

PARTIES: HOWKINS, Jeffrey Keith
v
COMMISSIONER OF NORTHERN
TERRITORY POLICE
AND
WERNHAM, Bruce Stewart

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY exercising Territory jurisdiction

FILE NO: 137/07 (20733751)

DELIVERED: 19 August 2008

HEARING DATES: 17 June 2008

JUDGMENT OF: THOMAS J

CATCHWORDS:

ADMINISTRATIVE LAW – JUDICIAL REVIEW

Judicial review – whether decision to dismiss by Deputy Commissioner was ultra vires the Commissioner’s powers – powers of Deputy Commissioner of Police – powers of prescribed members – delegation of power – whether decision incorrect according to law – whether a procedural error existed – whether procedure amounted to directory or mandatory – *Police Administration Act*.

Police Administration Act (NT), pt IV; ss 12, 12(1), 12(3), 14(3), 79, 81(2), 81(3), 81(3)(b), 84A(1), 84A(3), 84B, 84C, 84C(1)(b), 84C(2), 84D, 84D(k), 84F.

Police Administration Regulations (NT), regs 18(3), 19, 19(1)(d).

Interpretation Act (NT), ss 41, 41(2).

Attorney-General v Great Eastern Railway Co (1880) 5 App Case 473 at 479; *Project Blue Sky Inc and Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390, considered.

REPRESENTATION:

Counsel:

Plaintiff: L Silvester
Defendant: M Grant QC

Solicitors:

Plaintiff: Ward Keller
Defendant: Solicitor for the Northern Territory

Judgment category classification: C
Judgment ID Number: tho200802
Number of pages: 19

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Howkins v Commissioner of Northern Territory Police & Anor [2008]
NTSC 32
No. 137/07 (20733751)

BETWEEN:

HOWKINS, Jeffrey Keith
Plaintiff

AND:

**COMMISSIONER OF NORTHERN
TERRITORY POLICE**
First Defendant

AND:

WERNHAM, Bruce Stewart
Second Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 19 August 2008)

- [1] This is an application pursuant to an originating motion dated 13 December 2007 and summons on originating motion filed on the same date.
- [2] The originating motion seeks the following orders:
1. An Order in the nature of *Certiorari* quashing the second decision dismissing the Applicant from the Northern Territory Police Force.

2. An order in the nature of *Mandamus* compelling the First Defendant to reinstate the Plaintiff as a member of the Northern Territory Police Force at his previous rank of Constable; and
3. An order in the nature of *Mandamus* compelling the Second Defendant to reconsider the first and second decisions according to law.
4. Such further and other orders as the Court deems appropriate.
5. Costs.

[3] The plaintiff also seeks a further order declaring that:

“... the decision of the second defendant acting as Commissioner of Police made on 14 October 2007, to dismiss the plaintiff as a member of the Northern Territory Police Force was ultra vires the Police Administration Act, accordingly invalid and void ab initio.”

[4] The originating motion refers to two decisions made by the second defendant on 14 October 2007. The first decision was a decision made on or about 14 October 2007 to refer an Internal Memorandum prepared by Commander Dowd, under s 84C(1)(b) of the Police Administration Act (“the Act”), to the first defendant.

[5] The memorandum had been prepared by Commander Gregory Dowd, a prescribed member under Part IV of the Act, and was dated 6 June 2007. It was addressed to the second defendant in the second defendant’s capacity as Deputy Commissioner (DCP Wernham). Commander Dowd set out his findings and concluded that, on the balance of probabilities, Constable Howkins had committed 55 breaches of discipline. Under the heading

“Current Situation” Commander Dowd stated he was unable to apply the penalty needed to be imposed. He concluded with a recommendation.

- [6] The second decision referred to in the originating motion was a decision of the second defendant, in his capacity as the Acting Commissioner of Police, made on or about 14 October 2007, to accept the referral and impose, by way of penalty, an order dismissing the plaintiff from the Police Force of the Northern Territory.
- [7] Mr Silvester, counsel for the plaintiff, argues that under the Police Administration Act and Regulations, the Deputy Commissioner had no power to dismiss a member, Regulation 19(1)(d). It was submitted that no report was delivered to the Commissioner with a recommendation to dismiss. Accordingly, it is submitted no person acting or purporting to act in that position under delegation, had the power to act under s 84D(k). Mr Grant QC, on behalf of the first and second defendant, disputes the plaintiff’s assertion that the dismissal of the plaintiff is invalid and should be set aside.
- [8] With respect to the evidence in this matter, I rely on the affidavit of Robert Perry sworn 13 December 2007 and the affidavit of Helen Campbell sworn 8 April 2008.

Introduction

[9] On 7 August 2006, Jeffrey Keith Howkins, a serving member of the Northern Territory Police Force, was served with a Notice of Alleged Serious Breach of Discipline pursuant to ss 79 and 84F of the Act. The notice included 60 allegations of disciplinary breach. On 25 August 2006, Mr Howkins responded to the notice by way of letter from his solicitor Ward Keller. All but one of the allegations of breach were denied. An investigation pursuant to s 81(3) of the Act was carried out. On 25 November 2006, Mr Howkins was charged with a “serious breach of discipline” under s 84A(3). Notice of this was served upon him under s 84F of the Act. Pursuant to s 84A(1) of the Act, Commander Dowd was appointed as the “prescribed member”. He conducted a disciplinary hearing under s 84B of the Act on 2 April 2007 and found that Mr Howkins had committed 55 breaches of discipline. Commander Dowd made a written determination as to his findings and called for submissions as to the penalty. A copy of these findings are annexure marked RP4 to the affidavit of Robert Frederick Perry sworn 13 December 2007. It is agreed that submissions on penalty were received and considered.

[10] On 6 June 2007, Commander Dowd forwarded an internal memorandum to the second defendant, DCP Wernham, in which he stated that he was “unable to apply the penalty needed to be imposed, as it is greater than the range of penalties open to me as a Commander under PART IV of the Police Administration Act”. In that memorandum, Commander Dowd

recommended that Mr Howkins be cautioned in writing, fined \$2,000, placed on a good behaviour bond for 12 months and transferred to another locality. The internal memorandum addressed to the second defendant from Commander Dowd was under s 84C(1)(b) of the Police Administration Act which provides as follows:

“84C Action that may be taken after hearing

- (1) As soon as practicable after completing a hearing referred to in section 84B, the prescribed member or members conducting the hearing, if of the opinion that the member committed the breach of discipline –

.....

- (b) shall, if not permitted by the Regulations to take the action or impose the fine the prescribed member or members considers appropriate, in writing, report the opinion indicating the reasons for it and recommending a course of action the Commissioner or prescribed member might consider taking in the matter.”

[11] On 14 October 2007, DCP Wernham, acting as the Commissioner, issued an order dismissing the plaintiff from the Northern Territory Police Force. DCP Wernham had been delegated all of the powers of the Police Commissioner by an instrument dated 11 April 2002 in accordance with s 14(3) of the Act. Pursuant to s 12(1) of the Act, by an instrument dated 23 October 2006, the Minister for Police, Fire and Emergency Services appointed DCP Wernham to act from time to time as the Commissioner during the absence of the Commissioner from the Territory, or from his duties as Commissioner or during a vacancy of the office of Commissioner. The absence of the Police Commissioner between 6 October 2007 and

14 October 2007, inclusive, has not been disputed. DCP Wernham prepared detailed reasons for his decision to dismiss the plaintiff pursuant to s 84D. These reasons are contained in a document titled “Reasons for Action” which is Exhibit RFP7 to the affidavit of Robert Frederick Perry sworn 13 December 2007.

Plaintiff’s Submissions

- [12] Mr Silvester, counsel for the plaintiff, submitted that on 6 June 2007, Commander Dowd forwarded the internal memorandum concerning the plaintiff to the second defendant, DCP Wernham. At this time, Commander Dowd was acting pursuant to s 84C(1)(b) of the Act and DCP Wernham as the Deputy Commissioner of Police, was a “prescribed member” for the purposes of reg 18(3) of the Police Administration Regulations (“the Regulations”) and received the memorandum in his capacity as the “prescribed member” under s 84C(1)(b) of the Act. The disciplinary powers of the Deputy Commissioner of Police are limited by reg 19(1)(d) of the Regulations. DCP Wernham was not, at that time, acting as the Commissioner of Police.
- [13] On 14 October 2007, some five months later, DCP Wernham issued a written order terminating the plaintiff’s employment in the Northern Territory Police Force. At the time when he issued the written order, DCP Wernham was acting as the Commissioner of Police. Counsel for the plaintiff submitted that the powers provided by s 84D(k) of the Act were not

available to DCP Wernham as a report had not been received by him in his capacity as Commissioner as required by that section and, as such, DCP Wernham had no power to terminate the appointment of the plaintiff pursuant to s 84D(k).

[14] The plaintiff submits that DCP Wernham declined or failed, as a prescribed member, to act on Commander Dowd's report and chose to wait until he was acting as the Commissioner of Police to act unilaterally under s 84D(k) of the Act. The plaintiff further submits that the Commissioner of Police had no power to act on the memorandum supplied by Commander Dowd as the internal memorandum had not been submitted to the Commissioner of Police as required by s 84C(1)(b) of the Act but to a prescribed member.

[15] Further, counsel for the plaintiff submitted that except in circumstances where the public interest is invoked, the Commissioner has no role to play in the determination of guilt and the imposition of a penalty unless the prescribed member, who conducted the investigation, was of the view that the complaint should be dealt with by dismissal and, in those circumstances, may deliver the report to the Commissioner.

Defendants' Submissions

[16] Mr Grant QC, on behalf of the first and second defendant, submitted that it was open to the Commissioner (or acting Commissioner) to take whatever action he "might consider taking in the matter". The defendants argue that

an acting Commissioner has the same powers as the Commissioner (s 12 of the Act and s 41 of the Interpretation Act (NT)).

[17] Further, it is submitted on behalf of the defendants that although the report was addressed to DCP Wernham, that the following statement in the report shows that it was in fact directed to the Commissioner. The report provides:

“... [h]aving come to the above conclusion I am required to report the breach of discipline to the Commissioner, pursuant to section 81(3)(b) and 84C(1)(b) of the Act and I recommend the following ...”

[18] The defendants note that the reference to s 81(3)(b) in the above passage is an error as that section is irrelevant to the statement, however, submit that this does not vitiate the report or its disposition.

[19] The defendants go on to state that invalidity can only arise in situations where the decision-maker has failed to comply with a condition which directs the manner of the exercise of the power. The test for determining the issue of validity was stated by the High Court in *Project Blue Sky Inc and Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 per McHugh, Gummow, Kirby and Hayne JJ:

“A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of the courts in this country in recent years ... In determining the question of purpose, regard must be had to “the language of the relevant provision and the scope of the object of the whole statute”.

[20] The defendants submit that even if the report prepared by Commander Dowd was made solely for the second defendant, that there had been no breach of any relevant statutory requirement or condition as the statute does not dictate that the report be made to a prescribed member who is permitted by the Regulations to take the recommended course of action.

[21] The defendants further submit that the plaintiff's contention that the Commissioner has no power to dismiss unless the prescribed member who conducted the investigation is of the view that the member should be dismissed is incorrect. They contend that there is nothing in the legislation that is suggestive of an intention to constrain the Commissioner (or prescribed member) by the recommendations made by the investigating member, but rather that that contention is inconsistent with the discretion recognised by s 84C(1)(b) of the Act, that is that the Commissioner or prescribed member, as the case may be, need only consider the recommendation of the member who conducted the hearing.

[22] Counsel for the defendants further argued that there is nothing in the plaintiff's contention that if a report is sent to an officer with limited powers of disposition, that the range of penalties available is limited by the powers of the officer to whom the report was delivered and that the report cannot be further referred to an officer with greater powers.

Construction of the Legislation

[23] The plaintiff submits that the proper construction of the relevant provisions of the Act is that the jurisdiction of the Commissioner to dismiss, is, other than in cases demanded by the public interest, confined to circumstances in which, as a result of a report under s 84C(1)(b), the Commissioner's jurisdiction is enlivened and he or she is called upon to exercise a discretion as to penalty under s 84D of the Act. Counsel for the plaintiff further submits that the dismissal of the plaintiff by DCP Wernham, in his capacity as acting Commissioner of Police, absent a report to the Commissioner as required by s 84C(1)(b) of the Act, was an error of the Commissioner's jurisdiction under s 84D of the Act and was ultra vires the Commissioner's powers and thus invalid.

[24] Section 84C of the Act regulates the actions that may be taken following a hearing for a charge of breach of discipline. It states:

“84C Action that may be taken after hearing

- (1) As soon as practicable after completing a hearing referred to in section 84B, the prescribed member or members conducting the hearing, if of the opinion that the member committed the breach of discipline –
 - (a) may take such action in relation to, or impose such fine on, the member permitted by the Regulations as the prescribed member or members think fit; or
 - (b) shall, if not permitted by the Regulations to take the action or impose the fine the prescribed member or members considers appropriate, in writing, report the opinion indicating the reasons for it and recommending a course of action the Commissioner or prescribed member might consider taking in the matter.

- (2) A report under subsection (1)(b) shall be delivered to –
- (a) the Commissioner or the prescribed member who made the appointment or appointments under section 84A(1); or
 - (b) a prescribed member who is permitted by the Regulations to take the action or impose the fine recommended in the report.”

[25] Counsel for the defendants submitted that a natural and sensible reading of this section would result in the understanding that:

- (a) a prescribed member under the act could take any action they felt was appropriate if it was within their power under the Regulations; or,
- (b) that if the appropriate action was not within their power, to write a report recommending a course of action to the Commissioner or to a prescribed member and then deliver that report to either the prescribed member who convened the hearing or a prescribed member with the power under the Regulations to take the action recommended.

[26] Section 84D of the Act states the orders that a Commissioner or prescribed member may make following receipt of a report made pursuant to s 84C(1)(b). It states:

“84D Order of Commissioner or prescribed member

The Commissioner or prescribed member, on receiving a report prepared under section 84C(1)(b), may take no further action on the

matter or (in the case of a prescribed member, to the extent that the Regulations so permit) –

- (a) counsel and caution the member;
 - (b) cause the member to be formally cautioned in writing;
 - (c) take no further action on the basis that the member be of good behaviour for a period, not exceeding 12 months, fixed by the Commissioner or prescribed member;
 - (d) impose on the member a fine not exceeding \$2,000;
 - (e) reduce the member to a rank below the rank which the member held at the date of the hearing;
 - (f) reduce the rate of salary of the member to a rate of salary within the limits of the salary fixed for the rank held by the member;
 - (g) transfer the member –
 - (i) from the position held by the member in the Police Force to another position in the Police Force; and/or
 - (ii) from the locality in the Territory where the member is stationed to another locality in the Territory;
 - (h) suspend the member from the Police Force, for a period not exceeding 3 months, subject to such conditions as the Commissioner specifies;
 - (j) order the member to pay, by way of costs, compensation or restitution, such amount as the Commissioner or prescribed member considers appropriate to the matter; or
 - (k) dismiss the member from the Police Force,
- or do any one or more of those things, to have effect either concurrently or sequentially.”

[27] Counsel for the defence submitted that a natural and sensible reading of s 84C would result in the understanding that a prescribed member to whom the report is delivered may:

- (a) take no further action on the matter;
- (b) take the action recommended, if they have the power to do so under the Regulations; or,
- (c) if they consider a more severe action is appropriate, either,
 - (i) take more severe action if it is within their power; or,
 - (ii) pass the report to the Commissioner, who may then take whatever action he considers appropriate under this section.

[28] Counsel for the defendants noted that s 84D permits action by the Commissioner, “on receiving a report prepared under s 84C(1)(b)” and that the legislation does not require “delivery”. Counsel for the defence submits that this is a clear indication that the obligation to deliver the report under s 84C(2) does not constrain the Commissioner’s discretion in s 84D.

Was the first decision of the second defendant incorrect according to law?

[29] The plaintiff argues that the first decision by DCP Wernham to forward the report by Commander Dowd was incorrect according to law. The plaintiff argues that upon receipt of the internal memorandum the second defendant was, by reg 19(1)(d), empowered to do no more than any one or more of the powers specified in s 84D of the Act other than dismissing a member under subsection (k) of that section.

[30] Regulation 19 states the disciplinary powers of prescribed members as follows:

“(1) For the purposes of section 84D of the Act, a prescribed member of the rank of –

...

(d) Deputy Commissioner may do one or more things specified in section 84D of the Act other than dismiss a member under paragraph (k) of that section.”

[31] The plaintiff argues that the powers available to DCP Wernham were limited by reg 19 of the Regulations and that, as such, the powers available to DCP Wernham did not include the power of dismissal under s 84D(k). Additionally, the plaintiff argues that the only powers available to DCP Wernham were stated in s 84D and that, as such, he had no power to forward the memorandum to the Commissioner.

[32] The plaintiff referred to the cases of *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473 and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. In the earlier case, Lord Selbourne LC, at p 479, stated that:

“It would ... be contrary to sound principle to imply ... a condition, not expressed in the clause, if the words, as they stand, would be sensible and operative without it”.

[33] It is submitted, on behalf of the plaintiff, that in order to find that DCP Wernham had the power to forward the memorandum to the

Commissioner, such a power would necessarily need to be implied into the statute.

[34] I do not accept this submission. The wording of s 84D does not require the delivery of the report to Commissioner, but merely requires that the Commissioner “receive” the report. The decision of the legislature to use a different expression indicates that there was intent that the word have a different meaning. Counsel for the defence argue that there is a clear indication that the obligation to deliver a report to either a prescribed member or the Commissioner does not constrain a prescribed member or the Commissioner from later receiving the report.

[35] Counsel for the defendants argued that the use of the word “delivered” in contrast to the use of the word “received” in s 84D was indicative of a legislative intention that the report need not be delivered to the Commissioner, but only received in order to enliven s 84D. They also submitted that the memorandum, although delivered to the second defendant, was in fact addressed to the Commissioner and received by the second defendant as the Commissioners’ delegate or, in the alternative, as his agent. They also argue that there is no requirement in the legislation for the direct delivery of the report.

[36] Counsel for the plaintiff argued that the powers under s 84D are only enlivened on the report being “delivered” to the Commissioner and that that was a mandatory requirement of s 84C(1)(b).

[37] I disagree with the plaintiff's argument and find that the decision of the second defendant to forward the report to the Commissioner was not incorrect according to law. On a natural construction of s 84D of the Act, there is no requirement that a report prepared under s 84C be directly delivered to the Commissioner. Section 84D can be reasonably understood to be enlivened on receipt of a report by the Commissioner, or prescribed member as the case may be, without the additional requirement that the report have been delivered directly.

Was the second decision of the second defendant ultra vires the Commissioner's powers?

[38] The second decision of the second defendant was the decision to dismiss the plaintiff. Counsel for the plaintiff argues that the second defendant, DCP Wernham, had no power to act under s 81(2) and s 84D to dismiss the plaintiff. Counsel for the defendant disagrees and argues that it was within DCP Wernham's power as acting Commissioner to dismiss the plaintiff.

[39] In the letter dismissing the plaintiff, DCP Wernham stated:

"I, Bruce Stewart Wernham, Acting Commissioner of Police, having considered the Prescribed Member's opinion and report together with the matters put to the Prescribed Member at hearing and following, have decided for the reasons dated 14 October 2007, which are also attached (*), to dismiss you as a member of NT Police. I hereby terminate your appointment as member and dismiss you from the Police Force of the Northern Territory pursuant to Section 84D(k) of the Act. This action is to take effect immediately from the day of the service of this notice."

[40] Section 84D(k) gives the Commissioner the power to dismiss members from the Police Force. I have already given my reasons for accepting that this section had been enlivened in the circumstances. Section 12(1) of the Act allows the appointment of a member to the position Commissioner.

Section 12(3) states:

“Where a person is appointed to act as the Commissioner, a Deputy Commissioner or an Assistant Commissioner in pursuance of an appointment under subsection (1) –

- (a) a reference in a law of the Territory to the Commissioner, a Deputy Commissioner or an Assistant Commissioner, as the case may be, includes a reference to the person so appointed to act; and
- (b) that person has all the powers, functions and duties conferred or imposed upon the Commissioner, a Deputy Commissioner or an Assistant Commissioner, as the case may be, by any law of the Territory.”

[41] Section 41(2) of the Interpretation Act states:

“Where an Act confers a power or imposes a duty on the holder of an office or the occupier of a position or designation as such, the power may be exercised and the duty shall be performed by the person for the time being holding or occupying or performing the duties of the office, position or designation.”

[42] By an instrument dated 23 October 2006, the Minister for Police, Fire and Emergency Services appointed Bruce Stewart Wernham to act as Commissioner from time to time pursuant to s 12(1) of the Act. Section 12(1) states:

“The Minister may appoint a member to act from time to time as the Commissioner, Deputy Commissioner or Assistant Commissioner, as the case may be, during the absence from the Territory or from duty

or from duty of the Commissioner, Deputy Commissioner or Assistant Commissioner or a vacancy in any of those offices.”

[43] Accordingly, DCP Wernham, in his capacity as acting Commissioner had all the powers of the Commissioner for the period of time that the Commissioner was absent from the Territory. In an affidavit sworn by Helen Campbell on 8 April 2008, she states that the instrument of delegation had remained in force at all times since the 23 October 2006 to the date of her affidavit. I accept this. I also accept that between 6 October 2007 and 14 October 2007, inclusive, the Commissioner of Police was absent from the Territory and that DCP Wernham was acting Commissioner during that period pursuant to the instrument of delegation dated 23 October 2006. As earlier established, it was open to the Commissioner to dismiss the plaintiff pursuant to s 84D(k) of the Act. Accordingly, it was open to DCP Wernham, in his capacity as acting Commissioner to act pursuant to that section.

[44] In addition, by an instrument dated 11 April 2002, the Commissioner of Police delegated all of his powers to the person “acting in or performing the duties of Deputy Commissioner of Police” in pursuance to s 14(3) of the Act. That section states that, “The Commissioner may, in writing, delegate to a person the Commissioner’s powers or functions under this Act”. In an affidavit sworn by Helen Campbell on 8 April 2008, she states that the instrument of delegation had remained in force at all times since its formation until the date of her affidavit. I accept this.

[45] Accordingly, under this instrument of delegation, DCP Wernham had power, in his capacity as Deputy Commissioner, to dismiss the plaintiff pursuant to s 84D(k).

[46] The essence of the plaintiff's complaint is that as Deputy Commissioner the second defendant had no power to deliver the internal memorandum from Commander Dowd to the Commissioner or to himself as Acting Commissioner. It is asserted on behalf of the plaintiff that the second defendant, either in his capacity as Deputy Commissioner or at a later time as Commissioner, did not have the power to dismiss the plaintiff.

[47] The second defendant received the report originally in his capacity as Deputy Commissioner and subsequently in his capacity as Acting Commissioner. If this does amount to a procedural error (and I am not satisfied that it does), then I would consider it to be a procedure that is directory rather than mandatory. Having regard to the scheme of the legislation, the object of the legislation and the circumstances of the case the procedure which did occur does not give grounds for quashing the decision of the second defendant or for declaring that decision to be invalid or void ab initio.

Orders

[48] The summons on originating motion is dismissed.

[49] I will hear the parties on the question of costs.