Commissioner of Police v Farquhar [2010] NTSC 61

PARTIES:	COMMISSIONER OF POLICE v DAVID SYDNEY FARQUHAR, MAXWELL COLIN POPE and GOWAN CARTER (in their capacity as members of an Inability Appeal Board constituted under s 94(2) of the *Police Administration Act*) and ROBERTA FRANCINE BARNETT
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	185 of 2009 (20944084)
DELIVERED:	27 July 2010
HEARING DATES:	27 July 2010
JUDGMENT OF:	MILDREN J

CATCHWORDS:

ADMINISTRATIVE LAW – Decision of Northern Territory Commissioner of Police – Application to Supreme Court – Question of law as to proper construction of the *Police Administration Act – Police Administration Act*, s 87, s 91 – certiorari granted

Police Administration Act,, s 87, s 87(a), s 88, s 89, s 91, s 91(1), s 91(2), s 91(6), s 94(6)
Supreme Court Rules, O 56

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223; *Julius v The Bishop of Oxford* (1880) 5 App Cas 214; *Metropolitan Coal of Sydney Ltd v Australian Coal & Shale Employers Federation* (1917) 24 CLR 85; *R v Bates ex parte O'Brien* (1997) 116 NTR 1; referred to

REPRESENTATION:

Counsel:

Plaintiff:	P Barr QC
First Defendants:	R Jobson
Second Defendants:	L Silvester

Solicitors:

Plaintiff:	Kelvin Currie, Solicitor, Solicitor for the Northern Territory
First Defendants:	Solicitor for the Northern Territory
Second Defendants:	Ward Keller

Judgment category classification:	B
Number of pages:	9

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

Commissioner of Police v Farquhar [2010] NTSC 61
No 185 of 2009 (20944084)

BETWEEN:

COMMISSIONER OF POLICE
Plaintiff

AND:

DAVID SYDNEY FARQUHAR, MAXWELL COLIN POPE and **GOWAN CARTER** (in their capacity as members of an Inability Appeal Board constituted under s 94(2) of the *Police Administration Act*)
First Defendants

AND:

ROBERTA FRANCINE BARNETT
Second Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 27 July 2010)

Ex Tempore:

[1] This is an application by the Commissioner of Police for an order in the nature of *certiorari* pursuant to O 56 of the *Supreme Court Rules* to have a decision of the Inability Appeal Board established under the *Police Administration Act* quashed on the grounds of jurisdictional error, alternatively non-jurisdictional error of law on the face of the record.

[2] The application was amended to include an application for a declaration that the plaintiff has power to proceed under s 87 of the *Police Administration Act* notwithstanding the existence of concurrent medical incapacity, subject to the Commissioner being of the opinion, on reasonable grounds, as required by s 87(a) of the Act, that the officer is not fit to discharge or suited to perform or capable of efficiently performing the duties the member is employed to perform.

[3] The process which the Commissioner followed in this case was to form an opinion as required by s 87(a) and by notice in writing advise the member of his opinion and on the grounds on which he had formed the opinion, and to invite the defendant, Roberta Francine Barnett (hereafter referred to as Ms Barnett), to indicate in writing whether she agrees with his opinion or to explain in writing any matter referred to in the notice.

[4] Ms Barnett herself did not respond, but a response was given on her behalf by the Northern Territory Police Association Incorporated. In that response the Police Association, through its President, indicated that the proposed action pursuant to s 87 of the *Police Administration Act* is misdirected. It was put in the letter that the reason that Senior Constable Barnett cannot return to work is:

> That she is suffering from a psychological injury which prevents her from carrying out any duties or functions of a police officer in the Northern Territory Police Force.

[5] The letter goes on to say:

> We are therefore of the firm opinion that any decision that you come to in respect of Senior Constable Barnett's employment must be taken under s 91 of the Act (medical incapacity) rather than under s 87.

[6] The Commissioner was not satisfied with that explanation and so arranged for a review to be carried out by Assistant Commissioner McAdie, who concluded that the opinion of the Commissioner that Senior Constable Barnett should be retired on grounds of inability was well founded. From there, a notice of retirement was sent in accordance with s 89 of the *Police Administration Act* dated 13 October 2008.

[7] On 28 October 2008, Ms Barnett lodged a notice of appeal with the Inability Appeal Board in which the grounds of appeal referred to jurisdictional error by the Commissioner in invoking the procedures set out in s 87, s 88 and s 89 of the Act, rather than s 91, as well as other grounds which are all, it would appear to me to be anyway, administrative law grounds. It is not necessary to set them all out.

[8] The matter was dealt with by the Inability Appeal Board. There was a majority decision that the Board was bound by the decision of Kearney J in *R v Bates ex parte O'Brien*,[1] where his Honour said:

> Mr Reeves submitted that s 91 was restricted to cases of total and permanent incapacity arising on medical grounds, while partial incapacity on medical grounds could be a basis for para (a) or (b) or

[1] (1997) 116 NTR 1 at 9-10.

> (c) in s 87; however I consider that such cases are expressly and exclusively provided for in s 91(6). I consider that s 91 is a wholly self-contained provision instituting a procedure for dealing with the member's medical incapacity. Although s 86 provided that part V did 'not apply' to 'medical incapacity' that appears to be a drafting error, the intention probably being that the procedure for dealing with non-medical 'inability' in s 87, as set out in ss 87-90, should not apply to a case of medical incapacity, the procedure for dealing with the latter being set out in s 91.

[9] The majority of the Board was of the view that Kearney J's interpretation was binding on the Board to the extent that s 91 is to be applied where the Commissioner is of the view that a member is unable to efficiently or satisfactorily perform the member's duties because of a physical or mental condition.

[10] The majority was also of the view that the Commissioner acted incorrectly in taking this right away from Ms Barnett, that is, the right to go via the s 91 procedure, by not making a determination as to whether the appellant was or was not totally and permanently incapacitated.

[11] Accordingly, by a majority the Board allowed the appeal and set aside the Commissioner's decision made on 13 October 2008. The minority reasoning is not relied on by Mr Barr QC, but it is apparent that Mr Pope, the minority member, was of the view that the Commissioner acted correctly in the action that he had taken and that he had not denied Ms Barnett any rights by proceeding along the path that he did:

> His determination that the Member was not totally and permanently incapacitated but with significant behavioural issues left him with no

option other than to proceed with actions under s 87 of the *Police Administration Act*.

[12] Mr Barr QC argues that Kearney J's decision ought not be followed. In the first place, he submits that what his Honour had to say in relation to s 91 was *obiter dicta* and not a necessary reason for his decision. Plainly, that is correct. Nevertheless it would be a matter to which the members of any Board would be obliged to give great weight although, strictly speaking, not binding on them. Next Mr Barr submits that, in any event, the decision of Kearney J was incorrect, and this involves an examination of the provisions of the *Police Administration Act*.

[13] As it has been pointed out, the provisions of s 87 which enable the Commissioner to form an opinion that a member is not fit to discharge, suited to perform or capable of efficiently performing his duties is not limited in any way as to the reasons for that decision. It could well be that the reason for the Commissioner's opinion is that the constable in question is not fit to discharge his or her duties because of a medical incapacity.

[14] If Ms Barnett wished to respond to the Commissioner on the ground that she was unable to perform her duties because of a medical incapacity and had asked the Commissioner to proceed under s 91(2), so the argument went, then the Commissioner had a discretion as to whether or not he would go down that path.

[15] Mr Barr QC submitted, and I think correctly, that the starting point is to notice that in s 91(1) the legislative draftsman has used the word ‘shall’ and the same may be said of s 91(6), whereas in s 91(2) the draftsman has used the word ‘may’.

[16] It is well established that where the draftsman has used ‘may’ or ‘shall’ with any degree of particularity, the starting point is that there is a presumption that the word ‘may’ implies a discretion, whereas the word ‘shall’ implies an obligation.

[17] In the leading judgment of Earl Cairns LC in *Julius v The Bishop of Oxford*,[2] in relation to words ‘it shall be lawful’ said:

> These are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power and they do not of themselves do more than confer a faculty or a power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so.

[18] That case has been referred to in many cases since, when discussing words in statutes which appear to invest a person with a discretion. Generally speaking, the rule in *Julius v The Bishop of Oxford* is not, as the High Court

[2] (1880) 5 App Cas 214 at 222-223.

said in *Metropolitan Coal of Sydney Ltd v Australian Coal & Shale Employers Federation*,[3] per Isaacs and Rich JJ:

> … that whenever the word 'may' is used in connection with a public office it means 'shall'. Nor, if the Legislature confers a right by the same word and it contains conditions, does it necessarily follow that the word imposes a duty on the proper officer, irrespective of all other consideration. The true rule is thus stated by Lindley MR in *Southwark & Vauxhall Water Co v Wandsworth District Board of Words* (1898) 2 Ch 603 at 607 speaking of the words 'it shall be lawful'; these words may, no doubt, under certain circumstances impose a duty as well as confer a power, but it is for those who contend that they do both to make good their contention.

[19] One begins by an examination therefore, of what is the purpose of s 91. Section 91(2) provides that where the Commissioner or a prescribed member is of the opinion on reasonable grounds, that a member or a member of rank below that of the prescribed member is unable to efficiently or satisfactorily perform the member's duties because of a physical or mental condition, the Commissioner or prescribed member may direct the member to submit to an examination by one or more health practitioners as the Commissioner or prescribed member, as the case may be, sees fit.

[20] As Mr Barr pointed out, there are obviously going to be many cases where a member may be unable to efficiently or satisfactorily perform his or her duties because of a physical or mental condition which falls short and clearly falls well short of the member being totally and permanently incapacitated for work, within the meaning of s 91(1) of the Act.

[3] (1917) 24 CLR 85 at 96-97.

[21] It would seem that the purpose of conferring a discretion is to require the Commissioner, or the prescribed member, as the case may be, to consider whether or not to proceed under s 91(2). If the Commissioner or the prescribed member has failed to consider it at all, then administrative remedies would lie. If on the other hand, the Commissioner has considered it but he has not considered it properly, then the Commissioner's decision not to proceed by way of s 91 may be challenged by writ of mandamus on *Wednesbury*[4] unreasonableness grounds.

[22] It seems to me that there is no absolute entitlement on the part of a person who is unfortunate enough to find himself or herself unable to efficiently or satisfactorily perform his or her duties because of a physical or mental condition, to require the Commissioner to do more.

[23] That being so, I take the view that, unlike the view of Kearney J, in a case where the inability of the member to discharge the duties is not because of total incapacity but perhaps because of a partial incapacity, the Commissioner may nevertheless proceed under s 87.

[24] To that extent, I think that a declaration in the form sought by the Commissioner is appropriate, but it is subject to the requirement of the Commissioner to properly consider the existence of a concurrent medical incapacity and to decide whether or not, if there is some question about it, the Commissioner ought to proceed under s 91(2).

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[4] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

[25] So far as jurisdictional error is concerned, I am satisfied the plaintiff has made out its case for jurisdictional error and that *certiorari* should be granted. I am also satisfied by the submission of Mr Silvester that, in any event, the tribunal had no power to decide the appeal on the grounds which it did, irrespective of the correctness of Kearney J's decision.

[26] It is clear that the powers of the tribunal contained in s 94(6) do not include a power to, in effect, grant a remedy on administrative law grounds. The Disciplinary Inability Appeal Board can allow the appeal but on proper grounds not on administrative law grounds, which are purely the prerogative of this Court.

[27] There will be an order in the nature of *certiorari* pursuant to order 56 of the Rules quashing the decision of the Inability Appeal Board dated 11 December 2009.
