HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S56/2021

BETWEEN:

NSW Commissioner of Police
Appellant

And

Trevor Cottle
First Respondent

Industrial Relations Commission of New South Wales
Second Respondent

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: OUTLINE OF ORAL SUBMISSIONS

The issue for determination

2. The Commissioner relevantly has three statutory powers in the *Police Act 1990* to remove non-executive police officers from the NSW Police Force: dismissal of probationary constables under s 80(3); medical retirement under s 72A; and removal pursuant to s 181D. The issue for determination in this appeal relates to the second: AS [21]-[26].

Principles of statutory construction

3. Legislation that has undergone substantial amendment must be read as a combined statement of the will of the legislature: *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179, [25]: AS [34].

4. Legislation must be construed on the basis that its provisions are intended to give effect to harmonious goals: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [70]. These principles also apply to two statutes that interact or overlap in operation: *Commissioner of Police v Eaton* (2013) 252 CLR 1, [43]-[50], [78], [98]. Where there are two overlapping statutes, primacy must be given to specific provisions over general: *Ombudsman v Laughton* (2005) 64 NSWLR 114, [19]; AS [33].

5. Where the legislation relates to the granting of jurisdiction to a tribunal, in contrast to a court, there is no presumption that the provisions should be read broadly: cf *Owners of*

Ship Shin Kobe Maru v Empire Shipping Co Inc (1994) 181 CLR 404 at 423; *FAI General Insurance Co Ltd v Southern Cross Exploration N.L.* (1988) 165 CLR 268 at 283-4. Tribunals exercise only the jurisdiction/powers bestowed upon them by statute: AS [36].

The *Police Act* and *Industrial Relations Act*

6. Note:

   (a) *Industrial Relations Act* – ss 3, 6, 10, 83-89, 130, 145, 162, 210, Dictionary;

   (b) *Police Act* – Parts 2, 6, 6B, 9, and s 218;

   (c) *New South Wales v Briggs* (2016) 95 NSWLR 467, [50]-[63]: AS [16]-[17].

Application of construction principles

10 7. The *Police Act* sets out a scheme with respect to the appointment, conduct, discipline and removal of police officers that is not apt to be addressed under general industrial relations legislation: *Eaton* at [11]-[31], [43]-[90]; also *Ferdinands v C'ner of Public Employment* (2006) 225 CLR 130 at [10]-[11], [47]-[57] and [158]: AS [29]-[43]; Reply [9].

8. Section 84 of the IR Act is inapt to apply to dismissals of police officers under Police Act where there are specific mechanisms under the Police Act applying to removal under s 181D and reviewable action under s 173: PJ [65]-[67]; AS [44]-[46]. The Court of Appeal at [75]-[76] and [79]-[80] took the reverse approach by using an *expressio unius* argument which implicitly assumed that there is a desirable policy to allow police officers to have access to merits review: AS [48]; Reply [4].

20 9. The Court of Appeal placed undue weight on ss 85 and 218 of the *Police Act*, and did not give effect to this Court's decision in *Eaton:* AS [58]-[62]; Reply [5].

10. It is not anomalous that a police officer removed for cause has a (constrained) right to review for unfair dismissal, but an officer retired on objective medical grounds does not: AS [51]; Reply [3].

11. The absence of a right to merits review is consistent with the nature of the discretion in s 72A, which involves an unfettered power to retire once the statutory preconditions in that section are met: AS [52]; Reply [2]. There is no obligation on the Commission to provide the officer with written reasons for the decision, in contrast to s 181D: note *Eaton* at [13]-[14], [54], [57], [64] and [74]-[75]; AS [53]. Once the statutory preconditions are

met, it is difficult to see how the medical retirement of a police officer could be unfair where the ongoing appointment of a police officer found to be unfit on medical grounds would be pointless: PJ [96]; AS [54].

12. Purposive considerations favour the Commissioner being the person best placed to determine whether police officers are fit or capable of performing police work given their important role in the community in upholding rule of law, being granted special powers and the use of weapons, and being commonly exposed to traumatic events: note *Police Service Board v Morris* (1985) 156 CLR 397, 412; AS [49]-[50], [55]; Reply [10], [17].

13. The primary remedies for unfair dismissal are reinstatement or re-employment, which are inapposite for a police officer determined to be unfit to perform policing duties in his/her allocated position: AS [56]. Part 8 of *Workers Compensation Act* 1987 (NSW) is a distinct scheme which enables injured workers who have been dismissed due to work-related, compensable injuries to return to work. This is based on an inquiry into future fitness for employment, in contrast to s 84(1) which is directed to past events: Reply [11].

3 November 2021

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