SUPREME COURT OF QUEENSLAND

CITATION:	*Smith v Queensland Corrective Services Commission* [2000] QSC 026
PARTIES:	**STEVEN SMITH** (Applicant) v **QUEENSLAND CORRECTIVE SERVICES COMMISSION** (Respondent)
FILE NO/S:	S 7037 of 1999
DIVISION:	Trial Division (Brisbane Registry)
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	2 March 2000
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2000
JUDGE:	Mackenzie J
ORDER:	**Application dismissed with costs to be assessed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – Natural Justice – Relevant and irrelevant considerations – Disclosure of material adverse to prisoner – Failure to observe time limits – Failure to fix "decision date" – Remissions – prisoner not of good conduct and industry. *Judicial Review Act 1991* *Corrective Services Regulations 1989 Reg* 21,27 *McCasker v The Queensland Corrective Services Commission* (1998) 2 Qd R 261, 267 *Vaughan v Watt* 9 LJ Ex 272 *Derecourt v Corbishley* 5 E&B 188; *Groux Co v Cooper* 8CBNS 814 *Felton v The Queensland Corrective Services Commission* (1994) 2 Qd R 490 *Walker v Queensland Corrective Services Commission* (1999) QSC 49 *R v Rogers* (1987) 8 NSWLR 236, 238-9 *McSweeney v Queensland Corrective Services Commission* *T*SV 11/90, Kneipp J, 2 March 1990) *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355
COUNSEL:	K Varley for applicant

J Logan SC for respondent

SOLICITORS: Ryan & Bosscher for applicant
CW Lohe, Crown Solicitor, for respondent

[1] The applicant seeks a statutory order of review of a decision to refuse remissions to him. He is serving a sentence of eight years imprisonment and a cumulative sentence of 34 days for another offence. If he had been granted full remissions his earliest release date would have been 10 March 1999.

[2] Although the application concerns itself with a number of matters, Mr Varley who appeared for the applicant restricted himself to three areas of complaint. The first was a failure to extend natural justice to the applicant. This had two aspects. The first was that the applicant was not provided with a copy of a report prepared by a sentence management team in connection with the application for remission which was considered by the authorized delegate of the Office of Sentence Management. The second was that the decision to refuse remissions had been made before the applicant had been given the opportunity to respond to an invitation to comment on a letter dated 22 February 1999 in which the authorized delegate advised that he had decided to consider not granting remissions.

[3] The second area of complaint was that the decision maker took into account irrelevant considerations or failed to take relevant considerations into account. This was concerned with aspects of the construction of Regulations 21 and 27 of the *Corrective Services Regulations* and the administrative guideline relating to remissions, and a submission that because not all of eight specified items in a list of criteria in an Administrative Guideline relating to remissions were referred to in the letters relating to consideration of the applications the decision was flawed.

[4] The third was concerned with non-compliance with a timetable in the Administrative Guidelines for considering applications for remissions, and the implications of that failure.

[5] Before considering the grounds in detail it is desirable to set out the legislative framework relative to the application. Regulation 21 (which is in Part III) provides that a prisoner serving a sentence of imprisonment of two months or longer and who is of good conduct and industry may, at the discretion of the Commission, and subject to the following provisions of Part III be granted a remission of one-third of his sentence.

[6] A prisoner is of good conduct and industry for the purposes of Part III if he complies with all relevant requirements to which he is subject and displays a readiness to assist in maintaining order and a willingness and genuine desire to maintain steady industry in every employment or work which may be required of him. No complaint was made about his industry, which is attested to by documentary evidence.

[7] However, while in prison the applicant committed major breaches of discipline against Regulation 29 on six separate occasions between July 1996 and December 1998. On each occasion he was punished by seven days separate confinement.

There were numerous other lesser breaches of discipline while serving his sentence. While it would be unrealistic to expect perfection in this area, it would be difficult to conclude objectively that the applicant had been of good conduct or good conduct and industry, if it is a composite phrase, during his period of imprisonment having regard to his disciplinary history. The applicant conceded in his invited response to the delegate's letter of 22 February, 1999 that his breach history had not been good.

[8] Regulation 27 provides that when within a period of imprisonment a prisoner undergoes separate confinement for a period of seven days or more on three or more occasions and he has not generally been of good conduct and industry, the General Manager of the relevant prison shall submit all relevant details together with his recommendation to the Commission for consideration by it before the date on which the prisoner might ordinarily have been discharged had he been of good conduct and industry. The Commission is required thereupon to determine whether the prisoner shall forfeit the whole or any part of the remission which he might otherwise have enjoyed.

[9] The Regulations lack clarity (*McCasker v The Queensland Corrective Services Commission* (1998) 2 Qd R 261, 267, Pincus JA) but the authorities establish that where a prisoner is of good conduct and industry, he has a legitimate expectation that remissions will be granted in the absence of circumstances which otherwise make it inappropriate for him to be released. The authorities which establish the principle, *Ex parte Fritz* (1992) 59 A Crim R 132, *Felton v The Queensland Corrective Services Commission* (1994) 2 Qd R 490, *McCasker* and *Walker v Queensland Corrective Services Commission* (1999) QSC 49 were all cases where the accused was of good industry and character or conceded to be of good industry and character. Accordingly they are of limited assistance in the present case, for reasons to which reference will soon be made.

[10] In *McCasker*, Macrossan CJ said at 263 that Regulation 21 is structured on the premise that the good conduct and industry qualification entitles a prisoner to consideration for remission but does not assure the grant of it. He said of Regulation 27 that it simply provided for another threshold which could cause the loss of remission. It envisaged that there may be conduct of a specified kind which would result in forfeiture of the right in whole or in part. He referred to the function that remissions played in the maintenance of discipline and order in corrective institutions. Pincus JA at 268 said that the Commission had power under Regulation 21 to refuse a remission to a person who had not been subject to the process of forfeiture defined by Regulation 27.

[11] In *R v Rogers* (1987) 8 NSWLR 236, 238-9, Street CJ explained remissions in the following terms:

> "The remission system is essentially an administrative mechanism aimed at encouraging good behaviour by prisoners and conversely providing for the opportunity of imposing sanctions for bad behaviour by cancellation of remissions. This is the sole justification for the existence of the system. . . .
>
> The whole remission system is based on the premise that remissions are an incentive and reward for good conduct during the serving of a

> term of imprisonment. They are granted or withdrawn by prison authorities in the light of considerations essentially and properly relevant only to conduct and other circumstances arising during the course of the sentence being actually served."

[12] On 22 February 1999, about two weeks before the applicant would have been entitled to release if granted full remissions, the authorized delegate wrote to the applicant in the following terms:-

> "…..a decision was made to **consider** not grant (sic) remission on the sentence of 8 years which you are currently serving, on the basis of your poor institutional conduct and industry. The delegate is not granting remission on the basis that you have and that you displayed unacceptable behaviour and conduct during the period under consideration."

I mention, in passing for the time being, that the submission that the decision had already been made is based on the last sentence of that quotation.

[13] The letter listed the material considered by the authorized delegate in determining the matter. The list included the sentence management team recommendation dated 16 February 1999 relating to the prisoner. The report is contained in a form which requires boxes to be ticked in some instances and information to be provided in written form in other instances. Under the heading "Institutional Performance" the following is stated:-

> "General conduct and behaviour has at times of Sentence Management reviews been described as satisfactory though can be demanding, follows instructions and has on occasions involved himself in other inmate issues.
>
> Recent reports suggest Steven has improved his institutional performance and appearance, however, in December 1998 he received two major breaches of discipline.
>
> He has an extensive breach and incident history as recorded in CIS which does not reflect an inmate of satisfactory conduct."

[14] Under the heading "Assessed Risk to the Community if Released Unsupervised" it was noted that the nature of the offence and the length of sentence suggested the offence was of a serious nature. His extensive criminal history including a 3 years 6 months sentence for unlawful wounding was noted. It was also stated that the risk to the community was not perceived to be significant due to his satisfactory completion of recommended programmes and that he had received approval for release to work within the community. In an earlier section of the report it was noted that he had been approved for leave of absence by the Queensland Community Corrections Board. However, while waiting for a decision by the Commission as to whether the recommendation should be approved, he committed breaches of discipline and response from the Commission whether he was still approved for release was awaited.

[15] Under the heading “Conduct and Industry During the Period Under Consideration”, there was a question whether breaches or incidents other than those of seven days separate confinement revealed any patterns of unacceptable behaviour. It was reported that there was a pattern of disobeying or refusing to obey lawful orders and behaving in an offensive, threatening manner. Under the same section there is also a rather ambiguous question “Has the Prisoner’s Conduct and Industry Been of an Unacceptable Standard Through the Entire Period Under Consideration?". The comment is that reports suggest his conduct and behaviour had for periods of his sentence been satisfactory. He had completed recommendations in relation to his offending behaviour. Generally his industry was good though when breached “he is terminated”. The final recommendation was as follows:

> “Sentence management does for no other reason than Regulation 27 recommend the inmate only be approved part of his general remission”.

[16] Under the heading “General Manager”, the option “Recommended” is circled and the reason is expressed as follows:

> “Partial approval given that prior to his last breach had been approved RTW”.

That refers to his approval for release to work. At best the report is ambivalent. There are clear indications that on the one hand it was recognized that it could not be said that the applicant was of good conduct and industry but on the other hand there were factors which led those reporting to recommend partial remissions.

[17] The authorized delegate is not bound by recommendations in the General Manager’s report. Provided the decision is made in accordance with the principles of administrative law the fact that he disagrees with the recommendation made by the General Manager is not without more, a ground for review. The proper construction of the facts of the case and the report from the General Manager is that the good character and industry of the prisoner was not unreservedly accepted. In that respect it is distinguishable from the cases cited above.

[18] In the applicant's submissions, great reliance was placed on the absence of evidence that the applicant's release would subject the public to unnecessary risk. That is an important factor where a prisoner is of good conduct and industry. The Administrative Guidelines include it as a matter to which the delegate must have regard in a case where a prisoner is otherwise of good conduct and industry. The guideline says that, in relation to such a prisoner, overriding considerations indicating that the prisoner would be an unacceptable risk to the community if discharged without supervision may make it necessary to decline to grant remission.

[19] The submission fails to have regard to the essential purpose of remissions and the dichotomy between cases where the prisoner has been of good conduct and industry and those who have not. In the case of the former, having fulfilled the purpose behind remissions, only overriding considerations can take the expectation of remissions away. In the case of the latter, the purpose behind remissions has not been fulfilled. If full or partial remissions are granted, it is only because the delegate has seen fit, in all the circumstances, to recognise factors justifying some reward, notwithstanding the failure to be of good conduct and industry. Mere absence of evidence that the prisoner may present a risk to the community is not a crucial factor in exercising the discretion in such a case.

[20] The conceptual basis of remissions is that they are not automatically granted but are granted because the prisoner has demonstrated an attitude of conforming to discipline and order and other requirements in a corrective institution. In the present case the repetitive disruptive conduct on the part of the prisoner ran counter to that objective. The disciplinary history of the applicant was a relevant factor to take into account in making that decision. In the circumstances it was not unreasonable for the delegate to decide that remissions should be refused.

[21] The remaining issues are concerned with a failure to extend natural justice to the applicant. The first aspect of this is that the applicant says he was not provided with a copy of the report from the sentence management team at the Rockhampton Correctional Centre. In his affidavit the delegate relies on the fact that the invited comment on the "enclosed material referred to in sections 1 to 9 of his letter". He also deposes that "the material considered by me in determining the matter as numbered 1-9 was enclosed with my letter of 22 February 1999". That is the letter inviting comment. The applicant deposes that he did not at any time receive a copy of the report.

[22] Leaving aside that disputed issue of fact the case is not one where the existence of adverse material was not made known to the applicant. In addition to identifying the document by description, the letter of 22 February 1999 referred to the comments in the "remissions submission" concerning his institutional performance and that it stated that his behaviour had varied from satisfactory to demanding. It also referred to the breaches of discipline. It stated that the General Manager and sentence management team had recommended that he not be granted remission on the whole of his current period of imprisonment. This was a misstatement, since the recommendation related only to partial refusal. By the time the decision was made, as the letter of 2 June 1999 shows, the delegate was aware that the recommendation related to partial refusal. There is no evidence the misstatement prejudiced the prisoner. It was also alleged that there were other factual errors in summarizing what was in the report. One was that it was incorrect to say that the remission submission contained comments that, in the area of institutional performance, his behaviour had varied from "satisfactory to be (sic) demanding". What the report said was that his behaviour had been described as "satisfactory though can be demanding".

[23] Another was that the statement in the letter that the material under consideration by the delegate "would indicate that you have demonstrated unacceptable behaviour and conduct" was contrary to the General Manager's opinion.

[24] Issue was also taken with the notion that the applicant's work release employment had been terminated after he had been found in possession of a syringe.

[25] With regard to his performance, each of the statements implies a variance in conduct and the complaint about factual error in the delegate's letter is unsustainable. The passage about his conduct is not a paraphrase of the report but an expression by the delegate of a view of the effect of the material, which, since it was adverse to the prisoner's interests, he was obliged by the Administrative Guidelines to notify the prisoner of.

[26] With regard to the termination issue, so far as the evidence extends, it appears that until his breaches of discipline in December 1998, he was on leave of absence to work. It is implicit in this that upon those breaches occurring, this arrangement had ceased. To say it had been terminated does not misstate the situation.

[27] Overall the basis of the decision to consider not to grant remission is stated explicitly in the letter of 22 February 1999. On the assumption that for some reason the document from the sentence management team did not reach the applicant, he was aware that there was such a document and the aspects of it which were of concern to the delegate were made known to him. He was invited to respond and ask for an extension of time in which to respond if he wished. It was open to him, had he wished to do so, to request that a copy of the management team recommendation be provided to him. He did not do so. In the circumstances I am not satisfied that there was any breach of natural justice in this respect.

[28] I turn now to the submission that the decision to refuse his application had actually been made prior to receipt of his response to the letter of 22 February 1999. This is based on the paragraph of the letter quoted in paragraph 11 and an analysis of similarities between the letter of 22 February 1999 and the subsequent correspondence in which the decision was conveyed to the applicant. The letter of 22 February 1999 clearly highlights that the decision currently made was to consider not granting remissions. The last sentence of the paragraph is unfortunately worded but the fact that the submissions made by the applicant did not produce any different result does not in my view support the conclusion that a reviewable error has been made on the basis of denial of natural justice because the decision had already been made. The fact that the letters are similar in many respects is hardly surprising since one would not be surprised, where a decision in conformity with the areas of concern raised in the original letter had been made, if a decision maker simply used an earlier letter as a precedent for the later letter with necessary alterations for the purpose of notifying of the decision..

[29] With regard to the complaint of non-compliance with the Administrative Guidelines, under those guidelines the delegate is required to fix a date ("the decision date") for the purpose of determining whether to grant eligible remissions to the prisoner. That date shall be at least seven days prior to the date upon which the prisoner if granted eligible remissions would be discharged. At least 28 days before making the decision not to grant eligible remissions the delegate shall notify the prisoner in writing of the decision date and any relevant matters adverse to the prisoner's interests which the delegate proposes to take into account in making a decision. The delegate shall also give the prisoner 21 days within which to submit written comment on such relevant matters.

[30] The sequence of events was that the sentence management team recommendation and the General Manager's report were made on 16 February 1999. By this time it had become impossible to comply with the Administrative Guidelines since it was less than 28 days before the earliest release date if granted remissions (10 March 1999). Nor was it possible to set a "decision date" which complied with the Administrative Guidelines if a decision not to grant remissions was being considered.

[31] The letter of 22 February 1999 states that on that day the delegate had made a decision to consider not granting remissions. The letter failed to comply with the Administrative Guidelines in that the delegate did not fix a decision date, which should have been no later than 3 March 1999, and advise the prisoner of it.

[32] In fact the decision to refuse remissions was not made until 2 June 1999 and reasons for the decision were provided on 2 July 1999. At the least, the applicant's case was neither dealt with in accordance with the Administrative Guidelines nor within a reasonable timeframe. No reason has been advanced for this administrative error which seems to have started with the timing of the report from the sentence management team and the General Manager and to have been compounded by the delegate's failure to observe the Administrative Guidelines and his dilatoriness in making the decision. It is not explained why it took over two months to make the decision after the reply had been received from the prisoner. Such an error should not occur where a prisoner's rights are concerned.

[33] Having said that, the question remains whether any legal remedy pursuant to the present application flows from this. *McSweeney v Queensland Corrective Services Commission* (TSV 11/90, Kneipp J, 2 March 1990, unreported) left open the question whether the timetable in Reg 27 was mandatory or directory. Kneipp J decided that, since there had not been a grant of remission entitling the prisoner to release, he was not entitled to release and was in lawful custody.

[34] In *Felton,* at 502, Williams J used words which, read literally, might be taken to mean that it was obligatory to make a decision concerning remissions prior to the date when the prisoner might have been discharged if granted full remissions. However, the remarks were made in the context of a discussion of whether a prisoner of good character and industry had a legitimate expectation of remissions. They are not, in my view, a concluded opinion on the issue involved in this application. Regulation 27 requires that the General Manager shall submit details of a person's separate confinements and failure to be generally of good conduct and industry before the date upon which the prisoner might ordinarily have been discharged had he been of good conduct and industry. The Commission's obligation (and therefore the delegate's) under the Regulation is to thereupon determine whether all or part of the remission should be forfeited. The Administrative Guideline is intended to achieve this. The decision should be made before the potential release date. However, the question is whether failure to do so affects the prisoner's position.

[35] There is little authority on the point. It is possible to imagine situations where a decision would not be able to be made immediately, for example where clarification of some aspect of the General Manager's report was required or further medical information bearing on the prisoner's suitability for release was needed before a decision could be made and it took some time to obtain it. The delegate would have a legitimate interest in obtaining such information. It would be a harsh outcome for the prisoner if a decision in his favour would otherwise have been made after that date once the additional information had been received but the decision making process could not be completed.

[36] There is no compelling reason to conclude that failure to complete the decision making process would invalidate it or create an automatic right to remissions if the

decision was not made in time. If that had been the intention a less oblique way of doing so would have been employed. The opinion of Kneipp J in *McSweeney* is apposite to the case.

[37] The word "thereupon" is not free from ambiguity. It can have either a temporal sense or a consequential sense (e.g. *Vaughan v Watt* 9 LJ Ex 272 and *Derecourt v Corbishley* 5 E&B 188; *Groux Co v Cooper* 8CBNS 814). It is not necessary to decide for the purposes of this decision in which sense it is used in Reg 27.

[38] Since *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the classification of a provision as mandatory or discretionary is of less importance than deciding whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. For the reasons given, in my opinion there was no such intention in this case.

[39] Failure to conform with Administrative Guidelines may attract administrative sanctions against a person failing to comply with them but in my opinion an order of statutory review under the *Judicial Review Act* is not available to the applicant merely by reason of delay in dealing with the application. Whether other remedies may be available in an appropriate case is not a matter which falls for decision on this occasion.

[40] The application is dismissed with costs to be assessed.