

SUPREME COURT OF QUEENSLAND

CITATION: *Irwin v Stewart (Commissioner of Police) & Anor* [2015] QSC 350

PARTIES: **NATHAN IRWIN**
(applicant)
v
IAN STEWART (COMMISSIONER OF POLICE)
(first respondent)
STEPHEN HOLLANDS (ACTING ASSISTANT COMMISSIONER)
(second respondent)

FILE NO/S: SC No 4408 of 2015

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 10 December 2015

DELIVERED AT: Brisbane

HEARING DATE: 10 September 2015

JUDGE: Philip McMurdo JA

ORDER: **The Originating Application be dismissed.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – FAILURE TO OBSERVE STATUTORY PROCEDURE – whether the second respondent was attempting to circumvent limitations on the power to take disciplinary action under Pt 7 by relying on more general powers within the PSAA – where the decisions had a statutory basis outside Pt 7 of the PSAA

POLICE – INTERNAL ADMINISTRATION – DISCIPLINE AND DISMISSAL FOR MISCONDUCT – QUEENSLAND – where the second respondent temporarily redeployed the applicant police officer to another police station and indicated that he was considering a further transfer of the applicant – where the applicant argued that the respondents’ decisions were not authorised as their powers should have been exercised under the statutory regime for the discipline of police officers under Pt 7 of the *Police Service Administration Act 1990* (Qld) (“the PSAA”) – whether the second respondent was attempting to circumvent limitations on the power to take disciplinary action under Pt 7 by relying on more general powers within the

PSAA – where the decisions had a statutory basis outside Pt 7 of the PSAA

POLICE – INTERNAL ADMINISTRATION – OTHER MATTERS – where the applicant senior police constable sought declarations that the notice of temporary redeployment and directions and a foreshadowed transfer of the applicant to another police station were or would be invalid and of no force or effect – whether the second respondent’s decisions were authorised or exercised under Pt 5 or Pt 7 of the PSAA – where the factual preconditions of the exercise of disciplinary powers did not exist as there had been no finding of misconduct and therefore the second respondent did not seek to circumvent the limitations of upon the exercise of such powers – where the second respondent’s purpose was one of risk management

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – where the respondents argued that the Supreme Court had no jurisdiction to determine the proceeding because it was an “industrial matter” under s 7 of the *Industrial Relations Act* 1999 (Qld) and thus within the exclusive jurisdiction of the Queensland Industrial Relations Commission – where the foreshadowed decision to transfer the applicant to another police station under s 5.2(3) of the *Police Service Administration Act* 1990 (Qld) was reviewable under Pt 9 and thus a decision in relation to which the Industrial Relations Commission had no jurisdiction, pursuant to s 9.1A of the PSAA

Industrial Relations Act 1999 (Qld), s 7, s 265, s 267

Police Service Administration Act 1990 (Qld), s 4.8, s 5.2, s 7.4, Pt 5, Pt 7

Police Service (Discipline) Regulations 1990 (Qld), reg 3(a), reg 9(1)(f)

Allied Trades Union of Australia (1932) 47 CLR 1; [1932] HCA 9, considered

Anthony Hordern & Sons Ltd v Amalgamated Clothing and Kennedy v Commissioner of Queensland Police Service [2015] QSC 219, considered

Leon Fink Holdings Pty Ltd v Australian Film Commission (1979) 141 CLR 672; [1979] HCA 26, cited

Saraswati v The Queen (1991) 172 CLR 1; [1991] HCA 21, considered

Thomson v Minister for Education [1994] 1 Qd R 83, applied
Watson v Acting Deputy Commissioner McCallum [2012] QCAT 165, cited

COUNSEL:

P Davis QC, with A Scott, for the applicant

J Murdoch QC, with J Merrell, for the first and second respondents

SOLICITORS: Queensland Police Union Legal Group for the applicant
 Legal Services, Public Safety Business Agency for the first
 and second respondents

Introduction

- [1] The applicant is a senior constable in the Queensland Police Service. Until earlier this year, he worked from the Surfers Paradise police station. On 25 March 2015 the second respondent gave the applicant a document described as a “Notice of Temporary Redeployment and Directions”, in which the second respondent wrote that he had decided to “temporarily redeploy” the applicant to the Coomera police station. The second respondent also directed that the applicant not attend the Surfers Paradise station except under supervision from a more senior officer. Consequently the applicant went to work at the Coomera police station.
- [2] On 28 April 2015 the second respondent again wrote to the applicant. The second respondent wrote that he was considering whether to transfer the applicant to the Southport police station or the Nerang police station and invited comment from the applicant.
- [3] The applicant’s reaction was to bring this proceeding against the Commissioner of Police as first respondent and Acting Assistant Commissioner for the South Eastern Region, who is the second respondent. The applicant seeks two declarations. The first is a declaration that the directions given by the second respondent to him by the notice of 25 March 2015 are invalid and of no force or effect. The second is that the transfer of the applicant, which was foreshadowed by the letter of 28 April 2015, if made, would be invalid and of no force or effect.
- [4] Each of those documents expressed the second respondent’s concerns that the applicant had engaged in misconduct when working from the Surfers Paradise station. They referred to a large number of complaints which had been made by members of the public which were to the effect that the applicant had used excessive force in the discharge of his duties. The applicant argues that the directions of 25 March and the transfer foreshadowed on 28 April are or would be for the purpose of disciplining him for misconduct. Upon that premise, he argues that the respondents’ powers must be exercised within the statutory regime for the discipline of police officers which is prescribed by Pt 7 of the *Police Service Administration Act 1990* (Qld) (“the PSAA”).
- [5] Under Pt 7 a police officer is liable to disciplinary action in respect of the officer’s conduct which is considered to be misconduct or a breach of discipline on such grounds as are prescribed by regulation.¹ If the “prescribed officer”² decides that misconduct is proved against an officer, then there is a “range of disciplines” that may be imposed by the prescribed officer by way of disciplinary action³ and there is a merits review which is available in the Queensland Civil and Administrative Tribunal.⁴ As the subject decisions

¹ PSAA s 7.4(2).

² Meaning an officer authorised by the regulations to take disciplinary action in the circumstances of the case in question: PSSA s 7.4(1).

³ PSAA s 7.4(3).

⁴ PSAA s 7.4(2A).

have not or would not be made under the regime of Pt 7, the applicant says that they were not authorised and that there should be declarations as he seeks.

- [6] The respondents argue that this court has no jurisdiction to determine this proceeding because its subject matter is within the exclusive jurisdiction of the Queensland Industrial Relations Commission. Alternatively, they argue that the Commission has jurisdiction to determine this controversy which, if not an exclusive jurisdiction, should be exercised in preference to this court resolving the controversy within this proceeding. Alternatively again, they submit that the decision and proposed decision have a statutory basis outside Pt 7 of the PSAA.
- [7] For the reasons that follow, I accept the third of those arguments for the respondents but not their jurisdictional arguments, so that the present proceeding should be determined by this court and the application should be dismissed.

The respondents' actions

- [8] In 2007 the applicant was appointed to a permanent position as a police officer at the Surfers Paradise station. On 16 March this year he was served with a notice, signed by the second respondent and dated 5 March 2015. The heading of the document referred to s 4.8 and s 4.9 of the PSAA and to s 1.4.3 of a document described as the *Operational Procedures Manual*. The notice was as follows:

“It has been brought to my notice, and I believe on reasonable grounds, that concerns exist about your conduct in relation to disciplinary issues that are on-going within the Gold Coast District.

Particularly, I believe on reasonable grounds that concerns exist in relation to a trend in complaints regarding excessive use of force over a period of time whilst you have been stationed at Surfers Paradise Police Station.

I, Stephen H Hollands, Acting Assistant Commissioner, South Eastern Region hereby direct you to commence duties at Coomera Police Station to perform operational duties at your current rank.

This Direction will take effect immediately as from the service of this notice upon you and will remain in force until further advised.

My reason for this action is:

Concerns exist that should you remain performing operational duties within the current Entertainment Precinct environment at the present time, further complaints of excessive force are imminent. And to reduce the risk of complaints towards yourself, fellow workers and the community.

To ensure the effective and efficient management of the Gold Coast District, I consider it appropriate that you be restricted from performing duties at Surfers Paradise Police Station at this time.

Should you be aggrieved by my decision, you may forward your written submission, addressed to me, for my further consideration of the matter. Your submission should be received at my office no later than 4pm on 30th day of March 2015.

Dated and signed at Surfers Paradise this 5th day of March 2014.”

- [9] On 23 March 2015 the applicant’s solicitor wrote to the second respondent enquiring as to the specific powers upon which the second respondent relied in giving that direction. On 25 March 2015 the second respondent gave a notice to the applicant, headed “Revocation of Direction”, in these terms:

“On 16 March 2015 you were served with a Direction to commence duties at Coomera Police Station to perform duties at your current rank due to concerns which exist in relation to a trend in complaints regarding excessive use of force over a period of time whilst you have been stationed at Surfers Paradise Police Station.

I Stephen Howard Hollands, Acting Assistant Commissioner, South Eastern Region hereby revoke the direction that you are to commence duties at Coomera Police Station.

This revocation will take effect immediately.”

- [10] On the same day the second respondent served the document which is the subject of the first of the declarations which are sought by the applicant. In its heading, it referred to s 4.9 of the PSAA. The notice was as follows:

“It has been brought to my notice that you are subject to allegations relating to a trend in complaints regarding excessive use of force over a period of time whilst you have been stationed at Surfers Paradise Police Station.

Consequently, I have decided to temporarily redeploy you to another workplace. You are directed to

1. not to attend the Surfers Paradise Police Station unless:
 - (a) there is legitimate reason for the attendance; and
 - (b) your attendance at the Surfers Paradise Police Station is supervised by a more senior ranking officer;
2. perform duties at the Coomera Police Station as required by your District Officer until directed otherwise;
3. remain under the supervision of the Officer in Charge of Coomera Police Station whilst undertaking those duties;
4. keep the matter of this notice confidential;
5. specifically, to not contact any staff attached to Surfers Paradise Police station;
6. not contact members of the Service, either directly or indirectly, with regard to this matter unless:
 - (a) there is legitimate reason for the contact; and
 - (b) your supervisor is advised before the contact.

You are advised this temporary redeployment will:

1. take effect from the date this notice is given to you;

2. be reviewed on or before 25th June 2015, after which you will be advised of any extension to the temporary redeployment; and
3. have no impact on any salary or allowances.

You are reminded of the Commissioner's Standard of Practice requirement to comply with directions. Further, that a contravention of the Standard of Practice may result in disciplinary action.

You may wish to discuss this notice with your union representative. Should you be aggrieved by my interim decision, you may forward your written submission, addressed to me, for my further consideration of the matter. Your submission should be received at my office no later than 4.00 pm on 7th April 2015.

Thereafter I will consider your submission and make a further decision with respect to your work placement and duties."

[11] The notice to the applicant of 28 April 2015 was in the following terms:

"I refer to your substantive position as Senior Constable, Surfers Paradise Division, and the circumstances relevant to your ability to effectively carry out the duties of this position.

The circumstances I am referring to include:

- Operational factors associated with the need to implement an appropriate risk mitigation strategy to reduce instances of complaints against you, particularly as it relates to a persuasive theme with a commonality of excessive use of force by you in your substantive position at Surfers Paradise;⁽¹⁾

And

- Your future/further development as a member of the Queensland Police Service.

The following information is being considered regarding the above:

- A series of complaints from members of the public, the most prevalent being the excessive use of force by you in your official capacity as a police officer stationed at the Surfers Paradise Police Division; and
- Taking into account your past complaint history and steps taken to address that history, a transfer to a different work location would assist in mitigating the risk and liability associated with further complaints against: you, other officers at Surfers Paradise, and the Queensland Police Service as your employer.

As at the 17 March 2015, you have received a total of twenty-eight (28) complaints and two (2) favourable comments during your police service. It is noted that you have received managerial guidance on three (3) occasions. In the context of eight (8) years of service in the Gold Coast District this number of complaints indicates a course of unfavourable conduct.

Since 2007, the adverse pattern of behaviour (twenty-eight (28) complaints and sixty-eight (68) allegations) is most notable with respect to matters involving Assaults/Excessive Force. A précis of your complaint history, as at 17 March 2015, is outlined below:

...

Irrespective of the possible causes, the preceding allegations are indications that your level of professionalism is below that expected of a Senior Constable of Police in the Queensland Police Service.

Previous management strategies employed to assist you in your role within the Surfers Paradise Police Division (May 2009, April 2010 and July 2013) do not appear to have been effective in reducing the complaints received against you. Therefore, an alternative strategy now must include: a change of duties, where removing you from your current workplace will enable you to work in an environment where the frequency of confrontation with members of the public is less likely to occur.⁽²⁾ I am of the opinion that when taking into account operational factors associated with the deployment of resources within the South Eastern Region that this can occur in either the Southport or Nerang Police Divisions where you will be provided with appropriate levels of mentoring, guidance and support.

Industrially, this strategy will have no detrimental impact on your salary or allowances and given the proximity of your residence at Upper Coomera to either of these locations you may well be better off financially.⁽³⁾

Having regard to my prescribed responsibilities under section 1.4.3 of the Operational Procedures Manual relating to operational factors associated with the provision of effective and efficient operational policing within the South Eastern Region, your welfare and safety considerations, my responsibility to other staff and to the community, I hold the *provisional view* that the needs of all stakeholders *could* be fulfilled by implementing a Management Initiated Lateral Transfer (MILT) from your current position at Surfers Paradise Police Station.

I wish to advise that I am also considering options regarding a possible MILT transfer location should I decide to progress an MILT. Those options include: the Southport Police Station, or the Nerang Police Station. Both locations are within a 40km radius of your residence at Upper Coomera.

However, before I give this matter further consideration, you are invited to provide a written submission in response to my provisional view that a MILT may be the most appropriate strategy to address your propensity to attract complaints generally, and in particular, complaints relating to the use of force.

...

To assist in your submission, the matters as outlined in the attachment Complaint Summary will be relied upon should I, in due course, make a recommendation to the Transfer Advisory Committee.

(1) QPS Certified Agreement 2013 Part 6, s 49(5) having regard to the Commissioner's responsibilities pursuant to section 4.8 of the *Police Service Administration Act 1990*.

(2) QPS Certified Agreement 2013 Part 6, s 50(a).

(3) QPS Certified Agreement 2013 Part 6, s 49(4).

...”.

- [12] Since the commencement of this proceeding, the applicant has remained at the Coomera Station and he has been informed that the proposed transfer, as raised in the 28 April letter, remains a proposal subject, of course, to the outcome here.
- [13] Each of these notices or letters from the second respondent referred to the high incidence of complaints against and allegations about the applicant with the element of a (suggested) use of excessive force in dealing with members of the public. But the second respondent did not express a concluded view that any of these complaints or allegations was true. In other words there was no conclusion expressed by the second respondent that the applicant was guilty of any misconduct. Clearly the second respondent expressed his “concerns” that the applicant may have misconducted himself and in the letter of 28 April, he wrote that the incidence of complaints was indicative of “a course of unfavourable conduct” and an unacceptably low level of professionalism. That letter also referred to the applicant’s “propensity to attract complaints generally, and in particular, complaints relating to the use of force.” But again, this stopped short of a finding by the second respondent that the complaints or any of them had been well made. In his unchallenged affidavit evidence in this proceeding, the second respondent explained his reasoning as follows:

“Based on information I received about the Applicant’s performance, I hold significant concerns about the Applicant’s ability to perform policing duties at the Surfers Paradise Station.”

- [14] In their written submissions, counsel for the applicant submit that it is clear that “the Second Respondent considers the Applicant has engaged in misconduct.” I would not make that finding and in their oral submissions, counsel for the applicant agreed the second respondent had not expressed a conclusion of any misconduct.⁵

The disciplinary process

- [15] Within Pt 7 of the PSAA, s 7.4 provides:

“7.4 Disciplinary action

In this section—

officer, in relation to a person liable to disciplinary action, includes a police recruit.

prescribed officer means an officer authorised by the regulations to take disciplinary action in the circumstances of any case in question.

QCAT information notice means a notice complying with the QCAT Act, section 157(2).

⁵ Transcript at T 1-15 [20].

- (1) An officer is liable to disciplinary action in respect of the officer's conduct, which the prescribed officer considers to be misconduct or a breach of discipline on such grounds as are prescribed by the regulations.
- (2A) If the prescribed officer—
- (a) decides an allegation of misconduct brought against the officer; or
 - (b) when deciding an allegation of breach of discipline brought against the officer, finds that misconduct is proved against the officer;
- the commissioner must give a QCAT information notice to the officer and the Crime and Corruption Commission for the decision or finding within 14 days after the making of the decision or finding.
- (2) Without limiting the range of disciplines that may be imposed by the prescribed officer by way of disciplinary action, such disciplines may consist of the following—
- (a) dismissal;
 - (b) demotion in rank;
 - (c) reprimand;
 - (d) reduction in an officer's level of salary;
 - (e) forfeiture or deferment of a salary increment or increase;
 - (f) deduction from an officer's salary payment of a sum equivalent to a fine of 2 penalty units.
- (3) Every order made by way of disciplinary action takes effect in law and is to be given effect.
- (4) To remove any doubt, it is declared that a reference in the QCAT Act, section 157(2) to a decision includes a reference to a finding.”

[16] Certain words and expressions within s 7.4 are defined as follows:⁶

“disciplinary action means action taken for misconduct, corrupt conduct or a breach of discipline.

breach of discipline means a breach of this Act, the *Police Powers and Responsibilities Act 2000* or a direction of the commissioner given under this Act, but does not include misconduct.

misconduct means conduct that —

- (a) is disgraceful, improper or unbecoming an officer; or
- (b) shows unfitness to be or continue as an officer; or

⁶ PSAA s 1.4.

(c) does not meet the standard of conduct the community reasonably expects of a police officer.”

- [17] The disciplinary regime under the PSAA is further defined by the *Police Service (Discipline) Regulations* 1990 (Qld). One of the stated objects of those regulations is to “provide a system of guiding, correcting, chastising and disciplining subordinate officers”.⁷ The regulations specify the various disciplinary powers of the commissioner, a deputy commissioner, an assistant commissioner, a commissioned officer and a non-commissioned officer. Regulation 9 sets out the grounds for disciplinary action under s 7.4 of the PSAA and one of those grounds is “misconduct”.⁸
- [18] Regulation 10 provides that without limitation of the range of disciplines that may be imposed by the commissioner or a deputy commissioner pursuant to s 7.4(3) of the PSAA the “disciplinary sanctions” that may be imposed are the following:
- “(a) cautioning or reprimand;
 - (b) a deduction from the officer’s salary or wages ...
 - (c) a reduction in the officer’s level of salary or wages ...
 - (d) forfeiture or deferment of a salary increment or increase;
 - (e) a reduction in the officer’s rank or classification;
 - (f) dismissal from the police service.”

I was referred to the reasons for decision of the Hon James Thomas AM QC, as a Presiding Member of QCAT,⁹ to the effect that within the range of disciplines that may be imposed is a recommendation that a police officer not be allowed to return to his duties within the Dog Squad. I agree, as that decision illustrates, that the range of disciplines is not limited to those specified in reg 10.

- [19] As counsel for the applicant submit, the power to take disciplinary action under Pt 7 is subject to two important limitations. The first is that if misconduct is found by the prescribed officer, notice must be given to the officer concerned and the Crime and Corruption Commission in a form which complies with s 157(2) of the QCAT Act. This requires notification of the prescribed officer’s decision or finding, the reasons for it, the right to have the decision or finding reviewed by QCAT and other matters as prescribed by s 157(2). The second limitation is that there is such a right of review to QCAT.¹⁰ These limitations provide important safeguards for the proper interests of a police officer who is to be disciplined for misconduct. Most importantly there is the avenue for an independent review by QCAT.
- [20] The applicant’s argument is that the second respondent is attempting to circumvent those limitations by relying upon more general powers within the PSAA. It is said that this engages the “principle that a statutory power, expressed in general form, is not to be

⁷ *Police Service (Discipline) Regulations* 1990 (Qld) reg 3(a).

⁸ *Ibid* reg 9(1)(f).

⁹ *Watson v Acting Deputy Commissioner McCallum* [2012] QCAT 165.

¹⁰ A finding mentioned in s 7.4(2A)(b) of the PSAA is a “reviewable decision” as defined by s 219BA of the *Crime and Corruption Act* 2001 (Qld) and can therefore be the subject of a “disciplinary proceeding” as defined in s 219B of that Act which QCAT has jurisdiction under s 219C.

construed so as to avoid any condition or limitation placed on the exercise of a specific power”, as McHugh J described it in *Saraswati v The Queen*.¹¹ McHugh J there cited, amongst other cases, *Leon Fink Holdings Pty Ltd v Australian Film Commission*¹² where Mason J said:¹³

“It is accepted that when a statute confers both a general power, not subject to limitations and qualifications, and a special power, subject to limitations and qualifications, the general power cannot be exercised to do that which is the subject of the special power.”

McHugh J also cited this passage from the judgment of Gavan Duffy CJ and Dixon J in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*:¹⁴

“When the legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.”

- [21] As already discussed, the various notices and documents which have come from the second respondent do not record a finding of misconduct on the part of the applicant. The disciplinary powers under s 7.4 of the PSAA and the *Public Service (Discipline) Regulations* 1990 are exercisable only where there is a decision or finding by the prescribed officer under s 7.4(2A). There must be either a decision that an allegation of misconduct is proved or, when an allegation of breach of discipline is brought against an officer, a finding that misconduct is proved against the officer. Neither of those things has happened in the present case. So the specific but limited powers under Pt 7 are not presently exercisable and the principle which is discussed in those cases does not appear to apply.
- [22] Therefore the question is whether there are other provisions of the PSAA which empowered the second respondent to do as he did and I turn to the provisions which were discussed in the arguments.

Other powers under the PSAA

- [23] By s 4.8(1) of the PSAA, the commissioner is responsible for the efficient and proper administration, management and functioning of the police service in accordance with law. By s 4.8(3), the commissioner is authorised to do, or cause to be done, all such lawful acts and things as the commissioner considers to be necessary or convenient for the efficient and proper discharge of “the prescribed responsibility”.¹⁵
- [24] Section 4.8(4) qualifies the powers of the commissioner in several respects, including by a requirement that in discharging the prescribed responsibility, the commissioner -

¹¹ (1991) 172 CLR 1, 24.

¹² (1979) 141 CLR 672.

¹³ Ibid 678.

¹⁴ (1932) 47 CLR 1, 7.

¹⁵ Which s 1.4 defines as “the responsibility of the commissioner under s 4.8(1)”.

“is to comply with all relevant awards or industrial agreements, determinations and rules made by an industrial authority ...”

There is a relevant industrial agreement which is discussed below.

[25] Section 4.9 of the PSAA relevantly provides:

“(1) In discharging the prescribed responsibility, the commissioner may give, and cause to be issued, to officers, staff members or police recruits, 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.”

[26] On the unchallenged evidence of the first respondent, he, the commissioner, has directed that certain responsibilities be discharged by assistant commissioners and in June 2013 he issued a direction which established an organisational structure for the Queensland Police Service providing for regions, including the south eastern region of service which comprises the Gold Coast and Logan districts. He has also directed that staff of the Service comply with the provisions of the Operational Procedures Manual. Under para 1.4.3 of that document, regional assistant commissioners (such as the second respondent) are to “supervise provision of effective and operational policing and support activities within districts under their control”. The second respondent was appointed by the first respondent to the position of acting assistant commissioner in the south east region in September 2013. The applicant’s argument accepts that the powers of the commissioner under s 4.8 and 4.9 have been delegated for the south east region to the second respondent such that if the decision and foreshadowed decision of the second respondent are within the commissioner’s powers, in turn they are within the second respondent’s powers.

[27] Part 5 of the PSAA is headed “Appointment of personnel”. It includes s 5.2 which is, in part, as follows:

“5.2 Appointment to be on merit on impartial procedures

(1) In this section -

transfer of a police officer to a position means the appointment of a police officer to a position in which the police officer will hold the same rank and be entitled to at least the same level of salary.

(2) A decision to appoint a person as a police recruit or to a police officer position 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.

(3) However, if a decision is made to transfer a police officer on a basis prescribed by regulation, the decision need not involve the procedures mentioned in subsection (2)(a).

(4) Written notice to a police officer of a transfer because of a decision under subsection (3) must specify the prescribed basis used for the transfer. ...”.

- [28] There is no definition of the word “position” or the expression “police officer position”, as those terms are used in s 5.2 or elsewhere in the PSAA. But from other definitions in s 1.4, as well as from other provisions of the PSAA, it is clear that a police officer holds a certain position in the police service. For example a constable is defined to mean “a person who holds a position in the police service as a constable.”¹⁶ It is also clear that the position of a police officer is one to which the officer may be appointed or transferred. Section 5.2(2) refers to a decision to appoint the person “to a police officer position”. But such an appointment might be “on promotion” or “transfer”, as appears from s 9.3(1) which is set out below.
- [29] The decision which was foreshadowed by the second respondent’s letter of 28 April was there described as a “Management Initiated Lateral Transfer from your current position at Surfers Paradise Police Station”. That would be a transfer purportedly pursuant to the power conferred by s 5.2(3). But it was not the power purportedly exercised in the Notice of Temporary Redeployment dated 25 March 2015. That document was issued expressly in reliance upon the more general power conferred by s 4.9. The effect of that notice, if valid, was not to transfer the applicant to another “position”.
- [30] To be within the authority of s 5.2(3), a transfer decision must be upon a basis prescribed by regulation. By s 4.2A of the *Police Service Administration Regulation* 1990 (Qld), it is provided that such a basis might be one which is specified in an industrial agreement between the commissioner and relevant unions. The relevant industrial agreement is that which was certified by the Queensland Industrial Relations Commission on 31 July 2013.¹⁷ That agreement replaced the *Queensland Police Service – Determination*, 2010.
- [31] Part 6 of the Certified Agreement is headed “Transfers, Relocation Expenses and Travelling Entitlements”. Within Pt 6, and under the subheading “Lateral Transfers - Non-Commissioned Officers” are the following terms:

“49 Introduction

- (1) The lateral transfer process applies where appropriate in lieu of clause 4.1 of the Award.
- (2) Subject to clause 11(4) of this Agreement, an Assistant Commissioner or Executive Director may laterally transfer a Constable or Senior Constable under their command provided there is mutual agreement and the employee’s resultant travelling distance between the employee’s residence and place of work does not exceed 40 kilometres. Such transfers will not alter an employee’s tenure.

This process may occur without referring an application or submission to the Transfer Advisory Committee (TAC);

¹⁶ Similarly defined are the definitions of “commissioned officer”, “executive officer”, “noncommissioned officer”, “police recruit”, and “special constable” in s 1.4.

¹⁷ Pursuant to s 156 of the *Industrial Relations Act* 1999 (Qld).

provided that the TAC is advised of such transfers in the meeting agenda in a manner similar to “rotations”.

- (3) Lateral transfers provide a facility for the transfer of staff at their substantive rank to other jobs or locations in limited circumstances without the need to advertise and fill positions on an open merit basis.
- (4) Where a lateral transfer occurs, the employee will not suffer a reduction in ordinary salary.
- (5) The lateral transfer of members will not be used as a disciplinary sanction. However the Service may transfer a member to a location as a risk mitigation strategy with regard to the Commissioner’s responsibilities pursuant to section 4.8 of the *Police Service Administration Act 1990*.
- (6) Lateral transfers may be initiated either by the Service or through application by the employee.
- (7) These provisions will not apply to any appointments, postings, movements or transfers of a Constable up to and including such employee’s appointment upon confirmation.
- (8) Notwithstanding any other provision contained in this Agreement, the Commissioner has the discretion to initiate a directed transfer of a police officer at their substantive rank to other jobs or locations.

50 Operational factors

The following operational factors do not give an automatic right to a lateral transfer and may be utilised by either management or an employee in making submissions/applying for a lateral transfer. The factors allow consideration of applications/submissions:

...

(13) Resource Management

- (a) This operational factor covers grounds where a transfer is necessary because of a breakdown of personal relationships between the employee, of any rank, and other employees; or that employee and the local community.
- (b) Further, this factor applies where staff numbers have fallen below safe operational levels. Should there be no applicants for these positions after advertisement State-wide and there are no volunteers, the Service may consider the implementation of directed transfers. Provided that prior to so doing, the process of selection of appointees occurs by a process agreed between the Service and the QPUE. Agreement will not be unreasonably withheld or delayed by either party.

...

- (15) Management of Staffing Issues: Where it has been clearly demonstrated to TAC that an employee is not coping in their current position and management has taken all fair and reasonable actions to assist the employee in that position, the Service may seek to relocate the employee. Provided that any costs associated with or resulting from the relocation are borne by the Service. Further, reports have to be provided by management as to what has been the problem and what has been done to rectify it and, a report from the employee concerned regarding the proposed transfer. These are to be provided to TAC members at least 7 days before TAC meets.

51 Transfer Advisory Committee (TAC)

- (1) For the purposes of lateral transfers, there will be a Transfer Advisory Committee (TAC) established to advise the Commissioner regarding applications for lateral transfers.
- (2) Membership of the Committee comprises representatives of:
- Queensland Police Union of Employees;
 - Queensland Police Service.
- (3) TAC supports an employee out of their current location, not into a particular position, and notwithstanding any advice provided by the Committee, the Commissioner has the final decision-making authority.

...”.

[32] The respondents submit that the “operational factors” within cl 50(13) and (15) are relevant in the present case. However there has been no apparent conclusion by the second respondent in terms of those provisions. In his letter of 28 April, the second respondent referred to circumstances which included “[o]perational factors associated with the need to implement an appropriate risk mitigation strategy”. He also referred to a transfer to a different work location being to “assist in mitigating the risk”. And the letter as a whole sought to explain the proposed transfer as a means of reducing the risk of misconduct. This transfer, if implemented would be “risk mitigation strategy” as referred to in the second sentence of cl 49(5) of the Certified Agreement.

[33] In the course of their oral submissions, counsel for the applicant referred to a decision of Dalton J in *Kennedy v Commissioner of Queensland Police Service*.¹⁸ Her Honour was there considering the predecessor of the Certified Agreement, namely the Determination of 2010. That contained a provision which was in similar but not identical terms to cl 49(5) of the Certified Agreement. Her Honour’s view was that a “risk mitigation strategy” did not provide an independent source of power to make a lateral transfer under that Determination. This was because “risk mitigation” was not an “operational factor” as defined in the Determination which contained what her Honour regarded as an exhaustive list of operational factors. The same definition of operational factor does not appear in the (present) Certified Agreement. The Determination contained a definition

¹⁸ [2015] QSC 219.

of “lateral transfer” which referred to the process of transferring in response to one or more operational factors. That definition effectively reappears in the Certified Agreement. There are some similarities then between the two instruments. Her Honour considered that the clause which was in similar terms to the present cl 49(5) was “more in the nature of a general admonition and guidance as to what might properly motivate a lateral transfer otherwise made regularly for operational reasons.”¹⁹ It is unnecessary to decide in this judgment whether that reasoning should apply to the (present) Certified Agreement. Although there has been no finding yet expressed in the terms of cll 50(13) or 50(15), it is conceivable that the second respondent could and would make such a finding, consistently with his correspondence and his evidence. The lateral transfer power is yet to be exercised. At present it cannot be said that any necessary factual condition for the exercise of the transfer power could not exist.

Jurisdiction

[34] Section 265(1) of the *Industrial Relations Act 1999* (Qld) provides that the Queensland Industrial Relations Commission may hear and decide, amongst others, the following matters:

- “(a) ...
- (b) All questions –
 - (i) arising out of an industrial matter; or
 - (ii) involving deciding the rights and duties of a person in relation to an industrial matter; or
 - (iii) it considers expedient to hear and decide about an industrial matter;
- ...”

[35] The term “industrial matter” is defined by s 7 of that Act as follows:

- “7 What is an *industrial matter*
- (1) An *industrial matter* is a matter that affects or relates to—
 - (a) work done or to be done; or
 - (b) the privileges, rights or functions of—
 - (i) employers or employees; or
 - (ii) persons who have been, or propose to be, or who may become, employers or employees; or
 - (c) a matter (whether or not an industrial matter as defined in this section) that the court or commission considers has been, is, or may be a cause or contributory cause of an industrial action or industrial dispute.

¹⁹ Ibid 10 [32].

- (2) However, a matter is not an industrial matter if it is the subject of proceedings for an indictable offence.
- (3) Without limiting subsection (1) or affecting subsection (2), a matter is an industrial matter if it relates to a matter mentioned in schedule 1.”

The respondents argue that the applicant’s claim for declaratory relief constitutes a matter that affects or relates to the rights of the applicant as an employee and the rights of the State of Queensland as his employer, thereby making this an industrial matter according to s 7(1)(b).

- [36] Section 267 of the *Industrial Relations Act* provides that “the original and appellate jurisdiction conferred on the commission by an Act is exclusive of the jurisdiction of the Supreme Court or another court or tribunal unless otherwise prescribed under this Act”.
- [37] By s 5.15 of the PSAA, a police officer, other than one who holds appointment on a contract basis, is taken to be an employee of the Crown and to be within the application of the *Industrial Relations Act* 1999 to employees of the Crown as provided by that Act. At issue here is the existence of powers which are conferred not upon the employee, but upon the commissioner and by his delegation, upon the second respondent. There was argument on the question of to whether the powers of the respondents were to be regarded as rights of the Crown as the applicant’s employer, for the purpose of the definition of “industrial matter”. But of course the respondents argued that this is a matter affecting also the rights of an employee.
- [38] The applicant argues that what is in issue in this case is not “what are the rights of an employee, but what governs them.” That submission seeks to distinguish a controversy as to the existence and content of a power to impose a transfer from rights in relation to the exercise of a recognised power. That argument is supported by the judgment of Williams J in *Thomson v Minister for Education*.²⁰ The applicant in that case was appointed to a teaching position in the public service without compliance with the relevant statute. When the respondent Minister purported to rescind the appointment, the applicant sought a declaration that his appointment remained valid and effective, arguing that there was no power in the Minister to rescind it. The merits of the Minister’s decision were not in issue. The Minister objected to this court’s jurisdiction, arguing that the question of the existence of the Minister’s power to rescind the appointment was an “industrial matter” as defined in substantially the same terms as in the present statute. Williams J held that the extent of the Minister’s power, and in particular the question of whether or not he had a power to rescind the appointment, was not an “industrial matter” but was instead a question of statutory construction for the court. He said that:²¹

“Threshold questions, such as the extent of ministerial power and whether or not the relationship of employer and employee exists, remain within the jurisdiction of this Court; a question of the latter type arose in *Mutual Life & Citizens’ Assurance Company Ltd v Attorney-General (Q)* (1961) 106 CLR 48.”

²⁰ [1994] 1 Qd R 83.

²¹ *Ibid* 88.

The case cited by Williams J is not as close to the present one. But clearly the reasoning of Williams J could be applied here to reject the respondents' jurisdictional argument.

- [39] The PSAA recognises a potential operation of the *Industrial Relations Act* and in particular its conferral of jurisdiction upon the Commission, by providing for certain circumstances in which that jurisdiction will be excluded. As already discussed, under the disciplinary regime for which the PSAA provides, there is a jurisdiction conferred upon QCAT. And in relation to a transfer purportedly made under s 5.2(3), a police officer who is aggrieved by a decision about the selection of an officer for such a transfer may apply for a review under s 9.3(1)(b). So too may a police officer who is aggrieved by a decision about action against the officer for breach of discipline: s 9.3(e). In cases which are capable of being reviewed under Pt 9, s 9.1A provides as follows:

“The Industrial Court and the Industrial Relations Commission do not have jurisdiction in relation to a matter that has been, is being, or may be reviewed under this part, even though it may be, or be about, or arise out of, an industrial matter within the meaning of the *Industrial Relations Act 1999*.”

It is to be noted that this exclusion is in wide terms because it excludes jurisdiction *in relation to* a matter, including a matter that *may* be reviewed under Pt 9.

- [40] There is as yet no decision to transfer the applicant under s 5.2(3). Nevertheless the validity of the proposed transfer is a controversy which falls within s 9.1A because the transfer, if directed, may be reviewed under Pt 9. Therefore the Industrial Court and Industrial Relations Commission have no jurisdiction in relation to that matter.
- [41] As to the decision of 25 March 2015, what is in issue is whether that decision was empowered by s 4.9 of the PSAA. It does not follow that for every power of the respondents there is conversely a right of the applicant. And on the reasoning of Williams J in *Thomson v Minister for Education*, the applicant as an employee could not claim a relevant “right” unless and until the threshold question, which is raised by this proceeding, is decided and in his favour.
- [42] Accordingly I would not dismiss the proceeding upon the jurisdictional arguments of the respondents.
- [43] I return then to the applicant's case. The factual preconditions for the exercise of the disciplinary powers do not exist because there has not yet been a conclusion of misconduct. For that reason alone, it could not be said that the second respondent has sought to circumvent the limitations upon the exercise of the disciplinary powers. But further, the second respondent's purpose is one of risk management. He has not sought or indicated that he will seek any disciplinary sanction against the applicant. The transfer of the applicant to a position at another station might be within the “range of disciplines” that could be imposed in a particular case. But that is not to say that the use or proposed use of the powers in s 4.9 and s 5.2(3) are being made for an impermissible purpose.

Orders

- [44] The originating application must be dismissed. I will hear the parties as to costs.