SUPREME COURT OF QUEENSLAND

CITATION:	*Jarvis v Atkinson* [2013] QSC 349
PARTIES:	**HANS JOHANN JARVIS** (applicant) v **ROBERT ATKINSON** (respondent)
FILE NO/S:	BS 11791 of 2012
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2013
JUDGE:	Philip McMurdo J
ORDER:	**The decision of the respondent, as set out in the memorandum signed by him dated 23 October 2012, be set aside and the matter to which the decision relates be referred to the Commissioner of the Police Service for consideration under s 9.5 of the *Police Service Administration Act* 1990 (Qld).**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IMPROPER PURPOSES – where the applicant was a police officer – where the applicant suffered a spinal injury – where the applicant's injury prevented him from performing all operational duties of a police officer – where the applicant expressed an unwillingness to move to take up a non-operation position and began the process of retiring on medical grounds, believing that he would be assessed as permanently and totally disabled – where the applicant was assessed as permanently and partially disabled and consequently no longer minded to retire – where it was decided the applicant should retire on medical grounds – where that decision was withdrawn and the applicant agreed to be employed by the Queensland Police Service as a staff member, but to cease being a police officer – where the applicant sought to review the decision that he be retired as a police officer – where the respondent made the decision to confirm the transition of the applicant to a staff member position – where the respondent's

decision was based on the factual assumption that the applicant was unwilling to transfer to another location – where the applicant was not given the opportunity to be heard on his preparedness to transfer – where the applicant seeks judicial review of the respondent's decision pursuant to the *Judicial Review Act* 1991 (Qld) – whether the respondent's decision was an improper exercise of power – whether the applicant was denied procedural fairness by the respondent

Judicial Review Act 1991 (Qld), s 20(2)(e), s 23(b), s 23(g)
Police Service Administration Act 1990 (Qld), s 8.3, s 9.3

Rucker v Stewart [2013] QSC 182, considered

COUNSEL: D Williams for the applicant
S McLeod for the respondent

SOLICITORS: McInnes Wilson Lawyers for the applicant
Solicitor for the QPS for the respondent

[1] The applicant had been a police officer for approximately 20 years when, on 29 August 2009, he suffered a fracture to his cervical spine. As a result of this injury, which was not caused by his work, he became permanently disabled from performing all of the duties of an operational police officer.

[2] He was away from work until March 2010 when he returned to the Innisfail police station where he held the position of Senior Constable, General Duties. He also held the positions of Senior Training Officer and Senior Firearms Instructor, overseeing and conducting the training of police officers in Firearms and Officers Safety Training ("FOST") and Operational Skills and Tactics ("OST") systems. Despite his injury, he was able to perform this work.

[3] In July 2010, he was medically assessed as unable to "undertake any vigorous physical activities in his role of operational general duties officer" but able to perform "office based work duties or instructional work."

[4] In September 2010, the applicant began a lengthy period of accumulated leave.

[5] In October 2010, he applied to retire on the basis, he contended, that he was totally and permanently disabled within the relevant provisions of his superannuation entitlement. In March 2011, however, he was assessed by QSuper as permanently and partially disabled. Consequently he was no longer minded to retire.

[6] In late March 2011, he was advised by the Queensland Police Service that he would have to retire on medical grounds. After some correspondence, a letter was sent on 5 May 2011 by the Acting Deputy Commissioner (Regional Operations) to the applicant, saying that in view of the medical opinion that the applicant was "unable to perform the full responsibilities of [his] office as a police officer … medical retirement should proceed." By the same letter, he was formally dismissed pursuant to s 8.3(4) of the *Police Service Administration Act* 1990 ("the Act").

[7] After some representations by the police union on behalf of the applicant, that decision was withdrawn. The applicant agreed that he would cease to be a police

officer but be employed by the Queensland Police Service as a staff member, pursuant to s 8.3(5) of the Act. On 30 June 2011, he was so appointed.

[8] However, shortly afterwards he sought to review the decision that he be retired as a police officer and he lodged an application for review pursuant to s 9.3 of the Act.

[9] Accordingly, the decision came to be reviewed by a Commissioner for Police Service Reviews under s 9.4. The review was conducted by Mrs D L Browne. In her report dated 16 December 2011, Mrs Browne recommended that the applicant be reinstated as a police officer.

[10] Her report then had to be considered by the then Commissioner of the Police Service, who is the respondent, Mr Atkinson. It seems that the relevant documents were misplaced before they came to his personal attention, so that it was not until 23 October 2012 that Mr Atkinson made his decision, which was that the original transition of the applicant to a staff member position be confirmed. It is that decision by the respondent which the applicant, by this proceeding, seeks to have reviewed by the court under the *Judicial Review Act* 1991 (Qld) ("the JRA").

[11] Before going to the respondent's decision, it is necessary to discuss the original decision to transfer the applicant to a staff member position and the review by Mrs Browne of that decision.

[12] As already noted, the applicant's transition to a staff member position was made pursuant to a request made upon his behalf, following a decision by the Acting Deputy Commissioner that the applicant be dismissed from the Queensland Police Service upon the basis of his medical incapacity. This had followed a process, pursuant to s 8.3 of the Act, under which the applicant had been medically assessed. There is no issue as to the fact that the applicant was permanently disabled from performing most of the operational duties of a police officer. The circumstances thereby engaged s 8.3, which provides in part as follows:

> "(3) If, having regard to any medical opinions expressed by medical practitioners (including any such opinions furnished by the officer) on the health or condition of the officer concerned, or because of the presumption prescribed by subsection (2A), the prescribed authority is satisfied that the officer should not continue to be required to perform the duties of office, then, unless the commissioner takes action authorised by subsection (5), the prescribed authority may call upon the officer to retire from the service within a time specified by the prescribed authority.
>
> (4) If the officer called upon to retire does not retire within the time specified, the prescribed authority may dismiss the officer from the service.
>
> (5) If the commissioner believes the officer referred to in subsection (3) is sufficiently fit to perform duties as a staff member, then in lieu of the action authorised by subsections (3) and (4) and without limiting the commissioner's powers in relation to the officer, the commissioner may—

(a) in writing, appoint the officer to a position as a staff member, at a rate of salary not less than that of the officer immediately before such appointment; and

(b) may direct the officer to report for and perform duty in the position to which the officer is so appointed.

(6) The person appointed to a position under subsection (5) thereby ceases to be an officer and is relieved of all powers and duties of a constable at common law or under any Act or law.

(7) In subsections (3) and (4)—

prescribed authority means—

…

(b) the commissioner, in respect of an officer appointed to office by the commissioner."

[13] The staff member position was at the Innisfail police station, as the Intelligence Officer. This had been work which had been performed by a police officer; but there was apparently nothing about this work which meant that it could not be performed by a staff member.

[14] When the applicant sought to review the original decision of 2011, it appears that at least one of his objects was to be reinstated as a police officer to perform the same work (the role of the Intelligence Officer) at Innisfail. The practical benefit to the applicant from this outcome would have been the receipt of more generous employer contributions to his superannuation fund than are made for a staff member. Another possibility was that the applicant would be reinstated as a police officer but assigned to a different police station, in order to perform other work within his physical capability, such as FOST and OST training.

[15] As to that second possibility, it appears that in May 2011 there was little, if any, available work of that kind for a police officer, at least in far North Queensland. In about September 2010, such a position had became available in Cairns. But at that time the applicant was minded to retire if he could be paid his superannuation benefit upon the basis that he was totally disabled.

[16] Evidence was given by Ms Paull, the Human Resources Manager for the Far Northern Police Region, that in August 2010 she told the applicant that he would have to "career transition to a non operational position." She told him that there were "limited options for such a position in [the] Far Northern Region but if he was willing to move to another larger location, like Brisbane, he would have a wider range of positions available."[1] Ms Paull says that she also discussed with the applicant a FOST position which was likely to be available at Cairns. She explained that the availability of this position was dependent upon other changes within the Cairns station. She recalled that the applicant appeared enthusiastic

[1] Affidavit of Allyson Joy Paull, Court doc # 11, paragraph 11.

about this possibility.[2] In late September 2010, Ms Paull telephoned the applicant to advise that the FOST instructor position at Cairns had become available and that he would need to apply for a transfer to Cairns.[3]

[17] On 11 October 2010, the applicant sent an email to Ms Paull, saying that he was taking extended leave and asking whether this would affect the availability of the FOST position. Ms Paull replied by email to the effect that "it would not be a problem."[4] But later that day Ms Paull rang the applicant and told him that he would have to decide then as to whether he wanted the FOST position, as once it became vacant it would have to be filled. She said that the applicant would have to choose between "going down the path of medical retirement or the FOST position."[5] On 25 October 2010, she again rang the applicant. He told her that he had submitted an application to retire on medical grounds.[6]

[18] On 19 November 2010, Ms Paull sought expressions of interest for an officer to act as a sergeant in certain roles at the Innisfail station. This was work which could have been performed by the applicant. But he responded by saying that he was not interested in performing that work.[7]

[19] In April 2011, after the applicant had decided he wished to stay in the police service, Ms Paull was asked to consider whether there were any "suitable substantive positions in [the] Far Northern Region for Mr Jarvis to occupy."[8] She identified two possible positions in Innisfail, one being the intelligence officer position and the other being a temporary sergeant's position. But the view was taken by others that neither of these positions should be filled by the applicant because he was no longer able to discharge the full responsibilities of a police officer.[9] That view was reflected in the decision of May 2011 that the applicant should be dismissed from the police force on medical grounds.

[20] There was some brief cross-examination of Ms Paull, but there was no substantial challenge to her evidence and I accept it. It fairly appears then that the applicant had the opportunity in about October 2010 to take up positions in Cairns or Innisfail which he was able to perform and which, at least for the time being, would have kept him in the police force. But at that time he chose to pursue a different course, namely retirement in the hope that he would be paid superannuation as a person who was totally disabled.

[21] In her report, Mrs Browne was critical of the view that the applicant should be dismissed as a police officer when he was able to perform in a non-operational position just as had occurred in other cases. In particular, she was critical of the view that the applicant, as a police officer, should not perform the non-operational role at Innisfail of intelligence officer. She wrote:

> "The argument that Innisfail is too small to have non-operational police officers because they would still be recognised as police

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2 Affidavit of Allyson Joy Paull, Court doc # 11, paragraphs 15 and 16.
3 Affidavit of Allyson Joy Paull, Court doc # 11, paragraph 19.
4 Affidavit of Allyson Joy Paull, Court doc # 11, paragraph 20.
5 Affidavit of Allyson Joy Paull, Court doc # 11, paragraph 21.
6 Affidavit of Allyson Joy Paull, Court doc # 11, paragraph 22.
7 Affidavit of Allyson Joy Paull, Court doc # 11, paragraph 24.
8 Affidavit of Allyson Joy Paull, Court doc # 11, paragraph 36.
9 Affidavit of Allyson Joy Paull, Court doc # 11, paragraph 39.

> officers, is specious. In this instance, Senior Constable Jarvis is now still doing the job, under a different title."[10]

Her report continued:

> "The [intelligence officer] position was in the process of being civilianised, because the QPS could not get police officers to take the position. …
>
> The civilianisation of the [intelligence officer] position could simply have been withdrawn and the position offered to Senior Constable Jarvis as a police position, with a similar outcome as now for the QPS. … Similarly, the argument that the civilianisation freed up more operational police could be compared with the point raised by Senior Constable Jarvis, that his taking on a FOST role could release another training officer for operational duties. …"[11]

[22] In essence, Mrs Browne's view was that the applicant could and should be engaged as a police officer to perform in a non-operational role notwithstanding that he was physically unable to perform all of the duties of a police officer. It was not to the point that he could not do everything which other police officers could do, if there was work which he was able to perform and which had been performed by police officers.

[23] In his written decision of 23 October 2012, the respondent provided this summary of his reasons:

> "Due to his injuries which were not sustained in the course of his police duties Mr Jarvis is unable to continue in an operational role as a police officer.
>
> The decision to transition Mr Jarvis to a staff member position was fair, just and a reasonable decision.
>
> In places such as Innisfail all sworn officers perform or should be available to undertake operational duties. Mr Jarvis has declined the opportunity to relocate from Innisfail to a larger location where it may be possible to place an officer who is unable to perform operational duty into a non-operational role. Whilst the Service has done this in the past, ie place an injured officer into a non-operational role, the fundamental principle which underpins this is the availability of suitable positions which only exist in larger centres.
>
> It appears to me Mr Jarvis has been performing and fulfilling the duties of an Intelligence Officer at Innisfail as a staff member and there is no necessity for him to undertake this role as a police officer.
>
> I also note the current State Government's commitment and policy to have more police back on the streets which includes moving up to 200 existing officers from behind office desks back to front line - operational roles, in the first four years of the Government's term. If

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10 Exhibit HJJ-20 to the affidavit of Hans Johann Jarvis, Court doc # 6, page 105.

11 Exhibit HJJ-20 to the affidavit of Hans Johann Jarvis, Court doc # 6, page 106.

> Mr Jarvis was re-established as a sworn police officer his position could be vulnerable at some future time.
>
> I acknowledge the proposition of the Intelligence Officer position being withdrawn as a staff member position and being offered to Mr Jarvis as a police position but on balance after having considered all aspects of this matter do not support this position."[12]

[24] This review process was conducted under Part 9 of the Act, for which the relevant provisions were as follows:

> "**9.3 Application for review**
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> (1) A police officer who is aggrieved by a decision about—
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> …
>
> (e) another decision prescribed by regulation as open to review under this part;
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> may apply to have the decision reviewed by a commissioner for police service reviews.
>
> …
>
> (3) Authority is hereby conferred on a commissioner for police service reviews—
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> (a) to hear and consider all applications for review under this part duly made;
>
> (b) to make recommendations relating to any matters relevant to a review under this part.
>
> …
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> **9.5 Result of review**
>
> (1) Upon conclusion of a review under this part, a commissioner for police service reviews is to make such recommendations as that commissioner considers appropriate to the matter under review to the commissioner of the police service.
>
> (2) The commissioner of the police service, upon consideration of the matter reviewed and having regard to the recommendations made, is to take such action as appears to the commissioner of the police service to be just and fair."

[25] It can be seen that the respondent's decision was expressed in terms of s 9.5(2) where he wrote that the original decision to move the applicant to a staff member

[12] Exhibit HJJ-23 to the affidavit of Hans Johann Jarvis, Court doc # 6, page 110-11.

position was fair and just (as well as reasonable). In essence, the respondent concluded that the size of the Innisfail police station was such that all police officers working there should be able to perform the full range of police duties. As to the possibility that the applicant might work in a non-operational role away from Innisfail, the respondent noted that the applicant had "declined the opportunity to relocate from Innisfail to a larger location." That observation was fairly made in relation to what had occurred in October 2010. But it was not accurate as a reference to the position at the time of the original decision in May 2011.

[26] The respondent had been briefed with a memorandum from Mr Casey, dated 9 January 2012, which provided advice to him about Mrs Browne's report. Mr Casey there referred to the non-operational position which had become available in Cairns in 2010, saying that the applicant had declined that position although the applicant could not remember the position being offered to him. Mr Casey further wrote:

> "A review of permanent positions within Far Northern Region which met [the applicant's] medical capacity was undertaken and no other positions of a non-operational nature were identified. Options outside [the] Far Northern Region were not explored further as [the applicant] had previously indicated his unwillingness to relocate to another Region as his partner had a position as Principal with a local school."[13]

[27] It therefore appears that the respondent misunderstood the preparedness of the applicant to take up a non-operational role outside Innisfail. The respondent appears to have believed that the applicant was not prepared to relocate from Innisfail. Although that had been the case in 2010, the applicant's intentions had changed with the realisation that he would not be able to retire with the amount of superannuation which he had been seeking. This was an error by the respondent. The true position, according to Ms Paull's evidence, was that, as she wrote in an email on 4 April 2011,[14] the applicant had said that he would move to the Cairns District but there were no positions available at that time.

[28] That error by the respondent might have been inconsequential, if, at the time of his decision, the respondent had up to date evidence that there were no non-operational roles in the Cairns District. But the respondent had no evidence about that question, which was largely explained by the undue delay between the decision of Mrs Browne and his decision.

[29] If the respondent's decision was an improper exercise of the power conferred by s 9.5, it is susceptible to review under the JRA.[15] A reference to an improper exercise of a power includes a reference to failing to take a relevant consideration into account in the exercise of the power.[16] It was submitted for the applicant that the respondent failed to consider the applicant's willingness to be transferred to a place such as Cairns. However, as I read the respondent's reasons, he did consider that matter. He made an error in that consideration.

[30] It appears that the respondent did not consider the availability of non-operational roles for the applicant outside Innisfail. That would have been a relevant and

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13 Exhibit RA-2 to the affidavit of Robert Atkinson, Court doc # 10, page 7.

14 Exhibit "HAP9" to the affidavit of Allyson Joy Paull, Court doc # 11, page 21.

15 *Judicial Review Act* 1991 (Qld), s 20(2)(e).

16 *Judicial Review Act* 1991 (Qld), s 23(b).

essential consideration had the respondent understood that the applicant was prepared to work outside Innisfail. But given his (mistaken) understanding about that question, it was irrelevant for the respondent to have considered the availability of these other positions.

[31] An alternative submission for the applicant is that the respondent's failure to make any inquiry as to the applicant's preparedness to work outside Innisfail and the availability of a position at another station which would be suitable to him, involved an exercise of the power that was so unreasonable that no reasonable person could have so exercised the power.[17]

[32] In my opinion, the respondent had no evidence from which to conclude that the applicant was unwilling to work as a police officer away from Innisfail. Mrs Browne had not suggested such an unwillingness. And Mr Casey's memorandum of 9 January 2012 suggested otherwise.

[33] Mr Casey had also noted that there had been no positions of a non-operational nature which had been identified. But that was written in January 2012, apparently addressing the circumstances of May 2011. The respondent's decision was made in October 2012 and communicated to the applicant in the following month. By that time, it could not have been safely assumed by the respondent that there were no non-operational positions within the Far Northern Region.

[34] It was apparently submitted for the respondent that he was obliged to consider only the circumstances as they existed at the time of the original decision. In my view, that unduly limits the power which he was to exercise under s 9.5. He was required "to take such action as appears … to be just and fair." That required more than the consideration of what was just and fair at the time of the original decision, especially when almost 18 months had passed since its making. It required the respondent to reach a decision which, in the circumstances that then existed, was just and fair.

[35] There was no reasonable basis for the respondent to proceed upon the factual premise that the applicant was unprepared to work as a police officer in the Far Northern Region outside Innisfail. Absent that factual premise, any reasonable decision maker in the respondent's position would have inquired as to the availability of non-operational roles within that region at a time which was relevant for a decision being made in October 2012. Had the respondent not misunderstood the applicant's preparedness to work outside Innisfail, there is no reason to believe that he would not have inquired about the availability of that work.

[36] I am persuaded that his error about the applicant's preparedness to work outside Innisfail, and his failure to consider the availability of that work, resulted in an improper exercise of the power. There was a failure to consider a matter which required consideration. That failure would have been inconsequential had there been any reasonable basis for the respondent's factual conclusion that the applicant was unprepared to work outside Innisfail. But absent any reasonable basis for that conclusion, the decision can be seen to be an improper exercise of the power in one or both of the senses prescribed by paragraphs (b) and (g) of s 23 of the JRA.

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17 *Judicial Review Act* 1991 (Qld), s 23(g).

[37] It was argued that the applicant was denied procedural fairness by not being given an opportunity to be heard as to its preparedness to work outside Innisfail. In *Rucker v Stewart*,[18] Jackson J considered the circumstances in which a police officer would have a right to be heard in the context of the operation of s 9.5. Jackson J said that:

> "On receiving the recommendations of the commissioner for police service reviews, the commissioner of the service is not required to provide any further opportunity for the aggrieved person to be heard, before taking action, unless he or she proposes to take account of some new matter not appearing in the report of the recommending commissioner for police service reviews or before that commissioner."[19]

In my view, that exception applies here. The "new matter" which had not appeared earlier was, as the respondent mistakenly understood, that the applicant was unprepared to work outside Innisfail.

[38] I am therefore persuaded that the applicant has established grounds for a statutory order of review of this decision. It should be remitted for reconsideration. The respondent is no longer the Commissioner of Police so that it should be submitted to the current commissioner.

[39] I should say something about the applicant's other arguments, none of which were persuasive. These were directed to the respondent's reasoning that in a place such as Innisfail, all police officers should be able to undertake the full range of operational duties.

[40] It was said that this reasoning involved the exercise of a discretionary power at the behest of another or in accordance with a rule or policy without regard to the merits of this case. The argument referred to the policy "to have more police back on the streets which includes moving up to 200 existing officers from behind office desks back to front line - operational roles … ." In my view, this argument overstated the respondent's reliance upon that so-called policy. The respondent's reasoning was not to the effect that the policy required, by its terms, all police officers to be able to perform the full range of operational duties. Rather, the respondent's point was that the policy would make the applicant's position, if readmitted to the police force and working in a non-operational role, vulnerable at some future time.

[41] It is said that the applicant was denied procedural fairness by not being given an opportunity to be heard on the question of this policy. It is true that the applicant was not alerted to the respondent's intended reliance upon it. However, again this submission misstates the relevance of the policy as the respondent saw it. He did not make this decision because he believed that the policy required it. The more limited relevance of this policy was to provide some fortification for the respondent's decision which, it is clear, would have been the same absent that policy.

[42] Another policy was also referred to in the applicant's submissions. This one was not referred to in the respondent's reasons and the argument seemed to be that this was a policy which should have been considered by the respondent. This was the

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18 [2013] QSC 182.

19 [2013] QSC 182 at [55].

announced intention of the State Government to actively recruit further police officers. The apparent argument for the applicant was that this was likely to increase the need for training and therefore the possibility of a position being available for the applicant. I was not persuaded that this was something which the respondent was bound to consider.

[43] It will be ordered that the decision of the respondent, as set out in the memorandum signed by him dated 23 October 2012, be set aside and that the matter to which the decision relates be referred to the Commissioner of the Police Service for consideration under s 9.5 of the Act.