

**QUEENSLAND INDUSTRIAL RELATIONS COMMISSION**

CITATION: *Philipson v State of Queensland (Queensland Police Service)* [2022] QIRC 183

PARTIES: **Philipson, Joanne**  
(Appellant)

v

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

CASE NO: PSA/2022/261

PROCEEDING: Public Service Appeal – Appeal against a suspension without pay decision

DELIVERED ON: 26 May 2022

MEMBER: Pidgeon IC

HEARD AT: On the papers

ORDERS: **The decision appealed against is confirmed**

CATCHWORDS: PUBLIC SERVICE - EMPLOYEES AND SERVANT OF THE CROWN  
GENERALLY - public service appeal - appellant directed by employer to receive COVID-19 vaccine - appellant refused to follow direction - decision to suspended appellant without remuneration following show cause process - whether decision to suspend without remuneration was fair and reasonable - decision maker considered all relevant factors

LEGISLATION: *Industrial Relations Act 2016*, s 562B, s 562C

## Reasons for Decision

### Background

- [1] Ms Joanne Philipson (the Appellant) is employed by the State of Queensland (Queensland Police Service) (the Respondent/the Service) as a Station Client Service Officer paypoint AO3 at the Townsville Police Station.
- [2] *Instrument of Commissioner's Direction No. 12*<sup>1</sup> (the Direction) issued on 7 September 2021 addressed mandatory COVID-19 vaccination and mask requirements for police officers and certain staff members. By way of background, the Direction says
1. A public health emergency was declared on 29 January 2020 for the whole of Queensland, under the *Public Health Act 2005*, due to the outbreak of COVID-19 and the health implications to Queensland. The risk presented by COVID-19 is heightened by the increased transmissibility and secondary attack rate of the delta variant, its increased virulence and severity of disease and the reduction in neutralising antibody activity.
  2. In order to fulfil the functions of the Queensland Police Service under section 2.3 of the *Police Service Administration Act 1990*, police officers must be frontline-ready and available for deployment. The Queensland Police Service has particular responsibilities during the declared public health emergency, including deployment of police and staff members to quarantine facilities as well as to COVID-19 broader compliance duties. More broadly, the nature and frequency of police officers' interactions with members of the community, particularly vulnerable members of the community, results in a significantly increased risk of police officers contracting or transmitting COVID-19. Rapid transmission of COVID-19 through the Queensland Police Service would take police officers and staff members out of service while they undertake quarantine periods or recover from COVID-19. In an extreme scenario, this could reduce the availability of police officers and staff members for deployment, and threaten the ability of the Queensland Police Service to serve the community.
  3. While it is primarily police officers who are on the front line, many staff members:
    - a) have close working relationships with police officers;
    - b) interact with members of the community (including vulnerable members of the community) in roles such as Police Liaison Officers as well as in public-facing roles at police stations; and,
    - c) are mission critical, such as staff members stationed at Communications Centres, Policelink, fleet maintenance facilities and Queensland Government Air (QGAir)
  4. The *Work Health and Safety Act 2011* places a responsibility on me as the Commissioner of Police, so far as is reasonably practicable, to ensure the health and safety of police officers and staff members. The Act also requires me to ensure, so far as is reasonably practicable, the health and safety of other people with whom police officers and staff members interact when performing the functions of the Queensland Police Service.

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<sup>1</sup> Commissioner of Police Direction – Mandatory COVID-19 Vaccination and Mask Requirements for Police Officers and Certain Staff Members, Human Rights Compatibility Statement, Katarina Carroll, Commissioner Queensland Police Service 7 September 2021.

[3] Relevantly, paragraph 6 of the Direction states that it applies to all staff members appointed pursuant to s 119 of the PS Act who are frontline staff members or frontline support staff members

6. This Direction applies to:
  - a) all police officers appointed pursuant to section 2.2 of the *Police Service Administration Act 1990*; and
  - b) all staff members appointed pursuant to section 8.3(5) of the *Police Service Administration Act 1990* and/or sections 110, 119, 147 and 148 of the *Public Service Act 2008* who are:
    - (i) frontline staff members; or
    - (ii) frontline support staff members.

[4] Paragraph 7 provides that:

7. Unless a police officer or staff member is exempt under paragraph 8 or 9, all police officers and staff members must:
  - a) receive at least one dose of a COVID-19 vaccine by 4 October 2021;
  - b) receive a second dose of a COVID-19 vaccine by 24 January 2022; and
  - c) provide evidence of receiving a COVID-19 vaccine if requested by the Commissioner of Police (or delegate).

[5] Paragraphs 8 -11 address exemption from requirements for vaccination against COVID-19.

8. A police officer or staff member is exempt from the requirements of paragraph 7 if:
  - a) the police officer or staff member is unable to be vaccinated due to a medical contraindication; and
  - b) the police officer or staff member provides to the Commissioner of Police (or delegate) a letter from a treating doctor or specialist outlining:
    - (i) the condition which makes it unsafe for the police officer or staff member to receive all available COVID-19 vaccines; and
    - (ii) whether the condition is temporary in nature, and, if so, the duration.
9. A police officer or staff member is also exempt from the requirements of paragraph 7 if the Commissioner of Police (or delegate) grants an exemption:
  - a) due to a genuine religious objection; or
  - b) due to other exceptional circumstances.
10. A police officer or staff member who applies for an exemption under paragraph 9 must provide any supporting evidence requested.
11. An exemption granted under paragraph 9 must be given in writing and may be subject to conditions. A police officer or staff member given an exemption must comply with any conditions specified therein.

[6] Ms Philipson sets out the timeline of events relevant to this appeal in part C of her appeal notice filed 14 February 2022.

On 7th September 2021 the QPS advised that a direction had been issued by the Commissioner stating that all QPS employees were to receive their first dose of the vaccine by 4th October 2021, and their 2nd dose by 17th December 2021 (which was brought forward from 24th January 2022).

On 2nd April 2021 I was coerced into receiving the 1st dose of AstraZeneca vaccine whilst in Brisbane on COVID deployment. Brisbane had gone into 'Lockdown' so the Commissioner issued a direction that all front line employees on deployment had to be vaccinated or sent home.

Shortly after receiving my first dose, I experienced adverse reactions. As these reactions had not completely subsided, I consulted my doctor on 15th December 2021. I also sought advice regarding the 2nd vaccine dose. I was subsequently sent for a series of invasive tests.

After my experience with the 1st dose, and due to a family history of heart disease, I declined the 2nd vaccine dose and on 17th December 2021 I applied for a medical exemption on these grounds.

On 10th January 2022 I was served with a Notice of Suspension with Renumeration. I was given up until 24th January 2022 to submit a Show Cause as to why I should not be Suspended without Renumeration which I did so.

On 1st February 2022 I was served with a Notice of Suspension without Remuneration which commenced at midnight on 4th February 2022. I have had no other source of income since this date. The disciplinary process has not been finalised as of the date of this application.

- [7] The notice of suspension without remuneration (the notice) is attached to Ms Philipson's appeal notice. The decision maker, Virginia A Nelson, Acting Assistant Commissioner, Ethical Standards Command, provides extensive reasons for the decision to suspend Ms Philipson without pay. I will address the relevant parts of the letter throughout this decision .
- [8] Ms Philipson says that the QPS has not acted with proper consideration of her human rights or procedural fairness in this disciplinary process and there is no justification for the QPS to remove her income during this process in her particular circumstances.

### **Is the Appellant entitled to appeal?**

- [9] Section 194 of the *Public Service Act 2008* (The PS Act) lists various categories of decisions against which an appeal may be made. Section 194(1)(bb) provides that an appeal may be made against 'a decision to suspend a public service employee without entitlement to normal remuneration under s 137 (a suspension without pay decision)'.
- [10] The appeal notice was filed with the Industrial Registry 14 February 2022, within 21 days of the decision being received on 1 February 2022. I am satisfied that the Appellant may appeal the decision.

### **Appeal Principles**

- [11] Section 562B(3) of the *Industrial Relations Act 2016* (IR Act) provides that the appeal is to be decided by reviewing the decision appealed against and that 'the purpose of the appeal is to decide whether the decision appealed against was fair and reasonable'.
- [12] In deciding this appeal, s 562C(1) of the IR Act provides that the Commission may:

- (a) confirm the decision appealed against; or
- ...
- (c) For another appeal-set the decision aside, and substitute another decision or return the matter to the decision maker with a copy of the decision on appeal and any directions considered appropriate.

[13] A public service appeal is not an opportunity for a fresh hearing, but a review of the decision arrived at by the decision maker. My task in deciding this appeal is to review the decision received 1 February 2022 and decide whether that decision was fair and reasonable.<sup>2</sup>

[14] Findings made by the Respondent which are reasonably open to it based on the relevant materials or evidence should not be expected to be disturbed on appeal.

### **Legislative and Policy Framework**

[15] Suspension of a public service employee is outlined in s 137 of the PS Act:

#### **137 Suspension**

- (1) The chief executive may, by notice, suspend a person from duty if the chief executive reasonably believes –
  - (a) for a public service officer – the proper and efficient management of the department might be prejudiced if the officer is not suspended; or
  - (b) for a public service employee – the employee is liable to discipline under a disciplinary law
- (2) The notice must state –
  - (a) when the suspension starts and ends; and
  - (b) whether the person is entitled to remuneration for the period of the suspension; and
  - (c) the effect that alternative employment may, under subsection (5), have on any entitlement to remuneration.
- (3) However, before suspending the person, the chief executive must consider all reasonable alternatives, including alternative duties, a temporary transfer or another alternative working arrangement, that are available to the person.
- (4) A public service employee is entitled to normal remuneration during a suspension, unless –
  - (a) the person is suspended under subsection 1(b); and
  - (b) the chief executive considers it is not appropriate for the employee to be entitled to normal remuneration during the suspension, having regard to the nature of the discipline to which the chief executive believes the person is liable.
- ...
- (8) The chief executive may cancel the suspension at any time.

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<sup>2</sup> *Public Service Act 2008*, s 562B(2) and (3).

- (9) In suspending a public service employee under this section, the chief executive must comply with –
  - (a) The principles of natural justice; and
  - (b) this Act; and
  - (c) the directive made under section 137A.

[16] *Directive:16/20 Suspension Directive* (the Suspension Directive) supports the PS Act requirements relating to suspension. Clause 6 deals with suspension without remuneration.

- 1. Purpose
  - 1.1 This directive:
    - (a) Outlines the procedures relating to suspension
    - (b) Details the periodic reviews of suspension matters
    - (c) Establishes natural justice considerations, including requirements about providing reasons for the decisions about suspensions
    - (d) Describes the circumstances in which a chief executive may decide a public service employee is not entitled to normal remuneration during their suspension
    - (e) Details the circumstances in which an employee suspended without remuneration may be reimbursed for remuneration they do not receive during suspension after a determination on discipline penalty is made.
  - 1.2 This directive supports the *Public Service Act 2008* (PS Act) requirements relating to suspensions. Suspension is an administrative action, taken for administrative necessity. It is not a disciplinary action and is not to be used as a form of punishment. Suspension should be used as a last resort after a decision maker considers all alternative duties prior to making the decision to suspend an employee.
  - ...
  - 4. Principles
    - ...
    - 4.4 Under the *Human Rights Act 2019*, decision makers have an obligation to act and make decisions in a way that is compatible with human rights, and when making a decision under this directive to give proper consideration to human rights.
    - ...
  - 6. Suspension without remuneration
    - 6.1 Section 137(4) of the PS Act provides that the chief executive may decide that normal remuneration is not appropriate during a period of suspension where the employee is a public service employee liable to discipline.
    - 6.2 A decision that normal remuneration is not appropriate during the suspension will usually occur after a period of suspension with remuneration but may be made from the start of the suspension.
    - 6.3 In deciding that normal remuneration is not appropriate, the factors the chief executive is to consider include:
      - (a) the nature of the discipline matter
      - (b) any factors not within the control of the agency that are preventing the timely conclusion of the discipline process
      - (c) the public interest of the employee remaining on suspension with remuneration.

- 6.4 A decision to suspend an employee without remuneration is subject to the principles of natural justice. Natural justice is the right to be given a fair hearing and the opportunity to present one's case, the right to have a decision made by an unbiased or disinterested decision maker and the right to have that decision based on logically probative evidence.<sup>3</sup> As part of the suspension process:
- (a) The employee must be given the opportunity to respond to the proposed suspension without remuneration prior to the decision being made by the delegate. This can occur through a 'show cause' process at the time of notification of the initial suspension on normal remuneration, or at any subsequent stage during the suspension.
  - (b) The employee is to be provided with written notice, including the particulars required by section 137 of the PS Act, and reasons for the decision that suspension is without normal remuneration.
  - (c) The chief executive must provide the employee with a minimum of 7 days from the date of receipt of a show cause notice to consider and respond to the notice, having regard to the volume of material and complexity of the matter. The chief executive may grant, and must consider any request for, an extension of time to respond to a show cause notice if there are reasonable grounds for extension.
  - (d) If the employee does not respond to a show cause notice or does not respond within the nominated timeframe in clause 6.4(b) and has not been granted an extension of time to respond, the chief executive may make a decision on grounds based on the information available to them.
- 6.5 A public service employee may appeal a decision to suspend without normal remuneration. An appeal is made to the Queensland Industrial Relations Commission (QIRC) and further information can be found in their Appeals Guide.
- 6.6 An employee must be reimbursed for remuneration the employee does not receive during the employee's suspension if a decision on discipline has been made that does not result in termination of their employment.
- 6.7 The amount to be reimbursed is the employee's normal remuneration at the date of suspension without pay for the period the employee was suspended:
- (a) taking into account any increase due to certified agreements or rulings made in State Wage Cases, but
  - (b) less any amounts of paid leave taken by the employee during a period of suspension.
- 6.8 An employee who ceases employment prior to a decision on discipline being made is not entitled to reimbursement.
- 6.9 Any amount earned by the employee from alternative employment the employee engaged in during the period of suspension must be deducted from the amount repaid to the employee under 6.7 above, unless:
- (a) the employee was engaged in the employment at the time of the suspension, and
  - (b) the employee, in engaging in the employment, was not contravening:
    - (i) the PS Act, or
    - (ii) a standard of conduct applying to the employee under an approved code of conduct or standard of practice under *the Public Sector Ethics Act 1994*.
- 6.10 If the employee was not available to work during the period of suspension for reasons other than being suspended (for example, due to being detained in a corrective services facility), then the amount repaid to the employee must be less the total number of days that the employee was not available to work during the period of suspension.

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<sup>3</sup> *Salermi v MacKellar (No 2)* (1977) 137 CLR; 14 ALR 1.

## Submissions of the Respondent

- [17] The Respondent says that Ms Philipson was suspended without remuneration based on the allegation that she had failed to follow a lawful direction of the Police Commissioner per the Direction in that Ms Philipson not having been granted an exemption from the Commissioner's Direction, failed to comply with the lawful direction of the Commissioner by failing to receive and provide evidence of a second dose of the vaccine by 17 December 2021 as required by cl 10 of the Direction.
- [18] The Respondent submits that the decision to place Ms Philipson on suspension without normal remuneration for failing to fully comply with the Direction is a fair and reasonable decision. The decision maker has considered reasonable alternatives to suspension, the public interest of the Appellant remaining on suspension with remuneration, has addressed obligations under the *Human Rights Act 2019* and the evidence demonstrates that Ms Philipson has been afforded natural justice throughout the process.
- [19] The Respondent sets out the show cause process undertaken with regard to the suspension without pay in its submissions.<sup>4</sup> The Respondent has also provided me with the relevant documentation, including Ms Philipson's response to the show cause notice.
- [20] With regard to Ms Philipson's grounds of appeal set out above at [6], the Respondent makes the following submissions:

In respect of ground (a) the decision maker in the correspondence dated 28 January 2022 provides a thorough explanation regarding the aspects of the Appellant's human rights and why the action was taken.

In respect of ground (b) procedural fairness traditionally involves two requirements: the fair hearing rule and the rule against bias. The hearing rule requires a decision maker to afford a person an opportunity to be heard before making a decision affecting their interests. In *Kioa v West*, Gibbs J said that the '*fundamental rule is that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power*'.<sup>5</sup> The rule against bias ensure that the decision maker can be objectively considered to be impartial and not to have pre-judged a decision.

- [21] The Respondent says that Ms Philipson fails to appreciate the nature and seriousness of the allegation against her despite this being clearly outlined in the written decision of 28 January 2022 at page 4 of the decision letter at clause (e).
- [22] The Respondent notes that Ms Philipson's role is considered a non-corporate services role, has a close working relationship with frontline police officers and provides essential support to enable the effective delivery of an essential frontline service.

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<sup>4</sup> Respondent submissions filed 3 March 2022, [11].

<sup>5</sup> (1985) 159 CLR 550, 585.



- [23] The Respondent says that nothing in Ms Philipson's appeal documentation has substantiated any reasonable excuse for Ms Philipson to not comply with the lawful direction of the Commissioner.

### **Ms Philipson's submissions**

- [24] Ms Philipson recalls that she received the first dose of AstraZeneca vaccine on 2 April 2021. Ms Philipson says that upon returning home on 10 April 2021, she began to 'experience neurological adverse reactions such as significant sensations of poor balance while both standing and walking. Ms Philipson says that in addition to this:

within a few months of returning home from deployment, the appellant began to experience heart palpitations, irregular and rapid heartbeats, heaviness of chest and shortness of breath on a regular basis when either exercising or resting.

- [25] Ms Philipson says that after experiencing these 'adverse reactions' she 'grew concerned about receiving the second dose of the vaccine'.
- [26] Ms Philipson says that on 15 December 2021, she attended the Hyde Park Medical Centre and was assessed by her doctor. Ms Philipson's doctor determined that he was reluctant to issue the second dose of AstraZeneca and wished to undertake further tests. Ms Philipson says that two of the tests were not completed until after 17 December 2021 and that this meant that it was impossible for both the doctor and Ms Philipson to have received the test results and then make a decision about proceeding with the second dose of the vaccine. The doctor provided Ms Philipson with a medical certificate for the dates 15 December 2021 to 30 December 2021.
- [27] In the week commencing 10 January 2022, Ms Philipson received the test results and the tests showed no areas of concern. Ms Philipson says that despite this, she made a decision that 'it was in her best medical interest not to receive the second vaccine dose for fear of enduring further adverse reactions.
- [28] Ms Philipson recounts a number of occasions of communication with her supervisor and others regarding the status of her employment, whether she was able to return to work, suspension with pay and an offer for her to access recreational leave.<sup>6</sup>
- [29] Ms Philipson complains that she has not been provided with grounds for the refusal of her medical exemption. Ms Philipson says that 'it appears a decision to suspend her had already been made without any regards to her medical test results.
- [30] Ms Philipson says that the suspension process is fundamentally flawed and that the 'disciplinary process' did not follow the true course of justice or procedure.

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<sup>6</sup> Appellant submissions filed 24 March 2022, [8]-[12].

## Consideration

### *Ms Philipson's concerns about the vaccine exemption process*

- [31] While Ms Philipson has made submissions regarding her application for a vaccine exemption, it is important to note that in considering this appeal, I am required to decide whether the decision to suspend Ms Philipson without pay was fair and reasonable. This is not an appeal against a decision to refuse to make Ms Philipson exempt from the vaccination direction.
- [32] I note that Ms Philipson has raised similar concerns about the vaccine in her submissions for this appeal as she does in her response to the show cause notice. The notice lists key aspects of Ms Philipson's response on pages 1 and 2.

### *No disciplinary finding has been made*

- [33] Ms Philipson says that the 'disciplinary process' has not followed 'the true course of justice or procedure'.
- [34] I note that on page two of the Notice, Ms Philipson is informed that 'no adverse finding or determination has been made against you in relation to the allegation at this time'. The decision maker states, 'I reasonably believe that you are liable to discipline under a disciplinary law' in relation to the allegation set out on page one of the notice: 'It is alleged that you have not been granted an exemption from the Direction and, therefore, you failed to comply with the Direction by failing to receive and provide evidence of receiving a second dose of the vaccine by 17 December 2021 as required by clause 10 of the Direction'.
- [35] It is uncontroversial that Ms Philipson has not had the second dose of the vaccine. Her initial advice to the Respondent was that she was awaiting the results of tests her doctor had requested. However, Ms Philipson confirms in her submissions that having received advice from her doctor that there were no concerns, she had made a personal decision not to receive the vaccine. The allegation is that Ms Philipson failed to receive the vaccine. Ms Philipson has not received the vaccine. It was reasonably open to the decision maker to form a reasonable belief that Ms Philipson may be liable to discipline per s 137(1)(b) of the PS Act.

### *The notice provides detailed reasons for the decision and evidence that the decision maker considered the matters set out at cl 6.3 of the Directive.*

- [36] The notice is 8 pages long. The decision maker notes that Ms Philipson has been afforded natural justice and that she took the opportunity to show cause why she should not be suspended without pay. The decision maker goes on to address the matters raised in Ms Philipson's show cause response.

- [37] With regard to Ms Philipson's submissions regarding financial hardship, the decision maker determined that 'while I acknowledge your situation, I am not persuaded your private interests outweigh those of the Service and the public interest...'.
- [38] The decision maker notes that Ms Philipson did not receive a medical exemption on the grounds of the adverse reactions she says she experienced after receiving the first vaccination.
- [39] The decision maker writes that the failure to obey a Direction of the Commissioner is very serious and in direct conflict with the functions, responsibilities and organisational functions of the Service, the functions of a member of the Service and community expectations. The decision maker explains the purpose of the Direction and the risks presented by COVID-19.
- [40] The decision maker addresses that Ms Philipson's submission that she could work from home as employees did during lockdowns. The decision maker said 'I note also that your duties as a Station Client Service Officer require your attendance at the Station and are unable to be completed from an alternative location'. The decision maker says that consideration was given to all reasonable alternatives but that it has been determined that suspension is the appropriate option.
- [41] The decision maker goes on to say, 'Due to the nature and seriousness of your alleged conduct I consider your continued suspension with remuneration would be inappropriate and inconsistent with the public interest....I find you have not shown cause why your suspension should not be without remuneration'.
- [42] The decision maker has considered the nature of the discipline matter and the public interest of Ms Philipson remaining on suspension with remuneration and in doing so has complied with cl 6.3 of the Directive.

*The decision maker has considered Ms Philipson's human rights*

- [43] I note that Ms Philipson says in her appeal notice that her human rights have not been properly considered by the decision maker. I disagree. Pages 6 and 7 of the notice address human rights in detail. Having considered that the decision limits human rights, the decision maker goes on to say, 'I consider these limits on human rights are reasonable and justified by the need to ensure compliance with the Direction...'. The decision maker has complied with cl 4.4 of the Suspension Directive.

*Ms Philipson has been afforded procedural fairness*

- [44] Ms Philipson's appeal notice says that she has not received procedural fairness. This ground has not been made out. It is clear to me that Ms Philipson was provided with an opportunity to show cause why she should not be suspended without remuneration. Ms Philipson was given seven days to respond per cl 6.4 of the Suspension Directive. Ms Philipson took this opportunity and provided extensive submissions in response to

the show cause notice. The decision maker has clearly considered the matters put forward by Ms Philipson and this is evidenced in the notice.

*The decision was fair and reasonable*

- [45] Ms Philipson's initial reason for not receiving the second dose of the vaccine was that she was undergoing tests requested by her doctor. Those tests were completed and Ms Philipson's doctor indicated that there was no concern. There is no material before me to demonstrate that Ms Philipson has a current medical opinion or certificate to state that she cannot receive the second dose of the vaccine.
- [46] In such circumstances, it is clear that Ms Philipson has not complied with the Direction given to her by the Respondent.
- [47] It was open to the decision maker to form a reasonable belief that Ms Philipson is liable to discipline under a disciplinary law, and that in consideration of the nature of the discipline to which Ms Philipson may be liable accordance with s 137(4)(b) of the PS Act, it is not appropriate for Ms Philipson to be entitled to normal remuneration during her suspension.
- [48] The proper show cause process has been followed, and Ms Philipson has been provided with procedural fairness Ms Philipson's human rights have been considered.
- [49] The decision appealed against is confirmed.