

SUPREME COURT OF QUEENSLAND

CITATION: *Cuttler v Commissioner of the Queensland Police Service*
[2010] QSC 286

PARTIES: **MARK WILLIAM CUTTLER**
(Applicant)

v

**COMMISSIONER OF THE QUEENSLAND POLICE
SERVICE**
(Respondent)

FILE NO/S: 9714 of 2007

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 6 August 2010

DELIVERED AT: Brisbane

HEARING DATE: 20 July 2010

JUDGE: Boddice J

ORDER:

1. The application for statutory review and/or review is allowed.
2. The applicant's application to be engaged by the Queensland Police Service as a recruit be referred to the respondent for further consideration and to be dealt with by the respondent according to law.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – DELEGATION OF POWER – where the applicant had previously applied for appointment as a police recruit and had the most recent of those applications denied due to his criminal history – where the applicant again applied for appointment as a police recruit and the respondent had the power to determine that application – where the respondent was permitted to delegate any of his powers to a police officer or staff member and to give directions for the efficient and proper functioning of the police service – where the respondent had given a direction that where an applicant has previously undertaken the selection process, the decision to process a further application rests with the Manager, Recruiting Section – where the respondent had formally delegated his power to determine applications for appointment as a police recruit to the “Manager, Human Resource Development Branch” – where the “Manager, Recruiting Section, Human Resource

Management Branch” decided not to process the applicant’s most recent application as he had been permanently excluded from being offered employment as a police recruit – whether the Manager, Recruiting Section, Human Resource Management Branch was authorised to determine the applicant’s application.

Police Service Administration Act 1990 (Qld) ss 4.8, 4.9, 4.10, 5.2, 5AA.1, 5AA.3, 5AA.11, 5AA.12

Bedlington v Chong (1998) 157 ALR 436

Cutler v Commissioner of Police Service [2001] QSC 161

Raikua & Ors v Minister for Immigration and Multicultural and Indigenous Affairs & Ors (2007) 239 ALR 564

COUNSEL: N Kidson for the applicant
S A McLeod for the respondent

SOLICITORS: HWL Ebsworth Lawyers for the applicant
Queensland Police Service for the respondent

- [2] The applicant makes an application for a statutory order of review and an application for review in relation to the conduct of the respondent in dealing with an application by the applicant, for selection as a police recruit (“recruitment application”).
- [3] The applicant contends the respondent failed to make a decision in relation to his recruitment application or, alternatively, made a decision that it was unsuccessful in circumstances where the person who purported to make the decision was not authorised to do so and/or relied upon provisions that were of no effect in law and/or failed to observe requisite procedures in making the decision.

Prior applications

- [4] The applicant made five applications for appointment as a police recruit prior to 2007. Those earlier applications had been rejected on 1 June 1995, 8 February 1996, 12 July 1996, 6 July 1999 and 11 July 2003 respectively. Whilst the first three applications were unsuccessful for reasons unrelated to the applicant’s integrity, the fourth and fifth applications were unsuccessful for reasons directly related to integrity as on 1 October 1997 the applicant was convicted of 11 charges of stealing as a servant. Convictions were recorded on each charge and the applicant sentenced to 2½ years imprisonment, suspended after six months for a period of three years.
- [5] When the applicant lodged his fourth application, he was advised, by letter dated 6 July 1999, that he had not been “short listed for this intake as you do not fully satisfy the entry requirement in relation to your criminal history. The Integrity Committee has considered your application and has determined that your application is unsuccessful”. His fifth application also resulted in a reply to the effect that his application had been assessed in accordance with the Integrity Committee Guidelines and had been unsuccessful because he did not meet “the high level of integrity/personal conduct required for selection as a police recruit”.

- [6] On 9 January 2004, the applicant was informed that a decision had been made to permanently exclude him from appointment as a police recruit by the Integrity Committee on 13 October 1999. Reference was made to the applicant's criminal convictions, traffic violations and domestic violence protection orders. The applicant was invited to make representations about his suitability to be engaged by the Queensland Police Service ("Service"). In response, the applicant advised he did not believe he was able to respond properly until such time as he was provided with further information and clarification sought by him.
- [7] On 3 May 2004, a document entitled "Suitability notice" was sent to the applicant in the following terms:
- ... in respect to that relevant information including your representation, the Commissioner has determined that as you were convicted and imprisoned for committing 11 charges of Stealing as a Servant between 2/09/96 and 21/10/96 you are not suitable to be engaged by the Queensland Police Service.
- The Commissioner of the Queensland Police Service does not believe that you meet the level of integrity and conduct required by the Queensland Police Service for appointment as a police recruit.
- [8] In response, the applicant complained that the decision had been made without the benefit of submissions from him as he was still awaiting the further information sought by him. On 2 June 2004, the applicant was informed that if he required a reassessment of the decision he should forward any new facts or additional information which may be relevant within 28 days. The applicant responded on 30 June 2004 reiterating his earlier position. On 21 July 2004, the applicant was advised that the earlier decision was affirmed and that the Commissioner had determined he was not suitable to be engaged by the Service.

Recruitment application

- [9] On 3 October 2007, the applicant made his sixth application for appointment as a police recruit. It is this application that is the subject of the application for review.
- [10] On 5 October 2007 Inspector Phil Barrett wrote to the applicant in the following terms:
- I refer to your application for engagement as a police officer, made on the 3 October 2007.
- As you have previously been advised in correspondence dated 15 September 2005, it has been determined that you are permanently excluded from being offered employment as a police recruit.
- [11] Inspector Barrett, who held the position of Manager, Recruiting Section, Human Resources Management Branch, Human Resources Division of the Service, deposed that prior to reading this letter, he examined the applicant's application and recruiting section file in order for a decision to be made in relation to the further processing of that application.¹ Inspector Barrett noted that a determination had been made that the applicant was not suitable to be engaged as a recruit as he did

¹ Affidavit of Phillip Roger Barrett sworn 2 December 2008, paragraph 11.

not meet the level of integrity and conduct required by the Service for appointment as a recruit having regard to this conviction and imprisonment for offences of stealing as a servant. Inspector Barrett stated he had regard to the integrity guidelines and as those guidelines had remained unchanged since the time of the decision that the applicant was not suitable to be engaged, he determined that the assessment of the applicant's integrity in accordance with those guidelines did not require reassessment. Further, as no new or further information had been provided by the applicant that would impact upon the decision as to whether he met the level of integrity and conduct required by the Service for appointment as a police recruit, there was no reason to continue processing the application past the integrity assessment phase. Inspector Barrett stated:

[16] Having satisfied myself that there was no reason to continue processing the application past the integrity assessment phase, I advised [the applicant] by letter dated 5 October 2007 that, as previously advised, he had been determined as permanently excluded from being offered employment as a police recruit.

Review application

[12] In the amended application, the applicant relies on the following grounds:
In relation to the failure of the Respondent to make a decision on the recruitment application, the grounds of the application are:

1. the Respondent has failed to make a decision in circumstances where:
 - (a) the Respondent is under a duty pursuant to sections 4.8, 5.2(2) and 5.6 of the *Police Service Administration Act 1990 (Qld)* ("the PSA Act") to make such a decision;
 - (b) sections 4.1.9.1 and 4.1.9.7 of the Human Resource Management Manual, a policy adopted and published by the Respondent, are of no effect to the extent that those provisions are inconsistent with section 5.2(2) and sections 5AA.12(1) and (2) of the PSA Act.

Alternatively, in relation to the decision of the Respondent that the recruitment application was unsuccessful, the grounds of the application are:

2. the decision was not authorised by the enactment under which it was purported to be made because the person who made the decision was not authorised by section 4.10 of the PSA Act to make the decision;
3. the decision involved an error of law in that the person who made the decision relied upon sections 4.1.9.1 and 4.1.9.7 of the Human Resource Management Manual, and those provisions are of no effect to the extent that they are

inconsistent with section 5.2(2) and sections 5AA.12(1) and (2) of the PSA Act;

4. procedures that were required by sections 5AA.12(1) and (2) of the PSA Act to be observed in relation to the making of the decision were not observed.

[13] The applicant contends:

- (a) the respondent is under a statutory duty to make a decision in relation to his application and has failed to make a decision;
- (b) alternatively, the refusal of his application was not made by a properly authorised delegate of the respondent or in accordance with the requirements of the PSA Act.

Legislation

[14] The respondent is responsible for the efficient and proper administration, management and functioning of the police service, including the selection of persons as officers and police recruits.² In discharging his responsibility, the respondent may give or cause to be issued “such directions, written or oral, general or particular as the commissioner considers necessary or convenient for the efficient and proper functioning of the police service”.³ Every officer or staff member to whom a direction is addressed is to comply with all aspects of that direction, although a direction is of no effect to the extent that it is inconsistent with the PSA Act. The respondent is permitted to delegate his powers under the PSA Act or any other Act to a police officer or staff member.⁴

[15] Personnel are appointed under Part 5 of the PSA Act. Relevantly, a decision to appoint a police recruit must be made by fair and equitable procedures that:

- (a) include inviting applications and selection on the basis of the merit of applicants; and
- (b) prevent unjust discrimination, whether in favour of or against a person.⁵

[16] Applications for appointment as a police recruit are subject to the applicant’s suitability to be engaged by the Service.⁶ The respondent has power to gather all “relevant information” about a person to assess that person’s suitability to be, or continue to be, engaged by the Service. The term “relevant information” encompasses information about the person’s criminal, traffic, drug and domestic violence history.⁷ If, because of information obtained under that Part, the respondent considers a person may not be suitable to be, or continue to be, engaged by the Service, the respondent must, before deciding a person is not suitable:

- (a) disclose the information to the person; and

² *Police Service Administration Act 1990* (Qld) s 4.8(e).

³ *Ibid* s 4.9.

⁴ *Ibid* s 4.10.

⁵ *Ibid* s 5.2(2).

⁶ *Ibid* s 5AA.1(b).

⁷ *Ibid* s 5AA.11(3)-(5).

- (b) allow the person a reasonable opportunity to make representations about the information.⁸

In so doing, the respondent must give reasons, unless disclosure of the information would be prejudicial or identify confidential sources or otherwise is proscribed by the PSA Act.⁹ If, after considering representations made by the applicant, the respondent decides the person is not suitable to be, or continue to be, engaged by the Service, the respondent must give the person a written notice to that effect.

- [17] Since March 2004, a committee known as the Recruit Selection Committee has been responsible for assessing recruit applicants and making recommendations to the Manager, Human Resource Development Branch, as to the acceptance or rejection of applicants. In undertaking this task, the Recruit Selection Committee has adopted guidelines contained within a document entitled “Integrity Assessment of Police Recruit Applicants – Assessment Guidelines”. These guidelines divide offences into three categories and provide, in the case of criminal offences, that if the applicant was an adult at the time of the offence, the applicant would most likely be permanently excluded unless there are compelling circumstances which substantially reduce the gravity of the integrity concern.

- [18] The recruitment of police officers, including police recruits, is also the subject of directions given by the respondent pursuant to s 4.10 of the PSA Act. Relevantly, Chapter 4.1 of the Human Resource Management Manual (“HR Manual”) provides:

4.1.9.1 Criminal and Traffic History Checks

Before being invited to undertake the selection process, applicants will be checked for Queensland criminal and traffic histories. ...

Applicants with criminal or traffic histories deemed unacceptable under the integrity conduct guidelines are not to be processed further.

...

4.1.9.7 Previous applicant

Where an applicant has previously undertaken all or part of the selection process, the decision to process a further application rests with the Manager, Recruiting Section. An applicant may be required to undergo all or part of the selection process and in particular cases submit in writing, the reason or reasons supporting their case to be reconsidered and/or re-assessed for entry into the Service.

Was a decision made on the recruitment application?

- [19] The applicant contends the process undertaken by Inspector Barrett did not constitute a decision or determination in relation to the recruitment application. Instead, Inspector Barrett simply informed the applicant that no decision would be made on his application.

⁸ Ibid s 5AA.12.

⁹ Ibid s 5AA.12(2).

- [20] The respondent contends Inspector Barrett's actions constituted a decision in respect of the recruitment application in accordance with the directions issued by the respondent as set out in section 4.1.9.7 of the HR Manual. By that direction Inspector Barrett, as Manager, Recruiting Section, had the authority to determine whether to process the applicant's application further.
- [21] I accept that Inspector Barrett made a decision in respect of the applicant's recruitment application. His affidavit clearly states the application was referred to him for "a decision" in relation to its further processing, that he considered it and that he "determined" there was no new information that would impact upon the decision that the applicant did not meet the requirements to be appointed as a police recruit. His letter dated 5 October 2007 was in terms that a decision had been made on the application.

Did Inspector Barrett have authority to make the decision?

- [22] The applicant contends that Inspector Barrett, as Manager, Recruiting Section, Human Resources Management Branch, did not have power to make a decision that the applicant "did not meet the level of integrity and conduct required by the QPS" as that decision could only be made by the Manager, Human Resource Development Branch. In support of this contention, the applicant relies on a written delegation issued by the Commissioner delegating his powers in relation to the assessment and determination of applications to become a police recruit.¹⁰
- [23] That written delegation delegated the respondent's particular powers under s 5AA.12(1), (2) and (3) of the PSA Act to specified persons, including the Manager, Human Resource Management Branch. However, that instrument of delegation specifically restricted those powers as follows:
- (a) In relation to a person who is seeking to be engaged by the service as a police officer, a staff member, a recruit, a special constable, or a person working in the service as a volunteer or as a student on work experience as defined in section 5AA.3(a) or (b) or (d) or (g) of the Act respectively, this Instrument of Delegation is restricted to the Director, Human Resources Division and the Manager, Human Resource Management Branch.
 - (b) In relation to a person who is seeking to be engaged by the service as a recruit as defined in section 5AA.3(c) of the Act, this Instrument of Delegation is restricted to the Director, Human Resources Division and the Manager, Human Resource Development Branch.
 - (c) In relation to a person who is seeking to perform functions at a police station or police establishment under a contract for services as defined in section 5AA.3(f) of the Act, this Instrument of Delegation is restricted to the Assistant Commissioner or Director under whose control the person will be who is seeking to perform such functions.

¹⁰ Affidavit of Simon James Tolhurst sworn 7 December 2009, exhibit SJT5.

- [24] Whilst condition (a) includes the word “recruit”, condition (a) only refers to the definitions relevant to “police officer”, “staff member”, “special constable” and “volunteer or ... student on work experience”.¹¹ Condition (b) specifically deals with the position where a person is seeking to be engaged by the Service as a “recruit”.
- [25] In my view, a proper reading of the instrument of delegation is that the powers in the instrument of delegation in respect of a person seeking to be employed by the Service as “a recruit” are restricted to the two positions referred to in condition (b), which specifically restricts the instrument of delegation, insofar as “a recruit” is concerned, to “the Director, Human Resources Division and the Manager, Human Resource Development Branch” (my emphasis). The position “Manager, Human Resource Development Branch” is a different position to that of Manager, Human Resource Management Branch.
- [26] Whilst the instrument of delegation does not give the Manager, Human Resources Management Branch the power to determine whether the applicant is suitable to be engaged by the Service as a recruit, the respondent submits 4.1.9.7 of the HR Manual specifically gave the Manager, Recruiting Section (the position held by Inspector Barrett) the power to make the decision to process any further application where the applicant has previously undertaken all or part of the selection process. The respondent contends 4.1.9.7 is a lawful direction, and acts as a “filtering” process of applications consistent with the respondent’s statutory responsibilities.
- [27] In support of its contention that such a filtering process is lawful, the respondent relies on two authorities: *Bedlington v Chong*¹² and *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs*.¹³ However, both those cases are distinguishable. They concerned legislation containing specific provisions to the effect that the relevant decision-maker was under no duty to consider whether to exercise the power in question. That is a different situation to the present where there is a specific power vested in the respondent to appoint, and to do so in accordance with specified principles, and there has been a written delegation of aspects of the respondent’s decision-making to specified persons.
- [28] Whilst 4.1.9.7 rests a decision to process any further application with the Manager, Recruiting Section, the decision to be made by that Manager must be viewed having regard to the second sentence in 4.1.9.7. It provides:
- An applicant may be required to undergo all or part of the selection process and in particular cases submit in writing, the reason or reasons supporting the case to be reconsidered and/or re-assessed for entry into the Service.
- [29] That sentence provides context to the decision that is to be made by the Manager, Recruiting Section. That decision relates to the means by which the further application is to be processed by the Service. Those means can include either undergoing all or part of the selection process or being required to submit in writing their case ought to be reconsidered by the Service or reassessed for entry into the Service. Viewed in that way, 4.1.9.7 does not amount to giving the Manager,

¹¹ See s 5AA.3(a), (b), (d) and (g) of the PSA Act.

¹² (1998) 157 ALR 436.

¹³ (2007) 239 ALR 564.

Recruiting Section an unfettered power to determine the application itself. To read 4.1.9.7 otherwise, would be to interpret it as delegating to the Manager, Recruiting Service, the respondent's power to make a decision whether the person is or is not suitable for entry into the Service. Such an interpretation would be inconsistent with the provisions of s 5.2 of the PSA Act and inconsistent with the specific terms of the written instrument of delegation executed by the respondent.

- [30] I accept Inspector Barrett, in good faith, processed the applicant's application in accordance with what he understood to be his authority under 4.1.9.7 of the HR Manual. However, that authority did not extend to making a decision that the applicant was not suitable for entry into the Service. That decision must be made by the respondent under the PSA Act, or by his authorised delegate pursuant to a written instrument of delegation. As Inspector Barrett was not an authorised delegate to make that decision, his decision was not authorised by the PSA Act.
- [31] This conclusion does not mean the respondent is to be burdened with having to reconsider, from the beginning, every reapplication made by an applicant who has previously been found to be unsuitable for appointment by the Service. The respondent, or his authorised delegate, may properly consider any reapplication on the existing material, provided the applicant has been given the opportunity to make submissions as to why their case is to be reconsidered and/or reassessed for entry into the Service. Unless there is evidence displacing the previous findings or showing that those findings should be modified, the respondent or his authorised delegate would be entitled to rely upon those previous findings in reaching a determination of the reapplication. In this respect, the judgment of Muir J in *Cutler v Commissioner of Police Service*¹⁴ is apposite.
- [32] Such a conclusion is consistent with the terms of 4.1.9.7 of the HR Manual and s 5.2 of the PSA Act. It also accords with the contents of the guidelines for the Integrity Assessment of Police Recruit Applicants which allow an applicant to be considered, notwithstanding commission of criminal offences, in exceptional circumstances.
- [33] Having regard to the above, it is unnecessary to consider the remaining ground, namely, that procedures required to be observed were not observed in making the decision.
- [34] I order:
1. The application for statutory review and/or review is allowed;
 2. The applicant's application to be engaged by the Service as a recruit be referred to the respondent for further consideration and to be dealt with by the respondent according to law.
- [35] I shall hear the parties as to costs.

¹⁴ [2001] QSC 161, [49].