BAKER and Another v COMMISSIONER OF FEDERAL POLICE
[2000] FCA 1339

Gyles J

Australian Capital Territory District Registry

13, 19 September 2000

Administrative Law — Judicial review — Notice of possible termination of employment under the Australian Federal Police Act 1979 (Cth) inviting employees to make submissions in their cause — Invitation while criminal proceedings on same facts pending — Privilege against self-incrimination — Scope for judicial review — Australian Federal Police Act 1979 (Cth), ss 28, 40K.

Employment Law — Dismissal of employee — Criminal proceedings on same facts pending — Australian Federal Police Act 1979 (Cth), s 23.

B and M were members of the Australian Federal Police (the AFP). They were facing criminal charges relating to alleged assaults. The respondent on behalf of the Commonwealth had all the rights, duties and powers of an employer with respect to B and M by virtue of s 23 of the *Australian Federal Police Act* 1979 (Cth). The respondent issued a notice to each of B and M saying that the respondent was considering (1) terminating his employment under s 28 of the *Australian Federal Police Act* on the basis of the allegations; and (2) a notice under s 40K. Section 40K provided that where the basis for termination under s 28 was the respondent's belief that the employee's behaviour amounted to serious misconduct, or would have or be likely to have a damaging effect on (a) the professional self-respect or morale of some or all of the AFP employees or (b) the reputation of the AFP with the public, or with any section of the public, or with an Australian or overseas government or law enforcement agency, the respondent could make a written declaration to that effect. B and M were invited to make submissions as to why the respondent should not take such action, but the submission date was prior to the proposed criminal hearing relating to the alleged assaults.

B and M applied to the Court for judicial review. They argued that their right to silence was being affected or negated by actions on behalf of the AFP, and that those actions were both an abuse of the powers conferred by ss 28 and 40K and also an interference with the proper conduct of the criminal proceedings. They contended that the decisions foreshadowed by the notice, namely the decision to terminate and the decision to issue a s 40K notice, would be invalid upon judicial review.

Held, dismissing the application: (1) B and M have not established that the respondent's use of the power given by ss 28 and 40K of the *Australian Federal Police Act* in these circumstances would override B and M's right against self-incrimination. (36)

(2) There is, generally speaking, no inhibition upon an employer dismissing an employee in relation to conduct which is also the subject of incomplete criminal proceedings, although prejudice to the employee by reason of the existence of the cognate criminal proceedings is a factor to be considered by an employer in deciding whether to dismiss. (30)

CASES CITED

The following cases are cited in the judgment:

Anderson v Sullivan (1997) 78 FCR 380; 148 ALR 633.
Cameron's Unit Services Pty Ltd v Kevin R Whelpton & Associates (Australia) Pty Ltd (1984) 4 FCR 428.
Chambers v Commissioner of Taxation (1999) 41 ATR 233.
Edelsten v Richmond (1987) 11 NSWLR 51.
Golden City Car & Truck Centre Pty Ltd v Deputy Commissioner of Taxation (Cth) (1999) 42 ATR 379; ATC 4,779.
Hammond v Commonwealth (1982) 152 CLR 188.
Herron v McGregor 1986) 6 NSWLR 246.
Locke, Re; Ex parte Commissioner for Railways [1968] 2 NSWR 197.
McMahon v Gould (1982) 7 ACLR 202.
R v British Broadcasting Corporation; Ex parte Lavelle [1983] 1 WLR 23; [1983] 1 All ER 241.
Reid v Howard (1995) 184 CLR 1.
Yuill v Spedley Securities Ltd (In liq) (1992) 8 ACSR 272.

APPLICATION

C Erskine, for the applicant.

T Howe, for the respondent.

Cur adv vult

19 September 2000

1 GYLES J. This application under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (the ADJR Act) raises a short point of principle arising out of non-contentious facts. The statement of facts which follows has been agreed between the parties.

Facts

2 The applicants are members of the Australian Federal Police (the AFP).

3 The AFP is administered by the respondent pursuant to the *Australian Federal Police Act* 1979 (Cth) (the AFP Act).

4 On 14 May 2000 Jad McDevitt made allegations against police that on that day two officers:

(a) forcibly confined him at the BP Service Station on Melrose Drive, Philip, ACT, by placing him in the rear of a caged police vehicle; and
(b) assaulted him at Narrabundah Lane, Symonstown, ACT, by punching him in the area of his head approximately five to six times.

5 Following investigations, on 31 May 2000 Federal Agent Luke Morrish and Federal Agent Edward Sjollema interviewed the applicant, Michael Martin (the Martin interview).

6 During the Martin interview, it was alleged that Martin was one of the officers involved in the allegations in [4] above.

7 At the start of the Martin interview, Morrish offered him a criminal caution and Martin declined to answer questions about the allegations.

8 Immediately thereafter, Morrish served on Martin a direction issued under s 7(5) of the *Complaints (Australian Federal Police) Act* 1981 (Cth) (the Complaints Act) which, in essence, directed him to answer questions relating to the allegations (the direction).

9 Martin thereupon answered questions pursuant to the direction.

10 On 31 May 2000 Federal Agent Luke Morrish and Federal Agent Edward Sjollema interviewed the applicant, Rick Baker (the Baker interview).

11 During the Baker interview it was alleged that Baker was one of the officers involved in the allegations in [4].

12 At the start of the Baker interview, Morrish offered him a criminal caution but Baker answered questions about the allegations put to him by Morrish and Sjollema without requiring a direction under s 7(5) of the Complaints Act.

13 On 1 June 2000 Simon Overland, a General Manager of the Federal Police and a delegate of the respondent, wrote to each applicant alleging that each may have committed a disciplinary offence against s 18(1)(d) of the *Australian Federal Police (Discipline) Regulations* 1979 (Cth), in that on 14 May 2000 each was guilty of disgraceful or improper conduct in their official capacity or otherwise, in that they forcibly confined and assaulted Jad McDevitt without lawful authority.

14 On or about 5 June 2000 General Manager Overland suspended each applicant with pay pending the determination of the disciplinary offences.

15 On 22 June 2000 informations and summonses were issued by the Deputy Registrar of the ACT Magistrates Court, on the information of Federal Agent Luke Morrish (the criminal charges), alleging that:

(a) the applicant Martin had assaulted Jad McDevitt on 14 May 2000, contrary to s 26 of the *Crimes Act* 1900 (NSW) in its application to the ACT (the *Crimes Act*);

(b) the applicant Martin had unlawfully imprisoned Jad McDevitt on 14 May 2000 contrary to s 34 of the *Crimes Act*;

(c) the applicant Baker had assaulted Jad McDevitt on 14 May 2000 contrary to s 26 of the *Crimes Act*; and

(d) the applicant Martin had unlawfully imprisoned Jad McDevitt on 14 May 2000 contrary to s 34 of the *Crimes Act*.

16 On 6 July 2000 each applicant appeared before the ACT Magistrates Court where he was formally charged with the criminal charges and entered a plea of not guilty.

17 On 19 July 2000 General Manager Overland issued a notice to each applicant, saying that the respondent was considering terminating their employment under s 28 of the AFP Act, on the basis of the allegations in [4], and also that the respondent was considering issuing a notice to each applicant under s 40K of the AFP Act on the basis that the allegations in [4] amounted to serious misconduct that was, or was likely to have, a damaging effect on the professional self-respect or morale of some AFP employees, or on the reputation of the AFP with the public or the ACT Government (the termination notice).

18 The termination notice invited each applicant to put submissions to General Manager Overland as to why the respondent should not take the action referred to in that notice by 3 August 2000.

19 The response date referred to in [18] was later extended to 22 August 2000.

20 The criminal charges are due to be heard and determined by the ACT Magistrates Court on 30 and 31 October 2000.

Statutory provisions

21 The relevant provisions of the AFP Act are as follows:

"23. Employer powers etc of Commissioner

(1) The Commissioner, on behalf of the Commonwealth, has all the rights, duties and powers of an employer in respect of AFP employees.

(2) Without limiting subsection (1), the Commissioner has, in respect of AFP employees, the rights, duties and powers that are prescribed by the regulations.

. . .

28. Termination of employment by Commissioner

The Commissioner may at any time, by notice in writing, terminate the employment of an AFP employee . . .

. . .

38. Commissioner's Orders

In the exercise of his or her powers under section 37, the Commissioner may, by writing, issue orders with respect to the general administration of, and the control of the operations of, the Australian Federal Police.

39. Compliance with Commissioner's Orders

An AFP employee or a special member must comply with Commissioner's Orders.

40. Compliance with specific directions, instructions or orders

An AFP employee or a special member must not:

(a) disobey; or

(b) fail to carry out;

a lawful direction, instruction or order, whether written or oral, given to him or her by:

(c) the Commissioner; or

(d) a Deputy Commissioner; or

(e) the AFP employee or the special member under whose control, direction or supervision he or she performs his or her duties.

40A. Self-incrimination

(1) If an AFP employee or a special member is required under section 39 or 40 to give information, answer a question or produce a document, he or she is not excused from giving the information, answering the question or producing the document on the ground that the information, the answer to the question or the production of the document might tend to incriminate him or her or make him or her liable to a penalty.

(2) However, any information or answer so given or any document so produced is not admissible in evidence against the employee or special member in any proceedings, other than proceedings for a disciplinary offence under the *Australian Federal Police (Discipline) Regulations*.

(3) Subsection (2) does not apply to any information or answer so given, or any document so produced, that is relevant to conducting a test under section 40M or 40N (about testing for alcohol or prohibited drugs)

. . .

40K. Termination of employment for serious misconduct

(1) If the Commissioner terminates the employment of an AFP employee under section 28 because the Commissioner believes, on reasonable grounds, that the employee's conduct or behaviour, or any part of it:

(a) amounts to serious misconduct by the employee; and

(b) is having, or is likely to have, a damaging effect on:

(i) the professional self-respect or morale of some or all of the AFP employees; or

(ii) the reputation of the Australian Federal Police with the public, or with any section of the public, or with an Australian or overseas government or law enforcement agency;

the Commissioner may make a written declaration to that effect.

Timing of declaration etc

(2) Any declaration under subsection (1) must be made within 24 hours of the Commissioner's decision to terminate the employment of the AFP employee. The Commissioner must give a copy of the declaration to the AFP employee.

Definition

(3) In this section:

serious misconduct means

(a) corruption, a serious abuse of power, or a serious dereliction of duty; or

(a) any other seriously reprehensible act or behaviour by an AFP employee, whether or not acting, or purporting to act, in the course of his or her duties as an AFP employee."

22 I was told that a declaration pursuant to s 40K has significant adverse implications for the employee involved, which it is unnecessary to explore for the purposes of this case.

23 The relevant portions of s 7 of the Complaints Act are as follows:

"(5) A member of the Investigation Division may, for the purposes of the investigation of a complaint or matter, direct an AFP appointee to furnish information, produce a document or other record, or answer a question, that is relevant to the complaint or matter, as the case may be.

...

(6) Where an AFP appointee is directed under subsection (5) to furnish information, produce a document or record or answer a question, the appointee is not excused from complying with the direction on the ground that:

(a) the furnishing of the information, the production of the document or record or the answering of the question:

(i) would be contrary to the public interest; or

(ii) might make him or her liable to a penalty; or

(b) the information, the production of the document or record or the answer to the question might tend to incriminate him or her;

or on any other ground, but the information, the production of the document or record or the answer to the question is not admissible in evidence against him or her in any civil or criminal proceedings other than proceedings for an offence against subsection (8) or for or in relation to a breach of discipline.

(7) Nothing in subsection (6) shall be taken to affect the admissibility in evidence, in any civil or criminal proceedings, of:

(a) any information furnished by an AFP appointee to a member of the Investigation Division;

(b) the production of a document or other record by a member of the Australian Federal Police to a member of the Investigation Division; or

(c) an answer given by a member of the Australian Federal Police to a question put to him or her by a member of the Investigation Division;

where the appointee has not been expressly directed, under subsection (5), to furnish the information, produce the document or record or answer the question.''

24 ''Breach of discipline'' means an offence that is a disciplinary offence for the purposes of the prescribed Regulations (s 3(1)).

Issues

25 Each applicant is in this dilemma: if he does not respond to the invitation to defend himself against dismissal and a s 40K declaration, then he may well be dismissed and a declaration made, but if he does defend himself, whatever he says may be used against him in the forthcoming criminal proceedings. They say that the respondent is not just an employer — he is also responsible for criminal prosecutions. The applicants contend that their right to silence is effectively being affected or negated by actions on behalf of the respondent and that that action is both an abuse of the power which is conferred by ss 28 and 40K of the AFP Act and an interference with the proper conduct of the criminal proceedings. The applicants contend that the foreshadowed decisions will be invalid by reason of s 6(1)(a), (b), (c), (d), (f) and (j) and (2)(c), (g) and (j) of the ADJR Act.

26 The respondent answers by submitting that the statutory provisions are subject to no express or implied limitations, and that even if there were any implied prohibition on affecting the applicants' right to silence, then to afford the applicants an opportunity to offer an explanation or defence does not relevantly affect the right to silence. It is further put on behalf of the respondent that an examination of the history of the legislation makes it clear that there is no inhibition upon exercising the powers granted by ss 28 and 40K of the AFP Act during the pendency of criminal proceedings arising out of the same facts as led to the dismissal. It is contended for the applicants that there is no occasion to, and it is not appropriate to, take the legislative history into account.

Decision

27 It is clear that neither s 28 nor 40K of the AFP Act abrogate the right to silence by compelling the employee to speak, such as is the case with, for example, ss 39, 40 and 40A of the AFP Act and s 7(5) and (6) of the Complaints Act. Put another way, neither of the applicants is *obliged* to incriminate himself by reason of the opportunity afforded to him. It is argued for the respondent that the dilemma in which the applicants find themselves is no worse in principle than that facing parties in concurrent criminal and civil litigation. There is a long line of authority which establishes that the granting of a stay of civil proceedings in those circumstances is discretionary in the civil court and that the choice of either fully pursuing a civil claim or a defence to a civil claim or not doing so to avoid the risk of self-incrimination is not sufficient in itself to warrant a stay. This line of authority, which is generally seen as commencing with *McMahon v Gould* (1982) 7 ACLR 202 and, in this Court, *Cameron's Unit Services Pty Ltd v Kevin R Whelpton & Associates (Australia) Pty Ltd* (1984) 4 FCR 428, has been applied in this Court as recently as the decisions in *Chambers v Commissioner of Taxation* (1999)

41 ATR 233 and *Golden City Car & Truck Centre Pty Ltd v Deputy Commissioner of Taxation (Cth)* (1999) 42 ATR 379; ATC 4779.

28 The general principles applicable in those cases have been held applicable to disciplinary proceedings — *Edelsten v Richmond* (1987) 11 NSWLR 51, although it needs to be noted that the legislation in question there included s 32W of the *Medical Practitioners Act* 1938 (NSW), which provided:

> "A complaint may be referred to a Committee or the Tribunal, and dealt with by the Committee or Tribunal, even though the registered medical practitioner about whom the complaint is made is the subject of proposed or current criminal or civil proceedings relating to the subject-matter of the complaint."

29 Indeed, Hope JA in *Edelsten* at 59E (in a judgment agreed with by Clarke JA and generally agreed with by Priestley JA) referred to the following statement by McHugh JA (in a judgment agreed with by the other members of the Court) in *Herron v McGregor* (1986) 6 NSWLR 246 at 266:

> "No doubt it is only proper that, while criminal proceedings are pending, disciplinary proceedings should not be brought on for hearing. But this does not dispense with the obligation of the complainant, in the interests of a fair hearing and the public interest, to lodge his complaint. In a proper case it may also be desirable to lodge a complaint with the Board so as to initiate a fitness inquiry under s 30. I see nothing to prevent the Medical Board in an appropriate case from temporarily suspending a practitioner while criminal proceedings are pending if, after hearing him, it thinks that he is not fit to practise. The hearing need not be a full hearing. The rules of natural justice are flexible enough to deal with this situation: *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 514-516."

Whilst, as Hope JA pointed out in *Edelsten* at 64B, this passage does not deny the existence of a discretion, it is a significant statement in a situation such as the present.

30 It was put on behalf of the respondent that there is, generally speaking, no inhibition upon an employer dismissing an employee in relation to conduct which is also the subject of incomplete criminal proceedings (*Re Locke; Ex parte Commissioner for Railways* [1968] 2 NSWR 197; *R v British Broadcasting Corporation; Ex parte Lavelle* [1983] 1 WLR 23; [1983] 1 All ER 241) and that s 23 of the AFP Act gives to the Commissioner the rights, duties and powers of an employer. The support given for the first proposition in the cases cited is only indirect, but sufficient, in the absence of any countervailing authority, to establish it. These cases, however, also establish that prejudice to the employee by reason of the existence of cognate criminal proceedings is a factor to be considered by an employer in deciding whether to dismiss. Walsh J in *Ex parte Commissioner for Railways* at 203 makes clear that the practical rather than the legal position is to be considered. His Honour said:

> "If such evidence were given in the appeal, then, in a practical sense, Clatworthy could not hope to succeed in his appeal unless he gave evidence. If he did, he would no doubt be cross-examined. It is said that it would have been open to him to refuse to answer any question, the answer to which might incriminate him. So he could, but he could scarcely hope to win his appeal if, by exercising this right, he refrained from giving in full his version of what had taken place."

Although said in the context of a merits appeal against dismissal, this statement is apt to apply to an employer's decision whether to dismiss.

31 It was also put that the special nature of employment of a police officer as a member of a disciplined service has often been recognised by the courts — a recent example is the decision of Finn J in *Anderson v Sullivan* (1997) 78 FCR 380; 148 ALR 633. This, however, is only a consideration to be taken into account in the exercise of the discretion to dismiss.

32 The applicants rely upon the decision of the High Court in *Reid v Howard* (1995) 184 CLR 1 to suggest that the line of authority commencing with *McMahon v Gould* has given insufficient weight to, and has not fully appreciated the extent of, the privilege against self-incrimination. There is no doubt that *Reid v Howard* does re-affirm the importance of the privilege against self-incrimination, and does not give any encouragement to think that any devaluation of the principle which may apply in the United Kingdom will be applied in Australia. Toohey, Gaudron, McHugh and Gummow JJ said (at 14):

> "There is simply no scope for an exception to the privilege, other than by statute. At common law, it is necessarily of general application — a universal right which, as Murphy J pointed out in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 346, protects the innocent and the guilty. There is no basis for excepting any class or category of person whether by reference to legal status, legal relationship or, even, the offence in which he or she might be incriminated because, as already indicated, its purpose is the completely general purpose of protecting against 'the peril and possibility of being convicted as a criminal'. For the same reason, there can be no exception in civil proceedings, whether generally or of one kind or another. Moreover, it would be anomalous to allow that a person could refuse to answer questions in criminal proceedings or before investigative bodies where the privilege has not been abrogated if that person could be compelled to answer interrogatories or otherwise make disclosure with respect to the same matter in civil proceedings."

Furthermore, as pointed out by Deane J at 6-7, the privilege extends not only to the risk of incrimination by direct evidence, but also by indirect or "derivative" evidence — evidence obtained by using the disclosed material as a basis of investigation. However, *Reid v Howard* is distinguishable from the present case because it dealt with the compulsory process of discovery in course of civil proceedings.

33 It was also submitted on behalf of the applicants that the *McMahon v Gould* line of authority does not sufficiently, if at all, take account of the long line of cases in the High Court and elsewhere concerning interference with the course of justice where matters the subject of a criminal charge are also the subject of a parallel inquiry such as a Royal Commission — see, for example, *Hammond v Commonwealth* (1982) 152 CLR 188.

34 In my opinion, there is some merit in the submission that there should be reconsideration of the manner in which the *McMahon v Gould* line of authority is now applied so as to decide whether too little weight is given to the practical as well as legal prejudice to the accused and to the primacy of criminal proceedings in our justice system. The decision in *Reid v Howard* adds force to remarks to this effect by Kirby P (as he then was) in *Yuill v Spedley Securities Ltd (In liq)* (1992) 8 ACSR 272 at 274-275.

35 However, any such reconsideration would need to be undertaken either by a

Full Court of this Court or the High Court. In any event, it would be unlikely to avail the applicants here. The staying or control of proceedings by a court involves a decision by a court, subject to appeal. Here, the substantive decision is committed by legislation to the respondent, and involves the exercise of a discretion. The weighting to be given to a consideration in the exercise of that discretion is not a matter for a court examining that decision on judicial review. Furthermore, the question of proceedings to restrain contempt of, or interference with, the criminal proceedings does not arise directly in this kind of judicial review application.

36 The only presently operable decision is that to afford the applicants natural justice before the substantive decisions are made. The submissions on behalf of the applicants make clear that the breaches of s 6 of the ADJR Act which are alleged depend upon their establishing the proposition that the use of the substantive power given to the respondent by ss 28 and 40K of the AFP Act in the circumstances here would override the applicants' right against self-incrimination. In my view, that proposition is inconsistent with authority which binds me. In those circumstances, the grounds alleged are not made out. I should indicate that there is nothing in the evidence to establish that the respondent will not take the existence of the criminal proceedings, and their direct and indirect effects, into account in making the substantive decisions in question. Further, there is no sound basis for the argument that the substantive decisions will be unreasonable in the requisite sense.

37 In view of my decision, it is unnecessary to consider whether it would be legitimate to consider the legislative history. It is also unnecessary that I express any view as to the use which can be made of such answers as have been given already by the applicants to the respondent's officers.

38 The application is dismissed, with costs.

Orders accordingly

Solicitors for the applicants: *Porter Parkinson & Bradfield.*

Solicitor for the respondent: Australian Government Solicitor.

DAVID ASH