SUPREME COURT OF QUEENSLAND

CITATION:	*Conder v Byrne & Anor* [2004] QSC 082
PARTIES:	**CONDER, Richard Philip** (applicant) **v** **BYRNE, Michael John William** (first respondent) **D** (second respondent)
FILE NO/S:	SC 6781 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	5 April 2004
JUDGES:	de Jersey CJ
ORDER:	**1. Set aside the decisions by the Misconduct Tribunal on 4 July 2003 in relation to matters seven, eight, nine and ten** **2. Remit the appeal in respect of those matters to a Misconduct Tribunal, differently constituted, for fresh consideration according to law** **3. Reserve costs**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – OTHER GROUNDS – where the first respondent, in an appeal hearing of a Misconduct Tribunal, upheld the second respondent's appeal against the applicant's findings that four charges brought against the second respondent were substantiated – whether the first respondent made an important factual error in finding that one of the complainants made a mistake in their evidence – whether the first respondent made an error in finding that the accounts of the two complainants were "clearly incompatible" *Judicial Review Act* 1991 (Qld) *Misconduct Tribunals Act* 1997 (Qld) *Police Service Administration Act* 1990 (Qld), s 1.4, s 7.4

Police Service (Discipline) Regulations 1990 (Qld), s 9(1)(f)

Aldrich v Ross [2000] QCA 501; [2001] 2 Qd R 235, cited
R v M [2001] QCA 458, cited
R v Markuleski (2001) 52 NSWLR 82, cited

COUNSEL: G P Long for the applicant
No appearance for the first respondent (abides the order of the Court)
A J Rafter SC for the second respondent

SOLICITORS: Queensland Police Service Solicitor for the applicant
No appearance for the first respondent (abides the order of the Court)
Gilshenan and Luton for the second respondent

[1] **de JERSEY CJ:** This is an application under the *Judicial Review Act* 1991 to set aside decisions of the first respondent, Mr Byrne, sitting as a member of a Misconduct Tribunal constituted pursuant to the *Misconduct Tribunals Act* 1997. Mr Byrne upheld the second respondent D's appeal against the applicant's findings that four charges brought against D were substantiated. Those charges are designated numbers seven, eight, nine and ten.

[2] The applicant made his determination under s 7.4 of the *Police Service Administration Act* 1990 and s 9(1)(f) of the *Police Service (Discipline) Regulations* 1990. Following D's being informed of the allegations, D was heard in relation to them, and the applicant also took account of statements etc which had been assembled.

[3] Mr Byrne conducted his appeal hearing on 28 and 29 April 2003. He was obliged to exercise an independent judgment, but having regard to the applicant's antecedent decisions (*Aldrich v Ross* [2001] 2 Qd R 235, 256-7). On 4 July 2003 Mr Byrne published comprehensive reasons for his decision, and is to be commended for that.

[4] The charges brought against D alleged indecent conduct in relation to two young girls, his daughter KA and her school friend K. Those dismissed by Mr Byrne, and the others upheld by the applicant, had all been the subject of criminal prosecution which resulted in acquittal. Of course the standard of proof in the proceedings before the applicant and before Mr Byrne was different.

[5] I now set out the text of charges number seven, eight, nine and ten, being the charges in issue on this application.

> "Matter 7
> That on a date unknown between 1 June 1995 and 31 December 1995 at Mackay your conduct was disgraceful in that you:
>
> (a) put your hands inside the clothing of [K], a girl then aged 11 years, undid the buckle of her belt, unzipped her jeans, placed your hand inside the front of her jeans and rubbed her groin in the area of her pubic hair with your hand.

[Sections 1.4 and 7.4 *Police Service Administration Act 1990*, Section 9(1)(f) *Police Service (Discipline) Regulations 1990*]

Matter 8
That on a date unknown between 28 June 1995 and 31 December 1995 at Mackay your conduct was disgraceful in that you:

(a) placed your hands under the night dress of [K], a girl then aged 11 years, rubbed her breasts with one of your hands, removed her underpants, touched her vagina with your fingers and inserted one of your fingers inside her vagina.

[Sections 1.4 and 7.4 *Police Service Administration Act 1990*, Section 9(1)(f) *Police Service (Discipline) Regulations 1990*]

Matter 9
That on a date unknown between 28 June 1995 and 31 December 1995 at Mackay your conduct was disgraceful in that you:

(a) laid (sic) on a bed beside [K], a girl then aged 11 years and placed one of your hands inside her underpants and rubbed her vagina with your fingers.

[Sections 1.4 and 7.4 *Police Service Administration Act 1990*, Section 9(1)(f) *Police Service (Discipline) Regulations 1990*]

Matter 10
That on a date unknown between 1 July 1995 and 1 April 1996 at Mackay your conduct was disgraceful in that you:

(a) laid (sic) on a mattress beside [K], a girl then aged 11 years, placed one of your hands inside her pyjama pants, rubbed the area of her vagina on the outside of her underpants, placed your hand down the front of her underpants, rubbed her vagina with your fingers and attempted to place your fingers inside her vagina.

[Sections 1.4 and 7.4 *Police Service Administration Act 1990*, Section 9(1)(f) *Police Service (Discipline) Regulations 1990*]"

[6] It will be seen that each of those charges concerns the school friend K. D's contention before Mr Byrne, which Mr Byrne accepted, was that K's complaints should not be accepted as credible.

[7] Mr Byrne's approach emerges from the following passage taken from his reasons for decision:

"Matter 7
In respect of this allegation I find that the inconsistencies between the two girls, especially the failure of the child [D] to perceive any improper act, or providing any circumstantial corroboration to [K's] allegation, as making the allegation highly improbable and certainly not supported by the evidence to the standard required. (Decision of misconduct tribunal; exhibit CAB6 at p.26)

> Matter 8
> In assessing this particular complaint, I take into account the finding I have made in respect of [K's] earlier complaint. I find it improbable that the events occurred as alleged by [K] in respect of this allegation and that her mistake in respect of the existence of the door, her failure to complain (at any stage) that she had a sore vagina as a result of the rubbing, and the incompatibility of her being both "relaxed" while being "anxious and apprehensive" give grounds for having significant doubts about the veracity of her testimony in respect of this allegation.
> I find that this allegation is not supported by evidence to the required standard. (Exhibit CAB6 at p.27-28).
>
> Matter 9
> I find that it would be highly improbable that a person in the appellant's position would perform the acts as alleged and take no steps to prevent the other person in the room from catching him out. In the face of the appellant's denial that such an event ever happened, and taking into account my assessment of [K] in respect of other allegations, I find that this allegation is not made out to the requisite standard of proof. (Exhibit CAB6 of p.28)
>
> Matter 10
> I would agree that discrepancies (between the evidence of [K] and [KA]) are indicative of a lack of concoction or conspiracy. However, I find there is nothing which would enable me to make an authoritative choice as between the two versions. Taking this into account, together with the appellant's denial, one is left with two versions consistent with innocence and one version consistent with guilt. (Exhibit CAB6 at p.29)"

[8] The challenge mounted on this application focused on matters eight and ten. Mr Long, who appeared for the applicant, submitted that Mr Byrne made an important factual error in finding that K made a mistake in relation to the existence of a door.

[9] Earlier in Mr Byrne's reasons, the following appears:

> "[K's] evidence in respect of the existence or otherwise of the door impinges significantly on her credibility since she recounts that she was able to make her escape from the bedroom because the Appellant had gone into the en-suite and the door prevented him from seeing her. The photographs [Exhibit 2] tendered by the Respondent confirm that there was no door to the en-suite merely an archway."

[10] The photographs (exhibited to the affidavit of P F Campbell sworn 1 April 2004) actually confirm that there was a door, perhaps of concertina design, which could be used to cover the archway into the en-suite. It may be that it was a cupboard door which could however be used for that other purpose.

[11] In her evidence at the criminal trial, the complainant said that after the misconduct occurred, D went to his bathroom and closed the door, whereupon she left the room. She had noted that there was a rim of light around the door, indicating that he had switched on the light in the en-suite. She described it as a "sliding door". The following occurred during her being cross-examined at the trial:

> "[His Honour] And what about the en-suite? You've been asked about an archway and you go into the en-suite there? -- Yes.
>
> Are there any sliding doors or door ----?-- No.
>
> Well, what was the en-suite? Like, was there a toilet and shower in there or toilet and bath? – You've got the bedroom and then you've got the archway and then from – on your right you've got the – like the sink and the basin and on your left you've got the – his closet where he puts his clothes in and then you go to another like archway type doorway and then you go into the toilet. Well, the toilet is on your right and your shower is on your left.
>
> Any doors in there once you get into the ----?-- No, just the cupboard one where you shut the ----
>
> Right. Did you want to ask any ----
>
> MR FARR: No, thank you."

[12] In an addendum statement to the police of 28 June 2000, K said that she was sure there was a "sliding door". Mr Farr, appearing for D before Mr Byrne, emphasized that in his submissions (what follows is rather garbled, but repeated for the emphasis on the sliding door):

> "From under the door was that you can see in those photographs are going to prevent light, because they're all either cupboard doors or something else well in through the opening of the bathroom itself and she speaks of it being a sliding door, "I'm sure the door was a sliding door" in that addendum. And there's just no amount of argument that can change a non-existent door to an existent door."

[13] In my respectful view Mr Byrne erred in concluding that K was mistaken about the existence of a door covering the entry to the en-suite. It is clear that there was a way of covering the entry which would be consistent with K's version of the events. It may be that her description of it as a "sliding" door was not accurate. But the critical question was whether the entry could have been covered, while allowing also for a rim of light to be seen, and the photographs indicate that that was possible. I do not consider that it could be drawn, from K's evidence at the trial extracted above, that she was saying that there was no door: because of the interruption, the matter was left in an inconclusive state. What she may have been intending to convey was that the cupboard door could also be used for the additional purpose of covering the archway entry. That again may well be consistent with the photographs.

[14] Mr Rafter SC, who appeared for D, submitted that were I to conclude that such a mistake was made, I would nevertheless uphold Mr Byrne's decision in relation to

matter eight because that consideration was only one of a number basing his decision. Two points should be made. The first is that Mr Byrne regarded this point as important: the mistake, he said, "impinges significantly" on K's credibility. Second, in dealing with matter eight, Mr Byrne said that he took account of his earlier expressed rejection of K's credibility in relation to matter seven. On the basis of *R v Markuleski* (2001) 52 NSWLR 82 and *R v M* (2001) QCA 458, Mr Rafter submitted he was entitled to take that course. But I have difficulty with the apparently sequential approach of Mr Byrne. The question of the credibility of the complainant should preferably have been approached on a broader, more comprehensive basis, embracing her evidence overall, eschewing any piecemeal assessment. In any case, I do not think that the importance here attached to what he regarded as K's mistake should, for present purposes, be regarded as negated or neutralized by an earlier formed view on K's credibility in relation to the anterior charge.

[15] These conclusions warrant allowing the application and requiring reconsideration of the position in relation to all four charges. That follows from Mr Byrne's having regarded this "mistake" by K as bearing importantly on her credibility, and the question of her credibility being critical to the outcome in relation to all four matters.

[16] It is strictly unnecessary therefore for me to deal separately with the criticisms of Mr Byrne's approach to matter ten. But because the matter is to be remitted, it may be helpful if I express my views in relation to those criticisms, albeit briefly. They concern Mr Byrne's conclusions (a) that on KA's evidence there was not sufficient time for D to have acted as she claimed he did; and (b) that there was "clear incompatibility" between the accounts of KA and K, an incompatibility he could not resolve.

[17] As to matter (a), KA said that the incident lasted two to three minutes. The conduct involved D lying on a mattress between the two girls, and rubbing K's vagina inside and outside her clothing and attempting to insert a finger into her vagina. Plainly that could have been accomplished in that time.

[18] As to (b), while K described those events, KA had her eyes closed. At the criminal trial, KA agreed that she did not recall anything "untoward" about the incident, but that could be explained by the circumstance that she had her eyes closed. In KA's statement, she said that after the incident, K said to her: "Your dad was doing something to me", to which she, KA, responded: "Yeah, I could hear." KA could not recall that at the trial. Its being in her statement tended however to support K's credibility. In the result, I have difficulty with Mr Byrne's view that the accounts of the two girls were "clearly incompatible".

[19] It may be however that were these criticisms to stand alone, they may not have warranted interfering with the decision made by Mr Byrne, allowing for the approach appropriately restricted to be taken on a judicial review application. But they do not stand alone, all four charges being rendered vulnerable because of the common thread of K's credibility, to which the error made in relation to matter eight so critically relates.

[20] I make the following orders:

1. Set aside the decisions made by the Misconduct Tribunal on 4 July 2003 in relation to matters seven, eight, nine and ten;
2. Remit the appeal in respect of those matters to a Misconduct Tribunal, differently constituted, for fresh consideration according to law;
3. Reserve costs.