 2 July 2020 and two reports of Mr Craig Holt, psychologist dated 1 August 2020 and 30 April 2021.

(a) Personal references

- [43] JB's aunty, LS, gave some context to the incident which led to JB's offending behaviour. LS said that JB had been in a "very toxic two-year relationship" which had resulted in a loss of confidence, sense of self-worth and dignity. LS said that the entire extended family could see the serious domestic struggle she was enduring until, on the day of the offending, JB left the abusive relationship, albeit not in a healthy mental state. LS describes how JB's family did not give up on her, nor did JB give up on herself. LS said that "as a family we rallied around JB and she did the hard yards, owning it and taking each step to turn her life around". LS said that "she climbed a mountain from bottom to top and turned her life around in the process". LS refers to the professional help JB received which made the world of difference to her and that she is back to "living her authentic life, which is all about healthy, clean living and loving her job".
- [44] CJ, a family friend and solicitor prefaced his reference by saying that he had been asked to provide the reference for JB and as an officer of the court, did not do so lightly. Indeed, CJ said, he was selective in his willingness to provide references of others in any context. CJ has known JB her entire life and said he had only ever observed positive character traits and was aware of the tremendous support she provided to her family, particularly to her mother. CJ was aware of the offences and was shocked by them. CJ said it was his true belief that it was a situation in which an otherwise very good person demonstrated a very poor lapse in judgment and that she had acted in way that was entirely inconsistent with her character. CJ concluded by saying that he would not have provided the reference if he had felt there was any prospect of her committing such offences in the future.
- [45] BK, JB's mother, provided a reference which described JB as an 'exceptional, decent, respectful, hardworking, law-abiding, young lady who was excessively drunk'. BK says that she medically retired from her teaching career approximately 15 years earlier on a full and total disability pension and that she totally relies on JB to help her cook, shop, shower and with all household duties, as well as for most of her transport. BK said that the offending was totally out of character due to her being so excessively drunk. BK said that JB was extremely ashamed of her behaviour and as a consequence had lost half her hair and 15 kg in weight and was developing an eating disorder.

(b) Psychologists' reports

- [46] JB attended psychological sessions at Headspace from November 2019 to June 2020 where she was receiving assistance due to anxiety, panic attacks and trauma associated with a previous abusive relationship. JB's psychologist at Headspace, Ms

Catherine Cockburn, reported that JB had expressed complete remorse and regret for her actions on 5 October 2019. Ms Cockburn said that no anger management concerns had been noted over the course of her therapy and that the incident appeared to be a once off, lapse in judgment for her.

- [47] Mr Holt, in his report of 1 August 2020, said that JB's history, presentation and symptomatology was consistent with Alcohol Use Disorder, Cannabis Use Disorder and a Major Depressive Episode and that JB's use of substances is associated with 'self-medicating anxiety, stress and feelings of threat'. In relation to JB's use of cannabis, Mr Holt said that JB reported that she began using cannabis when she was 22 years of age on weekends, progressing to daily use; had self-medicated with cannabis for two days following her break-up in October 2019 and denied using any form of illicit drugs at the time of the assessment (1 August 2020). In relation to alcohol use, Mr Holt said that JB reported that her father was an alcoholic; that she had little control over her ability to self-limit her drinking once she starts; that she currently drinks red wines three times a week (3-5 standard drinks) and that she binge drinks every second or third weekend.
- [48] Mr Holt, in his later report of 30 April 2021, Mr Holt said that JB had not used cannabis since September 2020 and reported rarely drinking (approximately one glass of red wine every two weeks). Mr Holt reported that JB had completed a Back in Control program with Alcohol and Other Drugs Service, and a drug diversion program in 2020 and that her therapeutic support now includes Catherine Cockburn, psychologist, her general practitioner and her family. Mr Holt reported that JB presented with stable sleep patterns, positive appetite and an appropriate exercise regime and concluded:

[JB's] Alcohol Use Disorder and Cannabis Use Disorder are now in remission. She has rehabilitated herself. Her prognosis is good.

[JB] is using strategies from cognitive behaviour therapy, dialectical behaviour therapy and conflict resolution, to better regulate her emotional responses.

...

[JB] has significantly recovered from her depressive episode. She has made significant improvements in all areas since 1 August 2020.

[JB] presents as a low risk of re-offending. Her presentation is stable. Her results on DASS were in the normal range, indicating that she is emotionally stable and has recovered from the trauma and abuse she experienced, that triggered her previous offence.

[JB] is aware of psychological support services, should she require them. She presents as a determined career oriented woman, who has had a major depressive episode in response to complex relationship turmoil. Her presentation today, indicates that she has worked through the trauma and is now ready to resume her career. She is applying a range of self-soothing strategies, should her stress increase.

I support [JB] returning to full time duties with her teaching career.

(c) *Judge's sentencing remarks*

- [49] I accept the respondent's submissions that Her Honour Judge McGuinness' decision in the criminal proceedings involved a different legislative framework and that Her Honour may not have been aware of all the information relevant to the review.
- [50] That said, I consider the remarks to be relevant to the nature and seriousness of the offence and important in providing some context to JB's offending behaviour. Relevantly, Her Honour said:

In summary, the defence material satisfies me, particularly in relation to Mr [X]'s report, that you were experiencing severe stress and a depressed mood at the time of the offence due to factors from your childhood but also due to the break up in that month of the offences, with a long-term partner. You do have a history of alcohol abuse and misuse, and you certainly were using cannabis at that time. Mr [X] considers it highly desirable that you consider psychological treatment and continue with the rehabilitation that you have so far undertaken. That rehabilitation, for example, includes the fact that you have been undertaking psychological treatment with a treating psychologist, Ms [y] from XYZ for some period of time. You've also completed an alcohol and drug education program.

I also accept, in light of all the material that I've had regard to, that the offences that night were out of character for you. There has been no indication that you've behaved in that way previously or since.

...

I have after much thought, because I have had this material to think about since last week, come to the conclusion that because of factors in your favour – and, of course, that includes your early plea of guilty – the community on this occasion would best be served by you continuing your rehabilitation and continuing in your work as a teacher....¹²

(d) Move to Sydney

- [51] JB moved to Sydney to be near her two sisters around October 2020. JB reported that living there was a 'good break' from the Gold Coast and was 'grounding' for her. JB returned from Sydney in late April 2021, having lived in Sydney for approximately seven months. I note that JB was using an anxiolytic medication (Diazepam) for 3 months of that time, to assist her with anxiety.

Consideration

- [52] JB's offending behaviour in October 2019 all occurred during one night out when JB was intoxicated and had been self-medicating with cannabis after having been through a distressing and violent break-up with her partner of two years.
- [53] The offending is concerning because it shows a lack of ability by JB to deal appropriately with stress and to control her emotions. There is also some concern that her behaviours are related to a deeper issue with alcohol and drug misuse stemming from anxiety and depression that she has experienced on and off since secondary school.
- [54] The Tribunal has previously held that "[w]hile mental health issues do not preclude a person from obtaining a positive notice and blue card, the possibility that such issues can manifest if not effectively managed on an ongoing basis, and trigger

¹² BCS96 to 97: Transcript of District Court Proceedings of 19 August 2020.

further offending behaviour, is a risk factor when assessing a person's eligibility to hold a blue card".¹³

- [55] I accept that, at the time of the offending, JB was mentally unwell and that her behaviour was a reaction to a traumatic and abusive relationship which ended when she discovered her partner had cheated on her. I accept that JB's ex-partner broke into her house, "trashed" her house, damaged her property and stole property including her diploma, forms of identification and other legal documents.¹⁴ I also accept that this event, a traumatic and distressing end to an abusive long-term relationship, was a trigger for JB's offending conduct on 5 October 2019.
- [56] JB gave evidence in cross-examination that alcohol was never an issue until her relationship broke down in October 2019 and then for a month or two after that. However, this is inconsistent with Mr Holt's report, where JB is reported as having disclosed to Mr Holt in August 2020 that she binged on alcohol every second or third weekend. I find that JB still had an alcohol issue in August 2020 but that from April 2021 it has been in remission.
- [57] I accept that JB was using cannabis daily for a period of time but that, at least from August 2020, she was not using any illicit drugs. JB was asked in cross-examination about how she thought her daily cannabis use may have adversely affected her judgment while caring for children. JB did not acknowledge the potential adverse effects her use may have had on her ability to care for children. I do not accept, however, the submission by the respondent that this reflects poorly on her insight into the gravity of her behaviour, her appreciation of the obligations of a blue card holder and why her behaviour presents a concern for child-related employment. In my view, JB was remorseful and did understand the implications of alcohol and cannabis use on her ability to work with children in the sense, primarily, of whether it would be in their best interests for her to be issued with a blue card in her circumstances. Indeed, in my view, it was the fear of losing the ability to work with children due essentially to her misuse of alcohol and cannabis, that provided the motivation for JB to work towards changing her behaviour and to address its underlying causes. Although JB did not continue to see Ms Cockburn, psychologist, as recommended by Mr Holt, this was explained by JB to be because Ms Cockburn was with an organisation that only provided psychology services to persons under a certain age.
- [58] JB showed commitment to rehabilitate herself by engaging with psychologists and completing the Drug Diversion program and the online equivalent of the 'Back in Control' program recommended by Mr Holt. Mr Holt also reported in April 2021 that JB's alcohol and cannabis use disorder are now in remission, that she has rehabilitated herself and that her prognosis is good.
- [59] JB has not re-offended since October 2019. However, JB admits to having relapsed with cannabis once in either August or September 2020. JB's mental health issues, namely anxiety and depression, are stable at present, though JB admits to having "ups and downs".
- [60] The sentencing remarks of Her Honour, although applying a different statutory framework, are nonetheless relevant, in my view, in providing context to the

¹³ *DAW v Director-General, Department of Justice and Attorney-General* [2020] QCAT 137 at [55].

¹⁴ Exhibit A: Applicant's Opening Statement filed on 20 May 2021.

offending behaviour and in the acknowledgment by Her Honour that, in light of all the material, that the offences were out of character for JB.

- [61] In making my decision I have had regard to the paramount consideration being, the welfare and best interests of children. I have also taken into account the *Human Rights Act* 2019 (Qld) and to the particular human rights of JB and of the right of children to protection, that are engaged by this review. On balance, after considering those matters, all of the evidence and the factors in s 226 of the WWC Act as outlined above, I am not satisfied, on the balance of probabilities, that JB's is an exceptional case in which it would not be in the best interests of children for a positive notice to be issued.
- [62] Accordingly, the correct and preferable decision is to set aside the decision of the respondent on 10 September 2020 that this is an exceptional case and to replace it with a decision that this is not an exceptional case within the meaning of s 221(2) of the WWC Act. A non-publication made by the Tribunal on 24 June 2021 applies to prohibit, inter alia, the publication of the order made or reasons given in this review to the extent it could identify or lead to the identification of JB, any family member of JB, any child, or any non-party, save as was necessary for the parties to engage in and progress the proceedings.