

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: Assou v Queensland Police Service [2019]
QIRC 123

PARTIES: **Archer Assou**
(Applicant)

v

**State of Queensland (Queensland Police
Service)**
(Respondent)

CASE NO: TD/2019/21

PROCEEDING: Application

DELIVERED ON: 27 August 2019

HEARING DATE: 6 August 2019

MEMBER: O'Connor VP

ORDER: **1. Application allowed**

CATCHWORDS: INDUSTRIAL LAW – where Applicant seeks reinstatement – where Applicant was on a longer probationary period – whether applicant is excluded from the unfair dismissal regime because he was a probationary employee – whether the longer probationary period was valid

LEGISLATION: *Industrial Relations Act 2016* s 315
Industrial Relations Act 1999 s 72

CASES: *Queensland Police Union of Employees v State of Queensland (Queensland Police Service)* [2017] QIRC 034

APPEARANCES

Mr C Lloyd of Gilshenan & Luton Legal
Practice, for the Applicant

Ms A Howell of the Public Safety Business
Agency, for the Respondent

Reasons for Decision

- [1] Mr Archer Assou commenced employment with the Queensland Police Service on 7 July 2017. Between 7 July 2017 and 9 May 2018, he was employed on fixed term contracts. On completion of the recruit training programme Mr Assou was engaged as a First Year Constable on 10 May 2018. On 8 February 2019 Mr Assou was dismissed.
- [2] On 1 March 2019, Mr Assou filed an application for reinstatement pursuant to s 317 of the *Industrial Relations Act 2016* ("the Act") on the basis that his dismissal was harsh, unjust or unreasonable and therefore unfair.
- [3] On 6 March 2019 the Respondent's filed a response opposing the application for reinstatement on grounds that Mr Assou was a probationary employee and therefore the Commission had no jurisdiction to hear and determine the matter pursuant to s315(1)(b) of the Act.
- [4] The Respondent contended that:
- "... Mr Assou was appointed as a constable under a probational period of not less than 12 months effective from 10 May 2018 (per section 5.12(2) of the Police Service Administration Act 1990). The details of this 12-month probationary period were set out in a signed written agreement between Mr Assou and the Queensland Police Service in a document entitled "Acceptance of Offer", dated 8 September 2017. At the time Mr Assou was dismissed (8 February 2018) he was subject to this agreed probationary period. Accordingly, per section 315(2) of the *Industrial Relations Act 2016*, the unfair dismissal provision set out in Chapter 2 (sic), Part 2 of the IR Act are not available to Mr Assou."
- [5] The application for reinstatement was the subject of a conference before Industrial Commissioner Thompson on 14 March 2019. The conciliation conference was unsuccessful, and Thompson IC issued a certificate under s 318(3)(a) of the Act referring the jurisdictional question for determination.
- [6] On 5 June 2019 Mr Assou lodged an application in existing proceedings seeking orders that there is no impediment to the progression of the Application for reinstatement.
- [7] The sole issue for determination is whether Mr Assou is precluded from the unfair dismissal regime under the Act because he is a probationary "employee".

Statutory provisions

[8] Section 315 of the Act relevantly provides:

315 Employees to whom this part does not apply

(1) **Section 316 does not apply to any of the following—**

- (a) an employee during the first 3 months of employment with an employer (the "probationary period"), unless the employee and employer agree in writing that the employee serve—;
 - i. a period of probation that is shorter than the probationary period; or
 - ii. no period of probation; or
- (b) **an employee serving a period of probation that is longer than the probationary period, if the period decided, by written agreement between the employee and employer before the employment started, is a reasonable period having regard to the nature and circumstances of the employment.**

...

The Wheeler Decision

[9] The Applicant relies on the decision of Industrial Commissioner Black in *Queensland Police Union of Employees v State of Queensland (Queensland Police Service)*¹ ("the Wheeler decision").

[10] The correctness of the decision was accepted by both parties and it was not sought to reargue the interpretation of s 315 of the Act or the five pre-conditions identified by Black IC.

[11] In *Wheeler*, Black IC was called upon to interpret s 72 of the *Industrial Relations Act* 1999, the predecessor to s 315 of the 2016 Act. The factual matrix in *Wheeler* is materially the same as the matter presently before the Commission. The key parts of the *Wheeler* decision can be found at paragraphs [19] to [24] of the reasons of Black IC:

- [19] The unfair dismissal provisions of the IR Act are crafted in such a way as to limit the extent to which an unfair dismissal right can be excluded by virtue of the operation of probationary provisions. This purpose is achieved by setting conditions which must be complied with before the statutory probationary period can be exceeded. Satisfaction with these conditions, which are set out in s 72(1)(b)(i) of the IR Act, permits a probationary period longer than the 3 months statutory probationary period.

¹ [2017] QIRC 034.

- [20] **The first condition** specified is that the longer probation period is to be decided or specified. **The second condition** is that the employer and employee must agree on the longer probationary period. **Thirdly**, the agreement between the employer and the employee must be reduced to writing. **Fourthly**, any agreement to extend the statutory period must be entered into before the employment started. **Finally**, any longer probationary period agreed to must be reasonable having regard to the nature and circumstances of the employment.
- [21] The final condition imposes a safeguard or a constraint on the agreement making capacity of the employer and the employee. That is, notwithstanding that there may be an agreement about a longer probationary period, the unfair dismissal remedy is not excluded if the longer period is not reasonable. This safeguard however cannot be put to work without the written agreement also specifying the actual period of the probation that has been agreed to between the employer and the employee. If a term is not specified, it is not possible to make a determination about reasonableness, and the efficacy of the subsection is therefore undermined.
- [22] The difficulty with the QPS arrangements is that the PSA Act allows for indefinite periods of probation to be set at the discretion of the Commissioner after the written agreement has been entered into. While it is possible that the employee becomes aware of the duration of his probation soon after signing his acceptance form, he does not know at the time of entering into his written agreement what the duration will be. The indefinite character of probationary arrangements under the PSA Act is not consistent with the scheme of the unfair dismissal provisions of the IR Act.
- [23] If the purpose is other than to exclude unfair dismissal rights, there is no fetter on an employer's discretion to set probationary arrangements. In so far as the QPS is concerned, the PSA Act specifically authorises the Commissioner to do so. However if the purpose includes a requirement that unfair dismissal rights be excluded, then the probationary arrangements in place must comply with s 72 of the IR Act.
- [24] The deficiency in the acceptance form is that it does not specify the period of probation. In terms of the initial period of probation, this deficiency can be remedied by the specification of an initial probationary term of 12 months. The remedy in the event of extended periods is less straightforward. If the initial probationary term is included then the conditions set by the IR Act are satisfied in respect to that period. There is a written agreement, the period of probation is specified, and the agreement is entered into before the commencement of employment.

The Applicant's case

- [12] In short, the Applicant contends that the probationary arrangements to which he was subjected are ineffective in excluding his right to seek reinstatement under Chapter 8, Part 2 of the Act.
- [13] The Applicant contends that the "Acceptance of Offer" document states a *minimum* length of time for the probation period and that the *actual* length of probation (provided it was not less than 12 months) was to be determined at the discretion of the Commissioner. The indefinite character of the probationary arrangements is inconsistent with the legislative scheme. As a result, the "pre-conditions" as identified

in *Wheeler* have not been established thereby rendering ineffective the exclusionary provision contained in s 315 of the Act.

The Respondent's case

- [14] The Respondent submits that the Applicant was appointed as a constable under a probationary period of not less than 12 months effective from 10 May 2018. At the time of dismissal, the Applicant was subject to an agreed probationary period and therefore the unfair dismissal provisions set out in Chapter 8, Part 2 of the Act do not apply. Accordingly, the Applicant's employment was terminated effective from 8 February 2019 and therefore within the 12-month probationary period.
- [15] The Respondent relies on the signed "Acceptance of Offer" document dated 18 September 2017 which sets out, amongst other things, that the appointment as a police officer would be subject to a probationary period of "*not less than 12 months' probation*".
- [16] The Respondent contends that the longer probationary period was a valid period for the purposes of section 315(1)(b) of the Act because it was decided by written agreement between the employee and employer before the employment started and was a reasonable period having regard to the nature and circumstances of the employment.
- [17] The Respondent further contends that the *Wheeler* decision can be distinguished from the Applicant's circumstances on two grounds. First, unlike the *Wheeler* decision, the Applicant was terminated during his initial period of probation. Secondly, the Acceptance of Offer document signed by Mr Wheeler is different to that signed by the Applicant in the existing proceedings. Mr Wheeler's document only referred to the probationary periods prescribed in section 5.12 of the *Police Service Administration Act* 1990, in this case the document signed by the Applicant specifies an initial probationary period.

Consideration

- [18] The wording in s 315(b) states "*if the period decided*". The adjective "decided" means "free from ambiguity; unquestionable; un mistakeable".² In *Wheeler*, Black IC wrote that the longer probation period, namely the period longer than the first 3 months of employment with an employer is to be *decided or specified*. Black IC in his reasons imports the word "specified" which did not appear in s 72 of the 1999 Act nor does it appear in s 315 of the 2016 Act. The verb "specify" means "to mention or name specifically or definitely; state in detail; to give a specific character to".³

² The Macquarie Concise Dictionary.

³ The Macquarie Concise Dictionary.

- [19] The "Acceptance of Offer" signed by Mr Assou on 18 September 2017 relevantly provides that he would be subject to the probation periods as prescribed by section 5.12 of the PSA Act and that he would "...be appointed for a period of not less than 12 months determined by the Commissioner". Importantly, the "Acceptance of Offer" provided that "...at any time during the initial probation, or at the end of the probation period; the Commissioner may confirm [his] appointment, extend or further extend the period of probation, or terminate [his] appointment."
- [20] Whilst the "Acceptance and Offer" stipulated that the minimum period of time was not less than twelve months, no longer probationary period was decided by written agreement between the Applicant and the Queensland Police Service before the employment started. The probationary period was indeterminate.
- [21] It is the Commissioner who will ultimately decide the specified probationary period. The Applicant, in signing the agreement, would not have known the duration of the probationary period. It cannot therefore be said that the probationary period was "decided" for the purposes of s 315(b) of the Act.
- [22] The Respondent submitted that the *Wheeler* decision is distinguishable from the present case. The argument is advanced on two grounds. The first is that Wheeler was terminated during an extended period of probation. Mr Wheeler's extended period of probation was not decided in the written agreement before he commenced his employment. Secondly, unlike Wheeler, the document signed by the Applicant specifies an initial probationary period so "it was clear to the Applicant that the initial period of probation would be at least 12 months". The Applicant was terminated within the specified "initial probationary period".
- [23] The inclusion of the words "*not less than 12 months' probation*" is not a point of distinction between the *Wheeler* decision and the current matter. The inclusion of the words merely pick-up the words contained in 5.12 (2) of the PSAA 1990. In the Acceptance of Offer, the Applicant accepted that his probationary arrangements would be determined by the Commissioner, subject to 5.12 of the PSA Act.
- [24] The Respondent's submission fails to address the fundamental issue of the indeterminate nature of the probationary period. The Respondent has not "decided" the longer probation period; the employer and employee have not agreed on the longer probationary period; the agreement between the employer and the employee has not been reduced to writing; the agreement to extend the statutory period has not been entered into before the employment started; and absent agreement on the longer probation period, the reasonableness or otherwise of the period cannot be assessed.
- [25] For the reasons outlined, the Respondent's objection on the basis of a jurisdictional ground cannot be sustained. The Application must accordingly succeed.

Order

- 1) Application allowed.**