# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Queensland Police Union of Employees v State of Queensland* [2002] QSC 231 |
| PARTIES: | **QUEENSLAND POLICE UNION OF EMPLOYEES**<br>(applicant)<br>**v**<br>**THE STATE OF QUEENSLAND**<br>(respondent) |
| FILE NO/S: | S7153 of 2002 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| DELIVERED ON: | 19 August 2002 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 August 2002 |
| JUDGE: | Wilson J |
| ORDER: | **Application dismissed.** |
| CATCHWORDS: | INDUSTRIAL LAW – QUEENSLAND – DISPUTES – whether Supreme Court of Queensland had jurisdiction to make a declaration about the validity of a regulation when police had not gone on strike or threatened to go on strike – whether there was a real or only a hypothetical dispute<br><br>STATUTES – BY-LAWS AND REGULATIONS – VALIDITY – where regulation purported to prohibit police officers from going on strike – where applicant police union sought declaration that regulation was invalid<br><br>*Acts Interpretation Act* 1954 (Qld), s 14H<br>*Industrial Relations Act 1990* (Qld) (repealed)<br>*Industrial Relations Act 1999* (Qld), ss 174-181, sch 5<br>*Industrial Relations Reform Act 1994* (Qld)<br>*Police Administration Act 1990* (Qld), s 5.15, s 10.28<br>*Police Service (Administration) Regulations 1990* (Qld), S.5.3<br><br>*Bass v Permanent Trustee Company Limited* (1999) 198 CLR 334, applied. |
| COUNSEL: | R G Bain QC and B A Callaghan for the applicant<br>J S Douglas QC and P D Lane for the respondent |

SOLICITORS: Gilshenan and Luton for the applicant
Crown Solicitor for the respondent

[1] **WILSON J:** By an originating application filed on 6 August 2002, the applicant seeks a declaration that –

> "(i) S.5.3. of *The Police Service (Administration) Regulations 1990* is invalid and without force and effect insofar as it purports to prohibit a police officer to –
>
> > 'do any act or make any omission which, if done or omitted to be done by two or more officers, would constitute a strike within the meaning of the *Industrial Relations Act 1990*'
>
> in circumstances where police officers are able to take protected action pursuant to the *Industrial Relations Act 1999*.
>
> (ii) (further or alternatively) in circumstances in which police officers are able to take protected action pursuant to the *Industrial Relations Act 1999,* that protected action may include withdrawal of their services".

[2] The enterprise bargain agreement described as the *Queensland Police Service Agreement 3, 2000* expired on 30 June 2002, and there are presently negotiations for another such agreement.

[3] On 24 July 2002 the applicant told the Minister for Police and Corrective Services that it considered he had not been negotiating in good faith, and that it had received advice that "protected action" was available to it pursuant to s 174 of the *Industrial Relations Act 1999*. That advice was apparently based on the invalidity of s 5.3 of the *Police Service (Administration) Regulations 1990*. The applicant called on the Minister to express any different view he may hold, asserting that any differences would have to be resolved by declaratory proceedings.

[4] The Acting Minister for Police and Corrective Services referred the matter to the Minister for Industrial Relations, who replied by letter received by the applicant on 31 July 2002 asserting that the provision was valid and disputing the appropriateness of declaratory relief.

[5] The provision in question is in these terms –

**"PART V – RESIGNATION, RETIREMENT AND WITHDRAWAL OF SERVICES**

**5.3 Withdrawal of services.** An officer must not –

- withdraw from his or her duties whether as a constable or otherwise unless authorised by the Act, any regulations made under the Act or by the Commissioner;

- do any act or make any omission which, if done or omitted to be done by two or more officers, would constitute a strike within the meaning of the *Industrial Relations Act 1990.*

Penalty: 100 penalty units"

The reference to the *Industrial Relations Act 1990* should be read as a reference to the *Industrial Relations Act 1999*[1].

[6] Mr JS Douglas QC, who appeared as senior counsel for the respondent, submitted that the Court was being asked to determine the validity of s 5.3 in a vacuum - in other words to give an advisory opinion, something which it ought not do. In his submission, the Court was being asked to assume a state of facts, namely, that police officers proposed to withdraw their services, when there was no evidence that they actually proposed to do so or how they might do that. Senior counsel for the applicant, Mr Bain QC, submitted that it was sufficient that the parties were in negotiation, that there was potential for the exercise of the right to strike for which the applicant contended, and that there was dispute between the parties as to the existence of that right.

[7] In *Bass v Permanent Trustee Company Limited*[2] the High Court confirmed that it is not the function of Courts to give advisory opinions. Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said[3] -

> "The purpose of a judicial determination has been described in varying ways. But central to those descriptions is the notion that such a determination includes a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy. ......
>
> Because the object of the judicial process is the final determination of the rights of the parties to an action, courts have traditionally refused to provided answers to hypothetical questions[4] or to give advisory opinions. The jurisdiction with respect to declaratory relief has developed with an awareness of that traditional attitude.

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[1] *Acts Interpretation Act 1954* s 14H
[2] (1999) 198 CLR 334
[3] at 355 - 356
[4] *Luna Park Ltd v The Commonwealth* (1923) 32 CLR 596 at 600, per Knox CJ; *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia* (1925) 36 CLR 442 at 451, per Isaacs J; *University of NSW v Moorhouse* (1975) 133 CLR 1 at 10, per Gibbs J.

> ....................... The jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law and such a declaration will not be hypothetical in the relevant sense."

Their Honours went on to distinguish an advisory opinion from a declaratory judgment in this way[5] –

> "It is true that some have seen the use of the declaratory judgment as little more than the giving of an advisory opinion[6]. However, one crucial difference between an advisory opinion and a declaratory judgment is the fact that an advisory opinion is not based on a concrete situation and does not amount to a binding decision raising a res judicata between parties. Thus, the authors of one recent text on declaratory judgments[7] emphasise that, where the dispute is divorced from the facts, it is considered hypothetical and not suitable for judicial resolution by way of declaration or otherwise. They say[8]:
>
> > 'If… the dispute is not attached to specific facts, and the question is only whether the plaintiff is *generally* entitled to act in a certain way, the issue will still be considered theoretical. The main reason for this is that there may be no certainty that such a general declaration will settle the dispute finally. Subsequent to that declaration a person (the defendant himself or someone else) may be adversely affected by a particular act of the plaintiff. It may then be doubtful whether this act is covered by the declaration. In such a case the affected person will probably be entitled to raise the issue again on its special facts. Indeed, such a declaration will in effect be a mere advisory opinion.'"

[8] "Strike" is very widely defined in Schedule 5 of the *Industrial Relations Act 1999* as follows -

> "**strike –**
>
> (a) means the conduct of 2 or more employees who are, or have been, employed by the same employer, or different employers, consisting in –
>
> (i) a wilful failure to perform work required of them under their employment contracts; or
>
> (ii) a performance of work in a way in which it is not customarily performed; or

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[5] (1999) 198 CLR at 356 - 357

[6] Foster, "The Declaratory Judgment in Australia and the United States:, *Melbourne University Law Review,* vol 1 (1958) 347, at p 373

[7] Zamir & Woolf, *The Declaratory Judgment,* 2nd ed (1993).

[8] Zamir & Woolf, *The Declaratory Judgment,* 2nd ed (1993), p 132.

(iii) the adoption of a practice or strategy resulting in a restriction, limitation or delay in the performance of work or a restriction or limitation of the product of work; or

(iv) a ban, restriction or limitation on the performance of work or on acceptance or offering for work; or

(v) a wilful failure of the employees to attend for work that is not allowed by the employer; or

(vi) a wilful failure to perform any work at all by employees who attend for work that is not allowed by the employer;

that is because of a combination, agreement or understanding (expressed or implied) entered into by the employees or any of them and that has a purpose –

(vii) to compel or induce an employer to agree to employment conditions, or to employ, or cease to employ, a person or class of person, or to comply with demands made by the employees or any of them or by any other employees; or

(viii) to cause loss or inconvenience to an employer in the conduct of business; or

(ix) to incite, instigate, aid, abet or procure another strike; or

(x) to help employees in the employment of another employer to compel or induce the employer to agree to employment conditions or to employ, or cease to employ, a person or class of person or to comply with demands made by any employees; and

(b) includes conduct capable of constituting a strike even though the conduct relates to part only of the functions the employees must perform in their employment; but

(c) does not include action by an employee if—

(i) the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and

(ii) the employee did not unreasonably contravene a direction of his or her employer to perform other available work (whether at the same or another workplace) that was safe and appropriate for the employee to perform.”

[9] As Mr Douglas submitted, the interpretation questions posed by the declarations sought are set in a factual vacuum, and their resolution will depend very much on what happens in any real dispute. As yet, no withdrawal from duties or specific action which might come within the definition of "strike" has been taken or threatened. Depending upon the precise nature of such action, even if s 5.3 is invalid, other statutory provisions may render it unlawful.

[10] The parties' submissions on the substantive issue of invalidity raised important questions as to (inter alia) the scope of the regulation making power in s 10.28 of the *Police Service Administration Act 1990*, the effect of s 5.15 of that Act, the effect of amendments to the *Industrial Relations Act 1990* made by the *Industrial Relations Reform Act 1994*, and the effect of ss 174 - 181 of the *Industrial Relations Act 1999*. However, they cannot be resolved on a hypothetical basis.

[11] The application must be dismissed.