

*Kassman v Dwyer & Anor* [2014] NTSC 60

PARTIES: KASSMAN, Sean

v

DWYER, Justene

AND

KASSMAN, Sean

v

MORRIS SM, Elizabeth

AND

DWYER, Justene

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING APPELLATE  
JURISDICTION

FILE NO: JA 64 of 2014 (21435480)  
and  
97 of 2014 (21443891)

DELIVERED: 10 December 2014

HEARING DATES: 10 December 2014

JUDGMENT OF: RILEY CJ

APPEAL FROM: Court of Summary Jurisdiction

**REPRESENTATION:**

*Counsel:*

Appellant: J Truman  
Respondent: R Brebner

*Solicitors:*

Appellant: Northern Territory Police Association  
Respondent: Solicitor for the Northern Territory

Judgment category classification: C  
Judgment ID Number: Ril1416  
Number of pages: 7

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

*Kassman v Dwyer & Anor* [2014] NTSC 60  
No JA64 of 2014 (21435480)

BETWEEN:

**SEAN KASSMAN**  
Appellant

AND:

**JUSTENE DWYER**  
Respondent

AND:

No 97 of 2014 (21443891)

**SEAN KASSMAN**  
Plaintiff

AND:

**ELIZABETH MORRIS SM**  
First Defendant

AND:

**JUSTENE DWYER**  
Second Defendant

CORAM: RILEY CJ

EX TEMPORE

REASONS FOR JUDGMENT

(Delivered 10 December 2014)

- [1] Sean Kassman (the plaintiff) is a member of the Northern Territory Police Force, holding the rank of Aboriginal Community Police Officer. Justene

Dwyer (the second defendant) is a Sergeant of Police in the Domestic and Family Violence Unit and has responsibility for making applications under the *Domestic and Family Violence Act* (the Act).

- [2] The plaintiff was in a relationship with KS which came to an end in July 2014. Following the separation, KS made a number of allegations against the plaintiff concerning domestic violence. As a result of the allegations a Domestic Violence Order was made against the plaintiff pursuant to s. 41 of the Act which permits an authorised police officer to make a domestic violence order (a police DVO) in identified circumstances. The order was made by Senior Sergeant Hayes at 4:58 pm on 3 August 2014.
- [3] Prior to the making of the order the plaintiff had spoken to police informing them of an incident that had taken place between himself and KS. The plaintiff was contacted by a senior police officer and advised that a police DVO had issued. He was served with the order at 7:50 pm on 3 August 2014. Attached to the document served was a notice advising of the requirement for the plaintiff to appear at Court at 10 am on 8 August 2014 to “show cause why the attached order should not be confirmed”. He was not provided with any other documentation.
- [4] On 5 August 2014 the plaintiff met with Senior Sergeant Hayes who advised that the police DVO would stay in place to “keep the peace” until KS had carried out her expressed intention to leave Darwin. The plaintiff was

informed that the order would then be revoked. He agreed to the proposed course of action.

- [5] On 7 August 2014 the plaintiff received a text message from KS advising she would leave Darwin on 13 August 2014. The plaintiff informed Senior Sergeant Hayes and enquired whether he was required to attend Court on 8 August 2014. Senior Sergeant Hayes advised the plaintiff that he would apply to adjourn the matter and would then “revoke it”. He said it was up to the plaintiff whether he wished to attend Court but “there will be no action taken to confirm at this time”. In light of that advice the plaintiff did not attend Court on the return of the summons but, rather, supported his family during emergency surgery which was performed upon his father at that time.
- [6] Consistent with the proposal the second defendant provided instructions to her legal representative, Mr Ingrames, to request the Court to permit the police DVO to remain in place until KS had relocated to Queensland on the basis that the order would then be revoked.
- [7] When the matter came on for hearing on 8 August 2014 the presiding magistrate expressed surprise that the plaintiff was not present in light of his occupation. Mr Ingrames, on behalf of the second defendant, informed her Honour as follows:

I apologise I don't seek to confirm the order. Actually, the police don't want to confirm it at this point, they want to have it adjourned for a period for discussions to take place.

[8] Her Honour indicated that such discussions were “not my business” and Mr Ingrames then sought to have the matter stood down to enable him to obtain instructions. Her Honour said there was sufficient evidence contained in the affidavits to confirm the order and, without permitting Mr Ingrames the opportunity to obtain instructions, and in the unexplained absence of the plaintiff, proceeded to confirm the order for 12 months. Her Honour observed that:

Obviously someone can come back and put an application to vary if they need to.

[9] It is agreed between the parties that, in all the circumstances, the plaintiff was denied natural justice.

### **The legislative scheme**

[10] Section 41 of the Act permits an authorised police officer to make a police DVO if satisfied it is necessary to ensure a person’s safety because of urgent circumstances or because it is not otherwise practicable to refer the matter to the Court of Summary Jurisdiction and a “CSJ DVO might reasonably have been made had it been practicable to apply for one”.

[11] The police officer must then give a copy of the police DVO to the parties and send the original to the Court.<sup>1</sup> The police officer is required to explain to the defendant the effect of the order, the consequences that may follow if the defendant breaches the order and that the defendant has a right to apply for a review of the order. Section 44 of the Act provides that the police

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<sup>1</sup> Section 43 of the Act.

DVO is to be taken as a summons to appear before the Court to show cause why the order should not be confirmed by the Court.

[12] Section 82 of the Act then provides that:

(1) At the hearing, the Court may, by order:

(a) confirm the DVO (with or without variations); or

(b) revoke the DVO.

(2) The Court must not confirm the DVO unless:

(a) it is satisfied the defendant has been given a copy of the DVO; and

(b) it has considered any evidence before it and submissions from the parties to the DVO.

### **Failure to grant an adjournment**

[13] At the time of the hearing the parties were in agreement as to the desired outcome subject, of course, to the approval of the Court. The plaintiff was left with the understanding by his superiors that his presence was no longer required to achieve this end. As a consequence the plaintiff was not given the opportunity to place before the Court the evidence and submissions he would wish to make before the police DVO was confirmed. This was not a situation where a major indulgence was being sought by either party. The request for a short adjournment came from the second defendant to enable Mr Ingrames to obtain further information to place before the Court to explain the unexpected absence of the plaintiff from the hearing and to

explain his request that the order not be confirmed. There is no suggestion that a lengthy delay was anticipated because Mr Ingrames only sought time to obtain an email from a file. He was not permitted the opportunity to do so. It was the second defendant who sought the adjournment and, therefore, it could not be thought that any prejudice or injustice against the second defendant or KS could properly arise. Her Honour was aware of the occupation of the plaintiff and must have been aware of the significant risk of a serious injustice being occasioned to him by having the substantive matter determined in his absence.

[14] Her Honour confirmed the order without giving any reason for declining to provide the short adjournment requested or for confirming the order in the circumstances. Contrary to the requirements of s 82(2) of the Act her Honour confirmed the order without providing either of the parties to the order the opportunity to make submissions. In the unusual circumstances of this case the plaintiff was not present and counsel for the second defendant was not given the opportunity to obtain instructions and address the Court on the need for an adjournment or as to why the second defendant did not seek to confirm the order. This is not a case where a party has not sought to avail itself of the opportunity to make submissions to the Court. They were not given the opportunity to do so.

[15] In all the circumstances, through that unfortunate combination of events, it is plain that the plaintiff was denied natural justice. In addition her Honour did not comply with the requirements of s 82(2) of the Act.

[16] The decision is set aside and the matter remitted to the Court of Summary Jurisdiction for determination.

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