

CITATION: *Isles v McRoberts* [2011] NTMC 001

PARTIES: STEVEN ISLES

v

JOHN RINGLAND MCROBERTS

TITLE OF COURT: COURT OF SUMMARY JURISDICTION

JURISDICTION: Criminal

FILE NO(s): 21028723

DELIVERED ON: 5 January 2011

DELIVERED AT: Darwin

HEARING DATE(s): 1, 17, and 20 December 2010

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW – Abuse of Office – elements of the offence - application to stay charge- meaning of “employed in the public sector” – distinction between employment and holding office

Criminal Code Ss 4, 21, 77, 78, 79, 80, 81, 82 and 86

Police Administration Act Ss 7, 9, 16AAA, 27, 84E, 87 and 91

Public Sector Employment and Management Act

REPRESENTATION:

Counsel:

Informant: Mr Isles, the Informant in person
Defendant: Mr Currie

Solicitors:

Informant: Not applicable
Defendant: Kelvin Currie

Judgment category classification: A
Judgment ID number: [2011] NTMC 001
Number of paragraphs: 28

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21028723

BETWEEN:

Steven Isles
Informant

AND:

John Ringland McRoberts
Defendant

REASONS FOR DECISION

(Delivered 5 January 2011)

Ms Sue Oliver SM:

1. The informant, Mr Steven Isles, has laid an information for an indictable offence in which he alleges that the defendant, who is the Commissioner for Police for the Northern Territory, has abused the authority of his position by providing malicious advice to the Queensland Police Service regarding the informant and thereby causing detriment to him. The conduct is alleged to be a crime contrary to section 82 of the Criminal Code.
2. The parties have consented to the offence being dealt with summarily.
3. On 30 November 2010 an application for a stay of the proceedings was filed on behalf of the defendant. The application is made pursuant to section 21 of the Criminal Code. Section 21 permits a judge or a justice of the peace to stay proceedings that are before him or her on the basis that they are vexatious or harassing.

4. The stay application contends, *inter alia*, that there is no evidence of either an action fitting the elements of the alleged offence or of culpable intent. When the matter was before the court on 1 December 2010 the informant had only just been served with the application. I allowed an adjournment of the application in order for the informant to respond to it and to the affidavit that was filed in support of the stay application and directed that he provide a copy of the brief of evidence on which he intended to rely at a hearing of the charge. The charge under section 82 is one within the summary jurisdiction of this Court. It is the procedure of this Court for the brief of evidence to be provided in advance to a defendant in contested criminal matters in order for the defendant to consider the evidence that will be relied on at hearing and for the efficient conduct of hearings.
5. On 17 December 2010 I raised with the parties the issue of whether a Police Commissioner could be found guilty of an offence under section 82 given the requirement of that section that the person must be “employed in the public service” and took submissions from them on 20 December 2010.

The Offence

6. The offence created by section 82 provides:

82 Abuse of office

(1) Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a crime and is liable to imprisonment for 2 years.

(2) If the act is done or directed to be done for purposes of gain he is liable to imprisonment for 3 years.

7. It follows that to prove the commission of an offence contrary to section 82 the following elements are required. The defendant must:
 - a. be employed in the public service.

- b. do or direct to be done
 - c. in abuse of the authority of his office
 - d. an arbitrary act
 - e. prejudicial to the rights of another.
8. Section 4 of the Criminal Code defines the phrase “employed in the public service” as including “employed in an Agency under the *Public Sector Employment and Management Act*, as a police officer or to execute any process of a court of justice”. The definition therefore requires “employment” and provides three instances of employment that would satisfy the definition (though not apparently limited to these).
- a. In an Agency under the *Public Sector and Employment and Management Act*
 - b. As a police officer
 - c. To execute any process of a court of justice

Is the Commissioner of Police employed in an Agency under the *Public Sector Employment and Management Act*?

9. The office of Commissioner of Police is created by the *Police Administration Act*. Section 9(2) provides “The Commissioner, a Deputy Commissioner or an Assistant Commissioner appointed under this Part shall not be an employee for the purposes of the *Public Sector Employment and Management Act*.” Clearly then, a Commissioner of Police cannot fall within the first limb of the definition of employment.
10. Mr Isles however contends that Mr McRoberts is, notwithstanding that provision, an employee within the public service because he has been appointed as a Chief Executive Officer (“CEO”) of an agency pursuant to section 19(2) of the *Public Sector Employment and Management Act*. He

tendered a copy of a notice in the Northern Territory Government Gazette No G7 of 17 February 2010 showing that appointment. The instrument for which notice is given in the Gazette, actually appoints Mr McRoberts as the CEO of the Northern Territory Fire and Rescue Service. Even if I were to accept that the appointment is one that created employment under the *Public Sector Employment and Management Act* it would not be sufficient to satisfy the requirements of the present charge under section 82 of the Criminal Code. As I have noted in [7] above, that offence requires that the person must do an act “in abuse of the authority of his office”. The charge laid by Mr Isles alleges abuse by Mr McRoberts as Commissioner of Police. That is the office from which the correspondence that is alleged to constitute the arbitrary act was sent. It was not sent in his capacity of CEO of the Northern Territory Fire and Rescue Service, consequently employment as CEO of the Northern Territory Fire and Rescue Service (even if found to exist) would not be relevant to the charge which is laid.

11. In any event, even if there was an instrument purporting to create employment of the Commissioner of Police as a CEO, it would not, in my view, be effective to do so. An instrument cannot override a specific provision of a statute and section 9(2) is in absolute terms that the Commissioner of Police is not an employee under the *Public Sector Employment and Management Act*.

Is the Commissioner of Police a person “employed ... as a police officer” or otherwise “employed in the public service”?

12. There is a legal distinction between employment and the holding of office. The distinction most often arises in the context of actions for wrongful or unfair dismissal. The distinction is determinative of a person’s rights and responsibilities. The distinction is often blurred by the use of the term “office” in relation to those who actually perform work under contracts of employment (“employees”). Not all those described as “officers” either by

the statute that creates the position or by some other instrument of appointment will be, at law, an office holder. Rather, notwithstanding the title, they may be an employee, that is, a person working under a contract of employment.

13. The distinction may have significant consequences. Relevantly, the learned authors of *The Law of Employment*¹ note²

“...an employee charged with the offence of larceny or embezzlement by a person ‘employed in the public service’ might seek to argue that, being an ‘officer’ he or she was not “employed in the public service” and therefore could not be guilty of such an offence.”

14. Section 82 of the Criminal Code is itself drafted in terms that illustrate the way in which the distinction between employment and the holding of an office can be blurred. Section 82 is entitled “Abuse of Office” and refers to an act being done by a person “in abuse of the authority of his office”. However, in my view, the use of the expression “office” in this provision is simply a way of referring to the employment position that is held. The requirement that the defendant be “**employed** in the public sector” (emphasis added) is in my view a clear requirement that the person charged is one employed under a contract of employment distinct from a person who is an “officer” within the strict meaning of that term. I do not think that it evidences an intention on the part of the Legislature to include in the offence persons holding statutory office alone.
15. I take that view following consideration of the offences that comprise Part IV, Division 2 of the Criminal Code. Statutory provisions are to be read not

¹ *Macken, O’Grady and Sappideen*, 4th Edition, Law Book Company 1997

² By reference to articles by P D Finn “Public Officers: Some Personal Liabilities” (1977) 51 ALJ 313; “Official Misconduct” [1978] 2 Crim LJ 307

in isolation but in the context of the statute as a whole. Part IV of the Criminal Code is entitled “Offences against the administration of law and justice and against public authority”. Division 2 of Part IV provides for offences of “Corruption and Abuse of Office”. The term “employed in the public sector” is used in the majority of the offences created by Part IV, Division 2 (see sections 78, 79, 80, 81, 82 and 86) and as I have noted, is defined according to the inclusive meaning given by section 4.

16. Two provisions in Division 2 point to the view that the expression “employed in the public sector” is intended to be confined to those who work under a contract of employment.
17. Section 77 creates the offence of official corruption in these terms:

“77 Official corruption

Any person who:

(a) **being employed in the public service or being the holder of any public office** and being charged with the performance of any duty by virtue of such employment or office, not being a duty touching the administration of justice, corruptly asks for, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or

(b) corruptly gives, confers or procures, or promises or offers to give or confer or to procure or attempt to procure, to, upon or for **any person employed in the public service or being the holder of any public office**, or to, upon or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed or holding such office,

is guilty of a crime and is liable to imprisonment for 7 years.”

(emphasis added)

18. If the phrase “employed in the public service” was intended to include those holding statutory office other than as employees, there would be no need to add to this offence the phrase “holder of any public office”.

19. That the Legislature intended a distinction between employment and the holding of a public office in providing for offences relating to corruption and abuse of office is further illustrated by section 80. Section 80 provides:

“80 Officers charged with administration of property of a special character or with special duties

(1) Any person who, being employed in the public service and being charged by virtue of his employment with any judicial or administrative duties respecting property of a special character, or respecting the carrying on of any manufacture, trade or business of a special character and having acquired or holding, directly or indirectly, a private interest in any such property, manufacture, trade or business, discharges any such duties with respect to the property, manufacture, trade or business in which he has such interest, or with respect to the conduct of any person in relation thereto, is guilty of a crime and is liable to imprisonment for one year.

(2) For the purposes of subsection (1), private means **undisclosed to the head of the department of the service in which he is employed or to the minister responsible therefor.**” (emphasis added)

An office holder performs the duties of the office to which he or she is appointed and is not employed in a “department” of the [public] service.

20. Taken as a whole, Part IV, Division 2 of the Criminal Code illustrates an intention to distinguish between those offences for which employment in the public service is a requirement and those for which holding office may also be a requisite element. In my view then, the phrase “employed in the public service” cannot be interpreted broadly to include office holders but is limited to those who work under contracts of employment in an Agency or otherwise as part of the “public service” or under a contract of employment as a police officer.

Is the Police Commissioner employed as a police officer or otherwise employed in the public service?

21. Having determined that the defendant as Commissioner of Police is not employed in an Agency under the *Public Sector and Employment and Management Act* the remaining issue is whether he is “employed...as a police officer” or otherwise is employed in a manner that would satisfy the description “employed in the public service”.
22. As is the case in all Australian jurisdictions, police forces or services are established by statute. The terms of those statutes are not in identical terms; consequently it cannot be assumed that because in one particular force or service the Commissioner works under a contract of employment that this would necessarily be the case elsewhere³. In the Northern Territory the Police Force is established by the *Police Administration Act*. Section 7 of the *Police Administration Act* provides that the Administrator may, by commission, appoint a person to be Commissioner of Police or a Deputy Commissioner of Police. It is therefore a statutory office, the terms of which are to be determined according to the provisions of the *Police Administration Act*. Section 9 of the *Police Administration Act* provides for the remuneration and terms and conditions of the office of the Commissioner of Police. These are to be determined by the Administrator from time to time. Sections 10 and 11 deal respectively with retirement and resignation, both of which are matters that require acceptance by the Administrator of the Northern Territory. These provisions are in my view, inconsistent with the status of a contract of employment, because they place matters that would normally fall to the responsibility of an employer, or to the terms of an industrial agreement governing that workplace, within the hands of the

³ For example, the *Police Act 1990* (NSW) provides “The employment of the Commissioner is to be governed by a contract of employment between the Commissioner and the Minister”. The question of the Commissioner being an employee in that jurisdiction is without doubt.

Administrator of the Northern Territory. Significantly, section 9(4) provides that “Where the Commissioner, a Deputy Commissioner or an Assistant Commissioner ceases to hold office other than by reason of his death or resignation or his retirement under section 10, he shall be paid compensation to be determined by the Administrator”. The provision is strongly suggestive of the Commissioner holding “office at pleasure” and appears to negate any ability for a Commissioner removed from office to seek an assessment of damages for a wrongful dismissal, which would be a cause of action that would be open to a Commissioner on removal from office **if** he or she were an employee. Rather the question of compensation on early termination rests entirely with the Administrator without recourse it seems to challenge as to adequacy in whatever might be the relevant circumstances.

23. In addition, the *Police Administration Act* creates a distinction between the status of the Commissioner of Police and Deputy Commissioner of Police and other members of the police force. It is the Commissioner who appoints members of the police force and has power to determine the rank and periods of probation and promotion and dismissal (see Part 2, Division 3) of those members. The provisions of the Act that deal with police members appear to me to be clear in terms of those persons being employees. For example section 4 defines “*dismiss*” as “in Parts IV, V and VI, in relation to a member, means to terminate the employment of the member because of a breach of discipline” and “*retire*” as “in Parts IV, V and VI, in relation to a member, means to terminate the employment of the member otherwise than by dismissing the member”. Similarly, unlike the provisions dealing with the appointment of the Commissioner and Deputy Commissioner, other provisions refer specifically to the employment of members (see sections 16AAA, 27, 84E, 87 and 91).

24. In my view the Commissioner of Police is not a person “employed as a police officer” nor is the person appointed to that office employed in some other capacity in the public service. The provisions to which I have referred are consistent with a Commissioner holding public office and not working under a contract of employment.

Conclusion

25. That being the case, the requisite element of the offence created by section 82 that the person charged was “employed in the public service” cannot be satisfied. Mr McRoberts is charged in his position as Commissioner of Police. That office is not one of employment in the public service of the Northern Territory within the meaning to be attached to that phrase in the Criminal Code.
26. Consequently, there is simply no prospect that the present charge could be found proved whatever might be the factual evidence of an arbitrary act sought to be relied upon. There is no need for me to consider that question in terms of the stay application.
27. That being the case, in my view an order staying the proceedings under section 21 of the Criminal Code would not be the appropriate order. As a matter of law a charge under section 82 against a person in his or her capacity as Commissioner of Police cannot be found to be proved. That being the case there is no purpose to the matter proceeding further to a hearing.
28. The charge is dismissed and the defendant discharged.

Dated this 5th day of January 2011.

Sue Oliver
STIPENDIARY MAGISTRATE